

Article 6(2) – Competition

Notes and General comments regarding the whole article

Final Act as adopted (17/12/94)
CONF 104 (Text for adoption) (14/09/94)
Understanding 7 (With respect to Article 6)

- (a) The unilateral and concerted anti-competitive conduct referred to in Article 6(2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.
- (b) “Enforcement” and “enforces”* include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorization.

Interim text (25/06/94)
Understanding 7 (To Article 7)

- (a) The unilateral and concerted anti-competitive conduct referred to in Article 7(2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.
- (b) “Enforcement” or “**E** enforces” includes action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorization.

Interim Text (20/06/94)
Understanding 7 (To Article 7)

- (a) The unilateral and concerted anti-competitive conduct referred to in Article 7(2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.
- (b) “Enforcement” or “Enforces” includes action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorization.

Compromise text [CONF 98] (22/04/94)
Ministerial Declaration 6 (To Article 7)

* *Ed. note:* The word “enforces” was with capital E in the Interim text of 20/06/94 and changed in the Interim text of 25/06/94.

Interpretative understandings:

The unilateral and concerted anti-competitive conduct referred to in paragraph (2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.

“Enforcement” or “Enforces” includes action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorization.

ECT 7 [CONF 96] (17/03/94) Article 7 - Competition <i>Ministerial Declaration 6 (To Article 7)</i>	ECT 6 [CONF 82] (20/12/93) Article 7 - Competition <i>Ministerial Declaration 5 (To Article 7)</i>	ECT 5 [CONF 72] (11/10/93)¹ ECT 4 [CONF 64] (07/07/93)¹ [Article 7] - Competition <i>Ministerial Declaration 5 (To Article 7)</i>	ECT 3 [CONF 60] (01/06/93)¹ ECT 2 [CONF 56] (01/05/93)¹ [Article 7] – Competition <i>Ministerial Declaration 4 (To Article 7)</i>
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Interpretative understandings:

The unilateral and concerted anti-competitive conduct referred to in paragraph (2) is to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.

[“Enforcement” or “Enforces” include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further laws granting or continuing an authorization.]²

Chairman`s note

Negotiations in the Plenary finished.

(Compromise text) ECT 1 [CONF 50] (15/03/93) <i>Ministerial Declaration 3 (To Article 7)</i>
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Interpretative understandings:

The unilateral and concerted conduct referred to in paragraph (2) is to be defined by the Contracting Parties in accordance with their laws and may include exploitative abuses.

Enforcement action shall include any application of competition law by way of investigation, administrative action, or proceeding conducted by the competition authorities of a Party.

BA-37 (01/03/93) [Article 8] – Competition <i>Ministerial Declaration 4 (To Article 8)</i>

Norway contingency reserve. **Russian Federation** scrutiny reserve on changes.

¹ **Norway** contingency reserve pending Article 1(5).

² **Australia** scrutiny reserve.

Ministerial Declaration 4 (To Article 8)

Interpretative understandings:

The unilateral and concerted conduct referred to in paragraph (2) is to be defined by the Contracting Parties in accordance with their laws and may include exploitative abuses.³

Enforcement action shall include any application of competition law by way of investigation, administrative action, or proceeding conducted by the competition authorities of a Party.⁴

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BA-35 (09/02/93) BA-31 (21/12/92) [Article 8] – Competition

Norway contingency reserve.

Chairman's note

The accompanying Ministerial statement shall contain these interpretative understandings:

[Anti-competitive conduct]⁶ may include pricing behaviour designed to undermine the operation of a competitive market or to benefit the enterprises) involved to the detriment of other parties in a

³ USA scrutiny reserve.

⁴ Japan waiting reserve.

⁵ **Australia** is sympathetic to the intent of Article 8, which is essentially to oblige those countries which do not currently have effective competition laws in operation, to work to alleviate market distortions and barriers to competition, including through effective legislation against anti-competitive behaviour. The Australian Government has developed effective-legislation in this area through the Trade Practices Act. For longstanding historical and constitutional reasons, Australia would not be able to apply and enforce the obligation relating to anti-competitive conduct in this paragraph with respect to the activities of Australia State and Territory Governments.

