

## Competition Policy and the Euro-Mediterranean Partnership

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# Competition Policy and the Euro-Mediterranean Partnership

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To be published in (2003) 8 European Foreign Affairs Review pp.153-180

## I Introduction

While competition law regimes have for a long period of time only been present in industrialized countries, a large number of emerging economies have now adopted domestic competition rules. It is estimated that, in 2002, more than 90 countries had enacted competition law regimes.<sup>1</sup> The adoption of such competition regimes cannot merely be explained by the fact that emerging economies have spontaneously come to the conclusion that these rules may help promote economic development and be useful complement to the implementation of fundamental economic reforms, such as the liberalization of State monopolies.<sup>2</sup> Several external factors played a major influence on the adoption of such regimes. Some emerging economies have enacted or strengthened competition laws as a result of commitments made in the framework of free trade agreements. Efforts to strengthen competition policies have, for instance, been undertaken in the context of NAFTA and Mercosur.<sup>3</sup> In addition, institutional donors, such as the World Bank or regional development banks, strongly encouraged emerging economies to adopt competition law regimes and provided assistance to these countries in order to help them establish such regimes.<sup>4</sup>

Over the last decade, the European Community (EC) has also largely contributed to the adoption of competition laws in neighbouring third countries, in general through the insertion of competition law provisions in the trade agreements it signed with these countries. The growing significance of the external aspects of EC competition

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<sup>1</sup> See Yves Dellevennes and Georgios Kiriazis, "The Creation of an International Competition Network", *Competition Policy Newsletter*, n°1, February 2002, p.25.

<sup>2</sup> It is widely accepted that the application of competition rules contributes to economic efficiency, as well as to welfare maximization. See Ernest Gellhorn and William E. Kovacic, *Antitrust Law and Economics in a Nutshell*, (1994), 4<sup>th</sup> Ed., West Publishing, St. Paul, Minn., 42. Competition rules may also pursue other objectives. See Frédéric Jenny, "Globalization, Competition and Trade Policy", in *International and Comparative Competition Laws and Policies*, Yang-Ching Chao, Gee San, Changfa Lo, Jiming Ho Eds., (2001) Kluwer Law International, p.45.

<sup>3</sup> Many regional trade agreements provide for competition rules. See "The Relationship between Regional Trade Agreements and the Multilateral Trading System: Competition", Working Party of the Trade Committee OECD D/TC/WP(2002)19/FINAL, 7 May 2002.

<sup>4</sup> The IMF, the OECD and developed countries have also encouraged the adoption of antitrust regimes. See Manisha M. Seth, "Formulating Antitrust Policy in Emerging Economies", (1997) 86 *Georgetown Law Journal*, 451. See also A.E. Rodriguez and Malcolm B. Coate, "Limits to Antitrust Policy for Reforming Economies", (1996) 18 *Houston Journal of International Law*, 311.

policy has received considerable academic attention. Most of this attention has focused on the competition provisions contained in the Agreement on the European Economic Area (EEA) or in the Europe Agreements concluded with countries of Central and Eastern Europe (hereafter, the “CEECs”).<sup>5</sup> The competition law aspects of the association agreements concluded with North African and the Middle East countries has not, however, received comparable interest. The purpose of this article is thus to fill this gap in literature by providing a critical assessment of the efforts made by the EC to stimulate the development of competition laws in the Mediterranean countries with which it is engaged in partnership agreements (hereafter, the “Partner countries”).<sup>6</sup>

This partnership process places economic transition, as well as free trade, at the core of the cooperation between the EC and the Mediterranean region. The legal mechanisms organizing this partnership take the form of association agreements concluded on the basis of Article 310 of the EC Treaty.<sup>7</sup> These agreements deal with a range of political, economic, and socio-cultural aspects. As far as economic aspects are concerned, they contain provisions regarding the free movement of goods, services and the freedom of establishment, public procurement, payments, economic and financial cooperation, etc. These agreements also contain provisions replicating the competition rules contained in the Treaty of Rome. However, the influence played by EC competition policy goes beyond a mere presence in the association agreements. As will be seen below, there are clear indications that, under the impulsion of the European Commission, the EC seeks to promote a regulatory convergence of competition rules. Based on an extensive interpretation of the agreements, a variety of initiatives encourages the Partner countries to transpose the *Acquis Communautaire* in their domestic legal orders, a requirement that is not found in the association agreements.

This encouragement given to the Partner countries to transpose EC competition law is rather innovative. In association relationships, the EC traditionally acts on the basis of the provisions of the agreements and does not call for domestic convergence.<sup>8</sup> The Euro-Mediterranean partnership follows a different pattern for two reasons. First, as

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<sup>5</sup> See, *inter alia*, Richard Cunningham and Anthony LaRocca, “Harmonization of Competition Policies in a Regional Economic Integration”, (1996) 27 *Law and Policy of International Business* 879.

<sup>6</sup> See Barcelona Declaration – Euro-Mediterranean Conference, 27-28 November 1995. Twelve countries are engaged in the “Euromed Partnership”: Algeria, Morocco, Tunisia (Maghreb), Egypt, Israel, Jordan, the PLO, Lebanon, Syria (Mashrek), Cyprus, Malta and Turkey (applicants to the European Union, “EU”). Pursuant to the accession procedure, these last countries are submitted to special obligations in the field of competition policy. See D. Geradin and N. Petit, “Règles de concurrence et Partenariat Euro-Méditerranéen: Echec ou Succès?”, *Revue Internationale de Droit Economique*, forthcoming.

<sup>7</sup> The former agreements between the EC and some Mediterranean countries were mainly cooperation agreements. They are gradually replaced by “new generation” association agreements. Up to now, only four association agreements have entered into force (those with Tunisia, Israel, Morocco and the Palestinian Authority). Those concluded with Algeria, Jordan, Lebanon and Egypt have not yet come into force. Syria has not negotiated a new association agreement. The candidate countries have not re-negotiated association agreements pursuant to the Barcelona declaration and remain bound by their old association agreements. See Allan Rosas “The European Union and Mixed Agreement”, in Alan Dashwood and Christophe Hillion, *The General Law of EC External Relations*, (2000) Sweet & Maxwell, p.160.

<sup>8</sup> To the exception of the CEECs. Convergence in the field of competition policy has been imposed, but only to the extent that these countries were candidate to the accession to the EU.

will be seen below, that the provisions of the association agreements have a very limited effectiveness. In order to circumvent these weaknesses and ensure an effective protection of the competitive process, it is important that associated countries establish satisfactory domestic competition regimes. Second, it seems that regulatory harmonization in the competition field has become an increasingly important objective for the EC. This might be due to several reasons, such as the belief that EC competition rules are superior to domestic models and that harmonization around its rules generate many benefits, such as saving transactions costs for transnational economic actors and facilitating trade flows between the EC and the Partner countries. At a time of growing internationalization of competition rules, it might also be of strategic importance for the EC to create a constituency of States sharing its vision of competition policy and effectively using rules patterned on EC competition law in their domestic legal orders.

Following this introduction (Part I), the content of the competition provisions of the association agreements as well as their effectiveness will be examined (Part II). The regular calls for convergence on the EC model will in turn be analyzed (Part III). There is indeed room for debate regarding the opportunity, as well as the nature of such convergence. Finally a brief conclusion suggests that a “deep” convergence approach, whereby the non-candidate Partner countries would transpose EC competition rules in their domestic legal order, would provide many benefits for both the EC and these countries (Part IV).

## **II Rules of competition in the association and cooperation agreements**

The insertion of competition rules in the agreements concluded between the EC and the Partner countries is recent (A). These rules address a broad range of anticompetitive practices and are similar to those found in the EC Treaty (B). Their effectiveness is, however, limited (C).

### *A. The insertion of competition rules in the agreements concluded with the Partner countries*

The first bilateral agreements between the EC and the Partner countries essentially focused on the removal of some tariff and non-tariff barriers and did not provide for any competition rules.<sup>9</sup> The insertion of such rules within the association agreements came at a later stage. It was initiated, on the one hand, with the launching of the accession process with the “eligible” candidates of the Euro-Mediterranean area (Cyprus, Malta and Turkey) and, on the other hand, with the opening of negotiations on a new generation of agreements (the “Euromed Agreements”) with the other countries engaged in the Barcelona Process.<sup>10</sup> This new generation of agreements now provides for competition rules. Three main reasons explain this evolution.

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<sup>9</sup> Only a few agreements referred to competition policy. They simply encouraged the Parties to provide for fair conditions of competition. See the agreement between the European Economic Community and the Cyprus Republic, 19 December 1972, O.J. L133/2, 21 May 1973.

