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**"THE EVOLUTION OF ANTITRUST LAW IN THE LIGHT OF THE NEW
INTERNATIONAL PERSPECTIVE"**

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COMPETITION LAW

INTRODUCTION

This study focuses on the nexus of the general area of international business and business government relations. The matter considered lies in the field of antitrust legislation, where case decisions are frequently nebulous and consequent interpretations of the law may be as frustrating as they are perplexing.

Antitrust laws are designed to control the exercise of private economic power by preventing monopoly, and by punishing cartels. The nature of the term 'Anti-trust' is highly representative for the current situation in the world where the "small company" is designed to disappear into a market of globalisation, large companies and groups of companies, destined to govern the interests of States as a result of expansion. It is always very difficult to establish the correct competitive equilibriums where companies are involved. At the moment (many people think) there are too many jurisdictional barriers which hamper efficient antitrust enforcement.

The first authentic definition of the term "competition" can be found in the post war paper "*Havana Charter 1948*". Chapter V, *art. 46* contains a "*general policy of antitrust code*" which was clearly founded on an open economy, according to the rules of the market, which should not only have ensured the growth and the competitiveness of industry, but should also have been devoted to the creation of cooperation between commercial enterprise. In the United States at the end of the 18th / early 19th centuries, a *trust* was the instrument which was used most frequently for administering the concentration of economic power in private hands. An examination of the origins of the antitrust laws is helpful in understanding and interpreting them.

The increasing interdependence and globalisation of the world economy has decisively influenced the nature of international relations among States. In particular, in global markets, firms are subject to regulation under a *supranational agency* of antitrust law, for example, *World Trade Organisation* "WTO". The dynamic nature of the development of Antitrust taking place in today's global society calls for an internationally acceptable solution to the problem. These aspects are essential for the analysis of the WTO arise in the field of antitrust law related "*terms of trade*".

Certainly in the area of antitrust law several changes are in progress. Doctrines of extraterritorial application and enforcement show the problems in maintaining the current bilateral model. There is a conflict of jurisdictions between national and EU and also between US and EU Antitrust regulation. The bilateral model: (1) is not efficient, (2) enforces the reason for signing bilateral agreements, and (3) conflicts with aims of free trade, and (4) incurs costs of double regulation.

The central question here is how far the case for a multilateral model can be developed through bilateral subject. The European Community revived this concept in 1984 when a experts group on Competition Policy and trade reported that *Draft International Antitrust Code* “DIAC” was characterised by its political and legal pragmatism “*difference in national law, in degree of development, and in attitude towards the free market system*”. This does to some extent depends on the available institutional solutions. On the one hand there is the binding character of the dispute settlement mechanism to address the *restriction of trade* between “Member States”; on the other there is the efficiency of enforcement and the aims of its *national sovereignty*.

The first obvious aspect of research is a clear statement of the problem to be considered, in both *specific and general terms*. The first part of this work describes the current approach upon which an antitrust is based (substantive law). In the second part we propose an alternative approach in the light of the shortfalls of this policy in promoting competition. In particular, in the EU context, the strong push towards harmonisation and co-operation are not necessarily alternatives, let alone mutually exclusive. In the meanwhile, soft harmonization is an evolving phenomenon. Numerous meetings and workshops, and *ad hoc* technical assistance to nations that are newly adopting competition laws, have led to much cross-fertilization and increasing convergence. Co-operation and dialogue are key tools towards finding common ground with States from other jurisdictions. Analysis of these arguments is complicated by the fact that there are many versions of antitrust law and its goals, descriptively and normatively, and there are many possibilities for internationalization on antitrust rules and their enforcement. I explore the federalism of antitrust in view of global markets. Markets: many of them are global.

A thesis proposal in competition law should address at least the following 5 chapters:

Chapter I - This Chapter sets out what the research aims to achieve. It is dedicated to the expression of *antitrust* which was coined from trust history in the US. In this chapter I will refer to the basic principles of economic theory which bear directly on antitrust policy. I will start by speaking about the “*common law*” view of the market place which was protected as long as the legal right to trade was observed, and where the inadequacy of this safeguard constituted a serious interference and is most likely unfair. Then we will look at the liberal theory after called, “*ordo-liberalism*”. I will speak about “*the authority’s autonomies*” as an independent administration, in terms of geographical, national and international socio-economic aspects. Briefly speaking, the competition authorities take account of two factors from the new perspective of antitrust: a) the policy of governments in reducing the dominant power of the “suspected” monopoly; b) an analysis in a new geographical dimension of *cooperation rule*. The EU antitrust authority was often important in pushing other regulators to focus on the competition law introducing efficiency through market.

Chapter II - I will discuss the antitrust rules and enforcement in the US as fundamental principles of a traditional directive: “*The Sherman Act, the Rule of Reason, the Wilson Tariff Act, the Clayton Act, the Webb-Pomerene Act, the Federal Trade Commission Act*”, and the discussion will include comparative experience with EU “Enforcement”. There are many areas not covered by the antitrust laws, some examples are government contracts and activities approved by state law especially raw material and commodities. In this regard, it is also worth considering the role of national authorities within a federal environment after (the incorporation of) Council Regulation (EC) No 1/2003¹, known as the *Modernisation Regulation*. This new regulation, for which the Commission submitted its proposal in September 2000, the reform consists in the modernization of procedural norms going back 40 years, established from regulations 17 of 1962, it enforces the application of the dispositions of treaty UE on the agreements between enterprises that can limit the competition *Article 101 (ex Article 81 TEC)* and on the abuses of dominant position *Article 102 (ex Article 82 TEC)*². The

¹ EU Competition law- Rules applicable to Antitrust Enforcement – General rules Situation as at 1st December 2011”Provisions of the Treaty on the Functioning of the European Union (TFEU)”

<http://ec.europa.eu/competition/antitrust/legislation/legislation.html>

² With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The two sets of provisions are in substance identical. For the purposes of this document, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate

reform, represents the most complete review of the antitrust norms of the EU since forty years, it does not change the substantial content of articles 81 and 82 of the treaty. The new dispositions will come into force the 1^o May 2004, at the same time as the entry in the Union of 10 new States members.

Chapter III - I will talk about (the) overall structure of the competition enforcement law of 27 member states, relating to the new “modernisation rule”, called 1/2003 which has had the effect of (transferring) some responsibility from (the) European central authority to (the) national authority. The comparative backgrounds of Competition law in the new EU Member States are related to a system of “legitimate jurisdiction of one sovereign State”. I will lay out the narrow legal base of extraterritorial antitrust, utilizing contemporary views in a critical analysis of court decisions. The influence of the country within its own area is inevitable and absolute and any control upon it would involve a reduction of its own autonomy. The implementation of antitrust law is in practice almost completely entrusted to administrative enforcement. These are the new systems of block exception regulations, and the proposal for a fully decentralised system of enforcement rules.

Chapter IV - There are two approaches to cooperation Bilateral and multilateral, I will refer about “*bilateral agreement: a solution or a problem?*” Private restraints of competition have so far been asserted several and serious doubts, but it is already permitted in the form of bilateral agreements and cooperation in the context of “*positive comity*”, specifically an agreement signed between the US, the EU clarifying the circumstances under which they will refer to cases of anticompetitive activities to each other, and also look at “*matters involving foreign elements*”. What explanation do we have to justify the intricate conflicts of confidential information sharing? I will show (that) the new concept of the globalization of industry or company framework has increased international competition and given rise to the need for an increasingly integrated “*harmonisation*” with an evolving legal system. I have in addition analysed the studies of antitrust authority in the US and disclosed a number of possible explanations for the debate on harmonisation interests, with arguments concerning the nature and effect of laws of this kind currently operating. Protecting a domestic economy through trade restrictions has three objectives: (1) safeguarding a country's external financial position, (2) safeguarding its balance-of-payments position, and (3) shielding its

domestic industries (either infant or declining) from foreign competition. A government can also protect its domestic economy by prohibiting exports of indigenous natural resources or manufactured products, especially for strategic purposes. There are European and Worldwide markets, but there are also markets that are still regional in character. Industrial markets tend to globalize. Globalization and the development of global markets are factors of particular importance particularly in relation of personal trust, language and culture.

Chapter V - This Chapter would consist of an overview of the entire work and would present the recommendations necessary. I draw attention to a subtle link of the WTO umbrella, the new “World Trade Organisation” organisation, which is comprised of more than 159 members - countries and was established only in 1995. In fact the intention of these countries was united in this new network only to improve the study and analysis of the problems of sectors in the context of the political economy and international relations relating multilateral cooperation. WTO “World Trade Organisation” recommendations have led to national legislative changes and thus to increased convergence amongst jurisdictions. In effect, if the States had considered the WTO option, they would have easily obtained a solution to modernise the WTO within a new institutional framework. By calling for a WTO agreement are we sure that we are not seeking to erode the sovereignty of national authorities?

It would also consider some of the changing features in the 21st century by emphasizing the WTO can be an axis between the bilateral system and the multilateral position and furthermore whether a *new draft code*, such as the *Munich example*, can succeed in strengthening the power of the WTO in the field of trade and antitrust. My research intends to look into these issues listed above and other issues that may arise in the course of my studies. Upon analyzing these issues, I intend to put forward some recommendations which hopefully would bring this Act into the sphere of the century.

Conclusion - In the conclusion of the thesis after a brief look backward, a summary has been made, it involves discourses of *antitrust*, about earlier efforts and it incorporates antitrust principles into the rules for world trade. Some details are taken into consideration at the various options that are available to us that would, to lesser or greater degrees, “internationalize” antitrust law. The discussions include the implications for future International Organisation research for a perspective study the global competition. An answer about why until today there are complicated agreements

to create a global structure into *World Trade Organization* (WTO) is given. A common code will be considered only after deciding the *common structure of antitrust* in an international organization along the lines of the *Havana Charter*.

This research intends to look into the issues listed above and other issues that may arise in the course of these studies. Upon analyzing them, some recommendations are put forward which hopefully would bring this Act into the sphere of the century.

RESEARCH QUESTIONS

- TO LOOK INTO THE POSSIBILITY OF PROVIDING A WORKABLE FRAMEWORK FOR THE APPLICATION OF EX-ANTE COMPETITION REGULATION
- TO CONSIDER THE CONCEPT OF CONVERGENCE AND ITS CHALLENGES TO POLICY AND LEGISLATION IN THE 21ST CENTRY
- TO MAKE A DISTINCT, ORIGINAL CONTRIBUTION TO COMPETITION LAW AND COMPETITION POLICY AND REGULATION
- TO ANALYSE OTHER JURISDICTIONS LEGAL AND REGULATORY APPROACH TO WTO REGULATION AND THEIR SUITABILITY OR UNSUITABILITY
- CASE STUDY: “WTO CRITICAL ANALYSIS IN LIGHT OF RECENT DEVELOPMENTS”
- FROM AN ECONOMIC PERSPECTIVE THE KEY CRITERION IS THE LIKELY IMPACT ON NATIONAL WELFARE (*ECONOMIC EFFICIENCE*) OF WTO AGREEMENT IN THE AREA OF COMPETITION LAW.
- THE NAM³ AND THE CHAMBER OF COMMERCE LED THE OPPOSITION OF “*Restrictive Business Practices*” CODE

³ “National Association of Manufactory” which later became the U.S. Chamber of Commerce

Chapter 1

COMPETITION LAW: “HISTORICAL OVERVIEW AND POLITICAL SCENARIO”

Abstract: 1. The common law rules of competition law – 2. A brief history of Antitrust - 3. Interstate Commerce Commission “ICC” agency – 4. Independent administrations Authority model – 5. Antitrust law in the global market: challenges and problems - Conclusion

Abstract

This chapter will consist of a study of competition law, its origins and principles such as the prohibition of anti-competitive agreements and the prevention of the abuse of dominant positions and pose the question whether or not sector specific rules are sufficient in absence of Competition Law in regulating sector? This chapter is dedicated to the expression of *antitrust* which was coined from trust history in the US; in this chapter we will refer to the basic principles of economic theory which have a direct bearing on antitrust policy. I will start by speaking about the “*common law*” view of the market place which was protected as long as the legal right to trade was observed and where the inadequacy of this safeguard constituted a serious interference and an indictable offence. I will talk about “*the authority as independent administration*”, in relevant progress in terms of geographical, national and the international socio-economic aspects. Briefly speaking, the competition authorities take account of two factors from the new perspective of antitrust: a) the policy of governments in reducing the dominant power of the “suspected” monopoly; b) the geographical area in the presence or absence of barriers in the market. The antitrust authority was often important in pushing other regulators to focus on the competition issue and to apply competition policy concepts consistently.

This Chapter would consist of an overview of the entire work and would present the recommendations necessary comparative analysis of other competition jurisdictions as institutional framework linked in the Chapter II.

1. The common law rules of competition law

Although English common law dealt with some of the antitrust matters long before the US and many countries have adopted antitrust statutes, the US were the first to enact national legislation on monopolies and monopolisation. There are events and developments under English common law which could properly lay claim to be the first seeds of competition law. One of the most interesting of these is the “*Case of the monopolies*”, which was decided in *Tudor England*. The English Crown has developed a practice of granting a monopolistic licence known as “*letters patent*” to encourage the introduction of new inventions.

At the time of the Magna Carta (1215), legislation provided that all monopolies were to be contrary to the law because of their harmful effect on individual freedom. The guilds of feudal England were a complex system regulating relations among master, journeyman and apprentice.

However, it is still unclear whether the common law doctrine of ‘restraint of trade’ emerged in response to the pressures caused by labour shortages⁴. Beyond these developments, there was also the common law doctrine of restraint of trade, which provided that covenants in restraint of trade were not enforceable, though flexibility was added later to the doctrine to accommodate changing circumstances, such as providing that a restrictive covenant could be sustained if there was a legitimate interest to protect and the restraint was reasonable.

Various Saxon kings had taken action against a range of trading practices, including, for example, the purchase of commodities before they reached their designated market place in order to enhance the price and make a profit on a later sale. Common law is only a metaphor; there are as many common laws as there are independent judicial systems (which were used as an instrument of public policy). The common law view of the market place was that the public was protected as long as there was a legal right to trade. Occasionally state laws prohibited corporate combinations seeking to eliminate competition. Although supported by notions of the free market and the desire to

⁴ John Dyer’s case: “It seems that the common law of trade restraints originated not with notions of competition and protection of the free market, but rather in support of “fair” commercial activity and of crumbling guild customs. The rule that covenants in restraint of trade were not enforceable remained in place until the beginning of the seventeenth century, at which time added flexibility was introduced to accommodate changing circumstances (see, e.g., *Rogers v Parrey* (1613) 80 ER 1012)”.

encourage competition, the common law doctrine was at most only a small step in that direction. But the common law rule did not necessarily stop others from working under or observing such an agreement; their acceptance depended upon the parties satisfaction with the bargain rather than competitive norms.

Senator Sherman said: *they were setting forth the rule of common law which prevails in England and this country, and the act's terminology is borrowed from the common law. Early as well as current decisions applying the antitrust laws often rely on common law precedents*". Senator Sherman himself acknowledged this fact when he stated in the introduction of his bill to the Senate, that the bill did "*not announce a new principle of law, but applies old and well recognised principles of the common law to the complicated jurisdiction of our State and Federal Government*".

The ruling was justified on several grounds: monopoly harms actual and potential competition, deprives others of the opportunity to practise a trade, and injures the public through higher price and poorer quality.

The antimonopoly view was most frequently expressed in state constitutions and statutes. Yet neither the English nor American common law actually ruled that private monopoly (i.e. garnered by competitive effort or agreement) was illegal, except in dicta. Dissatisfaction with the common law's protectionism and, more importantly, rising concern over abusive practices by corporate giants in the second half of the 19th century, led to legislation restricting the power of the "trust".

2. A brief history of Antitrust

The term antitrust has entered into current use, (some legislation that prohibits in a sense the *trust*). *The trust is a typical institute of Anglo-Saxon law that corresponds to a current agreement between many subjects, whereby the group members trust an estate to a legal owner (trustee) to administrate it in favour of a beneficiary. In the United States at the end of the last century, a trust was the instrument which was used most frequently for administering the concentration of economic power in private hands.*

The shareholders of various companies transferred their shares to some trustees and would keep the right to the profits from the management of the company carried out by the same trustees. *Trusts* were used to fix prices and divide the market, the expression

came from there then to indicate large industrial or commercial groups that dominate the market; and therefore the correlated expression *antitrust legislation* was coined as legislation with the aim of suppressing the restrictions to free monopolies and competition⁵. The complexity of the discipline in question involves aspects of Civil Law, Commercial Law, Community Law, Constitutional Law and Administrative Law, each one with its own plans, its own principles and its own systematic outlines for funds.

In any case: *“The simultaneous presence of profiles belonging to different economic and legal fields does not constitute an origin that exclusively concerns the discipline of antitrust”*⁶. In fact all those fields are conventional, like Economic Law, being characterised by adding every traditional part of legal knowledge to themselves in such a way as to tend towards the traditional obstacle between public institutes and private institutes⁷, as previously pointed out, the application of antitrust law involves the relevant market, that is, in the economic context within which the anti-competitive conduct carries out its effect.

In the 1930’s⁸, the concept was developed by what has come to be known as the ordoliberal, developed and propagated by economists in the German university town of Freiburg, that the individual should enjoy economic freedom as part of their political freedom⁹. These liberal economists further believe that widespread competition is necessary for economic wellbeing. Learning from the experience of the late 19th Century, they believe that entities with too much economic power can present a considerable threat to competition and individual economic freedom, and must therefore be controlled¹⁰. The Ordoliberals expound a system where the market players freely

⁵ Bernini G., *Un secolo di filosofia antitrust. Il modello statunitense, la disciplina comunitaria e la normativa italiana*, Bologna, 1991, see David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1998). Published by “Oxford University Press”.

⁶ We’ll compare the communitarian discipline and the American practical situation and restrictive competition, (monopoly and abuse of dominant position and operations of concentration).

⁷ Ramajoli M., *Attività amministrativa e disciplina antitrust*, Milano, 1998, p.2.

⁸ For an excellent explanation of this school of thought see David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe*, 42 *Am. J. Comp. L.* 25 (1994) and in *Law and Competition in Twentieth Century Europe* 232 ff. (2001) also in *The American Journal of Comparative Law*, Vol. 48, No. 2 (Spring, 2000), pp. 327-336 Published by “American society of comparative Law”.

⁹ Initially, the Liberals wanted to free individuals from government interference in order to achieve autonomy. It was only later when it became evident that markets are not dominated by the “fair” competition of many individuals but rather by that of big and bigger entities that it was felt that the economic freedom of the individual required protection from these forces

¹⁰ Interestingly, and quite contrary to its later development, this was also the starting point for antitrust law in the U.S. where the Sherman Act aimed at restraining the growing power of giant combinations called trusts – Standard Oil being the most prominent among them, see: Lawrence Friedman, *History of American Law* 463 f. (2nd ed. 1985).

compete with each other while the State guarantees and provides for an economic order in which such competition is protected. Part of this order is the control and restriction of concentrations of economic power. Under this economic philosophy, the crucial point for competition law is not the market itself, but the position of the largest market players in the market. Their position must be controlled and, if necessary, capped in order to maintain competition and economic freedom. One consequence is that a merger which appears to bring about positive results for the consumer, i.e., lower prices, would be blocked on the grounds that the newly merged entity would become too strong, i.e., dominant in a certain market. Under the ordoliberal initiative, such a concentration of economic power ultimately may not only impede the freedom of the other and weaker market players, but ultimately also lead to serious disadvantages for consumers in that the dominant player might use its power to impose prices and conditions which it would find unsustainable in a diverse market.

The European approach focuses on the durable impact of mergers (elimination of competitors can lead to monopolistic structures and ultimately to higher prices) rather than short-term considerations (lower prices if the cost-reducing synergy effect caused by a merger is passed on to consumers). In Europe, under the current Regulation of Merger Control (*ECMR*)¹¹, the test is one of Market Dominance. Market Dominance is duly (and from a liberal's perspective, appropriately) defined as the power to behave, to an appreciable extent, independently of competitors, customers, and ultimately consumers¹². The first defining criterion in this regard is market share. However, when estimating the market position of an entity, the Commission looks at a whole range of other factors, notably access to superior technology¹³ or to capital¹⁴, vertical integration, a well-developed distribution system¹⁵, product differentiation, overall size and

¹¹ The new EC Merger Regulation, Regulation 139/2004 ("ECMR"), which replaces Regulation 4064/89, was adopted on 20 January 2003 and will enter into force on 1 May 2004 to coincide with EU enlargement (OJ 2004 L 24/1).

¹² E.C.J., Case 27/76, *United Brands Company, United Brands Continental BV v Commission of the European Communities*, 1978 E.C.R. 207, at 286, 1978 1 C.M.L.R. 429 ("United Brands"); the court used the same formula in E.C.J., Case 85/76, *Hoffmann-La Roche & Co AG v. Commission of the European Communities*, 1979 E.C.R. 461, 461; 1979 3 C.M.L.R. 211 ("Hoffmann La Roche").

¹³ E.C.J., Case 27/76, *United Brands*; Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Commission of the European Communities*, 1983 E.C.R. 3461, 3536; 1985 1 C.M.L.R. 282, ("Michelin").

¹⁴ Commission, Case IV/M.6.72R, *Continental Can*, 1972 O.J. (L7) 25, 1972 C.M.L.R. D11. This factor was also very important in the case of *GE/Honeywell*.

¹⁵ *United Brands v. Commission: 27/76 (1978)*; *Case Hoffmann-La Roche & Co. AG v Commission of the European Communities Court of Justice of the European Communities, Case 85/76*.

strength, conduct and performance¹⁶. Furthermore, the European approach leaves no room for considerations of efficiency, such as are practiced or applied in the United States. Although the European Commission appears to be open to any suggestions as to if and how the current European approach of Market Dominance should be changed¹⁷, even with a view to the American system, it is highly doubtful that a fundamental change away from Freiburg and towards Chicago, either in metaphorical or geographical terms, will occur.

The existence of antitrust law is closely connected to the success of the market economy; in fact, in a planned economy, in which economic choices are centralised, there should be no reason for its existence. Moreover, the success of the market economy does not automatically imply the existence of competition; economic theory teaches us that, even when the market is free, the conditions that guarantee the freedom of economic initiative for single individuals are not necessarily created, in as much as monopolies or strongly concentrated structures that limit this freedom can still exist¹⁸. In this way the mere existence of natural monopolies¹⁹ or the presence of economies of scale²⁰ may lead to *oligopolistic markets* among other causes. Furthermore economic agents can apply strategic behaviours; or active or passive conducts, that negatively affect the competition as well. With respect to companies, they can impose strategic deterrents (*entry deterring practices*), like predatory pricing, excess capacity and limited pricing in order to discourage the entry of potential rivals into the market or to encourage their exit.

Through *predatory pricing* a company can deliberately lower prices below the costs of production forcing the new entrant to leave the market and discouraging the entry of other potential competitors into the market²¹.

¹⁶ Commission, Case IV/F-3/33.708, *British Sugar* 1999 O.J. (L 76) 1.

¹⁷ This is the impression one gets when looking at the Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6 by the end of December 11, 2001. The new EC Merger Regulation, Regulation 139/2004 ("ECMR"), was adopted on 20 January 2003 and will enter into force on 1 May 2004 to coincide with EU enlargement (OJ 2004 L 24/1).

¹⁸ Gobbo F., *Il mercato e la tutela della concorrenza*, Bologna, 1997.

¹⁹ Stiglitz J. E., *Principi di microeconomia*, Torino, 1994. "therefore those fields are defined in which the competition arise natural monopoly has itself when a single enterprise can produce the desired amount cheaper than whichever productive combination with more than one enterprise".

²⁰ It is said that economies of scale exist when the average costs of production fall to increase of the production scale, in Stiglitz, op. cit. in note 25.

²¹ In particular predators price are practically the anticompetitive problem. (Areeda, Turner, in *Harvard Law Review* 75, p. 697 ss.) (Commission, 14-12-1985, *Akzo GUCE* 85, L 374; Commission, 5-10-1988, *BPB*). However they are from considering illicit the inferior prices to the average of the variable costs or to the average of the costs totals (Commission, *Akzo*, cit.; Court of First degree, *Tetra Pak II*).

In short, *limiting pricing* consists of adopting a pricing strategy that plays on the fact that potential entrants do not know the cost curves of the companies operating in the market, so these companies do everything possible to make entry to the market unattractive by making others believe that they have advantageous cost curves.

To better understand the effects of such practices one can look at the case of *Laker Airways*, which in 1977 successfully entered and operated in the civil airline transport on the London- New York route. In response, the competing airlines TWA, Pan America and British Airways drastically lowered their tariffs until Laker Airways, in financial difficulty, was expelled from the market, after which tariffs returned to previous levels with obvious damage to both the companies unfairly forced out of the market and the consumers.

The advantages and *performances* of competitive markets stood out with the words of Mario Monti, the European Commissioner of Competition, who asserted that: “*An essential role of competition is to promote innovation and guarantee that goods and services are produced in the most efficient way possible, with the consequent benefit to the consumer being in the form of reduced prices or the improvement of quality, the possibilities of choices and services. For example, in the period 1997-1999, domestic tariffs for international calls were reduced by an average of 40% in the majority of member States. The opening of this sector to competition has not only produced a reduction in prices, but has also generated a considerable increase in the offer of new and efficient products and services*”²².

As previously stated, it appears evident that a free market, even if it is an essential requirement of competition, is not a sufficient condition; in fact, the presence of a discipline of competition that guarantees that the rules are respected and represses anti-competitive behaviour is indispensable.

In other words, according to the dominant economic paradigm, the efficient allocation of resources occurs by means of the competitive market, which in some situations, can exist and endure thanks only to the intervention of a public authority that applies the antitrust discipline. Apart from problems of a legal and economic nature, the concentration of power entails serious risks for democracy, as Professor Giuliano Amato holds: “*Antitrust [...] was invented neither by technicians of Commercial Law,*

²² XXIX Relazione sulla politica della concorrenza, 1999, 5.5.2000.

who became the first specialists, nor by the same economists, who supplied it with the most solid cultural hinterland. It was wanted by politicians and (in Europe) scholars, attentive to the pillars of democratic systems, who saw an answer to a crucial problem of democracy: the emergence of the company, as the expression of the basic freedom of singles, of the conflicting phenomenon of private power, a power lacking legitimisation and dangerously capable of making an attempt not only on the economic freedom of other private powers, but also on the balance of public decisions exposed to its abuse of power”²³.

Therefore, on the one hand it is necessary to prevent private power from becoming a threat to other people’s freedom and on the other hand it is necessary that the power given to Antitrust does not suffocate the same freedom that it must protect. The debate is about establishing the uncertain boundary between the freedom of a company and the power given to the deputy institutions to protect the market. As previously stated it is not easy to understand the complexity as well as the centrality of the antitrust discipline in the contemporary world, and even more so in the global world that is to come.

3. Interstate Commerce Commission “ICC“ agency

The origins of antitrust are in the *Interstate Commerce Commission* (ICC), the first *independent agency* of the US in the 19th Century. The ICC was created in 1887 within the Department of the Interior to impose a federal level of regulation on the activities of the railway sector and to prevent abuse by some companies, with the aim of allowing an integration of the state markets. The International Chamber of Commerce has adopted a statement to the effect that international rules and dispute resolution with respect to competition policy under the auspices of the WTO are premature at this time. The ICC recommended that the WTO support continued analytical work on the trade and competition policy interface in conjunction with the OECD and other international organizations²⁴. The regulatory base of the American antitrust law, that is the first federal American law on the subject of protecting competition and controlling monopolies, was the *Sherman Act*, approved by the United States Congress in 1890,

²³ Amato G. , Il potere e l’antitrust: il dilemma della democrazia liberale nella storia del mercato, Bologna, Il Mulino, 1998.

²⁴ ICC Statement on Future WTO Work on Competition and Trade, Nov. 3, 1998, doc. No. 225/508 rev.

representing the historical matrix of all the successive laws on the subject; it was the result more of the economists who were capable of convincing the Congress of the social costs of monopolies than the negative aspects and the changes that were seen in the United States' economy. At the end of the 19th Century it was recognised that the *free market*²⁵ was not able to balance itself in an autonomous way, as has been wrongly maintained until that moment. The fact it was taken into consideration, instead, that the operating of the economic forces, did not ensure the conservation of economic pluralism or the expression of a healthy and correctly functioning market, but created dangerous imbalances of a competitive order constantly threatened by monopolistic and oligopolistic concentrations²⁶.

Such worries generated the need to put a policy of regulation into effect²⁷, which would admit a form of public control and intervention on companies through the issuing of

²⁵ The exact opposite of a planned economy (where the State makes all the decisions regarding production and consumption, and takes steps to allocate resources: work, land, prime materials, machinery etc.), free market economies presuppose minimal public interference. The State does not interfere across the board in the allocation of resources, or their distribution, which depends on an imprecise number of individual decisions by the producers (companies) and consumers (families) who interact in the markets. It is believed, from its origins, that this economic model, accompanied by 'industrial capitalism' and a presupposed condition of 'free economic initiative', means economic progress; This, apart from representing the "spring" that pushes producers and retailers (the main characters of the economic process) towards always finding new ways to obtain a constant improvement of product quality, presents undeniable psychological benefits:

- To prime 'the race' to reduce prices towards those of costs,
- To eliminate the entrepreneur's extra profits,
- To promote the quantitative growth of products,
- To exclude inefficient productive units from the market freeing resources and making them available for more profitable uses,
- To become the guarantor of the market's freedom in as much as it is equipped with inherent (but not infallible) potential to auto-regulate which hinders stable concentration of economic powers or collusions, favouring access to the market and the success of the most capable operators.

Competition, in this way, becomes an instrument of social justice.

²⁶ Monopoly is a market form in which the supply is concentrated in the hands of a single company and in which the goods produced do not have significant alternatives. The factors which can allow a company to exercise a monopoly position, are: exclusive control of essential resources (e.g. prime materials and trademarks), government restrictions on the entry of new companies (exclusive allocation of production by the State or another such entity; legal monopoly) and finally, the minimis of production costs (a monopoly arises in these cases because it represents the least expensive way to produce a given quantity of a product; natural monopoly). Before fixing the selling price of a product or alternatively fixing the quantity, the monopolist must determine the optimal level of production according to the quantity that he intends to offer to the market. It corresponds to the equivalent between marginal revenue (the growth of total revenues multiplied by the increase of a unit of product) and marginal cost (the growth of total costs multiplied by the variation of a unit of the quantity of the product), determined by the meeting point between the two respective curves. Determining the optimal level of production will also show the definite optimal selling price. With respect to perfect competition, the monopoly involves high social costs for the community: the optimal price, for the monopolist, is not so for the community. In fact, the monopolist, not finding competition on the part of the other producers, offers a quantity of goods that are supplied under perfect competition at a higher price (all to the advantage of the entrepreneur-owner of the company who earns the extra profits, given by the difference between price and average cost, adding to the common profits). The oligopoly is a market form in which offer is concentrated in the hands of a limited number of large companies. It is an industrial structure regularly used in Western countries, given that many systems require significant economies scale and huge investment technologies.

²⁷ In general, not all economic sectors are subjected to control by the antitrust authority, for those characterized by pre-eminent interests of a public nature and for this, disciplined by the administrative rules of the sector, it is possible

predisposed rules to protect competition. These rules had to operate to eliminate monopolistic and anti-competitive abusers in two ways: by prohibiting the company from adopting damaging behaviour in the *competition game*, or by taking advantage of their economic power. The United States is the homeland of antitrust law, which rises in reaction to private monopolies and trusts²⁸ (a contractual form from which the universally used term derives to individualise the instrumental regulations to protect competition).

Only after another half a century did the anti-monopoly policy disembark in the old continent, recognising in the American experience an instigating model not to be ignored.

The needs, which primed the formation process of antitrust law, have had a purpose different in America compared to Europe, since the paths followed by the economies of these two continents are different. In the United States of America the reason that led to the free company (*free enterprise policy*) was the reflection of an open economy.

The big companies (*corporations*) which were progressively substituted by the small and medium individual companies, evidenced an impressive economic growth, but causing on the other hand associated phenomena negatively perceived at political and social levels. An increasing tolerance of large dimensions developed to forms of industrial and financial concentration, which through the prosecution of big economic interests led to the abuse of social power.

The large concentrations of economic power with various predatory ways (trusts, cartels, pools) were for the community an impassable obstacle to the individual freedom of a company. The natural consequence of this order of ideas was careful observation of all those forms of agreements and contractual practices which were created by entrepreneurs aiming to reduce or limit competition.

hypothetically or in reality, to run into monopolistic regulations or a partial application or a complete subjection to antitrust rules, as occurred with the so-called regulated industries (for example, transport and credit institutions). Moreover, with regards to concentrations and mergers, antitrust regulation generally provides for these structures to notify certain organizations beforehand (in the US they are the Department of Justice and Federal Trade Commission), in anticipation of their authorization. It is necessary to point out that this last provision also works for mergers, the competition in these sectors does not take into consideration the geographical area or the commercial branch of the companies involved in such financial operations.

²⁸ Forms of industrial concentration that bring about the integration of a number of companies under one management, in order to reduce production costs leaving the selling price unaltered, and to limit competition and control the market. A concentration can be formed between companies producing the same goods (horizontal concentrations) or between companies, which produce intermediate and final products of the same cycle (vertical concentrations).

In Europe, the freedom of companies arises as a result of the reaction to a suffocating system of commercial barriers typical of a medieval economy, and to the corporal ties and monopolies characteristic of the organisations of that period. The emerging middle class, tied to commercial and industrial activities, was able to demolish the complex internal customs controls but not the external barriers between States, which continued to persist for a long time as an expression of a deep-rooted spirit of autonomy and political and economic distinction.

This slowed down the development process between the European nations, limiting the freedom of commercial and entrepreneurial initiative. The freedom of private initiative and competition was born and maintained, in Europe, as an alternative, and it refused state intervention in the economy, which came to be seen as exasperating and intolerable. Economists claimed the benefits of free competition were higher than those with the system where the state controls the distortion of markets, and these same market forces would have taken steps to correct these factors²⁹.

Antitrust law wants to represent a double measurement to guarantee the equilibrium (and efficiency) of the economy and democracy: its objective is the dispersion of the market's power, the struggle to accumulate power both economical and political, but the antitrust discipline has demonstrated itself as a multifunctional tool, used with formality and different purposes

The history of antitrust legislation in the United States and in Europe can be seen as a representation of different formalities, indicating the development of the Western countries and the "dilemma" unresolved by free democracy: "*the emergence of the market, as an expression and a product of individual freedom*". European antitrust has another origin and another history: the national antitrust policies present variable characteristics, but disseminated by a role more accentuated by the State and an approach to the market, filtered even by the need for more sensitive industrial, regional, social policy³⁰. In particular, Community Competition Law is a real and true "service structure" of the integration process of the common market; the independent administrations represents respectively the motor of the expansion process of the administrative State. The market economy and free competition are not found in nature:

²⁹ Bernini G., "Un secolo di filosofia antitrust", Clueb Bologna 1991.

³⁰ Irti N., L'ordine giuridico del mercato, Roma-Bari 1998. R.Franceschelli, Il mercato in senso giuridico, "Giurisprudenza commerciale" 1979, that it defines the market like "one general legal situation, legally guaranteed and protected".

they designate systems of relations built and governed by law³¹. Or rather, it is fair to refer to many markets as they are the nuclei of regulations relating to the exchange of determined goods, and it is normal to consider community law as the doctrine of competition³².

Speaking of antitrust means that at an economic and legal level the relationships between the market and competition are not synonymous because one is introductory to the other; where there is competition, there is a market, but not vice versa. Today antitrust has entered into its global dimension, today antitrust law no longer protects the small producers, but is becoming increasingly more tolerant of cartels with regards to the principle of a company's efficiency. It tends to undervalue vertical agreements and no longer applies automatic prohibitions; on the other hand it uses more sophisticated analytical instrumentation that nevertheless shows its impotency compared to new and more out of control forms of economic concentration, which are oligopolistic markets (models of stabilised equilibrium formally democratic and competitive, in reality formidably reinforced by their acquired dominant positions)³³.

4. Independent Administration Authority model

Recent years have witnessed major liberalisation of national economies. The role of competition authorities in regulated sectors of the economy and their relationship with sector regulators has been a subject of much debate, within countries and in international forums. This typically involves the setting up of an authority in the shape of a sector regulator which will control or regulate prices, quality, and other service conditions and also oversee the social obligation of the enterprises, such as providing universal service.

In the last few years Europe has changed through the integration of markets, with the imposition of new technologies, uniting the protection of collective interests. It is in the field of this complex change that many new Authorities have been created, to supervise and referee the competition, to impose transparent control, to carry out supervisory

³¹ It was the German doctrine in primis Raiser L., *Die Aufgabe des Privatrecht*, Kronenberg 1977 to pick the twofold level of the competition under the legal profile: of the free market like normative order and the subjective right of the economic operator.

³² Frignani-Waelbroek *Disciplina della concorrenza nella CE* UTET Torino, 1996

³³ Amato G., *Antitrust and the Bounds of Power. The Dilemma of Liberal Democracy in the History of the Market*, Oxford 1997

functions, which before, during the time of public management, were entrusted to ministerial organisations and which today are in the management of private companies, who consider it more correct to entrust more technical organisations that are more isolated from political-administrative management.

Their institutionalisation has elevated the *independent authorities* to becoming the spokesperson of the market influencing the role of the political institutions, producing a certain tendency to drastically reduce the sphere of politics and State sovereignty in favour of the economy.

Their reduction is seen historically as the inevitable effect of globalisation that is transforming the planet into one free market that would force each State to renounce its leadership claims on the national economy and perhaps as a result on the impoverishment of the country³⁴. Reading the English word - *Authority* – one would immediately think that this singular Authority has “*recently*” appeared on the European and International scene, but it is not exactly true.

The authorities are all marked by criteria of technique and specialisation; the more these criteria characterise the organisation, the more they allow the transfer of Government power and the neutralisation, by the Government, of the interests on which protection is placed. They are called to guarantee and protect different interests commensurate to the particular relevance that these assume, from the freedom of competition in the economic market to the exercising of a fundamental right like the freedom of thought. They give life to Governments of subjected sectors, like the magistrate body, which are assimilated for their impartiality alone and only to the law, and their aim is to unhinge the central political-administrative direction. The first function is an administrative-regulatory type (in the sense of vigilance of specific sectors of activities)³⁵, regulations or sanctions, which one might call the “*new*” administrative functions of the authority, guaranteeing directly the protection of the fundamental rights of the users and of public services. Obviously these functions are given to the authority *ex novo* or in substitution for previous functions attributed to traditional administrations.

After having highlighted the main distinguishing marks that are at the root of the establishment of independent administrations, it is right to say that the experience of the independent administrations, variously named agencies, commissions, institutions, is

³⁴ Guarino G., *Verso l'Europa ovvero la fine della politica*, Milano, Mondadori, 1997

³⁵ Merloni F., “Fortuna e limiti delle cosiddette autorità amministrative indipendenti”, in *Pol. Dir.*, 1997,

influenced by the Anglo-Saxon States, where numerous independent organisations have operated for a long time in the most varied and delicate socio-economic sectors. Also in France³⁶ one notices that there is a “strong” regulation of traditional administrations.³⁷

The Anglo-Saxon type Authority is independent of executive power where experts in neutral positions have directional and regulatory powers over those areas that they invest in economic and distribution processes. These Authorities are institutions of legitimate power, which also manage to design and nominate the directive organisations. In the United States, the independent Authorities are in charge of the most varied sectors of public life; the figure of the “Independent Regulatory Commissions” is emblematic, due to the “rivalry” between legislative and executive power, characteristic of the form of a presidential Government. The “speciality” of the practiced functions is at the root of the independence of these entities, which not being subject to any presidential power suffers various forms of political control.

In Great Britain analogous functions are carried out by “*Quangos*” (*Autonomous non-Governmental organisations*) operating in vast sectors of politico-economic life, characterised by a (n) (indirect and limited) co-responsibility with the political authorities. Within *Quangos* the “Regulatory Agencies” assume particular importance, with the responsibility of ensuring the cover of the interests protected by the law with those in any case worthy of protection, as well as the “Administrative Tribunals”, with decisive powers to solve disputes. These have a tacit independence by the functions carried out and for which in some cases, like in the United States³⁸, they have tried to re-structure the importance, although with poor results³⁹. In France, in spite of having quite a rigid Constitution inclined towards subordination to the Government’s Administration, it felt the need to separate politics from administration for which numerous authorities endowed with independence were set up, based on the French tradition of “*fonction publique*”.

The experience of independent authorities is also present in Germany for example, the (*Bundesbank*) by virtue of the concept of “neutralisation” theorised, as previously stated, by Schmitt, with regards to the independence of administration from political

³⁶ Moderne F., “Etude comparée”, in *Les Autorités administratives indépendantes*, Paris 1988.

³⁷ Varriale G., “Autorità o Authorities?”, in T.A.R., parte II, 1997

³⁸ Cottier B., “Les Independentes Agencies Americaines: un modèle pour l’administration policentrique de demain”, in R.I.S.A. I, 1985 [see 32]

³⁹ Straus P. L., “The Place of Agencies in Government”, in *Columbia Law review*, I, 1984

power. In Spain, the phenomenon is rather reduced: in fact they speak of “*Administraciones Independientes*”, to indicate those organisations endowed with measures more or less emphasised by characteristics of independence, which moreover, exist in a way consistent only with the “Council of Nuclear Security”.

The existing Antitrust Authorities in Italy, all only very recently set up, are “*Energia, Garante Editoria, Giurì Pubblicità*, Authorities to safeguard the communications industries.

This “proliferation” does not seem to respond to the interests of the country, even if some consider it to be a positive evolution by the State towards more agile structures, closer to the citizens. On the contrary, there are those who see the dangers of a multiplication of bureaucratic structures and are afraid of the birth of a new State employee: “*We are full of Authorities*” observed Cassese S., “*these institutions are useful, if they are few, small and efficient*”.⁴⁰

Since the promulgation of the Roma treaties in 1957 there has been continuing debate about the juridical nature and effects of directives, coupled with a developing jurisprudence of the court of justice. It is now acknowledged that Directives may have a direct effect on the legal position of individuals, considered only vertically, as between the State and the individual, and not horizontally, as between individuals. Here, however, the Treaty frames have relied on the device of the Directive, imposing the result to be achieved not upon each member state to which it is addressed, the potential authorities of the (art. 189 EC Treaty). Such a strategy is distinct from the creation of a unified rule and its substitution for hitherto distinct national rules as process primarily accomplished by the directly applicable Regulation of Community it must clearly be seen as a contribution to the process of encouraging improved working conditions, a contribution taking the form of harmonization.

5. Competition law in the global market: challenges and problems

It's always very difficult to establish the correct competitive measures governing companies, to be more precise those equilibriums that are not collusive. These situations can induce cooperative performances that are not always in explicit forms by means of

⁴⁰ Sabatini, in *Il Sole* -24 ore del 24 giugno 1997

contracts or “agreed practices”. The American experience dealt with in the application of the “*Webb-Pomerene Export Trade Act*”, shows that many cartels had a long life, which lasted depending on the conditions of the external market⁴¹.

From this experience which is still avoided today, it was proven that even in Europe, distortions of competition and the formation of monopolies are obstacles to technological advancement and, they have given a boost to the expansion of the market and to the opening of foreign competition.

The industries in which the operations of acquisitions and mergers are more frequent are distribution, agricultural food production, pharmaceuticals and the petroleum and energy industry. *It is not by chance that one refers to situations in which agreements are almost “inevitable”, as happens in markets during transition from public monopoly to competition, the European Community shied away from the possibility of abusing its collective dominant position, principally from the economic point of view that it is difficult to defend*⁴².

The history of almost 50 years of antitrust is one of the most important periods for the process of European integration; the policy of competition and the jurisprudence of competition in all these years have constituted the main instrument for the realisation of the Integrated European Market⁴³. The law must understand the reasons of the economy and transform them into formulas that have a legal sense, but on the other hand, the economy moves in a context of administrative proceedings, and the economic and legal particles⁴⁴ meet and collide in every proceeding, sometimes with satisfying results, sometimes less persuasive and this difficulty arises in all practices relating to competition⁴⁵.

The multinationals present the following structure: balance sheets of single companies don't express economic reality, because exchange rates are only formal, fixed arbitrarily by the same capital of command (buyer and seller, financier and financed, at the same time) that is, transfer of losses from one sector to another, from one country to another. One achieves the advantage of transforming exchange reports between companies, and

⁴¹ Grillo M. "The economic analysis of collusion and the detection of collusive behaviour : new perspectives for antitrust policy and law" in E. Raffaelli (a cura di) "Antitrust tra diritto nazionale e diritto comunitario" Giuffrè, Milano, 2000

⁴² Goyder D. "EC Competition Law" Oxford University Press, Oxford, 1998, pag.376

⁴³ Chen Y., Promises, trust and contracts “in Journal of law, economics and organization, Apr.2000.

⁴⁴ Kranton R. “The formation of cooperative relationships” in Journal of law, economics and organization, Apr.1996.

⁴⁵ Appiano E. M., Il Trattato di Amsterdam, in Contratto e Impresa /Europa 1997, p. 800 e ss..

better still in international exchanges, those which constitute, in their economic substance, simple movements of internal resources between companies.

In the European Union many regulations, directives and the harmonisation of legal systems of the Member States have been made, but even more so, has been the progressive demolition of the *public barriers and private barriers* that segmented the Single Market, through the work of antitrust. With the passing of the years, it has been confirmed that the policy of competition was more effective in determining integration, because it imposed rules more essential for the market.

The European experience shows that its application is not reversible and that it is more generally a strategic refusal, it is so true that this principle was applied to cases in which there was total monopolistic power and was born from an exclusive activity attributed from the State with the objective of limiting or eliminating this said power. For lack of specific measures of regulation, in the markets subjected to liberalisation the use of the “*essential facility*” principle becomes an indispensable instrument to ensure the effectiveness of the intervention of liberalisation. The objective of the protection and promotion of competition is expressed in two ways: **a.)** *Privatisation*, from which the possible effects of industrial concentration are based, **b.)** Construction of the *Single Market* where Authority would be confined within the limits of their own competencies, for a more recent case see “*behaviour by ex-monopolistic companies that harms the opening up of Competition, or, that tries to reintroduce artificial restrictions*” and asserts that “*The reform of regulation should also extend to different services other than public utilities*” and moreover, maintains its intention to hit back more severely against any anti-competitive behaviour spread throughout the entire economic system.

An important impulse to liberalisation came from national and international spheres, and in particular from the European Community, which has supported, and in some cases imposed, regulation policies oriented towards the liberalisation and diffusion of competitive mechanisms. The EC Treaty actually establishes that Member States’ economic policies must conform to the general principles of market economy and competition, supplying numerous direct and indirect instruments, in order to promote interventions of liberalisation in national spheres, from the executive to interventions by the Court of Justice, from recommendations by the Commission to the aforementioned (*peer reviews*). The model of independent regulation authorities took a more consistent

shape in the 1990's, in the wake of the more prominent experiences in North America, Britain and France. Whatever the nature of the preferred organisms of retail regulation, it is important that the general legislative arena explicitly establishes a *favour* for the regulation directed towards the promotion of competition. It would be desirable for the law to make provisions expressly for the Authority, appreciating the intensity and quality of the privatisation process, considering it necessary for interventions of privatisation to carefully analyse the economic characteristics of the sectors involved, with the aim of promoting preliminarily the necessary measures of liberalisation and of restructuring the industry with a view to creating an effective competitive context. Such measures render themselves particularly opportune in the sectors of local public services, which have been less affected by the processes of community liberalisation; arrangements that can limit the competitiveness of control of public companies are not introduced, in the absence of imperative requirements of general interests.

The proposal to revise the regulation of concentrations is directed towards ensuring that the said regulation continues to constitute an effective instrument of control of the concentrations in an evolving political and economic context, in Europe and in the rest of the world⁴⁶. Based on the positive results of the application of regulation in the last ten years, the advanced proposals also try to respond to the challenges represented by the concentrations on a worldwide scale; monetary union, the integration of markets, enlargement and the necessity to cooperate with other jurisdictions. The US are giving a terrible example, in fact protectionism is higher in developing countries than in those that are advanced, where the policy-makers⁴⁷ of these countries exhaustingly try to promote the liberalisation of their markets, and see that the biggest market of the world, that of the United States, is going in reverse. The politicians of the third route have made the slogan of globalisation *their own*, almost meaning that from the social point of view, globalisation is part of the problem, and not the solution.

The logical consequence of this is to think of measures that limit globalisation, while we need measures that complement it, not hinder it. Privatisation of the properties of large companies into the control of the State or public entities seemed, until a few years ago, an essential and supporting element of economic liberalism and, more generally, of market economy.

⁴⁶ European Policy Centre, Making sense of the Amsterdam Treaty, Brussels, 1997

⁴⁷ Relation of the Commission to the Council and the European Parliament Brussels 29 gennaio 2002, com (2002).

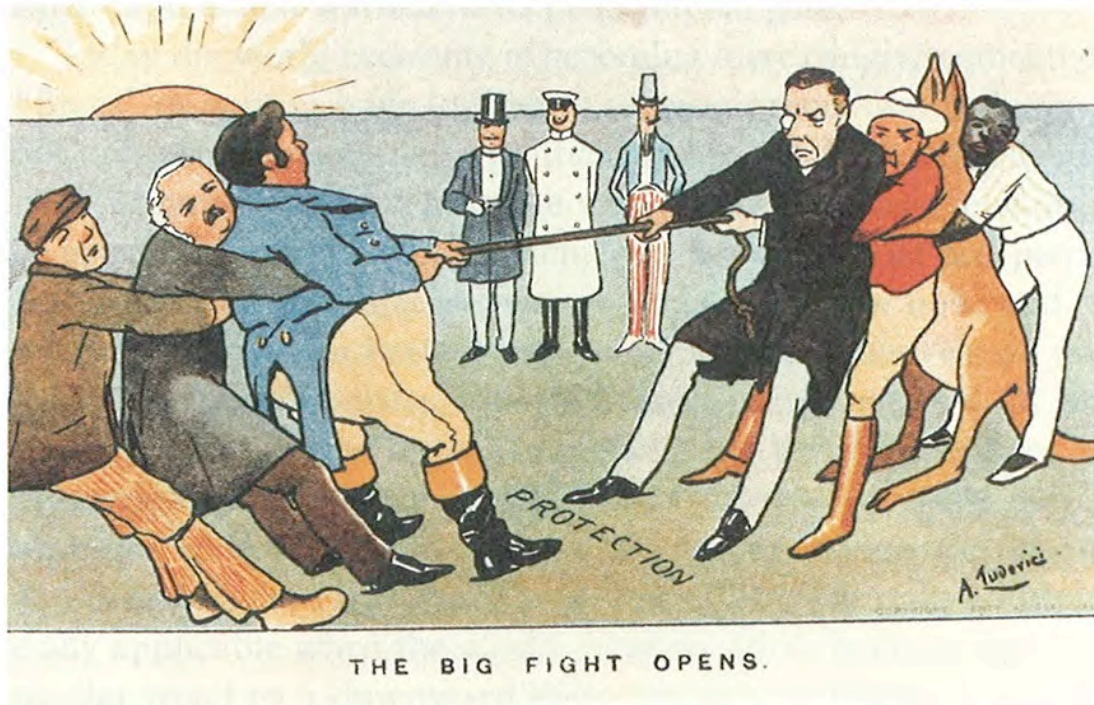
The relational problem between economic power and political power makes two fundamental rights come into conflict, that of the protection of property and that of the protection of freedom of the markets, which in the model of perfect competition are simultaneously guaranteed⁴⁸. In the last decade the interventions on the subject of the regulation of economic activities have led in various countries to a widespread reduction of the obstacles, normative to the function of the market and have favoured a significant opening up to competition. In a democracy it is appropriate that every alternative is discussed, also by the civilian society, and is, therefore, fully justified. Otherwise, every decision can seem arbitrary and dictated only by the abuse of power. The Commission believes that the reform should be based on the principles that are the basis of the regulation of concentrations, that is to say the necessity to ensure an effective, efficient, fair and transparent control of the operations of concentration at the most suitable level⁴⁹, conforming to the principle of subsidiary.

Conclusion

Chapter 1 mainly focuses on presenting the problem of the legislative history of Competition law which has been adopted in order to deal with the trusts that controlled and consolidated American industry at the end of the nineteenth century. In particular we explored in Chapter 1 the experience on “Competition Authority” various historical approaches were mentioned with some reflections. The Competition Authority represents any non-judicial authority or body independent of or incorporated in governmental bodies. The status in the public administration may range from structural independence from Government to being integrated in the ministerial structure, with no evident predominance for any particular approach. However, as a market becomes global and more and more states adopt new rules from a Competition perspective, the change will be largely positive and will increase efficiency. Finally some broad reflection about new perspectives demands different institutional solutions between economic power and political power. In the next chapter 2 will consider the competition law regime that has come to acquire huge significance with both Europe and globally issues.

⁴⁸ United States v. Aluminium Company of America, high Court Suprema 1945,-148 F.2d 416 (2d Cir. 1945).

⁴⁹ Organization of Cooperation and development International -Regulatory -Reform, vol. II, Paris, 1997.



A British poster (early 1900s) showing the fight over tariff reform led by the British colonial secretary Joseph Chamberlain.

He wanted to move away from free trade toward preferential trade with the British empire. For example Australia represented by the kangaroo behind him. In the background America watches.

Chapter 2

STRUCTURE OF ANTITRUST LAW IN THE UE AND US AND JAPAN

Abstract: 1. The basic legislation of antitrust in the US; - 1.1 The Sherman Act (1890) – 1.2 The Rule of Reason – 1.3 The Wilson Tariff Act- the Clayton Act (1914) - the Weeb-Pomerene Act- the Federal Trade Commission Act, the Hart-scott-Rodino enforcement; - 2. European antitrust Law – 2.1 The discipline of Concentrations – 2.2 Horizontal and vertical agreement Articles 101 TFEU (ex Article 81 TEC) and Articles 102 TFEU (ex Article 82 TEC) - 2.3 Regulation n. 01/2003 – 3. Assessment of recent regulation of Japan Authority Agency – 3.1 Merger control - 3.2 Antimonopoly Act - 3.3 Illegal penalty and leniency programme – 4. Comparative analysis of competition law jurisdiction – 4.1 General Aspect – 4.2 European enforcement and restrictive agreements of the competition law difference between EU and U.S – 4.3 The Enforcement a comparative evaluation - Conclusion

Abstract

We have an uneven or barely developed system of competition law in so many member states, so the cross juridical points do not often arise. In principle, though, the different effects produced by interaction 27 member States different legal system will create a variety of approach to this practical problem. I have tried to emphasize the transatlantic rule of antitrust in comparative manner just focusing on EU, US and JAPAN issues.

I don't think it does for those of us who are involved in antitrust enforcement simply to say that we had better not engaged in empirical study because it is too difficult. I think the common law method of developing competition law doctrine, which allows new economic thinking to be incorporated without having our legislature and all Atlantic antitrust dialogue seems to be very largely between the so called "*ordoliberal*" form and the people who are looking for a more economic approach.

We have already got 26 competition authority in Europe and 97 competition authority in the world, the issue of competition law and the various case law development that have occurred in different regimes, most notably the EU, US and JAPAN.

Historic influence view

Country	Influence From
Japan (1947)	USA (1890)
Australia (1974)	USA (1890)
South Korea (1980)	Japan (1947), Germany (1957)
Taiwan (1992)	Japan (1947), Germany (1957)
Thailand (1999)	South Korea (1980)
Indonesia (1999)	USA (1890), Japan (1947), Germany (1957), EC.

The number of countries that have implemented competition law has risen significantly in the past two decades. The drafting of competition laws in these countries benefited from the experiences of some of the more developed countries or communities such as the United States, Japan, Germany and the EU. Next chapter III will clarify progressing European member states policy of antitrust in many aspects involves.

1. The basic legislation of antitrust in the US

The key word of free business is antitrust law, when the market economy functions well, the antitrust works. Different sellers, vying for customers, must produce supplies and services of adequate quality, and at satisfactory prices, or be driven out off the field. That requirement forces them to be capable to buy inputs work, and supplies at the lowest achievable prices, and to use those inputs in such an approach that total production costs are reserved to a minimum. But antitrust law at times not pass, we suppose for one of three reasons: either administration as a matter of guidelines chooses to suppress it, by arrogating to itself the authority to print currency; or antitrust law extinguishes itself, creating the require for authority imposed rule, as for instance in parts of the electric utility industry; or private participants in the market challenge antitrust and thus prevent market forces from operating freely. Where antitrust fails, the administration has two options. It is capable of either look after the consumer from market abuse by directly regulating the firm with monopoly power or restores the vigor of competition through antitrust enforcement that prevents competitors from conspiring to fix prices or individual firms from dominating markets.

The necessity of antitrust legislation unites all modern economic systems based on free principles. The process that brought about the birth of this requirement is, however, very different in US and in Europe, as the paths followed through history by these two continents' economies are very different.

With the emergence of economic activity, the tendency to protect the economy from the threat of monopolies proliferated through ad hoc regulations. Thus the idea emerged that monopolies were an insurmountable obstacle to industrial free enterprise and in this respect, they were viewed very badly. Therefore, in this economic and social picture, it was necessary for the State to intervene in the economy, not with the purpose of stealing certain industrial or commercial fields from the free initiative of citizens, but to preserve competition to the advantage of the market in its entirety.

With this economic system, with its need to promote the free market, the distortions were threatening competition. It is only in recent times that governments have realised that it is necessary to oppose the effects of abuse to which a free an open economy is subjected because of its nature and the original US antitrust principles.

The regulatory principles were classified through agreements based on the types of restrictions put in place. This theory, called the “*Restraint of Trade*”, distinguished two types of agreements: the first were those agreements whereby a part was obliged not to exercise any desired type of professional, commercial or industrial activity; the second consisted of finalised accords to eliminate or to restrict competition, without being based on any contractual principle that could be considered valid on the grounds of reasonableness⁵⁰.

The **Sherman Act** was the first law to protect the market and was issued to eliminate the risk of illegitimate restrictions to competition at a commercial level in US. The Sections defined three types of prohibited behaviour: ‘contract’ which consists of a formal agreement, ‘conspiracy’, and ‘combination’, which consist of an action organised in order to achieve illegal aims, then another two illegal behaviours which are monopolisation and an attempt to monopolise.

It should be noted that this prohibition was more effective than that contained in Article 102 (ex Article 82) of the Treaty on the Functioning of the European Union (TFEU), in fact, monopolisation consists not only in the abuse of dominant position but also in the mere acquisition or the exercising of a dominant power, by means of internal growth.

The penalties foreseen by the Sherman Act are twofold: the Federal State can exercise a criminal action that concludes with a prison sentence or a fine. Or through the institution of injunction, which consists of issuing prohibitions and orders binding parts for a certain number of years⁵¹, (for example, a company refrains from continuing a certain activity). Section 2 of the Sherman Act makes it unlawful for any person who shall monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of an offence shall be punished by fine or by imprisonment not exceeding three years.

The legislative histories of the Sherman Act demonstrate the clear and exclusive policy intention of promoting consumer welfare, which means improvement of allocative efficiency without a substantial harm of productive efficiency. The legislative principles

⁵⁰ This principle (reasonableness) will follow the standardization antitrust for all its history until today, in how much profit half in order to temper an excessive rigidity that always risks to characterize the legislation on the competition.

⁵¹ To notice also the possibility, granted from the law to the private ones, to exercise the action it turns to the result of an equal compensation to the triple one of the endured damage because of a violation of the prohibition you set up from the Sherman Act, is moreover possible to conceive one violation of the normative antitrust in riconvenzionale center from part of a private part in a process.

on the subject of competition in the US are since long ago⁵² based on the fundamental principle of reasonableness: the “**Rule of Reason**”, that permits an agreement prohibited by the antitrust laws to be considered lawful if “it is reasonable and useful in the interests of community”⁵³.

An example of when the rule of reason was applied is found in that which the Americans call “the doctrine of the GTE Sylvania case”⁵⁴, the namesake case, in which, according to the principle sanctioned, an agreement between a producer and a distributor that tends to harm the exclusivity of another distributor, is not considered illegal in itself or by itself; such an evaluation is made on the principle of reasonableness⁵⁵.

In vertical agreements concerning prices, the criteria of reasonableness tends to create a standard that respects the balance of the market which, if it isn't exceeded by some kind of agreement, creates a favourable presumption of unlawfulness with respect to the same agreement.

In horizontal agreements, those is, where agreements between distributors of a product, prices are fixed in a uniform manner, and then applied to the final consumer, these agreements aim to divide the sales areas to the public, or they aim to impose their specific and common interests on the producer. In all of these cases, the agreement is considered prohibited principally or presumably at least. The sections 73-74 of the “**Wilson tariff act** “1894, enacted as part of a tariff statute, are antitrust provisions, the purpose of these provisions was to punish efforts to abuse the import laws of the US through agreement or conspiracies between importers and other person. The act prohibits every combination, conspiracy, trust, agreement or contract made by two or more persons or corporations either of whom engaged in importing any article from a foreign country into the US, where the agreement is intended to restrain trade or increase the market price in any part the imported articles of the US, or any manufacture into which such imported article enters or is intended to enter.

