COMMISSION OF THE EUROPEAN COMMUNITIES

COM(79) 526 final

Brussels, 10th October 1979

PREPARATION OF THE UNITED NATIONS CONFERENCE
ON RESTRICTIVE BUSINESS PRACTICES
(Geneva, 19 November - 7 December 1979)

(Communication from the Commission to the Council)

Purpose of the Communication

In accordance with UN General Assembly resolution 33/153 of 20 December 1978 and UNCTAD resolution 103 (V) of 30 May 1979, a United Nations conference is to be held, under the auspices of UNCTAD, in Geneva from 19 November to 7 December 1979 in order to negotiate a code for the control of restrictive business practices adversely affecting international trade.

These negotiations will be of major importance to the European Community. The developing countries consider such a code as an important element of the so-called New International Economic Order. The code is likely to entail considerable consequences of a political, economic and legal nature since it is aimed at regulating business behaviour in international trade worldwide. The negotiations also raise specific problems for the Community, namely the participation by the Community in the adoption of the code and its compatibility with Community law.

It is therefore necessary for the Community to define a common position on the key problems of the code and on the broad lines to be followed during the negotiations. This position must be based on the views which the Community and its Member States, together with the other member countries of the OECD, defended in the proparatory phase of the code and in other international forums.

I. Historical development and present situation

1. Attempts to come to international agreement on rules on restrictive business practices have a long history. They were already foreseen in the Havana Charter of 1948 which failed to be accepted.

   Within UNCTAD three ad hoc groups of experts have successively done work in the area of restrictive business practices since 1972. They have elaborated proposals for a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries (referred to as code for the control of restrictive business practices).

   Within UNCTAD negotiations also continue on a code of conduct on transfer of technology which contains specific rules on restrictive business practices in the context of international transfer of technology transactions.

   Moreover, an intergovernmental group of experts under the United Nations Commission on Transnational Corporations is in the process of drawing up an international code of conduct governing the activities of such corporations. This group has decided to postpone discussion of the chapter on restrictive business practices until the results of the negotiations on UNCTAD's code of conduct are available.

2. The Third ad hoc Group of Experts on Restrictive Business Practices has submitted the report on its sixth and last session from 17 to 27 April 1979 to UNCTAD V for consideration[1]. The report, in particular, contains the result of the work on the principles and rules.

   UNCTAD resolution 103 (V), in welcoming this report and noting the significant progress made by the experts, recalls that in accordance with General Assembly resolution 33/153 the task of the UN Conference on Restrictive Business Practices is "to negotiate, on the basis of the work of the Third ad hoc Group of Experts, and to take all decisions necessary

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1) TD/250; TD/B/C. 2/201; TD/B/C.2/AC. 6/20

1a) See Communcation to the Commission to the Council of 20 September 1978, Doc. COM (78) 447

for the adoption of the said principles and rules, including a decision on their legal character". It furthermore requests the UN Conference "to make recommendations in respect of institutional aspects concerning future work on restrictive business practices within the framework of UNCTAD, bearing in mind the work done in this field elsewhere in the United Nations".

3. The future code will contain

- provisions of substance, calling upon enterprises to refrain from specified restrictive business practices relating to cartels and abuses of a dominant position of market power
- provisions adressed to States at national, regional and subregional levels with respect to the control of restrictive business practices
- provisions relating to collaboration at the international level, particularly with respect to consultations between states and technical assistance for developing countries.

4. The regional groups (developing countries = group of 77; OECD-countries = group B; Eastern European socialist countries = group D) have together elaborated agreed texts on a large number of provisions. On major questions, however, substantial differences remain between these groups. Among the most important outstanding issues left to the Negotiating Conference are the following:

a) <u>scope of application of the code</u>

- Group B proposes that the principles and rules shall not apply to activities which are accepted or exempted under any applicable national law. Group of 77 recognizes only the possibility of exemptions under the law of a developing country.
- Group B proposes that the principles and rules shall not apply to practices between affiliated enterprises belonging to the same concern unless amounting to an abuse of a dominant position of market power. Group of 77 wants intra-enterprise restrictions to be included in the scope of application.