<sup>10</sup> In particular cases, some rules of competition had previously been added via the adoption of protocols. This is the case for Israel and Cyprus.

A first reason is related to the impact of the discussions engaged in the WTO framework, as well as in other multilateral forums. For the past ten years, the link between free trade and competition policy has become a very hot issue and has been increasingly discussed at the international level. Not surprisingly, this issue has also penetrated the negotiation of regional trade agreements.<sup>11</sup> In this respect, the exportation of EC competition rules through the negotiation of regional trade agreements could help achieve a strategic goal.<sup>12</sup> The creation of a web of countries sharing the same competition law principles as the EC might help the latter gain a stronger negotiation position in the future discussions over competition rules that will take place within the WTO framework.<sup>13</sup>

A second reason lies in the accession process and the association agreements previously concluded with the CEECs. These agreements (the “Europe Agreements”), which were adopted prior to the Euromed Agreements, provided for competition rules similar to those of the EC Treaty. The replication of such rules in the Euromed Agreements shows a form of spill over effect of the Europe Agreements on the Euromed Agreements.<sup>14</sup> From the EC standpoint, there also seems to be an effort to achieve a certain degree of standardization of the competition law provisions inserted in its external association agreements.

Finally, this evolution takes place within a process of increasing economic integration between the EC and the Partner countries. The first generation agreements have efficiently dismantled most tariff and non-tariff barriers and have allowed increased market-access to foreign operators. As a result, Partner countries have become important trading partners of the EC.<sup>15</sup> Market-access could, however, still be impeded by anticompetitive behaviors from private operators.<sup>16</sup> In order to prevent

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<sup>11</sup> See Laurence Idot “Mondialisation, Liberté et Régulation de la Concurrence – Le Contrôle des Concentrations”, (2002) 2-3 *Revue Internationale de Droit Economique - Numéro Spécial Mondialisation et Droit Economique*, p.175.

<sup>12</sup> Some authors make reference to a real competition between, on the one hand, the USA and on the other hand, the EC. See, e.g., Karl Raustalia, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law”, (2002) 43 *Virginia Journal of International Law*, 1.

<sup>13</sup> On this point, see Peter Holmes, “Trade and Competition in the New WTO Round” p.168, in *Trade Liberalization, Competition and the WTO*, Chris Milner and Robert Read Ed., “Trade Liberalization, Competition and the WTO”, (2002) *Edward Elgar in association with the International Economics Study Group*, 147. Some commentators have considered that the EC has efficiently used this method and is now, at the global level, in position to “harmonize competition law without U.S. participation”. See Sharon E. Foster, “While America Slept: the Harmonization of Competition Laws based upon the European Union Model”, (2001) 15 *Emory International Law Review*, 468.

<sup>14</sup> See L. Idot, *supra* note 11, p.178. After the conclusion of the EEA Agreement and of the Europe Agreements, the external competition policy of the EC gained in dynamism. Many commercial agreements concluded with third countries now include competition provisions. See P. Holmes in *Trade Liberalization, Competition and the WTO*, *supra* note 13, p.167.

<sup>15</sup> It is reported that between 1990 and 2000, EC imports from Partner countries have moved from 27.844 millions Euros to 63.805 millions Euros. During the same period, EC exports to partner countries have moved from 37.161 millions Euros to 84.973 Millions Euros. See European Commission, DG Trade in “The Barcelona Process – The Euro-Mediterranean Partnership – Synthesis 2001”.

<sup>16</sup> Such as, for instance, the refusal to provide access to an essential facility, a boycott cartel on foreign products, the creation of dominant positions that may impede imports.

that trade between the EC and its Euromed Partners be restricted by such practices, competition rules were enacted so as to complement the classic trade provisions.<sup>17</sup>

### *B. Review of the rules of competition inserted in the new Euromed Agreements*

As far as competition rules are concerned, the Partner countries are subject to a differentiated treatment. A first group of countries are bound by a complete set of competition rules equivalent to articles 81, 82, 86 and 87 of the EC Treaty.<sup>18</sup> A second group of countries, whose agreements with the EC are more recent, are bound by a more limited set of competition rules since these agreements do not include provisions on State aids.<sup>19</sup> We will now turn to a brief review of the main aspects of these competition provisions.

First, the competition rules contained in these agreements will only be applicable to situations where trade between the EC and the Partner country is hampered.<sup>20</sup> This criterion is analogous to the criterion that triggers the application of EC competition rules inside the EC legal order, which requires that trade between Member States be affected. As in the EC, it is also not exclusive of the application of national laws.<sup>21</sup>

The competition rules then declare incompatible all (i) restrictive agreements between undertakings, (ii) abuses of a dominant position by one or more undertakings, and (iii) State aids that distort, restrict or prevent competition. These provisions must be applied according to the criteria arising from the application of the competition rules of the EC Treaty. In other words, the competition rules found in the Euromed Agreements have to be interpreted in conformity with the EC secondary legislation, the decision-making practice of the European Commission and the case law of the European Court of Justice (ECJ) and of the Court of First Instance (CFI).<sup>22</sup> It is expected that each Euromed Agreement will be progressively implemented by the Council of Association that should adopt the necessary regulations during a transition

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<sup>17</sup> See Mohamed El Hédi Lahouel, "Competition Laws in MENA: An Assessment of the Status Quo and the Relevance of a WTO Agreement", *Paper Prepared for the Third Mediterranean Development Forum*, Cairo, 5-8 March 2000. The achievement of the European Single Market has followed the same pattern. The competition policy gained increasing importance with the dismantling of classical barriers to trade existing between its Member States and the elimination of quantitative restrictions and measures having an equivalent effect. See Jules Stuyck, "Libre Circulation et Concurrence : Les Deux Piliers du Marché Commun" *Mélanges en hommage à Michel Waelbroeck*, Vol. II, (1999) Bruylant p.1477. See also Claus-Dieter Ehlermann, "The Contribution of EC Competition Rules to the Single Market", Vol. I, (1992) *Common Market Law Review* 29.

<sup>18</sup> This is, for instance, the case of the agreements concluded with Morocco and Tunisia.

<sup>19</sup> This is the case for Algeria and Lebanon. The wording of the competition rules of these agreements is slightly different. The analysis that follows is based on the provisions of the association agreement between the EC and Morocco, 26 February 1996, O.J. L70, 12 March 2000. See Articles 36 to 41.

<sup>20</sup> Such a criterion is classic. The EEA Agreement contains a similar provision. Several non-EC regional trade agreements use similar criteria.

<sup>21</sup> The decision making practice of the EC competition authorities has for long interpreted this provision in a broad way. The ECJ recently put an end to this extensive approach. See ECJ, 28 April 1998, Case Javico International and Javico AG v. Yves St Laurent, C-306/96, Rec.p.I.1983.

<sup>22</sup> The criteria of application of the EC Treaty are expressly mentioned in the agreement. See also John Fingleton, Eleanor Fox, Damien Neven and Paul Seabright, *Competition Policy and the Transformation of Central Europe*, (1996) Centre for Economics Policy Research, p.55.

period of a variable length.<sup>23</sup>

These provisions call for three remarks. First, the association agreements do not provide for an exemption system comparable to the one put in place by Article 81(3) of the EC Treaty.<sup>24</sup> Some authors argue that until a rule providing for an exemption procedure comparable to the one found in Article 81(3) of the Treaty is adopted, exemptions to behaviors prohibited by an association agreement cannot be granted jointly by the EC and the associated country.<sup>25</sup> In practice, the power to grant exemptions will remain the exclusive competence of the European Commission acting on the basis of Article 81(3) of the EC Treaty.<sup>26</sup>

Second, the association agreements do not provide for rules dealing with mergers. It is thus likely that the European Commission will apply its merger control rules to operations carried out by undertakings from associated countries, which have an impact on the EC market. The scope of application of the EC Merger Control Regulation is indeed very large. It is sufficient that the thresholds provided for in that regulation be met to authorize the European Commission to examine a transaction, even if it takes place outside the scope of the EC.<sup>27</sup>

Third, the rules on State aids contained in the association agreements have several specific features that distinguish them from the other competition provisions. In the first place, the rules dealing with procedural aspects are more detailed and provide for requirements of notification and exchange of information. Moreover, unlike the provisions dealing with restrictive agreements and abuses of a dominant position, the association agreements provide for a transitory mechanism designed to ensure an immediate application of the State aid rules. In the absence of implementation measures, the Parties to the association agreements commit themselves to comply with the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereafter, the "GATT").<sup>28</sup> There is, however, a qualification. The agreements provide that during a period of five years the provisions of the agreements dealing with State aids will be implemented in such a way that the Partner country should be considered as one of the areas referred to in Article 87(3) of the EC Treaty. This qualification provides for a

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<sup>23</sup> The Council of Association is generally entrusted with the implementation of the agreements. Note that the agreement with Lebanon refers to a Joint Committee.

