RESTRICTIVE BUSINESS PRACTICES

Memorandum submitted to the CONTRACTING PARTIES for their Thirteenth Session

At their Twelfth Session, the CONTRACTING PARTIES instructed the secretariat to collect and analyse documentation on the subject of restrictive business practices. For this task the Executive Secretary engaged the services of Professor J. L'Huillier of the University of Geneva, who, with the assistance of M. C.A. Junod, has prepared the following memorandum.

This memorandum was written in French. Translation into English had to be done through outside assistance, and the attached English text is, therefore, to be regarded as provisional. If necessary, a revised translation will be issued after the Thirteenth Session.
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Table of Contents

Chapter | Page
---|---
Introduction | 5

PART ONE

RESTRICTIVE BUSINESS PRACTICES IN ECONOMIC LIFE | 6

I. THE ORIGIN AND FUNDAMENTAL CAUSES OF RESTRICTIVE BUSINESS PRACTICES | 7

1. The fundamental causes of restrictive business practices | 7
2. The initiators of restrictive business practices | 9

II. THE PRINCIPAL TYPES OF RESTRICTIVE BUSINESS PRACTICES | 12

1. Practices aimed at influencing prices or conditions of sale, purchase or hire | 12
2. Practices tending to limit output, productive capacity or the number of varieties produced | 15
3. Market-sharing | 15
4. Establishment of joint purchasing or sales services and the pooling of profits | 16
5. Restrictive business practices in matters of technological research, patents, etc. | 17
6. Practices aimed at eliminating external competition | 18
7. Restrictive business practices in international trade | 19

III. DIVERGENCY OF OPINIONS CONCERNING THE EFFECTS OF RESTRICTIVE BUSINESS PRACTICES AND THE DIVERSITY OF FACTORS WHICH DETERMINE THEIR EFFECTIVENESS | 24

1. Divergency of opinions concerning the effects of restrictive business practices on economic life | 24
2. The effectiveness of restrictive business practices | 27
PART TWO
THE ATTITUDE OF DOMESTIC LEGISLATION WITH RESPECT TO RESTRICTIVE BUSINESS PRACTICES

I. MEASURES AIMED AT GATHERING INFORMATION CONCERNING RESTRICTIVE BUSINESS PRACTICES
1. General investigations and reports
2. Registration

II. PROHIBITION AND REPRESSION OF RESTRICTIVE BUSINESS PRACTICES CONSIDERED INDEPENDENTLY OF THE NATURE OF THEIR EFFECTS
1. Restrictive business practices emanating from ententes
2. Restrictive business practices initiated by industrial concentrations

III. CONTROL AND REPRESSION OF RESTRICTIVE BUSINESS PRACTICES ON ACCOUNT OF THEIR PREJUDICIAL EFFECTS
1. The regulation of restrictive business practices in the field of prices and conditions of sale, purchase and hire
2. The regulation of business practices which limit output or supply
3. Regulations concerning market-sharing
4. The repression of abusive practices in the use of industrial or intellectual property rights and in preventing technological development
5. Control of profit-pooling and of the joint management of sales and purchases
6. Repression of schemes intended to eliminate external competition

IV. METHODS OF ENFORCEMENT AND PENALTIES ATTACHED TO MEASURES CONCERNING RESTRICTIVE BUSINESS PRACTICES
1. Methods of enforcement
2. Penalties
Chapter V. ENCOURAGEMENT OF CERTAIN RESTRICTIVE BUSINESS PRACTICES ON THE PART OF THE GOVERNMENT

VI. PROVISIONS OF INTERNAL LEGISLATION WITH REGARD TO RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE

1. Registration formalities
2. Provisions relating to imports
3. Provisions relating to exports
4. Provisions relating to industrial and intellectual property

PART THREE

ATTEMPTS MADE SINCE 1945 TO ACHIEVE INTERNATIONAL CONTROL OF RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE

I. CHAPTER V OF THE HAVANA CHARTER

1. The restrictive business practices referred to in the Charter
2. Methods used in the control of "harmful" practices

II. DRAFT OF THE AD HOC COMMITTEE ON RESTRICTIVE BUSINESS PRACTICES OF ECOSOC

1. The main provisions of the draft agreement
2. The draft agreement's proposals regarding organization

III. DRAFT OF THE COUNCIL OF EUROPE

1. Substantive provisions
2. Organizational provisions

IV. PROVISIONS OF THE TREATIES INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY AND THE EUROPEAN ECONOMIC COMMUNITY

1. The restrictive business practices dealt with
2. Methods employed to control practices

V. EXAMINATION OF THE PROBLEM OF RESTRICTIVE BUSINESS PRACTICES BY THE CONTRACTING PARTIES OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE
INTRODUCTION

The object of the present report, in accordance with a decision taken by the CONTRACTING PARTIES at their Twelfth Session, is to collect and analyse all the available material concerning any inter-governmental draft agreements or agreements which have been prepared or came into force since the end of the Second World War with a view to preventing or checking the harmful effects of restrictive business practices in international trade.

Since they were invited to consider drafts as well as formal agreements, the authors of this report felt that their task was to focus their attention on the spirit rather than on the letter of these texts. In view of this it seemed necessary to place before the actual study of the attempts made to control restrictive business practices on an international scale, which constitutes Part Three of this report, two other parts, one dealing with the evidence of such practices in economic life and the other devoted to a study of the appropriate provisions of internal legislation. Only as a result of this twofold introduction can the main difficulty of instituting international regulations in this field be understood: the latter stems from the diversity of the facts themselves and from the varying interpretations which obtain in different countries.

It is perhaps unnecessary to begin by formulating a definition of restrictive business practices since their range and variety can undoubtedly be better understood by a systematic enumeration of the forms they take, such as it will be attempted to set out in Chapter II of Part One. Howbeit, the discussions among experts on this subject show how difficult it is to reach agreement upon a formula that would not be too brief to do justice to the complexity of the real situation. We shall, however, mention the definition given in the Havana Charter, in view of the special authority attached to the latter. Article 46, paragraph 1, refers to business practices "which restrain competition, limit access to markets, or foster monopolistic control".

Inasmuch as such a definition could, if taken out of its context, cover inter-governmental agreements aiming at stabilizing the prices of primary goods, it is essential to make it clear that the latter are excluded from the scope of this study, since the CONTRACTING PARTIES make a clear distinction between the problems relating to such agreements and those which concern restrictive business practices proper. Nor will this report be concerned with regulatory measures introduced by individual countries in order to stabilize their domestic agricultural markets or to promote the economic development of under-developed areas, although such measures are not restricted to the usual instruments of commercial policy and can directly cause business concerns to follow a course of behaviour incompatible with the normal free play of competition.
PART ONE

RESTRICTIVE BUSINESS PRACTICES IN ECONOMIC LIFE

While all restrictive business practices are alike in impairing competition, they are practised by very different entities, have varied methods of action and differ widely in their degree of efficiency.
CHAPTER I

THE ORIGIN AND FUNDAMENTAL CAUSES OF
RESTRICTIVE BUSINESS PRACTICES

Restricting competition is not an end in itself but only a means. Before identifying those who avail themselves of this means, it will be helpful to recall briefly the underlying motives which they obey.

Section 1

The fundamental causes of restrictive business practices

In industry, commerce and finance alike, the evolution of production and organization methods has been an incentive to concentration, that is, an increase in the size of undertakings. The advantages of industrial concentration from the viewpoint of productivity can be so great that, automatically, an enterprise which resolutely commits itself to this course of action will eventually outdistance its competitors and be left alone on the market, its optimum volume of production enabling it to satisfy whatever demand exists at the price level corresponding to its own costs. Realizing its isolated situation, it may naturally be tempted to take advantage of its monopolistic position and to adopt an attitude very different from the one it had under normal competition.

It is generally agreed that, unless encouraged by artificial factors, such an extreme outcome of competition is unusual, if only because the size of the market increases at the same time as the phenomenon of concentration of industry develops. Thus the general opinion is that when an enterprise has achieved a monopoly it has done so by a definite decision to expand beyond the dimensions needed to obtain optimum returns. In this respect it is pointed out that the grouping of individual productive units into a single undertaking cannot always be explained by the saving in expenditure they achieve, as a group, in such costs as management, research, advertising, etc., in contrast to productive units operating individually. The elimination of competitors, in this case, has not been "natural" but has been deliberately sought after in order to attain a dominant position on the market and to profit from the resulting advantages. Even assuming that an enterprise does aspire to a position of monopoly, the likelihood of a single firm being able to control the market is small. But it is a fact that there are varying degrees in the influence it can exercise over the market and the conception of a dominant position reflects reality more accurately than does that of a monopoly.
On the other hand, it is fairly common to find a relatively small number of enterprises confronting one another. Since this situation arises only when certain natural factors have set in motion the process of concentration of industry, it may be assumed that each company is burdened with fairly heavy fixed costs. Hence each firm is liable to undergo losses, for if the market price declines, as a result of a falling off in the demand or of an increase in the aggregate supply, to a point where total costs are no longer covered, the company is not in a position to suspend operations, as it will obviously prefer to sacrifice part of the fixed costs rather than to make a complete loss.

The motive which causes undertakings to restrict competition among themselves would seem to be to ward off the threat of possible losses or to avoid them altogether, rather than to make abnormal profits. In order to eliminate losses or to put their normal profits on a sound basis, they may endeavor either to increase the price-cost ratio, limiting the supply accordingly, or to reduce costs by means of a collective re-organization of their activity or even more simply, for example, by economising on advertising expenditure once the intensity of competition has been lessened. Furthermore, companies that have succeeded in reducing competition among themselves often find it desirable in order to safeguard their position to limit effects of possible competition from enterprises outside the group. They are all the more inclined to do so as the costs of the outsiders may be lower than their own or may appear to be lower because of the accounting methods used to calculate them.

Needless to say, if this joint defensive reaction ultimately confers control of the market on the firms concerned, it may occur to them to use that control to increase their profits beyond the level they had first contemplated.

For enterprises burdened with fixed costs, the risk of losses is considerably aggravated in times of economic depression, when demand tends to decline everywhere. The multiplication of restrictive business practices during the crisis of the thirties was therefore not by accident. In the same way, after a war, hypertrophied sectors of activity which have been stimulated by the exceptional needs arising from the conduct of hostilities constitute an ideal breeding-ground for restrictive business practices when demand drops to its peace-time level. Lastly, we may observe in passing that if a finance company is led, even under normal economic conditions in any given field of activity, to take an interest in several rival concerns at the same time, the latter have a particularly strong motive for limiting competition among themselves.

From these remarks on the underlying motives of restrictive business practices, it will appear that such practices can be the work either of an enterprise operating alone and which has reached a high level of concentration of industry taking account of the size of the market, or else of the collective action of several concerns.
Section 2

The initiators of restrictive business practices

Thus, among the initiators of restrictive business practices, a distinction should be made between concentration of industry and ententes. It is not always easy to make each individual case fit into this classification, and one is tempted in particular to provide a third category for a type of situation which is the subject of increasing interest among economic theorists, in which several separate concerns behave differently to what one would expect of competitors without, however, actually acting according to a pre-arranged plan.

Paragraph 1. Concentration of industry

An enterprise which has reached a sufficiently advanced stage of concentration of industry to occupy a predominant position enabling it to indulge in restrictive business practices may, in spite of its being a single corporate unity, display many different characteristics.

Sometimes its activity is specialized, being focussed on one particular stage of a productive process - using that term in its widest sense - sometimes it is diversified, either covering successive stages in a single productive process (vertical integration) or relating to different productive processes, even if the latter are more or less connected, as in the case of commodities with a high degree of substitutions.

A further distinction between concentrations of industry is whether they are public or private undertakings. In the case of a public undertaking, monopolistic conditions are more likely to be found than in the case of private business.

On the other hand, it is equally important to distinguish between existing concentration and that in the process of formation. In the former case, we are confronted with an accomplished fact which it would be difficult to change. But until it actually takes place, the grouping of firms may appear merely as a possible alternative to an entente. The former may be preferred by those affected either because of the legal obstacles in the way of the second solution or because of specific advantages such as the possibility of taking radical steps towards the rationalization of the organization thus formed.

The boundary between concentration of industry and an entente becomes less clearly marked when the various firms grouped into a single company, or controlled by one, are united by highly complex legal ties.
Paragraph 2. Ententes

An entente is an arrangement between legally independent enterprises which aims at a collective restriction of competition. In theory, therefore, an entente presupposes the willingness of each of the participants to limit its own liberty in favour of collective action. In practice, it is sometimes a very delicate task to determine whether adhesion to the group is really spontaneous, as the enterprises may have some kind of legal relationship which is not known, or one of them may have been under coercion to join the entente.

As regards its precise form, the idea of the entente may include extremely different forms, ranging from the formation of a full company amalgamation to simple "gentlemen's agreements", whilst in between is a whole gamut of more or less detailed and explicit contracts.

Though there may often be correlation between the strength of the legal relationship uniting the parties and that of the real structure of the entente, this is not always so. In any event, it can be considered that the degree of organization within an entente is increased by the following factors: the existence of institutions common to each company, such as a syndicate in the case of countries of coded law or a "trustee" or countries of common-law, means of controlling or enforcing sanctions on its members and clearly-defined procedures for the settlement of disagreements which may arise among them. As may be expected, it is not infrequent in powerfully organized ententes for the enterprises participating to lose little by little to the central management some of the independence they originally intended to keep, so that they end up by bearing a marked resemblance to concentration of industry. Although certain authors believe that the term "cartel" should be reserved for strongly organized ententes, current terminology tends not to distinguish between them.

An entente between firms at a given stage of the productive process, can be strengthened by vertical agreements which connect it to the preceding or to the following stage or to both of them. These arrangements generally presuppose that the other stages are also governed by a cartel arrangement or concentration of industry. These vertical extensions usually give a greater strength to horizontal ententes by giving them very powerful means of sanction against their own members and provide them with additional defensive or offensive weapons against competitors outside the entente. Sometimes a whole network of horizontal and vertical cartel arrangements is incorporated into a larger cartel which undertakes their co-ordination. The formula of "cartel of cartels" is also used to head up a series of national ententes by a supreme international organization.
Paragraph 3. Non-concerted restrictive business practices

Commercial undertakings may enter into association without forming an entente for trading purposes. This may be to satisfy their need to exchange information on their activities or for the defence of their common interests before the public authorities, or else to take part in collective activities such as exhibitions. Once the association is formed, however, the straightforward exchange of views or the circulation of information on such subjects as prices, production, new investments contemplated, etc., can influence the attitude towards competition between the members of the association, independently of any collective decision which would be the only true justification for speaking of an entente. For instance, enterprises which have learned simultaneously through the information service of the association, of another member's intention to carry out an important investment programme and also of the possibility of an economic recession, may voluntarily decide to forego the execution of their own plans for expansion.

But this direct and non-concerted influence which enterprises may have on one another, without passing by the market mechanism, is much more likely to occur in the case of an oligopoly, that is to say, when the number of enterprises in competition is large enough to prevent any one of them from gaining sole control of the market but small enough for each of them to be able to appreciably influence the total output. As contemporary theory has clearly shown, experience quickly teaches such enterprises that any initiative on their part can call forth an immediate reaction from their competitors; and they learn to make allowance beforehand for these probable reactions. This tacit respect for the interests of others can prevent an outburst of violent competition, the possibility of which is inherent in any oligopolistic situation and which would, if it took place, overwhelm any entente. A variation of this case is the coexistence of one or more large undertakings together with several much smaller ones, the latter agreeing of their own accord to conform to the decisions taken by the one or more industrial concentrations.

Thus, while it would be arbitrary to suppose a priori that an enterprise with any degree of concentration of industry or a trade association, is the initiator of restrictive business practices, it would be just as incorrect to believe that an unimportant degree of industrial concentration or the absence of a formal entente excludes the possibility of such practices. It is therefore easier to describe restrictive business practices as such than their initiators.
CHAPTER II

THE PRINCIPAL TYPES OF RESTRICTIVE BUSINESS PRACTICES

Without wishing to draw up a list exhaustive enough to do justice to the fertile imaginations of the initiators of restrictive business practices, an endeavour will be made to indicate the principal types. Thus we shall deal successively with those whose aim is:

- the influencing of prices or conditions of sale, purchase or hire;
- the restriction of output, capacity of production, or the number of different varieties to be produced;
- market-sharing;
- the setting up of joint sales or purchasing services, or the pooling of profits;
- the hindering of the development or application of technical processes, or the abuse of the rights stemming from the ownership of patents, trade marks, etc.;
- the elimination of outside competition.

Then, in a final section, special consideration will be given to those of the above practices which occur more frequently in international trade.

Section 1

Practices aimed at influencing prices or conditions of sale, purchase or hire.

Restrictive business practices aimed at influencing prices and conditions of sale are far more frequent than those whose object is to act on prices and conditions of purchase or hire. Hence it is mainly the former that we shall consider in the description which follows, and which deals with speculative schemes, price-fixing, whether by common agreement or not, price differentiation and, in conclusion, ancillary conditions.

Paragraph 1. Speculative schemes

Long before technological evolution had whetted the urge, on the part of producers, to free themselves from competition, there was ample opportunity for speculators to cause fluctuations on the stock market by short-term manoeuvres which distorted trading conditions. The practice of cornering commodities, the demand for which is inelastic, during a period when circumstances tend of themselves to diminish supplies available, dates far back into the past. In more recent times, similar attempts at cornering have become current, this time on the forward market. An operator buys, for the account, large quantities of goods and at the same time discreetly gains
possession of a considerable part of the quantities actually available, which he will then offer at very high prices to the dealers when they have to fulfill their commitments toward himself. With the enlargement of the markets, the success of such schemes has become, at least under normal conditions, more and more unlikely, and it is sufficient merely to mention them here for the sake of completeness, the more so as their effects are not of long duration.