b) Content of principles and rules

- Group of 77 proposes that national enterprises of developing countries should be afforded preferential or differential treatment in order to ensure equitable application of the principles and rules. Group B only wants to accept that account should be taken of special conditions and economic circumstances, particularly in developing countries, including the need for small and medium-sized enterprises to cooperate.
- Group of 77, supported by group D, proposes specific rules for transnational enterprises. Group B wants transnational enterprises to be treated in the same way as enterprises based in one country only.
- Group of 77, supported by group D, proposes special rules for regional integration arrangements of developed countries relating to the control of practices restricting trade of developing countries.

c) Legal nature of the code

- Group of 77 wants the code to become legally binding. Group B is only willing to accept voluntary guidelines.

d) Role of UNCTAD

- Group of 77 proposes that notification would need to be made to the Secretary General of UNCTAD of all exemptions from the rules and principles granted pursuant to the possibilities given in the code.
- Group of 77 also proposes a consultation mechanism within UNCTAD relating to issues concerning the control of restrictive business practices which involve interests of several states. Group B defends the principle of bilateral consultations.
- Group of 77 proposes an appropriate permanent mechanism within UNCTAD to monitor the implementation of the code and to make proposals and recommendations concerning possible revisions and improvements. It has specifically proposed the establishment of a Committee on Restrictive Business Practices within UNCTAD. Group B proposes the organisation of periodic meetings among officials having responsibilities related to the control of restrictive business practices in States and regional groupings.

5. The developing countries have reiterated their position on the code's outstanding issues in the programme adopted at the 4th ministerial meet of the Group of 77 in Arusha. Particular emphasis was put on preferenti treatment for developing countries and their enterprises, the inclusion of restrictive business practices in transactions between various entities of transnational corporations and a strengthening of the role UNCTAD including notification, consultation and implementation mechanisms. These demands were again introduced in a draft resolution of the group of 77 submitted to UNCTAD V in Manila.

6. Several Member States of the Community and the Commission have participated in the work done on the expert level since the beginning. In preparation of UNCTAD V agenda item 11 b (restrictive business practices), a Community position was outlined relating to some of the outstanding issues.[2] In Manila a Community initiative served as the basis for the draft resolution on item 11 b submitted by group B. The adopted resolution 103 (V), (copy attached hereto) reflects the position held by the Community and group B, not to prejudge the outcor of the Negotiating Conference on substantive issues and institutional implications.

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2) Council document 5386/79/ Add. 2 of 16 March 1979 incorporating Commission Staff Paper SEC (79) 293/3

II. The code and Community law

1. Under Community law, in those fields where common rules are contained in the treaties or have been adopted for the implementation of a common policy provided for in the treaties, the Member States, whether acting individually or collectively, do not have the right to undertake obligations with third countries which affect those rules. Where common rules exist, the Community alone is in a position to assume and carry out obligations towards third countries affecting the whole sphere of application of the Community legal system[3].

2. In the area of restrictive business practices the EEC Treaty (Articles 85 to 90) and the ECSC Treaty (Articles 65 and 66) contain rules directly applicable to enterprises as well as obligations for the Member States. Their enforcement is safeguarded by the Commission and the Court of Justice, as well as by the competent authorities and tribunals of the Member States. The Community has adopted a series of regulations destined to implement and complete the rules of the Treaty. The common competition rules apply to all restrictive business practices which may have an effect on competition within the Community and on trade between the Member States, notwithstanding the fact that a concerned undertaking may be located outside the Community.

3. The proposed multilateral principles and rules for the control of restrictive business practices are universally applicable. They may therefore apply to business activities which take place and produce effects within the Community. They also apply to business behaviour in the relations between the Community and third countries, which may produce effects on competition and trade within the Community and therefore come within the scope of the community competition rules. Moreover, they contain provisions for the control of restrictive business

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3) see Judgment of the Court of Justice of the European Communities of 31 March 1971 in case 22/70 (AETR), (1971) ECR 263; see also opinion 1/7 of 26 April 1977, OJ no C 107/4, 3 May 1977

practices adressed to states with respect to their internal policies and as members of regional economic integration arrangements. It is therefore clear that the future code will apply to matters which come within the jurisdiction community law and could have significant effects on the application and implementation of Community competition policy.

4. Because of these possible effects on Community law and policy, it is vital for the Community to develop a common approach towards the forthcoming negotiations and ensure that the code will not infringe upon any existing or future application and implementation of the Community Treaties. In order to be able to carry out commitments under the code in the area of Community compet the Community as such must participate in the negotiation of the code, and must ensure that the Community in the areas of its competences becomes a party to the same manner as States. In addition to these reasons, a Community participation in the negotiation of the code and its coming into effect would furnish considerable know-how in handling restrictive business practic affecting international trade.

