

1977

## The OECD Guidelines for Multinational Enterprises: Competition

Barry E. Hawk

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Barry E. Hawk, *The OECD Guidelines for Multinational Enterprises: Competition*, 46 Fordham L. Rev. 241 (1977).

Available at: <https://ir.lawnet.fordham.edu/flr/vol46/iss2/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The OECD Guidelines for Multinational Enterprises: Competition

### Cover Page Footnote

Professor of Law, Fordham University School of Law. A.B. Fordham University; L.L.B. University of Virginia.

# THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: COMPETITION\*

BARRY E. HAWK\*\*

## I. INTRODUCTION

ATTEMPTS to regulate restrictive business practices on an international or supranational level have generally taken three forms: (1) consultation and cooperation between or among enforcement officials either through bilateral inter-governmental mechanisms or through multinational vehicles like the Organization for Economic Cooperation and Development (OECD); (2) binding legislation on the regional level, such as the Common Market competition rules; and (3) codes of conduct or "guidelines," either mandatory or voluntary. Such attempts have arisen primarily for two reasons. The first reason is a desire to mitigate actual and potential conflicts in enforcement of national laws, particularly where extraterritorial application of national laws is made. The second, and more recent, reason is the perceived need to regulate foreign-based multinational enterprises, a concern most frequently expressed by developing countries.

These developments in the regulation of multinational enterprises raise several fundamental questions:

(1) To what extent, if any, has the pre-World War II era of private international cartels been replaced by an era of nation-state cartels or nationally encouraged international cartels?

(2) Do the interests of the industrialized countries and the developing countries differ to such an extent as to preclude or substantially inhibit international regulation of restrictive business practices?

(3) To what extent are the concerns about multinational enterprises "antitrust" concerns in the American or even European sense?

(4) At the present time, is consultation and cooperation a more feasible method or route than formulation of international rules or codes?

(5) To what extent do governmental constraints on, and intervention in, international trade (which intervention is frequently based on non-competition and often protectionist premises) prevent or inhibit formulation of mutually acceptable principles? As a corollary, should such principles be applied to all commercial entities, including state and mixed enterprises?

---

\* This article is an expansion of a report submitted to the USA Business and Industry Advisory Committee of the Organization for Economic Cooperation and Development.

\*\* Professor of Law, Fordham University School of Law. A.B. Fordham University; L.L.B. University of Virginia.

In the years following World War II, there were two unsuccessful attempts to formulate principles for regulating restrictive business practices in international trade.<sup>1</sup> First, the unratified Havana Charter of 1948 declared a policy against international business practices on the part of both private and public commercial enterprises where these practices restrained competition, limited access to markets, or fostered monopolistic control.<sup>2</sup> Second, the Ad Hoc Committee on Restrictive Business Practices of the Economic and Social Council of the United Nations essentially incorporated the substantive principles of the Havana Charter concerning international business practices into a proposed draft.<sup>3</sup> This draft, like the Havana Charter, failed when the United States withdrew its support.<sup>4</sup>

In the 1970's the formulation of such international principles has been given an increasing amount of attention. This call for international regulation of restrictive business practices has received its major impetus from the developing countries, motivated not so much by traditional antitrust concerns about cartels as by concerns about the economic, social, and political power of multinationals and the desire to transfer technology on more favorable terms than have existed in the past.<sup>5</sup> Many of these demands are based, wholly or in part, on economic or social considerations inconsistent with the premises and goals underlying American antitrust principles.<sup>6</sup>

The United Nations has become the chief forum for such demands, with several bodies involved.<sup>7</sup> The United Nations Conference on Trade

---

1. For a recent history of attempts to formulate international rules or guidelines regulating restrictive business practices, see Joelson, *The Proposed International Codes of Conduct as Related to Restrictive Business Practices*, 8 L. & Pol'y Int'l Bus. 837 (1976) [hereinafter cited as Joelson].

2. Havana Charter for an International Trade Organization art. 46, reprinted in U.S. Dep't of State, Pub. No. 3206, Commercial Policy Series 114, at 86 (1948). The Havana Charter stated that certain restrictive practices were generally to be prohibited. These included price fixing, market division, allocation of customers, discrimination against particular purchasers, production limitations, and illegal extension of rights under patents, trademarks, and copyrights. *Id.*

The General Agreement on Tariffs and Trade provides for consultation among the contracting parties with respect to harmful restrictive practices in international trade. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

3. See Joelson, *supra* note 1, at 843-44.

4. *Id.*

5. See, e.g., UNCTAD Secretariat, Review of Major Developments in the Area of Restrictive Business Practices, U.N. Doc. TD/B/C.2/159 (1975).

6. See note 28 *infra*.

7. The following statement exemplifies the tone or concerns underlying many of these proposals: "The size and scope of the larger multinational corporations make it possible for a few large firms to control substantial shares of local and sometimes world markets. Because of this, and their transnational flexibility, they can engage in export market allocation, price discrimination, and transfer pricing, place stringent conditions on the transfer of technology and patents, and enter into cartel

and Development (UNCTAD), through the Third Ad Hoc Group of Experts on Restrictive Business Practices (UNCTAD Committee on Manufacturers), is presently studying formulations of both a model law for developing countries and a set of multilaterally acceptable principles designed to regulate restrictive business practices affecting developing countries.<sup>8</sup> UNCTAD is also attempting to draft a code on transfers of technology.<sup>9</sup> Moreover, the Commission on Transnational Corporations, an advisory body to the Economic and Social Council of the United Nations, is formulating a general code of conduct applicable to multinational enterprises.<sup>10</sup>

In the OECD,<sup>11</sup> there has been considerable activity in the area of restrictive business practices. In 1967, the Council of the OECD recommended to its member countries voluntary consultation and cooperation among antitrust officials.<sup>12</sup> A further step was taken in 1973 when the Council recommended that a member country, considering itself harmed by the practices of an enterprise located in another member country, should consult with the latter country. If the home state agrees, it may order the enterprise concerned to take appropriate remedial action. If the two countries cannot resolve the matter, they may submit the case to the Committee of Experts on Restrictive Business Practices for reconciliation.<sup>13</sup>

---

agreements that reduce competition." United Nations Group of Eminent Persons To Study the Impact of Multinational Corporations on Development and on International Relations, Department of Economic and Social Affairs, *The Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. E/5500/Rev. 1 ST/ESA/6, at 30 (1974).

8. See, e.g., UNCTAD, *Issues in Connexion with the Formulation of a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/B/C.2/AC.6/2 (1976).

9. See UNCTAD, *Preparation of a Draft Outline of an International Code of Conduct on Transfer of Technology*, U.N. Doc. TD/B/C.6/AC.1/2/ Supp. 1, at 3-8 (1975).

10. See Commission on Transnational Corporations, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/17 (1976).

11. The OECD is made up of 24 member nations: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, and West Germany. It was established in 1961 as a successor to the Organization for European Economic Cooperation (OEEC). The OEEC had been formed as a consequence of international efforts under the Marshall Plan to coordinate post-World War II economic recovery in Europe. See OEEC, *History and Structure* 11-12 (1956).

12. Recommendation of the Council of OECD Concerning Co-Operation Between Member Countries on Restrictive Business Practices Affecting International Trade, dated Oct. 5, 1967, OECD Doc. (67) 53, reprinted in Markert, *Recent Developments in International Antitrust Cooperation*, 13 *Antitrust Bull.* 355, 370 app. (1968).

13. Recommendation of the Council (OECD) Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, dated Dec. 20, 1973, OECD, Doc. C(73) 99, reprinted in 19 *Antitrust Bull.* 283 (1974).

The Committee of Experts, composed of competition enforcement officials from twenty-two OECD countries, has been quite active. Reports have been published on such antitrust topics as refusals to deal, market power, patent and license restrictions, export cartels, and mergers.<sup>14</sup> The Committee of Experts also wrote the first draft of the competition guideline. This draft was later revised in light of comments provided by member countries, the OECD's business and labor advisory committees, and interested professional and academic groups.<sup>15</sup>

In June 1976 the OECD adopted a *Declaration on International Investment and Multinational Enterprises*.<sup>16</sup> The *Declaration* includes three "complementary and inter-connected" statements of policy with respect to voluntary, non-binding *Guidelines for Multinational Enterprises*,<sup>17</sup> national treatment for foreign-controlled enterprises, and international investment incentives and disincentives.<sup>18</sup> Also included are agreements on consultation procedures and periodic review by the member countries. The *Guidelines* are divided into seven specific sections, covering general business policies, disclosure of information, competition, financing, taxation, employment and industrial relations, and science and technology.

This article will discuss the section of the *Guidelines* applicable to competition. The purpose is twofold: to describe the concerns and perceived problems that underlie the competition guideline and to offer interpretations of the competition guideline which reflect those concerns and perceived problems in light of existing antitrust laws, particularly those of the United States and the European Economic Community (EEC). The discussion is divided into general comments on the competition guideline as a whole followed by an analysis of each provision.

## II. GENERAL COMMENTS

While several proposals to formulate mutually acceptable competition principles or international codes have been made in the past,<sup>19</sup> the OECD

---

14. The operations of the Committee are described in Zisler, *The Work of the OECD Committee of Experts on Restrictive Business Practices*, 19 *Antitrust Bull.* 289 (1974).

15. See Davidow, *Some Reflections on the OECD Competition Guidelines*, draft of an article to appear in 22 *Antitrust Bull.* (1977) (no. 2), at 2 [hereinafter cited as Davidow].

16. Reprinted in OECD, *International Investment and Multinational Enterprises* 7 (1976) [hereinafter cited as *Declaration*]. The *Declaration* was adopted by the OECD on June 21, 1976. See OECD, USA Business and Industry Advisory Committee, *Committee on International Investment and Multinational Enterprise, A Review of the Declaration on International Investment and Multinational Enterprise* 3 (1976).

17. These are reprinted as an Annex to the *Declaration*, *supra* note 16, at 11-17 [hereinafter cited as *Guidelines*]. The *Guidelines* are prefaced by eleven introductory paragraphs.

18. *Guidelines*, *supra* note 17, introductory paras. 5 and 6, at 12.

19. See notes 1-3 *supra* and accompanying text.

competition guideline is the first such effort to gain approval by an international body. This guideline must be viewed against the background of the significant increase in foreign antitrust or competition legislation since World War II, the most notable example being the highly developed competition rules of the EEC.<sup>20</sup> Extensive antitrust legislation and enforcement also exist in many of the OECD member countries, for example, West Germany, the United Kingdom and Canada.<sup>21</sup> Multinationals presently face, therefore, a proliferation of sometimes conflicting competition rules and enforcement policies in the industrialized world. The resultant complexity has been increased in recent years by the demands of developing countries for regulation of multinational corporations based on both non-competition and competition policies. Indeed, the OECD competition guideline should be viewed as a partial response of twenty-three<sup>22</sup> non-Communist industrialized nations to Third World demands. To this extent, the competition guideline is a political document.