<sup>24</sup> The free-trade agreement concluded with the EFTA countries contained a clause providing for an exemption mechanism similar to that of Article 81(3) of the EC Treaty. The free-trade agreement between the EC and South-Africa also provides for an original exemption mechanism, based on a "rule of reason" approach.

<sup>25</sup> See the comments made by Jacques H.J. Bourgeois on the Europe Agreements p.130, in "Competition Policy and Commercial Policy" p.113 in Marc Maresceau Ed., *The European Community's Commercial Policy after 1992: The Legal Dimension*, Martinus Nijhoff Publishers, (1993).

<sup>26</sup> Id. Nevertheless, within the EC, national courts have managed to apply Article 81(1) in the absence of any exemption power.

<sup>27</sup> See Council Regulation (EEC) No 4064/89 of 21 December 1989. The most famous example of an application of EC rules to a merger operation outside the EC is Boeing-McDonnell Douglas, Commission Decision, 30 July 1997, O.J. L336, 8 December 1997.

<sup>28</sup> The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade enacts, *inter alia*, the rules applicable to State subsidies within the framework of the GATT. This is submitted to the condition that the Partner countries be member of the WTO and bound by the GATT provisions. This is the case of most of the Partner countries.

non-reciprocal mechanism that can only play to the benefit of the associated countries.<sup>29</sup> A large part of the subsidies granted by the associated countries will thus be tolerated.<sup>30</sup> Export subsidies will, however, remain prohibited as Article 11 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT does not allow them.

Two reasons permit to explain the existence of this non-reciprocal mechanism. First, the general objective of development that is at the core of the Euro-Mediterranean partnership probably contributed to a relaxation of the principle of incompatibility of State aids. The development of some sectors or regions may require the distribution of subsidies and prohibiting them would maintain these sectors and regions in a state of underdevelopment. Second, emerging economies often have a solid tradition of funding their economies through public resources and, in these countries, the political stakes that involve public subsidies are so high that a certain tolerance had to be admitted.

### *C. Analysis of the effectiveness of the competition rules of the association agreements*

Association agreements are considered as key instruments to facilitate trade between the EC and Partner countries. It is true that they contain a large set of provisions aiming to remove obstacles to trade, as well as to provide protection to traders. Yet, it is important to analyze the extent to which these provisions are effective in attaining their objectives. This depends on two elements. First, the implementation mechanisms instituted by the agreements (1) and second, the degree of protection granted to individuals in the absence of implementation (2).

#### 1) The implementation mechanisms

The effectiveness of an agreement depends on the enactment of implementation measures by the Council of Association.<sup>31</sup> Nevertheless, the adoption of such measures does not guarantee effective enforcement of the agreements since parties are left free to limit their commitment by invoking a safeguard mechanism. These points will be analyzed in turn.

##### a) The implementation measures

The insertion of competition rules within an association agreement generally implies the enactment of implementation measures. Unlike the Europe Agreements where these measures were quickly adopted, no such measures have been so far adopted in the context of the association agreements with the Partner countries.<sup>32</sup>

This situation can be explained by the existence of a loose implementation timetable. The association agreements provide that implementation measures must be adopted

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<sup>29</sup> This is also in line with the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT which explicitly allows aids aiming at eliminating “*industrial, economic and social disadvantages of specific regions*”.

<sup>30</sup> See Jacques H.J. Bourgeois, note 25, p.130.

<sup>31</sup> See Article 36-2 of the agreement between the EC and Morocco, note 19.

<sup>32</sup> The political conditionality and the accession objective of the CEEC's have probably influenced the rapid implementation of the agreements.



by the Council of Association within a given period of time, which varies depending on each agreement.<sup>33</sup> It seems, however, that these implementation periods only have an indicative value. For instance, the association agreement between the EC and Tunisia provided for an implementation period of five years. However, recent European Commission reports indicate that, in 2002, nothing had yet been done, in spite of the requests by the Commission to open the dialogue on the competition provisions.<sup>34</sup> The technical assistance programme in the field of competition policy should also have been initiated in 2002.<sup>35</sup> This suggests that the implementation periods provided for in the agreements are deprived of any practical effect and, thus, allow substantial delays to take place.<sup>36</sup>

In the absence of implementation measures of the competition rules contained in the association agreements by the respective Councils of Association, uncertainties remain with respect to the precise content and scope of such measures. The only instrument that can help answering these questions is the Proposal of Decision of the Council of Association EC-Turkey (hereafter, the "Proposal").<sup>37</sup> The most important aspect of this Proposal is that it contains a provision that renders the main prohibitions contained in the EC-Turkey Decision of the Council of Association (i.e. prohibition of restrictive agreements and abuses of a dominant position) directly applicable.<sup>38</sup> This is a very significant provision as it clearly indicates that the provisions of the agreements are not justiciable until they benefit from measures of implementation.

At the institutional level, this Proposal provides that national competition authorities are competent to apply the provisions of the agreement.<sup>39</sup> The Proposal makes thus clear that the EC-Turkey association agreement relies on national authorities to enforce its competition provisions. This decentralized approach to enforcement differs from the approach taken in the EEA Agreement that relies on a supranational

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<sup>33</sup> The period provided for by the agreements is generally five years. Some agreements, however, provide for shorter periods. For instance, the agreement with Israel provides for a three years period.

<sup>34</sup> See Report of the EU – Tunisia Council of Association, Brussels, 24 January 2002.

<sup>35</sup> The delay in the implementation can also be explained by the fact that the partner countries have often failed to request technical assistance from the EC. This is surprising since the financial resources necessary for such assistance are available. See Jean-François Pons "International Co-operation in Competition Matters" p.201, in *Towards WTO Competition Rules – Key Issues and Comments on the WTO Report on Trade and Competition*, (1999) Roger Zäch Ed., Kluwer Law International.

<sup>36</sup> The same conclusion can be reached for the agreements that do not provide for competition rules. This is the case of the agreement with Turkey. The association agreement concluded in 1964 has only been complemented by competition rules in 1995. These rules have not yet been implemented. A Proposal for implementing them was submitted in 2001, see infra note 37. See Communication from the Commission on the Euro-Mediterranean Partnership and the Single Market, 23 September 1998, COM(1998) 538 final.

<sup>37</sup> See Proposal for a Council decision on the position to be adopted by the Community within the EC-Turkey Association Council, concerning a Decision of the EC-Turkey Association Council adopting the implementing rules necessary for the application of the provisions on competition policy referred to in Article 37 of Decision 1/95 of the EC-Turkey Association Council, 7<sup>th</sup> November 2001, COM(2001), 632 final.

<sup>38</sup> See Article 9 of the Proposal. As has been explained above, the competition rules have been adopted by a decision of the Council of Association.

<sup>39</sup> These are the European Commission, on the one hand, and the *Rekabet Kurulu*, on the other hand. National law shall be relied upon, on a case by case basis, to determine whether these institutions have jurisdiction over a given case.

enforcement mechanism.<sup>40</sup> In the absence of mechanism of case allocation between competition authorities, there is a risk that two national authorities declare themselves competent to examine an anticompetitive practice on the basis of their domestic law. To avoid conflicts of competence, the Proposal contains a series of mechanisms organizing a procedure of cooperation between the authorities.<sup>41</sup>

It results from what precedes that the Proposal does not contain significant substantive provisions.<sup>42</sup> The approach followed is also decentralized. Instead of a formal replication of the EC secondary legislation, the Proposal refers to the domestic competition laws of the Parties together with the duty to assess the anti-competitive conducts in compliance with the “*criteria arising from the application of the rules*” of competition of the EC Treaty.<sup>43</sup>

It is subject to question whether the decentralized approach provided for in the Proposal of the EC-Turkey Council of Association could be usefully transposed to agreements with the non-candidate associated countries. In spite of the degree of protection conferred by the competition rules of the agreement, such a decentralized enforcement could lead to an asymmetric application of these rules and thus to an unequal level of protection among the Parties. Unlike candidate countries, non-candidate countries are under no obligation to transpose EC competition rules in their national legislation.<sup>44</sup> The level of protection offered by the national competition legislation can thus vary from one country to the other and will generally be lower than what is offered by EC competition law. Moreover, unlike candidate countries, non-candidate countries will not necessarily receive technical assistance from the EC to help competition authorities and national courts to enforce competition law. There might thus be divergences among the Partner countries in the effectiveness of the competition law provisions contained in the association agreements.

