

# Michigan Journal of International Law

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Volume 2 | Issue 1

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1981

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### Recommended Citation

Kurt Stockmann, *Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure*, 2 MICH. J. INT'L L. 223 (1981).

Available at: <https://repository.law.umich.edu/mjil/vol2/iss1/11>

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# Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure

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KURT STOCKMANN

In recent years, the Organisation for Economic Cooperation and Development (OECD) has repeatedly addressed, in a variety of forms, the problem of transnational corporate concentration. In the field of restrictive business practices, it has made suggestions on specific antitrust problems, issued council recommendations, and promulgated the 1976 Council Guidelines for multinational enterprises. Not surprisingly for an organisation that adheres to the principle of unanimity and, consequently, is governed by the law of the smallest common denominator, these efforts have thus far focused more on procedure than on substance. Even where quasi-substantive rules have been adopted, such as in competition guideline 1(a),<sup>1</sup> the "rules" tend to be lenient compared with stricter national antitrust laws like those of the United States and Germany. A structural approach to the problem of concentration, similar to Section 7 of the Clayton Act and the German merger law, has not had a great chance of adoption in the OECD. The reason is simply that most member countries still feel that flexible, conduct-oriented solutions are more appropriate.

Still, it would be rash to underestimate the importance of OECD efforts in this field. Particularly noteworthy are such procedural achievements as the 1967 and 1973 Recommendations on international cooperation, both now replaced by the consolidated Recommendation of 1979.<sup>2</sup> Although the 1967 Recommendation was not specifically intended to address transnational corporate concentration, it was highly relevant to the problem since the recommended procedures were, and under the 1979 Recommendation continue to be, applied in transnational merger cases.

To obtain a complete picture of OECD activity in this field, it is not

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sufficient to concentrate upon competition guideline 1(a) and corresponding section (1)(a) of the 1978 Recommendation concerning multinationals,<sup>3</sup> or the substantive suggestions in the OECD report on mergers.<sup>4</sup> Rather, competition guideline 4, the recommendations on cooperation with multinationals regarding restrictive business practices, is also relevant. The following analysis embraces this broader approach.

Before embarking on this analysis, it is helpful to describe briefly the mechanics of OECD activity. Actions of the OECD in the field of competition originate generally in the OECD Committee of Experts on Restrictive Business Practices (Committee) and its working parties. This Committee, in existence almost since the beginning of the OECD itself, has the authority to examine and comment upon particular competition problems and to report and make recommendations as appropriate to the OECD Council (Council) on matters within its competence.<sup>5</sup> Its studies on specific problems often result in published reports providing "suggestions for action" and/or in draft Council recommendations, which when adopted by the OECD Council, are addressed to member countries. Suggestions for action in such reports do not formally involve the Council even though the Council has to approve of reports of the Committee of Experts. Council recommendations are more formal and have a greater political weight in OECD usage. The OECD guidelines for multinational enterprises do engage the OECD Council but are addressed to enterprises, not member countries as with recommendations.

The first instance of a more than passing reference to some aspects of transnational corporate concentration is to be found in the report by the secretary general on inflation of December 1970.<sup>6</sup> This report discusses the issue of multinational corporate market power in the context of an effective competition policy as a method to fight inflation. It exposes multinationals and their market power as one of the more serious problems in the field of inflation, noting that acquisition by corporate merger is one route to such market power. However, the report does not limit its suggestions for action to market power acquired by external growth. Legislative action is advocated not only against undesirable mergers, but also against concentration of market power in general. In consequence of the secretary general's report on inflation, the OECD Council adopted a recommendation concerning action against inflation in the field of competition policy.<sup>7</sup> This nonbinding recommendation addressed to member countries cautiously advised governments, without specific reference to international restraints of competition or legislation, "to examine the advisability of adopting" effective provisions against the harmful practices of monopolies and oligopolies as well as against undesirable mergers and concentrations of enterprises which limit competition unduly. Both the suggestions for action in the secretary general's report and the recommendation seem to have been used in support of the national legislation generally strengthening competition laws.

Subsequently, the OECD Committee of Experts on Restrictive Business

Practices decided to examine more fully the problem of national and international corporate concentration, and thus established a working party on mergers. The working party's effort resulted in an OECD report on mergers, published in 1975.<sup>8</sup> After a careful analysis of the available data, the report concluded that transnational corporate concentration may have both beneficial and detrimental effects on national economic welfare and competition. In its suggestions for action, the report does not distinguish, in principle, between forms of national and transnational concentration;<sup>9</sup> rather, it recommends that as transnational concentrations raise particularly difficult procedural problems, member countries should utilize the OECD procedures on international cooperation, consultation, and conciliation.<sup>10</sup>

The next, and thus far most spectacular, action relevant to transnational corporate concentration occurred in June 1976 when the OECD Council adopted a Declaration on International Investment and Multinational Enterprises. This declaration recommended a set of "Guidelines for Multinational Enterprises" as well as intergovernmental consultation procedures applicable to these guidelines.<sup>11</sup> The guidelines cover, *inter alia*, general business policies, disclosure of information, and competitive practices. Those three (of seven) sections include provisions which touch directly or indirectly upon problems of transnational corporate concentration.

These guidelines are nonbinding standards of conduct or, in the words of the introductory paragraphs, recommendations jointly addressed by member countries to multinational enterprises operating in their territories.<sup>12</sup> Observance of these guidelines "is voluntary and not legally enforceable." Their objective is "to ensure that the operations of these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and States." The introduction provides that every state retains the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction; moreover, the different entities of a multinational enterprise are subject to the laws of the countries within which they transact business.<sup>13</sup>

As with the suggestions for action relating to the fight against inflation and undesirable mergers, the guidelines refrain from introducing specific substantive rules for multinational enterprises. The introduction explicitly states that guidelines "are not aimed at introducing differences of treatment between national and domestic enterprises"; rather, these enterprises "are subject to the same expectations in respect to their conduct wherever the guidelines are relevant to both."<sup>14</sup> In light of this principle of nondiscrimination, the deliberate absence in the introductory statement of a precise legal definition of *multinational enterprise* is workable.<sup>15</sup>

The first and only quasi-substantive guideline directly relevant to transnational corporate concentration reads:

Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate,

1. refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example
  - a) anticompetitive acquisitions. . . .<sup>16</sup>

The first point requiring interpretation is the word *enterprise*. It means primarily, of course, "multinational enterprise," although, as stated in paragraph nine of the introduction,<sup>17</sup> the guidelines reflect "good practice for all." In the light of paragraph eight of the introduction it seems clear that the nature of the ownership is irrelevant; it may be private, public, mixed, or state ownership.<sup>18</sup> Less clear is whether the multinational enterprise in toto, including its various subsidiaries and branches located in different countries in different legal forms, is the addressee of this guideline, or whether these individually located entities are each addressees. Although somewhat enigmatic,<sup>19</sup> the introductory phrases seem to favor the second alternative:

[T]he 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 as 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.

