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WORK ON THE MODEL LAW ON COMPETITION: REVISED COMMENTARY ON THE RELATIONSHIP BETWEEN COMPETITION AUTHORITY AND REGULATORY BODIES, INCLUDING SECTORAL REGULATORS; AND REVISED COMMENTARY ON NOTIFICATION, INVESTIGATION AND PROHIBITION OF MERGERS AFFECTING CONCENTRATED MARKETS

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INTRODUCTION

1. It will be recalled that paragraph 11 of the resolution adopted by the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (TD/RBP/CONF.5/16) requested UNCTAD to prepare a new chapter of the model law on the relationship between a competition authority and regulatory bodies, including sectoral regulators. A first document (TD/B/COM.2/CLP/23) containing proposals for a new article, together with commentaries suggesting how to promote competition in the public utilities and infrastructure industries, was submitted to the Intergovernmental Group of Experts on Competition Law and Policy at its third session (2–4 July 2001). This note also suggested how to promote efficiencies through the development of appropriate competition law and institutions, how to protect general interest within industries opened to competition, and how to organize the relationship between competition agencies and regulatory agencies.

2. The present note is an attempt to revise document TD/B/COM.2/CLP/23 on the basis of comments made by member States at the third session of the Group or sent in writing by 31 January 2002, in particular with a view to strengthening the protection of general interest within industries opened to competition, and to organizing the relationships between competition agencies and regulatory agencies more specifically with respect to local or regional governments.

3. The proposals are presented here as a new Article 5 of the Model Law and commentaries, which consolidate elements presently dispersed throughout diverse articles of the Model Law. Article 5 also takes into account a number of peculiarities of less mature market structures and focuses primarily on how to increase the efficiencies of regulated industries of developing countries and countries in transition.

4. The “Possible elements for Article 5” and their commentary “Notification, investigation and prohibition of mergers affecting concentrated markets” as contained in the Model Law now become possible elements for Article 6 and its commentary. The commentary has been revised to take into account recent developments in this field.

5. The Experts are invited to comment on the changes, which will be introduced in the revised version of the Model Law, to be finalized during 2003.

I. POSSIBLE ELEMENTS FOR ARTICLE 5: THE RELATIONSHIP BETWEEN COMPETITION POLICY AND REGULATION

A. Advocacy role of competition authorities with regard to regulation and regulatory reform

6. An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies with a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption. This should in particular be the case if the regulation limits the independence and liberty of action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens.

7. In particular, regulatory barriers to competition incorporated in the economic and administrative regulation should be assessed by competition authorities from an economic perspective, including for general-interest reasons.

B. Definition of regulation

8. The term regulation refers to the various instruments by which Governments impose requirements on enterprises and citizens. It thus embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which Governments have delegated regulatory powers.

C. Definition of regulatory barriers to competition

9. As differentiated from structural and strategic barriers to entry, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies, and by non-governmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licences and other permits for starting business operations.

D. Protection of general interest

10. Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms can be considered by Governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.

II. COMMENTARY FOR ARTICLE 5

11. The broad and commonly admitted purpose of competition policy is to minimize the economic inefficiencies created in markets by anti-competitive behaviours.[1] Competition policy consists not only of competition law enforcement, but also of trade liberalization and deregulation in the interest of consumers' welfare. Competition law and policy are intended to regulate non-competitive behaviours by firms, whereas deregulation is aimed at minimizing market-distorting government intervention. The proposal for Article 5 sets out four elements of definitions respectively regarding the advocacy role of competition agencies, the definitions of regulation and regulatory barriers to competition and the protection of general interest.

A. Advocacy role of competition authorities with regard to regulation and regulatory reform

> *An economic and administrative regulation issued by executive authorities, local self-government bodies or bodies with a governmental delegation, especially when such a regulation relates to sectors operated by infrastructure industries, should be subjected to a transparent review process by competition authorities prior to its adoption if it limits the independence and liberty of action of economic agents and/or if it creates discriminatory or, on the contrary, favourable conditions for the activity of particular firms – public or private – and/or if it results or may result in a restriction of competition and/or infringement of the interests of firms or citizens.*
>
> *In particular, regulatory barriers to competition incorporated in the economic and administrative regulation should be assessed by competition authorities from an economic perspective, including for general-interest reasons.*

12. Elements related to the proposed article raise two issues, which need to be treated separately.

1. Why do Governments pay particular attention to the performance of certain economic activities?

13. Governments tend to develop extensive and comprehensive sectoral rules applying in particular to major infrastructure service industries. Such industries, also referred to as "public utilities" or "public services", include activities access to which is indispensable for the development of modern ways of life or which provide essential inputs to many parts of a nation's economy, such as electricity, gas, water production and distribution, solid waste management, telecommunications, cable television, mail distribution and public transportation (by air, road or rail).[2]

14. There are four main reasons why Governments, both in developed and developing countries and in countries in transition, attach great importance to infrastructure service

industries. Governmental prescription of their functioning distinguishes them in four ways from common and traditionally competitive sectors of the economy: by control of entry, price fixing or capping, and the quality and conditions of service prescriptions (see box 1).

15. The first reason is that these industries are fundamental to the performance of the economy as providers of inputs for all other sectors of activity. The conditions of their operations and efficiency may affect not only the general productivity and competitiveness of a country but also its social order and even political stability if consumers express general dissatisfaction. It follows from the essential nature of these industries that they often have public or universal service obligations, which means that the firms – public or private – are required to provide a particular service even when it is not economic for them to do so. Thus, infrastructure service industries may not be competitive where there are regulatory restraints on competition in the activity concerned. Restraints are imposed on competition for various reasons, including, most commonly, to permit a firm to find a source of revenue to fund mandated non-commercial activities and services. For example, a national postal operator often has protection from competition with regard to standard letter mail, a protection justified on the grounds that it is necessary in order to protect the cross-subsidization of letter delivery in high-cost areas such as rural areas. The result is that reform of those sectors which are essential to a country's activity and are protected from competition for social and political reasons is often highly politicized.

16. The second reason is that the activities of these infrastructure service industries can be performed only by a very small number of operators at the national level; in other words, most government entities, such as local government units (e.g. cities, provinces, federated states), are faced with a very strong and concentrated bargaining power. In many countries central or local governments have decided to assume direct ownership of infrastructure service industries.