Paragraph 2. Concerted price-fixing

Enterprises may agree among themselves not to sell, or on occasion not to hire, certain goods below a given price, whether the price in question is set as the minimum or as the only price in force. If the product is not completely homogeneous, the basic fixed price is set to correspond to the most common variety, decreases or increases for the other varieties being determined in relation to this standard price. Naturally, enterprises may also agree not to buy this or that factor of production above a given price.

Similar to the above is the practice of a mutual agreement between enterprises to calculate their sale price according to uniform methods, so that none of them may be led to sacrifice, consciously or not, the coverage of part of their costs. This is a more flexible arrangement because although sale prices are determined by identical rules of accountancy, they may differ as to the actual amount. This can no longer occur, however, when cost elements are fixed according to a uniform basis. The method then becomes identical with that of establishing a universally valid fixed price, the device of cost accounting being adopted only because the nature of the goods is too heterogeneous to allow of deciding upon a definite price for each existing or possible new variety.

Agreements of this nature may be in force on a permanent or on a temporary basis, as in the case of concerted price-fixing for enterprises submitting tenders for a contract.

Paragraph 3. Non-concerted price-fixing

Unless other forces besides competition hamper its action, an industrial concentration which occupies a predominant position on the market is obviously able to set its sale, hire or purchase prices at different levels from those which it would have practised had it not been in a favoured situation.

Furthermore, it seems that non-concerted restrictive practices on the part of legally independent enterprises occur more frequently with regard to prices than in any other field.

In oligopoly, the enterprises can apply different prices from those they would apply if there were fewer competitors; they know from experience, or they guess, that if they modified their price the reaction of their rivals would nullify any advantage the change might at first bring. The more demand is inelastic, and the more identical the article, the more likely it is that such a situation will arise. If the demand is not elastic but the commodities can be classified in sufficiently real categories, the first
reaction of the members of the oligopoly is to specialize, each one in a
different category, thereby gaining a predominant position in its respective
sector. Such a situation recalls the first case examined in this paragraph.

Another possible situation is that when a product is supplied by one or
more industrial concentrations and smaller producers at the same time; the
latter then follow, of their own free will, the policy of the former. This
type of influence is called price leadership.

Paragraph 4. The institution of price differentiation

Price differentiation cannot be explained by real qualitative
differences in the goods or services, or in the transactions of which it is
the object. In other words, an entente or an industrial concentration
applies different prices in comparable transactions bearing on identical
goods or services.

This difference in price may be the outcome, for instance, of a desire
to make the most of the demand, or the supply, as the case may be, on a
market where the enterprise in question occupies a predominant position, by
demanding a counter-payment, greater or less in value as the need of those
taking part in the transaction to buy or sell is more or less urgent.
Or again, the same enterprises may have different prices according to whether
they are dealing on the market where they occupy a predominant position, or
on one where they meet with stronger competition.

Price differentiation is also used as a means of compelling buyers to
obtain their supplies through the usual trade channels: the price is
determined as a function of the buyer's quality and without reference to the
level in the distributionary process, with the result that the price is
likely to vary for comparable transactions.

Further, price differentiation is sometimes an instrument with which to
eliminate outside competition, as will be seen later (Section 6).

In conclusion, mention should be made of the "basing-point" system, in
which enterprises agree on identical prices, including transportation costs,
for all localities. The aim of this scheme is to ensure that the uniform
price shall be maintained when the product is particularly heavy and
transportation costs are high. If the enterprises are situated in different
localities, the uniformity of prices quoted from their respective production
centres would mean different sales prices at any one selling point, since the
cost of transportation to the selling point varies for each enterprise. The
enterprises, therefore, agree that the uniform ex factory price shall refer
to one of the production centres, generally that of the most important
concern or concerns. The selling price for any locality is then equal to
this basic price plus transportation costs from that production centre to the
locality. The consequence for enterprises not situated at the basing-point
is that the amount taken to represent the cost of transportation is
different from its real cost, which means that enterprises charge different
net prices for comparable transactions.
Paragraph 5. Ancillary conditions

Like the basing-point system, the ancillary conditions referred to are usually only a corollary of price fixing.

The nature of these ancillary conditions as well as the corresponding increases or reductions in price may be subject to determination. This concerns such elements as mode and terms of payment, conditions of delivery, bulk discounts, etc.

Section 2

Practices tending to limit output, productive capacity or the number of varieties produced

Given the fact that the market price is influenced by the available supply, practices aiming at limiting production may complement or substitute the fixing of prices.

In an entente, the most radical method of limiting the output to a level corresponding to the price deemed satisfactory is to allot a production quote to each enterprise, revising the quotas periodically. As the state of the market conditions may change between revisions, a central agency is sometimes charged with re-purchasing the quantities produced which are not absorbed by the market at the agreed price. But control of output is also ensured by less rigid methods. For instance, the parties concerned may undertake not to increase their productive capacity for a given length of time, or a cartel may decide to buy up the plant of certain of its members, in order to slow down activities. Limitation of production can also be the result of spontaneous restraint by the members of an oligopoly.

Limitation can also be qualitative, by reducing the number of types of goods supplied. It may be either the superior or the inferior varieties that are given up; or again, those that are discontinued may not differ in quality from those that remain. Similar restrictions may govern the range of subsidiary conditions of selling or hiring available to purchasers or hirers.

Section 3

Market-sharing

Unlike the two types of practices examined up to this point, market-sharing is necessarily the work of several enterprises, and the division generally concerns either territorial markets or different types of production.

Paragraph 1. Territorial market-sharing

Parties to an entente decide to assign to one another exclusive rights within a given sales territory. But it is not impossible for such regional allotment of markets to take place without a pre-arranged plan, if,
for example, the members of the oligopoly spontaneously refrain from extending their activity beyond the area in which it had previously developed.

It should be noted that the basing-point system, mentioned above in connection with price differentiation, can automatically bring about, under certain conditions, a territorial division of the market, generally more advantageous to those enterprises situated at the basing-point. This would appear to be the case if the ex-factory prices have not been generously calculated, as the enterprises not located near the basing-point will then be led to restrict their activity to the zone surrounding their respective production centres. They will thus enjoy some measure of protection since they will not in practice have to underwrite the transportation costs allowed for in the agreed price. As for those enterprises whose production plants are at the basing-point and who are thus protected from competition of the others, the prices they apply do not include transportation costs, which they alone escape by selling in that locality. But if the ex-factory prices are relatively high in relation to the costs, this automatic division of markets is less likely to occur, for if the aggregate demand is reduced in virtue of the high level of prices, many enterprises will be tempted to extend their sales zone, accepting the extra burden of transportation costs for the sake of the higher total profits they hope to gain, thanks to the greater volume of sales and, perhaps, to the reduction of the costs per unit of output which may result from this development.

Paragraph 2. The allocation of different types of production

The products which are allocated, although they may differ from each other, are competitive by virtue either of the similarity of their use or of that of their method of manufacture.

Concerted allocation affects both current and future manufacture. When an enterprise specializes in a given field of activity without obeying the prime rule of lowering the cost of its product, this is not necessarily the result of an entente, for industrial concentrations may tacitly respect one another, each avoiding trespassing on the other's traditional range of manufacture.

Section 4

Establishment of joint purchasing or sales services and the pooling of profits

In this variety of restrictive business practices, it is also evident that several enterprises are concerned.

Joint sales organizations are generally believed to be commoner than joint purchasing organizations, and are more likely to restrict competition.

If the receipts of the joint sales organization are divided among the participants in proportion to actual sales of their own products, it seems likely that a certain rivalry will persist. Hence this form of agreement is often accompanied by profit-pooling, the evaluation of profits being determined by different methods, for example, be reference to an average period prior to the agreement.
A slight variation of the joint sales method is the central sales office which is kept informed of all the orders received by the enterprises concerned and distributes them according to a predetermined plan. This readjustment of orders naturally goes some way towards the adjustment of profits. The latter can also take place without the intervention of a joint sales agency or central order bureau if an agreement is made fixing individual production or sales quotas, the enterprises which produce or sell more than their quota being obliged to pay a forfeit into a bonus fund for those enterprises which remain within their quota.

Section 5

Restrictive business practices in matters of technological research, patents, etc.

In this field, restrictive business practices are seldom an end in themselves, that is, they are less often used directly to limit competition than indirectly to consolidate other practices.

It may happen, however, that an enterprise decides, or rather several enterprises decide collectively to abstain from exploiting the results of their technological research, at least during a given period corresponding to the amortization of capital tied up in existing methods of production. Where there is no formal entente, it is obviously very difficult to detect this sterilization of technology, except in the case where the parties concerned, having taken out a patent for an invention, refuse to sell the rights to third parties although they themselves are not exploiting the patent. Such Malthusian practices may bear upon new products or new manufacturing techniques alike.

In most cases, then, restrictive business practices in this field do not aim at suppressing in the embryonic stage technological discoveries which have been achieved by their authors, or for which the latter have acquired patents, but at gaining control over the special rights attached to the possession of a patent in order to reinforce an agreement to share the market, or to fight outside competition.

When an agreement concerning territorial division of markets or types of production refers to manufactured articles in the production of which technology plays an important part, the legal protection covering the possession of the patent removes the temptation for the parties to violate the agreement. It suffices, in fact, for each party to obtain for itself the exclusive utilization of the patent if it holds it, or to obtain exclusive rights from the other parties in the territory for either the type of manufacture or the region that belongs to it by right of the agreement. To avoid taking up the question of market-sharing at each new technological discovery, the parties to the agreement may decide to share all their present and future patents (pooling), or grant each other rights of utilization (cross-licensing) for all present and future patents, so that each enjoys the exclusive use of the new techniques in the territorial market or branch of production assigned to it in the market-sharing. Arrangements of this kind can include not only the patents themselves, but also secret, unpatented processes and methods of employing techniques already patented ("the know-how").
The legal protection enjoyed by trade marks provides a similar opportunity for more rigorous application of agreements for market-sharing. The parties use the same trade mark, but each has the exclusive right to own and to use it in the country allotted to it.

In the absence of any entente, the enterprises constituting an oligopoly may rely on trade marks to separate, artificially, their respective fields of activity. If the articles they sell are really in competition with each other as regards their use, the firms must manage to associate their trade mark, in the mind of the buyer, with the alleged special properties of their product.

So far as the practice of using the rights deriving from the possession of patents to eliminate external competition is concerned, the following section deals with this matter.

Section 6

Practices aimed at eliminating external competition

An industrial concentration in a predominant position, or an entente which has acquired a more or less firm hold on the market, is usually concerned with strengthening its position against the remaining competitors and discouraging potential ones. To achieve this end, it may compete with its rivals on the market itself, or hamper their action by depriving them of the necessary means of production or distribution or even of their outlets.

On the market, the method made use of most frequently is to wage a price war against the competitor in the market where he finds or is likely to be able to find his customers; the temporary losses which may be sustained are compensated by profits in other areas or other kinds of products. In the case of an entente, a process of profit adjustment may be set in motion at the same time, so that even third parties not directly concerned with the conflict, because their trade is not threatened, may share the financial burden involved.

Methods aimed at depriving outside competitors of their means of production and distribution or outlets are usually less costly. But it is difficult for the interested parties to put their plan into practice unless they already control the previous or succeeding stages in the productive process of their main activity, or have vertical agreements covering those stages. However, they have the possibility of acting alone, even without integrated production, if they hold patents for manufacturing processes indispensable to the competitor's success.

If needs be they are able to regulate the degree of external competition to which they are exposed as they see fit by subjecting the granting of licences to appropriate conditions limiting the use of the licence such as control over the price or the volume of production. Moreover, enterprises have been known to threaten a competitor with proceedings for violation of
patent rights, although they had no intention of actually bringing action but relied on the competitor's fear of a lawsuit to cause him to negotiate. When enterprises have pooled their patents, the agreement may further stipulate that all parties will furnish assistance to any one among them who brings an action against a third party for unauthorized use of a patent which is likely under the circumstances to alarm the competitor still further.

If the parties concerned wish to deprive their competitors of access to factors of production, they must obtain control of these resources by their own integration or by a vertical agreement. Competitors will then be refused supplies (boycott), or will receive them only subject to discriminatory conditions which place these enterprises in a less advantageous position. According to circumstances, these practices may be disguised as chance circumstances, such as the impossibility of honouring a delivery due to an alleged accident. In exchange for the support which an industrial concentration or entente receives at an early stage in the productive process, it is often obliged to commit itself to order from one supplier only, unless its position as buyer is strong enough to enable it to dictate its own terms.

As regards the disposal of products, the most usual step taken is to persuade distributors to sell only the products of the industrial concentration or the entente, to the exclusion of those of its competitors. The mere threat of ceasing to receive supplies from the industrial concentration or the parties to the entente is sometimes sufficient to induce distributors to adopt this policy. If not, they may be attracted by the granting of a reduction, or may agree to the arrangement out of fear of being penalized by a rise in prices.

Supposing an industrial concentration or entente to have acquired control of the market for one of its products, mainly through the use of the practices described above, it may find itself in a position to obstruct its competitors' activities in other branches of production, by obliging the distributors or buyers whose sole supplier it is for the product in question, to order other products simultaneously (tie-in contracts).

When it is an entente that engages in these practices with a view to closing the market, its object may be either simply to eliminate the competitor or to impose the discipline of the entente on him by forcing him to join it. The choice between these two goals is usually influenced by the degree of prosperity which the parties to the entente enjoy; if their financial situation is precarious in spite of their collective action, then to enlarge their circle may appear less desirable.

Section 7

Restrictive business practices in international trade

Those responsible for restricted business practices are, obviously, the same in international trade as within the domestic economy. In the case of an industrial concentration, they must of course transact business, or own
or control firms, in two or more countries. In this connexion, the remark made in Chapter I of this Report on the complexity of the international organization of certain industrial concentrations is particularly cogent for those who control companies and branches in different countries. The extreme flexibility of company legislation in some countries may have something to do with this phenomenon. With regard to ententes, they have to include enterprises or groups of enterprises which have their headquarters or do business in two or more countries. This formula covers international ententes as well as cartels of exporters or, as the case may be, importers.

The degree of industrial concentration is necessarily measured, from the viewpoint of opportunity to engage in restrictive business practices, in relation to the size of the market. It therefore follows that such practices are more often carried out by ententes than by industrial concentrations in international trade, as compared with conditions within the framework of a national economy.

The principal types of restrictive business practices examined above will be briefly examined in order to list those generally agreed to be the most common in international trade.

Paragraph 1. Price-fixing policies

Speculative schemes, first of all, can only occur exceptionally on international markets because of the size of the latter.

Concerted price-fixing would seem to be quite infrequent on the part of international ententes, which seem to be inclined to use the method of market sharing. However, when the allocation of certain markets has not been rigorously carried out, the establishment of a minimum price can cause competition to slacken between parties to the entente. It would appear that cartels of exporters, for their part, tend to rely more on price-fixing than the international ententes.

Regarding non-concerted price-fixing, if it is true that industrial concentrations cannot acquire a predominant position in international trade as easily as they can within the framework of a national economy, then price leadership or the tacit suspension of price warfare cannot be as common in the first as in the second. But there is nothing to prevent an international entente from assuming price leadership in relation to exporters who do not belong to it and who spontaneously follow its price policy.

Price differentiation, on the other hand, plays an important part in international trade. An industrial concentration or entente within a single country, while it enjoys a stronger position on the domestic market than on the foreign ones, will have a tendency to set its prices much lower on the latter than on the former. This is the well-known phenomenon of dumping. In the case, however, of an international entente operating a territorial division of markets, each member may be led to apply different prices on the different markets allotted to it, according to the intensity, the urgency or the solvency of the demand.
In view of the fact that transportation costs normally constitute a more important factor of international than of domestic trade, it is not surprising that international ententes interested in heavy, homogeneous products should use the basing-point system.

**Paragraph 2. Practices aimed at controlling output**

Let us merely say here that since the failure of the first International Steel Cartel, international cartels in Europe no longer normally concern themselves directly with the production and the investments of their members. But indirectly they do influence them insofar as they induce their members to cut down their supplies by assuring them of a predominant position on certain markets or by fixing minimum prices. The same is true, naturally, if an industrial concentration has, by its own capacity, a predominant position in the international trade in a particular commodity.

**Paragraph 3. Market-sharing**

This is the most frequent method of action among international ententes. When they are composed, as is often the case, of national cartels, the most current form of regional division is that of attributing domestic markets to the appropriate cartel, those remaining being the only ones actually shared. In order not to run counter to the spirit of the agreement by directing trade into other channels, parties are sometimes required not to supply purchasers on their own national market who might be expected to export to markets allotted to other parties.

The sharing of markets on a regional basis may also be the direct consequence of the application of the basing-point system.

The sharing of markets according to types of production, although less common on the international scale than territorial division, is however not infrequent in the form of specialization agreements and is used not only by international ententes but also by export cartels.

Lastly, it is not impossible that industrial concentrations may, without prior agreement, take into consideration their respective positions on certain markets, or in certain kinds of goods, and may seek to benefit only from the sale of new goods or as the result of the introduction of new manufacturing processes.

**Paragraph 4. The establishment of joint sales services and profit-sharing**

Joint sales organizations and central order offices are often set up by international ententes or by export cartels. For the reasons previously mentioned, these solutions are quite likely to lead to a certain amount of adjustment of profits among the parties concerned.

On the other hand it appears that joint purchasing organizations are extremely rare in international trade.
Paragraph 5. Restrictive practices in the field of technological research, patents, etc.

