

HEINONLINE

Citation: 6 Minn. J. Global Trade 1 1997



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 17:04:42 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry

Daniel J. Gifford†

INTRODUCTION

Because private exclusionary arrangements can potentially effectively neutralize the market-opening efforts undertaken by governments, they have long been the subject of international concern.¹ Manifestations of this concern extend back to 1948 when delegates to the Havana Conference approved a set of provisions directed against cartels and restrictive business practices.² Periodically, government officials and others have focused upon the question of whether restrictive agreements among private business firms may impede trade. As a host of international agreements have progressively eliminated or have placed limits on government-erected trade barriers, attention has increasingly focused upon privately-erected barriers, i.e., those resulting from cartel-like exclusionary activities of private business firms.

The United States has repeatedly complained that the domestic markets of some nations, though freed from official trade

† Robins, Kaplan, Miller, & Ciresi Professor of Law, University of Minnesota. The author gratefully acknowledges the support and encouragement of his colleague, Professor Robert Hudec.

1. See Treaty Establishing the European Economic Community, *opened for signature* Nov. 23, 1957, pt. 3, tit. 1, ch. 1, § 1, arts. 85-86, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter Treaty of Rome]. The Treaty of Rome contains competition-law provisions designed to ensure that private agreements do not carve up the all-European market. In its first competition-law decision under the Treaty of Rome, the European Court of Justice ruled that the Treaty did not permit exclusive distribution agreements coincident with national boundaries to bar shipments of goods between member states, even though contractual prohibitions on interstate shipments were limited to goods of a single brand. Joined Cases 56 & 58/64, *Establishments Consent, S.A.R.L. v. Commission*, 1966 E.C.R. 299, 341.

2. Havana Charter for an International Trade Organization, Mar. 24, 1948 (United Nations Conference on Trade and Employment, Havana, Cuba), *reprinted in* U.S. DEP'T ST. COMMERCIAL POLICY SERIES 113 (1947) (Dep't St. Publication 3117).

barriers under the General Agreement on Tariffs and Trade ("GATT")³, have nonetheless been closed to foreign suppliers as a result of exclusionary actions taken by private cartels.⁴ Generally, the most effective remedy in cases where a domestic cartel excludes foreign suppliers lies in the enforcement of competition laws against the cartel. Thus, where nations adhere to a treaty removing or reducing trade barriers, a set of competition laws is a natural complement to such a treaty in order to ensure that private agreements do not frustrate the treaty objectives by erecting or maintaining private trading barriers.

The United States possesses a rich antitrust-law tradition extending back to the enactment of the Sherman Act in 1890.⁵ Americans thus tend to assume that other nations also control restrictive business practices within their territories. In fact, the control of the anticompetitive practices of private business concerns in most nations is a relatively new idea. Europe, for example, adopted competition-law provisions into the Treaty of Rome in 1958.⁶ Japan adopted its Anti-Monopoly Law during the American occupation upon the insistence of Allied authorities,⁷ and later weakened it substantially.⁸

3. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. The GATT has now been succeeded by the World Trade Organization. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 1 (1994) 33 I.L.M. 1125 (1994) (includes the Agreement Establishing the World Trade Organization, the General Agreement on Tariffs and Trade 1994 and other related agreements).

4. For example, the United States brought market-closing behavior by foreign cartels within the scope of Sherman Act enforcement. *Antitrust: U.S. Broadens Enforcement Posture on Foreign Application of Sherman Act*, 9 Int'l Trade Rep. (BNA) 622 (Apr. 8, 1992). Competition law concerns were also a focus of U.S. and Japanese discussions under the Structural Impediments Initiative. *Interim Reports of U.S. and Japanese Delegations on Talks Under Structural Impediments Initiative, Released April 5 [1990]*, 7 Int'l Trade Rep. (BNA) 527, 536 (Apr. 11, 1990).

5. See, e.g., RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW* (1996).

6. See Treaty of Rome, *supra* note 1.

7. MITSUO MATSUSHITA, *INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 3* (1990). See SHIGETO TSURU, *CREATIVE DEFEAT AND BEYOND: JAPANESE CAPITALISM SINCE THE WAR 18-20, 40-42* (Mark Perlman ed., paperback ed. 1994).

8. MATSUSHITA, *supra* note 7, at 3. Amendments to the Anti-Monopoly law of 1953, *inter alia*, authorized the Japanese Fair Trade Commission ("JFTC") to license both "depression cartels" and "rationalization cartels". MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 79-80* (1993). The amendments also altered the general treatment of cartels from per

Both European and Japanese approaches to enforcement and interpretation differ substantially from U.S. approaches. Since the mid 1970s, the courts have construed U.S. antitrust law as intended to further productive and allocative efficiency as its exclusive goals.⁹ European competition law, by contrast, acknowledges several competing goals besides efficiency.¹⁰ The Japanese Anti-Monopoly Law bends to accommodate Japanese industrial policy and includes a number of specific provisions exempting a host of cartel arrangements.¹¹ Both European and Japanese law have a tendency to focus upon vertical restraints to a larger extent than the current U.S. practice.¹² In the area of vertical restraints, the European and Japanese approaches resemble U.S. approaches prevalent in the 1960s and early

se illegality to a prohibition only when they caused a substantial restraint of competition in a particular field of trade. *Id.* at 78. In addition, they relaxed the treatment of mergers and acquisitions, and permitted resale price maintenance of books, records, other copyrighted materials and all JFTC exempted materials. *Id.* The amendments, however, did widen the prohibition of unfair practices to protect smaller companies from the exercise of bargaining power by larger suppliers. *Id.* at 81. See H. IYORI & A. UESUGI, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* 32-34 (1994) (discussing the 1953 amendments to Japan's Anti-Monopoly Law).

9. See Daniel J. Gifford, *The Jurisprudence of Antitrust*, 48 *SMU L. REV.* 1677, 1680-81 (1995); ROBERT H. BORK, *THE ANTITRUST PARADOX* 7-8 (1978) (articulating the exclusive focus upon economic efficiency which the Court was in the process of adopting).

10. For example, the Treaty of Rome explicitly condemns the imposition of dissimilar conditions in equivalent transactions, where parties are placed at a competitive disadvantage. Treaty of Rome, *supra* note 1, art. 85(1)(d) & 86(c). These provisions appear more concerned with fairness than with the maintenance of competition. Article 85 provides that agreements falling within the strictures of Article 85(1) but which can be shown to improve the production or distribution of goods or to promote technical or economic progress cannot be validated unless consumers are allowed a "fair share" of these benefits. This requirement seems to focus on distributional effects rather than productive or allocative efficiency.

11. See *supra* note 8 and accompanying text. In addition to the depression and rationalization cartels authorized under Japan's Anti-Monopoly Law, forty-two other laws exempted cartels from the application of the Anti-Monopoly Law. Daniel J. Gifford & Mitsuo Matsushita, *Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance?*, in 2 *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 317 app. A (Jagdish Bhagwati & Robert E. Hudec eds., 1996). Authorized cartels included export/import cartels, medium and small business cartels, shipping conferences, international agreements on tariffs and other terms of business in aviation, activities of insurance associations and others. *Id.* at 318.

12. See H. IYORI & A. UESUGI, *supra* note 8, at 113-25 (discussing Japanese approaches to vertical restraints); VALENTINE KORAH, *AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE* §§ 8.1-8.8, 137-55 (4th ed. 1990) (outlining ECC approaches to vertical restraints).

1970s. In this context, the difficulties of reaching agreement upon a broadly acceptable design for domestic competition laws are apparent. Indeed, the American Bar Association's Special Committee on International Antitrust concluded in 1991 that no worldwide standards for competition law are feasible.¹³ Even international discussion about harmonizing competition laws presents a substantial challenge, since the participants are likely to approach the subject with preconceptions arising out of their differing cultural experiences.¹⁴

I. THE DRAFT ANTITRUST CODE: ITS HISTORY AND THE OBSTACLES IN OBTAINING U.S. SUPPORT

In 1993 a group of antitrust scholars meeting in Munich, Germany, released a draft International Antitrust Code, which they proposed for adoption as a GATT-MTO-Plurilateral Trade Agreement.¹⁵ These scholars addressed the need for GATT-adhering nations to complement their movement towards freer trade under the GATT with domestic competition laws ensuring that markets throughout the world would be free of private restraints as well as government restraints. Their response to this problem, even though a flawed one, was an historic event. It was another step on the road towards international enforcement of free and open markets. Nonetheless, the Draft Antitrust Code fails in critical respects to provide a workable model for an international antitrust regime.

The Draft Antitrust Code is a draft agreement rather than a code. It requires adhering nations to enact minimum antitrust standards into their domestic law. The draft agreement then establishes procedures designed to ensure that these national standards in fact conform to the minimum standards mandated by the agreement and are effectively administered.

Because the authors of the Draft Antitrust Code included scholars from a number of nations, the Code is heavily influenced by European approaches. It thus tends to identify prohibited behavior through conceptual rather than economic approaches. The Draft Antitrust Code also tends to phrase its

13. AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST REPORT 294 (1991).

14. See Gifford & Matsushita, *supra* note 11, at 269.

15. Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), *published and released* July 10, 1993, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.) [hereinafter Draft Antitrust Code].

prohibitions in overly broad and often ambiguous language. For these reasons alone, the Code would not be acceptable in the United States. In addition, the Code would be objectionable in the United States because it contains a number of procedural flaws. The Code confers immense power upon a group of appointed officials who hold office for many years. These officials would thus possess long-lasting power to exploit ambiguities inherent in the Code's provisions. Yet, the Code provides no effective recourse against the very real possibility of its misuse. In the pages that follow, I will attempt to point out some of the major deficiencies of the Draft Antitrust Code.

II. THE SUBSTANTIVE PROVISIONS OF THE DRAFT ANTITRUST CODE

The Draft Antitrust Code contains eight parts and twenty-one articles. As might be expected in such an ambitious project, problematic provisions permeate the Code. This article addresses the flaws and ambiguities of the substantive provisions and examines the procedural and organizational provisions that seem troublesome. Parts two, three and four set forth the substantive provisions of the Draft Antitrust Code, which concern respectively: horizontal and vertical restraints, control of concentration and restructuring, and abuse of dominant position. Part two of the Code covers horizontal and vertical restraints, matters which are governed by section one of the Sherman Act¹⁶ in the United States and article eighty-five of the Treaty of Rome in the European Union. Part three of the Code deals with control of concentration and restructuring, matters which are governed by section seven of the Clayton Act¹⁷ and section one of the Sherman Act in the United States, and which are governed by articles eighty-five and eighty-six of the Treaty of Rome (and the merger regulation)¹⁸ in the European Union. Part four of the Code covers abuse of dominant position, a matter which is governed by section two of the Sherman Act¹⁹ in the United States and article eighty-six of the Treaty of Rome in the European Union. Part five of the Code sets forth procedural provisions and part seven contains structural provisions governing the Code's implementation. This article addresses many of the

16. Sherman Act § 1, 15 U.S.C. § 1 (1994).

17. Clayton Act § 7, 15 U.S.C. § 18 (1994).

18. Council Regulation 4064/89 1989 O.J. (L395/1), [1990] 4 C.M.L.R. 286.

19. Sherman Act § 2, 15 U.S.C. § 2 (1994).

major substantive provisions of the Code and then proceeds to discuss the procedural and organizational provisions.

A. HORIZONTAL AGREEMENTS

Article four of the Draft Antitrust Code deals with horizontal agreements.²⁰ The Code defines agreements broadly to embrace “[a]greements, understandings and concerted practices”.²¹ It then creates a class of agreements which are effectively per se illegal and a second class nominally treated under a rule-of-reason approach.²² The class of per se illegal agreements consists of agreements among competitors that “fix prices, divide customers or territories, or assign quotas . . .”²³ In creating such rigidly defined categories of per se offenses, the Code appears to follow a typical European approach of identifying classes of behavior for uniform treatment regardless of the economic consequences. As Professor Valentine Korah has pointed out, this approach often produces unintended results which could be avoided under an approach based upon economic principles.²⁴ The latter approach, often followed in U.S. law, allows more flexibility and condemns behavior only when indicated by the governing economic principle. As a result, decisions under the latter approach are more likely to lead to economically rational outcomes.

Article four section one, which creates the first per se category, provides an example of uniform treatment regardless of economic consequences. This provision makes all agreements which “fix prices” illegal per se.²⁵ If agreements which “fix prices” are equivalent to agreements on selling prices, then section one is overbroad because many agreements about selling prices are procompetitive. Perhaps the drafters intended the phrase “fix prices” to refer to agreements which actually control market prices. If so, the provision is less overbroad, but it still may condemn behavior resulting in efficiencies or even behavior producing an expansion of output, as illustrated in the U.S. case,

20. Horizontal agreements are agreements among competitors. See, e.g., *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1091-92 (6th Cir. 1996) (defining “horizontal” agreements).

21. Draft Antitrust Code, *supra* note 15, art. 4, § 1, at S-11.

22. *Id.*

23. *Id.* art. 4, § 2, at S-11.

24. See KORAH, *supra* note 12, § 8.3.1, at 141 (analyzing European Community Council Regulation 1983/83 article 2). See also *id.* § 14.1, at 223 (criticizing the European Economic Commission for avoiding economic analysis).

25. Draft Antitrust Code, *supra* note 15, art. 4, § 1, at S-11.

*Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*²⁶ Nothing in section one adverts to the problems raised by such a sweeping condemnation or articulates a recognition that some such agreements may result in procompetitive outcomes.

The impact of section one thus depends upon the meaning attributed to the phrase "fix prices". The Sherman Act also treats price-fixing agreements as illegal per se.²⁷ In construing the Sherman Act in *United States v. Socony-Vacuum Oil Co.*, Justice Douglas asserted that prices were "fixed" when they were "agreed upon".²⁸ He further declared that the defendants' power to control the market was irrelevant.²⁹ Thus, the Court held that a gasoline-buying program designed to remove excess supply from the spot market was per se illegal under the Sherman Act because the program was intended to affect price.³⁰ Justice Douglas also indicated that the same result would follow in other cases in which defendants tried to affect market prices, regardless of whether defendants actually possessed the power to bring about their intended results.³¹ The drafters of section one were perhaps familiar with Justice Douglas' *Socony-Vacuum* opinion and his view of the irrelevance of market power to the lawfulness of a price-fixing agreement. The drafters may have thought that they had incorporated U.S. law when they adopted the phrase "fix prices" in section one.

United States' law, however, is not so simple. Though U.S. law recognizes a per se rule against price fixing agreements, the Supreme Court has repeatedly insisted that per se rules should embrace only behavior which always or almost always produces anticompetitive effects and reduces output.³² Many agreements

26. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (recognizing that some agreements which literally set prices may be output-enhancing and thus procompetitive).

27. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) ("An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act.").

28. *Id.*

29. *Id.* at 224 n.59.

30. *Id.* at 223-24.

31. *Id.* at 225 n.59.

32. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 103-04 (1984); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979).

among competitors concerning price are lawful.³³ For example, the Court in *Broadcast Music* cautioned against an overly literal approach to price-fixing and thus consciously employed economic analysis to guide its construction of the rule against price-fixing.³⁴ *Appalachian Coals, Inc. v. United States*³⁵ offers another example of an agreement among competitors concerning price which produced procompetitive results. In both *Broadcast Music* and *Appalachian Coals* the defendants employed a device known as a common selling agency which effectively collectivizes the defendants' decision making concerning price. The device in *Appalachian Coals* enabled the defendants to overcome informational deficiencies in the operation of the market and effectively moved the behavior of the defendants closer to that of a properly operating competitive market.³⁶ Moreover, the common selling agency created little danger of monopoly pricing because the defendants produced a small share of the total coal produced and sold it under highly competitive conditions.³⁷ In *Broadcast Music* the defendants acted as common selling agencies for owners

33. See *Broadcast Music, Inc.*, 441 U.S. at 8-9 ("[T]wo partners [may] set the price of their goods . . . but they are not *per se* in violation of the Sherman Act.").

34. *Id.*

35. 288 U.S. 344 (1933).

