FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

REVIEW OF RECENT DEVELOPMENTS IN U.S. ANTITRUST LAW

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That the antitrust laws have a political foundation is a proposition that has received substantial proof in Washington recently. With the opening of the 100th Congress, and the Administration's antitrust and trade proposals on the table, the differing conceptions of what changes, if any, should be made to the antitrust laws and in their enforcement are appearing in several different forums.

Charles Rule, currently the acting Chief of the Antitrust Division of the Department of Justice, is expected to be nominated soon by the President to become the Chief of the Antitrust Division. Some in Washington say that Mr. Rule's likely nomination signals a strategic decision on the part of the Administration to continue with its reform through relaxed enforcement policy rather than to concentrate on obtaining legislative changes in the antitrust laws.

In the meantime, Mr. Rule's enforcement policies and plans for running the Division have come under scrutiny and criticism on Capitol Hill. In the first hearing of the Democratically controlled Senate Judiciary Committee, Senator Howard Metzenbaum (D-Ohio) attacked the Administration's antitrust enforcement policies. Metzenbaum cited a 33 percent staff cut in the Antitrust Division since Reagan took office as signalling a "hands off" approach to merger activity. The staff cut was felt in the final quarter of 1986, when, due to the tremendous increase in the volume of merger filings spurred by the changes in the tax law, DOJ had to temporarily assign economists, rather than lawyers, to perform initial screenings of premerger notifications. In addition, Senator Metzenbaum explained that the Reagan Antitrust Division had filed only 18 civil antitrust suits compared with 34 for a similar period under the Carter Administration, while the number of merger applications has increased 135 percent.

In response, Rule reaffirmed the Administration's position that the Antitrust Division should not be in the business of telling corporate America what a smart investment is; he said "those people who are willing to bet their money on corporate takeovers are much better able to make that judgment than we are as antitrust lawyers." Mr. Rule also reaffirmed the Antitrust Division's commitment to enforce the antitrust laws by saying that the Division has filed 53 criminal antitrusts seeking $10.7 million in fines during 1986 alone.

The Antitrust Division has recently challenged two proposed mergers of interest. First, it advised Hughes Tool Company and Baker International, two of the world's largest suppliers of oil well drilling equipment, that DOJ would file suit to block their proposed merger. Hughes has rejected the conditions DOJ has placed on the Hughes-Baker deal, and the success of the

merger is now doubtful. Second, DOJ has filed a civil suit to block Domtar's acquisition of two Imasco, Ltd., subsidiaries, Genstar Gypsum Products Company (of Irving, Texas) and St. Georges Gypsum Mines, Inc., a mining firm in Newfoundland. Genstar Gypsum is the fourth largest producer of gypsum board in the U.S., with five plants. Domtar has two wholly owned subsidiaries in the U.S. and through them is the fifth largest producer of gypsum board in the U.S. DOJ alleged that the proposed acquisition would violate section 7 of the *Clayton Act,* substantially lessening competition in the market for gypsum board in the Pacific Southwest. All parties have submitted to the court a consent decree settling the suit that requires Domtar to divest a Pacific Southwest plant within six months.

The Antitrust Division is also getting together with the Federal Trade Commission to seek changes in two areas. First, DOJ and the FTC are collaborating on regulations intended to plug loopholes that allow partnerships to engage in takeover activity without first filing premerger notification certificates under the *Hart-Scott-Rodino Act.* Under current law, a partnership can be formed specifically to complete an acquisition and may often be able to secretly acquire large blocks of stock in a target company. DOJ and FTC will eliminate the current exemptions for computing partnership assets so as to require partnership filings in many more merger situations. Although these changes have been in the works for several years, the two agencies are now closer than ever before. The draft regulations are not expected to be completed until this summer at the earliest.

In another demonstration of administrative cooperation, the Federal Trade Commission and the Justice Department have given their support to the efforts of state officials and small business representatives to repeal the antitrust exemption for the insurance industry under the *McCarran-Ferguson Act.* This exemption permits insurance companies to fix rates, make territorial allocations, restrict coverage, and engage in practices prohibited by the antitrust laws for most other businesses. Indeed, many feel the *McCarran-Ferguson Act* is at least a substantial cause of many of the recent problems with the insurance affordability crisis in the United States. The exemption in the *McCarran-Ferguson Act* originated in 1944 at the urging of the insurance industry following the Supreme Court's ruling in *U.S. v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), that the insurance industry was subject to the federal antitrust laws. Senate Bill 80, a measure to repeal *McCarran-Ferguson,* has been introduced in the Senate. It has drawn criticism from the insurance industry.