The act provides for seizure of the imported articles, a feature which has been employed to induce foreign corporations to consent to US jurisdiction.

⁵² Bernini G. Un secolo di filosofia antitrust.

⁵³ The rule of reason fu per la prima volta applicata nei casi Standard Oil e American Tabacco dalla Corte Suprema degli USA nel 1911.

⁵⁴ Sentence Mitchell v. Reinolds. 1P Wms.181, 24 Erg. Rep.347(K.B.1711).

⁵⁵ Continental TV, inc. v. GTE Sylvania, inc. 433 U.S.36 (1977).

In most cases the consent has been granted and there has been no need to use the forfeiture provisions. Moreover, in nearly every case which has involved allegations of violation of the Wilson tariff act, there have been double allegation of the violation of the Sherman act, treating the former as an application of the latter to importers. Accordingly the Wilson tariff act has little independent significance.

The “**Clayton Act (1914)**” which contains provisions of merger control and also tying, price discrimination, and exclusive dealing, it was issued with the aim of completing antitrust regulation, extending it to other kinds of restrictions to competition not yet subjected to federal control. Based on this law, it is sufficient to diminish competition in a substantial way or attempt to create a monopoly in a commercial field, to be considered anti-competitive⁵⁶. The definitive prohibited behaviours of this law rotate around the concept of ‘discrimination in prices among different buyers of goods’⁵⁷.

The law also prohibits a particular type of oppressive contract, that is, one that obliges buyers to purchase other products from the same company so that they can get the goods and services that they require⁵⁸. As for the sole rights clause, this type of restriction must also, in order to be pursued, present the potential effect of diminishing competition in a substantial way or be attempting to create a monopoly.

Under examination, this law, with the modifications made in 1950⁵⁹, forbids a company whose activity consists of foreign business to buy the shares or the property of other similar companies, if, naturally, the effect is that of creating a monopoly or restricting competition⁶⁰.

Finally, the prohibition against concentrating the administration of many companies in the hands of the same individual, among which at least one has non-distributed capital,

⁵⁶ This formulation has been adapted, to European level, the artt. 85 and 86 CE, therefore like, to Italian level, from the Law n.287/90. It moreover is confirmed from the jurisprudence of the Law court.

⁵⁷ Clayton Act, sez.2.

⁵⁸ Bernini G., a century of philosophy antitrust, Bologna, Clueb, 1991, pp 48-49.

⁵⁹ For the interpretation of the Supreme Court of the USA three elements are necessary in order to consider illegal in the how many such vessatorie clauses, that is: the vendor must have a market power on the main product; the secondary main product and that, than bier are obliged to buy, must be various; the conditioned sale must generate substantial an adverse effect in the market of the by-product.

⁶⁰ In 1950 it was emanated the Celler-Kefauver Antimerger Amendment Act, that the disposed one of the Clayton Act in the sense widened to make to fall back under its dictation the completed concentrations is through acquisition actions, is of part of the not share patrimony, always that there is the risk of effective restrictions of the competition or monopoly. Moreover, such amendment has sanctioned of the Clayton Act also to vertical fusions and conglomerates them.

surplus and profits which, in total, exceed a certain amount⁶¹, and that these companies are always in competition between themselves, is put in place.

The Clayton Act discarded behavior that represent not an accomplished trade restraint, as with the Sherman Act, but that might do so in the future. Therefore the regulation focuses on conduct, the effect of which “may be substantially to lessen antitrust policy, or to tend to create a monopoly in any line of commerce.” Getting anticompetitive conduct “in its incipency,” the Clayton Act even so requires a reasonable possibility not the mere hypothetical possibility that the conduct challenged would, if undisturbed, mature into a limit of commerce.

Section 2 of the Clayton Act, (as amended 1936 by the Robinson-Patman Act) in dealing with “*price discrimination*”, was rewritten but not improved. This provision would apply to discriminatory prices charged by foreign sellers in American import transactions, but would reach export situations in only a limited number of complex cases. It is interesting to note that the cases which have been the subject of the greatest controversy, concerning the law to foreign activities, included interstate commerce allegations. Technically the courts have used two distinct assessments for applying the interstate commerce requirement. One is whether the activity is “in “or “in the flow of” interstate commerce; the other is whether interstate commerce has been “affect”. Other requirements of Section 2 of the Clayton Act restrain brokerage fees, the payment of certain kinds of commissions, or other compensation.

Section 3 of the Clayton Act in general, make it unlawful to sell or lease goods, certain kinds of agreements, in which a product is sold only on the condition that the purchaser will not deal in the goods of a competitor of the seller. That section also applies only where the effect of the agreement “may be to substantially lessen competition or tend to create a monopoly in any line of business”.

Section 7 of the Clayton Act the anti merger, (as amended by the Celler-Kefauver Act of 1950⁶² trough which congress expressed concern about increasing concentration). Section 7 prohibits mergers and acquisitions “where in any line of commerce in any

⁶¹ This section has been applied in concrete to vertical, horizontal concentrations and conglomerates them that are (when the parts operate in different markets). In particular, in the case of vertical concentrations, the giurisprudenziale appraisal part from the fixation of a reference market (relevant market), which the effects of the conduct are estimated trades them.

⁶² Economic Aspects of Antitrust: Readings and Cases By Henry Adler Einhorn, William Paul Smith Published by Random House, 1968 461 pages

section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 12 of the Clayton Act is the basic provision governing in person jurisdiction in antitrust litigations. Its function is to fix a venue, or place of suit in antitrust cases, and determine where the defendant may be served with process in such suits. Section 15 of the Clayton Act empowers the Attorney General, and Section 13(b) of the FTC Act empowers the Commission, to seek a court order enjoining consummation of a merger that would violate Section 7.

The "**Webb-Pomerene Act**" provides a limited antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage in collective export sales. The Webb-Pomerene Act declares that an association entered into the "sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association" is not illegal under the Sherman Act, provided that it does not have an anticompetitive effect in the United States and also is not in restraint of the export trade of any domestic competitor of such export association. The exemption applies to the export of goods, wares or merchandise only. To obtain the exemption, export associations must file their articles of agreement and annual reports with the Federal Trade Commission, but FTC approval is not required. As was made manifest by the European Commission's attack on the export activities of members of the Webb-Pomerene association and other in the "*woodpulp*" case brought by the commission under European Community competition Law, registration under Webb-Pomerene does not confer any from prosecution under foreign antitrust laws. Although utilized by some US industries, the Webb-Pomerene procedure has not conferred benefits on US export commerce on broad scale. The jurisdiction of the competition laws of the most countries does not extend to activities that impact only overseas markets. In fact, some countries have special legislation authorizing export associations, so long as these do not have negative effects in the domestic markets⁶³. The congress enacted establishes an independent authority group the Federal Trade Commission and provide it the power to enforce the Clayton Act and the Robinson-Patman Act (but not the Sherman Act), and challenge, in the words of the Section 5 in principle "unfair methods of competition can

⁶³ The webb-Pomerene Export Trade Act provides antitrust immunity for the formation and operation associations of otherwise competing businesses to engage in collective export sales. See Antitrust division manual, Chapter 2, available <http://usdoj.gov/atr/foia/divisionmanual/chs.htm>

encompass more than the generally enforcement of the antitrust laws, but in practice the Federal Trade Commission represents a duplicative, or complementary, enforcement regime, depending on one's viewpoint.

The **Federal Trade Commission** is a particularly authoritative organisation, created to watch over the application of the antitrust law; the Commission is concerned with preventing and suppressing acts of unfair competition, for the benefit of the economy in its entirety⁶⁴. This Commission has the right to investigate in advance, any practices or agreements that it thinks could result in restricting competition⁶⁵. Pursuant to its authority over unfair methods of competition, the Commission may take administrative action against conduct that violates the Sherman Act and the Clayton Act, as well as anticompetitive practices that do not fall within the scope of the Sherman or Clayton Acts. The Commission principally worked to increase the jurisdiction of the Federal Trade Commission to all 'unfair methods of competition in business' and not only to cases of 'unfair competition'. It should be noted that in its jurisdictional headquarters, the Federal Trade Commission accepts the burden of proof. Federal Trade Commission amended in 1938 by the Wheeler-Lea Amendments, independent agency and charged it with prevent a variety of other consumer protection statutes, including the Truth-in-Lending Act, the Federal Trade Commission Act enforces the Fair Credit Reporting Act, and the Fair Packaging and Labeling Act.

The Miller Tydings Act was repealed in 1975, with a definitive position held by Congress, which established the prohibition of State legislation that considers agreements, which fix the sale price of goods, to be unlawful. It is exactly these state laws that have led to the creation of the Miller Tydings Act, with rules that are substantially similar to the federal ones. According to this law, all agreements that establish minimum retail prices are permitted, if they can be evaluated as legitimate in the State in which the same retail will take place.

A special antitrust regulation is applied to the so-called 'regulated industries', characterised by particular public controls and by property rights of the same nature. For example, the corporations that manage transport and credit institutions belong to this category. It is possible that the companies that re-enter the market and are affected

⁶⁴ Such competition comes estimated in the sense that the elimination between more enterprises than it to means of an agreement would constitute one violation of one whichever of the laws antitrust.

⁶⁵ You notice yourself that in the American legislation it is stretched to unitarily disciplining to the prevention and the repression of treacherous competition and monopolies.

by the regulation, control entry to the market or eliminate the competition already present in it. In the case in which the competitors, or also the potential competitors, agree to fusions or concentrations, the above mentioned corporations tend to limit the realisation of such agreements only in the cases in which they appear not to be in the public interest.

With general antitrust law, these cases of planned fusions or concentrations must be presented in advance to the Department of Justice and the Federal trade Commission, to obtain permission from these organisations. Moreover, all potential fusions that affect competition in any branch of business or in any geographic area of the USA are prohibited⁶⁶.

These rules are interpreted through two levels of evaluation; in fact, it is necessary to delimit the reference (relevant) market⁶⁷, in a precise manner. Subsequently, it is necessary to try and establish criteria capable of evaluating the tolerable and intolerable degrees of concentration.

It is fundamental at this point to assess the applicability of American antitrust law to extraterritorial agreements. The previously enforced territoriality criteria have been replaced by the Supreme Court with a different vision⁶⁸, independently of where these acts take place or where prohibited agreements are concluded based on the American antitrust laws when the illegal effects of restrictive competition can be witnessed internally in the U.S. sanctioning that any person can be punished. It can be said, therefore, that the principle of territoriality of effects has supported the territoriality of acts.

Merger enforcement was fundamentally changed in 1976, when the **Hart-scott-Rodino** Antitrust Improvements Act⁶⁹ encouraged state antitrust enforcement became a force with which to be reckoned. The Hart-scott-Rodino gave the agencies the ability to investigate merger using the club of delay consummation to enforce compliance with discovery requests made through the Hart-scott-Rodino process. Today attorney general can file action either under those laws or under federal law. After having seen the

⁶⁶ On the point they look at International the Operation Guidelines? of the Department of Justice, 10-11-1988, in Trade Regulation Reports 20,589.

⁶⁷ the Clayton Act is confronted on the point.

⁶⁸ used Viene, online of principle, the appraisal technique intercrossed of the question, that it allows, through a hypothetical forecast, to estimate upgrades it them modification of the competition of the market based on the consumption data puts into effect them and to the presumed movement of the users in the market that would be come to create to continuation sub-judice operation.

⁶⁹ Stephen Calkins, "perspectives on State and Federal Antitrust enforcement" 53 Duke L.J. 673 (2003).

contents of the substantive law, it seems opportune to focus on the powers of the Department of Justice and of the Federal Trade Commission, especially their investigative powers that were increased in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act. The procedures that previously permitted the authorities to supervise are now more effective in a preventive sense, in that, they allow them to take action before the activities begin⁷⁰. This argumentation, in fact, can express ‘class actions’⁷¹ against those who damaged public interests through violations of the laws of competition.

Competition law has developed into a relatively stable equilibrium, devotes the vast majority of its resources to carried criminal cartel cases and challenging mergers.

⁷⁰ For the new jurisprudence on the point the sentence *United States v. Aluminium Company of America* is looked at, 148F.2d 416 (2d cir.1945). For the old one the American sentence is looked at *Banana Co v. United Fruit Co*, 213 U.S.347 (1909).

⁷¹ In truth, a limit of the preliminary questions to investigative scope that the law in speech has introduced is in the fact not to be susceptible of execution forced in specific shape, where the subjects that of are addressees not realize spontaneous and independent way.

2. European antitrust law

European antitrust legislation with respect to American antitrust legislation has been delayed in being created, but it has drawn a great advantage. The discipline finds its regulatory roots in the EU, in the regulations of the European Council directives, and also in the jurisprudence of the Community Law Court.

Articles 101 (ex Article 81) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between companies that restrict competition; acts of illicit exploitation of dominant position in the market are prohibited respectively by Articles 101 (ex Article 81) and Articles 102 (ex Article 82). The Article provides control and authorisation preventative to the operations of concentrations between companies, the EU Treaty does not mention this subject, but it is covered by Council Regulation n. 4064/89 that came into force on 21/9/1990, new EC Merger Regulation No 139/2004.

The dimension of the company is absolutely irrelevant, also its legal form or the fact that its legal personality is or is not recognised or that it is public property, private property or mixed.

The concept of a company, for antitrust law, is composed of personal, material and immaterial elements that refer to an autonomous legal subject that actively participates in economic life, pursuing a specific aim⁷². It is possible that the company is considered a human being who always assumes the risks of the company and who participates in at least one of the stages of production and distribution of the goods and services offered⁷³.

At this point the problem of evaluating the applicability of the antitrust laws to groups of companies is posed. The “theory of group unity” has been elaborated, according to which, the group formed of the Mother Company and subsidiary companies is considered as a single company, this makes it impossible to apply Articles 101 (ex Article 81). Another consequence of this theory is the possibility of attributing each

⁷² On this point compare the judgement of Kleochner by the Court of Law on 13/7/1962 cases 17 and 20/61.

⁷³ It should be noted that, according to this view, neither workers’ syndicates nor consumer associations constitute companies. Ferrari Bravo L. and Moavero Milanese E., *Lessons of Community Law*, Naples, Scientific Editorial, 1997, p. 338.

company that is a part of the group, with the responsibility of anti-competitive behaviours held by other companies in the same group⁷⁴.

The Member States are also subjected to the antitrust regulations, based on Articles 101 (ex Article 81) and Articles 102 (ex Article 82) and Articles 3 and 5 of the EEC Treaty, they can be called to answer for non-fulfilment of the Treaty by the Law Court, for having carried out public interactions in the economy contrary to the regulations on competition⁷⁵.

2.1 The discipline of Concentrations

Possible cases of concentrations can originate from mergers of companies previously independent and autonomous, or from a third party acquiring control of a company. A merger arises when, without warning from a legal point of view, the previously independent activities of many companies are subsequently organised in such a way as to create a single economic activity operating in the market.

Mergers can occur both in cases in which a company, maintaining its own legal identity, absorbs other companies, and they lose their identities, and in cases in which all the legal identities of the companies participating in the operating cease to exist and a new company equipped with its own legal abilities ex novo is created. With regards to acquisitions of control, these are recognisable in cases of purchasing shareholdings of control, also through pacts or contracts of various kinds, like those that have industrial property as their objective, as well as through the setting up of laws in the company, or the cessation of goods and company profits, or the transfer of votes.

Because it is possible to make use of Articles 101 TFEU (ex Article 81 TEC) the existence of an agreement between companies is always necessary, for example, of a concentration originating from an OPA of antagonist companies; instead for the application of Article 82, it is required that one of the companies participating in the concentration already holds a dominant position in the market. The Commission realised that a more elastic application of the so-called articles could not have compensated the lack of an affected regulation ad hoc in the long term and put an end to

⁷⁴ The judgement ICI against the Commission on 14/7/1962, case 48/69.

⁷⁵ The judgement Hymn against Atab on 16/11/1977, case 13/77.

the uncertainties by issuing Regulation n. 4064/89 that came into force on 21/9/1990, new EC Merger Regulation No 139/2004.

The Regulation under discussion is applied only to concentrations of “Community dimensions”, taking as its legal parameters the total turnover of the company, including the profits of said company, but also those companies directly or indirectly controlled by it. Therefore, it can easily be said, that the criteria on which the Regulation rests is not so much on the operating dimensions, as the parts of the entity that carry it out.

The instance of concentrations represented a regulatory void of the EU Treaty that was not delayed in becoming so intolerable as to necessitate a solution⁷⁶. Initially, articles 101 (ex Article 81) and Articles 102 (ex Article 82) were applied in the instances under discussion⁷⁷, but this application caused insurmountable problems from the beginning, since, using these two articles required the existence of characteristics non always present in concentrations.

In one of its Communications, the Commission specifically supplied the interpretative criterion as a basis on which to distinguish simple co-operations between companies from concentrations. It is necessary that a company endures the control joined by other companies that is the decision regarding the common society must be taken by the mother companies in agreement. Moreover, when speaking about concentrations, the common company must exercise, in practice and in an unspecified time, every function of an autonomous activity. Lastly, the common company must not condition a co-ordination of the competitive behaviours of the mother companies.

The incompatibility of a concentration depends on its cause or reinforces a dominant position able to eliminate or obstruct the creating of an effective competitive situation within the Community market or a relevant part of it. The Commission’s powers in cases of prohibited behaviour reach the infliction of financial sanctions, without ever pushing itself to those of a penal character. Under the Merger Regulation, cooperative joint ventures that result in a "concentration" are subject to pre merger notification and review by the European Commission’s.

⁷⁶ One must remember that no such lack was regarded, instead the CZECH Treaty, took into consideration and disciplined this subject to its Article 66.

⁷⁷ Article 82 was first applied to a case of concentration in the judgement of Continental Can on 21/12/1973, case 6/72.

2.2 Horizontal and vertical agreement Articles 101 (ex Article 81) and Articles 102 (ex Article 82)

Through the analysis of Articles 101 (ex Article 81) one observes that some anti-competitive behaviours are forbidden: both agreements and agreed practices can be detrimental to commerce between Member States, with the effect of obstructing, reducing or distorting competition within the common market. Instead Articles 102 (ex Article 82) forbids the illicit exploitation of dominant positions on the part of companies in the common market or on a substantial part of it.

Another noticeable distinction between agreements and agreed practices is in the existence of exceptions to the legality of the first, against the absolutely insurmountable prohibition of the second. It is, in fact, possible not to subject an agreement to Articles 101 (ex Article 81) when the subjects who establish it are considered irrelevant in the market in which the agreement exists (so-called agreement of minor importance), that is, they are of negligible dimensions from the point of view of the turnover and their geographic area of action, as well as the product itself. In the presence of this irrelevancy it is believed impossible that the agreement can hurt competition in the common market. To apply Articles 101 (ex Article 81), it is necessary to determine two conditions: the first is a restriction of competition, also potential, and that can alternatively create the object or the effect of the prohibited behaviour⁷⁸. The second condition is the verification of harm to Community business, which must be sensitive, although also only potential⁷⁹.

Agreements in violation of Articles 101 (ex Article 81) can be distinguished vertically and horizontally according to how they are positioned by the operating companies in different stages of the production and distribution of a process, or on the same level of it. Examples of this first type are agreements of exclusive distribution of a product in a particular geographic area and speculative agreements of exclusive purchase, which commit a contractor to buy from a single producer⁸⁰. Moreover, they are vertical agreements, those of selective distribution, which give the manufacturer the possibility

⁷⁸ The decisions *Miller* on 1/12/1976 and *Sandoz* on 13/7/1987.

⁷⁹ The judgement *Société Technique Minière* on 30/6/1966, case 56/65.

⁸⁰ An example of the first type is the judgement *Tipp-Ex* on 8/2/1990. The second type are the judgements *Brasserie de Haecht* on 12/12/1967, case 23/67 and *DE Norre-Concordia* on 2/2/1977, case 47/76. It was established that exclusivity is limited to a maximum of five years, with the right of renewing. The company must have a series of products that are joined by a connection of type or commercial use

of selling only through specific distribution channels, always assuming that the selection is not based qualitative objective criterion (in that case they are allowed)⁸¹. They are part of horizontal agreements, those turned towards placing pre-determined prices on the market (so-called “price fixing”), or those relative to the conditions of sale and purchase⁸². Moreover, agreements that impose specific quantities of production or of company investments⁸³, as well as those on the division of markets⁸⁴, or agreements (so-called specialisation) that pledge to produce only particular goods and services belonging to a precise sector, leaving the exclusive production of other specific goods and services to their counterparts, so mutually dividing and eliminating competition in individual delimited fields⁸⁵ are always illegal⁸⁶.

Another typical example of a horizontal agreement is that which force who wants to have a specific performance, to also demand it from others as a condition of obtaining that, which is desired⁸⁷. There are many ways that companies in the condition to lay down the law in the market can use it to force those who are weaker to submit to their commercial blackmail. Those who, for example, do not respect agreements of this kind can suffer acts of boycott carried out collectively by other producers and distributors⁸⁸.

The dominant position of which this is about is also distinct from monopoly: Article 102 (ex Article 82) requires that the company under discussion is able to regulate the market in spite of competition that, even if impotent, still exists. Instead, in circumstances of monopoly, competition is presumed to be completely obliterated⁸⁹.

To evaluate if the position of a company is dominant or not, it is necessary to refer, one more time, to the relevant market, the category of American origin, that takes the market into consideration both from a geographical point of view (signs of dominant position can be barriers to entry) and from the product point of view (the ability of

⁸¹ The decisions of Omega on 28/10/1970 and Villaroy and Boch on 16/12/1985, as well as the judgement of Vichy on 17/2/1992, cases T-19/91.

⁸² The decision Eurocheques on 10/12/1984

⁸³ The decisions Rivestimenti Bituminosi on 10/7/1986; Polypropylene as stated above; LDPE and PVC on 21/12/1988

⁸⁴ The decisions Chinino Cartel on 16/7/1969 Cement Cartel on 30/11/1994; judgements Parke Davis on 16/7/1968, case 24/67; Consten/Grundig on 13/7/1966, cases 56 and 58/64.

⁸⁵ Jaz-Peter on 22/7/1969 and ENI-Montedison on 4/12/1986.

⁸⁶ The decisions Colouring materials on 24/7/1969 and Polypropylene on 23/4/1986; as well as the judgement Zuccheri on 16/12/1975, reunited cases 40-48, 54-56, 111, 113, 114/75; Polypropylene on 24/10 and 12/12/1991, cases T1/89, T2/89, T3/89, T4/89, T6/89, T7/89, T8/89; Publishers Association on 9/7/1992, case T66/89.

⁸⁷ The parallel to the American Institute is the so-called “tying clause”. The decision Vaessen Morris on 10/1/1979 (for tying clauses); Distillers on 21/12/1977; judgement VCH on 17/10/1972, case 8/72.

⁸⁸ The judgements Fadetab on 29/10/1980, cases 209-215 and 217/78; Wallpapers on 26/11/1975 case 73/74.

⁸⁹ The judgements United Brands; Hoffman -LaRoche (vitamins) on 13/2/1979, case 85/76.

substitution of the category of products offered on the market is evaluated)⁹⁰. Typical examples of abuse of dominant position can be given by the imposition of sale and purchase prices (in American law “predatory pricing”)⁹¹, or by the subordination from the conclusion of a contract to the acceptance of clauses unwanted by the buyer⁹², as well as the imposition of obligations on production or distribution⁹³. Moreover, forms of discrimination can be many, from fixing different prices to different buyers⁹⁴.

In Articles 102 (ex Article 82) the illicit exploitation of dominant position in the market is declared illegal, when this harms business between Member States; the dominant position can be held both by an individual company or by a group of companies, even if they are not connected by any form of agreement, provided that a casual link between the abuse and the dominant position is recognisable, deriving from the set of positions held by the individual companies of the group⁹⁵.

One notes that the prohibition does not have as its object the dominant position in as much as it is permitted to achieve it and maintain it, but abuse of this position, such as causing harm to the normal equilibrium of the inter-Community market. The differences with Articles 101 (ex Article 81) regard above all, the agreement in as much as and independently from the harm, even potential, that it can cause to the market. Articles 102 (ex Article 82) forces an evaluation of an effective harm to consider the exercising of power deriving from a dominant position abusive. In second place, just because of the presumptive character of the prohibition ex Articles 101 (ex Article 81), it makes provision for the significant exceptions, while the prohibition ex Articles 102 (ex Article 82) has an absolute character⁹⁶. A clear parallel is noted in principle with the American antitrust legislation, according to which agreements between non-EU companies that have negative effects on the Community market are subjected to Articles 101 (ex Article 81)⁹⁷. Contrary to the criteria of the applicability of the

⁹⁰ Again the judgement *United Brands* and the homonym decision on 17/12/1975.

⁹¹ The judgements *Tournier and Lucaraen* on 13/7/1989, cases 395/87 and reunited cases 110, 240-242/88; *General Motors* on 13/11/1975, case 26/75; decisions *ECS/AKZO* on 14/12/1985.

⁹² One returns to the American category of “tying clauses”, which occurs more frequently in the application of Article 82, rather than in Article 81. See cases *Hilti* on 22/12/1987; *Hoffman-La Roche*; *British Telecommunications* on 10/10/1982; *Microsoft* on/7/1994; *Tetrapak* on 14/11/1996, case 333/94.

⁹³ The decisions *Zoia* on 14/12/1972; *Hoffman-La Roche*.

⁹⁴ The decision *GEMA* on 2/6/1971 and the *United Brands* case

⁹⁵ *Ferrari Bravo L. and Moavero Milanesi E.*, *Lessons on Community Law cit.* Compare the judgement *Vetro Piano* on 16/3/1992, reunited cases T68/89 and 78/89.

⁹⁶ The judgement *Tetrapak* on 10/7/1990, case T51/89.

⁹⁷ How is it possible to apply Community Law in this case? If an associated company is present in the Community market, it will be possible to return to the principle of group unity, subjecting the company to the sanctions provided

regulations on competition in the USA, is the clause that states that Articles 101 (ex Article 81) is not applied to agreements relevant only out with the Community market, although they exist between Community companies.

2.3 Regulation n. 01/2003

Three years after the compilation of the White Paper on the modernisation of the regulations concerning the application of Articles 101 (ex Article 81) and Articles 102 (ex Article 82) Treaty⁹⁸ and forty years after the issuing of Regulation 17⁹⁹, formerly applied to *Articles 85 and 86 of the EC Treaty (from here on in, the Article will adopt the numbering introduced by the Treaty of Amsterdam)*¹⁰⁰, finally added to the reform of the rules of competition through the Regulation of the Council, on December 16th 2002. The function of this new instrument will be to replace its predecessor no. 17, characterised by a strong centralisation of power towards the European Commission and a presumption that potential agreements dangerous to the regulations of Articles 101 (ex Article 81) (1)¹⁰¹ and situations of abuse of dominant power according to Articles 102 (ex Article 82) of the EC Treaty¹⁰².

This regulation however, being by nature less malleable than Articles 101 (ex Article 81), has always escaped criticisms concerning the operation of the Regulation, and for this reason Regulation no. 17 has intentionally compressed as many powers as possible inside the community competencies, permitting in this way only a coherent, continuous and systematic application of the regulation, consolidated moreover by an abundant jurisprudential output by the European Law Court.

for the practices for which the mother company is responsible. Otherwise the only possibility to respect the regulation is to stipulate finalised international agreements this purpose, like those made between the European Union and the United States.

⁹⁸ *White Paper* man on the modernization of the norms for application of articles 85 and 86 of the Treaty CE, Program of the Commission n. 99/027, Brussels, 1999, available one on the situated official UE in all the communitarian languages.

⁹⁹ GU L 13 del 21/2/1962 modified from last regulations n.1216/1999 GU L 148 del 15.6/1999.

¹⁰⁰ To continuation of it ratifies of the Treaty of Amsterdam of 2 October 1997, entered in vigor 1° May 1999, have been brought modifications and introduced one new numeration to the Treaty European and to deals to you that they institute the European Community;

¹⁰¹ “They are incompatible with the common market and prohibits all to you the agreements between enterprises, all the decisions of associations of enterprises and all the practical ones agreed that they can pregiudicare the commerce between States members”.....

¹⁰² Incompatible with the common market and prohibited, in the measure in which it can be some prejudice to the commerce between States members, the exploitation illicit di one dominant position.

Nevertheless, today the situation of the European market presents profound differences with respect to forty years ago. From six member States it has, in fact, arrived (or better still, will arrive in a short time) at twenty-five and the internal market can at that time consider itself a reality consolidated also through the adoption of a single currency.

Until when the Commission will in fact remain the holder of power, of which Article 101 (ex Article 81) (3) has already stated, it will not only be forced to dedicate many resources to a purely administrative job, but will involuntarily find it creates strong frictions in the data management systems of the national authorities, by now mature and able to manage completely autonomously more complex tasks.

For all these reasons the Council, following an intensive study by the Commission, resolved itself principally in the compilation of the White Paper on the modernisation¹⁰³.

In the Council's Proposal of Regulation, presented by the Commission and concerning the application of the rules of competition by companies of Articles 101 (ex Article 81) and Articles 102 (ex Article 82)¹⁰⁴. In the interesting Conference organised by the European Parliament in November 2000 in Fryeburg to discuss the White Paper, it was decided through the issuing of the new Regulation, to reform the actual operating system of articles 101 (ex Article 81) and articles 102 (ex Article 82), in observance of the powers conferred by art. 107 TFEU (ex Article 87 TEC) (1) according to which, the Council can produce all "*the useful Regulations and Directives for the final application of the principles contemplated by Articles 85 and 86*".

In particular, the reform introduced by the new Regulation on the subject of applying the rules of competition, has art. 107 TFEU (ex Article 87 TEC) (2) as its legal base according to which, through the above mentioned legal acts, the Council has complete power to "*determine the application procedures of Articles 101 TFEU (ex Article 81 TEC) paragraph 3 respecting the necessity to exercise an effective surveillance and in the meantime, simplifying, as much as possible, administrative control*" and art. 107 TFEU (ex Article 87 TEC) (2) e – according to which the regulations of paragraph one

¹⁰³ Note III.

¹⁰⁴ Proposal of Regulations of the Council introduced from the concerning Commission and application to the enterprises of the rules of competition of which to articles 81 and 82 of bringing the treaty modification of regulations (the EEC) n. 1017/68, (the EEC) n. 2988/74, (the EEC) n. 4056/86 and (the EEC) n. 3975/87 Regulations application of articles 81 and 82 of the treaty.

of the same Article has the aim of “*defining the relationships between the national legislation of one part and the regulations of the present section...*”

Today Regulation no. 01/2003 is characterised, therefore, as a result of years of community experience and not as a conflicting matter to distort competition and so, presents itself as an instrument of benefit that, includes various different points, such as:

a. The role of national authorities in EU competition policy;

An organisation of this type inevitable requires close cooperation between the different local authorities, which are involved in the first person in the management of cases of common interest and international character. Such cooperation plays a part in the well-known and ambitious International Competition Network project established in 2002 on the trail of the very successful **International Competition Policy Advisory Committee** (ICPAC) project, established in the USA in 1997. An example of cooperation between guarantor authorities is represented by Article 22(1) of Regulation no. 01/2003, which makes provision in order to verify the existence of a violation of art. 101 TFEU (ex Article 81 TEC) and 102 TFEU (ex Article 82 TEC) of the Treaty. Each national authority can start legal proceedings in the name of and on behalf of the applicant authority against the buyer of goods in his own territory, respecting the internal legislation. The new Regulation no. 01/2003 redesigns the relationships map between the national Institutions and the community ones on the subject of the application of Articles 101 TFEU (ex Article 81 TEC) and 102 TFEU (ex Article 82 TEC). Nevertheless, the Commission will always maintain a function of general control and will have the power to take away the proceedings from the national authority, to concern itself in the first person, in the case that it doesn't consider the first proceedings to be in a position to adequately fulfil its task. Moreover Article 11(6) makes provision for “*The beginning of proceedings on the part of the Commission for the adoption of a decision...depriving the guarantor authorities of the competition of the member States and of the jurisdiction to apply Articles 101 TFEU (ex Article 81 TEC) and 102 TFEU (ex Article 82 TEC) of the Treaty*” even if “*...there has been previous consultation*” by the authority in the case that it has already started proceedings.

b. Investigative powers of the Commission in correspondence with the cooperation of the national authorities;

The Insertion of the new regulation has given the Commission the power to start checking in various premises with regards to the offices of the company under investigation. As a result of permitting the Commission to adequately carry out its functions, Regulation n. 01/2003 makes provision for a considerable expansion of the investigative powers within this last function with respect to Regulation n. 17 “First Regulation implementing 101 TFEU (ex Article 81 TEC) and 102 TFEU (ex Article 82 TEC) of the Treaty”. In reality, it is necessary to distinguish between the context community decisions, which would remain the exclusive competency of the EU organisations (so that, for example, the control of the legitimacy of decisions is reserved by the Law Court), and the context of coercive measures adopted as a result of insuring the obligation of the Commission’s decisions. Only these last functions, in fact, remain the competency of the national judge, who in granting them, must verify that they respect the principles of proportionality and are compatible with the internal regulations.

Therefore, it will have the possibility, in the sphere of its own investigative powers, to “ask whatever representative or member of personnel of the company or association of companies to explain about facts or documents relating to the object with the aim of checking and verbalising the answers” [Article 20(1) e] and not only to request oral explanations “but has the power to ask any information it wants” as seen in Regulation n. 17 “First Regulation implementing Articles 101 TFEU (ex Article 81 TEC) and 102 TFEU (ex Article 82 TEC) of the Treaty”.

c. Imposition of fines and leniency policy

The Commission enjoys a wider and more general power to impose fines that can reach 10% of the total amount achieved and invoiced in the preceding financial year by each company or association of companies involved in the violation or in the case of violation of the regulations of Articles 101 TFEU (ex Article 81 TEC) and 102 TFEU (ex Article 82 TEC) of the EC Treaty; or in the case of contravening a decision that

disposes cautionary measures towards the directions of Article 8 of Regulation 01/2003. Inside DG Competition, the debate concerning the necessity of adopting such an instrument is particularly inflamed, and has its centre, as well as, its stalling point, in the interpretation of article 103 (ex Article 83 TEC) (2) of the EC Treaty, which makes provision that the Commission, in order to preserve that state of competition, can issue proceedings of a binding nature and therefore, can “*guarantee the observance of the prohibitions from which Articles 101 TFEU (ex Article 81 TEC) paragraph 1 and Article 102 TFEU (ex Article 82 TEC) make provision for fines and penalties of delay*”. As far as the so-called policy of *leniency* is concerned, the Commission has, in other words, the possibility to decide about the allocation of single benefits of immunity or reductions of fines for companies that collaborate with it. It has still not reached a formalisation inside the regulations applicable to the rules of competition. Therefore the forecasts contained in the various Commission Communications on this subject, among those the last forecast regarding cartels between companies, adopted in 2002, remain of primary importance. In general, the commission has the power to impose fines under the EC Treaty, those fines may be appealed to the Court of First Instance and then to the European Court of Justice. Under the rules, the commission determines the gravity and period of the infringement and then adjusts increasing or descending from that figure on the basis of aggravating or attenuating circumstances relating to the infringement. The expectations, of those who expected the introduction of a type of penal liability, like the American model, which is valid in cases of extreme seriousness and is capable of manifesting itself through means of depriving personal freedom, have been let down. As with the US, the commission will use its leniency program to reward those who reveal cartels and punish those who conceal them. Leniency programmes are a major weapon in the cartel detection armoury of competition authorities:

- the first company to blow the whistle and admit its involvement in a cartel typically receives 100 per cent immunity from fines;
- other companies which come forward subsequently can also receive significant reductions in fines depending on the "value" they add to the authority's investigation.

Some leniency programmes include immunity for individuals where the existence of criminal sanctions for individuals makes that relevant. An issue of growing importance

in global competition law is the risk that materials produced pursuant to one foreign sovereign's confidential investigations or proceedings will later be subject to civil discovery in the US. In many jurisdictions, in particular in the European Union ("EU") and US, aggressive cartel enforcement has been significantly aided by programs offering leniency to cartel participants. Key to these programs are promises by antitrust enforcers that potentially incriminating documents or oral statements submitted to them by cartel participants will be protected from disclosure in other jurisdictions or proceedings. Competition authorities are constantly developing and revising their approaches to cartel regulation and introducing new mechanisms for businesses to report cartels, seek immunity and gain leniency. The need for businesses and their advisers to be able to identify and manage their global risk exposure is more pressing than ever before. Indeed, the globalized nature of many modern cartels had made such leniency and confidentiality programs critical and arguably indispensable to anti-cartel prosecution. In recent years cartel regulation has become a key priority for competition authorities around the globe resulting in a proliferation of immunity and leniency programs, hence an increasing need to keep abreast of developments in this rapidly evolving area.

3. Assessment of recent regulation of Japan Authority Agency

When Japan's competition law was adopted in 1947¹⁰⁵, Japanese society was not ready for the concept of competition, and therefore, JFTC had to face an uphill battle. The experience in Japan showed that in times of economic depression, business lobbies were able to push for exemptions from certain prohibitions, so there has been the system to preserve the sound market economy since then. However, As a result, the competition-restrictive protection policies came to be implemented in various industries it was amended to relax in 1953, based on the grim economic conditions and the critics that the All-American pro-competitive idea did not fit in the fragile economy in Japan. In this way, the industrial policies with the idea against market principle had occupied the main position in post war ages. The Antimonopoly Act of Japan (AMA) was enacted modeled after the antitrust laws of the United States of America as a part of the occupational policy of the allied powers. At the same time, JFTC was established as an independent commission whose idea was also taken from the Federal Trade Commission of the United States. However, when AMA was enacted, Japanese society believed in the primacy of harmonious cooperation among businesses over competition. From 1955 to 1970, the Japanese economy achieved substantial growth and enjoyed a yearly average growth of approximately 10% over 15 years The Japan Authority, is an independent administrative agency, the Antimonopoly Act enacted in 1947, has the rule to implement the Act subject to judicial review. Since 1970, the enforcement of the Antimonopoly law started to be strengthened gradually, and the provisions of the Antimonopoly law had been strengthened through several law amendment attempts. The memory of the Japanese economy's past success prevents many from accepting competition culture. The result was considerable retrogression in terms of both systems and implementation of competition policy. The "harmonization culture" was a factor that constrained the establishment of competition policy in Japan. Japanese business culture gives great importance to *Wa* (harmony) and does not generally find it acceptable for only one business or enterprise to prosper. We call this period in JFTC history as the "Dark Ages of the Antimonopoly Act." In some domestic sectors, the influence exerted by harmonization culture is still very strong. Most still harbor a strong

¹⁰⁵ M. Hadley, *antitrust in Japan* (Princeton: Princeton university press 1970) pp.125-26

belief that a business culture that favored harmonization among the business community was what allowed the Japanese economy to grow into the second largest in the world. This period of serious economic stagnation, also called the “lost decade,” arose from long-term deflation. Western economies in the 1980s focused on implementing regulatory reforms and economic policies based on free market principles, and actively enforced their competition laws. Although the long-functioning sector focused policy led Japan to be the second largest economy in the world, globalization has changed the economic environment drastically and some fundamentals of the Japanese economy have lost their capability to adapt to the rapidly changing global economy. However, intervention has not been avoidable due to the Government’s or politician’s pursuit of other state policies.

AMA clearly provides for the independence of JFTC with regard to its performance of duties. Therefore, government agencies and politicians must not intervene in JFTC’s enforcement of AMA. JFTC has advocated voluntary compliance with AMA, by persuading executives of private businesses that complying with AMA will result in profits in the long run. JFTC has faced many difficulties in coordinating competition policy with other policies. In drafting the latest bill to amend AMA, JFTC encountered difficulties in coordinating with industries and politicians. In addition, the number of the Japan Authority staffs was increased gradually since around 1990, but the situation can only be described as less than the desired level. Therefore, unfortunately, it must be said that Japan had experienced too late as well as too small steps taken in the field of competition law. Revisions included a review of the regulations on excessive concentration of economic power, an increase in the maximum penalty against juridical persons, procedures on the service of documents to overseas parties etc. and an extension of the scope of violations against which the Commission can take actions even after the violations have ceased to exist¹⁰⁶.

3.1 Merger control

Merger control is enforced by the JFTC, which was established by the AMA as an independent administrative office and is composed of a chairman and four

¹⁰⁶ From now on the Japan Authority will engage in the preparation for related cabinet ordinances and regulations with an aim to start the implementation of amended Antimonopoly law in the beginning of year 2006.

commissioners who possess broad enforcement powers with respect to the AMA. The JFTC regularly holds 'informal' consultations with relevant ministries and other sector-specific regulators and, in practice, when ruling on a given transaction, the JFTC takes into consideration relevant public and industrial policy issues. Among the various government ministries, it is generally considered that the **Ministry of Economy, Trade and Industry** (the METI) has a strong influence over competition policy but, depending on the specifics of each case, other ministries may have greater involvement. Depending on whether they exceed certain thresholds (described below), mergers, business transfers, corporate splits, joint share transfers and share acquisitions are subject to a prior notification obligation. The JFTC is an independent agency which has primary jurisdiction over the enforcement of merger control under the AMA¹⁰⁷. When companies execute actions such as a merger, division or business acquisition in Japan, the JFTC conducts a strict examination to determine whether the action will violate the Antimonopoly Act. In some cases, the parties to such transactions also consult with the JFTC prior to submitting their notification on the merger, division or business acquisition. In situations where the JFTC highlights a problem with such transactions, even at the stage of prior consultations with the parties to the transaction, the companies concerned make a decision on whether to abandon the merger, division or business acquisition in question, or to formally submit a notification after altering the details of the transaction to a form that will not violate the Antimonopoly Act.

The improvement of the merger assessment of the Antimonopoly law regarding stockholding and mergers was amended and entered into force in January 1999. As a result of the improvement involving the deletion of “Japan,” the law now applies to stockholdings and mergers by or between overseas undertakings which take place external the territory of Japan. As far as an accurate analysis of the provisions is

¹⁰⁷ Asian Development Bank: “report and Proceedings from the Competition Law and Policy Roundtable. 1. Asian Development Bank. 2. Competition Law and Policy”. In Mr. Nanbu’s opinion: “underlined the importance played by the establishment of an independent competition authority in Japan; the more active role that courts are called to play today for competition law to be enforced; and the need to get the business sector to understand the importance of competition policy. Mr. Nanbu summarized his presentation on JFTC with three key lessons: (1) government, industrial, and development policies suitable to each stage of economic development all need to be taken into consideration in the enforcement of competition laws; (2) governments need to consider minimizing the introduction of exemptions from competition laws’ application; and (3) ultimately, competition policy and the government’s industrial and development policies need not be mutually exclusive and could, in fact, be complementary. Mr. Nanbu then turned his attention to the development of competition policy in the APEC region and the promotion of international cooperation and competition networks impacting on the region. He emphasized that the formation of a regional network is important to enable countries within the region to cooperate and enforce competition policy.

concerned, there is opportunity for such an interpretation to mean that any territorial nexus is excluded from the jurisdictional reach of the law. On 28 March 2007, the JFTC adopted new Merger Guidelines (the 2007 Merger Guidelines) which amend the safe harbour rules, adopt the so-called 'small but significant and non-transitory increase in price test' (SSNIP test) for the purposes of analysing demand and supply substitution when defining the markets, and provide for additional factors to be considered in the analysis of the relevant transactions.

The 2007 Merger Guidelines clarify the category of M&A transactions whose impact on competition should be reviewed. Detailed rules are provided for market definition ('particular field of trade'). Importantly, the 2007 Merger Guidelines clarify that the geographic market may be wider than the geographic boundaries of the territory of Japan, depending upon the international nature of the relevant business. Perhaps the most interesting feature of the 2007 Merger Guidelines is the use of 'safe harbours' for each of the three categories of M&A transactions identified above (specific harbours apply to each category), as part of the substantive test analysis. These are cases where the JFTC normally considers that there is no possibility there may be a substantial restriction of competition, or that such possibility is small and therefore it is not necessary to conduct a detailed examination of the M&A transaction. The JFTC has thereafter updated the Merger Guidelines on 1 January 2010 to reflect the most recent amendment to the AMA.

The new regime of merger control is applicable to transactions which close on or after 31 January 2010. Generally speaking, no notification is required for transactions which amount to internal reorganisations of companies within the combined business group. It should be noted, however, that the JFTC has a general power to review any M&A transaction for compliance with the substantive test, described below, even where the jurisdictional thresholds are not fulfilled.

3.2 Antimonopoly Act

The Japan Authority, with hold to the U.S. guiding principle clearly rejects the effects policy circumstances that *“the application of the U.S. competition laws against anticompetitive behaviour overseas would essentially come into divergence with the*

positions of other countries, including Japan, on the jurisdiction of national competition laws and would raise trouble under international law”¹⁰⁸. However, two significant improvements observed in the last quite a few years might recommend that the territorial scope of competition law application have been extended on the exterior. The Japan Authority function of the Antimonopoly Act to overseas undertaking was limited compared to the European Court’s pronouncement in the *Wood Pulp cases*, where undertaking located outside the EC were subjected to EC competition regulation because they sold supplies to the EC under a price accord. As show in the course of its *Nippon Yusen case*¹⁰⁹, which “cannot be classified as based either on the territorial principle or the effect principle,” the Japan authority held that the law should be applied “when a specific act within Japan (such as entering into a contract) fell within one of the prohibited acts set forth in the [Act’s] provisions.”¹¹⁰ In the study group’s view, “if overseas undertaking start activities such as exporting supplies to Japan, and such activities are enough to form proceed in violation of the Antimonopoly Law, then it is deemed that a infringement of the Antimonopoly law exists and the conduct is subject to the Antimonopoly Act policy.

Existence in Japan of a overseas undertaking subsidiary or branch is not essentially as a circumstance for the applicability of the Antimonopoly Act, with respect to the regulations which damage competition in the internal market ... “If their acts sufficiently infringe the Law” then it is correct to consider that the overseas undertakings are subject to rule under the Antimonopoly Act. It has been recommended that the group of study above recommended the Japan Authority to follow the effects policy.

The Government of Japan initialled the draft text of the agreement, “Agreement between the Government of Japan and the European Community Concerning Cooperation on Anticompetitive Activities”, in Brussels on June 11, 2002 and formally signed it on July 10, 2003. Japan has bilateral cooperation agreements with the United States (1999) and Canada (2005). We have also started discussions on the conclusion of a similar cooperation agreement with Australia. These agreements, particularly the Japan United States agreement, set out the manner in which the competition authority of each party cooperates in the enforcement activities of the other. Such cooperation is

¹⁰⁸ Japan Authority Statement, 8 February 1995.

¹⁰⁹ Japan Authority Decision, 18 August 1972

¹¹⁰ Report of the Study Group for the Antimonopoly Act on External Affairs, February 1990.

expected to give rise to the efficient enforcement of competition laws and is a powerful countermeasure against international anticompetitive activities.

The Japan Authority, statement has been specify as the most characteristic extraterritorial importance of the Antimonopoly law, where illegal conducts were committed in Japan in the form of boundary against the client and the exclusion of competitors, the same as in Canada in the form of production and export. It can be upheld that the agreements in question were done and implemented in Japan, by the Japan Authority could suppose jurisdiction over this case in harmony with the territorial principle. In any case, no important sign in the decision itself clarify whether the effects doctrine was applied in this case. Nevertheless it would be significant to note that the Antimonopoly law was compulsory against an overseas business, a part of whose unrestricted behavior (export) to Japan was engaged outside Japan, which is practically the same as extraterritorial application of the Law.

The important agreement on the Cooperation Agreement signed in July 2003 with the Japan Authority *is based on reciprocal notification of cases under investigation by either authority, where they may affect the important interests of the other party, the Japan Authority has the possibility of coordination by the two authorities of their enforcement activities, as well as of rendering assistance to each other, also get the opportunity for one party to request the other to take enforcement action, and for one party to take into account the important interests of the other party in the course of its enforcement activities, and finally the exchange of information between the parties, while not affecting either party's confidentiality obligations with respect to such information.*

*Regular bilateral meetings to exchange information on current enforcement activities and priorities, on economic sectors of common interest, to discuss policy changes which either party is considering, and to discuss other matters of mutual interest relating to the application of competition laws*¹¹¹. The Antimonopoly law will be applied as a result of the amendment remains to be seen through the practice of the Japan Authority. The first test case was the consolidation between Exxon and Mobil. The Japan Authority “observed the consolidation planned by Exxon company ... and Mobil company ...

¹¹¹Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, OJ L 183, 22.7.2003, p. 12–17 - <http://ec.europa.eu/comm/competition/international/bilateral/japan.html>

both of the US ... the Japan Authority upheld its potential impacts in the field of crude oil manufacture trade, on the root of reference materials submitted by the consolidating business and their subsidiaries and other information. The Japan Authority has done that the considered consolidation was not probable to infringe the provisions of the Antimonopoly law”

In the Exxon Mobil case, there is some territorial nexus with Japan in the sense that parent and products and sales of the undertaking concerned are positioned and undertaken in Japan. However, this issue is an obvious example of the extraterritorial law of Japanese antitrust law in the mergers topic, as the merger itself was between overseas business, and it was agreed upon and implemented outside Japan. It is not clear on what principle the Japan Authority based its justification for its jurisdiction under international law. Even though the evolution to a more broad (extraterritorial) relevance of antitrust law has not been as evident as in the E.U. rule, Japan is also irregular toward extending its jurisdictional achieve especially in the case of merger assessment, as it is faced with increasing trans-border trade behavior that affect competition in relevant markets.

3.3 Illegal penalty and leniency program

The most important duty of any competition authority is rigorous enforcement of competition laws against cartel activities. Strict enforcement and prompt elimination of cartels and bid-riggings, in particular, serve to foster competitive process, to encourage new entry and innovation, to vitalize the economy. The benefit of effective competition law enforcement to consumers in general is obvious. The JFTC has adopted an active policy to apply criminal penalties to violations that (a) substantially restrict competition in a particular field of trade, including price cartels, supply restraint cartels, market allocation agreements, bid-rigging and boycotts, which constitute serious cases that are likely to have a widespread influence on the national economy; or (b) involve firms or industries that are repeat offenders or which do not take appropriate measures to eliminate a violation, and where the administrative measures of the JFTC are not considered sufficient to meet the aims of the Antimonopoly Act. When administrative bodies propose to enact or amend an economic law or ordinance from the standpoint of

a specific policy requirement, and there is a concern the proposed amendment or enactment will include exemption clauses from the Antimonopoly Act or provisions which may restrict competition, the JFTC acts in consultation with these bodies at the planning and drafting stage to ensure coordination among the proposed provisions, the Antimonopoly Act and competition policy. In manufacturing industries there is a consistent upward trend in the concentration of production from 1991 through 2000, and oligopolistic tendency has been intensified. Moreover, to the extent a product showed a large increase in imports or a large decrease in market size during the same period, a tendency for prices to fall is noted. Under the economic environment in last decade, during which globalization continued apace and Japan's economy declined, a tendency can be noted in which the larger the price decreases, the higher the ratio of the production concentration increase. This is considered to reflect the occurrence of mergers and acquisitions aimed at ensuring survival in markets experiencing increasing competition or the withdrawal from less-profitable sectors. In a society favouring harmonious cooperation, there was a possibility that a leniency program would be regarded as against its "business culture." Is the concept of leniency acceptable for Japanese businesses? Isn't it against business ethics firmly established in Japan? There have been active discussions whether Japan should introduce a leniency program in the last year or so. After the long period of active discussions, a leniency program could obtain necessary support to go through a legislative process within Japan. I think that an introduction of a leniency program will be an important step for establishing "competition culture" in Japan. In other words, a leniency program is one of the important elements for extending international cooperation among competition authorities in different jurisdictions.

However, we observed cases where some Japanese firm applied for a leniency to the affected jurisdictions other than Japan due to the lack of a leniency program in Japan, and this incidence revealed one of the serious problems, namely the absence of a leniency program in some key jurisdictions may act as an obstacle for uncovering international cartels. Therefore, I think that international antitrust community should be interested in seeing how many Japanese firms would apply for a leniency program once such system becomes effective in Japan in early next year.

The problem of the old system lies in its inflexibility, namely, the respondent has only a choice to accept or reject the recommendation. No rooms for negotiation or clarification were afforded. The legal nature of the recommendation is, according to our legal theory, a kind of so-called administrative guidance based on law. It is merely a suggestion to comply or a request to comply by the government agency, therefore, the respondent should be completely free to accept or reject the recommendation. Due to such nature of the recommendation, no prior notice or a chance of rebuttal is afforded to the respondent.

The recommendation system could have been effective when the Antimonopoly Act was not functioning properly in Japan. Change of the recommendation system is one of the important steps for the modernization of the JFTC enforcement procedure. Up to now, even when the respondent has an objection only as to a part of the recommended cease and desist order, the respondent has no choice but to move to the administrative hearing stage and contest it altogether¹¹².

4. Comparative analysis of competition law jurisdiction

4.1 General Aspect

Before examining the EU and US cases involving jurisdiction¹¹³ in competition issues, there will be a more general review of the public international law concerning jurisdiction.

The analysis of jurisdiction *is becoming* more complex due to the fact that the borders

¹¹² Asian Development Bank: "report and Proceedings from the Competition Law and Policy Roundtable. 1. Asian Development Bank. 2. Competition Law and Policy". According to Mr. Hoda's focuses on whether: "that the presentations on competition law regimes across region and interface with regulatory regimes offered the following two conclusions: (1) economic growth is enhanced by precompetitive regulation; and (2) competition authorities and regulators share common objectives. He emphasized the importance of competition authorities and regulators, saying that without these institutions, commercial enterprises would be unable to resist the temptation to increase profits by means of anticompetitive practice. Moreover, countries are beginning to see the necessity for international cooperation and the need for converging competition policies. In this regard, the presentation on convergence and harmonization of competition laws was enlightening. Mr. Hoda pointed out that convergence did not necessarily refer to the establishment of a uniform competition framework across countries. Indeed, a number of countries had eschewed the adoption of a national competition law, yet had adopted competition practice and principles that were enforced by sector regulators.

¹¹³ International Jurisdiction is an aspect or an ingredient or a consequence of sovereignty (or of territoriality or of the principle of non-intervention, the difference is merely terminological): laws extend so far as, but no further than the sovereignty of the State which puts them into force nor does any legislator normally intend to enact laws which apply to or cover persons, facts, events or conduct outside the limits of his State's sovereignty. FA Mann, "The Doctrine of Jurisdiction in International Law", 111 Recueil des cours 9, 10-13 (1964 I); F.A. Mann, "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years", 186 Recueil des cours 9, 20 (1984 III).

between public law, public international law and conflict of laws are becoming vague. The most *commonly-held* view is that public international law limits the scope of the jurisdiction and in some cases *conflicting laws* or other domestic legislation limits the jurisdiction further. In most European countries the distinction between private and public international law are *clearly defined* and to cross over the boundary between the two fields is a “tabu”¹¹⁴. In the US, however, the distinction between public international law and *conflicting laws* is not so strict, or rather, public international law, as viewed in the US, has recently been greatly influenced by concepts traditionally *associated with* conflicts of laws. In public international law it is often difficult to clearly define customary rules and the definitions are different in different countries. First it will be necessary to look behind regulations and discuss why competition regulations exist and how the goals of the EU and US differ. The primary goal of Competition law is to protect consumers, competitors and possible competitors from companies achieve monopoly, or (*Quasi-monopolistic*) positions in the market. Protecting consumers means ensuring that no company can impose a monopoly price. The principal mechanism for most competition laws is the argument for economic efficiency¹¹⁵. The antitrust laws are designed to control the competitors, ensuring that a dominant firm does not use predatory pricing to drive out competition, by assuring that markets remain open.

The country upholds antitrust through either a stated comprehensive competition guidelines or by incorporating competition rules *into* other policies. Antitrust policy is defined as “*those Government measures that directly affect the behaviour of enterprises and the structure of industry*”, also serves to promote equality of business opportunity. This has two elements firstly legislation i.e. antitrust law designed to prevent monopoly, punishing cartels and otherwise practices and unnecessary government involvement and secondly a set of policies that improves antitrust in national markets: a liberal trade policy, foreign investment and ownership requirements, privatisation and deregulation etc.

The range of governmental regulation of business is wide and extensive, antitrust policy

¹¹⁴ Andreas F. Lowenfeld, “International Litigation and the Quest for Reasonableness: Essays in Private International Law”, in *The American Journal of International Law*, Vol. 91, No. 2 (Apr., 1997), pp. 391-394

¹¹⁵ Daniel J. Gifford and E. Thomas Sullivan “Can International Antitrust Be Saved for the Post-Boeing Merger World? A Proposal to Minimize International Conflict and to Rescue from Misuse” in *Antitrust Bulletin*, Vol. 45, No. 1, P. 55, Spring 2000

has an interface with many other government policies. The influence of the country within its own area is inevitably and absolute and any control upon it would involve a reduction of its own autonomy. Every Country is competent to penalize crimes committed upon its own area. This regulation is universally regarded as of most important and fundamental disposition. The exclusivity of this principle was illustrated by Marshall C.J. in *The Schooner Exchange v. Mcfaddon*¹¹⁶. The matter which increases in the background of antitrust legal action is whether Countries be capable of apply extra-territorial rule on illegal matter not committed on their own country. The set of guidelines of jurisdiction is theoretical to hold strictly to the maxim: “*extra territorium jus dicenti impune non paretur*” “to the area that even a national when abroad is ordinarily outside the range of the criminal law of his own Country¹¹⁷”.

Countries argue about extra-territorial jurisdiction when they believe their legitimate interests to be concerned; whether that statement be rationalized and expressed by resources of the nationality claim, the safety measures claim, the objective territorial claim, the passive behaviour claim or the universality claim. It is logical to say, that international regulation will permit a state to exercise extra-territorial rule provided that said state's reasonable interests (i.e ‘*legitimate*’ by tests accepted in the regular practice of Countries) are involved; but alongside this should be set also the lawful and rational interests of the Country whose territory is mainly concerned, for the extra-territorial implement of jurisdiction must not be allowed to extend to the point where the local rule is supplanted.

A country has a right to extra-territorial authority where its lawful interests are concerned, but this right may be deemed to have been abused when it becomes fundamentally an interference with the effect of the local territorial jurisdiction.¹¹⁸

Under this law a Country may exercise extra-territorial authority over crimes of aliens directed against its safety, political independence, credit, or territorial integrity. Such a need improvement because Countries do not always have rules of their own to restrain the preparation on their territories of subversive activities against their neighbors. It is

¹¹⁶ Under the traditional view, the sovereign immunity defense was recognized only as a matter of comity when asserted in the courts of another sovereign, rather than as a limitation on the jurisdiction of that forum. See *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136 (1812) (Marshall, C. J.).

¹¹⁷ *The Rajah of Faridkot* (1984) AC 670, 683 PC: “*extra territorium jus dicenti impune non paretur*” (one how exercises jurisdiction out of his territory may disobey with impunity)

¹¹⁸ Professor R. Y. Jennings contributes an article of fascinating interest on 'Extraterritorial Jurisdiction and the United States Antitrust Laws'. ... *International Affairs* (Royal Institute of International Affairs 1944-), Vol. 34, No. 4 (Oct., 1958), pp. 516-517

also sometimes therefore called the "protective principle". The validity of this principle was raised but not firmly established, in the *Lotus Case*¹¹⁹.

According to Professor Ian Brownlie, "*the protective principle is the least justifiable, as a general principle, of the various bases of jurisdiction. In his opinion, certain of its applications fall under the principles of protection and universality*"¹²⁰.

The objective purpose of the territorial rule is limited to those "effects" which are direct, if not immediate, and which form a part of the *actus reus*; where in the verbal communication of the cases of a considerable antiquity, the offense was consummated in the territory claiming jurisdiction. It now remains to be seen how various jurisdictions have treated their 'arms length' jurisdiction of their antitrust legislation, in particular where commercial transactions, entered into in foreign countries, are alleged to have the effect of affecting competition in the domestic market. Conflicts related to competition law can be divided into two different categories: conflicts of competition laws and political conflicts. Political conflicts are usually started when a competition law issue suddenly becomes a trade issue. Governmental inability to separate competition issues from trade issues is the cause of many political conflicts.

4.2 European enforcement and restrictive agreements of the competition law difference between EU – US and Japan

Whilst community antitrust law is generally patterned on US antitrust law, the law of the community was certainly born from a totally different kind of parent. A principal purpose of the treaty was to eliminate the national barriers which have dived Europe for centuries by removing import duties and restrictions on goods. In the US such barriers were largely eliminated at the creation of the US as republic in federal constitution, so the legislator makes stronger the principles on the subject of competition, tracing a furrow that would be followed also by the European legislator.