Thus, in spite of being addressed in principle to the various entities, the criterion for the applicability of the guideline seems to be business "responsibility." Although the guidelines do not offer a definition of *responsibility*, interpreting this term as being, among other things, similar to the notion of "control" or "independent decision making authority" would lead to acceptable results. A subsidiary whose pricing policies were controlled by a parent would not be responsible for these prices and not an addressee of the competition guidelines on pricing. If this is true, it is difficult to follow Hawk when he states that the guidelines do not adopt the "highly controversial and ill-defined intraenterprise or 'bathtub' conspiracy doctrine."<sup>20</sup> That the guidelines do not distinguish between operations through a branch or division and operations through a separately incorporated subsidiary does not necessarily support his conclusion.<sup>21</sup> The use of the criterion "responsibility" makes an explicit distinction superfluous: branches and divisions are not responsible but subsidiaries may be, according to the circumstances and the degree of control by the parent company. One may conclude that the guidelines, without explicitly deciding this question, may be interpreted along the lines of the "bathtub conspiracy doctrine" and may possibly approximate the "effective working control" standard of the U.S. Department of Justice *Antitrust Guide for International Operations*.<sup>22</sup> The consequences of this interpretation are of no primary importance in the context of transnational corporation concen-

tration, but they may play a decisive role in other areas such as joint ventures, which are treated by certain antitrust laws as restrictive agreements.<sup>23</sup>

The second element of the introductory wording of competition guideline 1 acknowledges the priority of the individual competition rules and policies of the countries in which the enterprises operate.<sup>24</sup> The word *operate* does not mean that the applicability of the guidelines is based on the “conduct principle” as opposed to the “effects doctrine” recognized by the majority of OECD member countries with antitrust laws.<sup>25</sup> This issue, which is highly contested among OECD member countries, was deliberately left open in the guidelines.

The third criterion a multinational corporation must meet in order to be an addressee of competition guideline 1(a) is that of “dominant position of market power.” The concept of controlling abuse of market power, although not entirely unknown to U.S. law, is much more familiar to European antitrust laws.<sup>26</sup> European Community practice under Article 86 of the EEC Treaty illustrates the practical elements of this form of antitrust enforcement.<sup>27</sup> The control of market power abuse is in practice similar to antitrust regulation under Section 2 of the Sherman Act. However, there are some basic differences in the scope of regulation between the Sherman Act and OECD competition guideline 1(a). In one respect, Section 2 of the Sherman Act is broader than guideline 1(a) since Section 2 covers attempts to monopolize while the guideline applies only if a dominant position of market power is already present.<sup>28</sup> How this dominant market position is obtained is entirely irrelevant, as for example in the EEC Treaty Article 86 and Section 22 of the German Act Against Restraints of Competition. On the other hand, guideline 1(a) is broader at least in theory, since its applicability does not necessarily turn upon market share criteria.<sup>29</sup> A dominant position of market power may be established even if the enterprise holds only a small market share but commands superior financial or marketing resources, or more factors of protection, particularly if the relevant market is held predominantly by small- or medium-sized firms.

The fourth criterion is that the action in question has to affect competition in the “relevant market.” Although the language is not without ambiguity, OECD member countries will probably interpret the term in the sense that the effect has to be in the same relevant market in which the dominant position of market power is held.<sup>30</sup> Otherwise, the words “in the relevant market” would have little meaning; if anticompetitive effects would be sufficient, irrespective of the market in which they occur, these words could have been omitted.

The actions from which enterprises should refrain are such that “would adversely affect competition.” The guidelines do not offer any additional explanation of these terms. In spite of divergent interpretations in different OECD countries and the European Community, it is unlikely that this element will create many practical difficulties. Furthermore, it can safely be assumed that effects on competition that were merely theoretical would not

be sufficient to find a violation of guideline 1(a); they would have to be at least “perceptible” in the sense of EEC and German antitrust enforcement practice.<sup>31</sup> However, some countries might interpret competition guideline 1 as requiring “substantial” effects.

Any adverse effects on competition must be brought about by an “abuse.” Five subparagraphs give examples for types of abuses, this list being explanatory and not exclusive. Hawk has already suggested that European members of the OECD might interpret an abuse of a dominant position as including practices not enumerated in the list;<sup>32</sup> non-European members might obviously do the same. In regard to concentration this means that not only those forms of abuse falling under competition guideline 1(a), namely anticompetitive acquisitions, are subject to the guideline, but also other forms of external or internal growth not mentioned. Thus, it does not make much sense to interpret the term *acquisition* narrowly. Davidow seems to share this view when he deals with guideline 1(a) and assumes that it covers “acquisitions and mergers.”<sup>33</sup> Guideline 1(a) certainly covers all forms of external concentration such as horizontal, vertical, and conglomerate mergers and acquisitions.<sup>34</sup>

The qualification “anti-competitive” is not very meaningful if one accepts that the adverse effects on competition required by the introduction of guideline 1 have to appear in the market in which the enterprise holds a dominant position. The consequence of this requirement in the introductory phrase is that vertical or conglomerate mergers having no adverse effects on competition in the market in which the enterprise holds the dominant position, but only in the market into which the acquiring corporation extends its activities, do not fall under competition guideline 1(a) even though such acquisitions or mergers are anticompetitive. In other words, the qualification does not extend the scope of application of guideline 1(a), which covers only such “anticompetitive” acquisitions which adversely affect competition in the market dominated by the enterprise.<sup>35</sup>

As in Section 7 of the Clayton Act, assessment of anticompetitive effects of an acquisition requires a hypothetical analysis. While under the Clayton Act it is sufficient that the merger *may* lessen competition, guideline 1(a) requires that it *would* adversely affect competition.<sup>36</sup> It seems clear that guideline 1(a) requires a far higher degree of certainty of effect, with a concomitant higher burden of proof and sufficiency of evidence. The criteria to be used in this determination, however, are still unclear, that is, whether the effects have to be expected beyond a reasonable doubt or whether a high degree of likelihood would suffice.

