

The Convergence Crusade: The Politics of Global Competition Laws and Practices

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Abstract

Competition policy has reached global agenda status when competition was declared one of the Singapore Issues at the 1996 Ministerial Meeting of the WTO. In particular the European Commission has pushed hard for the inclusion of competition policy. The conclusion of a multilateral agreement on core competition principles has been scheduled at the WTO Ministerial Meeting in Cancún in September 2003. Due to fierce resistance of the US and a number of developing countries, the negotiations have come to a halt. The idea of a binding multilateral agreement has been abandoned for the time being. The alternative route of the post-Cancún era has been labeled with the catchword 'convergence'. The convergence talk that has captured the competition officials of the EU and the US is not unambiguous and unidirectional, rendering the 'convergence' of competition laws and practices a multidimensional enterprise. By arguing that convergence is a political practice in which a particular type of global competition culture is promoted, the paper seeks to debunk the myth of regulatory convergence as an automatic process driven by anonymous market forces. The paper analyses the case of the interface between global and European competition policy and unravels the conflicting positions of the two major protagonists, the EU and the US, in the formation of a common understanding on how cross-border competition questions should be addressed. Although the current situation displays signs of two forms legal imperialisms of two competing forces, the EU and the US, the politics of convergence is much more complex and marked by paradoxical features.

Introduction

The remarkable spread of liberal market ideas and the progressive reduction of trade barriers made it easier for companies to operate transnationally and to compete on a global scale. In particular the 1990s witnessed an accelerated pace of cross-border merger activity, acquisitions, joint ventures, cooperative arrangements, distribution and supplier agreements, licensing and franchising contracts. With the enhanced prominence of 'business going global', more and more antitrust actions have substantial transnational components, and hitherto increasingly fall simultaneously within different jurisdictions. This phenomenon, which judicial commentators tend to term 'multi-jurisdictional overlap', has been declared a pressing problem by both business and regulators. A number of competition authorities have engaged in bilateral cooperative agreements with their major trading partners in order to deal with cross-border competition cases. In addition to the bilateral trajectory, competition policy reached a global agenda status.

A number of initiatives have been launched to establish a multilateral competition regime on a global scale. The idea of global competition rules dates back as early as 1947 (Havana Charter), however it had to wait for its comeback until the mid-1990s when competition was declared one of the Singapore Issues at the Ministerial Meeting of the WTO. In particular the European Commission's DG Competition has put much effort in levelling the road towards a binding multilateral agreement within the framework of the WTO, which indicates that competition is a policy field not limited to Brussels. Due to fierce US resistance and the opposition of some developing countries headed by India and Brazil, no such agreement could be achieved. After the downfall of the WTO Ministerial Meeting in Cancún in September 2003, the prospects of multi-lateralizing competition policy have vanished. It seems that the Commission has dropped its ambitious plans for concluding a multilateral competition code. At least, a binding agreement is currently not further explored, nor is there much effort put in concluding additional bilateral cooperative agreements with the emerging competition regimes. Instead, the European Commission has resigned to the promotion of increased global convergence of regulatory competition rules and practices – a path followed also by the US.

On the basis of the failed negotiations at the 2003 WTO Ministerial Meeting in Cancún the paper unravels the conflicting positions of the two major protagonists, the EU and the US. It seeks to explain why the convergence of national competition laws has been posited as an important strategy in global competition governance and how to interpret the nature of convergence in the context of global competition laws and practices. By embedding the US opposition in a historical context, the paper argues that the underlying reason for its disapproval is rooted in a deeply held distrust with regard to the competition culture practiced elsewhere. According to US officials global competition laws should be defined in Washington and in Washington only. A WTO agreement would not only have imposed a multilateral straitjacket ending the long-standing hegemonic position of the US with regard to cross-border competition questions, which found its expression in the aggressive application of its antitrust laws extraterritorially, but would have also coerced the US to adopt different visions on what accounts as 'appropriate' competition control. Activities employed under the catchword 'convergence' leave much more scope in disseminating a particular creed of competition laws and practices around the

world. The recently established International Competition Network (ICN) is perceived as the major vehicle to advance such a convergence process. Informal and non-binding in nature, yet already encompassing almost all competition authorities of the world, it has been announced as serving the production of recommendations on how to achieve more consistency in competition control. Other global fora that address cross-border competition questions, such as the OECD and the UNCTAD, tend to be portrayed as supporting institutions for the great convergence project.

Thus, rather than providing an analysis of the extent to which a world-wide convergence could be established, the paper assesses why also the officials of the EU have become committed advocates of convergence. It seeks to debunk the myth of the overall convergence talk by arguing that convergence is a political practice carried out in parallel by the two principal forces, the EU and the US. Although the current situation displays signs of two forms legal imperialisms of a competing EU and US, the politics of convergence is much more complex and marked by a range of paradoxical features. The convergence talk that has captured the competition officials of the EU and the US is not unambiguous and unidirectional, rendering the 'convergence' of competition laws and practices a multidimensional enterprise. One dimension is constituted by the fact that the EU is gradually converging in its vision on competition laws and practices towards that of the US at the federal level - a systemic shift that will not be addressed throughout this paper. Instead, the paper will draw the attention to another important feature that marks the politics of convergence, namely that neither the EU nor the US possess a system of uniform competition laws and practices. In the federal setting of the US, the convergence of the State competition laws is currently simply not an issue. US federal competition enforcement coexists with a great diversity of State-level competition laws and practices. Similarly the EU features a two-tier system in which national competition laws are enforced in parallel to the supranational European laws. Although the Europeanization of national competition laws has politically never been feasible, there is reason to assume that the different national competition laws and practices of the EU Member States will gradually ebb away. Although not immanently visible, the recent competition overhaul of May 2004 of decentralizing the enforcement of European competition law to the national level is likely to catalyze a *de facto* convergence process, which clears the floor for European law. In this vein, the 2004 reform displays signs of a process of 'European integration through the backdoor'.

The paper is organized as follows: section one establishes the conceptual platform of convergence and asserts on a theoretical basis why the convergence discussion fails. Section two historicizes the multilateral initiatives and situates them against their socio-economic background. Section three addresses why to date no multilateral agreement could be established on the basis of the repeated US resistance. Section four offers a critical account on bilateralism as a mechanism to achieve convergence in competition matters. Section five unravels the conflicting positions between the EU and the US on the basis of the different paradigms that have shaped their understanding of how competition control should be enforced. Section six focuses on the special meaning of competition law convergence in the European Union and embeds the issue in the ongoing European integration process.