¹¹⁹ Diane P. Wood, Conflicts of Jurisdiction in Antitrust Law: A Comment on Ordovery and Atwood in Law and Contemporary Problems, Vol. 50, No. 3, Extraterritoriality of Economic Legislation (Summer, 1987), pp. 179-188. P. J. Kuyper, European Community Law and Extraterritoriality: Some Trends and New Developments in The International and Comparative Law Quarterly, Vol. 33, No. 4 (Oct., 1984), pp. 1013-1021

¹²⁰ Brownlie Ian, Principles of Public International Law, Oxford, 2003 (6th Ed).

The main enforcement authority in Europe concerning competition law is the European Commission, headquartered in Brussels. The European Commission has procedures in place ensuring correct handling of cases, is responsible for enforcing the EU antitrust laws under the EC Treaty, successor to the Treaty of Rome. The competition's content advocacy measure of enforcement results reveals a narrow substantive difference between EU and US practice. US laws is more paying attention on constraining behavior of antitrust law, in the public interest. The US government (through both the Justice department's antitrust division and the Federal Trade Commission) continue to encourage other countries to adopt antitrust regimes, merger control provisions. But neither the OECD nor the World Bank nor The International Monetary Fund seem at all interested in fostering measures that would alleviate the burdensome merger control situation, which is in fact hurting the free trade and market efficiency effort that they espouse.

The article Articles 101 TFEU (ex Article 81 TEC) and section 1 of the Sherman Act review illegal restrictive agreements. As with the Sherman Act, the special enforcement focus is on price-fixing. Whether called cartelisation, bid-rigging, or something else, it is automatically prohibited. The same broad condemnation includes all horizontal cooperation agreements market division, output limitations, and collective boycotts.

However, the European Commission has more closely inspected the activities of undertaking and levied heavy fines against those found to be engaged in price fixing, output limitation, sharing markets or customers and cartel behavior. *"The following shall be prohibited as incompatible with the common market: all agreements . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition."* European Commission Treaty Articles 101 TFEU (ex Article 81 TEC) (1) Vertical restrictions likewise come within Articles 101 TFEU (ex Article 81 TEC). Any provision of such agreements that has the effect of segmenting the EU economy will likely be found illegal.

Nevertheless Japan adopted competition law as a U.S. transplant after World War II, the transplant did not take root for many years and enforcement was occasional and minimal. The Ministry of International Trade and Industry (MITI) had great power in organizing the Japanese economy. Regulatory law and policy encouraged the cooperation of business people with one another and with government. Many business

firms were organized into “keiretsu”, informal associations of companies related by common directors, cross ownership of shares and supplier/customer relations. These groups enforced vertical and conglomerate ties and developed a culture of loyalty among the firms in the same "family." The Japanese *Anti-Monopoly Law* (AML) on its face resembles U.S. law on monopolistic and horizontal restraints. Vertical restraints fall under the unfair business practices section of the law, which prohibits unjust discrimination, boycotts, low pricing, passing-off, exclusionary restraints, resale price maintenance, and other conduct deemed “unfair”, and thus includes aspect of law that the U.S. practice does not view as “competition law”. Until approximately the late 1980s and the Structural Impediments Initiative, the Japan Fair Trade Commission (JFTC) often was overshadowed by MITI. Prior to this time, the JFTC brought relatively few formal proceedings and rarely imposed significant fines on businesses. The few proceedings it brought were often in furtherance of Japanese industrial policy¹²¹. In more recent years, Japan has strengthened its penalties and increased the number of its enforcement actions, the clearest example of a trade-restraining anticompetitive measure is a domestic cartel with a boycott excluding foreign product from the nation's shores and markets. For example, there might be a cartel in Japan carried out by Japanese producers through exclusive contracts with the only available distributors in Japan, in a context in which the domestic industry is concentrated and noncompetitive and new distribution systems cannot feasibly be established. If the cartel is sanctioned by Japanese industrial policy, this would be both a public and private restraint.

In Japan, such a course of conduct is likely to be unlawful if "it may reduce business opportunities of its competitors and prevent them from easily finding alternative trading partners"¹²². This difference between the U.S. approach and the EU/Japanese perspective is not necessarily trade restraining for a U.S. exporter, which might thereby gain a greater opportunity to sell in Europe or Japan. Japan has been much accused of

¹²¹ See Harry First, "Selling Antitrust in Japan," *Antitrust -Spring* (1993); Wilbur L. Fugate, "Antitrust Aspects of U.S.- Japanese Trade," 15 *Case W. Res. Int'l L.J.* 505, 524 (1983); J. Mark Ramseyer, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," 94 *Yale L.J.* 604 (1985); Alex Y. Seita & Jiro Tamura, "The Historical Background of Japan's Antimonopoly Law," 1994 *U. Ill. L. Rev.* 115, 119-20 & ns. 18 & 19 (1994); Joel P. Trachtman, "International Regulatory Competition, Externalization, and Jurisdiction," 34 *Harv. Int'l L.J.* 47, 54-55 (1993); F.M. Scherer, *Competitor Policies for an Integrated World Economy* 109, 113 (1994).

¹²² JFTC Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices, Part IV, July 11, 1991.

not enforcing its Anti- Monopoly Law, and especially so when firms outside Japan would be the beneficiaries of the enforcement¹²³. Although Japan has increased the number of cases it has prosecuted in recent years and denies the charge of laxness in enforcement, there is still a significant lack of confidence in the competition law enforcement procedures and commitment of Japan¹²⁴.

4.3 The Enforcement a comparative evaluation

In terms of the enforcement of European Union, it is significant to note that Article Articles 101 TFEU (ex Article 81 TEC) of the UE Treaty applies to measures between undertakings which may involve trade among member States and which have as their object or effect the prevention, restraint or distortion of competition within the common market. Articles 102 TFEU (ex Article 82 TEC) prohibits any abuse of a dominant position "within the common market or in a substantial part of it . . . *in so far as it may affect trade between member States*. Articles 101 TFEU (ex Article 81 TEC) makes it obvious that the aim of the prevention is behavior having a real or intended impact on the situation of competition in the territory over which the common market enlarged i.e. the area of the community as defined by Article 227 of the Treaty of Rome¹²⁵. Undertakings carrying on business in the community are free under EU policy on competition regulations to participate in harmony or practices that may interfere with the implementation of the market mechanism in third countries, so long as the consequences are dubious to spill back into the common market¹²⁶.

The Commission has also envisaged that it and the national competition authorities

¹²³ See JFTC Sees No Antitrust Offense in Japanese Flat Glass Market, 76 BNA Antitrust & Trade Reg. Rep. 584 (May 27, 1999). *For example, the JFTC, found no violation of the Anti- Monopoly Law in connection with complaints by foreign flat glass manufacturers that extensive vertical agreements had unduly restricted the Japanese market. This market, and the practices therein, has been labeled by the Clinton Administration as one of the top five "irritants" in bilateral trade relations.*

¹²⁴ See JFTC Issues Fewer Warnings, But Staff Perceives More Offenses, 76 BNA Antitrust and Trade Reg. Rep. 482 (May 6, 1999). *Indeed, even Japanese regulators suggest that they still lack the resources to keep up with the pace of competition violations. Noting that despite a belief that the number of competition violations was on the rise, the number of warnings issued by the JFTC actually dropped from 1997 to 1998. The official attributed this drop in warnings to an enforcement resource shortage, which was the result of a costly prior investigation into water meter bid rigging.*

¹²⁵ Michel Michael L'Applicabilite du Traite Instituant la C.E.E. et du Droit Derive au Plateau Continental des Etats Membres. The American Journal of International Law, Vol. 80, No. 1 (Jan., 1986), pp. 246-249

¹²⁶ European Union is not alone in tolerating anti-competitive behavior when its effects are limited to export markets. See, e.g., the Webb-Pomerene Act in the United States and the approach adopted under the Restrictive Trade Practices Act 1976 in the United Kingdom. See Barrack, The Application of the Competition Rules (Antitrust Law) of the European Economic Community to Enterprises and Arrangements External to the Common Market, (1981).

*should have the power to make written or oral submissions as amicus curiae before national courts. In the case of the Commission this power would be limited to cases presenting a Community public interest. Such an interest would in particular exist in cases raising important issues of coherence as regards competition policy. The Commission would not intervene on behalf of one of the parties but would present its opinion in the interest of a coherent application of the law*¹²⁷.

In addition to these elements of our reform proposal, I believe judges can also contribute to enhance private enforcement of competition law. This aspect takes on particular importance with regard to claims for damages. In this field, expansion of private enforcement is particularly desirable in order to ensure effective remedies for parties that suffer from infringements. At the same time, there is a general impression that there can be problems under national law and procedures with regard to proving the infringement and the causal link between the alleged infringement and the damage suffered as well as with regard to the determination of the extent of the damage to be compensated.

Arguably, in the light of this complexity, additional elements must come together in order to instil real life into the judges' competence to apply Articles 101 TFEU (ex Article 81 TEC) and Articles 102 TFEU (ex Article 82 TEC).

The Commission in one of its first decisions in this field in the case of *VVVF* permitted a Dutch association of paint and varnish company to continue a system of minimum prices and uniform conditions of sale in respect of send abroad by its members the common market, after protected the abolition of the system in respect of intra-community trade¹²⁸. The most important case dealing with extra-territorial application of EU Competition law was handed down in the case of *Re Wood Pulp*¹²⁹. These cases involved *Wood Pulp* appeals where undertaking against the European Commission disapproval and fining of various kinds of concentration in the wood pulp manufacturing during the late 1970s. The Court of Justice dealt with the matter of whether the Commission had been right to apply Articles 101 TFEU (ex Article 81 TEC) (1) to undertakings established outside the community area. It had been argued

¹²⁷ Speech by Mr. Mario Monti European Commissioner for Competition Policy Effective Private Enforcement of EC Antitrust Law Sixth EU Competition Law and Policy Workshop Florence, 1-2 June 2001

¹²⁸ *VVVF*, Commission Decision of 25th June 1969, Case 69/202/CEE.

¹²⁹ Cases 89/85, 114/85, 116-117/85, 125-129/85, A. Ahlström Osakeyhtiö v. Commission (*Wood Pulp*) Decision of 27 September 1988. The *Wood Pulp* Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings, 19 Georgia Journal of Int'l & Comp. Law (1989) 149.

that such a statement of authority involved an intolerable extra-territorial set of principles. The Court of Justice held that although the cartel was established outside the community, they had implemented their value cartel inside the community, through subsidiaries, agents, or branches, which acted in concert with each other.

The different public international law opinions (comity, legitimacy or not of the effects principle moderation in proscribing what another member state recommend, respect of the rule of territoriality), therefore, mostly disappeared. The Court of Justice here avoided the emphasis on "effect" and as an alternative concentrated on the place of completion. It held that a restrictive practice has two elements: formation and implementation. The *Wood Pulp* cartel, though formed outside the community, was applied within it and accordingly fell within the community's control under the territoriality principle that is uncontroversial in international law. The *Wood Pulp* decision went further than the ICI's decision¹³⁰ in which the Court of Justice founded its rule on a case concerning a overseas company not inside the community area upon the fact that the foreign seller acted through agents or closely controlled ancillary within the common market so that in fact it was the seller who acted there through intermediaries. The pronouncement also went further than *Alcoa*¹³¹ and *Timberlane*¹³² which qualify the status under extra-territorial rules of US Competition laws is acceptable. Under the *Re Wood Pulp*, community regulation omits any such qualifications, e.g., the balancing of benefit tests as are accessible to a US Court of Justice. Although from the abovementioned it is evident that a state can apply its Competition laws extra-territorial, it is important to note that this right is nevertheless limited by the corollary right a state has to abstain from releasing evidence to a foreign state even if this evidence may be absolutely crucial in the prosecution of the Competition laws proceedings. Although this eventuality is supposedly covered by "The Hague Convention" on the enforcing of support abroad, a Country does not have to accede to the Convention¹³³.

¹³⁰ Case 48/69, ICI v Commission (Dyestuffs), [1972] ECR 619; see also D.G.Goyder, EC Competition Law, 3rd ed. 1998, at pp. 548-549.

¹³¹ United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945)

¹³² James R. Atwood, Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels. Law and Contemporary Problems, Vol. 50, No. 3, Extraterritoriality of Economic Legislation (Summer, 1987), pp. 153-164.

¹³³ James H. Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States, 13 INT'L LAW 5 (1979); James A. Rahl, Enforcement and Discovery Conflicts: A View From the United States, in Proceedings of Fifth Annual Fordham Corporate Law Institute on International Antitrust, Nov. 15, 1978 at 343-57; Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., Dec. 1, [1978] 1 ALLER 434 (H.C); Samuel C. Silkin, The Perspective of the Attorney General of England and Wales, remarks in Griffin (ed.), Perspective on extraterritorial application of United States Antitrust and others laws 28 (1979).

The prevailing practice was held by Lord Wilberforce in his separate opinion but in accord in the *Westinghouse Electric Corp. Case*¹³⁴ when he said: "It is axiomatic that in antitrust matters the policy of one State may be to defend what it is the policy of another State to attack."¹³⁵ It is not surprising that "Blocking Statutes" prohibiting compliance with orders in foreign competition law cases that exist in the Australia, Netherlands, Ontario, the Quebec and United Kingdom¹³⁶. Regarding US Competition laws against overseas business for conduct outside the US is an excellent model, which affects US trade, has for several years caused significant international pressure. The rule of the Sherman and Clayton Acts extends to restraints of overseas alarm whether or not the intolerable conduct occurred in the US, if the requisite "effect" on US imports –export is present. While the statutes confer extra-territorial jurisdiction, the extent of that jurisdiction was left for judicial determination.

*American Banana Co. v. United Fruit Co*¹³⁷ was the most important international Sherman Act case relating to extra-territorial jurisdiction of competition law. *American Banana* involved a treble damage divergence in which it was assumed that the defendant had pressed Costa Rican soldiers to seize the plaintiff's Panamanian banana plantation. No effect on American business was alleged and lower courts held that no cause of action existed under the Sherman Act. The Supreme Court of Justice agreed and, in an opinion by *Justice Holmes*, denied recovery. The Sherman Act was found not to apply to acts committed within the territory of an overseas sovereign. Even though *American Banana* emerged to have foreclosed extra-territorial application of the Sherman Act, later cases narrowed its useful claim¹³⁸. In *US v. Aluminium Co. of America (Alcoa)*¹³⁹, the US administration alleged that a Swiss corporation entered into an accord with its investor *Aluminium Production Companies* incorporated in Britain, Canada, France,

¹³⁴ *Westinghouse Electric Corporation* 1978 AC 547; [1978] 1 All ER 434, see also P. F. Sutherland, *The Australia-United States Agreement on Co-operation in Antitrust Matters in The International and Comparative Law Quarterly*, Vol. 33, No. 1 (Jan., 1984), pp. 230-232

¹³⁵ Ronald E. Kennedy, *Of Lawyers, Light bulbs and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, NW. U. L. REV. 74 (1979); Remarks of Eleanor M. Fox, *Roundtable on Sovereign Compulsion Defense in Antitrust Litigation: New Life for the Act of State Doctrine in ASIL*, Proc. 97, 98 (1978); [1978] 1 ALLER at 448;

¹³⁶ See *Harding*, id. at 8. In the famous *Del Pont-Ici* case, the British Courts, by virtue of having control over the subject matter, completely frustrated the American antitrust court's orders with regard to certain nylon patents that had been assigned to the British Company by Du Pont pursuant to an alleged conspiracy. See *British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd.*, (1953) Ch. 19.

¹³⁷ *American Banana Company v. United Fruit Company*, *The American Journal of International Law*, Vol. 3, No. 4 (Oct., 1909), pp. 1006-1011

¹³⁸ *The Sherman Act* *The American Journal of Comparative Law*, Vol. 1, No. 1/2 (Winter-Spring, 1952), pp. 128-133

¹³⁹ *Problems of Anti-Trust Prosecution: The Alcoa Suit*. *The Yale Law Journal*, Vol. 48, No. 4 (Feb., 1939), pp. 677-683

Germany, and Switzerland, to set a proportion for the production of aluminum in violation of the Sherman Act. The agreement was intended to include exports to the US. Co-defendant Alcoa, a United States corporation, while benefiting from the agreement, was not a party to it.

The Supreme Court of Justice went on study three different circumstances¹⁴⁰, firstly settlements made beyond US restrictions which are not intended to affect *imports - exports* in the US but which do so. Here the Court of Justice held that mere effect was not enough ground for the exercise of jurisdiction; secondly deal which are intended to affect US *imports - exports* but which do not achieve this result. The Court of Justice considered this an insufficient basis of jurisdiction, and thirdly both fundamentals are established, that where the agreement is both intended to affect *imports - exports* in the US and is shown actually to have had some effect upon them, the Sherman Act was found to apply. Under the Alcoa assessment, the existence of a plan abroad, which was intended to affect US business, was the full plaintiff indispensable to prove to establish jurisdiction, except the defendant could demonstrate a lack of effect. Following cases to Alcoa dealing with overseas activities have continued to highlight participation by an American political party. For example, in *US v. Imperial Chemical Industries Ltd.*, the Court of Justice held that a conspiracy to divide overseas territories violated the Sherman Act¹⁴¹. The incapability to separate the relationships of an American subsidiary from its British parent was the focal point of the Court of Justice jurisdictional basis. In *US v. Watchmakers of Switzerland Information Centre, Inc.*, the plaintiffs complained of restraints encouraged by Swiss statutes¹⁴².

The Court of Justice ruled that in the absence of a direct overseas government action persuasive or requiring the challenged action, a US Court of Justice may exercise its jurisdiction as to acts and contracts entered into abroad if the acts and contracts have a substantial effect upon and are intended to affect US overseas business. It was not enough that the action was legal where undertaken, that the foreign country merely permitted it, or even that foreign government acquiesced in, encouraged or approved the action. Having considered the conflict, the Court of Justice held of the topic should

¹⁴⁰ Trade Regulation. Sherman Act. Illegal Monopoly. *Columbia Law Review*, Vol. 45, No. 4 (Jul., 1945), pp. 655-659

¹⁴¹ O. Kahn-Freund, *English Contracts and American Anti-Trust Law. The Nylon Patent Case. The Modern Law Review*, Vol. 18, No. 1 (Jan., 1955), pp. 65-70

¹⁴² Wilbur L. Fugate, *Antitrust Jurisdiction and Foreign Sovereignty. Virginia Law Review*, Vol. 49, No. 5 (Jun., 1963), pp. 925-937.

then determine whether on the face of it the contracts and interests of the United States are sufficient to support the exercise of extra-territorial jurisdiction. In essence, the rule was determined that United States courts could exercise U.S. long arm jurisdiction where conduct initiated abroad had an "effect" on United States commerce.

Conclusion

In this chapter furnish a basic description of the principle features of the system of competition rule enforcement as it exists in the UE- US- JAPAN prior to implementation of the Regulation and provide some information about the function and power between the Authority and the market. Clearly inspired by Chicago school, represented by Alchian (1950), Peltzman (1976), Posner (1972), and Stigler (1971), criticised the Structuralist assumption that firm behaviour and market performance are solely associated with market structure (Cook, 2002). According to the Chicago school, competition is considered to be a process wherein economic efficiency can be attained, irrespective of market structure.

Even highly concentrated industries can be associated with efficiency, as firm profits are perceived as a result of higher efficiency through economies of scale and innovation. Prohibiting firms to achieve these efficiencies would be irrational (Voigt and Schmidt, 2003). Accordingly, also dynamic efficiency gains are acknowledged in this respect. In the long run, only the most efficient firms survive in a competitive market, which results in an equilibrium-resembling market situation. Even with the deficiencies of the legal system considering the centralised economy of the countries, however, it becomes evident that:

A - The globalisation of antitrust rules is real;

B – There is significant variance among countries about the priority of enforcement, and the resources of different countries devoted to competition issues are starkly different.

Caution should be the watchword in using or interpreting these enforcement priorities, Competition policy has two columns one maintains or promotes competition in a market through the enforcement of competition laws. The other promotes the business sector's compliance with competition laws by making them understand that competition would benefit business in the long run.

Chapter III

DOMESTIC BACKGROUND OF EU STATES IN TERMS OF ENLARGEMENT

Abstract: 1. Principle and rule of antitrust from national to a new communitarian perspective – 1.1 Mediterranean Enlargement in 1980's (Greece, Portugal and Spain) – 1.2 “Luxembourg” and European Council of December 1997 – 2. Enlargement and Candidate Countries measures decision to enact antitrust law – 2.1 In the Enlargement 2004, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia also joined the European Union – 2.2 In 2007 Bulgaria and Romania, with other Eastern European countries will also join (Croatia, Turkey) – 3. New aspect of the Extraterritorial rules of Antitrust: solutions avoiding conflicts – 3.1 The fundamental point for competition – 3.2 Competition Law: the efficiency - 3.3 The unilateral approach – 3.4 Case law “The Hartford Fire” - 3.5 Unilateral effects - 3.6 Conflicts of Jurisdiction: extraterritorial solutions - Conclusion

Abstract

In the last decade a large number of countries have fundamentally changed their economic system, from a centrally planned economy into a decentralised market economy. The European Union was engaged in enlargement negotiations with twelve Candidate Countries. We start with the Mediterranean Enlargement in 1980's (Greece, Portugal and Spain). These countries had some characteristics similar to post-communist countries in that they also emerged from dictatorship and political and economic isolation. Their economies were quite closed but they were all private and that was a major difference with Central and Eastern Europe. Following the Luxembourg European Council of December 1997, accession negotiations were opened with Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia ('Luxembourg group'). Following the Helsinki European Council of December 1999, accession negotiations were also opened with Latvia, Lithuania, Malta, Slovakia, Romania and Bulgaria ("Helsinki group").

In the Enlargement 2004¹⁴³, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia also joined the European Union. In

¹⁴³ The original treaty was amended and consolidated by the Amsterdam Treaty of 1999. As of May 2004, the European Community comprises number 25 Member States

2007 Bulgaria and Romania, they were a part of accession process together with other Eastern European countries that have already joined the EU, will also join. Formal candidates as mention above (Croatia, Turkey) started negotiations in October of this year (2005). The negotiations are guided by the principle of differentiation, which means that each Candidate Country is assessed on its own merits. Although Turkey is a Candidate State the conditions for preparatory accession consultation have already been satisfied with complexity and discrimination problem. Turkey became European Economic Community member in 1962 of but did not become an official EU member until recently for many motivations both on the issue of domestic strategy and due to reservations from incumbent members. Finally probable candidates (*Western Balkans: Post-Yugoslavian countries and Albania*). They are some member of the stability promises for South-Eastern Europe, which considers EU membership as a final objective of this agreement. This process has not been the same in all those countries. Also the pace of reform has been different as a result of previous history, political developments and other factors, mainly of an economic nature. One common factor, however, is the central role of competition law and policy in creating an economic environment where consumers' preferences and the efforts to compete with economic operators to satisfy those demands, lead to economic efficiency and welfare. Competition law, effectively enforced by independent authorities and regulatory reform guided by competition principles, is particularly important for making markets work to the benefit of all citizens.

1. Principle and rule of antitrust from national to a new communitarian perspective

Austria¹⁴⁴

Executive Summary

The first norms aimed at protecting competition were promulgated, in 1838 and 1870, during the reign of the Austro-Hungarian monarchy, with the purpose of prohibiting those agreements which limit the availability of goods on the market and those which control the labour market. In 1952 a law was issued regarding the complete regulation of the market, which was the foundation of the current Kartellgesetz, the fundamental law of competition in Austria, in force since 1989 and subsequently modified many times, relating to issues of unfair competition in 1984 and the discipline of competition in 1993¹⁴⁵.

The characteristic of the Austrian economic system preceding its entry into the EEC on January 1st 1994 was the incentive to create cartels, with the aim of rendering the national industries more competitive. Cartels were prohibited only when they were seen to be against national interest; otherwise a simple obligation of publication was imposed through the registration of the agreement at assigned entities, which as a consequence, led to controls of a formal nature. The Kartellgesetz, contrary to the majority of other European antitrust regulations, does not contain any presumption on which to base the general prohibitions of anti-competitive behaviours, but proceeds to identify different types of anti-competitive activity, sanctioning the validity of those, which are advantageous for the economy in general, and in particular for the process of technological development. In spite of this, the State monopoly was effective; in fact after joining the EU, many sectors were liberalised: the credit and banking institutes as well as the insurance sector being notable examples. In its entirety, the Austrian political-economical system tended to be notably protectionist, characterised by an incisive control of commercial exchanges. This formulation derives from the fear that a

¹⁴⁴ Annual Report on Competition Policy Developments in Austria 2007 - 2008

¹⁴⁵ Bischof G., Pelinka A., Austria in the New Europe, vol 1, 1992.

regime of free competition in a single market can jeopardise the stability of the national economy¹⁴⁶. This situation was subsequently modified to achieve alignment between the Austrian competition policy and the Community.

The regulations contained in the Kartellgesetz are applied to the operations between companies in which the turnover or market share held exceed a level determined by the competent authorities. It should be noted that in this field innumerable exceptions are provided for with respect to specific sectors classified as exempt from the application of the regulations under examination. For example, transport companies, cooperatives and many other public and private subjects. The exceptions above, it should be said, occur in all cases in which they are considered to be incompatible with the international agreements ratified by Austria.

Companies who wish to create a concentration, even if it is created by an indirect control, or a merger, must declare their intention, and a check of the operation's headquarters must be undertaken. This is established in the Kartellgesetz, where it subdivides concentrations into three groups on the basis of the type of business that distinguishes them. Those with a strong impact on the market must notify in advance, while those of medium dimensions must notify within one month of their creation¹⁴⁷. Lastly, concentrations considered to be of irrelevant dimensions are not subjected to the so-called obligation of notification.

The Kartellgesetz defines a company in a dominant position as one that is not exposed to significant competition, or that holds a share of a national market equal at least to 5%; however, the company that is considered dominant is that which is able to obstruct, even partially, competitors' entry to the market. Companies of this kind are prohibited from abusing their position, deemed to exhibit behaviour that can damage consumers or which create the already mentioned barriers to entry.

Vertical constraints of sale are described as agreements between an entrepreneur and other independent entrepreneurs, where the first imposes a constraint on the second, through limiting sales or similar operations (for example, exclusive sales contracts). Contracts of this kind must be communicated to the Court beforehand, so it can decide if authorising them will positively influence the national economy. Vertical agreements

¹⁴⁶ Seidl- Hohenveldern I., Constitutional Problems Involved in Austria's Accession to the EU, in CML Rev. 1995, n. 32.

¹⁴⁷ Article 42 relieves the evaluation thresholds for concentrations between companies operating in the media sector, because in this sector budgets are extremely higher than in others.

permitted by Community regulations are always valid, while those that commit moral violations and those that disadvantage the consumer are never permitted. The Kartellgesetz provides sanctions with regard to the abusive creation of cartels geared towards increasing prices or reducing the offer, as well as the abuse of dominant position. These sanctions mainly consist of the absolute invalidity of the agreement, the confiscation of earnings deriving from the illegal practice and the possibility of a trial for the head of the operation¹⁴⁸.

The role of competition authorities in the formulation and implementation of other policies

The FCA comments on issues of general economic policy from a competition point of view and communicates the implications and benefits of fair competition to the general public, thus covering the field of competition advocacy. Besides numerous press contacts (interviews of the Director General, requests for information by the press) the FCA regularly disseminates information on important cases and participates in several international symposiums, seminars and workgroups and reporting on their experiences. Furthermore, the FCA comments on national legislation impacting on competition law, such as the national Packaging Regulation (Verpackungsverordnung) and the Waste Management Act (Abfallwirtschaftsgesetz).

On 1 May 2004 Council Regulation (EC) 1/2003 on the implementation of EC competition rules entered into force. It provides a system of legal exception in individual cases instead of the former notification system and the decentralised implementation of Articles 81 and 82 of the EC Treaty. Because of the direct applicability of the Regulation there was no legal obligation to align Austrian national law to the new EC law. For transparency reasons and to harmonise the law for merely national cases, it was decided to reform the Austrian Cartel Act (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen). The most important Austrian competition law statute is the Cartel Act 2005 (*Kartellgesetz 2005 – Cartel Act*), which came into force on 1 January 2006. The Cartel Act includes cartels, vertical and horizontal agreements, abuse of dominance position, mergers and enforcement

¹⁴⁸ It is interesting to note that in the case in which the company that commits the abuse belongs to the information technology sector, the relevant authority must evaluate the elements of public interest in the company and the plurality of means of information in the country.

procedure. The new Cartel Act has brought about important changes to the substantive and practical regulations on anti-competitive agreements and *concerted practices*. The distinction between various types of cartels and horizontal - vertical agreements to which a variety of different system were relevant has finally been abolished by substitute the old law with three provisions which are – *mutatis mutandis* – in substance identical to article 81 EC. Also the regulations on the abuse of a dominant position under the Cartel Act are largely identical to those of article 82 EC.

Belgium¹⁴⁹

The first Belgian law on the protection of competition, issued in 1960, was based on the principle of abuse and did not precisely outline the prohibited anti-competitive practices nor did it provide for a system of publication of the agreements. The proposed administrations of control were not endowed with strong investigative powers, as limited in value therefore as the sanctions themselves. Through the laws of 1991 and 1993, Belgium drew nearer to the Community model of protection of competition with the introduction of a control system for concentrations and the creation of new independent administrations endowed with vast powers. The new normative provides private companies with the power to go directly to the Belgian Courts to protect themselves against anti-competitive practices put in place by competitors (private enforcement). The new normative establishes a general prohibition of every kind of practice restrictive to competition, all agreements violating this norm are absolutely "null and void", unless they can benefit from individual exemptions or by category¹⁵⁰. In cases of abuse of dominant power cases are disciplined in an identical manner to Article 82 EU Treaty, exemptions are not provided for. The basis of the Belgian normative on competition is the presence of a concentration when two or more companies found or acquire, directly or indirectly, the control of one or more companies. The system does not use the formula of "double barriers", from the moment that the antitrust law under examination is not applied to restrictive practices that benefit

¹⁴⁹ Annual Report 2008 (In English)

¹⁵⁰ These are conceded if the agreements favour the Belgian economy through technical progress or the assertion of small and medium companies in the market.

from a Community exemption, nor to concentrations subjected to checks by the European Commission¹⁵¹.

Belgian law provides for a system of control based on the obligation of notification of any agreement that is created as a result of a merger, that is then subjected to a duplicate screening by the competent authorities: the first check serves to eliminate the clearly recognisable prohibited cases; the second, aims to evaluate the more complex cases. The authority considers prohibiting the merger, or allowing it because it is favourable to the national market or advantageous to technical progress. Agreements of prohibited concentration operations are null and void, and result in the termination of the agreements, imposing the separation of the group of companies. Since 1 May 2004 (entry into force of EC Regulation 1/2003, which modernized EU competition law), National Competition Authorities have been fully involved in the enforcement of EU competition law. This implies an increased responsibility and workload for the Belgian Competition Authority. The new Act will strengthen and reform the Belgian Competition Authority and will provide it with new powers designed to ensure a more effective and coherent competition law enforcement policy. On 19 July 2005, the Royal Decree of 3 July 2005 setting out the new merger thresholds entered into force.

The new Competition Act aligns the Belgian rules on merger control with the EU Merger Regulation by providing that concentrations that would significantly impede effective competition must be blocked. The new test is broader than the former “creation or strengthening of a dominant position” test and the Belgian Competition Authority will be allowed to take other criteria into account when assessing the impact on the market of a planned concentration. The new Act will also bring the so-called “standstill-obligation” in line with the EU Merger Regulation, by providing that concentrations may not be implemented until the Competition Council has cleared the operation, thus replacing the current – more lenient - prohibition on taking any “irreversible measure or measures leading to a lasting change in the market structure” pending approval of the merger.

On 8 May 2006, the Senate approved the proposal for a new Competition Act, which will introduce important institutional reforms and will bring Belgian competition law

¹⁵¹ Van de Walle De Ghelcke, Koen Platteau, *The New Belgian Competition Act*, in *Review of International Business Law*, 1993, pp. 743 ss.

further in line with EU competition law. At the institutional level, the new Act will reinforce the Belgian Competition Authority and will provide it with new tools designed to ensure a more effective and coherent enforcement policy. The Body of Auditors (formerly Reporters) should become more independent from the administration through its integration into the Competition Council. The Competition Council will have six permanent and six non-permanent members. With regard to restrictive practices, the possibility for parties to notify agreements with a view to obtaining an exemption from the prohibition of anti-competitive agreements will be abolished. The new Act also will explicitly provide for the possibility to close investigations by way of commitments and the Belgian leniency programme will be granted a formal legal basis.

Cyprus¹⁵²

The highland of Cyprus's get the access into the European Union in the achievement of the "*acquis communautaire*" in the subject of competition and the embracing of European competition policy regulations focusing on the smooth performance of the market with a outlook to consolidating "*a regime that would ensure competitiveness in the internal market*". The Commission for the Protection of Competition was enacted in 1990 whit a focus on protection of competition Law "207/89". These regulations along with the organization of concentrations between undertakings "law 22/99" constitute the foundations of competition policy. The Competition Law was improved in 2000 and its key provisions are reviewed in the following section

The Commission for the Protection of Competition try to maintain a situation of free market without distort competition in the market, by ensuring that any anti-competitive practices by companies.

Better competition in the economy encourages innovation and efficiency among company. We entitle this competitive practice and we are committed to safeguarding this process in the interest of consumers, company business and Cypriot economy in general.

The Competition Law act prescribes its powers and duties.

¹⁵² Annual Reports

These embrace investigating infringements of the restrictive agreements and abuse of a dominant position. The Commission for the Protection of Competition may order interim positive or injunctive measures in the furtherance of its duties, and may act as a result of receiving a complaint or on its own initiative. The CPC has wide powers to achieve information, not only by making written requests but also by examine and making copies of the documents and files of an undertaking or trade association and requiring oral clarification from its staff. For this reason the Commission for the Protection of Competition is empowered to enter all locations and means of transport used by an undertaking.

On 8th of March 2001 the Public Aid Control Law which entered into force on 30th April 2001 following the decision of the Council of Ministers. This legislation incorporated Community law provisions into the Cyprus legal order that are directly effective in the EU Member States, for the monitoring of the application of which the European Commission and not the Member States - is responsible.

The enactment of the Public Aid Control Law was followed by secondary legislation in the form of regulations which provided for the criteria of approval of the granting of state aid to various sectors.

In June 2002, a year after the establishment of the Office, with all the requirements set by the European Commission having been fulfilled (i.e. necessary legislative framework, adequate administrative capacity and credible enforcement record on the effective application of the *acquis on Competition*) the Chapter on Competition was provisionally closed, with regard to both state aid and anti-trust matters.

As provided by the Law, by 30th March 2003, the assessment of all existing aid schemes individual aid was completed.

On 29th April 2004 the State Aid Control Law of 2004 was passed. The role of the Commissioner was reviewed and his title was changed from Commissioner for Public Aid to Commissioner for State Aid Control.

It is worth noting that the Office, when necessary, cooperates with the European Institute of Public Administration in Maastricht according to a bilateral agreement. It should also be noted that the Office is in regular contact and cooperates closely with the Directorate-General Competition of the European Commission.

The rule of Concentrations Law provides for the control of concentrations between companies for the purposes of limit of efficient competition and applies to all concentrations of major importance, as defined below. The authority involved in the notification and evaluation procedure, the Competition and Consumer Protection Service of commerce, industry and tourism. Under the authority conferred by the Competition Law, the Council of Ministers has ended block exemptions in relation horizontal and vertical agreements as well as “*shipping companies and consortia, liner shipping conferences, insurance, road transport, air transport, agricultural products and the motor vehicle sector*”.

The CPC is particularly concerned about secret cartels, if a participant in a secret cartel comes forward and volunteer’s information to the CPC that leads to the finding of an infringement and to the imposition of fines on the other undertakings in the cartel, the CPC will consider granting the informant immunity from or reduction of any fine that would otherwise have been imposed on it.

The CPC in the end decide whether the company’s evidence significantly contributed to a finding of an infringement and the level of reduction the undertaking will obtain advantage from, relative to the fine which would otherwise have been compulsory suggest. A Competitor wishing to benefit from a reduction of a fine should contact the Competition Authority and submit the important proof.

The Authority will believe that evidence by an applicant for a reduction of a fine only after it has made a decision in relation to the same suspected infringement. The decisions of the CPC are legally considered as an administrative decision issued by a public authority. As such, it may be challenged by any person with a personal, present and legitimate interest in the decision by way of recourse to the Supreme Court of Cyprus.

Czech Republic¹⁵³

Competition policy developed in the Czech Republic along lines similar to most of continental Europe until 1948. The first explicit statute on the subject was adopted in the late nineteenth century, when Bohemia already had the most highly developed industry under the Habsburg monarchy. That law declared that agreements among traders to increase prices to the disadvantage of customers were void.¹⁵⁴ Under this approach, which was common at that time, price fixing agreements were not necessarily prohibited by public law, but the conspirators could not use private law remedies to enforce their agreements against defectors.

Later, in the inter-war period, Czechoslovakia adopted a program to register cartels and control abuses¹⁵⁵. This law was not repealed, but it could not be enforced in the first two years after World War II. From 1948 to 1989, when the economy was subject to monolithic central direction and planning, “competition policy” to regulate the resulting monopolies would have been incoherent. Some rules about unfair competition were added to the national planning regulations during the brief reform period in 1968-69. In 1970, a rule against abuse of dominance was added to the Economic Code. But this rule was not a precursor of a move toward wider application of competition concepts. It addressed organisations dealing with each other in the context of a national plan, not a competitive market. And it was actually invoked only once.

The central planning model appears to have been followed more consistently through the 1980s in Czechoslovakia than in some of its neighbours, which had begun to introduce market-pricing mechanisms and to anticipate the need to create new institutional structures for a market economy before 1989.

As the country revamped its institutions to shift to a market economy in 1990, one of the first steps was to draft a framework competition statute. The law on the “protection of economic competition” (“Competition Act”) was adopted in 1991.¹⁵⁶

This law drew on European models and substantive concepts, but it also included features designed to address particular national problems, notably the historically

¹⁵³ Report 2008

¹⁵⁴ Sec. 4, Austrian Coalition Act No. 43 of 1870

¹⁵⁵ Act No. 141/1933 Coll., on Cartels and Private Monopolies

¹⁵⁶ Act No. 63/1991 Coll., on the Protection of Economic Competition, as amended by Act No. 495/1992 Coll. and Act No. 286/1993 Coll.

monopolised structure of most markets. Not only were the “natural” monopolies in the utility sector still unregulated and unreformed, but also manufacturing and other industries were typically monopolies, at least within a domestic market. To apply the new law, the Czech National Council established the Office for the Protection of Economic Competition (“OPEC”), which began operation 1 July 1991.

The competition agency’s institutional status was upgraded in 1992, when the OPEC became the Ministry of Economic Competition. In that position, competition policy could intervene more directly in the privatisation process. After the June 1996 parliamentary elections, and as part of a general reorganisation of administration offices and functions, it became an “office” again.¹⁵⁷ Geographic separation from the other governmental institutions in Prague was intended to represent and re-enforce the competition policy body’s independent decision-making position.

The basic competition law will be replaced by a new law to make its text conform fully to EU competition policy. The most significant changes will involve the treatment of mergers and the definition of dominant position. The new Czech law will also follow the EU’s approach to exemptions and *de minimis* issues. It will enter into force on 1 July 2001.

The Czech Republic competition law is based on familiar European substantive concepts. Features that were appropriate for a transition setting are being revised in anticipation of EU accession. The enforcement body was at one time a separate Ministry; now, the Czech Office for the Protection of Economic Competition is an independent agency. Provisions for exemption are well controlled, and the processes for applying it are working well; however, stronger enforcement powers may be needed to deal with secret cartels. The major challenge of improving competitiveness by completing the reform of the inherited industrial structure requires solving problems of corporate governance and financing.

The situation in the Czech Republic must be understood in the context of 10 years of reform, as the country moved from central planning to a modern market economy. Competition policy principles have been integrated into the general policy framework for regulation from the beginning of that process. For several critical years, which included key decisions about privatisation and restructuring, competition policy was a

¹⁵⁷ References to the “OPEC” herein include the Ministry, with respect to the period 1992-96

separate Ministerial portfolio, so that considerations of competition policy were raised directly in intra-government decision-making. Anti-competitive constraints have been avoided, for the most part, in designing new regulatory institutions, but in restructuring energy monopolies, some competition concerns remain.

The most important challenge is not one of competition policy, as that is usually conceived, but of improving competitiveness by completing the process of reforming the inherited industrial structure. This will require solving some of the problems of corporate governance and financing that have emerged from the privatisation process. Managers need more incentive – or discipline – to produce efficiently and deploy assets productively. Among other reforms, this may require a clean-sweep replacement of the cumbersome bankruptcy law, where incremental tinkering is postponing fundamental solutions. Competition policy may play a modest role, sorting out investment cross-holdings that may inhibit competition and reviewing proposed restructuring deals to ensure against the creation of market power.

The Czech competition law is based on familiar European concepts, prohibiting restrictive agreements and abuse of dominance and requiring approval for major mergers. Some of the original features that were particularly appropriate for a transition setting, such as a strict test for dominance and merger control, are being revised now to conform to EU norms in anticipation of accession and to make it more useful as a tool of reform. The administrative approach in applying the competition law has worked well, but new tools are needed to deal with violations, such as horizontal cartels, that the parties do not report to the authorities. Most recurring issues are similar to those faced by all competition enforcers, such as self-regulatory barriers to professional services and increasing pressure for rules to protect competitors against abuse of economic dependence. Exclusion may be established in response to particular *case-by-case* purpose. In addition, there are generally applicable “*block exemptions*”, which detail circumstances or reason for permitted agreements, including clauses that either may or may not appear in accords (the “*white and black lists*”). Any accord that meets those conditions is excused without need for particular submission.

The OPEC has statutory responsibility to control anticompetitive state aids. Subsidies or preferences provided by the local or national governments at all levels may not distort competition by favouring some firms or products. The OPEC has the authority to order

firms to return the aid provided or to order the agency providing the aid to eliminate the competitive distortion. This responsibility was transferred from the Ministry of Finance as of May 2000. In 2008 the Office prepared an amendment to the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts (hereinafter referred to as “the Act”). This amendment should come into force in the year 2009. The most important changes concern particularly the area of mergers to which the amendment introduces the so-called simplified proceedings used in the Community law. At the beginning of the year 2009 the Parliament of the Czech Republic approved a new Criminal Code, which, among others, narrows criminal liability in the area of competition law. Compared to the existing widely defined legal regulation which in fact made any real application impossible, only horizontal cartel agreements are generally regarded as the most serious infringement of competition rules and thus regarded as a crime.

Denmark

The antitrust legislature was introduced in 1955 with the issuing of the Monopolies and Restrictive Practices Supervision Act, which introduced regulations, aimed at preventing the imposition of unreasonable prices and imposed controls on restrictive practices and monopolies. According to the principle on which this law was based, each type of anti-competitive activity could be prohibited only if it constituted an actual abuse. The Danish economy has always been characterised by a strong prevalence towards agriculture rather than industry. Industry is almost exclusively made up of small and medium companies. An economic system of this kind developed through consistent examples of corporatism and organised social mediation. State intervention in the economy was almost non-existent and concentrations were encouraged to make the weak, local companies more competitive¹⁵⁸.

In 1974, the Prices and Profits Act was issued, aimed at maintaining the stability of the internal economy, through the control of prices; the Danish vision of the free market was that of transparency, according to which every entrepreneurial activity or decision

¹⁵⁸ Knudsen T., Rothstein B., *State Building in Scandinavia*, in *Comparative Politics*, 1994, p. 218; Amoroso B., *Denmark*, in AA. VV., *Economic and Social Councils in Europe. Role and Perspectives*, Naples, E.S.I., 1992, pp.41 and following.

had to be publicised both with regards to the buyers and the competitors. In fact, transparency of the market was considered to guarantee easy access to new competitors in the market, as well as a competitive incentive.

However, the Danish economists soon realised that applying the principle of transparency, which certainly favoured the development of competition between the internal companies, put the national industries at risk from more experienced foreign companies. These companies, knowing the mechanisms of price formation in Denmark, could carry out practices, capable of putting the entire national economy at risk.

A new law on competition was published in 1989: based, once again, on the principles of abuse and transparency, with the aim of favouring competition, not just guaranteeing it, through the exclusion of every control of concentrations, the regulation of importations and control of restrictive practices. This law again gave a lot of importance to the discussion between companies and the competent authority, with the purpose of eliminating abuses preferably through negotiation and, only in the case of failure to negotiate, through the authoritative annulment of the effects of the incriminating act, added in 1992 with the issuing of an amendment of the law, which notably limited the possibility to make tactical-economical information known, especially in the sectors where competition was weaker.

In 1997, the Danish antitrust discipline abandoned the principles of abuse and transparency in favour of general prohibitions with regard to agreements, accords and practices contrary to free competition carried out by single companies or by their associations¹⁵⁹.

All prohibited agreements are automatically annulled, unless they are able to benefit from the exemptions provided by the law or by liberating declarations. This happens when the agreement favours public interest, technological development or a branch of the market, as well as when the interested companies' revenue is inferior to a certain sum (de minimis rule). These exemptions can be granted individually or by type of agreement: they can be conditioned and are revocable.

The concept of abuse of dominant power is copied perfectly from that expressed in the EEC Treaty and each practice that is part of this behaviour is prohibited by the Danish law of 1997.

¹⁵⁹ De Falco V., Public Interventions of the Protection of Competition in Denmark, in Ammannati L., Competition in Europe, cit., pp. 308-309.

It is the opposite as far as concentrations and mergers are concerned, as there is a lack of large multinational companies in Denmark, such practices are subjected to public control that is anything but strict¹⁶⁰. In fact for this type of operation it is sufficient to serve notice to the relevant authority, with the penalty being a simple administrative sanction¹⁶¹.

Since Denmark's competition regime came into force in 1998, prohibition has been the governing principle of the Danish Competition Act (*Konkurrenceoven*), Consolidated Act n. 785 of 8 August 2005. The regulations are stimulated by articles 81 and 82 of the EC Treaty. EC case law is measured as a relevant source of supervision for principle of the understanding of the Competition Act. A guideline of Merger was not firstly part of the Competition Act, but was established in 2000. To the contrary Concentrations that meet relevant thresholds may only be applies with authorization. The Danish competition authorities have prepared an important step in their efforts to implement the Competition Act efficiently: a number of successful procedures have been made against cartels, and revisions to the Competition Act in 2002 form the source increased level of fines. Since 2000 it has been prohibited to improve transactions fixed by Danish merger control without the prior authorization of the Council. Such agreement must be notified to the Authority, and the Council will assess the effects on competition on the basis of a market study and subject to the principles known from EC competition law. The dealings between companies to be announced pursuant to the EC Merger Regulation (ECMR) should not be notified to the Authority.

¹⁶⁰ Due to the lack of industrialisation in Denmark, concentrations can more often represent an advantage rather than a danger for the economy.

¹⁶¹ If a merger takes place between subsidiary companies of the same group then notification is not required.

Estonia

The Competition law was enacted in 1993 in the area of governance of the Ministry of Finance.

Five years of rapid progress of the economic and competition policy and legislation as well as experience gained from the improvement of the law necessitated drafting a new more specific and revised Competition Act. The newly drafted Law entered into force on 1998 with more particular implementation measures for meeting the commitment arising from the Europe harmonisation and establishing an association between the UE and their Member States and the one hand and the Republic of Estonia, on the other.

The recent Competition law established besides restrictive agreements, abuse of dominant position and unlawful competition, new areas like restrictions activities of undertakings with special or limited rights or natural monopoly, merging companies' obligation to notify of the merger, principles and procedure for granting state aid.

The Competition Board collaborate well with the above mentioned authorities exercising supervision over specific acts regulating various matters of economy.

In Estonia market share establishes a reputable presumption of dominance; the law seems to say that an enterprise with such a market share is conclusively presumed to be dominant. In addition to prohibiting generally the abuse of a dominant position, the laws also specify certain types of conduct that can constitute an abuse, in a manner similar to Article 82 of the EC Treaty.

In Estonia, abuse of dominance cases have been relatively numerous. Many such cases arise in markets characterised by natural monopoly or an essential facility. Most of the cases have been resolved by the issuance of remedial orders by the competition agency. Structural remedies generally have not been pursued. The importance of abuse of dominance cases in transition countries, but also those cases are difficult to prosecute successfully. It is recommended that the competition agencies increase their reliance on structural remedies, though not necessarily on the breaking up enterprises, which is very difficult, but on eliminating unnecessary barriers to entry in the relevant markets. The reports also recommend that the competition agencies focus on “exclusionary conduct” by dominant firms – conduct that excludes actual or potential rivals from competing in

the relevant market – rather than “exploitative conduct,” such as monopolistic pricing or improperly restricting output. The latter can be ambiguous; it is difficult both to identify truly anticompetitive conduct of that sort and to fashion an effective remedy against it.

Estonia does not currently have merger control, but its new law has instituted a merger notification requirement. In the absence of a specific prohibition of anticompetitive mergers in Estonia, it would seem that the abuse of dominance and restrictive agreement provisions of that law could be applied against anticompetitive mergers in appropriate circumstances. The reports emphasize the importance of setting merger notification thresholds at a relatively high level, high enough to catch only relatively large transactions and thereby minimising the burden of compliance on merging parties and the burden on the competition agency through having to review an unnecessarily large number of notifications. The thresholds set by the three laws appear to be at reasonable levels, but the report recommends that there be periodic review of the thresholds and adjustment as necessary.

The legal and structural aspects of the formation of a competition agency, however, are only a part of the necessary conditions for independence, and perhaps the lesser part. At least equally important is the development of “*de facto*,” or informal independence within the government. The agency must actually be confident that it is free to decide its cases without political interference. This type of independence is created only over time, as government, business and the public develops an understanding of and appreciation for a strong and impartial competition policy.

Finland

Finland debated the shape of its competition policy for more than 30 years, before making it a centrepiece of wide-ranging economic reforms in the late 1980s. Price controls, which had been the principal means of dealing with marketplace abuses, remained in place until 1988. High concentration in some sectors was to be expected, because of Finland’s small size and isolation from other markets. Cartels were tolerated, in part because of uncertainty about what it would mean to eliminate them. From 1958 to 1998, Finland’s competition statute was revised 6 times, with most of the changes intended to make it stronger. These changes in the law often lagged behind changes in

the policy that was actually being applied. Since the late 1980s, Finland has followed an economics-based competition policy, as part of a general shift from collective corporatism to a more individualist market order. The first antitrust law was enacted in Finland in 1973 and amended in 1988. It was oriented, in particular, to introduce public control on prices, but far from providing general prohibitions, it was based on the principle of abuse.

In 1992 a new law was issued that used a system of protection based on a new combination of the principles of abuse and general prohibitions¹⁶²: in fact, they are prohibited in a general way and express restrictive horizontal agreements, the abuse of dominant position and the vertical imposition of prices, while every other behaviour is prohibited only if it threatens dangerous consequences for competition.

In the last twenty years the Finnish economy has been characterised by high rates of unemployment and a lack of competitiveness of companies, this has resulted in a notable public debt, which has pushed not towards the construction of a competitive market but to an increase in the productivity of those already competitive companies¹⁶³.

In any case, practices which, no matter how anti-competitive, produce advantageous effects for consumers and for the Finnish economy in general, are always allowed. One may refer to the fact that individual exemptions are provided for, while all forms of exemption by category are completely forbidden.

The most recent changes, in early 2002, have been institutional. The Competition Council was replaced by a judicial body, the newly reconstituted Market Court. The policy standards in Finland's competition law are efficient markets and consumer interest. A comprehensive conception of competition policy based on efficiency supported the stronger enforcement in the 1990s. The mainly distinction between Finland's Competition law and the EU structure concerning competition law is a condition that speaks in the same terms as Finland's competition policy purpose: a restriction actions that is deemed to have harmful (of monopoly) effects through diminishing efficiency or avoid or hindering the behavior of business in a manner "inappropriate for sound and effective competition" may be enjoined even if it is not specifically prohibited in the statute.

¹⁶² Waelbroek M., Bouckaert J., The Law on the Protection of Economic Competition, in *Journal des Tribunaux*, 4 April 1992, n. 5628, pp. 281 ss.

¹⁶³ Hjalmarsson L., *Competition Policy and Economic Efficiency: Efficiency Trade-Off in Industrial Policy*, in *Internationalisation, Market Power and Consumer Welfare*, London and New York, Bourdet, 1992, pp. 337 ss.

This had been the principal substantive provision of the old competition law. It was retained in the 1992 revisions, despite the EU's request that Finland national law it's conform to the Treaty of Rome rules *in haec verba* before accession. It could provide a basis for flexible application of competition policy to complex or novel issues, such as non-price vertical agreements, joint dominance and oligopolistic co-ordination, or to unfair competition supported by state aids. On 1 May 2004, the modernisation of EC Antitrust measures will be implemented. The competition authorities of EU member will form a European Competition Network (ECN). The reform also involves changes in the Finnish national legislation so as to permit Finland to fully participate in European Competition Network actions. The Finnish Competition Authority has given "De Minimis rule" which clarify when a competition restriction not affecting business between EU member states is considered to restrict competition significantly. According to the procedure the Finnish Competition Authority consider the question of significant effect in accordance with the case regulation of the European Commission and the European Court of Justice and uses the Commission's *De Minimis* as an aid in the interpretation¹⁶⁴. The competition restrictions between competitors are considered to be of minor importance if the market share of the participants does not exceed ten per cent of the relevant market. However, severe competition restrictions such as price cartels, market sharing, resale price maintenance or granting of absolute territorial protection do not fall under the de minimis rule. The regulations concerning abuse of a dominant position under Finnish law correspond to article 82 of the EC Treaty. The Finnish rules regarding concentration do not have to have a presence in Finland in order for the Finnish merger control regulations to apply. Consequently Finnish Competition Act's merger control provisions also enclose the same two-year law as the one applied in EC merger control.

¹⁶⁴ Commission Notice on agreements of minor importance, which do not appreciably restrict competition under article 81(1) of the Treaty establishing the European Community (de minimis), Official Journal C 368, 22 December 2001, p 13-15.

France

The first French normative on competition was issued in 1945, with the aim of favouring the industrialisation of the country. An authority composed of experts was created¹⁶⁵ that prohibited single behaviours, without establishing general prohibitions. Moreover, a system of administrative controls of prices was introduced, to safeguard the economy from the risk of inflation and to protect consumers¹⁶⁶.

In France antitrust legislation developed in the sphere of the economic structure characterised by a central role for the public administration. This resulted in an economic policy of protection of consumers and national companies, based on a powerful control of prices and on the lack of serious monitoring of concentrations. Anti-competitive practices, although prohibited, were evaluated with extreme elasticity and the picture was further complicated by periodical overlaps of new authorities and the already existing ones, so creating a muddled bureaucratic network that occurred ever more frequently¹⁶⁷.

In 1967 a law-proxy was promulgated that extended the scope of application of the law of 1945 to sectors, which until then were not regulated. The principle that agreements could be prohibited for reasons other than their negative effect on prices was also established.

A new normative, issued in 1977, considerably updated matters, conferring incisive injunctive and sanctioning powers to the Ministry and re-enforcing the role of the antitrust authority and its structure¹⁶⁸, notably extending its consultative functions. The process that carried the independent antitrust authority on to cover its prominent role between the State organisations for the protection of competition was completed with the law of 1986, “Conseil de la Concurrence” which increased its powers of control for the abuse of dominant position or agreements. This law divided anti-competition activity into three categories: concentrations, practices restrictive to competition, agreements and anti-competitive practices.

¹⁶⁵ They did not represent centre of political or professional interest, rather they simply expressed their own opinions and not all the time.

¹⁶⁶ Brault D., *The State and the Spirit of Competition in France*, Paris, 1987.

¹⁶⁷ Dumez H., Jeunemaitre A., *Competition in Europe*, Paris 1991; Geneste B., *French Competition Law and European Competition Law*, Paris, 1992.

¹⁶⁸ In fact it became a permanent organisation

French antitrust law has quite an original vision of the concept of concentrations: in fact, it includes all forms of strong influence of one company over another, which at the same time has a fixed minimum threshold of importance¹⁶⁹ higher than that which initiates the prohibition. Once a company exceeds this threshold it is presumed that the concentration is prejudicial to competition and, in the absence of obligation of notification, it is up to the Ministry to decide whether to implement controls to evaluate the economic consequences of the operation and if these are negative, they prohibit the concentration. The final decision, therefore, is always left to the Ministry, but not before having requested an opinion from the *Conseil de la Concurrence*, although this is not binding. Filing a notice spontaneously with the Ministry, on the other hand, can be advantageous for those who intend to create a concentration, because, in this case, the rule of silent approval is valid; it is sufficient, for such behaviour to incur punishment, that an agreement has the theoretical potential to distort the characteristics of competition in a significant way, it is not necessary that this effect should actually require verification, agreements are punishable only for their anti-competitive content¹⁷⁰. The acts that fall within this category are not prohibited, except if they lead to a restriction of competition in the French market. This regulation is tempered by the principle of the “rule of reason” that allows the Conseil to consider only the agreements that are positioned above the minimum threshold of tolerance¹⁷¹. The other category of anti-competitive acts prohibited by the French law of 1986 is represented by the term “restrictive practices”; these consist of generalised behaviours independently punishable by checking the harmful effects on the market, subjected to customary jurisdictions, civil and penal. Typical examples of restrictive practices are: the imposition of minimal sale or acquisition prices; selling at a loss, selling subjected to unfair conditions.

The normative of 1986 prohibited two forms of abuse of dominant position: the first is the same as the legal paradigm present in all antitrust legislation, the second, instead, is defined as “abusive exploitation of the dependency situations of the market”. This latter paradigm includes the companies that impose oppressive contractual conditions on the companies in place of their obligatory partners. Here it does not deal, therefore, with the objective of dominant position in the market, but of a position of subjective influence

¹⁶⁹ This was calculated in terms of the portion of the market held (over 25%).

¹⁷⁰ Boutard-Labarde M.C., Canivet G., French Competition Law, Paris, 1994.

¹⁷¹ For example, the “rule of reason” was often used to avoid vertical agreements falling under the prohibition.

that a company, for various reasons, finds itself in, thereby unfairly profiting with regard to its weak contractual counterparts (buyers and sellers).

In 2001, France's competition law was comprehensively restated and codified in the law about *nouvelles régulations économiques* (NRE)¹⁷². The NRE reforms improved the processes of investigation and decision and added a premerger notification requirement, stronger sanctions, and a provision for leniency. Many of these measures follow procedural developments and requirements from EU law and enforcement practice. By contrast, substantive parts of the latest law address topics that do not parallel features of EU competition law, adding to the detailed rules related to the concept of abuse of economic dependence. In 1996, the *loi Galland* had already extended the powers of the *Conseil* to cover "abusively" low prices¹⁷³. The degree of attention to these subjects, both in the text of the law and in the practice of the enforcers, particularly the *Direction générale de la concurrence, de la consommation et de la répression des fraudes* ("DGCCRF")¹⁷⁴, reveals the central importance of concepts from the traditional French jurisprudence of unfair competition.

Reforms motivated by competition policy and mediated by competition law have called for rethinking fundamental structures of French law. Change has been prompted not only by EU-level competition law about state aids and public services, but also by decisions from the *Conseil* under French law about cross-subsidies and other abuses. In principle, dedication to public service coexists with competition law. Relations between private parties and the government with respect to functions performed under authority of public law have been under the administrative law jurisdiction of the *Conseil d'État*. The outlines of France's law follow the EU model and principles about restrictive agreements, dominant firms, and mergers. There are some notable variations, though. In France, the criteria for exemption apply directly, without any requirement or provision for notification and approval. Thus France already uses the same system to apply its law that will be used under the EU's modernised system of enforcement. In France, a balance may be made against any accrued economic benefits which could lead to

¹⁷² Law of 15 May 2001. Other parts of the NRE dealt with company law reforms and monetary issues. Citations to France's competition statute here will be to the law as restated and codified by the NRE, the Code de Commerce, Livre 4

¹⁷³ A rule against setting resale prices below purchase cost, enforced by criminal process like other price regulation rules, has been in France's competition law since 1963.

¹⁷⁴ The title is sometimes translated as the General Directorate for Competition, Consumer Affairs, and Trading Standards

exemption from the prohibition against abuse of dominance, but in the EU that is only possible with respect to the prohibition against restrictive agreements. In practice, exemptions from either prohibition have been rare. The French law embodies its distinctive heritage, for the book of the commercial code about anti-competitive practices and merger control also contains the residual authority to control prices and an entire title devoted to unfair market practices.