5. This participation is necessary irrespective of the legal character of the code. While it true that a non-binding code would not give rise to legal commitments in the proper sense at the international level, it would nevertheless establish principles and rules that are supposed to guide, to a greater or lesser degr the behaviour of those who have adopted them and of those to whom they are adressed. Group B and the Community, in these and other negotiations (ie. cod of conduct on transfer of technology, code of conduct on transnational corpor ons), while arguing in favour of non-binding lines of conduct, have repeated stressed that a code adopted by consensus in the form of guidelines will hav such a pronounced impact that its provisions would in effect be widely applied. This would be even more likely if an effective international machi for the supervision of the code were agreed upon. It would therefore not be correct to deny the possibility of conflicts between the code and Communi competition policy by refering simply to the nonbinding nature of the code.

6. In order to respect the Community competence in the area of competition policy and to ensure that the code will not infringe upon the application and implementation of the Community Treaties it is therefore necessary

- that the Community as such participates in the negotiation of the code and ensures that its provisions apply to the Community as such in the areas of its competences,
- that the Community makes sure that the code does not interfere with the application and implementation of rules which are in force within regional economic groupings. This can be done either in the context of the relevant provisions of the code or by introducing a specific clause relating to regional economic groupings.[4)]

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4) Such a clause has been discussed in the Council in the context of the examination of a communication of the Commission to the Council on the preparation of the conference of the United Nations on an international code of conduct on transfer of technology (see doc. S/1778/78 (Relex 172) of 25 October 1978). On the basis of this discussion, the COREPER has agreed to a formula to be negotiated if necessary which represents a compromise under the assumption that a non legally binding code were to be adopted by way of resolution of the U.N. General Assembly (see minutes of the 919th COREPE meeting of 7 November 1978, 2nd part, pt. 12). If the code were to be legally binding it would have to be ensured that the Community as such may become a contracting party to it.

III. Proposals for a Community position for the UN Negotiating Conference

1. General approach

a) The Community has always held the view that the development of international trade should take place under conditions of fair competition and that it is necessary to promote international cooperation in order to control restrictive business practices adversely affecting international trade. The existing national and regional rules do not apply to all restrictive business practices in international trade, particularly not to practices adversely affecting trade of those developing countries which have no legislation in this area. An interdependent world economy calls for a greater degree of collaboration in order to promote the concept of an open and fair trading system. Such collaboration exists among OECD countries and it would not be reasonable to deny the developing countries the benefit of something of a similar nature. Reasonable international rules should also be in the interest of the business community in giving some guidance and legal certainty to international business operations and helping to protect fair play in competition.

b) While taking a positive approach and showing flexibility in order to meet reasonable demands of the developing countries, the Community must be firm in insisting that fundamental principles of law such as non-discrimination are respected and that solutions are avoided the foreseeable effect of which would be to discourage trade and investment rather than promote fair competition. International solutions in this area should not go beyond principles whose soundness has been firmly established on the basis of experience gained in their application nationally or regionally. At the same time, it must be borne in mind that the international community lacks the degree of coherence and institutional integration necessary for the uniform operation of a system of strict control providing at the same time for a sufficient amount of flexibility to deal adequately with individual cases. It would not be a step towards a better international economic order nor a service to developing countries to adopt a code containing rules which would be either unenforceable or counterproductive in stifling trade relations and thus hampering economic development.

2. Exemptions under national and regional law

The Community must insist that the code provisions for enterprises do not apply to activities and forms of cooperation which are accepted or exempted under applicable national or regional law. An international system for the control of restrictive business practices in international trade can, for the foreseeable future, only be built upon existing national and regional laws and complement them with regard to practices which have effects outside their jurisdiction. Otherwise, conflicts between the code and both Community and national laws are unavoidable.

Exemptions from the prohibitions of restrictive business practices laws exist for certain industries or activities in most countries which have legislation in this area. Such exemptions often reflect important policies. To allow exemptions from the code rules only under the law of developing countries, as is proposed by the group of 77, would be discriminatory and imply intervention into internal policies to an extent which is legally and politically unacceptable.

