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"Convergence in International Antitrust Law"
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"Complete harmonization and convergence will be achieved only in the long run, iv ever"

ICPAC-Report, USA, feb. 2000

"Any discussion of cartels at a Global Competition Forum or Initiative will focus on Enforcement effectiveness and due process and not on conflicts or convergence"

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1. Introduction

International Competition Law is moving ahead. Only very recently, in October 2001, U.S. and foreign antitrust officials have launched an "International Competition Network" (ICN) at the Fordham Law Institute´s annual international antitrust conference. ICN provides

> "a venue where senior antitrust officials from developed and developing countries will work to achieve consensus on proposals for procedural and substantive convergence in antitrust enforcement."[1]

1 Department of Justice, Press release form october 25, 2001, www.usdoj.gov/atr/public/press_releases/2001/9400.htm.

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ICN is an interesting project, because it combines earlier initiatives for cooperation among antitrust authorities. At the same time it signifies a dedication of antitrust officials to "soft convergence", an approximation of antitrust enforcement practices by assimilation of legal cultures rather than by harmonization of binding rules. Soft convergence seems to be all International competition law can expect at the moment. ICN indicates that the idea of a world cartel office has been – rightly - overcome.

In February 2000 the International Competition Policy Advisory Committee (ICPAC) in its final report[2] recommended that the United States

> "explore the scope for collaborations among interested governments and international organizations to create a new venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can exchange ideas and work toward common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative".

Subsequently, the U.S. Department of Justice and the Federal Trade Commission invented a "Global Competition Initiative". A similar project started at the OECD. OECD proposed a "Global Forum on Competition", which on October 17th 2001, met in Paris for the first time.[3] The EU´s DG Competition supported such a Forum. Earlier, in March 2001 OECD published its report "Trade and Competition policies: Options for a greater coherence"[4].

Both projects, the "Global Competition Initiative" and the "Global Forum an Competition" seem to have given birth to the ICN, which is a merger of both earlier ideas. For business and for antitrust authorities alike it is high time for such a project to be successful.

2. Antitrust enforcement – two sides for Business

For business, international antitrust enforcement is an ambivalent matter. On the one hand it is an important tool to ensure free and fair access to new markets, customers and consumers. The opening of markets by WTO-efforts and local policies must not be undermined by the formation of cartels or by illegally achieved market dominance. On the other hand antitrust enforcement is a costly and time consuming burden. Competition authorities often ask for information which is not always easy to provide. Long procedures can be a serious obstacle for dynamic business. Both aspects of international antitrust enforcement - advantageous tool and disadvantageous burden - have become more important in recent years. Markets have been liberalized around the world and grown together in the last decades. International trade has increased enormously. Frontiers have been opened to foreign companies. International Mergers have become daily business.

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2 ICPAC, http://www.usdoj.gov/atr/icpac/finalreport.htm, p. 28.
3 OECD, http://www.oecd.org.
4 OECD, Trade and Competition Policies, Options for a greater coherence, Paris 2001.

Antitrust enforcement at the same time has basically remained a national activity. In merger control, about 60 countries have adopted notification systems. Even more countries have introduced antitrust laws. All of those countries are now determined to apply those laws most effectively. Business, though accepting the wish of countries for own antitrust rules, since long has called for an international strategy to limit the burdens of international antitrust enforcement. Those burdens result from different material standards and from procedural differences which should be largely reduced. Convergence of international antitrust law is thus a major issue for private industry.

3. Evolution

At first sight, the invention of a "Network" of international antitrust officials does not seem to be a very decisive effort to deal with the differences in international antitrust law and procedure. On the other hand it has to be borne in mind, that for many years efforts have been made without great success. Some historical remarks, not claiming completeness, remind of the many earlier activities by many different governments, institutions and individuals.[5] These earlier works may serve as a rich source for further development.

a) WTO

GATT and WTO have always been aware of the trade restricting force of antitrust activities. A common set of rules, though, has never been established. The proposed Havanna-Charta of 1947[6], which contained a chapter on antitrust practices, was not set into force. A similar project by the UN-ECOSOC was rejected in 1955.[7] Nor has the 1994 WTO-agreement introduced any substantial antitrust rules, although since then antitrust issues have returned to the WTO-agenda again. At least, WTO-Working groups have been set up for "Trade and Competition" and for "Trade and Investments", one further working group deals with issues concerning "Public Procurement".

b) Codes of Conduct

Codes of Conduct have seen the light especially in the 70s. In June 1976 the OECD has published its "Declaration on International Investment and Multinational Enterprises".[8] UNCTAD in 1980 has drafted its "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice" (UNCTAD-RBP-Code).[9] None of these Codes has ever resulted in binding rules. A later OECD-recommendation concerns the "Effective Action against Hard Core Cartels".[10] Here, for the first time, OECD member countries achieved an agreement on the very harmful effects of some anticompetitive practices.

