

Promoting Competition:
European Union and the Global Competition Order

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Abstract

Competition policy refers to a set of laws and policies that aim to ensure that competition in the marketplace is not restricted, such as laws that prohibit agreements to keep prices artificially high or markets segmented. In the last few decades, we have witnessed a proliferation of national competition laws, regional and bilateral cooperation agreements and efforts at multilateral cooperation on competition issues. The European Union has been an important player shaping these developments being one of the strongest competition authorities in the world. In this paper, I investigate the role of the EU in shaping developments on competition policy at the international level. While the EU's attempts at creating a truly global competition order through the World Trade Organization failed, the EU continues to 'export' its competition regime to its economic partners through bilateral and regional agreements, and informal dialogue with competition authorities around the world. This paper explores the conditions under which the EU's attempts at internationalizing competition policy have been successful.

Competition policy refers to the set of laws and policies that aim to ensure that competition in the marketplace is not restricted, such as laws that prohibit agreements to keep prices artificially high or markets segmented. In the last few decades, interest in competition policy has exploded: over a hundred countries now have competition laws compared to around twenty in the 1980s. In addition to the proliferation of national competition laws, international efforts at cooperation on competition laws and their enforcement have multiplied. More than twenty bilateral and multilateral cooperation agreements exist on various aspects of competition.

The proliferation of national, bilateral and multilateral competition regimes has created opportunities for global cooperation on competition issues. Yet, attempts at establishing international cooperation on competition policy have had mixed success. Existing international organizations that work on competition policy related issues either have limited membership (EU) or aim at informal cooperation (UNCTAD, International Competition Network) or both (OECD). The World Trade Organization established a Working Group on the Interaction between Trade and Competition Policy in 1996 as an initial step towards cooperation, but its General Council ended the activity of the Working Group in 2004 (Cini and McGowan 2009). Currently there is no formal multilateral competition regime at the global level. Instead, what exists is a dense web of cooperation agreements and institutions that take bilateral or limited multilateral forms.

The EU has been the most ardent supporter of the global competition policy initiative within the framework of the WTO. The international aspect of competition policy has been a priority and a challenge for the European Commission since the early 1990s. This paper investigates the role of the EU in shaping developments on competition policy at the international level. I argue that the failure of the WTO initiative does not signify that the EU's efforts at internationalizing competition policy proved unsuccessful. While attempts at creating a truly global competition order through the WTO failed, the EU continues to 'export' its competition regime to its economic partners through bilateral and regional agreements, and informal dialogue with competition authorities around the world. The paper explores and evaluates EU's various attempts at internationalizing competition policy and the conditions under which they have been successful. My argument is that in an international environment in which a multilateral competition regime could not be established, the EU's most successful strategy has been to work bilaterally to convince its trade partners to adopt competition laws along the lines of EU's competition policy. This has worked relatively well for countries at the EU's periphery, such as candidates and prospective candidates. With stronger trade partners such as the United States (US), however, the relationship is more complicated. The EU finds that it is frequently at the receiving end of policy influences from the US, and uses bilateral and informal multilateral networks in order to manage this relationship on a more equal footing.

Analyzing the EU's attempts at internationalizing competition policy is significant for two reasons. First, such an investigation will provide insights into the EU's role in international competition policy. Having developed possibly the most rigorous multilateral competition policy regime in the world, the EU has visions of extending this regime beyond its borders. In addition to pursuing such a vision, at a practical level, the EU and its member states, as well as other countries have to cope with a heightened possibility of anti-competitive behavior that transcends borders. The paper attempts to shed light on how the evolution of EU's own competition regime shapes its international strategies, and how successful these have been in helping the EU achieve its objectives in protecting and promoting competitive markets.

Second, exploring the EU's role in global competition policy issues also gives clues to its evolving role in the global economy. Under what conditions is the EU likely to project a strong vision and be able to achieve its goals in the global economy? The paper begins to address some of these issues by focusing on EU's international competition policy agenda.

The paper proceeds as follows. The following section discusses the developments in competition policy issues at the international level, focusing on two parallel trends of widespread diffusion of national competition laws and the intensification of efforts to cooperate on competition policy issues at the international level. The third section focuses on the strategies that the EU has followed in trying to shape these two trends and the effectiveness of its strategies. The fourth and final section draws some conclusions of the competition policy case for the broader context of EU's external economic relations.

The Internationalization of Competition Policy

Competition policy refers to a number of regulatory activities that are aimed at ensuring competitive markets, including merger review, cartel and monopoly policies (Damro 2006, 5). Competition laws prohibit practices and policies that seek to exclude or discriminate against rival firms or that intend to reduce competition among incumbent firms (Ibid, 5). For instance, competition laws prohibit cartels, which are secret agreements "between competitors who in coordination fix or increase their prices, restrict supply by limiting their sales or their production capacities, and/or divide up their markets or consumers" (Commission 2004, 2). Merger review seeks to ensure that a merger does not reduce competition in a market by creating or strengthening a dominant player. The underlying objective of various domestic competition laws is to promote competition, with the belief that doing so will increase economic efficiency and consumer welfare (Cini and McGowan 1998, 2-3; Damro 2006, 5).

Competition law and policy have become more salient in the last twenty years around the world. There are two sides to this development: first, a large number of countries have adopted national competition laws in a relatively circumscribed time period, and second, bilateral, regional and multilateral efforts to cooperate on competition policy issues have intensified. In order to evaluate the effectiveness of

EU's strategies to influence competition policy developments at the international level, we need to explore both of these developments in the sphere of competition policy.

