

Consumer Policy and Multilateral Competition Frameworks: A Consumers International Discussion Paper

March 2003



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Preface

This paper examines the various issues and perspectives that are currently being discussed in the debate over the need for a multilateral competition agreement and the desirability of hosting any such agreement in the World Trade Organisation (WTO). It considers this debate from the perspective of consumers in both developed and developing country contexts.

To ensure a diverse representation of professional opinion in this discussion paper, Consumers International commissioned six contributions on the role of multilateral competition agreements in promoting consumer policy, from competition experts in Africa,¹ Asia,² Latin America,³ Europe⁴ and North America.⁵ The views of these experts have been incorporated into this paper along with a wider examination of the issues that were raised. These views do not necessarily represent those of Consumers International and do not presuppose the policy that Consumers International will take on multilateral competition agreements at the WTO.

This discussion paper has been produced to address the fact that competition is now being considered within the WTO and that there is an urgent need to analyse the issues and objectives that could well be negotiated within such an agreement, from a consumer perspective.⁶

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The Consumers International competition resource suite

The discussion paper is one product in a “suite” of competition resources designed to promote greater understanding of the theoretical, technical and advocacy issues involved in forming and advancing consumer policy within the field of competition at both national and supra-national fora.

These include:

- *Consumers and Competition*: a comparative study of national competition regimes in 7 developing and transitional economies
- A Technical Report analysing what a multilateral competition agreement could cover and the implications of core WTO principles for a WTO multilateral competition agreement
- A Competition Handbook examining how to analyse markets for competition
- An Information and Advice kit with information and advice for consumer organisations wanting to work on competition, model activities for lobbying at national and supra-national levels and advice routes for contacting the relevant agencies and institutions.

These resources are ultimately aimed at increasing the capacity of consumer organisations to ensure that consumer policy is considered within competition negotiations and agreements and to provide a means to balance the traditional dominance of industry in trade policy making processes.

This work is a part of the Consumers And The Global Market Programme, co-funded by the Ford Foundation, Oxfam, The European Commission, The International Development Research Centre (IDRC) and the Foreign Ministry of the Netherlands, as well as the Consumer Policy and Multilateral Competition Agreements post-Doha Programme, funded by the UK Department For International Development (DFID). All the resources commissioned and produced in these programmes will be made available on the Consumers International web site.⁸

1: Consumers and competition – Post Doha

Consumers want their markets to offer them the best possible range of goods and services at the best possible prices and to appropriate standards. Competitive markets can help because in a competitive environment businesses have to be efficient, innovative and offer better quality products at lower prices if they are to attract customers. Unfortunately, the evidence suggests that left to their own devices, businesses will instinctively collude to increase their profits and distort markets, or use other unfair business practices to drive away competitors. This means that consumers need both information and appropriate laws and public policies to ensure that businesses are prohibited from undertaking unfair business practices, based on undue market dominance or forming cartel agreements.

While the benefits of competition policy for both efficiency and consumers have long been acknowledged, the face of competition has changed dramatically over the past decades. As economies have increasingly opened their borders, liberalising their economies and privatising previous state monopolies, creating effective national competition regimes has become a pressing issue both in developed and developing countries. The pressures to liberalise economies has led to the withdrawal of the state and increased business freedom. Yet anti-competitive practices have persisted and their impact has increased to the point where they are now being addressed through re-regulation and the creation of a second generation of policy at both the national and supra-national levels. The challenge rests not only in creating domestic competition agencies with the political backing and appropriate legal and expert infrastructure necessary to monitor, regulate and enforce competition. Particularly in developing and transition economies, there is often also a need to nurture a “competition culture” within government and civil society where previously none existed.

As businesses spread their operations throughout the world, promoting competition within national economies becomes even more complex. There is a widely acknowledged need to further curb restrictive business practices, particularly of the larger MNCs, who are able to adapt their activities to operate in countries with lax competition law and enforcement regimes. Yet international co-operation to act against such anti-competitive practices has not developed at the same pace as cross-border business operations. While various agreements exist at the bilateral, regional and multilateral level, critics have suggested that only a binding multilateral agreement would have the strength to undertake the tasks that are now needed

Introduction

Transnational activities

to promote healthy markets both nationally and internationally.

Attention therefore turned towards the GATT/WTO as a potential venue for more comprehensive multilateral competition framework. A Working Group was set up at the Singapore WTO Ministerial Conference in 1996 to explore the competition-related agreements already in the WTO agenda, and the wider issues relating to the interaction between trade and competition policy. And at the WTO Ministerial Meeting at Doha in 2001, there was a formal recognition of the case for a multilateral competition framework to enhance the contribution of competition policy to international trade and development. It was also agreed that the guiding principles of negotiations would be adopted at the 5th Session of the Ministerial Conference in 2003, at Cancun, on the basis of “explicit consensus”.