The sterilization of technology is not unknown in international trade. The most frequent practice in this field is for an industrial concentration to take out a patent in a foreign country without any intention of granting the licence unless required to do so by law the country, in order to safeguard its own exports to that country against possible local competition. This situation does indeed savour of technological sterilization, inasmuch as local producers would be able to produce the goods at far less cost than the exporter, taking into account local prices of the factors of production which the technique in question employs.

Exclusive rights attached to patents, or which may derive from licences, can be used, moreover, to protect the application of an agreement for territorial market-sharing between the members of an international entente. This method has been employed in particular when the territory of a country where legislation is in force to prohibit ententes is included in a plan for the market-sharing, and the desired result can thus be obtained with the hope of escaping the letter of the law.

Rival concentrations of industry can avoid too brutal a conflict in international trade by endeavouring to differentiate their productions, in the eyes of the importers, by the expedient of trade marks.

Paragraph 6. The elimination of outside competition

International ententes, exporters cartel organizations, and in some cases industrial concentrations, may try to eliminate competition from outside concerns, in international trade, by means of the various practices enumerated in Section 6 above: price warfare; appropriation of a sufficient number of patents to hamper the activity of competitors; by means of obstacles or discriminatory treatment in the matter of supplies of factors of production, as well as access to distribution channels or sales outlets.

In the great majority of cases, in international trade, it is the exporters who, whether jointly or not, seek to eliminate other exporters or local producers who are in competition with them. But situations also arise where local producers use restrictive practices to eliminate competition from foreign exporters, without referring here to the case, already treated, of a domestic market reserved for local producers by virtue of an agreement to share markets on a territorial basis. To achieve their ends, the producers of the country in question either make a vertical agreement with local distributors stipulating that the latter will be supplied only if they abstain from importing foreign competitive products, or by granting special prices to those among them who accept such a commitment.
After the above examination of the principal types of restrictive business practices generally, as well as those more especially to be found in international trade, and before going on to show the essential characteristics of domestic legislation concerning those practices, this is a convenient point to pause to consider the position taken by economic doctrine in relation to them and to the factors which condition their effectiveness. Moreover, these preliminary remarks may contribute to an understanding of the relevant legal provisions.
CHAPTER III

DIVERGENCE OF OPINIONS CONCERNING THE EFFECTS OF RESTRICTIVE BUSINESS PRACTICES AND THE DIVERSITY OF FACTORS WHICH DETERMINE THEIR EFFECTIVENESS

The simplest way of maintaining a strict objectivity in an analysis of restrictive business practices is to confine oneself to a description of the forms in which they appear. The study of the consequences of those practices upon economic life leads immediately to controversy. This divergency of opinions is understandable, not only because the consequences of such practices depend on different circumstances, but also because the interpretation given them may vary. It is possible, however, to give adequate treatment whilst still remaining neutral by mentioning, without endorsing them, the arguments most frequently used in favour of or in opposition to, restrictive business practices.

An attempt to evaluate the effectiveness of restrictive business practices is little more reliable, since the degree of effectiveness is also influenced by numerous factors; but this question is generally treated more dispassionately.

Section 1

Divergence of opinions concerning the effects of restrictive business practices on economic life

When restrictive business practices are aimed at procuring excess profits for their initiators which do not correspond to any extra effort furnished by them, owing to the hampering of free competition, whether by joint action or not, we believe we may affirm that opinion is unanimous as to the prejudicial effects upon the economy.

Opinions differ, however, on the question of whether in certain circumstances such practices are likely to be conducive to the rationalization of production and distribution on the one hand and, on the other, to bring under control competition to the extent in which the latter may be considered excessive and therefore harmful.

This is to say that restrictive business practices do not meet with unqualified support from the point of view of the interests of the economy as a whole. The issue is between those who condemn such practices per se and those who, whilst being free in their abuse, nevertheless are of the opinion that they may sometimes have useful effects.
Paragraph 1. Restrictive business practices and rationalization

Those who plead for the benefit of the doubt maintain that it is not unusual for restrictive business practices to constitute real steps towards rationalization. They quote the case of industrial concentrations or ententes deciding to close down relatively inefficient firms. Or else they stress the saving which results from decisions taken by ententes regarding production standardization, the specialization of each undertaking in a given branch of production, or the reduction of expenditure on advertising. Or, again, they extol the merits of agreements whereby firms decide to grant mutual patent rights to each other by forming a pool, or by the automatic concession of licences between the parties. Lastly, they believe that in eliminating the servitude of competition, restrictive practices sometimes relieve enterprises of the need to lower their costs by sacrificing the quality of their products.

The whole-hearted adversaries of restrictive business practices do recognize that such measures can, in certain circumstances, bring about a reduction in costs.

But they state, first of all, that the adoption of those measures does not necessarily imply restriction of competition. Thus the closing down of marginal production units is, according to them, much more frequent on the part of industrial concentrations than of ententes, the reason being that the former adopt this procedure precisely in order to increase their capacity for competition if they have not gained control of the market.

Secondly, they do not feel the reduction of costs to be a real advantage unless it is reflected in a lower price for the users of the product or service. Their opinion is that this is not always the case. Even if the price is lowered, the purchasers are not necessarily better off if the saving in price is compensated by what is felt to be a regrettable reduction in the variety of articles offered or in the service given.

Lastly, they claim that restrictive business practices, far from diminishing costs, often tend to make them heavier: in a general way, first of all, by dulling the spirit of initiative in their promoters with the sense of security they bring; and more particularly, in the second place, when they stilt competition which, being unable to act freely on the price, leads enterprises to incur useless expenditure on advertising or transportation in the struggle to compete for purchasers within the aggregate demand which exists at the price fixed.

Paragraph 2. Restrictive business practices and the control of competition

Underlying the affirmation that restrictive business practices are sometimes a desirable antidote to excessive competition are several different cases which should be distinguished from one another.
One of the meanings of this affirmation may be that there is a risk of some competitors underestimating their costs and distorting the market, until such time as they are eliminated by reason of the losses they incur.

To this the critics of restrictive practices object that such a situation is only conceivable, and likely to have really serious consequences for other producers, if the production costs concerned include a high percentage of fixed charges. It is highly improbable, they say, that a newly-created enterprise which has engulfed substantial investments will start off by selling at prices that do not cover its total costs.

The second case is that of a particular market becoming saturated due to a falling-off in the demand or to several producers simultaneously increasing their production capacity, due to ignorance of each other's plans. On this assumption, in contrast to the first case, it is actually a group of already existing enterprises who are ready to forego, should the occasion arise, the integral recuperation of their costs.

Those who are not hostile as a rule to restrictive business practices maintain that by voluntarily curtailing the supply, producers are able to narrow the gap between the price and their total cost, thus recovering a larger portion of their fixed charges, in order to maintain productive equipment which could be very useful if the demand were later to augment.

In the opposite camp, even those who are convinced by this argument ask whether it should be left to the interested parties themselves to determine the appropriate degree of contraction of output. But others go further and fear that producers are always inclined to consider as temporary difficulties which may well be lasting. If this is so, then restrictive practices appear to them to lead directly away from the desirable line of development, by delaying the transfer of productive forces from sectors of activity which are in depression to sectors in expansion. The deceptive stability of the price may even induce others to launch out in that production, thus increasing the excess total productive capacity.

The adaptation of the distribution of production potential to the structure of the demand seems to be even further endangered, in the eyes of those who systematically condemn restrictive practices, if at the same time as the latter render artificially attractive markets that are actually in depression, they shut off access to markets in true development.

The third case to be considered is that of a general economic depression. Then, those who are inclined to show forbearance remark that restrictive practices cannot be blamed for obstructing the natural mechanism, in its task of re-directing productive potentiality, because all markets are, by definition, simultaneously depressed. They also advance a more positive argument, namely, that if enterprises are freed from the immediate concerns of competition they can more easily plan long-term investment programmes, the executive of which will be less affected by the fluctuations of real demand; hence the restrictive practices themselves contribute to the stabilization of economic conditions.
From the opposite viewpoint, although admittedly a general depression distorts the free play of competition, the latter cannot be averted by restrictive practices. The initiators of such practices may react to a diminution of the demand by a more pronounced limitation of current production, or even of investments, than if they were in free competition, thus causing a general reduction of income. Remedies to an economic crisis, so say those who are contemptuous of restrictive business practices, must be sought in an expansion of aggregate demand and not in defensive organization on the part of producers. Moreover, they stress that in normal economic conditions the introduction of restrictive practices can sow the seeds of depression if they result in excess profits which are not re-invested.

To close this survey of the controversy on the effects of restrictive business practices on economic life, we shall set forth some arguments of more relative value, which are cited in support of tolerance towards certain practices. The most general consists in saying that to regard ententes, for example, too severely, for the unavowed reason that they are more easily controlled than the domination of the market by industrial concentrations, is to run the risk of fostering the growth of the latter in consequence. Moreover, especially in the field of international trade, some hold that if enterprises are forbidden by the law of their country to engage in restrictive practices, they will be in an inferior position in relation to the enterprises of other countries which are not subject to the same restriction. It is further contended that when national cartels exist in a given branch of activity but are not capped by an international cartel, the markets of third party importing countries are in danger of being subjected to unrestrained dumping.

Whatever one's opinion on the effects of restrictive business practices, it must be recognized that their existence is dependent upon the effectiveness of these practices.

Section 2

The effectiveness of restrictive business practices

Legal provisions are not in fact the only obstacle met with in the use of restrictive business practices. The effectiveness of such practices may depend on certain conditions within the purview of their initiators or on circumstances outside the latter's control.

Paragraph 1. The intrinsic strength of the initiators of restrictive business practices

Once enterprises turn to the use of restrictive business practices, it would seem that the effectiveness of their action is greater in the case of an industrial concentration than in that of an entente, the likelihood being that the former will be stronger and more permanent. But it is still necessary for the industrial concentration to have real control of the market.
With respect to ententes in particular, if it is true that the effectiveness of their practices depends on the strength of their internal organization, then one may argue that, all other things being equal, their strength will be in inverse proportion to the number of participants and the divergency of their interests, mainly because their respective costs vary more and the purposes of their activity are more dissimilar. It would be well to remember here that if there are only a few major concerns on the market, forming an oligopoly of which the members will have some degree of interdependence by the very nature of things, or even if a larger number of less important competitors exist alongside them, the independence of each of the competitors may be reduced without there having been concerted decision on the part of the different parties.

However, the inherent weakness of an entente can be minimized, or its strength can perhaps be increased, as the result of an organization of the kind discussed in Part One.

A priori, one may think that there is a lesser degree of cohesion in international ententes than in national ententes. This assumption is based on several observations. Firstly, the legal relationship of an international entente is generally looser. Hence we can suppose that the interests of the participants resemble each other closely enough for them to accept of their own free will the discipline of the cartel, without need of detailed contractual stipulations or rigorous methods of control and penalization. Secondly, the existence of an international entente usually implies the prior formation of national cartels, when the enterprises concerned are fairly numerous. The national cartels then take charge, in general, of the execution of decisions. Lastly, the usual policy of international agreements is to avoid as much as possible the clash of different national interests by reserving the domestic market to the national cartel in question.

Paragraph 2. External factors in the effectiveness of restrictive business practices

To go on to the external circumstances influencing the effectiveness of restrictive business practices, firstly should be mentioned the support that may be given them by the public authorities, without going so far as to make them obligatory, as that case rightly belongs to the study of national legislation and regulation bearing on restrictive practices. For example, certain governments have in the past taken part in the negotiation and constitution of international cartels. If the practices are indulged in by State commercial undertakings, the State becomes judge in its own cause.

1 See above: Part One, Chapter 1, Section 2, paragraph 2.

2 This remark refers only to international ententes and not to cartels of exporters within one country, in which there is obviously no reason for internal organisations to be systematically weaker than in international ententes.
The success of the practices also depends on the degree of elasticity of demand and on the possibilities of substitution among rival products.

The more pronounced these two factors are, the more difficult it will be to impose cartel discipline on the producers of the commodities in question if their costs are relatively low. Moreover, it is probable that the effects of competition being restricted by industrial concentrations or ententes will be dissipated in the squabble for customers if the restriction is really unfavourable to trade. On a domestic market, the commonest threat to domestic producers comes from imports, so that the effectiveness of restrictive practices on the part of domestic producers depends on whether the commercial policy of the State leans towards protectionism or liberalism. In this connexion it can be pointed out that in the particular case of dumping, a liberal import regime can neutralize this practice fairly radically since, if the product is not too heavy, it can easily be re-exported back from a foreign market to the domestic market. Even so, for this moderating action to have its effect on imports, there must have been no division of markets among producers by an international entente.

Finally, it is important to consider the factors which influence the fundamental causes of restrictive business practices. If it is true that their origin is generally due to an exceptional aggravation of competition, it follows that by maintaining economic conditions at a satisfactory level, and, in international trade, by avoiding too abrupt a liberalisation of trade or excessive fluctuations in exchange rates, restrictive practices can be discouraged.
PART TWO

THE ATTITUDE OF DOMESTIC LEGISLATION WITH RESPECT TO
RESTRICTIVE BUSINESS PRACTICES

The object of this second part is not to draw up an exhaustive list of
national regulatory measures governing the limitation of free competition.
It is solely in order that the study of present efforts on the international
level might profit from the experience gained at the level of domestic
legislation, and to indicate at the same time how the techniques thus employed
may henceforth affect practices which restrict international trade.

An investigation such as that being undertaken at present can be con­
ceived along many different lines. As it is not our intention to lay the
foundations of a complete now and cohesive regulatory system, we shall
endeavour above all to throw some light on the different methods used in
dealing with the various kinds of restrictive business practices. A first
chapter will be devoted to the means of collecting information concerning
such practices. Next we shall examine measures of repression or control,
considered first independently of the nature of their effects and then in
function of those consequences of their use which are held to be harmful.
After two brief chapters, one describing the methods of enforcement and the
penalties attached to those measures, and the other dealing with the en­
couragement of certain restrictive practices by the State, we shall analyse,
lastly, the scope of national regulation of restrictive practices affecting
international trade.

It goes without saying that by reason of the limited size of this report,
the wide legal field covered in this second part will have to be surveyed
very rapidly; only the most characteristic traits of the different internal
legislations will be described, and consequently the fact of mentioning or
not mentioning a particular method tried out in any given country does not
imply any judgment of value.

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1 This analysis is based on documentation collected by the Secretariat
of the United Nations Organization, at the request of the Economic and Social
Official Records of the sixteenth session of the Economic and Social Council,
Supplement No.11B; and "Restrictive Business Practices - Report on current
legal developments in the field of restrictive business practices", Official
Records of the nineteenth session of the Economic and Social Council, Supple­
ment No.3). It has not been possible to take into account changes which
have taken place since then, except in certain internal legislation with
which the authors of the present report are best acquainted.

As the two documents mentioned above remain the principal source of
information, we shall as a general rule avoid any precise reference to the
different legal provisions or to decisions specifying their scope.
CHAPTER I

MEASURES AIMED AT GATHERING INFORMATION CONCERNING
RESTRICTIVE BUSINESS PRACTICES

The possession of reliable information is a preliminary condition of any action in the field of restrictive business practices. It is all the more difficult to obtain as the initiators of these practices are generally very discreet in this respect. Hence most internal legislations give a fair amount of consideration to measures of information which take two main forms: general investigations and reports on the one hand and registration on the other.

This chapter will not deal with measures intended to help gather information within the compass of repressive proceedings already begun, for then they come under the heading of modes of application of regulations dealing with restrictive business practices. However, it is hard to know where to establish the borderline since for the most part general investigations and registration constitute the normal point of departure of such proceedings (cf., for instance, in Argentine and Danish law).

Section 1

General investigations and reports

Many internal legislations expressly confer on the government of the country in question the right to undertake, of its own accord or upon plaint by individuals (as in Canada) or at the request of Parliament (as in Argentina), general investigation on certain groups of restrictive business practices defined according to their intrinsic nature or to the section of the economy concerned.

Such is the case, for example, in the Union of South Africa, where the Board of Trade and Industries Act of 1944 set up a Commission of Trade and Industry charged with carrying out, at the request of the Minister for Economic Affairs, investigations concerning, among other things, attacks on freedom of trade, and the formulation of recommendations.

In Switzerland, the Federal Department of Public Economy created, by its decision of 28 December 1926, a Commission for the Examination of Prices which in 1936 was entrusted with undertaking an investigation on cartels in Switzerland. Similar measures exist in Canada, Great Britain, India, New Zealand, the United States, Uruguay, etc.

It should be noted that these general investigations, while not of a repressive nature in themselves, can nevertheless act as a preventive. The threat of an investigation and the possible publication of its findings is apt to induce the initiators of restrictive business practices to exercise
some amount of restraint, as experience would seem to have shown in the
described countries. The South African Act, in its 1949 version,
anticipates this psychological effect, since it provides that the Minister
for Economic Affairs may, if the recommendations made by him on the basis
of a report of the Commission are not followed, publish the information he
has received regarding the practices involved and the names of the parties
concerned.

Section 2

Registration

Many internal legislations provide for the compulsory, even automatic,
registration of restrictive business practices with few exceptions which vary
according to the country. Apart from Austria, Denmark, Norway, the
Netherlands and Sweden, one may mention Great Britain, where this procedure
has recently been inaugurated with the Trade Practices Act of 1956. The
obligation to register generally refers only to ententes, but some countries
extend it under certain conditions, to industrial concentrations (Norway and
Denmark).

However, this method of information does not appear to have much success
outside Europe, and has been used only occasionally or as a supplementary
method, for instance in the United States or in Japan, with reference to
ententes of exporters. In Germany, paragraph 9 of the Act of 27 July 1957
makes liable to registration only those ententes which are authorized as
exceptions to the general principle of prohibition.