3. Preferential treatment of enterprises of developing countries

The group of 77 also proposes to afford preferential treatment to national enterprises of developing countries. Such a differentiation would not only be impractical, because cartel arrangements may include enterprises from developed and developing countries, but would also be contrary to the principle of non-discrimination on the basis of nationality, seat or place of incorporation which governs the Community competition rules as well as most national competition laws and which should also govern international rules.

On the other hand, group B has proposed that upon the application of the rules account should be taken of special conditions and economic circumstances including the need for small and medium-sized enterprises to co-operate. Such an approach would be consistent with Community law and respond adequately to the particular needs of infant industries, which predominate in many developing countries.

4. Treatment of transnational enterprises

Some progress has been made during the last meetings of the experts towards acceptance of the position of group B that the rules should be applied in the same way to restrictive business practices involving transnational enterprises as to those involving enterprises based in one country only. Differential treatment of enterprises under competition rules on the basis of their transnational character would not be consistent with Community law.

5. Intra-enterprise restrictions

It is not appropriate to apply competition rules in the same way to restrictive business practices carried on between independent enterprises and practices between affiliated enterprises under common control. Article 85 (1) of the Treaty of Rome does not apply to agreements "between undertakings belonging to the same concern and having the status of parent company and subsidiary if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between undertakings" 5).

However, the present proposal of group B according to which the rules may apply to restrictions between enterprises belonging to the same concern only if they amount to an abuse of a dominant position of market power and adversely affect outside enterprises, is consistent with Community law. Solutions to the specific problems of intra-enterprise conspiracy should be negotiated on the basis of this approach.

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5) Judgment of the Court of Justice of the European Communities of 31 October 1974 in case 15/74 (Centrafarm B.V. v. Sterling Drug Inc.), (1974) ECR 1147, 1167

6. Specific rules with respect to regional integration arrangements of developed countries

Group of 77, supported by group D, is proposing rules requiring that regional integration arrangements of developed countries should not impede improved access to exports from developing countries and should not facilitate the use of restrictive business practices adversely affecting trade and development of these countries.

To the extent that the object of these proposed rules relates to governmental measures of trade policy they are outside the scope of a code for the control of restrictive business practices and should be discussed elsewhere.

To the extent that they are based on allegations that the application of EEC competition rules work to the disadvantage of trade from outside the Community they contain a misapprehension of EEC competition policy. This policy has always been to free trade within the Community and to liberalize access to the Common Market by removing business practices restricting free trade and by refusing to exempt cartel agreements aimed at the protection of home markets. In removing numerous trade barriers within the Community it has to a considerable extent contributed to offer trade possibilities to developing countries. The Community competition policy has also clearly limited the scope of export cartels forbidding them if they have an indirect negative effect on trade between Member States.

The Community therefore suggests to refuse acceptance of provisions imposing special obligations for regional groups because they aim at interfering with the application of the rules of the Treaties and because they discriminate against regional groups by unjustifiably requiring different standards for them as opposed to those for individual states. It should however be accepted that regional groups in applying law in the field of restrictive trade practices are submitted to the same principles as sovereign states.

7. Legal nature of the code

Up to now the group of 77 insists that the code should have a legally binding character even though this demand is not expressly formulated in the Arusha programme. Group B countries and the Community have never left in doubt that they could only accept a non legally binding guideline code.

The main reason for this position is that legally binding rules would directly interefere with existing national and regional laws, require ratification procedures and call for an enforcement mechanism at the international level for which, in the absence of a scheme of economic integration such as exists in the Community, the necessary preconditions for it to operate effectively are missing.

8. Role of UNCTAD

Contrary to the demands of the group of 77, obligations whereby UNCTAD would be involved in consultations relating to individual cases or would be notified of individual exemptions from rules prohibiting restrictive business practices should not be accepted. Such obligations would unnecessarily go beyond the kind of bilateral consultation mechanisms agreed upon within OECD and create serious legal problems under Community rules of procedure, particularly with respect to the provisions on disclosure of information.

Unless another body within the United Nations is being entrusted with the supervision of the code the Community should, however, accept a more important role for UNCTAD in the field of restrictive business practices with respect to such matters as technical assistance for developing countries relating to the administration of restrictive business practices legislation, the collection and dissemination of information and the establishment of a mechanism to enable discussion of questions relating to the code, including proposals for its revision, as well as the continuation of work on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation.

