

Roger Zäch (editor)

# Towards WTO Competition Rules

Key Issues and Comments on the WTO Report (1998) on Trade and Competition

Proceedings of the seminar, Zurich University, 8–10 July 1999,  
organized in cooperation with Marino Baldi, Wolfgang Fikentscher,  
Ulrich Immenga and Hanns Ullrich

with contributions by

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## Preface

The progressive elimination of formal, governmentally imposed trade barriers under the General Agreement on Tariffs and Trade („GATT”) and – since 1995 – the World Trade Organization („WTO”) has brought competition policy into focus. This is because it is necessary to prevent private enterprises from impeding by restraints of competition the advantages that nations expect to make when international trade is freed from governmental barriers.

For several years already two groups of independent academic experts have dealt with the issues of establishing and implementing International Antitrust or Competition rules for the global economy. Wolfgang Fikentscher of Munich University, Germany, and his group set up the first coherent proposal for world competition law, the Draft International Antitrust Code, that in the fall of 1993 was presented to the WTO and OECD (see Wolfgang Fikentscher/Ulrich Immenga (editors), *Draft International Antitrust Code*, Baden-Baden 1995). John O. Haley, University of Washington, USA, and Hiroshi Iyori, Chuo University and Mitsubishi Research Institute, Japan, initiated a joint research project in 1992 on Comparative Competition and Trade Policy. Two workshops were held in 1994 in Seattle and in 1995 in Hawaii, that focused on Antitrust as Trade Remedy (see Haley John O./Iyori Hiroshi (editors), *Antitrust: A New Trade Remedy?* Pacific Rim Law & Policy Association 1995).

In 1997 members of both groups began to „merge” and met at the College of Europe in Bruges, Belgium, to discuss issues relating to an international system of antitrust law (see Hanns Ullrich (editor), *Comparative Competition Law: Approaching an International System of Antitrust Law*, Baden-Baden 1998). In Bruges it was also decided that the groups should continue their work with a seminar to be held at Zurich University, Switzerland. At that moment it was already clear that International Competition Law which had started out as a topic of academic interest and concern had in the meantime become a political issue on the agenda of WTO. In fact the first WTO Ministerial Conference, held in Singapore in December 1996, directly addressed the issue and established a Working Group on the Interaction between Trade and Competition Policy. The Group, chaired by Professor F. Jenny presented a comprehensive report on its deliberations in November 1998 (Jenny-Report).

The Seminar at Zurich University took place from July 8 to 10, 1999. The group, with participants from Japan, the USA, Argentina and Europe, invited high ranking officials from the WTO, the European Commission, Directorate-General IV: Competition, and the German Bundeskartellamt. The main seminar aims were to comment on the Jenny Report (1998), to identify key issues of competition law for the WTO market place and to present proposals for such a law. By doing this the participants of the seminar hoped to show possible approaches to establishing WTO competition rules. The results are presented in this volume.

As was the case in Bruges, the Zurich seminar also made clear that the differences of approaches to an international competition law mean that negotiations in this area will be difficult. All the participants agreed that the WTO Working Group had done excellent work. While they individually suggest different and differentiated approaches to an international competition law they all recommended increased efforts by WTO to reach an international consensus.

It is obvious that the success of a seminar and a publication project like this is only possible thanks to the support of many people. I would like to express my gratitude by naming them all here:

*The co-organizers* Marino Baldi, Wolfgang Fikentscher, Ulrich Immenga and Hanns Ullrich and *the authors*, particularly for meeting the tough deadlines set for finalizing their papers, *the sponsors* Dr. h.c. Wolfgang Schürer, MS Management AG, Jörg Kehl, Zurich University Foundation, Elisabeth Steiner, Migros-Kulturprozent, lic.rer.pol. Ilse Rollé-Ditzler, Coop Switzerland, Dr. Rudolf Stämpfli, Stämpfli Verlag AG, Dr. Markus Berni, Baker & McKenzie, the Government of the Canton of Zurich and Dr. Andreas Kellerhals, Postgraduate Program International Business Law of Zurich University,

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Finally, a personal note of thanks to my academic mentor and friend, Professor Walter R. Schlupe, the „Swiss member” of the Fikentscher Group, who awakend my interest in the area which is the subject of this volume, International Competition Law.

