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**TRADE AND COMPETITION:  
WTO FRAMEWORK ON COMPETITION RULES**  
*Commission Discussion Paper*

## **PRELIMINARY UNICE COMMENTS**

### 1. INTRODUCTION

UNICE has noted the Commission Discussion Paper on Trade and Competition and welcomes the opportunity to take part in this important debate. UNICE might issue complementary comments once the debate evolves further at EU and WTO level.

UNICE understands that the Commission is concerned that markets opened by increasingly strict WTO disciplines are closed off to foreign competition by anti-competitive practices.

As a preliminary point, UNICE would like to underscore that it believes companies should be able to compete with each other in individual foreign markets on a level playing-field, taking full advantage of the expansion of international trade. The fundamental issue is the narrow one of systemic foreclosure of a market. UNICE therefore sees clear benefits for business in ensuring the achievement of this narrow outcome throughout world markets. In this respect UNICE appreciates the Commission's discussion paper.

Having said this, UNICE recognises the inevitable detailed differences of different competition law practices, procedures and substantive regimes around the world but would welcome a WTO agreement on objectives for competition rules which is directed to what is necessary to prevent foreclosure of markets.

UNICE is concerned about a binding multilateral agreement on specific competition rules concluded in the WTO as opposed to clear objectives or guidance for a voluntary set of rules. WTO is not intended or equipped to operate at the private-to-private level. UNICE fears that a binding agreement cannot but result in binding review of specific essentially private cases by bodies that are inappropriate and ill-equipped for that task. This will greatly slow down commerce and escalate private disputes to international problems.

UNICE will elaborate further on these and other issues below.

## 2. EU OBJECTIVES

UNICE believes that multilaterally agreed objectives for competition rules should be directed to what is necessary to prevent foreclosure of markets by anti-competitive practices.

UNICE believes that to that effect competition rules, and their enforcement, should be based on core principles of efficiency, transparency and non-discrimination.

Multilaterally agreed objectives for competition rules should not frustrate the effective working of the market mechanism and slow down commerce. Such a framework should ensure that bureaucracy is as limited as possible and that legal certainty is maximised.

UNICE recognises the inevitable detailed differences of different competition law practices, procedures and substantive regimes around the world. Concern has been expressed, although it is not universally shared, about the proliferation of different competition law regimes around the world. Certainly in the merger field, UNICE would deplore a situation where companies have to comply with fundamentally different approaches to competition law in a variety of countries and it is concerned that domestic competition laws could be abused for protectionist purposes.

In this respect, UNICE believes that one objective to be included should focus on finding solutions to competing claims for jurisdiction, issues concerning claims of extraterritoriality and multiple parallel proceedings. In addition, UNICE would refer to the lack of clear basic definitions in competition law. For instance, even the concept of a 'hard-core' cartel as set out in the recent OECD Recommendation concerned seems to be open to many interpretations.

UNICE urges the Commission to consider means of achieving the objectives set out above and avoiding the described inefficiencies.

## 3. PRIVATE PRACTICES VS GOVERNMENT PRACTICES

UNICE notes that the Commission's discussion paper mainly focuses on anti-competitive practices by business. UNICE would like to stress that not only anti-competitive practices by business can have an impact on access to a market but that, similarly, and more significantly, anti-competitive practices by governments seriously foreclose foreign markets.

UNICE therefore believes that any agreed objectives for competition rules should clearly address anti-competitive practices by governments.

## 4. EXCHANGE OF CONFIDENTIAL INFORMATION

UNICE understands that the Commission does not at this point in time envisage a sharing of confidential information as part of a multilateral framework of competition rules. On the other hand the Commission believes that WTO members should supply each other with all relevant non-confidential information and information whenever authorised to do so by the source of information.

UNICE believes that the maintenance of confidentiality is essential for EU companies and therefore opposes the exchange of confidential information.

UNICE's main concerns reside in the differences of approach between competition law enforcement systems. UNICE is worried that information notified for the purposes of receiving the clearances necessary under, for instance, EU law, may have to be disclosed to third parties, pursuant to the law of the receiving authority and used for another purpose in a system whose antitrust rules differ substantially from those of the EU.

