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ISSUES RELATED TO COMPETITION LAW OF PARTICULAR RELEVANCE TO DEVELOPMENT

Note by the UNCTAD secretariat

The present note is intended to provide substantive information on competition law and policy to the Commission, taking into account current developments and UNCTAD's role in this area, as a complement to the main note on these issues prepared by the UNCTAD secretariat.

1. Competition policy aims at minimizing restrictions upon free competition, both by controlling restrictive business practices (RBPs) engaged in by firms, and by promoting the reform of governmental regulations or measures where they unjustifiably distort competition or create barriers to market entry by new competitors. These two aspects of competition policy are interrelated, since not only may governmental measures restrain competition in their own right, but they may also provide incumbent firms with the opportunity to engage in RBPs.

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2. RBPs are practices by enterprises which limit access to product or geographical markets, which aim at maintaining a dominant position of market power, or which otherwise unduly restrain competition. As well as RBPs, such practices may be referred to in different national laws as restrictive trade practices, restraints of competition, monopolistic practices, or unfair trade practices. There are basically four ways enterprises can commit RBPs - although these four ways may sometimes overlap. An enterprise may try and control a market unilaterally by abusing its dominant position of market power in a number of ways, such as through predatory pricing (selling below cost to eliminate competitors) or unjustified discriminatory pricing for different customers. Alternatively, some enterprises which are existing or potential competitors can collectively undertake horizontal practices with each other - this usually involves forming a cartel to fix prices, to collude bids for a tender, or to allocate markets, customers, or sales or production quotas, and enforcing its arrangements through collective boycotts or other RBPs. Thirdly, an enterprise may impose a vertical restraint such as resale price maintenance, exclusive dealing, or tying the supply of some products to other products, along the chain of production, sale and distribution; this may be either upstream (e.g. where a large chain of distributors imposes restrictions upon a supplier) or downstream (where a manufacturer inserts a restriction in the contract it makes with its distributor, or the distributor does this with an individual consumer). Competition authorities usually prohibit most such vertical restrictions only if the enterprise applying the restriction is in a dominant position of market power or is abusing it, or if the adverse effects upon competition are not outweighed by the advantages for distribution or service. Finally, enterprises may try to concentrate their market power by undertaking horizontal, vertical or conglomerate mergers or joint ventures - again competition authorities will look at such arrangements on a case-by-case basis to see if they are likely to restrain competition and if there are any offsetting efficiency benefits.

3. As indicated above, competition authorities in many countries also have the right to advocate liberalization of regulatory measures which may adversely affect competition, such as the grant of monopolies or exclusive rights, subsidies, the allocation of production inputs, price controls, establishment or capacity licensing requirements, statutory marketing arrangements, other industrial policy measures, or restrictive trade or foreign investment policies. The objective of such advocacy is not merely to promote deregulation for the sake of it, but also to put into place the basic preconditions for effective competition amongst firms, so that deregulation is not merely followed by a "privatization" of governmental restraints.

4. Competition policy aims at safeguarding or promoting consumer welfare and economic efficiency. This is because competition encourages firms to become more efficient and innovative and encourages market entry by new firms. This makes prices more flexible and closer to costs, promotes efficient resource allocation throughout the economy, brings about a greater variety of cheaper or better quality goods and services for consumers (this includes intermediate inputs for user industries, making them more competitive), encourages technological innovation, and pushes firms and industries to become more

efficient and more competitive in international trade. In different jurisdictions, competition policy may also aim at a variety of other objectives, such as ensuring freedom of economic action, fairness in the market, controlling concentration of economic power, the public interest, or (in the European Union) greater integration of a regional market.

5. However, the distinctions among these other criteria and consumer welfare and efficiency criteria are blurred. There has been increasing convergence in the provisions or the application of competition laws over the last two decades, although there continue to be significant differences among them. Competition policies in many countries are now placing relatively greater emphasis upon the protection of competition, as well as upon efficiency and competitiveness criteria, rather than upon other goals. It is now generally accepted that a market-oriented policy requires both a reduction in direct State intervention in economic activity and more effective State intervention in providing an enabling framework ("rules of the game") for enterprises to do business, and competition policy constitutes a key part of such a framework. At the same time, it is recognized that proper economic analysis and flexibility in applying competition policy are necessary so as not to impede efficiency or consumer welfare instead of promoting them.

