

Community law and codes of conduct for multinational enterprises

OUTLINE

- I. The continued development of multinational enterprises = the benefits and the causes for concern.
- a) The development of cross frontier activities by enterprises is a significant and positive part of our economic system which, despite current difficulties, is still based on principles of free competition and free trade. Enterprises are thus faced with the necessity of developing a profitable combination of factors of production in a competitive world environment. This necessity leads and may even oblige enterprises to reach out beyond their national frontiers to achieve a combination of those factors which is closer to the optimum. The fundamental economic result is of great significance to everyone and should not be forgotten: a more efficient use of scarce resources upon which real increases in our standard of living, and even perhaps its maintenance, depend. Enterprises, developing multinationally, are a vital element in the process of economic and technical innovation which is the foundation of the Community's prosperity.
- b) At the same time, while recognizing the benefits which we derive from multinationals, we cannot ignore the fact that the activities of multinationals cause concern to many who are affected by their operations, both in the Member States and outside, notably in the developing countries, which are frequently sources of raw materials and markets of considerable importance to us. The main cause of the concern is essentially the perception that multinational enterprises, by reason of their scale and their expanded range of choice, may be less subject to national constraints, and less sensitive to national and local pre-occupations and needs, than enterprises which are national or local in character. Even a nation State of some size may feel itself on unfamiliar and insecure ground when confronted by an

enterprise which has apparently superior resources, financial, technical and human, organised on a world-wide basis. No wonder then that others who deal with these enterprises (suppliers, customers, shareholders, employees, unions etc.) should also express concern from time to time, and that these concerns should lead to demands for new regulations, national, Community and international.

- c) The fact that the activities of multinationals are clearly beneficial, but at the same time a challenge to existing institutions explains the ambivalence of much of the comment and criticism which is expressed concerning their operations. It is also a factor of crucial importance in determining the kind of policy which the Member States and the Community should adopt.

II. The nature of Community policy and law on multinational enterprises

a) Objectives

Community policy reflects the two aspects of multinational activities. The Community has sought ¹⁾ to remove obstacles to the cross frontier activities of enterprises within the Community while at the same time seeking ²⁾ to secure the adoption of appropriate legal rules to regulate the problems which are likely to arise as a result of those activities. Commission policy is thus not a crusade either for or against multinationals, but an attempt to create a balanced framework for their operations.

b) Major components in the legal framework

- 1) The right of establishment for enterprises formed under the laws of the Member States, arising directly from the Community Treaty, is the foundation for the development of multinational activities in the EEC (Articles 52-58). The Member States have agreed to introduce no new restrictions on this right of establishment in their territories of companies from other Member States (Article 53). Existing obstacles are to be progressively abolished (Article 52). Very important, not least because Article 53 requires no further implementation by means of Community legislation. Enterprises can benefit from it directly sometimes in a dramatic fashion as, for example, in the case of the large Ford car plant at Gent in Belgium which is owned and operated by Ford AG (Germany) and not by Ford's companies in Belgium.

- 2) Removal of barriers to integrated industrial and commercial activity, for example:
 - a) co-ordination of technical standards. Automobile industry as an example; and
 - b) fiscal harmonisation. At present, the tax systems of the Member States may well prevent an enterprise from conducting cross-frontier operations in the most sensible manner. The Commission has made a series of proposals to tackle this problem and progress is being made, if slowly. Examples: from among the proposed directives on the fiscal treatment of cross-frontier mergers, on the fiscal treatment of dividends distributed by a subsidiary in one Member State to its parent in another, on the harmonisation of company taxation and of withholding taxes on dividends, and on the elimination of double taxation in connection with the adjustment of transfers of profits between associated enterprises.
- 3) Maintenance of competition as part of the counter-balance to the facilitation of cross-frontier activities. Besides application of Articles 85 and 86 of the Community Treaty, reference also might be made to draft regulation on control of concentrations between undertakings.
- 4) Co-ordination of company and tax laws as a second major component of the counter balance, and in particular the development of minimum standards and procedures as to disclosure. The fourth directive and the proposed seventh directive, emphasis being placed on the latter. The problem of defining a group for the purposes of accounting. The value of consolidated group and sub-group accounts. Application of the system to groups controlled from outside the Community, but active within it. Reference might also be made to the directive on co-operation between tax authorities.

Increased transparency as a preferred solution, or as the essential first step towards further reasonable regulation where clear that publicity alone is not sufficient.

c) Characteristics of Community measures

- 1) Legal, binding character of measures given the special nature of the the EEC as an international institution;
- 2) Wherever possible, measures not made specifically applicable to multinationals but framed more generally because
 - a) multinational enterprises are very difficult to define legally, a difficulty which is increasing as their forms become more complex (joint ventures, licences and management contracts, etc.);
 - b) it is important to avoid unjustified discrimination against multinationals;
 - c) on close examination, many problems turn out to be not in their nature confined to multinationals, though frequently the problem may manifest itself more intensively where a multinational is involved. Accordingly, the best solution is often a general one which may well nevertheless have a particular significance for multinational enterprises e.g. seventh directive on group accounts.
- 3) Community measures have necessarily a Community scope, hence other initiatives necessary at the international level.

III. Codes of conduct for multinational enterprises

a) Codes of conduct as useful supplements to Community's own legal programme

- 1) To render it less likely that European multinationals will suffer a competitive disadvantage by having to observe standards that are more onerous than those of our competitors in the industrialized countries (OECD) and in the developing world (UN);

- 2) to preserve a positive investment climate, particularly in the developing world. Mutually agreed standards as to the behaviour of multinationals in developing countries, and as to host countries treatment of multinationals, have an important part to play in ensuring balanced economic development in which the interests of all partners are respected (IN);
- 3) to respond in a positive way to the difficult situation in Southern Africa, within the limits of what is possible (EEC Code).

b) The need for balance

In this context too, a balanced approach is of equal importance. The positive contributions of multinationals must be favoured, and at the same time, action must be taken as regards problems, actual and potential. This theme can be developed by reference to the position being taken by the Member States in the UN on a Code of Conduct for TNCs.

c) The limitations of codes

- 1) In the foreseeable future, codes likely to be non-binding in character. Difficulties of creating binding codes: diversity of national systems and interests. Possible exception is accounting standards, but even in this case, a multinational convention would clearly take a very long time to negotiate. Given their non-binding character, codes are not likely to resolve all difficult cases. The outcome will often depend on imponderable factors such as the degree of political support which is exerted in particular cases cf. Hadger Case.
- 2) These limitations underline the importance of the Community's internal legal regime and legislative programme. Community law and the codes complement each other and should not be considered as alternatives.

IV. Conclusions

To sum up,

- a) Community law and codes of conduct are complementary parts of the Community's approach to multinationals;
- b) both need to be developed in a balanced fashion which recognizes the positive as well as the negative features of the activities of multinational enterprises;
- c) priority should be given to increased transparency which may well solve many problems in itself, and in any case is the necessary basis for further regulation.