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Antitrust Issues in an International Dimension

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We live in an amazing time. The walls separating the East from the West have come tumbling down with astonishing speed in a way no one would have dared to prophesy some years ago. Democracy and liberalism seem to be carrying the day with unprecedented success. At the same time, the role of competition policy in the international economy is ever increasing, just as the antitrust enforcement activities of our major partners are becoming more and more internationalized.

These two developments are, of course, as former Assistant Attorney General James Rill has aptly expressed, two sides of the same coin.[1] As a consequence of the growing integration of world markets, antitrust enforcement covers not only the "national" players, but also necessarily extends to foreign companies conducting business in the relevant home market of an antitrust agency. More frequently than ever, agreements between economic entities cover more than one territory and, thus, fall under several jurisdictions.

These developments parallel a growing conviction among governments that a serious competition policy is needed, both on a national and world level. This conviction, which the European Community ("EC" or "Community") shares with its major trading partners, is winning more adherents than ever. The new democracies in Eastern and Central Europe have already come to realize that competition policy, as practiced in the Western world, is one of the crucial issues they must address if they are to build viable and open economies. Similarly, within the United Nations Conference on Trade and Development ("UNCTAD"), or even within the

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† Director General For Competition, Commission of the European Communities. This is a revised and updated version of a lecture delivered in Chicago on January 30, 1992. All views expressed are purely personal. The author gratefully acknowledges the assistance of Thinam Jakob-Siebert and Hartmut Weyer.

[1] James F. Rill, *International Antitrust Policy - A Justice Department Perspective* 3 (Before the Fordham Corporate Law Institute, Program on EC and US Competition Law, Oct 24, 1991) (unpublished manuscript on file with the *University of Chicago Legal Forum*).

context of bilateral agreements, more and more developing countries are requesting technical assistance in setting up their own antitrust legislation and enforcement regimes. We, the members of the European Community and the United States, must welcome these developments and should employ our best efforts to meet the challenge that they bring.

As we work to meet this goal, we should aim to establish antitrust rules at the world level. Certainly, in an open world market, we need to have a common conviction about certain minimum standards for controlling cartels, dominant positions, and mergers. We should not allow the state restraints we have abolished to be replaced by private restraints, for they would directly counteract the liberalization of trade. However, at least at present, we have to act without a uniform world antitrust law. The European Community and the United States, for instance, have rules which are based upon approaches which differ slightly at times, and yet, we are cooperating in a very satisfactory manner.

This paper will illustrate the Community approach by describing three recent examples in which the EC has actively promoted cooperative competition policy. The first example is the agreement on the European Economic Area ("EEA") which the Community recently signed with the seven European Free Trade Association ("EFTA") States: Sweden, Norway, Finland, Iceland, Switzerland, Austria, and Liechtenstein. The second example is the recent European Agreements concluded by the Community with Hungary, Poland, and Czechoslovakia. The third and final example is the cooperation agreement between the EC Commission and the U.S. federal antitrust authorities. Together, these examples demonstrate how individual circumstances determine whether or not the rules should be exactly the same.

I. THE EC-EFTA AGREEMENT

The EC-EFTA Agreement on the creation of the EEA is a novelty in the field of international relations. The EEA seeks to create an enlarged European market. Within the EEA, free movement of goods and services, workers and capital, as well as the right of establishment, will follow the same principles as those valid within the European Community to the largest extent possible. The EFTA States have associated themselves as closely as possible with new Community initiatives. The rules established in the context of the EEA Agreement are intended to have "direct effect," meaning that individuals and companies may invoke them before the national courts of the Contracting Parties. For instance,

parties may claim damages on the grounds that a given contract is null because it contravenes the EEA rules on competition.

A. The Origins of the European Economic Area Agreement

The EEA is an extension of a series of Association Agreements concluded by the EC with so-called "third countries" (states other than members of the European Community). These earlier agreements provide the legal background for the EEA, and help to explain the economic and political factors leading to its adoption.

1. *EC Association Agreements.*

As early as 1961 and 1963, the Community concluded Association Agreements with Greece[2] and Turkey,[3] which came into force in 1963 and 1964, respectively. These Agreements were designed to facilitate the future accession of these countries to the EC. On January 1, 1981, Greece became the tenth EC Member State, terminating the application of the Greek Association Agreement. The Agreement with Turkey entered into a transitional phase in 1973.[4] Presumably, this transition will lead to the final phase encompassing a customs union and closer coordination of economic policies.[5] In 1987, Turkey applied for EC membership.

These types of association agreements[6] go far beyond customs unions, covering the free movement of goods, services, and persons, the transfer of payments, competition, and taxes, as well as economic policy. Regarding competition policy in particular, the Agreements state that the principles expressed in EEC Treaty competition provisions—the Treaty articles governing cartels and concerted practices,[7] the abuse of a dominant position,[8] the role of public undertakings,[9] and state aids[10]—must be applicable within the Association. The Agreements charge an Association Council with establishing the conditions and details of application within a

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[2] Décision du Conseil portant conclusion de l'accord créant une association entre la Communauté économique européenne et la Grèce, 63/106, 1963 JO 26:293.

[3] Décision du Conseil portant conclusion de l'accord créant une association entre la Communauté économique européenne et la Turquie, 64/732, 1964 JO 217:3685.

[4] Réglement (CEE) 2760/72 du Conseil, 1972 JO L293:1.

[5] Association Agreement, Arts 2 and 5, 1964 JO 217:3685, 3689.

[6] In the case of Turkey and the Supplementary Protocol of 1973, see 1972 JO L293:1.

[7] Treaty Est the Eur Eco Comm, Art 85.

[8] EEC, Art 86.

[9] EEC, Art 90.

[10] EEC, Art 92.

given time limit,[11] which in the case of Turkey expired December 31, 1978.