36. In *Appalachian Coals*, several distorting practices had evolved as a result of inadequate information: distress production; pyramiding; and misrepresentation. *Id.* at 362-63. Distress production, i.e., the production of coal in sizes for which no present buyer exists, was a byproduct of coal extracted to meet a particular order. *Id.* Pyramiding resulted when sellers commissioned several agents to sell the same coal and each agent competed against the others. *Id.* at 363. Misrepresentation resulted from the lack of agreed standards on coal sizes. *Id.* Sellers in the Appalachian region established a common selling agency that was able to route to its central office all orders from buyers and information about production from producers. *Id.* at 358. The selling agency was able to vastly improve the matching of production with orders, thus mitigating the problem of distress production. *Id.* at 344. A single selling agency also mitigated the problems of pyramiding and misrepresentation.

Because the selling agency lacked market power, it could not control price. *Id.* at 373. Thus the use of a selling agency helped overcome informational deficiencies and coal was sold at competitive prices. *Id.* at 374. This final result better approximated conditions in a perfectly competitive market, since both buyers and sellers possessed complete information about matters relevant to buying and selling in such a market. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 10 (2d ed. 1994) (describing conditions present in a perfectly competitive market).

37. Defendants produced only 11.96% of the coal mined east of the Mississippi. *Appalachian Coals Inc.*, 288 U.S. at 357. Defendants sold their product in the "highly competitive region east of the Mississippi and north of the Ohio river." *Id.* at 364.

of musical copyrights.³⁸ Though the two common selling agencies represented the majority of the copyright owners for the two respective types of music involved,³⁹ the arrangement brought about a substantial reduction in transactions costs and thus expanded the total amount of licensing.⁴⁰

In section two of article four, the authors of the Draft Antitrust Code apparently intended to apply a rule-of-reason to horizontal agreements other than those covered by section one. The provision, however, is awkwardly drafted to achieve this purpose. The first sentence of section two states: "[o]ther agreements between or among competitors are illegal, if they unreasonably restrict competition."⁴¹ This phrase is defined in the following sentence: "[a]n agreement restricts competition if its purpose or effect is the lessening of competition."⁴² The third sentence then provides: "[s]uch anticompetitive agreements are presumed to unreasonably restrict competition, unless justified" according to the provision.⁴³ Thus, while a rule-of-reason purportedly applies to horizontal agreements not covered by section one, sentence three presumes unlawful any agreement of which the purpose or effect is the lessening of competition.

Section two is significantly more restrictive than the standard under current U.S. law. Under the Sherman Act, horizontal agreements falling outside a per se category are evaluated under a rule-of-reason.⁴⁴ Plaintiffs bear the burden of proving that these agreements unreasonably restrain trade.⁴⁵ Under existing U.S. law this effectively means that the plaintiff must prove the agreement will raise prices above competitive levels and/or output will decrease below the level prevailing in a competitive market.⁴⁶ The Draft Antitrust Code shifts the burden in exactly the opposite way from U.S. law. While U.S. law presumes that agreements are lawful, the Draft Antitrust Code

38. *Broadcast Music Inc.*, 441 U.S. at 5.

39. *Id.*

40. *Id.* at 20-22.

41. Draft Antitrust Code, *supra* note 15, art. 4, § 2, at S-11.

42. *Id.*

43. *Id.*

44. See, e.g., *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978) ("[Non-illegal per se agreements] can only be evaluated by analyzing the facts peculiar to the business, the history of the business, the history of the restraint, and the reasons why it was imposed.").

45. See, e.g., *Johnson v. Hospital Corp. of America*, 95 F.3d 383, 392 (5th Cir. 1996) (burden on plaintiff).

46. *National Collegiate Athletic Association v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984).

presumes that agreements are unreasonable and hence unlawful.

By its own terms, section two applies only to agreements whose purpose or effect is the lessening of competition. Though this provision creates the appearance that section two applies only to agreements that are anticompetitive in fact, the language of section two indicates otherwise. Section two provides that agreements to which the rule-of-reason applies may be justified "by outbalancing procompetitive effects",⁴⁷ thus revealing that the effects of lessening competition which bring it within section two may be different from the total effects produced by the agreement. Section two seems to break down the analysis of horizontal restraints into two or more stages, analogous to the evaluation of nonprice vertical restrictions under U.S. case law. Nonprice vertical restrictions are viewed not as lessening intrabrand competition but as enhancing interbrand competition.⁴⁸ One way of describing the total effects of such restrictions is to say that the lessening of intrabrand competition is offset by the intensification of interbrand competition.

A similar relationship between the effects which an agreement has on intrabrand and interbrand competition may sometimes be found at the horizontal level as well. These effects are illustrated in *United States v. Sealy, Inc.*,⁴⁹ *United States v. Topco Associates, Inc.*⁵⁰ and *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*⁵¹ These cases involved cooperative ventures which restrained competition among the participants but promoted competition in the general market. It is unclear how the Draft Antitrust Code would treat such cooperative ventures and how the results under the Code would compare with results under U.S. law. Several decades ago in the *Sealy* and *Topco* cases, the Supreme Court declared cooperative venture arrangements illegal per se on the theory that these arrangements di-

47. Draft Antitrust Code, *supra* note 15, art. 4, § 2, at S-11.

48. Vertical restrictions apply to supplier-customer relationships. Non-price vertical restrictions may include such matters as limits upon the location of dealers, the territory in which dealers may sell or the customers to whom dealers may sell. Such restrictions imposed by a supplier upon its dealers lessens intrabrand competition, i.e., competition among dealers carrying the same brand. These restrictions, however, may intensify interbrand competition, as dealers are forced to seek out marginal customers and are encouraged to engage in behavior which enhances the reputation of the brands which they carry.

49. 388 U.S. 350 (1967).

50. 405 U.S. 596 (1972).

51. 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

vided the market among competitors.⁵² Yet the *Sealy* and *Topco* rulings of the Supreme Court are widely believed to have been in error.⁵³ In those rulings, the Court ignored the fact that defendants *Sealy* and *Topco* were small cooperative ventures competing with large and powerful rivals. The *Sealy* and *Topco* arrangements enabled a group of very small companies to achieve advertising and other economies that were otherwise unavailable to them. By banding together, the defendants were able to offer more effective competition to their large rivals and thus intensified competition in the general market. Subsequent to those decisions, the Supreme Court has repeatedly insisted that the per se rule be limited to the kinds of behavior which always or almost always produce anticompetitive results and reduce output.⁵⁴ In 1986, Judge Robert Bork in *Rothery Storage* concluded that *Sealy* and *Topco* were no longer good law because the Supreme Court had impliedly overruled those decisions.⁵⁵

The comments to section two of article four state that a concerted refusal to deal would be illegal if in aid of an agreement fixing prices, allocating quotas, or dividing customers or territories.⁵⁶ The drafters appear to have invoked the per se rule of section one to cast light upon the lawfulness of concerted refusals to deal. These comments are not very helpful in resolving the ambiguities already identified. For example, the plaintiff in *Rothery* sought to invoke per se rules of illegality based upon agreements involving a concerted refusal to deal between defendant Atlas Van Lines, Inc., a common carrier of household goods, and its several carrier agents, local companies affiliated by contract with Atlas.⁵⁷ These agreements governed the prices charged by the Atlas agents⁵⁸ and prohibited the Atlas agents from dealing with carrier agents who failed to comply with Atlas rules requiring carrier agents to segregate their independent operations from those conducted as part of the Atlas enterprise.⁵⁹ These agreements created a joint venture among motor carriers which enabled a number of relatively small firms to offer nation-

52. *Sealy, Inc.*, 338 U.S. at 354-58; *Topco Associates, Inc.*, 405 U.S. at 608.

53. See, e.g., Gifford, *supra* note 9, at 1689-90 (criticizing the *Sealy* and *Topco* decisions); William F. Baxter & Daniel P. Kessler, *Toward a Consistent Theory of the Welfare Analysis of Agreements*, 47 STAN. L. REV. 615, 626-27 (1995).

54. See *supra* note 32.

55. *Rothery Storage & Van Co.*, 792 F.2d at 226.

56. Draft Antitrust Code, *supra* note 15, art. 4, cmt. 3, at S-11.

57. *Rothery Storage & Van Co.*, 792 F.2d at 215-17.

58. *Id.* at 212.

59. *Id.* at 217.

wide moving service.⁶⁰ *Rothery* thus provides an example of cooperative agreements among several small firms which allocate territories and fix prices facilitating procompetitive behavior. We need more guidance from the drafters to assess how the Draft Antitrust Code would affect an arrangement like the one in *Rothery*. The Code appears *prima facie* to prohibit such an arrangement.

The comments to section two add another class of concerted refusals to deal to the *per se* category, a class which is described in language strikingly similar to that used by the U.S. Supreme Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*⁶¹ In *Northwest Wholesale*, the Court restricted the application of the *per se* rule governing concerted refusals to deal to a limited class of behavior.⁶² The *per se* rule applies to joint efforts by firms "to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'"⁶³ Expanding on this statement, the Court described the prohibited activities as cutting off "access to a supply, facility, or market necessary to enable the boycotted firm to compete."⁶⁴ The comments to section two of the Draft Antitrust Code use almost identical language, except that the commentators have recast the language of the U.S. caselaw expansively. They have broadened the list of items in the U.S. formulation and have transformed the degree of dependence from facilities "needed" to compete to embrace facilities that are "important" to compete.⁶⁵ This language suggests that the drafters thought the U.S. Supreme Court had interpreted the *per se* rule too narrowly and that some broadening is advisable. Thus, the drafters have made U.S. Supreme Court precedent relevant in the Code only as a point of reference for expanding the *per se* rule. Having created a distinction between "needed" and "important", the drafters have offered no guidance for construing the apparently more expansive latter term.

60. *Id.* at 211-12.

61. 472 U.S. 284 (1985).

62. *Id.* at 295-96.

63. *Id.* at 294 (quoting LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 261-62 (1977)).

64. *Id.*

65. See Draft Antitrust Code, *supra* note 15, art. 4, cmt. 3, at S-11 ("A concerted refusal to deal would be illegal, also, if it is comprised of competitors attempting to deprive another competitor of sources of supply, customers, market outlets, or information, facilities, or other means needed or important to compete.").

B. VERTICAL RESTRAINTS

Article five deals with the legality of vertical restraints. Section one of article five defines "distribution strategies" to include "[a]greements, concerted practices and restraints in the course of distribution of products or services."⁶⁶ This definitional approach attempts to bring a variety of behaviors within the definition of the key term, "distribution strategies". This seems to have been designed to eliminate the need to prove an agreement or even a "combination" as an element of a violation.⁶⁷ The comments to section one confirm the broad sweep of this definition where the "inducement" of a dealer by "economic pressure" or even "influence" exerted by "a supplier or distributor to behave anticompetitively" constitutes a distribution strategy.⁶⁸ Manufacturers and suppliers therefore possess no option like the one available under *United States v. Colgate & Co.*⁶⁹ of suggesting courses of behavior to their dealers under penalty of cutting off future supplies.

Section two of article five explicitly makes resale price maintenance illegal. Indeed, not only is the fixing of a "resale price" prohibited; the fixing of a "price level" is also prohibited.⁷⁰ This phrasing is particularly troubling because it is unclear whether the adjective "resale" modifies the phrase "price level," which appears after the conjunction. If "resale" modifies "price level," then the drafters appear to be acting against the background of *Business Electronics Corp. v. Sharp Electronics Corp.*,⁷¹ which ruled that a vertical price fixing agreement would be unlawful only if it incorporated an obligation to maintain a specific price or price level. Yet the drafters have rejected the rationale of *Business Electronics* by prohibiting resale price

66. *Id.* art. 5, § 1, at S-12.

67. See Sherman Act § 1, 15 U.S.C. § 1 (1994) (a definition of distributional restraints that considers any "contract," "combination" or "conspiracy" an element of an antitrust violation); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 37-47 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 & n.6 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968). See also Treaty of Rome, *supra* note 1, art. 85 (considers "agreements," "decisions by associations of undertakings" and "concerted practices" elements of a violation).

68. Draft Antitrust Code, *supra* note 15, art. 5, cmt. 1, at S-12.

69. See *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (holding that Colgate did not violate the Sherman Act when it announced that it would not resupply dealers who resold goods bearing the manufacturer's brand at prices less than those suggested by the manufacturer).

70. Draft Antitrust Code, *supra* note 15, art. 5, § 2, at S-11.

71. 485 U.S. 717, 731-35 (1988).

maintenance, whether or not it is employed to reinforce a horizontal cartel.⁷²

An alternative interpretation of the Draft Antitrust Code is that it condemns the fixing of a "price level" for dealers by their supplier, whether or not the prices so fixed are "resale" prices. Under such an interpretation, the omission of the adjective "resale" would be intended to embrace the fixing of selling prices through agency/consignment arrangements, where there is no "resale". If that is the intention of the drafters, their prohibition sweeps broadly indeed. It is doubtful the U.S. Supreme Court would condemn agency/consignment arrangements today as it did three decades ago in *Simpson v. Union Oil Co.*⁷³ Moreover, a host of lower court decisions have demonstrated that the scope of *Simpson* is narrow.⁷⁴ The Code thus imposes limits upon distribution arrangements that are significantly more severe than those imposed by U.S. law.

Finally, this provision of the draft raises especially troubling problems for franchise operations. Since the definition of "distribution strategies" includes the distribution of "services," it appears that the article five prohibitions apply to most fast-food, hotel and other common franchise operations. The language prohibiting the fixing of a price level as opposed to fixing a resale price confirms this conclusion because this particular phrasing is necessary to fit franchise operations dealing in services, which are incapable of being resold.⁷⁵ Here the Code seems to again conflict with the imperatives of good business. It often makes good business sense for franchisees to sell at prices indicated or suggested by the franchisor, yet the Code fails to provide even a *Colgate*-like exception available to the franchisor.⁷⁶

In addition to outlawing resale price maintenance, section two of article five prohibits distribution strategies that aid in the enforcement of a producer or distributor cartel. Twenty five years ago Lester Telser pointed out how resale price mainte-

72. See Draft Antitrust Code, *supra* note 15, art. 5, § 2, at S-11 (prohibits both the fixing of a resale price and distribution strategies that aid in the enforcement of a producer or distributor cartel). This structure indicates that the fixing of resale prices is barred in itself, separate from the question of whether such an arrangement reinforces a horizontal cartel.

73. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

74. See, e.g., *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1436-39 (7th Cir. 1986).

75. The application of article five of the Draft Antitrust Code to services is consistent with reading the prohibition on the fixing of a "price level" as applying to nonsale transactions.

76. See *supra* note 69 and accompanying text.

nance could reinforce such cartels,⁷⁷ and in 1988 the U.S. Supreme Court incorporated his reasoning to assess the lawfulness of a vertical price maintenance scheme.⁷⁸ The strange aspect of this provision of the Code is that it reflects the reasoning of both Lester Telser and the *Business Electronics* majority while apparently rejecting their conclusions that the anticompetitive character of resale price maintenance lies in its ability to reinforce a horizontal cartel.⁷⁹

Section four of article five sets forth provisions governing tying and exclusive supplier/customer agreements. Tying, exclusive supply contracts, exclusive purchasing contracts and "other foreclosure restraints" are illegal when they "confer or increase market power" or "deny noncontracting persons access on the merits to a significant share of an input or output market" in circumstances in which "the foreclosed persons cannot feasibly procure a substitute source of supply or outlet" and in which the restraint fails a two-pronged justification.⁸⁰ Such contracts may be justified if they are reasonably necessary to improve production or distribution and "a fair share" of the benefits will be passed on to consumers.⁸¹ This language is derived from article eighty-five of the Treaty of Rome.⁸²

Though these provisions governing tying and exclusive supplier/customer agreements are written in the European style, they address problems familiar to U.S. antitrust practitioners. Under U.S. law the lawfulness of a tying arrangement would normally be addressed by examining the market power of the seller over the tying product.⁸³ Section four of article five, however, focuses directly upon the foreclosure of the tied product in the market. The present U.S. approach provides some guidance to business firms, by requiring a minimum 30% market share in the tying product in order to establish a per se violation.⁸⁴ In

77. Lester Telser, *Why Should Manufacturers Want Fair Trade?* 3 J.L. & ECON. 86, 96-99 (1960).

78. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724-31 (1988) (incorporating a concern with vertical price maintenance as facilitating cartels, a concern earlier pointed out by Telser).