17. The third reason, which has a bearing on regulation and competition, is that these industries often involve considerable barriers to entry or exit, such as sunk costs which are unrecoverable after the fact. In particular, the sequence of operations is of importance with respect to governmental regulation: often, initial major investments have to be made in a situation where investors commit to the market and second rents or revenues will arrive over a period of several years. This means that, to attract voluntary private investment, the framers of the regulatory regime have to make it credible and predictable. This concern for credibility is often shared by treasury policy-makers. Creating credibility and predictability is one of the basic tasks of a regulator.

18. The fourth and final reason why Governments attach great importance to infrastructure service industries derives from supply, costs and demand effects, owing to the fact that such a sector is not made up of a single homogeneous activity but includes a number of separate components. Some parts of these components cannot sustain competition, generally because of the presence of economies of scale., (i.e. situations in which a single firm in a defined area can meet market demand more efficiently than any combination of two or more firms). These components which cannot sustain competition usually require the use of a privilege, or exclusive right of use of some public good which is owned by the

Government and has to be given or lent by it. An infrastructure service industry may also not be able to sustain competition owing to the presence of “network effects” or “demand-side economies of scale” – that is, when the demand for a firm’s services increases with the consumption of those services.[3]

Box 1

Competition law and policy and regulation

Basically, competition law and policy and regulation aim to defend the public interest against monopoly power. While both provide a Government with tools to fulfil this objective, they vary in scope and types of intervention. Competition law and regulation are not identical. There are four ways in which competition law and policy and regulatory problems can interact:

- *Regulation can contradict competition policy*. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price coordination, prevented advertising or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than necessary to achieve the regulatory goals. Modification or suppression of these regulations compels affected firms to change their habits and expectations.
- *Regulation can replace competition policy*. In natural monopolies, regulation may try to control market power directly, by setting prices (price caps) and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, (i.e. that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power).
- *Regulation can reproduce competition law and policy*. Coordination and abuse in an industry may be prevented by regulation and regulators as well as by competition law and policy. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. However, different regulators may apply different standards, and changes or differences in regulatory institutions may reveal that policies which seemingly duplicate each other have led to different practical outcomes.
- *Regulation can use competing institutions’ methods.* Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Coordination may be necessary in order to ensure that these instruments work as intended in the context of competition law requirements.

Sources: OECD, *Report on Regulatory Reform,* Paris, 1997; European Commission.

19. From the particular perspective of developing countries, it should be stressed that market structure often raises serious concerns about enhancing efficiency through regulatory reform and opening regulated industries to competition.

20. For instance, it has been recently and repeatedly observed that the process of utilities reform in South America has not considered market evaluation prior to privatization of public assets in infrastructure industries. The regulated and unregulated activities constituting the market structure were generally undifferentiated, because of earlier government intervention.[4] Asian developing countries are having a similar experience as regulatory review processes are initiated. For instance, a representative of Papua New Guinea recently stressed the fact that regulatory restrictions imposed by government regulation or government ownership are an impediment to competition. In Papua New Guinea, the existing regulations were put in place when there was greater confidence in them, but less appreciation of their costs:

> "Examples include legislated monopolies for public utilities, statutory marketing arrangements for many agricultural products and licensing arrangements for various occupations and professions. The Central Agencies Working Group will carry out a review of barriers to entry... Structural reforms may be required to dismantle excessive market power that may impede the introduction of effective competition. In order for privatization to achieve its objective of improved efficiency, it is important for these structural reforms to be carried out first. This will require structural separation in two areas: the separation of regulatory and commercial functions and the separation of natural monopolies and potentially competitive activities".[5]

21. The examples given by the official from Papua New Guinea show that developing countries' concerns are indeed very close to those of developed countries. Efficient regulation in developed countries traditionally distinguishes between network segments, which are non-potentially competitive, and segments of production and retailing, which are generally considered to be natural monopolies and non-potentially competitive. Potentially competitive segments comprise, for instance, long distance in telecommunications, generation in electricity and transportation in railways. Non-potentially competitive segments include the transmission grid in electricity, the tracks in railways and the local loop in telecommunications; they often remain regulated after competition of the regulatory reform process. It is clear that the lack of effective separation gives market power to firms operating network infrastructures. Such power, exercised at the expense of other operators and consumers, should be kept under control.

2. What should be the role of competition agencies with respect to regulation?

22. From a market structure point of view, the competition authorities should be consulted when a process of regulatory reform is being undertaken as part of a privatization program. They should be given legal powers to impose divestiture measures on existing monopolies or to control or prohibit mergers that undermine competitive market structures. If they are not given such powers – for instance, because of lack of human resources – it should be made possible for them to suggest divestiture measures or merger controls to an executive authority those powers.[6] Nevertheless, it is clear that the dominant pattern of distribution of roles between competition agencies and regulatory agencies is rarely one in which competition authorities simply replace regulatory agencies.

23. However, it is interesting to look at the present relationship between competition authorities and sectoral regulators in most member countries of the Organisation for Economic Co-operation and Development (OECD). At a recent roundtable on the relationships between competition authorities and regulatory authorities, organized by the OECD Committee on Competition Law and Policy, attempts were made to define the main policy questions raised by the relationships between regulators and competition authorities.[7] A study of these relationships shows that the competitive process can be appropriately stimulated by the intervention of competition authorities when firms in a regulated sector abuse their privileges to the detriment of consumer interests and the efficiency of firms that

use their regulated services. The experience of deregulation in the most developed countries gives rise to four main observations:

- In OECD countries there are specific regulatory regimes in many sectors; they are particularly common in sectors such as telecommunications, electricity, railways and natural gas. However, such regimes are also found in radio and television broadcasting, civil aviation, cable television, ocean shipping, pharmaceuticals, radioactive minerals, alcoholic beverages, insurance, banking, intercity bus transportation and trucking, and water distribution, as well as in numerous other sectors.

- There is no unique model for the relationship between sector-specific regulators and competition authorities either across countries or sometimes even within a country. However, one particular model – the mandate-driven division of labour approach – appears to be somewhat more common than others. It is clear, at least, that sectoral regulators should be separated from regulated firms or entities and should assume obligations regarding accountability and independence from the executive branch of government. Also, institutional changes should be effected in order to guarantee their independence. As was recently and repeatedly pointed out by officials from the Republic of Korea, since sector-specific enforcement of competition law may be characterized by inconsistencies, regulators should first consult and coordinate with competition authorities.[8]

- In countries that deregulated somewhat earlier than others, a rather pragmatic approach seems to have emerged which differs empirically from one sector to another. Countries liberalizing somewhat later appear to have followed a more systematic approach.

