

Policy Recommendations Arising From A
DTI-sponsored Roundtable titled
International Competition Policy: Where to Next?

Held on 7 April 2004 at the Saïd Business School, University of Oxford

By

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This note describes **eleven policy recommendations** that were stimulated by discussions at the above roundtable. The opinions expressed here are my own and need not reflect those of any other participant at the roundtable or, indeed, any official agencies or civil society organisations present. **The policy recommendations discussed here may be of interest given the Department of Trade and Industry's (DTI's) goal of publishing a White Paper on Trade and Investment policy later this year.**

The **first set of policy recommendations** concern various aspects of the ongoing discussions on potential multilateral trade rules on competition law and policy at the World Trade Organization (WTO). Only one participant dissented from the view that international trade and competition policy matters were so obviously inter-related that they should continue to be discussed at the WTO, the international body best suited to the negotiation and enforcement of binding rules on global commerce. The first recommendation, therefore, is that **HMG should continue to actively participate in the formulation and promotion of the European Union's collective position on the interaction between trade and competition policy at the WTO.**

Such participation will become ever more important because, in the absence of a WTO agreement on competition law-related matters, the WTO's Appellate Body and the Panel's of its Dispute Settlement Understanding are likely to offer further interpretations of the competition-related provisions in existing WTO agreements—as recently happened in the

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Telemex case.² **Disengagement by HMG and the relevant competition and sectoral regulators would be undesirable and potentially harmful to UK interests.**

The discussion at the roundtable identified a number of impediments to progress on trade and competition-related matters in the WTO (especially in the light of the collapse of the WTO Ministerial Meeting in Cancun in September 2003.) **The principal policy recommendation here is that the level of ambition of any potential WTO agreement on competition law and policy should be revisited.** This re-assessment should examine:

- whether support for a multilateral agreement could be strengthened by expanding the set of anti-competitive practices (beyond so-called hard core cartels) that might be subject to binding WTO rules.³
- the balance of any potential costs and benefits of proposed obligations between different classes of WTO members. In this regard, a distinction is often made between industrialised and developing countries but, given that many developing countries have adopted competition laws, a more informative distinction might be between nations that have enacted such laws and those that have not.
- the balance between so-called binding and non-binding (including best endeavour) provisions in any proposed multilateral agreement, and the likely effects of the application of the WTO's Dispute Settlement Understanding to the provisions of such an agreement.
- whether or not a potential WTO agreement on competition law and policy should only apply to those nations that have enacted, or that subsequently enact, a competition law.⁴
- the pros and cons of negotiating provisions on competition law and policy on a plurilateral basis.
- the pros and cons of developing a sectoral approach to negotiating international competition rules, perhaps along the lines of the Telecoms Reference Paper.

The value of any discussions on the above matters would be considerably proscribed if they took place only within the UK or in the EU. Ideally such discussions should take place in a trade-related international fora where the largest number of the UK's trading partners can participate. **For this reason HMG should support the re-constitution of the WTO's Working Group on the Interaction Between Trade and Competition Policy with a mandate to not only discuss the above matters but with a goal that the Working Group propose to the trade ministers of the WTO a number of viable options for taking this issue forward over the medium term.**

² This case concerned the nature of certain telecoms regulations in Mexico. The United States brought a case against Mexico and, by and large, the recent WTO Panel ruling upheld the U.S. complaints.

³ Some argued at the roundtable that developing countries may be as interested, or indeed more interested, in multilateral rules on the abuse of a dominant position than on hard core cartels.

⁴ A number of WTO agreements only apply to those nations that have enacted certain laws. An example is the anti-dumping law. There is no comprehensive WTO requirement to adopt an anti-dumping law. Yet, if a nation does so, its law is supposed to adhere to certain WTO rules.

A growing and substantial number of the opponents at the Cancun meeting of WTO Trade Ministers to negotiations on multilateral rules on competition policy have decided to launch, or conclude, bilateral and regional trade agreements with explicit provisions on competition policy. These agreements are being pursued by some nations that previously had argued that they had neither the expertise nor the capacity to negotiate essentially the same matters at the WTO. The design of these regional provisions, and their potential impact on multilateral rule making on competition policy, directly affect the overseas trading interests of the UK. Therefore, **in addition to monitoring these developments, HMG should take an active role in developing trade-and-competition-related negotiating and analytical capacity in developing nations.** Such initiatives could be undertaken in partnership with those international organisations and regional development banks with the appropriate expertise and in accordance with HMG's overall priorities for development assistance.