79. See *supra* notes 71-72, 77-78 and accompanying text.

80. Draft Antitrust Code, *supra* note 15, art. 5, § 4, at S-11.

81. *Id.*

82. Treaty of Rome, *supra* note 1, art. 85(3) (provides that the European Economic Commission may declare the prohibitions of article 85(1) inapplicable to certain agreements which, *inter alia*, contribute "to the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.")

83. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 (1984).

84. *Id.* at 26-27.

contrast, neither article five nor its comments provide guidance for determining the parameters of what constitutes a "significant share" of a tied product market.

C. INFLECTING DISADVANTAGES

Article seven provides, *inter alia*, that an "[u]ndertaking may neither solicit nor inflict disadvantages upon other undertakings." While a European lawyer may find this provision acceptable, a U.S. antitrust lawyer would find it disturbing. This language suggests that the law is concerned with the protection of competitors as opposed to the protection of competition. An emphasis upon the protection of competitors is absent in U.S. law where competitors are protected only as a byproduct of preserving open markets.⁸⁵ Furthermore, a prohibition against inflicting disadvantages upon other undertakings appears radically imprecise and, in the regime which the agreement would establish,⁸⁶ extremely dangerous. Perhaps this language is intended to incorporate Steven Salop's theories about firms taking action to raise the costs of their rivals.⁸⁷ United States' courts have thus far not endorsed this theory.⁸⁸ This language, however, is not simply limited to the infliction of cost disadvantages in the Salop sense; literally this provision covers every case in which one firm obtains an advantage over a rival. Yet that is exactly what firms in competitive markets struggle to do. Firms are constantly struggling to find more efficient production and distribution methods, develop superior products, and acquire superior technology. All of these efforts can be described as attempts to gain advantages over rivals. Is the gaining of such advantages over rivals equivalent to the infliction of disadvantages upon rivals? It is indeed hard to believe that the drafters intended to prohibit the very competitive behavior which

85. See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (competitors of defendant supplier's dealers denied standing because no impairment of competition).

86. See *infra* notes 138-57 and accompanying text.

87. See Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983) (papers and proceedings); Thomas G. Krattenmaker & Steven C. Salop, *Competition and Cooperation in the Market for Exclusionary Rights*, 76 AM. ECON. REV. 109 (1986); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995).

88. The Supreme Court's *Eastman Kodak* decision came close to endorsing a Salop-like approach to antitrust analysis. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465-78 (1992).

they overtly endorse and purport to encourage through the provisions of the Code. Yet their choice of language permits this interpretation.

D. CONTROL OF CONCENTRATION AND RESTRUCTURING

Part three of the Draft Antitrust Code deals with the restructuring of monopolies, as well as with mergers and acquisitions. Restructuring, which is the subject of article thirteen, is not defined by the Code's provisions. The comments to article thirteen, however, indicate that restructuring involves "[a]n intervention into corporate structures to reestablish competition".⁸⁹ Thus, restructuring involves a "structural" remedy for a structural problem. According to section one, the remedy is used where "the market structure induces persistent abuses involving the exercise of significant market power."⁹⁰

Of course, restructuring is not unknown in U.S. law. The break-up of the Standard Oil⁹¹ and American Tobacco⁹² companies in the early 1900's involved restructuring. United States' courts, however, exhibit an aversion to restructuring and do not order restructuring very often. Their reluctance stems from their awareness that restructuring is likely to destroy scale or other economies possessed by the firm or firms before them. Restructuring therefore risks frustrating efficiency objectives of the antitrust laws in the name of enforcement. The Code drafters are aware of the dangers of restructuring and they accordingly impose limits on the availability of this remedy. Their comments to article thirteen indicate that restructuring is to be ordered only under "exceptional" conditions⁹³ and in any case, the degree of concentration requisite to evoke a restructuring order must be higher than the thresholds of merger control.⁹⁴ The comments also indicate that the propriety of recourse to restructuring is related to the duration of the concentration to be remedied. As discussed in the following paragraphs, restructuring is also prohibited if it would result in "disadvantages" to the "economy as such" which outweigh the enhancement of competition to be expected from the restructuring.⁹⁵

89. Draft Antitrust Code, *supra* note 15, art. 13, cmt. 1, at S-17.

90. *Id.* art. 13, § 1, at S-17.

91. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 77-82 (1911).

92. *United States v. American Tobacco Co.*, 221 U.S. 106, 184-88 (1911).

93. Draft Antitrust Code, *supra* note 15, art. 13, cmt. 1, at S-17.

94. *Id.*

95. *Id.* art. 13, § 2(a), at S-17.

As with much of the Code, the restructuring provisions are replete with ambiguous language. Section one makes restructuring a remedy for "persistent abuses" involving the exercise of significant market power.⁹⁶ It is unclear what the drafters mean by "abuses" in this context. Perhaps they are using the term "abuses" in the sense of "an abuse of dominant position," an offense under article eighty-six of the Treaty of Rome⁹⁷ and an offense covered by part four and article fourteen of the Code.⁹⁸ If so, it is unclear why the restructuring provision was included in part three with mergers and acquisitions rather than in part four with abuse of dominant position. The interpretative problems under article fourteen regarding abuse of dominant position are themselves serious enough. If article thirteen incorporates the meaning of abuse within article fourteen, the interpretative problems which it raises would be compounded. Since the relation of article thirteen on restructuring to article fourteen on abuse of dominant position is unclear, the interpretative problems are even more pronounced.

Generally, the Code attempts to bar restructuring in circumstances in which it would do more harm than good. Again the choice of language obscures rather than helps to clarify. For instance, section two bars restructuring whenever "restructuring would involve disadvantages of the economy as such outweighing the benefits in terms of competition, or if the order would adversely affect overwhelming public interests."⁹⁹ The imprecision of this language is not resolved by the drafters' comments, which merely state that "[r]estructuring cannot be ordered if the effects on competition are outweighed by general economic disadvantages or by overwhelming public interest."¹⁰⁰ A U.S. lawyer might expect that restructuring would not be ordered when such an order would destroy scale economies. It is unclear whether the Code would be construed to produce a similar result.

E. ABUSE OF DOMINANT POSITION

Article fourteen prohibits the abuse of a dominant position in language virtually identical to article eighty-six of the Treaty

96. *Id.* art. 13, § 1, at S-17.

97. Treaty of Rome, *supra* note 1, art. 86.

98. Draft Antitrust Code, *supra* note 15, art. 14, at S-17.

99. *Id.* art. 13, § 2(a), at S-17.

100. *Id.* art. 13, cmt. 2, at S-17.

of Rome.¹⁰¹ The drafters, however, wisely modified the article eighty-six language, by deleting clause (a) of that article. Clause (a) forbids the imposition of unfair purchase or selling prices or other unfair trading conditions.¹⁰² The comments indicate that the drafters wanted to avoid the possibility of courts imposing price controls.¹⁰³ Despite the elimination of clause (a), it is doubtful whether the United States would find it advisable to adhere to this provision. Article eighty-six is much more restrictive than section two of the Sherman Act. A dominant position within the meaning of article eighty six of the Treaty of Rome does not require the existence of monopoly power, as required by the Sherman Act.¹⁰⁴ Moreover, a dominant position can be abused through action which would not violate section two of the Sherman Act, even when performed by a firm with monopoly power.¹⁰⁵

F. MERGERS AND ACQUISITIONS

On the surface, the merger control provisions of the Code lack specificity. Section one of article eleven requires the National Antitrust Authority of each nation to prohibit any "concentration which creates or increases the power of one or more undertakings concerned, either separately or jointly, to impede effective competition in the relevant market."¹⁰⁶ According to the comments to section one, this standard "requires a considerably higher degree of anticompetitive effects" than is required for action against "cartel-like behavior."¹⁰⁷ In an attempt to clarify the meaning of "power to impede effective competition," the comments distinguish this power from "market domination," which is said to be a more "static" concept.¹⁰⁸ Power is defined in the conventional terms of monopoly power, *i.e.*, "power to determine prices, to control or restrict production or distribu-

101. *Id.* art. 14, at S-17. Compare Treaty of Rome, *supra* note 1, art. 86(b)-(d).

102. Treaty of Rome, *supra* note 1, art. 86(a).

103. Draft Antitrust Code, *supra* note 15, art. 14, cmt. 3, at S-18.

104. Case 27/27, *United Brands Co. v. Commission*, 1978 E.C.R. 207, 1 C.M.L.R. 429 (1978). See KORAH, *supra* note 12, § 4.2.1, at 69.

105. See KORAH, *supra* note 12, § 4.3.2, at 85 (analyzing the Court's interpretation of article 86 in *Continental Can v. Commission*, [1972] C.M.L.R. D11, to prohibit a merger attempt by a firm enjoying a dominant position for reason that it constitutes anticompetitive conduct).

106. Draft Antitrust Code, *supra* note 15, art. 11, § 1, at S-15.

107. *Id.* art. 11, cmt. 1, at S-16.

108. *Id.* art. 11, cmt. 2, at S-16.

tion."¹⁰⁹ The admonition in the comments that the Code should be confined to dealing with "clearly anticompetitive effects" which are then equated with "monopolies and tight oligopolies" suggests that the merger provisions are not to be read in the prophylactic way the Clayton Act has often been read.¹¹⁰ Instead the Code is concerned with the creation rather than the potential of market power. By referring to article sixty-six of the European Coal and Steel Community Treaty, the drafters provided an alternative definition as the power to hinder otherwise effective competition in a substantial part of the market.¹¹¹

The language of article eleven is no more vague than the language of section seven of the Clayton Act.¹¹² Much of the uncertainty surrounding section seven, however, has been resolved through the merger guidelines issued by the Department of Justice and the Federal Trade Commission.¹¹³ To some extent, recent U.S. case law is also helpful in determining the operative requirements of section seven of the Clayton Act.¹¹⁴ Apparently, the authors of the Draft Antitrust Code were concerned that the provisions of the Code afford sufficient flexibility to the various officials who would administer it and were also concerned that the merger provisions not deter efficient mergers. In addressing these concerns, the drafters appear to have employed open-textured language in the Code itself, while attempting to confine its application by admonitions in the comments. Though the drafters' concern for flexibility is understandable, the Code would have been improved had more of the confining language of the comments been incorporated in the text of the code. In addition, further specification along the lines of the merger guidelines of the Department of Justice and the Federal Trade Commission would have helped to alleviate apprehensions that the merger prohibitions would be abused by the foreign tribunals or the In-

109. *Id.*

110. *See, e.g.,* *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962) (reading Clayton Act § 7 as intended to reach incipient monopolies and trade restraints).

111. Draft Antitrust Code, *supra* note 15, art. 11, cmt. 2, at S-16.

112. Clayton Act § 7, 15 U.S.C. § 18 (1988).

113. *Merger Guidelines—1992*, Trade Reg. Rep. (CCH) ¶ 13,104 (May 5, 1992) (issued by the U.S. Department of Justice and the Federal Trade Commission).

114. *See, e.g.,* *United States v. Syufy Enterprises*, 903 F.2d 659, 663-674 (9th Cir. 1990). The court rejected the government's case alleging monopolization, attempted monopolization and violation of merger provisions of Clayton Act § 7, based on an economic analysis relying heavily on the absence of entry barriers. *Id.* This approach is similar to that of the Justice Department's merger guidelines.

ternational Antitrust Panel administering the Code.¹¹⁵ After all, this Code is designed as an international agreement where national approaches to antitrust differ significantly, and accordingly where nations are unlikely to agree to be bound by such open-textured language. This is especially so when the operative decisional standards will be developed later by an independent tribunal over which they have no control.

G. EFFICIENCIES

The Draft Antitrust Code is unclear on the way efficiencies relate to the standard for merger approval. The comments to article twelve concerning exceptions refer to "productive efficiencies" as a "political" justification,¹¹⁶ available only in unusual cases as a ground for approving a merger. This type of analysis is similar to the approach employed in analyzing horizontal and vertical agreements, where the "competitive" effects are considered separately from the "efficiency" effects.¹¹⁷

The Code's approaches to efficiency issues resemble the older U.S. approach. In the past, U.S. law did not explicitly recognize efficiencies as a justification for a merger which produced a substantial increase in concentration. In fact, the Justice Department's 1982 merger guidelines refused to recognize efficiencies as a mitigating factor in a merger "[e]xcept in extraordinary cases."¹¹⁸ Only in the 1984 version were efficiencies accorded recognition as a legitimate justification.¹¹⁹ The earlier reluctance of U.S. law to recognize efficiencies was premised, not upon a belief that efficiencies were irrelevant, but upon an understanding that they were difficult to prove.¹²⁰ Courts therefore were believed to be incapable of evaluating efficiency claims

115. See *infra* notes 138-57 and accompanying text.

116. Draft Antitrust Code, *supra* note 15, art. 12, cmt. 3, at S-17.

117. See *supra* notes 32-40, 49-55, 70-76 and accompanying text.

118. *Merger Guidelines, Issued by Justice Department on June 14, 1982, and Attorney General's Statement and FTC's Policy Statement on Horizontal Mergers* § V(A), Antitrust & Trade Reg. Rep. (BNA) No. 1069, at S-11 (June 17, 1982) (Special Supp.).

119. *Merger Guidelines Issued by Justice Department, June 14, 1984, and Accompanying Policy Statement* § 3.5, Antitrust & Trade Reg. Rep. (BNA) No. 1169, at S-8 (June 14, 1984) (Special Supp.). Though the standard employed to evaluate efficiencies in the 1984 guidelines is nearly identical to the language contained in the 1982 guidelines, the 1984 guidelines eliminated the limitation on recognizing efficiencies to extraordinary cases and included evaluative criteria in the text rather than in a footnote. *Id.* As a result, an efficiencies defense is significantly more acceptable in the 1984 version. *Id.*

120. See, e.g., Note, *Horizontal Mergers After United States v. General Dynamics Corp.*, 92 HARV. L. REV. 491, 508 (1978).

accurately. In this context it was thought that efficiencies could best enter the decisional calculus as an element in the decision of the Justice Department about whether to challenge a merger.¹²¹ Thus, one way of conceptualizing this approach is to describe the efficiency issue as outside the "competitive" concerns of antitrust litigation. Rather, the efficiency issue could be conceptualized as a "political" decision for the executive branch. As so described, this way of addressing the efficiency issue bears some resemblance to the way the Draft Antitrust Code deals with the issue.¹²²

In recent years efficiency has become increasingly recognized in the U.S. antitrust law. Not only is efficiency explicitly recognized in merger guidelines, the courts themselves are directly addressing efficiency issues.¹²³ From a theoretical perspective, most U.S. antitrust practitioners would probably agree with Robert Bork's policy approach in which efficiency is treated as the ultimate criterion for assessing all antitrust restraints.¹²⁴ In a widely discussed theoretical model which Robert Bork took from Oliver Williamson, a merger creating both substantial market power and production efficiencies in the merged companies may be shown to further the goals of the antitrust laws so long as the efficiencies exceed the deadweight loss which results from the newly created market power.¹²⁵ While Robert Bork employs this model to illustrate his policy position under which the law accords a positive value to efficiencies, he recognizes the problems of proof which have troubled Oliver Williamson and others.¹²⁶ Ultimately, however, Bork concludes that the law can

121. See Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 728-31, 734-35 (1977); Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 34 (1968).

122. See *supra* notes 116-17 and accompanying text.

123. E.g., *United States v. Carilion Health System*, 707 F. Supp. 840, 849 (W.D. Va. Feb. 13, 1989), *aff'd mem.*, 892 F.2d 1042 (4th Cir. 1989). See also *Federal Trade Commission v. University Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991) (recognizing that antitrust law includes an efficiency defense in the merger context but concluding that efficiencies were not proved).

124. BORK, *supra* note 9, at 107-15. Robert Bork notes the difficulties in measuring tradeoffs in individual cases between market power and productive efficiency to which Oliver Williamson has directed his attention, but concludes that antitrust analysis can deal with otherwise difficult tradeoff problems by formulating general rules which will produce net benefits. *Id.* at 128-29.

125. Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 27-28 (1968); BORK, *supra* note 9, at 124-29.