6. In parallel with this evolution and convergence in the goals and application of competition policy, there has been a substantial increase in the numbers of countries which have adopted and effectively implemented competition policies. Competition laws were adopted over a century ago in Canada and the United States, and all developed countries now also have competition laws. So do most of the countries of Central and Eastern Europe. A large number of developing countries have also adopted or are adopting competition laws, or are reforming existing laws. This trend is linked to the widespread adoption of market-oriented economic reforms, including deregulation, price liberalization, privatization and liberalization of controls upon trade and direct foreign investment.

7. The acceleration of globalization and trade and foreign investment liberalization have led competition authorities, in applying competition policy, to take more into account the effects of direct foreign investment and trade upon competition in the domestic market. But most national competition policies do not apply to RBPs which solely affect foreign markets, such as export cartels. In such cases, it is often difficult or impossible for the country whose markets are affected to gather the necessary evidence or to take effective remedial action without full cooperation from the authorities of the country where the RBP originates.

8. Similar difficulties may also be faced where RBPs are practised by foreign investors. The detection of practices by foreign investors may raise special problems because of their transnational structure; once detected, much of the relevant evidence may be located overseas. Special expertise may be required to evaluate whether the sophisticated practices used by foreign investors should be proscribed or may be acceptable because of efficiency benefits they may entail (it should be noted that national treatment is generally observed by competition authorities in examining the practices of foreign investors, and parent-subsidiary relationships within a transnational corporation are usually fully taken into account in evaluating the

acceptability of a practice). Enforcement problems may also arise since it would be difficult to compel the parent firms of TNCs located in other countries to follow orders issued by a national competition authority (issues of extraterritorial jurisdiction may arise in this connection), while subsidiaries may have insufficient assets located on national territory. The application of RBP controls would usually not act as a deterrent to foreign investors, particularly if they follow universal competition principles, but problems may sometimes be experienced with threats of relocation. Such difficulties may be faced in particular by developing countries, given their limited resources, small markets, possible lacunae in their competition policy frameworks, or weaker bargaining positions vis-à-vis foreign investors. Globalization and liberalization, while generally positive for competition, may also lead foreign firms (like national firms) to increase efforts to maintain or strengthen their market positions through resort to RBPs, and may also lead to new types of RBPs across borders, whose effects may be reinforced by the continuing trend towards international mergers, joint ventures and strategic alliances. There is therefore a strong need for technical cooperation on competition policy to assist developing countries' national efforts, as well as for the reinforcement of international information exchange, consultations and cooperation in this area, involving more countries and using as a basis existing bilateral or plurilateral cooperation agreements among developed countries.

9. Long-standing attempts have been made by the international community to adopt a multilateral instrument to strengthen cooperation in this area and to deal with private barriers to trade, starting in 1948 with Chapter V of the abortive Havana Charter. An important step in this area has been taken through the conclusion of the Uruguay Round Agreements, which contain several important provisions relevant to competition policy (particularly in the Agreements dealing with safeguards and with services). It should be noted that the Agreement on the Trade Related Aspects of Investment Measures (TRIM) provides that, when the Council for Trade in Goods reviews its operation (which is not to be done before January 2000), it shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy. Informal proposals by the European Union and by Japan to further strengthen the linkages between the trading system and competition policy have been made recently for consideration by the WTO Ministerial Meeting in Singapore in December 1996.

10. UNCTAD has long played an important role in this area. In 1980, in its resolution 35/63, the General Assembly unanimously adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. This instrument is not legally binding, but has the authority of a General Assembly resolution. It aims at ensuring that RBPs do not impede or negate the realization of benefits that should arise from trade liberalization, particularly those affecting the trade and development of developing countries. It sets out principles and rules to be observed by enterprises and Governments in this area, and sets up machinery

for intergovernmental consultations and cooperation, both bilaterally and under the auspices of UNCTAD. UNCTAD thus provides the only universal forum where Governments can exchange views and experiences, and promote consensus and convergence, on competition issues. It also undertakes a significant technical cooperation programme in this area, which includes advisory and training activities and assisting countries in formulating competition policies and legislation, and has provided important impetus for the adoption or reform of competition laws by developing countries.