An interesting question is whether any defenses can be raised in cases of acquisitions. Davidow and Hawk<sup>37</sup> are probably accurate in stating that the regular defenses are implicit in competition guideline 1. This conclusion, however, should not be made, as Hawk seems to do, from the “anticompetitive” qualification in guideline 1(a) since it is redundant. Rather, this conclusion can be deduced from the “adversely affect competition” requirement in

the introductory phrase or perhaps even from the “abuse” criterion. Thus, under the first alternative a valid failing company defense would be premised upon the argument that the acquisition does not adversely affect competition in the dominated market. Under the second alternative, it could be argued that the acquisition of a “failing company”—one which would no longer be a competitor—does not constitute an abuse.

To conclude the discussion of guideline 1(a), it is quite correct to estimate that no direct and important effects are to be expected, particularly in those countries applying stricter and structure-oriented national merger laws.<sup>38</sup> Still, as a policy statement of the OECD the guideline has a certain value, either as a symbol, a model, or as a clear articulation of a perceived problem, especially in those member countries which have not yet introduced merger control.

The second quasi-substantive competition guideline relevant for transnational corporate concentration is guideline 3:

Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate . . . 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>39</sup>

This guideline dealing with cartels and other restrictive agreements may be of particular interest for those countries, and the European Community, which do not yet have specific merger legislation. One means of attempting some control over external concentration is to interpret prohibitions of restrictive agreements broadly, for example, by regarding joint ventures as such agreements. A practical illustration of this possibility is afforded by the European Community’s practice on joint ventures.<sup>40</sup> Increasingly, the European Community administration tends to regard joint ventures as cartels under Article 85 (1) of the EEC Treaty that prohibits restrictive agreements. This has been done in part by extending the procedural application of Article 85 more and more to transactions which were already considered concentrations in other countries. Someone familiar with this practice may find it adequate to deal with joint ventures under competition guideline 3. Other examples can be found in national antitrust laws, such as those of the United States, that apply merger control under certain circumstances to prevent restrictive agreements in joint ventures.<sup>41</sup> In Germany, the relationship between the ban on cartels, Section 1 of the Act against Restraints of Competition (ARC) and merger control Section 23 *et seq.* ARC, is still in debate; one view is that at least as to certain forms of joint ventures, Section 1 ARC applies either simultaneously with Sections 23 ff., or even exclusively.<sup>42</sup> In this context, it does not seem necessary to go into all the delicate problems of



interpreting this guideline but rather to concentrate on those aspects which would make it possible for certain forms of transnational corporate concentration such as joint ventures to be measured under diverging standards, depending on whether they are assessed under guideline 1(a) or 3.

A first and quite important difference is that guideline 1(a) applies only when market domination is already present, while guideline 3 has no such requirement. Consequently, under guideline 3, joint ventures may be found objectionable when classical concentrations do not rise to the level of control under guideline 1(a).

A second question arises in connection with the words "or otherwise purposely strengthening the restrictive effects of" as opposed to "participating in" international or domestic cartels. While guideline 1(a) applies clearly only to those participating in a merger, or, more precisely, to those participants which hold a market-dominating position, guideline 3 also applies to third parties. However, the broad wording of guideline 3 must be interpreted narrowly,<sup>43</sup> certainly in regard to concentrations. The drafters of this text did not intend to subject specific forms of concentration to a more rigorous regime of regulation without some showing of general anticompetitive effects beyond those associated with classical forms of concentration. Joint ventures are, in general, no more anticompetitive than takeovers. The wording, however, leaves no choice; any interpretation that prevented application of guideline 3 to those other than the participants would be clearly incompatible with the express wording of the guideline and, therefore, is beyond the limits of interpretation. In order to reconcile guidelines 1(a) and 3 insofar as corporate concentration is concerned, an acceptable solution might be to interpret "purposely strengthening" as referring to the predominant aim of third party conduct. One must show that the *predominant aim* of the third party is to further the restrictive effects of the concentrative agreements; conduct alone which has such an effect, even if foreseen and substantial, is insufficient. In other words, a showing of intent and purpose to foster a restrictive result is necessary.

The difference in wording in regard to the effects test under guideline 1(a)—"which would adversely affect competition," and guideline 3—"which adversely affect or eliminate competition," are of no material significance. The explicit reference to the elimination of competition in guideline 3 does not imply that an acquisition eliminating competition would not also fall within the "adversely affect competition" standard found in guideline 1(a). Moreover, the difference between "would affect" in guideline 1(a) and "affect" in guideline 3 does not constitute a material distinction. It appears that both guidelines require anticompetitive effects either to be present or to be expected beyond a reasonable doubt or certain degree of probability. The required degree of proof to be applied with guideline 3 remains as uncertain as with guideline 1.<sup>44</sup>

Guideline 3, unlike guideline 1(a), contains a reservation exempting from its coverage agreements "which are not generally or specifically accepted under applicable national or international legislation." This qualifica-

tion referring to the various exemptions granted certain cartels found in national antitrust laws, such as export cartels, import cartels, rationalization cartels, and crisis cartels, is arguably already covered by the introductory sentence "while conforming to official competition rules . . . of the countries in which they operate." Enterprises engaging in a joint venture falling under a specialization exemption are in compliance with national competition rules,<sup>45</sup> and thus are also in compliance with guideline 3. This qualification reemphasizes that member countries remain free to establish as many exemptions from the ban of restrictive agreements as they wish and, therefore, may permit corporate concentration, both national and transnational, in order to effectuate other economic or social policies. It is not clear that the clause should be considered redundant as regards internationally accepted agreements. If the qualification in guideline 3 were to be deleted, however, the OECD member countries that were also members of the European Community would in all likelihood subsume an agreement exempted by Article 85(3) of the EEC Treaty under "official competition rules . . . of the countries in which they operate." Therefore, the qualification found in guideline 3 does not restrict its scope of application beyond the limits already established by the introductory phrase and the general prevalence of national legislation over the OECD guidelines.

Competition guideline 4 reads:

Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate . . . be ready to consult and cooperate, 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>46</sup>

In contrast to guidelines 1 through 3, competition guideline 4 deals with procedural problems, doing so in a general fashion and not specifically in regard to problems of transnational corporate concentration. Still, this guideline deserves comment, since dealing with transnational concentration at the OECD level will for a long time be a predominantly procedural problem. Even in the European Community, the probability that an enforceable merger control regulation will be adopted is small. In other international organizations, including the OECD, the chances of such action are even smaller.

To a certain extent, guideline 4 adopts language already used in the OECD recommendations of 1967 and 1973 concerning cooperation, consultation, and conciliation in the field of restrictive business practices affecting international trade.<sup>47</sup> In contrast to these recommendations that are addressed to member governments, guideline 4 addresses enterprises.