The OECD does not contemplate publication of a legislative history or "*travaux préparatoires*" of the competition guideline, which would aid in its interpretation, particularly in view of the many revisions made to the various drafts of the competition guideline. Some of that history is known, however, and should be looked to in any interpretation of the competition guideline. Very importantly, the Working Party of the Committee of Experts submitted its draft to the Committee "subject to a number of reservations or observations" which follow:

- (a) The submission of these standards does not imply that the Working Party has concluded that restrictive business practices are generally characteristic of multinational enterprises or that their behavior has worsened in recent years or that restrictive business practices are more prevalent among multinational enterprises than among national enterprises. Nor has the Working Party concluded that multinational enterprises are, on balance, a more anticompetitive force in world production and trade. The function of the Working Party has simply been to consider what kinds of restrictive business practices are encountered and to suggest standards of behavior relating thereto.
- (b) Standards of behavior dealing with difficult legal and economic concepts such as abuse of market power, adverse effects on competition and unreasonable pricing policies do not in themselves provide simple rules for business executives to follow in all circumstances. Under the national law of various countries, these concepts have been given meaning only through interpretation by the competent tribunals.
- (c) The initial Working Party has not yet concluded that standards of behavior are the best

---

20. The principal provisions are articles 85 and 86 of the Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, 47-49, *reprinted in* 1 Comm. Mkt. Rep. (CCH) ¶¶ 2005, 2101 [hereinafter cited as Treaty of Rome].

21. See, e.g., OECD, Annual Reports on Competition Policy in OECD Member Countries (1976).

22. Turkey did not participate in the promulgation of the *Guidelines or Declaration*. See *Declaration, supra* note 16, at 9 n.

approach to eliminating those restrictive business practices which multinational enterprises engage in. However, the Working Party has concluded at this time that the standards of behavior it has submitted may be of value in helping to achieve acceptable relationships between multinational enterprises and the countries whose trade they affect. Also, these standards might serve as a tentative outline for the future development of commonly accepted international restrictive business practices principles. The final report of the Working Party might contain additional or somewhat different standards of behavior or might concentrate exclusively on other approaches.<sup>23</sup>

Similarly, the United States antitrust official most closely involved with the drafting of the competition guideline has written:

[T]here was no unanimity [among the OECD experts] that multinational enterprises were committing a great number of restrictive business practice violations, or that their behavior was worse than that of national enterprises, or that national laws were generally incapable of dealing with most such offenses, or that guidelines were or could be the best international method of dealing with those violations which were incapable of being remedied or prevented by national law.<sup>24</sup>

The competition guideline should, therefore, be understood in light of the above qualifications and observations.

The stated primary purpose of the *Guidelines* (including the competition guideline) is to ensure that the operations of multinationals are in harmony with national policies.<sup>25</sup> The purpose is *not* to create a multilateral code of conduct, either voluntary or binding, nor is it necessarily or primarily to harmonize the competition laws of OECD member countries. Moreover, while it is true that many of the principles invoked in the competition guidelines are based to some extent upon rules which have evolved in certain OECD member countries (notably, the United States and West Germany), the competition guideline cannot be said simply to reflect existing national antitrust law. Significant differences in member country attitudes toward competition policy remain, and it is more accurate to describe the competition guideline as a recital of certain antitrust concepts articulated in terms broad enough to permit OECD member countries to interpret them consistently with each country's competition policies. Thus, it can be expected that OECD member countries will interpret the competition guideline consistently with their own legislation or national policies or, perhaps more importantly, according to the enforcement officials' views of national competition policies. Given the substantial differences in competition policy among OECD member countries, it remains to be seen how much specific guidance the competition guideline can provide to multinationals. Indeed, should questions

---

23. OECD, Working Party No. 11 of the Committee of Experts on Restrictive Business Practices, OECD Doc. DAF/RBP/WP 11/39 (1975).

24. Davidow, *supra* note 15, at 6-7.

25. See *Guidelines*, *supra* note 17, introductory para. 6, at 12.



arise as to the application of the *Guidelines* to a particular multinational, the *Guidelines* expressly provide that the multinational be afforded the opportunity to express its views to the OECD but that the OECD "shall not reach conclusions on the conduct of individual enterprises."<sup>26</sup> The competition guideline must be viewed not as a code or statute applicable to a particular arrangement or business practice but rather as an expression of the antitrust concerns of OECD member countries.

The OECD Committee of Experts apparently felt that the competition guideline could be helpful in, among other things, "codifying common competition values" and providing general rules for multinationals to follow.<sup>27</sup> Given the large divergencies among national policies and the broad and ambiguous language in the competition guideline, it is questionable whether those two hopes of codification and guidance will be realized. It should not be concluded, however, that the competition guideline will have little or no practical significance. First, it may move OECD member countries toward stronger and more pro-competition national policies. The possibility of such a movement is very real and substantial, particularly in view of the consultation procedures established under the *Declaration*. The importance of the increasing exchange of information and views among antitrust enforcement officials of the different member countries and the educational effect of that exchange on competition policy within each country cannot be overestimated. The competition guideline is a result of past exchanges and may very well be itself the catalyst for further exchanges and cooperation. To the extent that one supports a policy of competition and free enterprise principles, this propagation of antitrust principles among foreign nationals can be welcomed by United States-based multinationals, which already face strict antitrust enforcement under United States laws. Second, the competition guideline must be seen in its political context as a possible basis for future negotiations with the developing countries within a United Nations framework.

Before discussing each specific provision of the competition guideline, two general comments should be made. First, the singling out of

---

26. Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, reprinted in OECD, *International Investment and Multinational Enterprises* 19 (1976).

Trade unions in Belgium have already invoked the OECD *Guidelines* in a dispute involving the shutdown of a plant in Belgium by a United States-based multinational. See *Wall St. J.*, Apr. 1, 1977, at 8, col. 2. At least three new labor disputes have also been the subject of trade union complaints before the OECD Committee on International Investment and Multinational Enterprises. See *Financial Times*, May 11, 1977, at 4, col. 6; *Economist*, June 4, 1977, at 93.

27. Davidow, *supra* note 15, at 7-8.

multinational enterprises for separate treatment, in contrast with the treatment of purely domestic entities, may not be entirely appropriate in the competition area. Most accepted antitrust principles rest on economic and socio-political premises of competition<sup>28</sup> among all business entities, and it is questionable whether a distinction should be made for antitrust purposes between "multinational" and other business enterprises. One result of such a distinction could be to place multinational enterprises at a competitive disadvantage of vis-à-vis purely domestic traders and producers. This possibility is somewhat mitigated in the introduction to the *Guidelines*: "The guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; wherever relevant they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the guidelines are relevant to both."<sup>29</sup>

The second general comment concerns possible invocation of the guideline by non-OECD members, notably developing countries. For example, a developing country might informally invoke the competition guideline when objecting to the business conduct or policy of a multinational. While, technically speaking, the *Guidelines* apply only to operations of multinationals within the OECD member countries, there is nothing to prevent a non-member country from attempting to require adherence by a multinational to the *Guidelines*, at least with respect to operations within its territory. A multinational faced with such an informal invocation of the *Guidelines* (as contrasted with a formal promulgation of the *Guidelines* as national legislation) might point out the ambiguities of the competition guideline. It might further point out that the *Guidelines* are part of a broader package dealing also with non-discriminatory treatment of foreign enterprises and foreign investment incentives and disincentives. The ambiguous and broad language of the competition guideline, together with the unfamiliarity of many Third World officials with Western antitrust concepts, could raise significant problems for multinationals should Third World countries attempt to use the competition guideline to pressure multinationals doing business in their countries. Moreover, the absence of any enforcement mechanism or procedural safeguards under the *Guidelines* could aggravate those problems. In a sense, the

---

28. For the most recent United States Supreme Court statement on the economic and non-economic goals underlying the Sherman Act, see *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2495 (1977), where the Court stated: "Competitive economies have social and political as well as economic advantages but an antitrust policy divorced from market considerations would lack any objective bench marks." *Id.* at 2559 n.21 (citation omitted).

29. *Guidelines*, *supra* note 17, introductory para. 9, at 12-13.

“voluntary”<sup>30</sup> and informal nature of the *Guidelines* could be a double-edged sword if they are informally invoked by a developing country.

Finally, a serious and fundamental question remains: whether, and to what extent, the competition guideline can be applied in non-market or centrally directed economies. Indeed, state intervention and direction frequently alter the premises and conditions of the competitive process in so-called market economies. Such state intervention exists to an even greater extent in the international trade area where balance of payments policy, national security concerns, and protectionist policies (to name only three examples) frequently modify or override competition policies. As the *Guidelines* apply only to enterprises engaged in international trade, the extent to which the competition guideline can or will be interpreted with any degree of consistency remains uncertain.

### III. SPECIFIC COMMENTS

This section will analyze each provision of the competition guideline. The emphasis lies not on criticism, but on an effort to ascertain the purpose and possible interpretations of the competition guideline.

#### A. *Opening Language*

Introductory paragraph 8 of the *Guidelines* describes which business enterprises are to be included.<sup>31</sup> The crucial factor is multinational or transnational operations. United States-based firms with substantial manufacturing and sales operations abroad, *through either subsidiaries or branches*, would most clearly fall within the above description. On the other hand, the *Guidelines* should not apply to a United States manufacturer whose sole foreign connection is the licensing of foreign patents.

---

30. *Guidelines*, *supra* note 17, introductory para. 6, at 12.

31. “A precise legal definition of multinational enterprises is not required for the purposes of the guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degree of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the guidelines. The word ‘enterprise’ as used in these guidelines refers to these various entities in accordance with their responsibilities.” *Guidelines*, *supra* note 17, introductory para. 8, at 12.

Some of the factors listed in introductory paragraph 8 of the *Guidelines*<sup>32</sup> may arguably be present, however, in certain cases of sophisticated and complex licensing arrangements. Nevertheless, foreign operations consisting solely of licensing do not conform to the ordinary use of the term "multinational" enterprise which the *Guidelines* seem to adopt. A second example of an arrangement questionably subject to the *Guidelines* is that where a United States firm's only foreign connection is participation in a single joint venture with several European partners to manufacture, sell, and engage in research and development in a European country. Again, the mere fact that the partners may share knowledge and resources with each other should not make the United States firm a "multinational" for purposes of the *Guidelines*.