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5 See Basedow, Weltkartellrecht, Tübingen 1998, S. 61 ff.
6 See U.S. Department of State, Havanna Charter for an International Trade Organization, 24.3.1948, Chapter V, WuW 1953, 244.
7 Basedow, Weltkartellrecht, Tübingen 1998, S. 63.
8 Horn, Legal Problems of Codes of Conduct for Multinational Enterprises, Deventer 1980, 451 ff.; Davidow, Some reflections on the OECD Competition Guidelines, Antitrust Bulletin 1977, 441 ff.
9 UNCTAD, WuW 1982, 32 ff; Davidow, The UNCTAD Restrictive Business Practices Code, in: Horn, FN 7, 193 ff.
10 OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels, Paris 1998.

c) Cooperation

Already in 1967, the OECD had published its non-binding "Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade", which was revised in 1995[11]. First bilateral agreements and thus binding rules for the cooperation between National Antitrust Authorities have been established in the 70s between Germany and the U.S.[12] and Germany and France[13].

More important in recent years and better appreciated were the bilateral agreements between the U.S. and other countries including the EU. Those agreements contain elements of negative[14] and positive comity[15] and have deepened the exchange of knowledge and information between national competition authorities in international antitrust cases. Cooperation, though, remains a challenge. Europe, although a common competition law was already established in the Treaty of Rome in 1958, only recently invented a Forum for European Competition Authorities.[16] One could argue, that the Commission as such has been the European venue for Cooperation of antitrust authorities. But it is still astonishing, that specific cooperation among European antitrust authorities was not established earlier. The European Cooperation Forum has to be seen in the light of the Commissions project to modernize European Competition Law. This project will have fundamental impact on the consistent application of Art. 81 and 82 EG-Treaty in Europe. However, cooperation in Europe may partly serve as an example for international cooperation initiatives.

d) Research

Finally, Academics also have made important contributions for discussion including a "Draft International Antitrust Code"[17], based on a proposal by Wolfgang Fikentscher, which was handed over to the General Director of GATT in 1993.[18] Competition law studies exist in abundance.[19]

All those contributions by Governments, international Institutions and by academics have resulted in a better understanding of international competition law systems and of problems in international antitrust enforcement. But still, until today, international

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11 OECD, Revised Recommendation of the Council concerning Co-operation between member countries on Anticompetitive Practices affecting international trade, OECD Doc. C (95) 130 final.
12 Agreement from 23.6.1976, BGBl. 1976 II, 1712.
13 Agreement from 28.5.1984, BGBl. 1984 II, 758.
14 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, ABl. EG L 95/45 (1991), corrected by ABl. EG L 131/38 (1995).
15 Agreement between the European Communities and the United States on the application of positive comity principles in the enforcement of their competition laws, COM (97) 233 final.
16 See Böge, Konvergenz kartellrechtlicher Normen und deren Anwendung auf globale Sachverhalte, WuW 2001, 922 ff.
17 International Antitrust Working Group, Draft Internatinal Antitrust Code, WuW 1994, p. 128 ff.
18 See Fikentscher/Drexl, Der Draft International Antitrust Code, RIW 1994, p. 93-99.
19 See for example Basedow, Weltkartellrecht, Tübingen 1998; Kleinert/Klodt, Megafusionen, Tübingen 2000, Evenett a.o., Antitrust goes global, What future for transatlantic cooperation?, Washington 2000.

antitrust enforcement lacks both common procedures and common standards. The burden for business remains and even increases.

4. Effects Doctrine

Antitrust enforcement, although often a major issue in international media and politics, is basically the application of competition law by antitrust authorities.[20] Antitrust authorities apply their domestic laws according to international rules of jurisdiction. Very common in international antitrust law is the so-called "effects doctrine".[21] Whenever an anticompetitive practice has an appreciable or substantive effect in a countries market, this country may claim jurisdiction over that case.[22] This rule of international competition law, which is applied by many countries around the world, is a fundamental reason for the fact, that one single business transaction can result in many different antitrust authorities claiming jurisdiction.

