

**Juridiska Institutionen
Göteborgs universitet
Jur.kand.programmet
Tillämpade studier 20p.**

Towards International Competition Rules?

Charlotte Brorsson

Handledare: Per Cramér

Abstract

The ongoing trade liberalisation has reduced tariffs and barriers to trade significantly and has opened up markets to foreign actors. The globalisation has in the same time increased the effects of the trade liberalisation by the disappearance of national borders and the facilitation of cross-border transactions. The debate of further international cooperation in the field of competition is based on the fear that the effects of the trade liberalisation will be consumed by governmental and private anticompetitive behaviour, which will constitute new forms of barriers. Admittedly, nations have a tendency to direct their behaviour by mainly national welfare considerations and this increases the likelihood that nations use anticompetitive practices to limit the result of the trade liberalisation. After all, competition is a means to attain higher national economic efficiency and this makes the fear of rent shifting practices even more justified. The inability of nations to evaluate their actions in a wider spectrum, and to work towards global welfare as the predominant goal, makes the process towards any convergence of nations' competition laws very difficult and time-consuming. The process is also complicated by the different positions the US and the EC, the two largest economies in the world, have taken. The consequence has been a polarised debate with, on the one hand the far reaching approach of the EC, which is opting for the adoption of some core principles within the WTO, and on the other hand the more limited view of the US, which believes the best way to achieve international convergence in competition matters is by voluntary bilateral agreements.

The standpoint is taken from the cases Boeing/McDonnell Douglas and GE/Honeywell. The cases illustrate the possibility to arbitrarily take into consideration industrial policy reasons but openly defend this by the application of the nation's competition law. Not saying this was the case in the two mergers, even if some authors are of that opinion, it is obvious that differences in competition authorities' assessment may constitute a protectionistic measure or at least provoke accusation of protectionism.

Contents

ABSTRACT	2
CONTENTS	3
LIST OF ABBREVIATIONS	5
1. INTRODUCTION	6
1.1 OBJECTIVES	6
1.2 DELIMITATION AND OVERVIEW	6
1.3 DEFINITIONS	7
2. THE NEED FOR AN INTERNATIONAL COMPETITION POLICY	9
2.1 INTRODUCTION	9
2.1.1 <i>Governmental anticompetitive practices that impede trade</i>	9
2.1.2 <i>Beggar-thy-neighbour approach</i>	10
2.1.3 <i>Regulatory competition and a race-to-the-bottom</i>	11
2.1.4 <i>A world welfare standard</i>	12
2.2 PRIVATE BARRIERS TO TRADE	12
2.2.1 <i>Anticompetitive mergers</i>	13
2.3 THE APPLICATION OF EC AND US COMPETITION RULES	16
2.3.1 <i>Article 81</i>	16
2.3.2 <i>Article 82</i>	17
2.3.3 <i>The EC Merger Regulation</i>	18
2.3.4 <i>The US antitrust law</i>	20
2.4 THE ECONOMICS BEHIND THE COMPETITION LAWS	21
2.4.1 <i>The Harvard School</i>	22
2.4.2 <i>The Chicago School</i>	23
2.4.3 <i>Criticisms to the Chicago school</i>	24
2.4.4 <i>The debate today</i>	24
2.4.5 <i>The industrial economics</i>	25
2.4.6 <i>The EC Competition Policy</i>	25
2.5 BOEING/MCDONNELL DOUGLAS AND GE/HONEYWELL	26
2.5.1 <i>Boeing/McDonnell Douglas</i>	26
2.5.2 <i>Ge/Honeywell</i>	27
2.5.3 <i>Efficiency consideration in the US and the EC</i>	28
2.5.4 <i>The efficiency considerations in Boeing/McDonnell Douglas</i>	31
2.5.5 <i>The efficiency consideration in GE/Honeywell</i>	32
2.5.6 <i>The jurisdictional aspect</i>	33
2.5.7 <i>The effect doctrine</i>	34
2.5.8 <i>The single economic entity theory</i>	34
2.5.9 <i>Analysis</i>	36
2.6 <i>Conclusion</i>	37
3. THE RELATIONSHIP BETWEEN TRADE AND COMPETITION POLICY	38
3.1 INTRODUCTION	38
3.1.1 <i>Competition and trade contradict and complement each other</i>	38
3.1.2 <i>The import-as-market-discipline</i>	39
4. POSSIBLE OR EXISTING WAYS TO ACHIEVE FURTHER CONVERGENCE IN INTERNATIONAL ANTITRUST MATTERS	39
4.1 HISTORICAL BACKGROUND – THE ITO CHARTER	39
4.1.1 <i>The General Agreement on Tariff and Trade</i>	40
4.1.2 <i>The World Trade Organisation</i>	41
4.1.3 <i>The Working Group</i>	42
4.2 BILATERAL/ REGIONAL AGREEMENTS ON COMPETITION.....	43

4.2.1 Traditional and positive comity.....	43
4.2.2 The 1991 and 1998 bilateral agreements.....	44
4.2.3 Free trade, custom union and common market agreements.....	44
4.2.4 The application of the 1991 agreement in Boeing/McDonnell Douglas	45
4.2.5 The discussion of bilateral agreements in the Working Group.....	46
4.2.6 The debate outside the Working Group.....	47
4.3 MULTILATERAL AGREEMENT ON INTERNATIONAL COMPETITION POLICIES	48
4.3.1 The OECD notification form.....	49
4.3.2 International competition rules within the framework of the WTO treaty	50
4.3.3 The EC proposal	50
4.3.4 The discussion of a multilateral agreement on competition in the Working Group.....	51
4.3.5 Private barriers to trade	52
4.3.6 The relevance of fundamental WTO principles to competition policy.....	53
4.3.7 Conclusion	54
5. ALTERNATIVE APPROACHES AND SOLUTIONS FOR FURTHER INTERNATIONAL CONVERGENCE IN COMPETITION MATTERS	56
5.1 INTRODUCTION	56
5.1.1 A mixture of bilateralism and multilateralism.....	56
5.1.2 Principles of constitutional measures	57
5.1.3 Increased Transparency.....	58
5.1.5 WTO Premerger Office	60
6. FINAL REMARKS	61
SOURCES.....	66
A. INTERNATIONAL DOCUMENTS	66
B. LITERATURE	67
C. ARTICLES.....	67
D. SPEECHES	69
E. TABLE OF CASES.....	69

List of Abbreviations

Boeing	Boeing Company
DOJ	Department of Justice
EC	European Community
ECJ	European Court of Justice
FTC	Federal Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
ICJ	International Court of Justice
ITO	International Trade Organisation
MDC	McDonnell Douglas Corporation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
The Set	The Set of Multilateral Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice
TRIPS	Trade-Related Intellectual Property Agreement
UN	United Nation
UNCTAD	United Nations Conference on Trade and Development
US	United States
VER	Voluntary Export Restraint
WTO	World Trade Organisation

1. Introduction

1.1 Objectives

The intention with this essay was initially to analyse whether nations could use their competition law arbitrarily so as to compensate from the losses the trade liberalisation may cause. After consulting the literature I noticed that this debate was already going on to a certain extent and that the topic was awarded more and more attention from scholars and debaters alike. There was a growing literature on the subject, which consisted mostly of materials from different international organisations and other types of articles. It required a lot of research to find the relevant material and for this research process I had the advantage to be able to use the library of the European Court of Justice. It was mostly there I found the articles mentioned above. I have also used data from electronic media, literature presented in books, and articles in newspapers. The legal sources examined are statutes and regulations, recommendations and guidelines of relevance and authority, judicial decisions and international agreements of both bilateral and multilateral character.

1.2 Delimitation and overview

There are some disadvantages with the material for someone writing an essay with a limited number of pages; most of the material tries to deal with all possible anticompetitive behaviour without concentrating on one or two restraints to competition and trade. When attempts to have a more limited scope of the analysis were done, they (not surprisingly considering their relevance to trade) mostly concentrated on export cartels and issues of market access. Relatively little was mentioned specifically about anticompetitive mergers, despite the obvious international effects such transactions can have. Even if the deserved attention has been given to the two high profile merger-cases of Boeing/McDonnell Douglas and GE/Honeywell, which showed that nations' competitive assessment may differ and thereby cause different outcomes in different jurisdictions, the debate has mainly been on whether the world needs international competition rules or not. Given the legitimacy of this question and since it is important to have a general overview of the problems of governmental and private restraints to trade, the essay starts with identifying some of these anticompetitive practices.

While appreciating the ambition to try to identify all possible anticompetitive behaviour with negative impact on trade and possible ways to deal with these problems on the international arena, I have chosen to focus on anticompetitive mergers with cross-border effects. This choice is based partly because anticompetitive mergers are not as well covered as other forms of behaviour that impede competition, and partly because mergers with transnational effects

have increased the last couple of years, and is expected to increase even more as business seek to gain market shares abroad.

The standpoint is taken from the cases mentioned above, Boeing/McDonnell Douglas and GE/Honeywell. The cases illustrate the possibility to arbitrarily take into consideration industrial policy reasons but openly defend this by the application of the nation's competition law. Not saying this was the case in the two mergers, even if some authors are of that opinion, it is obvious that differences in competition authorities' assessment may constitute a protectionistic measure or at least provoke accusation of protectionism.

The second part of the essay will concentrate on the work done so far, both bilaterally and multilaterally, to achieve further convergence in competition matters. The most comprehensive discussion has occurred within the World Trade Organisation (WTO), which has established a Working Group with the aim to study the relationship between competition policy and trade policy. Even if the discussion in the Working Group is on a general basis there are many voices opting for a multilateral agreement on international competition policy within the WTO. The arguments for and against a multilateral agreement and if the WTO is the best forum to host such an agreement will also be discussed. In relation to this it is necessary to describe the close relationship between competition policy and trade policy that exists, in order to understand the ongoing discussion of international competition rules.

Finally, I intend to account for alternative solutions and proposals that have been advanced by scholars and debaters. They provide a useful input to the overall discussion because they are not constrained by political or institutional consideration, even if the proposals here are limited to what one can expect to be a realistic approach.

1.3 Definitions

Two of the reasons why conflicts over competition matter occur between nations are the differences in the competitive analysis in different jurisdictions and that those nations' competition laws are differently formulated. Even where nations have identically worded provisions differences remain because the words are interpreted differently. Example of terms that are given different meaning in different contexts and in different jurisdictions are "anticompetitive behaviour" and "abuse of competition". These general concepts will be used in the essay often without being more precisely specified. However, it should be recognised

that practices such as certain horizontal agreements, vertical restrictions and arrangements, practices by dominant firms and mergers with international impact can but do not necessarily have anticompetitive effects. It is not sure that these types of conduct always have international effects. Sometimes they may affect both competition and international trade but in other instances they will have neither impact on either competition nor trade.

Two other terms that need to be clarified for the purpose of this essay are the concept of competition law and competition policy. I will throughout the essay use these terms interchangeable, even if it can be argued that competition policy has a broader scope. Competition policy may comprise the full range of government measures that affect market structure and conduct and it has been argued that nations can be committed to competition policy but still not have a comprehensive competition law. The terms are often mixed in the literature and in this essay the two terms will be given the same implication.¹

In the debate of a multilateral agreement on competition law a lot has concerned the issue of harmonisation. Any form of multilateral agreement would inevitably result in some convergence and it is important to understand that it exists different levels of harmonisation. Depending on what one includes in the word harmonisation the possibility to reach some form of agreement on competition policy enhances or reduces. If one speaks of a rigid form of harmonisation, where common rules are enforced by common institutions and where little is left for the individual nation to regulate, there will never be a multilateral agreement on competition policy. In contrast, the lowest form of harmonisation, so called soft harmonisation occurs by informal means, e.g. in workshops, where ideas between nations' competition officials are shared and discussed, and by issuing guidelines and recommendations. In the long-term such soft harmonisation is thought to yield further convergence and cooperation between nations. The rigid form of harmonisation is not a realistic approach when discussing the establishment of international competition rules and will therefore not be referred to in the essay. Moreover, if the intention is to indicate soft harmonisation this will be specified. Besides those exceptions the term harmonisation or convergence will be used generally and could indicate any level at the scale of harmonisation.

¹ WT/WGTCP/2, Report (1998) of the Working Group on the Interaction between Trade and Competition Policy, para. 37

Part 1

2. The need for an international competition policy**2.1 Introduction**

The ongoing trade liberalisation has reduced tariffs and barriers to trade significantly and has opened up markets to foreign actors. The globalisation has in the same time increased the effects of the trade liberalisation by the disappearance of national borders and the facilitation of cross-border transactions. The debate of further international cooperation in the field of competition is based on the fear that the effects of the trade liberalisation will be consumed by governmental and private anticompetitive behaviour, which will constitute new forms of barriers. Admittedly, nations have a tendency to direct their behaviour by mainly national welfare considerations and this increases the likelihood that nations use anticompetitive practices to limit the result of the trade liberalisation. After all, competition is a means to attain higher national economic efficiency and this makes the fear of rent shifting practices even more justified. The inability of nations to evaluate their actions in a wider spectrum, and to work towards global welfare as the predominant goal, makes the process towards any convergence of nations' competition law very difficult and time-consuming. The process is also complicated by the different positions the US and the EC, the two largest economies in the world, have taken. The consequence has been a polarised debate with, on the one hand the far reaching approach of the EC, which is opting for the adoption of some core principles within the WTO, and on the other hand the more limited view of the US, which believes the best way to achieve international convergence in competition matters is by voluntary bilateral agreements.

2.1.1 Governmental anticompetitive practices that impede trade

As indicated in the introduction, governments may wish to apply their competition law so as to compensate for the effects of the trade liberalisation. This could be manifested by a lack of competition laws or non-enforcement of existing competition laws but it is also possible that the enactment of regional and national competition regimes could be formulated with the intention to increase the nation's trade shares on behalf of other trading partners. This would be the case if the competition rules protected the domestic market from anticompetitive practices but at the same time were used to camouflage protectionism; that is to prevent foreign firms access to the local market, or provide foreign enterprises different conditions than domestic ones when conducting business on the domestic market.

There is also a suspicion among many governments that other governments intend to use their competition law arbitrarily as a trade weapon², a suspicion that one might believe to be, to a certain extent, based on the fundamental differences that exist in nations' competition laws. Even when no such difference exists, rules will be interpreted differently and even a word such as anticompetitive is given different meanings. Governments as well as private business might regard the application of a nation's competition rules as based on pure national welfare considerations, because the assessment of a transaction is viewed differently in jurisdictions others than their own. This problem could arise in other areas of law which have transnational dimensions, but it is argued that the globalisation and the ongoing trade liberalisation create further implications in competition law issues, both because of their economic impact and the large number of transactions. It is also a fairly new area of law where more and more nations enact competition laws. Another problem relating to anticompetitive behaviour of governments is that governments often use their sovereignty as a defence and hide behind this notion when they take anticompetitive actions. It has therefore been argued that the concept of sovereignty is overused and misused, especially in international competition matters.³

2.1.2 Beggar-thy-neighbour approach

The practices mentioned above are clear examples of a beggar-thy-neighbour approach. Such conduct, which emphasises national welfare as the sole objective of governments, is not anything new in trade policies and in a competition law context there are several examples of how nations have tried to increase national welfare by facilitating export cartels and mergers to monopoly when most of the buying power is situated abroad. A beggar-thy-neighbour conduct is a short-term strategy but which non-the-less causes severe impediments to trade. Usually such measures result in a downward spiral where nations impose retaliatory measures to distort the first nation's restraints to trade and competition. These issues have been subject to many agreements, particularly within the General Agreement on Trade (GATT), succeeded by the WTO, and several successful steps have been taken regarding government imposed quotas, tariffs, anti-dumping actions and Voluntary Export Restraints (VERs).⁴ As will be seen later in the essay a lot of progress towards international competition policy could be achieved if nations did not have this "vision problem".

² D. Voillemot & A. Thiller, WTO and competition rules, (1999) Fordham Corp. L. Inst. 31 at p. 44 (B. Hawk ed.)

³ E. Fox and J. A. Ordover, The Harmonization of Competition and Trade Law – The case for modest linkages of law and the limits to parochial state action, Competition Policy in the Global Economy – Modalities for cooperation p. 407 at 429 (1997, L. Waverman, W. S. Comanor and A. Goto ed.)

⁴ Ibid, p. 416

2.1.3 Regulatory competition and a race-to-the-bottom

In line with the above lies the theory of regulatory competition and a race-to-the-bottom. Regulatory competition can be explained by the possibility for nations to use their laws to attract trade and, in order to take away profit from their neighbours, nations will degrade their laws. A race-to-the-bottom assumes that nations compete against each other in writing their laws and in the application of the provisions, so as to be more attractive for business than other nations. The theory has been discussed mainly in the area of environmental law and there it seems to be applicable. However, in regard to competition law, the theory is not as applicable since it is not always one nation's competition law that will be applied when evaluating anticompetitive conduct in a state. If the practice is taking place outside the territory of that state but has effects within it, the state will usually have jurisdiction over the case. Multinational enterprises will also be scrutinised by several nations' competition authorities as they choose to enter a market. Such market entry will probably occur despite lax or rigid enforcement of competition rules as long as the cost for applying to a nation's competition law will not be too burdensome.