126. BORK, *supra* note 9, at 124-29. Professor Hovenkamp takes note of similar problems of proof: that the courts are incapable of assessing welfare tradeoffs. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF*

be vastly more open to efficiencies than it has been in the past, in part by addressing the difficult issue of welfare tradeoffs through general rules rather than through particularized investigations.¹²⁷

The decision of the drafters to treat efficiency issues as a separate "political" issue is troublesome from several perspectives. Given the consensus U.S. position that efficiency is the basic goal underlying the antitrust laws, most U.S. antitrust lawyers would not be comfortable with a competitive analysis which omits efficiency considerations. Furthermore, by treating efficiency as a special "political" type of issue, the Code subjects efficiency claims to the same set of restrictive conditions applied to the recognition of "industrial policy" exemptions from the competitive analysis applied to merger evaluation.

H. INDUSTRIAL POLICY

The drafters have demonstrated their awareness of the interaction between competition law and industrial policy.¹²⁸ Indeed, they acknowledge that the pursuit of industrial policy could jeopardize the "protection of competitive market structures."¹²⁹ Nonetheless, the Code contemplates that concentrations which would otherwise be barred may be justified by "overwhelming public interests of the Parties to the Agreement affected and [when the resulting restraint] does not unreasonably harm the legitimate interests of other affected Parties."¹³⁰ The drafters describe this as a "political" justification.¹³¹ These political justifications must be approved by a national regulatory body other than the National Antitrust Authority.¹³² As discussed below,¹³³ the establishment of twin national antitrust authorities, one with enforcement responsibilities but no political accountability and one with political responsibilities but without enforcement authority, does not easily sit within the traditional U.S. governmental framework.

COMPETITION AND ITS PRACTICE 454 (1994); see also HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 299 (1985).

127. BORK, *supra* note 9, at 128-29.

128. See, e.g., MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 272-95* (1993) (discussing the relation between industrial policy and competition policy).

129. Draft Antitrust Code, *supra* note 15, art. 12, cmt. 2, at S-17.

130. *Id.* art. 12, § 1, at S-16.

131. *Id.* art. 12, cmt. 2, at S-17.

132. *Id.* art. 12, § 2(a), at S-16.

133. See *infra* notes 147-53 and accompanying text.

The drafters apparently felt compelled to create a merger exception for industrial policy reasons, but were unable to contain that exception. The best they could do was to express their general preference for competitive market structures and urge that justifications for anticompetitive mergers "be restricted to overwhelming general public interests."¹³⁴ The commentary is more confusing than enlightening. The drafters would apply the equivalent of a "least restrictive alternative" antitrust concept to these industrial policy exemptions, thus denying an exemption where the industrial policy objective could be achieved "by means which have less restrictive effects."¹³⁵ The drafters then include the Delphic statement: "[a] justification of the concentration is not possible if the scope of the restraint of competition would endanger the principle of market economy in the relevant market."¹³⁶ If by this statement the drafters intended to say that competition must be preserved in the relevant market affected by a merger, then there would appear to be no need for an exception.

In addition to allowing the adhering nations to justify mergers under an industrial policy rationale, the Code also permits an exemption from the restrictions on horizontal agreements for so-called "crisis cartels."¹³⁷ It is not entirely clear, however, whether special procedural provisions apply to the crisis-cartel exemption as they do to the merger exemption.

III. PROCEDURAL AND ORGANIZATIONAL MATTERS COVERED IN THE DRAFT ANTITRUST CODE

The Draft Antitrust Code establishes a right of private action for private parties to recover damages.¹³⁸ Though private parties have long possessed such a right in the United States,¹³⁹ the law of other nations often does not allow for a right of private action. In the European Union the Treaty of Rome does not create a right of private action, though the courts of some member states have created rights of action for damages arising from

134. Draft Antitrust Code, *supra* note 15, art. 12, cmt. 2, at S-17.

135. *Id.* art. 12, cmt. 3, at S-17.

136. *Id.*

137. *Id.* art. 4, cmt. 4, at S-11. Crisis cartels are horizontal agreements for reducing output and capacity, designed to facilitate an industry to modernize through cooperative efforts. See, e.g., Synthetic Fiber Agreement, Aug. 2, 1984, Common Mkt. Rep. (CCH) ¶ 10,606 (1984). See also MATSUSHITA, *supra* note 128, at 280-85.

138. Draft Antitrust Code, *supra* note 15, art. 15, § 6.

139. 15 U.S.C. § 16 (1988).

infringements of the Treaty.¹⁴⁰ The Japanese Anti-Monopoly Law nominally provides for private lawsuits, but as of 1986 a private plaintiff had never been successful under the Anti-Monopoly Law.¹⁴¹ Contrary to the *Illinois-Brick Co. v. Illinois*¹⁴² approach of the U.S. law, the Draft Antitrust Code does not limit recovery to those directly injured. As a result, the Code potentially may permit multiple recoveries against a single plaintiff and/or may impose upon the courts the burden of grappling with complex economic analyses necessary to prevent multiple recoveries. The U.S. Supreme Court believes such burdens exceed the institutional capacities of the judicial system.¹⁴³

The Code appears to be structured in accordance with the principle of subsidiarity, a principle widely followed within the European Union.¹⁴⁴ Under that principle problems are addressed at the most local level which can provide relief, and higher-level authorities enter only when local authorities are unable to provide adequate relief. Under the Code antitrust enforcement takes place before national tribunals. As discussed below, the Code contemplates the establishment of an International Antitrust Panel, but that Panel is concerned principally with resolving differences between adhering nations over their Code obligations.

The procedural and administrative provisions of the Code present additional problems. The Code requires each nation to establish a national antitrust authority to enforce its antitrust laws in accordance with the Code.¹⁴⁵ The national antitrust authority is further required to be structurally independent from the nation's government. The Code requires that the national antitrust authority within each nation be guaranteed political independence by law; that the national antitrust authority possess exclusive authority over the matters falling within the

140. KORAH, *supra* note 12, at 16.

141. F.K. Upham, *The Legal Framework of Japan's Declining Industries Policy: The Problem of Transparency in Administrative Processes*, 27 HARV. INT'L L.J. 425, 444-45 (1986) (reporting that as of 1986 no private action had ever been successful under the Japanese Antimonopoly Law).

142. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 744-48 (1977) (limiting standing in price-fixing cases to purchasers who purchased directly from the conspirators).

143. See, e.g., *Associated General Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-46 (1982).

144. See Treaty on European Union, Feb. 7, 1992, art. 3b, 1992 O.J. (C 191) (Maastricht).

145. Draft Antitrust Code, *supra* note 15, art. 17, § 1, at S-19.

Code; and that the authority have exclusive control over all decisions relating to its staff.¹⁴⁶

A. THE NATIONAL LEVEL OF ENFORCEMENT AND OVERSIGHT OF THE DRAFT ANTITRUST CODE

1. The National Antitrust Authorities

The political independence of the national antitrust authorities is not an approach which fits easily with U.S. governmental institutions. Under the U.S. Constitution, enforcement authorities are normally part of the executive branch. The U.S. Department of Justice is the principal agency concerned with the enforcement of the antitrust laws, and acts under the supervision of the Attorney General, who is a member of the President's Cabinet and who is subject to removal by the President. It is by virtue of their responsibility to the President that the enforcement authorities are ultimately deemed responsible to the electorate. It is also true that the Federal Trade Commission ("FTC") enforces some of the antitrust laws and the FTC is a so-called "independent" agency.¹⁴⁷ Thus, the FTC is an institution much like the "national antitrust authorities" contemplated by the Code. Yet the independence of the FTC from the President remains a complex matter under U.S. constitutional law and a subject of some controversy. Indeed, scholars who wish to defend the constitutionality of the independent agencies sometimes argue that their independence is more appearance than reality.¹⁴⁸ On a superficial level, however, the FTC is one of the independent agencies, and its independence was confirmed in 1935 by the Supreme Court's decision in *Humphrey's Executor v. United States*.¹⁴⁹ Were the United States to adhere to the agreement underlying the Code, the FTC would probably be designated as the national antitrust authority in charge of enforcement actions under the Code.

146. *Id.* § 1(b), at S-19.

147. The problems of the "independent agencies" are discussed in Daniel J. Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441 (1987). See also Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992).

148. See, e.g., Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 615, 640-41, 649, 663 (1984) (contending that even "independent" agencies are in fact subject to significant Presidential control).

149. 295 U.S. 602, 606-07, 614-18 (1935).

2. The National Political Authorities.

In addition to requiring each adhering nation to establish an independent National Antitrust Authority to bring enforcement actions under the Code, the Code also requires each adhering nation to designate a public body charged with approving mergers on the ground of furthering the "overwhelming public interest".¹⁵⁰ This standard and its likely application are discussed in previous sections of this article.¹⁵¹ The drafters recognize the superficial incompatibility of this "overwhelming public interest" standard with the pro-competitive focus of the Draft Antitrust Code, and by requiring the establishment of a separate decision-making body for these anticompetitive decisions, the drafters have attempted to maintain the integrity of the remainder of their decisional apparatus.

As suggested earlier, drafters may have attributed a narrow meaning to "competition," a meaning which excludes efficiency concerns.¹⁵² The structure of several provisions of the Draft Antitrust Code seems to confirm this approach. It is possible, therefore, that the drafters would include efficiency concerns within the scope of the "overwhelming public interest" standard. This would thus institutionalize the separation of competitive concerns from efficiency concerns beyond the requirements, elsewhere in the Code, for considering these issues separately.¹⁵³ Under this understanding, the work of the separate national political authorities would incorporate the efficiency concerns which under U.S. law are part of a competitive assessment with other anticompetitive concerns such as the attainment of industrial-policy objectives. The result would be that efficiency as an antitrust value would be eroded or lost in the Code's administration.

B. THE INTERNATIONAL LEVEL OF ENFORCEMENT AND OVERSIGHT OF THE DRAFT ANTITRUST CODE: THE INTERNATIONAL AUTHORITIES

At the international level, the Code contemplates an "executive" authority, designated the International Antitrust Authority, composed of a President appointed for a six-year nonrenewable term, and a twenty-member Council similarly ap-

150. Draft Antitrust Code, *supra* note 15, art. 12, § 2, at S-16.

151. See *supra* notes 128-37 and accompanying text.

152. See *supra* notes 116-27 and accompanying text.

153. *Id.*

pointed.¹⁵⁴ It also contemplates a "judicial" tribunal, designated the International Antitrust Panel.¹⁵⁵ The International Antitrust Authority possesses the power to ask the National Antitrust Authorities of individual nations to institute actions, and in the absence of action by the National Authority to institute actions itself in the national courts.¹⁵⁶ The International Antitrust Authority also has the power to bring suit against private firms and it has the right of appeal in all cases, including those to which it is not a party. Finally, it has the power to charge an adhering nation with a violation of the Code and to bring that nation before the International Antitrust Panel.

The members of the International Antitrust Panel are appointed for six year, once-renewable terms. The drafters intentionally designed their Panel differently from the traditional GATT practice of employing individuals chosen ad hoc for particular cases. Rather the intention here was to secure expertise and continuity through relatively long-term appointments of antitrust specialists.¹⁵⁷

By creating both an independent executive authority and an independent judicial authority, the drafters hoped to ensure that the obligations undertaken by adhering nations would be effectively enforced. These institutional arrangements, however, are flawed because they bestow immense power on the officials of the executive and judicial authorities with little guidance provided by the Code provisions as to how they should exercise their discretion.

CONCLUSION

The Draft Antitrust Code is another step towards the achievement of a widely shared goal: international recognition of an obligation upon all governments to prevent private business firms from closing or restricting access to markets. At least since the time of the Havana Charter, governments have shown awareness that consensual arrangements among private firms are capable of distorting trade. In periodic rounds of negotiations under the GATT, however, they have focused on the primary task of reducing governmentally-imposed barriers to trade.

154. Draft Antitrust Code, *supra* note 15, art. 19, § 1(b)-(c), at S-20.

155. *Id.* art. 20, § 1, at S-21.

156. The Authority's powers are set forth in Article 19. *Id.* art. 19, § 2, at S-20.

157. *Id.* art. 20, cmt. 1, at S-22.

As governmentally-imposed barriers have withered and as tariffs have been reduced dramatically, privately-imposed barriers to trade assume an increasing importance. Some efforts at market integration have been accompanied by competition laws ensuring that markets opened by governments are not closed by private agreements. This was the approach taken in Europe when the Treaty of Rome created the common market.¹⁵⁸ For the trading world as a whole, however, there is as yet no explicit set of obligations dealing with competition issues to which all governments are committed.

The Draft Antitrust Code attempts to identify national obligations whose recognition would further world trade. Unfortunately, the Code is hopelessly flawed in two important ways. First, ambiguity permeates the provisions of the Code. Perhaps this ambiguity has increased the Code's acceptability among lawyers from different nations because they each can read into these provisions their own presuppositions. That, however, would be a "legislative mirage, appearing to some [onlookers] but not to others, and assuming any form desired by the beholder."¹⁵⁹ Secondly, the Code commits immense and unreviewable power to the officials charged with administering the Code. The pervasive ambiguities of the Code further compound the potential for abuse by officials of their delegated power.

The task of writing a universally applicable competition code is immensely difficult. It is difficult because the nations of the world exhibit a wide variation on the role which they attribute to governmentally-inspired industrial policy and the role which they allocate to the unfettered free market. It is difficult because nations differ widely in their willingness to trust officials to make socially responsible choices through regulation, as opposed to market mechanisms. Differences in legal traditions foster different approaches to the control of competitive problems. The legal tradition of the United States, for example, accommodates the incorporation of economic analysis into judicial decision making more easily than does the legal tradition of continental Europe.¹⁶⁰ Nations which rely heavily upon governmentally inspired industrial policies often employ groups of private companies as instruments for carrying out those policies.¹⁶¹

158. *See supra* note 1.

159. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 681 (1980) (Rehnquist, J., concurring).

160. *See supra* note 24 and accompanying text.

161. *See, e.g., MATSUSHITA, supra* note 128, at 145.

Generally the relations among these companies are exempted from competition law prohibitions. Some nations also pursue policies expressly designed to favor small and medium size enterprises;¹⁶² those policies sometimes result in exclusionary or market closing effects, especially on foreign companies. Moreover, groups of private companies which control importation or distribution may exercise their control in ways which can be defended as plausibly furthering industrial policy, as promoting small and medium sized businesses, or as achieving other recognized societal goals. Consequently, many attempts such as the Draft Antitrust Code will be necessary before drafters are able to formulate a set of obligations commanding universal acceptance.

162. See, e.g., *id.* at 291.

APPENDIX

DRAFT INTERNATIONAL ANTITRUST CODE AS
A GATT-MTO-PLURILATERAL TRADE AGREEMENT*

Table of Contents

Part One: General Provisions and Basic Principles	32
Art. 1: Acceptance and Accession	32
Art. 2: Implementation of the Agreement	33
Art. 3: Scope of Application and Jurisdiction	34
Part Two: Horizontal and Vertical Restraints	35
Art. 4: Horizontal Restraints	35
Art. 5: Vertical Restraints (Distribution Strategies)	36
Art. 6: Restraints in Connection with Intellectual Prop- erty Rights	38
Art. 7: Inducing Illegal Restraints	40
Part Three: Control of Concentration and Restructuring .	41
Art. 8: Definition of Concentration	41
Art. 9: Scope of Application	43
Art. 10: Prior Notification and Suspension of Concentrations	44
Art. 11: Appraisal of Concentrations	47
Art. 12: Exceptions	50
Art. 13: Restructuring	52
Part Four: Abuse of Dominant Position	53
Art. 14: Abuse of Dominant Position	53
Part Five: Remedies	54
Art. 15: Remedies	54
Part Six: Public Undertakings and State Authorization ..	56
Art. 16: Public Undertakings and State Authorization....	56
Part Seven: Institutional Provisions	57
Art. 17: National Antitrust Authorities	57
Art. 18: Contracting Parties	59
Art. 19: The International Antitrust Authority	60
Art. 20: The International Antitrust Panel	63
Part Eight: Future Development of the Agreement	65
Art. 21: Future Development of the Agreement	65

* Reprinted with permission from *Antitrust & Trade Regulation Report*, Vol. 65, August 19, 1993, Special Supplement. Published by The Bureau of National Affairs, Inc. (800-372-1033)

PART ONE: GENERAL PROVISIONS AND BASIC PRINCIPLES

ART. 1: ACCEPTANCE AND ACCESSION

Sec. 1: This Agreement shall be open for acceptance, by signature or otherwise, by countries contracting parties to the GATT MTO (Agreement Establishing the Multilateral Trade Organization) and by the European Community.