Furthermore, the effects doctrine is applied in all subsections of antitrust law, e.g. horizontal and vertical cooperation, abuse of dominant positions and merger control. In merger control the effects doctrine is especially burdensome because many countries have introduced a mandatory notification systems. The merging companies might trade in many different countries. Although from the perspective of the international company the turnover in one country might be comparatively low and insignificant, the respective competition authority might not share that view. It might not even look at the turnover in its local market but rather at the companies world wide turnover.[23] Thus, the effects doctrine is felt strongest by companies who sell their products already in many countries of the world and who want to enter into new foreign markets. Their take-over will often not only have an effect in the target-companies home market, but also in many other markets. Thus, many different antitrust authorities will claim jurisdiction.

5. Consequences

The more a company sells its products and services in different markets, the more countries will claim parallel jurisdiction over actual or presumed anticompetitive behaviour. Especially in merger control law multi-jurisdictional filing is the burdensome consequence. Many different material and procedural standards have to be applied. Formal requirements of different antitrust authorities must be taken into account.

Some convergence is foreseeable. The German BKartA has recently analysed, that the differences between the European market dominance test and the American "substantial lessening of competition"-test are rather small, especially when the practical result of their application is taken into account. Furthermore, the recent "economic approach" of the European Community in its guidelines for vertical and

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20 Schaub, Konvergenz kartellrechtlicher Normen und deren Anwendung auf gobale Sachverhalte
21 Other rules and mixed forms are also applied, e.g. the principle of territoriality in England, see Basedow, Weltkartellrecht, Tübingen 1998, p. 11 ff.
22 E.g. § 130 Abs. 2 GWB (Germany); U.S. vs. Aluminium Co. of America, 148 F. 2d (2nd Cir. 1945) (USA); EU-Kommission, ABl. EG 1985, L 85/1, p. 14-15 ("Zellstoff") (Europe).
23 For a detailed analysis of procedural problems see BIAC, Recommended Framework for Best Practices in International Merger Control Procedures, 4th October 2001, http://www.biac.org/position.htm#Competition (*soon*).

horizontal cooperation has its roots in U.S.-law. Nevertheless, major differences remain and have to be carefully analysed.[24] International law firms have to be asked for expensive advice and huge notification fees have to be paid. Often, control procedures can be time consuming which may lead to serious obstacles for international transactions. These are by no means exceptional circumstances but everyday problems of cross-border business.

Another consequence of growing importance is linked to the exchange of information. On the one hand, information is necessary in order to identify and to analyse the competition problems of a case. On the other hand, such information might be of strategic importance to a company. Thus, strict rules against the disclosure of information is indispensable.

Although merger control activities have been a focus point of international antitrust politics and law-making, multi-jurisdictional conflicts might just as well arise in horizontal and/or vertical cooperation cases[25] or in cases of abuses of dominant positions. Especially questions of dominant positions might result in greater problems in the future. Many developing countries often pursue a policy of supporting their "national champions", i.e. big national companies, by allowing and even asking them to use their market dominance to discriminate foreign investors and to promote smaller national companies.[26] Such anticompetitive policy is likely to protect markets which have just been opened to international investments.

6. Business Demands

Business supports the idea of an International Competition Network. Companies have carefully noted, that not only "senior antitrust officials" will be part of this network, but also "the private sector", "legal and economic antitrust practitioners" and "business people". Business offers its participation to strengthen the cooperation efforts between antitrust authorities and to develop best practice rules both for substantive laws and for procedures.

Competition Experts from developed market economies should play a leading role in the Network. Officials from developing countries, though, should participate in the network and should regularly be invited to its meetings. Competition is a means of generating growth and prosperity equally for developed economies and for developing countries.

The idea of due process in international competition law procedures must be promoted. Transparent, non-discriminatory procedures and decisions are equally important. The exchange of information should be carefully handled. Companies involved must be informed and – wherever possible - asked for prior consent.

Representatives from antitrust authorities should seek to reduce time consuming control procedures to a minimum level. Antitrust authorities should step back from

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24 See e.g. Immenga/Stopper, Die europäischen und US-amerikanischen Leitlinien zur horizonatlen Kooperation, RIW 2001, 241 ff.

25 E.g. Kodak-Fuji-Case, WTO, Panel Reports 05.12.1997, see Grewlich, Wettbewerbsordnung als Bestandteil völkerrechtlicher Konstitutionalisierung, RIW 2001, p. 641, 644.

26 See Singh, Ajit, Competition Policy, Development and Developing Countries, Working paper, Cambridge 1999.

using their jurisdiction, especially when well-established antitrust authorities have already analysed a case. Multi-jurisdictional filing must be reduced by all means in order to reduce transaction costs.

Soft convergence by cooperation of antitrust authorities in individual cases seems to be an appropriate way in international competition law. Nevertheless, earlier efforts, like the OECD recommendation for hard core cartels or WTO-projects, must be continued to achieve common competition law standards in the future.

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