Australia also questions whether the obligation could be effectively applied and enforced by other parties to the negotiations on the Basic Agreement. In particular, Australia draws attention to the "State action" doctrine under United States anti-trust law and to the exemptions under Article 90 (2) of the Treaty of Rome.

To resolve this problem, **Australia** proposes one of the following two solutions:

Either

(a) the inclusion of the following wording in the interpretative understandings:

"The Article is not intended to oblige Contracting Parties to enact laws or make regulations to alleviate relevant anti-competitive conduct where presently statutory exemptions exist in their laws";

Or

(b) strengthen a wording proposed by Japan and Canada under footnote 8.6. The wording, which could also be included in the interpretative understandings, would then read as follows:

"Where Contracting Parties already have comprehensive domestic competition laws, the scope, Interpretation or enforcement policies applicable to those laws shall not be affected by this Article, nor shall it oblige them to enact further laws."

Australia considers that Article 8 (2), as currently drafted, could be interpreted as imposing a substantive obligation on Contracting Parties to amend their legislation to override statutory exemptions where such exemptions exist for state government instrumentalities.

⁶ **Canada** requests insertion of the following language: "is to be defined by the individual laws of the Contracting Parties and".

manner which would not be possible in a competitive market. An example might be unreasonable price discrimination between comparable consumers seeking similar supplies.]⁷

[Enforcement action may include investigation activities and judicial or administrative remedies by the Contracting Party or its competition authorities, or available to third parties, in accordance with the laws and rules of the Contracting Party concerned.]⁸

Chairman's conclusions

After discussion on 18 December 1992 WG II was not able to make any further progress towards agreement. The Chairman then established a Sub-Group of competition experts chaired by EC and composed of USA, Canada, Japan and Australia to meet in Brussels. EC agreed to make all necessary organisational arrangements.

The Sub-Group should seek to resolve all remaining problems under Article 8. To facilitate its deliberations the Legal Sub-Group made its recommendations on para (1).

Legal Sub-Group report*

The complete legal opinion on para (1) is contained in document 7/93, LEG-4 of 2 February 1993. The substance of its conclusions is as follows:

- the phrase, "subject to their existing international rights and obligations," in Article 8(1) is suggested to be clarified or deleted;
- the phrase, "in [relevant]⁹ markets", is suggested to be deleted;
- Working Group II is suggested to decide, on a policy basis, whether to delete from paragraph (1), or to add to paragraph (2), the words, "insofar as they may affect trade between Contracting Parties";
- the last line of paragraph (2) is suggested to be revised by incorporating language from paragraph (1), so that it would read, "markets relevant to extraction, production, conversion, treatment, carriage (including transmission, distribution and marketing) and supply of Energy Materials and Products".

BA 26 (25/11/92)

BA 22 (21/10/92)

⁷ USA cannot concur with this lengthy text which it considers to go beyond the original Chairman's draft of Room Document 18 of 17 November 1992. In USA's view the current broad language of para (2) is sufficient to achieve the twin goals of (i) requiring Contracting Parties to establish mechanisms to discipline anti-competitive conduct, while (ii) enabling individual Contracting Parties to decide what specific mechanisms to establish.

⁸ USA is of the opinion that this definition is not necessary. Moreover the reference to remedies "available to third parties" is in its view confusing and inaccurate, since the point of para (5) is that notified Contracting Parties may undertake enforcement action at the request of notifying Contracting Parties. The activities of third parties are irrelevant.

If the definition is deemed necessary USA suggests to consider something along the lines of USA-EC Antitrust Cooperation Agreement: "Enforcement activities shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party."

* *Ed. note:* The comment on the Legal Report appears only in BA-35..

⁹ **Australia** supported by **Japan** wants to substitute with: "their own".

