COMMISSION OF THE EUROPEAN COMMUNITIES

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Preparation of the Unuted Nations Conference
on an international code of conduct
on transfer of technology

(Geneva, 16 October - 10 November 1978)

(Commission communication to the Council)

C O N T E N T S

Introduction

In accordance with resolution 32/188 of the thirty-second UN General Assembly a United Nations conference is to be held, under the auspices of UNCTAD, in Geneva from 16 October to 10 November 1978 in order to negotiate an international code of conduct on transfer of technology and take all the decisions necessary for its adoption.

The task of this Conference will be particularly difficult.

Despite the preparatory work of an intergovernmental group of experts there are still considerable differences in the positions of the various groups of countries regarding the content and, above all, the legal status of the future code. Furthermore, the considerable consequences of a political, legal and economic nature which this code is likely to entail, in particular for the Western industrialized countries, will severely restrict the scope for compromise.

In addition, it is to be feared that UNCTAD V being close by and given the Group of 77's tendency to attribute the little progress made in the preparatory phase of the code to a lack of political will on the part of the industrialized countries there will be great pressure on Group B to give way to the Group of 77's views and claims in this area.

The proposed negotiations raise certain problems for the Community, the principal ones being participation by the Community as such in the adoption of the code and the latter's compatibility with Community law.

It is therefore vital for the Community to start now to define a common position on the key problems of the code and on the broad lines of its tactics at the Conference. This position must be based on the views which the Community and its member States defended together with the other members of Group B in the preparatory phase of the code and in other international forums.

This document presents the Commission's proposals on the subject with the aim of preparing the common position which will be needed by the Community and the Member States at the Geneva Conference on the code of conduct.

I. Present situation

1. In resolution 3362 (S-VII) of 16 September 1975, which was adopted at its seventh special session, the United Nations General Assembly called for the establishment of an international code of conduct on transfer of technology and gave UNCTAD the task of preparing such a code.

Pursuant to this mandate, resolution 89 (IV) of UNCTAD IV decided to establish an intergovernmental group fo experts in order to elaborate a draft code and recommended that a United Nations conference be convened to negotiate and adopt such a code.

At its thirty-second session the General Assembly decided that this Conference should be held in Geneva from 16 October to 10 November 1978.

2. The intergovernmental group of experts has so far met six times, the last session being from 26 June to 7 July 1978, and has tried, in accordance with the mandate conferred upon it by resolution 89 (IV), to formulate a draft code without prejudice to its legal character. It based this work on three draft codes presented by the Group of 77, Group B and Group D respectively. The Group of 77's draft involves a legally binding code, to be adopted in the form of an international treaty, while Group B's and, probably, Group D's drafts provide only for an agreement of a non-binding nature.

3. At the end of its last session the group of experts was able to present only an incomplete draft code. There are considerable gaps in a number of chapters for want of a compromise between the views of the various groups of countries, particularly with regard to restrictive business practices, the applicable law and the settlement of disputes, as well as to the

guarantees and responsibilities of parties to transfers of technology. Significant differences of opinion also exist regarding the definition of the transfers of technology to which the code would apply.

There is, however, a consensus on the universal nature of the code, in other words its applicability to transfers between all countries and not only to those between industrialized and developing countries.

4. The formulation of the draft code by the intergovernmental group of experts ran into two main obstacles, namely :

(i) a wide divergence between the views of the Group of 77 and Group B, particularly over the content and scope of the principles and rules to be included in the code, the Group of 77 aiming to make technological transactions subject to detailed, rigid rules and to strengthen the national sovereignty of the acquiring State over such transactions,

(ii) the uncertainty as to the final legal character of the code, which has considerably complicated the search for compromises which would have enabled the diverging views to be reconciled, given that Group B in particular was seeking to protect itself against the eventuality of a mandatory code by accepting only formulations which, even if such a hypothesis was ultimately inevitable, would not run counter to the essential principles of its position.

5. In view of these difficulties the group of experts was unable to resolve most of the key problems of the code arising in the incomplete chapters referred to above. This task will therefore fall to the Conference.