Professor Fox has discussed regulatory competition in antitrust matters. She provides the following example based on an antitrust system that business, consumers and governments regard as good antitrust system. As she is well aware of "good" antitrust law cannot objectively be defined but the US might regard competition rules that promote efficiency as a good antitrust system. The business community would also regard efficiency gains as the optimum and in such a scenario nations that have an efficiency based antitrust law will attract business, at least those businesses that are confident they can survive on their own merits. Since the notion of "good" antitrust law is subjective, other nations will have other definitions for what is good competition law. The EC and those countries that have similar competition laws will perhaps regard competition law that prohibits abuse-of-dominance as the best law for them. However, if businesses are guided by efficiency gains, the US efficiency based law could trigger a race-to-the-bottom; i.e. other countries would have to degrade their law so as not disadvantage their own business in the world competition.⁵ It is thus possible that conflicts between jurisdictions, like the ones illustrated in the already mentioned Boeing/McDonnell Douglas and GE/Honeywell, could be a result of the use of regulatory competition. However, it is not very likely that the US approved the mergers out of the wish

⁵ E. Fox, *Global Antitrust from a U.S. Perspective*, p. 217 at. 225f, 2002, *Europa und die Globalisierung-Referate des Zweiten Wiener Globalisierungs*, (C. Baudenbacher & E. Busek ed.)

to attract business and investment. The discussion seems in most part as very abstract. Professor Fox may find some support of the fact that the European competition law has approached itself to the US standard but if this has anything to do with a race-to-the-bottom is hard to tell. It is argued that if US efficiency based antitrust law would attract business, the efficiency gains must be defined identically for both business and competition authorities. It is difficult to see that an efficiency based antitrust law always will reconcile with the interest of businesses, hence the wish to maximise profits, while the antitrust provisions will intervene and to certain extent try to limit the behaviour of businesses, even if it applies an efficiency based competition law.

2.1.4 A world welfare standard

Instead of favouring a national welfare approach the governments might consider a world welfare standard, which has been defined as the “aggregate level of consumer benefits and profits realised by consumers and firms in all pertinent countries”.⁶ It has been suggested that one way to accomplish a world welfare standard is to specify that a government is prohibited to act when the negative consequences from such practices outweighs the benefits of correcting market failure or protecting a national interest. A difficulty with this approach is to find the adequate and necessary information and to objectively assess it, in order to determine what acts should be prohibited in a specific case. Another possible approach to reach a world welfare standard is to indicate a scale of permissible or less permissible actions. At one end of the hierarchy it could be permissible behaviour to cure market failures within the state, such as pollution. At the other end of the scale could be policies that have as their sole goal to shift profits from foreign firms to national firms, which would be regarded as impermissible. However, it might be difficult to find out the true reason for a nation’s policy and all policies can always be deemed to include several objectives. Both approaches have been said to be workable, in order to offer a world welfare model, subject to proper scope for national and local autonomy.⁷

2.2 Private barriers to trade

Although tremendous efforts are still required to abolish governmental trade barriers, a lot has already been done to reduce tariffs and other governmental barriers to trade. The debate has therefore more and more turned to the question of how to best regulate trade barriers created through restrictive business practices of private firms. The agreements of GATT and WTO

⁶ E. Fox and J. A. Ordovery, as note 3 above, p. 416

⁷ Ibid, p. 417

are mainly concerned with trade barriers imposed by governments even if some latter agreements have included provisions concerning both private and public practices.⁸ While governmental trade barriers primarily are concerned with tariffs or lax enforcement to the benefit of the domestic nation, private barriers can exist of market-sharing agreements, vertical restraints to exclude foreign competitors, export cartels or merger to monopoly. Such non-tariff barriers to trade often have more severe consequences to consumers than old-fashioned tariffs because they are less transparent and more costly. Private anticompetitive behaviour can be supported or encouraged by governments (but might as well be purely private restraints to competition) and will then be on the borderline between private and governmental restraint to trade and competition. The above mentioned practices are also clear examples of restraints with transnational effects.

It has been argued that a harmonised competition law would reduce anticompetitive practices by private firms and in the same time provide advantages for them. A clear benefit of a harmonised competition law is the reduction of non-tariff barriers to trade and a limitation of the pressure from private business on governments to obtain special treatment. Such pressure is often hard for governments to resist since nations compete for foreign direct investments and increased trade. The use of common principles or provisions for the assessment of competition matters would also simplify the business planning for enterprises and possibly generate efficiency gains.⁹

2.2.1 Anticompetitive mergers

Anticompetitive mergers, which is one type of private barrier, might not have as a direct link to trade as for example export cartels. However, the pre-notification system in merger reviews prevents many anticompetitive transactions from occurring in the first place and it is therefore difficult to more precisely analyse the potential consequences on trade of anticompetitive mergers. Generally two types of anticompetitive effects have been recognised to arise in mergers between competitors. One is a reduction of competition through coordinated interaction and/or a lessing of competition through unilateral trade. The result would thus be higher prices for the consumers and/or reduced output so the customers that desired to purchase the product at competitive prices would be hindered to do so.¹⁰ However, even if the negative consequences of an anticompetitive merger are recognised, the transaction will often

⁸ For example Article IX of GATS, the Telecommunication Annex of the GATS and Article 40 of TRIPS

⁹ E. Fox and J. A. Ordover, as note 3 above, p. 408

be permitted or escape the scrutiny of nations' merger regulations. International mergers also rise other issues, e.g. matters of procedure and cooperation between nations' competition authorities, which will be described below.

In a merger context, the problem is usually not the lack of competition laws prohibiting anticompetitive mergers but that some nations allow their competition authorities to take into consideration industrial policy reasons. The most common industrial policy reason is the willingness to save jobs and to create national champions. Michael Porter has described the national champion notion as the willingness to let a firm grow in size in order to compete more effectively in international markets.¹¹ The creation of a national champion might enhance the merged firm's possibility to exploit the world market. Moreover, merger laws are similarly drafted around the world but the methodologies and analysis differs sometimes substantially. I will return to this question later on, when comparing the antitrust laws of the US and the EU.

Another problem is that a merger between firms from two countries, or even in the same country, may have anticompetitive effects in other jurisdictions. This enhances the likelihood for the merger to be reviewed by multiple jurisdictions, which is both time-consuming and costly. It is also feared that a multi- jurisdictional review will be a too heavy burden on the parties involved in the transaction so that they feel obliged to abandon an agreement that would have been beneficial for the consumers.¹² Even if a merger has procompetitive effects in several jurisdictions, a single competition authority may still prohibit it because in that territory it has anticompetitive effects. This is a risk with multiple assessments. The problems occur when the merger in its total enhances world welfare but the benefits are widely dispersed over the globe. Governments, often pressured from domestic lobbying, tend to prohibit the transaction because of the negative consequences on their market even if the benefits in an overall perspective might outweigh these negative effects. In these cases, international competition rules could be beneficial if they stipulate that practice which promote efficiency, by e.g. promoting research and development, sustainable cross-border low pricing or alliances, which involves high technology investments, should be allowed

¹⁰ WT/WGTCP/W/66, Communication from the US, 26 March 1998

¹¹ M. E. Porter, (1990) *The Competitive Advantage of Nations*, 3rd edition

¹² J. F. Rill and C.C. Wilson, Selected recommendations for substantive and procedural convergence in the multi-jurisdictional merger context, (1999) *Fordham Corp. L. Inst.* 359 at p. 361 (B. Hawk ed.)

despite the negative consequences in a single nation.¹³ How this will work in practice is however hard to tell. Nations' competition authority cannot be expected to assess all possible effects on competition on a worldwide level. This would be time consuming and the authorities would not have the necessary resources for the task. It will only be a realistic solution if competition cases with transnational effects are assessed by a multilateral authority, e.g. the WTO, which more easily could make an "international review" of the cases. However, nations would then have to limit their sovereignty. As will be seen in part three, there has been suggested that a WTO premerger office should be established with the aim to identify the transactions that have effects in several jurisdictions. Such a body could then also analyse the effects in an overall worldwide perspective.

In analogy with the reasoning above, regarding a world welfare standard, the permissible conduct that could yield efficiency gains on the world market needs to be specified in detail so as not open up for abuses. Another possible approach in these situations and to which I will return to later, could be for nations to use jurisdictional discretion and refrain from actions when the negative consequences on the domestic market are less significant than the world wide benefits.

Multiple notifications may also lead to international disagreements over the extraterritorial limits of national jurisdiction, attempts to collect information outside the nation's territory and the right remedy to alter anticompetitive aspects of the transaction. There is a risk that the legal uncertainty will increase as a consequence of the multiple assertions in different jurisdictions when they all apply inconsistent legal standards and different remedies.¹⁴ Some of the issues mentioned above can be illustrated by the two high-profile cases, Boeing/McDonnell Douglas and GE/Honeywell. Both cases raises issues of jurisdiction, differences in the competitive analysis between nations' merger regulations (especially regarding the different economic interests and more specifically the issue of efficiency gains), cooperation between competition authorities and political interference. However, before an analysis of Boeing/McDonnell Douglas and GE/Honeywell is undertaken, it would be useful to account for the competition laws of the US and the EU, and the underlying economic theories that have influenced these laws.

¹³ E. Fox and J. A. Ordoover, as note 3 above, p. 417

¹⁴ J.P. Griffin, Antitrust Aspect of Cross-Border Mergers and Acquisitions [1998] E.C.L.R., issue 1, p. 12

2.3 The application of EC and US competition rules

2.3.1 Article 81

Article 81(1) prohibits agreements, decisions and concerted practice between undertakings that have as their object or effect to distort competition and which may affect trade between Member States. The article does not distinguish between horizontal agreement and agreements between firms operating at different levels of trade. Even though the article distinguishes between agreements, decisions and concerted practices the difference between them are not always clear-cut and the European Court of Justice (ECJ) has in complicated cases held it to be enough to find a combination of the different forms of cooperation that has resulted in systematic collusion.¹⁵

Article 81(1) will only apply to agreements that prevent, restrict or distort competition appreciably. The requirement of appreciable effect relates mostly to the parties market shares as well as to the size of the parties involved in the transaction. It is therefore necessary to undertake a comprehensive economic analysis in order to determine whether the agreement satisfies the requirement of appreciable effect on competition *or* trade between Member States.¹⁶ The agreements must have the object or effect of restricting competition within the Common Market for article 81(1) to apply. The object or effect of an agreement must be evaluated in its economic and legal context, in the light of the relevant market, and with consideration to the parties' individual competitive conditions, and the conditions of market entry.

Article 81(2) provides that agreements that are in violation of article 81(1) are void. However, an agreement that is prohibited under article 81(1) can still be permitted if they fall under a block exemption in accordance with article 81(3). For article 81(3) to apply, the net effect of the agreement must be beneficial, not only to the parties involved but to the general welfare. Price fixing, quota setting and markets sharing will normally not meet the requirements for an exemption under the article.¹⁷ The Commission has the sole authority and broad discretion to grant a block exemption.¹⁸ As a consequence, the Commission has been able to take into consideration issues of development and research, specialisation production, licensing of

¹⁵ *Hercules v. Commission*, Case T-7/89, 17.12.1991, (1991) II ECR 1711, para. 264

¹⁶ D. Hildebrand, (2002) *The Role of Economic Analysis in the EC Competition Rules*, 2nd edition, pp. 31-32

¹⁷ Circumstances that are regarded by the Commission as beneficial to consumers are higher quality of the products offered, introduction of new and improved products, more favourable prices, greater range of goods, lower costs and thereby lower cost for customers. J. Faull/A. Nikpay (1999) *The EC Law of Competition*, p. 103. D. Hildebrand, as note 16 above, p 35.

¹⁸ Article 9(1) of Regulation 17, which apply both to individual exemption as well as to block exemptions.

intellectual property and know-how. The Commission has, when granting individual exemptions and block exemptions, favoured small and medium-sized firms while agreements between large undertakings have been regarded with much more scepticism. However, it seems like the Commission in recent years has permitted more agreements between large enterprises than before, especially when those companies were subject to competition from large firms established outside the EC.¹⁹

2.3.2 Article 82

Article 82 prohibits abuse of a dominant position by one or more firms in a substantial part of the Common Market that may affect trade between member states. The article enumerates certain conducts that are considered as an abuse without being exhaustive. The mentioned abuses can be divided into three main categories, exploitative abuses, exclusionary abuses and structural abuses. Exploitative abuses are practices that exploit market power in a trading relationship with customers by, e.g. unfair purchase or selling prices or price discrimination. Structural abuses are a behaviour that eliminates a competitor by e.g. a merger or an acquisition, and exclusionary abuses are refusal to deal or other predatory actions.²⁰

A firm holding a dominant position is only to a limited extent exposed to competition and has therefore no incentive to improve the overall performance by means of cost reductions or increased innovations. This enables the firm to behave independently and in a way that may harm other market participants. The possibility to act rather unconstrained from its competitors was emphasised by the Court of Justice in the United Brand case. The Court defined a dominant position of a firm as “ a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its consumers and ultimately of the consumers.”²¹

The determination of whether a firm holds a dominant position depends to a large extent on the structure of the market and both the geographic and the product market needs to be evaluated. The main criteria that are considered when assessing dominance are the firm's market shares compared to its rivals, the degree of dependence of its customers or suppliers

¹⁹ D. Hildebrand, as note 16 above, p 36.

²⁰ L. Ritter, W. D. Braun, F. Rawlinson, (2000) *European Competition Law; A Practitioner's Guide*, 2nd edition, p. 328

²¹ *United Brands v. Commission*, (27/76) ECJ Feb. 14 1978, 1978 ECR 207, para 65

and the possibility to decide its prices and conditions of sale without serious regard to the competitive response of other firms.²²

It should be underlined that a dominant position does not in itself raise any objections for the application of article 82. It is the abuse of an already existing dominant position that the article attempts to regulate. However, if firms obtain a dominant position by coordination of their conduct or through mergers article 82 or the EC Merger Regulation will be infringed.²³

Firms that collectively hold a dominant position may violate article 82 if the enterprises forming the oligopoly are connected by structural links. Such links includes shareholdings, technology, production and marketing arrangements and exchange of sensitive information between them.²⁴

2.3.3 The EC Merger Regulation

The EC Merger Regulation 4064/89, was adopted on December 21 1989, and entered into force nine months later. It was later amended by Regulation 1310/97. The two regulations are based on article 83 and 308 of the EC Treaty. While article 83 permits the Council to legislate on conduct that falls within article 81 and article 82, article 308 allows the Council to take action not provided for in the Treaty if this is deemed necessary to obtain the objectives of the Treaty, including the maintenance of effective competition in the Common Market (article 3(g)).²⁵ Article 83 would in itself have been insufficient to regulate mergers since they sometimes fall outside the application of article 81 and article 82. Especially mergers, which created a dominant position, used to cause difficulties. However, until the Merger Regulation entered into force, article 82 and less often article 81 were applied to mergers.

The Merger Regulation is limited to mergers and joint ventures with a Community dimension. The notion of Community dimension aims at dividing the competence between national competition authorities and the Commission. Only transactions with a Community dimension will be assessed by the Commission, subject to a few exemptions²⁶. The national authorities have competence to deal with a transaction with no Community dimension but may refer the

²² D. Hildebrand, as note 16 above, p. 46

²³ Ibid, p. 41

²⁴ L. Ritter, W. D. Braun, F. Rawlinson, as not 20 above, p 314

²⁵ Recitals 6-8 of the preamble to Regulation 4064/89

case to the Commission for a decision.²⁷ The Commission does also have the possibility to refer a case to the national authority in accordance with article 9(3), as amended by Regulation 1310/97.

If the firms involved in the transaction have a Community dimension the Commission will evaluate whether the merger or joint venture create or strengthen a dominant position that would significantly impede effective competition.²⁸ Both conditions need to be established in order for the Commission to prevent the transaction. The transaction will not cause any concerns in the view of the Merger Regulation if the dominant position does not have any negative consequences in the Common Market. In determining whether the merger will create or strengthen a dominant position, the relevant product and geographic market must be analysed. The market definition is to a large extent the same as under article 81 or article 82, and is defined in the Commission's Notice on the Relevant Market for the Purposes of Community Law.²⁹ As the Common Market has become further integrated the relevant geographic market has been defined more broadly. The Commission indicated in its Notice on the Definition of the Relevant Market that the European market integration will be considered when defining the relevant market.³⁰ It is to be expected that the ongoing globalisation will broaden the assessment of the relevant geographic market.

The size of the firms' market shares in relation to their competitors will be regarded as a crucial criterion when determining if a merger creates or strengthens a dominant position. The Commission will compare the post-merger's market shares with those of its actual and potential competitors.³¹ However, not only the market shares will be taken into account in the assessment. Other factors that will be considered are e.g. the financial power of the parties and the competitors, alternatives available to suppliers and users, market entry barriers, supply and demand trends, and the development of technical and economic progress. This evaluation

²⁶ According to art. 21(3) of the Merger Regulation, the member states may take appropriate actions to protect public security, plurality of the media and prudential rules, and other unspecified public interest that are recognised by the Commission after the notification by the member state.