The arrangements described in the preceding paragraph are examples, and they are obviously not exhaustive, of the methods of doing business abroad. They do, however, indicate the imprecise scope of the *Guidelines*.

Another potential problem for multinationals concerns the definition of the term "enterprise" as a single overall entity comprised of subsidiary and affiliated companies and branches. Introductory paragraph 8 addresses the *Guidelines* "to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance . . . ."<sup>33</sup> The thrust appears to be to apply the *Guidelines* to each subsidiary, affiliate, or branch. It is far less clear whether paragraph 8 is intended to treat the entire multinational as a single "enterprise" with respect to the *Guidelines*, making the various entities thereof accountable for the actions of the others. Under United States and EEC law, a parent and its subsidiaries are considered as a single unit only under certain circumstances. While the case law is not entirely clear, the major factor for single treatment might be described as "control" by the parent of the subsidiary. Paragraph 8 does not adopt any standard. This question becomes especially important when considered with paragraph 4 of the competition guideline, which exhorts cooperation with antitrust enforcement officials.<sup>34</sup> This is particularly true with respect to disclosure of information; *e.g.*, where a United States parent is asked to provide documents located in New York to officials of

---

32. Most notable among these factors is the extent of sharing of knowledge and resources and mutual influence. *Id.*

33. *Id.*

34. See text accompanying notes 148-54 *infra*. See also Commission of the European Communities, Sixth Report on Competition Policy 32-33 (1977); Griffin, *The Power of Host Countries over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 L. & Pol'y Int'l Bus. 375 (1974).

the German Federal Cartel Office as part of an investigation of a German subsidiary.

The *Guidelines* also make no distinction between operations through a branch or division and operations through a separately incorporated subsidiary. Thus, the form of doing business abroad by a United States firm should not affect the applicability of the competition guideline. This is particularly important in that the competition guideline appears not to adopt the highly controversial and ill-defined intra-enterprise or "bathtub" conspiracy doctrine of United States antitrust law; *i.e.*, the finding of a conspiracy or combination between a parent and a subsidiary or between two subsidiaries. The doctrine's principal precedential basis is *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*<sup>35</sup> Perhaps the most forceful statement of the principle is found in *Perma Life Mufflers, Inc. v. International Parts Corp.*: "[S]ince [the defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."<sup>36</sup>

Despite the broad language in *Kiefer-Stewart* and *Perma Life*, many lower courts have indicated increasing discomfort with the intra-enterprise doctrine and have imposed various limitations on its applicability. For example, several courts have required that the parent and subsidiary, or two subsidiaries, hold themselves out as competitors.<sup>37</sup> Recent decisions emphasize that a number of factors must be considered and that the mere fact of separate incorporations does not bring the doctrine into play.<sup>38</sup> Other courts have refused to find a conspiracy where the two entities functioned essentially as a single business unit.<sup>39</sup>

35. 340 U.S. 211 (1951). *See also* *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). *But see* *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.*, 370 U.S. 19 (1962), where the Court held there was no unlawful conspiracy among three related but separately incorporated farmers' cooperative organizations, stating: "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect . . . There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." *Id.* at 29.

The only Supreme Court case involving bathtub conspiracies in the international area is *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), where it was stated that the "fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *Id.* at 598 (citing *Kiefer-Stewart Co. v. Seagrams & Sons*, 340 U.S. 211, 215 (1950)).

36. 392 U.S. 134, 141-42 (1968).

37. This limitation is based on language in *Kiefer-Stewart* that the intra-enterprise rule "is especially applicable where . . . [defendants] hold themselves out as competitors." 340 U.S. at 215. Language supporting this limitation is also found in *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 119-20 (1975).

38. *See, e.g.*, *Brager & Co. v. Leumi Securities Corp.*, [1977] 5 Trade Reg. Rep. (CCH) (1977-1 Trade Cas.) ¶ 61,379 (S.D.N.Y. Apr. 12, 1977) (foreign parent and U.S. subsidiary).

39. *See, e.g.*, *Giant Paper & Film Paper Corp. v. Albemarle Paper Co.*, [1977] 5 Trade Reg. Rep. (CCH) (1977-1 Trade Cas.) ¶ 61,351 (S.D.N.Y. Mar. 28, 1977).

The intra-enterprise doctrine has special relevance in the international area,<sup>40</sup> most importantly with respect to multinational enterprises. If a conspiracy can be found between or among the various parts of a multinational (*e.g.*, between a United States parent and a wholly-owned Venezuelan subsidiary), then internal pricing arrangements (transfer pricing) and territorial allocations may be subject to the prohibitions under section 1 of the Sherman Act,<sup>41</sup> under similar foreign antitrust laws, or under code provisions such as paragraph 3 of the OECD competition guideline.<sup>42</sup>

Transfer pricing and internal allocation of markets by multinationals are two of the most important concerns of developing countries. For example, many developing countries, notably those in South America, prohibit restrictions on a local subsidiary's right to export whether or not a so-called "bathtub" conspiracy can be established between the United States or foreign parent and the local subsidiary.<sup>43</sup> The International Antitrust Guide issued by the United States Department of Justice takes the general position that the intra-enterprise doctrine does not apply where the parent has "effective working control" over the subsidiary.<sup>44</sup> While the Justice Department's qualified rejection of the doctrine is welcome, many interesting and important questions remain open. For example, a common situation facing multinationals today is that where a host country requires majority ownership for itself in the foreign subsidiary, with only a minority stock interest held by the United States

---

40. For several recent decisions involving alleged bathtub conspiracies in an international setting, see *International Rys. v. United Brands Co.*, 532 F.2d 231 (2d Cir.), *cert. denied.*, 429 U.S. 835 (1976); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635 (S.D.N.Y. 1976) (no conspiracy between a United States parent-manufacturer and a wholly owned subsidiary formed to operate as export and overseas agent).

41. 15 U.S.C. § 1 (Supp. V 1975).

42. See text accompanying notes 141-47 *infra*.

43. See E. White, *Control of Restrictive Business Practices in Latin America* (U.N. Doc. UNCTAD/ST/MD/4, 1975).

44. See Antitrust Division, U.S. Department of Justice, *Antitrust Guide for International operations, Case A* (Jan. 26, 1977) [hereinafter cited as *Guide*], reprinted in *Trade Reg. Rep. (CCH)*, No. 266, Part II, 10 (Feb. 1, 1977). The *Guide* contains a potentially significant qualification to its otherwise lenient stance toward intra-enterprise restrictions: "This would still allow use of the Sherman Act to reach coercive attempts by members of a corporate group to drive third parties out of business or out of markets." *Id.* at 12 n.26. In this connection, see Report of the Attorney General's National Committee To Study the Antitrust Laws (1955), where it is stated that "when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 may be transgressed." *Id.* at 35. The *Guide's* position toward the intra-enterprise doctrine is generally consistent with prior announcements by Justice Department officials and with numerous consent decrees which provide that they are generally inapplicable to agreements and conduct involving a corporation and its subsidiaries or parent corporations. See, *e.g.*, *United States v. Sperry Rand Corp.*, 1965 Trade Cas. ¶ 71,330 (N.D. Ill. 1965).

“parent”; for example, a so-called “49-51” subsidiary. If the United States parent continues to exercise “effective working control,” then under the Guide no “conspiracy” will be found. On the other hand, if such control is not exercised by the United States parent, should a “conspiracy” be found where the parent is compelled to take only a minority interest? Should it make a difference whether there is a new subsidiary or a formerly wholly-owned subsidiary with the stock position subsequently reduced to forty-nine percent? In this connection, consider the Guide’s reference to *United States v. Citizens & Southern National Bank*,<sup>45</sup> where the Guide mentions, among other factors establishing “control,” the fact that the defendant bank had been prevented by state law from controlling more than five-percent interest in affiliated banks.<sup>46</sup> Does this reference mean that control may be found even where the “parent” has as little as five-percent ownership interest?

The OECD’s rejection of the intra-enterprise doctrine is generally consistent with the EEC position. The Court of Justice has stated that article 85 is not violated by

agreements or concerted practices 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 the undertakings.<sup>47</sup>

Finally, there is some inconsistency or at least tension in the first clause of the competition guideline if it is interpreted both to treat the entire multinational operation as a single unit and also to require that the multinational, viewed as a single unit, conform “to official competition rules and established policies of the countries in which [the whole unit] operate[s].”<sup>48</sup> It is somewhat difficult to see how the multinational enterprise as a *single unit* can be expected to conform to what are often conflicting national laws and policies in the competition area. In many instances, separate parts of the multinational may be compelled to follow the varying and sometimes conflicting laws and policies in the different national jurisdictions in which they operate. For example, a manufacturing subsidiary in country *A* may be compelled by the government of *A* not to export goods to a particular United States purchaser for political

---

45. 422 U.S. 86 (1975).

46. Guide, *supra* note 44, at 13 n.27.

47. *Centrafarm B.V. v. Sterling Drug, Inc.*, [1974] C.J. Comm. E. Rec. 1147, [1974 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8246, at 9151-57 to -58. *But see* Commission Decision of July 2, 1970, 13 J.O. Comm. Eur. (No. L. 147) 24 (1970), [1970-1972 Transfer Binder, Regulations List] Comm. Mkt. Rep. (CCH) ¶ 9378 (*Kodak*); Response to Written Question No. 894/76, [Current Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 9948 (May 13, 1977).

48. *Guidelines*, *supra* note 17, at 15.

reasons,<sup>49</sup> while the policies of country *B* may encourage or compel a sister subsidiary in country *B* to sell to the same United States purchaser for balance of payments reasons. In this situation, it makes little sense to speak in terms of a single unit multinational enterprise conforming to national competition policies. Rather, it is a problem of different parts of the unit attempting to comply with conflicting national policies. The *Guidelines* offer no guidance in this situation.

The potential inconsistency or tension in the language of the first clause of the competition guideline reflects the probable intent of the drafters to treat a multinational enterprise as a single unit in order: (1) to facilitate antitrust investigations of local activities through the use of information obtained from foreign parents and affiliates and (2) to impute "responsibility" to parents for non-observance of the competition guideline by subsidiaries and affiliates. As the *Guidelines* are voluntary, without binding legal effect, and not to be applied to evaluate the particular conduct of a specific multinational entity,<sup>50</sup> the nature and gravity of such "responsibility" is quite unclear.<sup>51</sup>

Two final comments should be noted about the introductory clause of the competition guideline. First, the term "enterprise" should include any form of commercial activity; *e.g.*, individual proprietorship, partnership, or corporation. Second, the clause emphasizes the paramountcy of existing national competition laws over the competition guideline. It cannot be overemphasized that multinationals should focus on compliance with United States and foreign antitrust laws and should not view the competition guideline as a surrogate. At the same time, where a multinational is operating in a country without well-formulated antitrust laws and principles, it might well be advised to treat the competition guideline in such a country as providing an ambiguous identification of likely antitrust concerns.