#### b) The safeguard mechanism

Notwithstanding the potential adoption of implementation measures, many doubts would still remain as regards the effectiveness of the provisions of the agreement. Indeed, the Euromed Agreements contain a provision that allows the Parties to exclude the application of the competition rules contained in the agreement to the

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<sup>40</sup> See Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, Articles 53, 54 and 108(1), Protocol XXI and Annex XIV of the Agreement. O.J. L1, 3 January 1994.

<sup>41</sup> The Proposal sets up the rules governing the organization of exchange of information, cooperation, notification, coordination and comity procedures. These obligations are inspired from the Revised Recommendation of the Council Concerning Co-Operation between Member Countries on Anticompetitive Practices Affecting International Trade C(95)130/FINAL.

<sup>42</sup> Authors insist on the fact that implementation measures are in essence mainly procedural. See Bernard Hoekman, “Competition Policy and Preferential Trade Agreements”, p.7, available at <http://www.worldbank.org/wbi/publications/wbi37131.pdf>. The implementation measures provide for notification and consultation procedures that are non binding dispute settlement systems. See also European Commission in its XXXIST REPORT ON COMPETITION POLICY 2001 — SEC(2002) 462 FINAL, p.147.

<sup>43</sup> The “*criteria arising from the application*” of the competition rules refer to the secondary legislations and guidelines adopted by the institutions of the EC, as well as the case law of the CFI and the ECJ.

<sup>44</sup> See note 56.

benefit of a unilateral application of their national legislation. The provision in question is generally written as follows:

“If the Community or (...) considers that a particular practice is incompatible with the terms of paragraph 1, and,

- (i) is not adequately dealt with under the implementing rules referred to in paragraph 3,
- (ii) or in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

It may take appropriate measures after consultation within the Association Committee or after 30 working days following referral to that Committee”.<sup>45</sup>

The provision can be applied when, for instance, a conduct incompatible with the competition rules contained in the agreement is taking place and one of the Parties considers that the implementation measures are not sufficiently strict to severely sanction an anti-competitive conduct.<sup>46</sup> This could also be the case if, in the absence of implementation measures, the government of an associated country granted a subsidy to a domestic undertaking, which created a prejudice to the interests of the other Party.<sup>47</sup> In such cases, the Party in question is authorized not to apply the competition provisions of the agreement and instead rely on unilateral measures to defend its interests. This would allow, for instance, the EC to rely on its own competition rules.<sup>48</sup> This would also allow the Parties to rely on national rules that are not normally designed to sanction anticompetitive practices but can be relied upon to sanction the anti-competitive conduct in question.<sup>49</sup>

This provision, which is often presented as a “safeguard clause”, can be criticized as it opens the door to a selective and unilateral application of the agreement by a Party that would consider that the implementation measures are not adequate. It is, however, subject to question whether the Parties, which are engaged in a cooperation agreement, would take the risk of relying on this provision to act unilaterally.<sup>50</sup> This is

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<sup>45</sup> See Article 36-6 of the agreement between the EC and Morocco, supra note 19.

<sup>46</sup> When this situation occurs, the Parties must find an agreement on how to deal with this practice within the Association Committee. This body is entrusted with the power to formulate an opinion in case of a disagreement between the Parties on the application of the association agreement. This opinion is, however, of a consultative nature and does not bind the Parties to the agreement.

<sup>47</sup> See Jacques H.J. Bourgeois supra note 25, p.132. See also, about the Europe Agreements, Andrew Evans, *The European Integration of the Community and Third States in Europe*, (1996) Clarendon Press, Oxford, p.133.

<sup>48</sup> In the context of the Europe Agreements, see Eleanor M. Fox, *The Central European Nations and the EU Waiting Room – Why Must the Central European Nations Adopt the Competition Law of the European Union?*, (1997), 23 *Brooklyn Journal of International Law*, L. 351. Faced with unsatisfying enforcement of the agreements provisions by the national competition authority of the associated country, the European Commission could decide to enforce directly EC competition law.

<sup>49</sup> See Evans, supra note 47, p.134. The author makes reference to countervailing measures and draws an analogy with the “Haegeman” Case, ECJ, 30 April 1974, 181/73, Rec.p. 449. The author also considers that Parties may make recourse to this safeguard clause in order to apply other kinds of legislation such as criminal laws for instance.

<sup>50</sup> These observations seem to be supported by practical evidence. To our knowledge, no dispute has so far been settled through this procedure.

particularly true for the Partner countries whose trade relationships with the EC are key to the success of their economy.

Finally, supposing that implementation measures be adopted and that no recourse to the safeguard procedure be made, it is submitted that the rules of the agreements could still remain ineffective. The experience with the Europe Agreements suggests that the competition provisions of these agreements have rarely been invoked or applied by the parties. National authorities from associated countries have indeed preferred applying only national competition legislation to the cases that were presented to them.<sup>51</sup>

## 2) The degree of protection enjoyed by individuals

As seen above, none of the existing Euromed Agreements have so far been completed by measures of implementation. It is generally considered that, in the absence of such measures, the competition rules of the agreements are not applicable. It is, however, subject to question whether alternative mechanisms could be used to offer a certain degree of protection to the individuals that are victims of an anti-competitive behavior. Two approaches can be explored.

A first approach would be to determine whether the competition provisions included in the association agreements could have direct effect, thereby allowing individuals to invoke them before national courts. It is now largely admitted that the provisions of international agreements that meet the conditions for having a direct effect can be invoked by any individual before the national courts.<sup>52</sup> The existence of a direct effect can legitimately be raised in the context of the Euromed Agreements. Indeed, those agreements replicate the competition rules of the EC Treaty, which enjoy direct effect within the EC legal order. Similarly worded norms contained in an international agreement could therefore be considered directly effective, even in the absence of implementation measures. A minimum degree of protection could accordingly be afforded to individuals through the application of the direct effect doctrine.

Two elements seem, however, to exclude that the competition rules found in the association agreements be granted direct effect. First, as suggested by several authors, no rule comparable to Protocol 35 of the EEA Agreement explicitly provides that the

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<sup>51</sup> See Janos Volkai, "Solutions to the Unconstitutionality of the EC-Hungary Antitrust Cooperation Regime : Antitrust or Antitrust Cooperation ?", (2000) 6 *Columbia Journal of European Law*, p.332. The author explains that, in practice, the Hungarian competition authority has not really enforced the provisions of the agreements.

<sup>52</sup> The question of the direct effect of provisions of international agreements concluded by the EC has been clarified by the case law. It is admitted that an international agreement concluded on the basis of article 310 of the EC Treaty belongs to the EC legal order since its conclusion. See ECJ, 30 April 1974, R. & V. Haegeman v. Belgian State, C-181/73, Rec.p. 449. Such agreements thus enjoy primacy over national law and, when certain conditions are met, direct effect. Indeed, the ECJ held that the provisions of international agreements can be directly invoked by *individuals* before national courts provided that the act contains clear, precise and unconditional obligations. See ECJ, 30 September 1987, Demirel v. Stadt Schwäbisch Gmünd, C-12/86, Rec.p.3719. In addition, the formulation, nature and goals of an agreement are taken into consideration to determine whether it can be granted direct effect. See ECJ, 1 July 1993, Metalsa, C-312/91, Rec.p. I-3751. On the general issue of direct effect, see Craig and de Burca, *EU Law – Text, Cases and Materials*, (2003), 3<sup>rd</sup> Ed., Oxford University Press, p.178.

competition rules shall be “directly applicable”.<sup>53</sup> Second, as seen above, the association agreements mandate the Councils of Association to adopt measures to implement their competition law provisions. Since the implementation measures make the competition rules applicable, it must be logically presumed that until such measures are adopted, the provisions of the agreements are not effective. It results from the above analysis that the degree of protection enjoyed by individuals on the basis of the association agreements is extremely limited, at least until the agreement is implemented.