The European Court of Justice ("ECJ") confirmed that these Association Agreements form an integral part of the Community legal system and therefore are binding on the Community and its Member States and open to judicial control before the ECJ.[12] The ECJ also has recognized that stipulations of the Association Agreements can have direct effect,[13] unless the obligation, in its implementation or effects, requires the adoption of any subsequent measure, especially by an Association Council.[14] Accordingly, the competition rules most likely do not have direct effect. In the Association Agreement with Turkey, for example, the competition rules are subject to measures which have not yet been adopted.[15] Moreover, the obligation of the Association Council to lay down conditions and details for the application of the competition rules suggests that the rules are not sufficiently precise and unconditional to have direct effect.[16]

2. *EC Free Trade Agreements.*

Competition rules were also included among provisions in the bilateral Free Trade Agreements ("FTAs") concluded by the EC in the early 1970s with the seven EFTA[17] States (namely, Austria,[18]

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[11] Association Agreement EC-Greece, 1963 JO 26:293, Arts 51, 52; Association Agreement EC-Turkey, 1964 JO 217:3685, 3691, Art 16; Supplementary Protocol, 1972 JO L293:1, 14, Art 43.

[12] Case 181/73, *R. & V. Haegeman v Belgian State*, 1974 ECR 449, 460, 1975:1 CMLR 515 (concerning the Agreement EC-Greece); Case 12/86, *Demirel v Stadt Schwabisch Gmund*, 1987 ECR 3719, 3750, 1989:1 CMLR 421 (concerning the Agreement EC-Turkey).

[13] Case 17/81, *Pabst & Richarz KG v Hauptzollamt Oldenburg*, 1982 ECR 1331, 1350, 1983:3 CMLR 11 (concerning a provision about fiscal non-discrimination in the Agreement EC-Greece).

[14] Case 12/86, *Demirel*, 1987 ECR at 3753 (concerning a provision about the free movement of workers in the Agreement EC-Turkey).

[15] The inactivity of the Association Council is at least partly due to political and economic difficulties. After the rise to power of a military regime in Turkey in 1981, there were no high-level meetings of the Association Council until 1986. Other difficulties originated in the Greek position towards Turkey.

[16] See Case C-18/90, *Office Nationale de l'Emploi v Kziber*, judgment of 31 January 1991 (not yet reported) (concerning Arts 41, 42 of the Association Agreement with Morocco, 1978 OJ L264:1, 20).

[17] European Free Trade Association, founded by the Stockholm Convention of Jan 4, 1960.

[18] Regulation (EEC) No 2836/72 of the Council concluding an Agreement between the European Economic Community and the Republic of Austria, 1972 JO L300:1.

Finland,[19] Iceland,[20] Norway,[21] Portugal,[22] Sweden,[23] and Switzerland/Liechtenstein[24]). In contrast to the Association Agreements with Greece and Turkey, the FTAs did not aim at future membership. Instead, they were born of a need for economic cooperation with the EC, while acknowledging the difficulty for the EFTA States if they associate themselves too closely with the Community's aims toward dynamic integration.[25] The legal basis in the EEC Treaty for the proposed creation of free trade areas was therefore Article 113 instead of Article 238, because the latter would have required at least partial participation of the associated country in the system of the Community.[26]

The FTAs explicitly refer to the broad framework of international trade and expressly state that the aim of the Agreements is "to contribute . . ., by the removal of barriers to trade, to the harmonious development and expansion of world trade."[27] Thus, one main objective of the Agreements is "to provide fair conditions of competition for trade between the Contracting Parties."[28] This objective is based on the increasingly popular assessment that a lack of a common understanding on these issues "would entail serious risks of distortion of competition liable to jeopardize the harmonious expansion of trade."[29]

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[19] Regulation (EEC) No 3177/73 of the Council concluding the Agreement between the European Economic Community and the Republic of Finland, 1973 JO L328:1.

[20] Regulation (EEC) No 2842/72 of the Council concluding an Agreement between the European Economic Community and the Republic of Iceland, 1972 JO L301:1.

[21] Regulation (EEC) No 1691/73 of the Council concluding an Agreement between the European Economic Community and the Kingdom of Norway, 1973 JO L171:1.

[22] Regulation (EEC) No 2844/72 of the Council concluding an Agreement between the European Economic Community and the Portuguese Republic, 1972 JO L301:164, Special edition 1972.

[23] Regulation (EEC) No 2838/72 of the Council concluding an Agreement between the European Economic Community and the Kingdom of Sweden, 1972 JO L300:96, Special edition 1972.

[24] Regulation (EEC) No 2840/72 of the Council concluding an Agreement between the European Economic Community and the Suiss Confederation and adopting provisions for its implementation and concluding an additional Agreement concerning the validity, for the Principality of Liechtenstein, of the Agreement between the European Economic Community and the Swiss Confederation, 1972 JO L300:188, Special edition 1974; a similar Agreement was also concluded with Israel, 1975 JO L136:1.

[25] The Agreements with Austria and Finland omitted even the allusion in the introductory paragraphs to the "purpose of contributing to the work of constructing Europe," contained in the other Agreements. See 1972 JO L300:1; 1973 JO L328:1.

[26] Case 12/86, *Demirel*, 1987 ECR at 3751.

[27] Free Trade Agreements, Art 1(c) (cited in notes 18 - 24).

[28] Free Trade Agreements, Art 1(b) (cited in notes 18 - 24).

[29] EC Commission, *Second Report on Competition Policy* 17 (1972); EC Commission, *Sixth General Report on the Activities of the Communities* 30.

Therefore, Article 23 of the Agreements[30] provides that cartels and concerted practices, abuses of dominant positions, and public aids are incompatible with the proper functioning of the Agreements insofar as they may affect trade between the Contracting Parties. If one of the Contracting Parties considers a given practice to be incompatible with these rules, it may take appropriate measures in accordance with the conditions and procedures set forth in Article 27 of the FTAs,[31] which require, in particular, consultation between the Contracting Parties in the respective Joint Committees. Consultation is being used for the first time in a case involving public aid from Austrian authorities to Eurostar, a joint venture of Chrysler and Steyr-Daimler-Puch, for the establishment of a manufacturing plant in Graz.[32] No consensus has been reached in the Joint Committee, and thus, the EC might unilaterally apply import duties in accordance with Article 27 of the FTA.