BA 18 (18/09/92)
BA 15 (12/08/92)
BA 14 (24/06/92)
BA 13 (19/06/92)
[Article 8] - Competition

Norway scrutiny reserve on whole Article.

Addendum to BA 6 (27/01/92)
Article 8 – Access to Markets

Chairman's note

New Article.

Paragraphs (1) to (3) above are based on the provisions of the EEA agreement which replicate provisions of the Treaty of Rome. The same articles are incorporated by direct reference in the EC's Association Agreements with Hungary, Poland and CSFR.

An alternative approach might be to remove much of the detailed provisions and instead require Contracting Parties to restrict and prohibit concerted practices etc. between energy undertakings which distort competition, and abuses by energy undertakings with monopoly or dominant positions, without most of the explicit detail on what precisely was to be prohibited or permitted. But, as a minimum, Contracting Parties would undertake to prevent such activities which

- (a) denied other undertakings access to energy markets on commercial terms;
- (b) led to unfair restriction of competition; or
- (c) involved discriminatory pricing practices.

Under this approach Contracting Parties with existing effective competition authorities and laws would undertake to ensure that their authorities could apply such laws in the energy field to achieve these objectives. There would also be provision for co-operation between authorities in different Contracting Parties, and assistance to those Contracting Parties without effective competition laws and authorities to establish them. The aim of minimising monopolies would remain in Article 9.

Addendum to BA 4 (5/11/91)
Article 7 - Energy Markets

New wording suggested by Chairman in light of extensive discussion in WG II meeting of 16-18 October.

Many delegations pointed out the problem of distinguishing between monopoly and dominant position.

<p>BA 4 (31/10/91) Article 7 – Energy Markets</p>
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New wording suggested by Chairman in light of EC, Japan and US comments.

(USA): the scope of the Article is unbalanced. Energy Materials and Products in square brackets dependant on the definitions.

Many delegations pointed out the problem of distinguishing between monopoly and dominant position.

<p>BP 2 (11/09/91) <i>Explanatory Memorandum</i></p>
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Article 7 establishes the free market principles which shall apply in order to promote efficiency in energy production, distribution and consumption:

- (a) market pricing where there is no monopoly or dominant position;
- (b) where a monopoly or dominant position exists, to ensure that this emulates free and competitive market operation, with particular reference to pricing;
- (c) in a monopoly or where there is a dominant position, pricing and other conditions or operations to be transparent, in order to reduce opportunities for monopoly pricing, discrimination and cross-subsidy.

Article 6.2

<p>ECT as adopted (17/12/94) CONF 104 (Text for adoption) (14/09/94)</p> <p>Article 6.2 - Competition</p>	<p>Interim text (25/06/94) Interim text (20/06/94) Compromise text [CONF 98] (22/04/94)</p> <p>Article 7.2 - Competition</p>
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Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector.

<p>ECT 7 [CONF 96] (17/03/94) ECT 6 [CONF 82] (20/12/93)</p> <p>Article 7.2 - Competition</p>	<p>ECT 5 [CONF 72] (11/10/93) ECT 4 [CONF 64] (07/07/93) ECT 3 [CONF 60] (01/06/93) ECT 2 [CONF 56] (01/05/93)</p> <p>[Article 7].2 - Competition</p>
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Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in [Economic Activity in the Energy Sector.]¹⁰

(Compromise text) ECT 1 [CONF 50] (15/03/93)
Article 7.2 – Competition

Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct affecting its market in areas covered by this Agreement.

BA-37 (01/03/93)
[Article 8].2 - Competition

Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct affecting its market in areas covered¹¹ by this Agreement^{12 13}

BA-35 (09/02/93)
BA-31 (21/12/92)
[Article 8].2 - Competition

Contracting Parties shall ensure that within their jurisdiction they have and enforce such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in markets relevant to areas covered above by this Agreement.¹²

BA-26 (25/11/92)
[Article 8].2 - Competition

Contracting Parties shall ensure that within their jurisdiction they have and enforce such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct¹⁴ in markets relevant to areas covered above by this Agreement.¹⁵

¹⁰ **Canada** and **Australia** scrutiny reserve.