Sec. 2: This Agreement shall be open to accession by any other country, on terms to be agreed between that country and the CONTRACTING PARTIES to this agreement, by the deposit with the Director-General of the GATT MTO of an instrument of accession which states the terms so agreed.

Comments

1. The GATT is the basic framework regulating international trade with global aspiration. As a result of the Uruguay Round of Multilateral Trade Negotiations in GATT, the more than 200 GATT and Uruguay Round Agreements will be integrated into one single new "Agreement Establishing the Multilateral Trade Organization" (MTO). Taking into account that the Havana Charter of 1948, which has never been brought into effect, included a special section on antitrust law, it seems to be advisable to combine a new international antitrust regime with the existing and evolving GATT-MTO system, so as to further the development of a coherent legal system for international trade.

2. Sec. 1 is based on the final provisions of the Tokyo Round Agreements, known as GATT codes, with a few adjustments in view of the future MTO Agreement into which an international Antitrust Agreement would have to be integrated.

3. GATT Codes constitute independent agreements in relation to the General Agreement with distinct, normally limited membership and distinct executives. The new MTO Agreement will put an end to the "Code approach," by prescribing that acceptance of the MTO Agreement carries with it acceptance of all GATT and Uruguay Round Agreements. As part of the new MTO legal system, the International Antitrust Code will either require acceptance by all MTO member countries or, preferably, if included into Annex 4 of the MTO Agreement, by a more limited membership (Plurilateral Trade Agreement).

4. A possible alternative to the idea of a GATT Code could have been the modification of the General Agreement itself, for example by introducing a new article on antitrust law referring to annex provisions, this annex constituting itself an integral part of the General Agreement. The Code model or Annex 4 to the MTO Agreement, instead, would leave adherence to the discretion of each Party to the Agreement. In relation to the General Agreement, membership to the Antitrust Agreement would be limited.

5. Generally, membership to the GATT should be a prerequisite to the Antitrust Code membership (Sec. 1). However, adherence must be open to the European Economic Community which, since 1960, has

been exercising most GATT rights and GATT obligations and will also become a full contracting party to the new MTO Agreement.

ART. 2: IMPLEMENTATION OF THE AGREEMENT

Sec. 1: Obligation to Implement and to Inform

(a) Any Party to this Agreement undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the effective application of this Agreement.

(b) Each Party shall inform the International Antitrust Authority of its existing law at the date of accession and of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

Sec. 2: Level of Antitrust Legislation and Non-Discrimination

(a) Each Party to the Agreement is free to provide for and to apply stricter antitrust rules in its national legislation unless provided otherwise in the Agreement.

(b) Without prejudice to the obligation under Sec. 1 (a) each Party to the Agreement shall apply all rules and principles applicable to national antitrust cases under domestic law immediately and unconditionally to all interstate antitrust cases within the scope of this Agreement.

Comments

1. Taking into account the discretion of each Party to the Agreement to give or not to give self-executing effect to the Code according to its constitutional principles, Sec. 1 (a) does only prescribe the obligation to bring domestic law and practice into conformity with the provisions of the Code. These obligations can be fulfilled either by direct transformation of the Code itself into domestic law, as far as the principle of self-execution is accepted by the national constitution, or by special legislation changing the Party's domestic antitrust law.

2. Taking into account the need for an efficient information system, Sec. 1 (b) establishes the obligation to inform the International Antitrust Authority of existing and changing domestic antitrust law and practice. This information system can be used as the main factual basis for actions taken by the International Antitrust Authority. Non-information can be a reason for the International Antitrust Authority to start the dispute settlement procedure according to Art. 19 Sec. 2 (e).

3. Sec. 2 (a) provides for the principle of minimum protection. The purpose of the Agreement is to ensure a certain minimum level of antitrust protection among Parties to the Agreement within its scope of application. Therefore, different national antitrust laws will persist. Parties to the Agreement are free to follow their own antitrust policy and to provide for stricter rules to combat restraints of competition. However, in some cases the Agreement provides for a type of maximum

protection. This is true, for example, in the case of procedural rights of private parties as alleged initiators of a restraint of competition. Such provisions have to be respected by the national legislator. Sec. 2 (a) takes into account this maximum protection saying that the principle of maximum protection only applies as far as the Agreement does not provide otherwise.

4. Section 2 (b) provides for a non-discrimination clause specially tailored to the needs of international antitrust law. Quite often national antitrust law is limited to mere national antitrust cases. For example it prohibits only cartels with economic effects in the domestic market, but allows export cartels. The basic idea of the Agreement is to establish the same rules for national and transnational competition. Therefore, national antitrust rules, intended to be applied to national cases, must also be applied to international cases. This obligation has to be fulfilled immediately, *i.e.* from the entry into force of the Agreement, and unconditionally, *i.e.* without recourse to the principle of reciprocity. The non-discrimination clause in Sec. 2 (b), moreover, has important effects when applied together with Sec. 2 (a). Whenever a Party to the Agreement provides for a higher level of antitrust protection than necessary according to the Agreement, this level of antitrust protection has to be respected by that Party to the Agreement independently in national and international cases.

ART. 3: SCOPE OF APPLICATION AND JURISDICTION

Sec. 1: Scope of Application

(a) The Agreement shall be applicable to all restraints of competition in the sense of this Agreement affecting at least two Parties to the Agreement.

(b) A Party to the Agreement is affected whenever there are economic effects in its territory or otherwise on its commerce, or private persons nationals of this Party, or undertakings having their main commercial establishment on the territory of the Party, are initiators or victims of a restraint of competition.

Sec. 2: Jurisdiction

Within the scope of application of this Agreement (Sec. 1), a Party to the Agreement may regulate and may apply its law to restraints that have economic effects in its territory or otherwise on its commerce, even if the practice is initiated from outside the territory, and it may regulate and apply its law to its nationals, and to all persons who initiate acts from its territory. Parties to this Agreement are encouraged to extend their law, if it does not otherwise apply, to restraints of competition that are prohibited by this Agreement and are initiated from their territory.

Comments

1. Sec. 1 deals with the delimitation of the Agreement's scope of application under public international law defining the cases in which the national legislature has to conform its domestic law to the obligations stipulated in the Agreement. The rule in Sec. 1 (a) stipulating that at least two Parties to the Agreement are affected is very general. It makes clear, that the Agreement shall be applied only to international, not mere national, cases. Sec. 1 (b) defines what is meant by "affected."

2. Sec. 2 provides that nations have jurisdiction to apply their anti-trust law to conduct that has effects within that nation or on its commerce. For example, conclusion abroad of contracts restraining competition or exclusive involvement of foreign parties in a restraint are no argument against the application of the law. However, normal principles of comity might counsel restraint in the application of law or tailoring of relief in cases of direct conflict with a foreign nation's law or policy particularly if the conduct is not prohibited by this Agreement and the restraint is valid and encouraged in the home nation's internal market and has its most direct effects there.

Section 2 contemplates that nations may apply their law to individuals or undertakings who initiate violations of the substantive law in the nation's territory even though the victims or principal victims are on the territory of another Party and it encourages nations to extend their law to take account of such harms.

3. Section 2 contemplates that either the injuring nation or the injured nation may sue and may apply its law. Normally it will seem appropriate for enforcement to take place in the forum where the principal harmful effects occur. National courts will retain their power to apply foreign antitrust law when appropriate under accepted principles.

4. As an example of enforcement under Sec. 2, nations whose law extends to export cartels can usefully enforce their law against their nationals who, within the nation, conspire to fix and do fix prices of their exports into another contracting nation. Such enforcement will tend to deter harmful restraints on competition in transnational markets. The enforcing nation will profit by general enhancement of competition, by reciprocal efforts of other contracting Parties, and by protecting against spillover effects in its own market.

PART TWO: HORIZONTAL AND VERTICAL RESTRAINTS

ART. 4: HORIZONTAL RESTRAINTS

Sec. 1: Agreements, understandings and concerted practices (hereafter "agreements") between or among competitors that fix prices, divide customers or territories, or assign quotas are illegal.

Sec. 2: Other agreements between or among competitors are illegal, if they unreasonably restrict competition. An agreement restricts competition if its purpose or effect is the lessening of

competition. Such anticompetitive agreements are presumed to unreasonably restrict competition, unless justified by:

- (1) outbalancing procompetitive effects, or
- (2) proof of outbalancing efficiencies or other properties likely to increase rivalry or inventiveness and to help the collaborating firms produce or deliver a better or lower priced product or service and increase the firms' responsiveness to the needs and wants of people.

Comments:

1. Intent to lessen competition means the intent to harm competition by acts not on the competitive merits under conditions in which there is a probability that such acts may be successfully carried out.

2. The prohibition of Sec. 1 applies to all import, export and international cartels, as well as to any other cartels that affect commerce.

It is particularly critical that export cartels be included within the prohibition because export cartels are perpetrated in one nation and harm individuals and firms in another nation. The exporting nation may profit by exploitation of foreigners, although the very same conduct would not be tolerated if the buyers were domestic firms or citizens. Moreover, the victims of the export cartel may as a practical matter find it impossible to get relief by attempts to enforce the law of their own nation because of jurisdictional, discovery and enforcement problems. The export cartel problem is therefore a prime example of why an international antitrust regime is necessary, and it is a prime application of the principle that one may not do to non-nationals what one is not permitted to do at home.

3. Concerted refusal to deal (boycott) would be illegal under Sec. 1 if it is in aid of an agreement fixing prices, allocating quotas, or dividing customers or territories.

A concerted refusal to deal would be illegal, also, if it is comprised of competitors attempting to deprive another competitor of sources of supply, customers, market outlets, or information, facilities, or other means needed or important to compete.

Agreements among competitors that are not intended to exclude or handicap a competitor but that have such an effect would be analyzed under the rule of reason in Sec. 2.

4. While crisis cartels are strongly disfavored, nations may retain powers to exempt specified private cartel conduct for a limited period of a crisis when national public policy so demands under condition of transparency.

ART. 5: VERTICAL RESTRAINTS (DISTRIBUTION STRATEGIES)

Sec. 1: Agreements, concerted practices and restraints in the course of distribution of products or services are referred to herein as "distribution strategies."

Sec. 2: Certain distribution strategies are conclusively presumed to prevent, restrict or distort competition unreasonably are illegal, namely:

1. Distribution strategies that aid in the enforcement of a producer or distributor cartel.
2. Distribution strategies fixing a resale price or price level.

Sec. 3: Certain distribution strategies presumptively prevent, restrict or distort competition unreasonably and, unless justified, are illegal:

a. Namely:

i. Distribution strategies preventing or restricting the free movement of goods or services across national borders, or discriminating against goods or services of non-nationals.

ii. Distribution strategies prohibiting discounting or transshipping.

b. Distribution strategies presumptively illegal may be justified if and only if the restraint is reasonably necessary to improve production or distribution and a fair share of the benefits will be passed on to consumers.

Sec. 4: Exclusive purchasing, exclusive dealing, requirement contracts, tying, and other foreclosure restraints are illegal where:

a. They confer or increase market power, or

b. they deny noncontracting persons access on the merits to a significant share of an input or outlet market and

i. the foreclosed persons cannot feasibly procure a substitute source of supply or outlet, and

ii. the restraint is not justified under the dual requirements: it must be reasonably necessary to improve production or distribution, and a fair share of the benefits will be passed on to consumers.

Comments:

1. Distribution strategies include contractual and economic ties such as vertical price fixing, exclusive arrangements, and the inducement by economic pressure or influence of a supplier or distributor to behave anticompetitively.

2. Consistent with GATT objectives, this section is based on the principle that vertical restraints should not be used to inhibit cross-border transactions.

Additional objectives are: (1) to prevent the use of restraints to enhance market power, and (2) to keep markets free and open, with a

right of sellers to set their own price and a right of competing firms to have access to markets on the merits.

3. It was considered whether there should be exemptions or special rules for franchising, pubs, petrol, automobile distribution, and the like. It was concluded that special rules are not necessary and not wise. Where restraints are needed to do business efficiently, they will fall within the provided justifications.

4. Vertical agreements to divide customers, and restricted distribution systems, are not specifically treated. These and all other unspecified restraints are analyzed under the generic prohibitions.

ART. 6: RESTRAINTS IN CONNECTION WITH INTELLECTUAL PROPERTY RIGHTS

Sec. 1: Exercise of International Property Rights

(a) The exercise of an international property right within the limits of the legal content of such right does not entail restraints of competition.

(b) Abusing a dominant position by obtaining or exercising intellectual property rights is prohibited (see Art. 14). Pooling intellectual property rights to suppress technology or raise prices is prohibited (see Art. 4).

(c) When the exploitation of an intellectual property right exceeds the limits of its legal content, any resulting restraint of competition may be illegal under the provisions of this Agreement.

Sec. 2: Licensing of Intellectual Property Rights

It is part of the legal content of an intellectual property right to grant, during the life of the right, licenses which may be exclusive and territorially restricted and to impose on a licensee justified obligations and restrictions.

Sec. 3: Know How Licenses

In case of know-how licenses Sec. 2 applies accordingly. Any obligation on the licensee not to use the licensed know-how at the end of the license agreement shall not be justified if the know-how has become public knowledge for any other reason than a breach of contract committed by the licensee.

Comments:

1. Intellectual property rights in the meaning of this Code are the rights mentioned in Art. 2 of the Convention establishing the World Intellectual Property Organisation, signed at Stockholm on 14 July 1967, namely rights relating to

- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavor,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

2. Intellectual property rights constitute elements of a system of market economy and are, as such, instruments of competition. They have been protected by international law, *e.g.*, by the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (since then several times revised). Sec. 1 (a) of the Agreement recognizes the economic function and the legal protection of intellectual property rights. As a consequence, any obligation or restriction imposed by the owner of an intellectual property right on the licensee is not objectionable under a point of view of antitrust as a restraint of competition as long and inasmuch as such obligation or restriction is covered by the content of the related intellectual property right. However, intellectual property rights should not be abused for anticompetitive purposes.

3. The following obligations and restrictions are, in particular in case of patent licenses, accepted as remaining within the legal content of related intellectual property rights. The list is not exhaustive. It may be enlarged taking into account the provisions of the applicable intellectual property legislation:

- an obligation on the licensee to procure goods and services from a given source, insofar as obtaining such products or services from that source is necessary for a technically satisfactory exploitation of a licensed invention;
- an obligation on the licensee to pay a minimum royalty or to produce a minimum quantity of the licensed product or to carry out a minimum number of operations exploiting the licensed invention;
- an obligation on the licensee to restrict his exploitation of the licensed invention to one or more technical fields of application covered by the licensed patent;
- an obligation on the licensee not to grant sublicenses or assign the license;
- an obligation to mark the licensed product or, if applicable, the service with an indication of the patentee's name, the licensed patent or the patent licensing agreement;
- an obligation on the licensee not to divulge know-how communicated by the licensor; the licensee may be held to this obligation even after the agreement has expired and as long as the know-how remains secret;
- an obligation to inform the licensor of infringements of the patent, to take legal action against an infringer, and to assist the licensor in any legal action against an infringer;

- an obligation on the licensee to observe specifications concerning the minimum quality of the licensed product which are necessary for a technically satisfactory exploitation of the licensed invention, and to allow the licensor to carry out related checks;
- an obligation on the parties to communicate to one another any experience gained in exploiting the licensed invention and to grant one another a non-exclusive license in respect of inventions relating to improvements and new applications;
- an obligation on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into.

4. On the other hand, Sec. 1 (b) makes it clear that the use of intellectual property rights is assessed under certain rules of the Agreement. According to Art. 14, intellectual property rights may not be used as a means to abuse a dominant position; neither are agreements allowed that pool intellectual property rights with the intention of suppressing rival technologies (Art. 4).

Moreover, a conduct going beyond the limits of the content of an intellectual property right may be illegal under the Agreement, Sec. 1 (c).

5. The following obligations and restrictions are, in particular in a license agreement, deemed to exceed the limits of the legal content of related intellectual property rights, unless they are found reasonable in a particular case. The list is not exhaustive. It may be enlarged taking into account the provisions of the applicable intellectual property legislation:

- an obligation not to challenge the validity of the licensed right;
- an obligation to respect the licensed right even though it may have expired.