Guideline 4 contains various complex prerequisites and, to some extent,

this complexity decreases the danger of this guideline being continuously invoked by antitrust authorities in their dealings with transnational corporations.<sup>48</sup> The general requirement "to be ready to consult and to co-operate" is no more than an appeal to make life somewhat less difficult for antitrust officials. Similar appeals in the context of national antitrust proceedings may have a different significance, since unlike the OECD guidelines, in such proceedings there are very real sanctions available against obstreperous enterprises and real benefits to be gained through cooperation.

The situation could be somewhat different in regard to the provision of information which guideline 4 mentions as one of the forms of cooperation. That the provision of information is the main issue becomes evident by reading the second sentence of this guideline. First, I agree with Hawk<sup>49</sup> and Davidow,<sup>50</sup> that "to be ready to provide information" goes beyond legal obligations under existing national laws. This was the prevailing view during the discussions in the working party on multinationals.

Guideline 4 requires cooperation with authorities of "countries whose interests are directly affected." As other scholars have correctly pointed out,<sup>51</sup> this covers authorities of countries in which the enterprises concerned have neither a subsidiary nor a branch office. One should not overestimate the impact of this seemingly sweeping provision. If an enterprise has no subsidiary or branch office in the country concerned, there are not many sanctions available to enforce a request for information based solely on competition guideline 4.

Admittedly, sentence 2 of guideline 4 is vague and ambiguous. In spite of this, Hawk seems to overestimate the potential danger of this mandate for affected enterprises. On the contrary, any enumeration of special safeguards such as business secret, professional secret, and others, probably would have been more dangerous. The reference to safeguards "normally applicable" was meant to preclude any loopholes. "Normally applicable" does not mean that there must be a consensus among OECD member countries about the validity and applicability of a special safeguard. Rather, it merely indicates that the safeguards normally applicable under the applicable national laws (that is, the laws of the countries in which the enterprise possessing the information and the authority requesting the information are located) shall also be available without reservation if guideline 4 is invoked.

The OECD guidelines for multinational enterprises contain some further guidelines relevant for competition. The most important in this context is guideline 3 of the "General Policies" chapter<sup>52</sup> which overlaps in part with competition guideline 4, and is simultaneously applicable with competition guideline 4.

General policy guideline 3 is somewhat limited inasmuch as it is concerned only with the provision of information and not with consultation and cooperation. It is also narrow since it deals only with information requested by the authorities of a country in which the addressee enterprise has a subsidiary or branch. However, this guideline contains a broader mandate

insofar as it requires that certain information be divulged to interested authorities, as well as to those entities of the enterprise that operate within the particular national jurisdiction. There are a number of ambiguities and uncertainties involved. According to the wording of this guideline it appears that multinationals are expected to go beyond their legal obligations. However, it is unclear whether the particular entity facing the request for information is under the same obligation. Furthermore, the only safeguard explicitly mentioned is business confidentiality; it is not certain that the others which are clearly covered by competition guideline 4 are equally applicable.

The chapter dealing with "disclosure of information" may also become relevant to transnational corporate concentration.<sup>53</sup> Much of the information to be provided by enterprises under this chapter is relevant for merger control, for example information about the structure of an enterprise, ownership percentage, areas of activities, sales, and investments. The information gathered pursuant to this guideline will be published annually. However, in practice, the burden to the enterprises of providing the requested information will be limited by two principal factors—the costs of collection and publication of the information, and the rules on business confidentiality. These guidelines should not create a greater burden for enterprises than disclosure requirements under competition guideline 4. There are other guidelines also relevant for competition issues, but which have no direct significance for transnational corporate concentration, such as guideline 2 on taxation and intraenterprise transfer pricing. It should be noted, of course, that regulation of intraenterprise activities may well foster or hinder concentration.

For matters related to the OECD guidelines for multinational enterprises, in 1976 the OECD Council adopted a decision establishing an intergovernmental consultation procedure.<sup>54</sup> In the field of competition, a question arises immediately as to the relationship of this procedure, administered essentially by the Committee on International Investment and Multinational Enterprises (IME), to the specific cooperation, consultation, and conciliation procedures in the field of restrictive business practices affecting international trade. Today, the question remains the same as in 1976, that is, whether the consultation and other procedural requirements of one set of guidelines preclude the application of requirements pursuant to OECD decisions. The 1967 and 1973 recommendations regulating these procedures have been consolidated by a new recommendation of 1979<sup>55</sup> without changing their substance or administration by the OECD Committee of Experts on Restrictive Business Practices. There is no explicit answer to this question in either procedure. It appears that both procedures may, in principle, be used in the same case; there is no general priority for one or the other. A transnational merger case may thus lead to consultations under the 1979 Recommendation as well as under paragraph four of the 1976 intergovernmental consultation procedure, provided the proposed merger subjects the interested corporate entities to conflicting requirements under national laws. Although the intergovernmental consultation procedure is, as regards competition, more narrowly fo-

cused than the 1979 restrictive business practices procedure, it is not exclusive in the sense that issues falling within the guidelines are the exclusive concern of the IME Committee. It is open to argument which procedure would be more practical to utilize in a specific case. Nothing precludes the same case being negotiated and examined by both committees at the same time. Moreover, the theoretical risk of divergent results could probably be avoided by a minimum of coordination within the OECD.

The OECD report on multinational enterprises under competition policy aspects published in 1977<sup>56</sup> contains a number of cautious and balanced suggestions for action, some of which are relevant to transnational corporate concentration. They have been taken into account in the 1978 Council Recommendation on restrictive business practices of multinational enterprises.<sup>57</sup>

The Council Recommendation adopted in 1978, as well as the report upon which it was based was prepared by the Restrictive Business Practices Committee and its Working Group on multinationals. In regard to its quasi-substantive recommendations the Business Practices Committee kept very close to the competition guidelines. Most differences in regard to the two quasi-substantive rules—guidelines 1(a) and 3 on the one hand and recommendations (1)(a) line 1 and (1)(b) on the other hand—can be explained by the simple fact that guidelines are addressed to enterprises while the 1978 Recommendation is addressed to governments. Accordingly, (1)(a), instead of requesting that the governments “refrain from certain actions,” recommends that they “adopt new or supplement existing measures” to “prohibit or control effectively such practices.” In substance, the requirements suggested in regard to acquisitions are the same as those contained in guideline (1)(a).<sup>58</sup>

With respect to cartels, though the wording of guideline 3 differs more greatly from recommendation 1(b) than do the measures discussed in the preceding paragraph, there is no implication of substantive differences between the two. The recommendation suggests action against “cartels or other restrictive agreements” without any reference to activities of nonparticipants that purposely strengthen the restrictive effect of such agreements; however, this does not limit remedial action to measures that seek to ensure free participation. On the contrary, a measure to effectively control cartels could also be directed against outsiders that purposely strengthen the restrictive agreement or cartel.<sup>59</sup> Furthermore, the term *cartels or other restrictive agreements* encompasses both national and international agreements explicitly enumerated in this guideline.