The rules and procedures provided for in the FTAs, however, do not preclude the application of the competition rules of the EEC Treaty if a given practice is incompatible with an FTA and the EEC Treaty at the same time.[33] While reliance on the provisions of the FTAs is often unnecessary, the FTA offers the only legal basis for action in dealing with public aids and cartels that do not fall within the scope of the EEC Treaty. The Community has declared that it will evaluate practices under Article 23(1) of the FTAs on the basis of the criteria applied to the EEC Treaty's competition provisions.[34]

A matter of intense debate concerns the direct effect of the FTAs' competition rules.[35] In the beginning, the Commission ex-

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[30] Agreement EC-Iceland, Art 24(1), 1972 JO L301:6.

[31] Id, Art 28, 1972 JO at L301:7.

[32] See *Chrysler, Austrian Firm Plan Minivans*, Detroit News 1E (Jan 23, 1990); Erich Thöni and Meinhard Ciresa, *Der Fall Chrysler*, Economy-Fachmagazin 13 (Oct 1990); *A Borderless Europe*, Auto Week 10 (June 18, 1990); John Griffiths, *Chrysler Plans Russian Network*, World Trade News § 1 at 4 (Sept 12, 1992). The plant was inaugurated on April 29, 1992.

[33] See the famous "Woodpulp" case (regarding the EC's FTA with Finland), Joint Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlstrom Osakeyhtiö v Commission*, 1988 ECR 5193, 5246, 1988:4 CMLR 901. For comment on this point, see J.E. Ferry, *Towards Completing the Charm: The Woodpulp Judgment*, 10 European Competition L Rev 58, 70-71 (1989), and Laurence Idot, 1989 Revue Trimestrielle de Droit Europeen 341, 353-354 (1989). See also Commission Dec 85/202 (*Woodpulp*), 1985 OJ L85:1; Commission Dec 86/398/EEC (*Polypropylene*), 1986 OJ L230:1; Commission Dec 89/190/EEC (*PVC*), 1989 OJ L74:1; and Commission Dec 89/191/EEC (*LdPE*), 1989 OJ L74:21.

[34] For example, the Agreement with Austria, 1972 JO L300:92.

[35] This debate does not include those rules governing public aids, for which a direct effect has not been discussed.

pressed the view that the inclusion of competition rules comparable, in substance, to those of the EEC Treaty did not mean they had direct effect. The Commission argued that the FTAs contained a special provision governing their enforcement under Article 27.[36]

The ECJ has not pronounced its judgment on this question. The ECJ's recognition that the stipulations prohibiting fiscal discrimination[37] and, implicitly, measures equivalent to quantitative restrictions,[38] have direct effect proves only that the direct effect of stipulations in the FTAs cannot generally be denied. Unlike Article 23(2) of the FTA, however, those provisions do not refer to any special enforcement procedure. Moreover, in dealing with cartels and concerted practices, the FTAs do not contain an exemption procedure comparable to Article 85(3) of the EEC Treaty. The Treaty would therefore have to be included by way of interpretation if the provisions were to have direct effect. Together, these considerations suggest that the competition rules, viewed in light of the purpose and the context of the Agreements, lack sufficient precision and unconditionality to have direct effect.[39] The absence of any executing provisions on the side of the Community strengthens this conclusion.[40]

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[36] Commission, *Second Report on Competition Policy* 17 (1972).

[37] Case 104/81, *Hauptzollamt Mainz v Kupferberg*, 1982 ECR 3641, 3661-66, 1983:1 CMLR 1 (concerning Art 21(1) of the Agreement with Portugal).

[38] Case 65/69, *Procureur de la République v Chatain*, 1980 ECR 1345, 1384-87, 1981:3 CMLR 418 (concerning Art 13 of the Agreement with Switzerland). In the famous *Polydor* case, concerning a different aspect of the equivalent provision in the Agreement with Portugal, the ECJ explicitly left open the question of direct effect. Case 270/80, *Polydor Ltd. v Harlequin Record Shops Ltd.*, 1982 ECR 329, 350-1, 1982:1 CMLR 677.

[39] Such is the formula of the ECJ. See, for example, Case 104/81, *Hauptzollamt Mainz*, 1982 ECR 3641, 3665. Commentators are divided on the question of whether the competition rules have direct effect. For arguments that the competition rules do have direct effect, see Neville March Hunnings, *Enforceability of the EC-EFTA Free Trade Agreements*, 1977 European L Rev 163, 188; Neville March Hunnings, *Enforceability, A Rejoinder*, 1978 European L Rev 278; and Helmut Schröter, in Hans von der Groeben, Jochen T. Thiesing, and Claus-Dieter Ehlermann, eds, *Kommentar zum EWG-Vertrag* 1381-83 (Nomos, 4th ed, 1991), Vorbemerkung Art 85-89, pt 123-24.

For arguments that they do not, see M. Waelbroeck, *Enforceability of the EC-EFTA Free Trade Agreements: A Reply*, 1978 European L Rev 27, 29-31; Winfried Veelken, *Die unmittelbare Anwendbarkeit der Freihandelsvertrage der EG mit den sog. Rest-Efta-Staaten*, 34 Recht der internationalen Wirtschaft 112, 121 (1988). Notably, the Swiss Federal Supreme Court has held that such competition rules do not have direct effect. *Adams v Staatsanwaltschaft des Kantons Basel-Stadt*, 1978:3 CMLR 480, 485-86 (regarding Art 23(1) of the Agreement EC-Switzerland).