The Conference will probably not be able to open the final, overall negotiations on the basis of this fragmentary draft code. It can therefore be expected that a large part of the Conference will be given over to the discussion and drafting, at expert level, of the chapters and paragraphs which are as yet inadequately prepared.

It is, however, possible that the Conference will embark upon partial negotiations at the political level on certain fundamental problems such as the definition of the international transfer of technology to which the code would apply, the applicable law for technological transactions and the legal character of the code, in conjunction, possibly, with a surveillance and review mechanism.

6. The prospect of these forthcoming negotiations means that the Community must now define a common position with regard to certain key problems of the code and the broad lines of its tactics at the Conference, in the light in particular of the problem of the future code's compatibility with the responsibilities and rules of the Community as such.

II. The code and Community law

1. At the present stage of the discussions it is possible that certain provisions which have been proposed could conflict with current Community law.

Such conflicts might arise, in particular, between the code's provisions on restrictive business practices and the implementation of Community competition law (articles 85, 86 and 90 of the EEC Treaty).

2. Community competition law is based on the general principle that restrictive or abusive practices are prohibited. This principle is moderated by the possibility of making, under certain conditions, by individual decision or general regulation, exceptions to this prohibition. This characteristic contradicts with the normative character of the specific rules which may be adopted in this matter under the future code.

Firstly, at the level of principles, the practices regarded as restrictive or abusive under the rules of the Treaty are not necessarily the same as the restrictive practices denounced by the code, which is partly due to the difference in approach between competition law developed within the framework of a common market and a code which is universally applicable.

Secondly, with regard to specific practices, the risk of conflict situations arising is high since the code may contain provisions whereby a number of practices will be specifically prohibited without the possibility of assessing the impact of such prohibition upon competition. Furthermore, there is nothing to prevent the code, in so far as it contains clauses derogating from certain rules of prohibition, from accepting restrictive practices which are not necessarily acceptable from the angle of Community law. The adoption by the Community of rules of this kind would therefore be incompatible with Community law in this field.

3. In order to avoid insoluble conflicts between the provisions of the future code and Community law neither the Member States nor the Community in the negotiations on the code can accept provisions which would be incompatible with Community law ; for the same reason the Community must require a derogation clause to be included in the code which would ensure that the latter does not infringe upon any existing or future application and implementation of the Treaties.

The main effect of such a clause would be to subjugate the applicability of the future code on intra-Community transfers of technology and on technology imports to the rules of Community law. However, the clause would not affect, with a few exceptions, the applicability of the code on transfers of technology from the Community to third industrialized or developing countries.

4. Independently of this problem, to which a solution is in any case essential in order to make the code compatible with the principles and rules of Community law, the question arises as to whether or not, the Community should regard itself as a single entity for the applicability of the code. This matter arises not only from the legal, but also from the economic and political angles in view of the fact that, for instance, the future code will certainly not be applied to transactions within the United States, to give only one example of an industrial and commercial entity which is comparable in size to the Community.

In order to exempt intra-Community relations as a whole from application of the code the Community should propose a clause whereby a derogation would be made in respect of customs unions and economic unions thus enabling relations between states or firms within the Community to be excluded from application of all or part of the code.

III. The code and Community powers

1. Under Community law, in those fields where the Community has adopted common rules for the implementation of a common policy provided for in the Treaty of Rome, the Member States, whether acting individually or even collectively, do not have the authority to enter into commitments with non-member States which are incompatible with those common rules (1).

Now the code deals with subjects which undeniably fall within the competence of the Community. This applies particularly to the Community's competition policy.

In view of this situation the Community as such has to participate in the adoption and application of the code.

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(1) See Judgment of the Court of Justice of the European Communities of 31 March 1971 in Case 22/70 (AETR), (1971) ECR 263

2. The Community's ability to participate in the adoption of the code derives firstly from Community responsibility for commercial policy matters (articles 113 and 114 of the EEC Treaty), in so far as transfers of technology constitute trade.

Secondly, according to the decisions of the European Court of Justice, the Community has authority at the external level whenever it has to enter into an international commitment for the purposes of attaining the objectives in respect of which Community law has created for the institutions of the Community powers at the internal level (1).

