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International Competition Law Enforcement: Different Means, One Goal?

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This paper addresses one of the intricacies of international competition law enforcement, namely the diversification of legal instruments used for bilateral cooperation. To name only a few: why are memorandums of understanding, dedicated competition cooperation agreements, competition law provisions in free trade agreements, and policy dialogues used in parallel to attain bilateral cooperation on competition law enforcement? What is the added legal value of each instrument? Is their added value to be found in political considerations? The argument put forward in this paper is that a parallel can be drawn between the internal and external functions of competition law. As competition law is not a goal as such within the EU, but in general serves the optimal functioning of the Single Market, the function of international cooperation on competition law matters is not solely to be found in competition considerations, but serves other goals as well. Therefore, the fact that a number of different objectives are pursued may explain the use of several distinct instruments for cooperation on competition law issues.

1. INTRODUCTION

1.1 Diversification of legal means in the EU for bilateral cooperation on competition law

As was recently demonstrated by the blocking of the Deutsche Börse AG/NYSE Euronext merger, the European Commission¹ deals with cases that go beyond the territorial scope of the European Union (EU), necessitating cooperation with the competition authorities of third countries.² This paper looks at the diversification of legal instruments used for this bilateral competition law enforcement cooperation.³ More specifically, the questions raised are: why are Memorandums of Understanding (MoUs), Dedicated Competition Cooperation Agreements, competition law provisions in Free Trade Agreements (FTAs), and Policy Dialogues used in parallel to attain bilateral cooperation on competition law enforcement? What is the added legal value of each instrument? Is their added value to be found in political considerations? These questions will be framed in the broader discussion on the optimal form of international cooperation on competition law, if such a form exists.

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¹ Herein 'the Commission'.

² Press Release, 'Mergers: Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions', 1 February 2012, MEMO/12/60, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/60&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed February 2012.

³ The term instrument covers both legally binding treaties or agreements as non-binding recommendations or guidelines.

The main focus of the paper will be on *bilateral* cooperation. The multilateral track will be touched upon, but initiatives such as the OECD Competition Committee and Global Forum on Competition, the International Competition Network (ICN), UNCTAD or the attempts to include competition matters in the WTO, will not be dealt with. The multilateral efforts in the field of competition law and the institutional forms they take are very important developments. However, this paper will focus on the observation that – contrary to multilateral initiatives that have noticeably distinct roles – the legal instruments for bilateral cooperation take on a wide variety of forms, although with an apparently similar purpose.⁴ Also falling outside the scope of this paper are the agreements with candidate countries, or agreements concluded in the framework of the European Neighbourhood Policy (ENP) or the Euro-Mediterranean Partnership. These agreements also contain competition provisions, but due to their very specific context, will not be analysed in this paper.

Questions will be answered from an EU perspective, because apart from the United States of America, the EU has developed one of the most mature competition regimes in the world. Secondly, EU insights in international competition law cooperation may be useful, as competition law in the EU itself is applied transnationally. A final factor is that the EU has been very active in international negotiations on competition law and the internationalisation of competition law and policy.⁵

1.2 A global and under-researched issue

A first reason why legal diversification in bilateral competition cooperation deserves to be highlighted relates to the importance of international competition law cooperation in itself. The emergence of the global market necessitates the creation of rules adapted to a globalised context, detached from territorialism. As protectionist influences often obstruct this type of evolution, cooperation to simplify *international* enforcement of *national* rules constitutes a necessary safeguard, as rules are without value if they cannot be effectively enforced. The impact of globalisation will be further discussed below (see 2.3).

What makes this field of research, in particular the diversity of bilateral legal instruments for international competition cooperation, even more interesting, is the fact that it is a fairly under-researched area. The debates on international cooperation on competition law issues mostly focus on different peculiarities, such as the discussion concerning bilateral versus multilateral cooperation, or the debate revolving around convergence versus cooperation (see 2.4). It is nevertheless also interesting to note that

⁴ Briefly put, the OECD focuses mainly on developed countries, UNCTAD's work is more centred on developing countries, the ICN is a virtual network on the agency-level, focusing only on competition matters and not trade issues, and the WTO is a binding platform. Of course this should be nuanced. For a more detailed overview of the characteristics of these platforms, see Damro, 'The new trade politics and EU competition policy: shopping for convergence and cooperation', 2006 13(6) *Journal of European Public Policy*, 867-886. This type of 'diversification' is not noticeable in bilateral cooperation instruments.

⁵ For an overview of this international action of the EU, see Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010.

the EU is currently negotiating second generation bilateral competition agreements (see 3.2) with Switzerland and Canada, while at the same time negotiating MoUs with India and China, and it includes competition provisions in its bilateral FTAs.⁶ What are the causes of this differentiation and what are the benefits and flaws of each instrument? These questions have not yet been fully answered from a *legal* perspective. A clearer view on this diversification could help improve the effectiveness of international cooperation on competition issues, by making the flaws and benefits of each approach more explicit, and being a cause for reflexion. Are clear goals of cooperation stated in advance, and is the legal instrument to attain that goal chosen accordingly? Or do other considerations determine the preferred instrument for cooperation? This paper will try to bring some clarity to this matter, aimed at facilitating the choice of instrument in the future.

Apparently, the Commission itself is aware of this problem. According to a Commission official:

The Directorate-General for Competition of the European Commission ('DG Competition') is now adopting a more strategic approach towards international agreements tailoring the instrument to the real needs of the relationship and to facts such as the size and importance of the country's economy, the intensity of the trade and investment relationship with the country concerned and the degree of maturity of its competition regime.⁷

This implies that the diversification of *existing* instruments is not caused by the need to tailor the agreements to the real needs of the relationship. Another question that comes to mind when reading this statement is who defines the 'needs' of the relationship? What are these 'needs' and from whose perspective are they seen? This paper would like to provide some clarity by conducting a comparative analysis with a narrower focus than is typically adopted. More precisely it will link the needs of international enforcement and the goals of international cooperation with the legal instruments used to attain this cooperation.

1.3 Overview

The paper will first elaborate on the context of international cooperation in the field of competition law by briefly explaining its necessity, benefits, and origins. Then a short overview will be given of the main axis around which current debates on international competition law cooperation revolve. The next section will analyse the similarities and differences in the legal means to achieve bilateral cooperation in competition law enforcement. It will clarify the main instruments by elaborating on their general content and legal value. Section four will then identify the possible standards of evaluation against which the added legal and political value of each instrument can be assessed. Section five contains the conclusion.

⁶ Interview with Commission official, November 2011.

⁷ Valle, 'International Agreements Regarding Cooperation in the Field of Competition: The New Strategy of the European Commission', (2010) 1(2) *Journal of European Competition Law & Practice* 155, 156.

2. INTERNATIONAL COMPETITION LAW COOPERATION

It has been said that any system of law is only as effective as its enforcement mechanism and that the 'life blood' of competition law lies in its effective enforcement.⁸ In the field of competition law, the effectiveness of this enforcement mechanism can be completely undone if it lacks an international character. This aspect of competition law enforcement therefore cannot be ignored. Why is this international dimension so valuable and how did it develop?

2.1 The need for international cooperation in the field of competition law

International competition law enforcement is necessitated first of all by globalisation.⁹ Looking at the international section of the website of Directorate General (DG) Competition, one is confronted with the heading 'Facing the challenges of globalisation'.¹⁰ The Commission explains its international engagements through the need for effective enforcement in a globalised economy, where a majority of companies operate across borders, thus affecting several distinct national markets.¹¹ The most important anticompetitive practices that have an international effect deserve to be mentioned. Firstly, there is the existence of international cartels. While no concrete recent data on the Commission's international cooperation efforts in the fight against international cartels are publicly available, the importance the Commission places on fighting international cartels is clear from many of its formal and informal communications. For example, competition Commissioner Almunia invited his audience to 'consider that at present my services are investigating over 25 cartel cases, ... only about half of them are limited to Europe in scope'.¹² Given the increase in multinational firms, and due to the potential existence of exclusive distribution agreements in the territory of one state, such agreements can have a significant impact on an international level.¹³ Also, multi-jurisdictional mergers are becoming increasingly common.¹⁴ Again, the rise of multinational firms and the global economy increase the emergence of this type of merger dramatically. As increasing economic liberalisation leads to the removal of trade barriers, this creates fresh incentives for anti-competitive behaviour by firms becoming more vulnerable to foreign competition. Competition

⁸ Yeung, *Securing compliance: a principled approach*, Oregon, Hart Publishing, 2004, 3.

⁹ In the sense of a globally interdependent economy. Steenbergen, 'Competition and trade policy and the challenge of globalization', in Govaere, Quick & Bronckers (eds), *Trade and Competition law in the EU and beyond*, Cheltenham, Edward Elgar Publishing, 2011, 3.

¹⁰ European Commission Competition, International, 'Facing the challenges of globalisation', http://ec.europa.eu/competition/international/overview/index_en.html, accessed April 2012.

¹¹ *Ibid.*

¹² Speech Almunia, 'Cartels: the priority in competition enforcement', 15th International Conference on Competition: a spotlight on cartel prosecution, Berlin, 2011; also, very recently, see Speech Italianer, 'Zero tolerance for international cartels', ICN Cartel Workshop, Bruges, 2011, both at http://ec.europa.eu/competition/speeches/index_theme_1.html, accessed December 2011. Further references can be found in the Commission's annual Management Plans, available at http://ec.europa.eu/dgs/competition/index_en.htm.

¹³ Papadopoulos, *op.cit.*, 42.

¹⁴ *Ibid.*, 43.

laws thus need to supplement this liberalisation in order to protect its effects, and cooperation is required to avoid gaps in the legislation or its enforcement.¹⁵

This necessity is not only put forward by the Commission, it is also supported by legal doctrine, confirming that assistance between states, for instance during investigations, proceedings or enforcement action, is essential for the effective enforcement of national competition laws.¹⁶ It is recognised that companies as well as business transactions have become global, and that the effects of such global transactions cannot be confined to one jurisdiction.¹⁷ Therefore, international cooperation to ensure the competitiveness of these transactions has become a necessity.