[40] Ulf Bernitz, *The EC-EFTA Free Trade Agreements with Special Reference to the Position of Sweden and the Other Scandinavian EFTA Countries*, 23 Common Mkt L Rev 567, 587 (1986); Ernst-Joachim Mestmäcker, *Die Gewährleistung gerechter Wettbewerbsbedingungen in den Freihandelsabkommen der EG*, in *Festschrift für Zweigert* 681, 690 (Mohr, 1981).

Yet, the FTAs have at least an indirect effect on the assessment of certain anticompetitive practices in the relations between the Community and EFTA States. Before the abolition of taxes provided for in the FTAs, the effect within the EC of vertical arrangements restricting trade with third countries was not considered appreciable. Tax barriers made the reimportation of goods into the EC, and thus effects on the Community territory, highly improbable.[41] After the full realization of free trade areas with the EFTA countries (limited however to goods and not covering services), such arrangements, depending on the individual circumstances, may fall within the scope of Article 85(1) of the EEC Treaty.[42] Thus, an action may be brought not only by the Commission, but also by individuals and companies before the national courts of EC Member States.

3. *The European Economic Area Agreement.*

At a joint ministerial meeting in 1984, the EC and EFTA initiated the so-called Luxembourg process to strengthen the economic cooperation begun under the then-existing Free Trade Agreements.[43] This process, and the economic pressures toward greater integration, ultimately led to the signing of the EEA Agreement.

As mentioned above, the EFTA was founded as a counterpart to the EC, as a model of intergovernmental cooperation rather than dynamic integration. Nevertheless, the EC was apparently the more attractive of the two systems, due to some extent to the legal framework it provides for economic activities. Portugal became a member in 1986 (together with Spain, which was not an EFTA country). Austria, Sweden, Switzerland, Finland, and Norway have applied for membership, and other EFTA countries are considering accession as well.

This attractive force increased with the Community's 1992 internal market program.[44] Although a Common Market should have been established at the latest in 1970, certain obstacles to internal trade remained. To remove these obstacles, the Community decided to launch the program for the completion of the common market, now called the internal market, by the end of 1992. This

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[41] Commission Dec 76/159 (*Saba*), 1976 OJ L28:19, 22, 26; Commission Dec 77/100 (*Junghans*), 1977 OJ L30:10, 14.

[42] Commission Dec 77/100 (*Junghans*), 1977 OJ at L30:14.

[43] The text of the Joint Ministerial Declaration is reproduced in 4 Bull EEC pt 1.2.1 (1984).

[44] *White Paper on the Completion of the Internal Market* (1985) (Office of Publications of the European Communities, Catalogue no CB 43-85-894-DE-C).

program was made part of the EC's "constitution" in the framework of the 1986/87 Single European Act.[45] The new dynamics of the integration process were not to remain without influence on other parts of Europe. On January 17, 1989, Jacques Delors, President of the EC Commission, outlined a plan for a pan-European strategy before the European Parliament.[46] EFTA ministers welcomed this initiative in Oslo on March 15, 1989, and declared: "We envisage that negotiations would lead to the fullest possible realisation of free movement of goods, services, capital, and persons with the aim of creating a dynamic and homogeneous European Economic Space."[47]

After a phase of exploratory discussions, formal negotiations began in June 1990, and political agreement was reached in October 1991.[48] However, on December 14, 1991, the European Court of Justice concluded that the EEA Agreement was incompatible with EC law.[49] As a result, discussions were reopened to a certain extent,[50] and the Agreement was not signed until May 2, 1992, after the ECJ delivered its second opinion on April 10, 1992.[51]

B. The Contents of the EEA Agreement

1. *Substance.*

The aim of the negotiations was to create, as of January 1, 1993, a European area which would resemble an internal market as closely as possible and within which the Community's "four freedoms" (right of free movement of goods, services, persons, and capital) would be realized to the greatest possible extent. Both sides quickly agreed that this should be done on the basis of the *acquis communautaire*, the substantive Community rules as applied and interpreted by Community organs, particularly the ECJ.[52] Thus, the current EEA Agreement contains rules broadly identical to Community provisions.[53]

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[45] Single European Act ("SEA"), 1987 OJ L169:1.

[46] 1 Bull EEC pts 1.1.1.-1.1.5. (1989); Bull EEC (Supp 1/89).

[47] 3 Bull EEC pt 2.2.7 (1989).

[48] Compare the summary of negotiations in the Commission, *XXIIIrd General Report on the Activities of the Communities* (1989), starting at pt 780; Commission, *XXIVth General Report on the Activities of the Communities* (1990), pt 688; and Commission *XXVth General Report on the Activities of the Communities* (1991), starting at pt 846.

[49] Opinion 1/91 (ECJ, Dec 14, 1991), 1992 OJ C110.

[50] See Commission Press Release IP(91)1149 (Dec 15, 1991).

[51] Opinion 1/92 (ECJ, Apr 10, 1992), 1992 OJ C136.

[52] See Joint EC-EFTA Ministerial Declaration (Dec 19, 1989), 12 Bull EEC (1989).

[53] See, for example, Agence Europe of Oct 23, 1991. Numbers of Articles or Protocols as contained in the draft EEA Agreement will not be cited in this text.

The free movement of goods—already to a large extent a fact of business life since 1972—will be further facilitated by EFTA recognition of EC standards as well as by the application of other relevant Community rules. Nevertheless, "internal" border controls will continue to exist as there will be no common customs tariff and no tax harmonization efforts.

Services will be liberalized, particularly banking and insurance, telecommunications, and certain public sector services, including water and energy.[54] The free movement of workers, comprising movement of persons and the right to establishment, will have to be realized within a transition period of five years for Switzerland and Liechtenstein. After that, discrimination against nationals of Contracting Parties will be, in principle, prohibited. Capital movement will be liberalized as well, although initially a number of transition periods will apply to both cross-border investments in companies and the acquisition of land ownership.