²⁷ Article 22(3) Merger Regulation 4064/89

²⁸ Article 2 of the Merger Regulation 4064/89.

²⁹ Commission Notice on the definition of the relevant market for the purpose of Community competition law [1997] OJ C372/5, [1998] 4 CMLR 177

³⁰ L. Ritter, W. D. Braun, F. Rawlinson, as note 20 above, pp. 453-454

³¹ V. Korah, (2000) An introductory guide to EC Competition Law and Practice, 7th edition, p. 309

must be made both with respect to the relevant product market as well as to the relevant geographic market.³²

2.3.4 The US antitrust law

The US has a strong policy against mergers that have anticompetitive effects. It was also the first country to adopt a modern system of competition law with the enactment of the Sherman Antitrust Act in 1890, of which the two basic provisions still remain the basis of current law.³³ The Sherman Act, under sections 1 and 2, forbids horizontal mergers if the result of the merger would be the elimination of competition between them. In assessing the legality of the horizontal merger under the Sherman Act the courts will examine market share, the degree of concentration, the harm to other competitors and the effects on competition. If the result of the merger would be a significant increase in the concentration of firms in the relevant market and the merged firm has an undue percentage of that market the merger will be banned.

New legislation was passed in the years and decades after the Sherman Act. Section 7 of the Clayton Act was passed 1917 and it prohibits acquisitions that substantially lessen competition or tend to create a monopoly. The provision was later amended by the Celler-Kefauver Act to apply to asset as well as stock acquisition, and thereby mergers explicitly. Section 7 of the amended Clayton Act provides that no firm shall acquire any of the stock or assets of any other firm if the result will be to substantially reduce competition or to tend to create a monopoly. In 1976, section 7A of the Clayton Act was enacted by the Hart-Scott-Rodino Antitrust Improvements Act, which established the requirement of pre-merger notifications.³⁴

The antitrust division has a tradition of issuing various guidelines in the field of merger policy. Even though decision of the courts may differ from the issued guidelines, the proposed standard shows the policy in merger cases for a considerable period. The merger guidelines are mostly designed as an analytical help in assessing whether a merger is likely to substantially lessen competition. The approach taken in the 1992 Merger Guidelines³⁵ is that the analysis of a merger should start with deciding the relevant market and then assess the competitive effects of the merger mainly from the resulting changes in market shares. The

³² L. Ritter, W. D. Braun, F. Rawlinson, as note 20 above, p. 470

³³ A. Jones, B. Sufrin, Text, (2001) Cases and Materials, EC Competition Law, p. 18

³⁴ D. Hildebrand, as note 16 above, p. 90f

³⁵ The 1992 Horizontal Merger Guidelines [with April 8, 1997, Revisions to Section 4 on Efficiencies]

part about efficiencies was revised in 1997. Efficiency gains, which is a result of a merger and which would not have been achieved in the absence of such a transaction, is called merger-specific efficiencies. It has been found by the Federal Trade Commission (FTC) that certain efficiencies are more likely to be substantial than others are and thereby less likely to result from anticompetitive behaviour. For example, efficiencies related to management, procurement or capital costs are less likely to be substantial, while efficiencies from shifting of production among facilities formerly owned separately, and those efficiencies relating to research and development costs are likely to be regarded as merger-specific.³⁶

2.4 The economics behind the competition laws

“Competition policy is an economic policy concerned with economic structures, economic conduct, and economic effects”.³⁷ Consequently, in order to fully understand a nation’s competition policy, it is important to study the economic theories behind it. However, there are a lot of disagreements between the economists on the details of the theories and this has resulted in many different thought of schools.³⁸ Even if it would be a desirable aim to describe all the existing competition theories, it would go beyond the scope of this essay. The intention is instead to account for the most influential theories for the development of the different competition policies of the US and the EC.

The scholars have, since Adam Smith presented his free market theory, discussed the proper economic analysis that should be applied in the field of competition. The question that the theories attempt to answer is how to achieve the best balance between the firm’s desire to maximise its profits and other policy interests, e.g. the interest of the consumers to buy the goods at the lowest price possible or consideration of employment issues. The tension between the “free market”, absent from state intervention in the production and distribution of goods and services, and the use of anticompetitive practices by firms to achieve the maximisation of profits, need to be solved by some sort of competition policy.³⁹ The competition policy can have its focus on only economic considerations or embedded in other policy objectives. The former is illustrated by the role of competition policy in the US, which concentrates on the implementation of economic theory only, while the EC is an example of the later. In the EC, considerations of economic values are not the sole objective of the

³⁶ D. Hildebrand, as note 16 above, p. 95f.

³⁷ J. Faull/A. Nikpay, as note 17 above, p. 4

³⁸ D. Hildebrand, as note 16 above, p. 14

³⁹ D. Hildebrand, as note 16 above, p. 9

competition law but consumer welfare and different types of social goals will also guide the application of the competition provisions.⁴⁰

However, even nations that are strongly in favour of promoting economic efficiency and are very devoted to the free market theory of Adam Smith, will not refrain from intervening in the market. It is common for industries everywhere to receive subsidies, and for governments to take into account employment consideration and to promote small and medium sized enterprises. The competition laws of nations will thus vary, depending on what governments regard as valuable objectives for the competition policy to promote and protect.⁴¹

2.4.1 The Harvard School

One of the models with the greatest influence on the US competition policy, has been the so-called S-C-P paradigm of the Harvard School.⁴² The paradigm indicates that the structure of the market decides the firm's behaviour and that behaviour determines market performance, e.g. profitability, efficiency, technical progress, and growth. In practice, the theory suggests that concentrated industry structures will cause a behaviour that result in poor economic performance, especially limited output and monopoly prices.⁴³ The model was developed by E.S. Mason in the 1930s and was further developed by his pupil J.S. Bain in the 1950s.⁴⁴

Bain argued that most industries were more concentrated than necessary (the economies of scale were not very high in most industries), that there existed many and difficult barriers to entry, which deterred new firms from establishing themselves on the market, and that monopoly pricing connected with oligopolies started to occur at relatively low levels of concentration.⁴⁵

The theory of the Harvard school suited the American political interest and fitted in the ideological climate of the 1960s. This was a time when government interventions were favoured to nullify the effects of monopolies and oligopolies and the US Congress attempted to pursue a more restrictive competition policy with the goal of protecting small businesses. The School aimed to develop intervention criteria for when it was appropriate for

⁴⁰ Ibid, p 11

⁴¹ Ibid p. 17

⁴² It got its name because many of its originators worked in Harvard.

⁴³ A. Jones, B. Sufrin, as note 33 above, p. 20

⁴⁴ D. Hildebrand, as note 16 above, p. 134

⁴⁵ A. Jones, B. Sufrin, as note 33 above, p. 20

governments to legalise against a conduct. The result was a rigid scrutiny of all types of behaviour and a lot of prohibitions, for example in relation to vertical agreements and conglomerate mergers.⁴⁶

2.4.2 The Chicago School

The Harvard school was criticised by several economists, for example by Stigler, Demsetz, and Bork, which belonged to the so-called Chicago school. The adherents to this thought of school argued that the relationship between entry barriers, concentration and profits was not as evident as the Harvard School claimed. The Chicago school created a revolution in antitrust thinking and has had a major influence on the US antitrust policy during the 1970s and the 1980s. The Chicago school denied the link between profitability and a high degree of concentrations and argued that a high level of concentration and profitability could be caused by efficiency gains achieved by companies who knew how to run an effective business policy.

The Chicago school emphasises that competition law should only be concerned with the production of allocative efficiency. It puts a strong trust on the market, which should direct the success or failure of a firm. Stigler called this market process, which is directed by the survival of the fittest, Economic Darwinism. If inefficient firms are forced out of the market the industry will become more concentrated. However, this is desirable from a competition policy point of view as it creates more efficient businesses.⁴⁷ The belief in the market, depends on the assumption that there exist few entry barriers, that industries often achieve economies of scale and that businesses are profit-maximisers. These features therefore make it easy for the members of the Chicago school to conclude that the market is able to correct and create efficiency without any significant interference from governments or competition laws.⁴⁸

One of the followers of the Chicago school, R. H. Bork, argues that antitrust laws only have a single goal, which is the maximisation of consumer welfare. It is therefore the responsibility of the courts to regard consumer welfare as the sole value when assessing antitrust cases.⁴⁹ Competition should thus be understood as the maximisation of consumer welfare, or in other words economic efficiency. To achieve this objective, courts must apply an economic

⁴⁶ D. Hildebrand, as note 16 above, p. 134

⁴⁷ J. Faull/A. Nikpay, as note 17 above, pp. 4-5

⁴⁸ A. Jones, B. Sufrin, as note 33 above, p. 21

reasoning where possible losses of efficiency and the allocation of resources are weighed against the possible benefits in the productive use of those resources. “In a word, the goal is maximum economic efficiency to make us as wealthy as possible. The distribution of that wealth of the accomplishment of noneconomic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases.”⁵⁰

As already mentioned, the Chicago school has influenced the competition policy of the US and changed the rigorous approach of the Harvard school to a rather loose policy, based on the application of purely economic considerations. Even if the Supreme Court never explicitly stated that efficiency should be the sole value to take into account when assessing antitrust cases, it has expressed, on several occasions, that efficiency is very important.⁵¹

2.4.3 Criticisms to the Chicago school

Despite the impact the Chicago school has had on the US antitrust policy, it has not avoided criticisms. Their model has been criticised as being too static and of having its focus too much on long-term benefits of competition policy rather than short-term effects. Moreover, the neo-classical market efficiency model of the Chicago school is too simple to predict or fit business conduct in the real world.⁵² The Chicago school claims that its findings are non-political since they are only concerned with the market. However, Fox and Sullivan argue that such a standpoint in itself expresses a political view. They feel that the law cannot and should not only be about economics but that economics can provide an instrument to support the antitrust system to serve the interest of the consumer.⁵³

2.4.4 The debate today

The discussion today refers less to doctrines and the S-C-P paradigm has during the recent years been rewarded new attention. Even if it is admitted that market structure has implications for a firm’s conduct, it is now recognised that there are several basic conditions, like consumer preferences and state of technology, which will influence market structure. Moreover, it is acknowledged that conduct is not an insignificant player when it comes to explaining performance. There is also a wide acceptance that both performance and conduct

⁴⁹ R. H. Bork, (1993) *The Antitrust Paradox – A Policy at War with Itself*, With a New Introduction and Epilogue, 2nd edition, p. 51

⁵⁰ *Ibid*, p. 427

⁵¹ D. Hildebrand, as note 16 above, p. 149

⁵² A. Jones, B. Sufirin, as note 33 above, p. 26

⁵³ E. Fox and L. A. Sullivan, in A. Jones, B. Sufirin, as note 33 above, p. 25

can influence market structure so the S-C-P paradigm is no longer “a one way” scheme. Accordingly, the S-C-P paradigm still plays a role in the industrial economics and in competition policy, not as a perfect model but as a guideline.

2.4.5 The industrial economics

The strategic behaviour of companies in oligopolistic markets has been the focus of the latest development of industrial economics. The industrial economics have tried, through the use of well-developed microeconomic models and with assistance of game theory, to find out the possible company strategies and whether collusion is likely or not. This is suitable for the more moderate, less ideological, and more technical approach of the nineties. So far, this new approach has not resulted in a robust and detailed guideline useful for competition policy. Faull and Nikpay argue that the focus on only one factor will not be enough to identify anti-competitive behaviour. It would therefore be favourable and more effective if nations’ competition authorities evaluated a mixture of aspects, both structural, behavioural, and performance considerations.⁵⁴

2.4.6 The EC Competition Policy

Competition policy plays a significant role in the EC and is a valuable tool to achieve the objectives of the Treaty. Article 2 of the Treaty lays down the general objectives of the Community, which should be established by a common market and an economic and monetary union;

“ to promote throughout the Community a harmonious and balanced development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity amongst Member States.”⁵⁵

Besides these objectives, the principle of an open market economy with free competition will also guide the competition policy of the Community. However, this principle, which is embedded in the Treaty, “does not imply an attitude of unconditional faith with respect to the operation of market mechanisms. On the contrary, it requires a serious commitment as well as self-restraint by public powers, aimed at preserving those mechanisms”.⁵⁶ Another, very important factor, for the development of the competition policy of the Community, is the

⁵⁴ J. Faull/A. Nikpay, as note 17 above, pp. 7-8

⁵⁵ Article 2 of the Treaty

⁵⁶ M. Monti, European Competition Policy for the 21st Century, The Fordham Corporate Law Institute –Twenty-eight Annual Conference on International Antitrust Law and Policy, New York 20 October 2000, available at www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/

single market integration. The achievement of the single market has, by the Commission and by the ECJ, often played a part in the decisions. However, competition policy is not regarded as the only efficient tool to achieve the goals of the EC. The application of EC competition policy must therefore be made with considerations to other activities of the Commission, e.g. in relation to industrial, regional, social, and environmental policies.⁵⁷ The competition policy of the EC has often been concerned with the promotion of small and medium sized enterprises, the competitiveness of businesses, the opening up of markets, and the enhancement of the consumer welfare.

The above enumeration of the objectives the Commission take into consideration when pursuing its competition policy does not mean that efficiency has no place in the application of EC competition law. There are some ambiguities concerning the exact scope for the Commission when applying efficiencies and a more detailed analysis of this issue will be accounted for later. It is here enough to state that EC competition policy has as one of its many objectives, the production of efficiency. Consequently, the EC competition policy acknowledges efficiency and the allocation of resources as valuable aims, but they are interacted with other Community policies, as described above. Efficiency is not regarded as the sole objective of the law, and the EC is therefore not a firm follower of the Chicago schools' view.⁵⁸

2.5 Boeing/McDonnell Douglas and GE/Honeywell

2.5.1 Boeing/McDonnell Douglas

In December 1996 the Boeing Company (Boeing) announced its intention to acquire McDonnell Douglas Corporation (MDC). The two companies were manufacturing aircraft; Boeing had the leading position in the world and McDonnell Douglas enjoyed the third place. The post-merger would only face significant competition by the European based Airbus. Boeing argued that the merger would enhance efficiency and promote consolidation in the US defence industry. The transaction would also save 14 000 jobs at the struggling McDonnell Douglas. The FTC acknowledged that the merger, on its face, raised serious antitrust questions. Boeing had 60 percent of the market for large commercial aircraft, which was a highly concentrated market with significant entry barriers. The company had also concluded exclusive twenty-year sole-supplier contracts with three major airlines; Delta, Continental and American airlines. The FTC considered these contracts as something that might cause

⁵⁷ D. Hildebrand, as note 16 above, pp. 9 & 11

concerns in the future, and would continue to observe the situation carefully.⁵⁹ However, in the overall assessment the FTC concluded that Douglas Aircraft (McDonnell Douglas's commercial aircraft part) would neither re-establish itself in the commercial aircraft market, nor did any potential buyer exist to invest in the company. Thus, the acquisition of McDonnell Douglas by Boeing would not, in American antitrust terms, substantially lessen competition in the relevant market and the FTC cleared the merger in its total.⁶⁰

Boeing's exclusive supply agreements with American, Continental and Delta airlines were according to the Commission an indication that Boeing enjoyed a dominant position in the relevant market. The exclusive contracts accounted for approximately 13 % of the 12 000 estimated aircraft that would be sold on the open market from 1997-2016 and the Commission thus regarded the agreements to give rise to serious foreclosure effects over the next 20 years. The Commission evaluated that the merger would give the companies a strengthened position of dominance in the market for large aircraft. The relevant market was also characterised by significant entry barriers due to, for example, huge investment costs and strict safety regulation by nations.⁶¹ Other concerns of the Commission were possible spillovers from the McDonnell Douglas's defence division. The Commission cleared the merger first after Boeing agreed to several concessions and after extensive lobbying from the US authorities.⁶²

2.5.2 *Ge/Honeywell*

The merger between GE and Honeywell was announced in October 2001 and was notified in the US on November the same year and in the EC on February 2002. Both GE and Honeywell manufactured engines but Honeywell also made avionics and non-avionics products. The merger would result in horizontal overlaps and vertical and conglomerate integration of the merging parties' activities. For example, GE's leasing arm, GECAS, was the largest purchaser of aircraft in the world and thereby a customer downstream of the supply of avionics and engines. GE capital provided GE with financial stability and enabled GE to invest large amounts into research and development. While the US cleared the merger without any demand for concessions, the EC found the merger problematic. The Commission did not

⁵⁸ A. Jones, B. Sufrin, as note 33 above, p. 34

⁵⁹ K. Luz, The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the need for a globalized Antitrust System, (1999-2000) *The George Washington Journal of International Law and Economics*, vol 32, p. 155 at. 158 & 161-162

⁶⁰ F. Romano, (1998) The Boeing/MDD Merger and the EU/US Agreement on the Application of their Antitrust Rules, *Revue de droit des affaires internationales*, no 4-5, p. 509 at. 511

⁶¹ Commission Decision, Boeing/McDonnell Douglas, 30 July 1997, 1997 O.J. (336) 0016, paras 45-46,49

⁶² F. Romano, as note 60 above, p. 512

regard the concessions offered by GE as sufficient and after Honeywell had asked GE to raise its concession once more, which GE refused to do, the Commission prohibited the deal.