Germany

In Germany it was necessary to evaluate if it was more appropriate to base the antitrust law on a general prohibition of creating cartels per se, or on the facility of creating them with government permission, revocable in cases of abuse. The first of the so-called hypotheses was chosen, on the basis of an economic theory of local origin that was diffused with the name of “*ordo-liberalism*”. According to the theory of *ordo-liberalism*, the preservation of effective competition was good for the economy, since it permitted the emergence of new companies that were more interested in the pursuit of technological innovation than the companies that were already competitive in the market¹⁷⁵. It can be said that a technical-economical function is attributed to competition, other than the more classic political-social function. This school of thought took its views from the idea of the “social economy of the market”¹⁷⁶, according to which the freedom of initiative of single companies cannot guarantee the preservation of competition in the market; in this context, a tendency for the economy to autodestruct manifested, evitable only through a State intervention of regulation¹⁷⁷. The *ordo-liberal* viewpoint became the basis for Germany’s post-war economic reconstruction, in which some of its proponents played key roles. A professor associated with the Freiburg school’s ideas, Ludwig Erhard, headed the self-government (under occupation) that eliminated rationing and price controls in 1948, then served as minister of economy until 1963 and as chancellor until 1966. The social market economy, built on *ordo-liberal* principles, was part of his party’s platform from 1949. In that conception,

¹⁷⁵ Ammannati L., (edited), *Competition in Europe*, Padova, CEDAM, 1998, pp. 16-17.

¹⁷⁶ Dumez h., Jeunemaitre A., *Competition in Europe*, Paris, 1991, p. 116.

¹⁷⁷ Van Den Berg R., Introduction- Economic Analysis of Competition Law, in Frignani A., Pardolesi R., Patroni Griggi A., Ubertazzi L.C., *Italian Antitrust Law*, Bologna, 1993, vol. 1, pp. 45 ss.

competition policy assumed a leading, constitutional status and role, promoting basic values, protecting fundamental rights, and operating on juridical principles¹⁷⁸. Most of you are well aware that Germany's robust tradition of antitrust enforcement began much earlier than 50 years ago. The Weimar Republic's Regulation Against Abuse of Economic Power Positions in 1923 was 'the first general legislation in Europe aimed specifically at protecting the competitive process.' Three decades later, the German federal parliament enacted the ARC after many years of debate, building upon the de-cartelization and de-concentration laws introduced in Germany by the U.S. authorities in 1947. The antitrust norms had the aim of defending the economy, not only from State authority interference, but also as much from behaviours restrictive to competition that could result in the demise of other private companies that could not resist the super power through special norms¹⁷⁹.

The German antitrust regulation, called GWB¹⁸⁰, was issued in 1957 under the influence of the American authorities, with the aim of building a market economy founded on competition. It was necessary, therefore, to eliminate an economic structure based principally on the proliferation of cartels, which was favoured beforehand, by the vast expansion of heavy industry and developed enormously for wartime uses.

Germany has also played a leading role in the development of European Community competition law as a source of highly-qualified enforcement officials, having provided the first Commissioner responsible for competition policy (Dr. Hans von der Groeben) and a stellar series of Directors-General for Competition (including Drs. Manfred Caspari, Claus Ehlermann, and Alexander Schaub). And last, but not least, while we in the U.S. often think that we invented premerger notification, in fact the German merger notification regime was established in 1973, three years before our Hart-Scott-Rodino Act, and 16 years before the EC's Merger Control Regulation. It is important to realise that the German regulation applies to multiple fields: abuse of dominant position and concentrations, cartels, horizontal and vertical agreements.

The GWB in illustrating the concept of dominant position affirmed that the unlawfulness of achieving this position is real when a company uses its strengths to

¹⁷⁸ Gerber, David J. (1998), *Law and Competition in Twentieth Century Europe: Protecting PROMETHEUS*, OXFORD.

¹⁷⁹ Bohm Fs. P., *Da roblem der Privaten Macht*, in *Reden e Schrissten*, 1960, pp. 27 ss.

¹⁸⁰ Gesetz gegen die Wettwebersbeschränkungen.

prevent other companies from accessing the market or by acquiring a competitive position¹⁸¹.

Concentrations are divided into large, small and medium, on the basis of their revenue. Depending on which categories they belong to, different rules are in force regarding notifying the competent authorities: this is obligatory in all cases but if the concentration is large, the notification is before, otherwise it is afterwards. Concentrations are not necessarily controlled even if they notify the authorities, since they operate with arrangements based on which, even below the determined levels of risk for the economy, renders them immune from prohibition by the authorities. This norm is tempered by the provision of a dispensation in favour of cartels between small and medium companies, permitted when these agreements of cooperation are directed towards increasing the competitiveness of the same companies with regards to their larger competitors. Sanctions, in the case of non-fulfilment on the part of the subjects participating in the agreement, consist of imposing very severe fines. In fact it was believed, that in order to discourage the creating of cartels with resoluteness, a penalty, equal to triple the amount of profits accumulated as a result of the operation, was necessary.

The control of the authorities assumed distinctive forms: it was possible that the authorities conceded permission to create a cartel for a limited time, also conditionally and with the power to revoke it. Three months after notifying the relevant authority, the cartel can become effective if no one is against it. It happens that a cartel is authorised, even if the conditions of the dispensation are missing, when it demonstrates that it is able to satisfy public interest or an actual need of the economy.

Instead, for vertical agreements, in line with accepted principles of the GWB absolutely prohibits only those agreements which have the objective of price fixing. However, the authority of the cartels reserves the power to prohibit, time and time again, vertical agreements on distribution already in place, if they have the effect of creating insurmountable barriers for competitors to enter the market. In this case, the authority's procedure for verifying the effective existence of a cartel to prohibit, can start as much in the office as from a request from an injured party. If the authority then effectively ascertains that there is an illegal situation, firstly it orders the company to halt the

¹⁸¹ Until 1980, the year the IV addition to the GWB was issued, a presumption of dominant position was in force regarding every company in a sensitive position with respect to competition in the market.

prohibited activity and if it does not obtain the desired result, it officially annuls the agreement. The year 1958 is a major milestone in the history of antitrust, with the adoption of the ARC in Germany and the signing of the Treaty of Rome establishing the European Community, with its famous articles 85 and 86 (since renumbered as 81 and 82).

The most recent amendments to the Act against Restraints on Competition (ARC)¹⁸², which became effective in 1999, deal with the increasingly important context of European competition law and enforcement. The ARC now includes substantive principles about restrictive agreements and dominance that track those of the EC treaty, along with Germany's traditional rules. The merger review process was revised, becoming more efficient and more consistent with the practices of the EC and other European jurisdictions. The Bundeskartellamt, (BKartA) was given new responsibilities over competitive tendering in public procurement. Most importantly for the process of regulatory reform, elimination of exemptions and addition of a new standard example concerning access to network facilities in the prohibition against abuse by dominant firms, made it possible to apply the ARC more effectively to infrastructure monopolies. Further amendments are now in preparation to adapt Germany's law to the latest developments in EU competition law and procedure, notably the changes in the application of Art. 81 of the Treaty. The regulation implementing the EC's modernisation programme, adopted in 2004, shifts responsibilities to member states. Other changes in EC competition rules have tended to reduce the importance of notification and clearance and to increase the importance of economic analysis. Germany has been concerned that changes at the European level, especially those that reduce the role of notification and clearance, will obfuscate legal certitude and transparency and will thus undermine what it considers to be the strengths of Germany's system¹⁸³.

The first part of the reform concerns the necessary adjustment of German law to European antitrust law, as stipulated by Regulation (EC) 1/2003. The second part of the reform – the most innovating – aims at stimulating private actions in Germany, defined as law suits taken by victims of anticompetitive behaviours on the basis of violations of Articles 81 or 82 EC or equivalent national provisions. For that purpose, the provisions

¹⁸² The German acronym is "GWB".

¹⁸³ See www.bundeskartellamt.de/tasks.html.

concerning claimants, damage and proceedings tend to facilitate actions, while at the same time a principle of recognition of European competition authorities' decisions is established.

The most interesting competition law issues in Germany today arise from the changes in EC competition law and enforcement. Increasing co-ordination of EU competition policy will challenge Germany to protect the historic strengths of its mature and successful system. On 1st July 2005, the 7th Amendment of the German Law against Restraints of Competition entered into force. This led to a substantial transformation of German competition law under the impetus of both the European and German legislators.

Greece

In 1961, an agreement protocol was issued between the EU and Greece; the sphere of the agreement of association permitted the application of the Community principles on the subject of competition on Hellenic companies.

These regulations were inserted in an economic context/panorama characterised by severe underdevelopment, which only started to improve in the 1970s through a policy of industrial and commercial expansion completely devoid of adequate controls which in turn resulted in the proliferation of monopolies, especially public ones, and the diffusion of various cases of anti-competitive practices¹⁸⁴.

The first law on the protection of competition and the control of monopolies was issued in Greece in 1977. It was based on the general principles sanctioned by the civil code like that, which prohibited "contra bonos mores" agreements and that, which prohibits abuse of laws. Specifically, the Law describes two types of trade practices, which under certain conditions may restrict competition: (i) restrictive agreements between undertakings and (ii) abuse of a dominant position.

Greece adopted an antitrust system that derived directly from the Community one, founded on the general prohibition of anti-competitive practices, but tempered by the provision for exemptions in the case of agreements and practices favourable to public interest. Moreover, prohibited practices, like in the EU discipline, are defined on the

¹⁸⁴ Petrochilos G. A., Greek Antitrust Policy: An Analysis, in Antitrust Bulletin, Autumn, 1979, p. 595.

basis of their substantive effects on the internal market, not on the basis of formal elements. The Greek antitrust discipline is characterised by the peculiarity of being born not so much for the need to protect competition, but to harmonise the internal regulative power with the Community one. These circumstances resulted in the norms on the protection of competition being applied rarely and badly, almost causing the reshuffle of the legal system and an unhappy association with the other branches of the law, compared to which these norms seem to be notably inhomogeneous.

In 1995 the homologation of the Greek antitrust law with the Community one was completed through the provision of an obligation of advance notification having determined kinds of concentrations as its subject. Greek law prohibits every practice restrictive to competition in the national market and every kind of abuse of dominant position unless an individual exemption has been conceded. It does not provide the concession of exemptions for categories, which can only derive, for Hellenic companies, from the Community regulations.

As highlighted before, an obligation of advance notification is provided, which, if not adhered to, makes the next concession of an exemption impossible and leads to the imposition of a sanction. As in many countries, the system charged with controlling competition and applying the relative norms is of a fundamentally administrative nature and it expresses itself through the exercise of investigative powers (including carrying out requisitions) and sanctions.

Concentrations are checked, based on the law issued in 1995, to see if two or more companies are founded independently from the way in which the merger occurred, or one or more subjects who control one or more companies acquire direct or indirect control of one or more other companies. Those who intend to proceed towards a concentration are burdened with the obligation of advance notification that, if not complied with, can lead to the invalidation of the entire operation and punitive economic sanctions. Only when the competent authority has decided to give authorisation or not, can the operation be continued, and then only if it favors the public interest, otherwise it must be suspended. After its introduction into the Greek legal system through the Act 2296/95, the mechanism for controlling concentrations turned out to be unworkable for the Committee, as the thresholds proved to be very low and the number of notified cases too large to be handled by the limited personnel of the

Secretariat of the Committee within the time limits stipulated by the Act. Most of the concentrations notified were of lesser importance as far as their impact on competition in the Greek market is concerned. In 1995, the National Competition Commission became an independent authority with administrative autonomy and in 2000 the National Competition Commission also acquired financial independence. The most recent and important amendment of the act took place in 2005, and introduced several modifications to the structure of National Competition Commission, enhancing its institutional function and autonomy “authority” which was enacted in alignment with European Community Regulation 1/2003. But the Law also stipulates that when the EC takes over a case in order to examine it and issue a decision, the National Competition Commission is then forfeits its right to apply articles 81 and 82.

Hungary

Hungary’s adopted of a new competition law in the 1980s was a principal point to establishing the institutional foundations for a market power. The approaches with a post-communist constitution recognise the right to engage innovative measure for the protection of free competition.

The competition rule is used to apply and promote efficiency, to ensure fairness performance, and to protect consumer. The procedure involve those aims: competition policy have held and encouraged continued reform. Hungary’s laws concerning Competition policy follow European models. A 1923 regulation¹⁸⁵ before the communist period, Hungary adopted laws much like those of other European nations at the same time present some remedies against unfair practices. In addition to specific provisions about prohibition of price fixing, ancillary restraints, and, it contained aspect prohibiting practices contrary to legitimate purpose of the agreement, foreshadowing the current law’s general substantive standard. A law policy to legalize cartels among larger companies was adopted in 1931¹⁸⁶, this regulation provided for a notification procedure and enforcement. But this law, like other cartel laws in Europe, was not

¹⁸⁵ Act No. V of 1923 on Unfair Competition.

¹⁸⁶ Act No. XX of 1931.

applied much before 1945. With rising market power activity come recognised needs for regulations about competition. The civil code addressed exploitative agreement and abusive practice. A special fine was applied to a business against the public interest and to the practice which recognize damaged a customer or consumer. The first part of this legislative program of competition law was adopted in 1984¹⁸⁷. This law prohibited illegal practices, cartels, and abuse of dominant position.

General competition regulation usually addresses the problems of monopoly in three formal settings: dealings and agreements among companies, actions by a single company, and structural groups of independent company. The first group agreements, is often subdivided for groups: “horizontal agreements”, and “vertical agreements” among companies at different phase of production or distribution. The second group is “monopolisation”, and “abuse of dominant position”; the legal structures that use different standard have developed different approaches to the problem of single-firm market power. The third group identify as “mergers” or “concentrations,” generally embrace other structural combination, “*such as share or asset acquisitions*”, joint ventures, cross-shareholdings and interlocking directorates.

From 1991 to 1997, the Hungarian Competition Office act’s rules about concentrations cover all of these privatisation transactions. This was reportedly a deliberate decision to harden the political consensus in support of competition policy by avoiding arguments where competition policy was likely to mislay many battles¹⁸⁸.

To complete the process of privatising and introducing competition law into infrastructure sectors and services, energy, natural gas, and rail transport, the Hungarian Competition Office will need to develop its capacity for dealing with competition problems in deregulating business, and try to increase in enforcement matters as liberalisation proceeds. Better consistency between the internal rules and the European rules will simplify compliance for firms that operate both inside Hungary and elsewhere. It is less clear whether aligning Hungary’s rules with EU norms are necessary to improve Hungary’s competition policy.

¹⁸⁷ Act No. IV of 1984, On the Prohibition of Unfair Economic Activities.

¹⁸⁸ (Fingleton et al., 1996, pp. 155-56).

The European Commission has said the intention to adopt new regulations and legitimate purpose about vertical restraints, so perhaps the Hungary and EU are on a long period of convergence and it will not be essential for Hungary to make considerable amended in its historic policies concerning competition Law. Competition law enforcement accorded to the aims of efficiency and consumer interests, which will make the competition law a solid establishment for sector reforms. Another sound sequencing decision, to open up quickly to foreign trade and investment, liberalising trade and investment complemented the reinforced competition policy.

Ireland

With the passing of time and thanks to the improvement of the competitiveness of Irish companies, the national economy has opened itself up to the external market, favouring exportation and foreign investment¹⁸⁹. The economy could only be furthered by maintaining the highest level of competition in the market, while every kind of agreement between entrepreneurs was seen as suspect. The first Irish law on competition dates back to 1953 and was affected by an economy characterised by the proliferation of concentrations and anti-competitive practices¹⁹⁰. This normative called the Restrictive Trade Practices Bill was inserted into an economic policy aimed at stimulating the industrialisation of a relatively backward country, through constructing tariff barriers for external competition, creating associations of producers and distributors, of reserved spaces for national companies. Monopolies were not rare either, both public and private. Nevertheless, it should be said that these principles were not put into practice in a very incisive way, so the law, founded on the analyses of single cases and on a judicial criteria based on the concept of public interest, did not express any pre-conceived prohibition. In order to actualise the antitrust procedures, the Irish government established an independent commission (called the Fair trading Commission) of an administrative nature, able to conduct public investigations, which they concluded with clear opinions, and formulated rules, without the support of the

¹⁸⁹ Edwards C., *Trade Regulation Overseas*, 1966, p. 481.

¹⁹⁰ Organni E., *The Discipline of Competition in Ireland. Protection of Competition or Defence of Contractors?*, in Ammannati L., (edited), *Competition in Europe*, cit., p. 201.

law, on correctness in business. This organisation was also in charge of resolving controversies through informal mediation between the parties. In 1991, with the issuing of the Competition Act, Ireland began a new battle against anti-competitive behaviours, definitively passing to a system based on general prohibitions. Two kinds of behaviours were prohibited: agreements and agreed practices capable of altering the natural characteristics of competition and the abusive exploitation of dominant position, not on the basis of formal requirements, but on their actual effects on competition.

Right from the start the application of this law relied greatly on so-called “private enforcement”, to be precise direct action in the court by the private companies harmed by the prohibited behaviours, with regards to the subjects who initiated them.

The drawing closer to the Community norms was completed with the issuing of the Competition Amendment Act of 1996, which contained significant initiatives with respect to the law of 1991.

In fact it prohibited “decisions of association between companies and agreed practices that have as their aim or effect preventing, restricting or distorting the characteristics of competition both in the sale of goods and in the performance of services in the State or in a substantial part and agreements between companies”; contravening this law is considered an offence, in fact, other than annulling the said agreements, criminal sanctions are provided for with regards to contraveners: ranging from a fine to the arrest of the company board members involved (with regards to those who are presumed responsible). The law of 1996 is applied to concentrations between companies of whom at least one is Irish, provided that the revenue of each one or the combined gross value of their activity is greater than a determined amount. The said concentrations attain, under the penalty of the invalidation of the operation and the inflation of the fine, the successive obligation of notification to the Ministry, which can subject them to conditions, authorise them, or prohibit them. The regulation was supported by a system of public initiative that delegated the responsibility to undertake civil or legal proceedings with the Authority for competition, which moreover, can obtain a declaration of illegality of certain behaviours and injunctions to prevent them from the High Court.

The prohibition of dominant position is also directed towards all public organisations that supply payable services¹⁹¹. They are considered, as a general rule, re-entering in this case, the imposition of predatory or excessively low pricing, of discriminatory conditions, the unjustified refusal to contract. In this case it is not necessary to notify, but it is foreseen that some type of licence will be issued.

In 2002 was enacted a new competition policy to consolidate and modernise the existing mergers. It replaces the 1978 Act, *Mergers, Takeovers and Monopolies (Control)*, the 1991 Competition Act, and the 1996 Competition (Amendment) Act. In addition introduce important amended to merger law arrangements in Ireland's. The new Regulation also takes account of other developments, particularly the proposed *modernisation of EU* competition law.

Italy

Italy was endowed with a normative specific to the protection of competition in very recent times; in fact, this subject was mainly regulated by a few norms of the civil code¹⁹². With the promulgation of Law 10 October 1990 n. 287, the Italian legislator issued the antitrust discipline, that conflicts as little as possible with the Community norms on the protection of competition and moreover also established an authority to protect internal competition on the basis that its competencies were exclusive from those of the Community authorities on all cases of practices and agreements capable of prejudicing business between member States.

If the competent Italian authority considers a case subjected to its examination not to be included in the scope of the application of the Law, it is its duty to inform the Commission about them; in cases, then, in which a procedure has already started in front of the Commission, it is the Italian authority's duty to suspend the preliminary investigation of all aspects that are not of exclusive national relevance¹⁹³. Law n. 287/90 closely follows the prohibition, provided by Article 81 of the Treaty, of ending agreements and accords between companies that have as their object or effect to prevent, restrict or distort the game of competition in a consistent way inside the national market or one of its relevant parts. All prohibited agreements are always

¹⁹¹ Sentence Deane and Ors v. Voluntary Health Board on 29-07-1992.

¹⁹² Mezzetti L., (edited), *Economic Constitution and Free Competition*, cit., pp. 224 ss.

¹⁹³ Bernini G., *A Century of Antitrust Philosophy*, cit. pp. 302 ss.

annulled, unless they are found to benefit from some exemptions, which can be conceded by the competent authority for a determined or undetermined time, always on the request of the interested companies. During the period of time that passes between the request and the authority's response the agreements are rendered temporarily invalid. The norm under examination prohibits abuse of dominant position without explaining what a dominant position consists of, nor in which way the abuse is verified; the norm lists a series of cases of abuse of dominant position which are also found in the corresponding norm of Article 82 of the Treaty¹⁹⁴. Concentrations are not defined within the norm but it regulates them in the following cases: when two or more previously independent companies or when there is a merger or when one or more subjects acquire the position through the purchase of shares or elements of the property, law n. 287/90¹⁹⁵ controls the prohibition of all concentrations that have the effect of creating or re-enforcing a dominant position in the national market so as to eliminate or reduce competition in a substantial and enduring way. Naturally, in the case in which the Community market is compromised as well as the national market¹⁹⁶, the competencies of the Community organisations would spring into action and would apply the normative contained in Regulation n. 4064/89¹⁹⁷.

All operations of concentrations and acquisitions of control must be communicated in advance to the authority that guarantees competition and the market, if the revenue of the companies involved in the operation exceeds a prearranged sum. Once they have complied with this obligation, the companies must, however, wait for the impediment of the authority, so no form of silent assent is provided for. On the other hand, the antitrust authority can initiate a preliminary investigation within thirty days or concede the impediment without completing its investigation, if it does not feel it is necessary. In short, the normative expressly establishes that the rules analysed until now are valid for private companies as well as public ones, both public entities and companies with State

¹⁹⁴ They are part of this list, for example: the imposition of contractual conditions onerous for the buyer; the subordination of the conclusion of a contract of supplementary services not connected to the principal uses; limitations to production or sale.

¹⁹⁵ On the subject of concentrations and Law 287/90: Frignani A., Pardolesi R., Patroni Griffi A., Ubertaini L. C., (edited) Italian Antitrust Law, Bologna, Zanichelli, 1997, pp. 49 ss.

¹⁹⁶ Problems with the relationship between national authorities and the Community: Hartley T. C., *The Foundations of European Community Law*, Oxford University Press, 1994; Lasok D., Bridge J., *Law and Institutions of the European Communities*, London, Butterworth, 1994; Lonbay J., Biondi A., *Remedies for Breach of the EC Law*, Wiley, 1997; Steiner J., *Enforcing European Community Law*, Blackstone Press, 1994; Korak, V. L., *An Introductory Guide to the EEC Competition Law and Practice*, Hart Publishing, 1997.

¹⁹⁷ From this the Italian norm was agreed, which is substantially identical.

intervention. On the other hand, the above stated norms are not applied to those companies, which, for an expressed disposition of law “exercise the management of services of general economic interest - to be precise they operate in a regime of monopoly in the market, for everything tightly connected to the fulfilment of the specific tasks entrusted to them”.

Competition law in Italy is set out by Law n. 287 of October 10th, 1990 (Law 287/90 or Italian Competition Law) that mirrors EU competition rules. The Act reproduces article 81 EC approximately in its total and applies to anti-competitive agreements, which appreciably prevent, restrict or distort competition within the national market or a substantial part thereof. The Law also provides lists of examples of agreements whose object is typically considered anti-competitive and which are therefore prohibited. The Italian Competition Law particularly involves that the policy provided by the law related to vertical and horizontal agreements, abuses of dominant position and concentrations should be interpreted in accordance with the principles of EC competition law.

Despite the alignment of the Competition Act with the EU approach, particularly with respect to the definition of restrictive practices, the Italian Competition Authority does not enjoy the same power to grant immunity as the one enjoyed by the European Commission pursuant to the 2002 *‘Commission notice on immunity from fines and reduction of fines in cartel cases’*. However, since the development of the modernisation process and the entry into force of Regulation no 1/2003 (Council Regulation (EC) no 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty), and in light of the improvement of information exchange between national authorities through the European Competition Network (‘ECN’) the need to adopt a leniency programme in Italy has become more urgent.

On 2006, the Italian parliament issued a new Law n. 248, converting into law and amending the previous Law Decree of 4 July 2006 n. 223, and provided the Italian Authority with new powers. In particular, the new Competition institution was provided with the authority to impose interim measures in cases of urgency due to the risk of serious damage to competition, which is assessed on the basis of a brief examination of the case.

Latvia

The Competition Council of the Republic of Latvia was founded on January 1998 on the basis of the Latvian Anti-monopoly Supervision Committee. The Competition Council performs its activities as a public state body, under supervision of the Ministry of Economics.

In Latvia, a Competition Bureau within the Competition Council has the functions of investigator and prosecutor. The tasks of Competition Council are directed towards realization of its duties in the field of competition protection and development: to analyze received applications, to establish possible violations of law provided by market participants and to achieve their termination as well as to eliminate initiation of rules restricting competition in existing and drafted regulatory enactments.

By accession of Latvia into the European Union in year 2004 and enforcement of direct legal effect of the European Community competition legislation, responsibility of the Competition Council also includes effective supervision of the Community internal market rules and incorporation into the co-operation and information network of the EU competition supervision authorities. In October 2004 the Cabinet of Ministers adopted Regulation “Statute of the Competition Council”. This document establishes legal status, structure and functions of this authority. The main aim of the Competition Council is to facilitate to every market participant the chance to perform his economic activities in a free and fair competition environment as well as to promote competition development in all sectors of national economy for the benefit of all society.

The substantive standard in Latvia’s law is “prevent, restrict or distort competition,” Latvia’s notification requirements include a criterion that one of the merging parties be dominant in a relevant market. The report recommends consideration of elimination of that criterion, for two reasons. First, determination of dominance is a difficult and relatively subjective exercise; objective criteria, such as amount of turnover or total assets, are more easily administered in a merger notification regime. Second, mergers of enterprises that are not dominant can be competitively harmful, as well as those involving firms that are already dominant.

The Law adopted on 2002 serves to promote the State aid “*Procedures for Accounting and Granting of de minimis Aid and Samples of de minimis Aid Accounting Forms*”,

control in Latvia is came into force on January 1, 2003; amendments in the law adopted on April 1, 2004, came into force on May 1, 2004,

The Law on Control of Aid, as well as national State aid control procedures, in order to lessen the negative impact of State Aid on competition and to prevent the possibility of obtaining economical advantages by receiving illegal aid.

In 2005 the Competition Council monitored the market to ensure that no market participant would abuse its dominant position and examined the submitted merger notifications to ensure that competition opportunities would not decrease in the relevant market after the merger. A crucial priority of the Competition Council was prevention of prohibited agreements between market participants deemed to be of considerable detriment both for the competitiveness of small and medium-sized enterprises and consumers' budgets. Reports on potential unfair competition and violations of the Advertising Law were also examined.

An effective performance of the Competition Council is an important precondition of development of small and medium-sized enterprises, because. as the backbone of the Latvian economy, they can work, develop and profit only under conditions of fair competition. The Competition Council will continue to ensure that no market participant is forced out of the market in an artificial and unfair manner and no artificial entry barriers are erected in any relevant sector of the market.

The Competition Council serves not only the interest of the businesses, but also that of consumers, especially of those with low income. The decisions taken last year protected the purchasers of goods and services from attempts to impose a single price for a product which would deny freedom of choice, as well as from unfair and misleading advertising. Additionally, in 2005, a new legal tool was introduced in practice – inspection within the framework of the administrative procedure. Inspection is an investigation activity aimed at finding the evidence that might be important in clarifying the issue under investigation in any case arising out of possible violations of prohibited agreements or abuse of a dominant position. The rights and duties of the Competition Council in carrying out inspection are defined by the Council Regulation (EC) No 1/2003.

Lithuania

The Lithuanian competition law had its inception with the adoption of the first Law on Competition on 1992 and has been marked by a gradual harmonisation of national competition rules with the European Community (EC) competition law standards.

The Competition Law on 1992 provided for two administrative bodies, one body was the State Competition and Consumer Protection Office, a governmental agency (the “Competition Office”), conducting investigations in cases illegal business behaviour not establishes in agreement.

The other Authority was the Competition Council, although bearing the identical name as the existing competition body, it had significantly less powers. The Competition Council was acted with a collegial assessment, the authority applying sanctions for infringement of competition, while Competition Office is in charge to preliminary analysis and investigation approach. The 1992 regulation on Competition was, to a certain extent, influenced by US antitrust law (for example, it did not impose restrictions on vertical and horizontal agreements unless one of the parties was a dominant undertaking), its fundamental arrangement and terminology followed the European tradition. The law seems to say that an enterprise with such a market share is conclusively presumed to be dominant. In addition to prohibiting generally the abuse of a dominant position, the laws also specify certain types of conduct that can constitute an abuse, in a manner similar to Article 82 of the EC Treaty.

Cartel agreements are difficult to identify and prosecute, in that they are usually conducted in secret. The new law of Lithuania permit the competition agency to offer incentives for co-operation in the investigation by cartel participants, through immunity from prosecution or reduced fines.

In Lithuania, the article on restrictive agreements does not become effective until the year 2000. Until then, the 1992 law continues to apply to horizontal agreements, and vertical agreements are considered to be lawful.

The Anti-dumping regulation enacted in 1998 assign both the Competition Office as an executive institution and the Competition Council as an assessment making body with powers to control compliance with anti-dumping policy. Such powers remained on

Competition until they were transferred on the Anti-dumping Law came into effect on 1 April 2002.

The most essential positive change was that the competences of the former competition authority were progressively cut down and the new institution was increasing operational efficiency and focusing on areas of antitrust, state aid and merger control.

In addition to the institutional changes introduced by the 1999 Law on Competition, the Competition Council is once again facing new challenges. This time they are related to Lithuania's forthcoming EU membership which starts on 1 May 2004.

The most important assignment for the authority is to prepare for the new situation, which includes becoming part of the national competition authorities (NCA) of the EU Member States. In order to ensure strong enforcement of not only national but also Community competition regulations the Competition Council will have to improve its working efficiency, and implement proficiency and procedures with the European Commission and other members of the NCA. The Competition Council proposes to abolish the current system of Competition and shift to the legal exception structure following the example set by the new EC Council Regulation 1/2003.

Luxembourg

The Ministry of Economic Affairs is finalising a bill which will completely overhaul the amended law of 17 June 1970 on restrictive business practices. The draft regulation implies major changes to Luxembourg law, which explains why the draft reform has fallen somewhat behind schedule. The 1970 Competition Law was amended by the law of 20 April 1989¹⁹⁸. Luxembourg competition law is modelled on Art 81(1) of the EC Treaty, since it takes up some concepts of Community competition law. Thus, the Grand Duchy numbers among those Member States in which cartels are generally prohibited as a matter of principle¹⁹⁹. The law penalises agreements between

¹⁹⁸ Law of 20 April 1989 amending and complementing the law of 17 June 1970 on restrictive commercial practices, in: Memorial A n°24 of 25 April 1989, p. 504.

¹⁹⁹ Academy of European Law Trier (Europäische Rechtsakademie Trier . ERA): .Study report on the policy of MS competition authorities towards horizontal cooperation agreements between companies., Project n° IV/97/ETD/13. The study was carried out at the request of DG IV. Competition of the EC Commission. In this study, the authors rely on information provided by the Competition Department of the Ministry for Economic Affairs dated 27 January 1998 according to which Article 1 of the 1970 Competition Law in conjunction with Articles 2 and 3 contains a prohibition in principle of horizontal restrictions on competition. See also Françoise Gillen, .A new system of competition law for Luxembourg?. Report of the internship with the Ministry of Economic Affairs, June 1996, hereafter referred to as

undertakings, decisions of groups of undertakings and concerted practices having as their purpose and effect the prevention, the restriction and the distortion of competition on the market whose nature is to affect public interest. All activities of one or more enterprises abusing a dominant position on the market and affecting public interest are targeted as well by the law. The application of the 1970 Competition Law presupposes two cumulative conditions: the practice under investigation should affect both the competition understandings, abusive use of a dominant position and the public interest. The operation under control must have affected competition, notably through the creation and reinforcement of a dominant position. The 1970 Competition Law on restrictive trade practices does not provide for any national control for concentrations in the Grand Duchy of Luxembourg. The old/ somewhat archaic character of this text might be explicative in this respect. Traditionally, it was admitted both by Member States of the EC and EC institutions that the control of concentrations, perhaps exerted through the rules governing understandings and abuse of dominant position, could be considered sufficient. The wording of the 1970 Competition Law remained at this stage and therefore does not concern concentrations not falling within the scope of application of the Community regulation. Given the thresholds required by Community competition law, it seems that many economic sectors are unconcerned by the application of the Community regulation in the territory of the Grand Duchy²⁰⁰. However, this does not mean that to date Luxembourg is without any control on concentrations, since the competition authority could adopt an approach on the basis of the rules governing understandings and the abuse of a dominant position²⁰¹. Thus did the EC Commission and the ECJ prior to the adoption of the merger regulation in 1989. Under the current competition law in Luxembourg, there is no possibility for the national competition authority to apply EC competition rules. The law of 2 September 1993²⁰² only entrusts to the competition authority the responsibility to receive notices and assume the rights

.Françoise Gillen.; Xavier Nevez, Synthesis of opinions of the Commission on Restrictive Trade Practices, study commissioned by the Ministry of Economics and tabled on 6 September 1997 (hereafter referred to as .Xavier Nevez, Synthesis., p.16; André Prüm, Hugues Dewolf and Xavier Nevez: .For a reform of Competition law., a research project realised to the account of the Ministry for Economic Affairs, February 1999, p. 53.

²⁰⁰ Françoise Gillen; Xavier Nevez, Synthesis, p.16

²⁰¹ Until the drawing up of her report in 1996, Françoise Gillen held that no case involving concentrations was presented to the CPCr, see Françoise Gillen.

²⁰² Law creating the conditions required for the application of the 1970 Competition Law, the Council Regulation 17/62 and the Merger Regulation 4064/89.

laid down in certain articles of the Council Regulations 17/62²⁰³ and 4064/89²⁰⁴. But none of these duties involves the application of Articles 81 and 82 EC Treaty.²⁰⁵ There is to date no independent competition authority in Luxembourg due to an insufficient legal basis for its creation. This situation is according to many sources due to constitutional problems²⁰⁶. The CPCR is the body entrusted with the evaluation of cartels and/or abuse of a dominant position. It is composed of independent experts and government representatives²⁰⁷. The CPCR is an administrative advisory authority, but its opinion influences the binding decisions the Minister of Economics might take against enterprises found responsible of understandings or an abuse of a dominant position. The CPCR delivers a not publicly available opinion on any case to the Minister, who alone has the power to take a decision. That global reform project completely overhauling the national legislation on competition was laid out by the Ministry of Economic Affairs and announced in the progress report on structural reforms of December 2000. The work on reforming price and competition policy started largely in line with the BEPG recommendations. The Direction for Competition and the Protection of Consumers (DCP) of the Ministry for Economic Affairs finalised the preliminary draft law in the course of the year 2002. The Minister for Economics presented it to the Government Council in September 2002. The modernisation of Luxembourg competition law should enable Community competition law to be fully applied by the new competition authority, and will take account of the decentralisation reflected in the proposal for a Council regulation on implementing the competition rules laid down in Articles 81 and 82 of the Treaty. The establishment of an independent competition authority is associated with the current move towards a more decentralised European competition policy. The Independent Competition Council will be part of the European network of national competition authorities that will be established by the

²⁰³ Council Regulation No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, version OJ L 257, 21.9.1990, p.13).

²⁰⁴ Council Regulation No 17/62, OJ P 013, 21 February 1962, p. 0204 – 0211.

²⁰⁵ European Commission 31st Report on competition policy 2001, P. 373

²⁰⁶ According to the authors of the Prüm report, the combination of Articles 84, 85, 86 and 94 of the constitution of the Grand Duchy reveals that jurisdictional power can be entrusted to judges only. They deduce from this that the constitution is an obstacle to the establishment of a separate body endowed with jurisdictional power, unless it provides for such a derogation supposed to be carried out by law. The authors maintain that this is not the case for the creation of an independent competition authority, given that the authority will undoubtedly exert jurisdictional function in the field of competition law. Therefore, the report did not opt for the creation of an administrative authority isolated from the executive power, albeit also from the point of view of its authors, an authority with jurisdictional power would be the most easy and effective solution. See European Economy: Report on the implementation of the 2000 BEPG, Luxembourg, (103-104).

²⁰⁷ Article 3 of the 1970 Competition Law. See also the Cardiff Progress Report 2001, p. 9.

new Community regulation on the application of Articles 81 and 82 EC Treaty coming into force on 1st May 2004. This new legislation is supposed to be modelled on Articles 81 and 82 of the EC Treaty and takes into account the new regulation on the application of Articles 81 and 82 EC Treaty, which will take effect from 1st May 2004 on²⁰⁸. In fact, certain behaviours will be prohibited as far as undertakings are concerned: abuse of dominant position and agreements aiming at restricting and distorting competition. While the abuse of dominant position will be absolutely forbidden, the prohibition principle concerning understandings will enjoy an exemption provided a profit share thereof benefits consumers. The modernisation of competition law in Luxembourg should ensure that Community competition law can be applied by the country's new competition authority and promote the objective of decentralisation embodied in the Council proposal regarding the implementation of the competition rules established under articles 81 and 82 of the Treaty. Following the adoption of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, that the creation of an independent Competition Council responsible for enforcing Articles 81 and 82 of the Treaty and domestic competition law. This Council will be assisted in investigating cases by a Competition Inspectorate, to be created in the services of the Minister responsible for Economic Affairs. The Competition Council may impose administrative fines, and introduces leniency rules allowing for immunity and reduced fines. Lastly, the rules that will enable national officials to provide assistance to the European Commission in the event of inspections conducted by the Commission pursuant to the Regulation. The independent Competition Council will be part of the future European network of competition authorities that will be established by the Regulation.

²⁰⁸ Activity Report 2002 of the Luxembourg Ministry for Economic Affairs, p. 142

Malta

The Malta's²⁰⁹ Competition regulation was intended to create a new system consistent with the European Union policy establishing a structure for effective competition in Malta. It provides a measure of legal certainty to undertakings in Malta by defining the limits within which they may legally behaviour their business on the Maltese commerce and will guarantee business and consumers the benefits of competition.

The Competition Act was enacted on 23rd December 1994, came into force on 1 February 1995 and was amended in 2000, principally to bring Maltese legislation more in line with the EU's *acquis communautaire*. The Competition Act is prohibition-based and generally incorporates the same principles that shape Community competition law, thereby outlawing anti-competitive agreements and concerted practices other than those that are *de minimis* or exempted individually or through block exemptions for countervailing economic benefits and abuse of single firm or collective dominance. There is also a merger regulation and concentrations that while in the main conditions was mutual dependence on the EC Merger Regulation draws from US experience specifically recognised in the law²¹⁰.

Agreements having a minimal impact on the market as calculated in terms of market share, turnover, and companies and asset would be deemed not to fall within the prohibition. The provision is directed at horizontal and vertical agreements and against other form of restrictions competition. An important requisite for the granting of such exemption is that the agreement must not contain restrictions which are not indispensable for the attainment of its objectives and must not significantly limit competition.

This occurs when a firm, due to its position of strength on the market, indulges in exploitative or anti-competitive behaviour, such as charging discriminatory or predatory prices and limiting production.

The Commission is also involved in proceedings arising under the Control of Concentrations Regulations, which entered into force on 1 January 2003. The Commission is empowered, on the request of an aggrieved party, to review any decision of the Director of the Office for Fair Competition and to adjudicate on any matter

²⁰⁹ Organisation de Coopération et de Développement Economiques 31-1-2003.

²¹⁰ see Buttigieg, 2003.

related to alleged collusive practices referred to it by the ordinary courts. The European Commission report also stated that the administrative capacity of the Office for Fair Competition and the Commission for Fair Trading appears adequate (European Commission, 2002).

The competition legislation does not take account of economic benefits²¹¹ when considering abuse of dominant positions, although dominance *per se* is not normally prohibited. Abuse arising from dominance, such as limiting production, applying dissimilar conditions, including price discrimination to equivalent transactions, charging excessive prices and refusing to supply goods or services in order to eliminate a trading party from the relevant market, once detected, would therefore be prohibited.

In some cases allowing dominant oligopolies indulge in discriminatory practices may be to the advantage of the consumer.

An oligopolistic market discriminatory pricing may work against rigid oligopolistic price structures and could result in lowering prices to the benefit of the consumers. In the case of Malta, various vertical agreements including certain exclusive distribution agreements, exclusive purchasing agreements, selective distribution agreements and franchise agreements are allowed and exempted en block, on such grounds. Exemption regulations were adopted on Vertical Agreements and Concerted Practices, Research & Development Agreements, Specialization Agreements and Technology Transfer Agreements. These types of agreements are exempt from having to notify the competition office, if they conform to the regulations. The Maltese Merger Control Regulations state that “*concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services.*”

However, in a small country, where market dominance and trade barriers are common, and sometimes cannot be easily dismantled, these exceptions are likely to have more

²¹¹ In other words, economic benefits are not traded off against the adverse effects of dominance as they are under Art 81 of the EC Treaty type of provisions this lack of consideration to offsetting economic benefits could, in some cases, be detrimental to consumer welfare and consumer interests.

significance. In the case of mergers, merger control may actually impede restructuring of firms trying to attain a “critical mass” which would enable them to compete in world markets.

The Director for Fair Competition in Malta has been reported as saying that resistance against parallel imports is one of the main problems relating to competition in Malta.²¹² Due to these disadvantages, exporters in small states tend to clamour for state aid, justifying their call on the grounds that, should their businesses default, a large proportion of the labour force would become unemployed, with dire consequences for the balance of payments

As is well known, in general, state aid is considered as a distortion to competition²¹³ But in small states, especially insular ones, the case for support of this type may be stronger than in larger territories, given the high reliance on exports of such states. There may therefore be a case for considering state aid as permitting some form of level playing field in cases where the small size and insularity have an important bearing on the cost of production.²¹⁴

Netherlands

Based on the principle of abuse, only those anti-competitive acts that were seen to be contrary to public interest were prohibited, as a consequence, abuses of dominant positions were tolerated, although the government retained the power to impose obligations and ways of explaining the said behaviours. In determined sectors the creating of true monopolies was halted, but the only real obligation for companies, heavily sanctioned, was to notify the public administrator of their relevant entrepreneurial behaviours. It was illegal, moreover, to ask for individual exemptions, powers that were not exploited at all because the companies preferred to keep their

²¹² On this question see also Gatt (1996)

²¹³ The EU makes several exceptions to this principle and it has drawn up a number of guidelines on the extent to which these exceptions may be used, including aid granted for the purposes of restructuring and for rescuing companies which risk bankruptcy, aid for research and development, aid granted to promote Small and Medium-sized Enterprises (SMEs), aid to promote employment, aid for training, aid to assist deprived urban areas and aid granted to promote the environment. The EU also allows aid which is granted to promote economic development in disadvantaged regions to support investment projects and in certain cases to compensate for transport disadvantages.

²¹⁴ In Malta, a State Aid Monitoring Board was set up under the Business Promotion Act (Act XXI of 1988 as subsequently amended) to oversee the compatibility of all state aid measures. All state aid must be notified to this board in advance. However, since Malta's GDP in PPS stands at 55% of the EU average, Malta may continue to grant aid to support investment. For example, Malta may grant state aid of up to 50% of the costs of investments in the case of large companies and up to 65% in the case of small firms.

agreements on the margins of legality secret. Another peculiarity of the normative under examination was a possibility, held by the government, to attribute the private anti-competitive agreements, a value that was binding for the companies extraneous to them²¹⁵, with the aim of promoting economic collaboration between companies of the same sector²¹⁶.

The government could exercise legal actions with regards to the subjects in dominant position but at the same time, there were no norms that allowed it to annul agreements contrary to the law, nor was there any way to control the activities of mergers.

The Dutch regulation system was characterised by not very incisive antitrust legislation, which conceded very large margins of discretion to the public administration. In fact, prohibited behaviours did not exist before because they were anti-competitive, but a system was in force based on which annulments were declared one by one on agreements and practices that were not appropriate for general interests. This type of policy normative, contained in the Economic Competition Act of 1956, derived from the particular Dutch economic-entrepreneurial situation that was characterised by the proliferation of small and medium companies. The almost complete lack of large economic poles resulted in the decline of technological development that the government, as a consequence, tried to offset by allowing concentrations and agreements of various kinds, so much so that Holland gained the title of “cartels’ paradise”.

But the true innovation was in the pipeline, which was completing the vision of antitrust based on the principle of abuse, and another based, like that of the Community, on the general prohibition of determined categories of practices and agreements considered to be anti-competitive before. Examples of this tendency are given by the issuing of a general prohibition of collusive offers, as well as a decree regarding the sector of construction contracts, which sanctioned a general prohibition of agreements with the aim of dividing the market, brought to completion through clauses limitative to the freedom of suppliers. Indeed, the tendency to stud such norms with exceptions showed

²¹⁵ This policy was used especially for agreements related to the production and pricing of food products.

²¹⁶ Meulenbelt M., Wissels C., The Netherlands, in AA.VV., Commercial Agency and Distribution Agreements: Law and Practice in the Member States of the EC and EFTA, Boston, Graham & Trotman, Dordrecht, Martinus Nijhoff, 1993, pp. 291 and following.

no sign of reducing²¹⁷, but it cannot distract from how they drew closer to the Community principles on the subject.

Between 1993 and 1994 the process of drawing the Dutch norms on competition closer to those of the Community started. The first step was that of extending the application of the antitrust principles to all types of informal agreements and recommendations. Some innovative decrees were issued: a decree on prices declared those agreements aimed at determining buying and selling prices annulled, establishing the criteria for exemptions (for example it provided a clause that exonerated agreements of minor relevance). Another decree, this time on the division of the markets, prohibited forms of division that did not favour advantageous cooperation between companies (for example, specialisation agreements were not considered disadvantageous, in this sense). In spite of the above innovations, the Dutch normative nevertheless continued to present many lapses anything but indifferent.

And so in 1998 the new Competition Act came into force, the current fundamental Dutch law on competition²¹⁸. This completed the definitive pass of the system of abuse to that of general prohibitions; the power of the government to declare some types of agreements binding was eliminated and opened the doors to the principle of development, free of entrepreneurial competition; the penal sanctions were transformed into administrative ones, this law prohibited every type of practice and agreement between companies that had the effect of preventing, restricting or distorting competition inside the Dutch market. The prohibited agreements, of which some elements of the normative are referred to in the UE Treaty, are subjected to the automatic sanction of annulment and an obligation of notification afterwards is foreseen, with the aim of controlling. Moreover, a prohibition of abuse of dominant position is provided for, but this category does not include concentrations, which are regulated by a specific discipline based on controls and obligatory advance notices, which are then authorised or prohibited. In fact, in these cases the government has the discretionary power to authorise all concentrations that produce anti-competitive effects, when the interests of the national economy justify them.

²¹⁷ For example, each of the norms mentioned contains the “de minimis” exemption clause, while, in the case of contracts, an individual exemption was conceded when the contract prices were necessary to fully realise public interest.

²¹⁸ Verloren Van Themaat V., The Dutch Competition Act of May 22 1997, in *European Competition Law Review*, 1997, 6, 346.

Poland

The competition authority in Poland is a central administrative body reporting to the Prime Minister: the Office for the Protection of Competition and Consumers' Interests (the "OPCC").

Poland has clearly recognised the need for competition policy in a market-based economy, adopting a general competition law in its first wave of basic reforms in 1990. The major goal of its competition policy has been to create the conditions for market-based development, though restructuring, privatisation, trade liberalisation, and oversight of traditional monopolies. Most enforcement of competition rules has concentrated on problems of dominance, and thus it has typically involved the conduct of larger firms, especially infrastructure providers and successors to state monopolies. The newest responsibility, for monitoring anti-competitive state aid, is a high-priority function which continues this theme. These conceptions of the role of competition policy in the process of reforming the Polish economy and administration have been generally supported through changes in government.

Several important steps were taken toward decentralising the economy and creating the possibility of market competition in the early 1980s. Much of this reform package was inspired by the example of Hungary's market-oriented reforms in a socialist framework. The Socio-Economic Planning Act of 1982 set procedures of contracting and market controls so plans could be implemented through enterprises. The Prices Act supported steps toward market-style exchange by defining three categories: fixed prices for consumer goods, controlled prices for industrial products, and contract prices between commercial partners. Prices that had been frozen for years were increased sharply – but not allowed to float freely. And the Enterprise Act, passed in the autumn of 1981, reformed the structure of management of state enterprises, introducing the possibility of decentralised decision-making in response to economic incentives.

No longer under direct state control, these enterprises were to become self financing, self-governing, and independent. As separate legal entities, responsible for their assets and transacting on their own account, they were charged with acting in a more economically efficient manner. In 1988, a new law on economic activity further freed the private sector by eliminating the system of permits for particular kinds of private

economic activity (although a broad system of permits and licences still survived until January 2000). Revisions to the law about foreign companies permitted greater foreign capital in the market. The new Solidarity government's program included the "shock therapy" of liberalised prices and other measures introduced in January 1990. Market competition was a theme of the Balcerowicz reforms, and one element was a new competition law.

To be sure, Poland already had laws to protect market competition against abusive behaviour. A law against cartels had been adopted in 1933, to support a government anti-cartel program. A law about unfair competition had been adopted in 1926. Neither of these laws was actually applied after 1945, but neither was repealed, either (Office for the Protection of Competition and Consumers), 2001; Fingleton, 1996, p. 50)²¹⁹.

In 1987, Poland adopted a law to control monopolistic practices²²⁰, whose terms were functionally the same as those of a standard general competition law.

The "monopolistic practices" it prohibited were similar to practices that are usually described as abuse of dominance, such as imposing onerous contract conditions, tying, or exclusivity obligations, or charging excessive prices. The law also dealt with cutting production to raise prices, practices leading to market division, production or sales limits, and boycotts. Agreements among enterprises could be prohibited if they might lead to substantial restriction of competition but did not produce economic benefits such as lower costs, higher quality, greater output, or innovation. Mergers had to be reported in advance and could be disapproved if they could lead to substantial restriction of competition.

Enforcement was by fines, and the enforcement body, the Ministry of Finance, also had the power to dissolve repeat offenders. But a major means of fulfilling its responsibility for countering monopolistic practices was by addressing other levels of government about their regulatory actions and their economic activities.

The 2000 Act prohibits agreements that have the objective or effect of eliminating or restricting competition in a relevant market. Particular types of agreement that are listed and prohibited include fixing prices or sales conditions, limiting production or technology, market division, discrimination, tying, boycotts, and bid rigging. The

²¹⁹ Fingleton, John, Eleanor Fox, Damien Neven and Paul Seabright (1996), *Competition Policy and the Transformation of Eastern Europe*, London.

²²⁰ Act of 28 January 1987 On counteracting monopolistic practices in the national economy

statute's list of types of prohibited conduct is not exclusive, and the principle can be expanded to cover types of agreements that are not identified specifically. For example, the explicit ban on collusive tendering is added in the 2000 Act, but bid rigging had already been covered by the general prohibition of the 1990 Act.

Most decisions about vertical agreements appear to have involved enterprises in dominant positions or at least with significant market power. Recognising that vertical agreements may often be efficient and thus require less enforcement oversight, the 2000 Act treats vertical agreements more leniently²²¹.

Government action through subsidies and preferences can distort free competition just as inappropriate regulations can. Poland's new law about state aids, which generally adopts the concepts and rules of the EU about state aids, and adapts them to domestic situations, became effective 1 January 2001. In principle, the law prohibits aid that may significantly distort competition or substantially hinder the development of competition, unless the anti-competitive effect is limited in time and the aid is part of a regional policy or restructuring program.²²² In practice, the regulation, like the system for controlling state aids by the EC, relies on technical and formal classifications and rules, more than on direct assessment of actual effects in particular market circumstances. The Office for the Protection of Competition and Consumers administers this law, pursuant to a 1998 government decision to transfer state aid responsibility out of the Ministry of Economy.

The 2000 Act substantially modifies the enforcement process. Before, Office for the Protection of Competition and Consumers proceedings generally followed the Code of Administrative Procedure and referred to the Code of Civil Procedure about some issues such as costs and evidence. The new rules, specifically designed for competition cases, are intended both to simplify proceedings and to facilitate investigations.

Poland appears to assert extraterritorial jurisdiction over conduct abroad that has anti-competitive effects in Poland. Like most other national laws, Poland's competition law is not concerned about export cartels, that is, conduct in Poland whose only anti-competitive effects are felt elsewhere (Office for the Protection of Competition and Consumers, 2001). Poland has a sound and complete substantive competition law, built

²²¹ European Commission (2000), 2000 Regular Report from the Commission on Poland's Progress Toward Accession, November.

²²² Art. 7, Law of 30 June 2000 On the Conditions for Admissibility and Supervision of State Aid to Entrepreneurs

on the familiar EU framework. Enforcement so far has concentrated on the conduct of larger firms. The legal framework should be more than adequate to deal with abusive practices now, and to deal in the future with the horizontal co-ordination that is sure to become more problematic as firms become stronger and competition among them intensifies.

Portugal

The original version of Constitution 1976 has evolved to reflect the different conflicting, political, social and economic concerns of the constitutional official. This supposed the principles in articles 60 to 62 of the Constitution, along with acknowledge like private property, private economic idea and consumer protection, explain that competition is seen as an essential element of the Portuguese economic system.

The current Portuguese antitrust normative was promulgated in 1993, the Portuguese law uses substantial criteria to evaluate the presence of a concentration, it is sufficient because it verifies the case, of an effective control exercised by one or more companies on another. The actual normative mainly concerns the control of concentrations of companies, like the case of mergers, the direct or indirect assumption of control of one or more companies, or the creating apart of more companies, whose function is to coordinate the competitive behaviour of the founding companies in the market²²³.

With regard to the operations of concentrations between companies that can re-enforce or create a dominant position in the market to prevent or distort the range of competition in Portugal, an obligation of advance notification is foreseen.

Control is carried out first by a competent commission that uses technical criteria and gives an opinion, then the Ministry completes an evaluation both technical and political and makes the final decision after carrying out its investigation, the result of these controls can be prohibition on conditioned authorisation²²⁴.

²²³ Machado Plazas J., The Control of Concentrations of Companies in Portuguese Law: A Particular Reference to Administrative Procedures of Control, in Ammannati L., (edited), *Competition in Europe*, cit. pp. 317 ss; Leitao Marques M. M., *Economic and Competitive Initiative in Portuguese Law*, in Mezzetti L., (edited), *Economic Constitution and Free Competition*, cit., pp. 96 ss.

²²⁴ Cases of exemption are almost the same as those foreseen by the Antitrust laws of the other EEC countries: technical development, benefits for the consumer or the economy.

The sanctioning system provided by the Portuguese normative is quite strict and is based on heavy pecuniary sanctions that are inflicted on those companies that have behaviours that do not conform to the law.

The Portuguese competition regime in 2003 was affected of a significant transformation with the adoption of a new Competition Law n. 18-2003, which abolishes the former regime Decree-Law 1993. The new legislation significantly follows the rules established at UE members State, concentrated practices, the abuse of a dominant position, the abuse of economic dependence, concentrations, and state aid. In addition the Authority has replaced with the enforcement of competition law, ie, the Directorate General for Trade and Competition (*Direcção Geral do Comércio e da Concorrência*) and the Competition Council (*Conselho da Concorrência*), both within the structure of the Ministry of Economy.

Also relevant is regulation enacted in 2006, which establishes the legal regime of the exemption and special reduction of fines for infringement of competition rules, the so-called “*leniency regime*”.

The new Authority has been trying to improve the new policy and to diffuse what is usually referred to in Portugal as a “competition culture”. In this situation, the prospect of remedy to a sound, effective, quick and capable analysis control method is absolutely necessary for the protection of company rights and the control of legality.

Slovak Republic

In the Slovak Republic, the Antimonopoly Office of the Slovak Republic has felt it necessary to propose amendments to legislation in order to repeal provisions concerning exemptions from the prohibition of agreements restricting competition with regard to concerted practices in agricultural production, on the grounds that they largely contradicted EU law. The Antimonopoly Office of the Slovak Republic is a central organ of the state administration. The Act on Protection of Economic Competition 136/2001 Competition Act, which describes the basic competition and merger control law in the Slovak Republic, reflects the main principles of the EC competition and merger control law. The Competition Act came into force on 1 May 2001 and was subsequently amended with effect from 1 October 2002. The Slovak competition law

was aligned with EC competition law, in particular, with the Council Regulation No. 1/2003. The Competition Act does not specifically regulate over private actions for damages for breach of competition law. Consequently, general provisions governing actions for damages under civil and commercial law will apply. Based on our experience and knowledge, there have been no actions for damages for breach of competition law filed or decided by the courts in the Slovak Republic. In the Slovak Republic, after eight years' operation of the Act on Protection, it has become obvious that reforms must be a continuing activity, such as anti-competitive agreements, abuse of a dominant position, control of concentrations. But also, once again, interventions by state administrative bodies and municipalities in economic competition. On March 1, 2005, an amendment of the Act on Competition Protection came into force, through which the Antimonopoly Office of the Slovak Republic was given a new power in the area of abuse of a dominant position. Pursuant to this amendment the Office is empowered to assess the abuse of a dominant position through excessive prices. The year 2005 was the first year for the Slovak Republic to apply Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community, namely through the application of the Community competition legislation by the Antimonopoly Office of the Slovak Republic, which specifically applied Article 81 of the EC Treaty to agreements restricting competition which may affect trade between Member States. During the reported period, the competition law of the Community, that is, assessment of restrictive practices according to Article 81 was implemented in cases concerning the construction sector and the provision of professional services. The year 2005 also was the first time that the Office applied the so-called referral system in accordance with Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. The aforementioned regulation clearly defines the division of powers between the European Commission and Member States in determining which institution will assess a concentration. The regulation provides for a certain correction mechanism, the so-called "referral system," i.e. a system of referrals of concentrations, based on which the Commission may refer a concentration with a Community dimension to Member States and, vice versa, Member States may refer a concentration without a Community dimension to the European Commission according to the general principle that a

concentration should be dealt with by the most appropriate competition authority. In the Slovak Republic the legal rules of State Aid came into effect on 1 January 2000, sets out the basic principles for the respect EU state aid law as stipulated in article 87 EU Treaty. The Implementing Rules adopted on 2001 contain more comprehensive obligations on conformity with EU state aid law and the procedure for supervising Slovakia's state aid practice.

With the accession on 1 May 2004, the authority responsible for approving and monitoring and supervising body that assesses the compliance of planned state aid with the Slovak State Aid Act and EU state aid rules.

Slovenia

The Competition Act²²⁵ in Slovenia was adopted on 1999 by the National Assembly of the Republic of Slovenia. This Law succeeded the Protection of Competition Act²²⁶, which regulated the area of restriction of competition, the new modern legislation, it is fully aligned with objects and procedural legislation of the EU and it regulates all three elements of restriction of competition by undertakings: abuse of a dominant position and concentrations restrictive agreements.

The guidelines for a Republic of Slovenia assess of classic restrictions of competition, liberalisation in co-operation processes within industries and in improving the level of the competition culture. We are not only committed to do so because of the existence of the rules of legislation in force, commitments from negotiating positions and the national programme for adoption of the *Acquis of the EU*, but principally because of our shared responsibility for progress and joining the common market, which is unimaginable without efficient competition.

The year 2000 was oriented to serious actions furthering the readiness of Slovenia to become European Union members. Implementing rules for the application of the competition provisions applicable to undertakings were adopted by the Association Committee by the law which came into force 2001.

²²⁵ Prevention of the Restriction of Competition Act, Official Gazette of the Republic of Slovenia, No. 56/1999, came into force on 14 July, 1999.

²²⁶ Protection of Competition Act, Official Gazette of the Republic of Slovenia, No. 18/1993.

The authority supervises the application of the law, monitors and analyses circumstances on the market power, conducts procedures and matters decisions in accordance with the law, submits its opinions to the Government under its competence, and in accordance with the Council Regulation on the Implementation of the policy on Competition Articles 81 and 82 of the EC Treaty.

The competition regulations prohibit the abuse of a dominant position and have power to restrain from any practices which restrict or prevent competition in the market without justifiable reason. The law does not clarify the concept of abuse but only talk about certain abusive practices.

Hard core cartels are one of the most dangerous threats to competition, to market economy. Cartels are in certain systems, by certain undertakings still not considered to be as damaging as they are. That is perhaps due to the fact that competition is still a new phenomenon, not wide-spread or well-understood and that there is still a low level of competition, and therefore a low level of competition culture. Restrictive practices are deemed between undertakings regarding business circumstances in the market which have as their object prevention or distortion of competition in the Republic of Slovenia. The law include the protection of competition (anti trust), also the state aid subject and state monopolies of a commercial character and the area of specific and exclusive rights.

Spain

Spain issued the first law on competition in 1963 even though it was a law that adapted very little to the Spanish economic panorama, characterised by strong protectionism and corporatism, which did not render it open to the liberalisation of the market²²⁷, only with the approval of the Constitution of 1978, was the principle of the freedom of companies sanctioned as a primary need of the Spanish economic system²²⁸ to create a

²²⁷ Broseta Pont M., The Law on the Repression of Restrictive Practices to Competition, in *Industrial Law Magazine*, 1973, pp.323 s.