In addition to adopting Community rules in the areas of the four freedoms, the EFTA countries will participate in, and contribute to, a number of programs, called "flanking policies." These policies support research and development, education, environmental protection, consumer policy, social policy, and economic and social cohesion. Economic and social cohesion will be implemented through the creation of a cohesion fund, established to benefit certain poorer EC Member States (specifically Ireland, Portugal, Greece, and Spain).

The EEA also contains provisions guiding future cooperation. So-called "evolutionary clauses" have been agreed upon, enabling Contracting Parties to discuss regularly progress achieved in certain areas, such as rules of origin or fisheries. In cases of serious difficulties, a Contracting Party may unilaterally—usually after consultation with the other Contracting Parties—limit the freedoms granted under the EEA regime. If such unilateral action leads to a disequilibrium in the contractual relations, the other Contracting Parties may take appropriate "rebalancing" measures.

As with the rules regarding the four freedoms, the negotiators agreed that the Community rules on competition would be incorporated into the EEA Agreement and applied by the EFTA nations. These rules cover not only cartels[55] and abuses of domi-

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[54] Transportation posed delicate problems. However, these problems have been resolved through separate agreements with Austria and Switzerland.

[55] EEC, Art 85.

nance,[56] but also state monopolies,[57] enterprises enjoying special or exclusive rights,[58] and the control of state aids,[59] as well as the corresponding provisions of the Paris Treaty creating the European Coal and Steel Community ("ECSC").

The draft EEA agreement foresees a complex system designed to ensure, as far as possible, equal conditions of competition throughout the EEA. From the beginning of the negotiations, one of the Community's main concerns was ensuring a level playing field for all participants. In an almost entirely open market, it would never do to have a paradise for cartels on one side of the territory and a strict policy against them on the other. Not only would this counter consumers' interests, but it would also contradict the aims pursued in the EEA negotiations, namely, free trade and integrated markets. The abolition of governmental restraints does not suffice to ensure market access if they are replaced by private restraints. Moreover, state aids and preferential treatment of public companies may distort competition and create additional barriers to market access. The EFTA States shared these concerns to a large extent, which is why one of the key issues in the course of the negotiations was *how* to ensure such equal conditions of competition throughout the EEA.[60]

2. *Institutional framework.*

The institutional aspect was certainly the most difficult part of the negotiations.[61] Both sides predicted that new measures and developments might disturb the desired homogeneity of the new system. Consequently, certain EFTA States favored truly common decision-making mechanisms, that is, a sort of "superstructure." The Community, however, could not accept such a structure for constitutional reasons and desired to keep intact its "decision-making autonomy." The Community and EFTA were able to reach a com-

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[56] EEC, Art 86.

[57] EEC, Art 37.

[58] EEC, Art 90.

[59] EEC, Art 92.

[60] For a recent survey of EEA competition rules, see Claude Rouam, *L'Espace economique européen: Un horizon nouveau pour la politique de concurrence?*, 354 Revue du Marché Commun 53 (Jan 1992); Thinam Jakob-Siebert, *Der Europäische Wirtschaftsraum: Wettbewerbspolitik in einer neuen Dimension*, 6 Wirtschaftsrechtliche Blätter 118 (1992).

[61] For general reflections on institutional issues, see Daniel Thürer, *Auf dem Wege zu einem Europäischen Wirtschaftsraum?*, Schweizerische Juristen-Zeitung 93 (Mar 15, 1990); Horst Günter Krenzler, *Neugestaltung der Beziehungen der EG zu den EFTA-Staaten*, Europäische Zeitung (Dec 14, 1989).

promise. The EFTA side will be associated, by way of complex procedures, to the Community's "decision-shaping" phase, the preparatory phase before any formalized measures are taken. Once an EC law has been adopted, it can be extended by consensus of the Contracting Parties to the EEA.

This approach had been denominated by the "two pillars" approach. Even though there are 20 Contracting Parties to the EEA (the Community, her twelve Member States, and the seven EFTA countries), the parties have agreed that the Community side and the EFTA side will each speak with one voice. This approach can be seen, in particular, in the provisions setting up two of the EEA institutions, namely, the EEA Council and the EEA Joint Committee. The former will be responsible for giving the political impetus to implement the EEA Agreement, as well as for handling issues giving rise to difficulties among Contracting Parties. The latter will be charged with the day-to-day implementation of the Agreement.

Additional institutions of the Agreement, each serving a consultative function, will be a Joint Parliamentary Committee, composed of members of the European Parliament and the parliaments of EFTA States and an EEA Consultative Committee, composed of members of the EC Economic and Social Committee and the EFTA Consultative Committee, which will represent the social partners.

The EFTA States will further create structures corresponding to Community structures—strengthening the two-pillar approach. One, the EFTA Consultative Committee, has already been mentioned. Another, a Standing Committee, will have decisionmaking, administrative, and management functions, and will institutionalize consultations among EFTA States. Thus, the Standing Committee's responsibilities will be very much like those of the EC Council. A third structure, an independent EFTA Surveillance Authority, will assume certain tasks corresponding to those of the EC Commission, namely, monitoring EFTA States' fulfillment of obligations under the EEA Agreement. This Authority will have specific responsibilities in the field of competition, and will be entrusted with the same procedural powers as the EC Commission to investigate and impose fines.[62]

The draft EEA Agreement further anticipated the creation of an independent EEA Court and an EEA Court of First Instance.

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[62] There will thus be a "Regulation No 17 bis" on the EFTA side. Compare with the executive powers of the EC, as provided in Commission Reg 17/62, 1962 JO 62:204. Fines may be imposed on companies amounting up to 10% of their annual turnover.

These courts, functionally integrated with the European Court of Justice in Luxembourg, would have been composed of both ECJ and EFTA judges. The EEA courts would have had jurisdiction to settle disputes among Contracting Parties resulting from the application of the EEA Agreement, as well as jurisdiction to decide on complaints of individuals against acts of the EFTA Surveillance Authority in the competition field.