The more troublesome difference between guideline 3 and recommendation 1(b) pertains to the safeguard clauses in each instrument. Guideline 3 conditions improper agreements on the basis of those “generally or specifically accepted under applicable national or international legislation”; the recommendation refers only to agreements “without justification.” Without being familiar with the history of both the guideline and the recommendation, one would be inclined to seek different interpretations. However, the drafters

of both texts intended the guideline and recommendation to cover all possible exemptions to general cartel prohibitions afforded by national and international legislation. Both clauses were intended to cover general and specific exceptions that exist in law, as well as those for which enterprises must show good cause before enforcement or judicial authorities can grant an exception.

The following recommendations (2) to (5)<sup>60</sup> are procedural and based on the report on multinationals. Each may play a role when governments deal with the problem of transnational corporate concentration. These recommendations call upon member countries to improve their antitrust procedures, to cooperate in disclosing information, and to lend aid for effective national antitrust enforcement. They suggest that this cooperation can best be achieved through additional bilateral and multilateral agreements as well as through further use of existing OECD procedures.

It should be noted that substantial importance has been attributed to the Working Party's note accompanying the draft on competition submitted to the IME Committee.<sup>61</sup> It has been suggested by Hawk<sup>62</sup> that this note should be kept in mind in interpreting the competition guidelines. This suggestion certainly was proper until the Council adopted the 1978 Recommendation prepared by the same expert groups that had prepared the guidelines. The note, no doubt, remains valid as to its general statements about the limited amount of information on the role of multinationals in national and international competition.

Although competition guidelines 1(a) and 3 are in substance identical to recommendations 1(a) and (b), this does not necessarily indicate that the Working Party has given up its specific caveat in the interpretative note: namely, that "standards of behaviour dealing with difficult legal and economic concepts such as abuse of market power [and] adverse effects on competition . . . do not in themselves provide simple rules for business executives to follow in all circumstances." This reservation remains valid because of the difference in quality between guidelines for enterprises and recommendations for governments. The practical value of guidelines addressed to enterprises may be seriously compromised by the vague and ambiguous nature of the mandate they contain; in contrast, the vagueness of recommendations for governmental action will have less impact upon their practical and political value.

The final OECD instrument to be briefly examined is entirely procedural. In the field of competition, the procedure set forth in the 1979 Council Recommendation Concerning Cooperation between member countries is the most important achievement of OECD.<sup>63</sup> The part of this procedure dealing with cooperation is likely to be successful since it is practically identical to the 1967 Recommendation, under which cooperation took place with respect to a substantial number of transnational mergers. There is no reason why this should change. On the contrary, the consolidation of the 1967 and 1973 procedures may lead to more frequent consultations between antitrust authorities in international merger cases and on problems of transnational cor-

porate concentration. As to the part on conciliation, this result seems to be less likely, because the conciliation part of the 1973 Recommendation has never been applied.

#### CONCLUSION

It can be seen that OECD activity with respect to competition policy has primarily been in the area of restrictive business practices—indicating the adoption of what is principally a behavioral approach to the control of multinational enterprises. Though aware of the problems of multinational corporate concentration, the OECD has not thus far taken direct measures with a structural approach as such.

In discerning the reasons for this past tendency toward behavioral rather than structural measures, it must be remembered that OECD efforts are significantly influenced by the principle of unanimity,<sup>64</sup> and therefore tend to represent the least common denominator among the member countries. OECD decisions are usually made by mutual agreement. This principle applies a well to the OECD committees and working parties such as the Committee of Experts on Restrictive Business Practices.<sup>65</sup>

Accordingly, it is important to recognize that less than a third of the OECD member countries have adopted any structurally based approach to merger control.<sup>66</sup> Moreover, enforcement in these countries with structural merger control laws does not always appear wholehearted. Until recently, the member nations have evidenced different attitudes toward the relative benefits and liabilities of corporate concentration, and thus have differed considerably in their attitudes toward regulation of industrial structure. Indeed, some European nations, for example the United Kingdom and France, have in the past actively supported the concentration of economic power in large national corporations.

Thus, the adoption of clear, structure-oriented recommendations should not be expected from the OECD within the next few years. However, it would be a mistake to ignore the influence of the OECD activity in this area since national legislators naturally look to OECD activity when contemplating modification of national regulatory mechanisms. Moreover, the changing political climate in the various member countries with respect to corporate concentration and antitrust laws generally portends a substantial impetus for future OECD action in the field. A number of member countries are adopting a more critical attitude toward the concentration phenomenon, and are moving in the direction of more stringent antitrust policy in general. At the same time, no member country has currently evinced a trend in the direction of fostering concentration. A number of member countries are seriously contemplating enactment of merger controls or have recently introduced such control. The most spectacular example is France, which for many years encouraged corporate concentration. Similar controls are being considered in

Sweden, Finland, and Ireland. Another group of countries, including Switzerland and Germany, is taking action to strengthen its antitrust laws in general.

These national trends will surely be reflected by the delegates in the Committee of Experts, and the Committee of Experts will very likely adopt a more critical attitude toward transnational corporation concentration. Of course, the Organisation's unanimity principle theoretically will preclude formal action if one member country opposes such action. Nonetheless, experience shows that if there is a clear majority on a particular issue, absolute opposition is difficult to maintain over time. Compromise solutions are usually found. Even when this is not possible, it is still more likely that an opposing party will abstain rather than veto a recommendation or suggestion for action.<sup>67</sup> The evolution of competition policies in the member countries promises to keep the problem of transnational corporate concentration on the OECD agenda, and increases the possibility that the OECD will adopt a more vocal and critical position toward such concentration.

In addition to the influences of the member countries, the developments in the European Economic Community and the United Nations will tend to influence future OECD efforts in the area. The European Community, with a functioning antitrust law and enforcement practice, stands as an example of a working supranational antitrust regime, and should lend encouragement to OECD member countries in developing greater cooperation on substantive antitrust matters including mergers and concentration. Although the European communities do not yet have a functioning merger control procedure,<sup>68</sup> except in the coal and steel sectors,<sup>69</sup> a draft European Community merger regulation has been under discussion for several years. Even though there is little chance for effective action in the near future, enactment of a European Community merger law would have a substantial impact on OECD initiatives and would generate additional momentum for future OECD efforts.