### B. Paragraph 1

Enterprises should . . . 1. refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of power, by means of, for example, (a) anti-competitive acquisitions, (b) predatory behavior toward competitors, (c) unreasonable refusal to deal, (d) anti-competitive abuse of industrial property rights, (e) discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises . . . .<sup>52</sup>

---

49. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

50. See *Guidelines*, *supra* note 17, introductory paras. 6-8, at 12. See also text accompanying note 26 *supra*.

51. For example, trade unions have invoked the employment and industrial relations guideline with respect to the specific conduct of a particular multinational entity. See note 26 *supra*.

52. *Guidelines*, *supra* note 17, at 15.



The general concept incorporated in paragraph 1—abuse of a dominant position by a single firm—reflects well-settled antitrust law in many OECD member countries,<sup>53</sup> including the United States,<sup>54</sup> the EEC,<sup>55</sup> and West Germany.<sup>56</sup> Paragraph 1 derives primarily from article 86 of the Treaty of Rome,<sup>57</sup> although it has analogues in several other OECD member countries where the “abuse of dominant position” is more widely employed than the American concept of “monopolization.”<sup>58</sup> As the nine EEC countries comprise more than one-third of the membership of the OECD, the following case examples of an “abuse of a dominant position” under article 86 may be helpful toward understanding paragraph 1 of the competition guideline: (1) a vertically-integrated United States manufacturer with a world-wide monopoly of raw material necessary for the production of medicine discontinued selling the raw material to an Italian customer with whom it was competing, or about to compete, in the sale of an end product;<sup>59</sup> (2) a United States manufacturer holding a dominant position (through European subsidiaries) in the West German market for certain types of metal cans acquired an actual and potential competitor;<sup>60</sup> and (3) a United States banana producer was held to have abused its dominant position by engaging in the following practices: charging different prices (thirty- to fifty-percent differences) in different countries for equivalent transactions “without objective justification”; imposing resale restrictions; charging “unfair” or “excessive” prices; and cutting off supplies to a dealer who had advertised a competing brand.<sup>61</sup>

While paragraph 1 of the competition guideline also parallels to some extent section 2 of the Sherman Act,<sup>62</sup> substantial differences exist between them. Section 2 prohibits monopolization, conspiracies to

53. See, e.g., OECD, *Market Power and the Law* (1970).

54. Sherman Act § 2, 15 U.S.C. § 2 (Supp. V 1975).

55. Article 86 of the Treaty of Rome, *supra* note 20.

56. German Anticartel Law § 22, [1973] *Bundesgesetzblatt I* 918-19 (W. Ger.), *reprinted and translated in* 2 OECD Guide to Legislation on Restrictive Business Practices 12 (1973).

57. See note 20 *supra*.

58. For example, German law prohibits the “abusive exploitation” of a market dominating position. See Markert, *Recent Developments in German Antitrust Law*, in 1974 Fordham Corporate Law Institute, *International Antitrust* 47, 66-70 (B. Hawk ed. 1975) [hereinafter cited as 1974 FCLI].

59. *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission*, [1974] C.J. Comm. E. Rec. 223, [1974 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8209.

60. *Europemballage Corp. & Continental Can Co. v. Commission*, [1973-2] C.J. Comm. E. Rec. 215, [1971-1973 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8171. The court annulled a Commission finding of an abuse on the ground that the Commission had inadequately defined the product market.

61. Commission Decision of December 17, 1975, 19 O.J. Eur. Comm. (No. L 95) 1 (1976), [Current Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 9800 [hereinafter cited as *Chiquita*]. This decision, imposing a fine of over one million dollars on United Brands, is presently on appeal to the Court of Justice.

62. 15 U.S.C. § 2 (Supp. V 1975).

monopolize, and attempts to monopolize.<sup>63</sup> The Supreme Court has defined actual "monopolization" in the following terms: "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>64</sup>

Paragraph 1 is narrower in its coverage than section 2 in that the former does not apply until an enterprise has already achieved a "dominant position" and has thereafter abused it. Section 2, on the other hand, prohibits conspiracies or attempts to *attain* a monopoly or dominant position. For example, under the conspiracy offense, the few courts to address the issue have generally not required either proof of a relevant market or any significant market power.<sup>65</sup> As to the attempt offense, the great majority of courts require, *inter alia*, a showing of a "dangerous probability" of successful monopolization, which is usually measured in terms of significant market share (although short of monopoly power).<sup>66</sup> Paragraph 1 of the competition guideline seems not to include a conspiracy or attempt offense but rather to be limited to what under United States law would constitute actual monopolization. Other differences between paragraph 1 of the competition guideline and section 2 of the Sherman Act are discussed below.

It is instructive to compare article 86 of the Treaty of Rome and section 2 of the Sherman Act with three conditions for coverage under paragraph 1: dominant position of market power, abuse, and adverse effect on competition in the relevant market.

The section 2 analogue of "dominant position" is "monopoly power."<sup>67</sup> The latter concept is usually (although not invariably) measured in terms of a market share, with at least sixty-five to seventy-five percent of a defined relevant market generally considered to be required for a finding of "monopoly power."<sup>68</sup> The European concept may be broader and more

---

63. *Id.*

64. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

65. *See, e.g., United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 572-73 (2d Cir. 1961).

66. *See, e.g., Hiland Dairy Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). *See generally* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121 (1973). The Ninth Circuit, however, has, in some decisions, not required a dangerous probability of success where the anticompetitive or abusive conduct was clearly unjustifiable on business or social grounds. *See, e.g., Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

67. *See United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

68. *See* ABA Antitrust Law Developments 53-55 (1975) and cases cited therein.

flexible with less emphasis on market share percentages. For example, the following factors, among others, have been relied upon to establish a dominant position under article 86: access to financial resources, access to supplies and consumer markets, range of output and geographical spread of capacity, vertical integration, and technological predominance (particularly through patents and knowhow).<sup>69</sup> Reliance on such factors or criteria could very well result in the finding or assertion of a dominant position even though a firm's market share is well below the threshold figure(s) required under United States antitrust law. A similar result can be reached under German antitrust law, where dominant market power is rebuttably presumed if a single firm has only one-third of the market.<sup>70</sup> Thus, some OECD member countries might give a broader reading to "dominant position" than the term "monopoly power" has been given under United States antitrust law.

Another question raised by paragraph 1 concerns the location of the dominant position; that is, must the dominant position be in the same market as that in which competition is adversely affected? For example, could France justifiably invoke paragraph 1 against a United States-based multinational that holds a world-wide dominant position in the manufacture of a product and discontinues selling to a French dealer if the manufacturer has only five percent of the French market? United States law usually requires that the abusive or exclusionary conduct occur in the same market in which defendant has monopoly power;<sup>71</sup> EEC decisions are not so clear.<sup>72</sup>

The ambiguities as to the location and proof of the dominant position are illustrated in the following hypothetical. A vertically integrated United States-based multinational with relatively large access to capital sells world-wide, owns extensive raw materials, and holds numerous

---

69. See *Chiquita*, *supra* note 61 (access to raw materials and consumer markets); Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission, [1974] C.J. Comm. E. Rec. 223, [1974 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8209 (access to raw materials); Commission Decision of December 9, 1971, 15 J.O. Eur. Comm. (No. L 17) 25 (1972), [1970-1972 Transfer Binder, New Developments] Comm. Mkt. Rep. (CCH) ¶ 9481 (access to technical knowledge, raw materials, and capital), *rev'd on other grounds sub-nom.* Europemballage Corp. & Continental Can Co. v. Commission, [1973-2] C.J. Comm. E. Rec. 215, [1971-1973 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8171.

70. See Markert, *Recent Developments in German Antitrust Law*, in 1974 FCLI, *supra* note 58, at 66.

71. One exception to this proposition may be so-called "two-market" cases where defendant uses monopoly power in one market to harm competition or gain a competitive advantage in a second market. See *United States v. Griffith*, 334 U.S. 100 (1948); Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1156-62 (1973).

72. See *Common Market—Article 86, Mergers, Joint Ventures and Concentration Studies—Panel Discussion*, in 1974 FCLI, *supra* note 58, at 159, 167-70.

patents throughout the world; the firm sells its products in the EEC only in France where it holds ten percent of the French market; the majority of its sales are through wholly-owned company stores; the firm decides to integrate forward and terminate its French distributors. A complaining OECD country (France) might argue that the firm has a world-wide dominant position (under article 86 factors) which it has abused in France by unreasonably refusing to deal with French distributors (see example (c) in paragraph 1), even though the manufacturer does not hold a dominant position in France. This hypothetical is not offered as an example of conduct appropriately characterized as an abuse of a dominant position under paragraph 1; rather, it is offered to illustrate the ambiguities of paragraph 1 even though that paragraph appears to rest on concepts generally accepted under United States and European antitrust law.

Finally, paragraph 1 on its face does not cover a "shared monopoly"; that is, a finding of a dominant position of independent enterprises without any showing of a conspiracy or concerted action among them. For example, three firms in an oligopoly may be found to hold collectively a dominant position even though each has a market share under twenty-five percent *and* even though there has been no concerted or conspiratorial action among them. The "shared monopoly" theory has been rejected to date under United States antitrust law,<sup>73</sup> but it is accepted in some other OECD member countries, notably West Germany.<sup>74</sup>

The concept of "abuse" under EEC competition policy parallels the Sherman Act actual monopolization requirement of "predatory," "exclusionary," or otherwise anticompetitive or unfair business conduct.<sup>75</sup> Some American examples are horizontal mergers,<sup>76</sup> price or supply squeezes,<sup>77</sup> discriminatory treatment of customers,<sup>78</sup> and conduct

---

73. The Federal Trade Commission is, however, relying upon this theory, among others, in its case against the major United States cereal manufacturers. See Order Denying Motion for Summary Decision Dismissing Complaint, *In re Kellogg Co.* No. 8883 (F.T.C., filed Feb. 19, 1974), reprinted in [1973-1976 Transfer Binder, FTC Complaints & Orders] Trade Reg. Rep. (CCH) ¶ 20,529.

74. See Markert, *Recent Developments in German Antitrust Law*, in 1974 FCLI, *supra* note 58, at 66.

75. It should be noted that the exact definition of such conduct has remained elusive over the 87-year history of the Sherman Act. For one formulation, see *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). For another, see *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). See generally L. Sullivan, *Handbook of the Law of Antitrust* §§ 33-38 (1977).

