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## THE SPEECH OF PROF. DR. AYDIN AYAYDIN, THE PRESIDENT OF THE COMPETITION AUTHORITY

**Prof. Dr. Aydın AYAYDIN**

Esteemed Guests,
Distinguished Representatives of Our Press,
Esteemed Members of Our Board,
Dear Colleagues,

I welcome all of our foreign and local guests participating as speakers and as audience in order to share our pride to organize the first international symposium in Turkey in the field of competition law, and I pay my respects to you all.

The aim of the Act on the Protection of Competition No. 4054 whose implementation rests with the Authority I head, is "to prevent agreements, decisions and practices hindering, distorting or restricting competition in the markets for goods and services, and the abuse, by the dominant undertakings in the market, of this dominance; to ensure the protection of competition by performing necessary relevant regulations and supervisions."

With respect to fulfilling this aim, we can list under three main headings the scope of the Act, which can be called as the material law section:

- Agreements, practices and decisions hindering, distorting or restricting competition, which are realized between any undertakings operating within the boundaries of the Turkish Republic, or affecting these markets,
- The abuse, by the dominant undertakings in the market, of this dominance,
- Any legal transactions and conducts having the nature of mergers or acquisitions that shall decrease competition to a significant extent.

The Act on the Protection of Competition No.4054 was adopted on December 7, 1994 by the Turkish Grand National Assembly, and entered into force after having been published in the Official Gazette dated December 13, 1994. On the other hand, the Competition Board which is the decisive body of the Competition Authority responsible for implementing the Act, could be appointed on December 27, 1997, with a nearly 27- month delay. However, the Authority completed its organization within a short period like 8 months, announced it to public with a communiqué issued on November 4, 1997 according to the Transitional Article 2 of the Act, and as of this date, the applications rapidly commenced to be assessed.

During this period, the Authority did not only form its physical infrastructure and organization, but also promptly prepared and put into effect the communiqués and group exemption communiqués in relation to the implementation of the Act, which are called as secondary legislation.

**Our Communiqués in Chronological Order are a Follows:**

- Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board
- Communiqué on the Procedures and Principles for Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings Pursuant to the Article 10 of the Act,
- Block Exemption Communiqué on the Exclusive Distribution Agreements,
- Block Exemption Communiqué on the Exclusive Purchasing Agreements,
- Block Exemption Communiqué Regarding Distribution and Servicing Agreements In Relation to Motor Vehicles
- Communiqué on the Procedures and Principles to be Followed in Prenotifications and Authorization Applications to the Competition Authority, In Order for Acquisitions Via Privatization to Gain Validity.

  A total of 367 applications were submitted to the Authority during the period from November 4, 1997 when the Authority, after having formed its organization, announced it to public according to the Transitional Article 2 of the Act, until October 2, 1998.

  Among them, 200 are the applications for exemption and negative clearance, most of them are the applications to be made within 6 months, until May 5, 1998, pursuant to the same Transitional Article, and they are still under examination.

- 61 applications reached our Authority for mergers and acquisitions, 54 of them were granted authorization, 5 of which were conditional, and 7 of them are currently under preliminary examination.

Among the applications for infringement of competition, initial examination of 3 of them has been concluded, preliminary research has been decided for 21 of them; among the applications whose preliminary research has been concluded, it was decided that 8 of them be investigated, while 1 of them not. The other 12 preliminary researches are still under way. Besides, as a result of the preliminary research decisions taken on our own initiative in relation to Istanbul Bread Market and Private Schools Market, investigations are carried out. Thus, the investigations in progress have reached to 10. As 40 applications did not come under the Act No.4054, any transactions were not performed. 35 applications, on the other hand, are yet at the stage of preliminary examination.

Having regard to the international nature of competition law, and its weight in relations with the European Union with which we are in the process of the Customs Union, our Authority attaches great importance to international relations.

Within this famework, close contact has been ensured with the Community Commission, and particularly the Directorate-General IV, important steps have been taken in mutual exchange of information and technical cooperation. Likewise, active participation has been ensured in the competition units of international organizations,

OECD and the World Trade Organization being in the lead, and Turkey's perspective on competition and practices conducted have been put forward in these platforms.

Our Authority directly contacted with a number of countries at the institutional level, in addition to international organizations. Among them, I would especially like to mention close relations based on mutual exchange of information and experience with France, Germany, Italy, Spain, Portugal, Japan, Russia, Ukraine, Moldavia, Georgia and Bulgaria.

Decisions of the Competion Board require a lengthy process and a meticulous work pursuant to our Act. Decisions we take may not naturally satisfy all parties concerned. Resort to law against our decisions is available. But, I would like to assure you all in one point: No power has had a direct or indirect influence on any of our decisions to date. All public is closely aware of this fact. From now on, the Authority shall proceed with the same decisiveness, and loyalty to law. No one should suspect of it.

With these thoughts and feelings, I again welcome all of our local and foreign guests, and I pay my respects to you all.

## THE SPEECH BY THE MINISTER OF INDUSTRY AND TRADE, MR. YALIM EREZ

**Yalım EREZ**

Mr. Prime Minister, Distinguished Members and Employees of the Competition Authority,Distinguished Guests;

Last year on November 5, 1997, when it was declared that the Competition Authority, commenced de facto operation, I made a speech, in which I stated that the process, stated in 70s, in order to form The Turkish Competition Law and the Authority who would implement this Law was completed; and thus, a new era began in the Turkish economy. The performance, known closely by the public and whose details were stated a few minutes ago by Mr. Ayaydın, the president of the Competition Authority, proved how right my Ministry to count on the Competition Authority and support it with all means. The work by the Authority within such a short period of 11 months deserve more than any appreciation; both with regard to the quantity of the files finalized and with regard to the quality of putting into force 20th Article of the Law which grants autonomy to the Competition Authority. As of December 13,1994, when the Competition Act, numbered 4054 was issued and put into effect, when it is the time, we proudly state that we have a regulation that is equivalent to and even better in some ways than the contemporary examples. Now Turkey can be proud of not only having a good Competition Act, but also of having an independent, respected and contemporary competition authority, who practices this Act. I by here congratulate everyone-from the President and members to the personnel of the lowest degree who has contributed to this success.

Distinguished Guests,

As we all know, Competition Law is not alone equal to the competition policies of a country. Competition policy is a broader concept, including incentives, domestic and foreign trade, state monopolies, public procurement, and privatization polies besides the Competition Law. İt is only possible for a country to have a competition policy after all these I have counted are harmonized. In this harmonization period, it is evident that the Competition Law and results of implementation, shortly the competition rules will act on the 1st degree. Implementation of competition rules should, without a doubt, serve to create and pursue a healthy Competition arena within the country. However, I should hereby state that, this implementation, at the same time, should support the extrovert structure of the country's economy; at least, it should not impede it. Like every country taking part in the international competition, Turkey also should not forget that she will need large scaled and powerful firms. In this respect, I, as the Minister in charge of National ındustry and Trade, would like to declare that I welcome the increase in 1998 of the turnover threshold stated in the Communiqué regarding Mergers and Acquisitions from 10 trillion TL to 25 trillion. Distinguished guests, the Competition Authority is the only body in charge of practicing the Act, number 4054, Regarding the Protection of Competition. In the 20th

Article of the same Act, it is taken under a provision that the Authority shall not take any orders or instructions from any organ, authority or persons while performing its duty within the short period of time passed, the Authority has seen the respect it deserved and proved its maturity via the decisions it has reached.

We, as the Ministry, have maximized our endeavours towards not casting a shadow over the semi-court nature of the Competition Authority. I would like to state hereby, in front of this distinguished group of people that we are not going to allow any slightest interference from outside towards the independency of the Authority, and that we will always stand by its side.

With these thoughts, I salute you all with respect, and wish asuccessful symposium.

## THE SPEECH BY PRIME MINISTER A. MESUT YILMAZ

Esteemed Guests,

Esteemed Members of the Competition Board,

I greet you all with respect and affection. A short while ago, we listened to the establishment purpose and works of the Competition Authority from Mr. Minister and Mr. Prof. Dr. Aydın AYAYDIN, the President of the Authority. We detected how the gap between Turkey and developed countries in terms of competition law, which is a gap arising out of long years of negligence, rapidly started to close. I congratulate everyone who had a share and took pains in these works, the Chairman of the Board and Board members being in the lead. I wish that this international meeting on Competition Law, which is held with local and foreign participants, sheds light on further works of our Competition Authority.

Esteemed Guests,

Today, the whole world adopted free market economy, and now all countries in the world spend effort to fulfil the requirements of this model. Turkey, also, has been endeavouring to bring free market economy into life in a modern sense since 1983. It is competition which determines the market as an economic model. Free competition is the touchstone of market economy. A system where there is no or limited competition, cannot be called as market economy.

Today, it is not possible for economies which haven't realized the importance of competition, and which could not form their legal and institutional infrastructure, to survive in the modern world. The existence of such an economy is only possible through great sacrifices from the public welfare.

Nowadays, the adoption of such an understanding is not likely in any society. Indeed, Turkey has seen this fact very long ago. But, unfortunately, it has been too late in fulfilling its requirements. During the last 15 years, the Turkish entrepreneurs caught up with global standards in the production of goods and services, after having eliminated the barriers ahead. I believe that the Turkish entrepreneurs selling goods to 135 countries in five continents, are the section who, in the best way, understand the phenomenon of globalization, and fulfil its requirements in our country. Notwithstanding, it is obvious that the coming 10 years shall be the scene of a tough struggle in the world within this framework, and that Turkey needs to enter this struggle in the most prepared manner. The key concept of such struggle is free competition. Free competition is also an element which ensures optimum effectiveness in the allocation of resources. When market dynamics do not decide the amount of production, and the price of goods and services produced, the fact called as " arbitrariness in the allocation of resources" emerges. Competition requires operation with the minimum cost possible, hence ensures efficiency in production by using less resources. The most important incentive underlying novelties, and the event we call as innovation is again competition. Adding momentum to the activities

of research and development, bears a vital importance for Turkey preparing for the 21st century which is the age of information and technology. Competition that upgrades the quality of goods and services, diminishes their price as well. The means of providing consumers with cheap and quality goods and services is to give way to competition. Creating a sound competitive environment within the country, shall also increase the competitive power of the Turkish economy abroad. When we look at the today's world, we see that the most powerful economies are the countries which have, at the same time, the most ancient competition laws and authorities. Regulations as to competition should by no means be considered as the state intervention in markets. On the contrary, such regulations are those which are directed at removing the barriers before a free undertaking. Market economy has its own nature and rules. What rests with the state is to set the rules of the game, and to prevent those who act contrary to these rules, in another words, to create conditions for honest competition. Any kind of independence of the Authority which shall ensure proper continuance of the rules of the game, will be as important as the other dimensions of the matter. The autonomy of the Competition Authority in our country is not an issue on paper, but today I can now delightedly say that it is an actualized fact. Our Competition Authority rapidly completing the process of institutionalization, reaches a structure at the level of its counterparts in the modern world. And, we, as the Government, issued an order to all Ministries, and all institutions and organizations with a circular. Via this circular, we stipulated that the opinion of the Competition Authority is absolutely received in advance about law, statute, regulations and communiqué drafts to be prepared. I wish that Turkey's first international symposium on Competition Law shall be beneficial, and be of assistance to further works of our select Authority. I congratulate all that took pains, and again pay my respects and send my affections to you all.

## REASONS FOR CONSTRUING ARTICLE 4 NARROWLY

**Prof. Valentine KORAH**

Thank you very much for giving me the floor and for inviting me to mingle with this wonderful group of people: old friends and new, former students and members of competition authorities whom I run into in many places. It is lovely to be here. The speakers even received Christmas presents when they arrived. They are lovely and heart warming. It is a great privilege to be allowed to talk when you are starting to work out the meaning of the abstract words in the Turkish competition law.

**Bifurcation of Articles 4 and 5**

Your law is so like our law in the European Community that we must be able to indicate some of our mistakes which you can avoid. Article 4 of your law forbids agreements that have the object or effect of restricting competition and Article 5 provides for exemptions. Only the Board can exempt: the Board has a monopoly. That is exactly our position: Article 85(1) prohibits such agreements and Article 85(3) provides for an exemption. Regulation 17 gives the monopoly over granting exemptions to the EC Commission. Agreements that infringe the prohibition in both systems are void and there is a great temptation at the beginning, when no one knows what the general abstract words in the law mean, to try to keep the decisions at the centre - to say that any restriction on liberty restricts competition and where such a restraint creates efficiencies, the Board can exempt it. Seen from the point of view of a competition authority, this is an attractive proposition.

**Harmless Provisions may become Void**

It has much to be said even from other viewpoints, but it does lead to the problem that vertical agreements with efficiency enhancing possibilities may be treated as void and illegal unless and until the Competition Board has been able to issue a formal exemption. We have suffered from this for many years - ever since Regulation 17 was adopted in 1962. It is difficult to enforce the restrictive provisions in a contract if the Commission has not actually granted an exemption.

**Monitoring Notifications may waste the Board's Resources**

The need for exemptions for harmless agreements is also creating problems for DG IV, the competition department of the Commission. A large number of agreements are notified to it - 221 last year. They have to be monitored, and DG IV has a limited number of officials to do this. So, it devotes much of its resources to monitoring agreements that may have no significant adverse effects on competition. Many of us and, indeed DG IV itself, think they should be spending their time on the things that only they can do:

- monitoring state aids, trying to take them out of politics;
- controlling public monopolies and firms given exclusive or special rights, a task that only the Commission can perform under article 90(3);
- monitoring large mergers, another Commission monopoly,
- finding horizontal cartels, cartels between competitors.

Some Austrian economists say that cartels do not matter, they will break down anyhow, but OPEC managed to keep the world in recession for a decade or two. Finding and deterring them must surely be a very important function and the focus of resources in any competition authority.

**Markets Pre-suppose exclusive property rights and that Agreements will be performed**

Let me return to the problem of enforcing agreements in national courts. I was brought up in the naïve belief that markets assume exclusive property rights, rights that one can transfer to someone else. The Turkish authority owned this brief case yesterday, but gave it to me and I own it today. It is mine, and I may exclude anyone that I wish. Markets also pre-suppose contracts whereby we can transfer property to each other, and commit ourselves to perform in the future. Markets presuppose that both exclusive rights of property and contracts will be respected and, in a sinful world, that pre-supposes that they can be enforced. Not only does the Turkish law provide for the invalidity of agreements that infringe the prohibition, it also provides for damages which in the case of agreements may be trebled. So it is very important that the Board does not follow the European Community's example and treat as having the object or effect of restricting competition all agreements that restrain individual action. It is of the nature of contracts to limit the parties' freedom.

**Exemptions Retrospective only to Notification**

There is a further problem that you share with us: the competition authority can grant its exemptions only retrospectively to the date of notification. Consequently, firms that may want to enforce their agreements against the other party, often feel that they must get a notification in early, before difficulties arise. We sign the contract expecting everything to go well and notify at once. It is only many years later that we fall out and one of us has to enforce the agreement against the other. If the agreement is not notified until that time, an exemption for the past cannot be granted. So this need for retrospective exemption increases the problem of invalidity, it increases the problem of the Commission having to devote resources to monitoring harmless agreements, and to the private sector having to waste resources in filling in Form A/B. This is a very complicated operation that requires a great deal of information and analysis of the market. It wastes the resources of expert lawyers and, probably more important, of their clients, because you need someone responsible for the future strategy of the company in the area that the contract affects to fill in this Form effectively.

The position is even worse under Turkish law: article 10 requires all agreements contrary to article 4 to be notified. In the EC, we are required to notify only if we want an exemption. It is even more important here that Article 4 be not interpreted so broadly as to include agreements that are unlikely to have significant anti-competitive effects.

**Commercial need to limit freedom**

In Europe, the Commission has frequently found that every important restriction of freedom is caught by Article 85(1) - requiring firms to delete the words “not”, “exclusive”, “limited to” and such like. This has made it easy for lawyers to advise and the Commission to deal with the prohibition of article 85(1). A realistic analysis of the likely effects of an agreement on the market is postponed until Article 85(3). The problem is that clients need those words. Take an exclusive technology licence. A licensee who is going to set up a production line and develop a market for Valentine widgets incurs costs. Its investment may not be recoverable except through selling Valentine widgets. If it is unsuccessful and everyone is buying Richard widgets, it loses most of its investment. It is unlikely to take the risk unless it expects to make a large profit if Valentine widgets are a success. The risk does not look half as big ten years later when Valentine widgets are successful and I want to start to make and sell my own. To induce a licensee's investment, I may have to grant it a sole and exclusive territory so it can reap where it has sown. To get my widgets distributed, we need the restriction on my freedom.

**EC Commission's Inability to grant many individual exemptions**

The Commission's view, that exclusive and limited contracts are prohibited by article 85(1) makes them void at least in part, unless and until the Commission exempts them. In practice it grants hardly any individual exemptions. There were 2 last year. In the 1990's, it has granted 3, 4 or 5 a year. You can tell a client who comes up with a new innovation that he is not going to get an exemption.

He may get a comfort letter. A comfort letter saying that because of his small market share, less than 10% in any Member State, the Commission sees no reason to intervene under Article 85 or 86 is a nice letter to get, until the market share exceeds 10%. Then it is something of a Trojan horse as it implies that the agreement is caught by article 85(1). Very occasionally, a letter may say that, because of the wonderful things that your client is doing for the economy, the Commission thinks that the agreement is not contrary to Article 85(1). Such letters are not very common. They are more likely to say the Commission sees no reason for intervening. A letter may add that the agreement merits exemption, and that the Commission is closing its file. That sort of letter used to be called a `discomfort letter,' because it implied that the agreement was caught by Article 85(1), and the provisions that enabled each party to recover its investment would be void.

Recently, the position has improved somewhat, because the Court of First Instance held that since the Commission has sole power to grant an exemption, it must proceed to a formal decision under Article 85(3),[1] because it has a monopoly. That sounds lovely, but the remedy is very remote. I ask the Commission to take a formal decision of exemption because I need to enforce the restrictive clause. A year later, having had no response in substance, I send a formal letter under Article 175, requiring the Commission to take a decision under Article 85(3) and sue in the C.F.I. if it does not do so within two months. There are 2 problems. One is that, by now, I am trying to sue the other party, and it is telling the Commission all the terrible things about the

[1] *Automec Srl v. Commission II, (T–24/90), 18 September 1992, [1992] E.C.R. II-2223, [1992] 5 C.M.L.R. 431.*

agreement and how powerful I am. The other problem is that the Commission may not actually adopt a decision within the two months, and all I can do is sue it for inaction. Then the Court of First Instance may award me my costs: not a very strong remedy. It is better than it sounds, because the Legal Service of the Commission dislikes paying costs and brings some pressure on DG IV to hurry up.

### E.C.J.'s Concept of Legal and Economic Context

I should say that the Community Court has been much more liberal than many of the Commission's decisions. A famous judgment, *Delimitis*,[2] related to exclusive purchasing. Henninger Bräu, one of the big brewers in Germany,[3] owned a beer house which it let to Mr. Delimitis. Delimitis agreed to buy all the beer and soft drinks consumed on the premises from his landlord. There was an issue at the end of the tenancy about dilapidations, how many repairs Delimitis should pay for out of the deposit he had made with Henninger Bräu. He argued that the exclusive purchasing obligation was anti-competitive and the contract void. A rather petty case, but a very common one, and therefore a test case.

The European Court of Justice ruled that the agreement did not have the object of restricting competition, but that the national court should consider whether it had that effect. This would be so, only if there was a barrier to entry at the retail level and so many beer houses were tied to one or other of the brewers, that it would be difficult for a new brewer to get into the market on a sufficient scale to distribute its beer efficiently. The Court said that everything is relevant under article 85(1), and an obligation to buy his beer and soft drinks from his landlord did not necessarily foreclose competition. That is the sort of analysis that traditionally has been done in Brussels under Article 85(3) rather than article 85(1). In a very similar case relating to a tie of freezer cabinets for ice-creams to the supplier who provided them free, the Commission analysed the market under Article 85(3). The Court of First Instance did not object to the analysis, but said that it should have been done under 85(1),[4] the prohibitory section, your Article 4. That is very important, because a national court or national authority has competence under the prohibition but cannot grant an exemption.

### E.C.J.'s Concept of Ancillary Restraints

Another doctrine that avoids the prohibition of article 85(1) has been created by the Community Court: where any transaction, not in itself anti-competitive, would not be not viable without a restriction on conduct, that restriction on conduct is not in itself anti-competitive. The most obvious example of this is the sale of a business as a going concern. If I sell the Valentine business to Prof. Esin, he is not going to pay me for the

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[2] *Delimitis (Stergios) v. Henninger Bräu (C–234/89), 28 February 1991, [1991] E.C.R. I–935, [1992] 5 C.M.L.R. 210, [1992] 2 C.E.C. 530.*

[3] *It had only 6.5% of the market, so it sounds as if the industry was not very concentrated.*

[4] *Langnese-Iglo GmbH & Co. KG, (93/406/EEC), 23 December 1992, O.J. 1993, L183/19, [1994] 4 C.M.L.R. 51, [1993] 1 C.E.C. 2123. On appeal, Langnese-Iglo GmbH & Co. KG (T–7/93), 8 June 1995, [1995] E.C.R. II–1533, [1995] 5 C.M.L.R. 602, [1995] 2 C.E.C. 217. The final appeal to the E.C.J. did not consider much of the substance, C-279/95P, 1 October 1998, [1998] E.C.R. I- .*

goodwill if I can set up my shop next door.[5] Similarly, franchising does not work unless I impose on my franchisee all sorts of restrictions. His shop must look like mine, it must be decorated that way, similar products handled, probably the products must be bought only from a designated source, and so on and so forth. Many restrictions are imposed on a franchisee, but without them I could not have a franchise. Consumers could not be assured that the Mc Donald's that they patronised in New York was the same as the Mc Donald's in Istanbul.

**Group Exemptions**

The Commission occasionally follows these precedents, but has reduced the problems caused by postponing realistic analysis to article 85(3) by granting group exemptions. These have many drawbacks.

- Each applies to a narrow range of contracts - most have been adopted as a reaction to a large number of notifications and exclude other kinds of transaction to which the same economic justification applies;
- The earlier ones permit no restrictions other than those expressly permitted;
- There is a significant list of conditions or clauses that prevent the application of the exemption, even to other provisions.

The system of group exemptions has been criticised on the ground that it forces agreements into a particular mould without any particular economic reason. We have separate group exemptions for exclusive distribution of goods for resale, exclusive purchasing of goods for resale, franchising, and no group exemption for selective distribution. Sometimes we can distort a transaction to come within one, sometimes we cannot.

**Commission's new Proposal for Vertical Distribution Agreements**

There is, however, a happier ending to my talk. The Commission intends its future block exemption to be based more on economic theory and less on legal form. It issued a Green Paper in January 1997 saying what it was going to do about vertical restrictions in the sphere of distribution. It envisages granting a single group exemption for all sorts of distribution agreements applying to goods or services for resale or for incorporation in another product. That will be a great improvement. It is no longer going to have a white list of the only permissible provisions you can insert in a contract and remain within the group exemption. In future, the Commission proposes that you may insert any provisions you like except some hard core provisions. If you have one of these hard core provisions, the agreement will not come within the regulation. There was an earlier draft, according to which it was just those provisions that would be excluded, but in the latest draft, the Commission has gone back to its custom on earlier group exemptions: a blacklisted provision, prevents the application of the Regulation even to the exclusive territory that you granted your dealer to encourage him to invest in promotion.

[5] *Remia BV and Verenigde Bedrijven Nutricia v. Commission (42/84), 11 July 1985, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1, C.M.R. 14217.*

The Commission is proposing to free many contracts from its control. So, it is going to insist on ceilings of market share. It admits that market share is not identical with market power, but asserts that it is the best test that can be devised that is of simple application. The exact level of the ceilings is still a matter of debate, but the present draft suggests that some provisions will be valid up to a market share of 20%. The share will usually be of the supplier, but in exclusive purchasing it will be of the dealer. Other provisions which it thinks less harmful will be exempt up to a market share of 40%.

Industry has been up in arms. It says that firms do not know what relevant market will be selected, so can not assess their market share: we lose a great deal of certainty. The Commission answers to this that it is easier to know the relevant market than it was, because it issued a notice on the test to be applied in defining the relevant market,[6] although a decider of fact has considerable discretion. It has another very important answer. It is going to propose legislation, by the Council of Ministers and European Parliament. It intends to propose an amendment to Regulation 17, that will enable it to exempt agreements retrospectively to a period before notification. If a firm mistakenly thinkgs that its share of a wider market is below the ceilings, it can notify late and apply for an exemption. Restrospective exemption to the date of notification will transform the notification process. At the moment, we notify early, when the other party to the agreement likes it, just after he has signed the agreement. So the Commission has to monitor and find out for itself any objections to the agreement. If we can get a retrospective exemption on a later notification, the balance of considerations for deciding whether to notify changes. At the moment, I know that unless I notify now, I will not be able to get damages under the contract for breach of a restrictive provision for the period before notification. But if I can, I may leave the notification until later. As I said, it takes a lot of resources to notify under EC Law. And if I leave it till the end just before I sue the other party, he is going to complain to the Commission, saying how unfair and anticompetitive it is. The process will become almost adversarial. It will be easier for the Commission to identify the drawbacks of one would prefer to get the agreement through the Commission at the time when the risk still looks substantial: when Valentine products are unknown in the Common Market, and there is still something to be said for early notification, but there is much less to be said for it than now.

This proposal is very important. You can find it on the Internet. DG4's home page certainly at the beginning was the best home page of any in the Commission. It has a little icon which does not come up very fast, particularly if you visit it in the afternoon when the Americans get on the system, `what's new.' Under what's new, you can find the proposal. The Commission adopted it only on Wednesday, and on Wednesday evening, I was able to get a copy from the Internet from someone who had taken it during the day. DG IV is prompt in loading material. So you do not need a hard copy of it, you just use your computer.

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[6] *Notice on the definition of the relevant market . . ., O.J. C372/5, [1998] 4 C.M.L.R. 177. Assume that the hypothetical monopolist of widgets were to raise its price by a small but significant amount, such as 5 - 10%. What would happen in the short term? Are there substitute products to which customers might turn, or would other firms start to supply the product. Conditions of entry are relevant only if they would operate as fast and effectively as substitutes on the demand side of the market.*

### Benefits of Exemptions being Retrospective to date before Notification

I was concerned to see that under Article 10 your Board can grant exemptions retrospectively only to the date of notification, and not to the date when the agreement was made. Even worse, there is a duty to notify all agreements that infringe article 4. I fear that unless the Board makes at least a truncated analysis of the likely effects of agreements under article 4 and treats only really anti-competitive provisions as forbidden, it will be forced to monitor far too many notifications and consume its resources wastefully.

### Reasons for Avoiding Bifurcation of Articles 4 and 5

It is the difficulty created by the bifurcation of article 85(1) and (3) for those enforcing their agreements that causes concern as well as overloading the Commission's resources. I would be very concerned if the Competition Board were to spend a great deal of time monitoring agreements that contain words like `exclusively' or `limited to' and was unable to deal with the more serious restraints on competition. I hope that it will use its resources more effectively, by imposing heavy fines on cartel agreements made between competitors, solely to reduce production and raise prices, with no benefits to consumers.

I wish you helpful developments of your competition law.

Thank you very much!

## REFLECTIONS ON THE APPLICATION OF ARTICLE 86 EC TREATY

**Prof. Dr. Richard WHISH**

### 1. Introduction

When I received the invitation to speak at this Symposium, I was informed that I could speak on any topic that I thought might be of interest to the participants who are here today. I decided to begin my search for a suitable subject by reading the

Turkish Act on the Protection of Competition of 7 December 1994. The influence of Articles 85 and 86 EC Treaty was immediately obvious in Article 1 of that Act, which states that its purpose is to prevent the abuse of a dominant position and agreements which have as their object or effect the prevention, restriction or distortion of competition. These prohibited practices are spelt out more clearly in Articles 4 to 7.

**2. Article 6 of Act on the Protection of Competition**

I was particularly interested to read Article 6, which forbids:

"Any abuse, by one or more undertakings acting alone or by means of an agreement or concerted practices, of a dominant position in a market for goods and services within the whole territory of the State or in a substantial part of it".

Article 6, as in the case of Article 86 EC Treaty, then goes on to provide a non-exhaustive list of examples of an abuse, although the list is different in numerous respects from Community law. The Turkish provision does not, for example, refer to the charging of unfair purchase or selling prices, as does Article 86(a): perhaps there are other provisions in Turkish law that deal with price regulation. The Turkısh provision does contain an interesting provision in Article 6(a) which is not to be found in Community law:

"Such abuse may, in particular, consist of :

(a) Practices whose aim is to prevent, directly or indirectly, new competitors in the market or to impede the activities of already existing competitors in the market".

**3. What is meant by "abuse"?**

It is natural that systems of competition law seek to control abusive behaviour on the part of dominant firms: the monopolist or near-monopolist that is complacent and inefficient, stirred into action only when threatened by a new competitor and that uses its power to eliminate the threat to its position, is not a figure that one would wish to protect. We will all know of real cases of abusive monopolistic behaviour, and would want to know that systems of competition law are capable of dealing with such behaviour and promoting the process of competition. However, it is abundantly clear that the concept of "abuse of dominance" is actually an immensely difficult one. It is more than 25 years since the Court of Justice gave its first ruling on Article 86 in Continental Can v Commission in 1972, and there have been many judgments since then. However, I would submit that we are no nearer achieving an intellectually satisfactory explanation of what is meant by “abuse” than we in 1972; and I consider that this is a major problem for all involved in competition law and policy for the years ahead. I say this, in particular, for four reasons:

- An unduly broad interpretation of "abuse" will have the effect of diminishing, rather than increasing, competition

- An unduly broad interpretation of "abuse" will entail considerable costs for industry because of the need to ensure compliance
- Article 86 is the model for a large number of domestic systems of competition law, both within and beyond the Communityand the Court's case-law will inevitably be resorted to by domestic competition authorities and courts
- The process of privatization and demonopolisation that is taking place worldwide, coupled with the introduction of new laws prohibiting abusive behaviour, means that the potential for new entrants to markets to invoke Article 86-type legislation is enormous. A very clear view is therefore needed as to what Article 86 is intended to achieve, but also of what it should not be used to achieve. In particular Article 86 ought not to be available to enable less efficient firms to enter the market of a dominant firm: to reward inefficiency in this way would itself entail a serious distortion of competition.

