

THE EEA RULES ON COMPETITION : ODD MAN OUT OR MODEL FOR MULTILATERAL RULES?

BY

JACQUES H.J. BOURGEOIS (1)

ADVOCAAT, PARTNER OF AKIN GUMP STRAUSS HAUER & FELD,
(BRUSSELS); PROFESSOR AT THE COLLEGE OF EUROPE (BRUGES);
GUEST PROFESSOR AT THE UNIVERSITY OF GENT LAW SCHOOL

Sven Norberg has always displayed a keen interest in international aspects of the various areas of the law in which he worked.

In the 1980's, he had already published an article dealing with EC competition law and its application to EFTA countries (2). As the director of Legal Affairs at the EFTA Secretariat, he played an important role in the negotiations which led to the EEA Agreement (3). This modest contribution is a tribute to his friendship, knowledge and wisdom. It is limited to the competition rules applying to undertakings.

I. – WHAT IS SPECIAL ABOUT THE COMPETITION RULES OF THE EEA ?

The substantive rules

The EEA Agreement concluded in 1992 between the EC and its Member States and the EFTA States (Austria, Finland, Iceland,

(1) I thank Vicky Hanley, associate in the Brussels office of Akin Gump, for casting a critical eye on the manuscript

(2) S. NORBERG, "European Community Antidumping and competition laws. Their actual and potential applications to EFTA countries", 1987 *Tidskrift for Rettsvitenskap* 638.

(3) He published a thoughtful contribution on "The Agreement of an European Economic Area", (1992) *CMLRev.* 1171; see also his article "Perspectives on the Future Development of the EEA Agreement", in *Afmaelisrit Thór Vilhjálmsón* (Reykjavik, Bokantgafa Orators, 2000), p. 367. He, *i.a.*, co-edited: NORBERG, HÖKBORG, JOHANSSON, ELIASSON, DEDICHEN, *EEA Law – A Commentary on the EEA Agreement* (CE Fritzes, Stockholm, 1993).

Liechtenstein, Norway, Sweden and Switzerland), contains rules on restrictive agreements (Article 53) and rules on abuse of dominant position (Article 54) which mirror Articles 81 and 82 EC.

It is not unknown for substantive rules on competition to appear in international agreements. Competition rules mirroring those laid down in the EC Treaty have been agreed upon in a number of agreements entered into by the EC, such as the 1970's FTAs with EFTA countries, as well as, for example, in the EC/Turkey Agreement and in agreements with Mediterranean countries, Israel, Bulgaria and Romania (4).

The competition clauses of these various agreements apply to the extent that the agreements and the abuse of dominant position prohibited by these clauses affect trade between the relevant countries and the EC. They do not commit these countries to adapt their national competition rules to the EC Treaty competition rules.

However, as proven by the difficulties of agreement within the OECD on a non-legally binding definition of hard-core cartels and the work of the WTO Working Group on Trade and Competition, agreeing internationally on substantive competition rules is far from obvious.

Countries that accepted substantive competition rules mirroring EC Treaty competition rules in their agreements with the EC did so either in the perspective of accession to the EC (countries party to the Europe agreements) or as part of a closer association with the EC (the EFTA countries in their FTAs with the EC and the Mediterranean countries).

As will be seen, the competition rules of the EEA Agreement (hereinafter: the Agreement) are a separate case, as is, for that matter, the whole of the Agreement.

Three of the Parties to this Agreement, Austria, Finland and Sweden, acceded subsequently to the EC. Following a referendum which rejected the Agreement, Switzerland did not ratify it. One may be tempted to use this to explain the far-reaching commit-

(4) For a good overview, see Th. JAKOB/H. SCHRÖTER, "Internationale Wettbewerbsregeln" in GROEBEN/SCHWARZE (Hrsg.), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft – Kommentar*, Band 2, 6. Auflage (Nomos, Baden-Baden, 2003), pp. 1229-1248. The EC is not alone in this. The OECD identified competition-related provisions in 47 recently concluded preferential trade agreements, OECD, 2005, *Competition Provisions in Regional Trade Agreements, Part I*, (COM/DAF/TD (2003)3).

ments undertaken by the EFTA States in the Agreement by their perspective of accession to the EC. This conclusion would be wrong. The negotiations of the Agreement find their origin in the "Europe 92" Programme of the European Commission and the concerns of third countries that its implementation would render the EC more inward, evoking the "Fortress Europe" syndrome. The EFTA countries were seeking an extension of what was called the Single Market so that it would include them, but did not want to enter into a process of political integration (5).