A second approach would be to explore whether, in the absence of implementation measures and of direct effect, individuals could directly rely on the provisions of the EC Treaty to have anti-competitive practices carried out in the EC or in Partner countries sanctioned. The relevant criterion here is to determine whether the practices in question have an impact within the EC. Indeed, the “*Woodpulp*” case law of the ECJ, according to which articles 23 and 27 of the EEA Agreement do not exclude the applicability of Article 81 of the EC Treaty, confers a minimal protection to economic agents.<sup>54</sup> This mechanism, however, protects only individuals located within the EC. To benefit from a similar protection, the economic agents of the associated countries have to rely on their national rules of competition. However, in another study, we have shown that the effectiveness of such rules is in some of these countries rather limited.<sup>55</sup> For this reason, there is an asymmetric protection of individuals between the EC and the Partner countries. The achievement of a convergence of domestic law on EC competition rules could help circumvent the weaknesses of the agreements.

### III A convergence of domestic competition rules

The Mediterranean Partners that are candidate to the accession to the EC have the obligation to harmonize their domestic laws on the basis of EC Competition law.<sup>56</sup> This process of forced transposition is not imposed on the non-candidate countries. Nevertheless, some of these countries have spontaneously adopted domestic competition laws. In this respect, the situation of the Partner countries is highly heterogeneous. Some have adopted a law that is patterned on the old French competition law and which fell short of transposing EC rules to their full extent (Algeria, Morocco and Tunisia). Others have made the choice of elaborating a law that takes elements from to other foreign models (Israel, Jordan?). At the moment, there is thus little convergence between the competition law regimes adopted by the

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<sup>53</sup> See Jacques H.J. Bourgeois about the Europe Agreements, supra note 25, p.132. On the direct effect of the EEA Agreement, see CFI, 22 January 1997, Opel Austria v. Council of the European Union, T-115/94, Rec.p.II-00039.

<sup>54</sup> See Jacques H.J. Bourgeois, supra note 25, p.133. See also, Eleanor M. Fox, supra note 48.

<sup>55</sup> See D. Geradin and N. Petit, supra note 6.

<sup>56</sup> See Mario Monti “Enforcement of Competition Policy – Case for the Accession Negotiations and for Developing a Real Competition Culture”, 7<sup>th</sup> Annual Competition Conference between Candidate Countries and the European Commission, Ljubljana, Slovenia 17-19 June 2001. Cyprus, Malta and Turkey are hence submitted to three main obligations in the field of competition policy. First, these countries must show that the necessary legal framework, for both antitrust and State aid, has been created. They are therefore required to bring their domestic legislation in line with that of the EC. Second, they must make sure that an efficient administrative capacity be in place to apply the competition rules. This obligation relates to the effectiveness of the domestic institutions. Third, the candidate countries need to show a concrete State aid and antitrust enforcement record.

non-candidate Partner countries. Whether a deeper degree of convergence is desirable is an issue that needs to be explored.

Many official documents produced by the EC institutions make a particularly extensive reading of the association agreements and evoke a “convergence” or a “harmonization” of the competition rules of the Partner countries towards EC competition rules.<sup>57</sup> The reference to this concept of convergence by the EC institutions is motivated by two reasons.

The first one is that the EC anticipates that the Euro-Mediterranean partnership will be one of the cornerstones of the establishment of a future Euro-Mediterranean free trade zone at the horizon 2010.<sup>58</sup> The EC believes that harmonization is a prerequisite for successful market integration.<sup>59</sup> In two Communications of 1998 and 2000, the European Commission draws the conclusion that the effectiveness of the future free trade zone requires the harmonization of a variety of rules, including competition rules.<sup>60</sup>

The second reason relates to a more concrete problem. In the EC legal order, the competition provisions of the EC Treaty have been given full effectiveness thanks to the existence of an integrated system relying on powerful institutions (i.e. the European Commission and the ECJ), which are able to ensure the uniform and coherent application of these rules. This element, combined with the principle of primacy of EC law, has allowed an effective implementation of the competition provisions contained in the EC Treaty.<sup>61</sup> At the external level, the EEA Agreement, which also provides for an integrated system comprising an independent institution of control, is also adequately equipped to ensure an effective implementation of the

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<sup>57</sup> See “The Barcelona Process, The Europe Mediterranean Partnership- 2001 Review”, European Commission: “*Other areas where convergence in legislation would help contribute to meeting the objectives of the association agreements include...competition*”, p.20. See Communication from the Commission supra note 36. See also Jean-François Pons, “Accords euro-méditerranéens et concurrence: une réponse aux problèmes de développement et de mondialisation”, *Competition Policy Newsletter*, n°3, October 2000, p.85, which refers to “*the application of converging competition rules*”. See finally, Euro-Med Partnership, Regional Strategy Paper 2002-2006 and Regional Indicative Program 2002-2004, “*all partners have acknowledged that harmonising their legislative and regulatory frameworks in areas such as ... competition laws, will facilitate their access to an enlarged market*”, p.14.

<sup>58</sup> This is explicit in each of the association agreements. See Article 43-3 of the association agreement between the EC and Tunisia, O.J. L97, 30 March 1998, p.2. It will be also noted that incentives are being given to accelerate the conclusion of free-trade agreements between the associated countries. See Article 29 of the same agreement.

<sup>59</sup> See Kerrin M. Vautier, “International Approaches to Competition Laws: Government Cooperation for Business Competition”, p.189, in *International and Comparative Competition Laws and Policies*, supra note 2.

<sup>60</sup> See Communication from the Commission, supra note 36 and Communication from the Commission, “Reinvigorating the Barcelona Process”, 6 September 2000, COM(2000) 497 final. The Commission has also initiated a three years “*Regional Programme for the Promotion of the Euro-Mediterranean Market Instruments and Mechanisms*”, (Euromed Market Programme) that involves the 27 Partners. As far as harmonization is concerned, eight relevant sectors have been identified, including competition rules. In a first step, the Commission intends to provide information and exchange experiences in order to stimulate legislative action in the Partner countries. In a second step, the programme will concentrate on the training and the provision of technical assistance to the officials of the Partner countries.

<sup>61</sup> See Laurence Idot, “L’Internationalisation du Droit de la Concurrence”, (2000) 3 *Cahiers de Droit de l’Entreprise*, p.34.

competition rules it contains.<sup>62</sup> In both cases, a convergence process was thus not necessary.

By contrast, the Europe Agreements did not provide for an integrated system to control the correct application of their provisions. The implementation of these provisions was thus conferred to the national jurisdictions. However, as pointed out above, it was not certain that the national courts of the associated countries would implement the provisions of the Europe Agreements, which do not have in principle direct effect in their domestic legal order.<sup>63</sup> In order to avoid that these rules be deprived of effectiveness, an obligation of convergence of national law on EC competition rules was thus imposed, thereby ensuring an application at the domestic level of rules similar to those contained in the association agreement.<sup>64</sup>

In the context of the Euromed Agreements, the EC seems to follow a comparable approach, however not as explicitly as in the Europe Agreements. As we have seen, the effectiveness of the competition rules contained in the association agreements is, in the absence of implementation measures, fairly limited.<sup>65</sup> In the absence of an integrated system of control, and given the risks that the domestic courts of the associated countries do not apply the provisions of the agreements, a certain degree of convergence is thus encouraged by the European Commission. Such a convergence is not, however, specifically mentioned in the chapter of the agreements that is devoted to competition rules.<sup>66</sup> It would indeed be asking too much to non-candidate countries in the framework of a simple association agreement. The EC thus seeks to attain an objective of convergence quite comparable to what is required in the framework of the accession process, but in an indirect way.

It is subject to question why it is essential that non-candidate countries adopt rules that are identical to, or at least largely inspired from, the EC competition rules. Insisting that the competition law regimes in non-candidate countries be patterned on EC competition rules is to impose on such countries obligations that go beyond what is imposed on the Member States.<sup>67</sup> The provisions of the EC Treaty do not require that Member States harmonize their competition rules. They are only bound, pursuant to the principles of primacy and of loyal cooperation to abstain from taking any action that would render impossible or more difficult the application of EC competition rules.<sup>68</sup>

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<sup>62</sup> See Richard Cunningham and Anthony LaRocca supra note 5, p.879.

<sup>63</sup> See above and Fingleton, Fox, Neven and Seabright supra note 22, p.56.

<sup>64</sup> Id. at p.55.

<sup>65</sup> See above.

<sup>66</sup> The Commission makes a very extensive interpretation of the agreements when it states that *“the provisions on competition [of the agreements] contain clear commitments aimed at bringing the competition policies of the countries concerned into line with the Community arrangements”*. See XXVIIIth Report on Competition Policy 1998, SEC (99) 743 Final, p.117.