The popularity of competition laws is a relatively new phenomenon. Only the United States, Canada and Australia had competition laws prior to World War I. Several European countries took steps in this direction in the 1920s. For instance, Germany had considered adopting laws to protect competition in the late 19th century, and after some unsuccessful attempts adopted legislation in this direction in the 1920s (Gerber 2006, 20-1). After World War II, the awareness and the acceptance of competition policy increased mostly due to the US efforts. Several European countries and Japan adopted competition laws. Many of the initiatives to develop competition policies in the European countries relied on the legal and institutional lessons drawn from the US experience, and were encouraged actively by the United States (Damro 2006, 31; Cini and McGowan 1998, 9).¹

The US also supported attempts at establishing a pan-European competition policy, the first effort for which is materialized in the Treaty of Paris (1951) establishing the European Coal and Steel Community, followed by the competition rules of the Treaty of Rome (1957) establishing the European Economic Community. The European Community's competition policy developed gradually and incrementally for the first two decades largely as a reactive policy, and since the 1980s, as a much more active one (Cini and McGowan 1998, 30). Moreover, the scope of EU's competition policy has widened gradually: in the 1960s competition policy focused on restrictive practices, in the 1970s, it started tackling monopolies, and in the 1980s and 1990s, it has expanded into merger control and monitoring of state subsidies (Ibid, 36).

In addition to spreading competition laws throughout Europe, the US sought more widespread diffusion of competition laws throughout the world. The Charter of the failed International Trade Organization included provisions dealing with anticompetitive behavior internationally, and required the members of the organization to adopt competition laws. With the failure of the organization the diffusion

¹ However, most authors also point to the influence of an interwar school of thought originating in the Weimar Republic. This ordoliberal thinking emerged among a number of lawyers and economists belonging to the so-called Freiburg school in the 1930s, and was influential in the adoption of an antitrust law in Germany in 1957 (Amato 1997; Weinrauch 2004).

of competition laws in the 1950s and 1960s remained limited. Through the 1970s and 1980s, competition laws spread steadily to countries in different regions of the world with varying degrees of income.

----- FIGURE 1 ABOUT HERE -----

The explosion in competition law adoption came in the late 1980s and the early 1990s, as seen in Figure 1. Central and Eastern European and former Soviet countries going through market reforms contributed to this explosion, but the wave of competition policy adopters were not limited to these. As Figure 2 demonstrates, most regions saw an upsurge in competition law adoptions in the 1990s. Competition law adoptions continued around the world through the 2000s.

----- FIGURE 2 ABOUT HERE -----

Competition law adoptions show variations across regional lines. Table 1 presents the regional breakdown of countries with competition laws in 2006. It is in Europe and Central Asia that we see the highest proportion of countries with such laws, followed by the Americas, East Asia and the Pacific, and South Asia. In all of these regions, more than half of the countries have adopted laws to protect competition. The Middle East, North Africa and Sub-Saharan Africa are the regions in which competition laws have diffused the least, but even in Sub-Saharan Africa, a quarter of countries have adopted such laws.

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In parallel to the development to the horizontal spread of competition laws around the world, we can observe an intensification of international efforts at cooperation on competition efforts in the last two decades. Efforts to establish a global competition regime started as early as 1947, with the draft provisions of the International Trade Organization (ITO) which included measures on restrictive business practices. These rules were included in the draft ITO against the backdrop of the 1930s, when international cartels had been widespread and were perceived to have been damaging to the world economy (Woolcock 2007, 2). The ITO never entered into force and the attempts at creating international

competition provisions were shelved. Efforts at competition policy cooperation in a multilateral trade forum did not pick up again until briefly in the 1960s—which were unsuccessful—and then much later at the Singapore WTO Ministerial meeting in 1996.

In the meanwhile, bilateral venues have become significant for cooperation on competition policy. The first bilateral agreement on competition policy was between the United States and Germany in 1976, followed by an agreement between the US and Australia in 1982. Bilateral agreements on competition have become more significant and widespread in the late 1980s and 1990s. Most significantly, after a history of discord, the EU and the US signed a bilateral cooperation agreement on competition policy in 1991. Both the US and the EU claim extraterritorial application of their competition laws, which had in the past led to frictions. The Bilateral Agreement seeks to address anticompetitive business activity that occurs outside the jurisdiction of one party, but adversely affects the interests of that party (Damro 2006, 13). It emphasizes the practice of mutual notification by competition authorities during the initial decision-making process, and stresses consideration of the effects of enforcement activities on the other party. The Agreement also introduces ‘positive comity,’ a principle that allows one competition authority to request formal consideration of their national interests by a foreign counterpart (Commission 2008; Damro 2006, 13).

The Bilateral Agreement was followed by the Positive Comity Agreement (PCA) in 1998, which encouraged competition authorities in one jurisdiction to request that their foreign counterparts conduct competition investigations on their behalf. The Administrative Arrangements on Attendance, concluded in 1999 is a non-binding effort to allow competition authorities of the EU and the US to attend certain stages of each others’ investigations on a case-by-case basis. These three bilateral agreements, along with increased contact of competition authorities of the EU and the US—the European Commission’s Directorate-General Competition and the US Department of Justice and the Federal Trade Commission’s Antitrust Division—according to Damro (2006), has led to a more cooperative relationship between the EU and the US on competition policy issues.

In addition to the transatlantic relationship that has developed cooperatively since the early 1990s, both the EU and the US have concluded numerous bilateral agreements. The EU has formal bilateral agreements with Canada and Japan, association agreements with potential accession candidates (e.g. with some Balkan countries), and inter-agency agreements, such as with Korea. Furthermore, the EU cooperates with other countries in competition policy matters through free trade agreements or economic partnership agreements, such as through the trade agreement with Mexico, the partnership agreement with Russia, and EU-Mediterranean association agreements with Morocco and Tunisia (Commission 2008; Lowe 2006). The US has bilateral agreements on competition policy with Australia, Brazil, Canada, Israel and Japan (Marsden 2003, 24-5). These bilateral agreements cleared the way for case cooperation and policy dialogue among competition authorities with positive results. For instance, the EU competition authorities cooperated with their counterparts on important cartel cases such as the international vitamin cartel, including the planning and coordination of dawn-raids on the companies under investigation (Lowe 2006).²

Bilateral agreements tend to be the easiest form of cooperation on competition policy because interagency trust and monitoring is easiest when only two parties are involved. However, the proliferation of bilateral cooperation agreements results in a patchwork of rules and norms, and therefore creates a complexities and anomalies for the competition authorities and the firms involved (Baker et al. 1997, 447-8). Moreover, they may increase frictions and problems with third parties. Potential problems with national, bilateral and regional agreements highlight the need for multilateral cooperation on competition policy. Multilateral cooperation is advantageous because greater jurisdictional coverage increases the potential magnitude of benefits available from cooperation. However, the likelihood of achieving a far-reaching agreement on competition policy decreases as more jurisdictions become involved, given the diversity of objectives, laws and enforcement mechanisms in different countries (Baker et al. 1997, 449).