The ECJ, however, opposed the provisions creating these additional courts.[63] The ECJ, whose views had been sought by the EC Commission as to whether the EEA Agreement, in particular the provisions regarding the powers of the EEA courts, was compatible with the EEC Treaty, delivered a negative opinion on December 14, 1991. The ECJ held that such a system was incompatible with basic principles of EC law, noting that, according to Article 164 of the EEC Treaty, the sole power to interpret Community acts lies with the European Court of Justice. Under the draft EEA Agreement, however, the EEA Courts would also have been empowered to interpret rules identical to EC rules to the extent they were incorporated in the EEA Agreement, and thus, the EEA courts would, at least indirectly, have been put in the position of interpreting EC rules. The ECJ concluded that this arrangement would put into question the basic system of the Community and, therefore, could not be tolerated.

Reactions to this opinion were—obviously—mixed; however the Community and EFTA States agreed to reopen discussions in order to address the ECJ's objections.[64] These discussions were terminated in February 1992, and the ECJ's opinion on the recently negotiated texts was sought anew. This time, the ECJ declared the EEA Agreement to be compatible with the EEC Treaty since, in particular, the notion of a common court had been abandoned and since dispute settlement between the Contracting Parties will take place mainly in the political framework of the Joint Committee, with an EFTA court responsible for "internal" EFTA disputes.[65]

3. *The specific institutional framework for competition.*

As mentioned above, the Community rules on competition are incorporated into the EEA Agreement and will be applied on the EFTA side by the new EFTA Surveillance Authority. Here is perhaps the most striking illustration of the two-pillar approach

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[63] See Opinion 1/91 (ECJ, Dec 14, 1991), 1992 OJ C110.

[64] For a first reaction, see EC Commission Press Release IP/91/1149 (Dec 15, 1991).

[65] Opinion 1/92 (ECJ, Apr 10, 1992), 1992 OJ C136.

within the EEA context: the same substantive competition rules will be applied by two independent organs (the EC Commission and the EFTA Surveillance Authority).

Tracing the evolution of the EEA competition system through the course of the negotiations, a number of different proposals for ensuring equal conditions of competition were placed on the table at different stages of the negotiations. These proposals basically fell into three categories: 1) leave things as they were and reinforce the cooperation structures under the existing bilateral Free Trade Agreements with the EFTA States; 2) create uniform rules to be enforced throughout the EEA by one single authority; and 3) design a "two-pillar" model, by which the same substantive rules would be applied by the EC Commission as well as by an independent EFTA authority.

The parties rejected the first concept, which would not have led to the desired goal of equal conditions of competition. The Community's antitrust system is based on the prohibition principle, whereby restrictive arrangements are automatically null and void, unless the Commission grants an express derogation.[66] By contrast, the laws of the EFTA States are based largely on the principle of control of abuse.[67] Restrictive agreements are only considered dangerous if they have harmful effects, which is obviously difficult to assess and can only be established after the fact.[68] Furthermore, the experience under the Free Trade Agreements demonstrated the problems of securing enforcement within the EFTA territory of the rules against cartels or state aids.[69]

Uniform rules had to be rejected for constitutional reasons. Although the EFTA States, as outlined above, will be closely associated in the "decision-shaping" phase of Community initiatives, the Community desired to retain autonomy in decision*making*. The Community could not accept joint decisionmaking with non-Member States, which this model would have required.

Therefore, the parties adopted the third concept, in line with the two-pillar approach described earlier. They considered this approach the most efficient way, under the circumstances, to ensure equal conditions of competition.

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[66] See, for example, Thinam Jakob-Siebert, *Competition Rules in the EC and Switzerland: A Comparison of Law and Practice*, 6 European Competition L Rev 255 (1990) (concerning Switzerland).

[67] Id at 256.

[68] Id at 262.

[69] See note 33 and accompanying text.

4. *One-stop-shop principle.*

The EC model would not have been sufficient, however, without safeguards to prevent the two pillars from making diverging decisions on the same facts. Therefore, the negotiators agreed on the one-stop-shop principle, whereby either the EC Commission or the EFTA Surveillance Authority takes responsibility for the proceedings in each individual case, with the decisions of either body valid throughout the EEA.

The criteria to determine which of the two pillars is responsible for a given case were simple to establish in cases where state action is at stake, as in the field of provisions governing state monopolies, public companies, or the granting of state subsidies. Here, each pillar will be responsible for "its own" Member States.

Negotiations were more difficult in allocating responsibility for antitrust cases and merger control. Of course, in the field of antitrust cases, such as restrictive arrangements[70] and abuse of dominance,[71] and the corresponding ECSC cases, there will be so-called "pure" cases, in which the practices are implemented and take effect only in the EC territory or only in the EFTA territory. These cases do not present problems, because obviously either one pillar or the other will have jurisdiction. Yet, a number of cases will be "mixed," in the sense that on the basis of the existing EC rules[72]—which will be mirrored by the EFTA—both pillars theoretically could claim jurisdiction.

To deal with these mixed cases, the negotiators originally favored a novel rule. In general, if the companies involved were to achieve 33 percent or more of their combined EEA-wide turnover in the EFTA territory, the EFTA Surveillance Authority would have been responsible. Otherwise, the EC Commission would bear the responsibility. In abuse of dominance cases, jurisdiction normally would have lain with the pillar in the territory in which dominance was found to exist. The above 33 percent rule would have applied only where there is dominance in both territories.

This concept, however, would have implied a transfer of jurisdiction from the Community to the EFTA. The negotiators originally considered this transfer acceptable, because the creation of the joint EEA court would have given some guarantee that EEA

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[70] EEC, Art 85.

[71] EEC, Art 86.