The Commission feared the merger would strengthen GE's dominant position in the markets for large commercial aircraft engines and large regional jet aircraft engines and create a dominant position on the market for corporate jet engines.⁶³ A contributing factor to GE's dominance was GE's vertical integration into aircraft purchasing, financing and leasing activities through GECAS. GECAS was the largest purchaser of aircraft in the world and the Commission argued that GECAS could influence aircraft manufactures and their choice of engines. GECAS GE-only policy was feared to extend to Honeywell products as well, with the effect of foreclosing the market.⁶⁴ GE also had unique strong financial position due to its financial organisation, GE Capital, which managed over 80 % of GE's total assets. It was argued that this allowed GE to take more risks in its product development programmes than any of its competitors.⁶⁵ Moreover, the Commission extensively discussed the issue of mixed bundling and it feared that the post-merger's broad product range would allow it to engage in bundling with the effect of foreclosing competitors that did not have complementary products to offer.⁶⁶ Mixed bundling occurs when products are available on a stand-alone basis, but are offered also as a package on cheaper terms. The mixed bundling was argued to be possible because of the complementary product range GE and Honeywell produced and from the cost-advantages the package would generate.⁶⁷ The issue of mixed bundling in GE/Honeywell and the issue on exclusive supply contracts in Boeing/McDonnell Douglas clearly show the US and the EC's different positions regarding efficiencies. It is evident that it will be hard to reach convergence in antitrust cases when there are substantial differences in the competition analysis between the two jurisdictions.

2.5.3 Efficiency consideration in the US and the EC

As already has been explained, both sides of the Atlantic take into consideration a range of goals, inclusive allocative efficiency, but the US performs a more comprehensive economic analysis. Economic efficiency consist of maximisation of social welfare by enhancing allocative efficiency (that is producing what the consumers desire as shown by their willingness to pay) and productive efficiency (producing goods and services by the use of as

⁶³ Commission Decision, General Electric/Honeywell, 3 July 2001, Case No Comp/M. 2220, para 341

⁶⁴ Ibid, paras 126-127, 406

⁶⁵ Ibid, paras 107-108

⁶⁶ Ibid, para 398

few resources as possible) and by promoting progressiveness (by for example rewarding innovation and development). Difficulties arise when mergers on the one hand restrain competition and on the other hand increase efficiency by, for example, a decrease in unit cost of production.⁶⁸ However, social welfare is more than just giving what the consumers want at as low price as possible. Social goals, like reducing unemployment or protecting the environment are not as well measured in terms of economic efficiency. It is difficult to see how only the production of what the consumers want to purchase to the lowest price possible, will enhance social welfare in its total. It is argued that a better way to describe economic efficiency would be to state that it consists of maximisation of fair pricing and adequate output to the benefits of the consumers. Social welfare is generally viewed as encompassing other concerns than just economic efficiency.

In the US efficiency claims do not constitute a defence to an anticompetitive merger but is something that will be taken into account when assessing the net competitive effects of the merger. The Merger Guidelines section 4 states the principles for the analysis of efficiency by the FTC. It is for example possible to rebut a presumption of illegality by showing unique economic circumstances that undermine the findings of the competition authorities. The Guidelines also state that:

“The primary benefit of mergers to the economy is their potential to generate... efficiencies. Efficiencies generated through merger can enhance the merged firm’s ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products... Even when efficiencies generated through merger enhance a firm’s ability to compete, however, a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive... To make the requisite determination, the Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market.”⁶⁹

Commissioner Monti has, in a speech in 2000, explained the scope for efficiency to be taken into consideration when applying the EC Merger Regulation;

“...once the existence of dominance has been established or foreseen as likely to be created, the test leaves less scope for the Commission to take account of arguments relating to the efficiencies which the merger might bring about, than does the US merger control test (“a substantial lessening of competition”).⁷⁰

⁶⁷ A. Burnside, GE, Honey, I Sunk the Merger, [2002] E.C.L.R. p. 107

⁶⁸ P. D. Camesasca, The Explicit Efficiency Defence in Merger Control: Does it Make the Difference? [1999] E.C.L.R. p. 14

⁶⁹ The 1992 Horizontal Merger Guidelines [with April 8, 1997, Revisions to Section 4 on Efficiencies], s. 4.

⁷⁰ M. Monti, A European Competition Policy for today and tomorrow, Conference jointly hosted by the AEI-Brookings Joint Center for Regulatory Studies, the Section of Antitrust Law of American Bar Association, and

This statement of the Commissioner is the most informative explanation of the current scope of efficiency considerations in the Merger Regulation. Despite the absence of an explicitly stated recognition of efficiencies in the Merger Regulation, the criterion of technical and economic progress as included in Article 2 (1) of the Merger Regulation has been said to open up for a kind of efficiency defence. Also “the structure of the market concerned” in 2 (1) of the Merger Regulation might refer to an alike approach. However, such a possibility exists only if it is to the consumers’ advantage and does not hinder competition, thus economical consideration of efficiencies in these contexts is almost always excluded.⁷¹

The recent case law indicates a gradual development towards a greater acceptance of efficiencies by the Commission. In the case of the *de Havilland*⁷², it was argued by the defendant that one of the aims with the merger was to reduce costs. The Commission founded that those cost-savings would only have a “negligible impact” for the parties but did not dismiss the efficiency consideration in its overall evaluation of the merger. The conclusion drawn from the decision has been that the efficiency gains need to be “substantial and merger specific, with the burden of proof resting on the parties.”⁷³ The EC thus deals with efficiencies between the lines, even if in practice is used as a defence to illegality. The unwillingness by the Commission and the ECJ to explicitly recognise efficiency considerations creates confusion and opens up for accusation of industrial policy consideration.⁷⁴

The development towards a further acceptance of efficiencies by the Commission now seem to have culminated with the modernisation process of EC competition laws and the embedded reform of the Merger Regulation. Commissioner Monti has therefore had many occasions to talk about the scope of efficiency claims in merger cases. In a speech on November 2002, he clarified the Commission’s position regarding efficiencies;

“...an explicit recognition of merger-specific efficiencies is possible without changing the present wording of the substantive test in the Merger Regulation. Article 2(1)(b) of the Merger Regulation provides a clear legal basis in that respect by stating that the Commission shall take account, inter alia, of “the development of technical and economic

the District of Columbia Bar Association’s Antitrust Committee of the International Law Section, Washington, 26 June 2000, available at www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/

⁷¹ P. D. Camesasca, as note 68 above, p. 24

⁷² Commission Decision, Case IV/M.053, *Aerospatiale- Alenia/de Halivand v. Commission*, 1991 O.J. (L 334) 42

⁷³ P. D. Camesasca, as note 71 above, p. 25

⁷⁴ *Ibid*, pp. 25-26

progress provided it is to consumers' advantage and does not form an obstacle to competition.

The guidelines should say that the Commission intends to carefully consider any efficiency claim in the overall assessment of the merger, and may ultimately decide that, as a consequence of the efficiencies the merger brings about, the merger does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.⁷⁵

It is thus clear that the Commission intends to take efficiency considerations into account. However, Monti underlines that the efficiency gains must have a certain weight and need to "be of direct benefit to consumers, as well as being merger-specific, substantial, timely, and verifiable".⁷⁶ It is unlikely that an efficiency claim would be regarded as sufficient in a transaction leading to monopoly or quasi-monopoly.⁷⁷

2.5.4 The efficiency considerations in Boeing/McDonnell Douglas

In the Boeing/McDonnell Douglas case, the FTC considered that the merger would result in significant industry efficiency and that competition would remain almost untouched. For aircraft manufacturers, a close cooperation between the producer and the customers was regarded as important due to the necessity to secure financial commitment and because design and functions depend on the customer's desire.⁷⁸ The exclusive supply contracts were thus seen as efficiency enhancing for this industry.

The Commission saw Boeing's exclusive supply contracts with American, Continental and Delta airlines, as giving rise to serious foreclosure effects.⁷⁹ It also suggested that these effects would give the incentives for other large airlines to conclude such exclusive contracts.⁸⁰ The likelihood for the exclusive agreement to result in foreclosure effects has been questioned and it has been suggested that what the Commission really feared was that the cost-advantages incurred by the agreements could be used by Boeing to unfairly exploit its competitors. It is possible however, that the Commission favours the preservation of interfirm rivalry in order to establish competition instead of a process to produce efficiencies.⁸¹

⁷⁵ M. Monti, Merger control in the European Union : a radical reform, European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002, Speech/02/545

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ D. J. Gifford & E. T. Sullivan, Can international antitrust be saved for the post-Boeing merger world? a proposal to minimize international conflicts and to rescue antitrust from misuse, *The Antitrust Bulletin/Spring* 2002, p. 55 at 76-77

⁷⁹ Commission Decision, Boeing/McDonnell Douglas, 30 July 1997, as note 61 above, para 46

⁸⁰ Ibid, para 71

The American position towards exclusive supply contracts has in the history differed a lot. In the late 1970s the Supreme Court was increasingly influenced by the Chicago school antitrust analysis, and recognised widely the efficiency gains generated by exclusive supply contracts and that such contracts should not be prohibited per se. Exclusive supply agreements should instead be assessed under the rule of reason and were thereby only permitted if their positive effects outweighed the negative aspects of the agreement. The American policy in the 1990s have, however, renewed the concern over exclusive supply contracts. The antitrust authorities have challenged several vertical mergers and other vertical agreements, including exclusive supply contracts. However, efficiency of vertical agreements are still recognised but there is an awareness that such restraints may, by their aggregate effects, reduce the overall supply of goods in a market, instead of increasing it.⁸²

The EC will also take into account the efficiency of exclusive supply contracts and will balance these against possible negative aspects. In the new Guidelines on Vertical Restraints, adopted on 24 May 2000, the Commission explained the new economic approach under the Block Exemption Regulation.⁸³ The Commission thereby approaches the American view regarding economic analysis, by increasingly emphasising its importance when assessing vertical restraints. It also indicates a more lenient approach for evaluating vertical agreements than the Commission used to apply.⁸⁴ However, as seen by the Boeing/McDonnell Douglas merger the Commission was not prepared to give efficiency gains the same weight as the FTC.

2.5.5 The efficiency consideration in GE/Honeywell

In GE/Honeywell, the main concern of the Commission was the mixed bundling the post-merger could offer to its customers. Because aircraft equipment and engines are complementary, the Commission feared that the GE would be able to sell more avionics if it priced the engine more cheaply, and vice versa. Prices would fall and this might in the long-term force competitors with a narrower product range out of the market. The high entry barriers for the relevant market would also make new entrances difficult. The Commission thus emphasised the long-term structural effects instead of any short-term benefits of the merger. It has been argued that the Commission's interest of the long-term procompetitive effects risk prohibiting mergers that in the short-term would create efficiency gains, if there is

⁸¹ D. J. Gifford & E. T. Sullivan, as note 78 above, pp. 78-80

⁸² Ibid, pp. 72-74

⁸³ Commission Notice Guidelines on vertical restraints OJ (2000) C 291/1, 13.10.2000

any, even remote possibility that the merger will force competitors out of the market. It is also difficult to predict the long-term benefits considering the long time frame and economic assumption of for example the development of future products.⁸⁵ Moreover, the Commission's lack of confidence towards the ability of market entry and its many interests, e.g. of helping small and medium sized enterprises, might have played a role in the decision. It has been argued that the US, on the other hand, considers the present benefits of the merger instead of more speculative long-term conduct of the parties, and encourages competitors to provide better competitive responses.⁸⁶

The cases clearly illustrate that nations with qualified competition laws, and even when one nation's law is influenced by the other, can have substantial differences in their analysis of competition in a given case. The EC has been accused of not taking enough consideration to economic arguments and to efficiency gains, and to protect competitors and not competition. It has been argued that the European focus on competitors and on the consumers might broaden the jurisdiction limits, since the breadth of the interest to be assessed is wider and thus results in a narrower scope for restraints.⁸⁷

2.5.6 The jurisdictional aspect

It is clear that the mergers had an economic impact in the European and the American market and were able to alter the competitive structure of the market on a worldwide basis. The Boeing/McDonnell Douglas concerned two US based firms and it was in the US the agreement would have substantially and wide-ranging economic effects, as well as tangible impact on the employment policy and in the field of defence. In the EC, it was mainly the position of Airbus that was threatened and this was of great concern to the Commission. The Commission also feared that the interests of the consumers would be affected. Since the effects in the EC, were not as clear as on the American market it was not evident that the EC should have taken jurisdiction in the first place. However, when doing so, it took a similar approach as the US towards extraterritoriality, even if it did not apply a pure effect-doctrine.⁸⁸

⁸⁴ D. J. Gifford & E. T. Sullivan, as note 78 above, pp. 75-76

⁸⁵ M. Planz & C. Caffarra, *The Economic of G.E./Honeywell*, [2002] E.C.L.R. p. 115 at 117-118

⁸⁶ A. Burnside, *GE, Honey*, as note 67 above, at 109

⁸⁷ A. F. Bavasso, *Boeing/McDonnell Douglas: Did the Commission Fly Too High* [1998] E.C.L.R p. 243 at 246

⁸⁸ *Ibid*, p. 243

2.5.7 *The effect doctrine*

The effect doctrine was developed under American law in 1945 by the Alcoa case⁸⁹, where judge Learned Hand stated that the Sherman Act applied to behaviour anywhere in the world that affected American business and commerce. This position has caused significant conflicts with other nations, especially after the US courts began to assess conduct within the jurisdiction of other countries. In order to reduce the ambiguities in the Alcoa formulation, the Congress enacted the Federal Trade Antitrust Improvement Act in 1982. The Act requires the conduct outside the US to have a “direct, substantial, and reasonably foreseeable effect” on US domestic commerce or on US exports.⁹⁰

2.5.8 *The single economic entity theory*

In the same way the EC Merger Regulation lacks explicit rules for efficiency considerations, it is silent regarding its international scope and whether the Commission has extraterritorial enforcement jurisdiction. Article 1 of the Merger Regulation provides the threshold for a transaction to have a Community dimension and thus needs to be notified to the Commission. It thereby activates the Commission’s jurisdiction to transactions, despite the fact that the parties are non-EC undertakings.⁹¹ This is a very broad definition and even if the Community rules on international jurisdiction apply to the Merger Regulation as well, they do not limit the extraterritorial reach in any significant way.

The EC has traditionally applied the single economic entity theory to non-European enterprises, as provided by the Dyestuff-case.⁹² The ECJ there held the parent companies responsible for the anticompetitive behaviour of their subsidiaries, despite the fact that only the subsidiaries were located within the EC. This was especially the case when the parent companies used their power to control the subsidiaries and the subsidiaries had little possibility to act independently. In the landmark case Wood Pulp⁹³, which concerned the application of article 81 and 82, the ECJ appeared to give support for the effect doctrine. The case concerned anticompetitive behaviour by non-EC producers to the detriment for EC consumers and was regarded to fall under the jurisdiction of the EC. However, the ECJ did not explicitly refer to the effect doctrine and it made a distinction between implementation

⁸⁹ US v. Aluminium Co. of America, 1945

⁹⁰ D. J. Gifford & E. T. Sullivan, as note 78 above, pp. 59-61

⁹¹ A. Ezrachi, Limitation on the Extraterritorial Reach of the European Merger Regulation, [2001] E.C.L.R. p. 137 at 138

⁹² Dyestuffs v. ICI, Case 48/69 (1972) E.C.R. 619; [1972] C.M.L.R. 557

⁹³ Wood Pulp, O.J. L85/1, [1985] 3 C.M.L.R. 474

and formation of an agreement. Once the agreement was implemented in the EC the Merger Regulation applied to the conduct. The absence of an explicit recognition of the effect doctrine has blurred the validity of the doctrine. However, it has been argued that the application of the pure effect doctrine will probably only be needed in relatively few cases and it, in most cases will be enough to apply the economic entity theory or the reasoning in the Wood Pulp.⁹⁴ In the Gencor-case⁹⁵, in which the Merger Regulation was applied, the distinction between implementation and formation was widely interpreted and it was enough to establish a mere sale within the Community for the Commission to assert jurisdiction. Consequently, if the undertakings have a Community dimension, their agreement is likely to be considered as implemented within the EC and will often be deemed to have a direct, substantial and foreseeable effect within the Community. The wide definition of Community dimension decided by the turnover criteria will in practice be the principal tool for the Commission to assert jurisdiction over non-EC undertakings.⁹⁶

The two largest economies of the world will thus apply some form of the economic effect test and this position is reaching further acceptance. However, if extending nations' jurisdiction to outside its territory, as the economic effect doctrine does, the risk for conflicts between countries increases.⁹⁷ It has been argued that the Community dimension is far too broad to be the only criterion to decide jurisdiction, and more considerations should be taken to actual and potential effects inside the Community. Such actual and potential effects will depend on more than just the turnover of the undertakings. If the wide applications of the Merger Regulation would be limited, the workload and costs for the Commission would be reduced.⁹⁸ However, without any multinational regulation of cross-border mergers, nations will not accept to limit their jurisdiction; the different political and economic interests would deter any authority to accept, one-sided, a reduction of its jurisdiction.⁹⁹

⁹⁴ J D Banks, *The development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation following the Boeing/McDonnell Douglas Decision 1997*, [1998] E.C.L.R. p. 306 at 308

⁹⁵ *Gencor/Lonrho*, case T-102/96 *Gencor Limited v. European Commission* [1999] 4 C.M.L.R. 971; *Gencor/Lonrho*, IV/M619 [1997] O.J. L11/30, [1999] 4 C.M.L.R. 1076

⁹⁶ A. Ezrachi, as note 91 above, p. 138

⁹⁷ D. J. Gifford & E. T. Sullivan, as note 78 above, p. 66

⁹⁸ A. Ezrachi, as note 91 above, pp. 139 and 142

⁹⁹ *Ibid*, p. 144

2.5.9 Analysis

Anticompetitive mergers are only one form of anticompetitive behaviour that nations' competition laws try to regulate. However, in merger cases there are particular problems to define an anticompetitive transaction. In Boeing/McDonnell Douglas and GE/Honeywell, the Commission was accused for having taken industrial policy reason into consideration and not applying an enough thorough economic analysis. These kinds of accusations imply that consideration to e.g. small and medium sized enterprises, to the environment or to employment issues should be protectionistic. To take it to its extreme, any form of merger that is cleared after an assessment that is not purely based on economic factors would be regarded as an anticompetitive merger. But is it so obvious and simple to say that competition authorities that value other elements than just efficiency gains should be deemed as acting with protectionism?