In contrast to the system analysed in the preceding section, registration
gives a continuous picture of most restrictive practices and allows their
development to be followed. But it loses in depth what it gains in breadth:
registration in itself does not generally allow any evaluation of the
practices registered to be made, except perhaps if the case arises in the
later stages of the procedure. In Austria the situation is quite different,
as only agreements deemed not detrimental to the general interest may be
registered. Moreover, it is difficult to believe in the absolute fidelity
of the register where tacit ententes are concerned, it generally being com-
pulsory to declare the latter. To remedy this difficulty, certain countries
have stipulated that agreements subject to registration must be in a written
form, under pain of being declared void. (Cf. Art. 2603 of the Italian Civil
Code; Art. 2 of the Dutch Decree of 1941; Para. 34 of the German Act of 1957.)

Registration, like the general investigation, is not only a means of
information but has a preventive role: the fear of publicity, though this
varies according to the country, is often sufficient to cause practices that
seem too rigorous to be abandoned. (Norwegian law, for instance, requires
that large companies which are parties to the agreements registered should
furnish annual balance sheets.) The recent British experiment seems to have
proved it once again. Nevertheless, the danger remains, especially in the
case of a part of the economy where there is a large measure of concentration
of industry, that the formal entente thus abandoned will be replaced, between the principal enterprises in that field, by gentlemen's agreements which are kept secret, or by parallel though non-concerted action.

Whatever the preventive effects of general investigations and registration, most States consider that legislation aimed at effectively protecting free competition cannot be limited to those alone, and that repressive measures should also be adopted in order to put a stop to undesirable restrictive business practices. In this respect, the study of different national law systems reveals two basic attitudes, corresponding to two different economic philosophies. Certain countries intend to protect the system of free competition as such, with the idea that it must remain the guiding principle of their economic organization; consequently, they prohibit all restrictive practices regardless of the nature of their effects. Others prefer to remain neutral in this matter, and confine themselves to contending with the results of restrictive business practices which they feel to be harmful. This distinction is often difficult to maintain, as most national legislations are guided by both principles; nevertheless, it will serve as a basis for the next two chapters.
CHAPTER II

PROHIBITION AND REPRESSION OF RESTRICTIVE BUSINESS PRACTICES CONSIDERED INDEPENDENTLY OF THE NATURE OF THEIR EFFECTS

Restrictive business practices should be distinguished according to whether they originate with an entente or industrial concentration.

Section 1

Restrictive business practices emanating from ententes

Internal legislations which favour absolute prohibition of restrictive business principles initiated by ententes generally go back to the ententes themselves, forbidding enterprises to associate for that purpose. This has been a basic principle in Canadian legislation since 1889 and in American legislation since 1890: "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal" (Article 1, Sherman Act). This provision, one of whose effects is to prohibit all ententes concerning prices, production quotas, the division of markets and boycotts, is not peculiar to the North American continent: apart from repeating, in its original form, a longstanding principle of common law which is to be found in French legislation of the Revolution and the Empire periods, it has inspired, more recently, special legislation in countries such as Argentina, Brazil, Costa Rica, Cuba, the Dominican Republic, Ecuador, Guatemala, Japan, Mexico, Panama and, in Europe, the new German Act, and has also found place in the constitutions of all the popular democratic States.

The differences that one notes in the expression of this principle in law are not essentially important: the formula is almost always broad enough to cover all the main types of restrictive business practices enumerated in Chapter II of Part One of the present study, except, possibly, non-concerted practices, with regard to which there is still some confusion. A detailed comparison of these different provisions would not therefore be very useful. Rather, we should like to stress that all these systems of law allow for exceptions to the general rule, sometimes few in number and strictly defined (as in the United States or Canada), sometimes more numerous or outlined in fairly vague terms, so that the general prohibition seems to be robbed of part of its substance (for example in Germany).

However, we must stress that the exact scope of these exceptions is sometimes very hard to evaluate; that would imply a thorough knowledge of the whole economic legislation in the country under consideration, for the development of State intervention has promoted the formulation of special statutes applicable to certain branches where the effectiveness of general
legislation in the matter of ententes is largely paralysed. We shall therefore confine ourselves here to noting, besides those provisions relating to cartels of exporters and which will be examined later, those which for the most part exempt from all control ententes of workers (as in Mexico) when the wording of the general prohibition itself does not exclude them.

Above all, the true character of such legislation can only be appreciated with full knowledge of the way in which it is put into execution. Thus the rigour of American legislation has been softened in many instances by the introduction, into jurisprudence, of the "rule of reason", which consists in subordinating the prohibition of certain restrictive business practices to a qualifying judgment on the nature of their effects. Again, certain countries which have decreed rigorous prohibition do not seem to have set up the necessary organs to apply it.

Legislations which have instituted general prohibition often pay special attention to practices whose purpose is to impose on third parties the respect of certain limitations of free competition, namely, boycotting, price warfare and discrimination. (Cf. for example, Article 34 of the Canadian Combine Investigation Act or in the United States the Robinson-Patman Act.) Such measures are sometimes declared illegal in themselves in States which do not forbid a priori all restrictive practices. Thus, the Swedish Act of 1953 and the British Act of 1956, which are directed only against the harmful effects of those practices, make exceptions, respectively, in the case of resale prices and of their collective imposition, which they prohibit absolutely. In the same way, in countries which have no special legislation against ententes or their abusive practices (for example, Switzerland), it is this type of measures of constraint on the part of cartels which conflict with the terms of private or public law.

For the sake of completeness, mention is made of older and more widespread legal provisions which prohibit certain forms of speculation or cornering of supplies. (Cf. for instance, Article 1 of the Spanish Act of 1939 or the Portuguese Legislative Decree of 1946.) Although often conceived in absolute terms, they nearly all come under the heading of measures whose object is to repress the harmful effects of restrictive business practices, an easily understandable fact since the practices are usually not directed against the functioning of free competition itself, but are rather abusive manifestations of competition.

Section 2

Restrictive business practices initiated by industrial concentrations

Control of such practices, considered independently of the nature of their effects, meets with a serious legal difficulty due to the absence of any explicit or tacit contractual element which characterizes ententes. Consequently a prohibitive measure, if applied mechanically, would attack the very
substance of the economic activity of industrial concentrations. Thus while price-fixing by a cartel can be prohibited in order to restore the liberty of its members, it is hard to see how the fact of establishing fixed prices, in itself, could be forbidden to an industrial concentration. Whereas such a prohibition is usually sufficient to put a stop to boycotts or to discrimination ordered by an entente, that is, to allow the entrepreneurs affected to resume normal business relations with their suppliers or customers, the fact that an industrial concentration acts as if by a single purpose places the legislator in the position of having to institute a veritable obligation to draw together on the part of concentrated enterprises. (Cf., for example, the South African law which permits the government to enact uniform conditions.) Such an obligation is often found in monopolies or oligopolies of administrative law, but is foreign to the traditions of private law in many States.

Consequently, when the legislators did not wish to go quite so far, they were constrained to have recourse first of all to preventive measures which, here again, reach back to the promoters of restrictive business practices: they set certain limits to the development of concentration, by subordinating the formation of trusts or "konzerns" to prior authorization or even by taking steps to break down enterprises which have acquired too much influence.

Measures of this kind, more or less rigorous, are found not only in American and Canadian legislation, but also in Argentina, Australia, Brazil and Japan, as well as in the German Act of 1957 (paragraphs 23-24).

Certain countries have made an attack on a particular form of industrial concentration, consisting in the exchange of managerial staff between enterprises in the same branch or allied branches (as in Belgium or in Brazil). Statutory prohibition of such accumulation is however motivated in no small degree by the wish to protect companies and their financiers against unscrupulous trading of influence.
CHAPTER III

CONTROL AND REPRES$ION OF RESTRICTIVE BUSINESS PRACTICES ON ACCOUNT OF THEIR PREJUDICIAL EFFECTS

Most countries appear to have adopted a pragmatic attitude to restrictive business practices; they consider that favourable effects as well as harmful ones can be expected, and that consequently one should separate the wheat from the tares. Hence, each practice must be subjected to careful inspection so as to measure its possible harmfulness in the light of general criteria or of particular considerations. Only if this test shows a positive reaction sanctions have to be made. Such a system presupposes the elaboration of an appropriate scale of values to serve as an objective basis for such a selection.

It should be noted in this respect that most systems of law usually employ rather general formulae and lay down adaptable rules of conduct, which do little to limit freedom of evaluation on the part of the administrative or judicial authorities charged with applying them. In this connexion we can quote the Swedish Act of 1953 which says that "restriction of competition produces damaging effects, in the meaning implied in this Act, when it unduly influences the determination of prices so far as public interest is concerned; hampers productive efficiency; or renders the economic activity of others more difficult or impossible". In the same way, the British Act of 1948 authorizes the government to repress monopolies and restrain practices contrary to public interest, thereby stressing the need for developing the capacity of production and the productivity of the British economy.

The principle of the new British Act of 1956 is not fundamentally different: while it establishes a general but relative presumption of illegality in the case of all restrictive business practices, that presumption may be overthrown if it is demonstrated that the practice has certain beneficial effects (though their definition is not strictly outlined, the possibilities of application are kept within certain bounds) and also that its harmful consequences are not out of proportion to these advantages. Thus, in spite of the transfer of the burden of proof, this is nothing but a system of suppression of abuses.

This recourse to general criteria, applicable to all varieties of restrictive practices causes certain difficulties in the analysis that follows. From one point of view, it might be necessary to apply successively to each of those varieties, the formula used by all the different internal legislations. Such an operation would be not only tedious but also useless for the general terms used by the legislator acquire concrete meaning only in the light of the administrative or judicial interpretation given to them. The practical impossibility of entering into such a thorough analysis means that this chapter does no more than quote outstanding examples. It will not attempt to describe consistently any complete system of repression of the harmful effects of restrictive business practices but merely to make a selection of the steps taken by the various States with respect to different types of restrictive practices.
Section I

The regulation of restrictive business practices in the field of prices and conditions of sale, purchase and hire

Paragraph 1. The repression of speculative schemes

Control of the abuses of speculation dates back far into the past and, as has already been observed, most countries experience or have experienced measures repressing cornering schemes, especially in the field of commodities of vital importance (as in Bolivia, Costa Rica, Egypt, Peru, Venezuela). The prescriptions of the Italian penal code concerning the destruction of goods with damaging consequences upon domestic output follow the same trend.

Paragraph 2. Regulations dealing with price determination

Here again, the origin of government intervention is of long standing, particularly with regard to the taxation of vital commodities when their price formation appears to have been artificially distorted. Measures directly attacking restrictive practices whose effects on prices seem abusive are more recent, as they imply the use of more delicate techniques.

All the governments which adhere to the principle of repressing abuses have adopted measures concerning restrictive business practices affecting the price of goods, if not also of services (as for instance in Austria). As a rule, these measures are loosely expressed, so that they may apply not only to the direct determination of prices, but also to indirect price-fixing by such subterfuges as profit margins and cost calculating.

The criterion which determines the application of sanctions is usually also defined in very vague terms: (Denmark, "unreasonable prices" in the light of "enterprises working with appropriate modern equipment and according to normal technical and commercial methods"; Guatemala, "unjustified increases in price"; New Zealand, "abnormally high prices", i.e. prices which bring in "more than just and reasonable commercial profits"). It is thus the task of jurisprudence to define more accurately the point at which the action of cartels and industrial concentrations on prices becomes harmful. Hence it is impossible to evaluate the effectiveness of the State's regulating action on the sole basis of the legal provisions.

Whilst the main object of these laws is to control abusive increases in price, it sometimes happens that they also curb selling below cost price, especially when it is aimed at eliminating competition. Such is, for instance, the case in Argentina, Brazil, Cuba and Mexico.

One variation of price agreements should be particularly noted: the case of price estimates. The very fact that the procedure of submitting estimates is intended to forestall collusion seems to stimulate the ingenuity of business enterprises, and the legislator has had to intervene to repres
their abuses all the more diligently since it is usually the defence of public property that is involved. In a great many countries, therefore, the law forbids applicants for a public contract to fix the amount of their tenders by common agreement or even undertake to inform each other of the amount, or to refrain from submitting bids, or to submit their bids in a given order (as for instance, in Panama, the Philippines, Sweden and Turkey). In the same way, the Norwegian law obliges all bidders, parties to an agreement, to inform the adjudicator of its conditions.

Lastly, separate mention should be made of practices aimed at resale price maintenance. Insofar as such prices are individually laid down by the producers, they are often tolerated unconditionally (as in the United Kingdom), or at any rate when they are applied to brand-name products (for example, in the United States). The case is different when they are imposed by an entente of producers, who are in a position to use collective measures of constraint (in particular boycotts). The law of some countries, however, goes further and absolutely prohibits resale price maintenance (e.g. Canada and Sweden).

Paragraph 3. Regulations concerning price differentiation

Much internal legislation gives express consideration to this category of restrictive business practices. Apart from coming within the scope of the general provisions of certain laws, abusive price discrimination is explicitly dealt with in some countries, not only when it is directed against competitors (see above, Section 6) but also when it affects certain categories of purchasers. Such is the case in Norway, and in an even more pronounced manner in Australia and New Zealand.

Here again, legislative criteria remain rather vague, almost as much so as those of common law which does not concern itself with anything less than serious and excessive injury to the interests of purchasers or competitors. American law, however, has attempted to follow more closely the infinite variety of discriminatory practices. Article 2 of the Clayton Act, given greater precision and strength by the later Robinson-Patman Act, endeavours to define as strictly as possible the circumstances in which different prices may lawfully be applied to apparently similar transactions. Profiting by the experience of the years which saw the formation of the great trusts, it attempts to limit the decisive support that a monopoly can receive from discrimination based on purchasing power. The same intention can be found elsewhere, for example in Australian and Canadian law.

Paragraph 4. Regulatory measures covering determination of ancillary conditions

Ancillary conditions concerning supply (or, in some cases demand) are often the object of restrictive business practices, sometimes concurrently with price agreements, sometimes independently of them. This is true of the period granted for payment, discounts and other authorized reductions,
mode of delivery and even of the responsibility of the seller. Hence this is a field where the dividing line between restrictive business practices and normal commercial usage is particularly thin. Consequently, most legislation is very cautious on this subject and intervenes only when the practices are unmistakably aimed at imposing certain prices indirectly, which brings them under the jurisdiction of general clauses in repression of the harmful effects of price agreements. (Cf., for example, the Danish law on agreements in matters of price.)

One category of ancillary conditions, however, receives particular attention, namely, stipulations concerning the terms under which the purchaser is obliged to undertake to order from the same supplier his requirements in other products (tie-in clauses). This unfavourable precedent (which in the United States takes the form of prohibition pure and simple) can be explained by the fact that such agreements may form a basis for effective monopoly; moreover, insofar as refusal to conform to these conditions is punished by the interruption of deliveries, they can be considered as a form of boycott.

Another type of restrictive practice in the matter of ancillary conditions may be noted here: the basing-point system, which constitutes a sort of equal distribution of transportation costs. (See above, Part One, Chapter II, Section 1, paragraph 4.)

The different internal legislations are more hesitant where this is concerned, since this practice has a stabilizing effect which is not, a priori, considered unfavourable.

Paragraph 5: The problem of non-concerted parallel behaviour

The phenomena of conscious parallelism and price-leadership are attracting more and more of the attention of the public authorities, which explains the multiplication of oligopolistic situations. They create a dilemma not only for the economist, but also for the jurist, to whom they offer no hold: in contrast to gentlemen's agreements, they do not even bear the marks of an entente, since they may well result from reasonable competitive behaviour of the part of an enterprise which finds itself in a situation of imperfect competition.

Consequently it is not surprising that in nearly all countries, antitrust laws should have an attitude of embarrassed reserve in this respect: at most, they admit that the phenomena can in certain cases be assimilated to concerted restrictive business practices, but not a priori and in general. This is the position taken not only by the new British Act but also by American statute law. Hence, only a prolonged study could give satisfactory information on the legal treatment accorded to "conscious parallelism"; on the whole, however, it may be said that developments in theory relating to oligopolistic competition have shown that administrative and judicial policy must be prudent and take action only against those forms of price-leadership which are manifestly abusive.
Section 2

The regulation of business practices which limit output or supply

Most internal legislations recognize that limitation of the supply by ententes or concentrations of industry can have damaging effects. Not only may they replace or reinforce direct action on prices, but the obstacles which they place in the way of expansion of the national economy are more patent and even, possibly, more confining in their results.

This is why many laws forbid practices which restrict production to an excessive degree, contrary to public interest (Belgium, Luxemburg, Great Britain according to the Act of 1948, New Zealand). Here again, the basis for declaring illegality is not clearly defined, and nowhere does the law go much further than in Great Britain where it refers to the goal of full utilization of factors of production at a high level of productivity. It is uncommon for any mention to be made of the system of forfeits, often used by cartels which give quotas for their members and which consists of collecting fines from enterprises which overstep their production quota for distribution to those which do not reach it.

Restrictions imposed on output arouse particular feeling when they take the form of physical destruction of goods or the shutting down of enterprises. Provisions which counter such practices (as in Brazil, Portugal or Mexico) are often of long standing, as has already been noted, and are connected with those dealing with speculative schemes or cornering.

In Chapter V mention will be made of the fact that, in certain countries or in certain industries, private allocation of production quotas has been given official blessing which may go as far as declaring a general obligation.

Section 3

Regulations concerning market-sharing

This variety of restrictive practices, while implicitly dealt with in most national law systems, is rarely singled out for special consideration (e.g., in Argentina) and even more seldom expressly and absolutely prohibited. If, nevertheless it has sometimes fallen under the axe of general statutory provisions, as in the United States of America, Canada or Germany, many other countries recognize that it can claim to be the outcome of a desire for rational organization and that, in given circumstances, it limits free competition only moderately.