**4. An unduly broad Interpretation of "abuse" will have the Effect of Diminishing, rather than Increasing Competition**

A frequent complaint against the Commission is that it tends, when applying Article 86, not to concern itself solely with the maintenance of the competitive process but, instead, with the protection of competitors, a quite different matter. To put the point another way, in any competition, whether economic, sporting or of some other kind, the most efficient or the fittest person will win. This is an inevitable part of the process so that, if a firm ends up as a monopolist simply by virtue of its superior efficiency, this should be applauded, or at the very least not be condemned. The criticism of the Commission tends to be that it condemns business practices of dominant firms that would be perfectly acceptable if the firm were not dominant and yet which are considered to be abusive if they are dominant. This amounts to the imposition of a handicap upon those firms, effectively penalizing them simply because of their success. Whatever the merits may be of this criticism, it is undoubtedly the case that a dominant firm (or one that might be characterized as dominant) must behave on the market with great caution: a transgression of Article 86 may have very serious consequences. It is important to point out that, where there is an infringement of Article 86, not only can the Commission impose an enormous fine: an injured third party might also bring an action in a national court, seeking an injunction and/or damages. I note in passing that a damages action is also available in Turkish law by virtue of Articles 57 and 58 of the Act of 1994.

The Court of Justice in Hoffmann-La Roche said that:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, *through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators,* has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".

In Michelin v Commission the Court spoke of abusive conduct involving recourse *to methods different from those governing normal competition in products or services based on traders' performance.*

In Tetra Pak II the Commission stated that:

"Article 86 of the Treaty prohibits an undertaking in a dominant position from eliminating a competitor *by practising competition by means of perice which does not come within the scope of competition on the basis of quality".*

Thus, the law would seem to recognise that competitive responses by dominant firms that are explicable by reference to their efficiency are permissible. My worry, however, is that when it comes to the actual application of Article 86 by the Commission, the rules are in fact so unclear and the reasoning behind them so opaque that in fact competitive behaviour on the part of dominant firms is wrongly characterised as abusive. This is particularly worrying in cases where the dominant firm reduces its prices when faced with new competition, but continues to make a profit: it is one thing to condemn predatory prices, where the dominant firm is making a loss in response to a competitor; it is another to condemn a price cut where the dominant firm continues to make a profit. The Commission has condemned selective price cutting of this kind in several cases: for example in Hilti, BPB Industries plc and in Irish Sugar. It would be helpful if, in the Irish Sugar appeal, the Court of First Instance and ultimately the Court of Justice could provide a conceptually satisfactory explanation of why this type of behaviour should be considered to be abusive. Otherwise the danger is that competitive responses on the part of dominant firms - which one would expect the law to encourage - will instead be condemned as abuses. Therefore, the fear of being found to be abusing will diminish, rather than increase, competition: a bizarre achievement for a system of law intended to encourage competition.

### 5. An Unduly Broad Interpretation of "abuse" will Entail Considerable Costs for Industry because of the need to Ensure Compliance

Infringing Article 86 is a very serious matter. Tetra Pak was fined 75 million ECU for infringing Article 86 in 1992, On 16 September this year, the Commission imposed fines totalling 273 million ECU on the members of the Trans-Atlantic Conference Agreement for infringing Article 86. Also, as mentioned above, there is the possibility of a damages action. This means that any firm that could have a dominant position on a market - and remember that markets can be very narrowly defined and that not only large firms might be found to be in a dominant position - must take seriously the need for compliance with the law. Many firms have instituted an elaborate Compliance Policy, which involves the expenditure of time and money on the part of senior management, in-house and external counsel. A Compliance Policy is essential, and needs to be reviewed and refreshed at fairly regular intervals.

## 6. Article 86 as a Model for Domestic Systems of Competition Law

Article 86 has become the model for numerous domestic systems of competition law. Majority of Member States of the Community now have legislation modelled upon Article 86. In the United Kingdom this will become true for us in November of this year, when the Competition Bill currently before Parliament receives the Royal Assent. The Netherlands and Denmark have also got new legislation this year based on Article 86. It is interesting to observe that Article 86 has been exported from the Community to numerous other countries as well: I have already noted the influence it has had on Turkish law, and would give Malta, Cyprus and several central and eastern European countries as well. However, this seems to me to make it even more important that we debate and correctly identify the true meaning of "abuse of dominance", since the danger that I have identified above - that Article 86 will have the effect of diminishing competition rather than promoting it - could extend beyond the European Community to all those countries where Article 86 has been used as a model for domestic law.

## 7. Privatization and Demonopolization

There are many markets which are now open to competition that historically were considered to be natural monopolies. In the UK, for example, we now have fairly rigorous competition in parts of the telecommunications sector, in electricity and gas from generation through to retail sale, and even, to a minor extent at the moment, in water. In Sweden and New Zealand, competition in the postal sector has been introduced. The legal or de facto monopolies that have characterised much of the transport sector are gradually being eroded. As new entrants enter these and other markets, and as former monopolists begin to react to this competition, the potential for invoking competition law to assist entry is obvious. However, it will be important to decide how far competition law should go in assisting such new entrants. A temptation might be to apply the law in order to positively assist new entrants, regardless of efficiency: but this in itself would be a distortion of the competitive process and, in my view, would be an improper use of competition law. If positive assistance for entry into markets is required in particular market circumstances, this should be dealt with by separate legislation (and probably administered by a specific regulatory body), and should not be achieved under the general principles of competition law.

## 8. Conclusion

Article 86 is an important part of the Community system of competition law and is the model for numerous systems of domestic law. However, the apparently simple words of Article 86 actually conceal some very considerable conceptual problems, which still await a satisfactory resolution.

## THE POSITION OF PUBLIC AND DOMINANT POSITION IN COMPETITION LAW

**Prof. Dr. Arif ESİN**

Distinguished Presidents and Esteemed Guests and Esteemed Scientists;

I will try to make a short speech. Because the time has passed and the attention has weakened; besides, as the Chairman has also stated, you have the opportunity to follow me up from various resources.

Ladies and gentlemen, my subject today is the position of Public and Dominant Position in Competition Law. Dominant Position in Competition Law and Abuse of this position are subjects closely regarded by all persons of Competition Law. However, in the case of dominant position, the position of public opens up a very interesting atmosphere for discussion. When we have a look at the Turkish economy, we are able to see that there is a dominancy of public sector in many

fields. In this respect, it is fruitful to discuss in details and support the subject with jurisprudence of Court of Justice of European Communities (CJEC) in order to enlighten concerNed environments.

Thus, ECCJ, with the decisions taken in recent years, endeavours to build a balance between competition rules of the Constituent Agreement and granting special rights to some undertakings by member states.

The Höfner and Elser vs Macroton[7] case indicate how national legislations breach Article 90(1) of the Constituent Treaty and lead Abuse of Dominant Position within the scope of Article 86 by creating public monopoly.

In this case, the Court of Justice, accepting the German Labour Office as an undertaking, and evaluating together the Articles 90(1) and 86 of the Constituent Treaty reached the decision that the Office abused its dominant position, via being insufficient to settle labour supply to current jobs, and in addition to this, not granting the subject service to other undertakings on the basis of the rights taken from the law and that this situation affected the trade between member states.

On the other hand, there is another well-known case regarding the Zaventem[8] decision of the Commision. In this case, it is evident that Articles 90(1) and 86 of the Constituent Treaty had been evaluated together and the decision was taken. According to the Belgian law, Brussels Airport is operated by the public, and it's regarded that discounts provided to some undertakings with regard to taxes for the take off of planes lead to an incomplete competition. In this case as well, it was concluded that the airport administration was abusing its dominant position on the basis of the law.

A similar result is seen in the Supreme Court's Porto di Genoa-II[9] decision. Supreme Court concluded that a member state, by breaching Articles 90 and 86 and granting some privileges to a public undertaking, caused the related undertaking to abuse its dominant position. Here " if the state of abusing the dominant position by economic monopoly (or a concered undertaking) is due to Article 90(1) of the Constituent Treaty, in this case, the party who causes the breach is not the undertaking, but the member state itself[10].

On the other hand, in ERT (EPT) vs Dimotiki case[11], the Supreme Court permits activites of some member state institutions having monopolistic rights on the condition that they do not run after interest and watch for public's favour. In order ERT (EPT) to act against Articles 90(1) and 86 of the Constituent Treaty it must practice those acts prohibited under the scope of Article 86. However, the Greek television only transmits national programmes and does not have the right to transmit

[7] *Aff 41/90, Höfner & Elser vs. Macrotron, Rec. 1991, p: 1-1979*
[8] *British Midlands vs. Brussels National Airport (Zaventem) Commission Decision, ECCG, 1. 216, 1995, p: 8*

[9] *Aff 18/93, Corsien ferries Italia S vs Porto di Genoa II, Rec. 1994,: 1-1812*
[10] *BUHART J, Principles de Droit Europeen de la Concurrence, Bruxelles, 1997, p:112*
[11] *Aff 260/89, ERT vs Dimotiki, Rec. 1991, P:1-2925*

foreign programmes. So, in this way, it was considered not possible to take to the first plan its own programmes against foreign programmes.

As a result, in the decisions regarding Höfner and ERT (EPT), mentioned above, it is concluded that the Supreme Court does not grant any special privileges to public economic enterprises while evaluating the position of public with regard to abuse of dominant position under the scope of the articles of the Constituent Treaty regarding competition. Even more, it can be said that CJEC takes a more strict stand against public enterprises. Thus, the Supreme Court in its decisions regarding abuse of dominant position by private enterprises, while making a very clear distinction between holding a dominant position in relevant product market or geographical market and abusing this position in relevant markets, there is no such distinction in public monopolies such as Höfner and ERT (EPT).

Thus in the evalution of the abovementioned two cases by the Supreme Court, although the result was positive for ERT (EPT) in the second case, “holding the dominant position” and the verb “abuse” have not been distinguished. In the Höfner case, although German Labour Office had no attempt to hinder the development of competition its holding the dominant position was evaluated to impede competition. And in the ERT (EPT) case, although there is no “abuse”, it was concluded that in the case of holding the publication rights of national and foreign programmes by a channel which is in monopolistic position, the dominant position would appear as *ipso facto*.

On the other hand, in Régie des Postes vs. Corbeau case[12], CJEC stated in its reply to Liege Criminal Court of First Instance who made the compliance of the holding the monopolisitic position by the post administration in Belgium with Article 90 (2) of the Constituent Treaty a dilatory question, that the subject article regards the granting of special privileges by member states to some Institutions and Organizations as permissible; but, also stated that in case these privileges have elements impeding competition, in order to watch public’s favour, it’s necessary to take restictive elements into consideration.

Upon this case, as everyone knows the Commission made two important steps regarding postal services under the scope of Article 90(3) of the Constinent Treaty. The first one was the issue of an Announcement[13] regarding competition rules to be applied on postal services. The second was a Directive regarding the development of postal services in the Community and increase in the service quality.

As a result, while CJEC accepts the granting of privileges to some undertakings for the favour of public, it wishes a very narrow frame for elements impeding competition or demolishing it completely and attaches a special importance to the settled. economic independency and economic viability of these undertakings

[12] *Aff 320/91 Regies des Postes vs. Paul Corbeau, Rec. 1993 p: 1-2533*
[13] *Commission Notice regarding the competition rules to be practiced for Postail services, ECCG, C 322, 1995, p:3*

On the other hand, the subject "financial independency and economic viability" of economic monopolies (those aiming at earning profits) lead to broad discussions in the Community. These undertakings, as a result of the privileges granted with the aim of public's favour, often work at a loss. But again as a result of the similar privileges the profit gained from profitable areas is used to subsidy works resulted with losses. Here emerges an interesting dilemma. If privileges are lifted and it's made possible for private undertakings to access profitable areas, then private entrepreneurs would be able to have access to price competition in order to get a share from the market opened up to competititon and the interest limit in the public profitted fields would be able to regress and as a natural consequence of this, the service quality in non-profitted fields would regress.

This discussion has been continuing in the Community, and in countries having centralistic structure it will take time to demolish economic monopolies with comparison to countries having a closer view to free competition. On the other hand, it is understood that these discussions shall go on for a while as the Supreme Court left the privileges restricting competition granted to economic monopolies to the possession of national legislations.

In spite of Commision CJEC jurisprudence and discussions given above, claims stating that public undertakings, performing activities against competition impeding or restricting it, which can be evaluated as breach within the scope of Articles 85 or 86 of the Constituent Treaty, can easily extricate themselves from responsibility under Article 90(2) of the Constituent Treaty, granting privileges to undertakings serving for the favour of the public, have completely become invalid pursuant to the decisions of Commission and Court of Justice in the beginning of 90s.

Sample decisions regarding public monopolies to be analized here shall clarify the scope of exemption provided by Article 90(2) of the Constituent Treaty and approaches of the Commision and Court of Justice with regard to the provisions of this article.

For example, in a Magill case[14], Irish Television refused to grant tv programme licence to Magill private undertaking whose activity is the publication of TV magazine. The Irish Television claimed that this activity should be evaluated within the scope of Article 90(2); and thus Irish Television is responsible to watch over the interest of public while performing its activities. Irish TV stated that it refused the demand by Magill, in order to protect Irish language. Trial Court stated that it is publication incomprehensible how the duty [to watch over public's interest] undertaken by the Irish TV could become impossible via a television magazine publicized by a private undertaking and decided that the Irish Television restricted competition.

[14] *Aff, T-69/89, RTC vs Commission, Rec. 1991, p:11-485, Aff. T-76/89, ITP vs Commission, Rec-1991, p:11-575*

A similar case occurred with Commision's LJsselcentrale decision[15]. In this case, the Commision refused the claims stating that it is necessary to impede parallel export in order to provide electricity safely by the four Belgian undertakings and by the undertaking SEP, with which these four jointly operate, and that this should not be evaluated as breach when taking Article 90(2) of the Treaty into consideration.

In addition, in Eurosport and Screensport cases[16], members of EBU (European Broadcasting Union) with the aim of encouraging the transmission of different types of sports, for which there is not a wide interest among public, stated that they needed Eurosport channel and this was a demand to the favour of public. But the Commision stated that Article 90(2) of the Constituent Treaty cannot have a supra-nations application and that activities of Eurosport were of supra-nations feature, and added Article 90(2) could not be the legal basis for this demand.

Either for cases stated above or for others related to Article 90(2), Court of Justice always has underlined that detecting the compliance of the acts of undertakings serving for the favour of the public in the market with competition rules is also a duty for the national institutions of member states. Together with it, according to Article 90(3) of the Treaty, the Commision also has a duty to watch over the implementation of provisions of Article 90 of the Treaty, and within the scope of this duty, the Commision has the authority to issue some directives with regard to member states.

Thank you Chairman.

[15] *Ljsselcentrale Commission Decision, ECCG, L 28, 1991, p:32*
[16] *Eurosport/ Screensport Commission Decision, ECCG, L 63,1991, p:32*

# THE CONCEPT OF COMPETITION AND ITS IMPLEMENTATION IN THE COMPETITION RULES OF THE EUROPEAN COMMUNITY

**Helmut SCHRÖTER**

1. The European Community is clearly based on a market economy. The commitment to develop and to maintain free, fair, undistorted and effective competition is evident throughout the EC Treaty, which forms, so to speak, the constitution of the Community. Already the preamble, fourth sentence, mentions the need to remove existing obstacles to free trade between Member States and to guarantee fair competition. Article 3 requires the Community to establish a system of rules which ensures that competition in the Internal European Market be not distorted. The EC Treaty has taken essentially the same approach in its provisions on economic policy (Articles 3a(1) and 102a) and monetary policy (Articles 3a(2) and 105(1)) which impose on both Community and Member States, the obligation to act in accordance with the principle of an open economy with free competition.

2. These basic commitments have led the founding fathers to provide a whole legal system for the protection of competition:

   a. Firstly, they have recognised that the removal of obstacles to the free movement of goods, persons, services and capital, i.e. of restrictions created

by national legislation or administrative practise, is not sufficient to create a common market, if undertakings or Member States still have the possibility of creating new barriers to free trade, the first by entering into agreements or concerted practices restricting or distorting competition or by abuse of dominant positions; the second by favouring national above foreign undertaking or products or by granting financial aid to their industries. Such conduct has therefore been declared incompatible with the Treaty and prohibited.

b. Secondly, they have come to the conclusion that a system or free competition does constitute the best means to achieve the general aim of the Community, such as (Article 2)

   i. a harmonious and balanced development of economic activities within the Community;
   ii. sustainable and non-inflationary growth respecting the environment,
   iii. a high degree of convergence of economic performance,
   iv. a high level of employment, and
   v. the raising of the standard of living and quality of life.

State intervention constitutes only the second best solution; it is allowed only where it leads to better results than those, which free competition would achieve do.

3. The European Commission has always stressed the double role of the Community's competition system, which consists on the one hand in completing the internal market, and on the other hand in bringing about general economic progress. In the eyes of the Commission, competition is the most efficient tool for ensuring that producers remain dynamic, concentrate on innovation, listen to the market, reduce costs and provide, in their own interest and in that of the consumers, high quality goods and services at the lowest possible prices. Competition therefore, is also considered to constitute the best means to improve the competitiveness of European industries and to make them well prepared to face their competitors inside and outside the Community. This is of course a prerequisite for more and safer jobs.

4. The proper function of the market mechanism, in which the Community has a vital interest, is guaranteed by specific competition rules, which address to undertakings, whether private or public, and to the Member States. The latter have to refrain from distorting competition by direct or indirect market intervention. In this context, I would confine myself just to mention the obligations imposed on Member States.

   a. to adjust their commercial monopolies with a view to end between nationals of Member States any discriminations regarding the conditions under which goods are procured and marketed (Art.3 7);

   b. in the case of public undertakings or undertakings to which special or exclusive rights have been granted, neither to enact nor or maintain in force

any measures contrary to the Treaty and in particular to its competition rules (Article 90).

Both provisions are very important tools in the ongoing process of liberalising regulated industries. We may come back to this during the discussion. Also the rules on State aids play a key role in the Community's competition policy. However, to discuss them in detail goes beyond the scope of my speech. I would, therefore suggest concentrating on the EC competition rules, which apply to undertakings.

5. Of these provisions, Article 85 on cartels has the widest scope and therefore the greatest practical importance. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect the trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (1) specifies that prohibited agreements and decisions shall be automatically void (2), but also offers the possibility of exemptions from prohibition and nullity with respect to agreements, decisions or concerted practices (and to categories of such) which entail significant economic advantages, in which consumers are granted a fair part and which are sufficiently important to compensate for the risks and perils brought about for competition; such exemption is however excluded with regard to restrictions which are not indispensable to the attainment of the aforesaid positive objectives, and in any case with regard to agreements which would afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question (3).

6. Pursuant to the case law of the European Court of Justice, Article 85 is first and foremost intended to guarantee the freedom of competition and the unity of the internal market. For this reason, it contains a general ban on cartels, irrespective of their horizontal or vertical nature. But it also permits the Community institutions to proceed to certain positive, albeit indirect interventions in order to achieve the general aims of the Treaty, and in particular to promote the harmonious development of economic life within the common market (see judgement Walt Wilhelm, case 14/68, (1968) ECR 1,14).

7. Article 86, which prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it deals with a particular market situation where competition is weakened because of the mere presence of a dominant firm so that it cannot fulfil its essential function, i.e. to orientate the conduct of the various operators according to the principles of a market economy. In such situation, there is obviously a need for special protection of competition, suppliers and clients of the dominant firm and of final consumers. Article 86 forces undertakings which have a dominant position, to behave in the same manner as a normal undertaking in a competitive market would do. It prohibits:

    a. the exploitation of other trading parties and of customers, in particular the imposition of unfair purchase or selling prices or other unfair trading conditions;

b. the limitation of production, markets or technical development to the prejudice of consumers;

c. the discrimination of other trading parties, thereby placing them at a competitive disadvantage, and

d. the applications of tying clauses with regard to goods or services, which by their nature or according to commercial usage have no connection with each other.

8. These are examples of abusive behaviour listed in Article 86 itself. But the prohibition rule has a much wider scope. It prohibits any recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators and which has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Court of Justice, Case 85/76, Hoffmann-La Roche (1979) ECR 461,541). The case law of the Court indicates that a refusal by the dominant firm to purchase or to sell constitutes an abuse if it is not justified by objective economic reasons. The access to essential facilities has to be granted whenever this is technically possible and always on fair commercial conditions. Strategies developed with the intention to push a smaller competitor out of the market or to impede market entry by newcomers are likewise considered to be abusive if the dominant firms use unfair competition methods, such as selling below cost. The European Court of Justice has moreover found that even mergers can constitute an abuse where the dominant firm by acquiring the control over one of its remaining competitors succeeds in substantially strengthening its market position (see judgement Continental Can, case 6/72, (1973) ECR 215,246).

9. There are many differences between Articles 85 and 86 of the EC Treaty, which together form the main part of the Community's competition system insofar as it relates to undertakings. Article 85 only deals with the collusive behaviour of at least two undertakings, prohibits cartels of any kind and makes them unenforceable by providing for the sanction of nullity, but also admits derogations in favour of economically useful horizontal and vertical cooperation between firms. This has allowed the European Commission to develop a competition policy with a double objective: On one hand, vigorous enforcement of the prohibition rule against hard core restrictions; on the other hand, encouragement for agreements which restrict competition, but which on balance bring about procompetitive results by substantially contributing to improving the production or distribution of goods; or more generally, to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefit. Article 86, on the contrary, relates to unilateral practices by one or more dominant firms. It therefore does not contain a civil law sanction, nor does it provide for exemptions, as the abusive exploitation of a dominant position is not justifiable.

10. However, the main difference between Articles 85 and 86 concerns the relation of each provision to the phenomenon of economic power. While Article 85 prevents the creation of dominant positions by means of cartels, Article 86 deals with situations where one or few undertakings are already holding a dominant position. The proper function of Article 86 therefore consists firstly in replacing the deficient market mechanism by a system of legal constraint imposed on the dominant firm with a view to protect its remaining competitors, its supplier and clients and final consumers; and secondly, in stopping the trend to a further deterioration of the market structure. The value of a legal tool allowing such remedial intervention should not be underestimated. The notion of "dominant position" has been given a broad interpretation. According to a confirmed practice (see judgement of the Court of Justice, case 322/8l, Michelin, (1983) ECR 3461,3503), this concept can be defined as a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent, independently of its competitors and customers and ultimately of consumers. Market dominance may already be present in situations where the leading firm has a market share of 25 to 30%, provided that the market shares of its competitors are negligible. Decisive influence on the conditions of competition is sufficient. As the concept of abuse is also defined in very broad terms, Article 86 has become a sharp sword in the hands of the European Commission.

11. Even with Articles 85 and 86 taken together, the Community's competition system would remain deficient, if provisions on merger control had not completed it. Council Regulation 4064/89 gives the European Commission the power to stop concentrations between undertakings which create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Insofar similar to Article 85, this regulation trends to prevent the concentration of excessive economic power in the hands of one or few undertakings, thereby insuring the maintenance or development of competitive market structures. This is better than to look for remedies on the basis of Article 86. The latter Article remains however, the only means of protecting competition where firms acquire dominant positions by internal growth. Community law indeed has not provided for specific rules allowing deconcentration in the aforementioned situation. Some commentators as a lacuna consider this in the Community competition system.

12. After having resumed the content of the Community's basic competition rules, we, should now turn to the main questions of my speech:

    a. Is there one uniform concept of competition, underlying Articles 85 and 86 of the EC Treaty and the provisions of the Merger Control Regulation?

    b. If not, which of the four attributes given to competition (free, fair, undistorted and effective) represents the leading principle?

13. We can anticipate the answer: it is not possible to deduct from the Treaty a uniform competition concept. Pursuant to the principles laid down in the

introductory Articles of the EC Treaty, competition must have all four of the above mentioned qualities. It has to be free, fair, undistorted and effective at the same time. Each of these qualities is expressed not in all, but in some of the rules forming the Community s competition law system.

14. The requirement of effective competition clearly underlies the Merger Control Regulation, with aims at the maintenance of a competitive market structure. The same objective can be distinguished in Article 85 (3)(b), a provision which excludes exemption from the prohibition of cartels, in cases where the participating undertakings might otherwise be afforded the possibility of eliminating competition in respect of a substantial part of the relevant market. Article 86, by protecting the remaining degree of competition, also aspires to the reestablishment of competitive markets, or in other words, of effective competition.

15. The aim of ensuring undistorted competition is present in Article 85(1), which prohibits collusive behaviour of undertakings that would otherwise artificially change normal market conditions within the Community. Article 92(1) also shares this concern. The principle of this provision is that, 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.

16. It is not the specific task of the Community institutions to ensure fair competition. This mission has in the contrary, been assigned to the national legislator of each Member State. Community competition law does however not take a neutral position with regard to unfair trading practises. Where exercised by undertakings in a dominant position, such practises constitute an abuse under Article 86. With regard to Article 85(1), the European Court of Justice (Judgment in case 26/76, Metro/Saba I, (1977) ECR 1875,1908) has stated that a contractual obligation imposed on wholesalers in a distribution system not to sell to final consumers, i.e. not to compete with retailers, escapes from the prohibition of cartels because it ensures fair competition. Free, but unfair competition is not protected by Article 85.

17. But what has to be understood by “free competition”? Does this notion also comprise the individual freedom of economic operators to determine their conduct in an autonomous manner and to enter into competition with whom they like? Or does “free competition” only indicate the absence of intervention by firms or State authorities, which would substantially change the market conditions? These questions have been discussed over the years and the positions taken on them are still controversial.

18. The problem arises when it comes to define the concept of “restriction of competition” under Article 85 (1). In a recent judgement (case C-266/93, Volkswagen and VAG Leasing, (1995) ECR I-3477, 3518), the European Court of Justice has underlined that this notion is composed by two elements: the

restriction of the commercial freedom of undertakings and the detrimental effect on market conditions. It is however not yet clear how these two factors should be balanced against each other.

19. In its decisions until the mid-80s, the Commission has heavily relied upon the restriction of the freedom of the parties, in order to prove that their agreement also restricted competition. Only agreements of minor importance were excluded from this approach. Today everybody recognises that more economic analysis is needed in most cases. Hard core restrictions of competition, i.e. agreements concluded with the intention to fix prices or quantities of output or to divide up markets or sources of supply may still be detected by reading the clauses of the agreement. In all other cases, it is no longer sufficient to find a restriction of the parties' commercial freedom. An analysis of the relevant economic factors, such as the nature and the quantity of the products in question, the number, size and market positions of the parties, the structure and the possible future development of the relevant market, etc has to be added.

20. In some cases, the presence of restrictions of the parties' commercial freedom may even be irrelevant. Pursuant to a case law of the Court of Justice, this is so where such restrictions constitute a necessary means to bring about merely positive results for competition, by allowing the parties to enter into new territorial or product markets, to disseminate, technical know-how, to establish an efficient franchise system or to create new competition which otherwise would not develop. This doctrine does however not justify the introduction of a general rule of reason in Article 85(1). The balance between the anticompetitive and the procompetitive elements of an agreement has to be stroken under the exemption rule in Article 85(3),

21. In the current reforms of its policy regarding vertical contracts, but also horizontal cooperation agreements including joint ventures, the Commission aspires to further develop a rather economic than legalistic approach when applying Article 85(1) and (3). It is therefore essential that the actual but also the future Member States of the European Union closely follow this trend with the view to harmonise as far as possible their national competition legislations with competition law and policy of the Community. Such harmonisation would considerably facilitate the achievement of another goal, which the European Commission is actively, pursuing. The question is of a more decentralised application of the EC competition rules. Mainly national judges and authorities should in the future enforce the latter. Only cases with major importance for the Community as a whole, should remain in the hands of the Commission. Such new allocation of responsibilities is necessary to ensure a well-balanced competition policy in the future Community, which will be composed by up to 30 Member States.

## PROJECTS OF THE COMPETITION LAW AND POLICY COMMITTEE

**John CLARK**

Mr. President
Dear Guests

The discussion and the proceedings are then subsequently published by the OECD Competition Law and Policy Committee. Finally the Committee conducts periodic reviews, in-depth reviews of competition enforcement in each Member country . I would like to discuss briefly a few timely projects of the Competition Law and Policy Committee of the OECD. There is uniform agreement that cartel conduct, agreement on price or output, market division, rigging of bids and so on is unambiguously harmful, is the most unambiguously harmful of all anticompetitive conduct all national competition laws prohibited. But as markets expand beyond national borders, cartel conduct expands correspondingly. It is a fact that international cartels are a significant and growing phenomenon. But for various political and procedural reasons, national competition agencies find it difficult to learn about and to prosecute cartel conduct that occurs outside their borders. This is an area that requires cooperation among competition agencies if international cartels are to be successfully frustrated. And in 1997, that is last year, the OECD promulgated a regulation, a kind of recommendation actually, outlining procedures for such international cooperation in cartel enforcement. We hope and expect that the recommendation will provide the basis for enhanced prosecution of this conduct. The document is available to you, you can find it on your website, or I can get you a copy if you would like it.

A second ongoing project that is OECD-wide is our regulatory reform project. Regulations have an enormous impact on the welfare of a country's citizens, either for good or ill. The OECD project is designed to encourage countries to engage in systematic and regular review of their regulations. In 1997, also the OECD promulgated a lengthy report on regulatory reform containing several recommendations, again that report is available, and I can get you a copy if you would like; there is also a summary. I will say only at this point that the

recommendations highlight the importance of competition policy. It is a cornerstone of regulatory reform. Work is continuing throughout the OECD on the regulatory reform project . Various parts of the organization are conducting country reviews country by country in individual sectors such as telecommunications , electricity, financial services, and food and agriculture. There are also country reviews under way of the public sector, of the ability ,if you will, of countries, of governments to manage change. The Competition Law and Policy Committee itself is conducting reviews of the application of competition policy to regulated industries in several sectors.

Another project that we hope would be completed very soon is the report of the Committee on merger notification, and this is the follow-up, by the way, of some very important work on transnational mergers, that was done by Prof. Whish who spoke this morning, and another noted antitrust scholar Prof. Diane Word from the US, now judge in the United States Federal Court of Appeals. That report recommended that there be work toward developing harmonization in Merger Notification Forms, and that is what the ongoing, the current project is involved in.

The report which we expect to finish soon will discuss the different types of Notification Forms currently employed by Member countries, and will contain an appendix in which there will be listed a set of sample specifications that could be used in Merger Notification Forms. We hope that this report will promote harmonization in Merger Notification Forms overtime both by Member countries as they revise their Forms and procedures, and by Non-member countries as they institute merger control procedures. Indeed Brasil has already used, well, the late drafts of this report as it revised its Merger Notification Form. Harmonization of Notification Forms will benefit both the merging parties who can achieve efficiencies as in mergers that must be reported to more than one country, and the enforcement officials in those countries through which the harmonized Form will promote their cooperation in investigating those mergers.

