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RESTRICTIVE BUSINESS PRACTICES INFORMATION

Issue No.19

This information note is part of a series issued by the UNCTAD secretariat, in response to a request to the Secretary-general of UNCTAD by the Intergovernmental Group of Experts on Restrictive Business Practices, with a view to keeping Governments and interested bodies or persons informed of recent major developments in the area of restrictive business practices.

I. LEGISLATIVE AND POLICY DEVELOPMENTS IN THE FIELD OF RESTRICTIVE BUSINESS PRACTICES

Brazil's new anti-trust legislation

1. On 10 June 1994, a new anti-trust bill was signed in Brazil by the President of the Republic. The new legislation, which was passed by Congress on 9 June, sets out anti-trust measures in keeping with constitutional principles such as free enterprise and open competition, the social role of property, consumer protection and restraint of abuses of economic power. The new law considers it a violation of economic order for companies to limit, restrain or in any way injure open competition or free enterprise; to control a relevant market for a certain product or service; to increase profits on a discretionary basis; and to abuse one's market control. The new law specifically prohibits: price fixing and setting conditions of sale with competitors; market sharing; restraining market access of new companies;

barring access of competitors to inputs, raw material, equipment or technology sources as well as to their distribution channels; and excluding competitors from access to the mass media.

2. Under the new legislation market control occurs when a company or group of companies controls 30 per cent of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology. The law stipulates that achievement of market control as a result of competitive efficiency is not illegal.

3. The new law imposes fines from one to 30 per cent of the gross pre-tax revenues of convicted companies. The fine is not to be lower than the advantage obtained from the underlying violation, if assessable. Managers directly or indirectly responsible for anti-trust activities can be fined from 10 to 50 per cent of the fine imposed on the company. This fine is to be personally and exclusively imposed on the manager. Fines may be doubled for repeat offences. Under the new legislation, the Administrative Council of Economic Rights (CADE), which is the agency entrusted with enforcement of the legislation, becomes a federal independent agency reporting to the Ministry of Justice. As a result, defendants may not appeal CADE fines to the Ministry; however, the law and the Brazilian Constitution permit appeals of all administrative decisions. 1/

A new competition act in the Netherlands

4. In the Netherlands, the introduction of new competition legislation is envisaged. The new act, which will replace the existing Economic Competition Act (Wem) will be based on the principle of prohibition in line with the European rules of competition. Restrictive agreements and practices will be prohibited, as well as the abuse of a dominant position by one or more enterprises. Some of the main features of this new legislation will be:

- As a general rule, all restrictive agreements and practices will be prohibited;
- In principle, all general exemptions introduced by the European Commission under article 85 of the Treaty of Rome will be applicable under the new act;
- Individual exemptions may be given in some cases. The criteria of article 85 will be applied. Enforcement by criminal law will be changed to a system of administrative enforcement;
- Fines will be in accordance with the European anti-trust fines;
- An independent administrative body, acting under the political responsibility of the Minister of Economic Affairs, will be charged with the implementation and enforcement of the law, starting investigations, fining infractions and deciding on exemptions in individual cases;
- Abuse of dominant positions will be prohibited in accordance with article 86 of the EU Treaty.

5. After seeking the advice of the Social and Economic Council (SER), the Economic Competition Commission and the Council of State, the Government will submit the proposed Competition Act to Parliament. The new Act is expected to take effect in 1997. 2/

Zambia adopts its first Competition and Fair Trading Act

6. In June 1994, the Zambian Parliament adopted "the Competition and Fair Trading Act, 1994". The objectives of the Act are: "to encourage competition in the economy by prohibiting anti-competitive trade practices; to regulate monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure the best possible conditions for the freedom of trade and to expand the base of entrepreneurship."

7. The legislation prohibits any category of agreements, decisions and concerted practices which have as their objective the prevention, restriction or distortion of competition to an appreciable extent in Zambia or any part of it. The anti-competitive practices enumerated in the Act include: predatory behaviour; discriminatory pricing and discrimination in terms and conditions; colluding; making the supply of goods or services dependent upon the acceptance of restriction on the distribution or manufacture of goods; making the supply of particular goods or services dependent upon the purchase of other goods or services. With regard to mergers and take-overs, the Act specifies that any person who, in the absence of authority from the Competition Commission, participates in effecting (i) a merger between two or more independent enterprises engaged in manufacturing or distributing or providing substantially similar goods or services, or (ii) a take-over of one or more such enterprises by another enterprise or by a person who controls another such enterprise, shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding 10 million kwacha (approximately one million US dollars) or imprisonment not exceeding five years, or both.