Such an obligation or restriction may be illegal under the provisions of this Agreement.

6. The owner of an intellectual property right who imposes on the licensee any restriction which is not justified by a clear and unambiguous provision of the applicable intellectual property law or which is not mentioned in this Agreement carries the burden of proof that the limits of the legal content are not exceeded. The burden of proof that an action lies under the provisions of this Agreement is on the Authority (resp. other antitrust plaintiffs).

ART. 7: INDUCING ILLEGAL RESTRAINTS

Undertakings may neither solicit nor inflict disadvantages upon other undertakings and may not promise or grant advantages to induce them into conduct which according to this Agreement is illegal.

Comments:

This provision contains a necessary supplement for the protection of competition under this Agreement. It contemplates, by preserving

independent business behavior, to prevent circumvention of the competition rules set forth in this Agreement. The text basically resembles Section 25 Paragraph 2 of the German Act against Restraints of Competition.

PART THREE: CONTROL OF CONCENTRATION AND RESTRUCTURING

ART. 8: DEFINITION OF CONCENTRATION

Sec. 1: Acquisition of control

A concentration between undertakings shall be deemed to arise when one or more undertakings, or one or more persons already controlling at least one undertaking, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or substantial parts of one or more other undertakings.

Sec. 2: Exception

A concentration shall not be deemed to arise where credit institutions or other financial institutions or insurance companies the normal activities of which include transactions and dealings in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behavior of that undertaking.

Comments:

1. The Agreement provides for a special set of rules dealing with control of concentration including mergers and restructuring. Unlike cartels which directly restrict competitive behavior, the concentration of the resources of previously independent enterprises is not bound to have anticompetitive effects; rather it may provide for economies of scale or other efficiency gains and may even have procompetitive effects, because, *e.g.*, it enables the merged enterprise to compete more effectively vis-à-vis its bigger rivals or to enter into new markets. On the other hand, concentration of the productive and research capabilities in the hands of one or relatively few enterprises has the potential to harm competition in the market place, undermine technological progress and lead to higher prices and costs, bad performance and inefficiency as well as to supra-competitive profits. Because of this ambiguity of concentration virtually all legal systems providing for a competition law distinguish between anticompetitive cartel-like behavior and concentrations, whereas concentrations are evaluated under a more lenient standard of review than cartels. The Agreement follows

this approach: only concentrations that create or increase the power to impede effective competition are prohibited. Effective competition must be created, maintained, and if necessary restored in the markets for products, services and research and development (see Art. 11 and 13).

2. There are different concepts of defining what constitutes a "concentration" as opposed to an anticompetitive coordination of market behavior. Sec 1 follows the broad concept of control which is, *e.g.*, the underlying principle of the EC Merger Control Regulation and the British Fair Trading Act of 1973. The acquisition of control leads to the establishment of an economic unit and goes beyond a single coordination of the competitive behavior of independent enterprises.

3. Alternative approaches would be (a) a definition of detailed criteria relating to the different forms of concentration, or (b) covering any transactions with potential anticompetitive effects. Under the first concept a number of specific transactions that shall be deemed to be a "concentration" have to be defined (for example acquisition of assets or shares—in a certain quantity, company affiliation agreements, interlocking directorates etc.). Since such specific criteria relating to the forms of concentration, particularly if they are connected with quantitative thresholds, can easily be circumvented, supplementary general provisions are necessary. Thus, Germany has recently supplemented its specific definition of concentration by general provisions relating to a controlling influence or even to a mere competitively substantial influence on another enterprise. On the other hand, US-Antitrust Law abstains from defining of what constitutes a concentration. Rather, Sec. 7 of the Clayton Act covers acquisitions of *any* part of the stock or share capital or *any* part of the assets of another person. The only test applied is that for substantive review, *i.e.*, whether such acquisition may have the effect to substantially lessen competition, unless the acquisition is for investments only.

4. The concept of control seems to be preferable: On the one hand, it is broad and flexible enough to cover all material transactions resulting in a concentration and cannot easily be circumvented. On the other hand, it is not as imprecise and uncertain as the American approach; the authorities in charge of applying the concentration regulation as well as the undertakings involved are generally able to determine whether a decisive influence over one undertaking is conferred to the other undertaking.

5. Control may be constituted by rights, contracts or any other means which, either separately or in combination, legally or factually, confer the possibility of exercising decisive influence on an undertaking, in particular with regard to the use of the assets or the composition, voting or decisions of the organs of such undertaking. In order to increase legal certainty for the undertakings involved, the Parties to the Agreement may introduce such a broad definition of control which is similar to Art. 3 (3) of the EC-Merger Regulation into their national antitrust laws.

6. Sec. 1 abstains from specifying any minimum thresholds such as a specific percentage of shares or voting capital necessary to establish control. While control will always exist where a majority of voting shares are acquired, it may also be established below 50 percent of the

voting capital, if *e.g.*, the rest of the shares are widely dispersed. In this regard, the national law may introduce certain rules of presumption that, *e.g.*, an acquisition of 35 or 40 percent of the shares is usually sufficient to confer control. The presumption, however, does not exclude the possibility that control is acquired with a shareholding below the threshold figure.

7. Joint ventures between two or more undertakings can be a means of coordinating the business activities of the participants in a certain field or region. Alternatively, a joint venture may constitute a concentration, if it leads to a lasting change in the structures of the participating enterprises and a new economic unit on the market. In order to be concentrative, a joint venture must perform on a lasting basis all the functions of an autonomous economic entity and must not give rise to coordination of the competitive behavior of the parties among themselves. The distinction between cooperative and concentrative joint ventures is controversial and the practice of the EC-Commission appears inconsistent. The notice of the Commission related to this distinction had not been followed strictly (OJ C 203, 14.8.1990, p. 10). A new notice has been issued by the Commission concerning cooperative joint ventures (OJ C 43, 16.2.1993). The distinction will require further clarification by the Commission.

8. Sec. 2 clarifies that normal transactions and dealings in securities by credit institutions, other financial institutions or insurance companies do not constitute a concentration, as long as they do not exercise voting rights in order to influence the competitive behavior of the undertaking concerned. The wording is influenced by Art. 3 (5)(a) of the EC-Merger Regulation without implementing all details of that provision. The Parties to this Agreement are free to introduce further clarifications into their national law if necessary to prevent application of merger control provisions to legal institutions that possibly confer decisive influence over an undertaking on certain persons, but do not affect the market structure and competitive situation in the relevant market.

ART. 9: SCOPE OF APPLICATION

Sec. 1: International Dimension

(a) This Agreement shall apply to concentrations with an international dimension, provided the threshold turnover requirements set forth in Sec. 2 of this Article are fulfilled.

(b) For the purposes of this Agreement, a concentration has an international dimension whenever the requirements of Art. 3 Sec. 1 are met.

Sec. 2: Threshold Turnover Requirements

(a) Concentrations shall be deemed not to have an international dimension where

(1) the aggregate worldwide turnover of all the undertakings concerned is less than 0.1 percent of the Gross National Product of the Party affected by the concentration, or

(2) more than 90 per cent of the aggregate worldwide turnover of all the undertakings concerned is made outside the territory of the Party affected by the concentration.

(b) Aggregate turnover within the meaning of paragraph (a) above shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and value added tax and other taxes directly related to turnover. Further details on the calculation of the aggregate turnover of an undertaking concerned may be established by the national law of the Parties to the Agreement.

Comments:

1. In accordance with the general provision regarding the Agreement's scope of application (Art. 3, Sec. 1), the application of the Agreement's concentration control regulation is restricted to concentrations with an international dimension. Sec. 1 (b) adopts the general rule to the specific situation in the case of concentrations.

2. In addition, the threshold turnover requirements are intended to limit the application of the concentration control provisions to significant structural changes the impact of which on the market goes beyond the national borders of any Party to the Agreement.

3. Details on the calculation of the aggregate turnover are left to national law. These include, inter alia, rules on the exclusion of inter-company sales within the group of undertakings to which the undertaking concerned belongs, the definition of such group of companies the external turnover of which is to be added to the turnover of the undertaking concerned, the possible modification or substitution of the turnover criterion in case of insurance companies, credit or other financial institutions. Art. 5 of the EC-Merger Regulation contains an example of a detailed provision regarding the calculation of turnover.

ART. 10: PRIOR NOTIFICATION AND SUSPENSION OF CONCENTRATIONS

Sec. 1: Prior Notification

(a) Concentrations with an international dimension as defined in this Agreement shall be notified to each National Anti-trust Authority of the Party or Parties affected. The notification shall be made prior to the intended transaction's becoming effective which would confer control on the acquirer.

(b) In addition, concentrations which are to be notified to the National Antitrust Authority of two or more Parties according to paragraph (a) shall be notified to the International Antitrust Authority.

(c) The notification according to paragraph (a) shall be effected by the person or undertaking acquiring control of the whole or substantial parts of one or more undertakings. The Parties to this Agreement shall establish in their national law details of the information to be given in the notification in accordance with a standardized form for notification and request of information to be used by the International Antitrust Authority.

(d) The notification according to paragraph (b) shall be effected by the National Antitrust Authorities of the Parties having received a notification according to paragraph (a) within one week after receipt of such notification.

Sec. 2: Suspension of Concentrations

(a) A concentration with an international dimension as defined in this Agreement shall not be put into effect before its notification and within a period of three months following its notification.

(b) The National Antitrust Authority may extend the suspension period for another period of up to three months, if it is not able to take a decision on the notified concentration according to Art. 11, *e.g.*, because further investigation is necessary. In cases in which more than one National Antitrust Authority is concerned with the matter (Sec. 1), the extension of the suspension period ordered by one National Antitrust Authority automatically extends to the concentration or concentrations pending before another or other National Antitrust Authorities. The time limits mentioned in (a) and (b) shall commence on the day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following that of the receipt of the complete information.

(c) Within the period of three months following the notification according to paragraph (a) or within the extended period granted under paragraph (b), the National Antitrust Authority may, on request, grant a derogation from suspension of a concentration according to paragraph (a) in order to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. The derogation may be made subject to conditions and obligations in order to ensure conditions of effec-

tive competition. In cases in which more than one National Antitrust Authority is concerned with the matter, the derogation, its conditions and obligations require the consent of all National Antitrust Authorities involved (Sec. 1 (a)).

(d) Any transaction carried out in contravention to paragraph (a) above shall be invalid, unless a derogation is granted pursuant to paragraph (c) or a decision pursuant to Art. 11 Sec. 3 is issued.

Sec 3: Rights of the International Antitrust Authority

In cases where the International Antitrust Authority has been notified according to Sec. 1 above, it may give recommendations to the National Antitrust Authorities of the Parties affected and exercise its rights of intervention pursuant to Art. 19, Sec. 2. However, as far as proceedings against private persons and undertakings involved in the concentration are concerned, it may exercise its rights only within the time limits set forth in the respective national law.

Comments:

1. Art. 10 provides for mandatory pre-merger notification and a limited waiting period for implementation of concentrations. This is in line with the EC-Merger Regulation as well as with modern antitrust provisions which were introduced, inter alia, in the USA and Germany during the past two decades.

2. Other jurisdictions, e.g., France and the U.K., do not require a notification of concentrations to the competent authorities at all. Rather, they rely on publicly available information about important concentrations and on the self-interest of the parties who usually want to get their transaction cleared by the authorities within reasonable time and therefore will often make an optional notification even prior to the transaction intended. If no public information was available on the transaction and no notification was filed, then the time-limit for a review of the transaction does not begin to run.

3. However, it may be difficult for the competent authorities to identify concentrations that fall under the scope of the concentration regulation, particularly in an international context involving undertakings from different countries. Since a restructuring (Art. 13) may be difficult after the concentration has been effected, the authorities should be in a position to prevent important anticompetitive transactions even before they have been executed. Therefore, a waiting period is introduced during which the parties may not proceed with their intended transactions.

4. In addition, Sec. 2 (c) enables the National Antitrust Authority to grant a derogation from the suspension of the concentration in exceptional cases. In cases of multiple notifications (diversity cases), this grant automatically extends to other jurisdictions concerned. On the

other hand, derogations from suspension, granted by one National Antitrust Authority, need be supported by parallel decisions, in diversity cases, by all other National Antitrust Authorities concerned in order to prevent discrepancies with respect to the legal existence of a concentration in different jurisdictions ("limping mergers").

5. Art. 10 does not provide for any post-merger notification which would mainly serve statistical purposes. The Parties to the Agreement may however supplement their national antitrust laws by introducing provisions for post-merger notification in addition to the mandatory rules for prior notification.

6. The information to be given in the pre-merger notification shall include all details necessary to enable the National Antitrust Authority to appraise the concentration. The information ought to include, *inter alia*, a description of the nature of the concentration being notified (acquisition of assets, shares etc.), information on the economic sectors involved, market shares and other details on the Parties to the concentration (turnover, number of employees, lists of all undertakings belonging to the same group etc.).

7. Sec. 3 limits the general rights of intervention of the International Antitrust Authority under Art. 10 Sec. 2 to the time limits specified by national law, as far as proceedings against private parties to the concentration are concerned, because the parties to the merger shall be able to fully rely on such time limits for intervention against the merger.

8. Problems of confidentiality shall be resolved before implementation of notification pursuant to Sec. 1.

ART. 11: APPRAISAL OF CONCENTRATIONS

Sec. 1: Power to Impede Effective Competition

(a) A concentration which creates or increases the power of one or more undertakings concerned, either separately or jointly, to impede effective competition in the relevant market, shall be prohibited by the National Antitrust Authority.

(b) In making its appraisal, the National Antitrust Authority shall take into account all relevant competitive factors, in particular:

(1) the competitive structure of all the markets concerned, including the actual or potential competition from undertakings located either within or outside the territory of the National Antitrust Authority;

(2) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry as well as supply and demand trends for the relevant goods and services.

Sec. 2: Conditions for Granting a Permission

(a) Where the National Antitrust Authority finds, that a concentration does not fulfill the criterion laid down in Sec. 1 (a), it shall issue a decision declaring that the concentration is permitted.

(b) Where the National Antitrust Authority finds that, following modifications by the undertakings concerned, a notified concentration does not fulfill the criterion laid down in Sec. 1 (a), it shall issue a decision declaring that the concentration is permitted and shall attach to its decision any conditions and obligations that in its opinion are reasonably necessary to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the National Antitrust Authority with a view to modifying the original concentration plan. The decision declaring the concentration permitted shall also cover restrictions directly related and necessary to the implementation of the concentration. The conditions and obligations attached to the National Antitrust Authority's decision may not be directed at placing the conduct of the undertakings concerned under continuous supervision.

Sec. 3: Decision of Nonviolation

If the National Antitrust Authority concludes that the concentration notified does not fall within the scope of this Agreement or does not raise reasonable concerns as to its compatibility with Sec. 1, it shall as soon as possible issue to the notifying person or undertaking a written decision declaring that the intended concentration does not violate Art. 11 and therefore may be implemented.

Sec. 4: Diversity Cases

In cases in which more than one National Antitrust Authority is concerned with the matter, decisions under this article require consent of all National Antitrust Authorities concerned. Failing such consent, the National Antitrust Authorities will decide in conformity with an instruction to decide issued by the International Antitrust Authority. The International Antitrust Authority, taking into account the public interests asserted by the Parties involved and the economic effects on the international market, has the right to issue this instruction to decide during the last month of the periods provided for in Art. 10 Sec. 2 (a) (suspension period) or (b) (extended suspension period). If the instruction to decide is issued and served to all National An-

titrust Authorities concerned (Art. 10 Sec. 1) within that last month of either period, the suspensions under Sec. 2 (a) or (b) is extended in all jurisdictions concerned to the day on which the last prohibition, permission, or nonviolation decision under this Article is made by a National Antitrust Authority concerned and served to the persons or undertakings mentioned in Art. 10 Sec. 1 (c).