Briefly let me describe the second area of activity in competition policy within the OECD, that is outreach to Non-member countries. Many countries have , in recent years, adopted new competition laws, and begun enforcing them , and more are in the process of doing so. Within the constraints of our budget, the OECD, through its Centre For Cooperation with Non-member Economies, works with Non-member countries that are in the beginning of stages of implementing competition policy. By means of conferences, seminars and bilateral contacts, members of the OECD Secretariat, and the competition officials from OECD-member countries assist their Non-member counterparts in drafting competition laws and guidelines, and in applying correct principles of antitrust analysis in enforcing their laws. In the earlier part of the decade, most of our outreach efforts were directed toward countries in Central and Eastern Europe, in transition from centrally managed economies. We still devote significant part of our work to that part of the world, including particularly Russia and other CIS countries. But we have expanded recently to other parts of the world, including Asia and South America. We are working with China for example, as they began work on drafting a competition law. We have held two competition seminars in South America, and we are getting ready to hold a third.

Briefly let me describe another, let me offer another preview of work in this area, outreach that is almost completed. We have been working with the World Bank on what we will call, unfortunately I think, a framework for competition law and policy, rather still to name , what we think will become, what we certainly hope will become a handbook or manual, if you will, for competition policy, for countries in the early stages of implementing competition policy. This publication will discuss all of the important aspects of competition analysis. There will be chapters on market definition, abuse of dominance, restrictive agreements, barriers to entry, competition advocacy, and efficiencies. And in an appendix there will be what we could euphemistically describe as a model competition law, not a preview one, but one at least that could be consulted by countries who are in the process of drafting or revising their laws. Several competition experts collaborated in writing this document, indeed two others are speaking here : Mr. Heimler from the Italian Competition Agency, and Mr. Anderson who will speak on behalf of the WTO. There were many others from OECD-member countries who contributed to this document. We are quite excited about it. I look forward to its publication which will be soon. We hope that it will be used widely in transition and developing countries.

Finally, on this subject of outreach, I would like to call your attention to an important component of that program here in İstanbul, and that is why I come so often, and why I enjoy coming so often. The İstanbul Centre for Private Sector Development is a joint venture of the countries of Turkey, Germany and the OECD. Many countries come here, and many conferences are held principally in areas of financial and fiscal policy, principally for officials from CIS countries. And we conduct at least one seminar every year on competition policy. Indeed in just two weeks I will be back, and we are going to have a seminar for competition officials from CIS countries on the subject of demonopolization. And the alternative plan is to create here at the Centre a prominent working group of the heads of CIS competition agencies who would meet here periodically to discuss issues of common interest, much as the Competition Law and Policy Committee does at the OECD in aris.

Mr. Chairman there is a lot more that I would enjoy talking about, but I will stop here.

Thank you again for the opportunity to come and to represent the OECD.

# THE INTERFACE OF COMPETITION POLICY WITH INTERNATIONAL TRADE POLICY: AN UPDATE ON DEVELOPMENTS AT THE WTO

**Robert ANDERSON**

**Purpose of Presentation**

To update participants on developments to date in the WTO Working Group on the Interaction between Trade and Competition Policy.

**Outline of Presentation**

1. Overview of the process and mandate: from the Singapore Ministerial Declaration onwards.
2. Work programme of the WTO-WGTCP: Checklist of Issues for Study.
3. The links between trade and competition policy: some key points of overlap.
4. Competition-related provisions in existing WTO Agreements.
5. The links between competition policy and economic development: observations from the discussions thus far.
6. The links between competition policy and regulatory reform: some further observations relevant to this conference.
7. The Future: Upcoming report to the General Council.

**Singapore Ministerial Declaration** (Paragraph 20)

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members 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.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora.... In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account.... It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas , will take place only after an explicit consensus decision is taken among WTO Members regarding regarding such negotiations.

**Work Programme of the WTO Working Group on Trade and Competition Policy:**

**Checklist of Issues Suggested for Study**

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements should be permeated by the development dimension. Particular attention should be paid to the situation of least-developed countries. In pursuing the items of its work programme, the Working Group should draw upon and avoid unnecessary duplication of the work of other WTO bodies concerned with specific trade measures as well as the work under way in UNCTAD and other organizations.

I- Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy.

Their relationship to development and economic growth.

II- Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application:

- national competition policies, laws and instruments as they relate to trade;
- existing WTO provisions;
- bilateral, regional, plurilateral and multilateral agreements and initiatives.

III- The interaction between trade and competition policy:

- the impact of anti-competitive practices of enterprises and associations on international trade;
- the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
- the relationship between the trade-related aspects of intellectual property rights and competition policy;
- the relationship between investment and competition policy;
- the impact of trade policy on competition.

IV- Identification of any areas that may merit further consideration in the WTO framework.

### The Links between Trade and Competition Policy

- Overlapping objectives of trade and competition policy

- Enterprise practices that affect market access:

- Vertical market restraints
- Import cartels/related arrangements

- Enterprise practices that affect international markets:

- International cartels
- Abuse of a dominant position
- Mergers

- Intellectual property and investment issues

- Government measures that affect trade and competition

### Competition-Related Provisions in Existing WTO Agreements

- Historical:

- Havana Charter, chapter V

- Consultation Arrangements:

- GATT (1960 resolution)
- GATS (Article IX)
- TRIPS (Article 40)

- Substantive standards:

- GATS
- Basic Telecoms Agreement: Reference Paper on Regulatory Principles

### The Links between Competition Policy and Economic Development

- The recent proliferation of competition laws among developing and transition economies.

- Reasons cited in the Group for adoption of such laws:

- Promoting economic efficiency (links with wider market reforms)
- Protecting welfare of consumers
- Addressing anti-competitive practices that affect development and trade
- Attracting/maximizing the benefits of foreign investment

- Reinforcing the benefits of privatization and regulatory reform

**The Links with Privatization and Deregulation**

- Purposes of privatization and regulatory reform
- Risks of privatization/regulatory reform without adequate measures to ensure competition
- National experiences relevant to this matter
- Wide agreement in the Group on the importance of competition advocacy work.

**The Future**

- The required report to the General Council at the end of 1998.
- A range of viewpoints on the issues.

## BLACK SEA ECONOMIC COOPERATION ORGANIZATION AND COMPETITION

**Nurver NUREŞ**

We are meeting at a highly volatile period. Hopefully, it is a passing phase but with uncertainties enough to be very cautious. At the outset, I need to refer to a number of international priority issues which have bearance on the region of the Black Sea Economic Cooperation Organization, BSEC for short, and on competition, our theme today.

First; the international agenda has shifted from international terrorism and organized crimes to economic and financial crisis which confront in different scales practically the whole world. At this stage, there is much smoke in the air.

Second; the hyper speed of international capital flow in search of lucrative markets with highest yields and the lack of local banking and financial institutions equipped with appropriate legal infrastructure, control mechanisms and transparent management are the principal causes of the present financial and economic turmoil. At this point of time, we can see the ice but not the iceberg.

It is evident that the existing international institutions can no more cope with the dynamics of globalization and the present financial volatility; a new international financial architecture needs to be devised as the world enters the 21st century.

Third; we now live in one economy world; the crisis has domino effect and therefore contagious. Since the sharp economic downfall in south-east Asia a year ago, the crises have been addressed individually, on a country-by-country basis. Time has come to assess them in global terms. It is expedient to see the tree, but wise not to miss the forest behind.

Fourth; with dynamics such as transportation/ communication, science-technology-r&d and the information highway, globalization has taken hostage our world. It has almost become unavoidable and irresistible with damages to some and new opportunities to others. It is clear that the road to globalization is quite slippery and rather unforgiving. The present financial and economic tremors are but a malaise of very rapid globalization. Human kind needs a deepened understanding of this movement in order to minimize its evils and maximize its blessings. A high level international meeting on globalization would be both timely and the right step.

Here, I must also add that, with these developments the process of transition has reached to a new milestone. In the background, briefly, what does BSEC signify, and where does it stand?

An initiative of regional economic cooperation with eleven participating states; two market economies, Greece and Turkey and the rest nine countries in transition, a market of 330 million people extending over an area of nearly 20 million $km^2$, covering seven seas and nine time belts, possessing rich human resources with competent researchers and prominent scientists, trained and untrained labor available at competitive costs, vast mineral and other natural reserves including rich oil and natural gas resources, unsaturated markets with high absorptive capacity in industry, services and agriculture, wide manufacturing basis in need of restructuring and modernization. All these underlie a potential of major proportions and many business opportunities.

BSEC is the response of its member states to the 21st century. It aims to transform the Black Sea region into an area of peace, stability and prosperity by way of economic cooperation.

BSEC is a partnership initiative between the public and the private sectors. The mission of the public sector is that of an incubator, an initiator. It is indicative, not restrictive; removing barriers and opening venues to cooperation. The private sector however composed of the BSEC businessmen is the locomotive, the principal player that will determine in effect the success of this long-term initiative.

BSEC presently is engaged on a variety of projects and activities: Laying the ground with partners for operable Eurasian transportation/communication system, cross-border improvement and trade facilitation, investigating the establishment of a free trade area, creation of intra-regional energy market and interconnection of national electricity power grids, strengthening the efficacy of SMES in national economies, developing investment-friendly environment, launching BSEC trade and development bank (BSTDB), combating drug-trafficking-illicit trade-organized crime, confronting environmental pollution and ecological degradation, arranging training programs/workshops/seminars/panels which are supportive to development strategies.

Given the experience and progress of the six years since the foundation of BSEC, the period ahead promises to be more fruitful than the achievements of the recent past.

The most engaging issue in the BSEC process is transition from command economy to free market system and privatization is its essence. Except Greece and Turkey, all members are involved in this exercise. The scope of implementation differs from one country to another with the road ahead still long and up-hill in general.

So far, the transformation has hardly delivered and disenchantment is high among the masses. This is due largely to the unforgiving rules of privatization. A more human face to transition would possibly enhance its chances to success. The shift to market economy has left countries in transition burdened with the tremendous task of transforming their societies in a multitude of ways; politically, socially and structurally.

The rule of law, that is a highly developed legal system with a supportive institutional set-up and good governance are the core of this transformation process. In the haste to realize capitalist liberal market economy, the countries in transition overlooked this legal-institutional framework which slowed down privatization and the transition process, created distortions in the management and operation of the economy, upset traditions and social values leading to illusions and frustration among the people. Hence the present crisis found a soft ground apt to set in.

Evidently, this is a pressing situation and must be remedied fast. Establishment of legal-institutional infrastructure with good governance in the creation of an operable market economy, whatever its face may be, is a priority issue and unavoidable. This is due to the fact that citizens and economic actors in the national economy need suitable legal landscape for their activities.

Competition is an essential ingredient of the free market place and means "fair play" in the flow of economy in the principal sectors of industry, services and agriculture. It is a powerhouse and makes the market economy work.

Theoretically and in a full-fledged market economy, competition is left to the market, which is regulated by way of supply and demand. Competition is totally alien to the former communist system. Despite the process of transition, its absorption by the indigenous people may take longer than the establishment of a competition-friendly legislative and institutional environment. Competition coupled with a supportive structure is in a stage of crawling in transitional economies where fragile legal-institutional infrastructure and governance continues to distort competition. The intensity of such distortions differs from one country to another. In major transitional economies, concentration of capital by any means, abusing norms of business conduct, mergers, appearance of monopolies giving way to excessive market power is becoming rather common. Needless to say, this trend must be averted, because it is ruinous to good governance, weakens "fair play" in the operation and management of the economy and opens deep wounds in the socio-political set-up.

Therefore, and still in the present stage of privatization and the transition process, there is need for introduction of competition regulations or more effective implementation, if regulations exist, for the legitimate operation of competition in order to overcome its ill-effects.

A corollary of such regulations is the creation of independent agencies, i.e. organizational framework, which will be responsible to supervise the flow of the market and thus open the way to improved and fair competition. A sustained dialogue and transparency should be established so that all the actors in the national economy are familiar with the rules of the game in order to promote and respect free competition. Such a comprehensive environment will facilitate market entries and foreign direct investments invigorating the business climate.

Finally, in dealing with competition, a set of standards for the conduct of business need to be promulgated in order to protect the consumer. This will be an important element in humanizing the process of transition.

At this point of time, given numerous burning issues of transition to market economy and development, the turbulence activating national production capacity of wide ranging reforms, and finally the present financial and economic crises shaking some of these economies, competition will emerge as an issue somewhat later; but it will definitely concern all of them as privatization expands and takes root.

## UNCTAD

**Philippe BRUSICK**

First of all, on behalf of the Secretary-General of UNCTAD, allow me to thank the Turkish Government, and in particular the Turkish Competition Authority, for inviting me to address this important conference and for the warm hospitality received here in this historic and beautiful city of Istanbul.

I should like to recall that UNCTAD's action in the area of Competition Law and Policy goes back to the early 1970's when, at the initiative of the developing countries, work was initiated at UNCTAD III in Santiago de Chile, to study restrictive business practices of private enterprises. This process culminated in 1980, when, after two years of negotiations, the Set of Multilaterally Agreed Equitable Principles and Rules on Restrictive Business Practices was adopted unanimously by the General Assembly of the United Nations.

The so-called "Set" was the first - and so far the only - fully multilateral code of conduct on competition. The core provisions of the Set prohibit horizontal restrictive business practices such as cartels, including import and export cartels; it also prohibits abuses of dominant positions of market power, and contains the basis for merger control. Another important provision of the set calls for all countries, including developing countries, to adopt and effectively enforce competition legislation. For this, countries with more experience in the field of competition are invited to share their expertise with countries willing to adopt national competition rules and to cooperate with each other in implementing such rules. The Set also envisages consultations among States on competition issues and establishes an Intergovernmental Group of Experts on Restrictive Business Practices at UNCTAD, to monitor the implementation of the Set, which meets annually at UNCTAD, in Geneva, since 1981. Moreover, every five years, a United Nations Conference to review all aspects of the Set was called for in the Set. Such Review Conferences took place in 1985, 1990 and 1995, to strengthen implementation of the Set and each time the validity of this multilateral instrument on competition and the need to strengthen its implementation, especially to help all countries adopt national competition rules, was reconfirmed. The Fourth UN Conference to Review the Set is now scheduled to take place in year 2000, and the General Assembly of the United Nations has recently decided to rename the IGE on Restrictive Business Practices as IGE on Competition Law and Policy. The IGE with its new name held its first session in July 1998, and is expected to hold its second session in July 1999. The 1999 Session will also be a preparatory session for the Fourth UN Review Conference in the year 2000. As you can see, UNCTAD has a longstanding mandate in the field of Competition Law and Policy, both at national, regional and multilateral levels.

UNCTAD's responsibilities in the field of Competition Law and Policy include, in particular, the promotion of competition at the world level. To this aim, UNCTAD has elaborated, and constantly revises and updates a Model Law on Competition, taking into accounts the latest trends and developments in this field. UNCTAD also

continuously elaborates a Handbook of Competition Laws, which is a compendium of all competition laws and regional rules in the world. I may state that the text of the Turkish Act on the Protection of Competition No. 4054 of 7 December 1994 and the Law on the Protection of Consumers No. 4077 of 8 March 1995 was published in November 1995 in document TD/RBP/CONF.4/9, which was submitted to the Third UN Conference to Review the Set in 1995.

Last but not least, UNCTAD, in cooperation with the competition authorities of member States, as well as the international organizations active in this field, such as OECD and the World Bank, provides technical assistance, advisory and training programmes for developing countries and countries in transition, wishing to adopt, effectively implement, and also revise competition legislation. Moreover, as called for at the World Trade Organization Singapore Ministerial Conference in December 1996, UNCTAD cooperates closely with the WTO in its Working Group on the Interaction Between Trade and Competition Policy, particularly in ensuring that the development dimension is taken fully into account.

In its efforts of technical cooperation in the field of Competition Law and Policy, UNCTAD intends to strengthen its links with the Turkish Competition Authority, as the Turkish experience, especially with respect to the development dimension, is considered of prime importance. We intend to draw upon the Turkish Competition Authority's expertise in particular with respect to cooperation with economies in transition of the CIS region, as well as countries of the Middle East and Mediterranean regions willing to adopt national competition legislation and to join the world “competition family”.

Thank you.

## GERMAN ANTITROST, GERMAN COMPETITION LAW

**Kurt STOCKMAN**

Thank you very much indeed Mr. Chairman. I realize that I have about sixteen and a half minutes if I want to share justly the time available with my colleagues from the other EC countries. Still just to surprise you, I would like to start like all the speakers before me by thanking you for the kind hospitality which we have had in the first two days in İstanbul. This is really a model of hospitality which I think sets a standard which is difficult to meet. Second, I would like to congratulate the Turkish Antitrust Authority for their achievement in the first year of their existence. We have heard about that in more detail this morning. We really have to think of a child prodigy, of a young child of ancient mythology throttling giant snakes at the age of one from its cradle. I have to tell you that with a certain envy I saw the high level of visibility of your Authority, with the Prime Minister present, and really the top political brass. Five years after the creation of the Authority in my country, it was argued in Court that the competition law was the least known law of all German laws. And now we have turned forty, the German Antitrust Authority, without realizing being in a mid- life crisis still. We still wait to be nominated “government agency of the year”. You achieved that in the first year already. If this goes on like that, we will have many more conferences here in the interest of other European governments. And there is justification for some of them, isn’ it? Because this conference is called First İstanbul Conference. As a lawyer, I tend to believe that the second is envisaged, and possibly even the third. Well already one and a half minutes I have gone off my time. I will turn to the topic which I am supposed to speak about, that is German Antitrust, German Competition Law. It is difficult to summarize our law and our experience in only fifteen minutes. Let me concentrate on some issues which might be of special interest in your phase of applying Competition Law.

Well as to the history, I should mention some facts. Germany was, a hundred years ago and well into this century, seen as the country of cartels with thousands of cartels. This does not mean that we were not concerned, as our report to our Parliament around the turn of last century clearly indicating that cartels pose a problem to the economy as a whole, that they do damage the consumers, that they limit choices of consumers and all that. Still no action was taken until the twenties, twenty-two, twenty-three while inflation was raging. Then President of the Republic adopted an ordinance providing for the control of abuses of cartels. No prohibition, nothing else, nothing which could be compared to a fully-fledged Competition Law of our time. Then the Second World War came: the end of very clumsily planned economy with mandatory cartelization; all that came to an end. And one of the benefits of losing the war was that two years after 45, the allied forces the Americans, the British , and the French although I have some doubts about whether the French thought very much about this type of legislation, but the Americans and the British certainly did introduce Antitrust Law in Germany, and that was a real advantage which we had over other European countries. I did not mean that losing a war is worthwhile just to get Competition Law, but, my friend from Italy, if Italy had stayed a little longer with the losers of the war, you might have got your Antitrust Law much earlier than in fact you did. What we got was in contrast to Japan and other

country: allied law, it was not German Law,but allied law. And this was of course until we had our own law. But the existence of allied law of course triggered off the discussion at national level to introduce our own law, and this was done. After long times, quite unpleasant discussion about the content of this law, we adopted this. Well, this was with one exception a quite modern law. We had a general ban on cartels, that means horizontal agreements, on verticals only to the extent that prices were concerned. On verticals, we were more generous than article 85 is. And I will come back to that, because I think our law is, although due deference to Brussels, in that respect superior to EC Law. We had abuse control. I am not going into that, I just strongly recommend keeping in mind what Prof. Whish said this morning about abuse control. This is in my experience the most difficult antitrust tool to apply, and you can do a lot of damage in applying it the wrong way. And if you want to see the kind of damage to be done, you can look at our experience, you can look at, as suggested by Prof. Whish, the European experience. And for more recent experience, you can look to the countries in transition in Central and Eastern Europe. What we did not have when we adopted our law was merger control, and this was like in Brussels, in the European Competition Law, one of the serious shortcomings. Funnily enough, the argument was that the German legislator should wait until the European legislator had introduced merger control. And of course it was clear that there was a lot of resistance in many many Member states at the time to have this kind of legislation. We have the opposite type of discussion right now. That means that the national legislator should harmonize fully to EC merger control which we are not going into. Well we have not done the last amendment I will mention in the end of my remarks. We played this incomplete Competition Law when we introduced merger control with a mixed story of success. I would not say that it is a 100% success story. It is a reasonable success story as far as the prosecution of horizontal agreements is concerned. After a while, we increased fines, we had a certain deterrence that became known that engaging in cartels is a violation of a very important central rule of our law that it may be sanctioned by really stiff fines. We have not imposed fines of the size mentioned earlier until recently, but two years ago in an individual case, we imposed close to DM 300 million, not ECU but DM. On the companies concerned, the highest individual fine was about DM 112 million which is even the balance sheet of a big company, not easy to hide. So, in that respect, a certain success story. As far as verticals are concerned, I think our life was easier than the life of the European law enforcers, because as I mentioned earlier, we distinguish on the substantive law level between horizontals and verticals. Well there is an outright ban on all kinds of horizontal agreements. We generally treat verticals just under a kind of abuse control approach. This saves us from the problem the EC has to modify at the secondary level of the EC Law what is provided at the first level. Valentine has been dealing with that, and I do think the advisers speaking to countries who have not yet adopted factual laws-by the way our friends from America who have the same problem with sanction on Sherman Act always say please distinguish clearly between horizontals and verticals; you may avoid a lot of problems which we have had to get to grips with this problem. As I mentioned already, abuse control is not a success story at all, and this applies in particular to one kind of abuse which we tried to identify. This is exploitation abuse, that means an enterprise in a market dominating position treats the other side of the market, be a buyer or seller, in a way it could not under conditions of functioning competition,

and forces the other side to pay too high prices or too low prices. The courts were very very reluctant in my country to adopt this philosophy, and the standard of proof was so high that this is practically dead letter by now. That's a little different as far as what we call hinderance abuse is concerned. As regards hinderance abuse, that means you block access to the market, or drive competitors out of the market by a means like rebate system which can be effective preventing market entry, or driving competitors out of that. There we have a few cases, but very limited number of cases, and once again as a recommendation, don't try to find an abuse in all those cases when complaints come to you that there is unfair competition around. As a rule, this is my experience, unfair competition, what is qualified as unfair competition is just competition that hurts, and competition should hurt. The cases of genuine predatory pricing are extremely rare.

Well, with the introduction of merger control, we introduced a very complicated, sophisticated system of distinguishing between mergers. I am not going to speak about the substantive standards; they are the same, more or less the same around the world. Certainly they are the standards used in the EC, and the German standard is very close. What matters is whether a market dominating position is created or strengthened. We distinguished, and there procedure comes in. I have not the time to speak too much about procedure. But procedure is as important as substantive law. You may have a very beautiful substantive law, it remains dead letter if you don't have the procedures to enforce it. We distinguished in the beginning between mergers which have to be notified beforehand. There was a prohibition, like in the EC Merger Control Law, to consummate the merger before approval . And a second type, well the thresholds were lower. The first type I spoke about was a DM 2 billion threshold. The second type was DM 500 million threshold. This type of merger was allowed to be notified afterwards . And this, once again, speaking about failures, because I think failures may be more instructive than successes. I was a clear failure, because to divest a consummated merger with very few exceptions which almost not worthwhile explaining in detail, turned out to be impossible. Once again, 100, almost 110 years of American experience shows that their knowledge which led them to state that "to unscramble the eggs is difficult" is right even under different legal conditions. We strongly suggest that only pre-merger control is workable. That is what we are going to have beginning next year.

So, now I am in the last six minutes of my time. I would like to come to the last amendment which has been adopted a couple of months ago, and which will be law in force from January 1 next year. We harmonized our law to some extent with EC Law. We streamlined our general prohibition of horizontal agreements, almost literally to text of article 85(1). We, as I said, streamlined our merger control by reducing it to an ex ante, a mandatory ex ante merger control of merger projects. There is no ex post control anymore. We retained our different treatment of some articles, because we do think that our system, our legal system is in that respect easier to live with, and requires less resources and clearer to the consumer so to say also. We are following, at a very important aspect, the European model by reducing those areas of our law which had been exempted so far in general or in part from the general rules of competition. This applies to energy, this applies to transportation, this applies to banks and insurances. Unfortunately but one has to admit that there

are powers in this world which are even beyond the reach of forceful competition policymakers. Agriculture will not be in the list of those sectors which are to be brought fully under the rule of general competition principles.

A last remark on national level, the really new thing in our law will be the incorporation of a kind of control of a public procurement. I do think we do not have the time to go into details of that, but economically speaking, public procurement in the European Union, as it is now, is a three digit billion ECU business every year, and three digit means ECU 700 billion every year, and that this business is done under competitive conditions, in my view, is extremely important. So, in principle, I agree with the idea of integrating some kind of control

Some very few remarks on the relationship between EC Law and national law. Turkey, sooner or later, my personal preference would be sooner, will have similar problems to deal with double layer of law applicable on your territory. On the whole things, I am going more smoothly as I could, we have simple rules. On the surface, of course, I mean the merger control, it is either Brussels or other national authority, and the rest of competition laws. In principle both rules apply simultaneously until there is conflict. But those among you who are lawyers, of course will guess that behind the simple rules, there is a whole jungle of most intriguing legal questions, and many of them still unsettled. What matters in a context like that is that beyond the letter of the law, one establishes functioning, working relationship between national authorities and Brussels. Otherwise you can both create a lot of problems for yourself as law enforces, and for your business which is even more serious. This will be when we have the scenario, I think John mentioned that, or no Helmut Schröter did that, of 30 members in the EU when 99 out of 100 EC employees will be interpreters, good news for the cabins I think! We don't know, but we have to prepare ourselves for that, and I think, well now I really have to, just to keep my promise, I have to stop in the middle of the sentence. Thank you for your attention.

## NATIONAL PRIORITIES, NATIONAL LAW AND EUROPEAN LAW: THE ITALIAN EXPERIENCE*

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## 1. Introduction

In Italy, the provisions of law October 10th 1990, no.287, (the Competition Act) are very similar in substance to those of the EU legislation. As far as agreements are concerned, section 2 of the Competition Act reflects also in wording article 85, paragraph 1, of the Rome Treaty, while section 4 introduces a system for exempting restrictive agreements analogous to that of article 85, paragraph 3, of the Treaty. Like article 86 of the Treaty, section 3 of the Act prohibits the abuse of a dominant position. Finally the provisions for merger control of section 6 resemble in substance those of the EC regulation 4064/89.

Before 1990, only the Commission on the basis of EU competition rules administered competition law in Italy. Starting from 1990, a double system was put in place both in terms of rules (Community and domestic) and of enforcing authorities. The Italian experience represents therefore an important example, almost a laboratory experiment, of the functioning of the subsidiarity principle, introduced in the EU legislation by the Maastricht Treaty.[17]

The next section of this paper will carry out a comparison of the antitrust enforcement activities undertaken in Italy in the two periods, providing some information on the importance that a domestic law, similar in substance to the EU law, can have in enhancing the respect of competition principles and in promoting a more competition oriented environment. In order to provide a better understanding of the way subsidiarity has functioned in the Italian case, some analysis of the objectives pursued by domestic and EU laws will be conducted in section 3. Finally, some concluding comments will refer to the recent Commission notice on decentralisation and the impact it might have on the activity of domestic competition authorities.

## 2. Law No. 287/90 and the Enforcement of Competition Law

The substantive provisions of the Italian Competition Act are very similar to those of the Treaty. The only difference is that a practice, in order to be considered as restricting competition under EU law, has to affect trade between member states. In principle therefore, while EU law should cover cases that have a trans-border effect, a domestic law has a much broader possibility of application to

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[17] *According to article 3 B of the Treaty, the Commission in areas of not exclusive competence intervenes directly only when "the objectives of the proposed action cannot be sufficiently achieved by the Member States".*

practices that exercise their effect within the national borders only. However the forty years practice of the Commission shows that the standards that have been used for assessing the perceived effects on trade of a given practice are very broad. In fact within an integrated market with no barriers to trade, every restrictive practice could influence trade prospects, at least potentially. Domestic and EU laws have therefore a broad area of overlapping.

On the other hand, the Italian Parliament, probably in order to provide enterprises with greater legal certainty, tried to eliminate the so-called double barrier in the enforcement of competition law, ignoring the existence of any possible overlap. In fact section 1, paragraph l, of the Competition Act seems to provide a strict system of separation between domestic and Community law, limiting the application of domestic rules "to agreements, abuse of a dominant position and concentrations falling outside the scope of Articles 65 and/or 66 of the Treaty establishing the European Coal and Steel Community, Articles 85 and/or 86 of the Treaty establishing the European Economic Community (EEC), EEC Regulations or Community acts having an equivalent statutory effect". Such a provision, given the wide interpretation that the European Commission and the Courts have given to the notion of prejudice to trade, might have introduced a very strict limitation to the possibilities of application of domestic law.[18] In practice this is not what happened, also because of the strict co-operation by the Italian Authority with the Commission. The Italian Authority was able, sustained in this by the Italian Courts, to substantially disregard the existence of this provision, maintaining those domestic jurisdiction only ceases when the Commission initiates a proceeding.[19] In any case the provision was not completely harmless since it induced a fair amount of litigation.

With regard to the substantive provisions of the Italian Competition Act, since they are very similar to those of EU law, their introduction in the Italian domestic law has allowed for a test of the efficiency of the subsidiarity principle. If subsidiarity would not have mattered, the application of competition law in Italy would not have changed after 1990. The only difference would have been the institution that would have treated a similar global number of cases.

From 1964 until 1990, the Commission opened up 25 formal proceedings on cases of restrictive practices (abuse of dominance and restrictive agreements) concerning the Italian market, an average of 0.8 cases per year. This very limited caseload did not allow for a thorough understanding in Italy of what a competition law was, nor of the objectives it wanted to achieve. Furthermore, with only very limited exceptions, companies and consumers did not even know what a restrictive behaviour was, nor that it could be subject to the control of a law. Newspapers covered antitrust issues and Community competition policy decisions very seldom and only in very special circumstances. After the domestic Competition Act was

[18] *Many authors, see among others Siragusa, M. and Scasselati Sforzolini, G. (1992), "Il diritto della concorrenza italiano e comunitario: un nuovo rapporto", Foro Italiano, IV: 249-72, have argued that the set of cases to which the Italian law is applicable is indeed very narrow.*

[19] *The possibility to apply articles 85, paragraph 1, and 86, granted to the Authority by a recent law, are a further sign of the correctness of the Authority's interpretation of this provision.*

introduced, the number of European cases where Italian firms were involved remained more or less constant (See table 1).