Another factor explaining the need for (increased) international cooperation on competition matters is the proliferation of competition laws. Even though competition law is a relatively young branch of law,¹⁸ the first competition laws having been enacted in 1889 in Canada and in 1923 in Europe (Germany),¹⁹ today over a hundred countries have competition laws in force.²⁰ This phenomenon increases the risk of different national laws being applicable to the same case. These legislations may be based on different legal or economic standards, resulting in conflicting or divergent outcomes.²¹ Although international competition cooperation does not solve this problem entirely, it can foster greater understanding of different competition systems and can cause competition authorities to take into account considerations of other competition authorities.

Not only conflicting outcomes are a concern, efficiency considerations should also be taken into account. International competition cases will often be treated simultaneously by several competition authorities.²² In order to avoid a duplication of effort by competition authorities and to reduce the procedural burden on the companies involved, competition authorities should communicate with each other and coordinate their investigations to the largest possible extent. For instance, in the case of multi-jurisdictional mergers, one procedural problem consists of the fact that several national notification procedures with different deadlines and requirements will have to be

¹⁵ Basedow, 'Competition policy in a globalized economy: from extraterritorial application to harmonization', in Neumann & Weigand (eds), *The International Handbook of Competition*, Cheltenham, Elgar, 2004, 321.

¹⁶ *Ibid*, 325.

¹⁷ Dieckmann, 'The benefits of cooperation between competition authorities', Inaugural symposium of the Competition Policy Research Center, Tokyo, 2003, 1, <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf>, accessed December 2011.

¹⁸ In 2004, over eighty countries had a form of competition legislation, of which more than two-third had taken effect only since 1992. Basedow, *op.cit.*, 321.

¹⁹ Papadopoulos, *op.cit.*, 9-12.

²⁰ Asian Development Bank, Competition Law Toolkit, 'Countries that have adopted systems of competition law', <http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw030000.asp>, accessed January 2012.

²¹ Papadopoulos, *op.cit.*, 44.

²² Dieckmann, *op.cit.*, 10.

fulfilled, subjecting the undertakings involved to both additional costs and legal unpredictability.²³

These two problems can be described as consequences of ‘over-regulation’, in the sense that they are caused by the applicability of more than one set of national competition rules. However, under-regulation can occur as well. Substantive law that is too lenient, restrictions in its scope of application or procedural enforcement difficulties can cause gaps in the protection of competition.²⁴ Companies engaging in anti-competitive behaviour can benefit from these gaps and undermine the entire competition system. Again, international cooperation can help overcome this problem.

2.2 Benefits of international competition law cooperation

The advantages of international competition cooperation by facing the challenges mentioned above, can be summarised as follows: a better use of resources, avoidance of conflicts with other laws and rulings and a more predictable and (cost-) efficient outcome, which is beneficial to the business environment.²⁵

In a broader perspective, cooperation can also stimulate a learning process that can lead to a more mature and sophisticated competition system. Regular interaction can lead to convergence in the economic and legal analysis of competition cases, and in this way can reduce the risk of incoherent rulings. Competition authorities can benefit from the experience that another competition authority may have with a particular market or problem, even when they are not working on the same case. By stimulating regular contact between different competition authorities, a close working relationship and mutual confidence in each other’s capabilities is encouraged.²⁶ This can play an important role in generating deeper cooperation in the future.

Another benefit of cooperation, especially for younger or less established competition authorities, is that international cooperation can – paradoxically – enhance their autonomy *vis-à-vis* politics, judges, and firms. When different national competition authorities come to conflicting outcomes in cases, ‘[t]hen, governments may try to intervene; firms can choose forums; and judges get the ultimate say.’²⁷ If however they cooperate, and their decisions are ‘backed’ by other authorities, this provides the decisions with more authority and will make the competition authorities less institutionally dependent.

²³ Papadopoulos, op.cit., 43. In 1989 the Gillette/ Wilkinson merger was notified in fourteen jurisdictions. In 1999 the Exxon/Mobil merger was notified in twenty jurisdictions (Papadopoulos, op.cit., 91). It must however be noted that these transactions took place before the EU Merger Regulation, which noticeably simplified the matter (ibid., 43).

²⁴ Basedow, op.cit., 322.

²⁵ Dieckmann, op.cit., 2.

²⁶ Ibid., 5-6.

²⁷ Blauger, ‘The governance of overlapping jurisdictions – How international cooperation enhances the autonomy of competition authorities’, Transtate Working Papers no.102, Bremen, Staatlichkeit im Wandel, 2009, 1.

There are also less idealistic benefits to international cooperation for the EU, such as more effective and efficient enforcement of EU competition rules, fairer treatment of EU companies in foreign markets, and the creation of a level-playing field between EU companies and their foreign competitors.²⁸

The remark should be made that this section has dealt with the benefits of international competition cooperation in general, not the way in which this cooperation should happen.

2.3 Origins of international competition law enforcement cooperation

As state sovereignty based on territorial integrity has been a central given in the international system since the Peace of Westphalia in 1648, how did states, competition authorities, and also the EU, reach the conclusion that they should cooperate with one another and to some extent allow other states to interfere with anticompetitive actions taking place on their territory?

2.3.1 Extraterritoriality

As already touched upon in section 2.1, restrictions of competition within a state can be caused by anticompetitive behaviour situated outside the territory of that state. For instance, foreign firms may decide to divide a national market between them or fix prices for that market, or a foreign firm may hold a dominant position and abuse it in another state. The first strategy of states (and the EU) to deal with this type of situation was to unilaterally apply their laws extraterritorially. It thus needed to be determined to what extent these 'foreign' situations could be governed by national rules and to what extent they fell under the jurisdiction of the national authorities.²⁹ The extraterritorial application of laws is not regulated (formally or informally) in a uniform manner.³⁰ While this paper does not offer the framework to discuss all different approaches in detail, the situation in the EU will be clarified briefly.

The main articles concerning competition law in the Treaty on the Functioning of the European Union (TFEU), Articles 101 and 102 TFEU,³¹ do not mention whether they apply extraterritorially. Therefore, the Court of Justice of the EU (the Court), often confirming Commission practice, has developed their extraterritorial application in its case-law.³² Three legal doctrines have been put forward, two of which were explicitly confirmed by the Court. The first doctrine, the *economic entity doctrine*, was based on the nationality of the undertakings engaging in anticompetitive behaviour.³³ Evidently this

²⁸ Valle, op.cit., 155.

²⁹ Jones & Sufrin, *EC Competition Law - Text, Cases and Materials*, 3rd ed, New York, Oxford University Press, 2008, 1356.

³⁰ For a detailed description of these four types, see Basedow, op.cit., 323.

³¹ Article 101 & 102 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 115 of 9 May 2008, 0001-0388.

³² Geradin, Reysen, & Henry, 'Extraterritoriality, comity, and cooperation in EU competition law', in Guzman (ed), *Cooperation, comity, and competition policy*, New York, Oxford University Press, 2011, 24.

³³ It was applied by the Court in the *Dyestuffs* case, where the Court confirmed its competence by holding parent companies from third countries liable for the anti-competitive behaviour of their EU subsidiaries

theory has its limits, as it cannot be applied to assume jurisdiction over purely non-European players distorting the Single Market.³⁴ Therefore an alternative doctrine was developed, the *implementation doctrine*. This doctrine finds its origins in the territoriality principle, and confers jurisdiction to the EU over conduct having a sufficiently close link to its territory.³⁵ The core of the doctrine is that in case agreements or practices are implemented within the EU and trade between member states is affected, they fall under the scope of Articles 101 and 102 TFEU, irrespective of their geographic origin,³⁶ or whether or not EU subsidiaries, (sub-)agents or branches were used. This was clarified by the Court in the *Woodpulp* case.³⁷ What actions constitute an *implementation* was clarified in the *Gencor* case, stating that the mere sale in the EU is an implementation act, irrespective of where the sources of supply or the production plants are located.³⁸ The final doctrine is recognised by the Commission, but disagreement exists on whether it is generally confirmed by the Court, which prefers to rely on the two other doctrines, as they are less politically sensitive.³⁹ This doctrine is the *effects doctrine*, also based on the territoriality principle and extending jurisdiction to situations where the effects in the EU of foreign anticompetitive actions are immediate, reasonably foreseeable, and substantial.⁴⁰

While noticeably widening the scope of jurisdiction, extraterritorial application of the law does have its obvious limits. In a globalised economy, with a proliferation of competition laws, companies will often find themselves subject to different national laws, creating an excessive burden for companies, for instance in the case of an international merger when complying with all the formalities of the different affected states. Moreover, extraterritorial application of national laws can result in irreconcilable remedies and diplomatic problems can arise.⁴¹ Another limitation is that in order for extraterritorial enforcement to be effective, very often the assistance of other states will

over which they had control. ECJ, 14 July 1972, Case 48-69 *Imperial Chemical Industries Ltd. v Commission of the European Communities*, [1972] ECR 619, paras 130-132, 135.

³⁴ Geradin, Reysen, & Henry, op.cit., 26.

³⁵ Ibid., p. 25, fn. 16.

³⁶ Ibid., p. 26.

³⁷ ECJ, 27 September 1988, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, [1988] ECR 5193, paras 16-17. (Wood Pulp)

³⁸ CFI, 25 March 1999, Case T-102/96, *Gencor Ltd v Commission of the European Communities*, [1999] ECR II-753, para 87.

³⁹ Geradin, Reysen, & Henry, op.cit., 27-28.

⁴⁰ *Gencor*, para. 87, 90. This doctrine was originally developed in the U.S., in the well-known *Alcoa* case (*United States v. Aluminium Co. Of America* 148F. 2d 416 (2 Cir.1945)).