However, opposition has emerged over the inclusion of competition on the WTO agenda, particularly from developing countries, many of which are still in the process of creating effective competition regimes at a national level. There is a feeling that they could better direct their limited expertise, negotiating skills and financial resources elsewhere at this stage in their development. Indeed, when placed next to public health, education and other urgent public issues, competition may not be considered a domestic policy priority. Thus, the objectives of a multilateral competition agreement in the WTO may well differ from, and potentially conflict with, the priorities embedded in their domestic trade and competition policies.

Others argue that, on the contrary, given that international cartels and other restrictive business practices, particularly from MNCs, cause such damage to developing country consumers and producers, formal international co-operation on these practices will actually alleviate some of the pressure on their limited resource base, in addition to addressing both consumer and development needs. Global problems require global solutions.

This discussion paper pulls together various perspectives on the role of multilateral competition regimes for consumers in both developed and developing country contexts. In doing so, it focuses on the issues of:

- Why competition can aid consumers in both developed and developing country contexts
- Competition policy and its various aims and objectives
- How these varying objectives have different policy solutions and prescriptions
- The case for a multilateral competition agreement
- The implications of housing a multilateral competition agreement in the WTO
- Whether such a multilateral competition agreement would be likely to be in the interests of consumers in both developed and developing country contexts.

Multilateral competition agreements

Issues under discussion

2: Consumers, competition and development

There is a broad consensus that consumers should welcome competition – in a competitive environment, firms are compelled not only to produce desirable goods and services in the most efficient manner, but also to allocate them at the right quality and price if they are to survive. Competition policy is therefore of benefit to consumers in promoting competitive or “fair” markets, rather than promoting the interests of individual competitors. By promoting the competitive process rather individual firms, competition policy is inherently biased towards consumers and serves to balance the dominance of producer interests represented in policy-making processes.⁹

Competition policy works to promote competitive markets through, for example, curbing the restrictive practices of businesses, such as predatory pricing to create or maintain a monopoly or a cartel, while simultaneously encouraging economic efficiency and therefore aiding development. Producers who form cartels by colluding to fix prices or divide territory have little incentive to improve their production techniques and specifications. Similarly, mergers and acquisitions may result in an unhealthy concentration of the market and create a position of dominance that a firm can abuse when there is a lack of competitors to ensure a healthy race for customer loyalty.

The extent of global economic integration means that the costs of anti-competitive practices can be huge, both to consumers (in terms of higher prices, poor standards and access restrictions), and to economic efficiency. Over the past decade the European Union and the United States have prosecuted 40 cartels with cross-border effects and 12 developing economies reported that they had prosecuted 28 cartels.¹⁰ The range of products being produced by known cartels during the 1990s included citric acid, vitamins, newsprint and fax paper, shipping, and chemicals.¹¹ These products are commonly used throughout the world and the cartels were negatively affecting a large proportion of the global population, everyday. Six of these cartels involved bid rigging involving infrastructures (schools, sewage facilities, etc), harming both taxpayers and social welfare.¹²

Recent research conducted on the impact of the vitamins cartel on international trade flows during the 1990s indicates that even at conservative estimates, the overcharges on vitamins imports during 1990 to 1999 amounted to nearly two and three quarter billion US dollars and affected 90 economies.¹³

Competition law tends to favour consumer interests in the overwhelming majority of cases regardless of the underlying objective¹⁴

The available evidence on private international cartels suggests that they have exploited the very open markets that the world trading system has sought to promote¹⁵

3: Perspectives on competition

Cartels, and other restrictive business practices and agreements, can clearly have adverse effects both for consumers and for economic efficiency. There is general agreement that a competition agreement to curb hard-core cartels and enhance co-operation to achieve this can serve the interests of both consumers and market efficiency. And further, that by promoting competition, competition policy can play an important role in development.

Yet despite this basic agreement about the benefits of competition for consumers and development, there remain many, sometimes sharply differing views about the overall objectives of competition and competition policy, and also about the best means of controlling cartels. The source of some of this conflict can be located in the blurring of the objectives of competition policy and trade policy.¹⁶

Trade policy is distinct from competition policy in primarily working to promote and protect the nation's interests within the global economic arena.¹⁷ Given that national interests are neither static nor limited to economic objectives, they will also include defence, geo-politics, culture or ideological factors. Trade agreements will therefore necessarily reflect a variety of concerns and qualifications that reach beyond the promotion of liberal markets or competition.

Competition policy at a national level, on the other hand, simply encompasses tools such as laws, regulations and enforcement policies that are able to react to and regulate cartels, to minimise the negative impact of regulatory capture and to proactively act against monopolies and agreements that are against the consumer interest.¹⁸ Its objectives are clearly and narrowly defined. Therefore, a decision to override the objective of promoting competitive markets in order to meet other policy priorities will not be made from within the scope of competition policy.¹⁹

Nevertheless, from a development perspective, the practical separation of the objectives of competition policy and trade or industrial policy is not necessarily so easy to identify. On the one hand it is seen as important to curb anti-competitive practices – such as mega-mergers and acquisitions, the abuse of anti-dumping actions²⁰ and restrictive business practices (RPBs) – which threaten the competitive position of local firms in developing countries. It is however, also stressed that in most developing countries, local firms and farms are historically under-developed and need to be supported