The competition rules of the Agreement are of considerable added value compared to the competition rules of other agreements entered into by the EC.

*The added value
of the EEA Agreement's competition rules*

The added value of the EEA Agreement relates both to additional and implementing substantive rules and to its enforcement and procedural provisions.

Additional substantive rules

First, in addition to rules on restrictive agreements (Article 53) and on abuse of dominant position (Article 54), the EEA Agreement contains rules on merger control (Article 57) providing that mergers, as defined in Article 57(2), "which create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by the Agreement" are to be declared incompatible with the Agreement.

Second, the so-called "acquis communautaire" is part of the EEA Agreement (Articles 6 and 7). The existing EC legislation implementing the EC Treaty rules on competition (listed in Annex XIV of the Agreement) applies. Moreover, the competition rules of the Agreement are, in their implementation and application, to be interpreted

(5) E.g., A. HAAGSMA, "The Competition Rules of the EEA and the Europe Agreements: Lawyers' Paradise or User's Safe Harbour" in P.J. SLOT and A. McDONNELL (eds), *Procedure and Enforcement in EC and US Competition Law* (Sweet & Maxwell, London, 1993), p. 243 at pp. 249-250; K. FUGLER, "L'EEE, partie intégrante de la nouvelle architecture européenne" in O. JACOT-GUILLARMOD (éd.), *Accord EEE, Commentaires et réflexions* (Stämpfli, Bern, 1992), who considers that the EEA heralds "le passage de la plus grande zone de libre-échange du monde au plus grand marché commun du monde", p. 845 at p. 847.

in conformity with the relevant rulings of the Court of Justice of the EC (ECJ) given prior to the date of signature of the EEA Agreement (Article 6). Interestingly, the EFTA Court takes this a step further. Relying on the “convergence” principle, it considers that subsequent interpretations of the ECJ are relevant. It held, *i.a.*, that “the reasoning which led the EC Court of Justice to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which this Court has to interpret” (6).

Enforcement and procedure

Agreeing on substantive rules is one thing. Enforcing them is another thing, as is ensuring that these rules are applied in a uniform manner. It is in these respects that the EEA Agreement has broken new grounds, nailing down in specific provisions the aim of ensuring uniform interpretation of the Agreement set out in its Preamble and its Article 6.

A “two pillars” enforcement structure

Further to the EEA Agreement, the European Commission’s jurisdiction was extended to the enforcement of the Agreement’s competition rules. The EFTA Surveillance Authority (ESA) contemplated by the EEA Agreement, a body monitoring fulfillment of the obligations under the Agreement and empowered to apply the competition rules of the Agreement, was established by an agreement between the EFTA States (7).

In particular with respect to competition rules, these two “pillars” are to co-operate “with a view to developing and maintaining a uniform surveillance throughout the EEA” according to detailed provisions (8). From the outset, ESA has apparently decided to exercise its tasks in a spirit of co-operation and conciliation (9).

(6) Case E-2/94 *Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority* [1994-1995] EFTA Ct. Rep. 59; for comments see A.M. VAN DEN BOSSCHE, “Het EVA-Hof: convergente scheurmaker?”, 49 *SEW* 257 (2001).

(7) Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (concluded between the EFTA States parties to the EEA), see <http://secretariat.efta.int/Web/legaldocuments/ESAAndEFTACourtAgreement/Documents/>. Published in *OJ* [1994] L 344/1, this agreement gives effect on the EFTA side to Articles 108-110 of the EEA Agreement.

(8) Protocols 23 and 24 EEA.

(9) J. FORMAN, “The EEA Agreement Five Years On : Dynamic Homogeneity in Practice and its Implementation by the two EEA Courts”, (1999) *CMLRev.* 751, at 767.

In addition, under the same agreement between EFTA States, the EFTA Court was established, whose tasks correspond to a large part of the tasks of the ECJ. One of these tasks is to review the acts of ESA regarding competition (10). The EFTA Court is also given a role similar to that of the ECJ, *i.e.*, that of giving preliminary rulings on the interpretation of EEA law at the request of courts of EFTA States (11).