<sup>67</sup> On the Europe Agreements, see Eleanor M. Fox, supra note 48. See also Halük A. Kabaalioglu, “The Turkish Model of Association: Customs Union Before Accession” in Paul Demaret, Jean-François Bellis and Gonzalo Garcia Jiménez Ed., *Regionalism and Multilateralism after the Uruguay Round* (1997) European Interuniversity Press, European Policy n°12, Brussels, p.133. Taking this idea a step further, it seems excessive to require non Member States – non candidate countries to adopt EC-modelled domestic competition laws.

<sup>68</sup> See ECJ, 14 December 2000, Masterfoods Ltd. v. HB Ice Cream Ltd., C-344/98, Rec.p.I-11369.

It seems that few, however, have so far critically reviewed the Commission's strategy to induce non-candidate countries to pattern their regulatory policies on the policies of the EC as a tool to create a large Euro-Mediterranean market. In this part, the regulatory convergence proposed by the Commission will be analyzed in three steps. We first explore what the Commission understands when it refers to the "convergence" of competition rules (A). Second, we analyze the respective costs and benefits for the EC and the Partner countries of engaging in a process of regulatory convergence in the competition field (B). Third, we review the alternatives for the Partner countries to harmonizing their competition rules on those of the EC (C).

*A. The notion of convergence in the framework of the Euro-Mediterranean partnership*

The degree regulatory harmonization in the field of competition that has to be achieved by candidate countries has been clearly identified by the European Commission.<sup>69</sup> By contrast, the degree of regulatory convergence that the EC foresees for the non-candidate Partner countries has not been precisely defined by the Commission. In its 1998 Communication on the Euro-Mediterranean partnership and the Single Market, the European Commission declared that it wanted to implement the same type of obligation of alignment of national laws as it carried out in the context of the single market.<sup>70</sup> This affirmation is, however, curious as the implementation of the single market has not relied on a mechanism of alignment of competition law regimes, but on a process of spontaneous harmonization.<sup>71</sup>

Current available information is insufficient to evaluate the intensity of the process of convergence that is envisaged by the European Commission. Two options may be envisaged. First, by analogy with the arguments developed by the Commission in the framework of the enlargement, it could be sustained that the concept of convergence should translate in an exhaustive and binding harmonization of the rules of the Partner countries on EC competition rules.<sup>72</sup> In such case, convergence would mean the complete transposition of the EC competition law in the domestic legal order of the Partner countries. It would thus engage the EC and the Partner countries in a process of "deep" regulatory convergence.

By contrast, other elements plead in favor of a flexible harmonization of the domestic laws of the Partner countries with EC law. In this scenario, convergence would correspond to the adoption by the non-candidate countries of competition laws that are compatible with the general principles of EC competition law. The provisions contained in Title V of the association agreements, which relates to economic cooperation, seem to sustain this interpretation. They institute an economic cooperation that seeks, *inter alia*, to help the associated countries to "*bring their*

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<sup>69</sup> The White Paper on Enlargement considers that the "key elements" of the European competition policy must be transposed at the domestic level. The content of these "key elements" extends to secondary legislation such as block exemption regulations, guidelines as well as Commission's notices. See White Paper on Enlargement, Competition Appendix, p.58. See also the comments made by Fingleton, Fox, Neven and Seabright, *supra* note 22, p. 56.

<sup>70</sup> See 1998 Communication from the Commission, *supra* note 36 and the 2000 Communication from the Commission, *supra* note 60.

<sup>71</sup> See Laurence Idot, *supra* note 61, p.34. The author stresses the importance of the principle of primacy of EC law for the bringing into line of domestic competition laws on the EC Treaty.

<sup>72</sup> Such as the harmonization that has taken place in the context of the enlargement process.



*legislation closer to that of the Community*”, in all the fields covered by the agreement.<sup>73</sup> This general provision thus applies to competition rules and provides information on the method of convergence that will be implemented. On the basis of this cooperation, harmonization would be voluntary and negotiated, by contrast to the process of binding transposition that has been implemented in the context of the accession process. Pursuant to this interpretation, the EC and the Partner countries would engage in a process of “loose” regulatory convergence.

*B. Benefits and costs of regulatory convergence in the competition law field*

As we have just seen, there is some uncertainty as to the intensity of the convergence process that is encouraged by the Commission vis-à-vis the non-candidate countries. In this section, we evaluate the benefits and the costs of a process of convergence whereby the Partner countries would transpose EC competition rules in their domestic legislation. For the sake of the analysis, a distinction is made between, on the one hand, the benefits and costs of a process of deep convergence and, on the other hand, the benefits and costs of a process of loose convergence.

1. Benefits and costs of deep regulatory convergence

The benefits and the costs of deep convergence will be examined in turn.

a) Benefits of deep convergence

i) Benefits for the EC

For the EC, a process of deep convergence would raise three kinds of benefits. First, deep convergence allows the EC to extend the territorial scope of application of its competition law through the adoption of similar domestic rules in third countries. Such an extension allows the EC to avoid relying on an extraterritorial application of its competition law – an approach that is often criticized and made more difficult by recent case-law, while ensuring a similar level of protection for all its economic operators whether the anti-competitive practices take place within the EC or in an associated country.<sup>74</sup>

Second, as we have already noted above, convergence is of strategic interest. By exporting its competition rules, the EC creates a critical mass of countries sharing its conceptions, a situation that could be advantageous in the context of multilateral discussions, such as the negotiations that will take place in the context of the Doha Round.<sup>75</sup> The exportation of its law to Partner countries would also be a remarkable achievement for the EC when we know that emerging countries are generally

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<sup>73</sup> See, for instance, Article 52 of the agreement with Tunisia.

<sup>74</sup> The competition rules of the EC Treaty only apply under condition that trade between Member States be hampered. As already mentioned, the ECJ put recently an end to the extensive interpretation of this provision. See Case “Javico”, supra note 21. For a discussion of the problems associated with the extraterritorial application of antitrust law, see Sharon E. Foster, supra note 13.

<sup>75</sup> The increasing importance of the debates related to the adoption of international standards of competition has been mentioned above.

reluctant to the idea of implementing competition rules that would be elaborated at the multilateral level.<sup>76</sup>

Finally, deep convergence offers benefits to EC operators willing to invest in Partner countries.<sup>77</sup> Regulatory convergence reduces transaction costs for EC operators and facilitates the development of economic activities on the markets that have been made accessible thanks to the trade provisions of the association agreements. This is particularly significant as regards distribution agreements. The convergence allows any EC economic operator to conclude similar distribution agreements in the various Partner countries to which it exports. Regulatory convergence could thus contribute to the implementation of an environment that is more favorable to investment in the Partner countries.

ii) Benefits for the non-candidate Partner countries

Deep convergence also brings a certain number of advantages to the Partner countries. First, convergence allows these countries to reduce the cost of elaboration of a domestic competition law regime. By contrast to other fields where the elaboration of legislation essentially depends on the local economic circumstances, it is possible in the area of competition to simply transpose in domestic law a set of imported rules, such as EC competition law. The effectiveness of EC Competition rules has been proven and the EC model was successfully applied in countries at different levels of economic development. The competition rules contained in the EC Treaty are formulated in very broad terms. For this reason, the taking into account of local circumstances is always possible at the implementation level. In addition to reducing the cost of elaboration, the domestic application of EC rules allows these countries to apply a competition regime the fiability of which has been already tested, and thus avoid the indirect costs that could be generated by the application of a domestic legislation that is poorly elaborated.<sup>78</sup>

Second, the adoption of domestic rules that are based on competition rules found in the EC Treaty could give these countries access to a series of additional instruments (i.e. secondary legislation) that they would simply need to transpose to their domestic legal order.<sup>79</sup> The Partner countries could, for instance, decide to transpose the EC rules on specialization or research and development agreements in their domestic

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<sup>76</sup> This reluctance can be explained by two reasons. First, the emerging economies are not always convinced of the benefits that could flow from adoption of a competition policy. Second, it appears that, in these economies, strong economic forces close to governments tend to consider such reforms as a threat to their privileges and try to influence the political decisions taken in this field.

<sup>77</sup> In emerging economies, the importance of Foreign Direct Investment is reinforced by the fact that the public redistributive mechanisms (taxes) and the modern financing mechanisms (stock exchanges and credit institutions) are all the more rudimentary and inefficient. The Commission has taken the view that the absence of a transparent economic and legal framework, largely affects investments by EC operators in the Mediterranean region. See Communication from the Commission, supra note 62, p.4.

<sup>78</sup> This idea is formulated by Karl Raustalia, supra note 12.