- There is a good deal of variation across countries in the terminology used. Some countries make a distinction between technical regulation, economic regulation and competition law enforcement. But sometimes, “competition policy” seems to be included in “economic regulation”. In some OECD countries, there also appears to be a tendency to use “economic regulation” and “technical regulation” interchangeably.

B. Definition of regulation

> *The term “regulation” refers to the various instruments by which Governments impose requirements on enterprises and citizens. It thus embraces laws, formal and informal orders, administrative guidance and subordinate rules issued by all levels of government, as well as rules issued by non-governmental or professional self-regulatory bodies to which Governments have delegated regulatory powers.*

24. Regulation can pursue different types of objectives. Economic regulation, social regulation and administrative regulation are among the three main categories of government intervention which may have a bearing on the market. *Economic regulation* includes government requirements which intervene directly in market decisions, such as pricing,

competition, and market entry or exit. *Social regulation* includes government requirements which protect public interests such as health, safety, the environment and social cohesion. *Administrative regulation* includes paperwork and formalities through which Governments collect information and intervene in individual economic decisions. In designing their regulation principles, competition authorities should be given opportunities to assess the potential effects of the envisioned regulation in light of efficiency principles (see box 2).

Box 2

Efficient regulation principles for the removal of regulatory barriers to competition

Efficient regulation principles should be built into domestic regulatory processes for social and economic regulations as well as administrative formalities. They are particularly useful with regard to regional economic integration. Such principles include:

Non-discrimination, especially with respect to standards. There should be equality of competitive opportunities between like products and services, irrespective of their countries of origin. Performance-based rather than design standards should be used as the basis of technical regulation; taxes or tradable permits should be used in place of regulation. When appropriate and feasible, internationally harmonized measures should be used as the basis of domestic regulations.

Recognition of the equivalence of other countries' regulatory measures. When internationally harmonized measures are not possible, necessary or desirable, the negative effects on cross-country markets caused by disparities in regulation and duplicative conformity assessment systems can be reduced by recognizing the equivalence of trading partners' regulatory measures or the results of conformity assessment carried out in other countries.

Source: OECD, *Report on Regulatory Reform,* Paris, 1997.

C. Definition of regulatory barriers to competition

As differentiated from structural and strategic barriers to entry, regulatory barriers to entry result from acts issued or acts performed by governmental executive authorities, by local self-government bodies, and by non-governmental or self-regulatory bodies to which Governments have delegated regulatory powers. They include administrative barriers to entry into a market, exclusive rights, certificates, licences and other permits for starting business operations.

25. Regulatory barriers to competition consist of measures taken by state administrations (e.g. central or federal government, local government) or by bodies with a governmental delegation, which prevent or hamper effective competition and which in the final analysis lead to a loss in welfare. Such measures are to be found in activities as diverse as telecommunications, financial services (banking and insurance), professional business services (accounting, legal advisement, architects' services, etc.), and the energy sector (electricity, gas), as is evidenced by an abundant literature.[9] These measures, which can negatively affect market entry, market exit and market operation, take a wide variety of forms, such as:

- Restraints on competition (i.e. by introducing uncommon norms and standards amounting to barriers to market entry or by preventing foreign firms from competing in national market);
- Elimination or exclusion from competition through exemption of certain activities from the scope and coverage of competition laws;[10] and
- The creation of distortions to competition, such as artificial executive interventions changing the competitive positions of certain firms (through arbitrary public procurement policy decisions, for instance).

26. Regulatory barriers to competition not only affect market entry but also can prevent market exit from happening – for instance, through public subsidization or the granting or prolongation of monopoly rights. In addition, they can make it harder for resources to be allocated from one sector or market segment to another. They can be considered barriers to mobility which prevent resources from being transferred into more efficient sectors or segments, and which in the end will reduce allocative efficiency.

D. Protection of general interest

Irrespective of their nature and of their relation to the market, some service activities performed by private or government-owned firms can be considered by Governments to be of general interest. Accordingly, the providers of services of general interest can be subject to specific obligations, such as guaranteeing universal access to various types of quality services at affordable prices. These obligations, which belong to the area of social and economic regulation, should be set out in a transparent manner.

27. In the design of their regulatory schemes, several countries have defined a necessity of protecting a general or public "interest", a responsibility which is generally delegated to different types of public authorities or entities. Among these entities, the units of local government can be involved in market functioning in several respects. Therefore, the interaction of regulation and competition should include an analysis of the role of local governments.[11]

1. How does the protection of "general interest" relate to regulation?

28. The protection of general interest is generally the most frequent feature sustaining regulation. Where it has been recognized that free competition cannot or does not provide sufficient guarantee of the quality, regularity, affordability, territorial coverage and security of services of general interest, generally performed by infrastructure service industries, Governments should be allowed to impose non-discriminatory and transparent regulations on all operators in the market, compelling them to meet certain standards for as long as they are operating in the market. Such a competition-friendly way of protecting services of general

economic interest has been the subject of in-depth research and study in the European Union, in connection with legislation designed to liberalize various sectors of the economy.[12]

2. Regulation, competition and local governments

29. In States characterized by a strong federal division of powers between the Federal State Authorities and Federated States or Regional Authorities, local regulations are often invoked by operators as a defence shielding them from the enforceability of competition law. Firms may seek special regulations or even subsidies from local state authorities. In the regulatory reform exercise which was conducted in several OECD member States, including Mexico and Spain, it was often stressed that such local regulations impeding interstate trade are indeed submitted to the control of federal competition authorities.[13] Under certain conditions, the European Union Treaty submits both enterprises with special and/or exclusive rights and state and regional or local subsidies to the monitoring control of the European Union Commission in charge of the enforcement of competition rules. This system is worth studying because it addresses several issues pertaining to regional economic integration and the interaction of regulation and competition (see box 3).

Box 3

**The submission of regional authorities to competition review:
the European Union toolkit**

The European Union is a recent creation incorporated in the Maastricht Treaty of February 7, 1992. But the major European competition rules provisions were created much longer ago by the Treaty of Rome of March 25, 1957, creating the European Economic Community, now called the European Community, which is a constituent part of the European Union. The Maastricht Treaty has been modified by the Treaty of Amsterdam of October 2, 1997, which resulted in the recent renumbering of all the original provisions of the Treaty of Rome, including those related to competition.