8. The legislation provides for the establishment of a Competition Commission whose function is to monitor, control and prohibit acts or behaviour which are likely to adversely affect competition and fair trading in the country. 3/

The European Court of Justice - ruling on EC/US anti-trust agreement

9. On 9 August 1994, the European Court of Justice ruled that the EC/US agreement on cooperation in the area of competition policy was void. The Court ruled that the agreement, which was concluded in September 1991, should have been concluded by the Council of Ministers rather than by the Commission. As reported in the Information Note No.17 (TD/B/RBP/INF.30), the agreement aimed at promoting cooperation and coordination between the competition authorities of the United States and the European Commission in order to lessen the possibility or impact of differences between the parties in the application of their competition laws.

10. The French Government, backed by Spain and the Netherlands, had challenged the European Commission’s competence to conclude the EC/US agreement and initiated the proceeding in the European Court of Justice.

France alleged that many of the matters covered by the agreement were beyond the jurisdiction of the Commission. It argued that, for an international agreement signed with another Government, it was not the Commission's place to represent the EU, but rather a matter for the member States as represented by the Council. The Court largely agreed with that reasoning.

11. The Commission stressed that, in most cases, bilateral agreements went before the Council, but that this agreement was a special case. It added that the substance of the agreement was not in question and it was likely to be approved without alteration by the Council. 4/

US Department of Justice Antitrust Division announce new individual leniency policy

12. On 10 August 1994, the US Justice Department's Antitrust Division announced a new Leniency Policy for individuals. Under this policy, individuals who report criminal anti-trust activity of which the Division had not been aware need not do so as part of a corporate proffer or confession in order to be considered for leniency.

13. This policy, which became effective immediately, goes beyond the Corporate Leniency Policy established in August 1993 under which a corporation can avoid criminal prosecution for anti-trust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also set out the conditions under which the directors, officers and employees who come forward with the company, confess and cooperate will be considered for individual leniency. The new Individual Leniency Policy applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal anti-trust activity. Under this policy, "leniency" means not charging such an individual criminally for the activity being reported.

14. According to this policy, leniency will be granted to an individual reporting illegal anti-trust activity before an investigation has begun if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about that activity from any other source;

2. The individual reports the wrongdoing with candour and completeness and cooperates fully with the Division throughout investigation;

3. The individual did not coerce another party to participate in the illegal activity and was not the leader in, or originator of, the activity. 5/

The International Antitrust Enforcement Act of 1994

15. In the United States, on 2 November 1994, President Clinton signed the International Antitrust Enforcement Assistance Act of 1994 to facilitate broad-ranging cooperation in anti-trust enforcement between the United States and other countries.

16. Under the Act, which had been passed by the US Senate on 8 October 1994, the Justice Department and the Federal Trade Commission (FTC) will be allowed to reciprocate with foreign anti-trust authorities to obtain investigative information. Currently, such disclosures are impossible because of the confidentiality provisions in the Antitrust Civil Process Act, comparable provisions in the FTC Act and grand jury secrecy rules.

17. Specifically, the Justice Department and FTC will be allowed to enter into mutual legal assistance treaties to share "anti-trust evidence" with foreign anti-trust agencies to assist each other in determining whether a person has violated, or is about to violate, any foreign anti-trust law and in enforcing such foreign anti-trust laws. Under the agreements, the foreign anti-trust authorities will provide reciprocal assistance to the US enforcers. In addition, on behalf of the Justice Department and FTC, the Act will permit the Attorney-General to accept, in whole or in part, requests from foreign anti-trust agencies to investigate whether a person has violated, or is about to violate, any of the foreign anti-trust laws enforced by the foreign agencies without regard to whether the conduct violates any US anti-trust laws.

18. The information sharing and investigation cooperation anticipated by the Act will be conditioned on advance reciprocal undertakings of cooperation and subject to certain conditionality safeguards.