⁴¹ Jones & Sufrin, op.cit., 1357. This explains the phenomenon of blocking statutes. In the context of excessive extraterritorial application of national laws by the US, not imposing any self-restraint, blocking statutes were adopted by other states in order to make discovery more difficult. Swaine, 'Cooperation, Comity, and Competition Policy: United States', in Guzman (ed), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 10. Through this type of statute, states hoped that by forbidding their national firms to provide documents to foreign competition authorities or courts, those courts will renounce to enforce their order, respecting the prohibition. Zanettin, op.cit., 51. For more information on blocking statutes, see Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 49-52.

still be needed, for instance during the proceedings, in gathering evidence or during the enforcement.⁴²

2.3.2 First step towards cooperation: the OECD recommendation

The next step was thus to find a solution to address these problems, and this solution was found in international cooperation.⁴³ Evidently, considering the sensitivity of competition law for states,⁴⁴ this cooperation only developed gradually, and the debate is not over yet (see 2.4).

This essay does not seek to provide a detailed overview of the history of international cooperation on competition issues.⁴⁵ Nevertheless, the issuing of a set of recommendations concerning cooperation between member countries on anticompetitive practices affecting international trade by the Organisation for Economic Co-operation and Development (OECD) in 1967 is important to mention.⁴⁶ These recommendations have been revised on several occasions, most recently in 1995.⁴⁷ They have certainly demonstrated their value. The content of many (bilateral) cooperation agreements strongly resembles the content of the recommendations.⁴⁸ The recommendations contain detailed provisions on notification, exchange of information, consultation and conciliation. An interpretative appendix has also been added to bring extra clarity.⁴⁹ As recommendations, however, they do not have any binding legal value. A subsequent step was then to incorporate the recommendations into more strict legal instruments, and to tailor them to the needs of the parties (see section 3).

2.4 Current debates

After having reviewed the origins and early evolution of competition law cooperation, it is time to look at the current situation. Before analysing some of the existing legal instruments used for bilateral competition cooperation, it is important to point out that cooperation is not the only option, and there is more than one way to do it. Today, a

⁴² Basedow, *op.cit.*, 324-325.

⁴³ Jones & Sufrin, *op.cit.*, 1387.

⁴⁴ Indeed, competition policy is closely linked to trade policy and industrial policy, causing national market-sensitivities and political interference to emerge.

⁴⁵ This started already in 1927 in the Preparatory Committee of the World Economic Conference, established under the auspices of the League of Nations. Report of the OECD Committee on competition law and policy – Making international markets more efficient through ‘positive comity’ in competition law enforcement (OECD report on positive comity), DAFE/CLP(99)19, 1999, 7, <http://www.oecd.org/dataoecd/40/3/2752161.pdf>, accessed January 2012. For some historic overview, see Papadopoulos, *op.cit.*, and Gerber, *Global Competition – Law, markets, and globalization*, Oxford, Oxford University Press, 2010.

⁴⁶ OECD Recommendations and Best Practices, Revised Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, C (95) 130/FINAL, 1995, <http://www.oecd.org/dataoecd/60/42/21570317.pdf>, accessed January 2012.

⁴⁷ More precisely in 1973, 1979, 1986, and 1995. *Ibid.*

⁴⁸ In a later stage, the recommendations have been influenced by the existing competition cooperation agreements. Zanettin, *op.cit.*, 56.

⁴⁹ *Ibid.*

strong debate continues concerning the best way forward for competition law on a global level. In the author's view, current discussions revolve around three main axis. These axis are not to be seen as distinct from each other, but rather intertwining.

2.4.1 Multilateral versus bilateral cooperation

The discussion on multilateral versus bilateral cooperation naturally concerns the number of parties that should be involved in cooperation. Some of the most recurring arguments for and against both tracks will be mentioned. As the benefits of one track will often be linked to the drawbacks of the other track, these two opponents will be dealt with together.

For Bilateral / Against Multilateral

As there are only two parties involved in bilateral cooperation, it is clear that this environment is more beneficial to create trust between the parties and to promote an intense level of continuous cooperation and interaction. In the same vein, it is logical to assume that cooperation and interaction will in general be more superficial in multilateral frameworks, as there are more and often more diverse partners involved than in the case of bilateral cooperation, where the chance is higher that parties are more similar. In a multilateral framework, developed and less developed countries, in general and with regard to their experience with competition law, will be involved.⁵⁰ As there is a greater matter of trust between more similar parties in bilateral cooperation, this may also increase the chances of an evolution towards substantial and procedural convergence.

On the other hand, in case of bilateral cooperation between partners that are rather distinct, this framework is beneficial for clauses involving technical assistance.⁵¹ As technical assistance is both time and resource consuming, it is clear that this kind of commitment is more difficult to offer in a multilateral context.

Considering the sensitive nature of competition policy to nation-states – it being closely linked to other policy areas such as industrial policy and trade – and the differing levels of experience with it, it is foreseeable that in a diverse multilateral framework the chance to reach agreement on certain issues is much smaller than in a bilateral context. Many parties do not even agree on the goal(s) of competition law and its substantial functions, which is the common basis needed to work out further issues.⁵² What would be agreed upon would reflect only a lowest common denominator and could have a perverse effect on the development of a sound competition policy.

⁵⁰ See for instance the member countries of the OECD or the WTO, at http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html and http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm respectively, accessed January 2012.

⁵¹ For an overview of technical assistance clauses in bilateral enforcement cooperation agreements from 1976 to 2009, see Papadopoulos, *op.cit.*, 56-57. 8 Out of 27 agreements contained such clauses.

⁵² Trittel, 'Is a multilateral Framework Necessary?', WTO Regional Workshop on Competition Policy, Cape Town, 22-24 February 2001, <http://www.ftc.gov/bc/international/docs/wtocapetown.pdf>, accessed December 2011.

For Multilateral / Against Bilateral

As mentioned before, more diverse partners will be involved in multilateral discussions. This also has positive implications. Not only does it allow to learn from a broader range of experiences, it also offers less developed countries, who would not be a selected partner for bilateral cooperation, or would not have sufficient negotiation powers, to be involved and have the chance to benefit of the experience and expertise of others, and coordinate their actions with other less developed countries.⁵³

Also, a true global competition culture can only be attained when many countries are involved. If a certain degree of convergence could be attained, even if it is a superficial one, the geographical scope would be much broader than in a bilateral context. As the economy becomes more and more globally integrated, bilateral agreements do encounter their limitations. A proliferation of bilateral agreements in the long term might prove to be counter-effective and confusing.⁵⁴

General Remarks

As mentioned, bilateral agreements are only concluded with a limited number of selected partners, but multilateral forums as well have their disadvantages. Some regional groupings have limited membership, while others have a small geographical scope. Others have a substantive limitation, for instance, WTO and UNCTAD cooperation will only involve competition issues with a direct trade dimension.

Considering the relatively young age of competition law, the great diversity between countries that have a competition policy, and their national sensitivities, a multilateral agreement that is more than the lowest common denominator, is hard to imagine. Therefore bilateral agreements appear to be the correct way to move forward at the moment, where appropriate in a network-environment. This appears to have been the evolution after the failure to include the Singapore issues in the Doha-Round.⁵⁵ This of course can and should be complemented by networks such as the ICN, whose potential should not be underestimated.⁵⁶

2.4.2 Convergence/harmonisation versus cooperation

The second axis of discussion opposes substantial or procedural convergence/harmonisation to (enforcement) cooperation. Convergence can be seen as 'the tendency of societies to grow more

⁵³ This may also constitute a reason for developed countries not to enter into multilateral negotiations. It was one of the causes of the failure to include competition issues into the Doha-round. Papadopoulos, *op.cit.*, 232.

⁵⁴ A partial solution for this problem could be the creation of networks of bilateral cooperation.

⁵⁵ For more on this issue, see Drexler, 'International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda', (2004) 27 (3) *Wcomp* 419.

⁵⁶ In this context one can refer to Slaughter's concept of government networks as a solution to what she calls the 'globalization paradox', see Slaughter, *A new world order*, Princeton, Princeton University Press, 2004.

alike, to develop similarities in structures, processes and performances'.⁵⁷ It is thus a rather passive process. Harmonisation on the other hand can be described as active convergence. It is conscious, intended and works towards a predefined standard.⁵⁸

The risks, costs, and inconveniences for companies of having to operate in a fragmented global legal environment with a great diversity of national competition laws are obvious. Substantial or procedural convergence would certainly simplify the international business environment, and make it more transparent and predictable while also promoting better and smoother enforcement, but there is too little agreement globally on what competition law should try to accomplish and how it should be done. Even though there is a global economy, nations 'are at different stages of economic development and have different capabilities, perceptions, and priorities'.⁵⁹ It is more realistic to start a process of convergence on a firm basis of daily intense cooperation to create trust between competition authorities and familiarity with other systems. Moreover, diversity does have benefits, 'and openness of the channels for experimentation and adjustment has its own dynamic, pro-competitive rewards'.⁶⁰ Through cooperation one can learn from the coexistence of different competition laws worldwide, and in this way one is continuously stimulated to review one's own national competition laws. A minimum harmonisation would however not undo this benefit. While Basedow stated in 2004 that a minimum harmonisation was the only realistic option at that time,⁶¹ it seems that the international climate is still not optimal to reach such level of convergence. Even though it is evolving rapidly, competition law is a young branch of law, and there is too much disagreement in the international community on the meaning and function of competition law, while national sensitivities continue to play a big role.

Another argument in favour of cooperation is that differences in substantive law are not the main cause of deficits in the protection of competition – the main substantive problems being the regulation of export cartels⁶² and protectionist behaviour by governments – but the difficulties rather lay in the enforcement of competition law in the international arena.⁶³ This indicates that the most urgent problems to be treated are not to be found in substantive law issues and therefore convergence should not be the main priority.

⁵⁷ Kerr, *The future of industrial Societies: convergence or continuing diversity?*, Cambridge, Mass: Harvard University Press, 1983, 3.