Table 1- Proceedings opened by the Commission and by the Italian Antitrust Authority (*number of cases, averages per year and %)*

Formal proceedings opened by the Commission according to Sections 85 and/or 86 of the Treaty

| **Years** | Number of cases involving the Italian market | Average number of cases involving the Italian market each year | Total number of cases | Percentage of cases involving the Italian market |
|---|---|---|---|---|
| 1964-1980 | 7 | 0.4 | 162 | %4 |
| 1981-1990 | 12 | 1.2 | 171 | %7 |
| 1964-1990 | 19 | 0.7 | 333 | %6 |
| 1991-1996 | 6 | 1 | 113 | %5 |
| 1964-1996 | 25 | 0.8 | 114 | 100% |

Formal proceedings opened by the Italian Competition Authority according to Sections 2 and 3 of Law no. 287/90

| | | | | |
|---|---|---|---|---|
| 1991-1996 | 114 | 19 | 114 | 100% |

Source: European Commission (various years) *Report on competition policy,* Bruxelles and Autorità garante della concorrenza e del mercato (various years), *Relazione annuale sull'attività svolta,* Rome.

The introduction of the Competition Act has represented a very important step in the direction of fostering a culture of competition in Italy. From October 1990 until December 1996, putting aside the more than 1000 merger cases, the Antitrust Authority has initiated 114 proceedings on the violation of the antitrust law, an average of 19 cases per year (see table I). Furthermore, the more than 100 competition advocacy interventions concerning restrictive laws and regulations, issued by the Authority under section 21 and 22 of the Act, were valued highly by Parliament and Government. In turn the wide coverage of the Authority's enforcement activity by the national press largely contributed to a more general and widespread information on competition rules and principles.

Given the very extensive interpretation that EU jurisprudence has given to the notion of trade prejudice, most cases covered by national law could have fallen under EU law. The reported increase in the number and the importance of competition cases, was therefore not so much related to an enlargement of the possible applications of the law, as rather to the fact that a highly respected domestic Authority was set up. In essence, the Italian experience shows the success of the process of decentralization for the enforcement of competition law. The effectiveness of the introduction of a domestic legislation, leading to a substantial increase in the number of cases dealt with, is very much related to the proximity of the Authority to

the potential violator, since for a national Authority it is much easier to acquire the information on a possible violation of the law than would be the case for the Commission in Brussels. Furthermore a single consumer or a single firm are usually more willing to cooperate with a national authority, than travel to Brussels and face a far less familiar institution.

### 3. Law 287/90 and national priorities

Not only the substantive rules of the Italian law are very much similar to article 85, article 86 and to article 2 of Regulation 4064/89; a very important provision (article 1 paragraph 3 of the Act) requires the Italian Authority to interpret these rules according to Community competition principles. Although somewhat binding, this provision has been extremely important for getting started the enforcement activity of the Authority, extending to the Italian system some important concepts already well developed at the Community level. The notion of enterprise, for example, was much more developed in Community jurisprudence than in the Italian civil code and this transposition allowed the Authority to take action with respect to economic operators that did not completely fit with the domestic notion of entrepreneur. The same occurred with other key concepts like that of a dominant position which were extensively utilised by the Italian Authority without having to settle for a new definition.

Very soon, however, it became clear that the need to interpret the substantive provisions of domestic law according to Community principles did not imply that the Authority could not possibly depart itself from the consolidated decision making of the Commission and the jurisprudence of the Courts. In fact, the domestic provisions, not requiring that a restrictive behaviour should have an appreciable effect on trade, are slightly different than the corresponding Community rules, leading the Authority to disregard all Community jurisprudence aiming at the integration of national markets.

Also for other substantive provisions of the law, the Authority introduced some innovations with respect to traditional Community interpretation. In particular, in the treatment of vertical restraints, the Authority was able to make a greater use of economic analysis than the Commission does. Furthermore the exemption possibilities of section 4 of the Competition Act, that resemble the provisions of article 85, paragraph 3, have been utilised very seldom, since most of the economic analysis is performed at the stage of section 2 of the Act, which is equivalent to article 85, paragraph l. In any case, the exemption provisions of section 4 have been interpreted very rigorously as requiring an analysis of the efficiency effect of a restrictive agreements, where the appreciable nature of the restrictions is evaluated under section 2 of the Act.

This very strict interpretation of section 4 has implied that the Authority did not find it necessary to introduce any kind of block exemption regulations.[20] Probably this lack of need for domestic block exemptions or guidelines was also caused by

[20] *The law does not seem to allow the Authority to issue block exemption regulations.*

the wide coverage of Community block exemptions. Furthermore, in Italy, I believe the same is true in other jurisdictions that have adopted an article 85-type system, most procedures against restrictive agreements originate from a complaint lodged with the Authority by third parties.

These slight but important differences in the interpretation of the substantive provisions of the Competition Act do not originate from the pursuance of national priorities by the Italian Authority. They are instead the consequence of a somewhat different interpretation of the objectives that competition law should try to achieve (consumer surplus maximisation in the case of Italy, some other wider objective comprising market integration in the case of the EU).

There are indeed some provisions in the Competition Act that could be interpreted as introducing some additional goal different from competition. However these provisions are very limited in scope and have not been very actively enforced. First of all, the Competition Act contains a provision on merger control that gives the Government some power to indicate to the Authority an additional set of criteria in order to approve an otherwise prohibited merger. In particular, Section 25, paragraph l, provides that "the Council of Ministers shall, at the proposal of the Minister for Trade and Industry, lay down the general criteria on the basis of which the Authority may exceptionally authorise concentrations otherwise forbidden pursuant to Section 6, when major general interests of the national economy are involved in the process of European integration, provided that competition is not eliminated from the market or restricted to an extent that is not strictly justified by the aforementioned general interests. In all these cases, the Authority shall also prescribe the measures to be adopted in order to restore full competition by a specific deadline". According to this rule, the control of concentrations could be influenced by concerns other than the application of competition principles. However, given the very specific requirements and limitations set forth in Section 25 (in particular, (i) that the government has to lay down general principles and that the antitrust Authority continues to be the sole enforcer of the law, (ii) the presence of a general interest of the national economy, (iii) the fact that competition cannot be completely eliminated or restricted in a way which is not strictly justified by the general interests, (iv) the adoption of measures for restoring full competition within a specific time limit), the scope of such provision would be in practice very limited. Furthermore, the constraints introduced by section 25, and in particular the fact that these criteria had to be identified *a-priori,* have made it very difficult for the Government to actually implement a system of guidelines which would provide the Authority with the general criteria needed to authorise a prohibited merger. Very wisely, section 25 has never been enforced.

Another way to introduce national priorities into the domestic Competition Act was to have sectoral regulatory authorities enforce the antitrust law in two specific sectors, namely media and banking. The relevant provisions, contained in section 20 of the Competition Act, were introduced with the understanding that these sectors had some special characteristics that made it necessary that the Authority enforcing the Competition Act had some specific sectoral competence. However, it was never made clear why this should be so just for these two sectors and not for other activities where, for example, the complexities of the technologies involved would

require some very careful market analysis before the competition Act could be applied.

From the experience of almost seven years of application it is clear now that it would be much better not to have sectoral specialised agencies apply the Competition Act. Even though the provisions of the law are very general, their interpretation can be quite discretionary. For example, the law does not say whether it is right or not to accept behavioural remedies in mergers, what the treatment to be given to vertical restraints is, or how to treat horizontal agreements. If a number of different agencies are responsible for enforcement, each for a given sector, a great variety of interpretations can come about and there is the risk to introduce significant sectoral distortions in the application of the Competition Act.

Recently the Italian Parliament, convinced by such arguments, has eliminated all special rules with reference to the enforcement of the antitrust law to the media and has granted to the antitrust Authority the responsibility of applying the Competition Act in that sector.[21] In the same vein, when establishing in 1996 the sectoral agency for regulating electric energy and gas, the legislator was very careful to leave with the antitrust Authority the task of applying the Competition Act in those sectors, requiring only that the agencies involved cooperate in the exchange of all relevant information regarding any possible violation of the Competition Act. At the moment, only banking continues to have a sectoral agency, the Bank of Italy, formally responsible for the application of the Competition Act.

### 4. The Decentralised Application of Community Law: Some Thoughts for the Future

The recent Commission notice on co-operation introduces some guidelines concerning the relationship between the Commission and national authorities.[22] An important aspect of that notice is that it recognises that subsidiarity does not necessarily imply a decentralised application of articles 85, paragraph l, and 86, but it could also lead to a greater application of domestic competition law by national authorities. The notice gives some guidelines as to the type of cases to be decentralised: (i) cases that produce effect in only one market; (ü) cases that are not very special under a legal or economic perspective.

The notice has been written under existing legislation and therefore it is quite clear that national authorities are not allowed to apply article 85, paragraph 3. However, many legislations provide national antitrust Authorities with the possibility to make a full assessment of an agreement, including taking into consideration any possible efficiency gain that would more than offset for the consumer the negative effect of the restriction. Furthermore, some laws allow national authorities to exempt an otherwise restrictive agreement, for reasons that remain outside a technical analysis of efficiencies and are based on some broader "political" considerations. These contradictions need to find a solution at the European level. Otherwise, the greater flexibility that national authorities have in the application of domestic laws

[21] *See law July 31 1997, n. 249.*
[22] *Official Journal C313/3, October 15 1997.*

would lead them not to choose community law, and the ban not to apply article 85, paragraph 3 would result in a much weaker control by the Commission and the Courts. An opposite result as that the Commission is trying to achieve.

Interpreting article 85, paragraph 3, a more rigorous way could make it easier for the Commission and for the member States to accept it that national authorities would be allowed to grant exemptions under Community law. In fact article 85, paragraph 3, introduces as a binding constraint for granting an exemption that the consumer has to benefit from the agreement. Such benefits have to be incorporated in the price or in the quality of the product involved. They cannot involve the general advantages determined by greater employment or greater industrial strength by a national champion, unless a detailed analysis is carried out showing that the actual consumers of the products involved are indeed better off.[23] In fact, although competition rules are enforced within the general framework of the fundamental objectives of Article 2 of the Treaty, including that of strengthening Community and social cohesion, this general consideration cannot override the binding wording of single provisions.

Article 9 of Regulation 17/62 excludes the possibilities for national authorities to directly apply article 85, paragraph 3. One of the reasons for such an exclusion is that leaving the power to exempt with the Commission is supposed to assure a more coherent application of the law, reducing the possibility that restrictive agreement be exempted for industrial policy considerations. However, since 1962, most member countries have introduced their own laws and national authorities can now apply their country laws in ways that can be much more discretionary than what would occur if they would be allowed to apply article 85, paragraph 3. Furthermore if article 85, paragraph 3, is given a rigorous interpretation and the exemption possibility is constrained by a consumer welfare maximisation standard, then the discretionary power introduced by Community law gets strongly reduced. A decentralised application of article 85, paragraph 3, would then not lead to a beggar-thy-neighbour application of Community law, but would instead enhance efficiency while at the same time respecting competition principles. With such a rigorous, interpretation of the provisions of article 85, paragraph 3, exempting a restrictive agreement would not be different than giving a negative clearance under article 85, paragraph 1, or ascertaining an abuse of a dominant position according to article 86, all activities that national authorities are already allowed to perform.

A fully decentralized application of community law would be much more transparent than the alternative, that is the decentralized application of national laws. In this last instance, the Commission and other member countries would not be informed of the decision-making activity of a national authority and under a Community perspective, this would strongly increase the possibility of strategic beggar-thy-neighbour policies. Furthermore, European Community courts do not have any jurisdiction in the case of decisions under national laws, while, according to article 177 of the EC Treaty, they continue to be responsible for the final interpretation of EC rules, even when applied at a decentralized level.

[23] *The European Courts, especially in recent years, have generally respected this principle.*

## 5. Conclusions

In 1990, Italy has introduced a competition law that reflects almost word by word the Community law. Looking back to the seven years that have elapsed since then, some considerations can be made.

The provision that makes it possible to interpret the domestic law applying Community jurisprudence has been very important for getting started the enforcement activity of the Italian Authority and for making it possible to analyse immediately substantive issues without having to begin with first principles (i.e. the notion of enterprise, dominance etc.). Furthermore, the reference in the law to EU principles allows the Authority not to necessarily endorse the interpretation of the Competition Act given by national Courts, should this be in contrast with EU jurisprudence. As a slight drawback, it has to be acknowledged that sometimes Community jurisprudence tends to be applied in a somewhat mechanical way.

The strict separation between domestic and Community law did not determine a reduction in the scope of application of the Competition Act. In fact, a single barrier has been in place in Italy, but not because of the separating provision. It occurred because of the intense cooperation between the Italian Authority and the Commission.

Having followed at the national level, the structure of article 85 for the treatment of restrictive agreements has probably not been very wise. The double system introduced by article 85 (if interpreted as stating that everything is prohibited except what is exempted) could have led to a very massive flow of notifications of harmless agreements that could have blocked the activity of the Authority. Luckily, this has not occurred also because the Community block exemption system was already in place and many harmless agreements have found legal certainty from community law. Furthermore, also because of the existence of Community regulations, the Italian Authority was able to innovate and provide a more economic oriented interpretation of the substantive rules. An outcome not necessarily expected when the law was introduced.

As for the future, since experience shows that trade effects cannot constitute an effective separator between national and community laws, in order to guarantee an homogeneous system of competition law in the European Union and a sufficiently common interpretation of its substantive rules; the most efficient solution would be that everybody, irrespective of the nationality of the enforcing institution, applies Community law according to the subsidiarity principle. This would then lead to the progressive elimination of national laws, not certainly of national authorities. If this would have been the accepted view twenty or thirty years ago, all the problems of decentralization and coordination now facing Europe would have long been solved and a common and homogeneously enforced competition policy would now be already in place.

## PROTECTING COMPETITION IN GREECE: LAW No. 703/1977 AND ITS ENFORCEMENT BY THE COMPETITION COMMITTEE IN THE YEARS 1995-1998

**Dr. Dimitrios TZOUGANATOS**[24]

### 1. The Regulatory Framework

The Greek Antitrust Law No. 703/1977 "on the control of monopolies and oligopolies and the protection of free competition" was enacted shortly before Greece became a Member of the EC. In view of this timing, it is not surprising that the Greek legislator chose Arts. 85 and 86 of the EC-Treaty as well as Regulation

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17/1962 as model. In fact through the adoption of the EC regulatory model he could achieve two goals: to provide the national authority entrusted with the enforcement of Law 703/1977 (the Competition Committee) with an interpretation guide offered by the application of the respective provisions by the European Commission and at the same time to safeguard harmony between national and EC competition law.

In the initial stage merger control was not deemed to be necessary, since the size of the vast majority of Greek enterprises indicated the need to promote rather than to control external growth. Nevertheless, the concentration process released by the abolishment of the barriers of the traditionally heavily regulated national market gave the Greek legislator the first incentive for a merger control which would protect competitive market structures without adversely affecting the goal of creating enterpreneurial units of efficient size. This compromise was effected by the Law 1934/1991 which, inter alia, provided for a general obligation to notify concentrations within one month of completion unless the combined market share or the combined aggregate turnover of all undertakings concerned in the national market was less than 10% or 10.000.000 ECUs respectively. The purpose of notification was to enable the government to keep track of the concentration ratio and to subject (by a Joint Decision of the Ministers of National Economy and of Trade) to a preventive merger control the branches of economy in which the increase of concentration ratio might result in a restriction or distortion of competition within the national market or a part of it. Since such a ministerial decision was never issued the "merger control" of Law No. 1934/1991 became a dead letter. This merger control has been abolished subsequently by Law No. 2296/1995.

The second amendment to Law No. 703/1977 in 1991 was even less successful. Law No. 2000/1991 introduced a number of superfluous, unintelligible and confusing provisions, which were rightly abolished by the third amendment, effected by Law No. 2296/1995. The only provision of Law No. 2000/1991, which survived the third amendment, was the prohibition of abuse of a state of economic dependence, a rule "inspired" by the German GWB (Paragraph 26 II 2) and the French Ordonnance of 1.12.1986 (art. 8-2), which has not acquired in Greek practice as important a position as its German equivalent.

However, the third amendment was not confined to the "restoration" of Law No. 703/1977. It also effected two major changes directed at the improvement of the mechanisms for the effective protection of competition: it introduced a preventive merger control and upgraded the status of the Competition Committee.

**a) The Merger Control of Law N. 2296/1995 (arts. 4-4f, Law No. 703/1977)**

Although the merger control provided in Law No. 2296/1995 is obviously influenced by Regulation 4064/1989, it bears three deviations vis-a-vis the EC model: (a) it requires notification not only of concentrations subject to preventive control (art. 4b, Law No. 703/1977) but also of smaller scale concentrations (art. 4a) in order to enable the Competition Committee to acquire information on the development of market structures; (b) it defines the thresholds for obligatory notification not only by the combined aggregate turnover of the undertakings involved

but, alternatively, by their combined market share and (c) it provides that concentrations which were prohibited by the Competition Committee because they were expected to significantly impede competition may be granted an exemption by Joint Decision of the Ministers of National Economy and of Development (formerly Minister of Trade), if they produce advantages of general economic importance which counterbalance the impediment of competition or if they are considered necessary for the service of a superior public interest, especially, if they contribute to the modernization and rationalization of the production and the economy, attract investment, enhance competitiveness on the european or the international market or create employment opportunities (art. 4c para. 3).

aa) Concentration (art. 4)

Concentration is defined in art. 4 as in art. 3 of Regulation 4064/89. Similar are the criteria applied for the distinction between concentrative and cooperative joint ventures.

bb) Notification (arts. 4a, 4b)

The obligation for the "informatory" notification of art. 4a arises, when the combined share of the undertakings concerned is at least 10% of the relevant national market or the combined aggregate turnover of the undertakings concerned at least 10.000.000 ECUs. The notification must be submitted to the Secretariat of the Competition Committee within one month of completion. The way to calculate the aggregate turnover is described in art. 4f, a provision equivalent to art. 5 of the Regulation 4064/89. Unless the concentration consists of an agreement, in which case it shall be notified jointly by the parties to the agreement, the obligation lies on the persons or the enterprises acquiring control of the whole or parts of one or more undertakings. Failure to comply with the obligation to notify, whether intentionally or negligently, results in the imposition of a fine up to 5% of the aggregate turnover of the untertakings obliged to notify.

Subject to control by the Competition Committee are concentrations where the combined share of the undertakings concerned is at least 25% of the relevant national market or the combined aggregate turnover of the undertakings concerned at least 50.000.000 ECUs and the aggregate national turnover of each of at least two of the undertakings concerned is more than 5.000.000 ECUs. Such concentrations shall be notified within 10 working days as from the conclusion of the agreement or the announcement of the public bid to buy or exchange or the acquisition of a controlling interest (prior notification). In cases of intentional or negligent failure to notify, the Competition Committee imposes a fine up to 7% of the aggregate turnover on the persons or undertakings with the obligation to effect notification, while failure to comply with the obligation not to put the concentration into effect results - regardless of a culpable conduct of the persons or untertakings concerned - in a fine up to 15% of the aggregate turnover of the undertakings concerned.

cc) Appraisal of concentrations - Procedure (arts. 4c, 4d)

A concentration subject to prior notification shall be prohibited by the Competition Committee, when it significantly impedes effective competition on the national market or a substantial part of it, especially when it creates or strengthens a dominant position (art. 4c para. 1 ). In making this appraisal the Competition Committee takes into account factors similar to those contained in art. 2 para.1 lit. a) and b) of Regulation 4064/89.

The examination of a concentration starts immediately after filing of the notification. Within a month of notification either a decision of the Committee's President is issued finding that the concentration is outside the scope of art. 4b or the case comes to a hearing before the Committee in which the notifying persons or undertakings are invited to attend. Within two months of the hearing the Committee issues a decision (published in the Government Gazette) either finding that the concentration does not significantly impede competition (possibly under condititions and obligations to ensure fulfilment of the parties' commitments in cases where the concentration plan has been modified) or prohibiting the concentration. Restrictions directly related and to necessary for the implementation of the concentration are also covered by the Committee decision accepting the legality of a concenration.

Any decision prohibiting the concentration is to be served to the persons and undertakings concerned within 10 days as of the date it has been issued. These can apply for a ministerial exemption (art. 4c para. 3) within one month of service. The Joint Ministerial Decision has to be issued within two months of the filing of the application. Anexemption can be granted with conditions or obligations in order to ensure conditions of effective competition or the attainment of economic or other advantages that counterbalance the negative effects on competition. If no decision is issued within the two-month period the application is considered to be rejected.

The above time limits are extended where the undertakings concerned consent to an extension, where the information contained in the notification is incomplete or where the notification is incorrect or misleading.

dd) Suspension of concentrations (art. 4e para. 1-3)

A concentration subject to prior notification shall not be put into effect until either the Competition Committee decides not to oppose it or to grant derogation from suspension or the Ministers of National Economy and of Development jointly decide that concentration prohibited by the Competition Committee may be exempted.

The suspension of concentrations does not prevent the implementation of a public bid to buy or exchange or the acquisition of control through the stock exchange market provided that the concentration has been notified in proper time and the acquirer does not exercise the voting rights attached to the securities or does so only to maintain the full value of of those investments and on the basis of a derogation granted by the Competition Committee. Such a derogation is granted, on request, in order to prevent serious damage to the undertakings concerned or to third parties and may be subject to conditions and obligations in order to ensure conditions of effective competition and to prevent situations that might render the

enforcement of an eventual prohibition of the concentration difficult. A derogation for suspension can be requested and granted at any time, even before notification or after the transaction.

ee) Divestiture (arí. 4e para. 4-7)

Where a concentration has already been implemented, the Competition Committee may order the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

In case of non-compliance with the divestiture order the Committee imposes a fine up to 15% of the aggregate turnover of the undertakings concerned and a penalty up to 3.000.000 Drachmae for each day of non-compliance.

A divestiture order does not preclude the possibility of the concentration's being exempted by a joint ministerial decision.

**b) The Competition Committee**

Before the enactment of Law No. 2296/1995 the Competition Committee was a body operating in the Ministry of Trade and assisted by the Competition Department of the Ministry of Trade. Until 1982 the Competition Committee acted as a decision-making body. Its decisions could be challenged before the Athens First Instance Administrative Court. In 1982 due to a change of law governing committees of the public sector the authority to decide on the application of Law No. 703/1977 was tranferred to the Minister of Trade and the Competition Committee acquired the character of an advisory body. It was not until 1991 that the Committee pursuant to Law No. 1934/1991 regained its decision- making powers, however only for cases that did not concern concentrations. Since 1991 the Committee's decisions can be challenged before the Athens Administrative Court of Appeals within 20 days of service. The latter's judgements may be brought for revision before the Council of State.

The Competition Department was responsible for keeping the registers of notifications, undertaking investigations, preparing the cases for hearing before the Competition Committee, effecting service of documents, supervising the enforcement of the Committee's orders, transmitting to the Public Prosecutor cases in which crimes are committed, acting as a Secretariat to the Competition Committee etc. However, the Competition Committee had no authority on the Competition Department, as this was a part of the Ministry of Trade and, therefore, subjects to the Minister's orders.

It was only with Law No. 2296/1995 that the Committee acquired its own organisation and personnel. This Law gives the Committee the status of an Independent Administrative Authority supervised by the Minister of Development. Its budget is registered under a special heading of the Ministry of Development budget.

The Committee consists of nine members: Three, a Faculty member of a Greek University specialized in competition law, a Faculty member of a Greek University specialized in competition matters and a person recognised as an authority and as having experience on matters of competition protection, are appointed by the Minister of Development. The State's Legal Council, the Supreme Court, the Association of Greek Industrialists, and the national Confederation of Greek Trade designate six members, the General Confederation of Greek Craftsmen and Traders and the national Consumers' Council respectively. The members of the Committee enjoy personal and functional independence and in the exercise of their duties are "bound solely by the law and their conscience". Their term in office is three years and can be renewed.

The Minister of Development appoints the President of the Committee from the members. During his term in office the President may not exercise any other professional activity.

The application of Law No. 703/1977 is exclusively entrusted to the Committee. Courts of any kind may judge on matters of validity of agreements and concerted practices as well as on matters of abuse of a dominant position only incidentally. The Committee is not bound by such judgements. A novum of Law No. 2296/1995 was to transfer from the civil courts exclusively to the Committee the power to order interim measures where an Infringement of arts. 1, 2, 2a Law No. 703/1977 is probable and imminent and irreparable damage to the applicant or to the public interest should be prevented.

The Committee is assisted by a Secretariat supervised by the President of the Committee. The maximum number of the Secretariat's staff is 40, the number of persons currently employed being 21.

On May 31st, 1998 the Competition Committee completed its first three-year term in office since it became an Independent Administrative Authority. On this occasion it would be interesting to examine, whether the warmly received third amendment to Law No. 703/1977 has in practice contributed to the effective protection of competition in the Greek Market.

## 2. The Practice of the Competition Committee: A Three Year Review 1995-1998

Between 1.6.1995 and 31.5.1998 the Committee issued 129 decisions and 2 opinions to the Minister of Development on the Committee's Rules of Procedure on the one hand and on competition policy matters submitted by the Minister on the other. The number is quite respectable compared with the 189 decisions and opinions the "old Committee" issued from 1979 to 31.5.1995 and given that the Secretariat, which carries the heavy load of undertaking investigations and preparing the cases for hearing before the Committee, had to operate with only 7 employees until the end of 1996.

### a) Merger control

The vast majority (84) of the Committee's decisions concerned concentrations. The reason for the "monopolization" of the Committee's activities by concentration control is not only due to the strict time limits set by the law, which require priority of review of concentration cases, but also due to the fact that the thresholds - and especially the turnover threshold - proved to be quite low. The latter problem is currently under discussion in the Ministry of Development and a revision of the threshholds is expected, so that powers of the Committee can be released towards a more intensive control of cartel practices and abusive conduct. Another matter increasing the Committee's workload arises from the examination of concentrations, which are effected abroad but nevertheless fulfil the criteria for prior notification. This matter is, however, expected to be partly resolved by the new Regulation 1310/1997.

With respect to the definition of the relevant product markets the Committee follows the general tendency of narrow definition. Many of the examined concentrations related to food, banking, insurance and advertising markets. Two concentrations with combined market shares of 83% of the brand name croissant and 75% of the rusk (and 83% of the brand name. rusk) markets respectively were prohibited (Decisions No. 23/1996 and 40/1996). Only the latter was granted a ministerial exemption as it was deemed to contribute to modernization and rationalization of production, attraction of investment, safeguarding of employment positions and strengthening of the international competitivness of "one of the few purely Greek undertakings" on the relevant market.

Other concentrations with similarly high or even higher market shares have not been prohibited. One could, therefore, ask how important the market share is for the appraisal of a concentration under Greek law. The answer is as unclear as in EC-competition law. Like the European Commission, the Committee adopts a pragmatic approach, considering each concentration case on its particular merits. Such an ad hoc approach makes evaluation of the appraisal criteria quite difficult. In any event, in the cases in which the Committee accepted a large combined market share this was because either the strengthening of the already existing dominant position was of limited extent or the market was open and the potential competition significant.

The Committee considered 6 joint venture cases. In one of them the Committee came to the conclusion that the joint-venture did not have a concentrative character as it fulfilled neither the positive requirement of the "autonomous economic entity" nor the negative requirement of not giving rise to coordination of the parents' competitive behaviour (it did the bottling for the liquid gas produced by the parents, it distributed the products through the parents and also purchased raw materials through them). The joint venture was granted an exemption under art.1 para. 3.

The Committee has been rather generous towards applications for derogation from the obligation not to put the concentration into effect. It rejected only 3 out of 13 applications, where there was no obvious damage to be prevented. This friendly

approach of the Committee was sometimes due to the fact that the time limits for issuing a final decision could not be kept.

In 13 cases the Committee dealt with competition restrictions related to concentrations which it accepted as ancillary, sometimes with minor modifications.

As far as fines are concerned, in 9 cases the Committee imposed fines for noncompliance with the obligation to suspend the concentration of a total amount of about 300 m. Drachmae the maximum and minimum being 109 and 2 m. respectively. In 11 cases fines totalling 44 m. were imposed for non-compliance with the obligation to notify (maximum 7 mio. and minimum 2 mio. respectively).

**b) Other cases**

The second largest number of case (14) concerned applications for interim measures. In most of these the alleged infringement of Law Na. 703/1977 was abuse of state of economic dependence provided for in art. 2a in the form of refusal to deal or abusive termination of business relationship (mainly distribution agreements). The Committee was very cautious in accepting such applications. It recognized the danger that art. 2a might easily develop into a provision of social character. It, therefore, examined the existence of a state of economic dependence very carefully and considered as abusive only business conduct that might cause competitive harm to the applicant.

The Committee was also conservative on the interpretation of the elements of "urgent need to prevent an imminent danger of irreparable damage" required to order interim measures (art. 9 para. 4). Thus, it is not surprising that the Committee issued such an order only once, to extend for one year the duration of a long-term distribution agreement which had been terminated by the supplier in an unreasonably short time after notice. The Committee's activities beyond the examination of merger control and interim measure cases were rather sparse. It reviewed and dismissed nine complaints and one investigation initiated by the "old" Committee on infringement of arts. 1, 2 and 2a; it granted two negative clearances to a selective distribution and a de minimis franchise agreement and three exemptions under art.1 para. 3 to two franchise agreements (under modification of certain agreement conditions) and to an exclusive purchase agreement for crude oil with a duration of 25 years; it, also, imposed a fine of 2 m. for noncompliance with the obligation to provide information. The remaining 14 decisions related to the notification forms for arts. 4a and 4b as well as to the internal affairs of the Committee.

In conclusion, the latest amendment to Law No. 703/1977 was a positive step towards the improvement of effective competition protection in Greece. A further improvement would be possible by íncreasing the turnover threshold for the "informatory" notification of mergers as well as for preventive merger control. This would enable the Committee to examine systematically cartels, concerted practices and abusive conduct, which could be more harmful to competition than minor concentrations.

## COMPETITION LAW IN PORTUGAL

**José Anselmo Dias RODRIGUES**

In the eighties, the market economy won clearly the struggle, taking place between this economy and the planned economy with nearly the State total predominance.

The keystone of the market economy is the freedom of competition.

One may distinguish mainly two great conceptions of competition as a principle of economic organisation.

The first one is the American conception, considering the free competition as an absolute value. Free competition is a condition of the progress, the main condition of the perfect functioning of the economy.