It is in danger of being declared illegal only when it appears contrary to public interest or when it leads to the creation of a monopoly. Here again, the interpretation of the general provisions of the law must be referred to.
The relative indifference shown by the law in certain countries with regard to market sharing can perhaps be ascribed, in part, to the fact that it is gradually falling into disuse on the national level; the constant improvement of communications and the resultant shrinkage of markets have caused geographical monopolies founded solely on such agreements to become fragile. Hence this method appears nowadays rather as a complement to price agreements. We shall see later that the same does not occur on the international level.

Section 4

The repression of abusive practices in the use of industrial or intellectual property rights and in preventing technological development

In contrast to the one previously cited, this type of restrictive business practice has drawn the particular attention of the legislator, which is understandable in view of the complexity of the legal problems they cause, and above all by their very effectiveness. Their originators never fail to invoke the special prescriptions of industrial or intellectual property rights in support of their claim that they are not bound by the general rules of antitrust law; for example, holders of patents or copyrights always plead in justification of a price agreement, that those property rights give them the exclusive privilege of putting into circulation the goods thus protected; they argue from this, by deduction a majori, that they should be granted facilities for subordinating circulation to the conditions, and in particular to the prices, that they wish to lay down. This is also the reason for which territorial allocation of patent rights and licences for patents has become so frequent.

By virtue of the very conflict of rights which they engender, these practices do not lend themselves to clear-cut solutions. Even in the United States their legal status is sometimes hard to define, in the sense that jurisprudence has not yet determined, in every case, how far the general prohibitions of antitrust law apply to them: whereas territorial division of markets does not seem to be excluded, "tie-ins" and resale price maintenance (save for legal exceptions) have been declared illicit.

In continental Europe, the tendency seems to be to consider industrial or intellectual property rights as exceptions to normal rules of competition (thus, the new German law admits price agreements relating to protected property), although they are limited by special provisions. This notion is often reinforced by the theory of the territoriality of such rights. Forfeiture clauses and the system of obligatory granting of licences for patents and (less frequently, for copyrights) can play an important part in controlling action which would prevent the development of patented inventions; according to these measures, the holder of a patent who does not make sufficient use of it within a certain period (generally two to five years), either
by exploiting it himself or by granting the licence to a third party, or a holder who exploits his patent in a manner contrary to public interest (cf., for example, the Canadian and the Portuguese laws), can be considered as having forfeited his rights or, more frequently, can be forced to grant non-exclusive licences upon conditions fixed, in the absence of agreement, by an independent authority. The effectiveness of such measures, which are incorporated in nearly all patent laws, is judged mainly by the ease with which it is possible for a third party to obtain an obligatory licence.

Industrial or intellectual property rights have given rise to still other abuses. For example, their holders sometimes attempt to evade the legal provisions limiting the period of protection, retarding its commencement by dilatory procedures or prolonging its duration by additional patents; or they seek to extend it beyond its legitimate scope, threatening to bring action for counterfeit against a competitor whose activity is in no way illegal, or forcing the users of the patented property to acquire non-patented complementary goods at the same time - the "tie-in" system. The existence of special provisions repressing such practices (as in British and South African law) confirm the hypothesis that they are not exceptional.

The battle against those who would limit technological development outside the field of patents is a hard one. Hence, general provisions remain the only reliable weapon, sometimes going as far as to make the communication of non-patented technological information obligatory. Methods of enforcement are so delicate, however, that in the main the legislator is constrained to fall back upon a formula assimilating this category of restrictive practices to those which affect the techniques protected (cf., for instance, paragraph 21 of the German Act of 1957).

Section 5

Control of profit-pooling and of the joint management of sales and purchases

Practices of this kind are not necessarily restrictive, save insofar as they constitute the beginnings of industrial concentration. Consequently, the attitude of the legislator with regard to these central sales or purchasing offices and these communities of interests is not generally marked by any reprobation a priori; it cannot be denied that joint purchase services and, in lesser degree perhaps, sales services, are above all measures of rationalization of a kind to bring about substantial savings in expenditure. As for profit-pooling, there is no doubt that it does disturb ideal conditions of competition but that is not its main objective. Hence its absolute prohibition is scarcely conceivable.

Like other types of industrial concentration, these practices are, however, exposed to the danger of becoming diverted from their normal or initial aim and becoming definitely restrictive; thus a sales office, when it comprises most of the main enterprises in the particular branch of industry, can very
advantageously replace a price agreement. In consequence, although they rarely single out, and that only for favourable mention, they may in this case fall within the general provisions to be found in most national laws. Thus, in the United States, according to judiciary law, it would seem that common sales agencies, though not illicit per se, are prohibited by the Sharman Act when, having attained sufficient control of the market, they succeed in imposing a sale price.

Section 6

Repression of schemes intended to eliminate external competition

Internal legislations concerned with repressing the harmful effects of restrictive business practices have given particular attention to measures directed against external competition. There are two explanations of this preoccupation: on the one hand, the fact that these measures constitute the principal threat to the system of free competition and, on the other hand, the fact that they also attack individual liberty.

Boycotting and other means of exclusion are obviously the main targets, being the most dangerous. Whereas certain countries prohibit them a priori (the United States, Canada), special legislation in other countries as well as all systems of common law, forbid them only when they appear abusive in the sense of the aforementioned consideration, that is to say, when they engender a water-tight collective monopoly or when they lead to the ruin of the boycotted party (thus in Norway, France, Switzerland and in common law). In all these systems, the determination of criteria of illegality raises difficulties that are often considerable and tend to create enough uncertainty to weaken the effectiveness of the provisions. In each case, it is necessary to determine to what degree the authors of the boycott control the market and how far foreign or substitute competition obstructs their monopoly; the investigation must extend to the motives of the boycotters to ascertain whether their intention is to eliminate the outsider or simply induce him to join the cartel.

With these reservations, boycotts and clauses of exclusion are regarded with particular disfavour in most countries. In addition, they have the peculiarity of being easily recognizable, as they ordinarily imply formal decisions or agreements, accompanied by penalty clauses. Ententes and monopolistic concerns are therefore often led to have recourse to less obvious means, which have the very appearance of competition. First to be mentioned are discriminatory practices; while their true nature can be dissimulated up to a point by technical or commercial pretexts, they cannot withstand thorough investigation. This cannot be said of price warfare and dumping (at least on the domestic market) for to sell at cheaper prices in the hope of attracting customers is the very essence of free competition. Hence it is necessary to introduce distinctions, generally subtle ones, since most countries have refused to consider selling at a loss as illicit in itself (cf., for example, Cuban law which has particularly fine gradations of
meaning). The application of these distinctions requires a close analysis of price formation and of the motives which can, according to circumstances, justify a price lower than the cost. Because of these difficulties, the effectiveness of proscriptions aiming at repressing price warfare cannot always be taken at face value. (Cf., also Argentina, Australia, Brazil, etc.)
CHAPTER IV

METHODS OF ENFORCEMENT AND PENALTIES ATTACHED TO MEASURES CONCERNING RESTRICTIVE BUSINESS PRACTICES

All the legislative measures which have been outlined in the two preceding chapters imply methods of enforcement and penalties, without which they would remain a dead letter.

Section 1
Methods of enforcement

The first stage in implementing any measure regulating restrictive business practices is to establish the truth of the suspected facts. The general measures of obtaining information mentioned in Chapter I of this second part of the Report normally supply the basis for such investigations by revealing certain practices or agreements that appear suspect. The question is then to know who is to initiate the rest of the procedure and who is to follow it up. In countries which do not use these general methods of obtaining information, the onus of inaugurating procedure falls either upon the persons who believe themselves injured or upon a special government body (in case of need, following an accusation from an individual or another public authority).

Whatever the answer legislation in different countries has found to this problem, the next step is to determine whether the procedure itself, in its first stage at least, should be entrusted to the government or to the law courts or to both.

The second solution is doubtless of longer standing, apart from government intervention against cornering. It could hardly be otherwise, since restrictive business practices were first repressed by means of the general provisions of civil law and sometimes of penal law, whose application is still the province of the judiciary in common law as in civil law countries. Hence States which do not as yet possess special legislation in this field continue to rely wholly on the law courts (as in Switzerland).

The role of the judge is still primordial in many States endowed with antitrust legislation. Thus, American law offers the victims of restrictive practices the recourse of bringing antitrust laws into action straight away in the ordinary civil courts. The same is true of many countries.
This legal procedure, aimed at protecting private interests, is usually accompanied by administrative procedure intended to safeguard the public interest: a specialized government service is instituted, generally within the framework of a ministry dealing with economic affairs acting either upon plaint or, very often, on its own initiative, in order to enforce respect for special legislation on restrictive business practices. (For example, in Germany, Argentina, or Great Britain, and of course in the United States with the Federal Trade Commission.)

This administrative procedure, like the legal one, aims first at establishing the facts of a presumed violation, nearly always by means of an enquiry in which all the parties interested can or should be heard; witnesses are called and, in case of need, an experts report ordered (especially with reference to the accounts: see, for example, Argentine law). At this stage, it is indispensable for the competent authority to have wide powers of investigation, primarily to obtain all the documents liable to throw light on the circumstances of the case.

It often happens that, in the course of the enquiry the enterprises concerned, believing themselves to be treading on shaky ground or wishing to avoid harmful publicity, acquiesce in the view of the public authorities. An agreement is then made between the parties, which, in the United States particularly, takes the form of a "consent decree", that is to say, a decision founded on the understanding between the parties - which excludes the allocation of triple damages to the victims.

Upon the termination of the enquiry - which can be long and voluminous - it is the place of the competent authority, if no transaction has taken place between the parties, to give its decision. Here in practice there are several solutions. The simplest is to attribute powers of decision to the administrative organ which conducted the enquiry (as, in the United States, with the Federal and Trade Commission; in Argentina; in Germany according to the law of 1957). Certain States have, however, deemed it preferable only to confer the power of recommendation on the investigating organ leaving the power of decision to the Ministry upon which it depends (in Canada, the Restrictive Trade Practices Commission; in Great Britain, by the Act of 1948); thus they hope to contribute to the maintenance of not too hostile relations between the organization in question and the industries it is supposed to supervise.

Finally, it must be noted that there is an intermediate solution between the administrative procedure and the legal, which consists in giving the government branch charged with controlling restrictive practices the right to come before a tribunal only as plaintiff (generally after having made a preliminairy administrative survey). This is the case with the new British Act of 1956, according to which the functions of the Registrar of Restrictive Trading Agreements are, essentially, to submit the agreements registered to the evaluation of the Restrictive Practices Court. This, as its name indicates, is a specialized tribunal comprising lay judges chosen for their knowledge and experience of industry, commerce or public affairs.
Even when the decision is taken by the administrative authority (a fortiori, by a specialized tribunal), right of appeal is often provided for, at least on points of law (Great Britain, Act of 1956), sometimes even on points of fact (the new German law). In the United States, enforcement of the decisions of the Federal Trade Commission can be ordered only by a law court.

Section 2

Penalties

Once the decision has acquired force of law, the penalties attached to it must be examined, for if the fact of declaring a given restrictive practice illegal can in some measure act as a preventive, it is generally agreed that the procedure cannot end there.

Penalties inflicted in these cases belong in the main to civil law. The first and most natural is the rendering null and void of agreements contrary to the law. The fulfillment of such agreements — for example, those of exclusivity — can then no longer be required legally, and any measures of constraint privately taken to enforce them would also be illegal. Thus the latent forces of competition can be liberated.

This measure however is not sufficient, in view of the possibility of a gentlemen's agreement taking the place of the cartel. Therefore, by virtue of a principle of law which is not less general, illegal practices entail the obligation for their authors to repair the damage they have caused to the enterprises in question. To accentuate the repressive character and the preventive effect of this rule, American and Australian legislation in particular have decreed, following the example of a rule found in the British Statute of Monopolies of 1623, that damages shall normally be set at three times the effective loss, thus becoming a decidedly heavy penalty.

Other and far more direct civil penalties exist. The latter impose on the authors of illegal practices a veritable obligation to contract on non-restrictive conditions. As has already been mentioned, the compulsory licensing system for patents is known in nearly all countries. Many laws go further and constraining the cartel which seeks to eliminate an outsider to accept it as a member (thus in Swiss or German law), a solution which may, moreover, tend to reinforce the cartel. Other States set even stricter limitations to the contractual liberty of authors of restrictive practices, obliging them to negotiate with outsiders at specific non-discriminatory conditions (as in Argentina or Denmark).
Thus we come now to sanctions of an administrative nature by which the State intervenes directly in economic life to replace, or to oppose, private planning with public supervisory methods. The commonest manifestation is the fixing of prices (provided for by Norwegian, New Zealand and Brazilian law). Other countries resort to indirect administrative penalties, consisting for example in the manipulation of commercial policy (as in India, the Philippines, the Union of South Africa). Finally, some are more draconian, imposing not only fixed production programmes (see Australian law), but also forfeiture of concessions (cf., Argentine law), or even expropriation (cf., the draft legislation of Brazil, 1948).

In the same category should be mentioned orders to break down industrial concentrations, such as are issued in Canada, Japan or the United States. The execution of such decisions is of a nature to raise serious difficulties, so that there may well be doubt as to their effectiveness.

Most law systems also provide for penal sanctions, at least in the second degree, that is to say, in punishment of violations against the decisions of judicial or administrative authorities. Here should be recorded briefly the essential role played in Anglo-Saxon law by the offence of contempt of court, which consists in not submitting to the decision of a court, and also the provisions of many penal codes of the Continental European type, which are more extensive but less rigorous (cf., for example, Article 471, paragraph 15 of the French Penal Code of 1810 and Article 292 of the Swiss Penal Code). Certain restrictive business practices considered illicit are made penal offences by law in many countries. The sanctions then take the form of fines (as in the German law of 1957 or the New Zealand Act of 1910) or even prison sentences (in Argentina, Norway, Japan etc.) not to mention complementary penalties such as confiscation, sequestration, exclusion from public markets or prohibition of commercial activity. It should be noted, in this respect, that the starting point of French and Canadian legislation is precisely the provisions of the penal code prohibiting ententes that restrict free competition.
CHAPTER V

ENCOURAGEMENT OF CERTAIN RESTRICTIVE BUSINESS PRACTICES ON THE PART OF THE GOVERNMENT

The State does not confine itself to combating restrictive business practices. As mentioned above (page 24) the majority of national law systems have admitted that these practices are not necessarily harmful but can have certain favourable effects. Now that State intervention in economic life is constantly increasing, it is not astonishing to find that legislators have sought to learn from these private forms of planning. The use of restricted business practices by the State can take many different shapes.

First of all, the State has frequently favoured economic concentration in constituting public enterprises: nearly all nationalization is accompanied by the phenomenon of concentration of industry, whether in the field of transportation, communications, public services etc. Needless to say, this phenomenon, instigated by the legislator, escapes all preventive control. Moreover, public enterprises, once constituted, generally enjoy a legal monopoly which free them from all direct competition; even more, they are sometimes (though rarely) exempted from the provisions of anti-trust laws, so that they are able to engage in restrictive practices among themselves without fear of retribution (cf., for example, the Japanese law exempts public services and all "other enterprises having, by nature, a monopolistic character").

Similarly, even private law can engender legal monopolies, for example, in the field of industrial and intellectual property, and in so doing they endow private enterprises with highly efficient means of action.

It is more interesting to consider the special encouragement given by the State to private ententes, sometimes directly, sometimes indirectly. Direct support can take the form of conferring the sanction of public law on restrictive practices originating in the private sector. The Belgian Decree of 1935 and the Netherlands Deceee of 1941 gave a large place to this technique which is almost a corporative one. The same phenomenon, however, is found in nearly all countries, limited either to certain determined practices or to particular economic sectors. For instance, the prices fixed by the entente are made obligatory by the State, or are at least exempted from the terms of antitrust law (thus, in the United States in the case of rail or sea transport); or else the obstructions placed by the entente in the way of aspirants to the profession are rendered official by the promulgation of numerus clausus, a requirement clause, or similar conditions (as in the watch-making industry in Switzerland); or again, the quotas set by an entente for its members are maintained by a quota law (as in many countries for the granting of import licences, or in the field of agricultural production).
In most of these cases, the support offered by the State is conditional to a permanent control, more or less strict, which gives the industries concerned a semi-public character.

Indirect encouragement of restrictive business practices by the State is perhaps even more frequent. The role of customs policy in this respect is well known, and the quantitative restrictions which are superimposed on it increase its efficiency still more. These are not, however, the only tools available to the State. The action of subsidies and public contracts, to mention only two more examples, offers opportunities that should not be underestimated. These measures often escape legal analysis, as they have no other basis than a certain policy on the part of the administration. But this need not be the case: the application of commercial policy to such ends is often openly admitted (cf., the Swiss Federal Law on agriculture).

Lastly, one should not ignore the increased aid lent by governments to restrictive practices in times of crisis. The often brutal intensification of competition resulting from the reduction of aggregate demand has led most governments to encourage the moderating influence of cartels, in order to mitigate the collapse of prices while preventing too great a reduction of the production capacity. General laws inspired by this purpose came into being in the thirties, not only in Europe (in particular in Belgium, Germany, Italy, the Netherlands), but also in Japan and even in the United States, where the National Recovery Act of 1933 was moreover declared unconstitutional no later than 1935. In the same period, other countries, such as France, Great Britain, and Switzerland, adopted similar laws, limited however to certain well-defined economic sectors in which price and quota agreements thus received official sanction.