² In 2001, the European Commission fined eight companies, including Hoffman-Roche, for their participation in cartels designed to eliminate competition in the vitamin sector. The fines amounted to more than Euro 800 million (Commission 2004, 2)

Nonetheless, there are a number of multilateral forums through which countries have attempted to address international competition issues.

The OECD has been involved in non-binding recommendations in competition policy enforcement since the 1960s. Various committees within the Organization have produced a number of reports and recommendations on different aspects of competition policy over the years, such as recommendations on methods of cooperation between its members, on exchange of confidential business information and on hard core cartels. The OECD approach has so far emphasized soft convergence on competition laws and their enforcement, and steered clear of any implication that uniformity among nations and a world competition policy agency is the goal (Doern 1996, 316). The OECD Competition Committee may be a particularly efficient forum for cooperation, since its membership is limited to developed economies that share broadly similar attitudes on cooperation. This has allowed the OECD members and the working groups to discuss the possibility of convergence over some core competition issues, without overt attempts at harmonization. However, the limited membership of the Organization prevents any agreement that may be reached here from being perceived as legitimate by developing countries (Campbell and Trebilcock 1997).

Another non-binding multilateral forum is the UNCTAD. The involvement of UNCTAD in the area of competition policy is partly due to the vacuum created by the failure of the proposed International Trade Organization, which included rules on restrictive trade practices (Doern 1996, 312). In 1980, the UNCTAD adopted a Code on Restrictive Business Practices. The impetus for action on restrictive business practices partly came from the developing countries in the late 1970s, which raised concerns about possible anticompetitive behavior by multinational companies and these countries' limited capacities to discipline such abuses (Benson 1980). These principles reflect the broad political spectrum of the United Nations, and recognize the need for preferential treatment for developing countries (Doern 1996, 312). They also include principles of good conduct for enterprises including transnational corporations, which, again, reflect the interest of developing countries (Ibid., 312). Cooperation in

UNCTAD has produced the most detailed official multilateral agreement on business practices; however, the non-binding nature of the agreement detracts from its effectiveness. According to some observers, however, the Code has played a significant role in expediting the adoption of competition policies in the developing countries, which have flocked to the UNCTAD to learn more about the operation of competition policies (Sell 1995, 317-8).

The mixed success of these non-binding multilateral cooperation efforts have led policy-makers and scholars to turn to the GATT/World Trade Organization as a possible forum. In the early 1990s, a group of competition scholars—predominantly European, and particularly German, but also US and Japanese—formed a working group which published a Draft International Antitrust Code (DIAC) (Drexl 2003). The DIAC proposed a competition code of minimum standards to be incorporated into the GATT and to be enforced in domestic jurisdictions. The enforcement of the Code was to be supported by an International Antitrust Agency, which would monitor compliance and act as dispute resolution body. The proposal received significant criticism from scholars and policy-makers in the US, and received only lukewarm support from Europeans (Gerber 1999, 127-8).

Around the time that the DIAC was published, the EU was starting to push for its own vision of global cooperation on competition policy. It was Sir Leon Brittan, the Commissioner responsible for competition policy in the EU, that revived the call for international cooperation on competition policy enforcement in the World Economic Forum in Davos in 1992 (Marsden 2003, 55). The US Department of Justice had serious concerns about bringing antitrust issues into the WTO, a binding multilateral trade agreement, but finally the US announced that it was willing to go along with other countries to begin a modest work program on competition policy (Marsden 2003, 57-8). In the 1996 Singapore ministerial meeting of the WTO, a working group on competition was set up with the task of studying the interaction between trade and competition policy. From 1997 until 2004, the Working Group on the Interaction between Trade and Competition Policy met three times a year to exchange ideas and identify areas of agreement and dissent (Marsden 2003, 60). In July 2004, the WTO General Council decided that the issue

of competition policy “will not form part of the work program set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round,” and ended the activity of the working group (World Trade Organization 2008).

The strongest objections to multilateralizing competition policy come from the US authorities. The US policy-makers are concerned that multilateral efforts would lead to a competition code that represents lowest-common denominator, and would thus weaken the US’ antitrust policy (Wood 2004, 185-6). They also see multilateral cooperation as an infringement on US sovereignty, and potentially an obstacle to the extraterritorial application of US antitrust laws.³ The US has been very active in enforcing its laws extraterritorially in the past, which has led not only frictions with the EU, but also to resentment around the world.

With increased economic globalization, the US anti-trust authorities have come to acknowledge the difficulty of competition policy approaches that rely solely on national laws and bilateral cooperation agreements (Pitofsky 1999, 166; Rill and Goldman 1997). Extraterritorial application of US antitrust rules encounters frequent legal and practical obstacles, particularly, in cases in which involved companies do not have any legal presence in the US. Often the key documents and witnesses are located abroad, out of reach of the evidence-seeking authority (Rill and Goldman 1997, 166; Weinrauch 2004, 93). For example, in 1994, a US court dismissed a criminal case which had been brought by the Department of Justice against General Electric, a Swiss affiliate of De Beers and two foreign nationals for conspiring to raise the price of industrial diamonds. The Court reasoned that much of the cartel behavior took place in Europe and the evidence was beyond the reach of the Department of Justice (Klein 1996b; Weinrauch 2004, 94). Additionally, it frequently proves difficult to craft meaningful remedies in antitrust cases when foreign companies have no assets within the territory of the US (Weinrauch 2004, 94).