The anti-trust law was conceived in the United States as an extension of the spirit of the Constitution, that aimed primarily not at the guarantee of the power efficiency but at the creation of a set of checks and balances in order to avoid that any of them could become despotic. It was the application of Montesquieu's theory of division of powers in its purity.

Moreover, anti-trust law does not aim at the increasing of economic efficiency but at preventing the monopolization of the economic power.

Who breaks that law, puts himself out of law and puts at stake a dogma of American democracy. It is not by chance that American people use the word "conspiracy" to mean the agreements in violation of the anti-trust law.

This conception is normally called "competition-condition" as opposed to "competition-mean", adopted as a rule in the European States.

In fact, for these States, as well as for the European Union, the competition is a mean of economic progress, but it is a mean among others. Competition is not an aim in itself, but one of the means, maybe one of the best to increase productivity, innovation and progress.

If for reaching these aims it is possible to rely upon competition as well as upon other more efficient means, the preference must be given to these ones. For that, for the application of competition law, the European States conceived technically specialized and independent bodies anyhow able at each moment to take into account the needs of each sector and its economic situation, i.e. what is normally the so called economic balance.

Those conceptions, although looking very different, are in a certain way converging, owing to the intervention of case law in the United States and the rule of reason created by it.

In fact, if the Sherman Act of 1890, condemns, without exception, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations..." and "every person who shall monopolize or attempt to monopolize..."(§§ 1 and 2) and the Clayton Act statues a prohibition with no derogation of merger of enterprises in far as the merger implies a substantial reduction of the competition.

This rigour, without losing the aim of competition, (Vd. Decision of the Supreme Court in the case National Society of Professional Engineers vs. United Sates) was in a certain way moderated by the rule from case-law origin the so-called "rule of reason" that without putting at stake the conception of "competition-condition", established that the rules of Sherman Act cannot be read as requiring the automatic elimination of any restriction to competition and that otherwise their application must comply with the principle of reasonability.

As said earlier, both in the European States as a rule and in the European Union, the conception of competition has a different nature from that of the United States with the adoption of the concept of "competition-mean". This one was firstly incorporated in a Japanese Law dated of 1925 that experienced a great success and influenced a great number of European legislation - France, Germany, and United Kingdom - in the aftermath of Second World War.

In Portugal, the first attempt to regulate the competition Law was made with the publication of a Law on economic coalitions dated of 1936, although by lack of regulation, this never entered into force.

The same destiny would be reserved to Law No 1/72, that foresaw - as it is perfectly understandable owing to the corporative nature of the political regime also contrary to economic freedom by ideological reasons - a regime of large discretionary power allowing the Public Administration the authorisation of any unlimited restrictions to competition.

It was only with the publication of Decree-Law No 422/83, of December 3, that Portugal had a true competition law that was already influenced by the laws in force in Community Member States and was replaced by Decree Law No 371/93, of October 29, after the accession to the Community.

The Portuguese Law, either in the framework of DL No 422/83 or in the framework of DL 371/93, is included in the group of legislations that adhered to and accepted the theory of "competition-instrument".

As can be seen, first of all, through the preamble of DL No 422/83, this statute does not aim at the defence the competition as an objective in itself but as an instrument of economic policy adequate to fulfil two great objectives. That is to say: the defence of the consumer providing a diversified choice of goods and services under the best conditions of quality and price and the rationalization of the production and distribution of goods and services and the continuos adaptation to technical and scientific progress.

The competition, in certain terms, will forego as far as it is not the most appropriate instrument to promote those objectives.

The acceptance of this conception of competition implies, however, the establishment of bodies independent from the Government being able to apply the rules of competition, to make the economic balance and lastly, to regulate the market free from the interference of the political power.

That was the objective that lead in Portugal to the creation of the Competition Council, a body that as regards its conception and powers had as a source the French Competition Council.

Taking into account the interventionist tradition of the State in the economy, that the legislator did not ignore, this one tried to confer this regulating power upon an as far as possible independent body.

Created in 1983 through the DL No 422/83, it maintained the same composition after the DL No 371/93 that is currently the Competition Law.

Taking into account the guarantee of independence, required in order to avoid discretionary and case by case Government decisions thus creating the confidence

of economic agents in the stability of rules of competition, fundamental factor for the economic development in the framework of the market economy, the Competition Council is chaired by a Magisbrate (the practice up to now is the appointment of a judge either from the Supreme Court of Justice or from the Supreme Administrative Court), appointed by the Prime Minister. This appointment is made under the previous agreement of Judicial Bench Senior Board, for a renewable three years term, and comprises six Members of recognised competence and ideousness for the fulfilment of their duties, who are also appointed by the Prime Minister under joint proposal from the Ministers of Justice and Economy.

It is a solution that aims at guaranteeing the independence of the Members of the Council along the lines of the solutions adopted by other countries having similar bodies.

The logistic and financial support is provided by the Secretariat General of the Ministry of Economy, not benefiting from administrative and financial autonomy, differently from what happens in other countries, that would provide a major independence. This is a weakness of the system and a Council's concern, having already expressed before the Government the need to make a modification in that sense.

The competence of the Council is a very large one including from the procedures concerning restrictive practice to competition, the application of fines, opinions asked for by the Minister of Economy on competition matters to binding opinions in the procedures of control of mergers.

The Competition Council is empowered to previously evaluate the legality of agreements, concerted practices and decisions of associations in any form whatsoever, which have as their object or effect the prevention, distortion or restriction of competition in all or part of the national market, namely those that directly or indirectly set purchasing or selling prices or interfere in their setting by the free market, artificially inducing either their rise or their fall; set directly or indirectly other trade conditions at the same or at different stages of the economic process; limit or control production, distribution, technical development or investment; share markets or sources of supply; apply in a systematic or occassional way, discriminatory conditions of price or others in respect of equivalent transactions; directly or indirectly refuse either the sale or the purchase of goods or services; subject the conclusion of contracts to the acceptance of additional obligations, which by their nature or according to trade uses, are not in connection with the object of such contracts.

Within the framework of the 1983 Decree-Law, the Competition Council had still the power to decide on the so called individual restrictive practices, i.e. those conducts, that because of their lack of transparency are *per se* illicit even though without meaningful effects on competition. With the publication of Decree-Laws No’s 379/93 and 371 /93, those practices were submitted to the powers of bodies competent to decide on misdemeanour, the powers of the Competition Council being restricted to the cases in which those practices breach the competition rules.

As it was said earlier, the Competition Council is empowered to decide the procedures on restrictive practices to competition that are essentially those already referred to in connection with previous evaluation of legality and on top of that, the abuses of dominant position and the abuse of economic dependence. This is defined as the abusive exploitation by one or more undertakings of the position of economic dependence of any supplier or customer in relation to such undertakings as a result of the absence of an equivalent alternative, namely when translated in the adoption of any of the conducts aforementioned as prohibited practices.

The Portuguese Competition Law still foresees as a violation of free competition, the concentration of undertakings, on which it is in the powers of the Council to issue a binding opinion when there is the possibility of violation of competition rules as well as state aids for which foresees a special regime that in any case does not imply the intervention of the Competition Council.

Besides the Council, as a body for the defence of the competition, the Portuguese Law established also another body, this one of governmental nature the Directorate General for Commerce and Competition empowered to identify the practices which may breach the law and by its own initiative or under request of the Competition Council, to organize and carry out the investigation in the procedures submitted to the Council's decision without prejudice to the power of the Council to conduct supplementary investigation actions.

To conclude, it must be said that all members of the Council, President included, do not fulfil their tasks on an exclusive basis accumulating these tasks with their own jobs, without prejudice to the application to all Members of the impediments applied to judges in the courts. All Council decisions, beyond being published in the Official Gazette as well in the newspapers at the expenses of the offenders, are included in the annual report submitted to the Minister of Economy.

## COMPETITION AUTHORITY AND ITS PRACTICES

**Dr. Kemal EROL**

Thank You Chairman,

Until now, almost every speaker here started his/her speech with a thanks to the Competititon Authority for holding this symposium. If you let me, I would like to start by thanking our distinguished guests from within Turkey or abroad, for their participation, and add that if this symposium is of success, it is due to their contributions. A little abusing my right to speak, I would like to thank especially to two of them: Prof. Korah, who contributed to my studies on Competititon Law at University of Amsterdam and Prof. Whish, my instructor at University of London- as they are of great importance at my studies abroad; and also I would like to thank our Turkish Instructors- Prof. Nurkut Inan and Prof. Yılmaz Arslan- who have supported my studies in the field of Competition Law until the day and who have worked hard in the preparation stage of the Act; I also thank all other participants.

Until now, we have listened to the developments at various countries and the European Union regarding Competition Law. The Turkish Competition Authority, who considered the necessity to say some things about the Turkish Law, appointed me being their youngest, to make some statements. We shared this duty with my friend Ms. Gamze Öz, my friend from the doctoral study. Today, I will try to inform you about the Competition Act, taking implementations up to day as point of start. If you let me, I want to make use of technology to provide you with more clear information.

Our topic is the structure of the Competition Authority, and duties and powers of the Board as per the Act considering the Protection of Competition. As you all know, our Act is taken from the European Union Legislation and it fully complies with it. I would like to focus on some significant dates. The first one is December 7,1994, which is the acceptance date. The second is a week later, December 13,1994, which is when it is issued in the Official Gazette and put into effect. However penalty provisions were put into force after 1 year, on December 13,1995; but, with regard to the formating of the Competititon Board this was a long term of delay. After a period of 27 months, we were appointed and started office on March 6, 1997, taking the oath. Pursuant to this, the Board had an important task of forming the Competititon Authority and its infrastructure. In fact, during the course of the preparation of the Act, this period was envisaged to be around 1 and a half years. However, taking this delay into consideration we felt that we must shorten this period as much as possible, and within such a short period of 8 months we announced in the Official Gazette that we completed our formation. Thus as of November 5, 1997, the Act was begun to be effectually implemented. After this, within a 6 months-period, old agreements were provided for to be notified. This period was over by May 5,1998 and as of then, we entered into a period during which we could no longer turn blind eye to violations. I hereby would like to talk about the aim of the Act. We can sum it up as avoiding Agreements, Decisions and Implementations that hinder, deteriorate, restrict competition-thus these are provision in Article 85 and Article 86 of Rome Treaty-, and pratice necessary arrangement and supervision in order to attain the final goal: that is to Protect Competition. In short, the aim of the Act is to Protect Competition, as we may understand by the name. In Article 2, the scope of the Act is given. It must have drawn your attention at once that the effect doctrine is included in the Act, saying operating or effecting Good and Service markets. And this means, these acts and conducts are included in the scope of the Act if their effects are deteced in the Turkish markets with regard to those undertakings which have not operated in the markets. The second is abuse of dominant posititon in these markets by the market dominanting firms. And there is a third scope which does not exist in the aim article; and that is mergers and acquisition of companies, which significantly reduce competition. You can see “effect doctrine” here. As my friend Dr. Gamze Öz is going to talk about the legal provisions, I am not going to go into that. My friend is going to talk about 3 main prohibition articles; but I want to tell you some things about the Competition Authority who is in charge of implementing the Act. The Authority is composed of the Competition Board and Presidency and service units. Members of the Board are members appointed from among various places in order to provide the impartiality. 4 members out of 11 shall be elected by the Board out of nominees of double the number, Two shall be elected by the Ministry of Industry and Trde. One shall be elected by the Minister of State to whom the Planning Organization is bound to; the remaining four shall be appointed by the Board of ministers from among the nominees of double the number, and indicated by the Court of Appeal, Council of State, Union of Chambers and Inter - Universities Board. Although appointment by the Board of Ministers seems to create a discussion on whether there might or not be political influence, in fact such a thing cannot be a matter of question. These Boards have an obligation to choose and appoint one nominee out of the two they had nominated. Board of Ministers do not even have the right to say “I don’t like these nominees. Send others and that is why it’ll have an

autonomous structure. Minimum two of the nominees of the 4, nominated by the Competition Board should be experts, skilled on Competition Law. It shall be also necessary for the Board Members to be skilled in occupational fields stated in the Act and these persons sould have the features of a judge, such as being impartial, and they sould not cast a shadow over the independency. The period of the office for Board Members is 6 years. Before the competition of this period, it is impossible for them to be removed from office. Their office shall be terminated only for the condemnation due to a crime they commit themselves. Here we see that a guarantee similar to the one of judges is provided for members of the Competition Board. The President of the Competition Authority has the representative power both as the Chairman of the Board and President of the Competition Authority. Nobody is able to order or instruct Board Members. It is fully independent in its own operations. I especially underline this feature. Independency, administrative and financial autonomy of the Competition Board is a fresh subject in the Turkish Legal System. In this field, in economic field. Competition Authority is not wellknown. That's why I especially underline it. Administrative and financial autonomy are not prepared in words; but they are inspired from the autonomy of judicial persons, and made similar to the guarantee provisions provided by the Constitutiton for the judges.

Competition Authority also has service units. Two Vice- Presidents are appointed to assist the President with regard to service units. Development of service units is the initiative of Competition Board.

Now, I would like to mention the duties of the Board, and state what it does, what the principal duties are for such a Board, whom is granted such a rate of independency and autonomy. I divided these duties written in the Act into 3. I classified the first as the duties and powers of the Competition Act with regards to the exercise of legal provisions. It is possible to sub-classify them. The first one is the power to make general arrangement. Legal provisions of our Act in fact contain general provisions in many respects. It is necessary to issue communiques regarding the implementation of these provisions. Preparation of this second legislation is completely left to the Competition Board. Thus, in this context, it is possible to talk about the semi-legislative power or the power resembling to legislation of the Board. For example, if we talk about issuing a communique regarding Mergers and Acquisitions, using this power via the threshold values imposed for mergers that have to be notified to the Board, legal validity shall be settled for those below this level without the legal validity notification; but, if those mergers and aquisitions above this value are not notified, they shall come across with such a repressive sanction of not having a legal validity. In this respect, it can be presented as an activity similar to legislation. Among the order powers we can count the following: Regarding the implementation of legal provisions of the Competition Law - as you know these are fulfilled upon complaint brought to the Board - negative clearance, granting exemptions, or modifying exemption condititons, making them contingent upon condititons, finalizing exemptions, exercising research, investigation and imposing penalties upon applications brought to the Board. This penalty is in administrative meaning. It's not of judicial features, however, it has the posibility to evaluate it semi-judicially. I am not going to count the administrative powers. Some of them are very important. For the first time in the Turkish Administrative Law, the Competition

Authority has the autonomy to determine what its cadre shall be. In fact, this is very important guarantee for us with regard to the continuation of the administrative autonomy feature. Yet there is no other state organization in the Turkish Administrative life having the power to create and cancel its cadre on its own. It also has the power to determine the salary conditions of its personnel. This is important as well. Thus, the Competition Authority has a real autonomy in the determination of any type of personnel policy it requires.

Among other powers and duties, we had stated expressing its view regarding the legislation, related to Competition Law. As you heard from the Prime Minister himself during his yesterday's speech, the most important development in this field is brought by the Prime Ministry, requiring the wiew of the Competition Authority to be absolutely and definitely taken whenever a Bill of Law, Bill of By Law, Bill of Communiqué, and a Regulation is prepared. This is a significant development. Meaning that, in order not to lead to any mistakes, a condition is brought requiring that the Competition Authority does not consider the Legislation to be passed as an infringement. Besides we have to prepare annual report. Just like the Commission does, we have to prepare annual Competition report on subjects considered to be important with regard to competition Policy. I think this year we are to prepare the first. We have to make it traditional just like the Commision.

I would like to talk a little about procedures: The procedures exercised by the Competition Authority. The audience from business environment might have been interested in this topic. Not in details, but all Agrements, Decisions or Concerted Pratices falling in the scope of Article 4 should be notified to the Competition Authority. Now, all Agrements, Decisions and Concerted Pratices should be notified to the Competition Authority within 1 month following their putting into effect. I am not going to mention previous agreements, as this period is over for them. If this notification is done within 1 month, there are 3 things, 3 possibilities, for the Competition Authority to do. The first is to grant Negative Clearence document. Second to grant exemption if it displays the conditions of exemption, and the third is to take it for examination and if necessary take it to investigation level. If such an Agreement, Decision or Concerted Pratice is not notified despite the fact that it has to be, the Authority will react it if it learns about it somehow and initiate an investigation and impose a penalty for the party who is to have made notification.

There is a similar communiqué with regard to mergers and acquisistions. We have not stated a period of time in mergers and acquisitions communiqué. The reason for that is procedures which are considered to have the quality of merger and acquisistion may not fall into a certain definition such as Agreement or Decision or Concerted Practice. There are such conducts that even a purchase of stock, sometimes changing of the board of directors may happen all at once. It is easy for not those in the form of pre-notification but for those in the form of merger Agreement; however even any procedure that may be considered to have the merger, acqusition quality should be notified. So, this merger and acquisition should be notified to the Competition Board within the possible shortest to period of time, and it is envisaged in the Act that unless the permission of the Competition Authority is taken the merger and acquisition are invalid. The period for this is envisaged in the

Act as 15 days. In case the Authority does not respond or react to a complete application for merger and acquisition this merger and acquisition shall legally become valid and then, the Competition Authority shall not be able to show any reaction to it anymore. Until today, as our president gave the numbers yesterday, I'm not going to repeat them. To 95 % of the merger and acquisition applications, we gave permission. Only to 5 of them, permissions were given on the basis of some conditions. Examination is continuing for some. Thus, Competition Board shall react in case it learns that a merger and acquisition is not notified, and take it for examination. If the result indicates that it is a prohibited merger under 1st paragraph of Article 7, final resolutions such as tranferning these shares, return of merger and acquisitions and returning to the previous condition can be taken; and of course, they shall be imposed penalty for irregularity due to their not notifying such a merger and acqusition and a penalty due to the violation.

Applications to the Authority can be done in a few ways. The first one is via notice, or upon the complaint by concerned parties; or the Authority, with its own initiative, can evaluate such violation claim and start an investigation. Investigation does not immediately start. There are some stages. I underline it. We may consider the notice or complaint as unserious and reply it, stating that the complaint has not been considered suitable or we might not reply it within a 60 days of time, and we are considered to have refused the complaint. However if we consider thje complaint as serious, we, as the Competition Board may decide on pre-research with our own initiative regarding the notice or complain or any subject. This pre-research is a short procedure, it has to result within 30 days. The Board, upon the report to be prepared within 30 days, either shall make an investigation and have completed the pre-research or considering it as serious, shall convert it into investigation stage and initiat investigation. I am not going to mention the periods of time in order not to bore you with details, as they all clear in the Act. But the interesting point here is that just like the courts, on the side there is the Board Member and experts executing the investigation and on the other there are the parties about whom the investigation is carried on, which is in legal – people's terminology called as "replique-duplique", the process of stating the claims and defence mutually in front of the Board is carried out. If, at the and of this, there is a worry that result shall be able to be got from the written claim and defense, opportunity is provided for oral explanation of these matters. We cannot call this "a trial", because our feature as a court can be discussed. However, due to our semi-judicial feature, we provide the parties with the opportunty to orally put forward any kind of their claims and defenses via a hearing.

In addition to these guaranties similar to juristiction in the procedures with regard to the implementation of legal provisions, sanctions by the Authority within the frame of the powers granted by the Act are of high importance.

If you let me I would also like to mention about sanctions. In the implementation of the Act, sanction is really very important. If sanctions are insufficient, it's obvious that provisions regarding violation of the Act shall not provide sufficent confidence. If we count these sanctions, the first and the most important one is violation of law and invalidity as in the European Union. In articles 4,6 and 7, we can talk about agreements and decisions which have no legal validity and are

under the prohibition that we will listen to later. In Article 9, there is a very important provision which we call sanction on terminating violation. If the Board detects any violations, via showing the ways to end it, it may warn the parties in order to end the violation. This is also of great importance.

The third is returning back to the point before the merger and acquisition, stated in Article 11. If a merger and acquisition is realized and the Board has detected it, then the 1st paragraph of Article 7 may rule the parties to return it back to the previous form; and realization of this rule is in a sense a sanction. In order to settle this, administrative fines have been envisaged. What kind of fines ? It is possible to separate them into two. What we call as fine are “fixed fines” and “rated fines” as per Article 16 of the Act. Fixed fines are those for unnotified agreements and decisions or merger or acquisitions which are necessary to be notified. They are increased annually by officer’s salary coefficient. Although smaller figures are stated in the Act, they are automatically increased every year by the inflation rate. For today, the minimum fixed fine is 3 billion 100 million TL, valid until December. This amount is expected to increase in accordance with the new coefficient in December. I guess, with today’s figures, it amounts to about 11.000 dollars. It will face a fixed fine between 11.000-22.000 dollars. If these undertakings are legal entities then each manager shall have to pay 10% of it for not making the notification.

As regards to rated fines, these also amount about 10%.

As regards to periodical fines, thay are very important. A few minutes ago, I talked about a set of sanctions such as returning back to the position before merger and acquisition, termination of the violation etc. As a second guarantee, if these are not fulfilled or complied we see that for each day a certain rated amount is calculated as fine. And this period of time is a measure which is to provide harmonization with the Board’s decision. As the last sanction, in our Act, everyone has a personal damage. The triple compensation, three times of the compensation provision is not present in the European States but taken from the U.S.A. is in a sense a sanction having the quality of a penalty. This will mean a penalty of triple the amount of the real damage. This also has been envisaged by the Act as a deterrent measure for the implementation of the Act.

It’s all that I want to say on the Act for now. If you have any questions regarding implementation I can reply them later. Thank you for your attention.

# SUBSTENTIAL PROVISIONS IN TURKISH COMPETITION LAW IN COMPARISON TO EUROPEAN UNION COMPETITION LAW

**Dr. Gamze ÖZ**[25]

Ladies and Gentlemen,

In order to avoid any misunderstanding, which may arise due to some specific legal and technical terms of competition law, I prefer to make my presentation in English.

Only a week ago, I was informed that I would have a speech in this symposium, however I did not want to miss this opportunity.

Before I start, I must express that I feel privileged and honored to take part as a speaker with the experts from different competition law organizations, national and international and particularly with the two Professors, Prof. Korah and Prof Whish whom I believe, mean, a lot more than what they would have thought especially for those who are students and used to be students like myself of competition law in Turkey.

I will now try to make a brief overview of the substantial provisions of Turkish Competition Law in comparison to European Union Competition Law.

I also would like to address some general remarks on the civil law consequences of the violation of the Law.

[25] *Öz, Gamze, LLM in International Law, Nottingham University (UK) Ph.D. in Competition Law, Ankara University Turkey)*

And finally as far as time allows, I want to spend a few minutes on the competition rules of the customs union set forth by the Association Council Decision No.1/95.

As it was said yesterday, the Law was enacted in 1994 after a lengthy process of debates and it took the Board to be established even longer than the enactment of the Law itself.

Turkish Competition Law is not a direct Translation of the EU competition rules. However the EU Competition rules together with its implementing rules and the jurisprudence of the European Court of Justice (ECJ) had influenced the Law to a considerable extent.

**Purpose and Scope**

The objectives and the scope of the Law are set forth in the first and the second Articles. These first two articles taken together with Articles 4,5,6 and 7, which are the substantial provisions of the Law, intend to establish a system, which encourages, maintains and protects competition and competitive process.

Article 3 provides the definitions of certain terms and concepts used throughout the Law. The term *"undertaking"* is defined very broadly. The definition of the term introduce the principle of *"single economic unit "*theory to Turkish Law.

It is realized from the substantial provisions of the Law that Turkish Competition Law has also introduced the *"effects theory".* Nonetheless in practice, there may arise some obstacles or at least difficulties, in the implementation of this theory.

In terms of the scope of the Law, in theory the Law is neutral towards all areas or sectors, in other words no sector or part of the economy is explicitly stated to be outside the scope of the Law. In practice however, some areas, by their nature may be left outside the scope of the Law, such as defence.

**Public Undertakings**

Looking at the status of public undertakings under the Law, when the Law was first enacted there has been considerable debate on whether or not it applied to public undertakings.

There is not a provision in the Law who explicitly refers to this matter like Article 90 of Rome Treaty, which is proving to be a useful instrument for the introduction and expansion of competition on an industry or sector wide basis.

There is not any provision in the Law, which excludes public undertakings from the scope of the Law. Further, the definition of the term *"undertaking"* is broad enough to cover also the public undertakings.

Recent practices of the Competition Board also confirm this approach that the Board is of the same opinion. The decisions of the Competition Board on the conditional approval and approval of certain mergers and acquisitions, especially in the course of privatization in Turkey like the POAS case or the notification requirement for approval of the transfer of operation rights in the power projects stand as examples of this approach.

In fact, the privatization of certain sectors without an effective competition law may cause serious and irreparable damages. The aim herein should be to open up those markets, promote efficiency and ensure that consumers receive services in a competitive market.

If this similarity is appropriate, I think privatization and competition law are like the horse and carriage as in the song.

**Restrictive Practices**

As it is mentioned since the last two days here, the substantial provisions of the Law mainly deals with three areas. Those are :

- Prohibition of restrictive agreements, concerted practices of the undertakings and decisions of association of undertakings,
- Prohibition of abuse of dominant position, and
- The control of mergers and acquisitions.

**Under Article 4**

The prohibition set forth in Article 4 is parallel to the provision of Article 85 of the Rome Treaty. The sub-paragraphs of Article 4, which provide a non-exhaustive list of practices as examples of restrictive practices, comprise of a broader list than the sub-paragraphs of Article 85.

**Presumption of Concerted Practice**

Unlike European Competition Law, the Law sets forth a *"presumption of concerted practice".* The function of this presumption is that, in the lack of sufficient proof for the existence of an agreement, where there arises a similarity regarding the price changes or the balance of supply and demand or the areas of activities of the undertakings between the markets concerned and the markets where competition is prevented or distorted or limited, the undertakings concerned shall be deemed to have performed a concerted practice.

As a result of this presumption, the burden of proof is shifted from the Competition Authority to the undertakings, which are accused to have been in such a parallel action.

In other words, if it is not possible to prove the existence of an agreement which distorts competition but where there is still an indication, explicit or disguised, of an anti-competitive active in the markets, the Competition Authority will be able to take an action against the undertakings who are deemed to have been involved in such activities. In cases as such, it is those undertakings who have to rebut the presumption of concerted practice and prove that they are not in such a parallel conduct and even if they seemed to have done so, they can be freed from liability if they prove that this was conducted on economic grounds.

**Exemption**

If the agreement or decision concerned meets certain requirements stated in Article 5 of the Law then the Competition, Board may declare the provisions of Article 4, inapplicable to that agreement, concerted practice or decision.

The Law has parallel provisions to that of Article 85 (3) of the Rome Treaty on exemption requirements.

As of date, the Competition Board has not yet granted any individual exemption however issued three block exemption communiqués, on the exemption of exclusive dealing agreements, exclusive purchasing agreements, and on the motor vehicle distribution and service agreements.

The block exemption communiqués issued by the Competition Board are to great extent parallel to the block exemption regulations of the European Union.

However, unlike the EU Regulation on the Block Exemption of Exclusive Purchasing Agreements, petrol station agreements and beer sales agreements are not included in the Block Exemption Communiqué of the Competition Board.

And as to our knowledge, the Board is now working on and expected to issue communiqués concerning other vertical agreements such as franchising agreements and technology transfer agreements.

**Prohibition of abuse of dominant position**

In addition to the anti-competitive agreements, decisions and concerted practices prohibited in Article 4, Article 6 of the Law prohibits the abuse of a dominant power in the market.

Unlike EU competition law, the definition of dominant position is explicitly set forth in the Law.

For the meaning of *"dominant position"*, it appears that lawmaker took into consideration the definition made in the well-known Continental Can, United Brands and Roche cases.

Like the EU competition rules, the Law is not concerned with the mere existence of a monopoly or a dominant position of an undertaking, but it prohibits the abuse of this dominant position and there is no exemption in such cases.

Likewise Article 86, a non-exhaustive list of examples is given in the sub-paragraphs of Article 6.

As Prof. Whish correctly pointed out yesterday in his speech, unlike paragraph (a) of Article 86 of Rome Treaty, Article 6 of the Law does not envisage an explicit provision on unfair pricing. Predatory pricing will probably be within the scope of this Article; however the Board should take into consideration the difficulties stated yesterday.

The answer is not as straightforward when it comes to excessive pricing and already there are competing views in Turkey both among academics and practitioners as to how this vacuum in the Law should be interpreted.

The drafters of the Law seem to have left this to the discretion of the Competition Board. Due to the fact that these are only examples of abuse, excessive pricing may be considered to be within the scope the Law. Nevertheless, even in such cases, the Board should use this authority very carefully and cautiously and refrain from becoming a price-determiner in markets.

The fact that the list given under Article 86 is non-exhaustive, leaves a power of discretion to the Competition Board to make an assessment and interpretation on such cases.

The plain language of the Law in Article 3 for the definition of the term *"dominant position"* and in Article 6 where it prohibits the *"abuse of dominant position"* suggests that the Law prohibits not only the abuse of dominant position by a sole undertaking but also the abuse of dominant position held by more than one undertaking. This offers an appropriate tool to cope with the anti-competitive practices of the undertakings in oligopolies in Turkey.

**Control of Mergers and Acquisitions**

The Law does not wholly prohibit mergers and acquisitions but sets forward a notification system for the control therein. The Competition Board, in accordance with Article 7 of the Law, issued a communiqué (Communiqué No. 1997/1) in which categories of mergers and acquisitions, that are subject to this notification requirement, is stated.

Thus, those mergers and acquisitions which are within the scope of this Communiqué shall be notified to the Board and get an approval in order to be legally valid.

Communiqué No.1997/1 sets forth two different sets of criteria for the notification procedure. The qualitative criteria define the types of transactions that will be covered by Communiqué No.1997/1 and therefore be defined as a merger or acquisition.

The quantitative criteria, namely the thresholds are set forth on the basis of the total market share of the undertakings, which are parties to the merger or acquisition concerned or of their total turnover. Accordingly, the threshold for the undertakings to be subject to the notification requirement is either to have a 25 % market share in the relevant market or 25 trillion Turkish Liras as a total turnover.

A merger or acquisition, which is notified to the Board, is not legally binding unless and until the Competition Board grants an explicit or implied approval.

Due to its privatization, the acquisition of the shares of POAŞ (a state owned petroleum distribution enterprise) is an example of one of the conditional approvals granted by the Board.

Taking this experience into account, the Board has issued a Communiqué on the procedure to be followed during the privatization of state undertakings, which are subject to the merger Communiqué.

Within the privatization context, private power projects are also subject to the approval of the Board since transfer of operation rights is considered to be within the scope of Communiqué No.1997/1.