These few notes are sufficient to show that it would be unwise to formulate an opinion on internal legislation in the field of restrictive business practices without giving full consideration to the direct and indirect forms and methods of public intervention in economic life.
CHAPTER VI

PROVISIONS OF INTERNAL LEGISLATION WITH REGARD TO RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE

It goes without saying that the action of governments in this field is of necessity incomplete and fragmentary: insofar as they act singly, the limits of their jurisdiction prevent them from having control over more than one aspect of the practices concerned. The expansion and increasing importance of international trade have nevertheless incited them to act.

By definition, all government measures bearing on restricted business practices are liable to affect international trade. We shall confine our study, therefore, to those of particular importance for international trade, while noting that the very fact of raising obstacles in the way of national cartels is apt to impede the action or even the formation of international cartels, which always presuppose an efficient national organization.

Section 1

Registration formalities

First of all, mention must be made of the particular situation, as regards registration formalities, of ententes in international trade. Several solutions are possible, depending on the purpose of the restrictive practices under consideration.

Ententes concerned with conditions of importation hardly ever escape registration even when they include foreign enterprises among their numbers. The new British law expressly states this, the Swedish law of 1946 and the Danish law of 1952 imply it.

On the other hand, the two latter texts exempt from this formality, again implicitly, ententes concerned with exports; they are aimed only at ententes affecting "prices, production, distribution or transportation in the whole of the country". A similar dispensation is expressly stated in the Austrian law of 1951 and in the new German law. The Netherlands, however, are the exception in that they make no exemptions. The British law of 1956 is more moderate: without going so far as that of 1948 and directly subjecting cartels of exporters to common law, it institutes a more discreet procedure of registration of them with the Board of Trade.

Section 2

Provisions relating to imports

As has just been noted with regard to registration, restrictive business practices affecting conditions of importation are nearly always subject, implicitly, to the general provisions of law. Certain systems of law emphasize this more clearly, thereby recognizing the importance of the
natural check which foreign competition places on the abuse of restrictive practices. Such is the case in Brazil, in Canada, etc.

Other countries, however, believe that imports can also be the fruit of restrictive business practices, in particular, cases of dumping, and allow national producers to defend themselves as far as necessary by other restrictive practices. This preoccupation appears in Australian federal legislation and that of the Philippines, which also resort to the more direct method of prohibiting imports of goods deemed to be in unfair competition with national production.

Section 3

Provisions relating to exports

National law systems have rarely been concerned with restrictive practices relating to the export trade, except to favour them insofar as they serve the interests of the country by reinforcing the position of exporters.

Some of these provisions go so far as actually to exempt the practices from any control. Such is the case, for example, with the German law of 1957 concerning ententes whose aim is to develop exports without prejudice to competition on national territory; and it is even possible to suspend this conditional clause. The British Act of 1956 is hardly less radical: doubtless cartels of exporters remain subject to the Act of 1948 (though with less publicity), but it is expressly provided that the presumption of the illegality of all restrictive practices can be overthrown by the proof that the suppression of the practice in question would substantially reduce the export trade.

The severity of American legislation has been similarly toned down in favour of ententes of exporters: while the fundamental basic principles of the Sherman Act and the Clayton Act are applicable, a priori, to restrictive practices limiting international trade, the Webb-Pomerene Act of 1918 exonerates all associations "entered into for the sole purpose of engaging in export trade and solely engaged in such trade", provided that they do not hinder competition on the national market nor the liberty of other national exporters.

The 1953 Norwegian legislation is the most moderate: while exempting cartels of exporters from the usual controls instituted by it (including registration), it nevertheless provides for some supervision "in order to prevent any situation arising which could damage Norwegian interests or which would appear to contradict commitments made by Norway in virtue of international agreements". In the same way, the exemption decreed by the Mexican constitution is subordinated to legislative authorization and to permanent government control.
Australian federal legislation seems to go much further, since the prohibitions it formulates, although somewhat mitigated, apply to "any person who shall have concluded a contract in matters of trade and commercial operation....or who is, remains or becomes party to a member of an association....restricting or tending to restrict trade and commercial operations".

Section 4

Provisions relating to industrial and intellectual property

Restrictive business practices founded on industrial or intellectual property rights play a very important part in international trade, as is clearly understandable from the developments in international law in this field. By assuring the inventor of a period of time during which he has priority to take out patents in all countries of the Union, and the holder of a trade mark of equally extensive protection by means of international registration, the Convention of Paris and the Madrid Arrangement gave such efficient indirect support to the international action of ententes and concentrations that the legislatures of different countries reacted.

Provisions relating to forfeiture and to compulsory licences for patents (cf., above, Chapter III, section 4) were in fact mainly inspired by the desire to counteract the sterilizing consequences of patents taken out by foreign enterprises with the sole aim of preventing the birth of local competition. This preoccupation is recognized by many patent laws (as in Australia, Austria, Belgium, Canada, New Zealand, Turkey, the United Kingdom, etc.) which refer expressly to the obstacle which the importation of patented goods can constitute for the inception and expansion of national production.

In conclusion, the scope of the legal provisions dealing with practices which restrict international trade seems to be very reduced. Not only is the unilateral action of each State blocked by the understandable fear of provoking inextricable legal conflicts, as well as by the territorial limitation of its power of execution, with special regard to international marketing cartels, but also little progress has been made in wearing down the opposition that springs from national self-interest; the favourable treatment given to most ententes of exporters is sufficient proof of this. It is therefore not surprising that all eyes should now be turning towards truly international solutions, based on mutual co-operation between States.
PART THREE

ATTEMPTS MADE SINCE 1945 TO ACHIEVE
INTERNATIONAL CONTROL OF RESTRICTIVE BUSINESS PRACTICES AFFECTING
INTERNATIONAL TRADE

By a natural reaction against the excesses of nationalism which, in
the economic field — to confine ourselves to the latter — accompanied and
followed the great depression of the 'thirties, a general desire towards
international economic co-operation became manifest after the second World
War. The attempts made to find an international solution to the problem of
restrictive business practices in international trade belong to this new
trend of ideas. It is significant that the first endeavour in this direction
after 1945, the Havana Charter, should have been conceived as part of a
whole, covering all aspects of economic relations between nations.

The Havana Charter, needless to recall, was not adopted in its original
form, but shortened and recast, became the source of inspiration of the
General Agreement on Tariffs and Trade. Chapter V of the Charter, referring
to restrictive business practices, is precisely one of those discarded in
the course of the changes. However, the basic ideas incorporated in
Chapter V still exercise considerable authority in all subsequent inter­
national agreements or draft agreements dealing with this question.

Such was the case, in particular, for the draft established by the
Ad Hoc Committee on Restrictive Business Practices created by the Economic
and Social Council of the United Nations. In its introductory remarks, the
Committee recognized the validity of the three basic postulates of Chapter V
of the Charter, namely: that restrictive business practices affecting
international trade can, in some circumstances, have harmful effects on the
achievement of generally acceptable objectives of international commercial
policy; that in such a situation it may be difficult for States acting
individually to take appropriate measures; and that the difficulty of
setting up international control arises mainly from the divergency of the
opinions held on the problem in different countries.

In these circumstances, the Ad Hoc Committee's draft offered a formula
of compromise very similar to that of Chapter V. Thus separated from other
problems of international economic policy, it has, however, not aroused
sufficient positive interest, up till now, to be put into effect.

Though stagnant on the world level, the trend towards international
action in the matter of practices affecting international trade was towards
regional solutions in Europe. The Council of Europe had already prepared a
draft at the time when the Ad Hoc Committee of ECOSOC was initiating its
work. Then came the era of practical achievements, with the Treaty
instituting the European Coal and Steel Community and the Rome Treaty.

But the hope of finding a solution on a larger scale has not been
abandoned, and the problem has been brought up for consideration many times
in the last few years by the CONTRACTING PARTIES, who have recently been
presented with a very detailed proposal from the Norwegian government,
intended to serve as a basis for discussions.
CHAPTER I

CHAPTER V OF THE HAVANA CHARTER

Right from the outset it should once more be stressed that the provisions relating to restrictive business practices contained in Chapter V were only one element of the Charter which, as its title indicates, was intended to cover the whole field of trade and employment problems in international economic life. This reminder is necessary in order to realize that Chapter V itself sometimes refers to other provisions of the Charter.

We shall endeavour to outline hereafter, the restrictive business practices affecting international trade which it was the intention of the Charter to subject to control, and the means contemplated for exercising it.

Section 1

The restrictive business practices referred to in the Charter

As regards the initiators of restrictive business practices, the Charter takes into consideration practices which are engaged in, or made effective by, "one or more private or public commercial enterprises, or by any combination, agreement or other arrangement between any such enterprises", it being understood that "such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries" (Article 46, paragraph 2, b and c).

This very comprehensive designation seems, in short, to cover all possible cases of industrial concentrations, ententes or non-concerted restrictions applied by more than one enterprise.

Concerning the restrictive business practices themselves, the Charter begins by giving the definition we have reproduced in the introduction to this Report: those which "restrain competition, limit access to markets or foster monopolistic control". Then it immediately specifies its intention to prevent them only "whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the objectives set forth in Article 1" (Article 46, paragraph 1). The Article referred to is, of course, the one stating the general aims and purposes of the Charter.

Then follows a list of the practices under consideration (Article 46, paragraph 3, a - f):

"(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sales or lease of any product;
(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotes or purchase quotas;
(c) discriminating against particular enterprises;
(d) limiting production or fixing production quotas;

(e) preventing by agreement the development or application of technology or invention whether patented or unpatented;

(f) extending the use of rights under patents, trade marks or copyrights granted by a Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subjects of such grants."

This list corresponds fairly closely, except for a few shades of meaning, to the description which we attempted to give of the main types of restrictive business practices (Part One, Chapter II of this Report). However, this list is not absolutely limitative since it adds at the end: "any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices" (Article 46, paragraph 3, g).

It remains to be seen whether, in the argument of this system, the practices in question have harmful effects or not. But this brings us to procedures of control.

Section 2

Methods used in the control of "harmful" practices

Chapter V of the Charter provides, on the one hand, for procedures applicable in special cases and, on the other, for general measures. For the application of both it relies largely on what it calls "the Organization", by which is intended, naturally, the International Trade Organization. The Charter does not, therefore, institute any specialized organization to deal with restrictive business practices.

Paragraph 1. Procedures applicable in particular cases

Two procedures are mentioned, one of consultation and one of investigation.

(1) Consultation procedure

This is open only to an affected Member State which considers that a practice exists which has, or is about to have, damaging effects as indicated in paragraph 1 or Article 46.

Recourse to this procedure must precede the use of the investigation procedure "in the case of complaints against a public commercial enterprise acting independently of any other enterprise" (Article 48, paragraph 1, in fine). In all other cases, the affected Member State has a choice between the procedure of consultation and that of investigation, but the adoption of the first alternative does not exclude the second.
The affected Member State may "consult other Members directly or request the Organization to arrange for consultation with particular Members with a view to reaching mutually satisfactory conclusions".

Furthermore, if the Organization is requested to arrange for such consultations, it is obliged to do so only if it considers such action justified (Article 47).

(2) Investigation procedure

This is, obviously, the more audacious and the more important of the two procedures suggested by Chapter V. We shall deal hereafter with the admissibility of complaints, with the investigation procedure proper and its conclusions and consequences.

(a) Admissibility of complaints

Here the initiative lies with any affected Member State acting on its own behalf or with any Member on behalf of any affected person, enterprise or organization within that Member's jurisdiction. However, in the case of complaints against a public commercial enterprise acting independently of any other enterprise, such complaints may be presented only by a Member on its own behalf. Complaints are presented to the Organization in writing (Article 48, paragraph 1).

Substantial indication of the nature and allegedly harmful effects of the practices must be supplied, and the Organization may request Members concerned to furnish supplementary information, "for example, information from commercial enterprises within their jurisdiction". After reviewing this information, the Organization decides whether an investigation is justified (Article 48, paragraph 3). But this decision does not rest entirely with the Organization, since according to Article 46, paragraph 2, complaints are subject to investigation when they concern practices originating in the manner described in Section 1 of this chapter, and when the practices fall within one of the categories enumerated in paragraph 3 of the said Article 46.

(b) Investigation procedure

The Organization informs all Members of the complaint, and may request any Member to furnish such additional information as the Organization deems necessary. Here mention should be made of a significant proviso, contained in Article 50, concerning the obligations of Member States. Paragraph 3 reads: "Provided that any Member, on notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise". It is true that this loophole is somewhat narrowed by the obligation imposed on Member States giving such
notification to indicate the general character of the information withheld and the reason why they do not consider it essential. On the other hand, one of the general provisions of the Charter lays down exceptions to protect the essential security interests of the Member States.

Moreover, the Organization conducts or arranges for hearings on the complaint, affording "reasonable opportunities to be heard" to "any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of" (Article 48, paragraph 4).

(o) Conclusion and consequences of the investigation

The Organization decides whether the conditions that justify an investigation have actually been fulfilled, and also whether the practice has had, has or is about to have "harmful effects" (Article 48, paragraph 5). It informs all Members of its decision and the reasons therefor (Article 48, paragraph 6).

In the case of an affirmative decision, the Organization may request each Member concerned to take every possible remedial action, and may recommend for this purpose the measures to be carried out in accordance with the Member's laws and procedures (Article 48, paragraph 7). It may also request any Member concerned to report fully on the remedial action it has taken in any particular case (Article 48, paragraph 8).

Thus, the Organization has no means of direct action but must act through the Member States, who, according to Article 50, paragraph 4, bind themselves to take full account of its recommendations. However, this undertaking is qualified in two respects, firstly by the slightly ambiguous formula stating that each Member shall take, in particular cases, whatever action it considers appropriate "in accordance with its constitution or system of law and economic organization"; secondly and above all, by the apparently superfluous precaution taken in Article 50, paragraph 5, of specifying that when a Member does not take action on the recommendations of the Organization, it shall inform the Organization of the reasons therefor and "discuss the matter further with the Organization if it (the Organization) so requests".

In these circumstances, it may be that the most effective instrument of pressure put in the hands of the Organization by Chapter V is the publication of "a report showing fully the decisions reached, the reasons therefor and any measures recommended to the Members concerned", in spite of the reservation that, if a Member so requests, "the Organization shall not disclose confidential information furnished by that Member, which if disclosed would substantially damage the legitimate business interests of a commercial enterprise" (Article 48, paragraph 9). In fact, the
comparison of this report with the information published concerning the measures actually taken by the Member States, should enable public opinion to evaluate the Members' alacrity in conforming to the Organization's recommendations.

The above procedures are applicable only to restrictive business practices affecting trade in commodities, in contrast to the care taken in Chapter V to treat practices affecting services in a special article. This accords with the general tendency of the Charter to concern itself first and foremost with visible international trade.

Appendix: Special procedures applicable in the matter of services

Here the Organization's role is very much more in the background.

The only means of action is consultation. A Member State which considers that there exist restrictive business practices which have or are about to have "harmful" effects, and that its interests are seriously prejudiced thereby, may submit a written statement explaining the situation to the State or Member States to which belong the private or public enterprises engaged in the service in question. Each Member State concerned shall afford opportunities for consultation with a view to effecting a satisfactory settlement (Article 52, paragraph 2).

If no settlement can be reached by this process, and if the matter is referred to the Organization, it shall be transferred to the appropriate inter-governmental organization, if one exists, with such observations as the Organization may wish to make. If no such inter-governmental organization exists, and if Members so request, the Organization may make recommendations, by virtue not of any specific authority in this matter but because of the very broad functions entrusted to it by Chapter VII of the Charter, which defines its statute (Article 52, paragraph 3).

Paragraph 2. General means of controlling restrictive business practices

Chapter V relies on the internal legislations of the Member States or on their concerted action, on the studies carried out by the Organization and on the latter's cooperation with other inter-governmental organizations to supplement the results of the procedures laid down for particular cases.

Independently of the help that each Member State gives the Organization in dealing with the particular cases which the latter investigates, the Member State agrees to take, of its own accord, all possible measures in accordance with its constitution, system of law and domestic economy to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices affecting international trade and which have "harmful" effects (Article 50, paragraph 1).

We should note that, while Chapter V of the Charter encourages Member States in this way to use their legislative arsenal against "harmful" practices, it reserves their rights in that it stipulates that "no act or omission on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly
or restraint of trade" (Article 52). This clause would seem to authorize a Member State to take measures, by virtue of its legislation, against enterprises situated in other countries which engage in restrictive practices described in Chapter V and not directly affecting its own market. Another reservation, in the opposite direction this time, covers the rights and obligations of Member States resulting from other chapters of the Charter than Chapter V, with reference, for example, to trade engaged in by the State or inter-governmental agreements on basic commodities (Article 54, paragraph 1).

In addition, Member States may co-operate with each other for the purpose of making the remedial measures more effective within their respective jurisdictions (Article 51, paragraph 1).

The Organization is authorized to make recommendations to Member States, probably resulting from its enquiries of which we shall speak presently, concerning conventions and laws which relate to restrictive business practices (Article 49, paragraph 2, a).

As regards the Organization's enquiries, it may undertake them on its own initiative, or at the request of any Member or of any organ of the United Nations or of any other inter-governmental organization. These enquiries deal with general aspects of restrictive business practices affecting international trade and with conventions, laws and procedures of all kinds insofar as they are relevant to such practices (Article 49, paragraph 1). The general powers of the Organization imply that it is qualified to publish the results of these enquiries.