UNICE believes therefore that all forms of information exchange should require the consent of the parties if confidential information identified as such either by the party or by the domestic law of the supplying or receiving authority is involved. Information exchanged should be subject to legal professional privilege when it would so qualify under the rules of either the supplying or receiving jurisdiction.

In addition, UNICE believes that consent alone is not enough. Exchanges should be subject to safeguards in order to ensure that information is not used for purposes other than those for which it was requested and to avoid uncontrolled disclosure.

Companies should be given notice of any proposed exchange of confidential information and they should have the possibility to apply to a court regarding the need for the exchange and the question of whether or not the information is confidential. This notice should be given prior to the exchange unless this would jeopardise an investigation into a hard-core cartel.

Any request for information should include precise identification of the information required, a clear statement of the reasons for the request and the manner in which the information is to be used. In addition, assurances should be given that there is a substantive case rather than a mere suspicion and that the requesting authority has exhausted its own administrative procedures and possibilities before making the request. Furthermore, assurances should be given that the information will not be disclosed outside the receiving authority, that the information will not be used for other purposes than for which it was disclosed and that the information will be subject to conditions of confidentiality at least as stringent as those of the supplying jurisdiction.

## 5. DISPUTE SETTLEMENT

UNICE regards as highly undesirable the review, within the framework of a trade organisation, of decisions on individual competition cases given by national jurisdictions. In this context it opposes binding review of individual cases in the framework of a WTO dispute settlement procedure.

UNICE understands that the Commission is not in favour of a review of individual decisions in the context of a WTO dispute settlement, but that it would welcome such settlement when there is a pattern of failure on the part of a government to introduce competition rules or to bring domestic competition law and enforcement thereof into line with the multilaterally agreed framework. UNICE fails to understand how such a dispute, e.g. on the discriminatory or non-transparent pattern of enforcement, could be considered without entering into the substance of more than one case leading to gross legal uncertainty. In this area it is impossible to distinguish form from substance.

In association with this, UNICE is worried about the binding nature of any agreement on competition rules concluded in the WTO as opposed to clear objectives or guidance for a voluntary set of rules. WTO is not intended or equipped to operate at the private-to-private level and UNICE fears that a binding agreement cannot but result in binding review of specific essentially private cases by bodies that are inappropriate and ill-equipped for that task in the context of a dispute

settlement procedure linked with binding multilateral trade agreements. This will greatly slow down commerce and escalate private disputes to international problems.

Although the case can be made in favour of a binding agreement on core principles (but with the attendant difficulties mentioned above), UNICE invites the Commission to consider a voluntary approach. This approach, possibly accompanied by appropriate incentives and follow-up provisions, might also be more suitable for addressing the concerns of some developing countries.

## 6. EXCEPTIONS

UNICE envisages that during negotiations in the WTO on a binding multilateral framework of competition law, the issue of exceptions for developing countries might be raised. UNICE would prefer these exceptions not to take the form of a general substantive exemption for, say, certain cartels but rather provide for transition periods.

## 7. CONCLUSION

UNICE believes that companies should be able to compete with each other in foreign markets on a level playing-field, taking full advantage of the expansion of international trade.

UNICE therefore sees clear benefits for business in the prevention of market foreclosure by anti-competitive practices. In this respect UNICE welcomes a multilateral agreement on objectives for competition rules which is directed to what is necessary to prevent such foreclosure.

UNICE believes that competition rules, and their enforcement, should be based on core principles of efficiency, transparency and non-discrimination. Multilaterally agreed objectives for competition rules should not frustrate the effective working of the market mechanism and slow down commerce. Such a framework should promote a reduction of administrative burdens and enhancement of legal certainty on a global scale.

UNICE opposes the review of individual cases in the framework of a binding WTO dispute settlement procedure and fears that the Commission's latest proposal will inevitably lead to such review. It therefore invites the Commission to consider a voluntary approach.

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