Division of responsibilities and "One-stop-shop"

There is a division of responsibilities between the European Commission and the EFTA Surveillance Authority.

Restrictive agreements that only affect trade between EFTA States or where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the EEA are to be dealt with by the ESA, except where trade between EC Member States is affected; others are to be dealt with by the European Commission.

Abuses of dominant position are dealt with by the surveillance authority in the territory in which the dominant position is found to exist. Where dominance exists within the territories of both surveillance authorities, the same division of responsibilities applies as in cases of restrictive agreements (12).

In addition, there are wide-ranging obligations of mutual information and consultation including mutual assistance in investigations and consultations before statements of objections are issued, in all cases where trade in both the EC and the EFTA areas is affected (13). While one surveillance authority does not participate in the decision-taking of the other, it has the possibility to have a role in its decision-shaping.

With respect to merger control which is subject to short deadlines, *i.a.*, for the European Commission, another division of responsibilities applies. A merger exceeding the worldwide and EEA-wide turnover thresholds is subject to the European Commission's exclusive control, even where the dominant position is created or

(10) Article 108 EEA.

(11) See, e.g., in a competition matter Case E-3/97 *Jan and Christian Jaeger AS v. Opel Norge* [1998] EFTA Ct. Rep.1.

(12) Article 56 EEA and additional rules in Protocols 21 and 23 and in Annex XIV EEA.

(13) Protocol 23 EEA.

strengthened on the EFTA States territory. Where turnover thresholds are exceeded on the territory of EFTA States only, rather than on the whole of the EEA, the merger is subject to ESA control (14).

Also in this respect, there are obligations on mutual information and consultations. They are further-reaching than in the case of restrictive agreements and abuses of dominant position and the special arrangements of the EC Merger Control Regulation with respect to EC Member States are extended to EFTA States (*i.e.*, possibility to refer cases subject to EC Merger Control to a national competition authority and protection of national non-competition interests) (15).

This division of enforcement responsibilities operating under a “one-stop-shop” principle means that the competent surveillance authority – ESA or the European Commission – determines the effects of a restrictive agreement, abuse of dominant position and qualified mergers in the *entire* EEA or in any “substantial part” thereof.

Uniform application and interpretation

As far as enforcement of the Agreement’s competition rules by the ESA and the European Commission is concerned, the wide-ranging mutual information, consultation and co-operation procedures were designed to prevent diverging interpretations. The negotiators of the Agreement put the emphasis on trying to avoid any problems at all arising by setting up extremely detailed institutional mechanisms designed to ensure its smooth operation (16).

Should interpretation and application nonetheless diverge, either the EC or an EFTA State may bring disputes before the EEA Joint Committee (17). Interestingly, this also applies where the dispute is over a provision which is “identical in substance” to provisions of EC law, in which case, should the dispute not be settled in the EEA Joint Committee, the Parties may agree to request the ECJ to give a ruling on the interpretation of the relevant rules (18).

(14) Article 57(2)(a) EEA, together with Protocols 21 and 24 and Annex XIV EEA.

(15) Protocol 24 EEA.

(16) J. FOREMAN, *op. cit.* *supra* footnote 8, at 751.

(17) Article 111 EEA.

(18) Article 111(3) EEA.

So far, no divergence of interpretation and application of the Agreement's competition rules by either the ESA or the European Commission has been brought before the EEA Joint Committee.

As far as enforcement in courts is concerned, judgments of both courts are transmitted to the EEA Joint Committee.

A special procedure is designed to deal with possible differences in the case law of the two courts. If the EEA Joint Committee "has not succeeded to preserve the homogeneous interpretation of the Agreement", the dispute settlement procedure of Article 111 EEA may be applied (19). Most actors are of the view that with regard to the results, the case law on the Agreement has developed in a homogeneous way (20). In the first ten years of the EEA existence, there has not been a judicial conflict even in cases in which the EFTA Court had to decide on a legal question as the first EEA Court. Commentators agree (21).

Direct effect

One of the issues discussed early on by commentators (22) is whether competition clauses in the agreements between the EC and various countries are enforceable by private parties in national courts. There are good arguments in support of the view that the EEA Agreement has direct effect (23). The EFTA Court appears to have recognized for all practical purposes the direct effect of certain Agreement provisions (24). As has the CFI of the EC: in *Opel Aus-*

(19) Article 105 EEA.