It could be argued that mergers, which are beneficial to the consumers, always should be approved. But it may be, and probably very often are, situations where the merger in order to reduce costs for the consumers will have to rationalise. It is often out of the rationalisation benefits a merger is proposed in the first place. Consequently, at the same time as the merger would be beneficial to the consumers it would have negative implications for the employees, whom may lose their jobs. Should the interest of the consumers outweigh for example, the interest of preserving jobs or other social dimensions? All depends on what one believes is the purpose of competition and how one defines anticompetitive behaviour.

There is no objective definition of the term anticompetitive behaviour but it depends on government's policy, judicial decisions and values. The American concept, that competition law is an instrument to produce efficiency through markets, has been argued to not necessarily provide the right answer. Professor Fox argues that antitrust is

*“whatever legislators and judges of particular jurisdictions say it is. It ranges from a body of law that controls business practices in order to protect or empower the underdog, to laws that check and disperse business power and assure a better distribution of opportunity and wealth to the nonestablished. Antitrust includes law that preserves the competitive process and its governance of markets and law that advances efficiency through markets anchored (for example) by an aggregate wealth or a consumer welfare paradigm.”*¹⁰⁰

The objective of competition law within a national system may also evolve and transform over time depending on the level of industrialisation of the economy, the strength of the

¹⁰⁰ E. Fox, as not 5 above, p. 219

political democracy, the intensity of the judiciary and the exposure of domestic enterprises to global competition. However, nations often have the same policy regarding certain types of conduct, which usually are prohibited because of fairness and efficiency reasons. This is most evident in relation to competitors' price fixing, market division, and cartels and against naked monopolistic exclusions designed to prevent market entry or expansion. However, there are exemptions to this coordinated approach. Developing countries may want to allow cartels in strategic goods in which they have an advantage, especially raw materials and as the Microsoft case illustrates, it is possible that the opinion about what is naked monopolistic exclusion varies.¹⁰¹

2.6 Conclusion

The Boeing/McDonnell Douglas illustrates how sensitive the application of merger control rules is to political interference. There is a significant political value to premerger approval decisions and this together with the difficulties of objectively and precisely define structural restraints to competition enhance the likelihood for political pressures on competition authorities and tensions between jurisdictions. It often seems that the application of merger control rules is influenced by industrial policy reasons or by political objectives. A common multiple merger control system would reduce the political conflicts between the politicians in different countries and reduce accusations of camouflaged protectionism.¹⁰² For the business community, a multiple merger regime would also provide enhanced legal certainty and hopefully a simplified notification procedure.

The need for international competition rules/policy has been widely recognised after these cases, and as more nations enact competition laws it is not hard to picture mergers that have to be evaluated in more than two jurisdictions. Since the probability that the outcomes of these evaluations always will be the same is not very high, legal uncertainty, difficulties of enforcement and potential political conflicts will increase. However, further convergence can only be established by further cooperation between nations' competition authorities and such cooperation is not realistic if nations do not receive greater understanding for other trading countries' competition systems.

¹⁰¹ Ibid, pp. 219-220

Part 2

3. The relationship between trade and competition policy**3.1 Introduction**

There has been an extensive debate concerning the relationship between trade and competition policies both bilateral and multilateral. The most recent discussion has occurred within the Working Group on Trade and International Competition Policy, which was established by the parties to the WTO in 1997. It is legitimate to question why this relationship is of any relevance in the discussion of international competition laws. However, it was from the observation that anticompetitive conduct might have negative consequences on the trade between nations that the Working Group was developed and the discussion started.

As stated in the introduction, there is a fear that the benefits of the trade liberalisation will be consumed by an increase of private and governmental anticompetitive behaviour if there is no harmonisation of nations' competition laws. Governments and businesses will have a greater incentive to impede the competitive environment in order to shift a way profits from foreigners and to compensate from the economic losses the reduction of trade barriers will result in. From a global perspective, impediments to trade reduce world welfare and diminish international trade. It is therefore important that governments and businesses refrain from anticompetitive actions that distort the trade liberalisation.

3.1.1 Competition and trade contradict and complement each other

Harmonised competition rules might contribute to further trade liberalisation and reduce the pressures from private businesses on governments to obtain special treatment.¹⁰³ This is so because harmonised competition laws remove restraints to the commercial flows and enhance trade while international trade and the reduction of tariffs encourage competition. Trade policies and competition policies thus seem to depend on each other.¹⁰⁴ However, it has also been argued that the two policies contradict each other, as well as substitute each other. They contradict each other since they typically aim at competing interests. While trade policy mostly is directed at restricting trade in order to let producers exercise market power and to shift profits away from foreigners, competition policy is concerned with the protection of

¹⁰² A Fiebig, A Role for the WTO in International Merger Control, *Northwestern Journal of International Law & Business*, Winter 2000, Vol 20, Issue 2, p. 233 at 238

¹⁰³ E. Fox and J. A. Ordovery, as note 3 above, p. 409

consumer interests and to restrict the exercise of firms' market power.¹⁰⁵ Another difference between the two policies is that competition policy is set at national level while trade policy is set at the industry level. Trade policy might thus give exemptions to certain industries where competition policy is not written separately for each industry.¹⁰⁶

3.1.2 The import-as-market-discipline

It has been argued that the two policies can substitute each other as well, meaning that increased trade will result in enhanced international competition and constrain the ability of domestic producers to engage in anticompetitive practices. A reduction of tariffs and non-tariff barriers to trade will thus tighten the national competitiveness making competition law superfluous. This is known as the import-as-market-discipline.¹⁰⁷ The issue has been brought up by nations, characterised by having small and open economies and thus intense imports. They argue that the trade liberalisation itself promote imports and achieve a competitive environment, without any need for competition legislation. Thus trade liberalisation forces competition and market openness and therefore works as a substitute to domestic national competition law.¹⁰⁸ There are, however, factors that may alter the import-as-market-discipline. Firstly, many services are not traded and competition law might still be needed to deal with high concentration in a service market. Secondly, in a differentiated product industry, domestic firms will be able to exercise market power if the cross-price elasticity of demand for home varieties compare to the price of foreign varieties is not very elastic.¹⁰⁹ Efficient industries might be able to better maintain profitability when challenged by foreign competition and industries may also use passed profits to innovate and compete in other ways than just price.

4. Possible or existing ways to achieve further convergence in international antitrust matters

4.1 Historical background – The ITO Charter

The awareness of the transnational dimension of market conduct is not a recent phenomenon. Trading nations have been discussing possible international actions against restrictive business- and governmental practices since the mid- to late 1940's, when the nations

¹⁰⁴ Paper prepared as part of the OECD work programme on trade and competition, COM/TD/DAFFE/CLP(98)98/FINAL

¹⁰⁵ J. Levinsohn, (1994) Competition policy and international trade, p. 12,15, National Bureau of Economic Research, December 1994, Working Paper No. 4972, available at <http://www.nber.org/papers/w4972.pdf>

¹⁰⁶ Ibid, p. 10

¹⁰⁷ Cadot O, Grether J-M, De Melo J, (2000) Trade and Competition Policy-Where do we Stand? p. 3, Journal of World Trade 34(3): 1-20

¹⁰⁸ Singapore is for example a country with a small and open economy and intense imports.

completed and nearly adopted the ITO Charter (1948), out of which GATT 1947 came into being.¹¹⁰ The intention was initially that the International Trade Organisation (ITO) should be a UN organ with world membership and staffed by a secretariat. The ITO Charter was also expected to have power to hear complaints, issue rulings and make recommendations, and its provisions should be subject to review of the International Court of Justice. These expectations were in line with the drafters' wish to create a more efficient and powerful organisation than the previous interwar trade agreements. The ITO Charter was therefore provided with forceful, substantive provisions, which were formulated with the greatest possible specificity. However, with the detailed provisions, little scope was left for any broad evasions and governments soon started to feel that their sovereignty was threatened. They started to demand for exemptions that would make the provisions less intrusive. This resulted in a patchwork of exemptions, which undermined the Charter's legal system.¹¹¹

The ITO Charter was, despite or probably because of its many exemptions, completed in Havana in 1948. Chapter V of the Charter contained some competition provisions, for example, relating to price fixing.¹¹² The intention was that the governments of the members to the ITO should ratify the Charter. However, the US Congress failed to adopt it and consequently the ITO Charter never came into force.¹¹³

4.1.1 The General Agreement on Tariff and Trade

After the failure of the ITO, it did not take long before the GATT served the purpose as the world's international trade organisation. However, the GATT was never intended as an organisation but a multilateral treaty designed to be attached to the umbrella of the ITO. Because of the lack of organisation status there was no secretariat established for the GATT, but the small staff of the ITO served the needs of the GATT as well. When it became obvious that the ITO was never going to come into force, the staff of the ITO devoted its time to the GATT and became de facto the GATT secretariat.¹¹⁴

¹⁰⁹ J. Levinsohn, as note 105 above, p.13

¹¹⁰ E. Fox, *Antitrust Law on a Global Scale: Races Up, Down, and Sideways, Regulatory Competition and economic integration- comparative perspective*, p. 348 at 350, (2000, D. C. Esty and D. Geradin ed.)

¹¹¹ R. E. Hudec, (2000) *Essays on the Nature of International Law*, 2nd edition, p. 22-23

¹¹² M. Mitsuo, *Reflections on Competition Policy/Law in the Framework of the WTO*, (1997) Fordham Corp. L. Inst. 31 at 31-32 (B. Hawk ed.)

¹¹³ J. H. Jackson, (1998) *The World Trade Organization – Constitution and Jurisprudence*, p. 16-17

¹¹⁴ *Ibid*, p 22

The drafters of the ITO Charter were, with few exceptions, the same men who negotiated the text of the GATT. It is therefore not surprising that the ambition of the ITO was reflected in the GATT and the drafted clauses of the GATT were almost the same as those in the draft ITO charter, which related to trading rules. The GATT also inherited the patchwork of exemptions of the ITO charter.¹¹⁵

4.1.2 The World Trade Organisation

GATT has through eight negotiation rounds gradually reduced tariffs and other trade barriers, culminating in the Uruguay Round. However, it eventually became clear that the GATT had problems to adopting and dealing with the issues of today. The globalisation made the world more complex and interdependent and governments increasingly sought to benefit from the “loopholes” of the GATT. The GATT provisions did not have the efficiency and power to satisfactory deal with damaging national behaviour. In order to achieve a more efficient framework, which took account of the problems mentioned above and considerations, it was proposed to establish a new trade organisation.¹¹⁶ Such a new organisation was created as a result of the Uruguay Round and the GATT institutional function was replaced by the WTO on 1 January 1995.

The Uruguay Round tried to correct the many defects of the GATT and it is therefore no longer possible for government officials to argue that the new institution and its provisions are non-binding. The new dispute settlement process unified the several existing dispute procedures under the prior GATT and its side agreements. Moreover, the Uruguay round produced a comparable treaty as the GATT for trade in services, the General Agreement on Trade in Services (GATS) and relating to intellectual property, notably the Trade-Related Intellectual Property Agreement (TRIPS).¹¹⁷

There are some special features, which distinguish the WTO treaty from the GATT, even though the underlying principles are the same. For example the WTO has a wider range of liberalisation measures, such as trade in services and trade-related aspects of intellectual property rights and the abolition of voluntary export restraints. It has therefore been argued that the issue of competition policy is even more suitable and important under the WTO system than it was in the old GATT. It should be mentioned that there exist other international

¹¹⁵ R. E. Hudec, as note 111 above, p. 22

¹¹⁶ J. H. Jackson, as note 113, above, pp. 22f

organisations dealing with trade and competition. For example, trading partners have drafted voluntary codes and principles within the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Cooperation and Development (OECD).¹¹⁸

4.1.3 The Working Group

When the WTO treaty was being negotiated a group of experts at the Max Planck Institute proposed a Draft International Antitrust Code that would establish an international competition regime. The Code was criticised as too ambitious and the parties to the WTO did not accept the draft and no agreement was annexed to the WTO charter. However, promoted by the EC, the issue of international competition policies was brought up at the First Ministerial Conference of the parties to the WTO in Singapore in 1996 and a Working Group on Trade and International Competition Policy was established a year later. The Working Group has the objective of examining the interaction between trade and competition policy, including anticompetitive practices, in order to identify areas that may merit further considerations in the WTO framework.¹¹⁹ The Working Group initially examined the relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy and their relationship with development and economic growth; stocktaking and analysis of existing instruments and standards and activities regarding trade and competition policy. Thereafter, the Working Group has examined three further areas: the relevance of the fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; approaches to promoting cooperation and communication among members, including in the field of technical cooperation, and the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

The Working Group has since its establishment presented yearly reports on its work. In accordance with the objective of the Group, which is to analyse the interaction between trade and competition on the basis of questions posed by the members, the reports have more the form of discussion where ideas are shared than any specific recommendation. It is evident when reading the reports that there is far from any consensus among nations that a multilateral

¹¹⁷ Ibid, pp. 36f

¹¹⁸ M. Mitsuo, as note 112 above, pp. 31-32

agreement on competition policy is needed. Even if such consensus could be achieved the next hurdles to overcome would concern the formulation of specific provisions, if the rules should be binding or only have the status of recommendations, if a dispute settlement process should be annexed to the agreement, and under which forum a multilateral agreement on international competition policy should be established. These issues have also been discussed by the Working Group.

4.2 Bilateral/ regional agreements on competition

One possible approach to achieve further convergence in competition policies is through the conclusion of bilateral agreements, an approach that the US is much in favour of. The US is already party to several bilateral agreements¹²⁰ while the EC, on the other hand, has concluded bilateral agreements involving competition matters with the US and Canada and in 2000, a mutual understanding with Japan on the substantial provisions of a similar cooperation agreement, was reached.¹²¹ Other ways to achieve cooperation in the area of competition are e.g. by friendship, commerce and navigation treaties, mutual legal assistance treaties and agreement on technical cooperation in competition law and policy. These examples are primarily of bilateral character.

4.2.1 Traditional and positive comity

Bilateral agreements dealing with antitrust matters usually include provisions on traditional comity; i.e. an obligation to take into account the other party's significant interest when investigating or applying remedies to corporate anticompetitive behaviour. Other common provisions concern assistance in investigation, when restrictive business practices in one nation adversely affect significant interest of the other party, commitments to give consideration to a request for investigatory assistance and in some agreements provisions to share confidential information (subject to safeguards).¹²² Some recent agreements also include a provision on positive comity. Such a provision provides for a harmed nation's competition authority to request another party's authority to initiate proceedings against anticompetitive practices originating within their territory and significantly affect important interest of the

¹¹⁹ C. Cocuzza & M. Montini, *International Antitrust Co-operation in a Global Economy*, [1998] E.C.L.R. p. 156 at 160-161

¹²⁰ UNCTAD, *Experiences gained so far on international cooperation on competition policy issues and the mechanisms used*, p. 7-8, TD/B/COM.2/CLP/21/Rev.1, 19 April 2002, available at <http://www.unctad.org/en/docs/c2clp21r1.en.pdf>

¹²¹ M. Monti, as note 56 above.

¹²² UNCTAD, as note 120 above.

first country. The requested authority should seriously consider such a request. However, it is still possible for the requesting nation to initiate or re-institute its own enforcement.