Consequently, an external Community power to enter into international commitments with regard to the code results from the internal powers enjoyed by the Community in matters of competition policy in particular and from the fact that only the Community as such has the power to apply certain rules of the code within the context of attaining the objectives of that common policy.

3. The need for a Community commitment on certain matters to be dealt with in the future code is not merely the consequence of the division of responsibilities between the member States and the Community.

It is also a response to the political need to give third States which will adopt the code an assurance that their partners from the Community will be capable of respecting all the obligations provided for in the code.

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(1) This principle has been stated by the Court of Justice in its Judgment of 31 March 1971 in Case 22/70, Commission v. Council (AETR), (1971) ECR 263

- in its Judgment of 14 July 1976 in Cases 3, 4 and 6/76, Kramer v. Commission, (1976) ECR 1279
- and in its Opinion 1/76 of 26 April 1977, OJ No C 107, 3.5.1977, p.4)

4. Furthermore, the procedure for the adoption of the code by the Community should ensure that since the Community has jurisdiction in the areas covered by the future code it should in those areas be a party to the code in the same manner as States.

IV. The legal character of the code

1. The problems set out above of the code's compatibility with Community law, its application to intra-Community relations and its adoption by the Community as such arise whatever the legal character of the future code.

2. A non-binding code, as envisaged by the Group B countries, which would be adopted by a non-legal procedure such as a resolution "by consensus", would not give rise to problems of principle in the same way as a mandatory code in the form of a treaty that has been signed and ratified, since the former would consist merely of guidelines for States and firms, guidelines which could not modify or replace either the provisions of national, Community or international law or the obligations and responsibilities resulting therefrom for States and firms. A non-binding code would therefore be easier for the Community to apply from the angle of its compatibility with the principles and rules of Community law.

3. However, if a non-binding code does not, like a code adopted under a treaty, create legal commitments proper at the international level it does nevertheless establish a number of key principles which are supposed to guide more or less strictly the behaviour of those who have adopted them and of those for whom they are intended, especially when these principles are formulated in a clear and precise manner.

By adopting texts or resolutions of this kind in an international forum States pledge their political will to respect the principles of their declaration and to bring the appropriate means to bear to enable them to attain the objectives of that declaration. Therefore such pledges are obviously politically important, notwithstanding the fact that their legal character cannot be acknowledged, and it would be difficult for the States which have adopted them to be easily able to avoid taking account of this fact.

4. The thesis of the binding nature of international resolutions is upheld in particular by the developing countries, which are seeking to establish in this way the principles and guidelines of the new international economic order to which they aspire. The code may thus become a touchstone for North-South cooperation although the transfer of technology between developing and industrialized countries at present amounts to barely 5 % of the transactions effected between the industrialized countries themselves.

The Community and its member States therefore owe it to the reputation of their policy for cooperation with the developing countries to state clearly to their partners during the final negotiation of the code the extent to which and the conditions on which they can apply the future code in view of the Community rules that they have established and intend to establish among themselves.

5. In conclusion, whatever the legal nature of the code, the Community as such must participate in the adoption of the code and make sure that the code is compatible with Community law by means of the clauses proposed above, which would be included in or annexed to the code in accordance with procedures to be defined during the negotiations.

6. While the legal nature of the code is ultimately only of relative importance with regard to the matter of how its application would fit in with the rules of Community law it does, however, play a leading role from the angle of its economic effects on future transfers between suppliers and buyers of technology.

7. Operations for the transfer of technology are generally speaking of a complex and specific nature. In transfers between Western industrialized countries, but also in their transactions with the Eastern-bloc countries, suppliers and buyers of technology are normally free to determine the content and the terms of their arrangements according to their needs and their capabilities. They are also free to choose for their arrangements the law, courts and arbitration boards appropriate to their needs.

The future code will contain a number of outline provisions offering the recipient countries in particular the possibility of restricting these freedoms and making transfers of technology beyond national frontiers subject to multiple controls and rules. In addition, many rules of the code, particularly in the fields of restrictive business practices and guarantees, are aimed at imposing standards of conduct on firms involved in transfers of technology.