1. Debunking the Myth of Convergence - a Conceptualization

Issues of convergence have been widely discussed in the academia and led to a plethora of articles, books, and conferences in a variety of disciplines (cf. Bennet 1991; Botcheva and Martin 2001; Crouch and Streek 1997; Drezner 2001; Kern *et al.* 2001; Hall and Soskice 2001; McNamara 2003; Potoski and Prakash 2004; Prakash and Kollman 2004; Williamson 1996). In particular the literature on globalization processes and developments has led to a resurgence of the convergence-divergence controversy. As the phenomenon is notoriously difficult to identify, academic debates concentrate foremost on the extent to which the phenomenon exists in single policy areas.

Reference to convergence is often made without further delineating the confines of the concept - as if it was completely unambiguous. It tends to be used as a mere descriptive term to encompass a tendency in which societies, states, or political systems gradually develop similarities in socio-economic structures, organizational patterns and performances over time. However, without any qualifying attributes convergence remains a vague concept as it can pertain on a gradual narrowing of 'regulatory', 'systemic', 'institutional', or 'policy' differences, as well as goals, ideas, problem perceptions, ideological viewpoints, approaches and outcomes.¹ With regard to competition control, convergence tends to be distinguished on the basis of a *substantive* nature, according to which two or more jurisdictions adopt similar legal or regulatory devices in terms of scope and content, and on the basis of a *procedural* nature, which implies the adoption of similar implementation practices in the investigation phase of antitrust cases.

Crucial for the understanding the meaning of convergence is its asymptotical nature. It presupposes an identifiable common reference point or sort of target towards which a certain structural, systemic, legal or regulatory device is moving. The approximation stops as soon as this common point is reached and the process of convergence ends. In this vein, convergence needs to be analytically distinguished from different, but related concepts, such as harmonization and coordination. Harmonization implies the adoption of identical rules, practices or systems by two or more entities and coordination points to a mediation effort of streamlining different regulatory or institutional approaches in order to make them more compatible and to eliminate contradictions. Translated into competition control, this immediately raises the question of the direction towards which convergence is moving. Competition control is public intervention in private market conduct. It generally aims at safeguarding market players from the anarchy of free competition and at penalizing the abuse of excessive market power, which manifests itself in a dominant position or collusive agreements, such as cartels and other restrictive business practices. Although competition policy is too complex to put it in simple antagonistic left-right stances, it can be more or less pro-market orientated, by serving goals such as the protection of free markets to the protection of small and medium sized business, specific market sectors, regions or national champions, the protection of workers, or even the protection of the

¹ The word 'gradual' should be treated with caution since a process of convergence does not necessarily imply following a linear pattern, but may proceed in small stages that are occasionally interrupted. In terms of the different stages of a rule making process, one stage is not necessarily a corollary of convergence in a preceding stage (cf. Drezner 2001; Pollit 2001; Bennet 1991).

environment. Thus, the genuine interventionist character makes competition control a very sensitive area, where a great variety of interests clash.

Most of the claims about convergence tend to be stripped from an explicit theoretical backbone. Yet, convergence implicitly presupposes theory. In this vein the question on the forces that drive convergence becomes important. Theories that build on the premises of relentless and anonymous market forces are in the heyday of their power. The assumption is that due to external pressures, rule makers will sooner or later be convinced to adopt a similar set of rules, practices or systems. The most prominent and also the most disputed are those on regulatory competition, which generally come in three different versions: the 'race to the bottom-hypothesis' predicting a downward convergence in economic regulatory standards over time (i.e. Delaware effect), or the opposite mechanism of trading up regulatory standards (i.e. 'California effect'). A third variant is constituted by the belief that the competition of different regulatory systems automatically generates the crystallization of the best and most effective regulatory solution to a problem – an objective solution that ultimately can be adopted by regulatory authorities. Underlying this variant is the notion of a 'one size fits all'- logic, which completely neglects the political dimension of a policy.

When theorizing convergence on the basis of inexorable and mechanical laws, the role of ideational influences and the possible inter-linkages of economic and ideational forces are neglected. Competing systemic or regulatory devices are taken for granted, while pre-existing institutional settings and a degree of path dependency are not considered important. The different versions of the regulatory competition theory are fundamentally at odds with the varieties of capitalism approach (VoC) put forward by Hall and Soskice (2001), according to which globalizing markets and the enhanced economic competition is assumed leading to divergent sets of institutions. One of the major assumptions is that regulatory authorities may be well aware of the comparative advantages of their system and henceforth 'strive to make incremental improvements in existing institutions rather than wholesale change' (Hall and Soskice 2001: 359). From the point of view of this perspective, systemic and regulatory differences end up to become more pronounced, rather than narrowing down.

Likewise to the former theoretical perspectives, the logic of the varieties of capitalism approach does not reveal the politics of convergence that would allow us to focus on the advocates and the adversaries of convergence. As this paper is not directed at abstracting the conditions favourable to processes of convergence, nor at providing an overall assessment of the extent to which the convergence of the different competition laws and practices has progressed, a different theoretical angle is necessary – one that allows for displaying the political nature of convergence.

Competition practitioners and commentators from the academic disciplines of law and economics tend to depoliticize competition control by positing a 'taken-for-granted' problem-solving understanding on cross-border competition questions. Yet, competition control is not a neutral regulatory field in which governments *seriatim* perceive problems and solutions in similar ways and elucidate the 'best' institutional and regulatory setting. In fact, there is no such thing as 'ultimate' competition laws and

practices. Competition laws and practices form part of a highly normative regime on how to organize public intervention in private market conduct and generally tend to be embedded in broader economic objectives. Each vision on how competition governance should be organized may be ingrained in a particular market-structure and serve particular socio-economic goals. Postulating the 'appropriate' scope and content of competition control is in its very nature a politically contested issue. As outlined above, the discussion on convergence immediately poses the question of an envisaged reference point towards which entities tend, wish or then are pressured to move. Therefore, one needs to focus on the 'chief socializers' crafting a common understanding on competition principles around the world. From this view, convergence must be seen as a political practice in which a particular type of global competition culture is promoted. The focal point is to reveal the conflicting positions, starting by asking who is considering convergence as something desirable or a necessity, and why. It requires to take into account the power imbalances caused by socio-economic realities and the authoritative pronouncements regarding convergence. Often positively loaded terms tend to camouflage the coercive nature of convergence activities. Recurring and ever more popular social practices in this context are 'capacity building' and 'technical assistance', 'policy advocacy', the recommendation of 'best practices catalogues'. For example, 'capacity building' connotes an act of rendering able to produce or perform something out of one's one strength at a later stage. 'Advocacy' predicates support evoking the image of an action provided in the interest of the advocacy-receiver, rather than out of self-interest. 'Best practices' imply that there is only one best solution to address a problem - a term often applied to maximize consensus and the legitimacy of an initiative for regulatory change.