Consideration should also be given to the question whether it is advisable to create a special committee within UNCTAD to deal with the code or whether this cannot be done within the existing Committee on Manufactures. Duplication of work within the United Nations relating to restrictive business practices should in any event be avoided as much as possible.

IV. Conclusions

The Commission asks the Council

- to agree that the Community as such participates in the negotiation of the code for the control of restrictive business practices and ensures that its provisions apply to the Community as such in the areas of its competences
- to agree that the Community must make sure in the forthcoming negotiations that the code is compatible with Community law and does not interfere with the application and implementation of Community competition policy
- to agree to the proposals for Community positions outlined in paragraph III above with regard to the United Nations Conference.

The Commission suggests that further Community coordination takes place during the conference in Geneva in order to develop common positions wherever necessary or desirable in the course of the negotiations.

Annex

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Fifth session
Manila, Philippines

Resolution 103 (V) Restrictive business practices

Date: 30 May 1979 Meeting: 169th Agenda item 11(b)
Resolution adopted without dissent Document: TD/L.157

The United Nations Conference on Trade and Development,

Taking into account the work done by the three Ad hoc Groups of Experts on Restrictive Business Practices, pursuant to Conference resolution 73(III) of 19 May 1972 and Section III of Conference resolution 96(IV) of 31 May 1976,

Taking into account also the significant progress made by the Third Ad hoc Group of Experts on Restrictive Business Practices, in particular in the proposals for the formulation of a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries,

Noting that a number of issues remain to be resolved by the United Nations Conference on Restrictive Business Practices on the basis of the work of the Third Ad hoc Group of Experts,

Bearing in mind General Assembly resolution 33/153 of 20 December 1978 convening under the auspices of the United Nations Conference on Trade and Development, a United Nations Conference on Restrictive Business Practices to negotiate, on the basis of the work of the Third Ad hoc Group of Experts, and to take all decisions necessary for the adoption of, the said principles and rules, including a decision on their legal character;

Recalling that the General Assembly, in resolution 33/153, authorized the United Nations Conference on Trade and Development, at its fifth session, to take appropriate actions for the Conference on Restrictive Business Practices, including decisions on relevant issues and, in particular, the determination of the precise dates for the Conference within the period September 1979 and April 1980.

Recalling further that the Trade and Development Board at its tenth special session authorized the Third Ad hoc Group of Experts to transmit its report on its sixth session to UNCTAD V for consideration,

1. Takes note of and welcomes with satisfaction the report of the Third Ad hoc Group of Experts on Restrictive Business Practices on its sixth session and in particular the proposals and recommendations for the set of multilaterally agreed equitable principles and rules;

2. Decides, in accordance with General Assembly resolution 33/153, to hold the United Nations Conference on Restrictive Business Practices, in the last quarter of 1979;

3. Requests the UNCTAD secretariat to make the necessary preparations for the Conference including in this regard of pertinent documentation to be distributed in a timely manner;

4. Decides that continued action should be taken within the framework of UNCTAD:

(a) to collect publicly available information and as far as possible other information, particularly on the basis of requests addressed to all member States or provided at their own initiative and, where appropriate, to the Centre on Transnational Corporations and other competent international organizations, on restrictive business practices adversely affecting international trade particularly that of developing countries and the economic development of these countries, including information related to the legislative, judicial, administrative actions for the effective control of such practices; and to disseminate such information;

(b) on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation;

5. Requests member States and the Secretary-General of UNCTAD to explore possibilities for international co-operation in the provision of technical assistance to developing countries relating to the control of restrictive business practices, including in respect of the training of their officials;

6. Reaffirms the decision in Conference resolution 96(IV) recommending that action should be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries, and the economic development of these countries;

7. Requests the United Nations Conference on Restrictive Business Practices to make recommendations through the United Nations General Assembly to the Trade and Development Board in respect of institutional aspects concerning future work on restrictive business practices within the framework of UNCTAD, bearing in mind the work done in this field elsewhere in the United Nations;

8. Requests the Secretary-General of UNCTAD to undertake studies in the field of restrictive business practices, including those of transnational corporations, adversely affecting international trade particularly that of developing countries and the economic development of these countries, concerning especially:

(a) marketing and distribution arrangements in respect of export and import transactions; and

(b) exclusive dealing arrangements in an abuse of a dominant position of market power,

9. Recognizes the desirability for developing countries to promote co-operation amongst themselves for the control of restrictive business practices adversely affecting their trade and economic development.