Consumers are the raison d'être of all economic activity. Thus consumer welfare is the basis of all economic policy making and implementation³²

There is a measure of confusion arising from the goals of trade policy that further obscures the real issues underlying the debate³³

by affirmative action if they are ever able to be capable of competing successfully in the global economy.²¹ Furthermore, given the small size of some economies it is difficult to encourage competition on a domestic level, and there is a natural tendency towards monopoly because limited physical size, population size or purchasing power, serve as a disincentive to the entry of new firms.²²

At present, levels of economic, political and social development are extremely uneven globally. There is no level playing field. In developing countries, many sectors of the economy have been either owned or directly assisted by government trade policy towards tariff and non-tariff barriers and subsidies, in order to ensure they are able to continue to produce goods and services necessary to serve domestic consumption. Thus, competition agreements that over-rule state support for fledgling industry and allow for an increase in the variety of foreign goods available, will tend to entail a fall in the production and consumption of goods from local industries. This is because as yet they are not developed enough to be globally competitive either in price, quality or choice. This will paradoxically “rob” the developing country consumers of the right to choose local products and may reduce their ability to obtain both information about foreign products and the right to redress if the product is of foreign origin.²³ It will also affect wider national development objectives towards achieving sustainable indigenous development.

Ultimately, it is argued that given the context of underdevelopment, any move to increase global competition in domestic markets will lead to further global concentration and increased market power for large MNCs, who are likely to abuse their market dominance. In the long run, this will negatively impact on consumers by reducing competition, and thus choice and value for money.²⁴ From this perspective, if competition is to be of positive value for the poorest and most disadvantaged people, it is vital that the wider context of post-colonial development and the historical nature of today’s inequalities are taken into account in competition policies at a national, regional and multilateral level.

The division of perspectives into pro-competition and pro-development camps is, however, too simplistic, for all the analyses point to the positive potential of competition for both consumers and development. There is also a general agreement that there are indeed different and possibly conflicting objectives that competition policy can potentially and legitimately address, and thus many demands for flexibility within any supra-national agreement.²⁵ These policy goals can include, for example:

- protecting consumers from undue exercise of market power
- promoting economic efficiency
- promoting trade and integration within an economic union
- facilitating economic liberalisation
- promoting a market economy
- promoting fairness and equity in marketplace transactions
- protecting the public interest
- minimising the need for excessive market regulation and intervention
- protecting opportunities for small and medium-sized businesses.

The build up of local capacity to remain and become more competitive also requires protection from the “free” and full force of the world market for the time it takes for the local capacity to build up³⁴

Increased variety of foreign goods should not be a substitute for local variety³⁵

Agreeing on differences

Given this wide variety, prioritising the objective of fairness between large and small businesses, for example, will not produce the same laws and policies as those prioritising consumer interests. The instruments aimed to achieve one policy objective may be condemned or outlawed by those of another.

It is therefore generally accepted that because differences in pre-existing market structures and levels of state ownership, legal and regulatory culture will influence the stance of national policies to promote competition, no “one-size” of competition policy will “fit-all”.²⁶ Few would disagree that the application of an inappropriate or inconsistent competition policy can produce the perverse effects of constraining competition and protecting weaker firms, to the detriment of consumer interests. It is also taken as read that any law or policy requires respect for the rule of law as a minimum requirement, if it is to succeed.

4: How best to achieve competition

Since it is agreed that competition has tangible benefits for both consumers and development, but opinion divides on how best to achieve it, what are the policy choices?

The subsidiary policy approach proposes that competition policy should be just one element in an overall development strategy to nurture domestic industry, agriculture and services for long-term competitiveness in the global economy.²⁷ It allows for national policy about the priority given to competition as against other national goals, and thus for flexibility at a national level in order to determine domestic development strategies.

Allied to this position is the common observation that it is difficult for competition to be a policy priority in a context of poverty, where there are scant resources available to implement and maintain an effective competition regime. The constraints faced by developing countries are widely acknowledged, but the solutions put forward to address this general resource shortage diverge markedly. On the one hand such a situation leads some to conclude that at present competition objectives in many developing countries should be placed behind other priorities and decisions over how to judge the importance and objectives of competition policy should be left to national governments.

The alternative proposition is to address development by actively promoting international co-operation in the field of competition.²⁸ Shared resources, information and experiences will facilitate the promotion of greater competition, consumer welfare and efficiency, as well as the investigation of anti-competitive practices at the national level and throughout the global economy. Recent surges in global economic integration require policy responses from a national, regional and international level, which are effective enough to deal with a growing number of cross-border anti-competitive practices that can impact on a domestic economy and gravely affect its development.²⁹

International business activity can introduce increased competition into markets previously monopolised by domestic firms, thereby improving product/service choice and improve economic welfare. However, it is also likely to promote cross border trade and investment and can extend the reach of anti-competitive mergers and cartels. For example, a cartel or merger made up of US and EC firms may be prohibited from operating under EC or US law, which is designed to protect US and EC consumers