[72] For the so-called "extraterritorial" application of EC rules, see Joint Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Åhlström Osakeyhtio* ("Woodpulp"), 1988 ECR 5193.

competition rules would be applied uniformly across EEA territory. The situation changed completely when the ECJ rejected the notion of an EEA court. A "transfer" of jurisdiction to the EFTA Surveillance Authority could no longer be envisaged. Therefore, a new rule was conceived which preserves Community jurisdiction by attributing to the EC Commission all "mixed" cases affecting trade between EC Member States. The only exception to this rule is that, where the effects of a given arrangement in the Community are not appreciable,[73] the EFTA Surveillance Authority will deal with the case.

Why place so much insistence on the one-stop-shop approach if the rules on attribution seem somewhat complex? By eliminating both the costs of grappling with different authorities concerning the same case and the potential for differing decisions on the same facts, this approach presents a great advantage for the business community. These benefits obviously accrue not only to EC or EFTA firms, but also to U.S. and other "third country" firms that are more and more frequently involved in transnational operations.

In the area of merger control, sharing cases was never envisaged. The Community pillar will retain its existing powers and will continue to exercise merger control when the companies fulfill the criteria of the EC Regulation on the Control of Concentrations.[74] In addition, the Community will take on the supplementary task of considering the effects not only on the common market, but also on the EFTA territory. Thus, the EC Commission may prohibit a merger that leads to market dominance not within the Community but within the EFTA territory.

The EFTA pillar will exercise its own merger control, on the basis of transposed Community rules. However, this control will be residual, in the sense that it will only apply where the Community has no jurisdiction under EC rules. Furthermore, EC Member States' powers will remain untouched. Thus, EFTA merger control will be strictly limited to EFTA territory.

This situation constitutes a clear divergence from the one-stop-shop principle as between the pillars. The same situation, however, exists in the relationship between Community merger

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[73] In the meaning of the Commission's Notice on Agreements of Minor Importance, 1986 OJ C231:2.

[74] The criteria are 5 billion ECU worldwide turnover, 250 million ECU turnover in the Community, and less than two-thirds of the turnover in one and the same EC Member State. Council Reg EEC/4064/89 on the Control of Concentrations between Undertakings, 1989 OJ L395:1; Corrigendum, 1990 OJ L257:1.

control provisions and EC Member States' national rules. The divergence can be explained by the fact that the EC merger control rules only entered into force in September 1990 and, therefore, the EC is only beginning the process of gathering experience. Given this lack of experience, as well as the extremely tight deadlines—one month to decide whether a merger might pose problems, plus four months within which to make a final decision—the negotiators thought that an attempt to change the existing regime might well prove premature, if not disastrous.

5. *Cooperation between the pillars.*

The system outlined above presupposes close cooperation between the two pillars and their respective Member States, in particular with respect to Article 85 and 86 "mixed" cases and merger control because the ensuing decisions will be valid throughout the EEA. Therefore, the Agreement contains three guiding principles:

1) mutual comprehensive information and consultations;
2) administrative assistance when it becomes necessary to conduct investigations in the territory of the pillar *not* responsible for a given case; and
3) administrative assistance concerning the recovery of fines.

6. *Judicial review.*

Last but not least, the negotiators wanted to ensure adequate judicial review in the competition field. According to the solution originally envisaged, the EC Court of First Instance and the ECJ would have retained jurisdiction for appeals against EC Commission decisions. The EEA Court of First Instance and the EEA Court, functionally integrated with the EC Courts, would have judged on appeals against decisions taken by the EFTA Surveillance Authority. As outlined above, this system was put into question by the European Court of Justice. According to the new version of the Agreement, an EFTA court will now rule on decisions of the EFTA Surveillance Authority, whereas the EC Courts will retain jurisdiction over Commission measures.

C. The Future of the EEA

The EEA is an adventure undertaken by the courageous. It represents an effort to design a larger integrated market, which fits into a general trend towards the creation of regional subsystems, such as the North American Free Trade Agreement ("NAFTA"),

envisaged among the U.S., Canada, and Mexico. Even though some call the EEA a "European Waiting Area" for those EFTA States who have applied or are considering application for EC membership, the EEA is also an important piece of European legal architecture. I personally believe that the EEA will be a success, providing unique opportunities for companies and some 380 million consumers, as well as preparing potential Member States for accession. The Agreement will also make life easier for non-EC or non-EFTA companies desiring to conduct business in Europe.

Competition policy is an important factor in this context because, vigorously applied, it will eliminate private import or market sharing cartels as well as distortions stemming from state subsidies or preferential treatment of public companies, thereby facilitating overall market access and furthering trade. There is of course a danger of diverging development of future law and practice. One of the means proposed to mitigate this danger had been the creation of an EEA Court composed of EC and EFTA judges. Since this alternative has been ruled out, one must hope that cooperation mechanisms will help reduce the scope for disparity in the future.

II. THE EUROPE AGREEMENTS

The so-called Europe Agreements recently concluded between the Community and Poland, Hungary, and Czechoslovakia are another piece of European architecture. These Agreements go far beyond the substance of "traditional" free trade agreements and should be considered an important step towards the political and economic "reintegration" of those states into Europe.[75]

The first formalized relations between the EC and the three Eastern European countries are agreements on commerce and economic and commercial cooperation. Once the developments in Eastern Europe were underway, however, both sides desired to strengthen the existing links by means of association agreements. Negotiations took only eleven months before the texts were initialled on November 22, 1991, and Bulgaria and Rumania have expressed the desire to conclude similar agreements with the Community.