4.2.2 The 1991¹²³ and 1998¹²⁴ bilateral agreements

The 1991 agreement between the US and the European Commission was the first bilateral instrument to include a provision on positive comity. This agreement was later replaced by the 1998 agreement, which includes an “enhanced positive comity”.¹²⁵ According to this provision the competition authority of an affected party will not take action if its citizens are not directly harmed or if the anticompetitive behaviour occur in the territory of the other party and is directed more towards that party.¹²⁶

There are some major flaws in the agreement. Firstly, the agreement does not apply to mergers because the short statutory deadlines in the two jurisdictions’ merger regulations make suspension or deferral of investigation almost impossible.¹²⁷ The Commission’s lack of power to investigate mergers other than those having a Community dimension, has also been argued to be a reason for excluding mergers from the application of the agreement. Consequently, a request by the US authorities to investigate a transaction without a Community dimension would have to be dismissed by the Commission.¹²⁸ It is thus difficult for the EC to cooperate in transnational merger cases. The second disadvantage with the 1998 agreement is that the US courts are not bound by it. The US federal authorities are, but that hardly makes up for the weakness of not having proper enforcement tools in form of the courts.

4.2.3 Free trade, custom union and common market agreements

Free trade, custom union or common market agreements differ from the other bilateral agreements mentioned above since they include some form of harmonisation objectives and not only procedural provisions regarding cooperation. There are many examples of regional system of competition rules. The EC, which has the most advanced cooperation in the field of

¹²³ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States, Official Journal L 095, 27/04/1995

¹²⁴ Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ L 173 of 18.06.1998

¹²⁵ Ibid, Article IV

¹²⁶ UNCTAD, as note 120 above, pp. 8-9

¹²⁷ J. L. McDavied, *Globalization of Premerger Notification and Review: Practical Problems and Solutions*, (1999) Ford. Corp. L. Inst. 31 at 35 (B. Hawk ed.)

competition, is one of them. The North American Free Trade Agreement (NAFTA) is also undertaking cooperation on competition issues but with a much less intense degree.¹²⁹

4.2.4 The application of the 1991 agreement in Boeing/McDonnell Douglas
In Boeing/McDonnell Douglas the 1991 US-EU Agreement was respected by the two nations¹³⁰ and traditional comity was used to a certain extent. The US Government expressed concerns regarding its defence interests and it objected a divestiture of the companies. This objection was taken into consideration by the Commission, which limited its action to the civil side of the companies' operations.¹³¹ However, it has been argued that the Commission did not enough respect the positive comity provision. This position is based on a proposal from the International Court of Justice (ICJ), which suggests that a less concerned state should not exercise jurisdiction when that nation's interests are outweighed by the interest of the other state.¹³² The Commission should accordingly not have taken jurisdiction in the first place.

The European legal system has been said to be unfamiliar to the practice of judicial discretion and this explains the Commission's decision to assert jurisdiction in the case of Boeing/McDonnell Douglas.¹³³ It is however argued that, despite the above statement by the ICJ, some form of "pre-investigation" has to be done in order to evaluate what a nation's interests are and their relation to the other party's interests. Even if the principle of judicial discretion is valuable in order to reduce conflicts, it has to be more precisely defined. The general formulation of the ICJ is hard to interpret objectively and every nation can argue that their interests are of more importance than the interest of the other party. It would also be impossible to make up a grading system of all possible interests that can be weighed against each other. The interests will differ from case to case and its importance will also depend on the specific circumstances in each situation. However, compared with the reasoning of a world welfare standard where it was argued to be possible to draw up a scale of more or less permissible behaviour,¹³⁴ it might be that they also would regard it possible to more precisely

¹²⁸ J. P. Griffin, as note 14 above, p. 17

¹²⁹ UNCTAD, as note 120 above, pp. 10-11

¹³⁰ A. F. Bavasso, as note 87 above, p. 247

¹³¹ UNCTAD, as note 120 above, p. 21

¹³² 1970 I.C.J. 65, 107

¹³³ A. F. Bavasso, as note 87 above, p. 247

¹³⁴ see p. 12

define the many valuable interests that exist in order for the formula of the ICJ to be more effective and for the judicial discretion to reach its fully potential.

Despite the different opinion of the 1991 agreement's proper application in Boeing/McDonnell Douglas, the general view of the Department of Justice (DOJ) and the FTC is that the agreement has worked well and enhanced the possibility to exchange ideas on enforcement policies and to cooperate in individual cases. The agreement provides for coordination of steps to be taken when the two jurisdictions investigate the same transaction. These steps may be a delimitation of the geographic market, timing of the procedures, remedies to be imposed and avoidance of conflicts between the nations. The FTC and DOJ admit, however, that the different timeframes for notifications in merger cases have limited the scope for cooperation but that the agreement in its total has improved the understanding of each other's competition assessment. The American business community and the Congress are, however, not as thrilled by the outcome of the application of the agreement. The Congress is disappointed over the fact that the positive comity provision has not, in a significant way, increased the access to foreign markets so far. The business community complains over delays in investigations by the Commission and that the evidentiary standards are too high.¹³⁵

4.2.5 The discussion of bilateral agreements in the Working Group

The bilateral approach was discussed in the Working Group. Some members questioned the utility of a multilateral framework on competition policies and argued that a better way to deal with existing problems was through bilateral agreements. As already mentioned, the US is strongly in favour of the bilateral approach. They are supported by some developing countries, which fear that a system that force market openness will leave them vulnerable to exploitation by multinational enterprises or prevent them the right to have no competition law at all. They also claim that they need more time to learn before they can adhere to a multinational competition regime.¹³⁶

A multilateral agreement on competition policy was argued by the opponents, not to provide the necessary flexibility that nations needed in order to take into account their interests and their different legal traditions and state of development. The sovereignty of nations'

¹³⁵ UNCTAD, as note 120 above, p. 21

¹³⁶ E.Fox, as note 110 above, p. 361

competition authorities would also be reduced, especially if the provisions were subject to the WTO Dispute Settlement Understanding. The supporters of a multilateral framework responded to the criticism by arguing that the proposed binding commitments only should relate to legislation and would not interfere with the enforcement of nations' legislation. A large degree of flexibility would thus be provided and the independence of nations' competition authorities would be preserved.¹³⁷ The scope was further limited in the report of 2001 when it was suggested that binding commitments only should relate to substantive provisions in the area of hardcore cartels.¹³⁸ This addition to the proposal is a good illustration of the unstructured nature the reports have. It is only after having read all the reports and compared them with each other that it is possible to understand the main ideas behind the arguments and the proposals. If only examining the reports separately from each other, there is a risk that one well-formulated argument by a member will, in a report one or two years later, be criticised or opposed using other relevant arguments, or supported by adding new thoughts or ideas to the proposal. It would have facilitated, if the Working Group had summarised the reports and sorted arguments and proposals into different categories depending on their relevance to different topics.

It was argued in the Working Group that nations could use bilateral agreements to seek information and evidence from foreign firms and governments with the intention to enforcing their law extraterritorially. However, this type of abuse was admitted to be only a theoretical example and there was no evidence that such behaviour had actually taken place.¹³⁹ Bilateral agreements in connection with regional and multilateral cooperation agreements could be another possible approach to achieve further convergence. Bilateral and regional agreements should thus serve as a starting point for a multilateral framework.¹⁴⁰

4.2.6 The debate outside the Working Group

Assistant Attorney General, Joel Klein, has argued that the objective legal and economic principles that are necessary for the foundation of an international agreement on competition law, are almost impossible to formulate in a way that all members can adhere to. Nations

¹³⁷ WT/WGTCP/4, Report (2000) of the Working Group on the Interaction between Trade and Competition Policy, para 79-80

¹³⁸ WT/WGTCP/5, Report (2001) of the Working Group on the Interaction between Trade and Competition Policy, para 15

¹³⁹ WT/WGTCP/3, Report (1999) of the Working Group on the Interaction between Trade and Competition Policy, para 44-45

¹⁴⁰ WT/WGTCP/6, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy, para 81

would instead degrade their laws in order to reach consensus, and the agreement would thus be with a lowest common standard and with weak and inefficient competition rules. There would also be practical problems for the WTO to both identify and remedy infringements of a multilateral competition regime.¹⁴¹

Despite the benefits mentioned above, there are some significant disadvantages with bilateral agreements on competition policy, which suggest that a multilateral framework is important to actively reduce the gap between the developed and developing world in competition / trade matters, and to reach a broader cooperation among the world's nations in this field. Firstly, bilateral agreements are usually concluded between countries that are economically interdependent and that share a similar degree of experience in competition law enforcement. The fact that bilateral agreements are based on mutual interest and reciprocity excludes developing countries from entering into such agreements. There are also important trading partners that are not parties to any bilateral agreement.¹⁴² Secondly, it has been argued that, in the field of mergers, the necessary information that would make the review more accurate and efficient, sometimes lay in jurisdictions outside a nation's set of bilateral agreements. Anticompetitive behaviour does not respect the neatly defined territory covered by those agreements and it might be that governments and business actively seek to use the gap between different bilateral agreements, to their advantage. It is feared that businesses would move to territories not covered by any enforcement cooperation agreement, territories that could be regarded as "safe havens". However, as shown in the part concerning regulatory competition, it is unlikely that difference in nations' enforcement procedures or in the substantive law of nations will have such a great influence on firms that they seek to conduct business in jurisdictions with lax enforcement policy. The reasons why many regard international competition policies as important are the awareness that anticompetitive practices impede trade by constituting new barriers and that many forms of anticompetitive conduct are transnational and cannot therefore be regulated within one nation.

4.3 Multilateral agreement on international competition policies

The Working Group was set up after a proposal by the EC to adopt a multilateral agreement on competition policy within the WTO. The need and usefulness of such an agreement has

¹⁴¹ J. Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, (1997) *Ford. Corp. L. Inst.* 1 at 10

¹⁴² WT/WGTCP/4, Report (2000) of the Working Group, as note 137 above, paras 57-58

consequently been discussed extensively within the Working Group but also by other organisations as well as by scholars. So far there is only one universally applicable multilateral device relating to international competition policy and law, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice (the Set), negotiated under the auspices of UNCTAD. The OECD provides several agreements on international competition policy as well but these apply only to a restricted group of nations, although non-OECD countries can implement the 1998 recommendation on hard-core cartels.¹⁴³ Both the Set and the OECD recommendations include similar provisions as in the bilateral enforcement cooperation agreements and in free trade, customs union or common market agreements.¹⁴⁴ The 1995 OECD recommendation¹⁴⁵ includes rules on notification, consultations, exchange of non-confidential and confidential information (subject to safeguards), traditional and positive comity and a conciliation mechanism to resolve disputes.¹⁴⁶

4.3.1 The OECD notification form¹⁴⁷

The OECD's Competition Law and Policy Committee presented in 1999 a framework for a merger notification form. The Committee pointed out that there are actually more similarities among nations' procedural merger rules than there are differences but it was non-the-less proposed that countries with an already existing merger review should revise some or all of the provisions therein to more adapt to the framework.¹⁴⁸ Unfortunately, it was not possible to reach consensus on all issues but the framework limited itself to identify the disparate approaches taken by different jurisdictions. The result has thus been more a menu of options than a pure model form and it has been argued that this might actually increase the diversity among merger notification forms if nations relied on the framework when designing their merger notification forms.¹⁴⁹ So far it does not seem like the framework has influenced nations to reach a more convergent approach regarding the notification forms. Even if it was

M. Matsushita, Reflections on Competition Policy/Law in the Framework of the WTO, 1997 Ford. Corp. L. Inst. 31 at 37, (B. Hawk ed.)

¹⁴³ Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Doc. C(98)35/FINAL (Apr. 27-28, 1998) available at <http://www.oecd.org/daf/clp/recommendations.htm>

¹⁴⁴ UNCTAD, as note 120 above, p. 16

¹⁴⁵ Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95) 130/FINAL (July 27-28, 1995), available at <http://www.oecd.org/daf/clp/recommendations.htm>

¹⁴⁶ UNCTAD, as note 120 above, p. 18

¹⁴⁷ OECD Committee on Competition Law and Policy, Report on Notification of Transnational Mergers, 5th February 1999, DAF/CLP(99)2/FINAL

¹⁴⁸ Ibid

¹⁴⁹ J. L. McDavid, as note 127 above, p. 370

with a valuable aim the framework was introduced, the lack of substantive result cannot be too surprising. The members of the OECD are industrialised countries that already have enacted competition laws and it is hard to convince competition officials from the developed world that they should modify already existing merger review procedures. As will be seen in part three, there are other possible solutions to reach a common policy among nations in the area of merger that hopefully will be more successful than the OECD notification form.

4.3.2 International competition rules within the framework of the WTO treaty

Both the Set and the recommendations of the OECD have the disadvantage of only being non-binding. There are therefore many that argue that a better and more suitable forum to host an agreement on international competition policy should be within the WTO, which is equipped with legally binding rules and an effective dispute settlement system. The WTO has also a long experience in negotiating agreements acceptable to both the developed and the developing world.¹⁵⁰ As already mentioned, the EC is strongly in favour of this approach. They are supported by some developing countries that feel that a multilateral agreement is their only chance to obtain cooperation agreement. These supporters also argue that their nations should be provided the same benefits of whatever agreements the developed world have negotiated and a multilateral agreement within the WTO would secure this.¹⁵¹

4.3.3 The EC proposal

A multilateral agreement on international competition policies should, according to the EC, involve several steps. Firstly, nations should domestically adopt a law that bans hardcore cartels. This commitment was argued not to pose any significant problem since hardcore cartels have detriment effects for all nations and are the most obvious violation of competition law. Similar agreements on anticompetitive behaviour of purely domestic character should not take place but be at the discretion of each nation. A set of agreed core principles was thereafter argued to be adopted. These principles have not been specified in detail but a lot of the discussion in the proposal and in the Working Group concerns the principles of transparency and non-discrimination, which the EC regards as a necessity in every nation's competition regime. The EC is also of the opinion that a competition committee should be established to monitor the competition situation in different nations and the development of competition at the global level. The final step would then be to offer technical assistance to

¹⁵⁰ WT/WGTCP/3, Report (1999) of the Working Group, as note 139 above, para 51

¹⁵¹ E.Fox, as note 116 above, p. 361

countries, which have not yet passed competition legislation. It was also argued by the EC that governments' intervention should not justify wide exemptions from the application of nations' competition law and any exception ought to be specified so as to provide transparency for enterprises.¹⁵² Many members of the WTO responded to the proposal by arguing that exemptions and exceptions would provide the desired flexibility and a possibility for nations to achieve other objectives than just enhanced competition, such as industrial and economic development. However, they also acknowledged that it was important for any exception to be subject to appropriate transparency procedure.¹⁵³

4.3.4 The discussion of a multilateral agreement on competition in the Working Group
The opponents to a multilateral agreement on competition policy argued that it was premature to set up a multilateral framework on competition policy since half of the WTO members had still not adopted a competition law nor had they put in place a credible competition authority.¹⁵⁴ Scepticism was expressed over the possibility to effectively incorporate the development dimension into a multilateral framework, which many members regarded as an important element of such agreement. Moreover, a harmonisation process often meant burdensome and difficult steps, which were hard to achieve and therefore the chances for adopting this type of agreement were not very high. Doubts were also raised to whether the WTO actually had the necessary resources and expertise that was required to host an agreement on competition policy. It should also be borne in mind that the WTO was a rule-making body and not a development or research agency and was therefore not suited to host an agreement on competition law.¹⁵⁵

The supporters of a multilateral agreement within the WTO responded to the criticism by arguing that the WTO was well equipped to host an agreement on competition policy and that its expertise in trade issues qualified it to deal with anticompetitive practices with the effect on trade and development. There were many examples of how anticompetitive practices undermined the gains from trade and development prospects of nations and it was against this background evident that there was a need for a multilateral framework on competition policy. The wide membership of the organisation was also of advantage when setting up this type of

¹⁵² Communication from European Community and its Member States, World Trade Organisation WT/WGTCP/W115, 25 May 1999

F. Jenny, *Global Antitrust from a European Perspective*, p. 203 at p.203-204, (2002), *Europa und die Globalisierung- Referate des Zweiten Wiener Globalisierungs*, (C. Baudenbacher & E. Busek ed.)