⁵⁸ Lohse, 'The meaning of harmonisation in the context of European Union Law – a process in need of definition', in Andenaes & Andersen (eds), *Theory and Practice of Harmonisation*, Cheltenham, Edward Elgar Publishing Limited, 2011, 291.

⁵⁹ Fox, 'Antitrust without borders – From roots to codes to networks', in Guzman (ed.), *op.cit.*, 267.

⁶⁰ *Ibid.*

⁶¹ Basedow, *op.cit.*, 329.

⁶² This is what can be more broadly categorized as 'the not my problem-problem'. Fox, *op.cit.*, 275.

⁶³ Basedow, *op.cit.*, 323.

On the other hand, cooperation cannot solve all problems. An example of the limits of cooperation can be found in the well-known GE/Honeywell case.⁶⁴ This case concerned the aircraft engine maker GE, that wanted to merge with avionics and non-avionics manufacturer Honeywell, causing concerns of dominance in the respective relevant markets. US and EU authorities cooperated closely on this case, but were not able to reach similar outcomes. The US reached an agreement with both parties, but the EU blocked the merger.⁶⁵ Another famous example is the Boeing/McDonnell Douglas case.⁶⁶ Here again, while the US authorities approved the merger, the European Commission could not accept it. Finally, after threats of a commercial war by the US, the Commission cleared the merger following commitments made by one of the parties.⁶⁷ This can be partly explained by the fact that the EU and the US, even though their competition laws are similar, have very different policy goals (even though convergence has certainly taken place), the US being focused more on the competitive process, and the EU on the consumer.⁶⁸ Also political considerations, such as the creation or protection of national champions, cannot be overcome by mere cooperation.⁶⁹

Convergence as well is not a solution to all problems. Different factual situations in distinct national markets, for instance in the field of intellectual property rights, can result in divergent outcomes, even if the rules applied and analysis followed are similar.⁷⁰

2.4.3 Hard versus soft law and formal versus informal cooperation

This discussion revolves around the level of legalisation and formalisation of the cooperation. One continuum is the one between hard and soft law. A generic definition of soft law includes ‘instruments that are not legally binding but can produce practical and legal effects’.⁷¹ Often the place of a certain provision along the continuum is determined by three characteristics: obligation, precision, and delegation. *Obligation* measures the degree in which the subjects of the rule are legally bound by them, *precision* refers to the extent to which the rules unambiguously define the required or forbidden behaviour or stick to vague principles, and *delegation* refers to whether or not third

⁶⁴ Commission Decision of 03/07/2001 declaring a concentration to be incompatible with the common market and the EEA Agreement Case No COMP/M.2220. General Electric/Honeywell.

⁶⁵ One of the reasons for the different outcomes is related in this case to the correctness of the portfolio effect theory: ‘a variety of different means by which a merger may allegedly create or strengthen a dominant position in non-overlap markets’. Papadopoulos, op.cit., 44-45.

⁶⁶ Commission decision of 97/816, 1997 O.J. (L 336) 16, 19-20.; re Boeing Company/McDonnell Douglas Corp., FTC, file no. 971-0051 (July 1, 1997).

⁶⁷ Ibid.; Basedow, op.cit., 324-25.

⁶⁸ Evidently, this statement needs to be nuanced.

⁶⁹ Papadopoulos, op.cit., 45.

⁷⁰ Competition Bureau, ‘Canadian perspectives on international competition cooperation’, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01087.html, accessed 30 April 2012.

⁷¹ Stefan, ‘Hybridity before the Court: a hard look at soft law in the EU competition and state aid case law’ (2012) 37 (1) ELRev 49.

parties are entitled to implement, interpret and apply the rules.⁷² A second continuum is the one between formal and informal cooperation. Informal competition cooperation can be described as the free and voluntary exchange of information and ideas between competition officials.⁷³ Semi-formal and formal cooperation imply that the timing, scope, manner and/or content of the cooperation is determined in an agreement. This agreement can be binding to a greater or lesser extent, and may contain provisions of hard or soft law. Of course informal cooperation may lead to or may pave the way for formal cooperation, and formal cooperation may be complemented by informal contacts.

One argument opposing hard law is that once rules are negotiated and formalised, they are difficult to change and adapt to societal evolutions, thus risking obsolescence.⁷⁴ Indeed, soft rules are more flexible in a rapidly changing environment and therefore seem more appropriate. Furthermore, looking at the majority of existing agreements, the international environment does not seem ready to accept the imposition of rules, and formal cooperation through soft law, or informal cooperation therefore are the leading trends today in international competition cooperation. As will become clear, even the formal instruments contain rules that are so vague or general that they can be considered as soft law (see section 3). On the other hand, not all aspects of cooperation can be regulated via soft law, for instance the exchange of confidential information, which requires stronger safeguards against abuse.

This paper will mainly contribute to the third discussion, by focusing on the proliferation of formal and semi-formal instruments – containing harder or softer law – in *bilateral* competition law enforcement *cooperation*.

2.4.4 Additional issues

While these are the main axis around which discussions on competition law cooperation revolve today, some other elements can be added to the debate. One issue is whether cooperation should take place in full transparency, or whether competition authorities benefit from some degree of secrecy. Today, little information is available on concrete cases where cooperation has taken place and in which form this cooperation occurred. Another debate that might gain importance, is the one on enforcement versus compliance. While once again one does not exclude the other, one might wonder whether it would not be wise to invest on joint efforts to promote compliance, as cooperation on enforcement still seems troublesome today.⁷⁵

⁷² Abbott, Keohane, Moravcsik, Slaughter & Snidal, 'The Concept of Legalization' (2000) 54 (3) International Organization 401.

⁷³ Papadopoulos, *op.cit.*, 47.

⁷⁴ Trittel, *op.cit.*

⁷⁵ In November 2011 the Commission issued a special Brochure for companies, entitled 'Compliance Matters', http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf (accessed November 2012).

3. DIVERSIFICATION OF MEANS IN BILATERAL COOPERATION

This section includes a comparative analysis of some of the different legal instruments of the EU that are frequently used today for bilateral competition law enforcement cooperation. The analysis will be based on theory, meaning the content and legal value of the texts only, not on the practical implementation thereof. As the paper attempts to determine the goals and objectives of the agreements, and thus tries to discover the *causes* for the diversification of legal instruments, a theoretical analysis suffices, as the practical implementation is a consequence rather than a cause of the agreements. The practical implementation of the agreements might tell us more on the *effectiveness* of the diversification, but this falls outside the scope of this paper.

3.1 Terminology

Bilateral instruments between the EU and third countries that include competition provisions have mushroomed over the last years. Some instruments are vigorously implemented, others mainly exist on paper. Some are real international treaties that require a Council mandate to be negotiated, others are administrative arrangements for which the Commission is fully competent. The name of the instrument does not necessarily correlate with its importance and significance, and the importance of the bilateral relation is not always reflected in the size and complexity of the instrument.⁷⁶

The diversification in legal means to achieve bilateral enforcement cooperation and the confusion this can cause, already becomes clear when looking at the terminology. Aust stated that the task of trying to explain the terminology of treaty-names becomes increasingly complex, as the names of formal and informal instruments are even more confusing and changeable than in the past, and as they lack consistency.⁷⁷ This adds to the confusion about the legal instruments used for bilateral cooperation. The analysis in this article is thus necessary to create clarity, as the name of the agreement does not give a clear indication.

⁷⁶ Valle, *op.cit.*, 155-56.

⁷⁷ Aust, *Modern Treaty Law and Practice*, 2nd ed, New York, Cambridge University Press, 2007, 23. When looking at the glossary of terms of the Treaties Office Database, the definition of 'agreement' is one of the longest of the whole list, as it is described as a generic term, a particular term, and in the specific context of regional integration schemes. Treaties Office Database, Glossary, <http://ec.europa.eu/world/agreements/glossary/glossary.jsp?internal=true> (accessed January 2012). Also, the Treaty Office Database contains only some MoU's, while it does not include others, such as the ones on competition law (see 3.3). The reason for this is that the classification is based on the content of the agreements, and not on the name. Therefore some MoU's are included in the database because they constitute legally binding agreements. Another example of possible confusion, is that a press release of the EEAS announced 'Vice President Almunia signs cooperation agreement with Russian competition authority', while in fact it was not a dedicated competition cooperation agreement, but an MoU, which is, from a legal point of view, a different instrument (see 3.3.2). Press Release, 'Competition: Vice President Almunia signs cooperation agreement with Russian competition authority', 10 March 2011, IP/11/278, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/278&language=EN&guiLanguage=en> (accessed January 2012).

3.2 Bilateral dedicated competition cooperation agreements of the EU

A first type of instrument used for bilateral competition cooperation, are the EU's dedicated competition cooperation agreements.⁷⁸ The EU has currently concluded four bilateral competition cooperation agreements, more precisely with the US in 1995 (completed by a specific agreement on positive comity in 1998, and an administrative arrangement on attendance in 1999),⁷⁹ with Canada in 1999,⁸⁰ with Japan in 2003⁸¹ and with the Republic of Korea in 2009.⁸² Negotiations are currently held with Switzerland⁸³ and Canada. These negotiations involve so-called second generation agreements, that go beyond the first generation agreements, which will be detailed in 3.2.1.⁸⁴

3.2.1 General content

This section will briefly indicate the general content of the dedicated competition cooperation agreements and the types of provisions that can be found. A distinction must be made between first and second generation agreements.

First generation agreements

The cooperation mechanisms that are included in first generation agreements can roughly be divided into two types: case-specific cooperation, and policy dialogue.⁸⁵

After stating the purpose and definitions of the agreement,⁸⁶ bilateral competition agreements generally provide, on a mutual basis, for notification of the cases that are being investigated by the competition authorities of one of the parties, that are likely to affect important interests of the other party.⁸⁷ Also exchange of non-confidential

⁷⁸ These are bilateral agreements that are dedicated entirely to competition law.

⁷⁹ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, Washington, 23 September 1991, OJ L 95 of 27 April 1995, p. 47; Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, 4 June 1998, OJ L 173 of 18 June 1998, p. 28.