The subsidiary policy approach

Concepts and principles of competition and competition policy have to be oriented to meet the developing countries' central development needs and strategy³⁶

The principal policy approach

Growing levels of trade and inversion as the result of globalization demand the strengthening of institutions at multilateral and regional level³⁷

from being abused by such anti-competitive practices. If there is no effective competition regulation in other countries or regions this can offer an attractive policy vacuum into which cartels promote their operations.³⁰ After the vitamins cartel began operating, exports from countries where the cartel members headquarters were located, to those economies in Asia, Western Europe and Latin America which did not have active cartel enforcement regimes, tended to rise in value relative to those countries which did have strong regulation. Research also indicates that prices rose more in those countries without active anti-cartel enforcement regimes.³¹

Notwithstanding the widely accepted need to develop effective policy responses to deal with the abusive effects of cartels, monopolies and other restrictive business practices, much debate remains about what the correct policy response to these developments should be in different developmental contexts. And while hard-core cartels are at the consensual end of competition policy objectives, issues relating to opening markets to free up domestic competition and prohibit domestic discrimination in favour of indigenous firms are far more controversial. That is, allied to the question of how competition should be prioritised alongside other national objectives, is the related issue of whether an appropriate competition policy response should emanate from national or regional frameworks or from a more forceful multilateral agreement.

*How does a country like Zambia, Malaysia, or India deal with a merger of two large corporations in the EC that has an impact upon their market?*³⁸

5: Is there a case for a multilateral competition agreement?

When development issues are discussed in relation to the need for a multilateral competition agreement, a common starting point is the dilemma that many developing countries do not yet have anti-monopoly legislation, while in others this legislation is new and poorly implemented.³⁹ In addition, the difficulties in implementing anti-monopoly laws in developing countries are often strongly associated with the existence of highly concentrated markets with a history of strict regulation, state intervention and strong interests or pressure groups who resist the change to a more competitive situation.⁴⁰

From within developing countries, much scepticism has been voiced about the potential for multilateral competition agreements to be able to address these issues in ways that will contribute to stable and equitable long-term growth. There is a belief that, given the dominance of developed country interests and the large business lobby, multilateral competition agreement negotiations are bound to be captured by market access objectives. That is, a binding multilateral agreement will be used to open markets to MNCs through promoting liberal economic regimes, rather than be designed simply to prevent cross-border anti-competitive practices. Multinationals will be given the opportunity to enter less developed markets and use their economic and political leverage to drive out smaller and newly emerging domestic firms, to the detriment of long-term indigenous development and of consumers. The priority of market liberalisation and integration will be placed above the priorities of development, thereby leading to a net loss for developing countries that wish to pursue their own nationally tailored development strategies.

However, as the previous discussion noted, market access is only one of a range of objectives for competition policy. Strong and clearly defined policy positions and negotiating strategies can be used to direct agreements towards other priorities. Indeed the lack of existing effective domestic competition agencies in developing and transition economies has itself been seen as a strong argument for developing a new agreement.⁴¹ This approach proposes that there are pressing challenges for all countries in dealing with cross-border anti-competitive agreements and given resource constraints and the complexity of the problems particularly for developing countries, the only realistic, effective and efficient way forward is to negotiate a multilateral agreement to facilitate co-operation and investigation. The results of the analysis of the vitamins cartel indicated that in seven out of nine countries, outlays of government expenditure on total competition

Multilateral competition policy leads to global concentration and increased market power for large MNCs and this reduces competition, choice and value for money for consumers⁴⁸

Absent an international agreement the EC cannot pass on information it might find about existing cartels in the EC to countries that those cartels also cover. This is not an imagined problem – it occurs already⁴⁹

policy enforcement were greatly exceeded by the reduction in overcharges from just one international cartel.⁴² Such research results have implications for the cost-benefit analysis of anti-cartel regimes, particularly in the context of economic scarcity.

It is clear that again, the case for and against a multilateral competition agreement depends on the prior definition of the various objectives to be upheld and an assessment of whether or not these objectives can and will be addressed at a multilateral level. So while on the one hand, it is commonly observed that there are indeed a number of prospective underlying principles for international co-operation in the area of competition. This is most notably the “low hanging fruit” - where multi-jurisdictional mergers take place and where welfare-reducing export cartels cannot be disciplined by the jurisdictions most able to collect evidence have no incentive to do so.⁴³ On the other hand, however, there is on-going disagreement over the various underlying objectives of competition in terms of: promoting economic efficiency, protecting consumers, and promoting trade and integration, for example. This disagreement is reflected in the lack of consensus about whether an MCA will have positive effects in both different countries and within different sections of the society of these countries.⁴⁴

For some, the implication of this disagreement and lack of clarity is that the primary focus of competition policy should remain on designing appropriate policies at a national level - exploiting existing opportunities to curb anti-competitive practices at the global level without resorting to the creation of new binding multilateral agreements.⁴⁵ The issue of the promotion of competition and the regulating of MNCs is already covered at the OECD and UNCTAD under various conventions. It is seen that enforcement issues represent the main difficulty in introducing competition law, which is a domestic issue, and one that cannot be resolved from above, using MCAs.