¹⁵³ WT/WGTCP/6, Report (2002) of the Working Group, as note 140 above, para 42

¹⁵⁴ WT/WGTCP/3, Report (1999) of the Working Group, as note 139 above, para 54

agreement. However, other members argued that the heterogeneous membership could affect the proper function and effectiveness of a multilateral framework.¹⁵⁶

4.3.5 Private barriers to trade

The discussion in the Working Group does not efficiently cover the problems arising from private anticompetitive conducts, including mergers, and how to best regulate such a behaviour. It seems that the intention from the beginning was to put more focus on this issue than has actually been done. The lack of a proper discussion of the effects of private anticompetitive practices to trade, makes the debate in the Working Group hollow and incomplete. The discussion by members regarding anticompetitive practices by firms are only held on a general basis and indicates problems caused by such practices without explaining how a multilateral agreement on competition issues would be an answer to these problems. The impression is that the problems with private anticompetitive conduct is too burdensome to deal with at the time, and provisions regulating this will just decrease the possibility to reach any agreement at all. However, this attitude also has the effect that private anticompetitive conduct feels less important and is thereby almost legitimised. It might be that the unwillingness to more specifically discuss this topic is a result of the fact that the discussion takes place in a WTO context. The Working Group is set up by the WTO, which has as its objective to address problems of government intervention to trade. It is not customary for the WTO to discuss regulations towards private conduct since this is regarded as a matter for each nation to remedy. However, there are some later agreements, which contain provisions concerning private parties. The previous mentioned GATS and its article VIII provides for members to ensure compliance with WTO disciplines by certain types of firms, such as monopolies and exclusive service suppliers and the Telecommunication Annex of the GATS, which prohibits discriminatory abuse of dominance and demand reasonable access to telephone networks, relate to private business. Both the GATS and TRIPS obliges members to, upon request, enter into consultations on restrictive business conduct or the abuse of intellectual property rights subject to domestic law and agreements to safeguard confidentiality. (Article IX of GATS and article 40 of TRIPS)¹⁵⁷

¹⁵⁵ WT/WGTCP/4, Report (2000) of the Working Group, as note 137 above, para 67

¹⁵⁶ WT/WGTCP/6, Report (2002) of the Working Group, as note 140 above, para 82, WT/WGTCP/5, Report (2001) of the Working Group, as note 138 above, para 18

¹⁵⁷ E. Fox, as note 5 above, p. 223-224

The private anticompetitive practices identified by some members as potentially restricting trade and development prospects of nations were argued to be both practices that had similar and detrimental effects across the markets of many countries, e.g. anticompetitive mergers and abuses of dominant position. There could also be situations where a doubtful transaction or behaviour had positive effects in one market but had detrimental impact on the markets of other countries. Transnational mergers, with beneficial effects in one market but negative knock-on effects in others, are examples of when this situation could occur.¹⁵⁸

It was also clear from the discussion in the Working Group that from the developing nations' perspective, private and governmental anticompetitive conduct could be favourable and have positive effects on the economic development for these countries. Both anticompetitive corporate mergers and the discrimination of foreign firms were argued to be able to have this effect on developing countries. Developing nations argued that they therefore should be exempted from the principle of national treatment in a multilateral agreement on competition policy or be provided some degree of flexibility.¹⁵⁹

4.3.6 The relevance of fundamental WTO principles to competition policy

It was discussed in the Working Group whether it was possible to reinforce the principle of non-discrimination and the principle of transparency in a WTO agreement on competition policies.¹⁶⁰ Especially the usefulness of transparency was underlined since this would ensure that the application of the provisions in the agreement was not unnecessarily intrusive. Even if it was recognised that increased transparency would generate enhanced costs in form of publication of laws, regulations, and guidelines it was non-the-less regarded as a key requirement for a credible enforcement system, which outweighed the negative consequences of the adherence to the principle.¹⁶¹ Another valuable principle in an agreement on competition policy was argued to be the principle of non-discrimination. This principle is embedded in the most-favoured nation rule, which states the obligation of a member, that give preferential rules to one country, to also grant the same favourable conditions to all other third countries. The non-discrimination principle also appears in national treatment provisions in GATT and other trade agreements. The principle of national treatment states that a member

Submission by the European Community and its Member States, World Trade Organisation WT/WGTCP/W/45, 24 November 1997

¹⁵⁸ WT/WGTCP/4, Report (2000) of the Working Group, as note 137 above, para 17

¹⁵⁹ WT/WGTCP/6, Report (2002) of the Working Group, as note 140 above, para 25

¹⁶⁰ WT/WGTCP/3, Report (1999) of the Working Group, as note 139 above, para 11

¹⁶¹ WT/WGTCP/6, Report (2002) of the Working Group, as note 140 above, para 16

cannot grant more favourable treatment to national products or services than to corresponding product or services from third countries¹⁶²

The principle of non-discrimination was suggested, in a multilateral agreement on competition policy, to apply only to de jure discrimination, i.e. discrimination embodied in laws and regulations and not de facto instances of discrimination.¹⁶³ It is, however, argued that de facto discrimination is as important as discrimination within the legislation since anticompetitive practices are a significant problem also in jurisdictions with a comprehensive and non-discriminating competition law. As was also argued by a member, most nations' competition laws did not contain discriminatory provisions and was therefore not the main cause of the divergent application of nations' competition laws.¹⁶⁴ The principle of non-discrimination might thus be even more important to de facto discrimination. However, as was also pointed out in the Working Group, de facto discrimination is harder to distinguish than de jure discrimination since the former often apply to "like" products and services. This is an unfamiliar approach for competition law because its application is case-specific and no situations are comparable or analogous. It would often be difficult to decide if the behaviour was discriminatory or if it was a fair application of the rule of reason in certain market conditions or if the application of prosecutorial discretion was based on objective factors.¹⁶⁵ As seen from the discussion on the regulation of private barriers, the debate in the Working Group is held on a general basis when issues that would be very difficult to reach a unified approach on are discussed, even if these issues might have more relevance than many other topics of concern to the Working Group.

4.3.7 Conclusion

The discussion in the Working Group can be summarised as a patchwork with faded and ill fitted pieces. The topics discussed in each report are not sorted to be only about a relevant issue but involves a broad range of subjects in relation to competition and trade, e.g. the effect on trade by anticompetitive behaviour, arguments in favour and against a multilateral agreement, the effects on developing countries, technical assistance, the possibility to reinforce existing WTO principles, and a lot more. The lack of structure in the reports makes it difficult to digest the content and it is overall hard to see how progress from the reports can

¹⁶² D. Voillemot & A. Thillier, as note 2 above, p. 50

¹⁶³ WT/WGTCP/6, Report (2002) of the Working Group, as note 140 above, paras 22, 24

¹⁶⁴ WT/WGTCP/5, Report (2001) of the Working Group, as note 138 above, para 18

¹⁶⁵ WT/WGTCP/6, Report (2002) of the Working Group, as note 140 above, paras 22, 24

evolve. As a forum for discussion where ideas on competition and trade are shared, it might serve a purpose but any further action based on the reports will probably not occur.

There is a wide gap between members that support a multilateral agreement on competition policies and members that regard such an agreement as unnecessary. As was pointed out in the report of 2001, an agreement on competition policy within the WTO would require a consensus among members and so far members are far from reaching any unity on this subject.¹⁶⁶ However, despite the lack of consensus, there can be no harm discussing the issues related to competition and trade if nations believe it is a valuable goal to reach further cooperation between the competition authorities and further understanding of nations' competition laws. However, if no significant progress in an international perspective can be made in the years to come it will be necessary to ask if these extensive preparations, which include several meetings every year between competition officials, contributions in form of petitions and resources by members and the adaptation of the material by the secretariat of the WTO, and which impose significant costs and bureaucracy to all parties involved, can be defended. Hopefully has the discussion in the Working Group enhanced the trust between members in competition matters and that cooperation will occur more readily and frequently than before, even without the establishment of a multilateral agreement. But with no signed agreement, cooperation will of course only be on a voluntary basis and probably to the disadvantage of the less industrialised nations. There will be no guarantee that cooperation will take place and no nation can rely on another countries willingness to work together to avoid anticompetitive behaviour with negative effects world wide or regionally.

Part 3

5. Alternative approaches and solutions for further international convergence in competition matters**5.1 Introduction**

Scholars and debaters have identified the need for a multilateral agreement on competition policy in many articles. The particular arguments for such an agreement have already been developed earlier in this essay. However, the wide support for the multilateral approach is not to be found when the discussion concerns alternative forum to host such an agreement. The WTO has of course its supporters but there are other interesting proposals that have been advanced which provide an interesting input to the debate.

5.1.1 A mixture of bilateralism and multilateralism

One interesting proposal is to use the WTO, the OECD and bilateral agreements together to solve the problems that are emerging in the field of competition at an international level. This is said to be favourable because the characteristics of the forums differ and each body would therefore be more suitable to deal with a specific competition problem than the others. A mixture of different forums and agreements would then increase the possibilities to deal with all the possible international competition problems in a satisfactory way. Bilateral agreements with positive comity provision should, according to the proponent, continue to be negotiated with the benefit of further enhancing cooperation in international cartel matters and reducing conflicts between nations. The OECD should on the other hand create a multilateral agreement with the aim of increasing consistency and coordination in other types of transnational anticompetitive practices. However, in order to achieve this objective, the OECD must be provided substantial autonomy.

It has also been suggested that the conducts that carry the most risks of inconsistent assessment by nations' competition authorities should be addressed in an established work program within the OECD. One possible area, which could merit further discussion in the program, would be transnational mergers. The hope is that such a work program will increase the understanding of the differences in nations' competition laws and decrease frictions between jurisdictions. In addition, competition authorities should engage in consultations with each other when multiple competition authorities claim jurisdiction over the same case. The WTO is also recognised to play a role in this multiple approach but a more limited one than in

¹⁶⁶ WT/WGTCP/5, Report (2001) of the Working Group, as note 138 above, para 36

the European proposal. A multilateral agreement hosted by the WTO alone has been argued to be an unsuccessful approach because it would not be able to deal with the specific features of competition laws. Competition rules are formulated generally and their application to specific cases has evolved over time. This development and the specific case-by-case approach of competition rules could not be considered with a favourable result within the WTO framework. An agreement within the WTO would also be influenced by the trade objectives of the organisation and focus would therefore be on the market-access norms of the trade system and less attention would be awarded to the consumer welfare norms.¹⁶⁷

5.1.2 Principles of constitutional measures

Professor Eleanor Fox is also strongly in favour of a multilateral agreement on competition policy but she suggests that such an agreement should include principles of “constitutional measures”. She argues that this would add strength and content to the general concept of nations’ competition provisions. Principles of constitutional generality could also prohibit international cartels and anticompetitive blockage of market access, while in the same time provide a discipline for trade-restraining practices by nations. Another of her proposals is to provide a modest extension of the WTO obligations. A multilateral agreement on competition law should thus oblige members to prevent market closure caused by private parties as well as public restraints. The agreement should include a choice of law principle, which will apply to mergers, monopoly and market access cases.¹⁶⁸ In another article she proposes different more or less far-reaching steps that should be taken in order to facilitate the merger review process and to reach consistency between nations’ assessment of mergers. The steps suggested are, among others, that nations should treat anticompetitive harms within the community of contracting parties in the multilateral framework as severely as harm within the territory of the nation’s border. A common premerger form should also be established, which provides for the merging parties at their own discretion to use a central filing system for mergers with international dimensions. The notification procedure should thereby be coordinated so all contracting parties will use the same waiting periods. Exception to certain anticompetitive transactions would probably be demanded by members in order for them to adhere to the framework. It would also be necessary for the authorisation process of anticompetitive mergers to be transparent, with the criteria used to grant the merger clearly stated. Moreover, gains from anticompetitive conduct to non-nationals as well as to nationals should not be

¹⁶⁷ D. K. Tarullo, Norms and Institutions in Global Competition Policy, *The American Journal of International Law* (2000), p. 478 at p. 479, 501-503

taken into consideration when assessing the merger. However, it is not likely that an efficient central filing system will be established if not the parties to the transactions agree to waive confidentiality.¹⁶⁹ The issue of confidentiality is thus another problem that needs to be further discussed.

5.1.3 Increased Transparency

Other authors have also underlined the importance of transparency in the application of nations' merger review provisions. One way to achieve enhanced transparency was argued to be the issuing of guidelines that explain the manner in which the rules are applied and publication of changes in relevant legislation, regulation and policy approaches. This step would be particularly useful for the business community but also to the enforcers. After having reached greater understanding of nations' merger review procedures the next task should be to develop common principles for the merger review. Both the WTO and the OECD have been suggested as suitable for this work. However, it should not be mandatory rules but a list of principles that countries with no antitrust legislation today could use as a model when establishing a merger regime. Procedural convergence is thus thought, seen in a longer perspective, to contribute to further substantive convergence.¹⁷⁰ The proposal seems a bit passé since the OECD already has introduced a list with possible rules to be used for nations that either want to renew their merger regulations or for nations with no competition law. The hoped progress from the 1998 filing form has not yet occurred and it therefore seems that the WTO might be a better host for this type of agreement. The fact that the OECD is not regarded as a high status organisation from nations' ministries (compared to the WTO, where trade and finance ministries are responsible for the discussion) is also an aspect to the disadvantage of the OECD.¹⁷¹ It is therefore easy to understand that many regard the chances for progress, in form of a multiple merger review as well as an agreement in other areas of competition, greater if the agreements are under the auspices of the WTO rather than the OECD.

5.1.4 National Treatment Principle

A way to reduce the risks of conflict when nations apply their competition law extraterritorially has been suggested to be through the application of the national treatment

¹⁶⁸ E. Fox, *World Antitrust and Market Access*, *The American Journal of International Law* (1997), p. 1 at p. 14

¹⁶⁹ E. Fox and J. A. Ordover, as note 3 above, pp.427-228

¹⁷⁰ J. F. Rill & C. Chambers Wilson, as note 12 above, pp. 363-364, 367

¹⁷¹ D. K. Tarullo, as note 167 above, p. 496

principle. This approach seems to have a great potential, especially for the reduction of conflicts in competition matters between the developed countries. Nations often allow anticompetitive practices by their nationals when such behaviour takes place abroad even if the practices are prohibited and sometimes criminally when occurring within its own territory.¹⁷² The national treatment obligation would here mean that the competition law of firms' home nation follows them when they conduct business abroad. The developed world would probably feel they are on the losing side in this proposal since their firms will be constrained more than firms from countries with loose or no competition law.¹⁷³ It is however argued that this approach still is appealing because it would satisfy the demanded flexibility that, in particular the developing nations, have argued for in the Working Group.

For developing nations a comprehensive competition law might actually reduce the economic development because too much competitive pressure may discourage investment. Besides, in the initial stage of economic development it might be appropriate to use industrial policy tools to promote growth and development due to the incomplete markets or because of the limited size of the local economy. However, in the same time a lack of competitive pressure, where nation permit rent seeking activities, will reduce the economic progress. It has therefore been argued that an optimal level of competition for the developing nations is preferable rather than the maximum degree, which is more useful for already developed countries. The EC has in the Working Group suggested that the scope of the competition law should be limited for countries at the initial level of economic development in order to achieve the equilibrium between the degrees of comprehensive competition law.¹⁷⁴

Another way to achieve the desired flexibility for developing nations could be to provide them with specified exemptions from the obligation of an agreement on competition policy. However, it may be difficult to enact exemptions only applicable for some parties to an agreement. There will be definitional questions; e.g. what should be the criteria for a nation at the "initial level of economic development". A national treatment obligation thus seems beneficial also in this context. However, there is a risk that the developing nations will lose the incentive to enact competition provisions and prefer not to have a competition law at all, as long as they are subject to the national treatment obligation and are a player at the export

¹⁷² E. Fox, as note 5 above, p. 240

¹⁷³ E. Fox, as note 168 above, pp. 18-19

¹⁷⁴ F. Jenny, as note 152 above, p. 112

market. China and many other Asian countries are examples of nations that probably would gain from a national treatment provision as well as those nations that have desired raw materials to export. The one that has the most to lose from a national treatment obligation has been argued to be the EC. The EC, which compared with the US, has a more rigid competition law would have a disadvantage when conducting business abroad if their firms had to apply the competition law of the EC even in other jurisdictions. There is however a disadvantage with a national treatment obligation, notably that it neglects the impact that private parties to trade have and that anticompetitive behaviour by private firms is as a significant problem as governments' intervention.¹⁷⁵

5.1.5 WTO Premerger Office

A slightly unusual proposal suggests that a premerger control office should be established within the framework of the WTO. The WTO premerger office should have the power to review some international mergers. However, in contrast to previous attempts of establishing a common notification procedure, the WTO premerger office should only identify these jurisdictions where a particular merger does not constitute a threat to competition and nations would consequently not be prevented from reviewing cases with significant political value. The proposal would therefore only have limited effects on nations' sovereignty. The proponent suggests that the WTO Premerger Office should have competence to assess mergers that are notified in more than one jurisdiction and which are voluntarily notified by the parties. They would thereafter be able to choose if they wish to submit filings in each of those identified jurisdictions or if they want to submit one filing to the WTO Premerger Office. The parties must notify to the Premerger Office before they notify the national agencies. There would otherwise be a risk that the opinion of the national competition authorities would influence the decision of the WTO Premerger Office. The parties would be obliged to abide the decision reached by the WTO Premerger Office.

In order for the system to be efficient, nations would have to refrain from reviewing a transaction that had been reviewed by the WTO Premerger Office. The risk of forum shopping would be avoided since the WTO Premerger Office only would review transactions with no anticompetitive effects in a particular jurisdiction. In order for the effectiveness of the

¹⁷⁵ E. Fox, as note 168 above, p. 19

Premerger Office, the Office will be empowered to grant exemptions for cases with certain legitimate reasons.¹⁷⁶

This proposal offers a more limited approach by the WTO and it is therefore interesting. It is also true that national competition authorities are assessing transactions by parties that file just to be sure, even if there is no threat to competition. This consumes the scarce resources of the competition authorities. However, it is not sure that even such a modest proposal would be accepted by the parties to the WTO because it non-the-less prevents nations from assessing cases that may affect their jurisdiction. There are many scholars that argue for common premerger notification forms like the one offered by the OECD, and this would evidently be useful. However, as mentioned above, these forms have so far not been successful and it would be preferable if debaters tried to see other possibilities like the different proposal of establishing a WTO Premerger Office. Even if there theoretically exist many options for creating further international cooperation in the field of competition, it would be desirable if more focus was given to proposals that potentially could create a difference. With the strong aversion against multilateralism from some countries, only limited approaches that in very modest way impair nations' sovereignty could lead to some progress towards the valuable of international rules on competition, and it is therefore only those proposals that are of real interest.