²²⁸ Canivell J. M., The Spanish Experience in the Defence of Competition in an Economy of Public Choices, *Journal of Public Finance and Public Choice*, 1990, pp. 125-126; Hierro L. L., Functions of the Tribunal to Defend Competition and the Regulatory Principles of the Procedure, in *REDA*, 1991, pp. 333-335; Bassols Coma M., *Constitution and Economic System*, Madrid, 1988; Ruiz G., Ruiz R., The Freedom of Companies in the Spanish Economic Constitution: With Particular Attention to the Principle of Free Competition, in Mezzetti L., (edited), *Economic Constitution and Free Competition. European Models to Compare*, Torino, 1994, pp. 36 ss; Font Galan J. I., *Economic Constitution and Competition Law*, Madrid, 1987.

market economy in which free competition was guaranteed. In 1985 and 1989 two new laws were issued to finally align the Spanish antitrust discipline with the Community one. On the other hand, the standardisation of the Community system on the protection of competition placed greater weight on the substantive aspects more than the procedural ones, so the Spanish legislator decided to adopt the mechanism of “double barriers”, which allows Spain to maintain a certain autonomy in the application of the rules of competition, with respect to the UE. Through this, the prohibition of actualising any kind of practice restrictive to competition was established and the abuse of dominant position was prohibited; the sectors and the situations excluded from the application of the antitrust normative are expressly listed; the criteria of dispensations of the above prohibitions were controlled, in cases in which certain anti-competitive practices were to the advantage of the national economy, without harming the consumers. In line with the Treaty of Rome and all the other European regulations, the absolute annulment of prohibited agreements and practices was established, once in place it ascertained that the sanctioning procedure could be set in motion as much from the office as on the request of an interested party. The Spanish government always retains the right to have the last word on the subject of competition so that every decision becomes binding, even if it is different from the competent authorities’ decisions. Control of the market and the application of the antitrust normative are entrusted to the administrative organisations, with the power to investigate and impose pecuniary sanctions. Lastly, a system of control of concentrations was introduced that operates either from the office or through voluntary notifications by interested parties.

Sweden

In Sweden the laws on the protection of competition followed one another from 1925 to 1956 and contrasted only those behaviours that were seen to be contrary to public interest, without giving the authorities any sanctioning or repressive powers to anti-competitive behaviours²²⁹, there has always been the tendency to favour the competitiveness of the existing productive companies, rather than favouring the

²²⁹ Bourdet Y., Policy Toward Market Power and Restrictive Prices in Internationalisation, Market Power and Consumer Welfare, pp. 229 and following.

development of competition. The only cases prohibited before and therefore criminally sanctionable were those seen as “joint cooperation in tendering bids”.

In 1983 the Competition Act was issued which improved the existing norms, it continued to mainly prohibit restrictions to competition that were potentially prejudicial to the national economy, widening the list of prohibited behaviours to include agreements designed to divide prices and markets. With this law, the power to control mergers was introduced. However the prohibition was still dependent on the verification of any detrimental effects on the economy. A merger in particular could only be prohibited if it had the effect of creating a dominant position in the market which produced negative effects on competition and as a consequence, on the national economy. Moreover, it was possible for companies interested in a merger to negotiate the terms with the competent/appropriate authorities in order to finalise such transactions, if only a few modifications were/are needed to satisfy the legal requirements.

In 1993 the new law on competition, which completely reformed the Swedish antitrust discipline, introduced the principle of prohibition, banning agreements that impose, restrict or distort competition in a relevant way. Between the new regulations there was also the prohibition of agreements of fixing the selling and purchase prices of goods; those aimed at controlling production or distribution; and those that imposed conditions or binding supplementary charges.

Nevertheless, the impossibility of controlling all the agreements drafted every year in Sweden has pushed the legislator to provide for a certain number of agreement types previously exempt from control²³⁰, for whom it was not necessary to proceed with the notification. Every kind of accord must, in line with the principle, be presented to the competent authority in view of a government control.

In Sweden, unlike other anti-competitive cases, no kind of exemption is provided for the prohibition of abuse of dominant position but it is possible to obtain specific liberating declarations. A position of dominant power is presumed when a company has more than 50% of the national market in a determined sector. The abuse of the said position can be verified through the direct or indirect imposition of prices or unfair

²³⁰ Originally there were eight types of agreements exempt from the obligation of notification, then another two were added: research and development, specialisation, trademark licences, franchising, know-how licences, exclusive distribution, exclusive selling, prices and services related to automobiles, some types of cooperation between retail resellers, insurers.

conditions, the limiting of production or technological innovation, being able to advantage the company to the detriment of the competitors and the clients.

The Swedish normative, unlike that of the Community, provides for a communal discipline that is applied indifferently to concentrations and acquisitions. An acquisition is regarded only when a Swedish company transfers the total of its property or at least, a large part to allow the buyer to exercise total control on the acquired company (that is more than 50% of the right to vote). Acquisitions can be prohibited if they are put into being by companies whose revenue exceeds determined limits but, in every case, an obligation of notification is provided for on the behalf of any company that is not of small dimensions, if the acquisitions are prohibited, it is automatically annulled, the Court can allow all the acquisitions that have a positive effect on the national economy without excessively distorting competition.

Non-observance of the antitrust norms results in sanctions other than with the cessation of the prohibited practices, with pecuniary penalties and with the compensation of the eventual damages suffered by the other companies as a result of the effects of the infractions. Acquisitions, in the Swedish normative, are distanced from that of the Community in as much as they are prohibited only if they are deemed to be contrary to public interest, or if they create or re-enforce a dominant position for competition.

United Kingdom

The first British law on competition was promulgated in 1948 with the title “Monopolies and Restrictive Practices (Inquiry and Control) Act”. This established an administrative organisation, which was *trusted* with controlling companies and supplying reports of their activities to the government. This organisation, like the majority of those in charge of controlling competition in Great Britain, assumed the form of independent administration. It evaluated cases of monopoly and agreements restrictive to competition. Lacking true prohibitions, this organisation acted on its own initiative or on a government impulse that could require it to carry out some inquiries related to specific cases, based on the concept of public interest. Once the so-called inquiries were finalised, often equipped with advice on measures to take, the government keeps the power to decide what to do without being restricted in any way.

In 1956 a new law was issued that imposed the public registration of related agreements to determine potential anti-competitive practices. These agreements were examined by an organisation, created deliberately and of a judicial nature that could prohibit them if they did not fall into cases of exemptions predetermined by the said law (these exemptions were called “gateways”)²³¹. The same normative provided, for the first time, a prohibition of resale price fixing.

In 1965 the Monopolies and Mergers Act was promulgated, which extended antitrust control to mergers and the services sector.

In 1973, through the issuing of the Fair trading Act, another independent organisation was established with consultative powers on the subject of mergers and with powers to stimulate the competent organisations, with the aim of examining cases of monopolies and restrictive practices. For the first time in Great Britain, this normative expressly included the necessity to maintain the freedom of competition between the essential elements in order to evaluate the public interest. Moreover, antitrust legislation was trusted explicitly with the responsibility of defending the consumer²³².

Great Britain developed a system for protecting competition aimed, not so much at guaranteeing the creation and maintenance of an open and competitive market, but instead, at guaranteeing the concept, rather imprecise, of public interest²³³. This background approach resulted in the absence of a united vision on the subject, with regulation and control trusted to a large, imperfectly co-ordinated series of institutions of various natures. The British antitrust system did not prohibit monopolies, but did its best to supervise the same monopolies, in order to identify them and repress the abuses. The regulation of monopolies is contained in the Fair Trading Act of 1973 and in the Competition Act of 1980, which establish investigative criteria in cases of exploiting monopolistic position (exploitation), refusal to negotiate, selling below cost level to eliminate competitors from the market (loss making prices), conditioned selling (tying clauses).

²³¹ For the first time in a British law on competition, a presumption of non-conformity to the law by a commercial practice or agreement was presented.

²³² Organni E., *The Discipline of Competition Great Britain. Pragmatism, Conservation and Innovation*, in Ammannati L., (edited), *Competition in Europe*, cit. pp. 108-109.

²³³ Huychings M.B., *The Need for Reform of UK Competition Policy*, in *ECLR*, 1995, 4, 211.

The Fair Trading Act 1973 restated the substantive basis of competition policy. A new official, the Director General of Fair Trading (DGFT), was designated to apply and champion that policy, with the support of the Office of Fair Trading (OFT). British antitrust legislation imposed an obligation to register agreements that are restrictive to competition, but it recognised these kinds of agreements only on the basis of their formal characteristics, with the result that it was very easy to elude the prohibition through the wording of contracts. The penalty for not registering restrictive agreements is their annulment, but it is very rare that an unregistered agreement is discovered, given that the investigative powers at the competent authorities' disposition are scarce. Only when the administration in charge of controlling competition brings an unregistered agreement to the attention of the judicial organisations, can these organisations then impose the companies not to carry out the activity. Not respecting this order would mean paying a fine and perhaps even imprisonment.

It is important to highlight the fact that the administrative organisations in charge of controlling anti-competitive practices have, in practice, limited investigative powers, often limited to only requesting information; moreover, the possibility of reporting anti-competitive behaviours on the behalf of the competitor companies harmed by these behaviours (so-called “private enforcement”), is almost non-existent.

The government reserves the power to adopt measures that declare that some agreements are not notifiable but for their nature should be subjected to registration. It should be added that neither agreements of irrelevant importance (“de minimis” rule) nor those that can benefit from a group exemption conceded by a Community regulation (block exemption) are subject to notification.

With regards to agreements that must be subjected to registration, a presumption of law opposed to public interest exists. This presumption is the evaluation criteria of agreements of the judicial authorities, the only possibility for the interested parties to bring the operation to an end is to demonstrate to the Court that in this specific case, the agreement in question does not damage public interest at all, instead it is beneficial for the British economy²³⁴. Agreements that do not demonstrate that they possess these requirements are indefinitely annulled and therefore inapplicable.

²³⁴ Parting cases were called “gateways” and passed through the demonstration that the advantages for the economy were greatly superior to the disadvantages for competition (this circumstance was called “tailpiece”).

Moreover, for private companies the possibility exists to sue for compensation for the damages caused as a result of the agreements stipulated to be in violation of the law (private enforcement). On the other hand, the authorities that control competition have the responsibility, to recognise illegal restrictions, to bring an end to the negotiations with the interested companies, with the aim of reducing restrictions to acceptable limits, with the consequence of making these agreements possible.

The rules for the procedures for controlling mergers and concentrations are mainly contained in the Companies Act of 1989, which refer only to mergers defined as relevant²³⁵. Based on the investigations carried out by the organisations in charge, the competent authority evaluates if the merger can be considered important and in actual cases, contrary to public interest; if this evaluation is affirmative, it is up to the Ministry, as previously said, to make a definitive decision on the fate of the operation. In 1991, a Parliamentary committee recommended combining it with OFT into a single Competition and Mergers Authority. Commission reports on auto retailing and parts, finding “complex monopoly” (owing in part to other regulations, such as the EC block exemptions and limits on imports) but declining to call for relief, drew sharp criticism from consumer organisations, including calls for abolishing the Commission completely because it was too permissive. Other reports finding complex monopolies but declining to find harm to the public interest drew public criticism from DGFT, culminating in his public endorsement of creating a single competition agency – contrary to government policy, and shortly before his resignation in 1995.

The long delay in revising the Competition Act and moving more clearly to a EU-style system suggests a lack of urgency and a consensus that the UK institutions were working well enough. The lack of controversy when it was finally adopted suggests an equally broad consensus in favour of incremental reform. Competition policy in the UK has shown considerable long-term consistency and bi-partisan support, perhaps because competition policy was often not politically salient. But the broad, shallow consensus in support of the general direction may have delayed reform in the 1990s, despite widespread recognition that the UK system needed it.

²³⁵ These norms are not applied to fusions that occur in the publishing sector.

The most important recent legislative development in competition policy, more narrowly conceived, was the Competition Act 1998. Enacted in November 1998, it became fully effective 1 March 2000. This law conformed UK's law about restrictive agreements and abuse of dominance to the "prohibition" approach of the EU. For the first time, the UK competition law imposes real penalties, rather than simply cease-and-desist orders. Powers of investigation were also strengthened substantially. The July 2001 White Paper announces that the government intends to repeal the exclusion for vertical agreements. The reason given is to align the UK exemption with the less generous EC exemption and thus encourage parties to seek redress in private actions.

2. Enlargement and Candidate Countries measures decision to enact antitrust law

Bulgaria

Bulgaria adopted competition law in 1991, although there are some exempted sectors, where the competition law was updated in 1998. These laws often extend to fields of the merger control and the abuse of dominance and prohibition of cartels. The competition regulation may also cover corruption, or state aids. Under The state aids affecting business between Bulgaria and other markets, shall be notified to the authority in particular the EU.

Bulgaria identifies as a major problem the ineffective implementation of the prohibition of anti-competitive agreements and hard-core cartels. To make its enforcement more effective, in 2002 the Commission on Protection of Competition will develop a sanctioning policy for the most serious distortions of competition and also develop special monitoring programmes for controlling companies with special or exclusive rights and companies with a significant market power.

The Commission on Protection of Competition would like to see an improvement in the quality and quantity of its competition cases. In particular, the Commission on Protection of Competition plans to enhance the theoretical knowledge and practical experience of its officials focusing on the experience of the EU law. Bulgaria has recently adopted EU block exemption on vertical agreements transposed the, modelled on the EU rules.

Bulgaria plans to make efforts to implement a new competition, in particular as regards monopolies of a commercial character and companies with special and exclusive rights. The purpose of the competition authority is to improve the investment in Bulgaria and to create equal conditions for all investors. For that purpose, in 2002 the Bulgarian competition authority adopts new regulations which ensure the equal treatment of commercial partnerships with and without state ownership;

Bulgaria has also adopted a number of guidelines based on the EU law, was discussed the modernisation of the EC rules will require further adjustment in the region, like exempts agreements that do not have an appreciable effect on competition (*de minimis principle*).

The Bulgarian competition authority plans to engage in two kinds of activities to open its markets to competition in particular telecommunications has been the primary area of economic reforms including the expiration of legal monopolies, but between these extremes privatisation sector, the competition law requires a former consent by the privatisation agency to an increase in capital by private cash or in-kind contributions to companies owned at least 30% by the state.

Croatia

In the Republic of Croatia the Competition Act has been in force since 1995. It was updated in 1997 and 1998. Finally in 2003 there was another review of the Competition Law that had to be brought into conformity with the EU competition law “*acquis communautaire*”. The legal ground for the harmonization with the *acquis* was set forth in the Stabilisation and Association Agreement between the European Communities and the Republic of Croatia. The regulatory of competition law authority in Croatia is the Agency for the Protection of Market Competition “*Agencija za zastitu trzisnog natjecanja*” but started its work after receiving financial support. The Agency has no competence with regard to public procurement or consumer protection matters, but it does of course protect them indirectly.

The new Competition law was enacted 2003 regulates more precisely the rules of protection of competition, but also related to the new solutions in the EC regulations.

The new Competition Law plan the basis for the balancing and benefits for definite types of agreements “agreements restricting competition, abuse of dominant market position and anticompetitive mergers, prohibits both horizontal and vertical restraints of competition, which, although they limit competition to a certain extent, have to be considered as practical and efficient in the business policy.

Special attention must be paid to the way this new Regulation, the Block Exemption Regulation has been adopted for exclusive distribution agreements, selective distribution agreements, and exclusive purchasing agreements and franchising. The new Regulation provides similar legal framework to the American one. The Law on the Protection of Market Competition of Croatia is based on the experience with the EC Competition Law and is in line with its Article 81. By 1 March 2003 Croatia assumed

the obligation to establish an operationally independent State aid authority and to prepare a regular annual report on State aid. And also it improved as an independent administrative authority with strong investigative powers; and the Authority decisions are subject to the control of an independent High Administrative Court.

Romania

There are two authorities in Romania concerning competition: the Competition Office, a specialised authority reporting to the government, and the Competition Council²³⁶, an autonomous administrative authority.

The key point of competence of Competition Council's are to investigate cases by case which could lead to the infringement of competition rules, to evaluate notifications; to investigate to anti-competitive agreements, abuses of dominance, and mergers; to grant decisions on competition issues; and, if necessary, to impose fines.

In Romania, competition policy came in force in 1997; in 2002 the competition authorities assess the development to prepare an activity plan for adapting the legislation of the EC competition law. In particular, the Competition Council arrange the actions in the field of horizontal and vertical agreements, will dedicate special attention to the cartels, in particular to adopting a leniency programme, following the ultimately UE regulation.

The Competition Council also provides for the individual and block exemption²³⁷ following the EC rules in adopting its block exemptions of certain types of agreements between undertakings, with an obligation to notify agreements for individual exemption²³⁸.

Furthermore, in its proposed plans to modernise the EC antitrust rules, the European Commission plans to abandon mandatory notification for all kinds of exemptions from the prohibition of anti-competitive agreements.

A general problem concerning competition it is cases against anti-competitive agreements, in particular against hard-core cartels in comparison to cases dealing with abuse of dominance. The second matter, focusing on competitive behaviour is control of

²³⁶ More information on the official site of the Competition Council: www.competition.ro

²³⁷ Romania has adopted a number of block exemptions modelled on the EC rules

²³⁸ Under Romanian law, notification for block exemption is also mandatory.

cost where the competition law enforcement is less effective and efficient than alternative tools. Nevertheless, perhaps following the EC model,²³⁹ many competition laws in the region²⁴⁰ explicitly allow for prohibiting allegedly excessive or “unfair” prices as an abuse of dominance.

The Competition Office in Romania which I mention above is in charge for drafting the state aids inventory and updating it annually, elaborating the state aids annual report, and monitoring all existing aids, in the same time still close with Competition Council which provides advisory opinions on state aid issues concerning new regulation.

Turkey

The need for a formal competition policy was recognised at the outset of the reform process and work on a competition law began in the 1970s, producing some drafts but no legislation. The project was revived in 1991, when an expert panel was appointed to design a set of competition and consumer protection policies. Both internal and external forces supported the development of competition legislation, and closure on a legislative model was finally reached in 1994 during Turkey’s negotiation of a customs union with the European Union. The customs agreement included the EU’s standard substantive provisions about competition, and obligated Turkey to enact those provisions as part of its own law (and establish a competition authority to enforce them) prior to the agreement’s effective date of 31 December 1995²⁴¹. The Act on the Protection of Competition, adopted by Turkey at the end of 1994, created the Turkish Competition Authority (TCA) as an autonomous antitrust enforcement agency, with a Competition Board to resolve cases and set policy²⁴².

Beyond the economic and political incentives that played a role in developing Turkey’s competition law, the Turkish Constitution provides an explicit foundation for

²³⁹ Exploitative abuses, such as excessive prices, may seem to be important by the wording of Article 82, EC Treaty; however, in reality those provisions play no significant role in the enforcement practice of the European Commission and the European Courts

²⁴⁰ For instance, the Romanian competition law has such a provision, although Romania points out that it has not been applying that provision.

²⁴¹ Art. 39(2)(a) and (b), Decision 1/95 of the EU-Turkey Association Council Implementing the Final Phase of the Customs Union (Dec. 22, 1995). Article 39(2)(a) also requires Turkey to “ensure that, within one year after the entry into force of the Customs Union, the principles contained in the block exemption Regulations in force in the Community, as well as in the case-law developed by EC authorities, shall be applied in Turkey”.

²⁴² Law No. 4054, on the Protection of Competition; passed 7 December 1994, effective 13 December 1994 (“Competition Act”).

competition policy by requiring that the state “take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and ... prevent the formation, in practice or by agreement, of monopolies and cartels.” In line with the constitution, the purpose of the Competition Act is stated simply as the “protection of competition”, and the Act defines competition in terms of independent rivalry: “The contest among the undertakings in the markets for goods and services, which enables them to take economic decisions independently”. The Competition Authority adds, however, that the Act’s ultimate objective is to protect the competitive process (not merely rivalry among firms) in order to achieve efficient markets and promote consumer welfare.

Initially, competition policy was the responsibility of the General Directorate of Consumer and Competition Protection, which was established in 1993 in the Ministry of Trade and Industry²⁴³. The Competition Board was appointed on 27 February 1997, two years after the Competition Act was adopted, and most of another year passed before the Board began operations in November 1997. The Board at that time assumed the competition law and policy functions, while the General Directorate turned its focus to handling consumer protection issues. The Competition Act has now been in force for ten years, and the Board has been applying it for seven years of that period.

At present, implementation of competition policy in Turkey is one element of a much larger national initiative to advance beyond the Customs Union Agreement and achieve formal membership in the European Union. In October 2004, the European Commission recommended that the EU open formal accession negotiations with Turkey, a recommendation that the EU member states accepted in December 2004. In Turkey, the Secretariat General for EU Affairs supervises a government-wide program to adopt the body of EU laws and regulations necessary for accession²⁴⁴. Turkey has also continued to implement economic reforms required for accession, despite an economic crisis in 2000-2002 characterised by severe inflation and disruption in the banking system. New monetary and fiscal policies have subdued inflation, while restructuring and improved regulation and supervision in the banking sector has increased credit funding for investment. The government has also adopted a variety of changes respecting government intervention in the product, labour, and financial markets; infrastructure

²⁴³ Statutory Decree No. 494, amending Organisational Act No. 3143

²⁴⁴ National Program for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis.

industries; and agricultural sector support programs²⁴⁵. As in EU Article 81, the statutory text in Turkey makes no distinction between agreements in the horizontal and vertical dimensions.

In June 2003, the TCA issued Vertical Guidelines²⁴⁶, designed to provide guidance about vertical restrictions similar to that provided by the EU's 2000 Guidelines on Vertical Restraints (2000/C 291/01). The TCA Guidelines are considerably less elaborate and detailed than the EU version, and one difference between the two has proven consequential for franchisors doing business in Turkey. The difference relates, again, to the permissible duration of non compete provisions. The vertical block exemptions of both the EU and the TCA generally limit non compete clauses to a five year duration, subject to renewal by mutual agreement of the contracting parties. Turkey, however, does not include the EU's reference to the imposition of "unfair purchase or selling prices or other unfair trading conditions", and adds references to the exclusion of competitors, the exploitation of market power to distort competition in a different market, and resale price maintenance.

In January 2004, however, the EU issued a new merger regulation (No. 139/2004), effective May 1, 2004, that recast the prohibition so as to bar mergers or acquisitions that "would significantly impede effective competition, in the common market or in a substantial part of it. This change was introduced by the EU to deal with the mergers that presented the risk of anticompetitive "unilateral" effects even though not leading to dominance. The definition of dominance in the EU (like that in Turkey's law) covers market control consolidated in the hands of either a single firm *or a group* of cooperating firms. Mergers that produced oligopolistic market structures leading to anticompetitive coordination among the surviving firms could effectively be addressed under the dominance clause of the existing merger regulation.

A draft version implementing rules has been developed that specifies the organic entities in Turkey and the EU responsible for enforcing the competition laws and controlling state aid. The draft text establishes procedures for notification, information exchange, and coordination of enforcement activities between the two jurisdictions; and provides mechanisms for avoidance of conflicts and resolution of disputes. The draft

²⁴⁵ For further information, see 2004 OECD Economic Survey of Turkey

²⁴⁶ Explanation of the Block Exemption Communiqué on Vertical Agreements (Decision No. 03-46/540-M, 30 June 2003).

lists the TCA specifically as the agency responsible for competition enforcement, but the provision relating to state aid lists only a non-existent “Turkish State Aid Monitoring Authority”. Particular strengths of the TCA include its devotion to the articulation and efficient implementation of sound competition policy; its focus on due process and transparency includes some disorganisation in its approach to harmonisation with EU competition law and the continuing problem of developing a robust competition culture. Other problems with competition law and policy in Turkey, reflected in the recommendations below, arise from statutory deficiencies that will require Parliamentary action to correct. Indeed, most of the recommendations made by the 2002 Report that remain unmet, and that are renewed here, entail action by the parts of the government other than the TCA.

3. New aspects of the extraterritorial rules of Antitrust: solutions avoiding conflicts

3.1 The fundamental point for competition

The ordoliberal developed and propagated by economists in the German university town of Freiburg in the 1930's²⁴⁷ believe that the individual should enjoy economic freedom as part of their political freedom²⁴⁸. These liberal economists further believe that widespread competition is necessary for economic wellbeing. Learning from the experience of the late 19th Century, they believe that entities with too much economic power can present a considerable threat to competition and individual economic freedom, and must therefore be controlled²⁴⁹. The Ordoliberals expound a system where the market players freely compete with each other while the State guarantees and provides for an economic order in which such competition is protected. Part of this order is the control and restriction of concentrations of economic power. Under this economic philosophy, the crucial point for competition law is not the market itself, but the position of the largest market players in the market. Their position must be controlled and, if necessary, capped in order to maintain competition and economic freedom. Only a market with no dominant competitors can promise complete economic freedom. One consequence is that a merger which appears to bring about positive results for the consumer, i.e., lower prices, would be blocked on the grounds that the newly merged entity would become too strong, i.e., dominant in a certain market. Under the ordoliberal initiative, such a concentration of economic power ultimately may not only impede the freedom of the other and weaker market players, but ultimately also lead to serious disadvantages for consumers in that the dominant

²⁴⁷ For an excellent explanation of this school of thought see David Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, 42 *Am. J. Comp. L.* 25 (1994) and in *Law and Competition in Twentieth Century Europe* 232 ff. (2001) who deserves credit for having brought the ideas of the Freiburg school to the attention of a wider audience particularly in the U.S also in *The American Journal of Comparative Law*, Vol. 48, No. 2 (Spring, 2000), pp. 327-336 (review consists of 10 pages). Published by "American society of comparative Law".

²⁴⁸ Initially, the Liberals wanted to free the individuals from government interference in order to achieve autonomy. It was only later when it became evident that the markets are not dominated by the "fair" competition of many individuals but rather by that of big and bigger entities that it was felt that the economic freedom of the individual required protection from these forces

²⁴⁹ Interestingly, and quite contrary to its later development, this was also the starting point for antitrust law in the U.S. where the Sherman Act aimed at restraining the growing power of giant combinations called trusts – Standard Oil being the most prominent among them, see: Lawrence Friedman, *History of American Law* 463 f. (2nd ed. 1985).

player might use its power to impose prices and conditions which it would find unsustainable in a diverse market.

The European approach is focus on the durable impact of mergers (elimination of competitors can lead to monopolistic structures and ultimately to higher prices) rather than short-term considerations (lower prices if the cost reducing synergy effect caused by a merger is passed on to consumers). In Europe, under the current Regulation of Merger Control (“ECMR”)²⁵⁰, the test is one of Market Dominance. Market Dominance is duly (and from a liberal’s perspective appropriately) defined as the power to behave, to an appreciable extent, independently of competitors, customers, and ultimately consumers²⁵¹. The first defining criterion in this regard is market share. An informal and elastic figure of 40% has been established as the line between dominance and non-dominance²⁵².

However, when estimated the market position of an entity the Commission looks at a whole range of other factors, notably access to superior technology²⁵³ or to capital²⁵⁴, vertical integration, a well-developed distribution system²⁵⁵, product differentiation, overall size and strength, conduct and performance²⁵⁶. Furthermore, the European approach leaves no room for considerations of efficiency, such as are practiced or applied in the United States. Although the European Commission appears to be open to any suggestions as to if and how the current European approach of Market Dominance should be changed²⁵⁷, even with a view to the American system, it is highly doubtful that a fundamental change away from Freiburg and towards Chicago, either in metaphorical or geographical terms, will occur.

²⁵⁰ The new EC Merger Regulation, Regulation 139/2004 (“ECMR”), which replaces Regulation 4064/89, was adopted on 20 January 2003 and will enter into force on 1 May 2004 to coincide with EU enlargement (OJ 2004 L 24/1).

²⁵¹ E.C.J., Case 27/76, *United Brands Company, United Brands Continental BV v Commission of the European Communities*, 1978 E.C.R. 207, at 286, 1978 1 C.M.L.R. 429 (“United Brands”); the court used the same formula in E.C.J., Case 85/76, *Hoffmann-La Roche & Co AG v. Commission of the European Communities*, 1979 E.C.R. 461, 461; 1979 3 C.M.L.R. 211 (“Hoffmann La Roche”).

²⁵² This figure has to be treated with extreme caution

²⁵³ E.C.J., Case 27/76, *United Brands*; Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Commission of the European Communities*, 1983 E.C.R. 3461, 3536; 1985 1 C.M.L.R. 282, (“Michelin”).

²⁵⁴ Commission, Case IV/M.6.72R, *Continental Can*, 1972 O.J. (L7) 25, 1972 C.M.L.R. D11. This factor was also very important in the case of *GE/Honeywell*.

²⁵⁵ *United Brands v. Commission*: 27/76 (1978); Case *Hoffmann-La Roche & Co. AG v Commission of the European Communities Court of Justice of the European Communities*, Case 85/76.

²⁵⁶ Commission, Case IV/F-3/33.708, *British Sugar* 1999 O.J. (L 76) 1.

²⁵⁷ This is the impression one gets when looking at the Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM (2001) 745/6 final of December 11, 2001, The new EC Merger Regulation, Regulation 139/2004 (“ECMR”), was adopted on 20 January 2003 and will enter into force on 1 May 2004 to coincide with EU enlargement (OJ 2004 L 24/1).

3.2 Competition Law: the efficiency

Competition law exists to protect consumers, competitors and potential competitors from firms gaining monopoly, or monopoly-like, positions in the marketplace. The common ground for most competition laws is the economic efficiency arguments²⁵⁸. The EU also has *non-economic efficiency* goals of the competition regulation, such as the political and economic integration of the common market. In the same manner the US have *non-economic efficiency* regulations, for example regulations protecting small retailers against chain stores²⁵⁹.

Protecting consumers means ensuring that no company can impose a monopoly price. Protecting the competitors means, among other things, ensuring that a dominant firm does not use predatory pricing to drive out competition. Minimizing private barriers to market entry protects potential competitors. In *most* instances a monopoly is an inefficient actor in the market. The inefficiencies, which are common to monopoly firms, include the *dead-weight-loss* and the *lack of incentives and productivity*. The former is the effect of pricing policies above market price and the corresponding decrease in consumption, a shift in the supply curve.

The latter is a change in the firm's incentive to produce efficiently and to develop new products. Incentive decreases as the firm does not have anyone to compete against. This represents a shift in the supply curve. Economic efficiency also includes *allocative efficiency*, which means that all resources should be used in the way which optimises their intrinsic value.

An interesting question is whether or not the conflict causes economic inefficiency in the regulation structure. Conflicts are undoubtedly economically inefficient since they will tend to interfere with otherwise efficient trading through provoking blocks by the authorities. However, in the context of this analysis, efficiency means minimizing conflicts whilst still achieving the objectives of the competition regulation. States

²⁵⁸ Gifford Daniel J. and E. Thomas Sullivan for discussion of non-efficiency goals in EC, US..... "Assistant Attorney General James contrasts EC competition law with American law by noting that the purpose of American antitrust laws "is not to protect business from the working of the market; it is to protect the public from the failure of the market. "While we disagree with his assessment of American antitrust law, the contrast is accurate. Goals other than efficiency underlie much of European competition law", Article 82 EC "Antitrust Bulletin, Vol. 45, No. 1, P. 55, Spring 2000.

²⁵⁹ The Robinson-Patman Act, an amendment to the Clayton Act, Title 15 of the United States Code, sec. 13. "Discrimination in price, services, or facilities" as amended (1997), <http://www.law.cornell.edu/uscode/15/13.html>

sometimes have different underlying interests when regulating competition. A merger might cause different effects in several jurisdictions. Is it better for only one jurisdiction to regulate the whole merger or should each jurisdiction be able to apply competition law to satisfy its own interest? One could argue that when it comes to economic efficiency and associated regulations all states will have the same interests, but as showed in the Boeing-case, that is not always the case. When the aim of a regulation is a *non-economic efficiency* goal, such as the common market integration, an extraterritorial jurisdictional claim, which would be likely to cause a conflict, this might be the only way to satisfy the aim of the regulation. This course of action could also be in accordance with an efficient regulation structure. Seemingly there is a trade off between conflicts and satisfying the aims of the regulations. Minimizing both would appear to be impossible, unless at total harmonization. On the other hand, what is achievable is a reasonable balance between conflicts and satisfying the competition regulation's aim.

The EU competition regulations are article 81 and 82 of the EC Treaty²⁶⁰ and the Merger Regulation²⁶¹. The focus of this orientation is to clarify to what extent the EU competition regulations can be extended to apply on conduct abroad. There have been a few cases concerning this and I will refer to a few and outline some general principles about when foreign conduct can be of concern to the EU. The extraterritorial application of EU competition regulations is based on two different approaches. The *group economic unit doctrine* is a method to pierce through the corporate veil. The foreign corporation, which controls a subsidiary within the EU, will be responsible for the subsidiary's action concerning anticompetitive conduct. The other method is the *effects doctrine*, by which the EU claims jurisdiction on foreign conduct affecting the common market. The limitations to this jurisdictional claim vary depending on whether the ECJ or the CFI decision has precedent.

US Antitrust regulations consist of several different acts. The Sherman Act²⁶² is the main act with regulations comparable to Articles 81 and 82 EC. Several acts exclusively

²⁶⁰ The Treaty establishing the European Community "Official Journal C 325, 24 December 2002".

²⁶¹ The new EC Merger Regulation, Regulation 139/2004 ("ECMR"), which replaces Regulation 4064/89, was adopted on 20 January 2003 and will enter into force on 1 May 2004 to coincide with EU enlargement (OJ 2004 L 24/1).

²⁶² The Sherman Act of 1890, 15 USC

or partially regulate competition, such as the Clayton Act ²⁶³ and the Robinson-Patman Act, but also the Trade Act has a few antitrust provisions. I will, however, in this presentation describe the Sherman Act on chapter II. The Clayton Act Sections 1 and 2 use the phrase “trade or commerce with foreign nations”. These actions consist of both US export and US imports.

3.3 The unilateral approach

About the unilateral approach several and serious doubts exist concerning the possibility multilateral harmonisation a low level of evidence of harmonisation it is already permitted in the form of bilateral agreements in cooperation.

It is now well established that explicit arrangement however, are better outlook as a form of unilateralism “cooperative agreement”.

The cooperation agreement is usually determined not by any global issues like (global welfare or trade liberalisation), but by the requirements of effective national internal regulations.

The principal objections to unilateral agreement are that the bilateral cooperation is non-binding and non international official authority ruling it. However, the unilateral agreement remains the preferred option of the US²⁶⁴.

As explained above, most international conflicts have been caused originally by the extraterritorial enforcement “antitrust laws” of U.S., followed by vehement effect from other international jurisdictions.

With such feedback as well as practical restrictions, on unilateral agreement the antitrust law enforcement, such as collecting evidence in a foreign country, the United States has established some limit supported on comity or balancing the interests of states, mainly through legal decisions coupled with the guidelines of enforcement Authority “agency”. However, this unilateral approach of self-limit will neither enough nor is suitable for the following motivation: Firstly, in order to recognize the interests of Countries the agreement was to deprive the public of the benefits of competition, it is important that foreign governments’ outlook be presented adequately.

²⁶³ Clayton Antitrust ACT, 1914, passed by the U.S. Congress as an amendment to clarify and supplement the Sherman Antitrust Act of 1890. It was drafted by Henry De Lamar Clayton

²⁶⁴ Joel Klein, ‘A Note of Caution with respect to a WTO Agenda on Competition Policy’ (Speech delivered at the Royal Institute of International Affairs, London,

Despite such changes, many exemptions still exist. For example, immunity from the antitrust laws has been granted to several special markets and activities, such as agricultural and fishery marketing associations, the banking and insurance industries and export trade associations²⁶⁵.

The government's laws are considerably averse to submit their point of views to courts by appearing before the court or by filing a brief of "*amicus curiae*" because they are concerned about sovereignty concept or the practical burden forced. Secondly, it is questionable whether any domestic judgments has the competence or knowledge to describe complicated states' interests involving not only legal issues but also a different economic, socio political, aspect²⁶⁶. U.S. court assessments have not been consistent with consider and balancing its impact of interests.

Despite the force of this analysis, since the "*U.S. Supreme Court decision in the Hartford Fire Insurance case*", the scope of states' interests considered by U.S. courts was really limited, as the Court seems to equate conflict with overseas compulsion²⁶⁷.

Following these directions, necessarily that international divergence, should be solved by international agreements between Countries concerned, and while a careful analysis of each of these arguments suggested should not be subjected to unilateral actions by any legal agency of the state, including internal courts.

After a decade of increasing confusion, restraints are applied not only to trade among the several states but also to trade "with foreign nations". The resulting problem of jurisdiction over the person and subject matter and the scope of relief are too intricate for simple summation. The critical factor, however, is whether the questioned activity has had an impact upon US commerce; in addition, question of comity must also be considered²⁶⁸.

During the early depression years in US, the emphasis was admittedly on restricting output and raising prices under government sponsored with political power. For now, however, it is sufficient to note that antitrust enforcement "unilateral approach" is in the mainstream of serious and sometimes heated public debate.

²⁶⁵ Foreign Trade Antitrust Improvements Act 1982, 15 U.S.C.A., 6a, 45 a 3.

²⁶⁶ BOWETT, D. W.: "Jurisdiction: changing patterns of authority over activities and resources", *BYIL*, 1982, pp. 1-26;

²⁶⁷ Andreas F. Lowenfeld, Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case *The American Journal of International Law*, Vol. 89, No. 1 (Jan., 1995), pp. 42-53
²⁶⁸ *Timberlane Lumber Co. v. Bank of America* 549 F. 2d 597 (9th Cir. 1976).

3.4 Case law “The Hartford Fire”

The law concerning the jurisdictional reach of the Sherman Act has changed. There is a difference of opinion as to whether the 1993 Supreme Court decision in the *Hartford Fire case*²⁶⁹ finally defined the jurisdictional reach of the Sherman Act or not. For this reason I will first discuss the jurisdictional reach before the *Hartford Fire case* decision and then the *Hartford Fire case* decision.

In the majority opinion composed by Justice Souter²⁷⁰ it was held that conduct in a foreign country by a foreign party violates the Sherman Act, if the same conduct, taking place within the US territory, would constitute a violation, and if there was an intention and an actual effect on the US market. The court further held that a foreign law is in conflict with the US law even if the foreign law encouraged the conduct was not a possible defence. The only possible defence would be a foreign law compulsion to act in the manner that would be a violation.

There was not a comity consideration in this judgement. The effect of the Hartford Fire judgement is not that international comities should disappear altogether but rather transfer the balancing to the Department of Justice and the Federal Trade Commission²⁷¹. However, some commentaries argue that what the majority opinion actually tries to articulate is that in this specific case the comity issues are irrelevant, but that comity should still be applied²⁷². Similarly to the EU, the US does not use antitrust enforcement against export cartels originating in the US as long as it does not affect the US internal markets.

The US does however exercise jurisdiction against import cartels of the importing country if they affect US’s export markets²⁷³. Both the Sherman Act and the Trade Act exist for exercising jurisdiction over foreign conduct affecting US’s exports. Notwithstanding this, what is needed is legislative jurisdiction which expressly exists for personal jurisdiction over the foreign actors and also provides for access to the

²⁶⁹ *Hartford Fire Ins. Co. v. California*, 509 US 764 (1993).

²⁷⁰ Kenneth W. Dam *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*. *The Supreme Court Review*, Vol. 1993, 1993 (1993), pp. 289-328

²⁷¹ Sullivan in civil actions the comity considerations cannot be done by the FTC or DOJ.

²⁷² Russell J Weintraub, ‘The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a “Choice-of-Law” Approach’, 70 *Tex L Rev* 1799 (1992).

²⁷³ Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 *CARDOZO L. REV.* 1111 (1996).

discovery or other means of proof and the possibility of obtaining an enforceable effective remedy²⁷⁴.

The US has a long history of extraterritorial application of its competition laws. If a substantial and foreseeable effect on the US market exists, the US have jurisdiction regardless of where the conduct took place. What is unclear at present is to what extent the courts should apply comity considerations.

Several authors discuss extraterritorial application of competition law and conflicting jurisdiction. What some authors argue over is whether the cause of problem is the overlapping of jurisdiction. However, I would like to view the problem from a different angle and although it might be primarily a terminological difference it is still important to avoid confusion.

Supposing an Italian citizen shoots from Germany territory and kills an Austrian citizen on Austrian territory. All three countries will have jurisdiction, but they are not in conflict, they coexist. What makes competition law a little different is that jurisdiction can be applied concurrently. If concurrent jurisdiction is applied, each jurisdiction can apply its competition regulatory goals on the conduct and thus protect its consumers and competitors in the internal market. Thus, the notion of concurrent jurisdiction needs to be kept separate from conflicting jurisdictions.

3.5 Unilateral effects

According to Prof. Timothy Bresnahan, Stanford University stated several opinions during his observations Firstly, he noted that there was nothing in the numbers to suggest that there was anything to complain about with regards to the current level of enforcement, and that the analysis of unilateral effects was appropriate as currently

²⁷⁴ The Foreign Trade Antitrust Improvements Act of 1982. “*The issue of extraterritorial application of the U.S. antitrust laws has a long and confusing history. The Courts of Appeals have routinely disagreed about the standards that would bring foreign claims under the jurisdiction of U.S. courts. In 1982, Congress passed the “Foreign Trade Antitrust Improvements Act” (“FTAIA”) in order to clarify the issue. Unfortunately, the FTAIA, a notoriously ill-drafted statute, only deepened the confusion. Here is the text of the statute: Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States. (15 U. S. C. §)*”.

applied. He also observed that one difficulty with studies of merger enforcement was that the studies heavily over-sample concentrated industries, and therefore were not so informative with regard to the economy as a whole.

In Professor Bresnahan's opinion, enforcement should focus more on competitive effects and less on market definition. Additionally, he stated that he felt that there was too much focus on consent decrees requiring the spin-off of divisions in order to get mergers approved, noting that these probably do not do much for competition. Otherwise, he stated that he felt that merger enforcement was about where it should be.

According to Prof. Lawrence J. White, New York University focuses on whether current measures of market power are effective in circumstances where the issue is "unilateral effects." He points out that under the 1982 Guidelines, the theory of harm from a merger was that of "coordinated effects." Coordinated effects are the enhanced ability of sellers of either homogeneous or differentiated products to generally and jointly sell at higher prices. It was not until the 1992 revisions that the Guidelines explicitly recognized a second theory of harm, that of "unilateral effects, whereby the merger of two sellers of differentiated products can yield a post-merger increase in the merged firm's prices.

Professor White observes that the Guidelines "hypothetical monopolist,"²⁷⁵ or *Small but Significant and Non-transitory Increase in Price* "SSNIP"²⁷⁶ test is a natural approach for the "coordinated effects" perspective, as it sought the smallest group of products over which the post-merger sellers might be able to exercise market power. He points out, however, that the "unilateral effects" theory of harm does not require a market specification, but rather requires information about the demand characteristics of the merging firms' customers. Professor White concludes that while the current Guidelines remain a useful guide for structuring the inquiry where the theory of harm is "coordinated effects," they are far less useful in dealing with "unilateral effects." He recommends that this dichotomy be clearly acknowledged by the agencies, and that

²⁷⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, [1997] O.J. C372/5, available at http://www.europa.eu.int/comm/competition/antitrust/relevma_en.html. The Notice cannot be said to fully embrace the hypothetical monopolist paradigm because it does not make reference to the hypothetical monopolist paradigm in articulating a conceptual definition of a market.

²⁷⁶ The introduction of the SSNIP test in the US Department of Justice 1982 Merger Guidelines resulted in the development of new methods for defining markets and for measuring market power directly. The EU Commission has adopted the SSNIP formulation in its Notice on Market Definition

when the Guidelines are revised, if not sooner, an alternative set of procedures for inquiry and enforcement be developed for addressing “unilateral effects.”

Professor White also notes that while empirical studies strongly support the conclusion that concentration matters, they do little to indicate what level of concentration should trigger antitrust enforcement. He suggests two lines of inquiry.

First, he proposes post-merger pricing studies be conducted in the markets where mergers that were “close,” as evidenced by second requests, and suggests that the results would be suggestive of whether enforcement was too strict or too lenient.

Second, he suggests a “meta analysis” of all of the existent price concentration studies.

Unilateral action is, of course, one alternative to harmonization of national competition laws. Unilateral action can involve use of national trade laws — such as Section 301 — against nations that tolerate such restraints or national competition laws to remedy private restraints that block foreign markets. The obvious advantage of using a national law unilaterally to remedy extraterritorial restraints is that there is no need to reach agreement with other nations. A nation can proceed on its own without the need to build a consensus as is required in a bilateral or multilateral context. There are, however, a number of disadvantages to a unilateral approach. In their current state, national laws are not adequate to reach the full range of extraterritorial misconduct. In the United States, Section 301 does not directly apply to private anticompetitive conduct, but only to government toleration of cartels and other restraints. Thus, action against the participants in private cartels is not possible, and even indirect action against their “government” (or nation) by the imposition of trade sanctions — the only action possible — can injure many “innocent bystanders” without affecting the offending parties in any way. In contrast, direct action against private restraints is within the ambit of the U.S. antitrust laws, but the existence of various foreign commerce and other defenses limits the potential utility of the U.S. antitrust laws when foreign governments are involved in or protect the conduct at issue²⁷⁷.

²⁷⁷ The legal basis for such unilateralism exists in that U.S. law can be applied extraterritorially in at least one respect not pursued by other jurisdictions; U.S. antitrust law applies at least in some cases to restraints that effect U.S. export commerce, while the laws of other nations do not. Indeed, the stated willingness of U.S. enforcement authorities to pursue private restraints on U.S. export commerce has resulted in attacks by foreign observers to the 1995 FTC/DOJ international operations guidelines even in nations with a tradition of antitrust enforcement, though the guidelines are mindful of comity considerations and suggest that the U.S. agencies would first seek to address restraints occurring abroad cooperatively with the enforcement authority of the nation where the restraint occurs.

Even if national law could be effectively imposed on foreign conduct that distorts export trade, and the resulting foreign disapprobation could be avoided or borne, there remain practical problems in effectively applying U.S.

Finally, Professor White observes that while the Guidelines work well for coordinated effects merger inquiries, he feels that they are inappropriate for most monopolization inquiries. He suggests that the agencies acknowledge this problem and focus attention on developing an appropriate remedy.

3.6 Conflicts of Jurisdiction: extraterritorial solutions

Which explanation I have to justify international conflicts? We can start to speak about conflicts of jurisdiction²⁷⁸ as substantive of law and policy. Firstly, there are conflicts from different positions for two reasons: over sovereignty under international law or state jurisdiction, which are standard causes of argument concerning the extensive extraterritorial application example “*U.S. antitrust laws based on the effects doctrine*”. Even though the difficulty with regard to the extraterritorial matter of antitrust among some other jurisdictions and the U.S. has narrowed, there remain considerable differences - for instance, between the U.S. and the UE, which rejects the method doctrine as a justification for the extraterritorial request of antitrust.

Although, as well-known the EU is in opposition to the extraterritorial role of antitrust about protect exporters’ interests, and even when the arrangement with regard to Country jurisdiction or sovereignty is no different, problems may start in the competitor claims for exercising jurisdiction over the same issue.

This introduction to basic concepts and exploration of several primary theories is relevant to study of antitrust for instance: they inform us in pursuing the antitrust law of a state where the suspected conduct took place be applied to another state’s legislation where the anticompetitive effects were suffered to serve economic efficiency.

Secondly, concerning conflicts with respect to substantive law and policy in the topic of antitrust, unlike in the unlawful issue where little substantive distinction exists concerning policy and rule. For example, about antitrust legislation, certain behaviors are legal in one Country while the same behavior can be illegal in another Country.

antitrust laws extraterritorially. It is often difficult to obtain personal jurisdiction over foreign antitrust violators of conduct abroad that denies access to a foreign market, since the perpetrators may not do business in the U.S. In addition, well-known problems in obtaining enforcement of U.S. antitrust judgments abroad further impede the practical utility of antitrust unilateralism. Finally, unilateralism can be practiced by more than one nation. In the end, the unilateral use of national laws extraterritorially, if widely adopted, would foster business uncertainty regarding applicable law. Nevertheless, the option remains and can be used when nations deem it appropriate to do so

²⁷⁸ Diane P. Wood “Conflicts of Jurisdiction in Antitrust Law: A Comment on Ordover and Atwood”. *Law and Contemporary Problems*, Vol. 50, No. 3, Extraterritoriality of Economic Legislation (Summer, 1987), pp. 179-188.

In most Countries jurisdictions, certain kind of behavior such as “export” cartels, are exempted from the antitrust authority.

In the case of merger reviews between foreign corporations, even if the “*substantive law*” is unusual it would not be extremely exceptional to achieve different conclusions on the same merger case from one jurisdiction to another when the respective merger policies are applied to different markets.

The increased conduct involving trade policy and competition policy tends to create conflicts more serious, with foreign nations, which may bring about political consequences.

Conclusion

The enforcement of extraterritorial laws is helpful to understand the historical actions relative principal mechanism like “*attractiveness of a country’s*” domestic market to overseas producers. If a nation seeks to apply its extraterritorial regulation, the only authority of obligation that it has against overseas corporations is rejection of market access. If the country established new implement for its extraterritorial laws concerning a large internal market, and if overseas corporation are significantly dependent on that market, there is a better option that the country will achieve something in approving its extraterritorial laws than if the country were small with reasonably unattractive domestic markets. In term of the cost to the corporation of the country’s about antitrust regulation is better than the advantage provided by participating in that market, the company will refuse to participate in the market and the State will have no power to implement its extraterritorial laws.

In general term, when the nation is big enough, the market broad also, and the needs for the corporations to be present in the market large enough, the state will be able to implement its antitrust extraterritorial laws. The state has that capability where the cost to the affected foreign company of antitrust regulations is smaller amount than the potential accruable value of being in that country’s internal market. At that point, a rational firm will accept the country’s antitrust laws because the benefits are greater than the costs. Therefore, the assignment is that the degree to which nation is able to

impose its *extraterritorial antitrust laws* is proportionate to the country's dimension and the attractiveness of its marketplace to overseas firms.

Let us consider the case of the state that can't ever apply its antitrust laws and presume that, for a particular deal, there are two producers, one internal, and one outside of the state. If the state is incapable to apply its antitrust laws extraterritorially, in that case it will only be able to apply them to the internal producer. Let us further assume that both the foreign company and the domestic company seek to merge with third parties and that these mergers case would produce a welfare loss. From the international perspective, it is most favorable to have the country block the one merger that falls within its jurisdiction, namely the merger of its domestic company. Careful analysis from the State point of view however, that may not be optimal, the most significant it is moving beyond the market definition is the starting point for determining market shares and concentration, the twin touchstone of merger analysis. The overseas merger would reduce consumer benefit through higher prices; because the foreign company would increase its dimension and market power. As things stand currently, the domestic company will be debilitated because it now occupies a weaker competitive position relative to the potentially merged overseas company. In order to raise its internal welfare product, the country will seek to support the domestic company²⁷⁹ by approving its merger. Despite the fact that, the transaction involves international perspective, we suppose the merger is a welfare-reducing, because the new, big company will have better scope to compete with the newly merged overseas firm. Despite this apparent explanation, we can conclude that countries without the power to implement their extraterritorial laws will regulate antitrust matters less than the globally optimum level. Then, in a logical view, were they to obstruct domestic mergers which reduced welfare, they would suffer because they would bear the full cost of reduced profits for the domestic company, but they would only share a portion of the benefits of increased consumer benefit through lower cost and higher production. This can often be critical because market definition is the starting point for determining market share and concentration. Antitrust enforcement guidelines tend to prevent local company from engaging in anticompetitive activities but do not prevent overseas company from

²⁷⁹ Assume for purposes of the analysis that the welfare of the country will increase if the domestic merger is consummated. That is, the increase in profit to the merged firm outweighs the loss in consumer welfare to domestic consumers.

reducing domestic consumer surplus.” The competition doctrine evidence, where a country does not have the power to declare its extraterritorial antitrust laws, one would expect that country to adopt antitrust policies that are substantially more lenient than the international antitrust policy. Then can conclude that, application extraterritorial laws of antitrust is “good policy” when it more closely aligns internal and global antitrust interests and leads to antitrust enforcement at a level that is closer to the perfect global level than when there is no extraterritoriality²⁸⁰.

²⁸⁰ It may be the case that where countries can assert extraterritorial application of their antitrust laws they will regulate antitrust more than the globally optimal level. *Id.* However, extraterritorial application of antitrust laws comes closer to meeting the global ideal than no extraterritoriality because the country has more of an incentive and ability to consider the global impact of possible antitrust enforcement.

Chapter IV

THE EFFECT OF COMPETITION LAW INTRODUCING “BILATERAL” PERSPECTIVE

Abstract: 1. The impact of competition policy between development trade and protectionism behavior – 1.1 Government policy – 1.2 Market access – 1.3 Some countries choose to have no antitrust law. Why would they do this? – 1.4 Government intervention the "Protection-ism" - 2. The economic context of harmonization a framework of a new scenario – 3. Overview of bilateral cooperation in the field of “comitas gentium” and “positive comity” – 3.1 Foreign sovereignty immunity act (FSIA) – 3.2 Positive comity agreement – 3.3 Convergence - Conclusion

Abstract

This chapter considers a variety of acts of governments and firms that can restrict both international trade and international competition. Governments may also take measures that are excessively trade restricting and anticompetitive, and in some instances private arrangements occur against a backdrop of supportive governmental restraints. Many factors influence decisions in the area “Domestic politics, international politics, and economic incentives” are among those that tend to receive an attention, and they are often important. Here, however, I look at the conflict through a different lens focusing on the role of legal experience in shaping the conflict between market, sovereignty, on the line of “*harmonization and convergence*” co-operation theory. This chapter reviews the landscape of global problems that implicate both international trade concerns about access to markets and competition policy concerns anticompetitive practices that inhibit the operation of markets. These matters are global competition problems but they are not trade and competition policy issues. As this chapter discusses, aspects of these tools can be mutually supportive neither purely private restraints nor purely governmental practices, but a mix of both. At the same time, overlapping policy concerns lead to different conclusions regarding the effects of a particular restraint. Anticompetitive private arrangements can also have adverse effects on international trade and access to markets, while formal governmental actions around the world immunize some firm conduct that is excessively trade-restricting and anticompetitive. I intend this essay to be part of a larger project that will explore the relationship between these factors, on the

one hand, and economic and political factors, on the other, but I gave that as yet largely uncharted project. There are two approaches to cooperation, i.e. *bilateral* which I describe in this chapter and *multilateral* cooperation should be given attention in the next Chapter V.

1. The impact of competition policy between development trade and protectionism behavior

*“The Lighthouse in Economics”*²⁸¹

“In the 21st century, if set free to do so, private enterprise would have the incentive to more productively innovate and implement rays that would better welcome richly laden commerce. “Commerce has been bold and has searched out the dark corners of the world, but it stays longest where it is most welcomed and best entertained. Where there are light-houses there come ships; some may come where there are no lights, but with the welcome rays come the many and the richly laden.” (Johnson, 1890, p. 2)

Competition law (*or, as it is more commonly known among Americans, Antitrust*)²⁸², can be defined as the set of rules and disciplines maintained by legislators placing limitations on the freedom of market players to engage in practices that restrict competition or to abuse a dominant position, including the attempts to create a dominant position through mergers. The main objective of competition law in most regimes is to improve the efficiency of resource allocation, thereby maximizing social welfare. Competition law is generally taken to refer to the laws that regulate private anti-competitive conduct. Whilst competition laws vary from nation to nation, there are certain core provisions which underpin nearly all competition law regimes²⁸³.

These include: prohibitions on anti-competitive cartel activities (*such as price fixing and market sharing by competitors*); anti-competitive conduct by dominant firms; and

²⁸¹ Even more so than when *Coase* made the lighthouse a famous example of a presumed governmental good that was not always historically so, it is politics, not economics, that now maintains government operation of signaling services to ships. For the lighthouses as buildings, the government is now providing historic monuments and scenic amenities rather than navigational aids. The shipwreck problem can be remedied even more thoroughly with more extensive private property rights. If the aquatic area near the lighthouse is privately owned space, or if the governing agency asserts similar property rights, then any entrants are trespassers unless explicitly welcomed. Van Zandt distinguishes various roles of government. There are then four relevant levels of government involvement to consider: (1) government enforcement of property and contract rights; (2) government fixing of rates, establishment of monopolies, and the enforcement of collections; (3) government provision from user fees; (4) government provision from general revenues. Coase, Ronald. 1974. “The Lighthouse in Economics.” *Journal of Law and Economics* 17 (October): 357-76. [Reprinted 1990 in *The Firm, the Market and the Law*, Chicago: University of Chicago Press.] Department of Commerce, Lighthouse Service. 1915. *The United States Lighthouse Service*. Washington: Government Printing Office. See Van Zandt, David E. 1993. “The Lessons of the Lighthouse: ‘Government’ or ‘Private’ Provision of Goods.” *Journal of Legal Studies* 22 (January): 47-72.

²⁸² I use the terms interchangeably here, though competition policy is sometimes meant to connote a broader range of instruments for promoting competitive activity. See William E. Kovacic, Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement, 77 CHI.-KENT L. REV. 265, 281 (2001).

²⁸³ See ABA Internationalization of Competition Law Rules, above n 2, 17. See also Eleanor Fox, ‘What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect’ (2002) 70 Antitrust Law Journal 371.

mergers that substantially reduce competition²⁸⁴. In the United States, competition law (*other than mergers*) is invariably referred to as ‘antitrust law’. In Australia and elsewhere, it is sometimes referred to as restrictive trade practices law²⁸⁵. The precise shape and content of a nation’s competition law both substantive and administrative depends to a significant degree on its competition policy.

In particular, it is useful to examine the connection between competition law and policy. It was largely due to the concerns of the international trade community that competition law and policy became a topic for international dialogue. Competition policy is often used as a synonym for competition law.

In our view it is more appropriate to define it as spanning the broader set of measures and instrument that may be pursued by governments to enhance the contestability of markets. This might include actions to privatize state-owned enterprises, deregulate activities, reduce licensing requirements for new investment or entry, cut firm specific subsidy programs, and trade liberalization. Thus, competition policy disciplines constrain both private and government actions, whereas antitrust rules pertain to the behavior of private entities (firms)²⁸⁶.

1.1 Government policy

Governments pursue trade, industrial and related policies for a variety of reasons, including as a means to raise revenue (*tariffs*), to protect specific industries, encourage participation by minorities or small and medium-sized enterprises, promote regional development, to shift the terms of trade, to attain certain foreign policy or security goals, or to restrict the consumption of specific goods for environmental or moral

²⁸⁴ See, *Communication From the European Community and Its Member States*, WTO Doc WT/WGTCP/W/115 (1999) 4 (Submission from the European Community and its Member States to the WGTCP).

²⁸⁵ The term “antitrust” refers to general legal regimes whose specific role is to combat restraints on competition it represents United States usage, but it has gained currency in other countries as well. “Competition law” is a more generic analogue which is used more commonly outside the United States.

²⁸⁶ We consider individuals to be engaged in undertaking activities if they devote their own independent efforts to the acquisition of wealth, power, and prestige. They do not do so as employees of others, and, in the undertaking process, they display initiative to a considerable degree. It seems clear that two primary avenues have been followed in this undertaking, which we label, for convenience, *redistributive undertaking* and *productive undertaking*. Examples of the first are obvious: aggressive conflict, breaking, bribery and rent-seeking litigation, among many others. Here it is important to distinguish between sanctioned or legal forms of redistributions such as lobbying for protective tariffs and unsanctioned ones, such as violent crime. It is practitioners of the former who can prosper and garner respect even in highly organized and “well-governed” societies. And it is to be noted that many such undertakings were once considered commendable and some still are. In-deed, those who undertook some of them were deemed heroic and were celebrated accordingly.

reasons. Whatever the underlying objective, such policies redistribute income between segments of the population by assisting specific industries, factors of production or activities. Here are two major decisions to be taken by governments with respect to competition law: **(i)** whether (when) and how much to invest in such disciplines; and **(ii)** how to design and enforce the rules.

Many products are non-tradable (e.g., many services). Even if tradable, competition may be limited to local markets for other reasons (e.g., transport costs). Certain products may be produced by (natural) monopolies²⁸⁷, by firms with global market power, or by firms where 'un-natural' (government-made) barriers to entry restrict contestability.

And, the more open are markets to foreign products, the greater the potential vulnerability to anti-competitive practices of foreign monopolists or cartels²⁸⁸. At this stage, it would be premature to say that the limited, tightly-framed exemptions given to export activity in the United States (in the Webb-Pomerene Act) and, of course, in other countries, should be more circumscribed.