⁸⁰ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws - Statement by the Commission - Exchange of Letters, Bonn, 17 June 1999, OJ L 175 of 10 July 1999, p. 50.

⁸¹ Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities - Agreed minute, Brussels, 10 July 2003, OJ L 183 of 22 July 2003, p. 12.

⁸² Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, Seoul, 23 May 2009, OJ L 202 of 4 August 2009, p. 36.

⁸³ European Commission's proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Brussels, June 2012, COM (2012) 244 final.

⁸⁴ Hence the mentioning of Canada for a second time. Interview with Commission official, November 2011.

⁸⁵ Dieckmann, *op.cit.*, 5.

⁸⁶ Article I EU-US agreement, article I EU-Canada agreement, article 1 EU-Japan agreement, and article 1 EU-Republic of Korea agreement.

⁸⁷ Article II EU-US agreement, article II EU-Canada agreement, article 2 EU-Japan agreement, and article 2 EU-Republic of Korea agreement.

information on general aspects of the application of the competition rules is provided for.⁸⁸ Another part of the agreements deals with the cooperation on and coordination of measures taken by the competition authorities of the parties.⁸⁹ Meetings between *appropriate authorities* of the parties to exchange views are mentioned.⁹⁰ One of the most important articles deals with the avoidance of conflicts over enforcement activities. The term ‘avoidance of conflicts’ covers what is also known as traditional or negative comity.⁹¹

Comity (as defined in general terms) is a concept under which extraterritorial determinations are often grounded in considerations of politeness or respect. [...] Specifically with reference to competition law, the principle of comity encourages states parties [sic] to take into account, in the enforcement of their competition laws, the important interests of the other party so as to avoid the creation of conflicts during their enforcement activity. In considering the other party’s important interest, the enforcing party applies the comity clause within the framework of its laws and to the extent compatible with its own important interests.⁹²

Traditional comity can thus be described as a passive courtesy procedure, allowing the parties to consider the other party’s important interests while they apply their own implementation measures.⁹³ An evolution in these agreements was the inclusion of positive comity clauses.⁹⁴ Positive comity, according to the OECD, implies that

a country should give full and sympathetic consideration to another country’s request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country’s interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.⁹⁵

⁸⁸ Article III EU-US agreement, article VII EU-Canada agreement, article 3 EU-Japan agreement, and article 3 EU-Republic of Korea agreement.

⁸⁹ Article IV EU-US agreement, article IV EU-Canada agreement, article 4 EU-Japan agreement, and article 4 EU-Republic of Korea agreement.

⁹⁰ Article VIII EU-Canada agreement, article 8 EU-Japan agreement, and article 8 EU-Republic of Korea agreement. Meetings are not explicitly mentioned in the EU-US agreement.

⁹¹ Article VI EU-US agreement, article VI EU-Canada agreement, article 6 EU-Japan agreement, and article 5 EU-Republic of Korea agreement.

⁹² Papadopoulos, *op.cit.*, 65.

⁹³ Treaties Office Database, Summary of Treaty, Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, <http://ec.europa.eu/world/agreements/prepare/CreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=288>, accessed November 2011.

⁹⁴ Article V EU-US agreement, article V EU-Canada agreement, article 5 EU-Japan agreement, and article 6 EU-Republic of Korea agreement.

⁹⁵ OECD, ‘CLP Report on Positive Comity’, June 1999, DAFFE/CLP (99) 19, 2, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAFFE/CLP\(99\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAFFE/CLP(99)19&docLanguage=En), accessed February 2012.

This allows a particular problem to be dealt with by the authority best placed to do so.⁹⁶ In other words, positive comity is an active courtesy process, in which the parties may request the application of the other party's competition rules, following anti-competitive behaviour on that party's territory, because it affects the important interests of the requesting party.⁹⁷

One of the most characteristic provisions of this type of agreements is the article stating that no changes to existing law are required.⁹⁸ This clause indicates that no article in the agreement requires a party to act against its existing laws or change them as a consequence thereof. This is specifically important with regard to national laws governing the use of confidential information gathered by the national competition authorities. This confidentiality-clause is also an explicit part of the agreements,⁹⁹ protecting in principle the exchange of confidential information. Because of the large discretion given to the parties by this clause, it is said that the outcome of cooperation is determined more by policy than by law.¹⁰⁰ This last problem can be partly solved by the conclusion of second generation agreements.

Second generation agreements

Second generation agreements go one step further and remedy one of the biggest weaknesses of the first generation agreements, namely they provide for the exchange of confidential information. Exchange of information obtained in the investigative process will be allowed and the agreements can be used as direct legal basis for the Commission to share information with the partner competition authorities, thereby superseding article 28 of Regulation 1/2003 and articles 17-18 of the Merger Regulation which normally prevent the Commission from sharing such documents with foreign authorities.¹⁰¹

⁹⁶ Dieckmann, *op.cit.*, 4.

⁹⁷ Treaties Office Database, Summary of Treaty, Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=288>, accessed November 2011. The 1998 EU-US agreement introduces the concept of 'enhanced positive comity', creating a presumption of deferral or suspension where the anti-competitive practices are more closely linked to the other party's territory. UNCTAD, 'Experiences gained so far on international cooperation on competition policy issues and the mechanisms used', 17-19 July 2007, TD/B/COM.2/CLP/21/Rev.5, 7, http://www.unctad.org/en/docs/c2clpd21rev5_en.pdf, accessed February 2012.

⁹⁸ Article IX EU-US agreement, article XI EU-Canada agreement, article 10 EU-Japan agreement, and article 10 EU-Republic of Korea agreement.

⁹⁹ Article VIII EU-US agreement, article X EU-Canada agreement, article 9 EU-Japan agreement, article 7 EU-Republic of Korea agreement.

¹⁰⁰ Papadopoulos, *op.cit.*, 78.

¹⁰¹ Interview with Commission official, November 2011. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1-25; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1-22.

3.2.2 Procedure for conclusion and legal value in the EU

Dedicated competition cooperation agreements are concluded between the government of the third country and the EU. They can thus be considered as *state-to-state* agreements (although the EU is not a state), as opposed to *agency-to-agency* agreements.¹⁰² While the competition authorities of both parties will be involved in executing the obligations incorporated in the agreement, it are the *governments* of the parties that will conclude it, and it is thus the EU (before the Lisbon Treaty: the EC) that commits itself internationally.¹⁰³ This was clarified during the conclusion of the first dedicated competition agreement in 1991 between the Commission and the US government, where the authority of the Commission to enter into the agreement was challenged. The Court of Justice agreed that the Commission did not have the competence to conclude agreements with third states.¹⁰⁴ A joint decision of the Council and the Commission finally approved the agreement in 1995.¹⁰⁵

As the agreements are entirely dedicated to competition law, and competition law is an exclusive competence of the Commission, the member states are not involved,¹⁰⁶ nor are other Directorate-Generals (DG's). The negotiation of this type of agreements is done solely by DG Competition, leaving other more significant DG's such as DG trade out of the process, and to a certain extent simplifying the procedure from an EU perspective, even though a Council mandate is still needed to open negotiations.¹⁰⁷ Approval of the agreement and authorization to sign the agreement is done by a Council decision, after a proposal of the Commission and consultation of the European Parliament.¹⁰⁸ The legal basis for the agreements were articles 83 and 308 EC Treaty.¹⁰⁹ This corresponds with the current articles 103 TFEU and 352 (& 353) TFEU.

¹⁰² The latter are agreements that are independently concluded between competition authorities. Damro, *Cooperating on Competition in Transatlantic Economic Relations: the Politics of Dispute Prevention*, New York, Palgrave MacMillan, 2006, 12.

¹⁰³ Opinion of Advocate General Tesauro, Case C-327/91, *French Republic v. Commission*, [1994] ECR I-3652 as cited in Zanettin, op.cit., 77.

¹⁰⁴ ECJ, 9 August 1994, case C-327/91, *French Republic v Commission of the European Communities*, ECR 1994, I-03641, para. 43.

¹⁰⁵ The conclusion of an agreement should not be confused with its negotiation. Decision of the Council and the Commission 95/145/EC, ECSC of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, OJ L 95 of 27 April 1995, 45–52.

¹⁰⁶ Art. 3 (1)(b) TFEU.

¹⁰⁷ Papadopoulos, op.cit., 62.

¹⁰⁸ Council Decision 2009/586/EC of 16 February 2009 relating to the conclusion of the Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, OJ L202 of 04 August 2009, 35; Council Decision 2003/520/EC of 16 June 2003 concluding the Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, OJ L183 of 22 July 2003, 11; Council and Commission Decision 1999/445/EC, ECSC of 29 April 1999 concerning the conclusion of the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ L175 of 10 July 1999, 49; Decision of the Council and of the Commission of 29 May 1998 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173 of 18 June 1998, 26; Decision of the Council and the Commission 95/145/EC, ECSC of 10 April

Dedicated competition cooperation agreements are fully-fledged international treaties that are binding on the parties, which implies that the procedure of Article 218 TFEU on the negotiation and conclusion of international agreements applies, and that any breach would have to be addressed under international public law. However, the discretionary and vague nature of the obligations of the parties may prevent this from ever happening. The second generation agreements will provide more obvious examples of hard law.¹¹⁰

3.3 Memoranda of Understanding: Brazil, Russia, and the Republic of Korea

The EU has currently concluded four MoUs. They have all been concluded only recently. The MoU with Brazil dates back to 2009,¹¹¹ an MoU with Russia was signed in 2011,¹¹² and an MoU with China was concluded on 20 September 2012.¹¹³ A fourth MoU was signed by the Commission with the Republic of Korea in 2004,¹¹⁴ but the EU concluded more recently in 2009 a dedicated agreement with this country (see 3.2), as well as an FTA including competition provisions in 2011 (see 3.4). Because this paper has been written mainly before the conclusion of the MoU with China, this MoU will be only briefly discussed under 3.5. *infra*.