Co-operation with other inter-governmental organizations (Article 53, paragraph 4) is no more than the application, in the field of restrictive practices, of a general principle of collaboration stated in Chapter VII, which refers to the statute of the International Trade Organization.
CHAPTER II

DRAFT OF THE AD HOC COMMITTEE ON
RESTRICTIVE BUSINESS PRACTICES OF ECOSOC

When the failure of the Havana Charter as such was generally recognized, the Economic and Social Council of the United Nations took it upon itself to examine the problem of restrictive business practices in international trade. In September 1951, it adopted a resolution (No. 375) charging an Ad Hoc Committee to submit a report on the possible methods of carrying out one of its recommendations requesting Member States of the United Nations Organization to take "appropriate measures and to cooperate with each other" with a view to fulfilling the aims defined in Article 46, paragraph 1 of Chapter V of the Charter. ECOSOC had explicitly stated its wish that these measures should take inspiration from the principles set forth in the said Chapter V.

It was at its Sixteenth Session, in July 1953, that ECOSOC had before it the draft agreement prepared by the Ad Hoc Committee. No general agreement on the draft being reached, the Council decided at its Nineteenth Session, in May 1955, to adjourn examination of the question sine die.

In deference to the wish of the Council, the provisions of the draft agree closely, except on a few points, with those of Chapter V of the Havana Charter. The organizational provisions, however, introduce decided innovations - which is easily understandable, as the International Trade Organization relied on for the implementation of Chapter V was competent to deal with all the problems treated in the whole Charter, whereas the Ad Hoc Committee was concerned only with an organization whose functions would be limited to the particular problem of restrictive business practices.

Section 1

The main provisions of the draft agreement

Paragraph 1. The restrictive business practices concerned

With respect to the origin of the practices, the draft closely follows the provisions of Chapter V of the Charter.

Concerning the practices themselves, two alterations should be noted.

Firstly, in evaluating "harmful effects" Chapter V referred to Article 1 of the Charter. To replace this Article, the Committee affixed a preamble to the text of the Agreement, setting forth general objectives inspired by those of the said Article 1. Defining in greater detail the scope of the preamble, the Ad Hoc Committee said in its report that "the purpose of the listing of a series of objectives is to ensure full examination of pertinent issues, not to enforce analysis of every point in the list, regardless of its relevance."

Secondly, the enumeration of restrictive business practices which made no evaluation a priori of the nature of their effects, whether "harmful" or not, undergoes substantial change in paragraph (e) which, in the Charter, covered only those practices which by agreement prevented the development
or application of technology or inventions, patented or unpatented. The Ad Hoc Committee considered this formula too narrow, as it did not allow for the practice in question being the work of an industrial concentration. It therefore added to the text of this paragraph a sentence covering practices "preventing by...coercion" the development or application of technology "or withholding the application of such technology with the result of monopolizing an industrial or economic field". Even so, according to this draft, the sterilization of technology by a concentration is taken into account only when the latter imposes its will on one or more other enterprises and the limitation leads to a monopoly.

Paragraph 2. Methods employed to check "harmful" practices

(1) Procedures applicable in particular cases

(a) Consultation procedure

The Committee did nothing to change this procedure; it merely replaced, in the French text, the expression "Etat lésé" by "Etat affecté" (the English translation for both terms being "the affected Member"). It went on to explain this nuance by stating its opinion that a Member had the right to adopt the consultation procedure only if it had itself, as distinct from the commercial enterprises within its jurisdiction, been affected by a restrictive business practice.

(b) Investigation procedure

(i) Admissibility of complaints

Following the example of Article 54, paragraph 1 of Chapter V of the Charter, which protects the rights of Members set forth in other chapters of the Charter, the Ad Hoc Committee introduced a provision explicitly exempting from any further investigation by the Organization, restrictive business practices "expressly rendered compulsory by government decrees". It added, however, that if a practice found in one or more countries were not expressly enforced by government decrees in all of those countries, the Organization would be empowered to decide whether the practice should be made the subject of another investigation. Furthermore, it was agreed that when an investigation had been suspended, the Organization could draw the attention of the government concerned to the practice in question.

(ii) Investigation procedure

Only one slight modification should be noted: the suppression of the allusion to the "hearings" that the Organization could conduct or arrange. The important point here is that the Ad Hoc Committee's decision was motivated in particular by the conviction that Chapter V intended to leave it to the Members to conduct the enquiries necessary to assemble the information needed by the Organization.
Appendix: Special procedures applicable in respect of services

The only change worthy of note is the replacement of the expression
"that its interests are thereby seriously prejudiced", referring to Members
who take the course of submitting a statement to the Organization, by the
milder phrase "that its interests are thereby adversely affected".

(2) General means of controlling restrictive business practices

With respect to cooperation between the Organization and other inter-
governmental bodies, the Ad Hoc Committee made an innovation concerning the
Organization's relations with entities having responsibility in the matter
of restrictive business practices and possessing sovereign powers by virtue
of delegation of authority from two or more States - such bodies, for example,
as the European Coal and Steel Community. The Ad Hoc Committee believed that
trade within such a Community should be considered, for the purposes of the
draft agreement, as domestic trade, and that the term "international trade"
should apply only to trade between the Community and countries outside it.
Without making any detailed proposals, the Committee suggested that the
Community be given an opportunity to subscribe to the terms of the draft
agreement, in the same manner as if it were a State party to the agreement and
to undertake the same engagements in the exercise of the powers granted to it
by the treaty establishing it, insofar as those powers allow. We may infer
from this that the restrictive business practices distinctly rendered neces-

Section 2

The draft agreement's proposals regarding organization

After having stressed the limitations of its terms of reference in this
respect, the Ad Hoc Committee explained that in formulating what it obviously
considers as mere suggestions, it was guided by two major considerations,
namely, that the information needed to pronounce on the "harmful" nature of a
restrictive business practice should be assembled and reported upon by
persons at once independent, impartial and having a special knowledge of such
questions; and that the representatives of the different States should be
given appropriate power of control in view of the fact that the essential
interests of governments could be affected by the decisions of the
organization.

The Ad Hoc Committee indicated that it spent a considerable length of
time discussing, without being able to reconcile the opinions expressed, the
question whether the body dealing with restrictive business practices should
be attached or assimilated to an inter-governmental organization concerned
with the obstruction of trade by governmental measures.
These two conditions, which at first sight appear somewhat contradictory, were finally both incorporated in the draft to the Committee's satisfaction, by dividing the functions of the new body among different organs.

Supreme authority and the power of final decision would reside with an organ composed of the representatives of all the States adhering to the Agreement ("Representative Body"). Its decisions would normally be taken by a majority vote.

This Representative Body would delegate substantial powers to a more restricted organ ("Executive Board"), composed of a smaller number of government representatives. To make the Board as representative as possible, the States chosen as members should belong to different categories as regards their type of economy and its degree of development, and their geographical location; and attention would be paid to the fact that certain nations have a great importance economically, so far as their participation in international trade is concerned.

Impartiality and specialized knowledge are the two main qualifications emphasized for the staffing of the organization. Whereas the detailed administrative work implied by the execution of the Representative Body's policy would fall to the lot of an Executive Secretariat, the task of collecting and analysing information would be entrusted to an advisory staff.

The Executive Secretariat would act in the matter of examining complaints, to verify the accuracy of the information supplied, request more information if necessary and, lastly, prepare a report for the Representative Body containing the Secretariat's opinion as to whether, at first examination, the complaints meet the required conditions.

When the Representative Body has decided that an investigation is justified, the advisory staff would examine and analyse the information, then submit a report on the facts revealed, giving an appreciation of the consequences and of the importance of those facts. The function of the advisory staff appears in its full value when we add that it would be in direct contact with the Representative Body, which it would even have to counsel, especially in decisions on the "harmful" effects of a restrictive business practice and in formulating appropriate recommendations regarding remedial action, and that its report would be incorporated in extenso in the report published by the Representative Body.

The draft prepared by the Council of Europe, which we shall proceed to examine, while also referring to Chapter V of the Havana Charter, differs from it far more than the draft of the Ad Hoc Committee of ECOSOC, not only by its regional character, but also because of its important innovations on the score of organization and also in the substance of the agreement.
CHAPTER III

DRAFT OF THE COUNCIL OF EUROPE

As early as August 1949 the Consultative Assembly of the Council of Europe requested the Committee of Ministers to prepare a "draft European convention on the control of international cartels".

The General Secretariat of the Council of Europe undertook the studies, in consultation with the OEEC and the Interim Commission of the International Trade Organization. A report and a draft convention were submitted for comment in March 1951 to all the governments of Member States of the Council of Europe.

Noting that ECOSOC was concerned with the same question, and in order to avoid duplication, the Committee of Ministers instructed the Secretary-General to observe the work thus being done on a world-wide scale.

As an interested inter-governmental organization, the Council of Europe received a copy, for information, of the report submitted to ECOSOC by its Ad Hoc Committee in July 1953. In a note of December 1954, the Consultative Assembly, after having reaffirmed its position on the need for control of restrictive business practices whose effects on international trade were harmful, expressed the opinion that the draft of the Special Committee of ECOSOC seemed to "answer the minimum requirements of an agreement on this subject likely to obtain the adhesion of a great number of States".

As is known, the work of ECOSOC has so far come to naught; hence the Council of Europe has no further reason to postpone action. However, even if the Council decided to re-open examination of the question, it seems unlikely that it would do so solely on the basis of the draft established by its General Secretariat in 1951 as, in the meantime, not only have certain developments taken place, but the draft of the Ad Hoc Committee of ECOSOC and the Treaties of the European Coal and Steel Community and the European Economic Community have seen the light. In the present study we are, of course, obliged to give a description of the document of 1951.

Before entering upon this analysis, we should underline that the courteous reserve of the Council of Europe vis-à-vis the work of ECOSOC did not imply that it believed there would be any conflict of authority between regional efforts in this field and an initiative on a world-wide scale. Concerning the substance of the work, the Council of Europe was of the opinion that an agreement whose field of application was limited to a fairly homogeneous region might go further, and be able in consequence to complement the instrument adopted on a world-wide basis. With regard to its form, the Council recalled that Article 51 of Chapter V of the Havana Charter contemplated concerted action of the Member States, and that the text of that article was incorporated in the draft of the Ad Hoc Committee of ECOSOC.
Section 1
Substantive provisions

Paragraph 1. The restricted business practices concerned

The designation of the origins of these practices is similar, on the whole, to that found in the Havana Charter and in the ECOSOC draft.

As regards the practices themselves, the draft of the Council of Europe, endeavouring to conform to the spirit of the Charter, met with the same difficulties as the Ad Hoc Committee of ECOSOC, arising out of the fact that Chapter V of the Charter refers to Article 1 for the evaluation of the "harmful" effects of the practices. The problem was solved in much the same fashion, by inserting in the draft agreement a preamble which states, in different terms, the general objectives set forth in Article 1 of the Charter.

However, the Council of Europe's draft does not include the addition made by the Ad Hoc Committee of ECOSOC to paragraph (e) (practices which obstruct the introduction of technological developments) of the list of restrictive practices which under certain conditions are subject to investigation.

Both the Havana Charter and the draft of the Ad Hoc Committee of ECOSOC, it will be remembered, carefully avoided qualifying a priori as "harmful" practices which embody the conditions necessary for opening an investigation, so as not to prejudice the results of the investigation. The Council of Europe draft, on the other hand, endeavoured to establish a clear distinction in the text itself between "restrictive practices" and "harmful practices". A commentary prepared in June 1956 by the Research Directorate of the General Secretariat for the Commission on Economic Questions of the Consultative Assembly, expressed the opinion that this departure was perhaps not a particularly happy one.

Paragraph 2. Methods used in the control of "harmful" practices

(1) Procedures applicable in particular cases

Here again, we find the two procedures of consultation and investigation. But whereas the Havana Charter and the draft of the Ad Hoc Committee of ECOSOC offer Member States the choice between these two procedures, or provide that they should, in certain cases, first adopt the consultation procedure, the draft of the Council of Europe insists upon the investigation procedure.
(a) **Investigation procedure**

(i) **Admissibility of complaints**

The draft of the Council of Europe departs from the Havana Charter on one point only, but it is an extremely important one. In fact, the right to submit complaints is given not only to Member States but also to any private party affected, whether an individual, enterprise or organization, who can thus act directly instead of merely submitting the case to its national government who then acts on its behalf. It would even seem that this text should be interpreted broadly enough to enable a private enterprise to bring a complaint against another enterprise established in the same country, provided of course that the practice complained of affects international trade.

However, complaints formulated by private enterprises are acceptable only if directed against a private enterprise and not against a public enterprise. Furthermore, the Council of Europe's draft gives the same interpretation of Article 54, paragraph 1 of Chapter V of the Havana Charter, as the Ad Hoc Committee of ECOSOC, by exempting from investigation "restrictive business practices expressly rendered compulsory by government measures".

(ii) **Procedure and conclusions of the investigation**

Between the stages of receiving the complaint and applying corrective measures, if such are deemed necessary, the draft of the Council of Europe does not differ from the provisions of the Havana Charter, which are closely followed by the Ad Hoc Committee of ECOSOC also, except with respect to the clause we have already singled out concerning hearings.

(iii) **Corrective measures**

Here again, as for the admissibility of complaints, the draft incorporates the provisions of the Havana Charter but goes beyond them. It offers complainants the possibility of appeal to the European Court - which will be described later - if the recommendations addressed to the Member States concerned with a view to terminating the harmful effects of a practice have not been followed.
(b) Consultation procedure

As mentioned above, the procedure of consultation, which otherwise is similar to that described in the Havana Charter, takes second place, in the Council of Europe draft, to that of investigation. This change was motivated by the wish to see the facts established by an impartial body prior to the commencement of the inquiry; it bears witness to the desire of the authors of the draft to be stricter towards harmful practices than the Charter or the Ad Hoc Committee of ECOSOC.

(2) General methods of controlling restrictive business practices

The draft of the Council of Europe is much more discreet than the Havana Charter or the draft of the Ad Hoc Committee of ECOSOC as regards the internal legislation of the Member States. It is at all events clear that it does not intend to make recommendations on this subject to the Members. In a general way, however, and subject to the proviso relating to practices expressly rendered obligatory, each Member is obliged to take all possible measures in accordance with its constitution and system of law or economic organization, to ensure that within its jurisdiction, private and public enterprises do not engage in harmful practices. Moreover, provision is made, as in the other two texts, for general enquiries to be undertaken with respect to restrictive business practices.

The Council's draft would therefore seem to be more cautious in the field of general instruments of control than the United Nations texts, if it were not for the decision to make obligatory the registration of all restrictive agreements within the jurisdiction of two or more contracting parties, that is to say, "any combination, agreement or other form of arrangement between private or public commercial enterprises which results or tends to result in restrictive practices". Thus it must be understood that registration applies not only to harmful practices but to all restrictive practices; on the other hand, from the viewpoint of the origin of the practices, registration affects only ententes and not concentrations of industry. To induce ententes to conform scrupulously to this obligation, the draft stipulates that failure to register gives rise automatically to a presumption of the harmful nature of the agreement, and the burden of proof to the contrary falls upon the enterprises involved. A summary list of the agreements registered is to be published regularly. However, registration is not intended solely to publicize ententes but also to serve as a point of departure for investigations in particular cases. Even without being requested to do so by a contracting party, the Commission of the European Cartel Office may ask the Registrar to investigate cases where the nature of the practices may be presumed to be harmful. Under these circumstances, it is easy to understand why the authors of the Council of Europe draft felt the need to clarify the general criteria according to which they would distinguish at first glance those restrictive business practices whose effects were likely to be harmful.
Lastly, it should be noted that, following the example of the Ad Hoc Committee of ECOSOC, the authors of the draft of the Council of Europe concerned themselves with the relations between the organization they were creating and entities such as the European Coal and Steel Community. Their solution was similar to the one put forward by the Committee, and consisted, briefly, in not ignoring such entities but considering them as States parties to the draft agreement.

Section 2

Organizational provisions

The desire to strike a balance between impartiality and competent knowledge on the part of the consultants, on the one hand, and the interests of the Member States, on the other hand, which inspired the Ad Hoc Committee of ECOSOC, was also present in the authors of the Council of Europe draft. They provided for the European Cartel Office to comprise a Registrar and a Commission.

The Commission would be composed of five members chosen for each separate case by drawing lots, from a panel consisting of a number of members equal to that of the Member States; it would be assisted by two experts also nominated specially for each case. Thus it appears that the organ of decision, as in the ECOSOC draft, is an emanation of the Member States, but in order to facilitate its operation the number of members is simply reduced, instead of the representative body delegating part of its functions to a smaller body.

The desire to introduce an element of impartiality without allowing the interests of Member States to neutralize each other in the decisive phase, which in the ECOSOC text is translated into the attribution to the consultant staff of advisory functions to the representative body, here appears in the form of assistance given to the Commission by experts.

As for the Registrar, he would obviously be chosen outside the milieu of government representatives for his competence in matters of restrictive business practices. Although he does not take part in formulating decisions, the Registrar must be capable of great objectivity, which assumes its full value in the conduct of investigations.

In these circumstances, the most original trait in the organization contemplated by the draft of the Council of Europe is the European Court to which a plaintiff may appeal if no adjustment is made within a given period or if the recommendations formulated by the Commission are not carried out. It should be noted, however, that this Court would probably be the same as the one contemplated by the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950 in the Council of Europe; one may wonder, in that case, whether there is a guarantee of competence as valid as that of impartiality, in this last stage of the investigation on procedure.
The solution of organizational problems which weighed so heavily on the work of the Council of Europe and of the Special Committee of ECOSOC was not so difficult for the authors of the Treaty instituting the European Coal and Steel Community and those of the Treaty of Rome, since the provisions of these two instruments relating to restrictive business practices were only part of a much larger whole, as was the case for the Havana Charter.
CHAPTER IV

PROVISIONS OF THE TREATIES INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY AND THE EUROPEAN ECONOMIC COMMUNITY

(referred to hereafter as Coal-Steel Treaty and Treaty of Rome respectively)

The similarity of the two Treaties, from the viewpoints which interest us – the absence of specialized organs to deal with restrictive business practices, the desire which they manifest to place the burden of controlling such practices upon their originators themselves, and the severity, or apparent severity, of their provisions – invites us to study them together. But this resemblance, which of course is explained in a considerable measure by the influence of the Coal-Steel Treaty on the elaboration of the Treaty of Rome, is far from complete. Paradoxically, therefore, a close comparison will be useful even more from the point of view of making tangible the differences between them than the similarities.