6. Final Remarks

The debate of establishing international competition rules has become more intensified due to the ongoing trade liberalisation and the globalisation process. As trade barriers fall nations may wish to use their competition law arbitrarily so as to camouflage protectionism or engage in anticompetitive practices to limit the effects of the trade liberalisation. The likelihood for rent shifting practices is perhaps not too surprising since competition in general terms is a means to attain higher *national* efficiency. Some form of convergence of nations' competition rules would probably restrain the ability to replace the tariff barriers with new barriers in form of anticompetitive practices. In the same time a similar drafted competition law between nations would reduce conflicts and increase the legal certainty for businesses.

There is a wide acceptance among governments that further cooperation in the field of competition is needed in order to enhance the economic development of nations. Despite this,

¹⁷⁶ A Fiebig, as note 102 above, pp. 239f

there is no genuine willingness to create a forceful cooperation agreement on competition. It seems that some nations feel that they would lose more on a multilateral agreement on competition policy than by preserving the system used today, i.e. the use of bilateral agreements and soft harmonisation (even if the option with bilateral agreements is not available to all nations). The US is one nation that supports the development towards further cooperation in the field of competition but argues that such a development should be through bilateral agreements. The objections towards a multilateral agreement on international competition rules by some nations might be caused by their interest to use rent shifting practices, which in a multilateral agreement would amount to anticompetitive behaviour and thereby be prohibited. They would therefore be constrained by such an agreement and their sovereignty would be limited.

It is difficult to understand how the strong support for some form of agreement and enhanced cooperation by nations in the field of competition has not yet resulted in a significant change. One explanation might be that nations support this development out of different reasons. The US has for example a strong tradition of enforcing its competition law extraterritoriality but in the same time allow practices by national firms abroad, that if it had taken place within its jurisdiction, would have been anticompetitive. Despite the fact that this attitude is very contradictory and shows a kind of double standard, it may also be an indication that nations want to preserve their competition laws as a tool to direct behaviour both within a nation but also outside its own jurisdiction. The competition law would in these cases be applied as a means to shift away profits from neighbours. This behaviour is in clear opposition to the expressed positive view of governments that international competition policies or at least further cooperation in this area should be developed.

If the US really sees competition law as such a tool, the support for further international cooperation in competition matters cannot be based on the wish to reduce rent shifting practices. Instead the US might regard further cooperation as a way to achieve consistency in nations' competition analysis. It is argued that this purpose of international competition policy is more limited than the objective to reduce rent shifting practices. A nation with the former view probably feels it is enough to just establish cooperation through bilateral agreements, which could be argued to be supported by the observation that conflicts over differences in the assessment of competition cases occur mostly between nations with comprehensive competition laws, i.e. developed countries. Bilateral agreements are mostly concluded

between nations in a similar stage of development and are built on reciprocity, and the prevention of inconsistent application of competition cases could, to a certain extent, be solved by bilateral agreements. Nations with no competition law or with lax enforcement policies will not assess too many international competition cases and it is therefore limited risks for political conflicts between those nations and others that also feel they have jurisdiction to assess the cases. However, those countries may still cause conflicts from a competition and trade spectrum since the lack of competition law or lax enforcement of such law will probably enhance the likelihood for rent shifting practices.

However, if one wants to cover both of two mentioned problems; rent shifting practices and inconsistent analysis, or to, e.g. reduce the possibility to arbitrarily use nations' competition rules, facilitate for the business community to comply with all nations' antitrust law, to increase legal certainty, to reduce political conflicts and irritation over competition matters, and to prevent anticompetitive practices by private firms, it would be beneficial to have a multilateral agreement on competition policy. Especially the question of anticompetitive behaviour by private firms is interesting and the intention was initially to put more focus on this issue. However, the discussion in the Working Group concerning international competition policies has effectively avoided the issue of private anticompetitive practices, with the consequence that anticompetitive practices by private bodies feel less important. This is in reality not true and it is argued that as the reduction of trade barriers continues, anticompetitive practices by firms will become more obvious and consequently "forces" itself on the agenda. It might then be that the WTO is not the right forum to discuss issues like competition, as some scholars have argued. The attention on governments' anticompetitive practices in the Working Group may be a result of the general objective of the WTO, notably to address problems concerning governmental behaviour related to trade issues. However, in this initial stage it does not matter so much where the discussion takes place as long as there is some form of communication on the subject. The discussion would however, in order to reach a broad acceptance, preferable take place within a multilateral forum with world wide membership. The WTO is therefore the most natural host for an agreement on international competition policy, despite its history as a trade organisation.

It is possible to argue that the time is not right to introduce another multilateral agreement embedded in the WTO. As has been shown on several occasions over the last couple of years, there are many voices against the globalisation process. To have an agreement on

international competition rules within the WTO, which by many is regarded as a club only for rich countries, will perhaps add another problem to the organisation and might affect the success of such an agreement. It is argued, however, that international competition rules within the WTO, will be beneficial for both the developed and developing world, if suitable flexibility is provided for developing nations. The resistance towards globalisation from some people should not be the argument that prevents such an agreement from occurring.

It is not likely that there will be any agreement on international competition rules in the near future. The aversion of the US against multilateralism is effectively hindering any far-reaching agreement on the issue and the way to work towards further cooperation will probably be through bilateral agreements. However, the discussion on how to create an international agreement on competition rules should continue but preferably limit itself to only realistically and thereby not too extensive solutions.

One form of anticompetitive behaviour, which clearly may have effects in several jurisdictions and is therefore often scrutinised by several competition authorities, are transnational mergers. Any form of multilateral assessment enhances the risk of inconsistent outcomes and thereby also political conflicts. Especially the case of Boeing/McDonnell Douglas illustrates how sensitive the application of merger control rules is to political interference. Since nations sometimes have different opinions of what amount to anticompetitive behaviour, mergers assessed by several competition authorities will often be approved in some jurisdictions but prohibited in others. The elements assessed in a nation's competition analysis are often difficult for foreigners to understand and sometimes they cannot be objectively defined. This opens up for accusations that nations use their competition law so as to camouflage protectionism and creates confusion for firms when conducting business in several jurisdictions. The conflicts over international competition matters could be reduced if there was one "right" purpose of competition law and all behaviour that prevented that purpose could then be defined as anticompetitive. However, there is no objective definition of anticompetitive practices and competition may serve many objectives. The merger law of the US emphasises the creation of efficiencies to the benefit of the consumers, while the EC is encompassing other objectives as well in their competition law.

It is astonishing that there are so many critical voices against the Commission's view regarding economic reasoning in the analysis of mergers. It is argued that competition law could not totally be separated from the effects the application of that law will create for the society as a whole and in a longer perspective. Even if a merger creates efficiency (which of course many mergers will) the consequences in a longer perspective can be detrimental both to the consumers and the society even if there is short term benefits. As long as there is an openness about what objectives the competition authority takes into consideration when applying its competition policy and as long as there is a consistent approach, it cannot be objectionable to include other objectives than just the creation of economic efficiency in a nation's competition policy. The problem is that the assessment of merger cases are not always transparent, partly out of confidentiality reasons, partly because it is convenient for a competition authority to briefly conclude that a transaction was procompetitive out of efficiency gains. Other times the authority may prohibit a merger because of interest to other policy objectives, without in detail specify the particular gains or all factors embedded in the decision. Since it is often difficult to objectively define "industrial policy reasons" this notion may be overused and misused. An international agreement on competition policy could then have the benefit of specifying the elements of nations' competition analysis. The difficult part will of course be to reach a compromise between the application of economic considerations and the application of other policy objectives. The EC and the US now seem to approach each other regarding their competition analysis and this may facilitate the process towards a common standard regarding international competition policies. However, for this to be a real possibility, nations must refrain from hiding behind the notion of sovereignty and to be fully committed to work towards further cooperation in this area, preferably on a multilateral level.

Sources

a. International Documents

WT/WGTCP/2, Report (1998) of the Working Group on the Interaction between Trade and Competition Policy

WT/WGTCP/3, Report (1999) of the Working Group on the Interaction between Trade and Competition Policy

WT/WGTCP/4, Report (2000) of the Working Group on the Interaction between Trade and Competition Policy

WT/WGTCP/5, Report (2001) of the Working Group on the Interaction between Trade and Competition Policy

WT/WGTCP/6, Report (2002) of the Working Group on the Interaction between Trade and Competition Policy

WT/WGTCP/W/45, World Trade Organisation, Submission by the European Community and its Member States, 24 November 1997

WT/WGTCP/W/66, World Trade Organisation, Communication from the US, 10 March 1998

WT/WGTCP/W115, World Trade Organisation, Communication from European Community and its Member States, 25 May 1999

Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (July 27-28, 1995), available at www.oecd.org/EN/document/0,,EN-786-nondirectorate-no-6-16490-768,00.html

Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Doc. C(98)35/FINAL (Apr. 27-28, 1998) available at <http://www.oecd.org/pdf/M00018000/M00018135.pdf>

OECD Work Programme on Trade and Competition, COM/TD/DAFFE/CLP(98)98/FINAL

OECD Committee on Competition Law and Policy, Report on Notification of Transnational Mergers, 5th February 1999, DAFPE/CLP(99)2/FINAL

UNCTAD, Experiences gained so far on international cooperation on competition policy issues and the mechanisms used, p. 7-8, TD/B/COM.2/CLP/21/Rev.1, 19 April 2002, available at <http://www.unctad.org/en/docs/c2clp21rl.en.pdf>

Commission Notice on the definition of the relevant market for the purpose of Community competition law [1997] OJ C372/5, [1998] 4 CMLR 177

Commission Notice Guidelines on vertical restraints O.J. (2000) C 291/1, 13.10.2000

The EC Merger Regulation 4064/89

Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States, Official Journal L 095, 27/04/1995

Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, Official Journal L 173 of 18.06.1998

General Agreement on Trade in Services (GATS)

b. Literature

Hudec Robert E, Essays on the Nature of International Law, Cameron May, London, 2nd edition, 2000

Jackson John H, The World Trade Organisation, Constitution and Jurisprudence, Royal Institute of International Affairs, London, first edition, 1988

Jones Alison and Sufrin Brenda, EC Competition Law – Text, Cases, and Materials, Oxford University Press, Oxford, First edition, 2001

Porter Michael E, The Competitive Advantage of Nations, with a new Introduction, MACMILLAN PRESS, London, 10th edition, first published 1990, 1998

Hildebrand Doris, The Role of Economic Analysis in the EC Competition Rules, Kluwer Law International, First edition, 2002

Ritter Lennart, Braun W. David, Rawlinson Francis, European Competition Law: A Practitioner's Guide, Kluwer Law International, 2nd edition, 2000

Korah Valentine, An introductory guide to EC Competition Law and Practice, Hart Publishing, 7th edition, 2000

Faull J./ Nikpay A, The EC Law of Competition, Oxford University Press, Oxford, 1999

Bork R.H, The Antitrust Paradox – A Policy at War with Itself, With a New Introduction and Epilogue, Maxwell Macmillan, second edition 1993, Printed in the US

c. Articles

Banks J.D, The development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation following the Boeing/McDonnell Douglas Decision 1997, [1998] E.C.L.R. p. 306

Bavasso A.F, Boeing/McDonnell Douglas: Did the Commission Fly Too High [1998] E.C.L.R p. 243 at 246

Burnside A, GE, Honey, I Sunk the Merger [2002] E.C.L.R. p. 107

Cadot O, Grether J-M, De Melo J, Trade and Competition Policy-Where do we Stand? (2000) Journal of World Trade 34(3)

Camesasca P.D, The Explicit Efficiency Defence in Merger Control: Does it Make the Difference? [1999] E.C.L.R. p. 14

Cocuzza A & Montini M, International Antitrust Co-operation in a Global Economy, [1998] E.C.L.R. p. 156

Ezrachi A, Limitation on the Extraterritorial Reach of the European Merger Regulation, [2001] E.C.L.R. p. 137

Fiebig A, A Role for the WTO in International Merger Control, Northwestern Journal of International Law & Business, Winter 2000, Vol 20, Issue 2, p. 233

Fox E, World Antitrust and Market Access, The American Journal of International Law [Vol. 91:1 1997] p. 1

Fox E, Antitrust Law on a Global Scale: Races Up, Down, and Sideways in Regulatory Competition and economic integration- comparative perspective, p. 348, 2001 (D. C. Esty and D. Geradin ed.) Oxford University Press, Oxford

Fox E, Global Antitrust from a U.S. Perspective in Europa und die Globalisierung- Referate des Zweiten Wiener Globalisierungs, p. 217, 2002 (C. Baudenbacher & E. Busek ed.), Verlag Österreich

Fox E and Ordovery J.A, The Harmonization of Competition and Trade Law – The case for modest linkages of law and the limits to parochial state action in Competition Policy in the Global Economy – Modalities for cooperation, p. 407, 1997 (L. Waverman, W. S. Comanor and A. Goto ed.) Routledge, London

Gifford D.J & Sullivan E.T, Can international antitrust be saved for the post-Boeing merger world? a proposal to minimize international conflicts and to rescue antitrust from misuse, The Antitrust Bulletin/Spring 2002, p. 55

Griffin J.P, Antitrust Aspect of Cross-Border Mergers and Aquisitions [1998] E.C.L.R., p. 12

Jenny F, Global Antitrust from a European Perspective in Europa und die Globalisierung-Referate des Zweiten Wiener Globalisierungs, p. 203, 2002 (C. Baudenbacher & E. Busek ed.), Verlag Österreich

Klein J, Anticipating the Millenium: International Antitrust Enforcement at the End of the Twentieth Century, (1997) Ford. Corp. L. Inst. 1

Levinsohn J, Competition policy and international trade, National Bureau of Economic Research, December 1994, Working Paper No. 4972, available at <http://www.nber.org/papers/w4972.pdf>

Luz K, The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the need for a globalized Antitrust System, *The George Washington Journal of International Law and Economics*, vol 32, 1999-2000, p. 155

Matsushita M, Reflections on Competition Policy/Law in the Framework of the WTO, (1997) *Ford. Corp. L. Inst.* 31, (B. Hawk ed.)

McDavid J.L, Globalization of Premerger Notification and Review: Practical Problems and Solutions, (1999) *Ford. Corp. L. Inst.* 31 (B. Hawk ed.)

van Miert K, XXVIIth Report on Competition Policy, 1997

Mitsuo M, Reflections on Competition Policy/Law in the Framework of the WTO, (1997) *Fordham Corp. L. Inst.* 31 (B. Hawk ed.)

Rill J.F and Wilson C.C, Selected recommendations for substantive and procedural convergence in the multi-jurisdictional merger context, 1999 *Fordham Corp. L. Inst.* 359 (B. Hawk ed.)

Romano F, The Boeing/MDD Merger and the EU/US Agreement on the Application of their Antitrust Rules, *Revue de droit des affaires internationales*, no 4-5, 1998, p. 509

Tarullo D.K, Norms and Institutions in Global Competition Policy, *The American Journal of International Law* 2000, p. 478

Voillemot D & Thiller A, WTO and competition rules, 1999 *Fordham Corp. L. Inst.* 31 (B. Hawk ed.)

d. Speeches

Monti M, A European Competition Policy for today and tomorrow, Conference jointly hosted by the AEI-Brookings Joint Center for Regulatory Studies, the Section of Antitrust Law of American Bar Association, and the District of Columbia Bar Association's Antitrust Committee of the International Law Section, Washington, 26 June 2000, available at www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/

Monti M, European Competition Policy for the 21st Century, The Fordham Corporate Law Institute – Twenty-eight Annual Conference on International Antitrust Law and Policy, New York 20 October 2000, available at www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/

Monti M, Merger control in the European Union : a radical reform, European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002

e. Table of Cases

United Brands, ECJ Feb. 14 1978, 1978 ECR 207

Dyestuffs v. ICI, Case 48/69 (1972) E.C.R. 619; [1972] C.M.L.R. 557

Wood Pulp, O.J. L85/1, [1985] 3 C.M.L.R. 474

Hercules v. Commission, Case T-7/89, 17.12.1991, (1991) II ECR 1711

Aerospatale- Alenia/de Halivand v. Commission, Case IV/M.053,

Boeing/McDonnell Douglas, Commission Decision of 30 July 1997, 1997 O.J. (336) 0016

General Electric/Honeywell, Commission Decision, Case No Comp/M. 2220, 3 July 2001

Gencor/Lonrho, case T-102/96 Gencor Limited v. European Commission [1999] 4 C.M.L.R. 971; Gencor/Lonrho, IV/M619 [1997] O.J. L11/30, [1999] 4 C.M.L.R. 1076

US v. Aluminium Co. of America, 1945