The US antitrust authorities also gradually realize the limits of bilateral cooperation agreements. The

³ US policy-makers emphasize that bilateral and regional agreements and ongoing efforts on multilateral cooperation do not prevent the possibility of rigorous extraterritorial application of US antitrust laws (International Competition Policy Advisory Committee 2000; Klein 1996a).

US has been successfully cooperating with its largest trading partners through bilateral agreements (Damro 2006). One significant obstacle to continued reliance on bilateral agreements is the exchange of confidential business information in the context of such agreements. In the past, bilateral agreements did not allow for exchange of such information. The Clinton administration and the US Congress realized the limits this has imposed on the possibility of obtaining evidence in antitrust cases involving foreign companies, and passed the International Antitrust Enforcement Assistance Act (IAEAA) in 1994 (Klein 1996b). The Act gives explicit authority to the US antitrust agencies to negotiate bilateral antitrust cooperation agreements through which they can exchange evidence on a reciprocal basis with foreign antitrust agencies, and to assist each other in obtaining evidence located in the other's country. The US has already concluded such an agreement with Canada, and is working on agreements with other countries and the EU. However, such agreements require explicit authorization in the laws of other countries for such exchange of information, and adequate safeguards for protecting confidential information. Zanettin and Ehlermann (2002, 131-4) point out that small countries have been skeptical of such agreements to share information between their antitrust agencies and the US, because they fear that such agreements may create or increase imbalances between the countries. Therefore, US attempts at concluding bilateral cooperation agreements that allow for such exchange of information have not been very effective.

The limits of extraterritorial application and bilateral agreements, and its reluctance to negotiate binding multilateral agreements has led the United States to pursue other means of international cooperation on competition issues. One such initiative was proposed by the International Competition Policy Advisory Committee of the US, which was established in 1997 to examine international competition policy issues, and which included a group of antitrust policy-makers and scholars. The Committee, in its final report published in 2000, found the WTO to be an inappropriate forum for discussing competition policy issues and suggested the creation of a "Global Competition Initiative," a non-binding, new venue where government officials, as well as private firms and nongovernmental

organizations can exchange ideas and work towards common solutions to competition law and policy problems. This document reflected the type of multilateral effort that the US was willing to make on internationalizing competition issues: one that fosters “dialogue directed toward greater convergence of competition law and analysis, common understanding and common culture,” and that does not require a new international bureaucracy and funding (International Competition Policy Advisory Committee 2000, 29). The initiative, which got the support of the EU and Canada, led to the launching in 2001 of the International Competition Network (ICN). The major goals of the ICN—a network of national competition agencies from developing and developed countries—are to support soft convergence in competition laws and enforcement, to improve cooperation and to establish non-binding best practices (Weinrauch 2004, 160).

The US position on internationalization of competition policy has evolved over the years, but it is possible to identify some common threads in the perceptions and attitudes of the US policy-makers towards cooperation. A fairly stable concern of the US antitrust authorities has been the protection of sovereignty. The US has eschewed most attempts at cooperation that may have implications for its sovereignty in the antitrust area. For instance, the Congress failed to ratify the Havana Charter of the failed International Trade Organization in the 1940s partly due to sovereignty concerns. The Draft International Antitrust Code of the mid-1990s was also criticized by the US antitrust agencies and some scholars because of its proposal to set up a binding international dispute resolution procedure in antitrust (Gerber 1999, 130). The US instead has supported bilateral and non-binding multilateral mechanisms for cooperation. The support for bilateral agreements with like-minded states arises partly from the fact that such agreements with the largest trade partners of the US can potentially help the US antitrust agencies achieve most of their objectives with minimal infringement on US sovereignty.

A second broad trend in the US attitudes towards competition policy cooperation is a preference for informal forums such as UNCTAD, OECD and the more recent ICN. Among these the US has especially been keen on efforts at soft convergence within the context of the OECD and the ICN. Gerber (1999)

argues that policy-makers and scholars in the US have great confidence in the strategy of convergence to solve the problems emerging from international competition issues. For instance, Joel Klein, the former Assistant Attorney General for the Department of Justice, Antitrust Division, frequently emphasized that “a culture of competition will emerge out of discussing of competition law issues among competition law authorities, and growing awareness of the benefits of a competition-based system and this culture of competition will lead to greater convergence among competition law systems” (Gerber 1999, 132 fn.22). Similarly, former chairman of the Federal Trade Commission Robert Pitofsky emphasizes the significance of informal convergence by ‘learning’ (Pitofsky 1999, 410).

According to Gerber, US commentators’ confidence in convergence stems from their belief that there is an identifiable and objectively verifiable “better way” for antitrust law and policy, and that this better way tends to be similar to or identical with US antitrust law (Gerber 1999, 133). This is also consistent, Gerber argues, with aspects of the US legal experience, as during the last two decades US law and economics scholarship has challenged the intellectual underpinnings of the US antitrust law. The rise of the Chicago School approach to antitrust and its replacement of the earlier antitrust approach domestically, then, is an experience that the US policy-makers and commentators believe would be replicated internationally. Hence, policy-makers and scholars in the US perceive convergence through bilateral cooperation and informal, non-binding multilateral forums to be the appropriate approach to internationalization of antitrust.

The EU’s Global Competition Policy Vision

Competition policy of the EU aims to prevent distortions to free trade in the single market. The legal basis for the policy can be found in Articles 81, 82 and 86 to 89 of the Treaty of the European Union (Articles 85-86 and 90-94 of the Treaty of Rome). The policy has two main objectives. The first is to deal with anti-competitive behavior of private firms. The second objective is to regulate uncompetitive behavior of member state governments, including state aid to industries and state owned enterprises. The Commission also examines mergers with a Community dimension to ensure that they do not impede

competition in the internal market.