The influence of United Nations activities on OECD efforts is somewhat different. The United Nations, unlike the European Community, is a most heterogeneous organization, and consequently the likelihood of substantive agreement on economic and competition values and objectives is minimal in that forum. Nonetheless, UNCTAD and the UN Centre for Transnational Corporations are considering the establishment of machinery which will be relevant to the issue of transnational corporate concentration. Although there is a marked disparity between the concerns of the industrialized and the developing countries, any consensus which is achieved in the United Nations organizations will undoubtedly encourage further OECD efforts. For example, if UNCTAD were to establish a permanent committee of experts on restrictive business practices, some method to harmonize the position of the industrialized market economy countries will be required. The OECD would be best equipped to effectuate that objective.

In summary, OECD efforts in transnational corporate concentration will continue. As member countries begin informally to adopt similar attitudes



toward the problem, the chances increase for formal OECD action. The potential positive impetus of European Community merger control activities, and the possible necessity of reaching a coordinated OECD position in the realm of United Nations activities both would encourage the OECD to begin a more activist role in the area of transnational corporate concentration.

## NOTES

1. Declaration on International Investment and Multinational Enterprises (21st June 1976); Guidelines for Multinational Enterprises; Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises. These instruments are reproduced in annex 3.
3. Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade Including those Involving Multinational Enterprises (Adopted by the Council at its 501st Meeting on 25th September 1979), C(79)154(Final). The recommendation is reproduced in annex 6.
3. Recommendation of the Council Concerning Action Against Restrictive Business Practices Affecting International Trade Including those Involving Multinational Enterprises (Adopted by the Council at its 469th Meeting on 20th July 1978), C(78)133(Final). The recommendation is reproduced in annex 5.
4. Mergers and Competition Policy: Report by the Committee of Experts on Restrictive Business Practices (OECD, Paris, 1979). An excerpt of the report is reproduced in annex 2.
5. Resolution of the Council Concerning Action in the Field of Restrictive Business Practices and the Establishment of a Committee of Experts (Adopted by the Council at its 8th Meeting on 5th December 1961), C(61)47(Final).
6. REPORT BY THE SECRETARY GENERAL, OECD INFLATION—THE PRESENT PROBLEM (December 1970), ¶ 137 *et seq.*
7. Recommendation of the Council Concerning Action Against Inflation in the Field of Competition Policy (Adopted by the Council at its 276th Meeting on 14th and 15th December 1971, and derestricted at its 280th Meeting on 26th January 1972), C(71)205(Final). The recommendation is reproduced in annex 1.
8. Annex 2, *supra* note 4.
9. Annex 2, *supra* note 4, at ¶¶ 185–86.
10. Annex 2, *supra* note 4, at ¶ 187.
11. Annex 3, *supra* note 1.
12. Annex 3, *supra* note 1, Guidelines for Multinational Enterprises, at ¶ 6.
13. *Id.* at ¶ 7.
14. *Id.* at ¶ 9.
15. *Id.* at ¶ 8.
16. *Id.* at competition section.
17. *Id.* at ¶ 9.
18. *Id.* at ¶ 8.
19. Hawk, *The OECD Guidelines for Multinational Enterprises: Competition*, 46 *FORDHAM L. REV.* 241, 250 (1977).
20. *Id.* at 251.
21. Annex 3, *supra* note 1, Guidelines for Multinational Enterprises, at ¶ 8.
22. ANTITRUST DIVISION U.S. DEPT OF JUSTICE, *ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS* (1977).

23. *See, e.g.*, EEC B 1, WORLD LAW OF COMPETITION, Pt. 1, §§ 7.03(3) and (4).
24. Annex 3, *supra* note 1, Guidelines for Multinational Enterprises, at ¶ 7.
25. *See, e.g.*, Restrictive Business Practices of Multinational Enterprises: Report of the Committee of Experts on Restrictive Business Practices (OECD, Paris, 1977), ¶ 199 ¶¶ 195–218 are reproduced in annex 4.
26. Hawk, *supra* note 19, at 255.
27. *Id.*
28. *Id.* at 255–57.
29. *Id.* at 256–257.
30. *Id.* at 257.
31. *See* EEC B 1, WORLD LAW OF COMPETITION, Pt. 1, § 3.03 (3)(d); FED. REPUBLIC OF GERMANY, B 5, WORLD LAW OF COMPETITION Pt. 9, § 3.03(2)(d).
32. Hawk, *supra* note 19, at 259.
33. Davidow, *Some Reflections on the OECD Competition Guidelines*, 22 ANTITRUST BULL. 441, 447 (1977).
34. Hawk, *supra* note 19, at 260.
35. Thus, it appears that guideline 1(a) is more limited in scope of application than EEC, U.S., or West German conglomerate merger regulation, since in the latter, the relevant market is not limited to that into which the acquiring corporation enters.
36. Hawk, *supra* note 19, at 260.
37. *Id.*; Davidow, *supra* note 33, at 448.
38. Hawk, *supra* note 19, at 261.
39. Annex 3, *supra* note 1 Guidelines for Multinational Enterprises.
40. *See, e.g.*, EEC B 1, WORLD LAW OF COMPETITION, Pt. 1, §§ 7.03(3)–(4).
41. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).
42. *See* FEDERAL CARTEL OFFICE GERMAN FEDERAL REPUBLIC, ANNUAL ACTIVITY REPORT FOR 1978, 23.
43. Hawk, *supra* note 19, at 272.
44. *See* text accompanying note 31 *supra*.
45. *See* annex 3, *supra* note 1, Guidelines for Multinational Enterprises, at ¶ 7.
46. Annex 3a *supra* note 1 Guidelines for Multinational Enterprises.
47. Annex 6, *supra* note 2.
48. Hawk thinks that multinationals can expect antitrust officials to rely on Competition Guideline 4 when negotiating during investigations and legislation. Hawk, *supra* note 19, at 274.
49. *Id.*
50. Davidow, *supra* note 33, at 455.
51. *Id.*; Hawk, *supra* note 19, at 274.
52. Annex 3, *supra* note 1 Guidelines for Multinational Enterprises.
53. *Id.*
54. Annex 3, *supra* note 1 Decision of the Council on Inter-Governmental Consultation Procedures.
55. Annex 6, *supra* note 2.
56. Annex 4, *supra* note 25.
57. Annex 5, *supra* note 3.
58. *See* text accompanying notes 11–38 *supra*.
59. *See* text accompanying note 43 *supra*.
60. Annex 5, *supra* note 3.
61. Hawk, *supra* note 19, at 245–46.
62. *Id.* at 245.
63. Annex 6, *supra* note 2.
64. *Id.* The principle of unanimity is laid down in Article 6 of the Convention on the Organisation of Economic Cooperation and Development. [1961] U.S.T.1728, T.I.A.S. 4891 Rules 18 and 29 of the OECD Rules of Procedure regulating also the procedure of the OECD Committee of Experts on Restrictive Business Practices and its working parties refer to this article.
65. OECD Rules of Procedure, R. 18 and 29.
66. Austria for example has only certain informational filing requirements and an abuse control regulation; in Denmark, there is no special rule for mergers; in Finland, the harmful ef-

facts of concentration may be the subject of negotiations between business interests and the government regulators; neither Switzerland nor the Netherlands has merger regulation.