<sup>79</sup> It is made reference to the regulations, guidelines and notices adopted by the European Commission. The benefits also extend to the availability of a full body of ready case law, which is furthermore frequently updated. See Michal S. Gal, "Size Does Matter: the Effect of Market Size on Optimal Competition Policy", (2001) 74 Southern California Law Review, 1437. This is worth noting since most small emerging economies "cannot generate the case law needed to refine their own laws".

competition law regime.<sup>80</sup> Regulatory convergence would thus allow these countries to implement not only basic competition rules, but also a set of additional, and compatible competition rules dealing with more specific aspects.

Third, the implementation of the free trade provisions contained in association agreements will create a wider opening of the domestic markets of the Partner countries to foreign operators. While this should increase the level of competition on these markets, there is also a risk that some of these markets could be the target of anti-competitive practices by large foreign industrial groups.<sup>81</sup> This could, for instance, be the case if some of these groups engaged in export cartels.<sup>82</sup> Once established on the market, some of these groups could also be tempted to use their market power to eliminate their local competitors (for instance, through predatory prices). Seen from that angle, the benefit of deep convergence is that it provides the Partner countries with a strict competition law regime which should allow them to protect their domestic undertakings against restrictive practices of foreign operators.

Fourth, in the context of growing efforts of cooperation at the international level, regulatory convergence plays a fundamental role in the development of a “competition culture”, the importance of which is often underlined by policy-makers.<sup>83</sup> In the first place, it ascertains domestic operators to the type of competitive discipline that will be imposed on them when they export their products on the EC market to which they have progressive access. In addition, it provides governmental authorities with a set of rules they should take into account in their policy discussions.<sup>84</sup>

Fifth, it allows these countries to speak a common language among themselves, but also with the EC. This is a significant benefit considering the growing importance of cooperation between competition authorities as is amply demonstrated by the development of bilateral agreements providing for negative and positive comity regimes, as well as by the development of network of competition authorities such as the *International Competition Network* or the *OECD Global Competition Forum*.<sup>85</sup> The convergence of the domestic competition laws of the Partner countries around EC competition rules gives a greater credibility to these countries and their competition authorities in international fora.

Finally, regulatory convergence increases the likelihood that these countries will be able to benefit from a technical and financial assistance of the EC. It seems indeed

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<sup>80</sup> See Commission Regulation n°2658/2000 of 29 November 2000 on specialization agreements, O.J L304, 05 December 2000, p.3. See Commission Regulation n°2659/2000 of 29 November 2000 on research and development agreements, O.J L304, 05 December 2000, p.7.

<sup>81</sup> See Frédéric Jenny, *supra* note 2, p.51.

<sup>82</sup> On this point, see Bernard Hoekman and Peter Holmes, “Competition Policy, Developing Countries, and the World Trade Organization”, World Bank, April 1999. The authors consider that the emerging economies have a strong interest in the adoption of international competition to better fight export cartels. In general the domestic law of those countries does not provide effective remedies against such practices. It is reasonable to believe that the convergence on severe rules of competition could therefore be useful.

<sup>83</sup> See Mario Monti, *supra* note 56.

<sup>84</sup> See on this point, B. Hoekman and P. Holmes, *supra* note 82, p. 12.

<sup>85</sup> Information is available at <http://internationalcompetitionnetwork.org> and at <http://www.oecd.org/FR/document/0,,FR-document-768-nodirectorate-no-20-23909-768,00.html>.

reasonable to think that the EC will be more willing to provide assistance to countries that have adopted rules that are patterned on the EC model, rather than to countries that would adopt rules on a different model or adopt no rules.

b) Costs of a deep convergence in the competition law field

The costs for the EC and for the Partner countries will be examined in turn.

i) Costs for the EC

The costs supported by the EC should be limited to the funds spent on technical and financial assistance. Such funds could be provided by the MEDA programme.<sup>86</sup> While money is available, it is, however, the duty of the Partner countries to request the technical and financial assistance that can be offered by this programme. To our knowledge, few requests of this kind have been made so far in the field of competition law.<sup>87</sup>

ii) Costs for the Partner countries

By contrast, deep convergence would impose substantial costs on the Partner countries. The principal short-term cost would be of an institutional nature. Regulatory convergence should not only mean substantive convergence, but also institutional convergence, as the domestic authorities would have to be as effective as the EC authorities of control.<sup>88</sup> In the absence of effective authorities, the benefits generated by deep convergence would indeed be neutralized.

In a great majority of Partner countries it appears that the national competition authorities are not sufficiently effective.<sup>89</sup> The costs that would need to be incurred to improve their performance would essentially be linked to the training of the officials working for these authorities.<sup>90</sup> The competition authorities of the non-candidate countries generally possess few experts enjoying academic training and sufficient experience in the disciplines (essentially law and economics) that are needed to apply competition rules. By improving training efforts, the quality of decisions and the credibility of these authorities would improve.

The weak performance of the competition authorities of the Partner countries can also be explained by the fact that economic operators and consumers have little knowledge of the competition authorities, their prerogatives and the rules they apply. As a result, few undertakings or individuals lodge complaints to these authorities when they are victims of anti-competitive practices. It is thus necessary to provide training not only

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<sup>86</sup> The MEDA programme is a financial instrument which supports, *inter alia*, economic transition in the Mediterranean countries. 5.3 Billion Euros have been made available for the period 2000-2006. The programme is implemented by Council Regulation “MEDA II”, 2698/200, 27 November 2000, O.J. L311, 12 December 2000. It must also be noted that institutional donors such as the European Investment Bank or the World Bank also grant funds to support economic transition.

<sup>87</sup> See the observations made by Jean-François Pons, *supra* note 35.

<sup>88</sup> This is what can be inferred from the speech of Mario Monti, *supra* note 56.

<sup>89</sup> See the analysis of D. Geradin and N. Petit, *supra* note 6.

<sup>90</sup> On these points see William E. Kovacic, “Getting Started : Creating New Competition Policy Institutions in Transition Economies”, (1997) 23 *Brooklyn Journal of International Law*, 403.

to competition officials, but also to industry and consumers associations.<sup>91</sup> In a majority of Partner countries, ordinary jurisdictions remain competent to implement competition rules. Training efforts should also be extended to them.

In the middle term, important costs could relate to the spillover effect that the adoption of competition rules may produce on other domestic law regimes. The adoption of competition rules generally implies a variety of legislative amendments in other areas and even in some cases a modification of the Constitution. Several authors have, for instance, observed that the adoption of competition rules only produces benefits if it is combined with a series of other legal mechanisms, such as an effective bankruptcy regime and a regime that guarantees the execution of contracts.<sup>92</sup>

The costs of converging towards the EC competition model would thus be significant. These costs, however, could be partly funded by financial assistance from the MEDA programme or other relevant EC programmes. Moreover, the costs of establishing an effective competition regime based on EC competition law appear lower than those that could emerge from the implementation of an inadequate system, such as the costs of erroneous decisions or the costs of the decredibilisation of the regulatory environment relating to investments.<sup>93</sup>

## 2. Benefits and costs of loose regulatory convergence

Adoption of a looser approach to convergence would reduce some of the costs that would be generated by deep convergence, but also deprive the EC and the Partner countries of some of the benefits that would be brought by deep convergence.<sup>94</sup>

Looser convergence would reduce the costs incurred by the Partner countries as this form of convergence would probably not entail major legislative or institutional changes. Pursuant to this approach, the Partner countries would commit themselves to ensure that their competition law regimes comply with the principles guiding EC competition law, but they would not commit themselves to additional legislative or

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<sup>91</sup> See William E. Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement", (2001) 77 *Chicago-Kent Law Review*, 265.

<sup>92</sup> See Jean-Jacques Laffont, "Competition, Information and Development", in *Annual World Bank Conference on Development Economics*, (1998) World Bank, Washington. The author gives a series of examples among which the bankruptcies mechanisms. It is estimated that the competitive pressure strengthens the risks of bankruptcy and thereby encourages executives to be efficient managers. This positive effect can only be obtained under condition that the countries have a strong and controlled bankruptcy law regime.

<sup>93</sup> A misconceived competition decision may have extremely important financial consequences (e.g. in the field of merger control). The main problem is that the costs generated by the adoption of a competition regime are easy to evaluate, whereas the costs incurred from a wrong decision are difficult to determine.