As this paper will demonstrate, the European Commission is increasingly playing a vital role in the promotion of global convergence of competition laws. Next to a wide range of bilateral cooperation agreements with other industrialized states and states in transition to a market economy, it has engaged unilaterally in a range of 'advocacy' activities. It has started a dialogue on competition issues with developing countries and is providing material and immaterial 'aid' for building up competition authorities, as well opportunities for the exchange of personnel – all activities that are generally referred to as 'technical assistance' and 'capacity-building'. In addition, the European Commission has played a major role in launching global initiatives aiming at establishing a multilateral agreement on competition control. The next section provides an historical account on how competition has achieved global agenda status.

2. From Havana to Cancún: Initiatives to Multilateralize Competition Issues

Calls for enhanced convergence of competition laws and practices are rooted in the coexistence of a great diversity of competition regimes, each applying different laws and practices. There are currently about a hundred countries that have established competition laws and competition authorities. The great variety of competition regimes is a rather recent phenomenon. In fact the number of competition authorities has more than doubled in the past ten years. In particular developing countries increasingly started build up a system of competition control. They have emerged foremost in South American countries, marking a gap with mostly African countries (with the exception of Zambia, Gabon and of

course South Africa) and much of Asia. South American countries even went as far as to establish regional cooperation agreements on competition (i.e. Mercosur, the Andean Community, Caricom) (cf. Lee and Morand 2003). The variety of different competition laws and practices (i.e. different legal standards, different measures for turnover and assets calculation, different time schedules and information requirements in the investigative phase) tend to be perceived as a problem by both competition law enforcers and those subject to these laws. The conclusion of a multilateral agreement on competition rules and principles enforced by a multilateral agency tends to be ideated as the final touch of convergence, ending the quasi-anarchistic situation, or the 'Tower of Babel' that resulted from the coexistence of many different competition authorities (Kerber 2003: 299).

Initiatives to conclude a binding multilateral agreement on cross-border competition questions have been many, yet none of them has been successful to date, which indicates its contentiousness. The Havana Charter of 1947, which ultimately aimed at establishing the International Trade Organization (ITO), contained a far reaching provision on Restrictive Business Practices that required from the signatories to combat all anticompetitive conduct that restrains cross-border trade. Due to a lack of support by the US, the ITO could never be ratified. In the subsequent General Agreement on Trade and Tariffs (GATT), the only enduring feature of the Havana Charter, competition remained a side issue, only. Given its largely interim character and the difficulties to come to terms with regard to a multilateral trading system (i.e. the Kennedy, Tokyo and Uruguay Rounds), the incorporation of competition rules always remained inferior to the trade negotiations. Although competition has been a point of discussion during the eight-years of negotiation in the Uruguay Round in 1986, it remained without significant outcomes. However, provisions touching upon competition questions could never be fully excluded, yet they were foremost sector-specific (see for an overview Anderson and Holmes 2002; Schoneveld 2003).

The field of competition became an issue in the Organization of Economic Cooperation and Development (OECD), and in the United Nations Conference on Trade and Development (UNCTAD) in the late 1960s. However, attempts for a binding multilateral agreement regained attention only in the early 1990s – a time marked by increased frictions resulting from the transnationalization of business activities that resulted from the opening of markets and the liberalization of trade. Committed advocates of a multilateral competition agreement emphasized the necessity to curb transnational anticompetitive business conduct. The concentration of market power, hardcore cartels and denied market access to newcomers increasingly were portrayed as obstructions to the free market play. The same argument has every now and then also been held against governments protecting 'national champions' and 'sunset industries' against foreign competitors. As national and/or regional regulators are limited in their jurisdictional reach to combat anticompetitive behavior outside their territory, a world competition authority should fill this gap. Transnational operating business, on the other hand, was increasingly confronted with high transaction costs resulting from different legal situations. The phenomenon is generally indicated as 'multi-jurisdictional overlap', which arises from the requirement to notify cross-border transactions to multiple competition authorities, or from being prosecuted and sanctioned by different jurisdictions for the same anticompetitive conduct. Request for a remedy to the

problem of 'multi-jurisdictional overlap' increased. However, the wish for more legal consistency and legal certainty has been limited to the field of mergers and acquisitions (M&As). Transnational operating business did not have the same pronounced incentive with regard to laws prohibiting certain business agreements as they tend to prefer a situation of *laissez-faire*, at least in so far as their own conduct is concerned. Safe heavens with regard to excessive market power or collusive agreements, such as cartels and other restrictive business practices (RBPs) can provide companies with a comparative advantage.

The early requests for a multilateral competition agreement in the 1990s have been out of private initiative. Contrary to previous initiatives, they tended to be more disjoint from trade issues. In the early 1990s, a group of foremost German academics and practitioners located in Munich, called the Munich Group, submitted the *Draft International Antitrust Code (DIAC)* to the GATT. The very detailed code suggested a strong form of multilateralization on competition issues with a dispute settlement mechanism, which would enforce international competition rules in parallel to the national competition authorities. Even though the DIAC proposal has been given a careful thought in what has become later the World Trade Organization (WTO), it did not create sufficient enthusiasm in the international community. Another private proposal has been launched by the International Antitrust Committee of the American Bar Association (ABA), which advocated an agreement among states with regard to some basic principles, such as unlawfulness of cartels, partial harmonization of filing requirements of mergers, however, without establishing an international enforcement authority (Canadian Competition Bureau 2001: 8). This proposal did also not accomplish the intended result. Nevertheless, it triggered the European Commission to explicate more clearly its own perspective on a binding multilateral agreement.