76. See, e.g., *United States v. Reading Co.*, 253 U.S. 26 (1920).

77. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

78. See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

otherwise constituting restraints of trade (such as price fixing, market division, customer allocation and boycotts).<sup>79</sup> Three "abuses" under article 86 of the Treaty of Rome were seen above.<sup>80</sup> Abuses under West German law include, among others, exclusive dealing, tying arrangements, refusals to deal and excessive prices.<sup>81</sup> Thus, with certain significant exceptions seen below, a United States-based multinational engaged in conduct which would not constitute actual monopolization under section 2 of the Sherman Act can be somewhat secure that it is not committing an "abuse" under paragraph 1 as that term may be interpreted by other OECD nations. The most significant exception concerns high or excessive prices which the EEC and West Germany have found to be anticompetitive abuses.<sup>82</sup> This contrasts with the United States where the mere fact that a firm's prices, or also profits, are high or at a comparatively high level does not constitute by itself either actual monopolization or any other antitrust violation. Other variations between American and foreign views of such terminology as "abuse" are seen in the analysis below.

Paragraph 1's enumeration of five examples of abuses of a dominant position raises two points. First, are the five examples an exhaustive list? Article 86 of the Treaty of Rome, from which paragraph 1 is primarily derived, also enumerates certain practices as examples of abuses of a dominant position. The Commission of the EEC and the Court of Justice have interpreted this list as nonexclusive, holding practices *not* listed to be abuses.<sup>83</sup> Therefore, European members of the OECD might interpret an abuse of a dominant position under paragraph 1 as including practices not enumerated in the list of examples, such as charging excessive prices.<sup>84</sup>

Second, there is some risk that some OECD member countries may view agreement on the examples as a basis for treating the conduct specified in the examples as abuses *per se*, without a sufficient analysis of a firm's market position or the practice's adverse effect on competition in a relevant market. Such an interpretation would be a distortion or misreading of the language and purpose of paragraph 1.

---

79. See, e.g., *id.*

80. See notes 59-61 *supra* and accompanying text.

81. See Markert, *Recent Developments in German Antitrust Law*, in 1974 FCLI, *supra* note 58, at 66-67.

82. See *Chiquita*, *supra* note 61; Doing Business in Europe, Comm. Mkt. Rep. (CCH) ¶ 30,855 (Mar. 9, 1976) (West German Federal Cartel Office orders Merck to cut prices).

83. *Europemballage Corp. & Continental Can Co. v. Commission*, [1973-2] C.J. Comm. E. Rec. 215, [1971-1973 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8171.

84. The United States antitrust official most closely involved with the OECD *Guidelines*, however, takes the position that the omission of excessive prices as an example indicates the drafters' acceptance of the United States law. See Davidow, *supra* note 15, at 11.

Example (a) in paragraph 1 of the competition guideline is "anti-competitive acquisitions." This derives primarily from the Court of Justice decision in *Continental Can*,<sup>85</sup> where the acquisition of an actual or potential competitor by a holder of a dominant position was held to constitute an abuse.<sup>86</sup> Example (a) is considerably narrower than the United States merger provision, section 7 of the Clayton Act,<sup>87</sup> which prohibits mergers that *may* lessen competition in the future. Thus, section 7 has been applied to bar mergers between competitors holding less than a ten-percent share of a concentrated market (or a market with a trend toward concentration).<sup>88</sup> Example (a), on the other hand, seems to follow the EEC practice and applies only where the acquiring firm already has a dominant position before the merger takes place.

Example (a) would appear, on its face, to apply to any form of acquisition; *i.e.*, horizontal (acquisition of a competitor), vertical (acquisition of a supplier or customer), or conglomerate. Also, example (a) does not specifically mention certain defenses available under United States anti-trust law, notably that the acquired company is failing<sup>89</sup> or that the acquisition of stock is for investment purposes only.<sup>90</sup> As these "defenses" relate to the basic issue of anticompetitive effect, they should be considered as implicit in paragraph 1.<sup>91</sup>

The efficacy of example (a) as a guideline is highly doubtful for several reasons. First, national policies toward merger control and concentration vary radically among even the OECD member countries. These policies often change or fluctuate substantially over periods of time. For example, some countries encourage mergers and concentration for political and social reasons as well as economic ones.<sup>92</sup> Other countries, like the United States, take the opposite stance. Moreover, even where a country imposes merger controls on competition grounds, the question whether an acquisition is "anticompetitive" is a very complex one which cannot be answered in the abstract and which would likely be answered in varying

---

85. *Europemballage Corp. & Continental Can Co. v. Commission*, [1973-2] C.J. Comm. E. Rec. 215, [1971-1973 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8171.

86. *Id.*

87. 15 U.S.C. § 18 (1970).

88. *See* *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (7.5% market share plus trend toward concentration); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (4.49% market share plus trend toward concentration).

89. *See, e.g.*, *Citizen Publ. Co. v. United States*, 394 U.S. 131 (1969).

90. *See, e.g.*, *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

91. This position or interpretation is taken by Davidow. *See* Davidow, *supra* note 15, at 14-15.

92. Thus, France traditionally has been comparatively lenient towards mergers, at least between domestic enterprises. This policy may now be changing. *See, e.g.*, Goldman, *Antitrust Laws of France*, in 1974 FCLI, *supra* note 58, at 317, 324-25.

ways by different nations. It is true that there is a trend among OECD member countries to establish merger controls,<sup>93</sup> but the philosophies, policies, and standards reflected in those controls differ so radically that example (a) offers little or no guidance to a multinational contemplating an acquisition in an OECD country. Second, many OECD countries already screen foreign takeovers or acquisitions of domestic firms.<sup>94</sup> Compliance with the formal or informal conditions for governmental approval of the takeover or acquisition will take precedence over the OECD competition guideline.

In light of all of the above, the first example of an abuse can be expected to have no practical effect on United States-based multinationals, except to the extent that a multinational with a world-wide dominant position may be faced with an additional objection by a foreign government to its acquisition of a local operation. Should such an objection be made, example (a) provides little guidance as to how that objection should or will be considered, although the reference to "anticompetitive" indicates strongly that economic and competition policies should be emphasized over political and nationalistic policies.

Example (b) in paragraph 1 is "predatory behavior toward competitors." Many of the OECD member countries, including the United States, prohibit certain unilateral "predatory" conduct by a monopolist or a firm holding a dominant position. Thus, example (b), read in the context of paragraph 1, does reflect a generally accepted principle and is, on its face, consistent with United States antitrust law. The problem is its general language which permits wide divergencies of interpretation. In the United States, "predatory behavior toward competitors" by a monopolist could include the following practices: temporary below-cost pricing to harm or eliminate a competitor;<sup>95</sup> tying and discriminatory

---

93. West Germany and the United Kingdom have adopted merger control laws. See *Doing Business in Europe*, Comm. Mkt. Rep. (CCH) ¶¶ 23,510 (Nov. 6, 1973), 24,011 (Dec. 2, 1975). The Common Market and France are now considering such adoption. See *Proposal for a Regulation (EEC) of the Council on the Control of Concentrations Between Undertakings*, 16 O.J. Comm. Eur. (No. C 92) 1 (1973), [1973-1975 Transfer Binder, Regulations List] Comm. Mkt. Rep. (CCH) ¶ 9586.

94. Such screening is practiced, for example, by Canada, France, and West Germany. See *Doing Business in Europe*, Comm. Mkt. Rep. (CCH) ¶ 22,653 (Mar. 9, 1976) ("With certain exceptions, foreign investments in France are considered 'direct investments,' for which a prior declaration or request for prior authorization must be made to the Ministry of Finance."); *id.* ¶ 23,154 (Dec. 2, 1975) (purchase of West German securities by non-residents is subject to approval by the Bundesbank); Bertrand, *Canadian Competition Policy Developments and the Multinational*, in 1974 FCLI, *supra* note 58, at 285, 297-98 (Canada's Foreign Investment Review Act requires review by the Minister of Industry, Trade and Commerce).

95. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n.12 (1967); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Continental Baking Co. v. Old Homestead*

arrangements;<sup>96</sup> and, more generally, "dirty tricks" directed at a competitor, ranging from sabotage and trade espionage to misrepresentations about a competitor's product.<sup>97</sup>

The problem of divergent interpretations by OECD member countries is aggravated by the fact that there is substantial controversy surrounding the very existence of some of these practices as well as difficulty in categorizing particular business conduct as "predatory" behavior.<sup>98</sup> For example, it is not clear in many situations whether pricing is "competitive" or "predatory" and, therefore, example (b) could be given anticompetitive interpretations.

Moreover, example (b) introduces the much disputed issue whether business activity harmful to a competitor should be proscribed when there is no apparent or short-run harm to competition (and consumers).<sup>99</sup> For example, a successful reduction in prices to take sales away from a competitor may seriously harm that competitor without any apparent harmful effect from the consumer's viewpoint. The first clause of paragraph 1 requiring that the actions "adversely affect competition in the relevant market" would seem to limit example (b) to predatory behavior where an adverse effect on competition can be shown and not merely harm to a competitor. This limitation also has the benefit of helping to prevent interpretations which result in anticompetitive effects.

Example (c) is an "unreasonable refusal to deal." This example is largely consistent with existing United States and most foreign antitrust law. United States law prohibits unilateral refusals to deal where they are

Bread Co., 476 F.2d 97, 104 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); Porto Rican Am. Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 236 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929).

96. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

97. See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143, 148-49 (1951) (newspaper publisher forced advertisers to boycott a radio station before it would sell advertising space to them); *United States v. International Fur Workers Union*, 100 F.2d 541, 546-47 (2d Cir.), *cert. denied*, 306 U.S. 653 (1938) (threats of violence, actual batteries and bombings); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 720 (D. Hawaii 1964), *aff'd per curiam*, 401 F.2d 182 (9th Cir.), *cert. denied*, 393 U.S. 1086 (1969) (repeated expenditure of excessive sums for advertising upon the introduction of new product).

98. Alleged "predatory pricing" is perhaps the best example. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & Econ. 137 (1958); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Telsler, *Cutthroat Competition and the Long Purse*, 9 J.L. & Econ. 259 (1966); Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & Econ. 129 (1972).