Comments:

1. The legitimate objective of a control of concentration in the framework of GATT ought to be the preservation of competitive market structures. The implementation of a national industrial policy by way of merger control is likely to raise conflicts with the policy of other states and would possibly jeopardize free international trade. Because of the ambiguity of concentration (and the different level of economic development achieved in different regions of the world) the control of concentrations should concentrate on clearly anticompetitive effects, *i.e.*, on the prevention of monopolistic situations and tight oligopolies. Therefore, Sec. 1 requires a considerably higher degree of anticompetitive effects for prohibition of a concentration than in the case of cartel-like behavior.

2. The criterion for intervention is the power to impede effective competition. The creation of such power marks a qualitative change in the competitive situation of a market. In comparison to the more static concept of market domination the criterion of "power to impede effective competition" places more emphasis on the resources and future possibilities of the undertaking concerned to act appreciably independent from its competitors and/or customers than the more static concept of market domination. The criterion is fulfilled where the concentration leads to a situation in which the undertakings concerned are put into a position where they are able to determine prices, to control or restrict production or distribution or to hinder otherwise effective competition in a substantial part of the market (see also Art. 66 ECSC). The criterion is applicable to oligopoly situations, too.

3. Sec. 1 (b) lists the most important factors to be taken into account in making the appraisal whether the concentration creates or increases the power to impede effective competition. In the end, a conclusive assessment of the overall competitive effect of the concentration is to be made. Part of this assessment should be, similar to a rule of reason, the balancing of competitive advantages and disadvantages on different markets affected by the concentration. This appraisal is strictly limited to the evaluation of the competitive effects of the concentration in question. Considerations of industrial policy must only be taken into account with regard to a possible justification of concentrations according to Art. 12 Sec. 1.

4. Sec. 2 (a) imposes on the National Antitrust Authorities the obligation to permit the concentration if the criterion laid down in Art. 11 Sec 1 (a) is not fulfilled in order to increase legal certainty for the undertakings concerned. Sec. 2(b) enables the National Antitrust Authorities to react flexibly on proposed transactions, as they may impose

conditions and obligations on the granting of a permission for the merger. This provision is closely related to Art. 8 (2) of the EC-Merger Regulation.

5. The mandatory pre-merger notification and particularly the suspension of intended concentrations may place a heavy burden on the enterprises involved and considerably delay even economic useful transactions. Therefore, Sec. 3 imposes the obligation on the National Antitrust Authority to reduce the waiting period in case no competitive concern is likely to be established.

6. Sec. 4 takes care of the diversity cases. Since the concentration affects more than one jurisdiction, the National Antitrust Authorities have to decide unanimously. If they cannot agree, the right to decide must be vested in the International Antitrust Authority. It may issue a binding instruction to decide to the National Antitrust Authorities during the last month of suspension or extended suspension (Art. 10 Sec. 2 (a) or (b)).

ART. 12: EXCEPTIONS

Sec. 1: Justification of Concentrations

A concentration that fulfils the criterion laid down in Art. 11 Sec. 1 (a) may nevertheless be permitted, if in the individual case the restraint of competition resulting from the concentration is justified by overwhelming public interests of the Parties to the Agreement affected and does not unreasonably harm the legitimate interests of other affected Parties.

Sec. 2: Authorities and Procedure for Granting Permission on Grounds of Overwhelming Public Interest

(a) Each Party to the Agreement shall designate a public body competent for the granting of permission for the concentration on the grounds of overwhelming public interest. This public body must be different from the National Antitrust Authority. In diversity cases, Art. 11 Sec. 4 applies accordingly.

(b) The application for the granting of permission shall be submitted to the public body mentioned in paragraph (a) in writing within a certain period.

(c) The public body designated by the Party to the Agreement concerned shall decide on the application within three months following the expiration of the periods for the application for permission referred to in paragraph (b). Prior thereto, the International Antitrust Authority shall be given opportunity for comment, if the concentration had to be notified to the International Antitrust Authority according to Art. 10 Sec. 1 (b).

(d) The permission may be subjected to conditions and obligations. These may not be directed at placing the conduct of the undertakings concerned under continuous supervision.

Comments:

1. Art. 12 provides for the introduction of certain political considerations in a separate proceeding before a different authority. A concentration prohibited by the National Antitrust Authority under purely competitive aspects may nevertheless be permitted, on application, if the restraint of competition is justified by overwhelming public interests of the Party affected by the concentration.

2. It is necessary to establish a second stage of review in which the participating parties can apply for an exception on the basis of political reasoning. However, the criteria for a possible justification of anticompetitive concentrations must be very limited and generally acknowledged, because otherwise protection of competitive market structures would be put into question; and the basic assumption of all competition laws is that competition itself is generally the best means for improving "social and economic welfare." Therefore, the criteria for a possible justification of anticompetitive concentrations on political reasons ought to be restricted to overwhelming general public interests.

3. In making this appraisal, only such advantages of the concentration may be taken into account that could not be achieved without the concentration or by means which have less anticompetitive effects. In addition, any economic advantages must be real economies as a consequence of productive efficiencies or technological progress. Such economic advantages as well as any other benefits resulting from the concentration with regard to the pursuing of overriding public policy goals must be so substantial that the disadvantages resulting from the restriction of competition are fully compensated. A justification of the concentration is not possible if the scope of the restraint of competition would endanger the principle of market economy in the relevant market.

Moreover, in determining whether the concentration is justified by overwhelming public interests, legitimate interests of other affected Parties to the Agreement must be taken into account to the extent that such interests may not unreasonably be harmed by permitting the concentration. This approach on the level of substantive law significantly reduces the potential for international conflicts. Nevertheless, whenever disputes between Parties to the Agreement arise, the International Antitrust Authority will issue an instruction to decide to the relevant public bodies of the Parties concerned.

4. The period for submitting an application to the public body to be designated by the Parties to the Agreement should be reasonably short (*e.g.*, one month). The national law ought to provide for further details, *e.g.*, that the period shall commence with the service of the decision of the National Antitrust Authority prohibiting the concentration in accordance with Art. 11 Sec. 1 (a). If this decision is appealed, then the period for application should commence on the date on which the decision becomes unappealable.

ART. 13: RESTRUCTURING**Sec. 1: Restructuring Order**

If in non-competitive, highly concentrated markets the market structure induces persistent abuses involving the exercise of significant market power adversely affecting at least one other Party the National Antitrust Authority shall order the restructuring of the undertaking. The order must be preceded by sectoral investigations, to which the National Antitrust Authority must be empowered by national law.

Sec. 2: Exceptions

(a) There shall be no recourse to a restructuring order if in a specific case restructuring would involve disadvantages of the economy as such outweighing the benefits in terms of competition, or if the order would adversely affect overwhelming public interests.

(b) A restructuring order shall be restricted in a way to achieve its objectives with the least cost and effort. The restructuring order can be linked with conditions and obligations, provided that the undertakings concerned are not subjected to continuous supervision of their business conduct.

Sec. 3: Diversity Cases

Art. 11 Sec. 4 sentences 1 and 2 apply accordingly.

Comments:

1. Restructuring is the most serious instrument of competition policy. An intervention into corporate structures to reestablish competition should be applied only under exceptional conditions. Criteria of a market structure are essential when examining whether measures of restructuring are necessary. The degree of concentration must be higher than the thresholds of merger control. Furthermore, the duration of concentration should be considered. Structural criteria as such may reveal anticompetitive industries. But to order restructuring, detrimental conduct on markets resulting from concentration should indicate whether an intervention is required. Therefore, the need for restructuring will primarily be demonstrated by showing that the specific conduct has structural causes which can only be removed by restructuring. Structural conditions are obviously conducive to an abusive conduct if general business objectives, such as profits, growth, inventiveness, research and development incentives, and risk reduction, can be best achieved via anticompetitive practices.

2. Restructuring cannot be ordered if the effects on competition are outweighed by general economic disadvantages or by overwhelming

public interest. Therefore, any order of restructuring should be effected by the National Antitrust Authority only.

3. Before issuing an order of restructuring, a thorough investigation into the competitive situation should be effected extending into markets which could provide substitutes for the products of the sector considered for restructuring. Such sectoral investigations, which are designed to determine whether restructuring measures are in fact appropriate, should be conducted by the National Antitrust Authority.

4. Sec. 2 (b) addressed the principle of proportionality. The practice of providing for conditions and obligations in merger cases has proved to be useful in national concentration control laws. It should be used in restructuring cases, too.

PART FOUR: ABUSE OF DOMINANT POSITION

ART. 14: ABUSE OF DOMINANT POSITION

Any abuse by one or more undertakings of a dominant position shall be prohibited in so far as it may adversely affect competition in any market. Such abuse may, in particular, consist in

(a) limiting production, markets or technical development to the prejudice of consumers;

(b) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(c) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.

Comments:

1. Competition law has, as a rule, to accept the existence of market dominating firms. However, the competitive pressure for those undertakings being absent, law substitutes this pressure and controls the firms' market behavior. This market behavior may be detrimental in view of buyers or sellers. Furthermore, the behavior of the market dominating firm may be directed against remaining competitors. Art. 14 provides for a control of the existing market power.

2. The proposed text is partly an adoption of Article 86 of the Treaty of Rome. Art. 86 provides several examples of abuses the first of which addresses exploitative behavior in form of excessive pricing. Further examples refer to exclusionary strategies of dominant firms with anticompetitive effects.

3. To interfere with an undertaking's price policies might easily result in price controls. This is not to be considered an objective of competition law. Its rules should be directed against anticompetitive exclusionary strategies by firms with considerable market power but not against the firms' market performance. Therefore, the reference in

Article 86 EEC Treaty to exploitative behavior in form of excessive pricing has been omitted. As far as exclusionary behavior is concerned the application of Article 14 follows established administrative and court practice to Art. 86 of the Treaty of Rome.

4. In some cases a dominant firm might engage in behavior that could appear to offend Art. 14 but that is undertaken to produce a better product or service, to produce more output, to distribute the product or service by a better or lower cost means, or otherwise to respond to demand. It is contemplated that behavior will not constitute an abuse under this Article if the dominant firm proves that the negative effects of the conduct are outbalanced by procompetitive effects, or by efficiencies or technological progress likely to enure to the market as a whole, with consumers deriving a fair share of the benefits.

PART FIVE: REMEDIES

ART. 15: REMEDIES

Sec. 1: Remedies under the Agreement and Other Remedies

(a) National law must provide for the following remedies: Injunctive relief, fines, disgorgement of profits, damages, and publication of judgment.

(b) National law may provide for additional remedies such as apology, warning, imprisonment, multiple damages, punitive damages, suspension of or closing down the business of the violator, etc.

(c) National law will determine the competent authorities for remedial action.

Sec. 2: Injunctive Relief

Injunctive relief consists in one or more of the following orders:

- to cease the violation
- to desist from further violation
- to induce the violator to take corrective action
- to take appropriate steps for corrective action to restore competition, independent from the cooperation of the violator.

Sec. 3: Fines

(a) A person who violates any provision of the Agreement will be fined.

(b) In the event a representative, agent, employee or any other person committing a violation of this Agreement hereby acts for a legal or natural person or for a business association,

this legal or natural person or business association shall also be subject to a fine. This fine may be multiple of the fine referred to under (a).

Sec. 4: Disgorgement or Restitution of Profits

In the event of an infringement of a provision of this Agreement the national authority will order the undertakings involved to pay the profits drawn from such infringements to the public treasury, the victims, or otherwise.

Sec. 5: Set-Offs

National law may provide for adequate set-offs with respect to the amounts of fines and disgorgement due under Secs. 3 and 4.

Sec. 6: Damages

(a) An undertaking which infringes upon the rights or interests of another person, competitor, consumer, or other, as a result of a violation of this Agreement shall be liable for damages arising therefrom.

(b) If an undertaking violates any provision of this Agreement and infringes upon another person's rights or interests, the injured party may petition to eliminate such infringement. If there is a likelihood of an infringement, the party may petition for prevention thereof. Such redress or prevention of an infringement does not require intent or negligence.

Sec. 7: Publication of Judgment

When an injured party institutes a lawsuit in accordance with this Article, it may request for publishing the results of the final judgment in two newspapers at the infringing party's expense.

Sec. 8: International Antitrust Authority

If the national authority delays or refuses to take remedial action under this Agreement, any Party to this Agreement may submit the matter to the International Antitrust Authority mentioned in Art. 19 of this Agreement.

Sec. 9: Diversity Cases

If injunctive relief requires the consent of more than one national authority absent such consent the national authorities

will decide in conformity with an instruction to decide issued by the International Antitrust Authority (Art. 19). The national authority that holds that a certain order of injunctive relief issued by another national authority should have needed consent, will notify the International Antitrust Authority. The decision in conformity with the instruction to decide replaces the earlier decisions of national authorities in that matter.

Comments:

1. Antitrust laws must be enforceable. Antitrust remedies involve administrative, punitive, and private law sanctions. With regard to remedies, national laws for the protection of competition vary greatly. Hence, the Agreement can only indicate some basic concepts and must leave all details to the national legislators. This refers to questions such as whether one or several remedies shall be applied in the particular case, the amount of fines, single or treble damages, the requirement of an apology, and other remedial issues.

2. The general guideline to be followed ought to be that doing wrong should not pay. The remedy or remedies must at any rate outweigh the possible profits drawn from the violation of the law.

3. Sec. 5 provides for the set-off of fines levied by more than one national authority, and when fines and disgorgement of profits concur in the particular case. This corresponds to EC practice.

4. If a national authority refuses to take remedial action, the way is open to the International Antitrust Authority (Art. 19 of the Agreement), Sec. 8.

5. Sec. 9 corresponds to Art. 11 Sec. 4 (diversity cases).

6. Investigative action and its remedies are regulated in Art. 17 Sec. 3 of the Agreement.

PART SIX: PUBLIC UNDERTAKINGS AND STATE AUTHORIZATION

ART. 16: PUBLIC UNDERTAKINGS AND STATE AUTHORIZATION

Sec. 1: Public undertakings, irrespective of their legal status, are subject to the applications of this Agreement as far as they engage in economic activities that could be carried out by private undertakings. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Sec. 2: State authorization is no defence against an alleged violation of this Agreement as far as direct effects on the territory of another Party to this Agreement are concerned.

Comments:

Art. 16 is the basis of the Agreement's application in the public sphere. Public undertakings are defined as "engagement in economic activities that could be carried out by private undertakings." An exemption clause for services of general economic interest or for undertakings having the character of a revenue-producing monopoly similar to Art. 90 Sec. 2 Phrase 1 EEC-Treaty seems indispensable. In view of the cases decided by the Court of the European Communities to Art. 90 Sec. 2 EEC-Treaty, it should be emphasized that this exemption covers only restraints of competition that are appropriate, indispensable and proportional to meet the public purpose. Restraints of competition promote public purposes only under rare circumstances. Therefore, the exemption clause has to be interpreted restrictively.

PART SEVEN: INSTITUTIONAL PROVISIONS**ART. 17: NATIONAL ANTITRUST AUTHORITIES****Sec. 1: Institution of National Antitrust Authorities (NAA)**

(a) Each Party to the Agreement shall establish a national antitrust authority for its own territory. Within regional economic organizations, being themselves Party to the Agreement, a centralized antitrust authority and persisting national antitrust authorities of member states shall be understood equally as national antitrust authorities in the sense of this Agreement.

(b) Political independence of the national antitrust authority shall be guaranteed by the domestic law of the Party to the Agreement especially embracing as far as this Agreement does not provide otherwise, exclusive competence of the national antitrust authority within the scope of application of this Agreement and autonomy of the national antitrust authority in all decisions relating to its staff.

(c) Each Party to the Agreement shall ensure a sufficient budget guaranteeing effective functioning of the national antitrust authority.

Sec. 2: Investigative Powers of the National Antitrust Authority

In order to enable the national antitrust authority to meet its obligations to investigate whether an undertaking violates a provision of this Agreement, the Authority should have the power to issue an order directed against the undertaking and other relevant parties to accept an investigation, to make statements, to produce the necessary evidence, to submit relevant ac-

count books and other relevant evidence. Sanctions shall be provided for false compliance or non-compliance.

**Sec. 3: Proceedings Before National Antitrust Authorities:
Judicial Protection Against National Antitrust
Authorities**

(a) Applying this Agreement and within their jurisdiction (Art. 3 Sec. 3) national antitrust authorities will respect all human, civil and procedural rights of the person or undertaking directly concerned according to the Rule of Law and internationally agreed standards.