Section 1

The restrictive business practices dealt with

In aiming at imposing control of restrictive business practices at their very source, the two Treaties were led to distinguish clearly between ententes and concentrations of industry.

Paragraph 1. Ententes

Both Treaties, in principle, are concerned with restrictive business practices as such, when they spring from ententes, and not with their harmful effects. To prevent such practices, they simply prohibit ententes. The formulae used to state this principle are almost identical.

Article 65, paragraph 1 of the Coal-Steel Treaty
"There are hereby forbidden all agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, which would tend, directly or indirectly to prevent, restrict or impede the normal operation of competition ..."

Article 85, paragraph of the Treaty of Rome
"The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market ..."
There is, however, an important difference between the two texts. Whereas the Coal-Steel Treaty deals with ententes on the territory of a single Member State as well as with ententes whose action affects trade between several Member States, the Treaty of Rome is concerned only with the second case.

The generality of the prohibition greatly diminishes the interest of the tabulation of forbidden restrictive practices found at the end of the paragraphs just quoted. Of the two, the list furnished by the Treaty of Rome is a little longer.

**Article 65, paragraph 1, in fine** of the Coal-Steel Treaty:

"(a) to fix or influence prices;
(b) to restrict or control production, technical development or investments;
(c) to allocate markets, products, customers or sources of supply."

**Article 85, paragraph 1, in fine** of the Treaty of Rome:

"(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
(b) the limitation or control of production, markets, technical development or investment;
(c) market-sharing or the sharing of sources of supply;
(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract."

It is true that part of the substance of paragraph (d) of the Treaty of Rome is found in Article 60, paragraph 1 of the Coal-Steel Treaty, in its chapter on prices, which forbids in this respect "discriminatory practices involving the application by a seller within the single market of unequal conditions to comparable transactions, especially according to the nationality of the buyer".
Hence it is more important to examine the exceptions that may under certain conditions be allowed, rather than those examples of general prohibition. If these conditions are satisfied, it appears that the High Authority of the European Coal and Steel Community is bound to grant an exception, while this course is optional according to the terms of the Treaty of Rome.

Article 65, paragraph 2 of the Coal-Steel Treaty provides for the authorization, for certain products, of specialization agreements or joint purchase or sales agreements if the High Authority finds: (a) that the agreements will contribute to a substantial improvement in the production or marketing of the products in question; (b) that the agreements are essential to such effects and do not impose any restriction not necessary for that purpose; and (c) that they are not susceptible of giving the interested enterprises the power to influence prices, or to control or limit production or marketing of an appreciable part of the products in question within the Common Market, or of protecting them from effective competition by other enterprises within the Common Market.

Article 85, paragraph 4 of the Treaty of Rome, using a more elastic formula, provides that the prohibition may be declared inapplicable in the case of any agreements between enterprises, any decisions by associations of enterprises or any concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives, nor (b) enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

Paragraph 2. Industrial Concentrations

The principles laid down by the Coal-Steel Treaty and the Treaty of Rome respectively are much more divergent for industrial concentrations than for ententes.

(1) The Coal-Steel Treaty and industrial concentrations

Whereas this Treaty endeavours to trace restrictive business practices back to their source by subjecting new concentrations involving several enterprises to prior authorization, the Rome Treaty expresses only the intention of combating the abuses of concentrations, whether they are new or already in existence at the date of entry into force of the Treaty.
The prior authorization of the High Authority, to which Article 66 of the Coal-Steel Treaty subjects all new concentrations, is however concerned only with concentrations involving more than one enterprise and not with those which result simply from the growth of an enterprise. But concentrations among enterprises fall within the scope of this provision whether they are carried out by a person or an enterprise, or a group of persons or enterprises, whether they concern a single product or different products (naturally within the field of coal and steel) whether they are effected by merger, acquisition of shares or assets, loan, contract, or any other means of control. For the application of the above provisions, the High Authority defines by a regulation what constitutes control of an enterprise.

The conditions to which the Treaty subordinates the granting of authorization are such that it is, in brief, given only if the industrial concentration is not in a position to engage in restrictive business practices even if it wished to do so. Article 66, paragraph 2 says that "the transaction in question will not give to the interested persons or enterprises ... the power:

- to influence prices, to control or restrain production or marketing, or to impair the maintenance of effective competition in a substantial part of the market ... ; or

- to evade the rules of competition resulting from the application of the present Treaty, particularly by establishing an artificially privileged position involving a material advantage in access to supplies or markets".

To relax this control, the High Authority is competent to define the classes of transactions exempt from the requirement of prior authorization. The concentrations in question are of course those whose assets are relatively small or which are composed of small enterprises (Article 66, paragraph 3).

Industrial concentrations involving several enterprises, prior to the entry into force of the Treaty, or benefitting after that date from authorization or from exemption from the requirement of authorization, and industrial concentrations resulting from the growth of an enterprise, do not escape control by the High Authority. The latter ensures that, if they require a predominant position on the market which protects them from effective competition with a substantial part of the Common Market, they do not use that position for purposes contrary to those of the Treaty (Article 66, paragraph 7). It will be evident that this standard used to evaluate practices of industrial concentrations is more comprehensive than those mentioned by the Treaty for the granting of authorizations to new concentrations involving several enterprises. This allusion to very general objectives recalls the similar procedure employed by the Havana Charter and the draft agreements that openly took inspiration from it.
(2) The Rome Treaty and industrial concentrations

The Treaty of Rome exercises no supervision prior to the formation of a concentration, but seeks to control its behaviour once it is formed. Article 86 says:

"To the extent to which trade between any Member States may be affected thereby, action by one or more enterprises to take improper advantage of a predominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall hereby be prohibited."

In addition, it may be noted that, as in the case of ententes, the Treaty of Rome concerns itself only with practices affecting trade between Member States, whereas the Coal-Steel Treaty is also interested in practices whose consequences are restricted to the territory of a single Member State.

Article 86 gives a list of the main types of improper practices carried out by industrial concentrations. Having due regard for the different origins of the practices, it is similar to the enumeration of practices engaged in by ententes which is quoted above from Article 85 of the Treaty.

Paragraph 3. Remarks concerning the restrictive business practices which relate to both ententes and concentrations

(1) Public enterprises

The Coal-Steel Treaty makes no distinction between private and public enterprises. Both are therefore equally subject to the provisions concerning ententes and concentrations.

The Treaty of Rome established more gradations. Its Article 90 provides, it is true, in its first paragraph, that "Member States shall, in respect of public enterprises and enterprises to which they grant special or exclusive rights, neither enact nor maintain in force any measure contrary to the rules contained in this Treaty", and it makes special reference to rules governing competition. But paragraph 2, after laying down that enterprises charged with the management of services of general economic interest or having the character of a fiscal monopoly shall be subject to the rules contained in the Treaty, establishes an exception to that provision "to the extent that the application of such rules does not obstruct the de jure or de facto fulfilment of the specific tasks entrusted to such an enterprise". However, the Commission may, where necessary, issue appropriate directives or decisions to Member States (paragraph 3).
(2) Trade with other countries

While the scope of control is not the same in the Coal-Steel Treaty and in the Treaty of Rome within the Common Market, as the latter considers only practices affecting trade between Member States, both texts completely ignore practices affecting trade between the Common Market and outsiders.

Section 2

Methods employed to control practices

Paragraph 1. General means of control

The importance of general means of control arises both from their preventive character and their strictness. For the record, let us repeat that in both Treaties the governing body applies the principle of prohibition of ententes and that in the Coal-Steel Treaty it requires new concentrations involving several enterprises to obtain prior authorization; both these provisions aim at preventing restrictive business practices by attacking their very roots.

Paragraph 2. Procedures applicable in particular cases

The competent bodies established by both Treaties have to concern themselves with particular cases, either in the practical application of general methods of control, by allowing exceptions to the prohibition of ententes or, in respect of the Coal-Steel Treaty in particular, by granting prior authorization to new concentrations of industry among enterprises, or in the control of restrictive practices carried out by industrial concentrations, whether or not they require prior authorization. The Coal-Steel Treaty is much more explicit in this respect than the Treaty of Rome.

(1) The Coal-Steel Treaty

(a) Exceptions to the prohibition of ententes

The High Authority has the power to grant such exceptional authorizations provided certain conditions are accepted. It may also grant them only for a limited period in order to ensure, before renewing them, that the conditions provided for in the Treaty and mentioned above continue to be fulfilled. In any case, the High Authority is empowered to revoke or modify an authorization "if it finds that as a result of changes in circumstances the agreement no longer fulfils the conditions set forth ..., or that the actual effects of the agreement or of the operations under it are contrary to the conditions required for its approval. The decisions granting, modifying, refusing or revoking an authorization shall be published along with their justification (Article 65, paragraph 2, in fine).

1 A fairly complete description of the action of the High Authority in this field is to be found in the Sixth General Report of the High Authority on the activity of the Community (Luxembourg, 13 April 1958, Volume II, pp. 90 to 111).
It is interesting to note in passing that the maximum fine which can be imposed by the High Authority in case of violation may be raised above the usual level if the object of the agreement is to restrict production, technical development or investments (Article 65, paragraph 5).

(b) Prior authorization of transactions between enterprises which bring about industrial concentrations

In appreciating whether, in particular cases, the conditions laid down by the Treaty for the granting of authorizations, and which are mentioned above, have been satisfied, the High Authority takes account of the size of enterprises of the same nature existing in the Community. It may, in addition, subject such an authorization to any conditions which it deems appropriate (Article 66, paragraph 2, in fine).

In case of violation the High Authority may pronounce fines. Moreover, if a concentration of industry between different undertakings should come about which the High Authority recognizes cannot satisfy the general or special conditions to which an authorization would be subject, it will establish the illegal character of such a concentration of industry by a decision accompanied by a justification; after having allowed the interested parties to present their observations, the High Authority orders the separation of the enterprises or assets improperly associated or the cessation of common control, as well as any other action which it deems appropriate to re-establish the independent operation of the enterprises or assets in question and to restore normal conditions of competition. Should the parties concerned not fulfil their obligations, then the High Authority is empowered to act. The Authority also has the power to make recommendations to States concerned in view of the execution of such a policy within the framework of existing internal legislation (Article 66, paragraph 5, in fine).

(c) Control of restrictive practices carried out by industrial concentrations

If the High Authority recognizes that an industrial concentration having attained a predominant position uses it for purposes contrary to those of the Treaty, it may make the appropriate recommendations to the latter. If such recommendations are not satisfactorily fulfilled within a reasonable period, the High Authority will, by decisions taken in consultation with the government concerned, fix the prices and conditions of sale to be applied by the enterprise in question, or establish manufacturing or delivery programmes to be executed by it (Article 66, paragraph 7, in fine).
(2) The Treaty of Rome

Article 87, paragraph 1, stipulates that within a period of three years after the entry into force of the Treaty, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall lay down any appropriate regulations or directives with a view to the application of the principles set out in Articles 85 and 86. If the Council cannot reach unanimity, a qualified majority vote will be sufficient after the above-mentioned time-limit has elapsed.

Paragraph 2 of the same Article lays down some lines of guidance.

With regard to exceptions to the prohibition of ententes, sub-paragraph (b) states that the particulars of application should take due account of "the need, on the one hand, of ensuring effective supervision and, on the other hand, of simplifying administrative control to the greatest possible extent". As Article 85, paragraph 3 provides for exceptions in favour of agreements or classes of agreements, we are entitled to believe that it would be closer to the spirit of sub-paragraph (b) to proceed whenever possible by general rather than by specific authorizations. Depending on the scope of the authorizations that may be granted, the principle of prohibition of ententes would be more or less deprived of its substance.

Furthermore, sub-paragraph (c) of the same paragraph 2 appears to invite the competent authorities to take account, for both ententes and concentrations, of the structure of the different branches of activity, by establishing the rules for exercising control. Experience has taught us that the probability of restrictive practices appearing is far greater in industries like those of coal and steel than in many other production sectors.

Lastly, sub-paragraph (e) seems to allow for the possibility of relying, in some degree, on national legislation to carry out the general and special measures against restrictive business practices.

Until such time as the particulars of application of Articles 85 and 86 shall be fixed, Article 88 empowers Member States to rule upon the admissibility of any understanding ("entente" in the sense of this Report) and on any improper advantage taken of a dominant position in the Common Market "in accordance with their respective municipal law and with the provisions of Article 85, particularly paragraph 3, and of Article 86". But Article 89, paragraph 1, while stipulating, it is true, that the provisions of Article 88 be respected, says that the Commission "shall, upon taking up its duties,
ensure the application of the principles laid down in Articles 85 and 86. Certain commentators have stressed the risk of contradiction which exists as long as the provisions of Article 87 are not enforced. Be that as it may, the Commission is charged with investigating, at the request of a Member or ex officio, and in conjunction with the competent authorities of the Member States which shall lend it their assistance, any alleged infringement of the above-mentioned principles. If it finds that such infringement has taken place, it shall propose appropriate means for bringing it to an end (Article 89, paragraph 1, in fine and paragraph 2).

Without prejudice to any further amplifications of Article 87, we may recognize forthwith, especially with reference to the special treatment given to public enterprises, that the Treaty of Rome allot a more important part in the control of restrictive business practices to Member States than does the Coal-Steel Treaty. And yet neither provides for action in this field by specialized international organizations whose particular competence might indicate that their attributions should be broader.

The fact that they do not institute specialized organizations dispenses us from making more than a brief survey of the organizational provisions of the Coal-Steel Treaty and the Treaty of Rome, as was the case with the Havana Charter also. We shall note, however, that according to Article 33, paragraph 1 of the Coal-Steel Treaty, the Court, in certain circumstances, has jurisdiction over appeals against decisions or recommendations of the High Authority. We shall stress particularly that notwithstanding the provisions of that Article, the Court is fully competent to judge whether the operation effected is an industrial concentration within the meaning of Section 1 of Article 66 and of the regulations issued in application of that section (Article 66, paragraph 5).

As regards the Treaty of Rome, Article 87, paragraph 2, (d) charges the Council with defining "the respective responsibilities of the Commission and of the Court of Justice in the application of the provisions referred to in Articles 85 and 86".
CHAPTER V
EXAMINATION OF THE PROBLEM OF RESTRICTIVE BUSINESS PRACTICES
BY THE CONTRACTING PARTIES OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

In 1954 the Governments of Denmark, Norway and Sweden expressed to the CONTRACTING PARTIES their opinion that the forthcoming revision of the General Agreement would afford the opportunity of examining the possibility of inserting provisions relating to restrictive business practices. They proposed taking as a basis for discussion the draft of the Ad Hoc Committee of ECOSOC.

In the same year the Government of the Federal Republic of Germany embodied suggestions along the same lines in a draft which was largely inspired by that of the Ad Hoc Committee, but which differed from it on one important point. Whereas the ECOSOC text (like the Havana Charter) left to the Member States, in general, the choice between consultation and investigation, the German draft considered that a Member presenting a complaint should first be obliged to resort to the consultation procedure, and only if that failed could the investigation procedure take place. In short, the German proposal was exactly the reverse of the alteration made of Chapter V of the Havana Charter, by the draft of the Ad Hoc Committee of ECOSOC.

At their Ninth Session, when revising the General Agreement, the CONTRACTING PARTIES examined the question whether they themselves should ensure the application of the international agreement on restrictive practices, the draft of which had been submitted to ECOSOC by its Ad Hoc Committee. They decided to adjourn this discussion until the opinion of the members of ECOSOC should be known.

In 1955, at the Tenth Session, seeing that ECOSOC had not reached agreement on the subject, they decided to postpone the question until the following session.

Then, in 1956, the Government of the Federal Republic of Germany and of Norway formulated new proposals addressed to the Eleventh Session of the CONTRACTING PARTIES. The German suggestion, this time, was to confine action in the matter to gathering information on restrictive business practices and holding mutual consultations among the contracting parties. As for the Government of Norway, it believed that consultations alone would not suffice, and expressed the hope that the CONTRACTING PARTIES would decide to form an interim working party to submit recommendations on the question whether and up to what point the CONTRACTING PARTIES should assume functions of control in the field of restrictive business practices affecting international trade; the recommendations should also cover the provisions to be included in the General Agreement or in a further agreement.

Finally, at their Eleventh Session, the CONTRACTING PARTIES forwarded the two proposals, the German and the Norwegian, to the Interim Commission, inviting it to submit a report and recommendations to the Twelfth Session.
By virtue of this charge, in 1957 the Interim Commission requested the contracting parties to formulate proposals which it could study during its September meeting. In reply to this invitation, the Norwegian Government prepared an explanatory memorandum and a draft agreement to supplement the General Agreement.

At the Twelfth Session of the CONTRACTING PARTIES, the Norwegian Government again put forward its proposal to appoint a working party, and suggested that the CONTRACTING PARTIES should study the matter at their Fourteenth Session on the basis of the report from the working party.

Finally, the CONTRACTING PARTIES instructed the Secretariat to assemble and analyze the existing material concerning restrictive business practices and to submit it to the Interim Commission. After examining this study, the Interim Commission will decide whether it would be appropriate to constitute a working party or panel of experts. If it feels that it cannot give an affirmative reply, that is to say, if it considers that the work cannot go forward immediately, it may refer the question to the CONTRACTING PARTIES at their Thirteenth Session, submitting appropriate recommendations.