(20) C. BAUDENBACHER, "The EFTA Court Ten Years On" in C. BAUDENBACHER, P. TRESSELT, T. ÖRLYGSSON (eds.), *The EFTA Court: Ten Years On* (Hart Publishing, Oxford, 2005), p. 51.

(21) VAN DEN BOSSCHE, *op. cit. supra* footnote 5, at p. 266; and FORMAN, *op. cit. supra* footnote 8, at p. 779.

(22) See the old debate between N. HUNNINGS, "Enforceability of the EEC-EFTA Free Trade Agreements", (1977) 2 *E.L.Rev.* 163, and "Enforceability, a Rejoinder", (1978) 3 *E.L.Rev.* 278 and M. WAELBROECK, "L'effet direct de l'accord relative aux échanges commerciaux du 22 juillet 1972 entre la Communauté économique européenne et la Confédération Suisse", 29 *Schweizerisches Jahrbuch für internationales Recht* 113 (1973) and "Enforceability of the EEC-EFTA Free Trade Agreements, a Reply", (1978) 3 *E.L.Rev.* 27.

(23) E.g., L. SEVÓN and M. JOHANSSON, "The protection of the rights of individuals under the EEA Agreement", (1999) 24 *E.L.Rev.* 373.

(24) See the "Francovich" style judgment of the EFTA Court in Case E-9/97 *Erla Maria Sveinbjörnsdóttir v The Government of Iceland* [1998] EFTA Ct. Rep. 95; C. BAUDENBACHER, "The EFTA Court and the European Court" in P.C. MÜLLER-GRAF and E. SELVIG (eds.), *EEA-EU Relations*, pp. 69-95 and 95-99 (Berlin Verlag, Berlin, 1999); BAUDENBACHER, *op. cit. supra* footnote. 19.

tria, it held that the articles of the Agreement relied upon by the applicant had direct effect (25).

II. – THE MULTILATERAL SCENE

The contrast between what the EEA Agreement achieved with respect to competition rules and the situation at the multilateral level is stark. While several fora are producing important and interesting work, in particular the OECD and the International Competition Network, their work remains at the *praeter legem* stage (OECD) or results in non-binding recommendations or guidelines addressed to national competition authorities (International Competition Network). At the 2003 Cancún WTO Ministerial Meeting, the negotiation of a multilateral agreement on competition rules was put off until the Greek Calends.

Numerous economic studies have demonstrated the need for, and the economic benefits of, a multilateral agreement on competition (26). Such agreement could at least complement the existing regulatory scheme of the WTO, in that it would prevent private parties from coming in through the back door and creating or maintaining the very obstacles to international trade that WTO Members agreed to remove. The rationale for a competition agreement in the WTO shows that it would be an important measure to support the barrier-reducing objectives of the WTO, as in the case of competition provisions in preferential trade agreements (27). Moreover, economic studies have shown the considerable cost that certain competition restraints in international trade entails particularly for developing countries. At a conference held in 2003 in Taiwan, Frédéric Jenny captured in one sentence the gist of these economic studies :

“... the net annual welfare benefit for developing countries from a drastic multilateral reduction in agricultural tariffs ... is only about half of the minimum esti-

(25) Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39, paragraph 95.

(26) For the state of play and good empirical evidence, see J.L. CLARKE and S.J. EVENETT, “A Multilateral Framework for Competition Policy” in S.J. EVENETT and SECO (eds), *The Singapore Issues and the World Trading System: The Road to Cancún and Beyond* (SECO, Bern, 2005).

(27) S.J. EVENETT, “What Can We Learn from the Competition Provisions of Preferential Trade Agreements?” in Ph. BRUSICK, A.M. ALVAREZ and L. CERNAT (eds.), *Trade and Competition Issues, Volume Competition Provisions in Regional Trade Agreements; How to Assure Development Gains* (UNCTAD, Nov. 2005) 39-66.

mate of the direct benefit they would get if a multilateral agreement on competition enabled the elimination of international cartels” (28).

*Any lessons to be learned
from the EEA Agreement?*

Replanting the EEA Agreement’s ambitious scheme on competition into the rather arid multilateral soil would obviously not bear fruit. However, some lessons can be learned from the EEA experience.