**Civil Law Consequences of Infringement of Competition Rules**

It is explicitly stated in the Law that agreements, which are defined to be contrary to the Law, shall be void.

In addition to the invalidity of such agreements, the Law also provides for compensation to be paid by those who violate the Law, to the persons who suffer damages by reason of such prohibited practices.

The Law appears to have influenced by the US *"treble damages action"* as it introduces, surely not the only, but certainly one of the very new concepts to Turkish legal system in general, and to Turkish law of compensation in particular.

Upon request of the parties from the civil courts, the judge can apply the above mentioned compensation provisions of the Law, regardless of an existence of a complaint to the Competition Board.

Civil law courts have jurisdiction on compensation cases. However the judicial review of the Board decisions is to be made by the Council of State.

These two different jurisdictions, although not conflicting, may create some problems especially taken together also with the authority of the Board.

**The Impact of the Customs Union Decision on Turkish Competition Law**

Decision No.1/1995, requires a high degree of the approximation of the competition laws and policies of the Parties, namely Turkey and the EU, to achieve an economic integration.

To that end, among other commitments, Turkey undertakes to ensure that competition legislation in Turkey operates effectively and in compliance with that of the EU.

It is an obligation arising from Decision No. 1/95 that Turkey would adopt a competition law, which is in compliance with the EU competition rules. The analysis of the Law No. 4054 shows that Turkey has complied with this requirement as the Law is to a great extent in conformity with the EU competition rules.

As stated above, the practices contrary to these substantial provisions of Decision No. 1/95 shall be assessed on the basis of criteria arising from the application of the EU competition rules both in the constitutive treaties and in the secondary legislation.

Further, the Association Council shall, within two years following the entry into force of the customs union, adopt the necessary rules for the implementation of the competition rules of the customs union until such rules are enacted, the competition authorities of both of the parties, namely the Commission in the EU and the Competition Authority in Turkey shall both have jurisdiction to deal with the infringement of the competition rules of the Customs Union.

In this respect, the Association Council is authorized to resolve any dispute on the conflict of jurisdiction between the EU Commission and the Turkish Competition Authority. As of today, the Association Council has not adopted the necessary implementation rules for the customs union competition rules.

In cases where there arises an infringement of the competition rules of the customs union and where one of the parties considers that this practice is not adequately dealt with under above-mentioned implementing rules of the customs union or in the absence of such rules, if such practice causes a serious prejudice to the interests of the other party or material injury to its industry, it may take the appropriate measures after consulting to the joint Customs Union Committee or in any case after 45 days, following the referral of such consultation to the Committee.

In such cases where the party concerned takes a unilateral action, priority shall be given to such measures that will least disturb the functioning of the Customs Union. This provision of Decision No.1/95 seems to provide a measure for the satisfaction of the parties in cases of the infringement of the competition rules.

Regarding the obligations of the EU arising from Decision No.1/95, EU undertakes to inform Turkey of an adoption or an amendment of the block exemption regulations and Turkey shall have one year after such information is given to adapt its legislation accordingly.

Furthermore by Decision No.1/95, the parties undertake to inform each other of any amendments made in their competition laws and of the implementation of their laws. The EU undertakes to inform Turkey, as soon as possible, of the adoption of any related decision, which might affect Turkey's interests.

One of the very crucial questions of Decision No. l/95 is the public undertakings and the undertakings to which special, exclusive or concessionaire rights are granted. Decision No. 1/95 requires that by the end of first year following the entry into force of the Customs Union, Turkey shall upheld the principles of the EU on this matter and especially the provisions of Article 90 which specifically regulates the area of public undertakings and undertakings to which special or exclusive rights are granted and the secondary legislation of the EU and the relevant case law.

Furthermore, Turkey is under the obligation to ensure that she will progressively adjust, in accordance with the time table laid down by the Association Council, any state monopolies of a commercial character, so as to provide that by the end of second year following the entry into force of Decision No. 1/95, no discrimination regarding the conditions under which goods are produced and marketed exists between nations of the Member States and of Turkey.

It must be stated at this point that, some of the provisions of Decision No. 1/95 do not set forth a realistic timetable at all such as the provision above. Taking into account the member states of the EU and their efforts to regulate the state monopolies and adjust them to the competition law system recognized by the Community, it does not seem to be realistic to set forth an obligation as such for a country such as Turkey where there is a considerable degree of state influenced undertakings operating in the Turkish economy.

If any of the Parties to Decision No. l/95 believes that anti-competitive practices carried out on the territory of the other party are adversely affecting its interests or the interests of its undertakings, each party may notify the other party and may request that the other party's competition authorities take necessary measures. During the proceedings, the parties shall keep each other informed of the interim developments. However such a complaint or cooperation procedure shall neither limit the power of discretion of the Party informed on the applicability of the relevant rules and their implementation thereof, nor limit the authority of the notifying party on undertaking an enforcement action with respect to the such anti-competitive practices.

It is apparent from all the above mentioned that, notwithstanding the existence of some vague points in Decision No.l/95 which need to be interpreted or somehow clarified by the Association Council, the effective implementation of the competition

rules in Turkey seems to stand as one of the key issues for the operation of the Customs Union.

In that context, the competition rules of the EU seem to imply much more then any ordinary set of competition rules. It is expected and required by Decision No. 1/95 that this newly emerging area, namely competition law of Turkey should develop in parallel to the principles of EU competition law.

**Conclusion**

I would like to conclude my words with a couple of concluding remarks.

1. Turkey today has a very young Competition Law. One cannot suggest or expect that there will be changes overnight. It is not expected that the so-called legislation will create a miracle and resolve all the problems in the markets in Turkey, however it is within the scope of expectations that this Law will introduce a new perspective and add a new dimension for the operation of the markets and to the ethics of competition in Turkey.

2. Without effective and active implementation, competition law would not be more than a deadletter of high expectations. Turkey's competition policy will develop over the years by the detection and elimination of anti-competitive behaviors of the undertakings.

3. This requires that the Board should review agreements and practices within a short time and provide legal certainty.

4. The publication in the Official Gazette of the decisions of the Competition Board is of great significance not only for the transparency of the decisions of the Board but also for informing the public and the enterprises.

5. Competition rules also comprise of provisions regarding state aids as well as the provisions on the distortion of competition by the undertakings themselves. State aids are definitely not within the scope of authority of the Competition Board. However competition policy is not only a matter of concern for companies. The government too, has to take into consideration the competition policy when planning the strategies and activities, which may affect the markets. Therefore the government while implementing state aids should take into account uniformity of the competition policy.

To regulate the markets for goods and services and to avoid cartel agreements and monopolies which is stated in Article 167 of the Turkish Constitution, is a commitment of the State which is half performed by the enactment of the Law and it is now hoped that the compliance by the undertakings and the

sound enforcement of the Law by the Competition Authority would allow the performance of the rest of the duty.

## ANTI-MONOPOLY LAW ENFORCEMENT IN JAPAN

**Akinori UESUGI**

### 1. Introduction

I am honored to be here to speak about what Japan had experienced in antitrust fields. I am expected to talk on Japanese experience as one of non-European countries. However, I think better understanding about Japanese experience could not only be meaningful as such, but also be illuminating in a sense that how antitrust law enforcement could be related to economic development or industrial policy to improve international competitiveness of the economy.

I think many people may be interested in inter-relationship between the industrial policy and competition policy in Japan, in particular, how it could gain its current status in a country where the government regulation played a bigger role during the rapid economic expansion and thereafter. I suppose that this aspect may be one of the reasons why Japanese representative was invited to this symposium.

First of all, I would like to emphasize the importance of better understanding of law enforcement activities by the Fair Trade Commission of Japan (JFTC), and its competition policy related activities, because, I fear, due to the lack of English materials available outside of Japan and, in particular, due to heavy publicity on Consumer Photografic Film and Paper Dispute between the United States and Japan, and submission of this issue to the Panel at the World Trade Organization (WTO), many people seem to have an impression that Japanese antimonopoly law enforcement is very weak or, at least, less than satisfactory level compared with other developed market economy countries, and weak enforcement of the Antimonopoly Act (AMA) could be responsible for the supposed difficulty to enter into the Japanese market.

### 2. General Remarks On Japanese Antımonopoly Law Enforcement

I would like to show some of the remarks and comments on Japanese antimonopoly law enforcement which could be found in academic articles and

government papers, then, in the latter half of my remarks, to introduce our current enforcement records and other competition policy related activities in order to show you that Japanese antimonopoly law enforcement could be counted as one of the most active in the antitrust world.

So far, comments on the antimonopoly law enforcement activities outside of Japan are, in general, not very favorable to the JFTC, and commentators seem to be unanimous in urging more vigorous enforcement activities by the JFTC.

I can understand these comments as an indication of necessity for the enhanced JFTC activities in Japan to make her economy more open and transparent to foreign competition. This is exactly what the JFTC is trying hard right now. However, if these comments presuppose that its enforcement activities are non-existent, or negligible, they are clearly wrong.

Let me show you some of the examples of comments that can be seen in English articles and papers on the law enforcement activities of the JETC.

"In Japan. . . the 1947 antitrust statute, one of the most stringent in the world on its face, seemed in its enforcement to be little more than a moribund vestige of Occupation reforms . . . Despite the American origins of Japanese antitrust legislation, which was drafted by Americans and imposed during the Occupation on a less that enthusiastic Japanese government, the influence of German law and practice on Japanese antitrust law, at least since 1953, has been profound." (J. Haley, Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law, 59 Washington L. Rev. 471 (1983))

"On its face, the AMA prohibits most types of practices that would be considered anticompetitive under general antitrust laws and policies. However, antitrust enforcement in Japan does not appear vigorous from a U.S. or EC perspective. The lack of an aggressive enforcement tradition inadequately deters private anticompetitive behavior, including that aimed at restricting access to the Japanese market." (American position paper for the Structural Impediments Initiative (1988))

"Japan's very weak enforcement of antitrust laws also contributes to high price. Beyond lax antitrust enforcement exclusive practices and cartels are accepted practices in Japan. Exclusive practices in distribution- - practices that would be illegal in the United States - - are common in Japan. Marketing one's product, thus, is often a more formidable task than just exporting (getting the good through customs) to Japan.

Until such restrictions and other distortions that overwhelmingly favor producers are modified or removed, prices in Japan will likely continue to exceed world prices. As a result, the basis for foreign views that Japan's market is protected will persist. The reason is that if cheaper imports could freely enter Japan, the gap between Japan's domestic prices and world prices would soon be narrowed." (Congressional Research Service Report on Japan: Prospects for Market Openness)

"There is a distinct contrast between America and Japan in the impact of the role of law on competition and on commercial relations. In America, the Federal Trade Commission is forever on the lookout for price-fixing (which is not found all that often), and the threat of private treble damage actions overshadows all cooperative activities. In Japan, the Japan Fair Trade Commission (JFTC) is relatively inactive (compared with the United States' antitrust agencies) and there are prominent instances in which the law retards rather than promotes competition, such as the Large-scale Retail Stores Law. The absence of enforcement and official sanction of group activities cause the law's objective of vigorous competition to take a back seat to the needs of industrial promotion and protection of business at the expense of the consumers", (A. Wolf, U.S.-Japan Relations and the Rule of Law; The Nature of the Trade Conflict and the American Response, K. Yamamura ed. Japan's Economic Structure: Should it Change ? (1990))

"In short, exclusionary and particularly collusive business practices often prevent new participants, by the Japanese or foreign firms, from easily entering the Japanese market and competing for market share. Part of the problem stems from Japan's past history of relatively lax enforcement of its competition laws. Japan has an antimonopoly law intended to discourage such practices. But the effectiveness of the law has been constrained by less than vigorous enforcement and an enforcement agency that has lacked the power and will to remedy anticompetitive market structures that exist in Japan. " (National Trade Estimate Report on Foreign Trade Barriers, Off. of U.S. Trade Representative (1994))

"A key reason for the prevalence of anticompetitive business practices is the JFTC's historically weak antitrust enforcement record. The JFTU routinely faces domestic criticism for its lack of bureaucratic clout and reluctance to exercise its enforcement powers aggressively. While there have been some improvements in recent years due to sustained U.S. efforts under the 1989-91 Structural Impediments Initiative, the U.S.- Japan Framework Agreement, and annual bilateral antitrust consultations, which have helped the JFTC muster domestic support for its gradual strengthening, the JFTC's enforcement efforts fall far short of those needed to ensure that Japanese markets are open to competition from U.S. and other foreign companies. " (National Trade Estimate Report on Foreign Trade Barriers, Off. of U.S. Trade Representative (1998 ))

### 3. JFTC Enforcement Activities

Last year, the Anti-monopoly Act (AMA) had 50$^{th}$ birthday since its enactment in 1947. It is true that the AMA had experienced up and down during these 50 years. Undoubtedly, up to the late 1970's, competition policy was treated as of a secondary importance in Japan, and in many fields, direct or indirect intervention into business activities by the competent ministries was prevalent; in particular, in the form of " administrative guidance ".

Various exemption systems to the AMA provided a convenient mechanism for such government intervention, and it was widely believed within the government

offices and business community, except the JFTC and academic circles, that cartel or anti-competitive agreement among firms could be used as an effective policy tool to recover from depression, or in some industrial sector, to promote rationalization of the industry necessary for improving international competitiveness. Relatively closed nature of the Japanese market at that time made it possible such anti-competitive policy to function to some extent.

So far, the JFTC's AMA enforcement activities are not well publicized in foreign countries. Before 1980, how the AMA is enforced in Japan was viewed as a purely domestic matter for Japan, and even among antitrust lawyers in America and Europe, interest on Japanese AMA enforcement was weak, and only a few studies on this issue was available in English.

In contrast, there were significant improvements in this regard in 1990's. Many books and articles covering this subject were published thereafter. Above-mentioned process of evolution of the AMA in Japan is described in various English and even German literatures.

See the following books and articles, if you are interested in these historical evolutions of competition laws and policies in Japan. The one I wrote is one of the most extensive on this aspect.

M. Matsushita & J. Davis, Introduction to Japanese Antimonopoly Law, Yuhikaku, Tokyo (1990);

* H. Iyori & A. Uesugi, 'The Antimonopoly Laws and Policies of Japan, Federal Legal Publications Inc., N.Y. (1994) ;

* H. Iyori, A. Uesugi & C. Heath, Das japanische Kartellrecht, Carl Heymanns Verlag KG, Koln (1994) ;

S. Wilks, The Revival of Japanese Competition Policy and its Importance for EU - Japan Relations, Royal Institute of International Affairs, London (1994)

A. Uesugi, New Directions in Japanese Antitrust Enforcement, International Antitrust Law & Policy 1994, B. Hark ed., Transnational Juris Publications Inc., N.Y. (1995) ;

H. Iyori, A Comparison of U.S. - Japan Antitrust Law: Looking at the International Harmonization of Competition Law, J. Haley and H. Iyori ed.

Antitrust: A New International Trade Remedy ?, Pacific Rim Law & Policy Association, Seattle (1995) ;

K. Sanekata & S. Wilks, The Fair Trade Commission and the Enforcement, G. Doern & S. Wilks ed. Comparative Competition Policy - National Institutions in a Global Market, Claredon Press, Oxford (1996) ;

* These books contain full translation of the AMA, important notifications, major guidelines, as well as description of historical development.

Since January 1988, the JFTC issued "FTC/Japan Yiews" in order to provide information in English on its activities which were just stopped by its 3l$^{st}$ issue dated on March 1998, and replaced by more quick method of access since April 1998, namely by way of the Internet (http://www.jftc.admix.go.jp). Many important JFTC

press release, guidelines, and reports are translated into English and provided by the Internet now.

### (1) AMA Enforcement in General

I think, most people can agree that the AMA prohibits most types of practices that would be considered anti-competitive under general antitrust laws and policies (see the brochure distributed at this symposium for the major prohibited conducts under the AMA).

The fact that the AMA was modelled after the U.S. antitrust laws make it relatively easy to explain about AMA's substantive provisions to audiences who are acquainted with the U.S. antitrust laws.

Therefore, I would like to move to the second point, namely, whether the AMA enforcement activities in Japan are as vigorous as it should be from U.S. or European perspective. As shown above, it is true that most observers on the Japanese affairs do not believe that the antitrust enforcement in Japan is at satisfactory level. Of course, I am not claiming it is, and I think there are a lot of room for improvements in this regard.

Comparative studies on antitrust laws in different countries or comparison of enforcement activities of various antitrust authorities are not easy task, because in this regards, you must also look at various aspects of the law enforcement activities, namely not only the provisions of laws, but also the number of cases handled, remedies available and sanctions actually imposed on antitrust violations, the easiness to obtain such remedies for those persons injured by antitrust violations, etc.. There is no standard method for such comparison.

Normally, when one looks at the substantive laws and finds that they look similar to his aquatinted laws, he might expect that the same kind of conducts are regulated in the same manner, therefore, similar performance would result from the enforcement activities.

However, it is clear that law enforcement could be quite different even if the same kinds of conducts are prohibited under the law. The law is interpreted by lawyers who are trained under the legal system of the country, and enforced within a society with differing cultural and social background.

The best way to give fair evaluation is to look and see how competition laws are functioning in the real economy of the country. In particular, how competition laws or competition itself is appreciated by businessmen or by business community. I have been looking at this aspect for many years, and I can identify very significant improvements in this regard. I will refer on this aspect where deregulation movements in Japan is explained.

The AMA enforcement has been weak, I think, not because the JFTC efforts were insufficient or ill-focused, but rather resources for enforcement were insufficient and various exemption systems and government regulations, including formal or informal ones, precluded the JFTC to do so. This means that, as a whole, public support was not strong enough and political climate for the JTFC was not favorable to the rigorous AMA enforcement. Frankly speaking, it seems to me that public in general had stronger belief for economic regulations by competent ministries and tended to distrust market mechanism as a solution of economic problems.

However, things started to change around 1980, and became almost irreversible trends in Japan in the late 1980's when the enforcement of AMA or the JFTC enforcement activities became an issue within the context of trade friction between the United States and Japan. Weakness of the JFTC enforcement activities was referred to as a symbol for lack of market access to Japan. Thereafter, how to improve the AMA enforcement performance became one of important policy issues at the cabinet level for the first time.

Improvement of the AMA enforcement in Japan was pursued not simply because there were foreign pressure to do so. Rather, business community and public in general started to realize the importance of securing proper functioning of market mechanism and, more importantly, government regulations started to lose public confidence gradually.

As is clear from this, improvement of the enforcement performance of the JFTC was not a difficult task, because what has been lacking was not laws and systems for enforcement, rather resources to enforce the AMA and public support for vigorous AMA enforcement.

**(2) Current Enforcement Activities of the JFTC**

Let me try to take this opportunity to provide current information on our enforcement activities and, as much as possible, to provide basis for fair evaluation of them. I know merely repeating such statements as the JFTC's determination to strictly enforce the AMA will not convince those who has been sceptical for a long time. I want to show the audience today, at least, that we are tough enforcers of law; at least tougher than foreign observers might think.

**(3) Developments in 1990's**

There were two important developments in 1990's in this aspect. One is the steady increase of staffs at the JFTC, and the second is the JFTC's new policy to utilize formal remedial power authorized under the AMA as much as feasible. Let me start from the first.

Since FY 1989, when the Structural Impediments Initiative (SII) talks started, the number of JFTC investigators had increased from 129 to 254, namely almost doubled. As a whole, the JFTC has 552 staff members for FY 1998. Those staffs are

located mostly at its headquarters in Tokyo, and around 130 staffs are working at its seven regional offices (See the organizational structure at p. 38 of the brochure)

In 1977, when significant strengthening of the AMA took place, the number of JFTC staffs was only 405 as a whole. Nearly 150 staff increase, although it took 20 years, was quite meaningful for enhancing investigation capability of the JFTC.

The Government of Japan has been pursuing very strict general cut-back program of government employees since mid-1970's and each agency is allocated a compulsory cut-back quota of its employees, and the General Affairs Agency strictly review the application for new positions by each agency for each fiscal year. This mechanism makes it possible to achieve necessary cutback of the government employees as a whole and necessary reallocation within the government offices reflecting new public service needs. This mechanism could work in a slow but in a steady manner and unfortunately, made it difficult to increase JFTC staffs in a drastic way.

One lesson from this episode is that mere tightening of the statutory provisions does not allow strengthening of the enforcement activities. As I emphasized, the key for the increased enforcement of the AMA is how to secure sufficient number of experienced staffs. Our enforcement workload is very high (around 200 per year); therefore, to engage in full-scale investigation as to many cases as possible, to have sufficient number of investigators. Besides, we need to have staffs in many other competition policy related activities which I will refer later.

There are other problems in this regard. The tightened enforcement activities, in particular the enhanced sanctions against cartel activities have caused unavoidable situation where more investigators are necessary to dispose of single case compared with the past. Undoubtedly the difficulty of gathering evidence sufficient to prove violations of the AMA has increased. It is natural for business firms facing severe sanctions against violations of laws to become even more cautious to hide their illicit activities. Hence, the JFTC must also enhance its investigation capability so as to improve the effectiveness of its enforcement activities.

Increased number of staffs is particularly meaningful in Japan, because the JFTC utilizes such investigation methods as "office raids" to gather evidence from the respondent firms. In this way mobilization of as many investigators as possible makes a lot of sense. In addition, we need to increase staffs who are responsible for accumulating and analyzing various informations with a view to start enforcement actions. Most of these investigators are working for the JFTC throughout their career and these well-experienced and trained investigators are a key for improving its enforcement activities.

I would like to give you one example why I said the difficulties increase as the JFTC increases its enforcement activities. In the past, most bid-rigging schemes were organized by a trade association, and the JFTC, after necessary investigation, could issue a cease-and-desist order against the trade association under Section 8 of the AMA which stipulates various prohibited conducts by trade associations. In

such cases, investigation activities can focus on depositions of those officers of the trade association involved, and the largeness of its member firms did not increase our investigation burden significantly.

However, as the JFTC enforcement was tightened, cartel activities tended to be pursued not through a trade association, rather through more informal collaboration of firms, so that the JFTC must look closely at cartel activities among business firms. This sometimes means that the investigators had to prove existence of an agreement or a conspiracy involving more than one hundred firms. Let me give you examples.

In the Aikawa Chosa Sekkei Co. and 139 others case, rendered in November 1992, the investigators had to find as many evidences as possible of bid-rigging conspiracy by 140 participants. In case of the Iiogumi Co. and 144 others, rendered in May 1997, cartel participants amounted to 145. It was a tough job to prove a conspiracy among more than 140 firms by identifying individual firms' involvement into the bid-rigging scheme. Investigation of this scale requires tremendous time and efforts by investigators. Such a case where the number of respondent firms exceeded 50 was not very exceptional nowadays.

**(4) Use of Formal Remedial Measures**

Let me move on to the second development.

By the final report of SII, which was agreed in 1990 between the governments of Japan and the United States, the JFTC promised to use its formal remedial power as much as feasible. In the past, namely before 1990, the JFTC relied on informal enforcement methods in many occasions so as to settle cases as quickly and summarily as possible, and the JFTC tended to utilize its formal remedial power as to serious cases.

This meant that investigators must spend more time and efforts gathering evidence sufficient to find a violation of law. When a case is settled informally, evidential burden for investigators may not be very high. However, as is indicated by the SII final report, this methods had serious problems of lack of deterrent effects and transparency in administrative proceedings; therefore, this methods are used thereafter when substantial evidence could not be collected after necessary investigation completed.

**(5) Caseload**

All I have said so far does not mean that the JFTC has been accomplishing all it could do throughout its 51-year history. On the contrary, I think it is fair to say that the AMA had not been enforced to its full potential until 1990. Besides, it cannot be denied that there could be many anti-competitive practices undetected by the JFTC. This might be the reason why the image of weak law enforcement is prevailing in foreign countries. However, I want to emphasize that the JFTC has accumulated significant investigation capability nowadays to attack any anti-competitive conducts,

and is trying to improve its capability to acquire relevant information in order to initiate enforcement actions.

Let me show you our current enforcement records. The primary enforcement mechanism by the JFTC is to issue "recommendation" to cease and desist the alleged conducts against respondent firms. When the recommended measures are accepted by the respondent firms, the same would became a formal order with legally binding force. When the same is rejected, the case moves to the hearing stage, namely adjudicative proceedings before the hearing examiners. The number of recommendations including other formal method of enforcement has increased since 1989, and remained at constant since 1991 as shown in the following table.

| Year | 89 | 90 | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98(4 ila 9) |
|---|---|---|---|---|---|---|---|---|---|---|
| Formal measure | 7 | 22 | 30 | 34 | 31 | 24 | 31 | 21 | 31 | 11 |
| Informal measure* | 115 | 60 | 24 | 21 | 25 | 12 | 13 | 17 | 19 | 7 |

* shows those cases settled by way of warning.

Most of them are related to bid-rigging, price fixing cartels, and resale price maintenance, entry restricting activities, but the variety of cases are expanding.

Informal measure means the case is settled by a cease and desists measure without legally binding force. This is called "warning ", a form of administrative guidance.

In any country, detecting collusive practices or cartel activities and gathering necessary evidence of them is a difficult task by its nature. It is almost impossible to reveal cartel activities without information by insiders or someone with access to such information.

**(6) Start of Criminal Enforcement**

To increase effectiveness of law enforcement, the JFTC started to take various methods to enhance deterring effects of measures against AMA violations.

In June 1989, the JFTC announced a policy statement on criminal accusations and made clear that it would seek criminal penalties, among others, in vicious and serious cases of violations such as price fixing cartels, bid-riggings, and group boycotts which are considered to have a widespread influence on people's lives (see p. 21 of the brochure).

Under the AMA, because the JFTC itself is not authorized any criminal power, the JFTC must file its accusation, if finds it appropriate, with the Prosecutor-General's Office. Only the prosecutor's office can prosecute the defendants to the court.

The JFTC filed its first criminal accusation based on this new policy, in December 1991 as to a price-fixing cartel for plastic wrapping materials, thereafter, three accusations were filed in total and all of them had resulted in fine and/or imprisonment sentences by the Tokyo High Court.

The Tokyo High Court found, as to all four cases filed so far, as shown in the table below, alleged acts of the defendants were violations of the AMA and, rendered imprisonment sentences for individual defendants with suspension of two years. Every defendant firms were fined, but no company is fined to the legal maximum yet.

| Case | Date | Defendant firms etc. | Sentences |
|---|---|---|---|
| Plastic wrapping materials | 21 May 1993 | Mitsui Toatsu Co. and 7 other Co. 15 İndividuals | Fine; 6-8 million yen Imprisonment; 6 months-1year |
| Adhesive seals procured by Social Security Agency | 14 Dec. 1993 | Toppan Moore Co. and 3 other Co. No individual | Fine; 4 million yen for each firm |
| Electric Work Contractors procured by Japan Sewerage Service | 31 May 1996 | Hitachi Ltd. and 8 other Co. 18 individuals | Fine; 40-60 million yen Imprisonment; 8 months-10 months |
| Meter for water supply procured by Tokyo Metropolitan gov. | 24 Dec. 1997 | Kinmon Mfg.Co. and 24 other Co. 34 individuals | Fine; 5-8 million yen Imprisonment; 6 months-9months |

In December 1992, the maximum criminal fine for certain serious AMA violations was increased from 5 million to 100 million yen per count. This increase of fine was made applicable to acts committed after January l, 1993. This is why Hitachi Ltd and 8 other companies were fined ranging from 40 to 60 million yen in 1996.

This amendment reflected a significant departure from old criminal law theory in Japan that required the maximum criminal fine for a corporation to be equal to those for individual defendants under "dual punishment" theory. It is the established criminal law theory in Japan that a juridical person such as a corporation by itself cannot commit a crime, and can only be punished as the employer of individual offenders under the theory of "dual punishment". This means that evidential burden is relatively high for a criminal enforcement compared with a legal system where a juridical person can be held liable to criminal penalty directly.

### (7) Significance of Surcharge Payment Order

In Japan, the AMA authorizes the JFTC to take three kinds of measures against cartel cases, namely remedial measures, surcharge payment orders and criminal accusations. The remedial measures and surcharge payment orders against respondent firms must go together, and for ordinary cartel cases, these measures might have sufficient deterrent effects. This is why the JFTC tries to use the criminal accusation power on vicious and serious cases or on those of repeated offences.

There is no system comparable to surcharge payment order in the United States; and it is also different in a significant aspect from the EU surcharge system, therefore, its characteristics shall be explained here.

The JFTC has no discretion whether or not a surcharge payment order shall be imposed or what amount of surcharge payment shall be ordered to each respondent firm. So long as the JFTC establishes the existence of cartel activity and renders a decision, the JFTC must issue surcharge payment orders. The amount of surcharge is determined automatically according to the formula prescribed in the AMA, namely based on the amount of actual turnovers during the cartel activities.

The salient characteristic of this system is that the amount of surcharge can be very significant depending on the amount of turnovers during the cartel period. It has no upper limit, in contrast to criminal fine. For example, in the cement cartel case in 1991, the JFTC issued surcharge payment orders amounting to 11.2 billion yen (about $80 million) as a whole. In this case, the Onoda Cement Co. and the Nippon Cement Co. were ordered to pay 2.4 billion yen (about $17 million) respectively to the Treasury (The dollar equivalent is converted by using the inter-bank exchange rate at the end of the FY 1991).

The rate of surcharge imposed on cartel participants was increased from 1.5 percent of the turnovers to 6 percent in principle in 1990, and the increased rate was made applicable to any portion of cartel activities effected after July 1991. Therefore, the full effect of this amendment is reflected, roughly speaking, in the amount of surcharges after 1995 (See p.19 of the brochure; The statute of limitation limits the maximum of three years from the final phase of the cartel activities. Besides, legal proceedings could take almost one year, therefore, if the alleged conducts are eliminated voluntarily when the JFTC investigation started, one year could have passed after the cease-and desist order becomes final and conclusive. )

It is worth mentioning that the cement case was still record keeping one in spite of the fact that the cartel took place before the increase of the surcharge rate. Recently, companies to be ordered more than 1 billion-yen surcharge are not rare.

Sometimes, we hear allegations on the level of surcharge rate of Japan, in particular in comparison with the EU surcharge system of 10 percent. However, the rate of surcharge payment was determined by law based on the average profit rate of corporations in general, therefore, unless the average profit rate changes, the rate cannot be raised.

Besides, the EU surcharge system allows EC Commission a broad discretion in ordering surcharge payment for each respondent. Such discretionary surcharge system is impossible to adopt in Japan, because discretionary surcharge would amount to a kind of penalty, and thus our system having both criminal penalty and surcharge payment order would pose a "double jeopardy problem" under the Japanese constitution.