The insurance industry fears that repeal of *McCarran-Ferguson* will result in creeping federal regulation of the insurance industry, which will be inefficient as compared to the current regulation of the industry by the states. However, FTC Chairman Daniel Oliver testified before the Senate Judiciary subcommittee that:

> experience and logic demonstrate that the exemption is adverse to consumers. The exemption denies them the best array of insurance services of the lowest possible cost. It is unnecessary because the application of the antitrust laws is in no way inconsistent with either desirable industry cooperation or effective state regulation.

Chairman Oliver's comments were echoed (somewhat less than categorically) by acting Chief of the Antitrust Division, Mr. Rule, who testified that:

> we believe that the current, broad exemption for the business of insurance may well have outlived its usefulness, and endorse the Committee's inquiry into the continuing need for it, at least in its present form.

The Administration's legislative proposals for the reform of the antitrust laws (see last issue) have been selectively reintroduced in the 100th Congress and are being touted as part of the Administration's new campaign to increase U.S. "competitiveness." The Administration's Economic Policy Council, in the context of a larger report on global competitiveness initiatives, recommended continued support for the reform proposals as necessary to allow unfair mergers and industries damaged by foreign competition. One of the President's proposals, to provide antitrust exemptions for industries injured by foreign competition, has made it into

S. 490, a bill entitled the *Omnibus Trade Act* of 1987. Under the Senate bill, the President would be authorized to consult with the Attorney General and to provide antitrust exemptions for industries injured by foreign competition after an affirmative finding of injury by the International Trade Commission in cases under section 201 of the *Trade Act* of 1974.

Under current law, the Secretary cannot certify an ETC unless all four of the following criteria are satisfied. The ETC cannot:

(1) result in a substantial lessening of competition or restraint of trade within the U.S. nor a substantial restraint of the export trade of any competition of the applicant;

(2) unreasonably enhance, stabilize, or depress prices within the U.S. of the class of products exported by the applicant;

(3) constitute unfair methods of competition against competitors engaged in the export of the products; and

(4) include any act that may reasonably be expected to result in the sale for consumption or resale within the U.S. of the products exported by the applicant.

The Administration's trade bill, introduced the week of February 19, 1987, also proposes changes in the antitrust protection afforded to export trading companies ("ETCs") by limiting the scope of future legal challenges on antitrust grounds and by making it easier to obtain an ETC certificate. According to the proposal, a suit challenging the ETC's antitrust protection would have to be limited to the administrative record compiled while processing the company's application. In addition, an ETC would only need to meet one, instead of the existing four, standards insuring that the export conduct would not reduce competition in the U.S. market.

This change is encompassed in Section 5005 (A)(7) of the Administration's legislative proposal, S.539. It would amend Section 303(A) of the *ETC Act* to read:

> a certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will not result in a substantial lessening of competition or restraint of trade within the United States.

The Administration has proposed this change in an effort to streamline and simplify the approval process for ETCs. As a practical matter, however, it is likely that the approval process will involve an examination of precisely the sorts of issues included under current law.

COMPETITION POLICY AND INTERNATIONAL TRADE: A FRAMEWORK FOR CO-OPERATION

As reported in the December 1986 issue of the Canadian Competition Policy Record, *the OECD Council has recently adopted two complementary Recommendations addressed to restrictive business practices affecting international trade and co-operation in areas of potential conflict between trade and competition policies. The first Recommendation, which is a revision and expansion of a series of texts which have been in operation for almost 20 years, sets out procedural arrangements for international antitrust co-operation in cases where inquiries or enforcement action in one country may affect the interest of other countries.*

The second instrument, which follows the conclusions of an earlier report on the interaction of competition and trade policies, sets out policy principles and a mechanism for co-operation between OECD governments.

The full text of the recommendations is set out below.

Organisation for Economic Cooperation and Development - First Recommendation

Revised recommendation of the Council concerning co-operation between Member countries on restrictive business practices affecting international trade.