99. The literature is replete with criticisms and discussions of this distinction. Compare, e.g., Blake & Jones, *In Defense of Antitrust*, 65 Colum. L. Rev. 377 (1965), with Bork & Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363 (1965).



part of a monopolistic scheme or accompanied by an intent to monopolize.<sup>100</sup> Article 86 of the Treaty of Rome has been interpreted to cover an unreasonable refusal to deal as an abuse of dominant position.<sup>101</sup> Indeed, some OECD countries prohibit unreasonable refusals to deal even by a non-monopolist.<sup>102</sup>

The use of the term "unreasonable" rather than the more frequently used American terms of "monopolistic intent" or "scheme" does raise the possibility that an OECD member country might take a stiffer position toward a refusal to deal. For example, it might argue that a refusal to deal by a multinational is "unreasonable" even though it is not part of a "monopolistic scheme." However, the latter term as interpreted under United States law is probably not significantly different from the term "unreasonable." In either case, the monopolist must have a legitimate business reason for the refusal.

The scope of example (c) is unclear in two other important respects: whether it covers (1) exclusive distributorships or (2) refusals to license patented or unpatented technology, trademarks, copyrights, and other industrial property. The answer is probably no as to both. Exclusive distributorships and licensing are subject to specific rules in most countries having a developed antitrust law.<sup>103</sup> Industrial property licensing would appear to be excluded from example (c) for the additional reason that it is specifically covered in example (d) and in a separate guideline on science and technology.<sup>104</sup>

Example (d) is an "anti-competitive abuse of industrial property rights." The extreme generality of this phrase does not provide any meaningful guidance in the highly complex area of antitrust and industrial property law. While the United States, the EEC, and several other OECD member countries have prohibited certain licensing and other arrangements on antitrust and other grounds,<sup>105</sup> the national rules (where they exist) vary and conflict to such a degree that at the present

---

100. See, e.g., *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

101. See *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission*, [1974] C.J. Comm. E. Rec. 223, [1974 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8209.

102. An example is the *réfus de vente* in France. See Goldman, *Antitrust Laws of France*, in 1974 FCLI, *supra* note 58, at 317, 318.

103. For a discussion of the law in France and Italy, see 2 *Business Regulation in the Common Market Nations* 323-24, 421-23 (franchising and licensing), 521-22 (exclusive dealing) (H. Blake ed. 1969). The law in West Germany is discussed in 3 *id.* at 249-52 (exclusive dealing) and 279-99 (licensing). As to the Common Market, see, e.g., Reg. No. 67/67, 10 J.O. Comm. Eur. (No. 57) 849 (1967), 1 Comm. Mkt. Rep. (CCH) ¶ 2727.

104. *Guidelines*, *supra* note 17, at 17.

105. See, e.g., 1974 FCLI, *supra* note 22, at 177-270.

time multinationals must look to them rather than the OECD competition guideline.

Example (d) is highly important to multinationals, however, not as a guideline but rather as a signal that many OECD member countries are, and will be, taking a harder look at industrial property rights like patents, knowhow, and trademarks. For example, in 1972 the OECD Committee of Experts on Restrictive Practices stated that the following arrangements might be found harmful under some circumstances: patent pools, cross-licensing agreements, territorial restrictions, package licensing, grant backs, and tying clauses.<sup>106</sup> This trend toward a stricter stance in the OECD countries must also be seen as part of the broader concern about technology transfers held by those developing countries which would not limit prohibitions on licensing to abuses by multinationals holding a dominant position as does paragraph 1 of the competition guideline.<sup>107</sup>

Example (e) can best be understood as having two separate clauses, each of which covers different types of pricing practices by a firm with a dominant position: (1) discriminatory or unreasonably differentiated pricing and (2) anticompetitive transfer pricing. The language in each clause could be given an interpretation by certain OECD member countries substantially different from existing United States antitrust law.

Three different kinds of pricing transactions could be covered by a prohibition against discriminatory or unreasonably differentiated pricing, and there is no published "legislative history" indicating whether such a prohibition is intended to apply to all or some of them. The three possibilities are: (1) price discrimination among purchasers within a single country; *i.e.*, a prohibition similar to that in the Robinson-Patman Act,<sup>108</sup> (2) price differences between or among different countries; *i.e.*, a prohibition along the lines of the EEC *Chiquita* decision;<sup>109</sup> and (3) an antidumping prohibition; *i.e.*, selling or "dumping" goods in a country at a price below their fair market value in the country of manufacture.<sup>110</sup>

---

106. OECD, Report by the Committee of Experts on Restrictive Business Practices, Restrictive Business Practices Relating to Patents and Licenses, para. 31 (1973).

107. Third World proposals are far more radical than the OECD recommendations. For example, developing countries in UNCTAD have proposed a code of conduct on the transfer of technology which enumerates 40 prohibited restrictions involving licensing of industrial property rights. See UNCTAD, Draft Outline for the Preparation of an International Code of Conduct on Transfer of Technology Submitted by Brazil on Behalf of the Group of 77, at 7-9, U.N. Doc. TD/B/C.6/AC.1/L.1/ Rev. 1 (1975). For a revised text of that draft outline, see UNCTAD, Report of the Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology on its Second Session, Annex II, U.N. Doc. TC/AC.1/7 (1977).

108. 15 U.S.C. § 13(a)-(f) (1970).

109. See note 61 *supra*.

110. The United States antidumping provisions are contained in the Revenue Act of 1916, 15

As to the first situation, prohibitions such as in the Robinson-Patman Act exist in several foreign jurisdictions, albeit in a less technical form. For example, articles 85 and 86 of the Treaty of Rome, under certain circumstances, prohibit discriminatory pricing and terms.<sup>111</sup> Nonetheless, such ambiguities and inconsistencies exist within single nations (such as the United States) that if example (e) is interpreted in the Robinson-Patman sense, it will inevitably be ambiguous, if not devoid of operational meaning. For example, the Robinson-Patman Act expressly provides for certain defenses, notably cost justification of the price differential and a showing that the lower price was offered to meet competition.<sup>112</sup> Example (e) on the other hand, is silent as to defenses. Moreover, the Robinson-Patman Act has been severely criticized as being anticompetitive in effect by, among others, the Antitrust Division of the United States Department of Justice.<sup>113</sup> Example (e) should not be interpreted, therefore, as embodying a general prohibition on price discrimination in the Robinson-Patman sense.

If example (e) is so interpreted by an OECD member country, it would appear to be narrower in scope than the Robinson-Patman Act in at least two ways. First, the competition guideline applies only where a firm has a dominant position; the United States law does not require any specific degree of market power, let alone dominance. Second, the competition guideline requires that the discriminatory pricing "adversely affect competition in the relevant market," while the United States law will apply where there is injury only to a competitor or buyer.<sup>114</sup> Thus, the competition guideline, unlike the Robinson-Patman Act, would appear not to apply to price reductions which harm a specific competitor (e.g., by diverting sales, etc.) without affecting competition in the market generally.<sup>115</sup> Finally, the parenthetical term "unreasonably differentiated" has no accepted meaning under either United States or foreign antitrust law and its inclusion in the competition guideline does not make it less ambiguous than the Robinson-Patman Act.

The second kind of pricing transaction possibly covered by the first

---

U.S.C. §§ 71-77 (1970), and the Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (1970 & Supp. V 1975).

111. Articles 85(1)(d) and 86(c) prohibit "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." Treaty of Rome, *supra* note 20.

112. 15 U.S.C. § 13(a), (b) (1970). *See generally* ABA, *Antitrust Law Developments* 136-40, 143-49 (1975).

113. *See, e.g.*, U.S. Department of Justice, *Report on the Robinson-Patman Act* 257 (1977) (criticizing the Act on the ground that it encourages price fixing and price uniformity, particularly in oligopolistic markets).

114. *See* 15 U.S.C. § 13(a) (1970).

115. The case law under the Robinson-Patman Act is not entirely clear. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* §§ 220-21 (1977) and authorities cited therein.

clause of example (e) is that where a multinational charges different prices for the same product in different countries. While at first glance this may seem perfectly legitimate in view of differing market conditions, price disparities across national lines have become a major concern of European antitrust enforcement. West Germany<sup>116</sup> and the United Kingdom<sup>117</sup> have brought proceedings in this regard. The Commission of the EEC has stated that international price disparities constitute an abuse of a dominant position under article 86 where they are not objectively justified.<sup>118</sup> This type of offense or theory is not found in United States law, except in the somewhat different situation of geographic price discrimination; *e.g.*, temporarily reducing a price in one marketing area to eliminate or harm competition in that area.<sup>119</sup> Moreover, one remedy adopted by the Europeans is to order a rollback of prices or to set a maximum price; this form of price control has been rejected by United States courts and enforcement officials as an antitrust remedy.<sup>120</sup> Thus, a United States-based multinational which sells the same product at widely different prices throughout the OECD countries must face the strong possibility that now, or in the future, an OECD member country in which the prices are comparatively higher may complain that the exhortation contained in the first clause of example (e) has not been followed.

The third situation conceivably covered by this prohibition is dumping.<sup>121</sup> In some cases this may simply reflect disparities discussed in the preceding paragraph with the complaining countries reversed. That is, the country with the higher price complains about price disparities and the country with the lower price charges dumping. Given the absence of supporting legislative history and the grave potential for conflict among nations from enforcement of antidumping laws, a multinational can reasonably interpret the first clause of example (e) as not covering dumping.

The prohibition against discriminatory or unreasonably differentiated pricing in the first clause of example (e) will most likely be considered by foreign OECD nations as reflecting their concern about high price disparities among different countries.

---

116. See Markert, *Recent Developments in German Antitrust Law*, in 1974 FCLI, *supra* note 58, at 69-70.

117. See Rhineland, *The Roche Case: One Giant Step for British Antitrust*, 15 Va. J. Int'l L. 1 (1974).

118. See Chiquita, *supra* note 61.

119. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

120. See Rhineland, *The Roche Case: One Giant Step for British Antitrust*, 15 Va. J. Int'l L. 1 (1974).

121. See note 110 *supra* and accompanying text. The current version of the Antidumping Act of 1921 applies to certain price discrimination actions by multinationals operating in more than one foreign country. 19 U.S.C. § 164(d) (Supp. V 1975).

The second clause of example (e) concerns the use of pricing transactions between affiliated enterprises to adversely affect outside competition. As with international disparities of prices in the first clause, the concerns underlying this second clause are more European than American, and the impetus for its inclusion in the guideline apparently came from European members of the OECD. The second clause also goes beyond United States antitrust law to the extent that it attempts to regulate in the sensitive area of intra-enterprise pricing and profit allocation.<sup>122</sup> The clause apparently applies to transfer pricing between branches or divisions as well as between parents and subsidiaries.