The *first*, obvious, *lesson* is that for a negotiation on meaningful multilateral competition rules to succeed, i.e. to lead to binding rules enforceable by and maybe even within the Parties, such negotiation must be part and parcel of broad negotiations covering a number of other topics. If WTO Members miss the boat of the Doha Round for any sort of agreement on competition, as they are very likely to, the earliest opportunity will only arise with the next WTO round of multilateral trade negotiations.

The *second lesson* is that far-reaching commitments on competition rules to be applied in trade between Parties imply mutual trust. Both the OECD and the International Competition Network fulfill an important function in developing such trust. This also, and more importantly, implies agreed mechanisms ensuring that what has been agreed holds the same meaning for all Parties concerned. This is particularly needed for competition rules. Competition is a moving target and competition law is ever evolving. Ensuring this within the WTO means that an agreement on competition rules would need to be subject to the Dispute Settlement Understanding. Part of the reservations voiced within the WTO in this respect are based on the fear that WTO panels and the Appellate Body would review *de novo* national competition authority decisions. Even if the current rules were considered to grant such authority to WTO panels and the Appellate Body – which is doubtful to say the least – no such review has been carried out so far. Moreover, in the EEA, reliance on this *ultima ratio* can be, and is, avoided by obligations on exchange of information and mutual consultation and co-operation on enforcement measures.

(28) In Tzong-Leh HUANG and Chiyuan CHEN (eds.), *The Future Development of Competition Frameworks* (Kluwer, the Hague, 2004) p. 20; see also his case study in B. HAWK (ed.), 2003 Fordham Corporate Law Institute (Juris Publishing, Huntington, 2004), pp. 631-653.

The *third lesson* is that an agreement on competition rules, such as the Agreement's competition rules, should be limited to apply only to competition restraints that affect trade between Parties. For a number of reasons, the EC and the EFTA countries did not find it necessary to define "may affect trade between Contracting Parties" and the EFTA countries accepted the case law of the ECJ in this respect as it stood. A WTO agreement could include a bright-line test of "affecting trade" between WTO Members, which would ensure that the competition rules of such an agreement would only supersede national competition rules in situations where this is considered as necessary from a WTO perspective.

The *fourth lesson* is that a system for allocating enforcement tasks is technically feasible, allowing, together with mutual assistance obligations, the decisions to be taken by the more appropriate competition authority. This would also make sense in a WTO framework, even if no legal effect would be given, as in the EEA, to a decision of the competition authority of a State in another State. Few WTO Members would be prepared to take this step. Positive comity clauses do not lead to legal effect in the requesting State of decisions of the requested State. Where, for example, at present the US would request the European Commission under the positive comity clause of the bilateral EC-US agreement on competition to investigate a restrictive agreement between EC undertakings having an effect on the US market, the US would not expect a prohibition of this agreement to have any *legal* effect in the US, quite apart from the fact that the European Commission's jurisdiction under the EC Treaty is limited to intra-EC trade. Yet, the US would expect that the eventual action by the European Commission against that restrictive agreement would in practice be likely to also put an end to it as far as it concerned the US market. Drawing inspiration from the Agreement, a WTO agreement on competition could include a positive comity provision that would obligate, under certain conditions, the requested WTO Member to act.

By way of conclusion

The efforts made by some WTO Members to launch a negotiation on a WTO agreement on competition and the contributions by economists and lawyers to the underlying thought process may appear at this stage to be a "quest for the Holy Grail". Even

though, from the outset, these efforts were limited to rules that would merely complement the WTO rules on trade, rather than to create a set of worldwide competition rules, they failed to persuade the other WTO Members. The attitude of WTO developing country Members appears paradoxical. Their opposition cannot be explained by a rejection of competition rules as such as many of them have adopted competition laws. While they may see proposals for a WTO agreement on competition as an attempt to open up their markets through the back door, they must be aware of the various economic studies showing that they suffer the most from international cartels. Other WTO Members consider that they are capable of independently managing to deal with private restraints on competition affecting their imports and their exports; they are less concerned about restraints of competition practiced by their undertakings on foreign markets and supporting the aim of the WTO through competition rules is not among their priorities.

There is a wide gulf separating these policy attitudes and those of the Parties to the EEA Agreement. There also are fundamental differences between the institutional framework of the EEA Agreement and that of the WTO. To the extent, however, that a consensus will emerge in the WTO on negotiations with a view to an agreement on competition, the competition provisions of the EEA Agreement offer some imaginative solutions that could *mutatis mutandis* be taken on board.