67. For example, Switzerland abstained from taking a vote on the 1967 Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade. In the following years, Swiss policy changed and Switzerland adopted both the 1973 Recommendation of the Council Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International

Trade and the 1979 Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade. *See* annex 6, *supra* note 2.

68. To a very limited extent, Articles 85 and 86 of the Treaty of Rome may be used as instruments of concentration control, especially Article 85 in regard to joint ventures and Article 86 if a market-dominating enterprise is involved. Both possibilities, however, are no substitute for the envisaged specific merger control procedure.
69. *See* Treaty Establishing European Coal and Steel Community, Article 65 [signed April 18, 1951].

ANNEX 1: RECOMMENDATION OF THE COUNCIL CONCERNING ACTION  
AGAINST INFLATION IN THE FIELD OF COMPETITION POLICY

(Adopted by the Council at its 276th Meeting on 14th and 15th December 1971, and derestricted at its 280th Meeting on 26th January, 1972)

The Council,

Having regard to Article 5(b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the Resolution of the Council of 5th December 1961 concerning Action in the Field of Restrictive Business Practices and the Establishment of a Committee of Experts [Doc. No. OECD/C(61)47(Final)];

Having regard to the Report of 18th November 1971 on the Present Problem of Inflation and, in particular, the proposals (16) and (19) contained therein [Doc. No. C(70)182];

Having regard to the Interim Report of 26th March 1971 submitted by the Chairman of the Committee of Experts on Restrictive Business Practices on Competition Policy and Inflation [Doc. No. C(71)49];

Recognising that an effective competition policy is one important factor in the achievement of optimum economic growth and price stability; and that measures to increase competition exercise a pressure on costs, prices and profits and thus contribute to the fight against inflation, although the impact of competition policy is usually apparent in the long term and is less immediate than anti-cyclical fiscal and monetary policies;

Recognising the urgency of curbing inflation and the need for a coordinated and global approach by all Member countries in order to bring about a significant reduction in inflationary pressures in the near future;

Considering therefore that more emphasis should be given to competition policy at the national level and that, from this standpoint, legislation against restrictive business practices should be applied with great vigilance in Member countries and that additional measures could be introduced where necessary;

Considering moreover that consumer policy can contribute to more rational consumer behaviour, which is essential for the effective functioning of price and quality competition;

I. RECOMMENDS to the Governments of Member countries

1. that they should promptly take steps, within the framework of their existing legislation:

- (i) to apply their restrictive business practices legislation with great vigilance against the detrimental effects especially
  - (a) of price-fixing and market-sharing agreements,
  - (b) of monopolistic and oligopolistic practices affecting prices, and
  - (c) of restrictive business practices in the field of patents and patent licensing;

- (ii) to keep under review the price situation in key sectors of their economies which have a monopolistic or oligopolistic structure in order to reduce any excessive prices by administrative or legal means at their disposal;
  - (iii) to examine whether the bodies responsible for the enforcement of the restrictive business practices legislation have adequate means at their disposal to carry out the measures outlined in paragraphs (i) and (ii) above;
  - (iv) to strengthen their consumer policies in relation to consumer protection, education and information, where they assist competition to function more effectively;
2. that they should examine the advisability of adopting the following longer-term measures, which may require new legislation:
- (i) stronger action—by means of prohibition or control—against resale price maintenance, recommended prices when they operate with a similar effect to resale price maintenance, and refusal to sell employed in connection with resale price maintenance or with recommended prices;
  - (ii) effective provisions against the harmful practices of monopolies and oligopolies;
  - (iii) effective provisions against undesirable mergers and concentrations of enterprises which limit competition unduly;
  - (iv) extension of their legislation to cover restrictive business practices in service industries or in those sectors to which it does not apply or does not fully apply, when these exemptions are insufficiently justified having regard to the public interest.

II. INSTRUCTS the Committee of Experts on Restrictive Business Practices to review, at its session in the autumn of 1972, the progress made, in particular with regard to short-term action in this field, and to report to the Council.

In adopting this Recommendation, the Council:

1. NOTED the Report by the Committee of Experts on Restrictive Business Practices of 19th November 1971 on Action against Inflation in the Field of Competition Policy [Doc. No. C(71)205 and Corrigendum] and the statement made in this connection by the Delegate for Switzerland at the meeting of the Executive Committee held from 8th to 10th December 1971 [Cf. CE/M(71)39 Part III (Final), Item 278];
2. NOTED with satisfaction the efforts of the Committee of Experts on Restrictive Business Practices to further develop international co-operation for the purpose of increasing competition.

ANNEX 2: EXCERPT FROM MERGERS AND COMPETITION POLICY:  
REPORT BY THE COMMITTEE OF EXPERTS ON  
RESTRICTIVE BUSINESS PRACTICES (OECD, PARIS, 1979)

*General Conclusions*

158. The effects upon competition of international mergers are analytically similar to those of domestic mergers, although they sometimes present special problems of evaluation at the national level. On the one hand, unlike purely domestic horizontal mergers, international mergers in some circumstances do not have any adverse effect on concentration at the national level, and they can be a means of introducing vigorous new competition, particularly where the company acquired is a small "foothold" company. It is also possible, of course, that the merger may not improve a non-competitive situation, and may even worsen it if the acquired firm has a large market share. The financial and other resources of the acquiring company can then be used to exploit and increase the already large market share of the acquired company. In addition, a merger which has no effect upon concentration in the countries directly involved may nevertheless increase it at the world level or in third countries. Moreover, an international merger may in some cases lead to restrictions on the freedom of the acquired company to compete in certain product lines or export markets. Also, national control over international mergers sometimes presents jurisdictional and informational problems not encountered in purely domestic mergers. Finally, there is the point that excess profits resulting from international mergers are different to an important degree from excess profits resulting from national mergers, in that the latter involve a domestic redistribution of income whereas the former involve a transfer of income between countries.

159. These considerations seem to point to the conclusion that, at the present time, viewed from the standpoint of their competitive effects, international mergers should, like national mergers, be treated on their respective merits, that is whether they are likely to increase competition in production, distribution and research and therefore the competitiveness of a country's economy or whether, on the other hand, they may create undue concentrations of economic power or otherwise injure competition. This judgement can only be made on a case-by-case basis.