3.3.1 General content

When comparing the three MoUs, one can see that they only vary slightly in length, structure and content. Equal in all MoUs is the fact that they are based on the principles of equality and mutual benefit.¹¹⁵

The general themes occurring in the MoUs are provisions on purpose and definitions, cooperation and coordination, assistance to be provided between the two sides (positive comity), avoidance of conflicts (negative comity), the organisation of

1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, OJ L95 of 27 April 1995, 45.

¹⁰⁹ Treaties Office Database, Summary of Treaty, Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=360>, accessed December 2011.

¹¹⁰ Interview with Commission official, January 2012.

¹¹¹ EU-Brazil Memorandum of Understanding on Cooperation, Brasilia, 8 October 2009, http://ec.europa.eu/competition/international/bilateral/brazil_mou_en.pdf, accessed November 2011.

¹¹² EU-Russia Memorandum of Understanding on Cooperation, Brussels, 10 March 2011, http://ec.europa.eu/competition/international/bilateral/mou_russia_en.pdf, accessed November 2011.

¹¹³ Memorandum of Understanding on Cooperation in the area of anti-monopoly law between the European Commission (Directorate-General for Competition) and the National Development and Reform Commission and the State administration for Industry and Commerce of the People's Republic of China. Brussels, 20 September 2012, http://ec.europa.eu/competition/international/bilateral/mou_china_en.pdf, accessed November 2012.

¹¹⁴ Memorandum of understanding on Cooperation between the Fair Trade Commission of the Republic of Korea and the Competition Directorate-General of the European Commission, Brussels, 28 October 2004, <http://ec.europa.eu/competition/international/legislation/korea.pdf>, accessed November 2011.

¹¹⁵ Art. 1 of the EU-Brazil MoU, art. 3 of the EU-Russia MoU, preamble of the EU-Republic of Korea MoU.

meetings, provisions on existing legislation and confidentiality of information, communications, and some final provisions. The content is thus very similar to the content of the dedicated competition agreements.

The EU-Republic of Korea MoU does not follow the structure or level of detail of the two other MoUs, although the main principles are the same. However, this MoU in its article 6 declares that '[b]oth Sides will do their best to establish a bilateral agreement as soon as the Member States of the EU will agree to initiate negotiations leading to the adoption of a formal bilateral agreement on competition.' One can thus assume that the context and *preparatory* nature of the memorandum explains the difference in structure and content between the MoU with Korea and the other competition MoUs of the EU.

3.3.2 Procedure for conclusion and legal value in the EU

MoUs are mere *administrative arrangements* concluded between the Commission and the competition authority of the partner country, and not by the EU and the foreign state.¹¹⁶ It is therefore a more flexible instrument, as it does not result in competence problems and is not a formal international treaty requiring a mandate of the Council to be negotiated. They are entered into by administrative authorities in view of cooperation with similar authorities of third countries, and are therefore concluded by 'bodies lacking the power to bind the state effectively at the international level.'¹¹⁷

The voluntary and non-binding nature of the memoranda is emphasised by their wording. For instance, in the EU-Brazil MoU, article 19 explicitly states that the MoU is applied by the parties on a voluntary basis and article 20 underlines that the MoU does not create legal rights or obligations under international law. Also the EU-Russia MoU states in article 21 that the MoU is not an international treaty and does not create any legal rights or obligations. While the content of the MoUs is similar to the dedicated competition cooperation agreements, the wording of the MoUs is used even more to emphasise the soft character of the obligations, by using more expressions such as 'where this is appropriate and practicable'¹¹⁸, 'nothing in this MoU limits the discretion of the requested Side',¹¹⁹ or the parties 'will endeavour'.¹²⁰

3.4 Competition law provisions in Free Trade Agreements: the cases of South Korea and Columbia & Peru

In its Global Europe communication,¹²¹ presenting a strategy to respond to the challenges faced by the EU in a rapidly globalising economy, the Commission stresses

¹¹⁶ Interview with Commission official, January 2012.

¹¹⁷ Opinion of Advocate General Tesouro, case C-327/91, *French Republic v. Commission*, [1994] ECR I-3641, 3654 as cited in Zanettin, op.cit., 76.

¹¹⁸ For instance in art. 3 & 4 of the EU-Brazil MoU.

¹¹⁹ For instance in art. 8 of the EU-Brazil MoU, and in art. 10 of the EU-Russia MoU.

¹²⁰ For instance in art. 4, 10 & 12 of the EU-Brazil MoU and in art. 6, 12 & 14 of the EU-Russia MoU.

¹²¹ Communication from the Commission, 'Global Europe: Competing in the world – A contribution to the EU's Growth and Jobs Strategy', 4 October 2006, COM (2006) 567 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0567:FIN:EN:PDF>, accessed January 2012.

the need for more international cooperation and for greater convergence in the competition area as it announces its intention to include stronger provisions on competition in the new generation of FTA's.¹²²

The most recent FTAs are the ones the EU concluded with South-Korea in 2010¹²³ and with Colombia and Peru in 2011.¹²⁴ They include competition provisions. Interesting is that with South-Korea there already was a dedicated competition cooperation agreement in place since 2009, which makes the context in which the competition provisions were included in the FTA quite particular. The FTA with South-Korea is considered to be the most comprehensive one concluded by the EU to date,¹²⁵ therefore, even though the context is specific, this FTA as well as the most recent one with Colombia and Peru, will be briefly examined. In the near future, the EU-Ukraine FTA will be very interesting to analyse, as is it the first of an announced series of so-called deep and comprehensive free trade agreements.¹²⁶ More detailed information is given here, as the competition provisions need to be contextualised in the greater agreement.

3.4.1 General content

KOREU FTA

The general objectives of the KOREU FTA are stated in Article 1.1(2), and reflect fairly well the objectives of any modern FTA in general. The main objective is to liberalise (and facilitate) trade in goods, services, and investment, as well as the government procurement markets of the parties. Furthermore, the parties aim to protect intellectual property rights and to promote foreign direct investment. More overarching objectives are contributing to 'the harmonious development and expansion of world trade' and to sustainable development. Promoting competition is mentioned as an objective in the context of the economic relations between the parties.

The agreement comprises fifteen chapters, one of which is entitled *competition*. The parties are required to maintain competition laws and they determine the activities restricting competition that are incompatible with the agreement.¹²⁷ Definitions are clarified,¹²⁸ and the parties are to maintain a competition authority, respect procedural fairness and the rights of defence, and will make public information available to the

¹²² Valle, op.cit., 155.

¹²³ Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Brussels, 6 October 2010, OJ L 127 of 14 May 2011, 6. (KOREU FTA)

¹²⁴ Trade Agreement between the European Union and Colombia and Peru, Brussels, 13 April 2011, http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf, accessed January 2012.

¹²⁵ European Commission, Trade, Press Release, 'EU-Korea FTA – What's in it for EU companies?', 27 October 2011, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=747>, accessed January 2012.

¹²⁶ European Commission, Trade, Bilateral relations: Ukraine, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/ukraine/>, accessed January 2012.

¹²⁷ Art. 11.1 KOREU FTA.

¹²⁸ Art. 11.2 KOREU FTA.

other party.¹²⁹ Two articles deal with public enterprises and enterprises entrusted with special rights or exclusive rights and with state monopolies.¹³⁰ The parties recognise the importance of cooperation and state that they shall cooperate through enforcement cooperation, notification, consultation and exchange of non-confidential information, based on the dedicated agreement of 2009.¹³¹ This implies some kind of reversed logic where the detailed agreement is concluded before the agreement setting out the framework for cooperation. Furthermore, it is specified in the FTA that in the absence of more specific rules in the dedicated competition agreement, a party shall, on request of the other party, enter into consultations regarding representations made by the other party, to foster mutual understanding or to address specific competition matters. It is also stated that each party shall endeavour to provide relevant non-confidential information to the other party.¹³² This is a very weak provision, as the parties do not commit themselves (they shall endeavour) while it only deals with non-confidential information. A stereotypical competition provision in FTAs is that the section on competition matters does not fall under the dispute settlement mechanism provided for by the FTA.¹³³ Finally, what is distinct about this FTA is that in the competition chapter there is a separate section dedicated to subsidies.¹³⁴

FTA EU – Columbia and Peru

Even though the FTA between the EU, Columbia and Peru is trilateral and thus does not fit perfectly in the scope of this paper, its content is still worth discussing as it is a very recent FTA and it possesses similar characteristics to the bilateral FTAs. This way it is relevant for a general assessment of this type of agreements. Similar general objectives are mentioned as in the KOREU FTA, although competition is mentioned more vaguely amongst them: ‘The objectives of this agreement are [...] conduct of economic activities, in particular those regarding the relations between the parties, in conformity with the principle of free competition’.¹³⁵

As in the KOREU FTA, one title is dedicated to competition.¹³⁶ Definitions are clarified and objectives and principles are agreed upon. The parties acknowledge the importance of free competition and dedicate themselves to applying their respective competition policies and laws. They agree on a list of practices inconsistent with the

¹²⁹ Art. 11.3 KOREU FTA.

¹³⁰ Art. 11.4 & 11.5 respectively KOREU FTA.

¹³¹ Art. 11.6 KOREU FTA.

¹³² Art. 11.7 KOREU FTA.

¹³³ Art. 11.8 KOREU FTA. For an analysis of the reasons why competition chapters are kept out of the dispute settlement mechanism, see Sokol, ‘Order without (enforceable) law: Why countries enter into non-enforceable competition policy chapters in free trade agreements’, (2007) 83 (1), *Chicaco-Kent Law Review*, 262-273.

¹³⁴ Art. 11.9 until 11.15 KOREU FTA. See also Jarosz-Friis, Pesaresi & Kerle, ‘EU-Korea FTA: a stepping stone towards better subsidies’ control at the international level’, 2010 n°1, *Competition Policy Newsletter*, 78-80, http://ec.europa.eu/competition/publications/cpn/2010_1_19.pdf, accessed February 2012.