(b) Any person or undertaking, directly affected by a restraint of competition prohibited under this Agreement, shall have a right to request the competent national antitrust authorities to take appropriate measures against individual restraints of competition.

(c) Any person or undertaking directly concerned by a refusal of a national antitrust authority to take appropriate measures against individual restraints of competition prohibited by this Agreement or concerned by sanctions and procedures initiated by the national antitrust authority in application of this Agreement shall have a right to start an action against the authority. National law shall guarantee the necessary independence of the competent law court and of its legal proceedings respecting the Rule of Law.

Comments:

1. Taking into account the need to enforce the provisions of the Agreement in the framework of domestic law, the institution of national antitrust authorities in all states accepting the Agreement is a necessity. Art. 17 Sec. 1 refers to the establishment and the status of the national antitrust authority. In addition public bodies in the sense of Art. 12 Sec. 2 and national authorities in the sense of Art. 15 will have to be established.

a) Sec. 1 (a) contains two basic principles:

(1.) The national antitrust authority must be independent. The notion of independence is clarified in Sec. 1 (b);

(2.) There must be at least one antitrust authority which is competent for a given territory. Parties to the Agreement which have or wish to establish more than one antitrust authority competent for the application of their national law, shall designate one of such authorities as the National Antitrust Authority for purposes of this Agreement. The second sentence of Sec. 1 (a) takes into account the situation in regional economic organizations, *e.g.*, the European Community, with a central antitrust authority. In such a case, the Agreement does not prohibit a system of combined centralized and

national antitrust administrations. Centralized and national authorities must respect the rules provided for by the Agreement, the relation between central and national authorities being exclusively regulated by the regional organization's own constitution.

b) Sec. 1 (b) provides for some principles guaranteeing the authority's political independence. As far as the Agreement has to be applied, domestic political influence must be limited. Sec. 1 (b) restricts itself to some basic ideas, leaving the final constitution of the authority to the discretion of the national legislator. The authority shall have exclusive jurisdiction in the application of the Agreement, especially excluding political antitrust decisions of the national government. Exceptions, however, seem to be possible in specific fields, such as a combined decision making procedure including the antitrust authority and the public body in concentration cases. Nevertheless exceptions to the general rule of exclusive jurisdiction should only be permitted as far as they are provided for by the Agreement, for example in Art. 12 Sec. 2. Personal independence of the chief executive of the authority and the staff from the government are essential.

2. Sec. 3 contains special rules referring to the proceedings to be applied in the national antitrust administration and to the judicial protection of private persons against acts of the authority.

a) Sec. 3 (a) refers to the proceedings applied by the authority in administering the Agreement. In doing so, Sec. 3 (a) contains procedural guarantees for the person or undertaking concerned. Although working in the interest of private persons, the respect of individual, human, civil, and procedural rights, at the same time, works as a misuse principle in the public interest. Only fair proceedings based on the Rule of Law and the respect of individual rights can guarantee a well functioning of the antitrust administration, free of errors and intended misuse. Both, individual protection of the person concerned and the said public interest, can be regarded as a form of maximum protection of internationally agreed principles of antitrust law. Human, civil, and procedural rights can be taken, above all, from the national constitution. The general principle of the Rule of Law requires likewise the respect of individual rights in the field of antitrust law. Internationally agreed standards can be found especially in Human Rights Conventions, such as the European Convention on Human Rights.

b) Supplementing Sec. 3 (a), Sec. 3 (b) provides for a judicial procedure initiated by the person or entity concerned against the national antitrust authority. Similarly, the applied judicial proceedings and the status of the court must be shaped accordingly on the basis of the Rule of Law and judicial independence.

ART. 18: CONTRACTING PARTIES

Representatives of the Parties to the Agreement shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action, especially promoting further development of the Agreement. Wherever reference is made in this Agreement to the Parties of the Agree-

ment acting jointly they are designated as the CONTRACTING PARTIES.

Comments:

Art. 18 defines the CONTRACTING PARTIES as the first body within the Agreement's administration. Consisting of representatives of the Parties to the Agreement, it is very much a political body, whereas the International Antitrust Authority (*infra* Art. 19) is an exclusively international and independent administrative body. Art. 18 follows the example of Art. XXV:1 GATT. However, special reference is made to the CONTRACTING PARTIES' main function to promote further development of this Agreement.

ART. 19: THE INTERNATIONAL ANTITRUST AUTHORITY

Sec. 1: Institution of the International Antitrust Authority (IAA)

(a) The CONTRACTING PARTIES shall establish an International Antitrust Authority and agree on a Statute of the Authority. The International Antitrust Authority shall be headed by a President and an International Antitrust Council. The International Antitrust Authority shall operate within the institutional framework of the GATT (MTO).

(b) The President of the International Antitrust Authority will be appointed by the CONTRACTING PARTIES on a non-renewable term of six years. The President shall be experienced in the field of national or international antitrust law. The responsibilities of the President and of the staff of the International Antitrust Authority shall be exclusively international in character. In the discharge of their duties, they shall not seek or accept instructions from any government. The International Antitrust Authority shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the exercise of its functions.

(c) The President will be assisted by the International Antitrust Council, consisting of twenty members. The appointment and legal status of the members of the Council correspond to the appointment and legal status of the President. A member of the Council can be appointed as President of the Authority. The International Antitrust Authority cooperates with the President in the administration of the International Antitrust Authority and the execution of this Agreement, each member being competent and responsible for a specific field of antitrust administration.

Sec. 2: Powers of the International Antitrust Authority

Without prejudice to other provisions in this Agreement the International Antitrust Authority shall have the following powers:

(a) The International Antitrust Authority has a right to ask for actions in individual antitrust cases or groups of cases in the sense of this Agreement to be initiated by a national antitrust authority.

(b) The International Antitrust Authority has a right to bring actions against national antitrust authorities in individual cases or groups of cases before national law courts, whenever a national antitrust authority refuses to take appropriate measures against individual restraints of competition.

(c) The International Antitrust Authority has a right to sue private persons and undertakings as alleged parties or initiators of a restraint of competition before national law courts asking for injunctions against the execution of the restraint.

(d) The International Antitrust Authority has a right of national appeal even when it is not a party to the case but under the same conditions as parties to the case.

(e) The International Antitrust Authority has the right and duty to sue a Party to this Agreement before the International Antitrust Panel whenever it is of the opinion that this Party violates obligations under this Agreement.

(f) The International Antitrust Authority will assist Parties to this Agreement in the promulgation of antitrust laws and the institution of an efficient antitrust administration.

Comments:

1. The International Antitrust Authority functions as an institution controlling the international execution and respect of the Agreement.

a) The CONTRACTING PARTIES establish the International Antitrust Authority. This will be realised by agreement on a Statute of the Authority. The Authority will be headed by a President (lit. b) and an International Antitrust Council (lit. c). The interrelations between different organs have to be defined in the Statute.

b) Sec. 1 (b) and (c) contain organizational rules concerning the International Antitrust Authority which have to be accepted in a future Statute of the Authority. The institution of the President and the International Antitrust Council act as the chief executives of the Au-

thority. Their own position is an independent one in relation to the Parties to the Agreement, guaranteed for example by their diplomatic immunity or the non-renewable term of office. The Council has the advantage to further a specialization of its members in different fields of antitrust law and to allow wider geographical representation of different groups of states at the head of the Authority. At the same time, it can be a forum where experienced candidates for presidency can be found.

2. Suits in national antitrust cases before national institutions and the right to initiate Panel proceedings are the main methods of control of the Agreement attributed to the International Antitrust Authority (Sec. 2 (a) to (e)). These rights of the International Antitrust Authority are independent from a person's or undertaking's rights under Art. 17 Sec. 3.

a) Section 2 (a) refers to the International Authority's right to act against national antitrust authorities that do not sufficiently execute the Agreement's provisions. In such cases the International Authority has a right to ask for antitrust measures to be taken by the national antitrust authority.

b) Sec. 2 (b) supplements the preceding subsection (a) with a judicial recourse whenever a national authority refuses to act according to the initiatives of the International Antitrust Authority. However, it has to be emphasized, that the issuance of administrative orders by the International Antitrust Authority directly against private persons as initiators of a restraint of competition is not possible. In its material part, the Agreement has to accept national policies, using national treatment and the minimum standards principle as legal methods. According to the minimum standards principle, the national legislator has considerable discretion to deal with national policy issues in the framework of general antitrust policy. Therefore, only a national authority can administer the transformed Agreement in the domestic domain. On the other hand, the International Antitrust Authority has the jurisdiction to ensure that a national antitrust authority or body respects the Agreement's obligations (see Introduction, VI.).

c) Moreover, it may be necessary to grant the International Antitrust Authority a right to sue private persons before national courts. This does not mean that the national law is applied by an international authority. It is the law court that applies the law. In comparison to lit. (a) and (b), Sec. 2 (c) has the advantage of a more direct control on the basis of the entire national antitrust law. The International Antitrust Authority is not limited to the control of the minimum standards of the Agreement.

d) Sec. 2 (d) supplements Sec. 2 (b), providing for a right of appeal of the International Antitrust Authority. Therefore, Sec. 2 (d) is the legal basis for efficient control of national law courts in the interpretation of the Agreement.

e) Sec. 2 (e) contains the Authority's right and duty to initiate Panel proceedings against Parties to the Agreement that violate provisions of the Agreement. Sec. 2 (e) does not only contain a right but an obligation to sue.

f) Sec. 2 (f) is especially important for countries without an antitrust tradition.

ART. 20: THE INTERNATIONAL ANTITRUST PANEL

Sec. 1: Institution of the International Antitrust Panel (IAP)

(a) The CONTRACTING PARTIES will establish a permanent International Antitrust Panel which shall operate in the framework and subject to the rules of the Integrated Dispute Settlement System set out in Annex 2 of the Agreement Establishing the MTO, to decide on disputes arising with regard to the application of this Agreement. In doing so the CONTRACTING PARTIES will agree on a Statute of the Panel.

(b) The members of the International Antitrust Panel shall be appointed by the CONTRACTING PARTIES on the basis of consensus for a once renewable term of 6 years. Members to the panel shall be experienced in the field of national or international antitrust law. Panelists shall serve in their individual capacities and not as government representatives. During their term of office they are exclusively bound by this Agreement and enjoy full diplomatic immunity.

Sec. 2: Actions Brought before the International Antitrust Panel

Notwithstanding the right and duty of the International Antitrust Authority to sue Parties to the Agreement (Art. 19 Sec. 2 (e)), each Party to the Agreement has a right to bring an action against another Party before the International Antitrust Panel whenever it is of the opinion that this other Party violates obligations under this Agreement. In accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes, as set out in Annex 2 of the Agreement Establishing the MTO, requests for panel proceedings are admissible only after consultations between the International Antitrust Authority and the Parties concerned have failed to settle the dispute within 60 days after the request for consultations.

Sec. 3: Legal Proceedings before the Panel

(a) The legal proceedings before the Panel shall be governed, *mutatis mutandis*, by the Understanding on Rules and Procedures Governing the Settlement of Disputes, as set out in Annex 2 of the Agreement Establishing the MTO, and by such supplementary rules which the CONTRACTING PARTIES may adopt at the proposal of the International Antitrust Authority. Proceedings shall be open to the parties to the dispute. Other inter-

ested Parties to the Agreement and the International Antitrust Authority have a right to be heard.

(b) Each private person or undertaking concerned in a particular antitrust case brought before the Panel has a right to be heard.

(c) The International Antitrust Panel takes its decision on purely legal grounds and on the basis of this Agreement.

Sec. 4: Decisions Passed by the Panel

(a) The International Antitrust Panel determines whether the obligations under this Agreement have been violated.

(b) Decisions by the Panel are legally binding. If a national judicial decision has been found to be inconsistent with obligations under this Agreement, the competent national law court or other authorities have to reconsider their decision respecting the findings of the International Antitrust Panel.

Comments:

1. Art. 20 concerns dispute resolution. Sec. 1 (a) contains a general provision on the establishment of a Panel providing for the global competence of the Panel to decide on disputes concerning the interpretation of the Agreement. The institution of the Antitrust Panel is therefore complementary to the function of the International Antitrust Authority. Whereas the International Antitrust Authority works as an international administration, the Panel constitutes the forum of international antitrust jurisdiction. The notion of "Panel" is taken from the traditional GATT dispute settlement procedure. Sec. 1 (b) contains rules on the status of Panel members. Their judicial independence has to be guaranteed. They are specialists in the field of antitrust law, appointed for a long term, and not, in difference to the present GATT system, appointed ad hoc for individual cases and chosen among the GATT representatives of GATT Contracting Parties. A renewal of the term or office seems to be useful, so as to further the continuity of the Panel's working.

2. Two different types of proceedings before the Antitrust Panel can be distinguished. The first, and probably more important type of proceedings is initiated by the International Antitrust Authority (Art. 19 Sec. 2 (e)). The second type, provided for in Art. 20 Sec. 2, is initiated by Parties to the Agreement against other Parties. This second type of proceedings is the cornerstone of dispute resolution between different Parties to the Agreement concerning all questions or interpretation of the Agreement. Violations of the Agreement can be found in a Party's legislation, its antitrust administration or jurisdiction.

3. Proceedings before the Panel are strictly law-oriented (Sec. 3 (c)). Following this law-oriented approach, it is clear that concerned parties to the international dispute must be heard. But in all cases the International Antitrust Authority and each Party to the Agreement must also have a right to intervene, even though they are not parties to

the disputes. The Authority is the supervising institution and all Parties to the Agreement should feel concerned if there is a violation (Sec. 3 (a)). In order to protect the interests of private persons concerned in an individual case, the Panel must also hear such persons, although they are not party to the international dispute (Sec. 3 (b)).

4. According to Sec. 4 (a) there are two possible forms of decision: The pure confirmation of violation is appropriate in cases of non- or non-sufficient implementation of the Agreement into domestic law. According to Sec. 4 (b) the Party concerned would have to change its law accordingly. If it does not respect the decision, new Panel proceedings can be initiated for non-respect of Art. 20 Sec. 4 (b). The possibility to reject national judicial decisions as inconsistent with the Agreement is a very efficient means to further the legal effect of the Agreement. Sec. 4 (b), in this case, provides for a binding effect of the Panel's decision for the national legal system. Therefore, the Panel proceedings work more like an appeal than an international dispute settlement procedure. A similar form of dispute settlement with binding panel decisions for national courts can be found in the Canadian-U.S. American Free Trade Association Treaty.

PART EIGHT: FUTURE DEVELOPMENT OF THE AGREEMENT

ART. 21: FUTURE DEVELOPMENT OF THE AGREEMENT

Sec. 1: Revisions to the Agreement

The International Antitrust Authority has the power to prepare and propose revisions to the Agreement. Adoption of a revision and recommendation for ratification by contracting parties require unanimity minus 3 votes of the CONTRACTING PARTIES. Each Party has one vote. In preparing revisions, the International Antitrust Authority shall especially consider the need for rules referring to specific groups of agreements between private parties or to specific sectors of private and public economy.

Sec. 2: Right to Initiative

Each Party to the Agreement has a right to initiate revisions in the sense of Section 1. The CONTRACTING PARTIES shall decide on such initiatives after submission of the International Antitrust Authority's independent opinion.

Comments:

1. Sec. 1 provides for the revision-making process. The principle of unanimity has to be accepted in principle. Otherwise an anti-antitrust majority could weaken the Agreement's philosophy. In order to exclude stagnation, the principle of unanimity minus 3 seems to be appropriate.

In preparing future revisions special weight should be laid on sectoral rules that take into consideration specific needs relating to certain forms of restraints or to certain economic sectors. In this sense, the purpose of Sec. 2 could even be a reorganization of present uncompetitive structures in specific fields of world economy, such as banking, food, etc.

2. Sec. 2 could even be regarded as an additional form of dispute settlement. Parties to the Agreement, that specifically suffer under uncompetitive structures on the territory of other Parties can propose measures to be taken in the framework of the Agreement. On a first level, the International Antitrust Authority has to give its opinion, possibly in form of a report, evaluating the present, allegedly uncompetitive situation, exploring possible counter-measures, and eventually proposing a revision to the Agreement. On a second level, the CONTRACTING PARTIES shall have to discuss the report and eventually accept a revised text of the Agreement.