Zurich, August 10, 1999

Roger Zäch

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- Regierungsrat des Kantons Zürich

## List of Abbreviations

ABI	Official Journal of the European Communities
ASEAN	Association of South-East Asian Nations
BGH	Bundesgerichtshof
BKartA	Bundeskartellamt
BWM	Bundeswirtschaftsminister
DIAC	Draft International Antitrust Code der Fikentscher Gruppe
E.C.R.	European Court Reports
EC	European Communities
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECT	Treaty Establishing the European Community
ed.	edition
Ed.	Editor
Eds.	Editors
EEC	European Economic Community
EFTA	European Free Trade Association
Encl.	Enclosure
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (journal)
EWS	Europäisches Wirtschafts- und Steuerrecht (journal)
F. Supp.	Federal Supplement
FKVO	EG-Fusionskontrollverordnung (Council Regulation [EEC] n. 4064/89 on the control of concentration between undertakings)
Fordham Corp.L.Inst.	Fordham Corporate Law Institute
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade



GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (journal)
GWB	German Act Against Restraints of Competition
IP	Intellectual Property
IPR	Intellectual Property Right
n.	note
NAFTA	North American Free Trade Association
O.J.	Official Journal of the European Communities
p.	page
R&D	Research and Development
Swiss Cartel Act	Swiss Federal Act on Cartels and other Restraints of Competition
Trade Reg. Rep. (CCH)	Trade Regulation Reporter
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Aspects of Intellectual Property Rights
U.S.	United States Supreme Court Reports
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
WuW	Wirtschaft und Wettbewerb (journal)

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# I. Fundamentals



# Globalization, Competition and Trade Policy: Issues and Challenges

Frédéric Jenny\*

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- I. The goals and benefits of trade liberalization
- II. The goals and benefits of regulatory reforms
- III. The goals and benefits of competition policy
- IV. The challenges of globalization
- V. The complementarity between trade policy, domestic deregulation and competition policy in the perspective of globalization
- VI. Competition policy and economic development
- VII. Options for the future
- VIII. Conclusion

For the last three years the trade and competition communities have hotly debated the question of how to address the interface between trade and competition in the context of the globalization of markets. Scores of conference have been held on this issue, hundreds of papers have been produced for academic conferences, all of the international organizations which deal with international economic relations have spent considerable time studying the issue. At times this debate has been highly emotional, at times it has been highly

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\* Frédéric Jenny is Vice-Chairman of the Conseil de la concurrence, Chairman of the OECD Competition law and Policy Committee and Chairman of the WTO Working Group on Trade and Competition Policy. The views expressed in this paper are solely those of the author and should not be ascribed to the above organizations.

sophisticated. It has also been very complex because the study of the interface between trade and competition in the context of the globalization of markets raises political, economical, legal and institutional issues at both domestic and international levels. Very different opinions are still being expressed on how to deal with this issue and some may feel that we are no closer to building a consensus than we were three years ago and may wonder whether all the energy that has gone into the debate has not been spent in vain.

Yet, if we go beyond the political posturing which is inevitable before any upcoming WTO ministerial, it should be recognized that we are not where we were three years ago. For one thing, most participants in the debate now admit that the globalization process implies that the issue of the interface between international trade and competition has to be addressed in some way or, as Jim Rill would say, that „the elephant is on the table. It will not go away”. Second, the debate has allowed us to explore in much more detail than had been the case previously the differences and the complementarities between trade policy and competition policy both at the substantive and at the instrumental level. The fact that the trade and competition officials in each capital had to agree to present a national contribution at the WTO Working group has contributed to this process. In the course of the debate, competition law enforcers in many developed countries have had the opportunity to abandon their situation of splendid isolation, have become less intellectually arrogant (vis a vis trade officials or officials of developing countries) and have gained in credibility with economic policy makers. At the same time, trade officials, on the other hand, have become more aware of the fact that their negotiating skills and tools had limits for gaining effective market access. The Asian crisis has also contributed to making developing countries more aware of the benefits of competition (or rather the dangers of neglecting the role of competition forces) and the usefulness of controlling global markets. The remarkable progress of reflection on bilateral cooperation instruments that has occurred in the context of OECD has also been partly a by-product of this debate.

Only time will tell if and how the international community will choose to build on these achievements.



In the remaining sections of the paper we explore some of the issues which were addressed in the course of the three year debate on the interaction between trade and competition policy.

## **I. The goals and benefits of trade liberalization**

The benefits of international trade liberalization (which has so far mostly focused on the elimination of „at the border” trade obstacles) are well known. First, trade liberalization expands the economic opportunities of firms by allowing them to reach consumers located beyond their borders. By expanding the potential market of domestic firms, trade liberalization also allows them to benefit from economies of scale or of scope which they could not benefit from in a purely national context. Thus, it contributes to cost reduction and potential increase in real income.

Second, trade liberalization implies more market competition which in turn means that static efficiency gains in production and distribution are passed on to consumers and that innovations reach the market place.

Third, because trade liberalization is a two way street, it contributes to a reallocation of resources in each of the trading nations. Resources invested in domestic industries which produce at a relatively high cost compared to foreign industries tend to be shifted over the long run to industries where they create more value.

The above benefits constitute the main reason why the community of trading nations has pursued a determined effort to liberalize international trade for the last fifty years.

While increased domestic competition and increased foreign investment may entail long run gains for labor and consumers, trade liberalization also entails short or medium term adjustment costs and raises political difficulties.

First, although trade liberalization brings overall benefits for trading countries, the distribution of gains may be uneven among countries since some may be better able to take advantage of the enhanced economic opportunities because