¹³⁵ Title I, art. 4 FTA EU-Colombia and Peru.

¹³⁶ Title VIII FTA EU-Colombia and Peru.

FTA, and they recognize the importance of cooperation and coordination.¹³⁷ Furthermore, it is announced that each party shall maintain competition laws and authorities and adopt appropriate actions, with respect to the principle of due process and the rights of defence. However, it is underlined that each party shall maintain its autonomy.¹³⁸ The parties will make their best efforts to cooperate, and a party may request cooperation, but it is explicitly formulated that this shall not prevent the parties concerned from taking independent decisions. Competition authorities may exchange information, but this is limited by the restrictions imposed by their respective legislation – which again is related to confidentiality issues. A party may request that another party initiates the enforcement activities established under its legislation. This provision can be interpreted as referring to positive comity.¹³⁹ Other articles deal with notification¹⁴⁰ and designated monopolies and state enterprises. There is no prohibition on these enterprises, but they must be subject to competition laws. However, only in so far their performance is not obstructed.¹⁴¹ Also technical assistance is offered, which did not occur in any of the discussed dedicated competition cooperation agreements or MoUs.¹⁴² Final provisions deal with consultations, and the fact that no recourse can be made by any of the parties to the dispute settlement mechanism provided by the FTA. The FTA states that the *initiation* of consultations shall be accepted, and that the fullest considerations must be given to the concerns of the requested party.¹⁴³ There is thus no guarantee about the continuation of the consultations, which weakens the overall provision.

Briefly stated, while there are some similarities in content with the dedicated competition agreements and MoUs, the obligations of the parties are far less detailed, and competition is seen more in the context of serving the trade relations between the parties involved, as opposed to the agreement serving the goal of closer cooperation and coordination between competition authorities. Cooperation is mentioned among the competition provisions, but also far more basic substantive obligations, such as the maintenance of competition laws and authorities are ‘imposed’ on the parties, and they explicitly agree on which type of anti-competitive behaviour is inconsistent with the FTA.

3.4.2 Procedure of conclusion and legal value in the EU

Similar to competition cooperation agreements, FTAs are full-fledged international treaties. However, they are negotiated and concluded under Article 207 TFEU. Additional legal bases of these agreements will depend on the content of the FTAs, which can be quite varied.

¹³⁷ Art. 258 and 259 FTA EU-Colombia and Peru.

¹³⁸ Art. 260 FTA EU-Colombia and Peru.

¹³⁹ Art. 261 FTA EU-Colombia and Peru.

¹⁴⁰ Art. 262 FTA EU-Colombia and Peru.

¹⁴¹ Art. 263 FTA EU-Colombia and Peru.

¹⁴² Art. 264 FTA EU-Colombia and Peru.

¹⁴³ Art. 265 and 266 FTA EU-Colombia and Peru.

What can make the procedure for the conclusion of a FTA more burdensome than for a dedicated competition agreement, is that in case trade in services or commercial aspects of intellectual property rights are included in the FTA (as is the case with the recent FTAs and the announced deep and comprehensive FTAs), unanimity of the Council is required apart from the consent of the European Parliament.¹⁴⁴ Furthermore, sometimes elements are included in an FTA that constitute a competence of the member states and are not an exclusive competence of the EU, which can cause FTAs to become mixed agreements.¹⁴⁵

Apart from the fact that the member states are then involved in the negotiation of the agreement, and must ratify it, it is also the case that DG Competition is not the main DG in charge of these negotiations, but DG Trade is. This DG may have other priorities than DG Competition, and even though consultations are held, may decide to agree on trade-offs and issue-linkages that DG Competition does not approve of.¹⁴⁶ Therefore, the negotiation and conclusion of FTA's is a long and burdensome process.

3.5 Dialogue: China

Before the recent conclusion of an MoU with China, cooperation on competition issues with this major trade partner of the EU, took on yet another form. With China the EU entered into a so-called Competition Policy Dialogue.

3.5.1 General content

The EU-China Competition Policy Dialogue was created on 6 May 2004, but the initial agreement on its creation was reached on 24 November 2003,¹⁴⁷ the same year the EU and China launched their strategic partnership.¹⁴⁸ It was the first competition dialogue of this kind entered into by China, and was concluded at a time where China had recently adopted provisional rules on mergers and antitrust and had drafted a comprehensive competition law.¹⁴⁹ The Declaration on the Start of a Dialogue on Competition by the EU and China as well as the Terms of Reference of the EU-China

¹⁴⁴ Art. 207 (4) TFEU.

¹⁴⁵ For instance, the KOREU FTA included a protocol related to cultural matters, making it a mixed agreement. 'Mixed agreements are agreements to which both the EU and the member states are contracting parties on the basis that their joint participation is required, because not all matters covered by the agreement fall exclusively within EU competence or exclusively within member state competence.' Craig & de Búrca, *EU Law - Text, Cases and Materials*, 5th ed, Oxford, Oxford University Press, 2011, 334. This is a very basic description of what is in fact a very complex matter. For more information, see Hillion & Koutrakos (eds), *Mixed Agreements Revisited*, Oxford, Hart Publishing, 2010.

¹⁴⁶ On this matter see Damro, 'Destructive Issue Linkages: The Failure of Multilateral Trade-Competition negotiations', *Antitrust Bulletin*, (2012) 57(3) *Antitrust Bulletin* 563-589.

¹⁴⁷ Terms of reference of the EU-China Competition Policy Dialogue, Beijing, 6 May 2004, <http://ec.europa.eu/competition/international/legislation/china.pdf>, accessed March 2012.

¹⁴⁸ European Council Press Release, '14th EU-China Summit holds promise for a strengthened cooperation', 13 February 2012, EUCO 26/12, PRESSE 46, PR PCE 22, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/127951.pdf, accessed February 2012.

¹⁴⁹ Font Galarza, 'EU-China dialogue on Competition formalised with the signature of Terms of Reference on May 6 2004', 2004 n°2, *Competition Policy Newsletter*, 27, http://ec.europa.eu/competition/publications/cpn/2004_2_27.pdf, accessed February 2012.

Competition Policy Dialogue define as the primary goal of the dialogue the establishment of a permanent mechanism of consultation and transparency between China and the EU in the field of competition law, thereby enhancing the EU's technical and capacity-building assistance to China in that context, while contributing to the establishment of smooth and sustainable trade relations between the two partners.¹⁵⁰ The terms of reference of the EU-China competition policy dialogue set out the objectives and scope of the dialogue, the structure, the content, provisions on technical assistance and capacity building, and costs.

Further activities that originate from the dialogue are to be taken by consensus. Ad hoc working groups can be created and the dialogue should be conducted at least on a yearly basis. Focus is, as the name indicates, on policy dialogue, meaning that enforcement cooperation is part of the dialogue, but not its main aim. The exchange of views will take place on policy level, rather than on concrete cooperation.

Some of the topics the dialogue enters upon, are

‘[a]ntitrust law and enforcement, including an exchange of views on new developments on legislation and on the fight against international cartels, merger control in a global economy, liberalisation of public utility sectors as well as state intervention in the market process, [and] technical and capacity building assistance to China in the field of competition policy’.¹⁵¹

The dialogue builds on workshops and conferences mainly and is focused entirely on competition issues.¹⁵²

3.5.2 Procedure of conclusion and legal value in the EU

What is distinctive about this instrument is that it is a permanent and institutionalised set-up.¹⁵³ As it is a dialogue however, this initiative is entirely political in nature and does not create any legal obligations. This may make the instrument very flexible, but what it can accomplish in short or medium term is rather limited. It is a good means to keep communications open, be a source of inspiration, and create a culture of regular dialogue, thereby trying to foster greater understanding, but for creating a structured framework for concrete cooperation and coordination it has little use. DG Competition is the only representative of the EU, China is represented by the National Development and Reform Commission, the State Administration of Industry and Commerce, and the Ministry of Commerce.¹⁵⁴

¹⁵⁰ Terms of reference of the EU-China Competition Policy Dialogue, op.cit.

¹⁵¹ Galarza, loc.cit.

¹⁵² Wu, ‘EU-China Competition Dialogue: a new step in the internationalization of EU competition law?’, (2012) 18(3) ELJ 18.

¹⁵³ Ibid., 19.

¹⁵⁴ Ibid., 18.

3.5.3 Conclusion of an MoU with China

With the conclusion of an MoU with China, the next step in cooperation has been taken, even though the MoU is more limited than the other competition MoUs the EU has concluded (described under 3.3 supra). The goal of the MoU is to ‘strengthen cooperation and coordination between the two Sides in the area of competition *legislation* [own emphasis]’.¹⁵⁵ Competition *enforcement* thus does not seem to be the primary aim. According to the MoU, the ‘ultimate aim is to increase mutual understanding and awareness of current and forthcoming trends and expected developments’.¹⁵⁶ The MoU contains only five main articles, dealing with the scope and objective of the agreement, the content of the cooperation and coordination activities between the two sides, existing laws and confidentiality, costs, and final provisions. While the EU-China MoU is also based on principles of equality and mutual benefit,¹⁵⁷ and emphasises its non-binding nature¹⁵⁸, its scope is much more limited. There are no provisions dealing with positive or negative comity. The main emphasis is on the exchange of views and experiences.¹⁵⁹ Also technical cooperation activities for the efficient use of available resources is mentioned,¹⁶⁰ and finally the exchange of non-confidential information and direct coordination are mentioned, but without any details as to how this coordination should happen or in which form(s).¹⁶¹ The article concerning costs is rather confusing, as it states on the one hand that each side should cover its own costs, but on the other side it states that each side will provide support and assistance to the other whenever requested.¹⁶² In general, it is hard to see how this MoU will contribute to or go beyond the existing framework.

4. ONE GOAL?

The diversification just described, does not appear to be entirely based on a desire to tailor the agreement to the partner country, as there is little variation in both content and the *de facto* binding nature of the instruments. Therefore, the added value of the differentiation might lay in the fact that different goals are served.

