

21995A0427(01)

L 95/47

IL-ĠURNAL UFFIĊJALI TAL-KOMUNITAJIET EWROPEJ

27.4.1995

AGREEMENT**between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws**

THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986;

and

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990,

HAVE AGREED AS FOLLOWS:

*Article I***Purpose and definitions**

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

2. For the purpose of this Agreement, the following terms shall have the following definitions:

A. "competition law(s)" shall mean

(i) for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) N° 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision N° 24-54, and

(ii) for the United States of America, the Sherman Act (15 USC §§ 1-7), the Clayton Act (15 USC §§ 12-27), the Wilson Tariff Act (15 USC §§ 8-11), and the Federal Trade Commission Act (15 USC §§ 41-68, except as these sections relate to consumer protection functions),

as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for purposes of this Agreement;

B. "competition authorities" shall mean (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws

of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

C. "enforcement activities" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party; and

D. "anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.

*Article II***Notification**

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

(a) are relevant to enforcement activities of the other Party;

(b) involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;

(c) involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its States or Member States;

- (d) involve conduct believed to have been required, encouraged or approved by the other Party; or
- (e) involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

3. With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:

- (a) in the case of the Government of the United States of America,
 - (i) not later than the time its competition authorities request, pursuant to 15 USC § 18 a (e), additional information or documentary material concerning the proposed transaction,
 - (ii) when its competition authorities decide to file a complaint challenging the transaction, and
 - (iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and
- (b) in the case of the Commission of the European Communities,
 - (i) when notice of the transaction is published in the Official Journal, pursuant to Article 4 (3) of Council Regulation (EEC) N° 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,
 - (ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6 (1) (c) of Council Regulation (EEC) N° 4064/89, and
 - (iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of:

- (a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America; and
- (b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America;

to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to:

- (a) regulatory or judicial proceedings that are public;
- (b) intervention or participation that is public and pursuant to formal procedures; and
- (c) in the case of regulatory proceedings in the United States, only proceedings before federal agencies.

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Article III

Exchange of information

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II (5).

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article IV

Cooperation and coordination in enforcement activities

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

- (a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;
- (b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
- (c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
- (d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V

Cooperation regarding anticompetitive activities in the territory of one Party that adversely affect the interests of the other Party

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.

3. Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI

Avoidance of conflicts over enforcement activities

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.
2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.
3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:
 - (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared to conduct within the other Party's territory;
 - (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;
 - (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;
 - (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

- (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and
- (f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

Article VII

Consultation

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

Article VIII

Confidentiality of information

1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest

extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article IX

Existing law

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States.

Article X

Communications under this Agreement

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI

Entry into force, termination and review

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved.

The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at Washington, in duplicate, this twenty-third day of September, 1991, in the English language.

For the Commission of the European Communities

For the Government of the United States of America

EXCHANGE OF INTERPRETATIVE LETTERS WITH THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Dear [name],

As you are aware, on 9 August 1994, the Court of Justice of the European Communities held that the European Commission was not competent to conclude the "Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition rules".

In order to remedy this situation, the Council has decided on [date] to conclude the Agreement itself. However, as the Agreement will now be concluded by the Council on behalf of the European Community and by the Commission on behalf of the European Coal and Steel Community only, certain corrections of errors in the text of the Agreement are necessary. These are set out in detail in the Annex to this letter, which forms an integral part of this letter.

As these corrections do not affect the substance of the Agreement, we consider that they can be made through an exchange of letters. We should therefore be grateful if you would confirm your acceptance of the corrections contained in this letter.

Moreover, in order to ensure a clear understanding of the European Communities' interpretation of the Agreement, we set out below two interpretative statements:

1. In the light of Article IX of the Agreement, Article VIII (1) should be understood to mean that the information covered by the provisions of Article 20 of Council Regulation 17/62 may not under any circumstances be communicated by the Commission to the US antitrust authorities, save with the express agreement of the source concerned.

Similarly, the information referred to in Articles II (6) and III of the Agreement may not include information covered by Article 20 of Regulation 17/62 nor by similar provisions of regulations of equivalent application save with the express agreement of the source concerned.

2. In the light of Article VIII (2) of the Agreement, all non-public information provided by either of the Parties in accordance with the Agreement will be considered as confidential by the receiving Party which should oppose any request for disclosure to a third party unless such disclosure is:
 - (a) authorized by the undertaking concerned, or
 - (b) required under the law of the receiving Party.

This is understood to mean that

- each Party assures the confidentiality of all information furnished by the other Party in accordance with the applicable rules, including those rules intended to assure the confidentiality of information gathered during a Party's own enforcement activities,
- each Party shall use all the legal means at its disposal to oppose the disclosure of this information. The European Communities recall the principles which govern the relationship between the Commission and the Member States in the application of the competition rules as enshrined, for example, in Council Regulation 17/62. The Commission after notice to the US competition authorities, will inform the Member State or Member States whose interests are affected of the notifications sent to it by the US antitrust authorities. The Commission, after consultation with the US competition authorities, will also inform such Member State or Member States of any cooperation and coordination of enforcement activities. However, as regards such activities, either competition authority will respect the other's request not to disclose the information which it provides when necessary to ensure confidentiality, subject to any contrary requirement of the applicable law.

We should be grateful if you would also confirm that these interpretative statements do not present any difficulties for the US Government.

Yours sincerely,

ANNEX

CHANGES TO THE TEXT OF THE AGREEMENT NECESSITATED BY THE CONCLUSION OF THE AGREEMENT BY THE COMMISSION ON BEHALF OF THE EUROPEAN COAL AND STEEL COMMUNITY AND BY THE COUNCIL ON BEHALF OF THE EUROPEAN COMMUNITY ⁽¹⁾**Title**

Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws

Parties

The European Community and the European Coal and Steel Community on the one hand (hereinafter referred to as "the European Communities")

Recital N° 2

Noting that the European Communities and the Government of the United States of America share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Execution

For the European Community

For the European Coal and Steel Community

For the Government of the United States of America.

⁽¹⁾ All changes have been underlined (italic in this Official Journal)