The history-loaded Cartel Conference in Berlin, on June 19 in 1990 has been path breaking in this regard. In his opening speech, the European Competition Commissioner Sir Leon Brittan considered 'the time ripe to address international antitrust convergence'. The conference was held shortly after the fall of the Berlin Wall, marking the beginning of a 'larger geopolitical transformation' of the Central and Eastern European countries towards the establishment of market economies – a time in which also 'Western democracies re-examined their regulations within their economies' (Calvani 2004: 11). Two years later, the mere call for convergence has had converted into the idea of building a multilateral competition regime. At the 1992 Annual Meeting of the World Economic Forum (WEF) in Davos, Switzerland, Sir Leon Brittan proposed the WTO as the most appropriate forum for addressing competition questions. The underlying reasoning was that convergence and cooperation in competition matters does not occur automatically and needs to be actively pursued and stimulated. Brittan's successors, the Commissioners Karel van Miert and Mario Monti, have taken this quest further and dedicated their office to establishing a WTO agreement on competition. Commissioner Karel van Miert assigned a group of 'Wise Men' (mostly constituted by its own staff) with the duty to put forward recommendations for a multilateral framework for competition. In a report issued in 1995, the 'Wise Men' advised the Commission to conclude 'a fully fledged multilateral agreement' on a set of common rules and principles within the WTO framework. In contrast to the ambitious DIAC proposal,

the idea was that such an agreement should not replace or interfere with the domestic antitrust regimes. Instead, a much more moderate approach on internationalization should be followed according to which the compliance of the Members to the agreed rules and principles should be monitored. The report did not advocate establishing a dispute settlement procedure, which would review conflicting decisions or enforce WTO rules (European Commission 1995). The initiatives of the European Commission began to take shape in 1996 when competition was declared one of the Singapore Issues at the Singapore Ministerial Meeting of the WTO - next to trade and investment, transparency in government procurement and trade facilitation. In the subsequent Doha Ministerial Declaration, the prospects of a possible multilateral framework on competition had been fostered by an agreement to launch the official negotiations on the issue at the Fifth Ministerial Meeting at Cancún during 11-14 September 2003. Yet, as the following section will demonstrate, due to the fierce opposition by the representatives of the US, as well as a few developing countries, the negotiations on competition came to a halt. In the post-Cancún era, no further negotiations on competition have been scheduled.

The accelerated pace in which competition achieved global agenda status has been paralleled by a greater visibility of what has been termed the problem of multi-jurisdictional overlap. In the years preceding the collapse of the Cancún negotiations, the worldwide volume of mergers increased from about US\$ 0.5 trillion in the early 1990s to US\$ 3.5 trillion in 2000, while about a third of the mergers involved firms from more than one country (Bannerman 2002: 3). In particular the late 1990s have been rolled over by a big wave of mergers of significant international dimensions. It is referred to as the fifth wave of mergers and one that stands out in history (cf. Carroll 2002; Gaughan 2002: 23-56). In comparison to the past big merger waves, which were characterized by larger companies 'eating' smaller ones, mergers in the late 1990s concerned companies of similar size, including successful global players, touching on virtually every industry. For instance, the merger between Vodafone and Airtouch/Mannesmann or the AOL/Time Warner merger in 2000 concerned transactions of respective US\$ 190 and 166 billion, which compares to the size of GDP of a middle-sized industrial country like Portugal with about US\$ 120 billion (Budzinski 2002: 2). Even though the worldwide recession following the wave of mega-mergers has slowed down the pace of merger activities, the level remained considerable high in the years following. Multi-jurisdictional overlaps divulged to the *extremum*, such as the planned merger of MCI WorldCom/Sprint, which has been notified in 37 different jurisdictions before the two companies finally abandoned the deal during the course of 2000 (Bannerman 2002: 55-56), or the merger between Exxon/Mobil, which has been notified to 20 different jurisdictions. Similarly, frictions between regulating authorities reached the surface. For example, the Boeing McDonnell Douglas merger almost caused a trade war between the EU and the US in 1997. While the US competition authorities approved the merger without any conditions, the European Commission imposed heavy requirements before allowing the transaction to go through (see for a more detailed account Bannerman 2002). However, despite of the prominence and the breathtaking pace of cross-border transactions and the sharpened tone of competition authorities, to date all initiatives suggesting a binding international agreement on competition control failed. Going back in the history has shown that sixty years after the downfall of the Havana Charter, US resistance seemed

to repeat itself. The following section addresses the question why the US officials lack the necessary commitment to engage in a binding multilateral competition agreement.

3. Repeated US Resistance to a Binding Multilateral Agreement

Even though US competition authorities welcome the idea of more consistency among competition laws and practices, their resistance to all initiatives requiring a treaty-based solution in competition matters remains a constant factor. Much of the US reluctance towards a global competition regime seemed to have waned under the Clinton administration, when competition policy was declared one of the Singapore issues, however, when the negotiations started, US officials could not share the European enthusiasm for the WTO as the principal coordinating body of competition issues.

US skepticism manifested itself in the rather weak mandate given to the 'Working Group on the Interaction between Trade and Competition Policy', established at the Singapore Conference in 1996. Its task was confined to 'study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework' (WTO 1996). The subsequent report in 1998 lacked the necessary vigor to substantiate serious negotiations. The working Group merely recommended further studying the possibilities for a multilateral framework (WTO 1998). In its final report, the Working Group advised an WTO agreement on some loosely defined 'core principles', including transparency, non-discrimination, procedural fairness, provisions on hardcore cartels, modalities for voluntary cooperation and support for progressive technical assistance, as well as institutional capacity building in developing countries (WTO 2003). Hence, the whole idea of establishing detailed and binding competition rules enforced by global enforcement structures has ultimately been watered down by the US delegations to a range of broadly defined guidelines. Moreover, it entailed provision that negotiations will take place after Cancún only if there is a 'explicit' consensus among WTO Members to proceed on the issue. The emphasis on 'explicit' had never before been stipulated in a WTO setting, which indicates how contested the incorporation of competition was. The dream of convergence through multilateralism had come to an end. The final core principles were too broadly defined and too weak to achieve the goal of legal consistency in the enforcement of competition control. Somewhat ironically, US representatives argued that if this minimum set of principles is the maximum, a WTO agreement would lead to legitimizing fallible and ineffective rules – something the US will not agree upon (Hwang 2004: 123). The developing countries, headed by India and Brazil, disapproved the WTO proposal on competition for different reasons. In particular the principle of non-discrimination was regarded as a 'Trojan Horse' designed by industrialized countries to access to their markets by means of facilitated cross-border mergers and acquisitions (M&A) (cf. Lee and Moran, 2003).