In 1957, the Constitution of the European Community (EC), the Treaty of Rome, stated in its Article 3(g) that the Community had to create and maintain "a system ensuring that competition in the common market is not distorted". Furthermore, the explicit reference to competition rules in the EC Constitution has had a significant and long-standing effect on the decision-making process of the Commission, the Court of First Instance (the Appeal Tribunal for decisions of the Commission, notably in the field of competition law enforcement) and the European Court of Justice (the European Supreme Court), which have often interpreted the competition rules from that starting point of Article 3(g) in the light of all provisions of the European Treaty.

Today, the competition rules of the European Union are thus contained in the provisions of Articles 31 (ex-Article 37), 49 to 55 (ex-Articles 59 to 66) and 81 to 90 (ex-Articles 85 to 94). And we will see later that, as far as regulation and deregulation are concerned, one should especially pay careful attention to Articles 86 and 95.

Market integration principles

Articles 31 and 49 to 55 are often forgotten in the presentation of the competition principles of the European Union, market integration must be considered as complementary to the actual provisions on competition included in Articles 81 to 90 to create a competitive environment within the European Single Market. Articles 31 and 49 to 55 relate respectively to national monopoly regulations and to the free movement of services and national regulations which restrain the free movement of these services: a manufacturing or infrastructure services firm may find that it cannot compete in a relevant market for numerous reasons quite apart from the actual anti-competitive behaviour of private or public corporations – for instance, because of a national regulation which discriminates against non-national operators or closes the national market to them. Furthermore, since public procurement represents as much as about 11 per cent of the European Union's GDP, upon the initiative of the Commission, the Council of Ministers of the Union has also designed a series of "directives" aimed at the public procurement policies of Member States which may discriminate against firms established in other member States and designed to open up these procurement policies to pan-European competitive tendering.

Articles 81 to 90 of the Treaty of Rome are better known than most of the other Articles of that treaty, Articles 81 and 82 contain the antitrust provisions respectively prohibiting anti-competitive agreements and abuses of a dominant position and which are the European equivalent of Sections 1 and 2 of the United States Sherman Act. These Articles 81 and 82 are chiefly applied to anti-competitive behaviours of private firms.

Infrastructure regulation

As far as the relationship between competition policy and sectoral regulation is concerned, Article 82 enforced in connection with Article 86 has been used to tackle anti-competitive behaviours of firms – both privately and publicly owned – which operate in infrastructure service industries. Article 86 can be seen as a key instrument for strengthening the single market integration in the infrastructure service industries. Within the European Union, the model of regulation is chiefly governed by the provisions of Article 86 (ex-Article 90) of the modified Treaty of Rome, which defines the principle of liberalization. Article 86 is enforced by the

Commission. Its provisions extend the enforcement of European Union competition law to public undertakings as well as undertakings enjoying special or exclusive rights (i.e. enjoying a monopoly status to perform a service activity in the "general economic interest"): for these firms, be they public or private, member States may not give rights or maintain regulations ("measures" in the European Union legal formulation) which could impede the competition rules vested in the Treaty. The purpose of the competition-based Article 86 principle is to strengthen European economic integration by removing the rights granted to monopolies as long as this removal does not conflict with commitments by member States and European Community to services of general economic interest.

Therefore, the European Union Commission in charge of enforcing the Treaty has adopted in the last decade a number of decisions and regulations removing legal entry barriers across member States for infrastructure service industries while extending enforcement of competition rules to the firms operating in these sectors, as long as the general interests were not harmed.

To define what is meant by "general interest", the Commission has explained in its Guidelines of 1996 that this extension of competition rules would not run against obligations of public service that may be imposed by the public authorities on the entities – public or private – that perform the services for the sake of protecting economic and social cohesion, the environment, the planning and promotion of consumer interests and land use.

Furthermore, the principle of opening to competition or "liberalization" rooted in Article 86 is complemented by the principle of "harmonization" which lies in the long and complex procedural Article 95 (ex-Article 100-A) of the Treaty. The provisions of Article 95 aim to bring together the Laws of the member States or, in other words, to "harmonize" these Laws by setting out procedures by which both the Commission and the Council of Ministers of the European Union can adopt "directives" to impose on member States the removal of barriers to the further construction and integration of the internal market.

More specifically, for infrastructure service industries, this principle of harmonization implies that the Commission can propose to the Council of Ministers the conditions by which member States will have to align or "harmonize" their sector-specific regulatory regimes to further integrate the European market. Whereas the enforcement of Article 86 seems to be mainly reacting to individual behaviours of States or firms enjoying special or exclusive rights on a case-by-case basis, the enforcement of Article 95 is more proactive and aimed at organizing a harmonized framework of regulatory rules to ensure businesses and investors security within the Internal Market as well as to effectively unify the single market for firms operating in the field of infrastructure service industries.

Public subsidies

Finally, the fact that Articles 88 to 90 provide the Commission with powers to deal with State Aids that could distort competition in the European Single Market should be stressed. It is a unique feature in the world of competition agencies and regulators to provide a body with such a powerful tool to prohibit States from distorting the rule of competition. Even if exceptions are acceptable, they are publicly and transparently monitored by the Commission, which has developed important case law on the matter.

Article 88(1) provides that "save as otherwise provided in this Treaty, any aid granted by a member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between member States, be incompatible with the Common Market". But Article 88(3) nevertheless provides the Commission with the discretion to analyse and authorize other aids – for instance, to promote economic development of areas where the standard of living is abnormally low or where there is serious unemployment, or to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, just as Article 88(2) specifies that aids having a social character granted to individual consumers and aids to remedy damage caused by national disasters or exceptional circumstances are compatible with the Common Market.

With regard to State aids, Article 89 is also of interest because it gives insight into procedural matters which will be discussed in some detail in the following section. Under this Article, the Commission may adopt a decision – published in the official journal of the European Union – that a State Aid which is incompatible with the Common Market has to be abolished or altered. If the member State does not comply with this decision within the stated time, the Commission or another member State may take the matter to the European Court of Justice, following a simplified and accelerated procedure. Then repayments of unduly attributed aids can be demanded. Furthermore, prior to the attribution of aids, plans to grant or alter aids must be reported to the Commission in sufficient time to enable it to submit its comments, and aids may not be implemented until the Commission has reached a decision. In other words, the Treaty of Rome has had to organize a substantial transfer of sovereignty to solve the problems raised by direct state involvement in the economy, and the entry into force in 1999 of a procedural regulation regarding State Aids has been an important achievement. This regulation codifies the procedural rules and makes them transparent, thereby increasing legal certainty. The Commission can really force member States to require interim recovery of illegally granted aid. It also sets time limits for State Aid decisions. Other improvements are being prepared such as block exemption regulations, a public register and a scoreboard that will trace the performance of each member State in the field of State Aids, thus adding peer pressure to the legal enforcement instruments.