8. These restrictions and rules affecting arrangements between firms tend to hinder the development of the transfer of technology, particularly to the developing countries, as illustrated in recent years by certain developing countries which have adopted a very restrictive policy in this matter.

It is also to be feared that such obstacles will affect above all transfers made by small- and medium-sized firms, whose technology and know-how are generally regarded as better suited to the needs of the developing countries.

9. Clearly, a binding code would be likely to reinforce this trend since the mandatory nature of its provisions would limit the options available to suppliers and buyers in such a way, or would entail for them such complications, that the transfer of technology would no longer be of interest to them. A non-binding code, whose provisions in respect of firms would ultimately remain optional, would, however, a priori offer greater

flexibility for adjusting to the needs and capabilities of the parties concerned and would therefore be more conducive to the development of the transfer of technology in general and to the developing countries in particular.

10. The member States of the Community, which are among the world's major generators, suppliers and buyers of technology and whose industrial and commercial development in years to come depends largely on their capacity for technological innovation are therefore not interested in submitting to binding international rules in this field which might complicate and raise the prices of their technological trade and which, for reasons set out above, would not be suitable for facilitating the transfer of technology to the developing countries either.

V. Interdependence with other international negotiations

1. The problems connected with the transfer of technology and the compatibility of the codes and other international standards with Community rules do not at present arise solely in the context of UNCTAD's work on the code of conduct in question.

2. 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, whose work has only just started, has decided to postpone discussion of the chapters on the transfer of technology and restrictive business practices until the results of the negotiations on UNCTAD's code of conduct are available. The latter may therefore influence the code on transnational corporations in such matters and serve as a precedent for a number of other problems, such as the legal nature of the latter code.

3. At WIPO work is under way to amend the Paris Convention on the protection of patents and other industrial property rights. The negotiations in this forum are partly concerned with the developing countries' demands that the system for the protection of industrial rights be better adapted to their policies and their needs. They will therefore be guided by the principles and rules which the UNCTAD code will adopt on this matter.

4. Similarly, the code's provisions regarding restrictive business practices with respect to the transfer of technology may prejudice the deliberations of the UNCTAD group of experts on the general aspects of such practices and how to control them within the context of international trade. There is obviously a close link between the two subject matters and a great number of controversial problems which are common to both of them such as the treatment of relations between parent companies and their branches.

5. Lastly, matters relating to the transfer of technology are also under discussion within the context of the Conference on the Law of the Sea.

6. Given the interdependence of these problems the Community must adopt a harmonized, coherent position at these different negotiations, with regard to both the substantive provisions and the legal aspects of any international agreements, particularly in so far as the binding or non-binding nature of such agreements and their compatibility with Community law are concerned.

The progress on the code of conduct for the transfer of technology - as compared to other negotiations on this subject - means that this code will be taken as a precedent for the negotiations in the forums referred to above. In defining its position for the Conference on the code the Community must therefore ensure that this position does not unnecessarily restrict its room for manoeuvre in the other negotiations.

VI. Proposal for a Community position

1. In recent years the Community has defined its position on the code of conduct for the transfer of technology on a number of occasions, in particular at the CIEC and UNCTAD IV.

In its statement to the CIEC on the transfer of technology (1) the Community confirmed that it accepted both the objective pursued through such a code - namely improvement of the conditions under which technology was transferred - and the very concept of a code on this subject. It printed out, however, that it considered that the adoption of the Group of 77's draft code in the form of a code which was mandatory under international law would not only be impracticable in the market-economy industrialized countries - which would prevent them from being able to accept it in this form - but might also seriously impede the transfer of technology to the developing countries instead of stimulating it, which would be the reverse of the intended result.

For these reasons the Community advocated that a code defining non-binding lines of conduct should be established which in its opinion would in the long run be more likely to have a positive effect on technological transactions between industrialized and developing countries.