Elsewhere it has been argued that the antagonistic stance of the US competition authorities needs to be understood in terms of the institutional configuration of the US competition authorities. According to Damro (2002; 2004) the conclusion of any binding multilateral competition agreement would substantially weaken the far-reaching discretionary power held by the US competition authorities,

which explains why the US competition authorities obstruct the attempts to establish binding multilateral agreements, or vice versa, why the European Commission is much more keener to conclude such an agreement. The argument is that the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) surpass their European counterpart in one important point: the International Antitrust Enforcement Assistance (IAEAA) dating from 1994 entrusts US competition authorities with a considerably high degree of discretionary power to negotiate and conclude bilateral competition agreements with other governments or competition authorities. In comparison, the European Commission enjoys far less discretionary competences, a situation of which the European Court of Justice (ECJ) in the landmark case *France v. Commission* (Case C-327/91) had unpleasantly remembered it in 1994.² Thus, due to the institutional configuration of the federal competition authorities in the US, so the argument, US officials have a strong preference for concluding bilateral agreements (cf. Damro 2002; 2004). A binding multilateral agreement would have to pass many domestic veto points in the ratification process of the US Congress, which discards not only the level of discretionary power, but also increase the level of politicization of cross-border competition questions.

As a matter of fact, institutional features provide us with an interesting perspective on the US aversion on multilateralism in the field of competition questions. However, they do not provide us with the broader picture of why the US authorities refused a multilateral approach for so long. In fact, the high degree of discretionary power enjoyed by US competition officials dates back only to 1994 when the IAEAA was imposed, which makes it rather recent phenomenon. The US reluctance to give up sovereignty in the competition field, however, is much older. As the previous section has outlined, it dates back to the Havana Charter in 1947. The US' hostility towards multilateralism seems paradoxical in several regards. Many of the multilateral organizations that emerged in the postwar world and that were designed to create a liberal world economic order have been invented by the US, including the WTO. Yet, US support and commitment for multilateralism has been declining throughout time. In particular under the current presidency of George W. Bush, the overall US disapproval against organizations such as the WTO has regained its prominence. The Republicans are the most hostile to have their sovereignty constrained by multilateral institutions such as the United Nations and the WTO (Barber 1997). Hence, the resistance against a WTO competition agreement must be embedded in the broader context of an old age dilemma of US foreign policy: multilateralism versus unilateralism. In a following section, this point will be further discussed on the basis of the hegemonic application of US competition laws extraterritorially. Rather than having competition policy formally integrated into a WTO round, US officials praise the conclusion of bilateral agreements as a means to achieve convergence, preferably embedded in the framework of voluntary OECD recommendations. The next section sheds some critical light on the potentiality of bilateral agreements to spur convergence.

² In the first transatlantic competition agreement, the 1991 Agreement Regarding the Application of Competition Laws, the Commission acted without the political consent of the Council of Ministers. France, supported by Spain and the Netherlands, successfully challenged the legality of the agreement before the ECJ (case 32/91) on basis that the Commission had exceeded the scope of its 'discretionary authority' when concluding a formal and binding international agreement with the US government. The ECJ ruled that the Commission had acted *ultra vires*, i.e. the conclusion of such agreements belong to the competences of the Council (European Commission 1994).

4. Bilateralism as a Mechanism for Convergence?

When the European Competition Commissioner Sir Leon Brittan announced his plans to address international antitrust convergence at the 1990 Cartel Conference in Berlin, the US Assistant Attorney General Joel Klein responded to him that a bilateral approach also brings convergence.

A number of competition authorities have engaged in various bilateral cooperation activities with their major trading partners as a way to deal with cross-border aspects of competition control. The span of bilateral agreements has growing ever-wider in the past decade, making it a dense net of cooperative activities. The world of bilateralism has long been reserved to industrialized states. For example, the US has concluded bilateral agreements with the EU, Canada, Japan, Mexico, Israel, Brazil and Australia. The EU in turn cooperates with the US, Canada, Japan, Australia, Switzerland, Russia and most recently also with China. In the mid-1990s, the Commission also concluded a great number of competition agreements with the Central and Eastern European Countries (CEEC), the Newly Independent States (NIS), the Baltic and the Mediterranean counties (Cyprus, Turkey, and Tunisia).

Bilateral competition agreements strongly differ in scope and intensity of cooperation, making these agreements mostly incompatible with each other. They can serve different purposes. The case of Turkey and the Central and Eastern European Countries (CEEC) are exemplary for bilateralism as an authoritative dictation to adopt a particular system of competition control. When the EU entered into a Customs Union with Turkey in March 1995, the establishment of competition laws that are compatible with the EC system has been made a precondition. Similarly, when the European Commission concluded a range of Interim Agreements with Central and Eastern European Countries (CEEC) in the early 1990s, it put much effort in building up competition authorities according to its splitting image.³ By regular compliance reports, the Commission monitored the progress of the candidate countries in terms of resemblance with EC competition law, which has made it impossible for the new entrants to opt for a different competition regime. In the subsequent 1997 Enlargement Package, the 'approximation of competition legislation and the implementation of competition laws' has been made a pre-condition for accession - together with the whole load of the *acquis communautaire*. In fact, the Eastern enlargement comprises a significant leap of 'convergence' in the intra-EU situation of competition regimes. The above cases demonstrate that power imbalance caused by socio-economic realities has opened up a window of opportunity to impose convergence by means of bilateralism. Yet, this is not a uniform practice. Other bilateral competition agreements have been concluded on a much more equal footing.