Most often it is used to refer to the rules and policies that determine the conditions of competition within a nation²⁸⁹. In this sense competition policy includes not only competition law, but also government policy towards the implementation of the law. A number of states have superficially strong competition laws that are weakly enforced in practice. Sometimes this is due to unavoidable funding constraints and sometimes

²⁸⁷ The main issue lies in the recognition in the sovereignty of states. With regard to the sovereignty of states in the current context, the most important principle is the 'Permanent Sovereignty over Natural Resources'. This principle has evolved in the UN general assembly since the early 1950s in an effort to secure newly-independent states the benefits of the exploitation of natural resources within their territory as well as provide these states legal framework against a breach of their economic sovereignty due to property or contractual rights of foreign states and companies (Schrijver, 1995). In a nutshell, this principle recognizes that it is a country's sovereign right to utilize its natural resources in the best interest of the country and its people without having to justify its actions. It is up to the member states themselves to decide what amount of oil to produce. In this way, member countries maintain absolute sovereignty over their raw material production, which, in practice, is in the hands of each member countries' national raw material company. Since these national raw material companies are completely owned by the member country's government, they can be considered an agent or instrumentality of that member country (Abdallah, 2005).

²⁸⁸ For example, a takeover by a foreign firm may be prevented because the new firm would compete more effectively with an existing domestic producer. There will inevitably have to be much more consultation and some evolution of cooperative mechanisms to keep such protectionism from creeping into national competition policy systems. And, more specifically, the issue of anti-competitive behaviour in export trade will have to be reviewed. In such a context, protectionism enters as uncompetitive behaviour.

²⁸⁹ The nature of competition policy is discussed in the Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WTO Doc WT/WGTCP/2 (1998). Bernard Hoekman and Peter Holmes, 'Competition Policy, Developing Countries and the World Trade Organization' (Policy Research Working Paper No WPS2211, World Bank, 1999). See also Destler, 'US Approach to International Competition Policy' [1998] Brookings Trade Forum 395, 396-8; Bernard Hoekman and Petros Mavroidis, 'Economic Development, Competition Policy, and the World Trade Organization' (Policy Research Working Paper No WPS 2917, World Bank, 2002).

to a lack of proper understanding. In many states competition policy tends to be seen as a subset of industry policy²⁹⁰.

Competition policy also includes government policies on deregulation, privatization, foreign direct investment, and government procurement practices. When used in its broadest sense to refer to all those factors which influence the nation's competition conditions, competition policy would also include trade policy and industry policy.

The subject of competition law may be seen from three different perspectives:

A) **Trade Barriers.** As government trade barriers have fallen, a number of governments have begun to assert that the benefits they had expected to flow from these trade agreements have not been fully realized due to the existence of private anticompetitive restraints in certain markets²⁹¹. Accordingly, an interest among world trading partners has arisen to assure that each country has and enforces competition laws that proscribe restraints that impede access to national markets.

B) **Global Business.** Firms that do business in numerous countries face very substantial costs from compliance with the different laws of various countries. In some cases, they must revamp their entire distribution system to tailor it to a host nation's competition laws. In other cases, they must file a multitude of notification forms, which ask for similar information but in different formats and under different time schedules.

Multinational businesses have complained about the burden and expense of complying with the different competition law regimes adopted in various jurisdictions.

C) **Global Consumer Interest.** The general interest of consumers and producers in a robust world economy. There are gains to be made from rules as broad as markets. With global vision one can better appreciate all of the impacts of international transactions, positive and negative.

In modern times, market conduct has nearly always had transnational dimensions. One can be reasonably sure that whatever the statute or regulations may say, very few administrations will be willing to be excessively zealous in policing

²⁹⁰ Competition policy can easily become part of industry policy where competition law enforcement is left in the hands of bureaucracies. Where a competition law regime has an unfettered private right of action (for example in the US), it is much more difficult for special interests to capture competition policy. In Dianne Wood, 'Cooperation and Convergence in International Antitrust: Why the Light is Still Yellow' (Speech delivered at the "The New Antitrust Paradox: Policy Proliferation in the Global Economy" Conference, American Enterprise Institute for Public Policy Research, Washington DC, 22 April 2003)

²⁹¹ WTO, Annual Report 1997, Vol. I, at 30, 33.

anti-competitive behaviour in export trade, as long as it does not too obviously have effects in domestic markets. Developing countries may therefore wish to consider what sort of "agenda" of trade policy can encompass this sort of issue²⁹².

The U.S. Trade Agreements Act of 1934 provided for the retention of unconditional **Most Favoured Nation** status (*except for 15 countries*) and exemption of certain products, the subject of trade agreement concessions, from the cost equalization provisions of the 1930 U.S. trade act. Trading nations have discussed the possibility of world disciplines against restrictive business practices since the mid to late 1940s, when they contemplated and nearly adopted the Havana Charter. The United States proceeded to reduce tariffs sizably through bilateral and multilateral negotiations. Such agreements transmitted tariff reductions to third countries. However, the extension of tariff reductions was only possible if the third country had an unconditional MFN clause with the United States. Trade authorities broker deals on market access. The touchstone is the deal, not some objective standard such as consumer welfare²⁹³.

Traders and trade authorities, therefore, view market access in terms of competitors' rights.

Whilst theoretically this means the right to an opportunity to enter a foreign market, in practice this often becomes a right to enter a foreign market²⁹⁴.

Market access very often means something different to trade authorities²⁹⁵.

This springs from the fact that whilst trade theory is dominated by the ethic of

²⁹² For example, less developed countries may exempt from antitrust proscriptions cartels in strategies goods where they have a comparative advantage, especially raw materials and commodities. Moreover, there is often disagreement even within a single jurisdiction about what is a naked monopolistic exclusion, as evident in opinions and discussions about the Microsoft case (Antitrust 1999).

²⁹³ While some trade authorities may refer to the goal of contestable markets, trade authorities are influenced by exporters whose objectives are less likely to be driven by the principles of welfare economics. In Robert Hudec, 'A WTO Perspective on Private Anti-Competitive Behavior in World Markets' (1999) 34 *New England Law Review* 79, 82. This is based on the argument that the liberalisation of trade will increase the wealth of nations. However there are caveats, particularly in respect of the needs of the developing world. See Joseph Stiglitz, 'Development Policies in a World of Globalization' (2002)

²⁹⁴ It has been suggested that US trade policy has shifted from a focus on national treatment to a focus on reciprocity of treatment. See generally Michael Young, 'Lessons from the Battlefield: US-Japan Trade Wars and their Impact on the Multilateral Trading System' (2001). *George Washington International Law Review* 753.

²⁹⁵ This issue is discussed in Marsden, *A Competition Policy for the WTO*, above n 31, 125-8. See also Philip Marsden, 'A WTO "Rule of Reason" - (1998). *European Competition Law Review* 530; see Thomas Schoenbaum, 'The Concept of Market Contestability and the New Agenda of the Multilateral Trading System' (1996) First, international trade exhibits characteristics of a prisoner's dilemma. Although all states would be better off with reduced access barriers, generally speaking, trade authorities act rationally by demanding the maximum possible market access in return for minimal dismantling of trade barriers. Secondly, it cannot be assumed that trade authorities generally act in the public interest. It is just as likely that they act for local producers. This reinforces the first point, that the object of national trade authorities is a bargain-driven notion of market access.

free trade, trade practice is often profoundly protectionist. In contrast to the process-oriented nature of competition law, trade policy is very outcome oriented²⁹⁶.

Antitrust (or competition law) is whatever legislators and judges of particular jurisdictions say it is, and it ranges from law to control business practices in order to protect or empower the underdog, to law to check and disperse business power and ensure a better distribution of opportunity and wealth to the non-established, to law to preserve the competitive process and its governance of markets, to law to advance efficiency through markets anchored (for example) by an aggregate wealth or by a consumer welfare paradigm.

²⁹⁶ Barringer, 'Competition Policy and Cross Border Dispute Resolution', above Barringer was the US legal representative for Fuji in the Kodak-Fuji dispute. Barringer, has distinguished trade and competition authorities. See Alan Wolff, Thomas Howell and John Magnus, 'Trade and Competition Policy: A Suggested US Strategy'.

1.2 Market access

Adam Smith

*Scottish professor that strongly believed in the idea of a free economy. In 1776 in The Wealth of Nations recognised the importance of market processes in achieving an efficient allocation of resources. According to Smith the pursuit in markets by individuals of their own interest generally served to maximise the interests of the public as a whole. However, Smith stressed that the pursuit of individual interest only worked in the public interest if there was competition. His treatise contains numerous attacks upon the many forms of restrictions on competition that existed then (and many of which remain to this day), discusses his law of **competition**, which is the idea that competition forces people to make a better product²⁹⁷.*

The trade conception of market access is not necessarily about enhancing welfare²⁹⁸. Whether that market is already competitive is not relevant to the issue of whether a state, by failing to discipline private access barriers, is failing to honor its market access undertaking that is, honoring its trade deal. From the trade perspective, the importance of access barriers is not the effect they may have on competition, but the effect they have on the integrity of the deal. This has led some trade commentators to completely reject the application of competition principles to the trade problem, simply because competition principles will direct attention away from ensuring market access towards inappropriate notions of efficiency²⁹⁹.

If a market access rule based on consumer welfare is unlikely to succeed, is it possible to construct another form of market access rule using competition principles?

²⁹⁷ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Clarendon Press (Cambridge), 1976, pp.26-27.

²⁹⁸ Bernard Hoekman, in 'Competition Policy and the Global Trading System: A Developing Country Perspective' (Policy Research Working Paper No WPS1735, World Bank, 1997).

²⁹⁹ See, eg, Alan Wolff, 'The (Notionally) Bridgeable Chasm between Antitrust and Trade Policy' (2003) 47 *New York Law School Law Review* 167. One of the most prolific academic commentators on trade and competition has been Eleanor Fox. Fox also sees market access (market blockage) as the issue that brings trade and competition together: See, eg, Fox, 'Toward World Antitrust and Market Access', Jagdish Bhagwati, 'Afterword: The Question of Linkage' (2002) 96 *American Journal of International Law* 126, 130. Failure to discipline private exclusive practices will force states into unilateral action. This is the very thing that the GATT-WTO system was designed to prevent. It is clear that market access issues were at the heart of the EU's move to bring competition policy into the WTO. For a discussion on this issue, see Philip Marsden, *A Competition Policy for the WTO* (2003) 161-8. Market access issues have also been the key factor driving calls by US trade interests for better US antitrust enforcement

The concept of market power is fundamental to antitrust economics and to the law. Except for conduct subject to *per se* treatment, antitrust violations typically require the government or a private plaintiff to show that the defendant created, enhanced, or extended in time its market power.

Although the requisite degree of existing or increased market power varies by context, the nature of the inquiry is, for the most part, qualitatively the same. It is important to emphasize at the outset that the mere possession of market power is not a violation of antitrust law in the US. Rather, the inquiry into market power is usually a threshold question; if sufficient market power is established, it is then asked whether the conduct in question say, a horizontal merger or an alleged act of monopolization constitutes an antitrust violation. If sufficient market power is not demonstrated, the inquiry terminates with a victory for the defendant. Exports from a developing country are often accompanied with young, naive, and internationally inexperienced attitudes. This type of misunderstanding may cause additional trade conflict. Perhaps the critical substantive difference between US and EU competition policy is that while US policy is firmly fixed on outcomes measured in terms of consumer welfare³⁰⁰, EU policy gives greater prominence to the process of maintaining competitive rivalry³⁰¹. The definition of a ‘relevant market’ is essential to several aspects of competition law. Markets are where consumers and suppliers of a product or service interact. As was mentioned above it may, for the purposes of rigorous analysis, be necessary to determine whether product A competes with product B. This is particularly important in the case of investigations into abuses of a dominant position, as we need to know in respect of what the undertaking is believed to be dominant³⁰².

³⁰⁰ William Kolasky, in ‘What is Competition?’ (Speech delivered at the Seminar on Convergence, The Hague, 28 October 2002) expressing the view of the Department of Justice’s Antitrust Division that efficiencies are often more important than concentration.

³⁰¹ Eleanor Fox, in ‘Global Markets, National Law, and the Regulation of Business: A View from the Top’ (2001) *St John’s Law Review* 383, 394–5. Fox summarises the difference between US and EU merger policies: “*United States authorities normally approve a merger if it cannot be proven to raise prices. The European Commission normally disapproves a merger or imposes regulatory conditions if the merger significantly enhances the market share of a dominant firm, creates joint dominance, or seriously distorts the playing field for competitors*”.

³⁰² For example, is there a market for bus services? If there is it might be possible to apply the laws of dominance to a bus company that has a strong market position in a given area. On the other hand, if bus services compete strongly with rail and taxi services, with walking, and with the use of private cars, then it would probably not be possible to apply the law. As indicated above the most important factor here is that of the extent to which products are interchangeable one for the other.

Theoretical models of market structure focus only on *actual* competition facing producers, and make no reference to *potential* competition. It has long been recognized that potential competition serves as a restraint on the conduct of incumbents (those already in the market) in just the same way as does the actual competition faced. The higher the barriers that exist, the greater is the ability of the incumbent to ignore the potential competition. While the existence of barriers to entry in any given situation may be a matter of some concern to those investigating the market, there is intense debate between the Harvard and Chicago schools as to the policy implications of barriers to entry, and even as to what a barrier to entry is. The issue is of such importance that it should be dealt with at this early stage. At its very broadest, a barrier to entry is any factor that operates as a cost of a new entrant into a market. By this definition it might include such factors as: lack of knowledge about the market; any premium rate paid for capital to compensate for the risk this lack of knowledge results in; the cost of acquiring the necessary physical capacity (plant and raw materials); the cost of establishing brand recognition with consumers, and a distribution system, etc.

In other words, the trade notion of market access rather than the competition notion would become dominant. It is difficult to see that US antitrust authorities would tolerate a rule that is so opposed to current US competition policy³⁰³. Thinking about trade friction, we tend to focus our attention on exports and imports of goods, and services. But when we consider a country, there exist some ubiquitous, often indigenous, and characteristic phenomena of the society, such as, attitudes in looking at things, ways of thinking, of spending energy and time, culture, habits, and ways of living. We can call those phenomena, conceptually, a social value System unique to the country.

When imported goods reach consumers, they reflect portions of the foreign social value System. In the importing country, there is also a specific, autonomous social value System. Imports therefore mean that the importing country is importing not only goods but also a foreign social value System, which results in a surprise or even a shock.

³⁰³ Many European commentators also have objections to the EU approach to merger analysis: See, eg, Matthias Pflanz and Cristina Caffarra, 'The Economics of GE/Honeywell' (2002) *European Competition Law Review* 115, who criticize the EC's analysis of portfolio effects in the GE/Honeywell case; see also Burnside, who claims that the EC's substantive analysis was speculative and economically 'novel'.

It is not easy to understand foreign social value systems since they will be significantly different from the indigenous value System of the importing country.

Such differences in social value systems underlie trade frictions and arouse resistance in the importing country. It is, however, unfair and unfortunate only to justify one's own social value system.

On the other hand, many people are pleased to encounter a foreign social value system if it is fresh and interesting for them. In addition, the social value System unique to each country changes over time. Furthermore, the social value system is reflected in costs of production via the quality of labor. Thus, a social value system plus governmental policy can encourage or retard economic development.

1.3 Some countries choose to have no antitrust law. Why would they do this?

One hypothesis is: to attract business and investment. Business might want freedom to do what antitrust usually prohibits (cartelize, monopolize, exclude rivals by unreason-ably restrictive acts, merge to market power; perhaps price discriminate, tic, refuse to deal); and firms might value this freedom more than they value protection against rivals predations.

A second hypothesis is: antitrust law and its enforcement are expensive; it takes resources. For practical and political reasons, it may be difficult to enforce the law effectively and especially to enforce the law where gains may be greatest for example, where the state is involved. Antitrust proponents that have in mind efficient antitrust may fear that their nation's legislator will adopt an antitrust law that will spill over into overregulation and protectionism. Moreover, the marginal gains to economic welfare from antitrust may be small, and even below zero if antitrust is or becomes protectionist.

The small marginal gains possibility would be true especially if the economy is small and open, so that most domestic markets will be protected by inbound foreign competition, and domestic anti-competitive conduct that spills over to the world may be prosecuted by mature antitrust jurisdictions.

The first hypothesis freedom from antitrust will attract business is relatively unlikely to be the case. If the attracted business sells abroad, its anti-competitive practices will

be subject to scrutiny in the consumer jurisdictions, the firm cannot escape antitrust. Indonesia adopted a competition law few years ago because the IMF International Monetary Fund required it to do so as a part of the economic reforms on which rescue funds were conditioned.

Many countries moving from “*Nationalism*” or “*command and control economies*” to markets want rules in place to check the greed expected to attend free markets. Many nations are convinced (often by US or EU advocates) that competition law is good for them, make their businesses more robust and better able to compete while attracting investment and jobs, thus increasing economic opportunity and serving their people as entrepreneurs³⁰⁴, consumers, and workers.

In its 1995 White Paper on Enlargement, the European Commission (1995)³⁰⁵ explained its policy to require hopeful EU members to approximate the major bodies of law of the European Community, prominently including competition law, into their *national legal systems*

³⁰⁴ As was noted above, it is the presumed goal of entrepreneurs to maximize their profits, and to be as successful as possible. While Bill Gates probably did not envisage 25 years ago that Microsoft would become one of the largest and most profitable corporations in the world, if asked he would probably have said that he would like it to. Now that it has assumed such a strong position Microsoft’s commercial practices have been scrutinized by competition authorities around the world, and practices that might be pursued legitimately by smaller firms may be condemned if followed by Microsoft. The managers of a business may determine a strategy for all the ‘right’ reasons as far as that business is concerned, and yet, on the basis of a test related to society’s welfare, be attacked.

³⁰⁵ The White Paper says, at point 2.13: “*Another reason for legislating at the Community level has been the need to create and maintain equal conditions for economic operators. Competition could be distorted if undertakings in one part of the Community had to bear much heavier costs than in another and there would be a risk of economic activity migrating to locations where costs were lower . . . The implementation of high common standards of protection is among the Union’s objectives and at the same time helps to ensure this ‘level playing field’.*”

1.4 Government intervention the "Protectionism"

As the democratic franchise was extended, so was state intervention in the economy. From the 1870s to the First World War, a spate of reforms was implemented, limiting market freedoms for the sake of social cohesion (and sometimes economic efficiency).

So far, the term "protect" has been considered, but "protectionism" per se has a much wider meaning than "protect" does. If many countries "protect" their trade and these practices and ideas spread, thus inspiring other nations to follow similar measures, "protectionism" will result. When a protectionist measure is applied to the imports of some specific country's or countries' commodities on a non-egalitarian basis, it favors commodities from other countries and thus is discriminatory.

The government intervenes where the market fails. This widely known formula is the basis of every intervention of government into market. Some authors argue that even the market itself is the outcome of a conscious and often violent intervention on the part of government³⁰⁶

Protection is enforced by the use of several visible methods and means, which can be classified by where they are practiced. Protecting a domestic economy through trade restrictions has three objectives: (1) safeguarding a country's external financial position, (2) safeguarding its balance-of-payments position, and (3) shielding its domestic industries (either infant or declining) from foreign competition.

A government can also protect its domestic economy by prohibiting exports of indigenous natural resources or manufactured products, especially for strategic purposes. Although the measures detailed above are the primary prerogatives of the government sector or local authorities, the private sector also participates in protective practices: for example, voluntary export restraints those are often the result of private agreements or are disguised under them.

³⁰⁶ John Gray, *False Dawn – The Delusions of Global Capitalism*, The New Press (New York), 1998, p. 14.

In 20th century history observed a variety of violent state interventions into market economy under the just cause of the democratic control of market. Unfortunately most interventions turned out to be government failures³⁰⁷.

Global is a double-edged sword from the vantage point of antitrust law: liberalization of (world) trade implies on the one hand that national markets, previously sealed off for foreign goods and services, should be opened up; globalization thus makes the dangers of protectionism relative for domestic competition ("the tariff is the mother of trusts").

But market openings on the other hand induce private international restraints on competition ("as competition becomes increasingly transnational, so do restraints on competition")³⁰⁸ companies which can no longer fall back on artificially sealed off markets and, in particular, on protective tariffs, could then try to denude (world) trade liberalization of its contents by replacing governmental market access barriers with private ones in order to obstruct competition from imports; they could perhaps

³⁰⁷ Most European countries have adopted a legal system, called the employment protection legislation (EPL), in order to provide employees with extra security for their jobs. An employer may lay off his employees only at specific occasions and must go through difficult and complicated procedures to do so. Both the occasions and procedures are stipulated in the law.

This protection certainly renders a desired job security to employees. The employers, however, may not easily replace an employee by a superior alternative even though it is available in the market; he has to maintain the employment despite that he does not need anymore the skill of some employees. Employed workers remain in their jobs, while better workers are still unemployed and looking for jobs outside the firm. Employee's incentive is weakened to improve their productivity as her job is not threatened by superior competitors from outside. The cost of job security is the inflexibility of labor market which invites inefficient allocation of workforce. Resignation is the only practical mode for a normal employee to quit his job under EPL, but it imposes on the employer an extra payment to persuade an employee to resign. This imposition will inflate the cost to hire an alternative outside worker. EPL has thus enlarged the cost for employer to replace an employee by an outside alternative, and the employees make the use of this advantage to demand higher wage. EPL not only provides employees with greater job security but also awards them with extra bargaining power in wage renegotiation. Market competition works, only when buyers can buy from the best seller and sellers can sell to the highest bidder, to encourage production of goods of higher qualities at cheaper prices and consumption on economized budget. As EPL handicaps employer in replacing an employee by a best alternative, it seriously lessens competition in labor market. Job security by EPL thus weakens the incentive of employees to improve productivity and misleads them to be unduly tough on wage bargaining. It clearly infringes upon employers' property right by awarding employees with unfair bargaining power in extra. The cost to employ a new worker soars up if employers will not be free to lay off him later. Employers may give up hiring new workers if they are needed only for a short period of time. Also employers must evaluate each job applicant more deeply and seriously in order to avoid hiring a potential trouble-maker, and so respond to EPL by reluctance to employ new workers. The overall consequence is a low level of employment, a kind of government failure. There is an alternative solution for the workers' job security. If labor market is so efficient that a laid-off worker easily finds a new job, then his life is not endangered. What a worker needs is not job security but employment security. Employment security exposes workers to competition with outsiders, while job security protects inferior employees from competition with superior outsiders. Government intervention better aims at improving efficiency of labor market rather than EPL. Well-functioning intermediaries will provide unemployed workers with proper retraining and channel them to proper new job openings, if the intermediaries are given proper incentives. It is the role of the government to define and protect property right so that intermediaries in labor market find it profitable to work for unemployed workers.

³⁰⁸ Gerber, "The US-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective", in: 34 New England L Rev, at 123, 125.

threaten a collective boycott of traders including foreign products in their production range; they could create barriers to market access along the lines of the Japanese “*Keiretsu*” and justify it by pointing at intense horizontal competition; they could abuse proprietary rights or patents for geographic market segmentation and they could obstruct third-party market access with the aid of their essential facilities. International trade law which, according to the preamble of the WTO Agreement, aims at “the substantial reduction of tariffs and other barriers to trade.” therefore runs the risk of being eroded by a “*privatization of protectionism*”.

Backed up by private market isolation, the State pleads without “*compunction*” for liberalization of International trade.

It opens up foreign markets for domestic companies without putting protection of the domestic market in jeopardy. It therefore projects a cooperative image on the outside but condones behind the scenes a private sealing off of the market.

The lack of effective international antitrust law is, from this point of view, in the side of liberalization of (*world*) trade; only a coherent legal regime of international trade law and international antitrust law excludes continuation of protectionism with other means and thus ensures comparative cost advantages. International antitrust law must nonetheless react not only to the danger of privately “*re-territorialised*” markets but also to global market integration which can be read out of the market clout of “*global players*” and out of the wave of international mergers. This integration process admittedly does not entail a single “universal” market; there will continue to be local, national and regional markets; but it confronts international antitrust law with new challenges: The corporate strategy of “global players” does not only affect individual markets, but all (geographic) markets, that is, they are ubiquitous. A classic example is the market behavior of Microsoft³⁰⁹.

The international merger wave (e.g. *Daimler/Chrysler*) is due to the fact that corporations are redefining their optimal size on global markets and can grow faster externally, that is with mergers, than internally. International antitrust law must in particular answer the question of whether and how it should react to

³⁰⁹ In the Microsoft decision (findings of fact) it is said that Microsoft has abused its market dominating position of the (world) market for PC operating systems in order to monopolize the market for internet browsers. Such abuse has effects not only in the US, but everywhere so that with a view to international antitrust law the questions arise whether foreign cartel authorities should intervene or take over the results of the US antitrust proceedings.

progressing market concentration. Additionally there are international corporate networks: *General Motors*, *Daimler/Chrysler* and *Ford* have announced that they are setting up a joint e-commerce platform for automotive parts" looking for an annual gross of US\$ 240 billion; with such an electronic purchasing market, the danger of abuse of demand clout is obvious, in particular the danger of discrimination against individual suppliers.

Going beyond this, the joint infrastructure as an (unintended) market information method could be the breach in defences making horizontally coordinated market action possible. Frequently, however, these "*private*" arrangements are due to covert government "guidance" to private industries among competing countries. Protection is enforced by the use of several visible methods and means, which can be classified by where they are practiced. Restrictive measures, for example, can be imposed at the country's territorial borders, and the following typical measures are among many of these practical devices: tariffs, quotas, customs valuation systems, orderly import arrangements, voluntary export restraints, foreign exchange controls, and import licensing systems. They can be applied in different ways and at different rates, and they can directly and effectively curb trade in general, depending on their strengths. Protective measures can also be defined as grants or aids that help the establishment of a training school attached to a factory, since individuate trained there can be used as skilled labor in the company to increase productivity. Whether this can be classified as an educational grant or as an indirect protection on a long-term basis, however, is not clear. Understandably, numerous practices could be classified almost endlessly as protection because they will ultimately influence the quality and efficiency of economic performance in domestic industries. So far, the term "protect" has been considered, but "protection-ism" per se has a much wider meaning than "protect" does. If many countries "protect" their trade and these practices and ideas spread, thus inspiring other nations to follow similar measures, "protectionism" will result.

When a protectionist measure is applied to the imports of some specific country's or countries' commodities on an non egalitarian basis, it favors commodities from other countries and thus is discriminatory.

Restrictive measures can protect domestic industries not only at the borders but also within the country. They can take the form of subsidies, grants, tax incentives such as

allowances or refunds, favorable terms for industrial financing (at lower rates of interest and longer maturity periods), or favorable allocation of industrial resources. Protective measures can also be defined as grants or aids that help the establishment of a training school attached to a factory, since individuals trained there can be used as skilled labor in the company to increase productivity. Whether this can be classified as an educational grant or as an indirect protection on a long-term basis, however, is not clear. Understandably, numerous practices could be classified almost endlessly as protection because they will ultimately influence the quality and efficiency of economic performance in domestic industries. Although the measures detailed above are the primary prerogatives of the government sector or local authorities, the private sector also participates in protective practices: for example, voluntary export restraints those are often the result of private agreements or are disguised under them.

Some such measures are caught by the prohibitions of the WTO, but many, including blessings in the form of a state action defense, are not. There is no international understanding of what is or is not appropriate government intervention to limit trade³¹⁰. Moreover, anti-dumping laws are a major facilitator of world cartels. The anti-dumping problem appears, appropriately, on many agendas for reform. In concept, it fits neatly into the list of competition-related state restraints of trade.

As a concession to political pragmatism, however (the US opposition to reform), we may need to de-emphasize the problem or defer its solution. In the past 20 years, the European Union has become a major player in developing and enforcing competition law³¹¹. These are among the phenomena that have led to the current initiatives to harmonize various national laws (not only competition laws), or at least to coordinate such laws at their intersection with trade policy in order to reduce tensions and take advantage of synergies with trade law.

³¹⁰ Examples of situations that would have profited from common understandings, or at least shared knowledge and clarity, are the uranium cartel matter of the 1970s and the Russian aluminum market-flooding problem of the early 1990s. Easily triggered anti-dumping laws likewise present a problem of state restraints on trade and competition.

³¹¹ In Eastern Europe, communism and command-and-control regimes have given way to democracy and free enterprise. Many of these nations are hoping to join the European Union, and implementation of EU style rules is a condition precedent to consideration for membership. Meanwhile, the completion of the Uruguay Round of the GATT significantly lowered government trade barriers, and there followed increased complaints about private (nongovernment) trade barriers. Given advances in communications and information technology (e.g., telecommunications reform and the advent of the internet), less expensive air transportation, and lower trade barriers, much business has become global.

2. The economic context of harmonization a framework of a new scenario

*What is an appropriate method of harmonizing diverse domestic competition rules and practices where the object of the harmonization is to further the requirements of liberal trade policy?*³¹²

Unlike unification, harmonization does not eschew diversity³¹³. Another term which is frequently used in the context of globalization, but is not as widely defined as legal diffusion, is harmonization, which is often wielded as a collective descriptor in legal disciplines for all attempts to bring about some form of legal similarity, including uniformity. Uniform laws are perceived as a sub-category for some scholarly attempts to categorize harmonization techniques, with the uniform law as a goal and the harmonization as a process. Based on the intermediary definition above, it would then be logical to assume that those harmonized laws which reach a high degree of similarity in the effect that they produce on a given legal phenomenon could be labeled “uniform”. As a sub-category of “harmonization”, uniformity encompasses different degrees of unity of law, and the scholarly discussion of whether they encompass the same will probably never be resolved. There is much logic in the conclusion that to harmonize aims at a lesser legal equality than to unify; however, the application of the two terms over the past decade has been characterized by some degree of arbitrariness: often we say “uniform” when we should be saying “harmonized” if we apply the above logic. A particularly astute example of this is found in the realm of the European Union which, with its introduction of supranational laws throughout the legal jurisdictions of member States, reaches very similar results but under the label of “harmonization”; it only rarely applies the term “uniform”.

The goal of harmonization is the creation of a relationship of accord or consonance between diverse elements so as to achieve a particular object.

³¹² Spencer Weber Waller, ‘Neo-Realism and the International Harmonization of Law: Lessons from Antitrust’ (1994) 42 University of Kansas Law Review 557, 558–9.

³¹³ Martin Boodman, ‘The Myth of Harmonization of Laws’ (1991) 39 American Journal of Comparative Law 699, 702, Although the expression ‘harmonisation’ is used widely throughout literature dealing with trade and competition law, this use is not consistent. This article adopts the meaning ascribed to ‘harmonisation’ by who states that harmonisation is a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality. In its relative sense, harmonisation is the creation of a relationship between diverse things. Its absolute and most common meaning, however, implies the creation of a relationship of accord or consonance.

Most commentators who have looked at this issue have stressed the role of competition law enforcement. In other words, the way to advance the object of free trade is to ensure an appropriate level of enforcement of domestic competition law. Appropriate enforcement tends to mean that imports should not be subjected to discriminatory treatment by local authorities. Thus, a non-discrimination principle, already present in international trade law, provides the baseline substantive rule to which agreed enforcement procedures are added to make a workable harmonization programme³¹⁴. Harmonization, and the capacity to treat problems as a whole, could produce a freer flow of trade and investment to the benefit of the world's consumers.

A fourth perspective is often offered for harmonization of laws in general, namely the alleged need for a "level playing field." We note that perspective, but doubt its relevance to competition law. Argument is made along the following lines: Nation A has high standards for the protection of a public policy objective, such as protecting the environment, protecting small business, or preserving the dispersion of business. Without harmonization in the direction of the high standards, businesses in other nations will produce their products at lower cost and be able to outcompete the firms of nation A. As a result, capital and business will take flight to the lower-cost nations. This will put pressure on A to degrade its standards; i.e., to compete in the race to the bottom, making society worse off.

The U.S. antitrust laws as enforced today do not seem to raise the race-to-the bottom problem³¹⁵. U.S. antitrust law is designed to be market freeing, not handicapping. The quality of U.S. antitrust law is not in jeopardy because of insufficient antitrust abroad, nor does it appear that capital has migrated away from the United States because of costs imposed by the U.S. antitrust laws but not by the laws of other nations³¹⁶.

Harmonization may be approached from a descriptive as well as a normative point of view. The competition laws of the various nations generally have tended to become

³¹⁴ OECD, Joint Group on Trade and Competition, Outline of (A) Core Principles, Common Approaches and Common Standards and (B) Bilateral and Multilateral Approaches (1999) COM/TD/DAFFE/CLP(98)97/FINAL

³¹⁵ U.S. antitrust enforcement in the 1960s might be seen as raising such problems. Small-sized businesses were accepted as a public good and their protection an end of public policy (as still exists in other U.S. law, e.g., SBA and set-asides in government procurement law). Enforcement of competition laws primarily to protect small businesses, as such, can handicap efficiency (e.g., economies of scale, research and development).

³¹⁶ Joel I. Klein, "The Importance of Antitrust Enforcement in the New Economy," Jan. 29, 1998, at 9-13 (a strong antitrust policy is essential to establishing and maintaining a strong economy). In certain extraordinary circumstances, businesses may remain offshore to evade application of the U.S. antitrust laws. The De Beers diamond company, for example, reportedly operates entirely outside of the United States to avoid U.S. jurisdiction.

more alike over time. This natural convergence is to be expected. Laws tends to converge as nations learn from one another, and as more nations become industrialized or seek partnership in the world trading system, and thus support similar goals. Proposals regarding a world dimension to competition law cluster around several options. All start with recognition of the benefits of greater cooperation among the national competition authorities, including information sharing and positive comity — cooperation that is being pursued and is expected to deepen. Commonly expressed options are:

A Continued soft harmonization, through conversation and workshops, agency cooperation and the resulting deeper understanding. Positive comity is an important component of a cooperative approach. If positive comity fails, extraterritorial use of national law may be considered an important option.

B At the other extreme would be a detailed world competition law code possibly with an international competition law authority and enforcement and dispute resolution powers; this option is generally considered premature, if not excessively centralizing.

C In the middle (including and building on the first option), adoption by nations of a few strong consensus principles at the trade/competition interface (e.g. a rule against cartels and a rule against unreasonable restraints of market access), with a mandate to nations to adopt these principles into their national laws in their own words, to enforce the law, and to provide enforcement mechanisms, tools for obtaining relevant facts and procedural enforcement vehicles at the national level with due process and non-discriminatory treatment assured to harmed nations and persons, and with a choice of law rule designating the law of the excluding nation. Proposals also concern the appropriate forum for the development of options.

These range from national only, to a small group of "major players" (e.g., *United States, Canada, European Union and Japan*), to a larger group of like-minded countries (e.g., *the industrialized countries the OECD*), to an inclusive initiative with trading partners (*the WTO*) as proposed by the European Union.

A free-standing agreement, and thus a new forum, is also possible; it could be a more attractive option than the WTO to those who envision an international competition regime significantly broader than one that is directly linked to trade enhancement. As a practical matter, soft harmonization has been the only approach pursued to date. This approach has the advantage of practicality in that it generates little opposition and requires no legislative initiatives or worldwide negotiations. It is the most respectful approach as regards national sovereignty, and it is favored by existing competition law authorities, in part because it maintains their enforcement prerogatives. Soft harmonization is a gradualist approach, producing relatively modest incremental change.

The sections of this essay which follow will address the costs and benefits to be achieved if the nations of the world embarked on a project to harmonize their competition laws in a more formal and comprehensive fashion. First, we evaluate the positives and negatives of a far-reaching project involving total harmonization of national laws.

This is several steps removed from a world code, and would be somewhat akin to the uniform state law projects in the United States (*e.g.*, *the Uniform Commercial Code*). Second, we consider a less sweeping project involving selected harmonization of a few principles important to trade, with dispute resolution available, for example, for patterns of non enforcement.

Harmonization with a uniform competition law, uniformly interpreted A project for total harmonization of national laws is marginally less offensive to sovereignty concerns and the prerogatives of national enforcement authorities than a single world code, since each nation would presumably choose to adopt a version of the law on its own, and enforcement presumably would be left to national enforcement authorities and courts, at least in the first instance. Because it has been viewed by many as impractical, if not offensive, the costs and benefits of such an approach have tended to avoid critical examination.

There are a number of potential benefits to a uniform national law approach. These include reduction in transaction costs and the potential for inconsistent results as well as an enhanced ability to eliminate trade blockages caused by private restraints.

Reduction of transaction costs

A single, optimal law that is uniformly interpreted and that is enforced arguably would avoid the transaction costs and other inefficiencies of having to comply with multiple systems. We analyze these potential benefits in two specific contexts mergers and acquisitions and the day to day operations of securities markets. The market for corporate control is increasingly characterized by panoply of diverging competition law merger notification requirements and an array of more similar substantive competition law regimes. Given the aggressive positions certain countries take as to the extraterritorial application of the mandatory premerger notification regime established under their competition laws (*e.g., the United States, Germany, Canada, the European Union and particularly countries with new competition law regimes such as Russia, Poland and the Czech Republic*), an increasingly large number of significant transactions require retaining counsel in many jurisdictions, if only to assure the parties that mandatory premerger filing and waiting period requirements do not apply.

The substantive standards employed by various enforcement authorities also differ in respects that can and do produce different results as regards the same transaction. There is the real possibility, in transactions raising substantive issues in which multiple antitrust authorities conduct investigations, which the parties will be subject to a divestiture requirement to cure the anticompetitive effects of the transaction in one jurisdiction while the transaction is permitted to proceed in another jurisdiction. On at least one occasion, a government protest occurred when the U.S. Federal Trade Commission “FTC” entered into an agreement with the merging parties requiring certain relief that could only be implemented by a Canadian firm in that country, without prior consultation with the Canadian government. The different resolutions

reached by the FTC and the European Commission on the Boeing/McDonald Douglas matter almost resulted in a "full scale trade war" in 1998³¹⁷.

A single competition law that is uniformly interpreted and enforced might reduce the risk of parties being subject to inconsistent judgments or agreements to remedy the anticompetitive effects of a transaction. A single, uniformly interpreted competition law would also benefit companies that are active globally in their competition law compliance efforts³¹⁸.

Elimination of trade blockages

A single, optimal law that is uniformly interpreted and that is enforced would presumably eliminate blockage of markets by anticompetitive private restraints, and might reasonably be expected to increase efficiency, consumer welfare and trade flows³¹⁹. The potential benefits are more ambiguous with regard to eliminating differences among the competition laws of jurisdictions that take competition law enforcement seriously, since many of the substantive differences among those laws may not be trade restraining, as described above. Harmonization of national laws offers a potentially significant advantage over an international code in that it avoids the problems of two-tier law international plus national that otherwise might arise. If an international code were adopted, it would be superimposed over the panoply of varying national laws now in existence, which presumably would continue in effect to address purely domestic restraints. Such a code would raise questions of hierarchy, conflict and

³¹⁷ The Federal Trade Commission determined not to challenge the merger, while the European Commission threatened to block it unless Boeing agreed to release certain customers from agreements to purchase Boeing aircraft exclusively. See Boeing Press Release, Boeing- McDonnell Douglas Merger Gains a Positive Opinion from the European Commission (July 23, 1997).

³¹⁸ Although there do not appear to have been instances of directly inconsistent divestiture orders or conduct restrictions (i.e., one jurisdiction ordering something prohibited in another jurisdiction), such direct conflicts might conceivably occur in the future. Good examples of world markets subject to multiple competition law regimes are the various securities, commodities, and futures markets which are clearly interlinked. Traders in Tokyo and London take actions which affect the markets based in New York and Chicago. As such, the United States would presumably assert jurisdiction over the individuals abroad should they be suspected of engaging in anticompetitive acts. Those traders would also be subject to British, European and Japanese jurisdiction. A single, uniformly interpreted competition law would presumably reduce compliance costs and enhance an efficient marketplace.

³¹⁹ The benefits of such an approach would be most clear-cut with regard to countries that do not have competition laws, including some large and increasingly important economies (China, India and the so-called "tigers" of Eastern Asia) and others that have been accused of not enforcing their laws (Japan and South Korea).

federalism. Some proponents seem to favor harmonization of competition laws as a means to improve the U.S. balance of payments or balance of trade.

Harmonization in fact will not necessarily have that effect. When applied properly, competition laws focus on eliminating anticompetitive restraints, but are not concerned about the direction of trade flows following the elimination of the impediment. Indeed, it is often very difficult to determine what effect a proposed enforcement action would have on any particular nation's balance of trade³²⁰.

An effort to achieve a uniform national law would face great difficulties. Nations disagree on what is an optimal law, given different objectives and agendas. Even nations with a commitment to vigorous competition law enforcement have differences in their laws, and there appears to be no consensus for countries that follow a U.S. model to switch over to an EU model, or vice versa. Moreover, there are very substantial differences in interpretations of the word "competition" and how to achieve efficiency between nations that are committed to competition law enforcement and others that have restrictive practices laws focused on reducing competitive advantages among firms, however acquired. As a result, there is a real risk that an ambitious harmonization project might fail to produce consensus as to any common standard. Alternatively, the need to achieve consensus in the face of real differences in views might result in adopting principles of such a level of generality as to be meaningless. Potentially more troubling, nations that effectively enforce their competition laws in a manner designed to maximize consumer welfare might find themselves pressured to accept principles of law with which they do not agree; if they acceded, this would degrade their national laws or lead to noncompliance. In other words, "harmonization" may not be a good in and of itself.

The benefits of harmonization we have considered all have assumed that the single law is optimal. That assumption does not necessarily hold. Some would argue that an optimal law should be neither unduly regulatory nor insufficiently interventionist, and the procedural system employed should be the least costly alternative consistent with

³²⁰ For example, consider a market division cartel in which three firms have previously divided the world, with one firm (based in the U.S.) allocated the Western Hemisphere, a European firm (based abroad) being given primacy in Europe and western Asia, and another firm based abroad receiving exclusive rights to eastern Asia. If the cartel is broken up, it is by no means clear whether the firm that is based in the U.S. would increase or decrease its shipments in a competitive environment.

those goals. That is not the necessary result of harmonization efforts, as recent experience confirms³²¹.

This may or may not indicate that political realities play a more influential role in the harmonization of laws than do purely economic or efficiency considerations. Realizing the benefits of a single, uniformly interpreted competition law would require uniformity in enforcement. Yet few serious observers would consider — and political reality would seem to preclude — a single, worldwide competition law agency with authority to enforce the uniform law. Set forth below is a range of more realistic possibilities for attempting to balance the need for uniform enforcement with the need to respect national sovereignty.

³²¹ Canada recently amended its antitrust laws to require the submission of substantially more information and documents than had previously been required. These amendments will take effect after implementing regulations are adopted. For example, in the area of merger control, Canada uses a less formal system that avoids the massive document requests that have become common under the Hart-Scott-Rodino process. For this reason, the Canadian system may be perceived as preferable to the U.S. system from the standpoint of transaction costs. When discussions over conforming merger control procedures occurred in 1997 between Canada and the U.S., the result was a Canadian proposal to revise its system to more closely approximate the U.S. regime. Canada recently amended its antitrust laws to require the submission of substantially more information and documents than had previously been required. These amendments will take effect after implementing regulations are adopted.

3. Overview of bilateral cooperation in the field of “*comitas gentium*” and “*positive comity*”.

The legal concept of comity is however not clearly specified. For the purpose of this thesis paragraph a distinction is made between traditional or negative comity and positive comity rules. Traditional comity can be defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation".³²² Comity agreements form a frequent part of interagency cooperation initiatives to overcome the uncoordinated employment of the effects doctrine by a number of jurisdictions simultaneously³²³. The primary objective of these agreements was to avoid jurisdictional conflicts. Later, with the progress of international cooperation, countries developed a second generation of bilateral cooperation agreements, which are more complex and comprehensive and are based on a broader idea of comity, called positive comity³²⁴.

In other words it describes how a national authority tries to apply its competition rules without harming another country's important interests. The concept of positive comity equally serves to regulate the international delimitation of competences, but instead of the passive weighting of interests in traditional comity, it is characterized by sympathetically giving active assistance to other nation's critical concerns³²⁵. According to the EU-US 1991 and 1998 positive comity³²⁶ regulations the competition authority of one jurisdiction can ask the other authority to investigate anticompetitive behaviour based on foreign rules.

³²² On negative comity see also OECD, Report on positive comity (1999), paragraph 5; Zanettin, Cooperation between antitrust agencies at the international level (2002), 184; Slaughter, A new world order (2005), 251.

³²³ Taking the words of Joel R. Paul Comity in international law (1991), 3 "comity has been defined variously as the basis of international law, a rule of International law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expedience, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations"

³²⁴ OECD 'Making International Markets More Efficient Through "Positive Comity" in Competition Law Enforcement' OECD Journal of Competition Law and Policy, Vol.5 No.3, 38, 43; Charles Stark, 'International Cooperation in the Pursuit of Cartels (1997-98) 6 George Mason Law Review 533, 536.

³²⁵ OECD, Report on positive comity (1999);

³²⁶ On the first bilateral agreement to include a positive comity provision: Agreement between the government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (23.09.1991), OJ 1995 L 95/45, see in detail Buchmann, Positive Comity im internationalen Kartellrecht (2004), 65 et sqq. Agreement between the European Communities and the government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (18.06.1998), O.J.L 173.

One important prerequisite for the functioning of positive comity is thus that the conduct in question is unlawful under the national competition laws of the requested country. Positive comity counts as an instrument of hard cooperation, as the investigation is conducted by the requested country. Investigatory assistance, i.e. *information sharing on the other hand is based on competition proceedings in the requesting country.*

3.1 Foreign Sovereignty Immunity Act (FSIA)

The review of notified mergers is excluded from the 1998 agreement, but as this has no effect for the operation of the 1991 agreement, most transatlantic cooperation today involves merger cases³²⁷. International comity can be defined as the forbearing of the exercitation of legitimate jurisdiction of one sovereign state when another sovereign state also can exercise its jurisdiction. In other words, it is a concept signifying *courtesy* towards the jurisdiction of another sovereign in cases where the interests of the other sovereign are clearly stronger, such as in the cases involving large trade interests of the other *sovereign state*, as is the case for a finite natural resource.

Although, following the *Hartford Fire* case, international comity considerations were, in practice, mostly eliminated as a barrier to the extraterritorial application of US antitrust laws, the issue of asserting jurisdiction over a foreign sovereign state still remains controversial. In US law, this issue is addressed in the 1975 *Foreign Sovereignty Immunity Act* (FSIA). This act set forth standards to guide decisions in US courts in dealing with foreign sovereignty issues. Most importantly, the FSIA only extends sovereign immunity from US courts for foreign governments (including their agents and instrumentalities) for actions that are purely governmental as opposed to commercial, with the latter ambiguously defined as an activity of which the nature is one in which a private person could engage. In addition to the FSIA, a further limitation on the extraterritorial application of US antitrust law is placed by the *Act of State Doctrine*. In short, this act states that no country should inquire into actions of foreign governments performing within their own jurisdiction.

³²⁷ See *Papadopoulos*, *The international dimension of EU competition law and policy* (2010), 75; *Van Bael*, *Due process in EU competition proceedings* (2011), 61. The exclusion of mergers in the 1998 agreement can be explained by reasons of different decision deadlines in the EU and the US as well as the restriction upon the EU to only review mergers that have a Community Dimension.

In conclusion, under the Foreign Sovereignty Immunity Act and the Act of State Doctrine, only purely commercial acts performed by governments outside of their own territory which have an effect on the US are subject to jurisdiction under US (antitrust) laws. The European Community and the United States concluded in the autumn of 1991, particularly in view of the potential for political conflict, a bilateral cooperation agreement. In addition to notification, information and consultation obligations, this agreement provides for cooperation and coordination in enforcement activities. Cooperation is based on the "*positive comity*" provisions of Article V. According to it, in cases where a domestic action also has effects on a foreign market, the State of action declares its readiness, upon the request of the (foreign) market State, to intervene against the (domestic) act. The parties then additionally on 4 June 1998 concluded a (supplemental) agreement (not relating to mergers) "on the application of positive comity principles", also containing a "negative comity" clause in Article VI. According to the latter', the parties, even in cases where a (foreign) act has direct, significant and predictable domestic effects, will waive, under certain circumstances, their legal application claims and recognize the priority of the foreign antitrust action.

In literature, bilateral cooperation agreements are overwhelmingly given a positive appraisal; however, there are, in addition to general objections to conflict-of-laws arrangements in antitrust, critical voices as well: bilateral cooperation agreements have the danger of abuse of power "to them. On 5 May 2000 at Humboldt University symposium *Immenga*³²⁸ pointed out that the USA have unofficially (justified their pleas for a network of bilateral cooperation agreements with the fact that the US as the strongest trading nation would always be strong enough to enforce their interests at the bilateral level. In the debate about a reform of International antitrust law, it is thus a question of making political power more relative.

Added to this is the fact that bilateral cooperation agreements only apply *inter partes*, that international restrictions of competition however typically have their effects in more than just two States; a bilateral solution is thus inefficient since it does not adequately cope with the complexity of real-life conditions.

³²⁸ Paper presented to the fifth International Business Colloquium (Crossroads of International Business and Trade Law)

3.2 Positive Comity Agreement

"The old common rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe"³²⁹.

"We should not expect the principle of positive comity [...] to impact dramatically on the proposition that laws are written and enforced to protect national interests"³³⁰.

The first generation of bilateral cooperation agreements can be regarded as a forum in which the parties exchanged their views on competition problems. They also ensured a basic framework for the coordination of the enforcement activities of separate competition authorities. Within this framework, each authority should take into consideration the interests of the other party in order not to harm them³³¹. Examples of these agreements include the 1976 US-Germany Antitrust Accord and the 1982 US-Australia Agreement³³².

What distinguishes the second generation bilateral cooperation agreements from the first generation agreements is that they do not pursue the minimum objective of preventing jurisdictional conflicts. Instead, they create frameworks for closer coordination between the enforcement activities of national competition authorities³³³.

Such agreements are founded on the principle of positive comity, which allows positive acts of cooperation and reciprocal assistance between competition authorities. This principle is based on the presumption that the country, in which the negative effects of a restrictive business practice are felt, should renounce its right to regulate this practice if the competition authority of a third country is in a better position to regulate it. This situation arises when a restrictive practice is performed in one country but its effects affect another country. In this case positive comity enables the country whose economic

³²⁹ Taken from the *Hunt v. T&N* (4 S.C.R. 289, 1993) ruling by the Canadian Supreme Court, a landmark decision on the conflict of laws.

³³⁰ *Ahwood*, Positive comity: is it a positive step?, in: *Hawk*, Annual proceedings of the Fordham Corporate Law Institute (1993), 86.

³³¹ OECD, Making International Markets More Efficient Through "Positive Comity" in Competition Law Enforcement.

³³² Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matter,

<<http://www.usdoj.gov/atr/public/international/docs/austral.us.txt>> (visited 2 October 2006).

³³³ Robert Shank, 'The Justice Department's Recent Antitrust Enforcement Policy: Toward A "Positive Comity" Solution To International Competition Problems?' (1996) 29 *Vanderbilt Journal of Transnational Law* 155, 175.

interests are harmed to seek the cooperation of the country where the practice has been carried out. Accordingly, the former may request the competition authority of the latter to open or expand enforcement activities in order to remedy the restrictive practice.

The first international instrument to incorporate the principle of positive comity was the 1991 EU/US Cooperation Agreement³³⁴.

The 1991 Cooperation Agreement amongst the many bilateral cooperation agreements concluded, particular attention will be given to the EU/US bilateral cooperation agreement. The EU/US bilateral cooperation is chosen as a case study to evaluate the achievements of the bilateral strategy because these two jurisdictions have a long history of cooperation and because the most important examples of inconsistencies between national merger control regimes involve the EU and the US competition authorities. The cornerstone of EU/US bilateral cooperation is the 1991 Cooperation Agreement. The objective of the agreement is to “promote cooperation and coordination and lessen the possibility or impact of differences between the parties in the application of their competition laws”. The most important points of the 1991 Agreement are contained in Articles V and VI. Article VI codifies the principle of negative comity that prescribes that at any stage of their respective enforcement activities each party should

³³⁴ Second generation agreements are the 1995 US-Canada Agreement; the 1999 US-Israel Agreement; the 1999 US-Japan Agreement; the 1999 US-Brazil Agreement; the 2000 US-Mexico Agreement; the 1999 EC-Canada Agreement; the EU-Japan Agreement; and the EC-South Africa Trade Agreement. Other examples of second generation agreements are the 1995 US-Canada Agreement; the 1999 US-Israel Agreement; the 1999 US-Japan Agreement; the 1999 US-Brazil Agreement; the 2000 US-Mexico Agreement; the 1999 EC-Canada Agreement; the EU-Japan Agreement; and the EC-South Africa Trade Agreement. Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, <<http://www.usdoj.gov/atr/public/international/docs/uscan721.htm>> (visited 2 October 2006). Agreement between the Government of the United States of America and the Government of State of Israel Regarding the Application of Their Competition Laws, <<http://www.usdoj.gov/atr/public/international/2296.htm>> (visited 2 October 2006). Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anti-competitive, <<http://www.usdoj.gov/atr/public/international/docs/3740.htm>> (visited 2 October 2006). Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding between Their Competition Authorities in the Enforcement of Their Competition Laws <<http://www.usdoj.gov/atr/public/international/3776.htm>> (visited 2 October 2006). Agreement between the Government of the United States of America and the Government of the United States of Mexico Regarding The Application of Their Competition Laws <<http://www.usdoj.gov/atr/icpac/5145.htm>> (visited 2 October 2006). Agreement between the European Community and the Government of Canada Regarding the Application of Their Competition Laws <http://www.europa.eu.int/comm/competition/international/bilateral/extracts/ca2a_en.pdf> (visited 2 October 2006). Agreement between the European Community and the Government of Japan Concerning Cooperation on Anticompetitive Activities <http://www.europa.eu.int/comm/competition/international/bilateral/extracts/jp2a_en.pdf> (visited 2 October 2006). Agreement on Trade, Development and Cooperation between the European Communities and its Member States, of the one part, and the Republic of South Africa, of the other part <http://www.europa.eu.int/comm/competition/international/bilateral/extracts/za2a_en.pdf> (visited 2 October 2006).

take into consideration important interests of the other party. A non exhaustive list of relevant factors for evaluating the interests of other parties is also included in Article VI. Article V sets out the principle of positive comity, whereby one competition authority may request the other to initiate appropriate enforcement activities against businesses within the latter's jurisdiction if the negative effects of that business's restrictive practices are felt within its territory. Following the request, the competition authority of the notified party will consider whether or not to begin new enforcement activities or expand ongoing enforcement activities on the notified anticompetitive activities. So, if a merger between two EU based firms is thought to have anticompetitive effects in the US markets, the US competition authorities may invoke Article V and ask the EU Commission to investigate into the legality of that transaction. The concept of positive comity has been refined by the 1998 Agreement³³⁵, the purpose of which is to avoid anticompetitive conducts which may negatively affect trade and investments flow. It also aims at reducing the adverse effects of such conducts on competition and consumer welfare³³⁶.

The greatest innovation of the 1998 Agreement is the presumption that, under some circumstances, the party, which has made the positive comity request, will normally suspend its enforcement activities over the period, not exceeding six months, during which the requested party conducts its investigation³³⁷. Article III establishes that such a request may be advanced even if the conduct at issue does not infringe the competition law of the other party. The abolition of the double illegality requirement should facilitate positive comity requests. So the competition authority of one party may be requested to investigate into a conduct even though that conduct is not prohibited by its national competition law and despite the possibility that the former may not be interested in carrying out enforcement activities³³⁸.

The EU/US Cooperation Agreement is praised for attaining many achievements. It created a framework within which officers of the EC Commission and their colleagues from the US competition authorities can better coordinate their enforcement activities.

³³⁵ Agreement between the European Commission and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws [1999] IV *CMLR* 502.

³³⁶ John Parisi, 'Enforcement Cooperation among Antitrust Authorities' [1999] *ECLR* 133, 135. Article I.2 of the 1998 Agreement.

³³⁷ William Baer, 'International Antitrust Policy' [1998] *Fordham Corporate Law Institute* 247, 255. Article IV of the 1998 Agreement.

³³⁸ Alessandro Montini and Claudio Cocuzza, 'International Antitrust Co-operation in a Global Economy', [1998] *ECLR* 156, 159.

In 1999 the EU and the US signed an administrative agreement that enables the members of the competition authorities of one party to take part in proceedings before the competition authority of the other party. Visits of staff of the authorities of one party to the authorities of the other party are often arranged. Officials from the US competition authorities are sometimes present in the decision-making meetings of the Commission and vice versa³³⁹.

The EU/US Cooperation Agreements certainly bring mutual benefits to both parties, which are identified “in terms of enhancing our respective enforcement activity, avoiding unnecessary conflicts or inconsistencies between those enforcement activities, and in terms of better understanding each other’s competition policy regimes”³⁴⁰. It also fosters a **marked convergence** in the application of the EC and the US competition law³⁴¹. Despite the success of bilateral cooperation, the EC and the US still divide on the assessment of a number of competition law issues.

³³⁹ Robert Pitofsky, “Antitrust Cooperation Global Trade and US Competition Policy”, in - *Competition Policy in the Global Trading System*- (Kluwer Law International, The Hague 2002) 57.

³⁴⁰ Commission report to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws – 1 January 2000 to 31 December 2000, above n 46, 291.

³⁴¹ Mario Monti, ‘A European Competition Policy for Today And Tomorrow’ speech addressed at conference jointly held by Antitrust Law of the American Bar Association and the District of Columbia Bar’s Association Antitrust Committee of the International Law Section, Washington 26 June 2000,

<<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/00/240&format=HTML&aged=0&language=EN&guiLanguage=en>> (visited 2 October 2006); Robert Pitofsky, ‘EU and US Approaches to International Merger-Views from the US Federal Trade Commission’ speech addressed at the EC Merger Control 10th anniversary conference hosted by the European Commission Directorate General for Competition and the International Bar Association <<http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm>> (visited 2 October 2006).

As examples of such convergence, it is possible to cite the adoption, on the part of the EC, of the economics-based approach for the appraisal of vertical restrictions; the Guidelines published by the Commission to clarify its position on particular issues; the reformulation of the substantive test for the appraisal of mergers. An influential US competition law scholar has commented that the level of cooperation and coordination between the US and the EC is so high that it would be difficult to improve it. Officers from the US Department of Justice have underlined the substantial convergence between US and EC competition policies in many areas. Former EC **Commissioner Mario Monti** has acknowledged that the convergence between the US and EC competition laws is facilitated by transatlantic cooperation and that such a cooperation is particularly relevant in the field of merger control, in which the national competition authorities have to assess the competitive effects of the same transaction. Finally, bilateral cooperation reduces the risk of conflicting decisions too, though Boeing/Mc Donnell Douglas and General Electric/Honeywell indicate that this risk still exists.

As of speaking in 2002, William Kolasky identified as many as five potential sources of disagreement: “*the role of efficiency considerations in merger control, fidelity rebates, predatory pricing, the doctrine of essential facilities and monopoly leveraging*”³⁴².

On a few occasions such different approaches resulted in disagreements between the EC and the US competition authorities. More efforts are therefore desirable to further strengthen the bilateral cooperation. A right step in this direction may be the establishment of the EU/US Merger Working Group, which in 2002 published the Best Practices on Cooperation in Merger Review³⁴³. Especially with respect to EU/US bilateral cooperation, the most important achievements of the bilateral strategy seem to be the harmonisation of the legal systems of the signatory parties. Regional agreements can be also regarded as valuable instruments to pursue harmonisation programmes, although they require close economic, social and political links existing between the signatory countries.

Bilateral cooperation, and notably the principle of comity, can attenuate the problem of multi-jurisdictional review as outlined by the OECD, which has claimed that positive comity may bring in several benefits.

First, it increases the effectiveness of the regulation of illegal conducts and overcomes the limitations that international law imposes on jurisdictions by enabling the harmed

³⁴² William Kolasky, 'North Atlantic Competition Policy: Converging Toward What?' speech addressed before the BIICL Second Annual International and Comparative Law Conference, London, May 2002, <<http://www.usdoj.gov/atr/public/speeches/11153.htm>> (visited 2 October 2006). However, since 2002 US and EC have reviewed their policies; so their position on some of such issues is now similar. For example, the US Supreme Court in *Verizon* has taken quite a strict approach for the application of the doctrine of essential facilities which is not far away from the case law of EC Courts. See, *Verizon Communications v. Law Offices of Curtis Trinko, LLP*, 157 L.Ed. 2d 823 (2004). For example, in *General Electric/Honeywell* they disagreed on the issue of monopoly leveraging. US law condemns this practice when the dominant firm is likely to obtain a monopoly position in a neighbouring market. But Article 82 EC Treaty bans every practice by which a dominant firm extends its market power into a neighbouring market even if it does not obtain a dominant position. Accordingly, the European Commission disallowed *General Electric/Honeywell* because, among other things, it would have enabled the merged entity to engage in leveraging conducts. As explained above in chapter four, the Commission based its findings on a controversial theory, the theory of conglomerate effects, that had been long abandoned by the US competition authorities. It seems that the different approach regarding the role of efficiencies considerations surfaced and influenced the assessment of *Boeing/McDonnell Douglas* as well. The initial unenthusiastic attitude of the Commission towards the merger may arguably be explained with the sceptical attitude of EC merger control towards efficiencies.