Source: European Union Commission.

III. POSSIBLE ELEMENTS FOR ARTICLE 6: NOTIFICATION, INVESTIGATION AND PROHIBITION OF MERGERS AFFECTING CONCENTRATED MARKETS

A. Notification

30. Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature, should be notified when:

(a) At least one of the enterprises is established within the country; and

(b) The resulting market share in the country, or any substantial part of it, relating to any product or service, is likely to create market power, especially in industries where there is a high degree of market concentration, where there are barriers to entry and where there is a lack of substitutes for a product supplied by firms whose conduct is under scrutiny.

B. Prohibition

31. Mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, should be prohibited when:

(a) The proposed transaction substantially increases the ability to exercise market power (e.g. to enable a firm or group of firms acting jointly to profitably maintain prices above competitive levels for a significant period of time); and

(b) The resulting market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.

C. Investigation procedures

32. Provisions to allow investigation of mergers, takeovers, joint ventures or other acquisitions of control, including interlocking directorships, whether of a horizontal, vertical or conglomerate nature, which may harm competition could be set out in a regulation regarding concentrations.

33. In particular, no firm should, in the cases falling under the preceding subsections, effect a merger until the expiration of a specified waiting period from the date of the issuance of the receipt of the notification, unless the competition authority shortens the said period or extends it by an additional period of time not exceeding a specified number of days with the consent of the firms concerned, in accordance with the provisions of possible elements for Article 7 below. The authority could be empowered to demand documents and testimony

from the parties and from enterprises in the affected market or lines of commerce, with the parties losing additional time if their response is late.

34. If a full hearing before the competition authority or before a tribunal results in a finding against the transaction, acquisitions or mergers could be subject to being prevented or even undone whenever they are likely to lessen competition substantially in a line of commerce in the jurisdiction or in a significant part of the relevant market within the jurisdiction.

IV. COMMENTARY FOR ARTICLE 6

Mergers, takeovers, joint ventures, or other acquisitions of control,[14] *including interlocking directorships, whether of a horizontal, vertical, or conglomerate nature, should be notified when:*

(i) *At least one of the enterprises is established within the country; and*

(ii) *The resulting market share in the country, or any substantial part of it, relating to any product or service, will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.*

A. Definitions

35. Concentration of economic power occurs *inter alia* through mergers, takeovers, joint ventures and other acquisitions of control, such as interlocking directorates. A merger is a fusion between two or more enterprises whereby the identity of one or more is lost and the result is a single enterprise. The takeover of one enterprise by another usually involves the purchase of all or a sufficient amount of the shares of another enterprise to enable it to exercise control, and it may take place without the consent of the former. A joint venture involves the formation of a separate enterprise by two or more enterprises.

36. Such acquisitions of control might, in some cases, lead to a concentration of economic power which may be horizontal (for example, the acquisition of a competitor), vertical (for example, between enterprises at different stages of the manufacturing and distribution process), or conglomerate (involving different kinds of activities). In some cases such concentrations can be both horizontal and vertical, and the enterprises involved may originate in one or more countries. Box 4 sums up the main reasons for instituting merger control.

Box 4

Why institute merger control?

Some countries with smaller markets believe that merger control is unnecessary because they do not want to impede restructuring of firms trying to obtain a "critical mass" which would enable them to be competitive in world markets. Others believe that having a "national champion", even one abusing a monopoly position domestically, might allow them to be competitive abroad in third markets. Two objections can be made to these views. First, it is often the case that monopolies enjoy their "monopoly rent" without becoming more competitive abroad, at the expense of domestic consumers and eventually of the development of the economy as a whole. Second, if the local market is open to competition from imports or FDI, the world market may be relevant for the merger control test, and the single domestic supplier might be authorized to merge anyway. It should also be noted that prohibiting a cartel while being unable to act against the cartel members if they merge is unwarranted. Moreover, by not having a merger control system, a host country deprives itself of the power to challenge foreign mergers and acquisitions which might have adverse effects on the national territory.

As a rule, merger control aims to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. Mergers that are in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition.

Depending on the degree of experience of the competition authorities, and varying from one jurisdiction to another, the test of the legality of a merger is derived from the laws governing dominance or restraints, or a separate test is developed and phrased in terms of measures of the actual or potential effect on competition and the competitive process. In earlier versions of the Model Law, merger control was thus included in the possible elements for articles on the abuse of a dominant position.

Most merger control systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for pre-expedited investigations, so that problems can be identified and resolved before the restructuring is actually undertaken when the merger is consummated.

Merger control analysis incorporates the following aspects:

- Relevant market definition in geographical or product terms;
- Characterization of the products that actually or potentially compete;
- Firms that might offer competition;
- The relative shares and strategic importance of those firms with respect to the product markets; and
- The likelihood of new entry and the existence of effective barriers to new entry.

B. Notification and criteria for notification

37. Many States, in controlling mergers and other forms of acquisition of control, have established a system of notification prior to consummation of mergers such as those existing in the United States and the European Union. Some countries have retained a mandatory system of notification after consummation of the merger and a few countries have submitted merger control only to a voluntary notification process. A list of the countries falling in these three categories can be found in a table in annex 2 of the Model Law on Competition (TD/RBP/CONF.5/7). For most countries, notification is mandatory only when the enterprises concerned have, or are likely to acquire, a certain level of concentration. Tables in annex 3 give detailed examples of thresholds triggering the mandatory (*ex ante* and *ex post*) or voluntary notification systems for a number of countries as well as information about the

whole merger control systems of selected developed and developing countries and countries in transition.