Far-reaching bilateral agreements have incorporated the positive comity principle, which finds its origins in a series of non-binding OECD Recommendations. Positive comity entails that the signatories can request of the other party to take actions under its own laws, as well as allowing the other party to

³ There is much anecdotal evidence on the high turnover of staff in the newly established competition regimes of the accession countries. Due to very low salaries, many of the lawyers and economist trained by the European Commission sought employment in the private sector. The 'precious' European assistance in establishing competition authorities has caused a brain drain and left the new entrants without the wished for expertise (European Commission 1997).

address competition problems in its own jurisdiction, which are actually situated in the other parties territory but affecting its own 'important' interests. For example, the *Positive Comity Agreement (PCA)* between the US and EU of 1998 constitutes the core of the transatlantic cooperation. It contains a commitment not to act unilaterally unless all means provided by comity have been exhausted, as well as a provision of mutual notification of cases to keep the other party informed. In practice, the agreement goes as far as allowing the other party to participate in the staff meetings and final hearings of the companies under investigation, provided that the companies involved give their permission. Following former Commissioner Karel van Miert, the positive comity agreement allows for canalizing a case to only one competition authority, preferably to the best-placed authority (Miert 1998: 2).

The bilateral agreements entailing the comity principle demonstrate an attempt to diminish extraterritoriality. Although an agreement on the principle of positive comity appears to allow the signatories to mutually exert extraterritorial jurisdiction, the very purpose is to curb such behavior. Yet, the positive comity provision has hardly been applied elsewhere since its premiere in the transatlantic competition agreement. Hence, apart from a few exceptions, bilateral agreements tend to be rather soft in character. The convergence generating power of bilateralism between 'equals' needs to be treated with caution. Voluntary cooperation does not immediately lead to a perception by competition authorities to adopt the same or similar laws and procedures. While a multilateral competition treaty would supervene upon domestic legislation, bilateral agreements tend to be confined to the coordination of investigative strategies and to the provision of mutual assistance in the investigation of cross-border cases. Thus, cooperation tends to take the form of coordination in most cases, while the cooperating parties, i.e. the competition authorities, continue to enforce their own laws. Nevertheless, bilateralism may ultimately provide a mechanism favorable to convergence. However, in the short run inter-agency discussions under bilateralism are likely to evoke only some form of procedural convergence (i.e. similar definitions on markets and market power, the likely competitive effects of particular transactions, the viability of potential remedies, and time schedules).

Despite of a few exceptions, bilateral competition agreements represent primarily an artifact restricted to the OECD world with highly developed competition law systems, similar interests and economic structures. Although bilateral agreements have become more common, there are hardly any agreements between developed and developing countries, even though many developing countries have recently established competition laws. Exceptions are Australia and Papua New Guinea, Canada and Chile, Canada and Costa Rica. Underlying the asymmetrical state of affairs with regard to those excluded from the world of bilateralism are more structural socio-economic interests that do not coincide. Competition authorities from developed economies simply enforce their laws when they observe restrictive business practices, regardless of the company's nationality. Anti-competitive practices of national companies abroad tend not to be perceived as a pressing problem. Hence, there is hardly an incentive to put much effort in concluding bilateral agreements with less advanced competition agencies.

This section has demonstrated that bilateral agreements are not compatible to each other and that they differ in scope and intensity of cooperation. If there are signs of convergence between the signatory competition regimes, they are very unlikely to lead to a broader process of convergence as a bilateral agreement concerns only two authorities. Moreover, bilateralism is not an exclusive hobby of the US, but also very frequently applied by the EU to enforce the convergence of competition laws abroad. Thus, bilateralism in competition matters does not account for why the EU is a proponent of a multilateral agreement and the US not. Or to put it differently, US aversion against multilateralism in competition requires a much more elaborate account.

5. The Clash of Competition Cultures

Much of the European enthusiasm towards a multilateral competition regime can be explained on the basis of its longstanding experience of delegating power to a higher level of governance during the course of European integration – an experience the US does not share. Yet, the reasons for the US aversion against a treaty-based ‘convergence’ are much more deeply rooted. When employing a historical perspective on the US position in competition matters, the hegemonic position occupied by the US with regard to cross-border competition questions becomes visible. This is revealed in a long-standing US unilateralism, which includes an extensive record of extraterritorial application of its competition laws, as well as substantial efforts in ‘instructing’ competition authorities abroad in their process of adopting competition laws and practices.

Extraterritorial application of law has been by and large a US commodity. While the D’Amato Act and the Helms-Burton Act of March 1996 are probably the most well known examples, the extraterritorial application of competition law only reaches the greater public when it culminates to the brink of a trade war.⁴ The US unilateralism in competition affairs has caused substantial opposition as it fundamentally violates the basic principles of international law with regard to ‘territoriality’ and ‘nationality’ (see for more Shaw 2003: 611-620). The extent of US extraterritorial actions has been varying throughout time. For example the Reagan administration has been much less belligerent in the extraterritorial enforcement of competition law (Hwang 2004: 117). Moreover, when other jurisdictions started to apply their laws against US companies, the US officials tempered their conduct (Griffin 2000: 41). Even though the level of extraterritoriality has long been comparatively harmless in the EU, since the 1990s the number of cases of extraterritoriality has steadily been growing.⁵ Meanwhile not only the

⁴ Much discussed in the literature are the decision in the *Timberlane* and the *Alcoa* case in 1945 (cf. Damro 2002). The *Alcoa* decision has led to the ‘Effects Doctrine’ in US antitrust law, according to which the exercise of US extraterritorial jurisdiction was given a statutory basis. It entailed that US jurisdictions can prosecute restraining market conduct by non-nationals, such as price fixing cartels that were organized outside the US territory, but had a significant effect in the US (for example on the basis of products that were imported).

⁵ For example, the Commission fined the South Korean electronics manufacturer *Samsung* in 1998 because of not having notified in advance its takeover of the US computer manufacturer *AST Research Incorporated*. It constituted the first extraterritorial fine and concerned even a case in which there was no damaging effect on competition in the computer market. The company was sanctioned merely because of non-compliance to its merger rules. The fine symbolized more a question of principles, which has been reflected in its relatively small size of mere 33’000 Ecu. Positive clearance would have been given anyway to these companies (European Commission 1998).

European Commission, but also competition authorities from other countries increasingly enforce their laws extraterritorially. The impact of this trend remains to be seen. One could assume that the proliferation of competition authorities is leading to increased extraterritorial competition law enforcement. For the same reasons, it may also gradually ebb away as it may create a certain degree of co-deterrence.