In the decade following the founding of the European Economic Community, competition policy became an essential part of the common market project. After all, “there was little to be gained from the removal of tariff barriers and quotas if having promoted the free operation of economic forces through the free movement of capital, goods, people and services, private companies were to engage in collusive and other anti-competitive activities” (McGowan and Wilks 1995, 147). Following this logic the Commission gradually established a coherent regime regulating the anti-competitive practices of private firms. According to some observers, competition policy became the “first supranational policy” of the EEC (McGowan and Wilks 1995, X), being the sector in which the formal authority of the Commission and the Court is at its greatest (Andersen and Sitter 2006, 15).

The European Commission has made the international aspect of competition policy a priority since the 1980s and has pursued various strategies to achieve international cooperation on competition. Two developments may account for the increased salience of the international aspects of competition policy in this period. First, the EU’s competition policy reached a level of maturity by the end of 1980s through the gradual development and confirmation of the Commission’s power in this area in the 1960s and the 1970s. In addition to the gradual maturation of the policy, the member states’ decision to complete the European internal market with the Single European Act (1987) further encouraged DG Competition to enforce the competition regime rigorously and increased the DG’s scope of action with the 1989 merger regulation (Devuyst 2000, 134). In a 1990 speech, Competition Commissioner Sir Leon Brittan emphasized the new global vision: “Competition policy has come of age and must face up to the challenges of our interdependent world” (Devuyst 2000, 134).

Second, as is apparent from Brittan’s statement, there was growing concern with how global economic interdependence would influence the EU’s efforts to maintain competition in the marketplace. As economies become interdependent, the opportunities for cross-border anticompetitive activity grow. For instance, the number of cross-border acquisitions and mergers has escalated dramatically in the 1980s

(Campbell and Trebilcock 1997, 89). Since 1990, mergers have typically accounted for between one third to one half of all Foreign Direct Investment (FDI) flows, and by 1999 cross border mergers amounted to 80% of all FDI flows (Damro 2006, 7-8). Such developments have meant that individual jurisdictions are no longer able to enforce merger control or detect and prevent international cartels and other types of anticompetitive activity with domestic competition legislation alone. Hence, the Commission considers it necessary to tackle international competition policy issues. The EU pursues multiple objectives by internationalizing competition policy. It seeks to ensure market access to its companies, to tackle anticompetitive behavior originating outside the EU but that affects the EU market, and to make sure that its companies are not disadvantaged by different competition rules around the world.

I argue that it is possible to identify five different strategies that the European Union has followed at times in order to influence the international developments in competition policy: a) a unilateral strategy of extraterritorial application of the EU's competition rules, b) a strategy of coercing the EU's weaker trade partners and candidate countries to adopt competition laws in line with those of the EU's, c) signing bilateral agreements to achieve exchange of information and cooperation with relatively equal trade partners, d) using non-binding multilateral forums to influence world-wide competition policy trends, and e) using multilateral forums to achieve binding international rules on competition. These strategies are not mutually exclusive in that the EU has pursued them in combination at different times, and has had various degrees of success in realizing its objectives through these strategies.

The EU has not been shy to use its competition rules extraterritorially especially since the 1988 *Woodpulp* decision of the European Court of Justice.⁴ Both the EU and the US has acted on the principle that their antitrust laws can be applied extraterritorially when conduct outside of their borders has implications within their markets. However, this approach has its limits. Both among themselves and with the rest of the world, the aggressive application of competition laws of the US and the EU antitrust authorities have led to problems and frictions. Extraterritorial application of antitrust rules encounters

⁴ See European Court of Justice. 1988. *Judgment of the Court of 27 September 1988: Woodpulp Decision*, available from Eur-Lex.

frequent legal and practical obstacles, particularly in cases in which involved companies do not have any legal presence in the territory of the investigating state. Often the key documents and witnesses are located abroad, out of reach of the evidence-seeking authority (Rill and Goldman 1997, 166; Weinrauch 2004, 93). Additionally, it is frequently difficult to craft meaningful remedies in antitrust cases when foreign companies have no assets within that territory (Weinrauch 2004, 94). Finally, the extraterritorial application of competition rules creates resentment towards the EU around the world.

The strategy of pursuing binding multilateral competition rules have proven impossible due to the objections of the United States and some developing countries. As discussed above, the US has been unwilling to cooperate on competition policy in the WTO context, as a global competition order—which may turn out to be less stringent than the US laws due to the lowest common denominator bargaining in this context—may come to replace extraterritorial application of US antitrust laws. Developing countries, in turn, are suspicious of a global competition regime because they perceive this as a strategy on the part of the economically powerful countries to gain market access for their companies (Weinrauch 2004, 43).

In between the unilateral and the multilateral strategies lie three other options, which have proved more successful than these two extremes. Among these three, I argue that the EU's strategy of persuading and/or coercing its weaker trade partners and prospective member states to adopt competition rules based on the EU model has been the most effective. In the literature on EU external relations, the strategy of exporting EU rules and norms to surrounding countries is described as "external governance" or as EU's use of "civilian power" (Duchêne 1972; Lavenex 2004; Schimmelfennig and Sedelmeier 2004). As applied to internal processes of the EU, the governance perspective "concerns primarily the *creation* of rules as well as their implementation in national political systems", while the external dimension is "exclusively about the *transfer* of given EU rules and their adoption by non-member states" (Schimmelfennig and Sedelmeier 2004, 661).