Those pointing to the pressing challenges caused by cross-border RBPs do not dispute the primacy of effective national competition regimes. Rather, they are seeking to explore new and complementary ways to tackle contemporary international competition challenges. Some see the use of bilateral agreements as a cumbersome task for most developing countries and, notwithstanding the need for substantive negotiations on the scope, contours and venue, consider a multilateral framework a natural option. Indeed, it was argued that all of the 100 or so Members of the WTO with competition law have felt need of international co-operation for not only enforcement but also for learning from others.⁴⁶

Others stress the need to assess the goals that are to be met before judging the case for dismissing bilateral and regional agreements in favour of a binding multilateral agreement. If the aim is to improve the effectiveness of competition law enforcement world-wide, particularly with respect to cross-border transactions, there is little evidence to suggest that this would not be achieved by more direct contacts between competition authorities under bilateral and regional agreements designed to fit the specific needs of individual parties. However, if the current objective is to improve the efficiency and competitiveness of the world trading system, a binding multilateral competition policy may be more appropriate.

Developing countries face a dilemma over this discussion⁵⁰

The primary focus should be on the design of appropriate national policies⁵¹

In 1995 there were hardly 50 countries with a competition law, which now exceeds 100. Another 30 or so countries are in the process of formulating a new law. All of them have a felt need of international co-operation for not only enforcement but also learning from others⁵²

The limitations of bilateral co-operation in the case of multi-jurisdiction cases have been noted. It is pointed out that bilateral processes work best when the agencies and laws of both parties are similar, which is unusual outside the US and EC. The potential of regional co-operation is also more likely to be realised if there is sufficient cohesion, strength and leverage to investigate and prosecute anti-competitive practices, which is by no means certain in the developing world. And such regional agreements can undermine the utility of existing bilateral arrangements. Unilateral action is noted to have a tendency to work in the favour of the more powerful countries, diminishing its utility for countries in the process of developing their economic, legal and political systems. These combinations of agreements become messy in a rapidly integrating global economy.

Such an assessment suggests that only greater international co-operation agreements will be strong enough to counter the problems that all countries face in a modern economic environment.⁴⁷ If the aim is strictly to serve consumer interests, a formal but limited multilateral competition policy could be a positive step – if fashioned correctly. And inclusive and representative negotiations are essential as the basis for fashioning such an agreement.

In theory a multilateral competition agreement could encompass a minimal non-binding and hortatory commitment to adopt competition laws. Or it could be framed to hold more robust provisions on procedural matters in competition law enforcement. Or at its most extreme, it could be a wide-ranging multilateral competition code establishing both substantive and procedural obligations along the lines of the WTO TRIPs Agreement. The choice of policy options available to a potential multilateral competition agreement has implications for the choice of 'venue' in which to install it. Nevertheless, it is clear from the outset that there is widespread agreement against designing a multilateral competition agreement along on the TRIPs model.

6: Who should host a multilateral competition agreement?

Given the differences in interpretation of competition and objectives for competition policy, the WTO is not the only organisation that has been cited as a suitable venue for a multilateral competition agreement.

The UNCTAD

It is argued that if the objective of an MCA is to arrange for co-operation among national competition authorities, UNCTAD is both a viable and desirable alternative to the WTO.⁵³ One advantage is that UNCTAD is already the venue of an international set of principles to deal with restrictive business practices⁵⁴ and it has long been assisting developing countries to establish competition laws. It uses its observer status in the WTO Working Group on Trade and Competition to facilitate developing country Members build their own negotiating positions and strategies, although it does not offer a direction for the position to be advanced.

The UNCTAD is therefore a pro-development forum which offers reassurance to developing countries fearing that a MNC may not be appropriate for their unique development strategies and addressing issues relating to their particular levels of economic, political and social development. Nevertheless, the UNCTAD promotes the creation of competition regimes, believing that competition can promote development. And it has itself noted that a competition policy framework within the WTO might offer some value, depending on its final provisions and incorporation of the development dimension in the form of SDT.

UNCTAD has noted that within the WTO Working Group discussions, the point has been made that SDT could or should be provided itself as a core principle within the framework. This could perhaps provide a framework for Members to consider when making decisions regarding exemptions or exclusions for developing firms or sectors. To the extent that such mechanisms in the WTO could provide additional legal reinforcement for the Set, it could be argued that UNCTAD would be well within its mandate to advance the objectives of the Set by encouraging a functioning multilateral co-operation mechanism.⁵⁵

However, while noting that the issue of the control of RBPs has been on the UNCTAD agenda since UNCTAD II, critics argue that any moves to give the Set “additional legal effects” by making it a binding agreement have been blocked by industrialised countries. Without the power to enforce agreements, UNCTAD can make little further positive impact.

The issue of jurisdiction and enforcement is also brought into discussion about the International Competition Network (ICN).⁵⁶ The ICN is a project-oriented, consensus-based, informal network of competition authorities. Since 1997 the ICN has worked towards harmonising the processes and approaches to multi-jurisdictional merger review and focuses on the future direction for co-operation between competition agencies.