2. The negotiating stance adopted by the Community for UNCTAD IV (2) therefore proposed that the Community should continue to insist with its Group B partners that only a non-mandatory, universally applicable code could have a practical impact ; it should be adopted by a resolution of the United Nations General Assembly. The Community could not accept a code containing both mandatory and non-mandatory parts ("mixed code"). The possibility of a review procedure should be considered.

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(1) Statement by the European Economic Community of 24 April 1976

(2) See T/366/76 (COMEUR) (DIAL) of 30 April 1976

It was on the basis of this position that the member States of the Community adopted Resolution 89 (IV), which entrusted the intergovernmental group of experts with the task of drawing up a draft code, without prejudice to the final decision on the legal character of the code.

3. The Community position for the Conference on the code of conduct to be held in October/November must be based on the views which the Community and its member States have defended both in the previous two conferences and within the intergovernmental group of experts in the preparatory phase for the code.

4. Since the intergovernmental group of experts was not able to complete the draft of the code the Conference will have to carry out the tasks of drafting the missing chapters and seeking compromise formulas on controversial subjects. The Community should continue this work, as in the past, within the framework and in close coordination with the other members of Group B.

5. With regard to the legal nature of the code, its basic concept and the possible consequences of its principles and rules as already defined, or proposed by the Group of 77 in particular, scarcely enable the Community to adopt a position which is different from that defended by it at the CIEC or UNCTAD IV. In order to avoid legal and political difficulties relating to the application of a binding code to transactions by independent firms and in an effort to avoid impeding the transfer of technology by a system of schematic, rigid rules the Community should negotiate the code on the basis of an agreement in the form of non-binding lines of conduct and adopt only a code of this kind.

In view of its potential legal consequences, the magnitude of which is unclear for want of a detailed examination, a "mixed code" formula involving both binding and non-mandatory sections should be rejected by the Community.

The Community should, however, encourage the precise formulation of the provisions which will ultimately be incorporated in the code. This would provide a clear and hence more persuasive picture of the lines of conduct which the parties to a transfer of technology operation should - voluntarily - aim at. This would facilitate the task of firms and of the public authorities in so far as the practical application of the code is concerned.

6. As the code of conduct is supposed to regularize progressively international trade in an area which is of prime importance for both industrialized and developing countries the practical application of the code must be regularly monitored and it should be possible to review the code if it fails to do its job adequately.

A proposal, already put forward informally by a number of sides, to supplement the code with provisions of this kind could make the concept of the non-binding code more attractive to the Group of 77, while confirming the industrialized countries'intention to ensure that the guidelines of this code are strictly observed by all the parties concerned.

Such provisions in the code should not, however, involve the establishment of cumbersome monitoring and surveillance machinery.

The Community should support any proposal envisaging a reasonable, flexible mechanism for monitoring and reviewing the code if such a proposal could help make the code in the form of non-binding guidelines acceptable to the Group of 77.

7. Since the Community has competence in certain fields covered by the future code the Community should demand to be allowed to participate as such in the adoption of the code, whatever its legal nature.

8. To settle the problem of the code's compatibility with Community law the Communicty should propose an EEC clause ensuring :

(i) that the code would not infringe upon any existing or future application and implementation of the Treaties,

(ii) that the Community as such will in so far as the areas of its competences are concerned, be a party to the code in the same manner as States.

Such a clause could be included in the text of the code (for instance in the chapter on final provisions) or could be attached to it in accordance with a procedure to be defined, for instance in the form of a protocol annexed to the code, or an exchange of letters.

If the Community failed to have one of these formulas accepted it could issue an explanatory statement relating to the code or enter a reservation, regarding the status of Community law and rules, when the code is adopted.

9. When the Conference on the code of conduct is opened the Community should make a statement drawing the attention of the participants to this Community problem and announcing its intention to ensure that the code takes suitable account thereof.

In this statement the Community could comment upon its position regarding the legal nature of the code and the desirability of a monitoring and review mechanism. It could also state its willingness to pursue the negotiations on the code with an open mind to the needs of the partners, particularly the developing countries, in order to arrive at a result acceptable to all parties. These last passages of the Community statement should, however, be closely linked to the position which Group B as a whole will adopt on that occasion.