The US hegemonic approach of enforcing its competition laws abroad has not immediately created a pressing need to conclude a multilateral agreement. However, the US aversion against multilateralism is much more deeply rooted. The idea that global competition laws should be defined in Washington and in Washington only is widespread among US competition officials. As Joel Klein, US Assistant Attorney General for Antitrust has put it: "If you want a perfect solution, there is only one perfect solution, one that I haven't been able to persuade anybody to adopt, and that is to let the United States Department of Justice do global enforcement! [...] (I)t would be terribly efficient. [...] And my friends at the Federal Trade Commission, I'm sure would be the first people to support this idea." (Klein 2002: 338) Following Robert Pitofsky, Chairman of the Federal Trade Commission in the US, the answer to multilateral initiatives seems quite definitive: "[...] convergence by law is an aspiration [...] it is just not going to happen." (Pitofsky 2002: 58) Much of the hopes to achieve convergence are concentrated in the recently established International Competition Network (ICN) - a broad based global policy network of national and regional competition authorities, which aims at producing non-binding recommendations and promoting a worldwide competition 'policy-learning' by identifying 'best practices' in competition control. As a multilateral voluntary framework, the ICN provides the perfect means for the diffusion of norms, as well as to mobilize and coerce competition authorities to adopt these norms into their legal systems. Given the high commitment of US officials, who also appear to be the founding forces of the ICN, its voluntary and non-binding character should not surprise. The flexibility of the network structure to bring more consistency and convergence among the national and supranational jurisdictional agencies seems to remedy the American 'tie anxiety' to a more constraining rule system (see for more www.internationalcompetitionnetwork.org).

The crux of the conflicting positions between the EU and the US on a binding multilateral agreement is constituted by a deeply rooted US distrust with regard to the competition culture practiced elsewhere, including that of the EU and other OECD countries. Given the different purposes which competition laws can serve, the US fears that negotiations would dilute the US understanding of competition control (Calvani 2003: 418). Although it can be ascribed to US influence that competition control

The judgment on the Gencor/Lonrho merger case by the *European Court of First Instance (CFI)* in 1999 is taken as a landmark decision for the further exercise of extraterritoriality. The Commission prohibited the merger between the two South African companies, which in turn appealed to the CFI. The court ruled that the European merger rules could be applied to transactions outside the Community and that the ruling was consistent with international law, as the merger produces 'direct, substantial and foreseeable' effects within the EU (Monti, 2003: 72). Thereby, the Commission could rely on its own 'effects doctrine' providing a statutory basis for prosecuting corporations based outside EU territory, which could have a significant impact on the EU. As Mario Monti (2003) has argued: "This new found clarity is a welcome development, which will hopefully render less controversial the extra-territorial application of our rules [...]. (ibidem). The jurisdiction on the Gencor/Lonrho case represents a case of 'convergence' to the US Effects Doctrine, providing the US with a competitor in the extraterritorial competition law enforcement.

became one of the principal policy areas in the Treaty of Rome of 1957 establishing the European Communities, a different kind of competition culture started to emerge in the course of European integration. European competition enforcers tended to orientate themselves on the theoretical core of German ordo-liberalism, the so-called *Freiburg School*, or what more recently came to be termed the *Third Way*, which is premised on the assumption that market invention is necessary for the preservation of an open and free economic life. In this vein, competition control provides a perfect instrument to organize capitalism: market players need to be safeguarded from the anarchy of free competition and private economic power needs to be curbed in order not to distort free and fair competition. In contrast, the Chicago School has had a strong influence on the US antitrust system, in particular under the competition officials of the Reagan administration. According to this paradigm, the central focus of competition control is to protect 'free and fair' competition by all means (at least within the US territory). As the market is believed to regulate itself, public market intervention is intrinsically at odds with a free market ideology, or then should be the exception and be restricted to the minimum necessary. This has led to the perception that not market concentration is perceived as a central problem, but collusive agreements such as cartels and other restrictive business practices. Moreover, market efficiency and consumer welfare should be the determining factors for assessing anti-competitive business conduct, rather than company size and dominant market positions. The Chicagoan principles of consumer welfare and efficiency considerations continue to dominate in the US. They have even undergone a revival under the presidency of George W. Bush, who employed competition officials that have already served under the Reagan administration in the early 1980s - the epitome of the Chicago-School.

The different perspectives on questions of competition control resulted in the fact that public market intervention in Europe used to have a lot stronger tradition than in the US. Moreover, European competition laws are deeply embedded in the integration project as they were designed to enhance the creation of the single European market. For instance, European competition control was marked by a greater distrust of bigness, which was due to a concern of a potentially negative influence of concentrated economic power in the course of European integration. The protection of competitors and at times even employment considerations predicated on distributional objectives tended to be considered more important in Europe than the 'smooth' running of the market machinery. As a result, US competition officials have repeatedly accused their European counterparts of pampering 'sunset industries', overstaffed state-run companies and 'national champions'.

The recent overhaul of the European competition regime of May 1 2004 has brought the EU system closer to that of the US, which indicates a genuine change in the economic philosophy in which competition control is addressed in Europe. Heightened emphasis is given to economic analyses. Moreover, consumer welfare and efficiency considerations have become as important as in the US in judging competition cases. Some commentators even speculated that Cancún would have been successful if reform was conducted earlier (cf. Hwang 2004). There is substantial reason to assume that the shift in ideological climate in Europe brings with it a détente with regard to the clash of competition cultures - at least for the time being. Nevertheless an 'appeasement' is unlikely to alter the

US position on a multilateral competition framework. With respect to convergence, however, proponents of the US type of competition culture have reason to triumph as the intra-EU diversity of competition regimes is likely to clear the floor for European laws. The 2004 competition reform has brought profound institutional changes, which contain elements that decentralize European competition law to the national level. The next section elaborates on how displays signs of a process of 'European integration through the backdoor'.

6. European Integration Through the Backdoor: A Process of *De Facto* Convergence?

The promotion of a common understanding on competition principles and antitrust mechanisms on a global scale is paralleled by a situation in which domestic competition regimes of the EU Member States continue to differ remarkably. The Member States of the EU have their own competition laws and regimes, which coexist next to the supranational European competition authority. National competition authorities within the EU primarily focus on combating anti-competitive conduct within their geographical boundaries, whereas European competition control is confined to companies meeting a certain turnover threshold. Attempts to streamline the multilevel competition system could never generate the necessary political support. National competition laws have long provided one of the last resorts of national public market intervention and therefore could never formally been 'Europeanized'. With ten new 'look-alikes' in the course of European enlargement, the heterogeneity of national competition regimes within the confines of the EU already has substantially been reduced. The recent overhaul of the European competition regime of May 1 in 2004 is likely to add to this significant leap of intra-EU 'convergence'.