19. After the signature of the legislation by President Clinton, it was announced that the Justice Department and FTC have begun to implement the Act by agreeing to enter into exploratory discussions with the Canadian Government for the purpose of developing an agreement allowing both countries to share and obtain otherwise confidential civil investigative information and evidence involving anti-trust investigations. 6/

US 1994 Antitrust Enforcement Guidelines for International Operations

20. On 13 October 1994, for the first time on a joint basis, the United States Department of Justice’s Antitrust Division and the Federal Trade Commission (collectively "the agencies") released proposed 1994 Antitrust Enforcement Guidelines for International Operations, to supersede the Department of Justice’s 1988 Guidelines. The Guidelines were adopted in final form after completion of a 60-day public comment period. The Guidelines are intended to provide anti-trust guidance to businesses engaged in international operations on questions that relate specifically to the Agencies international enforcement policy. They therefore reflect the current views of the Agencies on international anti-trust enforcement. These issues include: the Agencies subject matter jurisdiction over conduct and entities outside the United States and the considerations, issues, policies, and processes that govern their decision to exercise that jurisdiction; comity; mutual assistance

in international anti-trust enforcement; and the effects of foreign governmental involvement on the anti-trust liability of private entities. The Guidelines also discuss anti-trust issues arising in the context of international trade law proceedings. 7/

Measures taken against bid-rigging in Japan

21. In January 1994, the Japanese Government publicized an "Action Plan on Reform of the Bidding and Contracting Procedures for Public Works" which is intended to reform the bidding and contracting procedures for public works projects and make them more transparent, objective and competitive. The recent situation involving bribery and other scandals in relation to the bidding for, and execution of, public works projects in Japan and also recognition of the increasing requests from foreign companies to enter the Japanese construction market against the background of the international trend for liberalization of the construction market prompted the Japanese Government to formulate the said Action Plan. As stated in the Action Plan, the Japanese Government intends to take specific measures such as: the adoption of more transparent, objective and competitive procurement procedures; appropriate evaluation of foreign firms; establishment of a complaint mechanism; and preventive measures against such unfair practices as bid-rigging.

22. Specific measures stated in the Action Plan include a requirement, entitled "Adoption of Transparent, Objective and Competitive Procurement Procedures", for procurement through an open and competitive bidding procedure for construction services that are commissioned by central government entities and quasi-governmental agencies and above a certain threshold. This represents a fundamental reform of the Japanese bidding and contracting procedures for public works projects, which have been based on a designated bidding procedure for almost a century.

23. Other measures mentioned in the Action Plan include, under the title of "Preventive Measures against Unfair Practices including Bid-Rigging", many of the areas with which the Fair Trade Commission has been actively involved to cope with the problem of bid-rigging, such as elimination of Anti-monopoly Act violations; prevention of acts of bid-rigging, etc. 8/

II. DEVELOPMENTS IN THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

A. Restrictive business practices in goods and services

Microsoft anti-trust deal

24. On 16 July 1994, it was announced that Microsoft, the world’s largest computer software company, had settled US and EU anti-trust investigations by agreeing to drop some alleged monopolistic practices.

25. As reported in Information Note No. 17 (TD/B/RBP/INF.30) of 30 September 1993, Microsoft had been accused by rival software groups of using unfair practices restraining competition. This prompted the US Federal Trade Commission to launch the investigation four years ago. The matter was later taken up by the Justice Department, and the European Commission launched a similar probe later. The US authorities, announcing the settlement on

16 July 1994, said that Microsoft had built a barricade of exclusive and unreasonably restrictive licensing agreements to deny others an opportunity to develop and market competing products. Ms. Anne Bingaman, Assistant Attorney-General in charge of the Antitrust Division of the US Justice Department, said: "Microsoft is an American success story, but there is no excuse for any company to try to cement its success through unlawful means, as Microsoft has done". She added: "This sends a powerful message that anti-trust authorities of the US and the EU are prepared to move decisively and promptly to pool resources to attack conduct by multinational firms that violate the anti-trust laws of the two jurisdictions". Similarly, in Brussels, the EU Commission said that its cooperation with the US Department of Justice on the Microsoft case was a warning to other large businesses. The main points of the consent decree agreed to by Microsoft and the Justice Department are as follows:

- Abandonment of the per-processor licensing system. In exchange for steep discounts, Microsoft had required some producers of personal computers to pay a royalty for each computer they shipped, regardless of whether the unit contained a Microsoft operating system or not. If those manufacturers wanted to install a competing operating system, they would end up paying double royalties;

- Prohibition of licences of more than a year, with extensions at the computer manufacturer's discretion of one year. Currently some contracts extend beyond the life cycle of an operating system;

- Less restrictive non-disclosure agreements. Recently Microsoft had asked some software writers working with the company's next version of Windows to sign agreements that effectively preclude them from working with Microsoft's competitors. 9/

26. The consent decree has since been rejected in the US Federal Court, and the Court's decision is being appealed by both Microsoft and the Department of Justice.