While this remit is relevant to an MCA, the work of the ICN is not intended to replace or co-ordinate the work of other organisations. Neither is it intended to exercise any rule-making function. The ICN can only work towards harmonising approaches and processes, it cannot develop such laws and treaties and indeed it is extremely rare for the enforcers of competition to draft the laws that they will enforce. This means that it does not have much political direction or power and can possess only a strictly limited ability to enforce its agreements. Relevant recommendations are made, which have been decided upon consensually by the members of the ICN. These are widely disseminated, along with experiences of best practice. However, it is left to the individual competition authorities to decide whether and how to implement them.⁵⁷

Yet by far the greatest weakness of the ICN as a viable host for an MCA has been reflected in its exclusion from most discussions. The ICN is seen as a results-oriented organisation, and one that is composed of only those countries with existing regulators. Given that many countries, particularly the less developed, do not possess competition regulation, they are necessarily excluded from the Network.

A similar criticism has been directed at the OECD as a potential venue for an MCA because it is an organisation that is based on the membership of 30 of the richest countries of the world, who represent 60% of the global economy. Nevertheless, the OECD has been included as a potential host due to its experience in developing international guidelines for competition law and policy and facilitating member states in problem solving. The OECD's Global Forum on Competition aims to extend external co-operation beyond its regular capacity building programmes, to include high-level policy dialogue to build mutual understanding, identify "best practices" and provide informal advice and feedback on the entire range of competition policy issues

The OECD holds bi-annual meetings of a network of competition officials, government, business and consumer representatives, but it is questionable whether it would be able to gather sufficient support from non-OECD members to host a binding MCA. While it presently promotes conventions and recommendations relating to the activities of MNCs and a variety of other aspects related to trade, the lack of legal enforcement of such recommendations weakens their impact.

It is clear from the discussion that important problems involved in implementing effective competition policy revolve around enforcement, for which the solution may well be to have a binding MCA. Given that the WTO is the only rules-based international organisation with a disputes settlement body, and that it has experience in competition related issues and negotiating complex agreements, for some analysts it has become the obvious choice of venue.

The International Competition Network (ICN)

The Organisation for Economic Co-operation and Development (OECD)

The WTO

While no multilateral competition agreement exists within the WTO, competition policy is not a new issue within the GATT/WTO framework and is present in many of the provisions of existing WTO Agreements.⁵⁸ At present approximately 100 of the 140 members of the WTO have domestic competition regimes, and about 30 others are in the process of introducing them.

In assessing the potential impact of a MNC in the WTO, many developing country commentators put forward a broad veto against the WTO as a venue for a competition agreement, per se. It has been argued that if there is a genuine need for a multilateral agreement on competition, it is preferable and safer to locate the negotiations and the agreement itself in an organisation other than the WTO. Moreover, that if the objective is to arrange for co-operation among national competition authorities, then it is both unnecessary and inappropriate for the WTO to be the venue.

These commentators look at the past performance of the WTO as a primary reason not to expand its agenda any further, particularly given the acknowledged differences in objectives for competition policy and the uncertainty of gaining consensus on an agreement. They argue that many of the agreements forged within the framework of the WTO have benefited developed countries and large business interests to the detriment of the developing country members. The WTO has been accused of setting standards and rules in a "one size fits all" manner, which is inappropriate and be detrimental to developing countries.

The reason for these policies lie in the power structure of international political economy and the role of WTO as an organisation that reflects and supports the existing power base where the major developed countries usually get their way. Western interests within the WTO are dominated by the demands of their multinational corporations and export trade industries, marginalizing the concerns of other less powerful interest groups including consumers or those with scant resources or leverage to make their concerns know. The TRIPs and services agreements are pointed to as examples of previous WTO agreements that have been grossly imbalanced against the interests of both developing countries and consumers.

For these commentators, the WTO process is discredited because it has not shown itself to be driven by national welfare considerations. It is felt that the WTO is less likely to be a powerful instrument to encourage adoption of welfare enhancing competition rules than it is a forum for the abolition of border measures. The negotiations and the agreement itself will be geared towards the objective of market access rather than abusive practices, which affect social welfare and long-term sustainable development. There is no assurance that the agreed rules will be welfare enhancing or pro-development, since there is no guiding requirement for this within the WTO. Without this understanding, the inclusion of competition policy on the WTO agenda would place more obligations on resource-poor developing countries and possibly impair their ability to apply a broad range of development policies. This is at a time when policy makers in developing countries already face major difficulties in formulating national competition policies and establishing effective enforcement regimes.⁵⁹

Anti-WTO opinion

The more positive contrary view can be briefly summarised as follows. Given that a multilateral competition agreement could potentially be a positive step for consumers in developing and developed countries, and that a multilateral competition agreement is likely to have little meaning unless it is binding - the WTO seems to be the most appropriate or perhaps the only realistic venue in which to place it. It also has the advantage of experience in both competition issues and as a negotiating forum.