(adopted by the Council at its 643rd Meeting on 21st May 1986)

Paris, drafted 3rd June, 1986 dist: 5th June, 1986 C(86)44(Final)

The Council,

Having regard to Article 5b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

Having regard to the Recommendation of the Council of 25th September, 1979, concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(79)154(Final)] which repealed and superseded the Recommendations of the Council of 5th October 1967 and of 3rd July 1973 on the same subject;

Having regard to the request made by the Council meeting at Ministerial level in May 1982 to the Committee of Experts on Restrictive Business Practices to undertake a review of the 1979 Council Recommendation [C/M(82)12 Part I (Final), items 114 and 115, paragraph 12a)];

Having regard to the report by the Committee of Experts on Restrictive Business Practices on the operation of the 1979 Council Recommendation during the period 1980 to mid-1985 [RBP(86)2(1st Revisions), Part A];

Having regard to the report by the Committee of Experts on Restrictive Business Practices on international co-operation in the collection of information for purposes of competition law enforcement and, in particular, the suggestions for action contained in that report (paragraphs 173 to 179);

Recognising that restrictive business practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries such as the control of inflation;

Recognising that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognising the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation in the field of restrictive business practices;

Recognising that restrictive business practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of restrictive business practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with restrictive business practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning restrictive business practices, as may arise.

Recognising the desirability of setting forth procedures by which the Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to restrictive business practices affecting international trade;

Considering that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles.

I. **Recommends** to the Governments of Member countries that insofar as their laws permit:

A. NOTIFICATION, EXCHANGE OF INFORMATION AND CO-ORDINATION OF ACTION

1.a) When a Member country undertakes under its restrictive business practices laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country while retaining full freedom of ultimate decision to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws to deal with the restrictive business practices;

b) Where two or more Member countries proceed against a restrictive business practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

2. Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with restrictive business practices in international trade. In this connection, they should supply each other with such relevant information on restrictive business practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

B. CONSULTATION AND CONCILIATION

3.a) A Member country which considers that a restrictive business practice investigation or proceeding being conducted by another Member country may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

b) Without prejudice to the continuation of its action under its restrictive business practices law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the restrictive business practice investigation or proceeding;

4.a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in restrictive business practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its restrictive business practices law and to the full freedom of ultimate decision of the Member countries concerned;

b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the restrictive business practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

c) The Member country addressed which agrees that enterprises situated in

its territory are engaged in restrictive business practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on restrictive business practices or administrative measures, on a voluntary basis and considering its legitimate interests;

5. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 3 and 4 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

6. In the event of a satisfactory conclusion to the consultations under paragraphs 3 and 4 above, the requesting country, in agreement with, and in the form accepted by, the Member country or countries addressed, should inform the Committee of Experts on Restrictive Business Practices of the nature of the restrictive business practices in question and of the settlement reached;

7. In the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the Committee of Experts on Restrictive Business Practices with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. **Recommends** that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III. **Instructs** the Committee of Experts on Restrictive Business Practices

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;

2. To consider the reports submitted by Member countries in accordance with paragraph 6 of Section I above;

3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 7 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;

4. To report to the Council as appropriate on the application of the present Recommendation.

IV. **Decides** that this Recommendation and its Appendix cancel and replace the Recomendation of the Council of 25th September 1979 [C(79)154(Final)].

APPENDIX

Guiding Principles For Notifications, Exchanges Of Information, Consultations And Conciliation On Restrictive Business Practices Affecting International Trade

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws.

Notification

2. The circumstances in which a notification of an investigation or proceeding should be made include:

a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;

b) When it concerns a practice carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

Procedure for notifying

3.a) Under the Recommendation notification should be "if possible in advance". However there may be cases, for example relating to certain kinds of mergers, where advance notification could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.

b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Committee of Experts on Restrictive Business Practices.

c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interest. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned.

Collection of information from persons or enterprises located abroad

4.a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.

b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.

c) Any requests for information located abroad should be framed in terms that are as specific as possible.