One should start the discourse on the goals of competition law by looking at the role competition law itself is attributed in the Treaty. Article 9 TFEU, that was introduced by the Treaty of Amsterdam as Article 127(2) EC, states that:

‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the

¹⁵⁵ Article 1.1 EU-China MoU.

¹⁵⁶ Ibid.

¹⁵⁷ Article 1.2 EU-China MoU.

¹⁵⁸ Article 5.2 and 5.3 EU-China MoU.

¹⁵⁹ Article 2.1 EU-China MoU.

¹⁶⁰ Article 2.2 EU-China MoU.

¹⁶¹ Article 2.3 EU-China MoU.

¹⁶² Article 4 EU-China MoU.

guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’.

These ‘policies and activities’ also include competition policy. This article should be read together with Article 3(3) TEU on the establishment of the internal market¹⁶³ and Protocol 27 on the internal market and competition. After the introduction of the Lisbon Treaty, the ‘shift’ of competition policy to Protocol 27 has been an issue of intense debate, as competition law/free competition is no longer mentioned in the Treaty articles as an instrument to achieve the internal market. To add to this debate¹⁶⁴ at this point however, would lead this paper too far. One conclusion that can be drawn from the before mentioned Treaty Articles is that competition policy should take into account different objectives that are not limited to those of economic nature. The goals of competition law attributed to it by DG Competition itself, are worth considering.

The mission statement of DG Competition explains that competition is not an end in itself, but it contributes to the functioning of the Single Market by providing a level playing field. It also tries to achieve wider objectives, such as the promotion of strong and sustainable growth, competitiveness, and the creation of employment. The mission statement continues that DG COMP aims to strengthen international enforcement cooperation and promote increased convergence of different competition policy instruments, thereby shaping global economic governance.¹⁶⁵

Furthermore, DG COMP defines its general objectives to be the enhancement of consumer welfare by protecting market competition, to support growth, job creation and the competitiveness of the EU economy, and to foster a competition culture. It specifies that EU competition policy aims to pass on the benefits of globalisation to European consumers, by keeping markets open. But apart from passing on the benefits, EU competition policy also wants to protect European consumers from the harmful aspects of globalisation, by tackling international cartels, merges and abusive practices of firms of any nationality.¹⁶⁶

Refining even more, one of the so-called ‘specific objectives’ of DG COMP is described as ‘[p]olicy coordination, European Competition Network (ECN) and international cooperation’. What DG COMP pursues under the last part of this objective is to promote the international convergence of competition policy and to contribute actively towards this objective by cooperating effectively with the EU’s main trading partners and third country competition authorities, in a bilateral and multilateral

¹⁶³ The article reads: ‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.’

¹⁶⁴ For a comprehensive discussion of the impact of the Lisbon Treaty on the place of competition law in the EU, see Steenbergen, ‘Het mededingingsbeleid en het Verdrag van Lissabon’, in van Ooik & Wessel (eds), *De Europese Unie na het Verdrag van Lissabon*, Deventer, Kluwer, 2009; and Parret, *Side effects of the modernization of EU competition law*, Nijmegen, Wolf Legal Publishers, 2011.

¹⁶⁵ DG Competition Management Plan 2012, http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp.pdf, 2, accessed January 2012.

¹⁶⁶ *Ibid.*, 6-7.

context and by including competition and state aid clauses in FTAs to create a level playing field for European and foreign companies.¹⁶⁷

Thus, EU competition policy does not constitute a goal in itself, but serves a wide range of goals in order to strengthen and optimise the internal market. Why then, would competition law constitute a goal as such in the EU's external relations? While there is no global Single Market to support, other goals can be served. An evaluation of an instrument by definition depends on the standard it is measured against. Some instruments may be better suited to attain a certain goal, but do not contribute to another. Therefore, it is interesting to outline some of the different objectives that may be attained through the diversification of legal instruments in competition cooperation.

A first set of objectives that can be identified revolves around the improvement of international competition law enforcement, the creation of a global competition culture and a global level playing field. Dedicated competition cooperation agreements 'provide for better structured and therefore more effective dialogue. A dedicated agreement creates a framework within which cooperation can be conducted.'¹⁶⁸ An MoU basically pursues the same goal. It is not a binding international agreement, but considering the flexibility of the provisions in the dedicated competition cooperation agreements, both can be considered as soft law. Some legal commentators strive for these objectives to take priority. They claim that states need to accept that ensuring competition on the market should not be motivated by the public interest of a particular state, but is in the interest of the international community as a whole, and that therefore the application of national competition laws should not be based solely on the effect that anti-competitive behaviour can have on the domestic market.¹⁶⁹

Related to this set of objectives, is the aim of supporting the effects of trade liberalisation and making sure that they are not undone by anticompetitive practices. This is done in particular by the inclusion of competition provisions in FTAs.¹⁷⁰ FTAs are also used, according to some legal commentators, to achieve what could not be achieved in the multilateral context of the WTO,¹⁷¹ because competition issues were too complex or went beyond the purview of the WTO. This statement is supported by what is said in the EU's Global Europe strategy (see 3.4).¹⁷² These agreements may also

¹⁶⁷ *Ibid.*, 35.

¹⁶⁸ Dieckmann, *op.cit.*, 4; see also Press Release 'Competition: Vice President Almunia signs cooperation agreement with Russian competition authority', 10 March 2011, IP/11/278, *loc.cit.*

¹⁶⁹ Basedow, *op.cit.*, 331.

¹⁷⁰ Woolcock, 'European Union Policy towards Free Trade Agreements', (2007) n° 3, ECIPE Working Papers, 9, <http://www.ecipe.org/publications/ecipe-working-papers/european-union-policy-towards-free-trade-agreements/PDF>, accessed January 2012.

¹⁷¹ *Ibid.*, 4.

¹⁷² Cooper, Jurenas, Platzer & Manyin, 'The EU-South Korea Free Trade Agreement and its Implications for the United States', CRS Report for Congress, 16 June 2011, <http://www.fas.org/sgp/crs/row/R41534.pdf>, accessed January 2012.

help to improve the EU's competitiveness, as put forward in the EU's Europe 2020 strategy.¹⁷³

Agreements revolving around or including competition provisions can also be more politically motivated, for instance in order to spread the *acquis communautaire*, in the context of the ENP, or in agreements preparing for accession. They may serve to provide impetus to a certain bilateral relationship or to stimulate involvement in and provide guidance to emerging economies with very young competition authorities. The Competition Policy Dialogue with China, for instance, may have contributed to such objectives. Even though China is one of the major trading partners of the EU, and one would thus expect an FTA or a bilateral competition agreement between the two countries, the competition system of China is much younger than the US system, which makes the same type of agreement inappropriate for this particular relationship.

These goals cannot be attained by the same type of legal instrument. Diversification in terms of scope, content, legal value and flexibility can help attain different aims. However, some questions remain unanswered. None of the instruments described above tackle some of the main obstacles to true international cooperation. None of these instruments, except for the second generation agreements, provide for some form of exchange of confidential information, or provide truly binding obligations. The lack of the ability to exchange confidential information, has often been recognized as 'the single most important reason why more and better cooperation does not yet occur between national authorities'.¹⁷⁴ Also the problem that positive comity is only very rarely used in practice is not solved, nor have these instruments provided a solution for divergences on substantial analysis.

5. CONCLUSION

The prospectus in DG Competition's management plan for 2013 states that the mid-term targets for bilateral competition cooperation are: no increase in first generation agreements, an increase from zero to two second generation agreements, an increase from four to five MoUs on competition law,¹⁷⁵ and an increase from thirty-one to fifty FTAs containing competition and/or state aid clauses.¹⁷⁶ The large increase in FTAs with competition provisions indicates that the most important goal for the EU, apart from the specific context of agreements with future member states or in the framework of the ENP or the Euro-Mediterranean partnership, seems to be the support of trade liberalisation. This follows the internal philosophy of the EU according to which EU competition policy exists to support the liberalisation within the Single Market.

It is suggested by the United Nations Conference on Trade and Development (UNCTAD) that voluntary cooperation between countries is more plausible if they

¹⁷³ European Commission, 'Europe 2020', http://ec.europa.eu/europe2020/index_en.htm, accessed April 2012.

¹⁷⁴ Diane Wood, Luncheon speech, "Is cooperation possible?", (2000) 34(1) *New England Law Review* 103.

¹⁷⁵ Which seems to have been already achieved by concluding the recent MoU with China.

¹⁷⁶ DG Competition Management Plan 2012, *op.cit.*, 37.

share a perception of common interest and mutual benefit.¹⁷⁷ This may explain on the one hand, the large measure of discretion left to the parties in competition cooperation, and on the other hand, justify the increased linkage of competition to trade agreements, where parties may be more willing to adhere to certain competition principles in order to create an environment that provides incentives for increased trade flows. Mutual confidence in enforcement capabilities and a shared commitment to upholding the competitive process are key to successful competition cooperation.¹⁷⁸ In which way this can best be attained, will depend on the specific relation of the EU with the partner country, their level of similarity, in general and in terms of competition system, and of course the preferences of the partner country itself. However, these factors do not seem to be the main cause of differentiation of legal instruments. A more EU-centred agenda seems to play a large role, incorporating various non-competition related goals. This might explain why the agreements – even though much progress has already been made – do not go as far as they could to enhance the effectiveness of international competition law enforcement.

Further research may analyse the strategy of other countries in cooperating internationally on competition law issues, and find out whether a similar approach is applied, or whether this differentiation is EU-specific. Other questions that remain unsolved are whether this differentiation may lead to fragmentation in the long term, preventing the EU from efficiently shaping the global competition enforcement regime, and whether it is really the EU that is actively shaping this differentiation, or merely replying to external evolutions and preferences.

¹⁷⁷ UNCTAD, 'Experiences gained so far on international cooperation on competition policy issues and the mechanisms used', 17-19 July 2007, TD/B/COM.2/CLP/21/Rev.5, op.cit., 20.

¹⁷⁸ Ibid.