In competition policy, the strategy of external governance had an initial success with the incorporation of the member states of the European Free Trade Area (EFTA) Iceland, Liechtenstein and

Norway into the European Economic Area (EEA), which brought them into the EU internal market with the adoption of the relevant *acquis* (Brittan 1992; Commission of the European Communities 2009). All relevant Community legislation, including the competition rules are dynamically brought into the EEA Agreement, and the EFTA Surveillance Authority and the European Commission are responsible for the enforcement of competition rules throughout the EEA. In addition to this initial success of exporting EU's competition rules to its neighbors, the European Commission took active part in incorporating competition and state aid provisions in the Europe Agreements signed with the Central and Eastern European countries in the early 1990s. As a consequence, all of the Central and Eastern European Countries adopted competition laws between 1990-1996, as seen in Table 2.

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The transfer of EU's competition rules to third countries did not stop there, however. Turkey adopted competition laws modeled on the EU's prior to entering a customs union with the EU. With very few exceptions, all of the countries that have signed association agreements with the European Union adopted competition laws.⁵ Many of them did so after they have signed the association agreements with the European Union. The European Neighborhood Policy (ENP), which counts as members all of EU's neighbors by land and sea (except for Russia, with whom a strategic partnership exists) and relies on bilateral, non-binding action plans also includes some competition provisions. The Cotonou Agreement which regulates trade and development assistance with the African, Pacific and Caribbean countries also include competition provisions, but the adoption of competition laws among these countries have been slower. Finally, the EU maintains structured dialogue and consultations with Korea and China.

Through these bilateral relations the EU has made significant progress in exporting its competition laws to countries in its neighborhood. The wider Europe and Central Asian regions have the highest

⁵ Lebanon, for instance, does not have a competition law despite having an association agreement with the EU, but the Ministry of Economy suggests that it is in the process of drafting a competition law. A recent presentation titled "Competition Policy in Lebanon" was presented by two competition experts from the EU and one official from the Ministry. See the website of the Lebanese Ministry of Economy, [cited April 3, 2009]. Available <http://www.economy.gov.lb/MOET/English/Panel/EconomicResearchAndPrices/EconomicResearch/Competition.htm>

proportion of countries that have adopted competition laws, as seen in Table 1. There are however, two limitations to the strategy of exporting EU competition laws. First, there is no guarantee that the adoption of competition laws will ensure that a viable competition regime is established in the country. It takes more than a commitment on paper to competition laws to establish a viable competition regime in a country. Second, as suggested in the literature on external governance, the main factor that influences the successful transfer of EU rules to countries outside of the EU is the offer of external incentives, and especially a credible prospect for membership in the case of applicant countries (Lavenex and Schimmelfennig 2008, 146; Schimmelfennig and Sedelmeier 2004, 662). This suggests that this strategy becomes less useful for countries to which the EU cannot offer strong external incentives, for instance those to which the EU cannot credibly offer membership prospects, or those that are not in the EU's neighborhood in terms of geography and trade. Therefore, while this strategy has been very effective in the past to convince countries at the periphery of the EU to adopt competition laws, it may have reached its limits.

A second bilateral strategy which the EU has pursued is to conclude bilateral cooperation agreements with its stronger trade partners such as the United States, Canada and Japan. These cooperation agreements provide for the reciprocal notification of cases under investigation where they may affect interests of the other country, cooperation and coordination of competition authorities and positive comity procedures. Observers argue that these bilateral treaties, especially the US-EU Agreement which has been the most intensely studied, have proved very important to establish cooperative relations between the two sides. Damro (2006) argues that the agreement between the EU and the US gradually transformed what used to be a conflictual relationship into a cooperative one. Devuyst (2000) argues that despite the disproportionate media attention given to cases that involve conflict between the two sides, the EU-US relationship has been one of strong regulatory cooperation.

These bilateral relations with EU's powerful economic partners are preferable to a situation of non-cooperation from the perspective of the EU, but nonetheless, these have certain disadvantages. First, as

the 1997 Boeing-McDonnell Douglas merger and the 2001 GE-Honeywell merger show, there is still significant scope for divergence and conflict among the two sides due to differences in competition policy principles and priorities and different methods of analysis (Morgan and McGuire 2004). Second, in contrast with its bilateral relations with its weaker trade partners which brings other countries' laws closer to the EU's, EU's bilateral cooperation with the US may be leading to a convergence of the EU competition law with the US antitrust laws (Fox 2007; Pitofsky 1999). This may not be an altogether problematic development, but some scholars criticize the EU's gradual move towards more neoliberal, market based competition approach following in the footsteps of the United States (Wigger 2007). Finally, the proliferation of bilateral ties more generally "would introduce complexities and anomalies, would be cumbersome when dealing with conduct which extends beyond a particular bilateral pairing, and would fail to capture the full potential benefits of widespread multilateral harmonization" (Baker et al. 1997, 447-8). Campbell and Trebilcock (1997) similarly argue that in the case of merger control, the co-existence of bilateral regimes may lead to interjurisdictional conflict between the rules and their enforcement when the merging companies are located in different jurisdictions, or have significant market power in multiple jurisdictions. The shortcoming of bilateral and regional agreements is that "they capture only a portion of the trade of the member countries. As a result, system frictions with external trading partners remain a problem--indeed, they may even increase" (Campbell and Trebilcock 1997, 114).

A final strategy that the EU has pursued at the international stage is to become part of non-binding multilateral forums. The history of such non-binding cooperation goes back to the OECD's efforts in the 1960s and the UNCTAD's activity on restrictive practices starting in the 1970s. A more recent effort at non-binding multilateral cooperation on competition, and one which is more comprehensive in its membership than the OECD and UNCTAD is the International Competition Network (ICN) which was launched in 2001. All three organizations work on the basis of exchanging information and experience, issuing non-binding recommendations and guidelines, identifying best practices and providing technical assistance for new or prospective competition law adopters. In its own words, the ICN "facilitates

procedural and substantive convergence in antitrust enforcement through a results-oriented agenda” (International Competition Network 2008).