Furthermore, an MCA in the WTO could help to ensure that the benefits of freer trade and globalisation are passed on to consumers. That is, existing agreements with anti-competitive effects – such as TRIPs – can be subject to international challenge and review and other existing competition related provisions can be brought together more coherently and transparently. Rather than being captured by market access issues, the WTO process is now well suited to exploring problems and negotiating an initially limited agreement that will not impose too many conditions.⁶⁰ The lessons learnt from the negative TRIPs experience will be brought into any new negotiations, to ensure it is not repeated, along with increased concern for and understanding of developing country issues from civil society movements and governmental and intergovernmental organisations, such as DFID and UNCTAD.

The point that is stressed is that while an MCA in the WTO could potentially be of benefit to consumers and development, it would need to be carefully crafted with regard to both the objectives of competition policy for consumers and the existing core principles of the GATT/WTO. An analysis of both the mechanisms of WTO rules and of competition and competition policy are needed in order to broadly define what an MCA would need to cover, in both scope and detail, if it were to benefit consumers and efficiency, rather than the business strategies of large MNCs and developed country trade policies.

Pro-WTO opinion

7: Impact of existing WTO agreements

It is a general observation that the nuances of interpretation and divergences of definitions and objectives involved in competition policy suggest that only a very well designed and implemented MCA in the WTO would be of benefit consumers in both developed and developing country contexts.

As noted, the ambiguity surrounding the scope and substance of an MCA in the WTO has reinforced some observers' belief that competition should be withdrawn from future negotiations being addressed under the label of "new issues". This is because if a competition agreement is negotiated in the WTO, the major developed countries will most likely succeed in getting the core WTO principles – of liberalisation, market access and "non-discrimination", – placed at the centre of the agreement. This would perversely lead to greater concentration of market power by the MNCs, in the name of competition. It is felt that developing countries would have to establish national competition laws and policies that are inappropriate for their conditions and this would curb the right of governments to provide advantages to local firms, in a context of historical disadvantage.

The inclusion of a competition agreement in the WTO would have to conform to Most Favoured Nation status and National Treatment, the main objective of which is to eliminate discrimination. Given these provisions, countries can neither place special restrictions on what foreign investors can own nor maintain economic assistance programs that solely benefit domestic companies. For developing countries, non-discrimination towards foreigners would in reality be discrimination against locals who would not be able to compete on equal terms. This is likely to impact negatively on consumer welfare in the long run. However, it is acknowledged that some of these problems could be avoided through flexibility, incremental approaches and SDT.⁶¹

Contrary to this, there remains a strong body of opinion that holds that the creation of a multilateral competition agreement in the WTO could be framed to be in the interests of consumers. Such an agreement would offer new and tougher ways to prevent hard-core cartels and other restrictive business practices. This agreement would not follow a full-blown TRIPs model, but take an incremental approach. The development issues are recognised by stressing that for any competition agreement to be desirable it would need to be balanced towards information and co-operation rather than market access or convergence of national policies. It would need to be

Core principles

The need for flexibility

Coverage and the consumer interest

accompanied by specific policies of SDT with, for example, only developed countries holding an obligation to investigate cartels.

An eventual agreement along these lines is thought to be possible because past negotiating disasters (from the developing country perspective), occurred during the Uruguay Round, when there was no awareness or experience of the implications of agreements among developing country Members or civil society movements. There was also an acknowledged lack of transparency.

In putting forward broad notions about a WTO competition agreement, the analysis was divided into: a) agreement coverage and b) process issues. Although competition regimes cover issues such as mergers, hard-core cartels and abuse of dominance and anti-competitive agreements, it was thought that any agreement would best limit itself to the “low-hanging fruit” of hard-core cartels and mega-mergers. In procedural terms, granting national treatment and MFN on the procedural steps involved in merger processes, for example, would be both relatively easy and non-controversial. Further, dispute settlement could be limited to procedural issues which would identify cases of excessive abuse by foreign companies.⁶²

Overall, if such an agreement could be framed it could help to allow developing countries diverse competition regimes. This is then likely to help consumers. Consumer policy could be further promoted if WTO competition processes are obliged to allow participation by relevant civil society movements. This would include representative bodies of consumers and users, which could intervene to present their views in any process investigating issues with a potential to have an impact on consumers in terms of choice, quality or price. This objective could be further facilitated by the creation of ‘non-confidential’ files and the publication of basic market structure and industry data directly relevant to the case.

The current proposals in paragraphs 23, 24 and 25 of the Doha Ministerial Declaration include recognition of the case for a multilateral framework to enhance the contribution of competition policy to international trade and development. It also stresses the need for enhanced technical assistance and capacity building in the areas of policy analysis and development in order to evaluate the implications of closer multilateral co-operation for development priorities. This work is to focus on clarification of the core principles of transparency, non-discrimination and procedural fairness, provisions on hardcore cartels and the modalities for voluntary co-operation and support.