According to Davidow, this clause is probably intended to reach two marketing situations. The first is "subsidization" of a particular subsidiary through higher profits obtained elsewhere by the parent corporation. The subsidiary is thereby permitted to engage in local below-cost pricing to gain entry or increase market share as against unaffiliated competitors. The other marketing situation is discrimination by a vertically-integrated multinational against independent distributors in favor of company-owned outlets, particularly in times of shortages and other crises such as the oil embargo of 1973-74.<sup>123</sup>

As to the first situation, below-cost pricing (whether through a subsidiary, affiliate, or directly) is under certain conditions unlawful under United States antitrust law as predatory pricing.<sup>124</sup> It is far less clear under United States antitrust law whether using profits made in one area of an enterprise's overall operations to fund or "subsidize" operations of a subsidiary or affiliate in a second area in order to gain entry or increase the subsidiary's market share is unlawful, at least in the absence of other illegitimate practices.<sup>125</sup> Moreover, the difficulties of determining

---

122. See Guide, *supra* note 44, at Case A.

123. See Davidow, *supra* note 15, at 19.

124. See note 98 *supra*.

125. There is considerable controversy concerning the existence and anticompetitive effect of so-called "subsidization." See L. Sullivan, Handbook of the Law of Antitrust §§ 220-21 (1977). Compare *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961) (lawful for a firm to reduce its profits in one of several regional, oligopolistic markets, so long as it does not act in a predatory way), and *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968) (in addition to diversion of business, a showing of structural change is needed to establish violation), with *Shore Gas & Oil Co. v. Humble Oil & Ref. Co.*, 224 F. Supp. 922, 926-27 (D.N.J. 1963) (injury to competitor due to discrimination is a violation if, but only if, the low price is supported by higher prices elsewhere).

Perhaps the closest United States analogue to the second clause of example (e) is contained in the Trade Act of 1974, Pub. L. No. 93-168, § 321(d), 88 Stat. 1978 (codified at 19 U.S.C. § 164(d) (Supp. V 1975)) (prohibiting under certain circumstances price discrimination by multinationals operating in more than one foreign country). See also S. Rep. No. 1298, 93d Cong., 2d Sess. 174-77 (1974).

whether "subsidization" exists are magnified considerably in the case of multinational operations where internal or transfer pricing decisions are often made primarily on the basis of tax and financial considerations and not on competitive ones.<sup>126</sup> The OECD concern with asserted anticompetitive abuse of transfer pricing must be seen against the background of perhaps more vocal Third World concern with transfer pricing of multinationals.<sup>127</sup>

The second clause of example (e), as it relates to transfer pricing, should be viewed by multinationals as an expression of the growing concern of certain OECD member countries and the Third World with asserted anticompetitive abuses of transfer pricing. It should be recognized that serious doubts exist whether transfer prices ordinarily implicate antitrust policies rather than taxation, customs, and other national policies. Beyond this, example (e) seems generally consistent with United States law insofar as it prohibits price squeezes and other predatory pricing action by a vertically-integrated or diversified multinational with a dominant position, as discussed below. The question of "subsidization" is so complex and controversial that the generality of the second clause of example (e) provides little or no practical guidance in this regard.

The second situation possibly contemplated by the drafters—discriminatory treatment by vertically-integrated enterprises—again indicates a European rather than American influence. As a dominant position is required for example (e) to apply, limitation of example (e) to "price squeezes" with an intent to harm a competitor would probably be consistent with United States law. On the other hand, United States law does not generally require a vertically-integrated firm (*e.g.*, manufacturer-retailer) to sell its products at exactly the same price to independent retailers as it charges company-owned retail outlets.<sup>128</sup> Interpretations of the second clause of example (e) to require such uniformity would probably be a significant departure from United States antitrust law, with obviously important ramifications for multinationals attempting to comply with the guideline.

A final ambiguity with the second clause of example (e) is whether the term "affiliated enterprises" includes a licensor-licensee relationship.

---

126. See generally 1976 Fordham Corporate Law Institute, *International Taxation and Transfer Pricing* (E. Yorio ed. 1977).

127. See note 5 *supra* and accompanying text.

128. The courts differ as to whether a Robinson-Patman violation occurs where a parent charges a lower "transfer price" to a wholly owned outlet than it does to an independent outlet. Compare *Reines Distribs., Inc. v. Admiral Corp.*, 256 F. Supp. 581 (S.D.N.Y. 1966), with *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953).

C. *Paragraph 2.*

Enterprises should . . . 2. allow purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for specialization and sound commercial practice . . . .<sup>129</sup>

Paragraph 2 concerns vertical restrictions imposed by an enterprise on downstream purchasers and licensees. A dominant position or monopoly is not necessary for coverage. Paragraph 2 is analogous to section 1 of the Sherman Act and article 85 of the Treaty of Rome. Unlike these two enactments, however, no conspiracy or concerted action is necessary under paragraph 2, although this difference may not have great practical significance in many vertical arrangements.<sup>130</sup>

The various terms used in paragraph 2—such as “freedom to resell,” “develop their operations,” “trade conditions,” and “sound commercial practice”—are neither antitrust terms of art familiar to enforcement officials and practitioners nor terms about whose meaning there is a consensus. Given these ambiguities, together with the breadth of the exceptions or conditions, it is doubtful whether paragraph 2 provides much practical guidance to multinationals beyond bringing to their attention certain concerns of foreign countries, both members and non-members of the OECD.

The primary concern reflected in paragraph 2 is with restrictions on exports and re-exports imposed by multinationals (and others) on local licensees, distributors, and other resellers. Third World governments are particularly sensitive to such restrictions because of their impact on balance of payments policies and the development of local industries; *e.g.*, where a United States licensor or manufacturer restricts licensee or distributor in Brazil from re-exporting or exporting to the United States.<sup>131</sup> The EEC also takes a strong position against any restriction banning exports from one member state to another (*e.g.*, where a United States licensor or manufacturer restricts French licensee or distributor from exporting to the Netherlands) because of its interference with the goal of creating a single economic market among the member states.<sup>132</sup> This negative stance toward export bans may be

---

129. *Guidelines, supra* note 17, at 15.

130. United States courts have shown extraordinary ingenuity in finding the requisite “conspiracy” in vertical cases. *See, e.g.*, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

131. *See, e.g.*, UNCTAD, *An International Code of Conduct on Transfer of Technology* 25-28, U.N. Doc. TD/B/C.6/AC.1/2/Supp.1/Rev.1 (1975); E. White, *Control of Restrictive Business Practices in Latin America*, 86-96 (U.N. Doc. UNCTAD/ST/MD/4, 1975).

132. *Establisements Consten and Grundig-Verkaufs-GmBh v. Commission*, [1966] E. Comm. Ct. J. Rep. 429, [1961-1966 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8046. Restrictions on

stricter than the comparable United States antitrust rules. First, under *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>133</sup> vertical territorial and customer restrictions are now subject to the rule of reason. Modified territorial restrictions, such as primary areas of responsibility and dealer location clauses, were increasingly permitted even before *GTE Sylvania*.<sup>134</sup> Second, territorial restrictions within the United States are permitted where a patent is licensed.<sup>135</sup> Third, jurisdiction under the Sherman Act may not extend to every export ban imposed on foreign resellers or licensees;<sup>136</sup> *e.g.*, where a United States manufacturer restricts Brazilian distributors from exporting to Japan. These three qualifications indicate the almost impossible task of formulating a "code" or "guideline" covering the complex and shifting area of the law on vertical restrictions. Finally, other United States laws such as the Trading With the Enemy Act<sup>137</sup> may require restrictions on exports by foreign resellers or licensees of United States firms. Thus, paragraph 2 is subject to an interpretation that not only goes beyond the United States antitrust laws but which could also result in a heightening of national conflicts. One can only conclude that paragraph 2's conditions are sufficiently broad to permit export restrictions where they are not expressly prohibited by local law.

Several remaining points should be made concerning paragraph 2. First, joint ventures (and restrictions placed on joint ventures by the parent partners) appear to be excluded from its application. Second, restrictions placed on subsidiaries (both minority- and majority-owned) should not be covered under paragraph 2. Earlier drafts of paragraph 2 did include the phrase "when competitively important, wholly-owned subsidiaries" but this phrase was deleted in the final version.<sup>138</sup> Third,

---

exports are a type of territorial restriction, *i.e.*, one where the territory is coincident with national boundaries.

133. 97 S. Ct. 2549 (1977). The Court expressly overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

134. *See, e.g.*, ABA Section of Antitrust Law, Monograph 2, Vertical Restrictions Limiting Intra-brand Competition 20-25 (1977).

135. The Patent Code provides that a patentee may convey exclusive patent rights in "any specified part of the United States." 35 U.S.C. § 261 (1970 & Supp. V 1975); *see, e.g.*, *Security Materials Co. v. Mixermobile Co.*, 72 F. Supp. 450 (S.D. Cal. 1947). For one criticism of the general rule, see L. Sullivan, *Handbook of the Law of Antitrust* § 184, at 528-38 (1977).

136. *See* Guide, *supra* note 44, at Case F.

137. 50 U.S.C. § 1 (1970), *as amended* by Act of June 22, 1977, Pub. L. No. 95-52, 91 Stat. 235.

138. *See* Joelson, *supra* note 1, at 868. Davidow maintains, nonetheless, that the language is ambiguous and that paragraph 2 might be applied to a licensee or distributor which is a wholly or partially owned subsidiary of the enterprise imposing the restriction. Application would depend on factors such as the degree of ownership or control, the competitive situation, and the intent and effect of the conduct of which the restriction was a part. *See* Davidow, *supra* note 15, at 22.



the phrase "freedom to . . . purchase" is apparently intended to cover tying arrangements. It should not be interpreted, therefore, as imposing an obligation on multinationals to sell to whoever demands.<sup>139</sup> Many OECD member countries, including the United States, generally prohibit tie-ins and paragraph 2 as so interpreted is consistent.<sup>140</sup> There are, however, exceptions from the general prohibitions on tie-ins, and these vary among the OECD member countries. Given the broad language and conditions of paragraph 2, it cannot be expected to provide any practical guidance with respect to tying arrangements. Again, as with export bans, paragraph 2 should be considered not so much a "guideline" as an expression of OECD concern about the imposition of tie-ins by multinationals upon unwilling purchasers and licensees.

The last point, but perhaps the most significant, is that paragraph 2 emphasizes freedom of purchasers and licensors to resell and engage in other related business activity. In other words, the thrust of paragraph 2 is to prevent coercion by multinationals and not to prohibit particular vertical restrictions. Thus, paragraph 2 could fairly be read as not disapproving or condemning vertical restrictions voluntarily entered into by the purchaser, distributor, or licensee.