The European Commission imposes record fines on price-fixing cartel

27. On 13 July 1994, the European Commission imposed record fines totalling ECU 132.15 m (approximately $160 m) on 19 carton-board producers who had formed a price-fixing cartel. The cartel members violated EC competition laws by carefully orchestrating price increases every six months. The Community's inspectors were able to discover detailed evidence which enabled the Commission to condemn a serious breach of competition rules, despite sophisticated efforts used by the carton-board producers to cover up their activities. These results allowed the Commission to sanction what it considered as a "serious and flagrant" violation of article 85 of the EC Treaty.

28. Carton-board producers, who include international forestry groups, as well as small independent paper mills, had managed to establish a system in 1986 by which they fixed prices and organized the Western European market by dividing it up between them. The formal collaboration structure established

to this end involved practically all the producers of carton-board in Western Europe, who operated under cover of an ostensibly legitimate trade association called the PG (Product Group) Paper board. A Swiss fiduciary company, FIDES, conducted the information exchange system by which the operation of the cartel was monitored and policed and provided the cartel with secretariat services during meetings. Violation began in 1986, as the Commission believes, even though the PG had tried to regulate the market since 1981; it was only five years later, following structural reorganization, that the cartel really became operational. The key to the success of the cartel, according to the Commission, was achieving a balance between supply and demand which would enable the concerted price initiatives to go through. This was done by agreeing on a joint policy of so-called "price before tonnage" to which all EC and EFTA producers adhered, but which represented in practice mutual recognition of respective market shares. Pressure was put on firms suspected of deviating from the agreed prices, and a consultation system in times of recession was also developed by the main producers who, in order to avoid excessive production, went as far as to impose temporary planified production stops. As a result, the price of carton-board increased regularly between 1987 and 1990, in general twice a year with a 6-10 per cent rise each time in each member State. Planned price increases were disguised thanks to a comprehensive organization including establishing in advance a price rise scenario initiated by one of the members of the cartel and setting out the order and dates when the other members would follow. The companies involved were as follows: Buchmann, Europa Carton, Gruber & Weber, Laakman and Moritz J. Weig of Germany, Cascades and Papeteries de Lancy of France, Enso-Gutzeit and Finnboard of Finland, Fyskeby, Mo Do and Stora of Sweden, BPB De Eenderracht and KNP BT of the Netherlands, Mayer-Meln0hof of Austria, Rena of Norway, Sarrio of Italy, SCA Holding of the UK, and Enso Espanola of Spain.

29. Iggesund, the packaging unit of the Swedish forestry products group Mo Do, was fined the largest single sum of ECU 22.75 million. Fines were lower for roughly half of the companies involved which did not contest the essential facts alleged against them. 10/

The European Commission fines German railways for abuse of dominant position

30. In March 1994, the European Commission imposed an ECU 11 million fine on Deutsche Bahn (DB) (German railway network) which was found guilty of abusing a dominant position of market power. Over a long period of time, DB had systematically charged more favourable rates for combined transport from German ports (Hamburg and Bremen) compared with similar transport from Dutch and Belgian ports (Rotterdam and Antwerp). DB had taken advantage of its monopoly to favour its subsidiaries which use the infrastructure of German ports for the transport of containers. According to the Commission, DB's practices: (i) considerably limited competition between the railway companies, between the operators of combined transport who intervene on the different itineraries and between the German ports and the Community ports; (ii) were aimed to deflect traffic and partition markets; (iii) deteriorated the competitive position of the combined transport of goods compared with road transport, imposing uncompetitive prices on certain railway routes. The complaint against DB had been lodged by the association HOV SVZ, which brings together companies operating in the port of Rotterdam. It accused DB of

imposing railway transport rates through the operation of combined transport intercontainer that were lower for containers transiting via Hamburg and Bremen than via Rotterdam. This was confirmed by the investigation which revealed differences of up to 42 per cent. The Commission also found that DB officials were fully aware that they were applying discriminatory rates and that the infringement was committed over a long period of time. European Competition Commissioner Karl Van Miert underlined that this decision is at the centre of the action of the Council and the Commission aimed at promoting railway transport and combined transport and defending the general interest. 11/