<sup>94</sup> There is a debate among authors as to whether convergence of competition laws of emerging economies should be loose or deep. Many authors have expressed the view that the specific features of emerging economies should be taken into account instead of implementing an automatic deep convergence. See for instance, Michal S. Gal, *supra* note 79, who argues in favour of a "cautious approach towards competition law harmonization or convergence". Other authors tend to consider that "no domestic legal system is perfect or exportable as a whole". Hence, the legal transplants should be carefully and voluntarily selected, so as to assist economic development. See Loukas A. Mistellis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform – Some Fundamental Observations", (2000) 34 *International Lawyer*, 1055.

institutional changes. If, of course, loose convergence required these types of changes, then it would not reduce the costs to be faced by the Partner countries. As far as the EC is concerned, opting for a loose convergence approach would not have major financial implications.

Looser convergence might, however, deprive the EC and the Partner countries of some of the most significant benefits that could be achieved by deeper convergence. As far as the EC is concerned, loose convergence would be less attractive from a strategic standpoint. As pointed out above, the main benefit of deep convergence is that it would allow the EC to extend the territorial scope of application of its competition law. More generally, encouraging the Partner countries to align their competition rules on the principles of EC competition law is a very broad commitment that may not mean much in practice. Whatever the legislation it adopts, a Partner country would always be able to claim that its legislation is in conformity with EC competition law principles. By opting for a model of looser convergence, the Partner countries would also deprive themselves of most of the benefits associated with deep convergence. As we have seen, one of the main benefits of deep convergence is that it provides the Partner countries with a set of rules whose effectiveness has been proved. Even if the countries commit to adopt a competition law regime that complies with the principles of EC competition law, it does not mean that these regimes will be effective. The presence of some exceptions, or of inefficient procedures, could, for instance deprive a regime of any practical effect. In addition, adopting a regime that is only inspired from the principles of EC competition law may deprive these countries from a series of additional tools, such as block exemption regulations, which are specifically tailored to complement EC competition rules. Finally, looser convergence may render the participation of the Partner countries in international competition networks more difficult, as they will speak a language that is not necessarily known by representatives of other jurisdictions..

On balance, it is therefore not clear that the Partner countries would gain much by limiting their association with the EC in the competition field to a form of loose convergence. On the contrary, we believe that much would be lost by these countries if they decided to opt for loose convergence approach.

### C. *Alternatives to convergence around EC rules*

Instead of converging around the EC model, another option would be for the non-candidate Partners to develop an ad hoc competition law model and converge around that model.<sup>95</sup> This approach would thus involve the adoption through negotiations taking place at the regional level of a specific model of competition rules that would not necessarily be based on EC competition rules and principles, but could be for instance a mix of rules of principles of different existing models of competition law. Such an alternative approach would raise two issues. The first relates to whether it would be a good idea for the Partner countries to develop such an *ad hoc* model and to

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<sup>95</sup> Some authors have taken strong positions against the convergence of emerging economies on EC or US-based models. See for instance Manisha M. Sheth, "Formulating Antitrust Policy in Emerging Economies", (1997) 86 *Georgetown Law Journal*, 451. The "*different structural features of developing countries...require the implementation of different antitrust policies*", p.466. Laffont, *supra* note 92 without excluding possible influence of modern models, has argued in favour of a tailor made antitrust policy, adapted to the specific environment of emerging economies.

decide to converge around it (a). If this alternative option were to be recommended, it would then be useful to examine whether such an option would be practicable (b).

a) Opportunity of regulatory convergence around an ad hoc model

Three main reasons raise doubts as to the opportunity for the Partner countries to develop an ad hoc model and to converge around it. First, the EC model is an effective model, which seems easily adaptable to economies at different levels of economic development. Moreover, although many emerging economies have adopted competition law regimes, there does not seem to be an *ad hoc* model that is particularly suitable to these countries. In fact, most of these countries have transplanted foreign competition law regimes.<sup>96</sup> The costly elaboration of an ad hoc model thus does not seem to be necessary. It is probably more effective to rely on a pre-existing competition law model (e.g. the EC model) and to take into account of the local circumstances at the implementation level.

Second, the choice of an ad hoc model involves greater risks than relying on the EC model as there is no guarantee that such an *ad hoc* model would operate effectively. In addition, the risks of denaturation (i.e., inadequate use to satisfy vested interests) of an ad hoc model is greater than for well established models (e.g., the EC competition law regime) as, given the novelty of this model, few people will be able to determine whether the system is being abused.

Finally, the indirect costs of choosing to converge around a model that subsequently proves to be inadequate can be heavy. If the ad hoc rules are ineffective, the resulting costs will be multiplied by the convergence process.

It thus results from the above analysis that the opportunity of a convergence around an ad hoc model is uncertain.

b) Improbability of a convergence around an ad hoc model

Even if a process of convergence around an *ad hoc* model were to be desirable, it seems unlikely that such a regional model could be negotiated and implemented. First, the Partner countries have reached different stages in the process of domestic regulatory reforms, and it is not clear that adoption of common competition law regimes would be easy to achieve. Several initiatives, such as the “Agadir Declaration” of 8 May 2001 suggest that a more limited convergence of sub-regional nature would be possible.<sup>97</sup> This initiative is, however, at a very early stage and the modalities of the envisaged cooperation remain unclear. In addition, it is too early to say at this stage whether the convergence of competition rules will be a priority in the development of trade relationships among the Partner to this project.

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<sup>96</sup> See however on this point, Carlos M. Correa, “Competition Law and Development Policy” in *Towards WTO Competition Rules*, supra note 35, p.367.

<sup>97</sup> The Agadir declaration lays down the principles of cooperation between Egypt, Jordan, Morocco and Tunisia. In the long run, those states affirm that they want to implement a free-trade area. The EU has manifested strong support to this project. See Declaration of the European Union, Third Meeting of the EU-Tunisia Council of Association, 29 January 2002, Press report 24 January 2002.

Second, statistic analysis raise some doubts on the chances of success of regional or sub-regional cooperation initiatives and, thus, on the probability of a convergence of the competition rules. Trade flows in the Euro-Mediterranean zone show that the Partner countries are essentially trading with EC Member States. By contrast, trade among Partner countries is very limited.<sup>98</sup> Since the launching of the Barcelona process, intra-regional (South-South) trade has little progressed. In 2000, intra-regional trade exchanges represented less than 6% of the total trade exchanges of the Mediterranean Partners.<sup>99</sup>

It seems thus at this stage unlikely that the Partner countries will launch a process of regulatory convergence at a regional level. The EC has well understood the shortcomings of cooperation between these countries and is thus using the Euro-Mediterranean partnership to develop some forms of regulatory harmonization.<sup>100</sup>

#### IV Conclusions

In this paper, we have shown that the effectiveness of the competition provisions included in the association agreements the EC concluded with the Partner countries is very limited. However, the Commission has indicated in a number of policy documents its intention to promote regulatory convergence encourage non-candidate Partner countries to harmonize their competition rules on EC competition rules. As the Commission has not so far been clear about the degree of convergence it intended to promote, we analyze the costs and benefits of two different possible approaches: a process of “deep” convergence, whereby the non-candidate Partner countries would transpose EC competition rules into their domestic legal order, and a process of “loose” convergence, whereby these countries would only make sure that their domestic competition rules are compatible with the principles of EC competition law.

We argue that a model of deep convergence would generate significant benefits for both the EC and the Partner countries, although it would raise certain costs especially on the part of the Partner countries. Such costs could, however, be largely covered by technical and financial assistance granted in the framework of the MEDA programme. Deep convergence may, however, raise some objections on the part of the non-candidate Partner countries, which could consider such an approach as a violation of their regulatory sovereignty. Nothing in the association agreements, however, forces these countries to transpose EC competition rules in their national law. Opting for such an approach would thus be a voluntary choice, which should not be made on political or ideological considerations, but instead be based on a careful analysis of

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<sup>98</sup> Economic theory explains the relative weakness of intra-regional trade by the lack of complementarities between the countries of a given region. It can however be considered that the Mediterranean region has a respectable potential for such trade which remain underexploited because of the existence of regional parallel traffics, of political tensions, of the lack of infrastructures, of the negative effects linked to rules of origins and of the tariffs and non-tariffs barriers to trade.

<sup>99</sup> See Communication from the Commission, *supra* note 60, p.7. It is also related that intra-zone trade has less progressed in the Mediterranean region than in other regions. (From 4 to 6% between 1970 and 1998 for the Euromed region, whereas members of the NAFTA have progressed from 36% to 50% and South American trade has increased from 11 to 25%).

<sup>100</sup> See Communication from the Commission, *supra* note 60, p.14. The European Commission today tries to use the association agreements so as to enhance regional cooperation and asks all its new Partners to conclude a free-trade agreement with the other Partners already associated to the EC.



the costs and benefits such an approach would entail. In any event, deeper convergence will not be successful without a significant investment of the EC institutions.