The EU and its member states take active part in these organizations to shape informal cooperation efforts on competition policy. Nonetheless, these organizations and their approach to competition policy cooperation have limits for the EU. The EU supported the establishment of the International Competition Network, but has not regarded it as an alternative to the involvement of the WTO in competition policy cooperation (Weinrauch 2004, 159). In addition the non-binding nature of this cooperation, what may be problematic from the point of view of the EU is the difficulty of controlling the agenda of cooperation in such an organization. The large and diverse membership, and the increasingly vocal role played by newly emerging economies in these organizations may prevent the EU from achieving cooperative results in line with its own competition policy approach.

Discussion and Conclusion

Among the five different strategies of influencing the global competition policy agenda, the EU’s preferred method is a binding and multilateral framework on competition policy. This strategy was first mentioned by Competition Commissioner Sir Leon Brittan in 1990. In 1995, an expert group commissioned by Karel van Miert, then EU Competition Policy Commissioner, published a report emphasizing that the EU should adopt a parallel approach of deepening its bilateral efforts and working towards a multilateral framework on competition principles (Commission 1995). The Report suggested that the geographical coverage of such a multilateral framework should initially include the industrialized economies, but in the long run seek to broaden to include developing countries as well. Due to the broad membership of the Organization and the complementary relationship between trade and competition policy, the Commission has regarded the WTO as the institution best suited to house such an agreement (Weinrauch 2004, 158). When this approach was rejected by the US International Competition Policy Advisory Committee, the Competition Commissioner Mario Monti expressed his disappointment (Wienrauch 2004, 159).

This strategy was the preferred by the European Union, Gerber argues, because the framework approach which the EU suggests for adoption in the WTO corresponds to the basic mechanism of European integration (Gerber 1999, 138). The Treaty of Rome has been likened to a framework within which the European Community members have developed the norms, institutions and arrangements of integration. The evolution of competition policy in the EU itself also fits this framework model (Gerber 1994). The competition law principles of the Treaty of Rome “have gradually been given form and effect through the interpretations and interactions of individuals, states, and regional institutions” (Gerber 1999, 138; see also Cini and McGowan 1998). The EU officials therefore prefer an international competition framework under the WTO because this idea fits closely with their competition policy cooperation within the EU.

Moreover, EU officials support binding multilateral rules, because compared to their US counterparts they are less optimistic about the possibility of a relatively smooth convergence of competition regimes around the world through informal and bilateral cooperation (Gerber 1999, 134). They see it equally conceivable that convergence will display discontinuity. Gerber argues that this stems partly from the fact that European scholars often tend to study not only their own systems, but US antitrust as well, and thus are aware of the different competition policy models and the limited possibilities for convergence (Ibid., 134). National differences in competition policies of the EU countries, and their relatively slow and incomplete convergence (Amato 1997)—despite the fact that Rome Treaty included a strong commitment to competitive markets—might have also contributed to the European perceptions on the limited potential for convergence. Thus, the EU is more skeptical of soft convergence and has put more effort into multilateral cooperation as a means to achieve internationalization of competition policy.

The failure of its WTO strategy in the face of objections from the US and developing countries has led the EU to intensify its efforts to pursue other strategies. As discussed above, other unilateral, bilateral and multilateral strategies have their limits as well. I argued in this paper that the EU has been most successful in spreading its competition principles in its neighborhood by persuading countries to adopt

competition laws modeled on the EU laws. This strategy works to ensure that the EU's neighbors develop competition laws similar to that of the EU, and thus avoids the frictions that may result from the absence of competition laws or the emergence of different approaches to competition among the EU's trade and investment partners. But this strategy may have reached its limits. Beyond its neighborhood, it is difficult for the EU to extend credible external incentives. The second bilateral strategy of concluding cooperative agreements with the US, Canada and Japan have kept serious conflicts between these countries and the EU to a minimum, but there is no guarantee that the EU will be able to achieve its competition policy objectives through these agreements. If anything, cooperation with the US antitrust officials may have led to the convergence of the EU competition policy practices towards the EU than the other way around. Moreover, bilateral agreements create a complex web of relationships which sometimes increases frictions between the competition authorities. And finally, non-binding multilateral cooperation may not prove beneficial for the EU in pursuing its competition policy objectives because it is difficult to control the agenda of such cooperation efforts to ensure that the outcome is favorable for the EU. This discussion suggests that the EU should continue to pursue the strategy of pushing for multilateral and binding competition rules at the international level. In combination with this, the EU could attempt to make its strategy of "exporting" competition rules to other countries more effective by focusing on the implementation of these rules once they are adopted.

Throughout the paper, I have assumed that the EU is acting as a monolith in competition policy issues. This could be considered a valid assumption given the dominance of the European Commission in competition policy issues in the EU. Having achieved this dominance in intra-EU competition affairs, we can assume that the Commission dominates external relations on competition policy issues. This approach may be problematic in two senses, however. First, competition policy priorities of the member states may differ, and we may find that the member states pursue their own national interests in competition policy in the international arena in addition to the EU's external efforts, and hence perhaps sometimes undermining and sometimes reinforcing the EU's efforts. Therefore we need to pay attention to developments in the

external relations of the member states on competition issues. Second, we need to consider factors internal to the EU that may influence which external competition policy strategy that the EU will pursue. The EU's external strategy may be shaped by intra-Community political dynamics, by the preferences of the member states, or by pressures from different interest groups and firms. Thus, the external competition policy strategy of the EU may not simply be a response to developments outside of the EU, but may have to do with intra-EU dynamics and politics. Future research could explore the possibility of divergences within the EU on the objectives and the choice of strategies to pursue on international competition policy goals. This would give us a more complete picture of how and why the EU chooses particular strategies in promoting competition around the world, and to what extent its strategy will be effective in reaching its objectives.

Tables and Figures

Figure 1: Number of countries that have adopted competition laws, 1950-2005.