³⁴³ Merger Working Group, Best Practices on Cooperation in Merger Review <http://www.europa.eu.int/comm/competition/mergers/others/eu_us.pdf>

This document contains a number of measures to render bilateral cooperation in merger review more effective, such as the synchronisation of the investigations timetable. The Best Practices also recommend facilitating the exchange of information between the EC and the US competition authorities. They should exchange non-confidential information and discuss their views on issues such as market definition, the assessment of competitive effects and the treatment of efficiencies. The Best Practices also encourage the merging parties to waive their confidentiality rights on the information they have provided during the investigations. This would allow the exchange of these data between the EC and US competition authorities.

country to request the country where the illegal conduct was performed to take the necessary measures.

Secondly, it improves efficiency in investigations, which should be carried out by the competition authority which has the best access to the relevant facts.

Thirdly, it reduces the need for sharing confidential information as well as other types of information, since the investigations are conducted by the authority closest to the facts.

Fourthly, it avoids jurisprudential conflicts in that only the competition law of the requested country applies.

Fifthly, due to the voluntary nature of comity, the requested country can fulfil the requests of another country only when this does not harm its national interests.

Finally, it ensures protection for other legitimate interests of the requested country, as its competition authority conducts the investigations and is therefore in a position to control the application of its own competition policy³⁴⁴.

On the other side, it must be said that the bilateral strategy has a number of inconveniences. Cooperation agreements are normally concluded by competition authorities via administrative channels and they therefore fall outside the control of national parliaments. This means there may be a democratic deficit in the process of the formation of these agreements the risk being that competition authorities might sign cooperation agreements that are incompatible with their own national legal system³⁴⁵. The risk of democratic deficit may be inherent in trans-governmental cooperation, especially with respect to the conducts which may escape their regulatory review due to the limitations imposed to their regulatory powers by the principle of sovereignty³⁴⁶.

³⁴⁴ OECD Committee on Competition Law and Policy Report on Positive Comity, <<http://www.oecd.org/dataoecd/40/3/2752161.pdf>> (visited 27 October 2005).

³⁴⁵ The risk that the cooperative process pursued by national competition authorities may be not legitimate is raised by Edward M. Graham in 'Internationalizing Competition Policy: An Assessment of the Two Main Alternatives' [2003] *Antitrust Bulletin* 947, 968.

³⁴⁶ The term of trans-governmentalism refers to the web of relations created by government units of countries. Bilateral cooperation agreements entered into by national competition authorities can be considered as an example of trans-governmentalism. With its ensuing international coordination, trans-governmentalism allows national regulators to deal with international problems more effectively than they would do acting unilaterally. In this respect trans-governmentalism does not mean exercise of regulatory powers independently from national regulators. Under EC law the issue of the power of regulators to engage in international relations with their counterparts was addressed in relation to the 1991 EC/US Cooperation Agreement. The French Government contested before the European Court of Justice the decision of the Commission to conclude the above agreement with the US. The Court found that this decision infringed article 228.1 of the EC Treaty, which lays down that the Commission has only the power to negotiate agreements with third countries, whereas the power to conclude international agreements is conferred on the Council. Then the Court annulled the Commission's decision to conclude the agreement (ECJ Case C-327/92, *France v Commission* [1994] *ECR* 3641). Thomas Lampert, 'International Co-operation Among Competition

Another factor that can weaken the capability of bilateral cooperation agreements to address global competition problems is their voluntary nature.

The conclusion of a cooperation agreement between two countries depends exclusively on their political will. Countries are generally more prepared to set up cooperation schemes with those countries with which they share mutual interests or similar economic conditions or with whom they have common views on competition laws³⁴⁷.

However, the track record of these agreements is rather poor and they appear to be toothless with regard to restrictive business practices carried out by firms located in developed countries. The majority of bilateral cooperation agreements have been concluded so far by either the EU or the US with a third country³⁴⁸. Opponents of the bilateral strategy point out that cooperation mechanisms set up by bilateral cooperation agreements rest on instruments of soft law. As a result, they do not create any legally binding obligations for the signatory countries, which are not obliged to modify their national competition laws, and some argue such a low-profile approach may be conducive to some negative consequences. These agreements pursue the minimum objective of creating a framework within which countries can notify each other at the beginning of enforcement activities which may affect the relevant interests of the other party. They also include arrangements to promote cooperation and coordination between the national competition authorities, mainly upon a voluntarily basis. Bilateral agreements leave the differences in national competition laws mainly untouched,

Authorities' [1999] *ECLR* 214, 216. For an analysis of the EC/US bilateral cooperation through the lens of trans-governmentalism, Christopher Whytock, 'A Rational Design Theory of Trans-governmentalism: The Case of E.U.-U.S. Merger Review Cooperation' (2005) 23 *Boston University International Law Journal*. Anne-Marie Slaughter, 'The Real New Order', (1997) 76 *Foreign Affairs* 183.

³⁴⁷ Frédéric Jenny, *Globalization Competition and Trade Policy: Convergence, Divergence and Cooperation*, in (Clifford Jones and Mitsuo Matsushita eds.) *Competition Policy in the Global Trading System* (Kluwer International Law The Hague/London, 2002), 320; Andrew T. Guzman, 'Is International Antitrust Possible?' (1998) 73 *New York University Law Review* 1501, 1546;

Karel Van Miert, 'Globalization of Competition: The Need for Global Governance' speech addressed at the Vrije Universiteit Bruxelles, 25 March 1998,

<http://www.europa.eu.int/comm/competition/speeches/text/sp1998_052_en.html> (visited 2 October 2006). For example, two importing countries are more likely to conclude a cooperation agreement than one exporting and one importing country. Countries which have similar net trade balances similarly evaluate the attractiveness or inconveniences of cooperation agreements. Such self-interested stance may prevent the chances of developing countries entering into bilateral cooperation schemes with developed countries given that the latter are generally net exporters, while developing countries are generally net importers. On the other hand, developing countries are more likely to conclude bilateral cooperation agreements with those countries with a similar level of economic development.

³⁴⁸ The EC has concluded bilateral cooperation with US, Canada and Japan. Moreover in May 2004 the EC strengthened its cooperation with China by launching the Competition Policy Dialogue,

http://www.europa.eu.int/comm/competition/international/bilateral/extracts/cn2b_en.pdf (visited 2 October 2006). On the other side the USA have entered bilateral cooperation agreements with Brazil, Canada, Germany, Israel, Mexico, Australia, Japan and, as already known, with EC.

differences giving rise to multiple notifications, different timetables and different substantive tests, which may fuel the risk of conflicting decisions.

In addition, they do not provide any dispute settlement mechanisms to resolve controversies between countries on the application and enforcement of their respective national laws. Especially in cases of jurisdictional conflicts the bilateral strategy may be worthless in the face of the resulting tensions between the countries concerned, as it does not contain WTO style dispute settlement mechanisms to solve such conflicts. The fact that bilateral agreements do not oblige countries to modify their national laws may have negative consequences on the correct working of the cooperation mechanisms introduced by the bilateral strategy. An example of these consequences is given by the different provisions that in each national legal system protect confidential information. Such differences restrain the ability of competition authorities to share confidential information, which may hamper international cooperation. Under this agreement the protection of confidentiality still prevails over the exchange of confidential information for the benefit of coordination between competition authorities. The authorities cannot share information with one another if it is illegal to do so or if the disclosure of the information is incompatible with important interests of the parties. The EC and the US competition authorities can share only those pieces of information which their national laws allow them to exchange and in any event they must preserve the confidentiality of the information provided by the other party. As general rule, the data the competition authorities can freely share are the publicly available information and any information submitted to them with a waiver of confidentiality. In order to identify which data benefit from confidentiality protection, it is necessary to distinguish between confidential business information and confidential agency information. The latter type of information is protected by confidentiality in order to ensure the effective handling of the investigations and it can be shared between competition authorities³⁴⁹.

In contrast confidential business information is covered by professional secrecy and its disclosure is prohibited by national laws. This type of information includes the data that

³⁴⁹ The methodology followed by competition law enforcers for the definition of relevant markets and for the assessment of competitive effects can be cited as example of confidential agency information. See, Commission report to the Council and the European Parliament on the application of the agreement between the European Communities and the Government of the United States of America regarding the application of the agreement on the application of their competition laws, 1 January 1997 to 31 December 1997 in XXVIIth Report on Competition Policy 1997, 319.

are submitted to competition authorities during its investigations. The promising prospects of positive comity are not matched by its poor enforcement record. Up to date only one formal positive comity request has been made. This was in 1997 when the US Department of Justice invited the European Commission to investigate anticompetitive practices in the market for computerised airline reservation systems.

The US Department of Justice feared that the conduct of some EC airlines could prevent computerised airline reservation systems owned by US-based airlines from entering the markets of certain European countries³⁵⁰. The European Commission found that Air France provided Amadeus, the reservation system it partly owned, with more accurate information than it provided with SABRE, the reservation system owned by American Airlines³⁵¹. The investigation was closed when Air France offered commitments to ensure equal treatment of every computerized airline reservation system. Professor Mario Monti has praised the satisfactory outcome of this first positive comity request. In his own words, this proves that close cooperation between the US and EU competition authorities enhances the effectiveness of the enforcement of competition law in both jurisdictions³⁵². The bilateral strategy is certainly a step further than the unilateral strategy towards the internationalisation of competition law. Bilateral cooperation agreements are free from those inconveniences that dent the viability of the unilateral application of national competition laws as optimal response to global competition problems. The voluntary nature of bilateral cooperation agreements contributes to soften the legal.

How similar are the antitrust laws of nations? Should such efforts be made or accelerated, and if so how?

³⁵⁰ US Department of Justice Press Release, 28 April 1997, 'Justice Department Ask European Communities to Investigate Possible Anticompetitive Conducts Affecting US Airlines' Computer Reservation Systems' <http://www.usdoj.gov/atr/public/press_releases/1997/180at.htm> (visited 2 October 2006).

³⁵¹ European Commission Press Release, IP/99/171, 15 March 1999, 'Commission Opens Procedure Against Air France For Favouring Amadeus Reservation System',

³⁵² Eleanor Fox, 'International Antitrust and the Doha Declaration' (2002-03) 43 Virginia Journal of International Law 911, 917. A practical example may be of help. Let us assume that four countries A, B, C and D have jurisdiction over the same transaction and that between them there exist bilateral cooperation agreements. A has concluded a cooperation agreement with B, C and D. B, on its part, has concluded bilateral cooperation agreements respectively with C and D. Finally, the competition authorities of C and D have signed a bilateral cooperation agreement. Thus six different cooperation agreements can in theory apply to regulate the enforcement activities of four different national competition authorities concerning the same transaction. The advisors of the parties to the transaction at issue have to analyse all the applicable cooperation agreements in order to elaborate the strategy to adopt before the competition authorities involved. This is a time-consuming exercise and it does not seem to lower compliance costs. See Sandra Ferson Young, 'An International Antitrust Dilemma: An Analysis of the Interaction of Antitrust Laws in the United States of America and the European Union' (2002) 36 John Marshall Review 271, 271.

COOPERATION AGREEMENTS ON COMPETITION LAW

BILATERAL AND TRILATERAL (UP TO 2009)

	US	EU	Ger.	Aus.	Fra.	Nwz	Can.	China	Rus.	Taipei	Isra.	Jap.	Kaz.	Bra.	PNG	Mex	Ice.	Nor.	Den.	Chil.	Fiji	Korea	UK	
US	*	1991 1998	1976	1982 1997 1999			1995 2004				1999	1999		1999		2000								
EU	1991 1998	*					1999 2000																2009	
Germany	1976		*		1984																			
Australia	1982 1997 1999			*			1994 2000** 2007	2000**		1996					1999							2002	2002	
France			1984		*																			
New Zealand				1994 2000** 2007		*	2000**			1996														
Canada	1995 2004	1999 2000		2000**		2000**	*					2005		2008		2001				2001		2006	2003	
China								*	1996				1999											
Russia								1996	*					2001										
Taipei				1996		1996				*														
Israel	1999										*													
Japan	1999						2005					*												
Kazakhstan								1999					*											
Brazil	1999						2008		2001					*										
Papua New Guinea				1999											*									
Mexico	2000						2001									*								
Iceland																	*	2001**	2001**					
Norway																	2001**	*	2001**					
Denmark																	2001**	2001**	*					
Chile							2001													*				
Fiji				2002																	*			
Korea		2009		2002			2006															*		
UK							2003																	*

Sorce- World Bank

White - indicate a cooperation agreement exists

***- indicate a trilateral agreement exists

3.3 Convergence

The convergence model relies on an open self-regulating harmonization process that is supposed to lead gradually to legal adaptation and reduce the potential of international conflict. Convergence is supposed to come about through international dialogue, through the "soft law" of international organizations and through an "invisible hand" of rationality; gradually, as the American advocates of convergence argue, all States will take over the superior US antitrust law as a point of convergence³⁵³.

*Harmonisation is a process which may result in unification of law subject to a number of (often utopian) conditions...Harmonisation is by no means synonymous with unification*³⁵⁴;

Variations tend to concern the methods of defining and applying these proscriptions: Current programs, initiatives and proposals for convergence at the **trade/competition** interface are described earlier in this work.

..... *In a world which is beginning to demonstrate a remarkable similarity of economic needs, values and interests, convergence will continue to occur, but true assimilation and wholesale integration of judicial styles appear, at the present time, to be an extremely remote possibility.....*³⁵⁵

Policy makers in the European Union have probably, more than others, thought about the points of tension between trade and competition and the integration of trade and competition policy.

³⁵³ Gerber: "convergence solutions are viewed very favourably, particularly in the US. More sceptically ...in "The US-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective", in: 34 New England L Rev, at 123, 125.

³⁵⁴ Loukas Mistelis entitled "Is Harmonisation a Necessary Evil?", Cremona (Eds.), *Foundations and Perspectives of International Trade Law*, Sweet & Maxwell (2000).

³⁵⁵ DE CRUZ's explanations of Convergence Theories in *Comparative Law in a Changing World*, 2nd ed. (1999). With the term "legal convergence" we approach one definition of the process of attaining similar results in differing legal regimes in different context. But the term describes the reciprocal changes of legal systems in order to reach a compromise of similarity, and is commonly used to describe the alleged mutual eradication of differences between common law and civil law. Neither the concept of convergence, nor the bridging of legal families, help us to define uniformity directly. However, if we see uniform laws as an element of convergence, we come closer to a description of the core of "uniformity" as it defines the process by which legal systems are becoming similar. It is, however, a very wide term which will accommodate all manner of similarity, and all manner of means by which these different similarities are attained, regardless of whether they are deliberate, voluntary or not.

Convergence is a central concept in the conflict, but there is little consistency in the way the term is used, and thus much confusion about what it involves.

Therefore, in order to give the term analytical utility, I specify how I am using it here. At its most basic, 'convergence' refers to movement from a state of difference to a state of similarity. For present purposes that means an increase in characteristics shared by competition law regimes and a reduction in non-shared characteristics³⁵⁶.

Comparison must also account, however, for the relative prominence and importance of the features being compared.³⁵⁷

I will use the term therefore, to refer to an increase in shared characteristics and a reduction in non-shared characteristics, adjusted for the relative importance of those characteristics in the general operations of the systems. Note that I use "convergence" to refer only to independent choices by states - i.e., *those that are not the subject of international agreement*.

Current usage often fails to distinguish between two very different ideas: in one, decisions are the subjects of international obligations: in the other, they are not this confusion creates analytical chaos, because a single term is being applied to two fundamentally different notions³⁵⁸. Having a common set of principles is only the beginning of the process of achieving real convergence. Attention should be given to greater transparency regarding any nationally authorized deviation from pro-competition principles, e.g., state action and encouragement in facilitating cartels and discriminatory bars to market access. It is thus necessary to consider whether enforcement and dispute resolution can be achieved through credible and trusted institutions and without invoking trade remedies.

Selected trade convergence requires identifying points of tension and also points at which trade and competition policy could work together more effectively to eliminate obstructions or make a transitional market more fluid, whether those obstructions are public, private or hybrid.

³⁵⁶ Convergence: "here includes the idea that states that do not currently have competition law regimes will introduce them and thereby more closely resemble states that already have them".

³⁵⁷ for example, a fundamental characteristic such as the role of administrative decision making in the respective systems diverges, while many presumably less central characteristics (such as, the filing period for mergers) move closer together, we would presumably not refer to this as "convergence".

³⁵⁸ I avoid the term "harmonization" in this context because its referents are not only vague, but often contradictory

Candidates for study in this regard include:

1 Government-authorized cartels with large spillovers and discriminatory regulations are alleged to impose significant trade barriers in many parts of the world, but they are frequently insulated from effective competition law attack under "state-action," Noerr-Pennington Doctrine (petitioning for anticompetitive government action) and various foreign compulsion defenses (act of state, foreign sovereign compulsion, etc.). Adopting multilateral agreements to make competition laws applicable to governmental bodies and/or private conduct whether or not authorized by governmental action could address this problem, but there is no consensus for revising competition laws domestically in that respect.

2 A number of exemptions exist for various industry sectors under many competition laws. Examples include energy, natural gas, transportation, telecommunications and shipping. The elimination of these exemptions would reduce inefficiency in local markets and eliminate certain trade barriers. Entrenched domestic interests make repeal of such exemptions a political challenge.

3 Over-regulation (e.g., unnecessary and burdensome automobile inspections at borders) and discriminatory regulations (as are alleged to occur in Japan) can impair the flow of imports. This type of activity is typically not amenable to attack under competition law.

4 Discriminatory procurement practices not necessary to national defense and discriminatory practices by government entities that control essential facilities are also perceived to create trade barriers. Again, these activities are not reachable by most competition laws.

5 Other government-imposed barriers to national markets. The WTO does not eliminate all border measures; thus, this item would include tariffs, safeguards and countervail measures.

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Convergence of National Competition Law with Regulation No. 1/2003

	Power to impose structural remedies	Power to order interim measures	Power to adopt commitments	Power to seal business promises, books	Power to inspect private premises	Calculation of fine Max. 10% of undertaking's turnover	Fines on association of undertakings	Informal guidance	Leniency
Austria	YES	YES	YES	NO	YES	*	PARTIAL IMPLEMENTATION	YES	YES
Belgium	YES	YES	YES	YES	YES	*	YES	YES	YES
Bulgaria	PARTIAL IMPLEMENTATION	PARTIAL IMPLEMENTATION	YES	PARTIAL IMPLEMENTATION	NO	YES	PARTIAL IMPLEMENTATION	PARTIAL IMPLEMENTATION	YES
Cyprus	*	PARTIAL IMPLEMENTATION	PARTIAL IMPLEMENTATION	PARTIAL IMPLEMENTATION	PARTIAL IMPLEMENTATION	*	*	PARTIAL IMPLEMENTATION	YES
Czech Republic	YES	YES	YES	YES	YES	YES	PARTIAL IMPLEMENTATION	NO	YES
Denmark	NO	NO	NO	YES	NO	*	PARTIAL IMPLEMENTATION	YES	YES
Estonia	NO	NO	NO	*	YES	NO	NO	NO	YES
France	PARTIAL IMPLEMENTATION	YES	YES	YES	YES	*	PARTIAL IMPLEMENTATION	NO	YES
Finland	NO	YES	YES	YES	YES	*	YES	YES	YES
Germany	YES	YES	YES	YES	PARTIAL IMPLEMENTATION	*	PARTIAL IMPLEMENTATION	YES	YES
Greece	YES	YES	YES	YES	YES	*	PARTIAL IMPLEMENTATION	NO	YES
Hungary	NO	YES	YES	YES	YES	YES	YES	NO	YES
Ireland	YES	YES	YES	NO	YES	*	PARTIAL IMPLEMENTATION	YES	YES
Italy	*	YES	YES	PARTIAL IMPLEMENTATION	NO	*	PARTIAL IMPLEMENTATION	YES	YES
Latvia	NO	*	PARTIAL IMPLEMENTATION	PARTIAL IMPLEMENTATION	*	YES	YES	YES	YES
Lithuania	NO	YES	YES	YES	PARTIAL IMPLEMENTATION	YES	YES	PARTIAL IMPLEMENTATION	YES
Luxembourg	NO	PARTIAL IMPLEMENTATION	YES	NO	YES	*	NO	NO	YES
Malta	YES	YES	NO	*	YES	*	*	NO	NO
Netherlands	YES	YES	YES	YES	YES	*	YES	YES	YES
Poland	NO	YES	YES	YES	YES	YES	NO	YES	YES
Portugal	NO	YES	PARTIAL IMPLEMENTATION	*	NO	*	PARTIAL IMPLEMENTATION	YES	YES
Romania	PARTIAL IMPLEMENTATION	YES	YES	PARTIAL IMPLEMENTATION	YES	YES	NO	YES	YES
Slovakia	NO	YES	YES	YES	YES	YES	NO	PARTIAL IMPLEMENTATION	YES
Slovenia	YES	YES	YES	NO	YES	YES	*	YES	PARTIAL IMPLEMENTATION
Spain	YES	YES	YES	YES	YES	*	YES	YES	YES
Sweden	PARTIAL IMPLEMENTATION	YES	YES	YES	YES	*	PARTIAL IMPLEMENTATION	YES	YES
United Kingdom	YES	YES	YES	YES	YES	*	PARTIAL IMPLEMENTATION	YES	YES

Source: Results of the questionnaire on the reform of Member States' national competition laws after EC Regulation No. 1/2003; International Comparative Legal Guide, Enforcement of Competition Law 2009, Global Legal Group, Cartels & Leniency 2009, Country Reports, 2009

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In accordance with all that, there is a need for reform of the international antitrust law regime that overcomes the dichotomy of "*all politics is local*" and "all economics is international and avoids the inadequacies of the conflict of laws solution". Reform's core problem are the differences in national antitrust law systems and traditions: " in industrialized countries, antitrust law is commonly aimed at protecting the free market, in transition countries at market economy reforms and in developing countries at protection of manufacturers, regional development and export promotion". Added to this is a disparate and constantly changing understanding of antitrust law even in leading industrialized countries ranging from the pure efficiency model of the Chicago School up to alternative integration models that also take interests of industrial and social policy into consideration. Personally, I do not think that harmonization³⁵⁹ and co-operation are alternatives, let alone mutually exclusive. Even if achieving a truly global competition order remains a rather distant objective, I do believe that there is great scope for "*harmonization de facto convergence*" even through co-operation.

Co-operation and dialogue are key tools to find common ground with colleagues from other jurisdictions. That is why, as you know, the Commission works on a bilateral basis with the competition authorities of the Community's major trading partners. We already have dedicated cooperation agreements with the United States, Canada and Japan, and contacts with their authorities are frequent and intense.

Not only as regards individual cases, but also on policy issues, to build a common understanding of the principles we apply. Regrettably, at this moment we are still unable to share actionable evidence, the kind of information that is most useful for cartel investigations. The time has come to explore ways to enhance some of our bilateral agreements and to share such information among a small number of enforcers. We also cooperate closely with the competition authority of South Korea, on the basis of a Memorandum of Understanding and I hope we will in due course have a dedicated competition agreement. Over time, the Community has also insisted on including commitments on competition law in a raft of association or partnership agreements

³⁵⁹ Professor Möschel in "*Harmonization of laws or cooperation between authorities?*" will present a paper on conflicts between competition regimes.

with countries as diverse as Chile, Russia, South Africa, and our Mediterranean partners. Our informal dialogue with Russia has been very constructive. For example we were pleased to share our experience of competition law enforcement with Russia, and were delighted that some of our input inspired recent competition legislation in Russia. China too has just adopted new national legislation – in this case its first anti-monopoly law. From the early stages of the drafting process onwards, we established a structured dialogue on competition policy issues with the Chinese authorities, and this has influenced the content of the law. Now, in the crucial implementation phase, we intend to continue working closely with our Chinese counterparts where they would find this helpful. I would also like to mention here the clear inter-relation between delivering internal market objectives including competition and the Community's trade policy. In all our bilateral relationships, combined and more coherent efforts of competition and trade policy are needed to give the necessary push to the forces of competition. We are actively reflecting on how best to achieve that, not only as regards foreign subsidies, but also other trade barriers where external action may be required³⁶⁰. As the above examples show, I think it is fair to say that bilateral agreements and cooperation deliver good results. But bilateralism has clear limitations. There are now about 100 national competition systems and competition authorities around the world. So creating more convergence must also imply going multilateral.

³⁶⁰ For example, the Commission is determined to push competition issues, and introduce subsidies discipline, in the context of the new generation of market access driven Free Trade Agreements currently under negotiation with important trading partners, like South Korea or India. These agreements would constitute a further tool to reach common understanding on important competition matters, contribute to greater convergence of substantive rules and help ensure reciprocal fair and open access to our respective markets.

Enforcement Agreement from 1976 to 2009 – “Globalization perspectives”

	Notification	Exchange Information	Enforcement cooperation	Coordination	Consultation	Meeting between officials	Technical assistance	Comity	Positive Comity	Predominance of existing laws of the parties
US-Germany	YES	YES	YES		YES			YES		YES
US-Australia	YES	YES	YES		YES			YES		YES
US-EU	YES	YES	YES	YES	YES	YES		YES	YES	YES
US- Canada	YES	YES	YES	YES	YES	YES		YES	YES	YES
Australia – Taipei	YES	YES	YES	YES			YES	YES		YES
New Zealand-Taipei	YES	YES	YES	YES			YES			YES
EU-US positive comity			YES						YES	YES
US-Australia (1999)		YES	YES							YES
EU-Canada	YES	YES	YES	YES	YES	YES		YES	YES	YES
US-Japan	YES	YES	YES	YES	YES	YES		YES		YES
US-Brasile	YES		YES	YES		YES	YES	YES	YES	YES
Australia-Papua NG	YES	YES	YES	YES	YES		YES	YES		YES
US-Israelce	YES	YES	YES	YES	YES	YES		YES	YES	YES
US-Mexico	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
Canada-Chile	YES	YES	YES	YES		YES		YES		YES
Russia-Brasile			YES		YES	YES				YES
Canada-Mexico	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES
Australia-Fiji		YES	YES	YES		YES	YES	YES		YES
Australia-Korea	YES	YES	YES	YES	YES	YES	YES	YES		YES
Canada-UK	YES	YES	YES	YES		YES		YES		YES
EU-Japan	YES	YES	YES	YES	YES	YES		YES	YES	YES
US-Canada positive comity (2004)			YES						YES	YES
Canada-Japan	YES	YES	YES	YES	YES	YES		YES	YES	YES
Canada-Korea	YES	YES	YES	YES		YES		YES		YES
Australia-New Zealand		YES	YES	YES	YES	YES		YES		
Canada-Brasile	YES	YES	YES	YES		YES		YES		YES
EU-Korea	YES	YES	YES	YES	YES			YES	YES	YES

Conclusion

In conclusion, the necessity to identify the cooperation agreement within the scope of application of which a transaction falls may raise the advisory fees and compliance costs the parties incur in. The bilateral strategy may provide appropriate remedies to competition problems raised by merger operations whose effects are localised only in the territory of the parties to the cooperation agreements. A global competition forum could deepen *convergence, cooperation*, understanding, and respect, and could put into motion a programme for agreements to limit nationalistic action and to enhance a hospitable linking of systems. The conflict over the globalization of antitrust law centers on whether the strategies of convergence and cooperation are likely to be adequate responses to the current problems and harms or some type of international legal framework should be created for use in combating restraints of competition. During the last few years, Europeans have increasingly argued for the development of an international framework for competition law, while U.S. Officials and commentators have generally rejected the idea. Some less developed countries side with the United States, expressing fear that a regime forcing open markets will leave them and their cultures vulnerable to the on rush of multinational corporations, or asserting the right to have no antitrust, or claiming the need for time to learn. Others side with the European Union, noting that they have no power to obtain cooperation agreements on their own, and they assert, with moral force, that they should have the benefits of whatever agreements are struck by the developed world. Some issues are at the intersection of trade and competition, and these issues can and should eventually be addressed in the context of the WTO. In the next chapter V the debate on international economic law it also stands for a global System of antitrust law that is supposed to overcome the supposed inadequacies of private international law. The concept of "international antitrust law" is ambivalent: In the context of private international law it is a synonym for national law to settle conflict of laws situations in the field of antitrust law. In the interest of standardized terminology, differentiation according to the source of regulation can be dispensed with here so that the concept of "international antitrust law" is shorthand for all (national and international) rules attempting to protect the market from private international restraints of competition. The need to reform international antitrust law emerges

from the very logic of globalization, in particular from the rise of a global marketplace for goods and services and from the concomitant lack of antitrust law solutions. Around the world, competition rules are still national, bilateral or at best regional, and they are enforced by numerous authorities each acting on its own respective territory. That is a fact of life we have to take into account if we are to continue to ensure that competition policy really delivers in today's world. If we want to protect European consumers and businesses from the harmful effects on the internal market of global cartels, abuse of dominance, restrictive agreements, and foreign subsidies. So what does this imply for Europe's strategy for managing globalization? Ideally, faced with global problems we would design truly global solutions. Inside next Chapter V, I will provide some new empirical theory attempts to introduce an international competition "Code" within the WTO organization.

Chapter V

THE MULTILATERAL VIEW OF ANTITRUST

Abstract: 1. The contribution of transnational industrial corporation towards competition policy – 1.1 The 21st century will be the century of globalization and the proliferation of national antitrust laws - 1.2 Lisbon agenda - 2. Global approach of multilateral cooperation of RBP “Restrictive Business Practices” point of criticism of the DIAC “the Draft International Antitrust Code” – 3. New “World Trade Organization”, feasibility study of Worldwide antitrust - 3.1 General Agreement on Tariffs and Trade “GATT” - Conclusion

Abstract

In the late 1930s and in the 1940s, Germany, Japan and Italy used cartelization as a strategy for mobilizing for World War II. The pattern was uncovered in U.S. congressional and antitrust investigations, and a surge of hostility towards international cartels emerged in the United States.

The United States initiated support for an international trade organization that would protect competition in international trade³⁶¹. These include the Havana Charter, the UNCTAD Set of Principles on Restrictive Business Practices, the proposed UNCTAD Set of Principles on Transfer of Technology, the OECD Multinational Guidelines, and, more recently, the OECD Recommendation on Hard Core Cartels.

³⁶¹ Corwin Edwards described the competition law provisions of the U.S. draft as follows: “*The proposal about business practices was that member states agree to take appropriate measures "to prevent business practices among commercial enterprises which restrain competition, restrict access to markets or foster monopolistic control in international trade, and which have the effect of frustrating the purpose of the Organization to promote expansion of production and trade and the maintenance in all countries of high levels of real income."* Member states were also to agree that unless there was proof to the contrary in a specific case the specified effect would be presumed where there were arrangements to fix prices or terms, exclude enterprises from any territorial market or field of business activity, fix quotas of sale or purchase, boycott or discriminate against particular enterprises, limit production, suppress technology or invention, or extend the use of patents, trademarks, or copyrights to matters not properly within the scope thereof. Thus, though recognizing the possibility of exceptions, the proposal would have committed participating countries to the American position that restrictive agreements are typically impediments to economic prosperity. The international organization was to receive and winnow complaints from governments and private interested persons, investigate them, decide whether or not practices had harmful effects, recommend remedial action to member states, and publish reports of its decisions and recommendations and the actions taken”.

The proposal was watered down considerably in the final draft Havana Charter of March 1948, which obliged states to take action only when "[restrictive] practices have harmful effects on the expansion of production or trade and interfere with the achievement" of any of the charter's objectives. Meanwhile, many of the industrialized nations of the world adopted competition laws, and developing countries began to regulate exclusionary and abusive business practices. The developing nations began to advocate an international agreement to control multinational corporations. The 2003 Ministerial Conference of the **World Trade Organization** at Cancún in Mexico closed without any agreement³⁶². One of the main reasons for this failure was disagreement over the continuing inclusion of the so-called '*Singapore issues*' in the Doha Round of negotiations one of which is competition policy.

Competition law and policy first appeared on the international agenda at the end of World War II as part of the negotiations that resulted in the introduction of the *General Agreement on Tariffs and Trade*³⁶³. Pursuant to a decision taken at the Singapore Ministerial Conference in 1996, a WTO committee was set up to look into the issue of the interaction between trade and competition policy. At the Doha Ministerial Conference in 2001 it was agreed that negotiations regarding multilateral cooperation on competition policy would take place 'after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations'. After Cancún, the WTO General Council has now agreed that the interaction between trade and competition policy

³⁶² The WTO was established by the Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('Marrakesh Agreement'). On the outcome from the WTO Ministerial Conference at Cancún, see WTO, Briefing Note, Day 5: Conference Ends Without Consensus (2003)

<http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm> at 1 October 2004.

³⁶³ Marrakesh Agreement, above, annex 1A (General Agreement on Tariffs and Trade) 1867 UNTS 190 ('GATT'). Competition law provisions were included in the Havana Charter for an International Trade Organization ('Havana Charter'), the proposed charter for the International Trade Organization ('ITO'). See art 46 of the Havana Charter, in United Nations Conference on Trade and Employment, Final Act and Related Documents, UN Doc E/CONF.2/78 (1948) (the conditions for the entry into force of the Havana Charter, set forth in art 103, were not fulfilled within the prescribed time limit. The ITO failed to obtain US congressional approval and never came into effect). See American Bar Association Sections of Antitrust Law and International Law and Practice, Report on the Internationalization of Competition Law Rules: Coordination and Convergence (1999) American Bar Association, 4 <<http://www.abanet.org/antitrust/comments/2000/convexe.html>> at 1 October 2004 ('ABA Internationalization of Competition Law Rules'). See John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 177. See also Spencer Weber Waller, 'Neo-Realism and the International Harmonization of Law: Lessons from Antitrust' (1994) 42 *University of Kansas Law Review* 557, 558–9.

1. The contribution of transnational industrial corporation towards competition policy

The "*globalization*" word has been used to describe the phenomenally rapid expansion of many sorts of global interaction. It seems appropriate both to restrict the term to the current stage of these integrative processes and to recognize that contemporary globalization has long historical roots, many of which were regional rather than worldwide. Although no consensus exists, social scientists and historians have proposed many different starting points for the history of globalization. Practitioners of some academic disciplines, economists in particular, are inclined to shorter timeframes, whereas historians are likely to describe a much longer process. Besides disciplinary proclivities, the debate about a starting point sometimes reflects ideological debates over Marxism or cultural wars over Euro-centrism³⁶⁴. Contemporary globalization and its historical antecedents include many analytical separable forms of convergence.

This dissertation uses the term "*convergence*" to describe the underlying processes of integration that prefigure contemporary globalization. It argues that for most of human history convergent forces bringing people together were much weaker than divergent ones that isolated people and that the point at which convergent forces surpassed divergent is the appropriate starting point of the history of globalization. Those dates, of course, are for globalization properly so called: "*Friedman notes in passing that the larger process went back to 1945, when the world was able to résumé economic and political efforts at integration dating from the early 1800s that had been disrupted by the world wars and the Great Depression*". Although some researchers have proposed terms such as "*proto-globalization*" or "*archaic globalization*" to describe these earlier stages, such language has not gained general acceptance.

For understandable reasons, most analyses of recent globalization concentrate on economic factors. However, there are many other factors that are a part of globalization and have shaped its historical development. The first is political. Both today and in earlier time's trade has been hindered, helped, and regulated by political systems. The development of the institutions, legal systems, and regulatory bodies that serve (or hinder) the growth of international trade and settle disputes among nation-states has a long history. A second form of non-economic globalization is cultural and social³⁶⁵. The

³⁶⁴ Some scholars have also shown how discussions of globalization connect to or mirror earlier debates about modernization, underdevelopment, and the rise of the West. Most proposed starting points centre on one of three historical events: the Industrial Revolution about 1800, Western maritime expansion around 1500, or the integration of Asia around 1000 or earlier. Many analyses place the relevant beginnings in very recent times. The first of Thomas Friedman's influential books on globalization, "*The Lexus and the Olive Tree, puts the dawn of globalization in the early 1990s triggered by the end of the Cold War and the explosion in use of the Internet*".

³⁶⁵ Peter Berger "has identified four streams of contemporary global culture that have relevant historical antecedents: a global business culture, a global academic culture, a popular secular culture, and a popular religious culture". Framing the phenomena differently, other social scientists like John Keane have written of a new "global civil society," with long historical roots. Underlying all forms of globalization

history of globalization has involved complex interactions among these economic, political, socio-cultural, and biological factors. Thus, the challenge of historicizing the process is to bring together the different disciplinary approaches in a framework that shows their intersections.

1.1 The 21st century will be the century of globalization and the proliferation of national antitrust laws

Then globalization and the proliferation of national antitrust laws made the creation of an international antitrust regime a subject of great interest in its own right. Academics and practitioners came to be occupied with whether this was a good idea, and even if it was, whether WTO members would ever agree to put it there³⁶⁶. European Community officials have argued that internationalization is a means to cure a problem of excessive, if not imperialistic, extraterritorial application of competition law.

They point, for example, to US threats to use its antitrust laws to price open foreign markets closed by anti-competitive private restraints. There are no transnational or international rules or protocols to channel behavior so as to alleviate such conflicts³⁶⁷. If international rules would prohibit private market access restraints, it is thought, the United States may forego its claim of right to so use the Sherman Act.

While excessive extraterritoriality may be seen as a problem that justifies internationalization, it may be seen, alternatively, as a means to address transnational problems in the absence of transnational law. Internationalizing economic law stems from the hypothesis that, if left alone, nations will design or use their laws to attract trade, investment, or the establishment of business, and that, to seduce business away from their

are underlying technologies, including systems of transportation and communication and the knowledge systems that underlie them.

³⁶⁶ Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94- AM. J. INT'L L. 478, 487-94 (2000) (criticizing likely efficacy of WTO in addressing global competition needs) with ICPAC Final Report, supra, at Annex 1-A (separate statement of Advisory Committee member Eleanor M. Fox) <http://www.usdoj.gov/atr/icpac/lc.pdf>;

³⁶⁷ For example, there are no rules of primary jurisdiction to grant or withhold an order to enjoin a merger See Eleanor M. Fox & Janusz A. Ordover, The Harmonization of Competition and Trade Law-The Case for Modest Linkages of Law and Limits to Parochial State Action, World Competition, Dec.1995, at 5, 8-9, 15-20 (describing downward spiral and proposing world welfare standard with derogations for non parochial sovereignty claims); Frédéric Jenny, Globalization, Competition and Trade Policy: Issues and Challenges, in Towards WTO Competition Rules, supra note 1, at 3, 22-23 (showing how developing countries are prime victims of anticompetitive practices).

neighbors, nations will degrade their laws in competition³⁶⁸. Firms will choose to enter many different markets to serve the people there for example (*Coca-Cola or McDonald's may establish themselves in Russia*), knowing that they will be subject to the nation's entire System of laws. Competition law that is helpful or harmful could possibly be a marginal incentive or disincentive, but the firm first chooses to serve the market, and probably will do so absent 'unlivable' law.

But the trend of economic integration has long transcended Europe Competition policy, too, and the decision making practice of Competition watchdogs have to be put to the test in the light of globalization, which brings me to today's subject. I know what I am talking about, for in Italy we have just brought to a dose the discussion about the amendment of our competition law, and had to face our share of what I would like to call critical debate. The Authority was reproached by many particularly by industry, for failing to realize that markets in the wake of globalization. The larger a firm's share of the overall market, the greater the concern from the competition law perspective if this firm acquires competitors. It is obvious that a firm's market share appears smaller, the larger and broader the market definition. From the firm's perspective, big markets are therefore beneficial when describing a merger project to the antitrust authority. In my many years of professional experience with competition matters I have never ever come across a firm which proposed a market definition that was narrow in the opinion of the Authority. There are European and worldwide markets, but there are also markets that are still regional in character. Industrial markets tend to globalize. With respect to competition policy this means that the domestic buyers find sufficient alternative sources of supply in the international markets so that mergers in this area do not as a rule raise concerns³⁶⁹.

Globalization and the development of global markets are instead more a trend facing the contrary development of re-regionalization. But in areas where regional markets continue to exist, and I dare to forecast that these will be in the majority also in the future, national competition authorities will not be out of a job. The

³⁶⁸ Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 Va. L. Rev. 1283, 1301-06 (1997) (explaining why multilateral regime might be justified); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1210-16 (1977) (exploring how federal authority to compel state implementation of federal environmental programs is grounded in moral claims).

³⁶⁹ Example like (*German steel giants Krupp and Thyssen*). In this case the firms are facing big markets (*Daimler/Chrysler case*), too, the primary motive was arguably to penetrate new markets rather than to merely acquire additional market share.

industrial sector has long been shrinking to the benefit of services. That national competition authority has enough to do even in the age of globalization and in many areas they will remain important and irreplaceable contacts for national industries³⁷⁰. From a competition perspective it has to be added that the effect of potential competition, which is given such importance in modern competition theory, changes when looked at from a global perspective. While our sights were set on national or regional markets, it was possible to take account of the market entry of rivals from other countries or continents as an important factor. As a result, a few global players will lime and again face each other in different geographic markets³⁷¹. The question therefore arises as to how we can ensure that the law is enforced even against global players in future.

But even if they were given greater attention in these agreements, I believe that effective protection of competition could not be achieved solely on the basis of the bilateral agreements now in place.

In the long run, therefore, closer international cooperation in competition matters will become unavoidable. There are two approaches to cooperation, i.e., bilateral and multilateral cooperation. While state restraints of competition and trade are dealt with by the multilateral bodies of the World Trade Organization (WTO), private restraints of competition have so far been addressed only by bilateral cooperation agreements of the kind EU concluded with the US and several States.

³⁷⁰ The extent of the current wave of mega-mergers is enormous, in the United States as in Asia and in Europe. As with the notifications under the Hart-Scott-Rodino Act, the US provisions governing the notification of concentrations, or under the European Merger Regulation, we are witnessing a fast growing number of cases. In 1999 a new record was achieved with a volume of turnover involved in mergers reaching a figure of USD 4000 billion, if not exceeding it. The focus of real mega-mergers still lies in the United States but, as I said, the number of transnational mergers is increasing. Daimler/Chrysler is one example of this.

³⁷¹ Here, too, the car industry may be cited as an example. Although the sale of Rolls-Royce, to a foreign company of all things, may have come as a blow to our British company, as it was a shock to many Germans to see Mannesmann being taken over by Vodafone, it is a fact that such industries have to undergo structural adjustments and focus on a few major suppliers.

1.2 Lisbon agenda

The recently revised cooperation agreement on competition matters between the European Union and the U. S. explicitly leaves aside merger control. We must accept, however, that cartels are almost permanently subjected to centrifugal forces and are therefore unstable. In theory it could be addressed by means of divestiture, but as we know from experience, divestiture is a highly problematic and rather ineffective instrument of competition policy.

My idea of global merger control may instill the fear that I intend to respond to mega-mergers with mega-institutions. A firm cannot afford to have expensive modern equipment laying idle longer than necessary simply because the maintenance or delivery of spare parts does not occur on time. Therefore, with complex special equipment one cannot automatically assume markets to be worldwide, because manufacturers that operate. Before looking at the role of European competition policy in the age of globalization and the perspectives for a global competition order, let me quickly go back to basics. *Why is the European legal and political order so attached to competition and this since its very start in 1957?* No doubt the competition enforcers present in this room all understand the key role competition plays in ensuring Europe's wealth and prosperity.

Free trade and undistorted competition are among the main drivers of economic growth. Competition within the single market and competition with other markets give consumers access to a wide range of high quality products and services at low prices. But they have been heightened by the growing pace of international economic integration and the integration of new and dynamic players think for example about the recent emergence of **Sovereign Wealth Funds** into the world economy. And some concerns may even be justified in cases where European players are exposed to anti-competitive conduct by foreign companies or to protectionist interference by foreign governments.

This is why, if European business wants to continue to benefit from the opportunities globalization brings, European regulators and policy-makers need to deliver open and competitive markets. In terms of economic governance, this means that we have to ask ourselves how best to keep a grip on global actors in a global economy, if their anti-competitive behaviour is damaging the interests of the Union, its businesses or its citizens.

Globalisation as an opportunity certainly does bring challenges which need proper governance. Without a doubt, globalisation is also the biggest opportunity that Europe has had for a long time. By making the most of the global market place we can deliver sustained economic growth, and thus assure our citizens the standard of living they rightly expect, some profound and painful transformations will be needed in order to meet, on a sustainable basis, the EU's needs for security, solidarity and prosperity. The renewed *Lisbon agenda* is about managing this change and accompanying people through it. And a fully open, Single European Market is vital to the Lisbon Strategy. It is open, competitive markets that generate wealth not politicians. And it is that wealth which enables us to develop effective social policy, which in turn supports strong economic performance, creating stability and prosperity. Without a dynamic market economy, Europe is inevitably consigned to a lingering but irreversible economic and political decline.

Competition policy and enforcement of the EC competition rules play an essential role in delivering the Lisbon Agenda. They contribute to the integration of the European markets through ensuring a fair playing field where efficiency and innovation are encouraged to prosper, because competition is solely on merit. Policies on state aid, merger control and anti-trust ensure that everyone is playing by the same rules. In turn, enforcement of competition rules ensures those rules are observed. The Commission is aware that there is more work to be done in order to deliver a completed Single Market and our Lisbon objectives. In the Commission's communication to the European Council of 10th May a new Citizen's Agenda for Europe we propose to launch a fundamental review of the single market to look at what more needs to be done, and how. In this context, there are also some new and substantial challenges coming over the horizon. Much has been said recently about energy markets the need for secure and affordable energy supplies and the deficiencies in the current European market. *Mergers and acquisition are means by which companies develop in order to benefit from and harness the opportunities of globalisation and world markets. So, it is vital that industrial re-structuring can take place not just within individual countries but also across national borders. Cross-border mergers are increasing in the EU, and particularly so in sectors which have recently been liberalised or are going through the process of liberalisation: this trend is most striking in the telecoms, transport, energy and banking industries.*

The liberalisation Directives adopted since the mid 1990s opened the way for competition, with the aim of increasing efficiency in the production, transmission and distribution of energy. However, over the last years it has become clear that a fully competitive single European energy market is not yet a reality. Competitive forces are still not functioning at their optimum level, I considered it essential to move quickly to identify and remedy the problems in view of the vital role of a single energy market for the Lisbon process³⁷².

³⁷² The initial findings of that inquiry confirm that there are serious malfunctions in Europe's energy markets. In particular, we have found evidence that:

- Wholesale markets still a very high level of concentration, creating scope for incumbents to raise prices.
- Consumers are denied choice due to the difficulties faced by new suppliers trying to enter the markets. Insufficient separation of infrastructure and supply functions prevents new entrants from reaching the final consumer.
- There is no significant cross-border competition – for gas, it is difficult to secure transit capacity on key routes and for electricity there are long-term capacity reservations and not enough inter-connector capacity.
- A severe lack of transparency prevents new entrants from competing effectively.
- finally, prices often are not determined on the basis of effective competition.

2. Global approach of multilateral cooperation of RBP “Restrictive Business Practices” point of criticism of the DIAC “the Draft International Antitrust Code”

I will describe the general picture of the original GATT on an ambitious Charter for the international trading system, known later as the **Havana Charter**³⁷³ that would have established an **International Trade Organization**. Chapter Five of that Charter would have set forth rules on “restrictive business practices,” or antitrust principles (as we would be more likely to term them). It is striking today to read through Chapter Five, to see how closely it resembles some of the proposals for a multilateral antitrust code that are currently being put forward. However, it is important to remember that a key reason why the ITO never came into being, and why the U.S. Congress in particular objected to the Havana Charter, was the feeling that the antitrust rules of **Chapter Five** were not adequate for the United States, and that the rest of the world was not yet ready to embrace a serious antitrust regime.

³⁷³ united nation conference on trade and employment held at **Havana**, cuba from november 21, 1947, to march 24, 1948 final act and related documents interim commission for the international trade organization lake success, new york april, 1948

FINAL ACT
OF THE
UNITED NATIONS CONFERENCE
ON TRADE AND EMPLOYMENT:
HAVANA CHARTER
FOR AN
INTERNATIONAL TRADE ORGANIZATION

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FINAL ACT OF THE UNITED NATIONS CONFERENCE
ON TRADE AND EMPLOYMENT

The Economic and Social Council of the United Nations, by a resolution dated February 18, 1946, resolved to call an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods.

The Conference, which met at Havana on November 21, 1947, and ended on March 24, 1948, drew up the Havana Charter for an International Trade Organization to be submitted to the Governments represented. The text of the Charter in the English and French languages is annexed hereto and is hereby authenticated. The authentic text of the Charter in the Chinese, Russian and Spanish languages will be established by the Interim Commission of the International Trade Organization, in accordance with the procedure approved by the Conference.

There are also annexed to this Final Act a resolution of the Conference establishing an Interim Commission of the International Trade Organization and the other resolutions of the Conference.

This Final Act and the documents annexed shall be deposited with the Secretary-General of the United Nations, who will send certified copies to each of the Governments represented at the Conference.

IN WITNESS WHEREOF, the duly authorized representatives of their Governments had subscribed their names below.

DONE at Havana, this twenty-fourth day of March, one thousand nine hundred and forty-eight, in a single copy in the Chinese, English, French, Russian and Spanish languages.

CHAPTER V: RESTRICTIVE BUSINESS PRACTICES

Article 46: General Policy towards Restrictive Business Practices

1. Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

2. In order that the Organization may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regarding complaints provided for in Articles 48 and 50, whenever

- (a) such a complaint is presented to the Organization, and
- (b) the practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and
- (c) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

3. The practices referred to in paragraph 2 are the following:

- (a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
- (b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
- (c) discriminating against particular enterprises;
- (d) limiting production or fixing production quotas;
- (e) preventing by agreement the development or application of technology or invention whether patented or unpatented;
- (f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;
- (g) any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

Article 47: Consultation Procedure

Any affected Member which considers that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of Article 46 may consult other Members directly or request the Organization to

Article 46 of the Charter called on each Member State to “take appropriate measures” and to cooperate with the ITO to “prevent. . . *business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives of the “ITO” set forth in Article 1.*” Article 46 also provided that the Member States would give the ITO the power to decide in particular cases whether the practices would have had the proscribed effect, in accordance with powers spelled out in Articles 48 and 50.

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arrange for consultation with particular Members with a view to reaching mutually satisfactory conclusions. If requested by the Member and if it considers such action to be justified, the Organization shall arrange for and assist in such consultation. Action under this Article shall be without prejudice to the procedure provided for in Article 48.

Article 48: Investigation Procedure

1. In accordance with paragraphs 2 and 8 of Article 46, any affected Member on its own behalf or any Member on behalf of any affected person, enterprise or organization within that Member's jurisdiction, may present a written complaint to the Organization that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of Article 46; *Provided* that in the case of complaints against a public commercial enterprise acting independently of any other enterprise, such complaints may be presented only by a Member on its own behalf and only after the Member has resorted to the procedure of Article 47.
2. The Organization shall prescribe the minimum information to be included in complaints under this Article. This information shall give substantial indication of the nature and harmful effects of the practices.
3. The Organization shall consider each complaint presented in accordance with paragraph 1. If the Organization deems it appropriate, it shall request Members concerned to furnish supplementary information, for example, information from commercial enterprises within their jurisdiction. After reviewing the relevant information, the Organization shall decide whether an investigation is justified.
4. If the Organization decides that an investigation is justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. Any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, shall be afforded reasonable opportunity to be heard.
5. The Organization shall review all information available and decide whether the conditions specified in paragraphs 2 and 3 of Article 46 are present and the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that Article.
6. The Organization shall inform all Members of its decision and the reasons therefore.
7. If the Organization decides that in any particular case the conditions specified in paragraphs 2 and 3 of Article 46 are present and that the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that Article, it shall request each Member concerned to take every possible remedial action, and may also recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures.
8. The Organization may request any Member concerned to report fully on the remedial action it has taken in any particular case.
9. As soon as possible after its proceedings in respect of any complaint under this Article have been provisionally or finally closed, the Organization shall prepare and publish a report showing fully the decisions reached, the reasons therefore and any measures recommended to the Members concerned. The Organization shall not, if a Member so requests, disclose confidential information furnished by that Member, which if disclosed would substantially damage the legitimate business interests of a commercial enterprise.

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10. The Organization shall report to all Members and make public the remedial action which has been taken by the Members concerned in any particular case.

Article 49: Studies relating to Restrictive Business Practices

1. The Organization is authorized:
 - (a) to conduct studies, either on its own initiative or at the request of any Member or of any organ of the United Nations or of any other inter-governmental organization, relating to
 - (i) general aspects of restrictive business practices affecting international trade;
 - (ii) conventions, laws and procedures concerning, for example, incorporation, company registration, investments, securities, prices, markets, fair trade practices, trade marks, copyrights, patents and the exchange and development of technology in so far as they are relevant to restrictive business practices affecting international trade; and
 - (iii) the registration of restrictive business agreements and other arrangements affecting international trade; and
 - (b) to request information from Members in connection with such studies.
2. The Organization is authorized:
 - (a) to make recommendations to Members concerning such conventions, laws and procedures as are relevant to their obligations under this Chapter; and
 - (b) to arrange for conferences of Members to discuss any matters relating to restrictive business practices affecting international trade.

Article 50: Obligations of Members

1. Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.
2. Each Member shall make adequate arrangements for presenting complaints, conducting investigations and preparing information and reports requested by the Organization.
3. Each Member shall furnish to the Organization, as promptly and as fully as possible, such information as is requested by the Organization for its consideration and investigation of complaints and for its conduct of studies under this Chapter; *Provided* that any Member on notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld and the reason why it considers it not essential.
4. Each Member shall take full account of each request, decision and recommendation of the

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Organization under Article 48 and, in accordance with its constitution or system of law and economic organization, take in the particular case the action it considers appropriate having regard to its obligations under this Chapter.

5. Each Member shall report fully any action taken, independently or in concert with other Members, to comply with the requests and carry out the recommendations of the Organization and, when no action has been taken, inform the Organization of the reasons therefore and discuss the matter further with the Organization if it so requests.

6. Each Member shall, at the request of the Organization, take part in consultations and conferences provided for in this Chapter with a view to reaching mutually satisfactory conclusions.

Article 51: Co-operative Remedial Arrangements

1. Members may co-operate with each other for the purpose of making more effective within their respective jurisdictions any remedial measures taken in furtherance of the objectives of this Chapter and consistent with their obligations under other provisions of this Charter.

2. Members shall keep the Organization informed of any decision to participate in any such co-operative action and of any measures taken.

Article 52: Domestic Measures against Restrictive Business Practices

No act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade.

Article 53: Special Procedures with respect to Services

1. The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 46. Such practices shall be dealt with in accordance with the following paragraphs of this Article.

2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have such harmful effects, and that its interests are thereby seriously prejudiced, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question. The Member or Member concerned shall give sympathetic consideration to the statement and to such proposals as may be made and shall afford adequate opportunities for consultation, with a view to effecting a satisfactory adjustment.

3. If no adjustment can be effected in accordance with the provisions of paragraph 2, and if the matter is referred to the Organization, it shall be transferred to the appropriate inter-governmental organization, if one exists, with such observations as the Organization may wish to make. If no such inter-governmental organization exists, and if Members so request, the Organization may, in accordance with the provisions of paragraph 1 (c) of Article 72, make recommendations for, and promote international agreement on, measures designed to remedy the particular situation so far as it comes within the scope of this Charter.

4. The Organization shall, in accordance with paragraph 1 of Article 87, co-operate with other inter-governmental organizations in connection with, restrictive business practices affecting any field coming within the scope of this Charter and those organizations shall be entitled to consult the

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Organization, to seek advice, and to ask that a study of a particular problem be made.

Article 54: Interpretation and Definition

1. The provisions of this Chapter shall be construed with due regard for the rights and obligations of Members set forth elsewhere in this Charter and shall not therefore be so interpreted as to prevent the adoption and enforcement of any measures in so far as they are specifically permitted under other Chapters of this Charter. The Organization may, however, make recommendations to Members or to any appropriate inter-governmental organization concerning any features of these measures which may have the effect indicated in paragraph I of Article 46.

2. For the purposes of this Chapter

- (a) the term "business practice" shall not be so construed as to include an individual contract between two parties as seller and buyer, lessor and lessee, or principal and agent, provided that such contract is not used to restrain competition, limit access to markets or foster monopolistic control;
- (b) the term "public commercial enterprises" means
 - (i) agencies of governments in so far as they are engaged in trade, and
 - (ii) trading enterprises mainly or wholly owned by public authority, provided the Member concerned declares that for the purposes of this Chapter it has effective control over or assumes responsibility for the enterprises;
- (c) the term "private commercial enterprises" means all commercial enterprises other than public commercial enterprises;
- (d) the terms "decide" and "decision" as used in Articles 46, 48 (except in paragraphs 3 and 4) and 50 do not determine the obligations of Members, but mean only that the Organization reaches a conclusion.

CHAPTER VI: INTER-GOVERNMENTAL COMMODITY AGREEMENTS

SECTION A - INTRODUCTORY CONSIDERATIONS

Article 55: Difficulties relating to Primary Commodities

The Members recognize that the conditions under which some primary commodities are produced, exchanged and consumed are such that international trade in these commodities may be affected by special difficulties such as the tendency towards persistent disequilibrium between production and consumption, the accumulation of burdensome stocks and pronounced fluctuations in prices. These special difficulties may have serious adverse effects on the interests of producers and consumers, as well as widespread repercussions jeopardizing the general policy of economic expansion. The Members recognize that such difficulties may, at times, necessitate special treatment of the international trade in such commodities through inter-governmental agreement.

Article 56: Primary and Related Commodities

1. For the purposes of this Charter, the term "primary commodity" means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

The practices that would have been prohibited look quite familiar to a U.S. antitrust lawyer. They included price fixing, territorial allocations, “discriminating against any particular enterprise,” limiting production or fixing production quotas, “preventing by agreement the development or application of technology or invention whether patented or unpatented,” “extending the use of rights under patents and other forms of intellectual property” to matters outside the scope of the grants, and other practices similar to the enumerated ones. **Article 48.3 reads as follows:**

The Organization shall consider each complaint presented in accordance with paragraph 1. If the Organization deems it appropriate, it shall request Members concerned to furnish supplementary information, for example, information from commercial enterprises within their jurisdiction. After reviewing the relevant information, the Organization shall decide whether an investigation is justified.

If the ITO found the investigation to be justified, it would have been empowered to request further supplementary information from “any Member,” and to conduct hearings on the complaint. (*Article 48. 4.*) With respect to commercial information, Article 50.3 did give Member States the authority to withhold information from the ITO if *two* criteria were met: (1) the information was not essential to the Organization in conducting an adequate investigation, *and* (2) if disclosed, the information would substantially damage the legitimate business interests of a commercial enterprise. As I said, the Havana Charter and the ITO it would have created never went anywhere, in significant part because of U.S. objections to these antitrust provisions. It stands today, however, as the most fully elaborated international precedent for an antitrust code, and as such it is well worth studying as we consider whether or not to go down this road now. There is in fact a multilateral “**Restrictive Business Practices Code**,” which was adopted by the U.N. General Assembly on May 2, 1980. That code was negotiated under the auspices of the U.N. Conference on Trade and Development, or UNCTAD, and it therefore is oriented toward the interests of the developing countries. Importantly, it is nonbinding, and was understood throughout the negotiating process as a nonbinding document.

More broadly, the history of the UNCTAD RBP Code, as well as other negotiations that involved the full U.N. membership, teaches caution. Although there has been great progress in recent years at a world-wide level toward acceptance of the principles of market economies, there is still a long way to go. It is not clear whether or not the attitudes toward intellectual property rights advocated in those exercises (*and apparent*

even in the Havana Charter) have been superseded completely yet. It is fair to say, therefore, that the potential exists for more harm than good in this critically important area. In addition, it remains true today that only about a third of the nations in the world have enacted antitrust or competition laws. Finally, there is no escaping the fact that any kind of enforceable and enforced worldwide competition regime would present unprecedented issues relating to the appropriate kinds of follow-up and dispute resolution mechanisms that will be required. The new International Antitrust Enforcement Assistance Act contains well elaborated safeguards that will ensure the proper treatment of all such information that is exchanged among responsible, existing antitrust agencies provisions that the Congress included because of the concerns expressed by the business community while the legislation was under consideration. Before the necessary national support for a vastly expanded international system can be developed, it is reasonable to assume that enforcers and companies alike will need to build significant experience under the bilateral information sharing agreements that will be developed under the new law. At the end of World War II, the United States had proposed the creation of an international trade organization, the draft charter of which contained provisions condemning certain restrictive business practices. In 1975, Secretary of State Henry Kissinger at a special session of the United Nations indicated that the United States was willing to discuss the subject of codes of conduct for Multinational Corporation in various spheres, including restrictive business practices.