A **second set of policy recommendations** concerns the appropriate allocation of roles and responsibilities between various international organisations that deal, exclusively or partly, with competition law and policy. The matters of duplication of activities and of resources available for the effective and broad-based participation in, and implementation of, the initiatives of various international organisations received considerable attention at the roundtable. With respect to technical assistance and capacity building it was noted that the WTO, UNCTAD, and OECD⁵ have each conducted such activities in recent years. Moreover, it was noted that over the years four international organisations (OECD, ICN, WTO, and UNCTAD) had engaged in different forms of international rule making and norm formation on competition law and enforcement.

With respect to technical assistance, the very high quality of the WTO's recent programmes was recognised. A distinct advantage of the WTO's approach is that officials from foreign affairs, international trade, industry, and economic ministries attended their capacity building programmes. (It should be noted that in many nations international negotiations on competition rules are not led by officials from the relevant competition enforcement agency; instead they are led by officials from central government departments.) **The goal of encouraging the adoption of well-thought-through international provisions on trade and competition policy could be advanced by HMG firmly supporting the WTO's technical assistance measures in this area.**

Considerable dissatisfaction was expressed with UNCTAD's activities in the area of competition law and policy. Discussions at UNCTAD are often undiscerning with few serious attempts to challenge stated measures and initiatives in member countries that evidently fall below best practice. For this reason doubts were expressed that UNCTAD could ever become a serious negotiating forum for binding international rules on competition law and policy. Moreover, it was noted that few (if any) of UNCTAD's competition staff have experience in working at competition agencies or in negotiating trade agreements or inter-agency cooperation agreements on competition law-related matters. These concerns are particularly important in the run up to, and after, the UNCTAD XI Ministerial meeting in June 2004.

⁵ At the roundtable it became clear that little was known about the OECD's capacity building programmes on competition law and policy. (This itself may be quite telling.) For this reason the following discussion refers only to the activities by the WTO and by UNCTAD.

Recognising that some useful technical assistance and capacity building initiatives have been undertaken by UNCTAD, **one policy recommendation is that HMG strongly support a new competition-related mandate for the UNCTAD secretariat so long as the expected programme of activities and resources (including personnel) are substantially strengthened. Active participation by HMG in the implementation and evaluation of this mandate is recommended.** Thought might also be given to minimising the overlaps between such a programme and the technical assistance activities of other international agencies.

There was also a wide-ranging discussion of the activities of the International Competition Network (ICN). The point was made that the ICN focused on practical, important, day-to-day measures that enhanced the effectiveness of competition law enforcement and, where appropriate, reduced the burdens on the private sector of such enforcement. The ICN has been particularly active in the area of merger reviews with (at the time of this roundtable) seven recommendations for national enforcement practice being adopted by members. (Since the roundtable was held four more recommendations have been adopted.) Mergers are not, however, the only element of the ICN's work programme as working groups on cartel enforcement, capacity building and implementation issues, and competition law and enforcement in regulated industries have been established in recent years.

Several participants questioned the accessibility, transparency, and accountability of the ICN. Representatives from the business community and consumer organisations felt that, at times, the ICN appeared to be a closed group of enforcement officials. Some argued that the benefits of the ICN's recommendations on merger reviews did not extend beyond large corporations. Others were concerned that the ICN should not intrude into areas of government policy and noted that this forum should not become the home of a binding international agreement.

In the light of the foregoing remarks perhaps a number of recommendations for HMG can be made. **First, the momentum behind the ICN's attempts to enhance the transparency and efficiency of national competition law enforcement should be supported, so long as it does not intrude into the realm of government policymaking. Second, the ICN should be evaluated in its third or fourth year of operation⁶ to assess the progress made to date, to assess members' compliance with agreed recommendations, and to evaluate whether sufficient steps have been taken to facilitate the participation of all interested parties (including civil society and government officials from agencies or ministries outside competition enforcement agencies.) Third, given the ICN's exclusive focus on competition law enforcement matters, HMG should keep open other fora where discussions on the interaction between competition law and other important government policies (such as trade policies) can take place. Finally, some mechanisms within HMG may be necessary to align the ICN's activities with the UK's and EC's trade negotiating position, should any divergence emerge.**

The recent momentum behind the ICN was sharply contrasted with that of the OECD's Competition Committee, where valuable initiatives on competition-related matters were

⁶ The ICN was established in 2002.

accomplished in the mid-to-late 1990s. Understanding the source of dissatisfaction with this particular committee at the OECD, in particular the perceived disenchantment of the United States' competition agencies with this body, was seen as a priority. Reforms to the operation of the OECD's Competition Committee might enhance the attractiveness of this once-important inter-governmental forum, although expectations should be tempered by the fact the OECD's limited membership precludes the negotiation of a comprehensive initiative on trade and competition policy matters. **HMG should support a review and possible overhaul of the OECD's Competition Committee** with the goal of reinstating its leading role as forum for the discussion, identification, and analysis of best practice in competition law and policy and in the interaction between the latter and other important government policies such as trade policy, investment policy, regulatory policy, and other microeconomic reforms.