Even though the 2004 reform does not touch upon the great variety of competition enforcement systems and the national competition authorities may continue to apply their own laws, it bears great potential to catalyze a convergence process among the Member States towards the European model of competition laws and practices. Two elements are crucial in this respect: First, the reform package entails a *de facto* devolution of enforcement competences in competition matters. Under the new system, Article 81 and Article 82 (TEC) are directly applicable by the Member States if 'trade between the Member States is affected'. This implies that national competition authorities have to enforce European law in certain cases and their own laws in others. Thereby the European Commission has lost its exclusionary competence with regard to large transborder business transactions. In this respect, the reform has brought a shift in power towards the competition authorities of the Member States, which newly form a structural part in European competition governance. The second element of the 2004 overhaul that is likely to spur a convergence process is the establishment of the *European Competition Network (ECN)*, in which the Commission's DG Competition, the European Courts are required to cooperate with their national counterparts in order to 'guarantee a smooth application of European laws'. The ECN constitutes one of the key features of the reform as it is expected to bring about a higher degree of integration of the national and European competition authorities. Ultimately, increased intra-EU cooperation, coordination and exchange of information are expected to lead to more consistency among the European enforcement agencies.

The ECN is established in a field where accomplishing a fully-fledged *de facto* harmonization is not an option. In a system in which national competition authorities are obliged to enforce both domestic and European laws, European laws and practices are likely to win the contest. Given the high costs involved in applying in tandem two different types of laws, national enforcers are likely to adhere to European competition laws and practices at last – irrespective to which ‘dimension’ a case belongs. Although the new system is likely to bring about a convergence with regard to investigative techniques and procedures, it does not catalyze a process of convergence in terms of substantial legal changes in domestic competition regimes. Instead, the importance of national competition laws and practices risks to be diluted in the long run.

The wide ranging competences hold by the Commission within the framework of the ECN underpin that there is only one common reference point towards which national competition authorities are allowed to converge, that is the European model. The reform has conveyed extensive controlling functions to the DG Competition, such as the right to intervene in case of ‘conflicting decisions’, and to withdraw a case at any time from a national competition authority. As the stipulation ‘conflicting decisions’ provides much room for interpretation, the Commission can theoretically intrude in every national proceeding that deviates from its own perspective.⁶ Originally, the ECN has been proclaimed as means for Member States competition authorities to bring in their interests on the background of their a different political and economic reality (Gerber 2002: 12). Yet, the power imbalance on behalf of the Commission and the strong imperative to apply European laws to cases with a Community dimension does not create a level playing field for national competition authorities. On the contrary, it indicates that the ECN has been established foremost to warrant compliance and ‘consistent’ enforcement among national competition authorities. Hence, the recent competition reform constitutes an opening move for a diminished significance of national competition laws and brings the EU one step closer to one common competition culture.

Conclusions

Initiatives to conclude a binding agreement on competition policy have been many, yet, none of them has been successful. They range from increased jurisdictional cooperation, the conclusion of binding multilateral competition rules, to the creation of a fully-fledged supranational competition law regime entrusted with its own jurisdiction for the global economy. Common to all initiatives is that the reliance on domestic competition control is perceived as an inadequate response to the transnationalization of economic activities.

This paper has sought to explain why, after competition rules have been high on the agenda in the WTO Cancún negotiations, ‘convergence’ is ultimately perceived as the only viable option left to address cross-border competition problems. By conceptualizing convergence as a political practice, every instance of convergence conveys a political dimension. This is revealed in the fact that

⁶ The conditions in which the Commission can supersede national competition authorities are outlined in Regulation No. 1/2003, which displaces the more than 40 year old Regulation No. 17.

convergence presupposes an envisaged reference point towards which entities tend, wish or then are pressured to move. The conclusion of a multilateral agreement on competition rules has been declared the final touch of convergence. The forces that have put competition on the WTO agenda are of European origin. In particular the European Commission has attempted to establish a binding multilateral regime on competition in the WTO framework. Although competition policy has reached a high position on the international agenda, the Commission's efforts in multilateralizing competition rules and practices have proven unsuccessful due to resistance from the US and a number of developing countries. Despite the fact that establishing a common ground for cross-border competition questions has been an enduring endeavor of US competition officials, it strongly opposed a multilateral agreement. When embedding the US position in a larger time span and situating the WTO agreement against the ongoing US quandary of multilateralism versus unilateralism, the US opposition can not be convincingly be explained on basis of institutional features that provide US competition authorities with discretionary freedom. Instead, the US competition officials display a deeply ingrained mistrust on competition control is enforced elsewhere. Different visions on what accounts as 'appropriate' competition control would require balancing many different interests – something on which US competition officials are not willing to compromise after their long-standing hegemonic position in competition affairs. As a result of repeated US resistance, the convergence of competition laws and practices has been declared the only viable strategy left.

US officials praise the conclusion of bilateral agreements as a mechanism for convergence – a strategy followed also by the EU. As most of the agreements differ in scope and intensity of cooperation, they are not compatible to each other. In case of the new EU Member States and aspirant Members, bilateralism provided a channel for the Commission to discipline the convergence of emerging competition systems towards the European model of competition control. Hence, bilateralism can serve as means to impose its own parameters on competition control. Nevertheless, bilateralism in the field of competition remains merely a hobby of the industrialized world, directed at curtailing the extraterritorial application of competition law, rather than convergence. As it is restricted to two signatories, only, the prospects of an overall convergence remain limited. Moreover, anticompetitive conduct in a third country cannot be addressed.

Convergence in the field of competition laws and practices is not an anonymous, god-driven process. This becomes in particular evident in the case of the highly integrated and liberalized markets of the US and EU, which are by themselves not regulated by uniform competition laws and practices. Although both the EU and the US are committed convergence advocates, at home the convergence project seems politically not feasible. Yet, the recent European reform, which constitutes in itself a converging shift towards the US model of competition control, displays signs of a *de facto* convergence process, clearing the floor for European competition law on the Member State level. There is reason to assume that national competition laws and practices in Europe are likely to loose their importance. Hence, the EU is not only engaged in establishing a shared understanding of cross-border competition issues in the contemporary global economy, but has also set the structural parameters to catalyze an intra-EU convergence process.

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