In contrast to the earlier agreements which were limited to economic and commercial cooperation, these new agreements include

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[75] The Agreements were signed on December 16, 1991. The texts are published in 1992 JO L114 (Poland), 1992 JO L115 (Czechoslovakia), and 1992 JO L116 (Hungary).

a number of new elements. First, they institutionalize a high-level political dialogue. Second, they provide for establishing a free trade area at the end of a ten-year transition period; the free trade areas would initially favor the three Eastern European states. Third, they contemplate economic cooperation in order to render the economies of Hungary, Poland, and Czechoslovakia competitive. Fourth, they envision cooperation in financial matters. Fifth, they contain provisions concerning free circulation of persons and capital, right to establishment, competition, public procurement, and industrial and intellectual property rights, as well as provisions foreseeing the approximation of laws to Community provisions. Furthermore, the Europe Agreements have been concluded taking into account the process of European integration.[76] The Europe Agreements also create new institutions. One, an Association Council, will survey the application of the agreement and take binding decisions in certain areas. A second, a Parliamentary Association Committee, will have consultative functions.

The competition rules contained in the Europe Agreements go much further than the rules in the "traditional" Free Trade Agreements concluded between the Community and EFTA States in the early 1970s. Not only do they cover cartels, abuses of dominant positions, and state aids, but they also cover state monopolies and companies to which special or exclusive rights have been granted. The parties to the Europe Agreements have also agreed that the competition rules will be interpreted in the same way as the corresponding EC rules. Within three years, the Association Council will adopt rules implementing the provisions on competition. Their actual application, however, will be left to the Community and the three states.

The Europe Agreements are qualitatively different from the EEA Agreement, in that they do not provide for immediate and virtually full reciprocal market access. Rather, they serve to prepare these newly market-oriented economies to establish themselves and gradually become competitive.

Competition issues played an important role in the negotiations. The negotiators from both sides believed that, although transition periods were necessary, particularly in the area of state aids for former Eastern industries, a vigorous competition policy

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[76] The preamble of the agreement with Hungary states: "Having in mind that the final objective of Hungary is to become a member of the Community and that this association, in the view of the parties, will help to achieve this objective." The other two agreements contain similar statements.

directed against restrictive practices would increase competition. Such competition would establish competitive market structures, facilitate market access, and benefit consumers.

These aims must be reached gradually. Accordingly, the negotiators agreed in substance on certain standards for competition rules and incorporated into the Agreements principles pertaining to restrictive business practices affecting trade between the Contracting Parties. Meanwhile, the negotiators left the implementing rules to be elaborated at a later stage, allowing the rules to be adapted to the changing situation of the new democracies. One might even envisage direct effect of those provisions in the future.

III. THE EC-U.S. AGREEMENT

The EC and U.S. authorities started from a different angle before reaching the 1991 cooperation agreement, adopted after only ten months of negotiations.[77] The perspectives were quite different from those of the EFTA dialogue because, unlike a number of EFTA States, the U.S. is not a potential candidate for EC membership.

Both the U.S. and the EC are committed to a similar and active competition policy, even though their approaches may at times be slightly different. Rather than harmonizing both parties' approaches, the aim was to create a forum for greater transparency, closer cooperation, and better understanding between EC and U.S. authorities. While both sides continue to act on the basis of their own rules, the negotiators believed that better coordination would promote the aims of effective enforcement. For the EC side, the agreement is the first of this kind ever to be concluded by the EC Commission. For the United States, the agreement is likewise a novelty: it goes further than the corresponding agreements concluded with Canada and other nations.

A well-defined cooperation procedure is of crucial importance for the Community and her trading partners, because restrictive practices in the Community are more and more frequently interrelated with restrictive practices in other markets, and because important mergers rarely have effects solely within the common market. The aim of the agreement, however, is not to provide a dispute

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[77] See EC Commission Press Release IP (91) 848 of 23 September 1991. See also James F. Rill, *International Antitrust Policy* (manuscript on file at office of the *University of Chicago Legal Forum*) (cited in note 2). The agreement is presently being reviewed by the ECJ, on the initiative of France. The text is published in 14 *Competition Law of the European Communities* 12:312 (Dec 1991).

settlement mechanism between the EC and the U.S. in such cases, but rather to prevent conflicts ahead of time through close cooperation between the authorities. For these reasons, the agreement contains several traditional instruments such as notification, information, and consultation.

However, the agreement also contains unusually detailed provisions on comity, according to which the parties should take into account their respective interests. Specifically, each party should be reticent to apply its own competition rules "extraterritorially" ("negative comity") but may request the other to become active in order to deal with restrictions of competition ("positive comity"). Indeed, the most innovative provision of the agreement, Article V, recognizes that anti-competitive practices in one territory can affect important interests of the other party.

Furthermore, the EC-U.S. Agreement is a political signal and a symbol of the conviction of both parties of the necessity to tackle in common the challenges that go hand in hand with trade liberalization. The EC and the U.S. have known each other for a long time and have cooperated in the framework of the OECD, but this agreement takes us a decisive step farther in our mutual relations. It might even help both parties to diminish certain psychological barriers ("Berührungsangst") which may still exist to a certain extent. If that is the case, we may indeed count the EC-U.S. Agreement as one of our greatest successes so far in the history of our bilateral relations.

Conclusion

Outlined above are three illustrations of the Community's involvement in the process of internationalization of competition law and policy. In a certain sense, they somewhat contradict each other: harmonization and cooperation with the EFTA countries; harmonization and cooperation to a lesser degree with the new democracies; cooperation without harmonization with the U.S.

But this riddle is easily solved, for each agreement is adapted to the specific needs evoked by a given situation. In markets as closely interlinked—both economically and geographically—as the EC and EFTA markets, governed until now by totally different rules, parties agreed to try a uniform regime, not only with regard to competition rules, but also with regard to a great many other aspects. Given the existing objective differences (newly evolving market economies, novelty of competition aspects), such a uniform regime would not have suited the Eastern European context, which is why the parties agreed on another, equally viable and well-

suited, approach. Finally, despite some differences in approach, both the EC and U.S. systems are highly sophisticated and dedicated in their commitment to combat restrictive practices. I think that it may have been precisely because of this similarity that an agreement on cooperation was thought to be needed and adequate to meet the parties' aims at this particular stage.