Under the circumstances, what the surcharge payment order can do at maximum is to rip off supposed gains from cartel activities. Although there could be some other ways to calculate such supposed gains, the average profit rate for corporations which the AMA sets as such criteria seems reasonable.

Statistics on surcharge payment order is as follows (See also the comparison of Japan, U.S. and EU given at p.24 of the brochure).

| Year | Number of cases | Amount of surcharge payment ordered in total (million yen) | US dollar term (million dolar)* |
|---|---|---|---|
| '89 | 6 | 803 | 5.1 |
| '90 | 11 | 12,562 | 89.4 |
| '91 | 10 | 1,972 | 14.8 |
| '92 | 17 | 2,682 | 23.2 |
| '93 | 21 | 3,553 | 34.6 |
| '94 | 26 | 5,668 | 64.1 |
| '95 | 24 | 6,446 | 60.5 |
| '96 | 14 | 7,486 | 60.4 |
| '97 | 16 | **2,833 | 21.2 |

* shows the figures in dollar term converted by using inter-bank exchange rate ( Tokyo market ) at the end of each fiscal year.

** As to FY 1997, surcharge payment orders amounting to 5,451 million yen were issued in addition, but respondent firms are litigating the validity of the orders at the JFTC hearing, therefore, the figure was excluded.

All of these changes indicate that the enforcement mechanism under the AMA is well in tune with comparable enforcement mechanism of other developed market economy countries.

### (8) Guideline Related Activities

I want to mention on the exclusionary practice regulation in Japan, because most foreign observers seem to feel that this is the area where its weakness appears at most.

One should clearly distinguish horizontal restraints from vertical restraints in this analysis. As to the horizontal restraints, I explained already that the enforcement mechanism is well in tune with the current necessity. On the other hand, most of the exclusionary practices are vertical in nature, and, there remains some uncertainty on antitrust rules for vertical restraints even among antitrust specialists.

The Distribution and Business Practices Guidelines issued in July 1991 are important steps from the viewpoint of exclusionary practices regulation among

business firms in Japan. In my view, the guideline contains views that are fairly tough toward vertical restraints in view of their adverse effects on market access for foreign firms.

For example, under this guideline, exclusive-dealing arrangements are classified as one of the violative conducts when employed by an influential entrepreneur. An entrepreneur can be regarded as influential if he has more than a 10 percent market share or he is among top-three in a relevant market. I think this is a very strict standard for illegality compared with those for other developed countries.

It seems a common sense among antitrust specialists that the vertical nonprice restraint should not be subject to per-se illegal treatment. One must examine them on a case-by-case basis by looking at its exclusionary effects on competitors or new entrants including potential one.

Since early 1980's, the JFTC has been actively formulating various guidelines for the purpose of clarification of law. Under the general standard of the continental legal system in which Japan is a member, the major substantive provisions of the AMA are intolerably vague. Besides, Japan has relatively few attorneys-at-law specializing in anti-monopoly fields and we have few court decisions that clarify interpretation of the AMA.

Under these circumstances, guidelines to clarify what the AMA prohibits or what is not prohibited under the AMA are particularly useful in Japan. First of all, those firms that are willing to abide by the law can reduce the antimonopoly risk of their conducts by referring these guidelines.

Violations of the AMA shall be eliminated by remedial measures with sufficient deterrent effects. But in order to take such measures, illegal conducts need to be spelled out beforehand as clearly as possible. As long as business firms do comply with the AMA described in detail in guidelines, the enforcement burden of the JFTC can also be lessened. This can be called preventive law approach, and this approach is highly appreciated in Japan and contributed significantly to better understanding of the AMA within the business community.

The JFTC issued or renewed, within the last 10 years, the following guidelines.

(a) Patent and Know-how Licensing Agreement Guideline (February 1989 )
(b) Distribution and Business Practices Guidelines (July 1991 )
(c) Joint Research and Development Guideline (April 1993)
(d) Guideline for Unfair Trade Practices by Financial Companies in connection with Entry into the other Financial Fields (April 1993)
(e) Guideline for Financial Companies with respect to Stockholdings of Non-financial Companies (May 1994; Amended in December 1997)
(f) Guideline for Administrative Guidance and the AMA (June 1994)
(g) Guideline for Public Bidding and the AMA (July 1994)
(h) Merger Guideline (Amended in August 1994)

(i) Stockholding Guideline (Amended in August 1994)
(j) Trade Association Activities Guideline (Amended in October 1995)
(k) Holding Company Guideline (December 1997)
(l) Abuse of Market Dominating Position Guideline for the Service Contract (March 1998)

As to important guidelines, the JFTC solicited interested antitrust agencies of other countries to file comments, and received valuable comments on the draft. These efforts could also be effective to increase better understanding on specific policy issues among antitrust agencies.

In this connection, I want to add that the JFTC maintains network of bilateral consultations with various antitrust authorities, and the JFTC holds bilateral consultations annually with the U.S.A, EU, UK, France and Korea.

**4. Deregulation And Competition Policy**

**(1) Deregulation Movement and the JFTC**

Finally, let me touch on the JFTC efforts in the field of deregulation, which became a very important task for the Japanese competition policy.

In this front, the competition authority needs to perform many functions depending on the circumstances of regulation in the respective economy. It might be easy to imagine that the role of the, JFTC is bigger in such a country as Japan where regulation used to occupy a very important role traditionally.

Roughly speaking, there are five kinds of tasks for the JFTC to perform. First, the JFTC engages in surveys and researches of competitive conditions in the regulated industrial sectors and makes proposals for improved role of competition, and/or elimination of some regulatory measures. In a country where regulatory reform initiative is vested in the hands of regulatory agencies themselves, this is a very important function.

Second, the JFTC needs to review the exemption laws of the AMA so that exemptions from the AMA should be kept minimum necessity. This requires special efforts in Japan, because, as described above, regulatory reform initiative is vested in the regulatory agencies.

Third, the JFTC needs to watch the actual role of the regulatory agencies after deregulatory measures were taken. Sometimes, deregulatory measures might be replaced by administrative guidance by the competent ministries or local governments.

Fourth, the JFTC needs to watch carefully competitive performance in the relevant sectors after deregulatory measures were taken. Sometimes, deregulatory measures could be replaced by cartel or any other anti-competitive activities by related trade associations or related firms.

Fifth, the JFTC needs to check various abusive conducts of market dominating firms. Under the government regulation, the chance of such abusive conducts being implemented is not large, or competition in the sector is anyhow restricted. This initiative is important to promote deregulation initiative further, besides, without this initiative, it may be difficult to maintain free and fair competition in the deregulated market.

It is true that deregulatory measures tended to be implemented gradually or step-by-step, therefore, first two missions occupy still an important policy initiative for the JFTC, and of course, the importance of fourth and fifth mission would increase as deregulation movements proceed.

### (2) Deregulation Movement in Japan

"Behave based on the principle of market mechanism and at your own risk" became a slogan which could be found in almost all government papers, and nowadays this concept is widely accepted by the Japanese society in general. However, the situation was completely different before 1990. I myself cannot help having difficulty to catch-up such a drastic change.

When the JFTC made public a report on the needs of deregulatory measures in 1982 and indicated the area (namely 16 industrial sectors) where serious review on the needs of regulation was appropriate from the viewpoint of competition policy, we were a very isolated group of officials within the government who were making unrealistic or irresponsible proposals in the eyes of regulators. There was almost no appreciation among business community. Very few businessmen thought that deregulation meant bigger business chances for them.

I can clearly recall my experience in 1981 when I talked to a group of government officials about the necessity for deregulation from the viewpoint of competition policy. They could not understand why the JFTC was involved with the deregulation issue at all, although they already had some information on the move toward significant deregulation in the United States and United Kingdom.

Because of the extensiveness of the exemption system of the AMA and traditionally close government-business relations (in particular, the use of administrative guidance), competition policy could function effectively only within relatively limited industrial sectors. Therefore, it goes without saying that strengthening of competition policy in Japan must go hand in hand with deregulation efforts. It took more than ten years before the necessity for deregulation was widely accepted in Japan, at least as a matter of general principle.

The year 1993 was particularly important in this regard because the general principle for deregulation was clearly formulated by the Hiraiwa Committee commissioned by the Hosokawa cabinet. In essence, the general principle for deregulation says that economic regulation shall be eliminated in principle and social regulation shall be kept at the minimum necessity.

The JFTC is not authorized to make any recommendation to other government agencies, and the decision to deregulate, including the contents of deregulatory measures, is in the hands of regulating agencies. Therefore, what the JFTC could do is to study competitive conditions in a particular sector and indicate concrete problems of on-going regulation, which are thought to be excessive, outdated or unnecessary, or replaceable by other kinds of modest regulation.

Recently, as the JFTC's importance within the government of Japan increased, the views indicated in the study report of the JFTC tend to be respected or, at least cannot be disregarded by the regulating agencies. The, JFTC is particularly active in such fields as telecommunication, distribution, energy and transportation and has indicated various problems of excessive, outdated or unnecessary regulations in successive survey reports.

As a front runner of deregulation movement in Japan, I feel that early 1980's were the most appropriate time to start serious deregulatory movements in various fields in Japan. Unfortunately, it took almost 10 years before Japan started serious steps towards deregulation. This delay seems to be critical, and raised significantly the adjustment cost and burden on the Japanese economy that Japan is suffering gravely for a recent couple of years.

### (3) AMA Exemption Systems Reviewed

In March 1995, at the cabinet level, it was decided that such exemption provisions in the laws that granted exemptions from the applications of the AMA shall be reviewed in order to eliminate them in principle within three years (namely by FY 1997), and the exemption systems to be eliminated must be stipulated by the end of FY 1995.

This is a very important policy decision that has a wide range of implications for competition policy. First, this meant that the cartel and administrative guidance lost its status as a tool for industrial policy finally. It also meant that government intervention into business shall be confined to the minimum necessity and without specific justification for maintaining ongoing regulation, free and fair competition rule shall prevail.

The First Three-year Action Program for Deregulation (covering FY 1995-1997) had produced very significant results in this area. Among 47 exemption systems provided in 25 separate regulatory laws which were administered by the various regulatory agencies, it was decided that 35 exemption systems provided under 20 laws be eliminated or be narrowed in their scope (See p.14 of the brochure). The Omnibus Act to implement these deregulatory measures was enacted in May 1997 and became effective immediately.

Thereafter, further review of the exemption systems was conducted under the above mentioned action program, and in March 1998, exemption systems that could remain were made clear. The depression cartel and rationalization cartel systems which were included in the AMA by the 1953 amendment which has been regarded

as symbolic exceptions to the principle stipulated in the AMA are among those to be eliminated. Necessary bill is going to be submitted to the next ordinary session of the Diet.

In March 1998, the Cabinet adopted the Second Three-year Action Program for Deregulation (covering FY 1998-2000) reflecting further deregulatory measures. The action program is going to be reviewed each year including the follow-up of the implementation of the deregulatory measures by each agency.

**(4) Administrative Guidance Issue**

Government agencies in Japan had developed particular practices generally known as "administrative guidance". But particular aspect of administrative guidance is not in the fact that such informal way of intervention into business has been utilized frequently in Japan, but rather, such guidance, in most occasions, has been complied by the Japanese businesses.

In October 1994, the "Administrative Procedures Act" came into effect. It stipulates some provisions to be observed by government agencies when they implement "administrative guidance" and it also contains some provisions to prevent regulatory agencies from abusing "administrative guidance" such as taking retaliatory measures against those who didn't comply with the guidance.

Because there is no limitation on when and how the government agencies use administrative guidance, there is a risk that administrative guidance would be used as a convenient mechanism to restrict competition or to promote collaboration among firms. And, as indicated above, this seems particularly applicable to the deregulated sectors because there could be a strong temptation to maintain the status quo after deregulatory measures were effected.

The JFTC prepared a new guideline explaining the relationship between the administrative guidance and the applicability of the AMA (June 30, 1994). This guideline clarified situations where administrative guidance might cause antimonopoly problems. Antimonopoly problems mean that the use of administrative guidance by regulatory agencies would raise policy conflict with the AMA, thus consultation for policy adjustment is necessary between those agencies and the JFTC.

However, the problem of administrative guidance is not limited to such policy conflict problems because, in some cases, those who comply with specific administrative guidance might find themselves involved in the AMA violations.

The JFTC expressed in this guideline that the government agencies should consult with the JFTC before effecting administrative guidance under the situations described in the guideline, and also gives warning to the related entrepreneurs that administrative guidance does not immunize them from the AMA violations.

In view of the recent trends where the role of government is declining under deregulation movement in Japan, administrative guidance may not be utilized as easily as before, and more importantly, may not be complied as easily as before by the related businesses.

**(5) Enforcement Activities in the Deregulated Sectors**

As deregulation movements proceed in Japan, the JFTC jurisdiction is enlarged significantly and the room for competition among business expands. Therefore, unless the JFTC watches carefully against any anti-competitive practices in those deregulated sectors, any deregulation measures may not be effective. Those firms which had been subjected government regulation for many years may resort to anti-competitive measures to avoid or lessen newly emerging competition; at least such risk or temptation seems high in Japan. Under these new circumstances, the importance of JFTC's role as a watchdog for the market increases in proportion to the progress of deregulation in Japan.

The most important area seems to be entry-restricting activities. By deregulation measures, entry into the formerly restricted area and expansion of capacity becomes free by business judgement. In order to secure free entry or free capacity expansion, anti-competitive activities and practices shall be eliminated.

The JFTC took, for example, the following measures in this regard in recent years.

In the Hukushima Taxi Cab Cooperative case, after the zone fare system was introduced as a deregulatory measure for taxi fare, the cooperative tried to raise a handling commission for common ticket only against those taxicabs which lowered its fare according to the liberalization measure. The JFTC took remedial measures on Oct. 24, 1997.

In the NTT Mobile Communication Network Co. case, after the sale of mobile telephone equipment was liberalized, the respondent tried to maintain the resale price of those mobile telephones bearing its own trademark at the price equal to those which it sells to the customer directly. The, JFTC issued a recommendation decision against the respondent on December 16, 1997.

**(6) Promotion of Fair Competition**

I would briefly touch on this issue so far as it relates to deregulation movements. Unfair trade practice regulation could function, to some extent, as fair competition rule in a market. As businessmen get acquainted with the AMA or competition policy, demand for fair competition increases. Many complaints are filed with the JFTC, which allege unfair competition in the deregulated sectors or in the sector where competition becomes keen.

Long standing regulation in some industrial sector appears to produce such problem as lack of rule for competition. Related entrepreneurs are not accustomed to

serious competition for a long time and once free competition started, risk increases for market dominating firms to resort to unfair trade practices.

On the other hand, some of the complaints are merely reflecting their desire to lessen newly emerging competition. It is important to distinguish the latter complaints from legitimate ones, therefore in this sense; it is desirable for the competition authority to keep necessary jurisdiction over unfair trade practices regulations.

**5. Conclusion**

Thus far, I have described the current status of the AMA enforcement, and tried to provide the audiences relevant information in Japan. From the Japanese experience, I want to emphasize the importance of the following for the competition policy to be effective in the respective jurisdiction.

First, competition laws should be enforced by the well-regarded independent competition authority, not by one of the bureaus of the ministry. Second, the competition authority should be equipped with sufficient number of well-trained staffs. This seems to be even more important than merely having well-streamlined legal provisions in the statute. Remember that the difficulty increases as the effectiveness of enforcement activities increases.

Third, the competition authority should be able to have influence over deregulation process of his country in one way or another. This should comprise an essential component of effective competition law and policy of the country.

Because of the independent status of the JFTC and its involvement into competition policy related activities initiated in early 1980's, the JFTC could emerge as an important figure within the government very quickly as Japan shift from regulation-oriented economy to more competition-oriented one. I think, if the JFPC remained simply as an enforcement agency of the AMA, the transformation could not be that much smooth.

I sincerely hope that my remarks are of some value for the audience. Thank you again for inviting me to speak today.

(The views expressed in this remark are strictly my own, and does not represent those of the Fair Trade Commission of Japan by any means.)

## DISCUSSION & GENERAL EVALUATION

**Lawyer Hüseyin YERSUVAT**

Mr. President, I would like to mention some points for five minutes. We have two matters to be informed by the esteemed speakers and foreign guests. I have a fear as a 30-year lawyer. First, I want to express that. Today was very important as the practice in Turkey was mentioned. In this practice in Turkey, there are two events that scare me. One of them is the independency of the Board members, and the other is the comparison of this independency with the members of jurisdiction. That is, it is said that they can, by no means, change during six years, except of course the extreme matters in the Law, and this issue is not in question in Turkey for

independent judges. So, we see an assurance beyond the personnel of jurisdiction, the members of jurisdiction. Again, according to their own statement, they expressed that, I use their exact words, “they fulfil a legislative task” via the circulars prepared by them, and as to the execution of penalties, they showed that these penalties are above jurisdiction, also by giving figures. Briefly, they said that the Authority acts as a quasi-jurisdictional body, jurisdiction is performed like in a court, and retorts and repeats were mentioned as well. It was stated that oral interrogations can be made. And, consequently, it was asserted that decision is taken like in a court. Now, my question here is. My fear is something else, but my question is “While making the definitions, the material scope of the Competition Law has not been drawn. I mean the circular to be prepared by this court, quasi-jurisdictional or quasi-legal sermon shall come under which law?”. Look, Turkey has undergone certain stages in terms of political and economic law. For example, one of them is the Assets Tax Law, the others are the National Protection law, and the Law for the Protection of Turkish Currency. They led to deep wounds in the Turkish economy. From my own experience, late Menderes who was the member of Public Officers Register Law Commission, another member of which was my late father, pointed to an apple and said “Look, it seems how nice, but the inside may be poisonous.” His implication referred to a debate about whether declaring a Strike and Lockout Act or not. Just so, a Strike and Lockout Act issued with a hurry after the 1961 operations, ruined the Turkish economy until the year 1980, and prevented it to upgrade, promote, and compete with the other developed countries. You all know these statistics closely as it is our recent history. My fear here is that, besides the decisions which were issued in practice by the courts, passed by the Supreme Court of Appeal and finalized, and despite a decision given by the judicial bodies that also examined in detail, discussed and decided upon the Competition Law presented as a multipower for the Turkish economy, the Competition Board resorted to an interim injunction, an issue about which the courts are extremely delicate. The lady said that today we don’t have any dispute with the Council of State. I think she did not know as it is something very new. The Council of State made an application to the Court of Constitution, and therefore, the first important case between the Council of State and the Competition Authority has been forwarded to our Court of Constitution. Its grounds shall be announced in the near future. In this respect, I fear whether here is a judicial body, we want to know that. As the practitioners and since I am its primary customer, I want to learn meanwhile how we shall act, i.e. would you take the Intellectual and Artistic Works Act, and apply it in a matter? With regard to the media, would you take an article of RTÜK (the Superior Board of Radio and Television) and apply it? I would like to learn that. This is the question I address you.

The second point is what would be applied in terms of the material law? Because, there are references to the other acts among the decisions, but a court can do this. The Criminal Court, for example, can apply the Forest Act. Does this place also perform such a practice? Does it make a definition? Because, it does not exist among the definitions.

There is a matter I would like to learn from our foreign guests. It is particularly a matter that concerns Turkey very much during the recent days, that is, today you see that a person comes up, and immediately buys two media, two banks, two newspapers with a figure like two billion dollars, and all of a sudden, a brand new

group emerges. I wonder whether the competition authorities examine it in their own countries. What's more, tenders are commenced and ended in issues that take place on the media where these people's names are quoted as a gang, as a gangster. Do they have a precedent in their countries? I want to learn that. Thank you ladies and gentlemen.

Chairman:

Mr. AYAYDIN, for answering the first question please.

**Prof. Dr. Aydın AYAYDIN**

Thank you Mr. President. I would like to answer this good explanation made by my friend Mr. Yersuvat who, I think, made it under the influence of our decision. I want to make an explanation so that not only himself but also the Turkish public is enlightened, and our foreign friends who are closely engaged in the Competition Law, obtain information about an issue related to competition in Turkey.

The matter which our friend Mr. Yersuvat wanted to explain is the question he asked with reference to our decision on the live broadcast of football games in the premier league, which very closely concerns the Turkish public. As is known, the broadcasting right of all games played in the Premier League of Turkey was awarded by tender to a private TV broadcasting organization, as a result of the tender opened by the Football Federation, and the issue was transferred to our Board upon the claims that this contract, i.e. this agreement is contrary to the Competition Law No. 4054, on grounds of the violation of competition in relation to this practice. Our Board examined this issue with great impartiality and extreme meticulosity, as a result of the examinations performed by the experts of our Authority with also great impartiality, based on entirely objective data, and under the influence of no one, and did so as the games of the premier football league concern the whole sports public due to their news value; this issue is still under the investigation of our Board. We haven't yet reached the stage of decision, but while this issue was transferred to our Board, an interim injunction was requested in order to prevent future events that are not compensable. Our Board evaluated, at this stage, the request of interim injunction here, and rejected the request to impose an injunction on the entire tender at this stage. However, it issued an interim injunction in certain matters. The matters about which it issued an interim injunction are as follows. All football games have an intention of news. In my opinion, it is the freedom to be informed that at the end of these sports games, all television organizations show their own spectators the results, and the important moments which affect these results, even in a very short clip. Mr. Yersuvat said that this issue had been transferred to the legal jurisdiction previously, our high jurisdiction had resolved upon this, and it had been approved in the Supreme Court of Appeal as well. But, the form in which it was transferred to the jurisdiction is different than the one in which it was transferred to the Competition Board. Applications were made to the Competition Board in accordance with the provisions of the Law on the Protection of Competition No. 4054. They resorted to our Board with the claim of contrariness to 4054. Therefore, the power and authority to implement the Law No.4054 in Turkey is of course the Competition Board. The

high jurisdiction shall naturally decide on the matters transferred to itself; we, as the Competition Board, never enter into matters other than those under our scope of assignment, we never interfere in the duties of either the administrative or the legal jurisdiction. We absolutely never see ourself as entitled to enter into those issues. However, as the Competition Board which is the practitioner of the Law, i.e. the act passed by the Turkish Grand National Assembly, the right and power to decide on the matters transferred to our Board concerning our Law, certainly rest with the Competition Board. What's envisaged in this matter which we, as the Board, consider as having the nature of injunction, is that all television, broadcasting organizations shall be able to broadcast these matches only for 90 seconds after the matches finish, with an intention of news. We have issued a relevant decision of injunction. Resort to law against our decisions is available. Perhaps we have done wrong, we have taken this decision unanimously, believing that we were doing right. If we have done wrong, resort to law is available; this shall return from the Council of State. Mr. Yersuvat also used such an expression that there is a friction, or a conflict of assignment between the Competition Board and the Council of State. Such a friction is never in question between the Competition Board and the Council of State, which are two select institutions of Turkey. The First Chairman of the Council of State followed our session till the end in yesterday's open session. We sat side by side. The existence of such a thing is impossible. But, I think Mr. Yersuvat wanted to mention the following issue. The Council of State resolved to resort to the Court of Constitution, that's true, but it should also be explained in what aspect the Council of State resorts to the Court of Constitution. The Council of State says that in my Law, i.e. the Law of the Council of State, there are issues which come under my scope of assignment, and the names of the Competition Board decisions are not present among them. My act does not say that the Competition Board decisions come to the Council of State. In this respect, it mentions that the issue better goes to the Court of Constitution. The Competition Board too says that the issue better goes to the Court of Constitution as the Law of the Council of State is an older one. The Law of the Council of State was not issued after issuing the Competition Law, and after forming the Competition Board; therefore, it was probably impossible then to think of an article in the Law of the Council of State that a Competition Board shall be formed 50 or 20 years later, and it would be among the duties of the Council of State. Certainly the high court, i.e. the Court of Constitution shall discuss this issue. And not only the Competition Board but also the Council of State and all sections of the society shall of course conform to the decision to be made by the high court. If the authority for appeal is not the Council of State, absolutely resort to law should be available in relation to our decisions; then, either the Council of State shall determine that, or a new relevant arrangement shall be made. The need may arise to make an arrangement in our Law or in the Law of the Council of State. Other than these, I would not like to go into detail much, as the issue is in the hands of jurisdiction. It is also under our investigation. Mr. Yersuvat should be certain that the Competition Board carries out definitely with great meticulosity our investigations and preliminary researches on your file, and other four issues concerning the media. The Competition Board is under the influence of no one, what law dictates shall come true for the matters transferred to us. The contrary is by no means under discussion.

Your 2nd question: A new media group emerges, and it is said to be related with the gangs. These are extremely wrong things, these are assumptions. The Competition Law does not contain an article stating that this person can buy a media group, or this person can buy this company. Every citizen in the T.R. is equal before law. Should he is in a case not to perform a task before law, of course what needs to be done with him shall be done. We, as the Competition Board, shall certainly make an examination in a matter under the scope of our Law. If the entry into the media by the group you mentioned constitutes drawbacks in terms of competition, the Competition Board shall not give permission, but if it bears no drawbacks in terms of the Competition Law, the Competition Board shall of course allow it. I pay my respects to you all.

**Mr. Ergun ÖZSUNAY**

I was the member of the first Commission which prepared this Law, more precisely, the initial drafts of the Law. I think that I have trivial contributions to the formation of this Law. However, the Law frustrated me in various aspects after it had arisen . My relevant opinions also take place as a comment in the Commission report. I don't want to go into the history of formation of the Law once more, but would like to be enlightened on a matter I am still curious about.

This Law is a successful Law in itself. Having seen the development of the Competition Authority within a short period, I would like to mention that I am actually proud of the Authority. One of the points in the Law that makes me wonder the most is-; we do not have any doubts about the territorial scope of this Law. Either the third article or the second article, I think the third article refers to the territorial scope of the Law. This Law is applied within the boundaries of the Turkish Republic.But, we have doubts about its material scope. For instance, in Germany, there is an elaborated Competition Law as you know. If you read the fifth section in the last part of this Law, you will see that it has been taken to writing long from the paragraph 99 until the paragraph 104 or 105. In these paragraphs, it is stated which rules of this Law on restrictions of competition or on competition are applicable or inapplicable to which contracts of undertakings, or decisions or recommendations of associations of undertakings. For example, the state of undertakings engaged in agriculture, production, insurance, collection of copyrights, contracts concluded by the undertakings engaged in goods and passenger transportation, decisions of associations of such undertakings, some important acts such as the livestock act, meat act, cereal act etc. Thus, you have the possibility here to determine your legal position. Whereas, this does not exist in our Law. A lawyer friend expressed it in some different terms, but I don't want to impose it that way. In this regard, to say the truth, the legislator leaves the Competition Authority with a very heavy burden. This is a task exceeding the duties of the Competition Authority; indeed, the legislator had to mention to which conditions and to what extent the provisions of this Law are not applicable. I would like to focus on the German Law as the model. Besides, I want to address my second question to the foreign guests. For quite a long time, I've been working as a representative of the Turkish National Committee in the International Chamber of Trade, Competition Law and Pratices Commission. The issue we have been studying recently, is that of cooperation between the competition

authorities of the European Union and United States of America. Now, Canada has also joined, and the cooperation agreement between the EU and Canada has emerged considerably. The next meeting will be held in New York on October 21. I wonder whether I could have an opinion about the multilateral cooperation between the Commission and EU Federal Trade Commission, or among the Commission, EU and Canada, together with the reflections of such relations on the Competition Commissions of the Member States. I would also like to be informed about whether there exist bilateral relations. Thank you.

Chairman: Mr. EROL please.

**Dr. Kemal EROL**

I would like to thank the distinguished lecturer Prof. Özsunay. He granted me the opportunity for some explanations. His first question was that whether it was possible in this model law to make a regulation in terms of exemption provisions or the application scope of the law, as in the German Law. Although our Law has been derived from the model of the European Union, it is a National Law. While preparing a Competition Law under the duty assigned by the Article 167 of the Turkish Constitution, we were forced to create a law freed from the own domestic policies of the European Union, since we are not a full member of it. I am not informed about the German Law, here Mr. Stockman would answer to this question better. But, I think as the European Community does not have a competition policy specific to Turkey, it can't be more natural that exemption provisions take place in the Law in terms of applying some of its other policies such as the agriculture policy, fishing policy, transportation policy. Since, in relation to our Law, we do not yet have an obligation to conform with other policies, and we are not a full member, the need to provide such an exemption provision in our Law has not arisen then. Therefore, we do not have any discomfort as to the sector. The sectors, even including the public sector, shall be subject to the same competition rules, and the same Law shall address them. I think that this is a situation in favour of the Turkish economy, rather than creating a discomfort. If what one wants to say here are the conditions of exemption, the Competition Board, as Prof. Korah said, has an exclusive power over the exemption of the Article 4 from the prohibition scope in terms of the agreements, decisions and concerted practices. Actually, the sole exclusive power over granting an exemption belongs to the Competition Board. I can also say easily based on my legal knowledge that I think even the courts are not entitled to determine and to issue a determination decision about whether an agreement, a decision or a concerted practice bears the conditions in the Article 5. This is specifically subject to a certain procedure. It is absolutely necessary that a relevant application be made in order to be able to grant an exemption. Upon such application, the Competition Board has to determine, within the said procedure, that the conditions in the Article 5 of the Law, i.e. the four conditions, two being positive and two being negative, have jointly taken place. In terms of offsetting policy in the exemption from the scope of prohibition, and the conditions that may be restricted as required by the competition law, it is the task of the Competition Board to make this assessment for each agreement. Instead of examining a large number of agreements, regulations envisaging category exemptions, that is group exemptions for those included in certain categories, have been made, as in the

European Union. In this matter, our Board has taken the European Union regulations as a model exactly, under the association agreement with the European Union, and the resolution for the Customs Union. Therefore, I am in the opinion that this is prevented as well.

As for the other matter, the issue of cooperation between Competition Authorities is beyond being the problem of only the European Union and America, and now Canada, but rather the problem of all Member States, whereby I mean the Member States of OECD. As far as I am concerned, our guest who is an OECD representative can make further explanations. OECD has a model agreement. Cooperation agreements are mutually concluded under this agreement model. Insofar as I could detect, the agreement performed between the European Union and America is harmonious with this model agreement. It is envisaged that cooperation be established between the Commission which is the competition expert of the European Union, and our Authority, by the decision of the Association Council under the Customs Union. Accordingly, every regulation shall be made during the time ahead under the operation of the Customs Union, but it may be a model similar to the agreement under the European agreements between the European Union and Central and Eastern European countries, or it may be done in accordance with the EFTA Treaty between the EFTA countries and European Union countries. However, I think that these can be based on a model via mutual negotiations over the course of time. Thank you.