Consultations between Member countries

5.a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.

b) Requests for consultation under paragraphs 3 and 4 of the Recommendation should be made as soon as possible after notification and explanation of the national interest affected should be provided in sufficient detail to enable full consideration to be given to them.

c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.

d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

Conciliation

6.a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph 7, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invoking conciliation.

b) The Secretariat should continue to compile a list of persons willing to act as conciliators.

c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.

d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

Confidentiality

7. When engaging in notification, consultation or any other form of co-operation under this Recommendation, the degree to which a Member country discloses information to another Member country may be subject to and dependent upon the assurances of confidentiality given by the other Member country. When supplying information, Member countries should indicate the degree to which and the length of time during which the information should be treated as confidential. At the request of the country providing information, the receiving country should consider the information exchanged to be confidential and that it will not be disclosed unless the country providing the information agrees to its disclosure or disclosure is compelled by law. Member countries receiving such information should take all reasonable steps to ensure observance of the confidentiality requested.

Organisation for Co-Operation and Development - Second Recommendation

Recommendation of the Council for cooperation between Member countries in areas of potential conflict between competition and trade policies (adopted by the Council at its 649th meeting on 23rd October 1986)

The Council,

Having regard to Article 5b) of the convention of the OECD of 14th December 1960;

Having regard to the Decision of the Council of 10th and 11th May 1982 requesting the Committee of Experts on Restrictive Business Practices

to examine, in particular, possible longer-term approaches to developing an improved international framework for dealing with problems arising at the frontier of competition and trade policies. After consultation with the Trade Committee, the results of the study should be reported to the Council as soon as possible. [C(82)58(Final)];

Having regard to the Revised Recommendation of the Council concerning co-operation between Member countries on restrictive business practices affecting international trade [C(86)44(Final)];

Having regard to the Report of the Committee of Experts on Restrictive Business Practices on "Competition Policy and International Trade: Their Interaction" derestricted by Council Decision of 7th June 1984 and in particular the conclusions contained in Part I of this Report;

Having regard to the Joint Report of the Committee of Experts on Restrictive Business Practices and the Committee on Consumer Policy proposing an indicative checklist for the assessment of trade policy measures [C(85)32] and the resolution of the Council of 30th April 1985 calling upon Member governments to undertake, on the basis of the checklist, as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as of existing measures when the latter are subject to review;

Recognising that government actions or policies which limit or distort trade, in particular, through mechanisms or import restrictions of a discriminatory nature, as well as other trade-related measures, may affect competition in domestic and international markets;

Recognising that the 1984 Communiqué of the Council meeting at Ministerial level on 17th and 18th May 1984 acknowledged the importance of issues arising in relation to both competition and trade policies, such as cartels and voluntary export restraints, which have the effect of inhibiting competition and the proper functioning of markets and called for continued work and improved international co-operation in this area;

Considering that the effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports;

Considering the need for increased co-operation between competition and trade authorities at the national and international levels to avoid or minimise conflicts between laws, regulations and policies in the field of trade and competition;

On the proposal of the Committee of Experts on Restrictive Business Practices, after consultation with the Trade Committee:

I. **Recommends** to the Governments of Member Countries

A. Policy Principles to Strengthen Competition in National and International Markets

a) Trade policy measures affecting competition.

1. Member governments should undertake, on the basis of the attached checklist, as systematic and comprehensive an evaluation as possible of proposed trade and trade-related measures as well as of existing measures when the latter are subject to review;

2. In the course of negotiations or discussions concerning export limitation arrangements, governments should take into account the interests of their trading partners and give consideration to the effects of such arrangements on competition in the markets concerned, as well as to the applicability of competition laws;

3. They should respond as positively as possible to requests for consultations by other Member countries which express concern about the impact on competition in their markets of measures referred to in paragraphs 1 and 2 above;

4. Because of the potential effects on competition, governments, when supplying or purchasing goods or services or providing subsidies to enterprises, whether privately owned or under government control, should make these practices and policies as transparent as possible;

5. Care should be exercised that proceedings under laws dealing with unfair trade practices, especially proceedings initiated by enterprises, are not misused for anticompetitive purposes;

b) Application of competition laws to restrictive practices by enterprises affecting international trade

6. When considering action to approve or otherwise exempt export cartels, export limitation arrangements or import cartels from the application of their competition laws, governments should, as far as possible, within existing national laws, take into account the impact of such practices on competition in domestic and foreign markets. Member countries which have not yet done so should consider the possibility of requiring the notification of export cartels, export limitation arrangements and import cartels to competition authorities or similar procedures to obtain more information about the nature and extent of these practices;