The Havana Charter³⁷⁴ was never adopted by the United States Congress, largely because of controversies on related to restrictive business practices. *The United Nations Conference on Restrictive Business Practices* was convened by the General Assembly in its resolution 33/153 of 20 December 1978 under the auspices of UNCTAD. Pursuant to resolution 103 (V) of 30 May 1979 of the United Nations Conference on Trade and Development the Conference on Restrictive Business Practices met at the United Nations Office at Geneva from 19 November to 8 December 1979. The conference's approval of the "Principles and Rules"³⁷⁵ came at the end of more than thirty years of discussions and negotiation of an international code for competition.

³⁷⁴In United Nation Conference on Trade and Employment, HAVANA, 1947-1948: Final Act and Related Document in MARCH 1948.

³⁷⁵U.N. Doc. TD/RBP/CONF/10(1980). For two views on the draft UNCTAD RBP Code prior to the final negotiations, see Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW. 587 (1979) and Gill, *The UNCTAD Restrictive Business Practices Code: A Code for Competition?* 13 INT'L LAW. 607(1979). Stuart Benson of the State Department Office of the Legal Advisor headed the United States delegation in the diplomatic level negotiations of the UNCTAD RBP Code; Davidow of the Justice Department's Antitrust Division was Vice-Chairman. Gill attended the April 1980 final negotiating

The **Ad Hoc Group of Experts** held its sixth session April 17-27, 1979 and completed its work on the set of Principles and Rules. Although the "**Principles and Rules**" were described as "multilaterally agreed," there in fact remained wide areas of disagreement between the Group of 77 (*the less developed countries*), Group B (*the developed countries*) and Group D (*the East Bloc*)³⁷⁶. Agreement was finally reached on the principle, urged by the developed countries, that the code should not be in treaty form but should be embodied in a United Nations General Assembly resolution. It also was agreed that implementation of the code would not include judgment on the behavior of any particular enterprise or government or on the issues involved in any dispute. The issue of how to deal with parent/subsidiary relationships remained a central problem³⁷⁷.

The commission president's proposed compromise text suggested a complete exemption from the code's provisions only for intergovernmental agreements with provision that "due account," i.e., "*application of the principle of comity, be taken both of the extent to which conduct had been exempted or permitted by national law and of the special trade, development and financial needs of developing countries. Nonetheless, many business groups at the end of the first session were prepared to assist in obtaining appropriate provisions on the fundamental points which still divided the developed and developing countries*".

The crucial issues concerning business were the following (abstracted from the statement forwarded to the first session of the conference by the **International Chamber of Commerce** on November 16, 1979):

session as an advisor to the United States delegation. Mr. Davidow's article contains much useful background and explanation of the code to which the reader is referred.

³⁷⁶ 'Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Sixth Session, U.N.Doc.TD/250, TD/B/C.2/201, TD/B/C.2/AC.6/20(1979). [hereinafter cited as UN 1979

³⁷⁷ Joel Davidow, a prominent figure in the negotiations and vice-chairman of the United States delegation to the conference, has reported as follows: "*Late in the negotiation, the Chairman of the Conference produced a text stating that the section dealing with horizontal offenses would apply only to arrangements between enterprises "not under common control," but that the section dealing with abuses of a dominant position would apply to parent-subsidary conduct, subject to a footnote indicating that the listed restrictive practices might be non abusive if "appropriate in light of the legal organizational or managerial relationship of the enterprises involved."*

- The code should contain an express statement that its provisions are voluntary and non-mandatory.
- Section E 3 should be amended to require "nondiscriminatory" treatment of enterprises.
- With respect to transactions and relationships between affiliated enterprises, a general exemption of affiliated relationships and behavior, such as that contained in Group B's proposed Section B (vii), must be added.
- The definition of "dominant position of market power" should be amended to exclude any possible extension of "shared monopoly" situations;
- State enterprises must remain within the coverage of the Code

The second session of the conference began with an intense and sustained effort by the Group of 77 to obtain the agreement of the Group D countries to the inclusion of state enterprises within the definition of "enterprises" (in section B3) and hence within the coverage of the code. This effort was finally successful late in the evening of April 17. The Group of 77 then turned its attention to sections D3 and D4 and attempted to narrow the proposal made by Group B to exempt behavior and relationships of affiliated enterprises from these sections.

Final agreement on the text of the Principles and Rules was reached early in the morning of April 22, 1980. The final text was hailed by representatives of the various groups. In contrast with the text of the OECD Guidelines for Multinational Enterprises relating to competition,¹ the Principles and Rules deal in considerable detail with both the substantive definition of "restrictive business practices" and the procedures for implementation of the code.

The Preamble records the agreement of the United Nations Conference on Restrictive Business Practices on the final text of the code. By stating that "all countries should encourage their enterprises to follow" the code and by referring to the code as "recommendations," the Preamble may be said to characterize the code as voluntary and nonbinding. Such a characterization is further reinforced by the Conference's recommendation that the code be adopted as a General Assembly Resolution, because the United Nations Charter expressly defines such Resolutions as non-binding. The premises of the Preamble can nevertheless be also fairly read as recognizing the important contribution which competition and free trade can make to international development, and of the role which transnational corporations currently play in such process. During the course of the negotiations, the President proposal endorsing

"restructuring of international economic relations" was eliminated. In the closing sessions of the Conference, the final premise of the Preamble was expanded to include the concept of treatment "on the same basis to all enterprise" as well as in accordance with established procedures of law".

The definition of "enterprises," which describes the entities whose activities are regulated in section D, includes any juridical person "irrespective of the mode of creation or control or ownership, private or state, which are engaged in commercial activities. . . ." By this language the code, like the OECD Guidelines for Multinational Enterprises, is applicable to private, state-owned, and mixed ownership enterprises. In the final negotiating session in December 1979 the Group D socialist countries had made their objections to the inclusion of state owned enterprises within the code a ground for terminating the negotiations. Despite Group D's concurrence in April 1980 in the final inclusion of state owned enterprises within the definition in section B3, it should be noted that: (1) Group D regards "transnational corporation" as excluding state owned enterprises; and (2) Group D representatives have indicated that the voluntary nature of the code leaves them free to consider state-owned enterprises as included only in "appropriate" circumstances³⁷⁸.

The Group of 77 favored the view that local branches, subsidiaries or affiliates are separate 'enterprises' within the meaning of the Principles and Rules so that any entity acting within their territory is made responsible and subject to their laws and policies.

Ultimately, the applicability of the code to inter-affiliate transactions had to be clarified in section D3 and the footnote to D4. With respect to the obligation of enterprises to provide information, section D2 suggests that multiple country disclosure may be recommended to the extent the interests of a particular country are directly affected by restrictive business practices: In order to ensure the equitable application of the Set of *Principles and Rules*, States, particularly of developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular the least developed countries, for the purposes especially of developing countries in:

³⁷⁸ The statement by the spokesman for Group D at the closing meeting of the Conference sought to blur the code's inclusions of state-owned enterprises by the repeated assertion that the code was directed only at transnational corporations. See U.N. Doc. TD/RBP/CNF/11 (1980) at 8.

- promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and
- encouraging their economic development through regional or global arrangements among developing countries.

Group B accepted the Group of 77's demand for "preferential or differential treatment for developing countries." The principle, however, is expressed, consistent with C6, as a matter of comity which states "should take into account." It may be argued that recognition of this principle of "preferential or differential treatment" does violence to the concept of the code as a code for competition. On the other hand, most observers have now concluded that the Group of 77 is more interested in development than in competition and that acknowledgement of this fact represents an acceptance of reality rather than a retreat from principle. Enterprises should conform to the restrictive business practice laws of the countries in which they operate; in the event of proceedings under these laws they "should be subject to the competence of the courts and relevant administrative bodies therein." Comment: Several business organizations, including the International Chamber of Commerce, suggested that the final clause in the preceding sentence should be eliminated because such words were superfluous at best and may adversely encourage countries to exercise extraterritoriality jurisdiction over foreign enterprises doing business in their territories.

The OECD **Guidelines for Multinational Enterprises** specifically note that such exercise of jurisdiction by any state is "subject to international law" although the latter phrase is omitted in this code, it must be assumed that it remains as an implied condition.

The United States Council of the **International Chamber of Commerce** adopted the following statement, which it forwarded to the United States government:

While the Committee would have preferred that the text of the Set of Principles and Rules contain an express characterization of the code as "voluntary," we note that, for the most part, the suggestions of the ICC and other business groups have been recognized by the negotiators with respect to other provisions of the code, particularly those dealing with affiliated enterprises. We believe that the OECD and BIAC **Business and Industry Advisory Committee** should jointly or separately take action to express their understanding of the voluntary nature of the Set of Principles and Rules. BIAC should urge their governments on the vote in the General Assembly to state affirmatively that the Resolution is recommendatory and does not bind any government to take any action in implementation

of it. Most importantly, we believe that it is essential that both 'governments and business groups should continue to monitor the progress of the proposed resolution through the General Assembly and the utilization and implementation of the code by UNCTAD and its member countries, including any proposal for a Model Law. In our opinion, the detail of the Set of Principles and Rules makes it unnecessary to draft a Model Law³⁷⁹

The National Foreign Trade Council

The impact of the Code will depend largely on how it is interpreted and implemented, especially by developing countries. Both the United States Government and the international business community should carefully monitor the use and implementation of the Code and take vigorous action to assure that it will have a beneficial rather than adverse effect on a free and open international trading System. The Restrictive Business Practices Code will be open to interpretation by nations having different and in some cases irreconcilable economic systems. The long-term impact of the Code on the conduct of international business is therefore now difficult to assess. We recommend that the State Department give serious consideration to deferring action on any other such codes until the effects of the Restrictive Business Practices Code have been assessed through experience.

We do not think it appropriate that companies be asked to subscribe to the Code; but they should be made aware of the Code and its implications and urged to adhere to the spirit of fair competition in international trade which the Code was intended to promote, despite the problems which the Council perceives in interpretation of the Code."

The United States **Chamber of Commerce**, after commending the United States negotiators for their diligent efforts, suggested that there were several points which it believed should be made in the United Nations resolution adopting the code. These include reference to the voluntary and nonbinding nature of the code, a more positive characterization of the contribution of transnational corporations to the development process, and clarification that the purpose of the code is to promote the adoption of antitrust laws rather than the correction of some problem peculiar to transnational corporations."

The **National Association of Manufacturers NAM**, after noting that certain improvements in the proposed code had been obtained in the course of negotiation, expressed its concern: "*It is quite probable that many governments will simply use this Code to harass American companies operating locally, and then disregard the Code when*

³⁷⁹ Statement by the United States Council of the International Chamber of Commerce (May 28, 1980).

it is convenient for them to do so. For this reason, NAM plans to monitor the implementation of the Code in the next few years, and we assume that the State Department will do likewise, to ensure to the greatest practicable extent that the Code is not misapplied or misinterpreted by foreign governments to the detriment of American firms operating abroad”.

The United States has long been a leader in the development of giant industrial corporations and strict antitrust rules. In response to both these criticisms, the United States has agreed to participate in drafting and promulgating international antitrust principles to serve as guidelines for multinationals³⁸⁰. In a statement prepared for the seventh special session of the U. N., then secretary of State Kissinger announced that the United States, as a leader in developing antitrust rules, would support equivalent rules in an international code of conduct if such a code were voluntary, nondiscriminatory, and applicable to states as well as enterprises³⁸¹.

³⁸⁰ In June 1979 the fifth United Nations Conference on Trade and Development agreed to schedule diplomatic conferences on restrictive business practices and transfer of technology rules to be held in November and December 1979 at Geneva.

³⁸¹ Global Consensus and Economic Development, address by Secretary of State Kissinger read before the seventh special session of the U.N. General Assembly on Sept. 1, 1975, by Ambassador Daniel P. Moynihan, reprinted in 73 dep't state bull. 425, 432-33 (1975).

Munich group Draft International Antitrust Code “DIAC”

In 1993, the so-called Munich group of competition law experts created a Draft International Antitrust Code³⁸². The establishment of an International Antitrust Authority is envisaged, which would have the task of enforcing a set of common, harmonized antitrust rules in all contracting parties (through the offices of national competition authorities). It would have the power to request domestic competition authorities to initiate an investigation and to challenge implementation of the Code before an International Antitrust Panel. Therefore, one of the first general issues presented to the WTO will be this international law of competition, consisting of unfair trade and restraint of competition inhibitions. Anticipating this still under the old GATT regime, in 1991³⁸³, together with eleven friends in the antitrust field, I formed an "International Antitrust Working Group," as we called ourselves, and two years later we presented our draft to Mr. Sutherland, Director General of **GATT**. An EU Group of Experts has suggested that agreement be sought in the WTO context on specific business practices that impede trade, *without* creating a new international institution (EU Commission, 1995).

³⁸² European Commission. 1995. "Competition Policy in The New Trade Order: Strengthening International Cooperation and Rules," Report of the Group of Experts, mimeo. In Fikentscher, Wolfgang and Ulrich Immenga (eds). 1995. *Draft International Antitrust Code*. Baden-Baden: Nomos Verlag.

³⁸³ The private International Antitrust Code Working Group was composed of J. Drexler, W. Fikentscher, E.M. Fox, A. Fuchs, A. Heineman, U. Immenga, H.P. Kunz-Hallstein, E.-U. Petersmann, W.R. Schluep, A. Shoda, S.J. Soltysinski, and L.A. Sullivan. The text, introductory explanation, and detailed comments on this Code are published in *World Trade Materials*, September 1995, 126-96; Special Supplement, 64 Antitrust & Trade Regulation Report No. 1628 (Aug. 19, 1993); *International Competition Rules in the GATT/WTO System* (Hauser & Petersmann eds.), Special Issue, *Swiss Review of Economic Relations* 310-25 (1994); *Draft International Antitrust Code* 53-110 (W. Fikentscher & U. Immenga eds., 1995).

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FOREWORD

This document contains a summary of the discussions conducted in an informal Ad Hoc Expert Group on Competition Policy and Trade, convened on 14 to 15 December 1993 by the Secretary-General of UNCTAD. The experts comprising the Group who were present in their personal capacity are listed in annex I. Two international organizations, the OECD and the World Bank, also participated in the discussions. One of the documents which constituted a basis for the discussions was a consultant report entitled "The Impact of Competition Policy in Trade Policy" prepared for UNCTAD by a well-known expert in this field, Mr. Rodney de C. Grey. This report is annexed (annex II).

SUMMARY OF DISCUSSIONS OF THE AD HOC EXPERT GROUP
ON COMPETITION POLICY AND TRADE

INTRODUCTION

1. The Expert Group was organized to assist the secretariat in identifying possible approaches to ensure that the international trading system of tomorrow embodies universally agreed principles of competition and takes into account the interests of developing countries. The list of participants in the discussions on 14 and 15 December 1993 is annexed (annex I). Meeting just as the Uruguay Round Agreement was concluded, the experts had been invited to make proposals to ensure that the post-Uruguay Round trading system would not open the door to restrictive business practices by enterprises, and that governmental trade actions would conform with competition principles, bearing in mind the universal trend towards liberalization and the adoption of competition policies by a rapidly growing number of countries. The discussions were based on two papers, namely the "Draft International Antitrust Code: A proposed GATT-MTO-Plurilateral Trade Agreement", prepared by an autonomous "international antitrust code working group" as an academic exercise, and a draft paper prepared for the secretariat by a consultant, Mr. Rodney de C. Grey, entitled "The Impact of Competition Policy in Trade Policy" (see annex II). A fruitful exchange of views took place during the discussions, the main points of which are summarized below.

DRAFT INTERNATIONAL ANTITRUST CODE (DIAC)

2. The Draft International Antitrust Code (DIAC) was presented by Messrs. Fikentscher and Drexl. They explained that the DIAC was based on five legal principles: (a) exclusive application to transborder cases; (b) the application of national law in individual cases by national authorities; (c) national treatment; (d) minimum protection; and (e) international procedural initiative. According to the principle of national treatment, national and international competition would have to be treated alike. The DIAC would not advocate a conflict-of-law approach, nor total harmonization of national laws, but rather minimum standards of antitrust enforcement that would be recognized worldwide. It was national law that would be applied by national authorities even to transborder cases. National law, however, would require respect for the minimum standard in cases where the DIAC applied. An international antitrust authority would be accorded procedural rights before national authorities under national law (standing) so as to ensure effective enforcement of the DIAC. This principle of international procedural initiative would be complemented by a system of international dispute resolution. The minimum standards of the DIAC would deal with horizontal and vertical restraints using a per se and rule-of-reason approach, respectively, in different groups of cases. DIAC would deal with the intersection of antitrust and intellectual property, providing for merger control and control of dominant position. In applying the law to transborder cases, States would have to take into account effects on competition in foreign countries. Export cartels would not be exempted from the cartel prohibition. The working group which had elaborated the DIAC was of the opinion that all States depended on access to foreign markets. A minority of the working group would have preferred 15 basic competition principles of international antitrust law, which are included in the introduction to the DIAC, over the rather detailed provisions of the DIAC itself.

3. In the discussions on the DIAC, some participants questioned what would be obtained from having international competition standards or from linking a code on RBPs to the MTO system as most RBPs could be dealt with through national or bilateral action. A dispute settlement system would not improve world competition, since there would be no global investigation authority, and because governmental actions or compulsion would lead to exemption; it would instead have to address tensions among States regarding extra-territorial enforcement. Other participants considered international standards necessary because of the risk of discrimination among enterprises if all countries had not adopted competition laws and because of market access issues. Still other participants considered that the adoption of the DIAC was not a priority because the main restraints on global competition were the way in which trade policies were applied by Governments. It was also pointed out that private parties should not be allowed to restrict competition, in addition to restrictive government actions, nor to go against government endeavours to liberalize trade. Some participants emphasized the need for the DIAC to allow for differential treatment in the competitive situations among countries, and for differences in competition policy objectives. The problem of ensuring consistent treatment of different types of RBPs or government actions was also highlighted, along with the uncertainties regarding the form of market structure which would be optimal for both competition and efficiency. The need for a "rule of reason" treatment of practices was emphasized, particularly in respect of vertical restraints, since exclusivity arrangements could help market access. Some scepticism was expressed as to how easy it would be to enforce a DIAC in practice, given lobbying of Governments by firms; a gradual and incremental approach was considered appropriate. The fact that there was little clear popular awareness of, or interest in, competition was emphasized; the resulting lack of political pressure would hamper the adoption of global rules. In this connection, pedagogical measures were necessary in order to create a "constituency" for competition, although competition issues were also a question of States' interests in the bargaining context of trade negotiations.

Competition in the trading system

4. The consultant, Mr. Grey, then introduced his paper on how competition principles and criteria could, through minimal changes or interpretation of existing texts of the GATT or its associated codes, be used to mitigate the protectionist and anti-competitive bias of trade laws as currently applied in the areas of anti-subsidy, countervailing duties, anti-dumping (including price undertakings made to settle anti-dumping proceedings) and voluntary export restraints. He argued that this could be done, for example, by raising the thresholds necessary for import penetration, degree of material injury, causality and triggering of trade action, and by taking into account consumer welfare effects. Such modifications to trade laws were necessary because a liberal trade policy was a strong safeguard of competition, particularly in small economies; priority should therefore be given to this rather than to elaborating global antitrust rules.

5. In the discussions that followed, there was a general consensus that anti-dumping criteria and procedures were often applied in a manner that was anti-competitive and irrational. Alternative regimes that applied in such cases were those relating to discriminatory pricing, predatory pricing or unfair competition, which would not intervene in most cases where dumping was

currently found. Several participants suggested that the anti-dumping regime was so entrenched that it could realistically be modified only through small incremental technical changes, as had been suggested by Mr. Grey. Other participants favoured a more ambitious attempt to change the system and focus on the overriding theme of market access. Still other participants considered it unrealistic to attempt to change trade policies, and suggested that instead the focus should be on reaching agreement on basic principles regarding RBPs affecting trade, such as the following:

- (a) Prohibition of private restraints on trade;
- (b) The duty of Governments to regulate their economies could not be delegated;
- (c) Trade restraints should not be secret.

Another participant proposed the principle that competition was the basis of a market economy.

6. Points made during the discussions on the relationship between trade and competition policies included the following:

- (a) Industrial and trade policies should be subordinated to competition policies;
- (b) Competition authorities should have the standing to act as advocates for competition, in a transparent setting, and should have some independence from political pressures;
- (c) The question of how far an agreement on competition and trade should cover State actions needed to be resolved;
- (d) While some participants considered that, in smaller economies, liberal trade policy could be the principal weapon for competition policy, others suggested that trade policy could never handle all the problems that could be dealt with by competition policy, particularly in the service sector (and including "hidden dumping" by transnationals through transfer pricing abuses);
- (e) It was easy to assemble political opposition to anti-dumping for consumer goods, while it was not so easy in respect of intermediate inputs.

Further work

7. Suggestions made by one or more participants as to the work that might be done in this area by UNCTAD included:

- (a) Continuing provision of information and technical assistance to developing and other countries so as to enable them to adopt or better implement competition policies and to prepare for international negotiations in this area;
- (b) Submission of the consultant's report (annex II) to the Intergovernmental Expert Group on Restrictive Business Practices;

- (c) Survey of bilateral cooperation agreements concluded in this area, including the "affirmative comity" solutions adopted in the US/EEC Commission agreement;
- (d) Survey of how disputes relating to restraint of trade have been dealt with;
- (e) Elaboration of rules to resolve conflicts relating to extra-territoriality, including enforcement problems;
- (f) A look at possible antitrust violations involving private trade arrangements;
- (g) A look at the objectives of competition policies as applied in various countries and the rationale for the granting of exemptions in some sectors, for public enterprises, for some types of practices or for intellectual property rights (particularly copyright) in importing and exporting countries in different sectors, for example textiles;
- (h) Examination of the use of competition policies to further trade goals;
- (i) Examination of the extent to which existing trade principles conform to the Set of Principles and Rules;
- (j) Provision of information on the anti-competitive impact of trade measures and how trade policy could be used instead as an instrument for competition;
- (k) Advocacy of more transparency relating to the costs to society of economic decisions affecting competition;
- (l) Advocacy of liberalization of trade and other economic policies;
- (m) Advocacy of greater compatibility between trade and competition policies, including by reducing the scope of anti-dumping actions to cover only activities contrary to antitrust or unfair competition laws, and by action against export cartels and exclusionary behaviour in domestic markets;
- (n) A look at how competition policy can be made part of development policies;
- (o) Articulation of a set of basic competition principles;
- (p) Proposals for an international setting for competition rules modelled on the Set and the DIAC;
- (q) Further examination of the impact of trade restrictions on competition, including effects on prices and industry structures in various markets and the relationships between trade and price disparities.

ANNEX I

Ad Hoc Expert Group on Competition and Trade
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The well-known coordination project, the Draft International Antitrust Code (DIAC) of 27 July 1993 was written by *Fikentscher, Immenga* and others. DIAC is designed to be a "*plurilateral instead of multilateral, that is, optional, only binding on the members that have ratified it*" antitrust agreement that is supposed to fit into the regulatory structure of the **Marrakesh Agreement** on the establishment of the WTO³⁸⁴. In Section I of the Introduction of the DIAC we stress the necessity of an international antitrust law in today's economic world. One of the arguments, which we raised there, concerns the law of merchants. The law of merchants was developed in history when merchants came together trading. It could be claimed that it is enough to have this self-made law of merchants. Then why do we have to regulate something? Should not the rules of how to compete be left to the competitors themselves? However, it is well known that if two are going to make a deal to regulate a conflict among themselves, more often than not the outcome of the settlement turns out to be at the expense of others, of some outsiders who did not participate in this negotiating under the law of merchants.

Within the legal system of a nation-state it is the government which, in such circumstances, is able and in charge to protect the public or third party interests-for example those of the consumers.

Judge Wood said: "*This should be done in such a way that at least one national government lends its arm to put into effect the protection of the so far unprotected third party in the international arena. This party could be the consumer who falls victim to an international cartel. It could also be a producer who falls victim to the activities of some powerful chain of stores or suppliers. The next section discusses the prospects and the usefulness of an international antitrust law from various points of view: United Nations, American, Japanese, and European Community. We tried there to anticipate what these nations and regions would think about an international antitrust system. The third section deals with areas of law which we do not cover in our Draft, for example, dumping, subsidies, illicit payments, corruption, other unfair trading practices, and consumer protection; to include them would have surpassed our abilities*

³⁸⁴ Gerber, - The US-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective, in: 34 New England L Rev, at 123, 125.

*to finish the Draft Code within two years. This history begins during the war years 1940-1941 with the Atlantic Charter*³⁸⁵.

Some words about **section V** of the DIAC, which deals with the ideas of **competition and market** which we used: we did not follow any theoretical concepts. We just took competition as it is understood in the marketplace. We rejected the competition and market concepts which I have called the "objective" market idea-that is, a market in square miles, possibly blown up to the dimensions of a world market, without paying attention to competitive rivalry. For a concept, we were looking to a market in which there is competitive strategy, for example, in which advertising is worthwhile. It is the market which is defined by competitive rivalry, and this means, by two criteria: The agent in the marketplace, the "owner of the firm," asks himself: "*Who is my competitor, whose rival am I?*" This is the first criterion. The second criterion is the answer to his question, while considering the other side of the market: "*Whose competition can I use for my own strategies, from whose competition do I benefit?*"

DIAC is based on five regulatory principles:

- (1) *substantive national law*, in the interest of State sovereignty, it provides no immediately applicable standard law but only a (limited) "harmonization of national antitrust laws from above";
- (2) *national treatment*³⁸⁶, it treats domestic and foreign companies equally so that, for instance, creating privileges for export cartels and discriminating foreign companies is done away with on a domestic market;
- (3) *minimum standards*³⁸⁷; it respects differences in national antitrust law provided that a certain minimum protection of competition is ensured;
- (4) *international procedural initiatives*³⁸⁸; it provides for an international antitrust authority ensuring compliance with minimum standards of support for national courts and it implements an international antitrust panel whose decisions are to be legally binding in case of disputes among States;

³⁸⁵ for example, to the Uniform Bills of Exchange and Check Laws of 1930

³⁸⁶ Article 2, section 2 (a) of DIAC: Level of Antitrust Legislation.

³⁸⁷ Article 19 of DIAC: The International Antitrust Authority.

³⁸⁸ Article 3, section 1 of DIAC: Scope of Application.

(5) *restriction to cross-border situations*, it limits itself to international cases in which more than one signatory is affected, either as action State or market State³⁸⁹.

Criticism has been primarily directed at the ambitious regulatory approach; the minimum standards basically involve maximum standards that are said to be politically unenforceable; the setting up of an International antitrust authority that can take States to court (under domestic law) would likewise be unrealistic. In addition, key DIAC concepts such as "market clout" and "relevant market" are not defined so that there is a lack of "guidelines for uniform legal application". It thereby eliminates the System competition that comprises the ability of law to innovate via parallel experimental processes and mutual learning experiences. Some said this is "*Freiburg thinking*," indicating an alleged similarity to the teaching of the so-called Freiburg School of neo-liberal thinking, influential in Germany. I may answer to this that we made a mix of all kinds of antitrust ideologies-of the good Old English common law of trade restraints dating back to Edward Coke, and to the old common law ancillary restraint doctrines. Of course, U.S. antitrust was observed in its political aspects. Also the Freiburg School teachings, and the United Nations' experiences based on the Restrictive Business Practices Code of 1980 were given due consideration. We felt quite independent from any theory. A second objection says there is much too little theory in the DIAC. We were reproached for having overlooked the teachings of the Chicago School, and other important theories that lie behind a sound antitrust philosophy.

To my observation as an outsider, Chicago school teachings suffered a severe blow in the Kodak case of 1992 and are no longer so much observed as they used to be. Anyway, looking to the needs also of small countries we could not follow Chicago teachings. Small countries are especially sensitive against vertical restraints.

They suffer much more from vertical restraints in economy than large countries with big economies. So, as you know, France, Canada, and Austria are hostile to and have rather strict laws against vertical restraints. The bigger the economy, the less dangerous are vertical restraints because one can better replace intrabrand by interbrand competition. But in a small economy this cannot work as market access is more difficult. Take, for example, the eastern *Länder* in reunited Germany, where vertical restraints in the beverage industry, supermarket chains, and by important brand owners

³⁸⁹ Article 2, section 2 (b) of DIAC, "(...) Each party shall apply all rules and principles applicable to national antitrust cases under domestic law immediately and unconditionally to all interstate antitrust cases (...)."

have killed off large parts of the liberalized and fledgling domestic economy. The West German tax payer has to pay for this ill-conceived antitrust policy by huge transfer payments.

European Initiative began to take shape in the mid-1990s Two have been prominent, but prominent for different reasons The so-called "Munich Draft Code" (also known as the Draft International Antitrust Code (DIAC)³⁹⁰ has been prominent because it has provided a conceptually well developed and audacious effort to define a workable international competition law framework It has also galvanized U S resistance to the notion of a framework. The European Union initiative has been prominent because it has given the issue high visibility and spearheaded effort in the WTO to consider the issue. The importance of the DIAC can easily be overlooked, because it has not garnered widespread or enthusiastic support. Even in Europe, there has been little support for its adoption. it has, however. been a key part of the dialogue.

This Code was published in 1995 as part of a report by a private group of scholars, whose drafting meetings were typically held in "Munich Germany". This group included U.S. and Japanese scholars, but the membership was predominantly European, with particular strong representation from German scholars. The group's aim was to develop a code that would at least provide a basis for international discusses» and perhaps for international agreement³⁹¹. At about the time Munich Draft Code was presented to the WTO consideration. The European Union began to develop its own position. **Karel van Miert**, the European Commissioner for antitrust, took the lead in the subject, and their report, "*Report of the Group of Experts*," (Report) was issued in 1995³⁹². This "*wise men*" report basically argues that in order to foster competition in the "new," more open international trading order, competition law must be aggressively pursued. According to van Miert, "As regards competition policy, how can we imagine that this new trade order could produce its full, positive effects when, throughout the world, companies are subject to different rules on competition and, of

³⁹⁰ Draft International Antitrust Code, reprinted in Public policy and Global Technology integration 285 (Frederik M Abbott & David J Gerber eds. 1997)

³⁹¹ See Wolfgang Fikentsher, The Draft international Antitrust Code DIAC in Public policy and Global Technology integration 285 (Frederik M Abbott & David J Gerber eds. 1997) this report include a minority position in which Eleanor Fox of the US, among others, generally supported the substantive principle, but argued that the procedural mechanism was too interventionist

³⁹² European Commission, Directorate-GENERAL IV, Competition Policy in the new Trade Order:: "STRENGTHENING INTERNATIONAL COOPERATION AND RULES" Report of the Group of experts (3 July 1995) [hereinafter REPORT OF THE GROUP OF EXPERTS].

even more concern, certain national authorities (or regional authorities in the case of the EU) rigorously apply their antitrust legislation while others have a more lax approach?³⁹³

Many European leaders have espoused the contents of the Report, and at its Singapore meeting in 1996 the WTO called for establishment of a working group to study the issue³⁹⁴. The working group issued its first report in December 1998, basically recounting the views on the subject presented to it by state representatives and recommending further study³⁹⁵. Representatives of the United States have generally opposed these European initiatives, as have most U.S. commentators. As Eleanor Fox has written, it is not a surprise that many Americans prefer things the way they are. Americans are not steeped in the postwar Western European tradition of community building. They have the tools of unilateralism, they fear the compromises of bargaining, and they abjure the ‘relinquishment’ of sovereignty³⁹⁶. This analysis will look at the conflict from a perspective that has seldom been utilized in any systematic way in this context³⁹⁷. Many factors influence decisions in the area, “**Domestic politics, international politics**” (assuming the two can be separated), and economic incentives are among those that tend to receive attention, and they are often important.

³⁹³ Karel van Miert, *Introduction to European Commission, Directorate-GENERAL IV,- [hereinafter REPORT OF THE GROUP OF EXPERTS]*. 3-5 (1995).

³⁹⁴ They agreed to establish a working group to study issues “relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.” *Singapore Ministerial Declaration*, WTO Conf. Doc. WT/MIN (96)/DEC., para. 20 (Dec. 13, 1996).

³⁹⁵ See World Trade Organization, *Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council. Dec. 8, 1998 WT/WGTCP/2* (visited Sept. 27, 1999) <<http://www.wto.org/wto/online/ddf.htm>>.

³⁹⁶ Fox, *Toward World Antitrust and Market Access*, *supra* note 2, at 12.

³⁹⁷ For fuller treatment of European experience, see David J. Gerber, *Law and Competition in the twentieth Century Europe: Protecting Prometheus* (1998) (giving extensive treatment of the development of European competition law ideas and practices).

3. New “World Trade Organisation Wto”, feasibility study of Antitrust Worldwide

3.1 General Agreement on Tariffs and Trade “GATT”

Over the past half-century, the world has enjoyed unparalleled economic growth and prosperity. It is generally recognized that this has come about because the world has been more or less at peace during this period, because in more and more countries democracy has taken root, and because the system for governing world trade that was put into place after the Second World War succeeded beyond anyone's wildest dreams. Today, after the successful conclusion of the eighth round of negotiations under the General Agreement on Tariffs and Trade, which has served (somewhat awkwardly) as the world's trading charter, and the launching of the new **World Trade Organization “WTO”**, we are looking for ways to assure the same kind of growth and prosperity for the next century. In one form or another, competition policy will surely play an important role in this process. By the same token, antitrust or competition policy is not the only tool that will be needed as we work to keep markets open, free, and competitive in the 21st century. In the time available this morning, I would like to take a closer look at the roles antitrust might play in the post-Uruguay Round world. After a brief look backward, at earlier efforts to incorporate antitrust principles into the rules for world trade, I look in some detail at the various options that are available to us that would, to lesser or greater degrees, “internationalize” antitrust law in global markets³⁹⁸.

The original GATT dealt principally with direct barriers to trade, such as tariffs and quotas, although even it had modest provisions that addressed nontariff barriers, such as discriminatory customs valuation procedures, government procurement practices, and subsidies. The GATT also had a dispute resolution procedure, under which countries could complain either about actual GATT violations on the part of other Contracting Parties, or any other measures that would “nullify or impair” benefits that had been given to the complaining party in GATT negotiations³⁹⁹. Encouraged by their success, the Contracting Parties undertook successive additional rounds of tariff negotiations

³⁹⁸ Evolution of Rules for the Market: “A brief look at the history of the development of rules for the global marketplace reveals a process something like peeling an onion. Immediately after the conclusion of World War II, efforts began to construct an open, liberal world trading system, which would have had three pillars: an International Monetary Fund, to govern world financial policy; an International Bank for Reconstruction and Development (or the World Bank), for economic development in both the war-devastated countries and the Third World; and an International Trade Organization, to govern all aspects of world trade, including not only classical governmental trade restrictions such as tariffs, but also subjects such as investment policy and competition policy”.

³⁹⁹ The initial tariff reductions that were achieved in the 1947 GATT negotiations sent an important signal to a world that still recalled the disaster of the 1930 Smoot-Hawley Tariff Act and the world-wide recession that followed it.

designed to achieve ever-greater cuts⁴⁰⁰. What distinguished the Kennedy Round was not the absence of tariff negotiations, but efforts to reduce tariffs, realization that barriers to world trade apart from tariffs needed serious attention⁴⁰¹. Attention to non-tariff barriers to trade accelerated during the Tokyo Round of negotiations, which concluded in 1979, and these issues took center stage in the Uruguay Round. Going further, the Uruguay Round negotiators took on the extraordinarily difficult issues of agricultural trade, trade-related investment measures, and trade-related intellectual property rules. It is to their great credit that the Round concluded with agreements on all these topics, and to the great credit of the President and the Congress that the Uruguay Round implementing legislation was passed and signed into law last December 8th.

Each step along this road from high tariffs to lower tariffs, from tariffs in any form to other direct trade restrictions (such as quotas), from direct restrictions to the innumerable non-tariff barriers, and finally to government policies that affect the international trading system (such as intellectual property rules and investment regimes) -- has had one thing in common. Each one has dealt with governmental rules and regulations that are subject to negotiation by governments and that can be monitored.

As these have been addressed, however, it has become apparent that private restrictions can also have an important effect on the openness of the international trading system. And one natural place to look for rules relating to private restraints of trade is the antitrust laws, which are designed to assure that markets operate competitively⁴⁰². *The question for today is what, if anything, do antitrust rules have to contribute to the problem of private restraints affecting international trade?*

The effect on the global trading environment, over the medium to long term, will be to create a strong basis for efficient transactions and arrangements, open competitive opportunity, and global prosperity.

I will describe five different approaches that have been advanced in from my perspective:

⁴⁰⁰ This process continued until the so-called Kennedy Round of negotiations, which lasted from 1962 through 1967

⁴⁰¹ So, for example, the Kennedy Round resulted in a more elaborate Anti-Dumping Code than had ever been adopted, which attempted to clarify the rules with respect to this type of unfair trade practice. (The Congress of the United States never approved this Code.)

⁴⁰² Anne Bingaman (Assistant Attorney General) has made clear: "antitrust law right now is being enforced in the United States with full awareness of the relevance of international competition. We define global, regional, hemispheric, or North American markets when the evidence shows that they exist. Our jurisdiction extends, according to the 1982 Foreign Trade Antitrust Improvements Act, to restraints overseas that have a "direct, substantial, and reasonably foreseeable effect" on U.S. import or domestic commerce, or on the export commerce of U.S. exporters.

The first option for achieving this kind of improved global competitive regime is simple continued strong enforcement of the U.S. antitrust laws, whenever the necessary effects on U.S. commerce are present⁴⁰³. However, as my reference to our counterparts in other countries suggests, we cannot and should not be the only ones with this kind of commitment to strong enforcement. Countries that urge the “strict territoriality” approach toward antitrust enforcement are simply not in touch with this reality of today’s markets. If cooperation with the legitimate investigations of the countries where the effects of such conspiracies are felt is not forthcoming, the general cause of strong antitrust enforcement is harmed. A second option, which complements the first, focuses on bilateral cooperation efforts.

The United States and Canada have recently enjoyed successes in several cases that were made possible by the **Mutual Legal Assistance Treaty**⁴⁰⁴. Under the new legislation⁴⁰⁵ the Department of Justice and the Federal Trade Commission are authorized to enter into antitrust mutual assistance agreements with foreign antitrust agencies. This legislation is an important step toward the internationalization of antitrust enforcement, which we believe will contribute substantially to efforts to ensure a global market in which competition is free to operate.

⁴⁰³ As the draft Antitrust Enforcement Guidelines for International Operations issued last October 13th state, both the Department of Justice and the Federal Trade Commission are committed to appropriate enforcement when we have jurisdiction to do so, but also to take full account of considerations of international comity and the possibilities of cooperating with our counterpart agencies in other countries when that is an option. The U.S. antitrust laws are there to protect U.S. consumers, U.S. businesses, and U.S. markets, and we take our enforcement responsibilities very seriously.

⁴⁰⁴ Example the plastic dinnerware actions and the joint investigation in the thermal fax paper industry. These successes demonstrate that cooperation works, for the most serious kinds of antitrust violations -- those that are prosecuted criminally in both Canada and the United States. The United States also has a number of cooperation agreements that do not supersede existing laws on either side, and thus do not permit the sharing of confidential information, including those with Germany, Australia, and (again) Canada. These agreements are helpful both for more general exchanges of views on approaches to antitrust enforcement matters, and for preventing conflicts from arising when both parties have an interest in a particular case.

⁴⁰⁵ HR 4781 and S 2297, the International Antitrust Enforcement Assistance Act of 1994 (103rd Cong., 2d Sess.), with the sponsorship of the Administration, was introduced in both Houses of Congress, with the co-sponsorship in the Senate of then-Chairman Howard Metzenbaum and then-Ranking Member Senator Strom Thurmond of the Senate Judiciary Committee's Antitrust Subcommittee, along with Senators Hatch, Specter, Kennedy, Biden, Leahy, Simon, Simpson, and Grassley, and on the House side with the co-sponsorship of then-Chairman Jack Brooks and then-Ranking Minority Member Representative Hamilton Fish of the House Judiciary Committee's Antitrust Subcommittee. In just ten weeks, with overwhelming bi-partisan support and the strong support of leaders of the bar (including former Assistant Attorney General Jim Rill), the bill passed both Houses of Congress. President Clinton signed it into law on November 2, 1994.

The pioneers of this approach, of course, are the Europeans, who went far beyond regional efforts to harmonize competition law when they created the fully integrated market of the European Union⁴⁰⁶.

The OECD Competition Law and Policy Committee has been working for many years with the Trade Committee to find new and creative ways in which both competition law and trade law can mutually reinforce the ideal of the open and free multilateral trading system. The two committees “have sponsored joint roundtable discussions on topics such as *“cartels, barriers to access to markets, and predatory strategies”* that have been very illuminating”. They have revealed both the importance of these kinds of practices to international trade, but also the still- considerable gap in approach toward them under the competition or antitrust laws of the OECD member States. As I turn to my last option, the multilateral treatment of antitrust in the **World Trade Organization** (or WTO), is in certain ways the most ambitious, since it differs the most from the existing legal regime for antitrust law: **an international competition code that would somehow be related to the new World Trade Organization.**

From an economic perspective, policy should aim at safeguarding the competitive process so that firms are able to compete away any excess profits that may exist at any point in time. Trade economists believe that a liberal trade policy stance is the cheapest and most effective competition policy instrument available to a government. This is the case in particular for countries with highly concentrated industrial structures inherited from the past, as the resulting monopoly rents may be a major drag on the economy. As the magnitude of trade restrictions in most developing countries significantly exceeds those that are applied by high income nations, trade economists tend to argue that priority should continue to be given to reducing traditional trade barriers. The international experience indicates that reductions in trade barriers reduce “price-cost” “mark-ups”, especially among large firms. Although a free trade stance defined to

⁴⁰⁶ It is unlikely in the extreme that the United States will become party to a regional organization whose laws would take precedence over U.S. law, and which has its own fully independent set of courts, as is true in the EU. More realistically, the United States has already begun to work with its North American partners in the Competition Working Group established by the North American Free Trade Agreement (NAFTA), to bring about closer cooperation among the three antitrust agencies in North America. Mexico, as the newest Member Country of the OECD, has an impressive new competition law, which took effect in June 1993. The Federal Competition Agency in Mexico is up and running, under the outstanding leadership first of Dr. Santiago Levy, and more recently of Dr. Fernando Sanchez Ugarte. The strong competition rules in place in all three NAFTA countries, coupled with the cooperation and coordination that the Working Group will foster, will surely complement the free trade rules spelled out in the NAFTA agreement itself. This may be a promising model for the way in which competition rules can and should take their part in the trading system.

include the freedom for foreign firms to establish (*invest*) greatly reduces the scope for anticompetitive practices to be sustainable, it does not imply that the need for competition law disappears. Competition may be limited to local markets e.g., retail distribution and certain products may be produced by (*natural*) monopolies, by firms with global market power, or by firms where natural or ‘unnatural’ (*government-made*) barriers to entry restrict contestability. Recent research has confirmed an old insight that free entry into an industry depends on there being no scope for an existing dominant firm to “*punish*” a new entrant by cutting prices when it is attacked. Developing countries should seek to ensure that their competition laws and related regulations aim at safeguarding the competitive process. Where institutional enforcement capacity is limited, it is desirable for political structures to do all they can to make conditions as favorable as possible for pro-competitive behavior, which includes sustaining free trade and avoiding the creation of monopolies through perverse regulation or by privatization. This has led many specialists to recommend that developing countries pursue a broad-based competition policy defined to encompass all actions governments may take to promote competition, including trade liberalization, measures to facilitate domestic entry into industry and services, de-monopolization of sectors, and imposition of hard budget constraints on public enterprises.

What is the rationale for a multilateral agreement? For an international agreement to be beneficial, it must either offset an externality imposed by policies of other countries or help governments to overcome domestic political economy constraints that impede the adoption of welfare enhancing policy changes. Of course, in many countries institutional weaknesses may impede this, but that is a matter for technical and financial assistance that will not be solved by the adoption of international disciplines. The merger issue is clearly of interest to developing countries who may suffer from the increased market power and reduction in competition that result from a merger of two or more “global” firms. This also applied to the more general potential problem for developing countries of being confronted with export cartels and analogous arrangements that reduce national welfare (the sum of consumer and producer surplus). The political economy argument in favor of international competition disciplines is that external disciplines might prove helpful to overcome domestic opposition to the implementation of precompetitive policies. If competition law moves on to the WTO agenda, an important question for developing country policymakers is what this will

imply for their ability to adopt antitrust and competition policies that are in the national interest. Developing countries have not been at the center of the debate on trade and competition in the WTO. For the WTO dynamic to “work” one must start from the presumption that competition law and policy in developing countries has been or will be captured by domestic producer lobbies, and therefore does not focus on welfare maximization. The problem remains, however, that the WTO process is driven by export interests (market access), not national welfare considerations, and there is no assurance that the rules that will be proposed or agreed will be welfare enhancing. From a national welfare perspective, in principle there is a strong rationale for adopting and enforcing antitrust rules. The reason is that although an open trade and investment regime is a powerful device to ensure competition, it may not be adequate in the face of concerted efforts by firms to collude or to restrict entry. Moreover, if non-tradable sectors (e.g., distribution services) are controlled by domestic manufacturers and sheltered from foreign competition (through investment) imports may be subject to discrimination. Whether antitrust enforcement will improve national welfare depends on the substantive rules that are adopted and on their enforcement. The option of linking trade and competition policy disciplines is likely to be welfare enhancing for developing countries insofar as it reduces the threat of contingent protection, both in export markets and at home. *As mentioned previously, an increasing number of developing countries have adopted or are in the process of doing so antidumping mechanisms*⁴⁰⁷. *Thus, elimination or disciplining of antidumping is not only an issue of expanding exports, but also one of reducing costs for domestic users of imports in developing countries.* It is well established that the economic rationale for antidumping is almost nonexistent and that antidumping regimes can be very costly for the countries that implement them⁴⁰⁸. The welfare implications of expansion of non violation dispute settlement are also likely to be positive as this is an additional instrument to ensure that liberalization commitments will be implemented. Here again there is a domestic and foreign market access component, with the former being as if not more important than the latter. The reason is that non-violation can be a useful avenue to identify policies that restrict competition. In this respect non-violation is a “strong” form of competition advocacy and would complement any mandate that might be given to the WTO

⁴⁰⁷ McChesney, Fred and William Shughart (eds.). 1995. *The Causes and Consequences of Antitrust: The Public Choice Perspective*. Chicago: University of Chicago Press.

⁴⁰⁸ Finger, J. Michael (ed.). 1993. *Antidumping: How it Works and Who Gets Hurt*. Ann Arbor: University of Michigan Press.

secretariat to act as a competition advocate. Giving the WTO such an advocacy mandate would also be beneficial as it would generate information on the economic effects of government policies. More important, it could provide incentives for the establishment of domestic counterpart institutions. Domestic “**transparency institutions**” and competition agencies have long been promoted by trade policy and competition analysts who argue that public information on the costs and benefits of government policies is required in order to countervail rent-seeking activities⁴⁰⁹. Various criteria can be used to evaluate the desirability of alternative options for a WTO agreement in the area of competition law. From an economic perspective the key criterion is the likely impact on **national welfare** of WTO members.

⁴⁰⁹ Finger, J. Michael. 1982. “Incorporating the Gains from Trade into Policy,” *The World Economy*, 5:367-77.

NATIONAL WELFARE AS ECONOMIC EFFICIENCY

	Minimum substantive standard of antitrust law	Expand the scope to bring non-violation complaints	Introduce antitrust criteria in Antidumping	Give a greater transparency and discovery role of the WTO	Prohibit export cartels	Adopt procedural and due process norms
Positive impact			+	+	+	
Negative impact	-	-				
No impact						No impact

Competition Law and "National Welfare" in the area of WTO

The mission of the WTO is to increase the welfare (of its member countries)⁴¹⁰, by eliminating barriers to trade. It is clear that a close relation between trade (and barriers to trade) and competition policy exists. In a way, both policy regimes represent two sides of the same coin: whereas the role of international trade policy is to prevent the misbehavior of governments in the trade arena, international competition policy is aimed at addressing the misconduct of firms⁴¹¹. Since the WTO already has a leading role in issues relating to international trade, incorporating the new competition policy in the existing WTO framework can bolster the WTO as a charter for international economic regulation. By combining all (trade related) policy areas within one institution, this allows the coordination of the different policies in order to reach the optimal effect in terms of maximizing welfare. Besides this fundamental argument, there are also significant arguments from a practical point of view⁴¹². The WTO as an institution is well established and has the institutional framework to deal with disputes and enforce its rulings by sanctions. Through this set-up, the WTO can cope with the free-riders problem, the most common problem to institutions⁴¹³, which is rather unique among global institutions. In addition, another practical advantage of incorporating competition laws in the WTO is that most trading nations are already members of the WTO and would, in an ideal case, automatically be subject to the newly instituted competition law legislation. If a new institution is to be established, however, it could start with a small number of founding members which show the ‘proof of principle’ of the validity and benefits of such an institution and actively pursuing the required change in mindset in countries without an existing competition policy. Subsequently, the coverage of the new institution could be expanded through accession of new member countries.

Another point of critique is that international competition policy, by its nature, will concern itself with the structure of markets located within different countries. As such, each case would require the intensive investigations to understand the behavior and dynamics of local markets and private entities acting within these markets. Even if the

⁴¹⁰ The goal of the World Trade Organization is to “improve the welfare of the peoples of the member countries” by “helping trade flow smoothly, freely, fairly and predictable”. (Source: “The World Trade Organization... in brief.” Folder available on the WTO website)

⁴¹¹ Jacquemin and Lloyd, 1998

⁴¹² Lloyd, 1998

⁴¹³ Weinstein and Charnovitz, 2001

WTO has the power to obtain information from private entities, which it does not have now, it would require a huge change for the WTO to investigate all private actions in all relevant goods and service markets. A new institution, on the other hand, could address this issue and develop the proper tools and framework from the onset to tackle this daunting task. Use of non violation dispute settlement might be facilitated by seeking agreement that non enforcement of national antitrust law is a government “measure” and weakening the requirement that the measure was not “reasonably” foreseeable at the time the trade concessions were negotiated⁴¹⁴. While this may expand the willingness to invoke this procedure, a problem that remains is that the remedies that may be suggested by a WTO panel cannot affect the national application of antitrust law at best a complainant country will be offered compensation. The likelihood of disciplining antidumping through the introduction of competition law criteria an often proposed option in the literature⁴¹⁵ is not high, to say the least, even though it would be welfare improving⁴¹⁶. Association Agreements involving the EU as a partner reveal that a commitment to apply common disciplines in areas such as antitrust, state aids, and state monopolies, and to adopt the whole of the EU’s internal market rules is necessary to induce the EU to abolish the reach of antidumping on intra-regional trade. Disciplining antidumping is an issue for national constituencies to deal with; a necessary first step is to recognize that antidumping is straightforward protection⁴¹⁷.

Summing up, any agreement on international competition policy that goes beyond general procedural cooperation and introduction of transparency mechanisms is likely to have been plurilateral, at least initially. The divergence in interests between WTO members is large, and commitments to undertake any significant harmonization of substantive norms (*such as banning export cartels, the treatment of mergers, policy*

⁴¹⁴ Hindley, Brian. 1996. “Competition Law and the WTO: Alternative Structures for Agreement,” in Jagdish Bhagwati and Robert Hudec (eds.), *Fair Trade and Harmonization*. Cambridge: MIT Press.

⁴¹⁵ Hoekman, Bernard. 1997. “Competition Policy and the Global Trading System,” *The World Economy*, 20: 383-406.

⁴¹⁶ There are powerful lobbies that support the maintenance of antidumping. Moreover it is clear that the aim of anti-dumping is not the same as that of competition policy: one protects domestic firms (competitors), the other protects the competitive process. Recent free trade agreements illustrate the strength of the antidumping lobbies.

⁴¹⁷ Finger, J. Michael (ed.). 1993. *Antidumping*. Ann Arbor: University of Michigan Press – also Mavroidis, P. and D. Neven, (1999), Some reflections on extraterritoriality in international economic law. A law and economic analysis, *Mélanges offerts à Michel Waelbroeck*, Vol 1 International Law, Presse Universitaire de Bruxelles, Brussels

towards parallel imports, etc.) can be expected to require substantial cross issue linkages. But any deal involving a commitment by developing countries to adopt substantive competition rules would have to be accompanied by significant concessions from the demanders that they are not willing or able to offer on a general basis. The desirability of increased voluntary international cooperation in the area of competition law, which may be bilateral (*e.g. EU-US*) or plurilateral, must be distinguished from attempts to agree on binding multilateral disciplines. In principle, a commitment to more thorough policing by industrial countries of their own exporters, of global strategic alliances (*e.g. in telecoms*), and import-competing industries' use of instruments of contingent protection could have very general benefits for developing countries. Developing countries should use the opportunities offered by the WTO to implement a pro-active, broad-based competition policy stance as this is in their own interest, while seeking all the leverage they can to increase the contestability of world markets. Multilateral surveillance and scrutiny of domestic competition policy may help in this regard, as it will support domestic “**transparency**” activities that focus attention on the competitive conditions that prevail in the economy. If there is a move to negotiate on competition law at the WTO, the challenge for developed as well as developing countries is to pull off the same trick that lies at the heart of the GATT, namely harnessing the interests of competing producers to promote the adoption of policies that are welfare enhancing. How can the desire of firms for market access be made compatible with the need to ensure the markets they enter become and remain competitive, without imposing unreasonable administrative burdens?

The effect of a failure to recognize this ‘*community-based*’ approach was recently seen in the unsuccessful attempt to include competition law on the negotiation agenda for the WTO Doha round⁴¹⁸.

⁴¹⁸ Doha Work Programme, WTO Doc WT/GC/W/535 (2004) [1(g)] (Draft General Council Decision). The 2002 Annual Report of the Working Group on the Interaction between Trade and Competition Policy (‘WGTC’P’) at the WTO revealed considerable disagreement on nearly all the Doha issues: See *Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WTO Doc WT/WGTC’P/6 (2002).

Conclusion

The thesis reviews the growth in competition legislation and updates as much as enlarges our knowledge of countries that have enacted a comprehensive competition law. It does not assess the extent to which countries actually enforce their competition legislation but is concerned with the factors that determine a country's decision to enact. The analysis establishes that in particular during the nineties, a large number of countries have enacted a competition legislation, and this includes not as previously mainly developed nations but also developing countries, with a bias on lower middle income states.

The question we face today is not whether we would like to see the internationalization of antitrust law. That decision was made quite some time ago, by businesses and consumers alike: antitrust law must take its place in international markets. Instead, it is how best to go about making antitrust an effective tool to protect competition in international markets. It is clear that is general principle in the areas are "Harmonization" export cartels, "Convergence" mergers, and "Transparency" system.

Almost all of the strategies suggest an international procedure as it already exists within the framework of the WTO for trade policy conflicts for competition policy conflicts as well. An internationally coordinated control is mostly considered necessary for international challenge. For all other competition policy instruments and institutional forms there seem to be no clear tendency. The comparison between the reform strategies shows that there is a clear trade-off between gained advantage and acceptance on the one hand and loss of sovereignty and organisational modern welfare state on the other. The international community must decide between the preservation of "*national individuality sovereignty*" and a not distorted world trade, which means wealth and growth. Even though many are not aware of it, the decision was made long ago on the basis of the importance of "*less developed countries*" LDCs' development to the industrialized world and to the community of nations as effect of competition policy on their development goals, which will force on competition over the long or short term due to the unavoidable international conflicts.

Well-organised international competition would maximise not only global welfare, but economic freedom as well. The free access to all markets, as is the goal of the WTO, would then practically create itself.

The arguments at the beginning of this thesis as well as the leading strategies for reform all show that the current system of “world trade” WTO desperately needs to be supplemented by a regulated system of competition. An international competition authority would be the best means of providing for fair competition and optimal resource allocation.

Such an authority would come hand in hand with a loss in national sovereignty on the part of the States, and would require a relatively harmonized conception of competition. In addition, States must give up many instruments of competition policy which have the effect of competition like a new rules of “*Chamber of Commerce*” institution. These instruments are not currently used to advance their domestic economies, and one could expect national trade unions and industries not to offer resistance any more. The probability of the political creation of a comprehensive international system of competition with an independent competition authority does not seem especially high. The national competition authorities and *Chamber of Commerce* would be accessible for both foreign countries and companies. **Foreign and domestic companies would be treated equally, including with regard to dumping measures.**

According to the WTO model, the international community of States must agree on at least basic rules for competition policy that apply to all States, such as the most preferred nation principle and the national treatment. States that are not prepared to give up at least part of their sovereignty for better international market access, or that do not have their own national competition authority would not be made to put the code into force. Clear instructions for the national authorities on the commitment to cooperate would be necessary. The critical point of this minimal strategy is the “*implementation*” in the national governments and their NCA authorities, just as it is for the other described strategies “*Requiring non-discriminatory treatment and transparency of rules of law and of methodology of analysis*”. Since an international competition authority with its own sanction mechanisms impinges on national sovereignty to a high degree, the reformed mediation instruments from the **Uruguay Rounds** offer themselves as an option, to which all parties including private companies should be open.

Private parties do not have any redress measures of their own, and are therefore dependent upon their governments, and in the production of evidence dependent upon support through domestic and foreign competition authorities. Should insuperable State

resistance continue to persist despite this strategy, one could push the coming into force of such an agreement so far into the future that the politicians who have to decide on the signing of it would no longer have to fear resistance from interest groups and voters in their term of office.

Conversion Table

EE Treaty

Treaty of Amsterdam

Treaty of Lisbon

Competition Rules:

Art. 5 EEC	Art. 10 EC	Art. 4(3) TEU
Art. 85 EEC	Art. 81 EC	Art. 101 TFEU
Art. 86 EEC	Art. 82 EC	Art. 102 TFEU
Art. 90 EEC	Art. 86 EC	Art. 106 TFEU
Art. 3(f), later also art. 3(g) EEC	Art. 3(1)g EC	Internal Market Protocol n.27

State Aid Rules:

Artt. 92-94 EC	Artt. 87-89 EC	Artt. 107- 109 TFEU
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Abbreviations:

- EEC - European Economic Community
- EC - European Community
- TEU - Treaty of the European Union
- TFEU - Treaty on the Functioning of the European Union

List of abbreviations

CFR	Charter of Fundamental Rights of the European Union
Commission	European Commission
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
EU	European Union
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GE	General Electric
ICN	International Competition Network
M&A	Mergers and Acquisitions
NCA	National Competition Authority
OECD	Organization for Economic Cooperation and Development
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

Competition Index

Austria. Federal Competition Authority
Belgium. Ministère des Affaires économiques
Denmark. Konkurrencestyrelsen
Finland. Kilpailuvirasto
France. Conseil de la Concurrence
France. Direction générale de la concurrence, de la consommation et de la répression des fraudes
Germany. Bundeskartellamt
Germany. Monopolkommission
Hellenic Competition Authority
Ireland. Competition Authority
Italy. Autorità Garante della Concorrenza e del Mercato
Netherlands. Nederlandse Mededingingsautoriteit (NMa) (Netherlands Competition Authority)
Netherlands. Subsidies (Ministerie van Economische Zaken)
Portugal. Autoridade de concorrência
Spain. Dirección General de Defensa de la Competencia
Spain. Tribunal de Defensa de la Competencia
Sweden. Konkurrensverket: Swedish competition authority
United Kingdom. Competition Commission
United Kingdom. Office of Fair Trading
Bulgaria. Commission on Protection of Competition (CPC)
Bulgaria. Ministry of Finance
Bulgaria. Ministry of Finance - State aid department
Cyprus. Commission for the Protection of Competition (C.P.C)
Cyprus. Office of the Commissioner for Public Aid
Czech Republic. Office for the Protection of Economic Competition
Estonia. Konkurentsiamet (Estonian Competition Board)
Estonia. Ministry of Finance
Hungary. Gazdasági Versenyhivatal (Office of Economic Competition)

Latvia. Competition Council of Latvia
Latvia. State aid Surveillance Commission
Lithuania. Competition Council (Konkurencijos taryba)
Malta. Consumer and Competition Division, Ministry for Economics Services
Poland. Office of Competition and Consumer Protection
Romania. Competition Office (Oficiul Concurentei)
Slovakia. Antimonopoly Office
Slovenia. Ministry of Finance.
Slovenia. Office for Protection of Competition.
Turkey. Competition Authority (Rekabet Kuruma)
Albania. Ministria Ekonomise - Competition Department
Antimonopoly Committee of the Ukraine
Croatia Competition Act.
Iceland. Icelandic Competition Authority
Macedonia. The Former Yugoslav Republic of
Norway. Konkurransetilsynet (Norwegian Competition Authority)
Switzerland. Commission de la concurrence
Switzerland. Legislation sur la concurrence
Antitrust Division, Department of Justice (US)
The Antitrust Case Browser (US)
United States. Antitrust Washington
United States. Federal Trade Commission - Antitrust/Competition
Canada. Competition Bureau
Japan. Fair Trade Commission
Competition law and policy in OECD countries (Annual Reports)
International Competition Network
EFTA Surveillance Authority
OECD Competition Committee
OECD Round Tables
Organisation for Economic Co-operation and Development
World Trade Organisation

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