**Prof. Valentine KORAH:**

I have a question about concentrated industries which comes out of article 4 at the last two paragraphs of it. It says that where there are prices such as you would expect where there is market power, there is a presumption of concerted practice, but one may avoid liability if the countries proven on economic and rational grounds. And I would like to make a plea that the Board would treat the presumption as not very strong, and that it work easy to avoid liability. My problem is one of policy. Supposing there are three people in the market, and A raises his price, B knows that unless B goes up very quickly, A will drop his price again. So the only way that you can raise your price is one of them to go up and for the others to go up, probably within a couple of days, possibly exactly two days later of the day they had their meeting on the second, and decided what to do. This looks like collusion. But if you forbid it, it becomes impossible to raise your price and you end up with the position where one or other has to leave the market as his prompt needs replacement. So I think it is very important that the problem of oligopoly be not solved under a concept of concerted practice. I would much prefer it to be seen under article 6, the abuse of a jointly held dominant position. Now I am assuming there is no actual collusion, they are just acting sensibly as oligopolists each in their own interest. And I am not sure about your definition of joint dominance. It refers to joint dominance as a result of agreement. I would hope there could also be joint dominance without an agreement when we have a very concentrated industry , and each operator is closely watching his colleagues because he knows perfectly well that he cannot be pricing at a higher

level than they are. And so I would much prefer to see it covered under article 6. But the mere raising of prices instead parallel pricing or other parallel conducts should not itself be an abuse, merely the dominance. You will then have to show as an abuse unilateral practices to prevent other people entering the market, or unilateral practices to make it less likely that the existing operators will compete with each other in ways that can be copied fast .So I think it is a plea to the Board to construe the penaltimate paragraph of article 6 and article 4 narrowly, and construe the concept of joint dominance to go beyond the case of a cartel, and to a case where there is no agreement between the parties, but they are acting as if there were such an agreement. Thank you very much Chairman.

Chairman:

I thank Madam Korah for her interesting observation. Is there any reaction on the part of the group to the observation made by Madam Korah? Please you have the floor madam.

**Dr. Gamze Öz:**

Thank you Madam Korah for your observations. In fact we had the chance to discuss this with Professor Korah during the break. It was part of my PhD thesis that I also criticized the wording of the Law as far as joint dominance or collective dominance of more than one undertaking is concerned. Because when you look at the wording of the Law, it gives the impression that collective dominance could only be or will only be as a result of an agreement or a conscious collusion between the undertakings, whereas I believe this is not the only case where joint dominance could arise, and joint dominance could also arise where there is not such an agreement between the undertakings as in the case of oligopolies. Therefore taking this together with the presumption of concerted practice in article 4 which I believe again the Board should be quite cautious to apply because taking into account the circumstances of the undertakings and taking into account the fact that the Board has to prove first that there is a concerted practice in the market. But of course the undertakings do have the chance as a result of the presumption to rebut this that they are really not interacting consciously, and acting like this as a concerted practice just by economic reasons. So I am of the same opinion with professor Korah and I am happy to be confirmed by her here as I've discussed in my thesis that collective dominance is a more appropriate tool as it were compared to the presumption of concerted practice but even then I believe it should not be the - it should still be - interpreted and well-defined by the Board with its decisions and not only be limited to the wording - the literal meaning - the wording of the Law in article 6 and article 3 of the Law. Thank you very much.

Chairman:

Thank you Dr.Öz. I am so glad that two specialized personalities in this highly technical matter see eye-to-eye. It doesn't happen so often, does it? Any other comments? Well, I have a list, I'm coming, I'm just following one by one. But any other comments on the subject? May I remind you that we are approaching to the

end of our seminar, and I think I haven't the time as we are coming to the lunch time so those who are interested please be precise in your questions and try to - when you have a certain explanation - be as brief as possible. I have on my list Dr. Yıldırım. Dr. Deren Yıldırım. Can you first tell us in what area you have Doctored? What is your profession?

**Dr. Deren YILDIRIM**

My name is Deren Yıldırım and I am an instructor at Marmara University, School of Law. My expertise is on Civil Trial Law and Execution and Bankrupt Law. My questions shall especially regard these topics, and legal sanctions exercised to cartel law. I have two questions. One is a deficiency that I see in the Act regarding the Protection of Competition; it is that there is a type of litigation in the German Act regarding the Protection of Competition. It is called Verbandsklade, where the administrative mechanism acts sua suponte or upon a complaint or notice when the administrative mechanism does not function. However, there is another protection mechanism in the German Law for cases where this does not function well. That is Association Litigation. What is done here ? Here the opportunity to litigate is given to - for example, consumer assocations or any other assocation or union - in order to proscribe interference, and conducts restricing competition. I have examined the Act as far as I see in the Turkish Law. I also have a study on the subject that has been issued in the Periodical of the Court of Appeal. In this Cartel Law field, the opportunity to file an Association Suit has not been granted to occupational unions. I would like to ask Herr. Dr. Stockman, whether this Associations Litigation is in fact functional in the German Law.

I have another question. That is to Dr. Erol. He has stated that in the Act regarding the Protection Competition, an American originated institution has been given a place. That is stated in the last paragraph of Article 58, stating three times of their profit shall be able to be adjudged as compensation. And this recalls the Class-Action in the American Law. However, I could not correlate this Article with the way Class-Action is practiced. Why not ? Because there, the Group Representative starts action in order to protect the legal interests of all injured individuals of that society due to the conduct restricting competition, and not to get himself enriched unjustly. Then, the Group Representative does not get rich. On the contrary, as the Cartel Law amounts upto 2.250.000 people in the litigations in America; because it damages many people in the society and the litigation can be conducted for this many people, and high rates of compensation are adjudged. Thus, I believe that sanctions in cartel law also get stronger. This is not done with the aim to enrich the person who litigates, unlike the situation in our Act. Then, when said a litigation compensating the legal losses of all individuals of the society damaged by conducts restriching competition emerges from the American Law, is it meant that a sanction similar to Class-Action had been thought about or something else ?

**Dr. Kemal EROL**

If you let me Chairman, I first would like to respond to the question of Assistant Professor Yıldırım. This Principle in the American Law is of high significance. I wanted to emphasize it in my presentation via counting it among sanctions. I do not agree with the first thing stating that the equivalent of Association Suit of American Law is non-existent in our Act. Because, I had stated that there were some number of ways while exercising the authority granted to us by the Act. One is notification, one is complaint and the other is by its own initiative-sua suponte. All ways are open. It is not possible to say that for example a consumer association cannot start action. The Act grants the possibility for the damaged party to make a complaint; and not depending on being imposed to any damages, the procedure can be initiated via notification.

If we come to the second point of your question, which is compensation, it is necessary for compensation to be deterrent. Thus it is more than the compensation of the damage suffered - as we see in civil Law or private Law - but it is three times of the exceeding amount. In this sense, I think this would have a significant contribution as a deterrence to our Act, either taken from the American or European Law. The person shall receive it at the end of the Lawsuit brought to the General Courts as per provisions of Private Law. The Competition Authority shall not give the decision for that. There will be disputes between the parties during the course of the suit, then decision shall of course be given by General Court. Even it can be put forward that this Act infringes Constitution. At the moment, being the representative of the Authority, which is in charge of exercising the Competition Act, I favor that this provision having this penaltimate quality is kept due to its deterrent quality. Thank you.

Referring to this note, I think that Mr. Stockman wants the floor in order to reply the Lady’s question.

Chairman:

I would like to give now the floor to Mr. Stockman, one of our distinguished foreign guests here in answer to your first question.

**Mr. STOCKMAN:**

Well, thank you very much Mr. Chairman. I think it's a very interesting question, which I'll try to reply to starting with a clarification. The Act against restraints of competition and - that is the Act we're talking about here in the first place and I was talking about yesterday - does not contain a provision for Verbandsklade kind of a class action in a way. It's the Act against unfair competition, which is a different area. The primary aim of the Act against unfair competition is the protection of competitors against unfair practices while the primary aim of the Act against restraints of competition is the protection of competition not competitors. It is a very simplified way to put it. Because of course there is overlapping both Acts on that. First as regard to the experience we made with this kind of class action just using this word which is not very accurate Verbandsklade would be better but I don't think it is easily translatable into other kind of civilized languages. It is difficult to

understand the manoeuvre on language. The experience is mixed. One of the bad sides of it is that it led to the formation of so called ab man fein once again a german word “knapp” is really, new possibility to bring action. Lawyers with not very good businesses going on using this just to make money on that. Because it is always easy to find out violations of the Act against unfair competition. I interestingly enough didn't mention that yesterday when I spoke about the last amendment of our Act, it was discussed again whether we should not introduce a kind of class action on the Act against restraints of competition - that means the Act protects competition, not the competitors in the context of the integration of some rules on public procurement. And the result of this discussion was better not. Because we might make similar experiences as in the Act against unfair competition. The instrument of class action might be abused. The possibility to bring such kind of action might be used as a bargaining chip with competitor of the government itself. The outcome was that the Parliament did not introduce any such provision into the German Act against restraints of competition. There is no possibility for a class action. I may end the sentence - although this was not in your question but it has to do with compensation and damages all that - this part of our Act does not play in practice so far a great role. This may change in the future with the amendment making out of the ban on cartels and in particular the control of abuses of dominant positions and outride prohibition. So we have to wait what the future brings beginning next January. Possibly there is a change. It's not likely but it's not excluded. Well, thank you very much.

Chairman:

We thank Mr. Stockman for his kind explanation and response. I think the distinguished delegate from European Commission would like to have a word. Please sir.

**Mr. Helmut SCHRÖTER:**

Thank you very much Chairman. I think I should add some words about the situation in European Community Law. Because it's different than that prevailing in Germany. Associations of undertakings can make complaints to the Commission. This is expressly provided for in Regulation No: 17 which is main implementing rule for Articles 85 and 86. Complainants have a specific statute under Regulation No: 17 under the Community Law. They can force the Commission to examine the complaint. The Commission can of course reject complaints, but decisions rejecting complaints can be attacked before European judges, before the Court of First Instance and Second Instance, before the Court of Justice. Well, these happen very often and I should even add that associations of undertakings - even associations of consumers - where they defend the interest of individual consumers or of category of consumers can be recognized as complainants. Now our experience, this of course goes a little bit into the direction of protection of individual interest. This of course is not a task of the European Commission as a competition board. Because it has to act according to the public interest, to the general interest of the community. But you may have the situation where a private interest of an individual coincides with the public interest. And it's always good for the Commission to have information from the

complainants. That's the good side of the story. The bad side is that we are overflooded with complaints which are not serious. We have to reject them but organ-through decisions rejecting complaints can be attacked. This is likely to create problems. So I should not go too far into that direction. What can impedents do when they are - if violation of Law has taken place and where they want to get damages or they want just this violations are put to an end and when the Commission says we are not interested to intervene because the general interest is not sufficient? Now individuals can bring actions before National Courts of the member states. Because the provisions on cartels and abuse of dominant position are directly applicable everywhere. And they can give rise to private actions before National Courts of the member states. This is recognized in all the member states. The practice however shows that the process of what you may call "a private enforcement" is growing slowly. The Commission has a policy of decentralized application of Articles 85 and 86. Therefore it promotes what we can call "the private enforcement" of Article 85 (1), ban on cartels and provision of abuse of dominant positions. And it has issued a Notice to that extent. So we hope that by fostering private enforcement, we will have more resources free to attack serious cases where evident general interest is important. Thank you.

Chairman:

I want to thank Mr. Schröter form the European Commission for bringing to our attention the position of the European Commission in this interesting exchange. I understand we have one more speaker, another distinguished delegate. You have the floor sir.

**Mr. John CLARK:**

Thank you Mr. Chairman. If I speak as a former practitioner of Antitrust Law in United States, where the treble damage liability is very very significant, it's a very important part of the complete fabrique of our competition enforcement. I agree completely with Dr. Erol, with his view that this is a very significant deterrent to those who might consider violating the Competition Law the possibility that they would be subject to treble damage liability. In the US there are many times the number of private cases brought to recover damages. Then there are cases brought by Government Authorities. There is one caution, because it is possible indeed to recover so much money, there will be incentive for private parties, I think, to be very active in bringing these cases. And there will be incentive to bring cases that are not meritorious that in fact should not be brought. How can the good cases be distinguished from the bad ones? In the US, the courts have done so by articulating the standards of injury that can be redressed in private cases. Courts have outlined the so-called Antitrust Injury, which must be suffered by private plaintiffs. And only that type of injury which results from the elimination of competition, not from competition itself, is cognizable in treble damage cases. And I suggest that will be the task of the Courts here in Turkey as they face increasing number of these cases

to define those types of injury only that should be the subject of treble damage cases. Thank you Mr. Chairman.

Chairman:

Thank you Mr. Clark. We welcome the new dimension you brought to the discussion. Dear guests, we have at least 4 or 5 speakers in our list, those who want to ask questions. I, by this occasion, would like to emphasize this in particular: Mr. Prof. Aydın Ayaydın, MSc, PhD. these hot discussions show that in this step you have taken, you really provide a great service to Turkey as to the issue concerned. I would like to express you a second point with enthusiasm. So, this feeling of competition, and the studies on competition conducted historically, have reached our society as a Law, and as an Authority. Today, with your presence in large numbers, our society shows that it really adopted this. I sincerely congratulate you all, all participants by this occasion. I think that your presence today shall act as a new source of energy for the Competition Authority, and a new constitutional element for future studies. After these words of mine, I am supposed to allow only one more speaker, one more question if you let, as time has elapsed a great deal. Prof. Nurkut İnan, MSc, PhD. had a question, I give the turn to you, and with your high permission, this shall be the last question of the day. We shall have reached the end of our seminar with the answer to be given.

**Mr. Nurkut İNAN:**

Mr. Chairman, I have a practical question which closely concerns also the future studies of the Competition Board. However, I think these speeches are recorded in minutes, and to be done so, I want to make two very brief determinations if you let. It was mentioned that the Competition Board also fulfils a legislative task. All authorities involved in the administration have the power to perform a regulatory operation. They derive this power from the Law. The communiqués of the Competition Board are not different from the communiqués of, for example, the Capital Market Board, first. Second, the Competition Board is responsible for the enforcement of the Competition Law. But, it also has to conform to all Laws, as a Board of the State of the Turkish Republic. That is to say, in another words, we cannot make a generalization that the Competition Board does not apply another law. It conforms, it has to comply with an article of RTÜK (The Superior Board of Radio and Television). But it cannot apply the penalties in RTÜK. The issue should be seen within this framework. Eventually, the last point I want to determine is that the Competition Board was said to act as a jurisdictional body, and to hold hearings and so forth. One should not confuse also here the power of the jurisdictional body and the power of the Competition Board. In fact, today preparations are made in Turkey; an administrative procedural law, I don't say an administrative jurisdictional procedure. The administrative procedural law already exists in developed countries like America and France; this preparation is also being made in Turkey. Here the Law on the Protection of Competition is the first example of an administrative procedural law in Turkey. It is the detailed procedural provisions that determine which procedures should be conformed by the administration while taking a decision concerning people, and how to protect the rights of the person about whom a decision is taken. Therefore, it should not be confused with the jurisdiction. After a

short period, alike provisions, maybe parallel provisions in the same way, an administrative procedural law comprising the whole administration in Turkey shall be determined. Now, I would like to pass to my question sir. If you let, I want to direct this question to foreign scholars Prof. Korah and Prof. Whish as well. My question is very short, therefore I want to ask it both in English and Turkish. There are notification thresholds in the Mergers and Acquisitions Communiqué, you know. These notification thresholds are two in number. The quantitative ones are joint market share's exceeding a certain percentage in the relevant product market, and overall turnover's being more than a certain total. Now, it's possible to misinterpret the communiqué concerned due to the syntactic structure of Turkish; just so, it is being misinterpreted. These two thresholds here should be taken exactly as follows: the share in a relevant product market, and the overall turnover, but not the turnover in the relevant product market. This is very important. Because turnover shows the power of merging companies or acquiring company, but the other one, the market share shows the power in that product, while turnover shows the general power. Therefore, this application must be performed in the said manner.

I would like to repeat the question and my opinion. According to the Communiqué concerning mergers and acquisitions, the numerical thresholds are two-fold. One is the market shares of the enterprises. Their total market share in the relevant product market should be, if it is more than 25%, subject to notification. Also, or if their total turnover is above a certain amount, it still is subject to notification. But due to the peculiarities of Turkish grammar or syntax, this particular clause can be interpreted as follows: "Their market shares in the relevant market" or "their turnovers in the relevant product market". This second interpretation that means limiting the turnover by the relevant product market, in my opinion, is wrong. And there is tendency to interpret it like that. So I would like to express my opinion which I think it is wrong, and I would like to hear what Professor Korah and Professor Whish has to say. Of course also as a member of the Board what Dr. Erol has to say in that. Thank you.

Chairman:

Thank you Professor İnan. May I invite the distinguished foreign speakers here whether they would like to respond to that question and thereafter Dr. Erol, I would like to give the floor to you sir. Thank you.

**Prof. Dr. Richard WHISH:**

Is this microphone on? I have to say that I haven't actually seen the communiqué in question. When I came to Turkey, this was one of the very things I wanted to look into myself, because I looked at your 1994 Act and I saw Article 4, which simply says that it is possible to prohibit a merger that will create or strengthen a dominant position. And Article 4 goes on to say that the Board may issue a communiqué indicating whether there is mandatory pre-notification. I haven't had the benefit yet of seeing the communiqué, and I was talking to Dr. Gamze Öz over coffee and she's very kindly let me see a copy of this and I'll also discussed the same issue with Dr. Erol tomorrow. All I will say about this is that having heard that there were

these two jurisdictional criteria, I was a little bit anxious about them. Because if one in the business of advising international companies, one increasingly finds that the same transaction may turn out to be subject to compulsory pre-notification in 12 or 14 or 16 or 18 jurisdictions. And this can have a very considerably adverse effect on the whole business of getting a transaction cleared, and I think it is important that National Competition Authorities only to assert jurisdiction in relation to transactions that could give rise to serious anti-competitive problems. And my feeling was that having these two jurisdictional criteria, perhaps imposes an undue burden on companies, the benefit of having purely quantitative criteria i.e. one which refers to the turnover of the undertaking concerned has the great benefit that companies can work out whether they are above or below those criteria relatively easily. Then the issue becomes how high should the figure be, and I might add additionally whether the turnover has to be within the state itself, or it's a reference to global turnover. Because I've got a feeling that possibly the communiqué isn't absolutely clear on that issue either. I have worry about having a market share criterion simply for notifiability. Because it is extremely difficult for companies to predict how the relevant market will be defined in relation to any particular transaction. And feeling is that analysis of the relevant market and the determination of whether there is a creation or strengthening of a dominant position in that market that is the analysis that should be undertaken once it has been established that jurisdiction exists. I so I would actually prefer - to be honest- that a purely quantitative criterion at the stage of determining notifiability and one should leave analysis of the market itself until the Board or whatever other Competition Authority in any other state comes into look at the transaction in question. But quite clearly there is a sort of linguistic ambiguity about this communiqué and I would like to have a look at it. The point being made by the Professor here is that if you have a quantitative criterion where you say the question is your turnover of more than x-million Lira should that mean turnover in the relevant market or should it mean turnover generally of the companies concerned. And I think of those two and to be consistent with what I've just said: It should be the turnover of the companies concerned generally, not the turnover in the relevant market; otherwise, you get precisely back into the problem I've just identified.

Chairman:

Thank you very much. Are there further comments from our distinguished guests?

**Prof. Valentine KORAH:**

My name was mentioned. But I have nothing to add. I have spoken enough today.

Chairman:

Thank you. I now give the floor to Dr. Erol.

**Dr. Kemal EROL:**

Thank you Mr. Chairman. First of all, I feel obliged to add to the initial explanation by the esteemed lecturer Nurkut İnan, which was made in order to be recorded in minutes. I want to do so as it was me who put it forward, said it in my presentation, and as I am afraid of my words being misunderstood. I never said that the Competition Board is a jurisdictional body. As a matter of fact, particularly using its Latin term “Quasi”, I said that it’s a semi-jurisdictional administrative body, or an administrative body similar to jurisdiction. I also never said it is a legislative body; as everyone who studies the Constitutional Law knows what a legislative body is according to the “separation of forces” principle, I never mentioned it, I want to correct that. Then, to turn to the main question Mr. İnan asked, I should immediately state that Article 7 paragraph 1 of our law brought in a very precise, clear principle about which mergers and acquisitions are prohibited. What’s in question here is what kind of a method the Competition Board should follow in the communiqué to be issued about which mergers and acquisitions need to be notified to the Competition Board in order to gain validity according to paragraph 2 issued by the Competition Board, aiming at detecting and catching the ones prohibited. Of course it was possible to say that all mergers and acquisitions are better passed through the Competition Board, this was the safest way. That was so in terms of controlling the mergers and acquisitions under paragraph 1, but you would appreciate that no one shall desire such a thing in anyway. It would create an extra workload, and be an obstacle before the mergers and acquisitions. But, you would also appreciate that the Competition Board had to impose a notification obligation as to the mergers and acquisitions likely to come under paragraph 1; as soon as we took office, we commenced to study on how this should be in our Communiqué No.1. Here one could place only the turnover value as in the European Community, but from the point of likelihood and necessity to exonerate those who are below a market share of 25% which is recognized as a criterion for dominant position in many countries, we made it clear that those mergers and acquisitions which do not attain a market share of 25% shall gain validity. As for the turnover, we again had to find it by groping in darkness. We placed a threshold value such as 10 trillion TL, but we immediately saw that there happened to be unnecessary merger and acquisition applications to us, since a threshold value of 10 trillion TL turned out to be too low. Therefore, right after that, I think 8 months later, we felt necessary to increase it to 25 trillion TL. The question our lecturer asked is about whether it should be the turnover in the relevant product market, or the overall turnover. To date, applications have been made merely according to turnovers in the relevant product market, and we even see among them that the ones which concern our competition law, I mean which have the nature to come under paragraph 1 are quite a few; therefore we overlooked that. But, up to my personal opinion, as I also said to Prof. Whish during dinner, overall turnovers are concerned, and if overall turnovers are above this threshold value, they should absolutely be notified to us. But as the Competition Board, we may have to review these threshold values. For the present, these are considered as adequate threshold values based on the flow of workload of us. However, they can be reviewed over the course of time. Thank you.

Chairman:

Distinguished guests, as we approach the end of the symposium, I now give the floor to the esteemed President of our distinguished Authority in order to deliver the closing speech.

**Prof. Aydın AYAYDIN:**

Distinguished guests, for two days, we examined in detail both the application of the Competition Law in Turkey, and the competition laws in the European Union countries and other countries as local and foreign panelists, and our foreign panelists expressed their views on various issues related to the application of such laws. We would like to mention that we are extremely pleased to host in this matter. Though the Competition Law was issued in Turkey in 1994, we are before you with its 11-month application. And as a product of 11-month work, today we received before you the representatives of many countries, renowned academicians in the branch of Competition Law, and the representatives of many international organizations, and found an opportunity here to examine together with them not only the Turkish Competition Law but also the laws and practices in their own countries, and relevant practices of various organizations. We benefited from this to a very high degree as the Turkish Competition Board, and followed the speeches of all speakers with extreme meticulosity. Ourselves, the persons interested in the Competition Law in Turkey, academicians, and young experts of our Authority followed these presentations with extreme attention. I think in the meetings to be held the following years, we would perhaps find an opportunity to examine an issue which we feel is missing today, and we shall discuss it also here together. In all countries of the world, many organizations and institutions have a setup: World Patent Organizations have a setup, World Standards Organization has a setup, World Trade Undersecretariats have a setup, and World Finance and Treasury Organizations have a setup as well. But, as a deficiency that we see, there is no World Competition Organization in the world. Hopefully, we shall also lay its foundation in this meeting, and maybe in our future meetings, we will start to make preparations for a World Competition Organization which shall perhaps be leaded by us, and encompass the representatives of organizations, and the representatives of countries here today. I believe that this meeting has been beneficial in this regard as well. I forthwith end my speech for lunch, without boring you much. I thank to the distinguished representatives from very far away, from Japan, USA, from many countries of Europe, and to the representatives of esteemed organizations, and the representatives of esteemed countries, I express that we would be glad to see them among us again in our future meetings, and pay my respects to you all.

## THE SPEECH OF THE CHIEF ADVISER TO THE PRESIDENT

**Kemalettin Ali KAŞİFOĞLU**

Distinguished Chairman,
Distinguished members of the council,
Esteemed guests,
Esteemed delegates,
Select members of our press,

I greet you all with respect. As expressed a short while ago, Mr. President would have liked to attend the closing session of the First International Competition Symposium of Turkey, and address you. Accordingly, every kind of arrangement was made. However, due to Egypt President Hüsnü Mübarak's visit to our country, he could not find the opportunity to realize this wish.

Therefore, I shall deliver his speech to you by your permission.

Mr. Chairman,
Distinguished guests,

I congratulate the Board members in the presence of the Chairman of the Competition Board Mr. Prof. Aydın AYAYDIN, MSc, PhD., for their contribution in organizing the International Competition Symposium of Turkey. First, I would like to express my pleasure that the Competition Board reached a state where it can host to an international activity within such a short time like 1 year as of its establishment. The Competition Law which regulates the rules that will ensure the protection of competition, a "must" element of economics, is a very new branch of law in Turkey. Today it's impossible that countries are isolated from the developments in global

economy, and that they can create effective and sound policies without conforming to these developments, where goods, the capital, services and ideas move all around the world by crossing the borders and with a dizzy speed, and where the concepts such as the superiority of law, outward and competitive market economy are recognized as common values. Essentially, competition is the most characteristic element of surviving against the facts of new global economy. That's why it is considered a very limited understanding or perspective to recognize the Law on the Protection of Competition as merely a requirement of the Customs Union. The practice of a Competition Board is at the lead of "must" elements of the legal infrastructure corresponding to global economy. As I also mentioned in my opening remarks in the Turkish Grand National Assembly, globalization is not an ideology, but rather a dynamic phenomenon gaining new dimensions day by day. In fact, the Turkish entrepreneurs have understood it very well. They have commenced producing for global markets, and grasped the importance of competition within this framework. If they do something so that the goods and services produced have modern standards, they spend effort to make it in the best way. The issue on agenda is how to regulate the legal infrastructures corresponding to the globalization of economy. One may construct the transparency of finance and legal order ensuring that global investors see what's ahead. This is an issue related to the operation of institutions of finance on the one hand, and the creation of legal institutional infrastructure of free market economy on the other hand. The Competition Board is the product of such a need. That Turkey has taken quite a long distance along this direction and integrated with the developed economies on a base of association relation, and that it has staff to successfully conduct a finance system which is as transparent as possible, ensured that it is relatively less affected from this crisis. Therefore, Turkey is obliged to remain an open economy in competition with the world, and to breathe together with the world. Protectionist reflexes such as restricting international capital movements, placing new barriers to free trade, are incompatible with the dynamics of global market and information age. Turkey has to catch, by its state and society, the novelties of globalization. To follow up the legal regulations of the Competition Board which was constituted as a requirement of this necessity, and to fulfil what is due by them, are not solely a legal obligation. The decisions and regulations of the Competition Board serve as a guide for Turkey in terms of the structuralization of a supportive sector that will invest today in the future's dynamic and comparative superiorities. Just so, the accumulation of economic resources in the fields where they can be most effective, shall only be possible provided that the barriers to competition are minimized. In order for the Turkish private sector to survive within global competitive enviroment, it is required that the rules of competition corresponding to free market economy, and the institutions controlling such rules are primarily formed. The end of a free market economy exempted from any kind of rules and limitations, is only isolation from global markets. However, today, the ability to compete to a global extent, is the key of prosperity and happiness. The process that started with the Competition Board's commencing operation, the minimization of state intervention in economic life, and attaching more importance to the task of observing the conformity of economic activities to market mechanism rules, are in harmony with our objective as well. Just so, particularly since the early 1995, a serious liberalization and expansion have been being observed in the global trade, multilateral principles and rules have been

being developed in the areas of subventions, anti – damping, trade and technical barriers, protective measures, and the mechanisms for the settlement of disputes have been being improved. With the aim of monitoring the results of application, the World Trade Organization dating back to very old times and having nearly 130 member countries, was founded on January 1, 1995, seeing whose representative among the participants makes me pleased. Along the lines of the objective of opening to foreign markets, and integrating with global economy, Turkey not only conforms to the general principles and rules set forth by the World Trade Organization where it is a member, for purposes of the operation of international trade, but also plays a leading role in regional integration such as the European Community Customs Union, EFTA, Black Sea Economic Cooperation Organization and D-8. On the other hand, it also makes attempts to enhance its commercial and economic relations with NAFTA member countries and Pacific countries. All of these formations are not rivals of each other, but complementaries. All such restructuralization initiatives which are an inevitable requirement of globalization introduce a change in mentality as well, and therefore need time. So, the application of competition policies shall play an accelerating role as to effectiveness in economy, and in the creation of prosperity. That the Competition Law forms a basis for a practice not punishing the markets, but instead deterring from criminal actions, shall take place largely by establishing the culture of competition. Until such a culture develops, ensuring deterrence which is the main objective, shall be possible via introductory and awakening activities and practices of the Competition Board responsible for the implementation of the Law, which concern the criminal actions, and its persuasive and convincing activities and practices that the Law is eventually to the advantage of entrepreneurs. The administrative and financial autonomy of the Competition Board is critical at this point. That it takes its decisions under no influences at all, and within a complete objectivity and transparency, and that the society is informed about those decisions in time and with their grounds, bear importance in terms of both clearly understanding the activities and duties of the Competition Board, and creating and protecting a sound competitive environment.

Distinguished guests,

Today the most important issue we face is to understand the tomorrow's world, and to prepare ourselves for that world in the best manner. Should we realize necessary reforms with a determined and dynamic approach, no one would be able to prevent Turkey from being among the first ten countries to stamp the coming century.

We should put forward in the strongest way our will to prepare for our bright future together, we don't have time to lose. Turkey is obliged to continue its efforts for development determinedly, to seize the standards of age in every field ranging from education, health, environment, traffic, agriculture, industry to energy, transportation, sports, culture and art, and to further develop its competitive power with the world. Only Turkey that can compete with the world shall have the power to realize such dreams of its.

With these feelings and opinions, I thank to the local and foreign participants extending their contribution to the First International Competition Symposium, and wish that such efficient and useful works of the Competition Board do continue.

I present my respects.