7. While recognising that policies designed to allow interfirm co-operation in export trade can stimulate trade flows, governments in general should not encourage the exercise of market power in foreign markets through the use of export cartels. Nor should they encourage other restrictive business practices in export or import markets, e.g., export limitation arrangements and import cartels, which restrain competition in these markets;

8. The government of the country where such cartels or export arrangements exist, should, without prejudice to each government's full freedom of action and according to the procedures of the Revised Council Recommendation concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, be ready to co-operate within existing national laws with the authorities of other countries in any investigation into possible anticompetitive effects of arrangements located in their countries, recognising the jurisdictional difficulties that sometimes arise when information is sought from abroad or where the parties to a restrictive agreement are located abroad;

9. When assessing restrictive business practices of enterprises within relevant markets, the role of imports and the existence of trade barriers should be taken into account.

B. Procedural Arrangements to Avoid or Minimize Conflicts Between Trade and Competition Policies

a) At the national level

10. Governments should seek to ensure that competition policy considerations are taken into account in the formulation and implementation of trade policies, including laws dealing with unfair trade practices;

b) At the international level

11. Where a Member country considers that the implementation of a trade measure by another Member country of which it has notice from any source would or may significantly affect the application of its competition laws or policies, the Government of the first mentioned Member country may communicate its concerns to the Government of the other Member country;

12. Where a Member country implements or proposes to implement a trade measure which may lead to the application of competition laws in or by another Member country, the first mentioned Member country may notify the other Member country;

13. Member countries should respond as positively as possible to requests they may receive for consultations in relation to such measures and their implications for their competition laws or policies, without prejudice to each government's full freedom of action;

14. Where the governments of the Member countries concerned agree, the consultations could be a matter for report and discussion within the Committee of Experts on Restrictive Business Practices, in close co-operation with the Trade Committee;

II. **Instructs** the Committee of Experts on Restricitve Business Practices, in relation to its continuing work in analysing the role of competition policy in strengthening the international trading system and in close co-operation with the Trade Committee on all matters relating to trade policy issues,

1. to examine periodically developments in the implementation of the provisions set out in this Recommendation;

2. to report to the Council as appropriate on the implementation of the present Recommendation.

Appendix

Indicative Checklist for the Assessment of Trade Policy Measures(*)

a) Is the measure in conformity with the country's international obligations and commitments?

b) What is the expected effect of the measure on the domestic prices of the goods or services concerned and on the general price level?

c) What are the expected direct economic gains to the domestic sector, industry or firms in question (technically, the increase in producers' surplus)?

d) What types of jobs are expected to be affected by the measure? What are the net employment effects of the measure in the short and long term?

e) What are the expected (direct) gains to government revenues (e.g. from tariffs, import licences, tax receipts) and/or increased government costs (e.g. export promotion, government subsidies, lost tax revenues)?

f) What are the direct costs of the measure to consumers due to the resulting higher prices they must pay for the product in question and the reduction in the level of consumption of the product (technically, the reduction in consumers' surplus)? Are there specific groups of consumers which are particularly affected by the measure?

g) What is the likely impact of the measure on the availability, choice, quality and safety of goods and services?

h) What is the likely impact of the measure on the structure of the relevant markets and the competitive process within those markets?

i) In the medium and longer term perspective, will the measure, on balance, encourage or permit structural adaptation of domestic industry leading over time to increased productivity and international competitiveness or will it further weaken and delay pressures for such adaptation? Is the measure of a temporary nature? Is it contingent on, or linked to, other policy measures designed to bring about the desired structural adjustment?

j) What will be the expected effect on investment by domestic firms in the affected sector, by potential new entrants and by foreign investors?

k) What could be the expected economic effects of the measure on other sectors of the economy, in particular on firms purchasing products from, and selling products to, the industry in question?

l) What are the likely effects of the measure on other countries? How can prejudice to trading partners be minimized?

m) How are other governments and foreign firms likey to react to the measure and what would be the expected effect on the economy of such actions? Is the measure a response to unfair practices in other countries?

*This checklist applies to all trade policy measures other than laws relating to unfair trade practices.