38. The main indicators used for examining such concentrations of economic power are market shares total annual turnover, the number of employees and total assets. Other factors, including the general market structure, the existing degree of market concentration, barriers to entry and the competitive position of other enterprises in the relevant market, as well as the advantages currently enjoyed and those to be gained by the acquisition, are also taken into account in assessing the effects of an acquisition. It is important to note that authorization schemes must not be interpreted so as to discourage firms from undertaking pro-competitive activities. In the European Union the obligation to notify regarding a concentration is based on the worldwide, Community-wide or national aggregate turnover of the concerned undertaking.[15]

39. For example, in 1989 the European Union adopted a comprehensive system of merger control through Regulation No. 4064/89. This regulation was extensively modified in 1997. The Merger Regulation is based on the principle of the “one-stop shop”: once a transaction has triggered the application of the European Competition Authority powers (e.g. the European Commission through its Directorate General for Competition), the national competition authorities of the member States are precluded from applying their own competition laws to the transaction (except in very limited circumstances). The application of this principle is aimed at strengthening the firms’ certainty with regard to international transactions (which otherwise could fall under the review of multiple national merger control authorities). This principle of the “one-stop shop” has been strengthened by the modification, in an attempt to reduce the need for the business community to make multiple applications for clearance with national merger regulators.

40. Until 1 March 1998, the regulation required notification regarding all mergers or acquisitions between firms with a combined turnover of 5 billion euro and each having a turnover of at least 250 million euro in the EC, unless each of the parties achieved more than two thirds of its aggregate Community-wide turnover in one and the same member State. Since 1 March 1998, the Merger Regulation has also applied to smaller concentrations which have a significant impact in at least three member States. The Regulation catches the concentrations where the aggregate Community-wide turnover of the parties exceeds 2.5 billion euro, and where the Community-wide turnover of each of at least two parties exceeds 100 million euro and where in each of at least three member States, the aggregate turnover of all the parties exceeds 100 million euro and in each of the three just-mentioned member States the turnover of each of at least two parties exceeds 25 million euro, unless each of the parties achieves more than two thirds of its aggregate Community-wide turnover in one and the same member State.

41. Such transactions have to be notified, and halted for up to four months if investigated. It is rare to see corporations failing to comply with the obligation to notify: for instance, in the European Union, over 10 years of practice of enforcement, only in 1998 did the Commission first imposed a financial penalty on an enterprise for failure to notify a concentration in time.[16] Mergers which do not reach the indicated threshold may still be

subject to control by the national authorities of the member States.[17] Also, there are exceptions which may, in any case, bring a merger back within a member State's ambit**.**[18]

C. Types of concentrations

42. Horizontal acquisitions are clearly the type of activity which contributes most directly to concentration of economic power and which is likely to lead to a dominant position of market power, thereby reducing or eliminating competition**.**[19] This is why restrictive business practices legislation in many developed and developing countries applies strict controls to the merging or integration of competitors. In fact, one of the primary purposes of anti-monopoly legislation has been to control the growth of monopoly power, which is often created as a direct result of integration of competitors into a single unit. Horizontal acquisitions of control are not limited to mergers but may also be effected through takeovers, joint ventures or interlocking directorates. Horizontal acquisition of control, even between small enterprises, while not necessarily adversely affecting competition in the market, may nonetheless create conditions which can trigger further concentration of economic power and oligopoly.

43. Where the acquisition of control occurs through the establishment of a joint venture, the first consideration should be to establish whether the agreement is of the type proscribed by the possible elements for article 3, and whether it involves market allocation arrangements or is likely to lead to allocation of sales and production.

44. Vertical acquisitions of control involve enterprises at different stages in the production and distribution process and may have a number of adverse effects. For example, a supplying enterprise which merges with or acquires a customer enterprise can extend its control over the market by foreclosing an actual or potential outlet for the products of its competitors. By acquiring a supplier, a customer can similarly limit its competitors access to supplies.

45. Conglomerate acquisitions which neither constitute the bringing together of competitors nor have a vertical connection (i.e. forms of diversification into totally unrelated fields) are more difficult to deal with, since it might appear that the structure of competition in relevant markets would not change. The most important element to be considered in this context is the additional financial strength which the arrangement will give to the parties concerned. A considerable increase in the financial strength of the combined enterprises could give them a wider scope of action and greater leverage vis-à-vis competitors or potential competitors of both the acquired and the acquiring enterprise, especially if one or both are in a dominant market position.[20]

46. In several recent cases within the European Union, conglomerate effects have been perceived as producing anti-competitive effects. The EC sees such anti-competitive effects as arising if a sequence of conditions is met, namely when mergers enable leveraging of market power, thus foreclosing rivals, thereby reducing consumer choice and, ultimately, leading to a loss of welfare. Therefore, as a starting point, the existence of market power is a necessary condition for the feasibility, the likelihood and the profitability of leveraging practices. The

complementary character of the product markets is also of significance. Complementary products or close substitutes, (e.g. in the spirits and drinks sectors) are more likely to create leveraging opportunities because these complementary products are sold to the same types of customers and are viewed by such customers as constituting an essential part of their requirements. Such was the case in 2001 in the much-advertised European Union Commission's decision regarding the GE/Honeywell merger. In this case, which remains unpublished as from June 2002, the European Union Commission considered that the GE/Honeywell merger would have united the dominant firm in one market and the leading (not necessarily dominant) supplier in another market. In particular, "the combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets."[21] This risk of a leveraging effect was also involved in the Tetra Laval/Sidel case, where the Commission also prohibited the contemplated merger. In this case, Tetra Laval, the acquiring firm, was found to hold a dominant position in the carton packaging systems market while Sidel, the purchased firm, was the leader in the side-market for PET (plastic) packaging systems. Although the two markets were found to be clearly separate, it appeared that they were also clearly closely related for the consumers of the relevant goods. The European Union Commission considered that the merged entity, by leveraging its dominance in the carton packaging systems market, could have been able to extend its dominant position to the PET packaging systems market, since the beverage industry will increasingly want to use both PET and cartons for the packaging of its products. Consequently, insofar as Tetra Laval has a dependent customer base often bound by long-term exclusive purchasing agreements, the merged entity would be in an ideal position to encourage the same customers to purchase not only carton packaging systems but also PET packaging systems. Based on the Commission's experiences of past practices in this industry, this would inevitably lead the new firm to attempt to carry out tying and bundling practices in its relationships with customers.[22]

47. Mergers, takeovers and other acquisitions of control involving transnational corporations should be subject to some kind of scrutiny in all countries where the corporation operates, since such acquisitions of control, irrespective of whether they take place solely within a country or abroad, might have direct or indirect effects on the operations of other units of the economic entity.