¹¹ **USA** would like to consider whether to reinsert the word “above”. **USA** was asked to consider lifting the footnote by 2 March 1993.

¹² **Australia** would like to keep the words “insofar as they may affect trade between Contracting Parties” to be inserted in paragraph (2). During the WG II meeting on 24 February 1993 AUS committed to submit explanation of its concerns in writing and draft an interpretative note for Ministerial declaration. The explanation and suggestions are recorded in Annex II of BA-37.

¹³ **Japan** and **Canada** wish to retain as a reminder the possibility of proposing this additional wording: “Where Contracting Parties already have such laws, their scope, interpretation or enforcement shall not be affected by this Article”.

Canada reserve contingent to what happens to the rest of the Article. **Japan** will draft interpretative note for Ministerial declaration on this issue by 5 March 1993.

¹⁴ In the accompanying document to the Basic Agreement it will be noted that anti-competitive conduct includes unjustified price discrimination as elaborated in the individual laws of the Contracting Parties. Subject to scrutiny reserve.

BA-22 (21/10/92)
BA-18 (18/09/92)
BA-15 (12/08/92)
[Article 8].2 - Competition

Contracting Parties shall ensure that within their jurisdiction they have and [enforce]¹⁶ such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct¹⁷ in the areas covered by this Agreement.

[Where Contracting Parties already have such laws, their scope, interpretation or implementation shall not be affected by this Article]¹⁸.

BA-14 (24/06/92)
BA 13 (19/06/92)
[Article 8].2 - Competition

Contracting Parties shall ensure that within their jurisdiction they have and [enforce]¹⁹ such laws, as are necessary and appropriate to address unilateral and concerted anti-competitive conduct¹⁸ in the areas covered by this Agreement.

[Where Contracting Parties already have such laws, their scope, interpretation or implementation shall not be affected by this Article]²⁰.

BA 12 (09/04/92)
Article 8.2 - Competition²¹

Contracting Parties [shall]²² ensure that within their jurisdiction they have and implement laws, addressing unilateral and concerted anti-competitive conduct²³ in the areas covered by this Agreement. [Where Contracting Parties already have such laws they²⁴ shall not be affected by this Article].

Contracting Parties which have not yet adopted such legislation shall see to it that new legislation does not conflict with the contents of this Agreement.

¹⁵ In case no agreement be reached on substance of Article 8 some delegations may wish to propose this additional wording:

"Where Contracting Parties already have such laws, their scope, interpretation or enforcement shall not be affected by this Article".

¹⁶ USA scrutiny reserve.

¹⁷ EC, United Kingdom suggest insertion of "and exploitative abuses".

¹⁸ Contingency reserve by Japan and USA. USA is considering, if necessary, to submit a particular wording to the Secretariat.

¹⁹ USA scrutiny reserve.

²⁰ Contingency reserve by Japan and USA. USA is considering, if necessary, to submit a particular wording to the Secretariat.

²¹ Norway will propose an alternative text for whole para 2, which will be circulated prior to 27 April meeting.

²² USA suggests "should".

²³ EC suggests insertion of "and exploitative abuses".

²⁴ USA asks for insertion of "their scope, [interpretation or implementation]".

Addendum to BA 6 (21/01/92)
Article 8.1 to 8.3 – Access to Market

- (1) In respect of [Energy Materials and Products] each Contracting Party undertakes to prohibit all agreements between undertakings, decisions by associations of undertakings and concerted practices which may effect trade between the Contracting Party and another Contracting Party and which have as their object or effect the prevention, restriction or distortion of competition within the Territory of the Contracting Party, and in particular those which:
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or Investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (2) The provisions of paragraph (1) may however be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (3) In respect of [Energy Materials and Products] each Contracting Party undertakes to prohibit any abuse by one or more undertakings of a dominant position within their Territory in so far as it may affect trade between the Contracting Party and another Contracting Party.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.