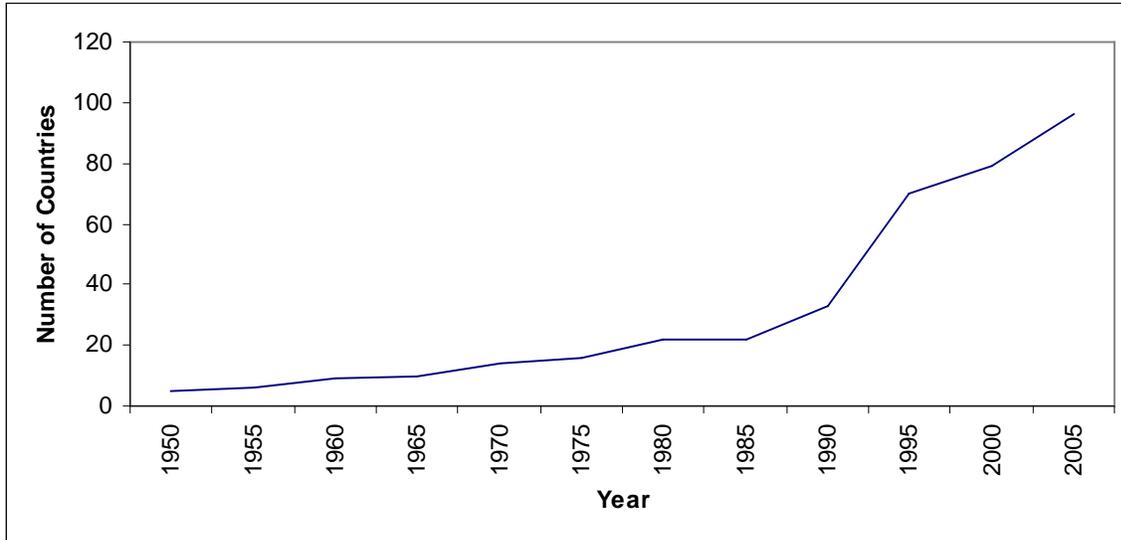


Figure 2: Percentage of countries that have adopted competition laws in a region.

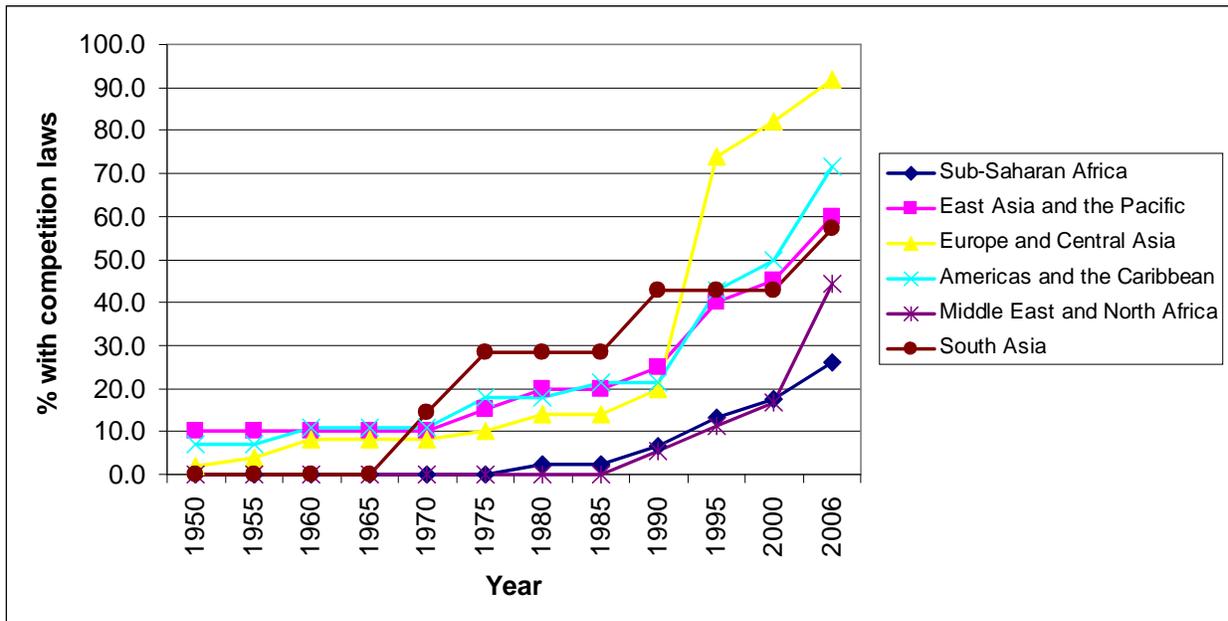


Table 1: Countries that have adopted competition laws, broken down by geographical regions
(World Bank Geographical Regions)

	Sub-Saharan Africa	Americas and the Caribbean ¹	E. Asia and the Pacific ²	Europe and Central Asia ³	Mid. East and North Africa	South Asia	Total
% with competition laws (number)	26 % (12)	71% (20)	60% (12)	92% (46)	44% (8)	57% (4)	60% (102)

¹ The United States and Canada are included along with World Bank's Latin America and Caribbean countries.

² Australia, Fiji, New Zealand, Fiji, Samoa and Solomon Island are also included in this category.

³ Member states of the European Union are included in this category.

Table 2: The year of competition law adoption for the countries in the EU's neighborhood

Cyprus	1990	Belarus	1992	Malta	1994	Israel	1988
Hungary	1990	Bulgaria	1992	Turkey	1994	Tunisia	1991
Poland	1990	Finland	1992	Albania	1995	Algeria	1995
Czech Rep.	1991	Lithuania	1992	Switzerland	1995	Morocco	2001
Kazakhstan	1991	Moldova	1992	Georgia	1996	Jordan	2002
Latvia	1991	Azerbaijan	1993	Romania	1996	Egypt	2005
Russia	1991	Estonia	1993	Serbia	1996		
Slovakia	1991	Iceland	1993	Armenia	2000		
		Norway	1993	Bosnia-Herz.	2001		
		Slovenia	1993	Croatia	2003		
		Ukraine	1993	Macedonia	2005		
				Montenegro	2005		

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