48. For example, in Australia, amending legislation to strengthen and improve the effectiveness of the Trade Practices Act of 1986 was introduced to cover overseas mergers of foreign corporations with subsidiaries in Australia. Subsection 50(A)(1) provides that the Tribunal may, on the application of the Minister, the Commission or any other person, declare that the person who, as a consequence of an acquisition outside Australia, obtains a controlling interest (defined by subsection 50(A)(8)) in one or more corporations will or will be likely to dominate a substantial market for goods or services in Australia, and that the acquisition will not result in a public benefit. The term "substantial market for goods and services" is used to make clear that the provision applies only to markets of a magnitude similar to that of those to which section 50 applies.

49. Interesting examples of action against international mergers taking place outside national borders but having effects in the national territory are provided by the Federal Cartel Office of Germany, in the Bayer/Firestone and Phillip Morris/Rothmans mergers cases.[23] There are several cases of restrictive business practices which have had effects in various countries, so that various national authorities have dealt with them. For instance, in 1998, 14 cases involving several European Union national authorities were notified to the European Commission. Particularly prominent are the Gillette/Wilkinson and Boeing/McDonnell Douglas mergers.[24]

50. An interlocking directorship is a situation where a person is a member of the board of directors of two or more enterprises or the representatives of two or more enterprises meet on the board of directors of one firm. This would include interlocking directorship among parent companies, a parent of one enterprise and a subsidiary of another parent or between subsidiaries of different parents. Generally, financial tie-ups and common ownership of stocks give rise to such situations.

51. Interlocking directorships can affect competition in a number of ways. They can lead to administrative control whereby decisions regarding investment and production can in effect lead to the formation of common strategies among enterprises regarding prices, market allocations and other concerted activities of the type discussed in Article 3. Interlocking directorates at the vertical level can result in vertical integration of activities, (e.g. between suppliers and customers) can discourage expansion into competitive areas, and can lead to reciprocal arrangements among them. Links between directorates of financial enterprises and non-financial enterprises can result in discriminatory conditions of financing for competitors and act as catalysts for vertical-horizontal or conglomerate acquisitions of control.[25]

52. It is important to note that interlocking directorship, if it is not effectively controlled, can be used as a means of circumventing any well-constructed and rigorously applied legislation in the area of restrictive business practices.[26] Therefore, States may wish to consider mandatory notification of interlocking directorates and prior approval thereof, irrespective of whether the interlocking is among competitors, vertical or conglomerate.

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1 Muhammad N, "Promoting Competition in Regulated Sectors or State Enterprises and the Role of Government on Monopoly Practices in Indonesia". Fifth APEC/PFP Course on Competition Policy, Bangkok, March 2001.

2 A recent OECD roundtable organized by the Committee on Competition Law and Policy has shown that specific regulatory regimes can also be found in radio and television broadcasting, cable television, civil aviation, ocean shipping, pharmaceuticals, banking, inter-city bus transportation and trucking, etc. See OECD, "The Relationship between Competition and Regulatory Authorities", *OECD Journal of Competition Law and Policy*, Paris, 1999, 1, (3), 169–246. See also the papers produced for a recent Inter-American Development Bank symposium held in Washington, DC, in April 2001, on competition policy issues in infrastructure industries.

3 These network effects, or "network externalities", often arise in information and communication technology industries. There are often advantages to being on a larger network or on a more widely adopted standard, as this increases the number of people with whom one can interact or conduct economic transactions. Provided there are additional costs involved in being connected to (or compatible with) two or more networks (or standards), consumers will pay more for being on a larger network. Markets which exhibit sizeable network externalities may only be able to sustain a single firm. These facts emerge from studies by the OECD

Committee on Competition Law and Policy in connection with the elaboration of an OECD recommendation on the separation of vertically integrated industries, which was drafted in 2000. See in particular OECD, *Structural Separation in Regulated Industries*, Paris, 2000.

4 See De Leon I, The Role of Competition Policy in the Regulation of Infrastructure Industries: Some Lessons from the Latin American Experience. Washington, DC, Inter-American Development Bank Working Paper, 2001.

5 Maru R G, "Promoting Competition in Regulated Sectors or State Enterprises in Papua New Guinea". Fifth APEC/PFP Course on Competition Policy, Bangkok, 2001.

6 It has recently been stressed that in the case of developing countries in South America, competition institutions very often do not have the power to impose penalties or to overrule the regulatory authorities' decision. "When immunity from competition law enforcement is provided for regulated firms, there is no assurance that they will be properly regulated in this respect, should a case arise, as regulatory agencies lack the expertise in handling competition regulation. In these cases, when conduct is detected, and no competition authority intervenes (as a result of the immunity from competition law enforcement), there are no legal powers granted to the regulatory agency to intervene." This is the case, for example, with Colombia's as well as Argentina's Regulatory Commission for Energy, "which detected abusive behaviour among gas producers, but could not intervene". De Leon, op. cit., p.3.

7 *Roundtable of the Committee on Competition Law and Policy on Competition Authorities and Regulation*, Paris, OECD, 1999 (see footnote 2).

8 Among many statements, see Chul Ho Ji, *Promotion of Competition in State-owned Enterprises (SOEs) and Regulated Sectors in Korea.* Fifth APEC/PFP Course on Competition Policy, Bangkok, 2001.

9 See in particular OECD, *Report on Regulatory Reform*, vols. 1 and 2, Paris, 1997. With regard to developing countries and countries in transition, see D. Zemanovicova, *Regulatory Barriers to Economic Competition in Transitional Countries,* Bratislava, 1998 (published under the Phare-ACE programme).

10 See, for instance, OECD, *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade*, Paris, 1996.

11 This paragraph and the following developments, including box 4 on the submission of local governments to competition review in the European Union, have been included in this document at the repeated request of the Russian Federation in sessions of the IGE on competition law and policy in 2000 and 2001.