This has been interpreted to mean that developing countries would not be required to introduce national competition legislation immediately, nor would it establish a supranational competition authority or use the WTO Dispute Settlement Mechanism to overturn decisions made by domestic competition authorities. The draft proposal also allows for SDT for developing countries. A minimum agreement could thus be concluded, leaving the negotiations for a more complex multilateral framework for later, when parties wanted and were ready to tackle them. This fuller framework could include the core principles along with a well-designed transition arrangement. A GATS-type positive list could be adopted so that countries may decide on different types of substantive provisions relating to

Low-hanging fruit

The Doha declaration

Special and differential treatment

competition principles as well as the sectors that they may subject to the multilateral competition agreement.⁶³

It was also held that the WTO could potentially prioritise a convergence approach for those institutions and laws related to competition, based on permanent contact and co-operation between those responsible for the policies related to the promotion of competition in each country. Such an approach could be implemented through a system of “Peer Review”, as already used in the WTO to check trade practices (Trade Policy Review Mechanism TPRM). This would create discussion forums where a gradual process of convergence is generated under the auspices of the WTO. These forums would not suffer legal restrictions limiting the discussion, and would offer greater transparency to policy and as a consequence to the opinions of consumer associations and of the general public. Each Member could exchange and learn from the experience of others and institutions be strengthened by making use of technical assistance. It was thought that a proposal of this nature could be of great interest to developing countries, which generally are in the initial phases of the implementation of policy related to competition.⁶⁴

It is clear from the discussion that an extensive list of areas of consumer interest could potentially be positively addressed by the WTO negotiations on competition policy. Indeed, given that producer interests are heavily represented in policy-making processes, competition policy – by promoting the competitive process rather than competitors – is inherently biased towards consumer interests. The lack of appetite for a full-blown agreement covering both substantive and procedural obligations, on either the developed and developing country side means that any eventual agreement would be “soft”, restricting itself to the core principles covered in paragraph 25. In sum, if the approach to forming an MCA in the WTO was cautious, incremental and consensual, it could be designed to be positive in formally reinforcing those aspects of the WTO machinery that are more focused on consumer interests than producer interests.

A peer review mechanism

Competition as inherently biased towards consumers

8: Conclusions

The above discussion has served to demonstrate that there are various restrictive business practices harming consumers and economic development throughout the world, which could potentially be addressed within a multilateral competition agreement. The challenges involved in creating effective competition regimes at a national level, particularly in developing economies, are exacerbated by the difficulty of detecting and prosecuting cross-border hard-core cartels and anti-competitive MNCs. Enhanced co-operation to address international trade issues is required and this could be facilitated through an umbrella agreement at the multilateral level.

Existing conventions and recommendations relating to competition have not proved to meet the challenges that are presently faced and have been relatively ineffective in providing adequate safeguards against harmful business operations. The reason most commonly identified for this short fall is the fact they are not binding. They do not possess powers of enforcement.

The only international trade organisation presently capable of issuing a binding multilateral competition agreement is the WTO. If a binding multilateral competition agreement is required to promote markets that serve consumers and efficiency, the WTO is the obvious choice. This is particularly given that competition agreements already exist within provisions of the GATT/WTO and has been discussed in WTO Working Groups since 1996, in the run up to the 2003 Ministerial Meeting in Cancun. This is when consensus will be sought on the modalities for negotiating competition.

What is required is a careful examination of what consumers from both developed and developing country contexts need from a multilateral competition policy. This involves a close examination of the implications of the core principles of the WTO for a multilateral competition agreement, in the light of consumer policy and what such an agreement might cover in scope and substance. The negotiating positions and proposals of both the major players and developing country Members must be scrutinised. For whether or not a multilateral competition agreement in the WTO has the potential to serve consumer policy, depends entirely upon the issues and objectives it chooses to focus upon.

Consumers' needs should be seen as a requirement of what should be in a WTO multilateral competition agreement. This serves as a minimal objective

The need for enhanced international co-operation

Binding or non-binding agreements?

of a consumer policy, which reserves the right to take the issue of the legitimacy of the WTO into account and the right to the position that competition should be seen as distinct from other trade issues.

The need for increased recognition of consumer perspective in competition agreements

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What is Consumers International?

Consumers International (CI) supports, links and represents consumer groups and agencies all over the world. It has a membership of over 250 organisations in 115 countries. It strives to promote a fairer society through defending the rights of all consumers, especially the poor, marginalised and disadvantaged, by:

- supporting and strengthening member organisations and the consumer movement in general
- campaigning at the international level for policies which respect consumer concerns.

Consumers International was founded in 1960 as the International Organisation of Consumers Unions (IOCU) by a group of national consumer organisations. The group recognised that they could build upon their individual strengths by working across national borders. The organisation rapidly grew and soon became established as the voice of the international consumer movement on issues such as product and food standards, health and patients' rights, the environment and sustainable consumption, and the regulation of international trade and public utilities.

Consumers International is an independent, non-profit organisation. It is not aligned with or supported by any political party or industry. It is funded by fees from member organisations and by grants from foundations, governments and multilateral agencies.

Consumers International's Head Office is based in London. It has Regional Offices in Kuala Lumpur (Malaysia), Santiago (Chile) and Harare (Zimbabwe), and in London.



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