#### D. *Paragraph 3.*

Enterprises should . . . 3. refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation . . .<sup>141</sup>

Paragraph 3's general prohibition of cartels and other anticompetitive horizontal restraints is certainly consistent with United States antitrust law as well as the competition laws of most of the other OECD member countries. Paragraph 3 roughly parallels section 1 of the Sherman Act and requires a conspiracy or concerted action among competitors. Cartel arrangements can include price fixing, division of markets, allocation of customers, and limitations on production. These examples are per se violations of section 1 of the Sherman Act and are never permitted even where firms assert economic or business justifications for a particular agreement.<sup>142</sup> The EEC has adopted under

---

139. This interpretation is supported by the inclusion of "unreasonable refusal to deal" as an abuse of a dominant position.

140. See, e.g., Clayton Act § 3, 15 U.S.C. § 14 (1970); article 86 of the Treaty of Rome, *supra* note 20.

141. *Guidelines*, *supra* note 17, at 15.

142. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

article 85 a similarly strict approach, at least where the parties enjoy some degree of market power.<sup>143</sup> Thus, the general prohibition of paragraph 3 should be already familiar to United States-based multinationals. Given the broad jurisdictional reach of the Sherman Act, paragraph 3 should impose few additional limitations on United States-based multinationals doing business abroad. Indeed, the qualifying clause "adversely affect or eliminate competition" may be interpreted as suggesting a more tolerant stance toward traditional cartel arrangements than is the present United States position.<sup>144</sup>

While paragraph 3's general condemnation of cartels raises no particular problems for United States-based multinationals, the language of paragraph 3 suggests two points worthy of comment. First, earlier drafts barred "cooperation" with cartels. This language raised fears that presumably innocent activity, such as mere purchasing from a cartel, might be covered by the guideline. "Cooperation" was replaced by the phrase condemning actions "purposely strengthening the restrictive effects" of cartels. While this amendment certainly removes mere purchasing from a cartel as a proscribed action, it does not remove all doubts concerning a situation where a multinational is compelled by a foreign government to participate in or aid a nation-state cartel (like OPEC). A foreign government compulsion defense to an antitrust claim exists under United States law.<sup>145</sup>

The final qualifying clause, "and which are not generally or specifically accepted under applicable national or international legislation," is subject to a plethora of interpretations. Given the high inconsistency and serious conflicts among national laws and policies and the almost total lack of consensus on applicable international law principles, this last clause provides no practical guidance whatsoever to multinationals. For example, it offers the multinational no assistance in resolving issues such as relations with nation-state cartels or participation in export cartels which are encouraged in the exporting country but are per se unlawful under the laws of the importing country.<sup>146</sup>

This does not mean that paragraph 3 is a dead letter, for it does condemn private cartels which are not "accepted" by some national or

---

143. See Hawk, *Antitrust in the EEC—The First Decade*, 41 *Fordham L. Rev.* 229, 249-56 (1972).

144. Perhaps the language is mere surplusage in the sense that cartels inherently harm competition. On the other hand, the qualifying clause does suggest the possibility of cartels which do not have an anticompetitive effect. See Davidow, *supra* note 15, at 24.

145. See *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D.Del. 1970). *But see* Guide, *supra* note 44, at Case K.

146. For example, an export cartel of United States manufacturers, exempt from the United States antitrust laws under the Webb-Pomerene Act, could constitute a violation of Common Market and German antitrust laws. See Timberg, *Export Agreements and Export Cartels*, in 1974 *FCLL*, *supra* note 58, at 25, 32-33.

supranational body. Of course, ambiguities abound even here, but further analysis is beyond the scope of this article.

Paragraph 3 is not a meaningless gesture for two additional reasons. First, it is a declaration by twenty-three industrialized nations that as a general rule their multinationals should not participate in cartels. United States-based multinationals have already been operating under the same general rule under United States antitrust law. To the extent one believes in competition policy, one can welcome the acceptance of United States antitrust principles by foreign nations. Second, as with the preceding paragraphs of the competition guideline, paragraph 3 is important to multinationals not so much as a guideline to follow in specific detail but rather as an expression of national concerns about multinationals. The anti-cartel rule may indicate the changing national concerns about the competitive behavior of multinationals.<sup>147</sup>

#### E. Paragraph 4.

Enterprises should . . . 4. be ready to consult and co-operate, including the provision of information, with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations. Provision of information should be in accordance with safeguards normally applicable in this field.<sup>148</sup>

The apparent concern underlying paragraph 4 is the belief held by the drafters that enforcement of antitrust law with respect to multinationals is hampered by nonsubstantive obstacles involving service of process, the obtaining of information, and relief. For example, the Committee of Experts on Restrictive Business Practices felt strongly that parent companies often possess information highly relevant to investigations of subsidiaries and that the fact of separate corporate identities has been used to keep such information from enforcement authorities.<sup>149</sup>

---

147. Davidow, the chief United States enforcement official in the international antitrust area and the United States antitrust official most intimately involved with the OECD competition guideline, has stated: "It has become evident that many nations are now more concerned with the unilateral behavior of powerful, large multinationals or with their distribution and licensing practices than with the likelihood that multinationals will join in traditional international cartels of the types that were frequent in the 1930's. In fact, the references to participating in or otherwise purposely strengthening international or domestic cartels emphasizes the perceived possibility that multinationals may not so often instigate cartel arrangements as be put in a position of being induced to participate in or strengthen a cartel. This formulation, among other things, recognizes the propensity of governmental agencies or governmentally affiliated enterprises, particularly from developing countries, to form cartel-like arrangements and to put pressure on multinationals to assist in the carrying out and achievement of the cartel purposes. The rest of the guideline reflects a series of very delicate compromises and undoubtedly does leave the advice being given in a less than pellucid formulation." Davidow, *supra* note 15, at 23-24.

148. *Guidelines*, *supra* note 17, at 15.

149. *See* Davidow, *supra* note 15, at 26.

This broad concern must be kept in mind when interpreting paragraph 4. On its face, it calls for consultation and cooperation beyond the mere furnishing of information to antitrust enforcement officials. Exactly what is entailed is unclear and delineation must await any requests for consultation and cooperation by officials. Some possible demands can probably be ruled out; for example, a United States court would not require (by imposing sanctions) a foreign multinational to submit to the court's antitrust jurisdiction on the ground that the multinational must obey paragraph 4's exhortation to cooperate. On the other hand, multinationals can expect antitrust officials to rely upon paragraph 4 when negotiating during investigations and litigation.

It would appear, however, that the provision of information clause is the most important aspect of paragraph 4. It should be kept in mind that a separate guideline on disclosure of information exhorts multinationals to publish information on the structure, activities, and policies of the enterprise as a whole.<sup>150</sup>

The scope of paragraph 4 is quite broad. First, parents and subsidiaries are treated as a single unit, and the guideline generally requires a parent (*e.g.*, a United States-based multinational) to cooperate and supply information in connection with the antitrust issues or an investigation involving a foreign subsidiary. Moreover, the paragraph can be interpreted to require cooperation and provision of information to any nation "whose interests are directly affected" even though the multinational has no subsidiary or branch there.<sup>151</sup> Second, paragraph 4 can be read to include cooperation beyond that required by national law; *e.g.*, beyond the investigative powers given the United States Justice Department in the Hart-Scott-Rodino Antitrust Improvement Act of 1976.<sup>152</sup> Again, it is extremely doubtful that a United States court would accept such an interpretation even in the case of a multinational that previously declared its voluntary adherence to the *Guidelines*.

The qualifying sentence that the "[p]rovision of information should be in accordance with safeguards normally applicable in this field" is perhaps intentionally vague, and subject to numerous and conflicting interpretations. There is no consensus even among the OECD member countries as to the scope of procedural protections, privileges and confidentiality. Bluntly speaking, it is doubtful whether there are

---

150. *Guidelines*, *supra* note 17, at 14. See generally USA Business and Industry Advisory Committee, Committee on International Investment and Multinational Enterprises, *A Review of the OECD Guidelines for Multinational Enterprises: Disclosure of Information* (1976).

151. This is the position taken by Davidow. See Davidow, *supra* note 15, at 27.

152. Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections of 15, 18 U.S.C.).

"safeguards normally applicable in this field." Hopefully, the phrase encompasses the "safeguards" available under United States law as well as the laws of other OECD member countries; for example, confidentiality of trade secrets and competitively sensitive information, and evidentiary privileges such as the attorney-client privilege.<sup>153</sup>

Finally, the possibility of international conflicts, with the multinational in the middle, is increased by reason of the laws of several OECD countries which prohibit certain disclosures of information in connection with foreign antitrust investigations.<sup>154</sup> Paragraph 4 is silent on this situation.

#### IV. CONCLUSION

The competition guideline is *not* a multinational code of conduct reflecting existing antitrust legislation and policies of OECD member countries. Significant ambiguities exist and differences in interpretations can be expected given the broad language employed and the divergencies of national competition policies. Furthermore, the competition guideline in many respects does not appear simply to restate existing United States antitrust law; in some instances, it may be interpreted as going beyond United States law.

The competition guideline is most useful as an expression of areas of antitrust concern about multinationals shared by OECD member countries. Despite these shared concerns, the generality of the competition guideline permits each OECD member country to impart a content consistent with its own national policies. Multinationals should continue, therefore, to emphasize compliance with national antitrust rules and policies. The competition guideline is not a replacement of national rules.

The conclusion should not be drawn, however, that the competition guideline will have no practical significance. First, the extensive work which went into the formulation of the competition guideline, its acceptance by the OECD member countries, and the consultation procedures provided in the *Declaration* may very well encourage OECD member countries (and their antitrust officials) to move toward stronger and more pro-competition national policies and enforcement. The educational effect of the increasing exchange of information and views among officials can be a real and substantial one. Such a movement toward stronger antitrust enforcement can certainly occur even without a "harmonization" of national laws in the formal or technical sense.

Second, it can be expected that paragraph 4 of the competition guideline, and the consultation procedures embodied in the *Guidelines* general-

---

153. This is the view taken by Davidow. See Davidow, *supra* note 15, at 27.

154. For example, Australia, Canada, and the Netherlands have such prohibitions.

ly, will themselves encourage greater cooperation among national enforcement officials. For example, multinationals should contemplate that paragraph 4 will be invoked by national authorities in order to facilitate investigations of local activities by seeking information from foreign parents, subsidiaries and affiliates. More specifically, paragraph 4 of the competition guideline may result in increased pressure by enforcement officials on multinationals to disclose information pursuant to antitrust investigations and actions.

Third, the competition guideline may also have political significance as a possible basis for negotiations between the industrialized nations of the OECD and the developing countries.