Federal Cartel Office prohibits agreement between German gas importers and distributors

31. In April 1994 it was announced in Germany that the Federal Cartel Office (FCO) had prohibited under article 85 (1) of the EEC Treaty the demarcation agreement between the two large German gas importers and distributors, Ruhgas AG of Essen and Thyssengas GmbH of Duisburg. It was the first time that the FCO based a prohibition on the competition rules of the EEC Treaty. With the agreement, the firms concerned had set demarcation lines between their supply areas and had agreed to jointly supply four large German utilities (Duisburg, Dusseldorf, Cologne and Oberhausen). Only a few large industrial consumers were not covered by the allocation of territories. Competition between the two firms was ruled out as a result of the allocation of territories and the obligation to jointly supply the above-mentioned utilities. The restraint of competition also affected trade in gas between the member States of the European Union, since both firms import a large share of their natural gas requirements (Thyssengas, in particular - over 50 per cent) from other members of the European Union (the Netherlands and Denmark). According to FCO, the agreement violated German competition law, because obligations to jointly supply certain customers and the designation of territories not to be supplied by either of the parties are not eligible for exemption. 12/

Printing companies fined in Japan for bid-rigging

32. On 14 December 1993, the Tokyo High Court convicted and fined four printing companies 4 million Japanese yen each (approximately US$ 47,000) for violation of the Anti-monopoly Act by rigging bids for certain sticker supply contracts with the Social Insurance Agency. Accusations of bid-rigging had been made against the said companies by JFTC in February of the same year. The convicted companies were Toppan Moore, Dainippon Printing, Kobayashi Kirokushi and Hitachi Information Systems. The convicted companies were found to have violated the Anti-monopoly Act and to have substantially restricted competition in their supply contracts with the Social Insurance Agency for special stickers used by the agency to notify insurance payments to members as follows:

(i) The parties in collusion would decide which company’s turn it was to be awarded the contract before each tender, and determine the winning price;

(ii) In order to ensure that the predetermined winner was awarded the contract, the other members of the cartel would bid higher prices than the predetermined winning price;

(iii) The winning company would subcontract part of the contract work with one of the other colluding companies;

(iv) The parties would equalize each of their benefits by, for example, adjusting the subcontract prices.

33. According to the chairman of JFTC, this is the first case being brought against bid-rigging in JFTC's history and it will set a precedent for future bid-rigging cases under the Anti-monopoly Act. 13/

B. Acquisition of market power through mergers, takeovers and joint ventures

Federal Cartel Office in Germany orders divestiture in the Krupp/Hoesch case

34. In February 1994, the Federal Cartel Office (FCO) ordered Krupp/Hoesch to sell off the suspension springs division of the German firm Krupp Bruninghaus GmbH. If Krupp/Hoesch fails to comply with the order, the FCO will appoint a trustee for Krupp Bruninghaus as a first step in enforcing the order to divest. To avert prohibition of the Krupp/Hoesch merger project notified in 1992, the firms had committed themselves in a public law contract with the FCO to the sale by 31 December 1993 of part of the automotive suspension division which had caused competition concerns. At the end of 1993 Krupp/Hoesch terminated the contract on the grounds that market conditions had since undergone profound changes and that the anti-competitive effects then found to exist by the FCO were no longer present. In the FCO's view, the merger still creates a paramount position of market power for automotive suspension springs. 14/

Notes

1/ Information provided by the Government of Brazil.

2/ Information provided by the Government of the Netherlands.

3/ Information provided by the Government of Zambia.

4/ Financial Times, 10 August 1994. For more information on the EC/US agreement, see Information Note No. 17 (TD/B/RBP/INF.30).

5/ Information provided by the Government of the United States.

6/ Information provided by the Government of the United States. See also Antitrust and Trade Regulation Report, 10 November 1994, vol. 67, No. 1688.

7/ Information provided by the Government of the United States.

8/ Information provided by the Government of Japan.

9/ Financial Times, 18 July 1994. See also Wall Street Journal, 18 July 1994.

10/ Europe, 14 July 1994. See also Financial Times, 14 July 1994.

11/ Europe, 30 March 1994.

12/ Federal Cartel Office, press release dated 20 April 1994.

13/ FTC/Japan Views, No. 17, February 1994.

14/ Federal Cartel Office, press release No.1/94, 28 February 1994.