12 The EU policy of liberalization is rooted in a number of texts called "directives". The main legal texts incorporating the notion of services of general interest as well as provisions on competition preserving the general interest are the following: Council Directive concerning the co-ordination of procedures for the award of public works contracts 71/305/EEC, OJEC 1971, L185/5, as amended by Directive 89/440/EEC, OJCE 1989, L210/1 and codified by Directive 93/37 OJEC 1993, L 199; Council Directive 77/62/EEC concerning the co-ordination of procedures for the award of public supply contracts, OJEC 1977/ L 13/1, codified by Directive 93/96 EEC, OJEC 1993 L 199; Council Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures for the award of public supply and public work contracts, OJEC 1989, L 395/33, modified by Directive 92/50 OJEC 1992, L 209; Council Directive 90/531/EEC on the procurement procedures of entities operating in water, energy, transports and telecommunications sectors, OJEC 1990, L297/1, codified by Directive 93/38, OJEC 1993 L 199; Council Directive 92/13/EEC co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in water, energy, transports and telecommunications sectors, OJEC 1992 L 76/14; Council Directive 92/50/EEC relating to the co-ordination of procedures for the award of public services contracts, OJEC 1992, L 209/1. Furthermore, to define what is meant by "general interest", the European Commission explained in its Guidelines in 1996 that the extension of competition rules would not run counter to obligations of public service that might be imposed by the public authorities on the entities – public or private – that perform services for the protection of economic, and social cohesion, the environment, the planning and promotion of consumer interests, and land use. See EU Commission, *Communication on Services of General Interest in Europe,* Brussels, September 1996.

13 See, for instance OECD, *Review of Regulatory Reform in Spain*, Paris, 2000, p. 164.

14 So far, merger control has been presented in the Model Law as in the Set, under the concept of "abuse of dominant position". In line with modern competition legislation, a separate provision for merger control is now proposed in the Model Law.

15 Information provided by the Commission of the European Communities. Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L395, 30 December 1989), p. 1, in particular Article 1.

[16] Council Regulation (EEC) No. 4064/89 of December 1989 on the control of concentrations between undertakings (OJ L 395, 30 December 1989) as amended by Council Regulation (EC) No. 1310 97 (OJ L 180, 9 July 1997).

[17] For a detailed analysis of the concentration of market power through mergers, takeovers, joint ventures and other acquisitions of control, and its effects on international markets, in particular the markets of developing countries, see TD/B/RBP/80/Rev.1.

[18] Provisions concerning referral to the competent authorities of the member States are considered in Article 9 of Council Regulation 4064/89.

[19] For example, the Korean Fair Trade Office held illegal an acquisition combining a Company with 54 per cent of the PVC stabilizer market and another company with 19 per cent of the same market. The acquiring company was ordered to dispose of the stock. *In re* Dong Yang Chemical Industrial Co., 1 KFTC 153. 13 January 1982.

[20] In the United States' experience, conglomerate mergers are highly unlikely to pose competitive problems (comment submitted by the Government of the United States). In the United Kingdom, it is unlikely that the merger would be referred if there were no overlap in any market (comment transmitted by the Government of the United Kingdom).

[21] Commissioner Mario Monti, quoted in a press release from the European Union Commission on 3 July 2001, "The Commission Prohibits GE's Acquisition of Honeywell".

[22] See European Union Commission press release "Commission Adopts Decision for the Divestiture of Tetra Laval's Shareholding in Sidel".

[23] For a full account of these cases, see TD/B/RBP/48, paras. 12–22.

[24] The United States firm Gillette acquired 100 per cent of Wilkinson Sword, a United Kingdom company, with the exception of the European Union – and United States – based activities. Because of merger control regulations in the European Union and the United States, Gillette had so far acquired only a 22.9 per cent non-voting capital participation in Eemland Holding N.V., a Netherlands firm and sole shareholder of Wilkinson Sword Europe, accompanied, however, by additional agreements providing for a competitively significant influence on Eemland and consequently also on Wilkinson Sword Europe. Gillette and Wilkinson are the world's largest manufacturers of wet-shaving products, including razor blades and razors, the relevant product market as defined by all authorities involved. Although the market shares of both firms varied from country to country, they held the two leading positions in most relevant geographical markets. In many West European countries, Gillette and Wilkinson accounted for a combined market share of around 90 per cent. In March 1993, Eemland disposed of its Wilkinson Sword business to Warner Lambert and retransferred the trademarks and business in various non-European Union countries. The transactions described led to the initiation of competition proceedings in 14 jurisdictions worldwide. The case illustrates particularly well the problems which can be raised by international cases because of the fact that they may cause competitive effects in many countries and consequently lead to as many competition proceedings under different laws. For the enterprises concerned, as well as for the administrations involved, such cases may be extremely costly in terms of human and financial resources. Obviously, these problems would not exist if such cases could be dealt with under one law by one authority. As such an authority does not exist, close cooperation among the competition authorities appears to be in the interest of both the participating firms and the competition authorities involved. For additional cases, see "Restrictive Business Practices That Have an Effect in More Than One Country, in Particular Developing and Other Countries, with Overall Conclusions Regarding the Issues Raised by These Cases" (UNCTAD TD/RBP/CONF.4/6). The Boeing-McDonnell Douglas merger is also a case of major interest since the proposed transaction notified both to the United States and the European Union competition authorities initially led to divergent positions being taken by these two authorities as to the desirability of allowing the merger to proceed. The merger of Boeing Co. and McDonnell Douglas Corp. was to bring together the two major United States-based players in the international civil aircraft industry, leaving only one other major competitor, the European Union-based Airbus Industry group. In the United States, the reviewing authority, the Federal Trade Commission, decided not to oppose the transaction because, in its view, in many respects McDonnell Douglas was no longer a vigorous competitor. The takeover by Boeing of a nearly failing firm was view as not adversely affecting the state of competition in the line of business. In contrast, pursuant to its case law on the 1991 prohibited attempted merger between European Union-based Alenia-Aérospatiale and De Havilland (the latter being a Canada-based failing firm, subsidiary of Boeing Co.) the EU Commission signalled, on notification by Boeing Co. of its intent to absorb McDonnell Douglas Corp., fundamental concerns about the merger leading to an apparent dead end and to concerns about the potential wider repercussions that a failure to find a consensual approach would have on international trade. The issue was found when Boeing Co.

agreed to undertakings relating to the suppression of the long-term exclusive dealing contracts it had previously negotiated with North-American airlines and to other matters. For further details see EU Commission, *XXVIIth Annual Report on Competition Policy 1997*, Luxembourg, 1998. For an interesting review of the views of the European Union and the United States, see William E. Kovacic, "Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy", *Antitrust Law Journal*, 68 (3), 2001, 805–873.

25 Note that under United Kingdom law, interlocking directorships alone would not give rise to a merger situation. Interlocking directorships without substantial cross-share holdings are more likely to give rise to restrictive agreements than mergers. Comment submitted by the Government of the United Kingdom.

26 The situation has to be considered not only at the level of directors. In the United States it is illegal not only for a Company to have one of its directors also serve as a director of a competitor, but also for it to have one of its corporate officers serve as a director of a competitor.