160. There are sufficient indications in some Member countries of a continuing trend towards increase aggregate concentration to suggest the need for the adoption or strengthening of control of both national and international mergers. Possible conflicts between Member countries in the field of international mergers arising out of divergent national merger policies could be reduced if Member countries work toward similar standards and approaches for assessing and dealing with mergers. Moreover, another problem not exclusive to international mergers but requiring an international solution

is the extra-territorial application or effect of competition policies. Although the cases mentioned in this report do not lend support to the view that there are frequent conflicts between Member countries in the field of international mergers, in the event that such extra-territorial application or effect possibly creates difficulties, a solution might be achieved under the 1967 OECD Council Recommendation concerning cooperation between Member countries on restrictive business practices affecting international trade [C(67)-53(Final)] or under the 1973 OECD Council Recommendation concerning a consultation and conciliation procedure on restrictive business practices affecting international trade [C(73)(Final)] or perhaps through creation of some sort of new international anti-trust co-ordination arrangement.

### *International Mergers*

182. The data presented in the chapter on international mergers show, for those countries with records, that these may be a major component of all merger activity and therefore they cannot be ignored on the ground of infrequent occurrence. International mergers are a form of direct inward investment, and as such raise basically similar problems of efficiency and competition as do domestic mergers. There is evidence to suggest that this type of merger may result from the desire to exploit some differential advantage, whether it be efficiency or product differentiation; and as a consequence their predominant form is horizontal rather than vertical or diversified. This may not, of course, raise concentration levels in host countries but it does so when the world market for the product is considered, and this may have long-term detrimental consequences. In the short-term, on the other hand, it is suggested that international mergers based on differential efficiency may result in increased competition in host country markets because the foreign entrant would wish to exploit this advantage; and will also not have absorbed any prevailing non-competitive behaviour patterns. For these reasons it is not possible to reach any general conclusions about the effect of international mergers; like many domestic mergers they need to be considered as individual cases.

183. In those countries with merger control systems international mergers have only been rarely considered. Canada and Japan have so far not taken action against mergers between foreign entrants and their own national firms, while in the United Kingdom only one such case was considered and this was found unlikely to operate against the public interest. A few cases have occurred in the United States of America and these have been judged in terms of their effects on competition, the predominant consideration being foreclosure of markets and restraint of expansion of actual or potential competitors in concentrated industries. A similar consideration arose with Continental Can case in the European Economic Community. In view of this relative lack of experience it can be tentatively suggested that few interna-

tional mergers have yet raised problems of enhanced market power, but where they have they have been judged strictly in accordance with competition policy considerations.

184. Although there have only been a relatively small number of international mergers which have appeared to raise questions for competition policy so far, it is likely that the continual growth in international investment and the integration of world markets will lead to many more such cases in the future. The evidence does not suggest that jurisdictional and other problems have yet arisen, but as this may well change in the future with an increased number of international mergers there are good grounds for suggesting that it would be valuable for there to be an international exchange of information and, where necessary, consultations about such mergers.

#### *Suggestions for Future Action by Member Countries*

185. The accelerating trend towards merger together with the already high level of concentration in a number of economic sectors draws attention to the problems of competition which are created by changing market structures and it seems therefore appropriate at the present time to suggest to Member countries which have not yet done so to consider the adoption of an effective system of merger control.

186. The following characteristics might be taken into account:

- i) a procedure for registering mergers, wherever this is felt necessary;
- ii) a system to facilitate obtaining information about occurrence of major mergers, such as requiring their prior notification;
- iii) minimum quantitative criteria below which mergers would not be subject to control;
- iv) objective criteria or presumptions for use in evaluating mergers;
- v) reasonable time limits for deciding initially whether to allow or challenge certain mergers.

187. With respect to the application of national laws to mergers and acquisitions involving foreign enterprises and any conflicts which may arise from such an application, Member countries are invited to have recourse to the OECD Council Recommendation of 1967 concerning cooperation between Member countries in the field of restrictive business practices affecting international trade and to the OECD Council Recommendation of 1973 concerning a consultation and conciliation procedure on restrictive business practices affecting international trade.



ANNEX 3: DECLARATION ON INTERNATIONAL INVESTMENT AND  
MULTINATIONAL ENTERPRISES (21ST JUNE 1976)

The governments of OECD member countries, considering

that international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries;

that multinational enterprises play an important role in this investment process;

that co-operation by Member countries can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimise and resolve difficulties which may arise from their various operations;

that, while continuing endeavours within the OECD may lead to further international arrangements and agreements in this field, it seems appropriate at this stage to intensify their co-operation and consultation on issues relating to international investment and multinational enterprises through inter-related instruments each of which deals with a different aspect of the matter and together constitute a framework within which the OECD will consider these issues:

Declare:

I. Guidelines for Multinational Enterprises

that they jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth in the Annex hereto having regard to the considerations and understandings which introduce the Guidelines and are an integral part of them;

II. National Treatment

1. that Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country (hereinafter referred to as "Foreign-Controlled Enterprises") treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as "National Treatment");
2. that Member countries will consider applying "National Treatment" in respect of countries other than Member countries;
3. That Member countries will endeavour to ensure that their territorial subdivisions apply "National Treatment";

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Note: The Turkish Government did not participate in the Declaration and abstained from the Decisions.

4. That this Declaration does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises;

### III. International Investment Incentives and Disincentives

1. That they recognise the need to strengthen their co-operation in the field of international direct investment;
2. That they thus recognise the need to give due weight to the interests of Member countries affected by specific laws, regulations and administrative practices in this field (hereinafter called "measures") providing official incentives and disincentives to international direct investment;
3. That Member countries will endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available;

### IV. Consultation Procedures

that they are prepared to consult one another on the above matters in conformity with the Decisions of the Council relating to Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives;

### V. Review

that they will review the above matters within three years with a view to improving the effectiveness of international economic cooperation among Member countries on issues relating to international investment and multinational enterprises;

### *Guidelines for Multinational Enterprises (Annex to the Declaration of 21st June 1976 by Governments of OECD Member Countries on International Investment and Multinational Enterprises)*

1. Multinational enterprises now play an important part in the economies of Member countries and in international economic relations, which is of increasing interest to governments. Through international direct investment, such enterprises can bring substantial benefits to home and host countries by contributing to the efficient utilisation of capital, technology and human resources between countries and can thus fulfil an important role in the promotion of economic and social welfare. But the advances made by multinational enterprises in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives. In addition, the complexity of these multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern.
2. The common aim of the Member countries is to encourage the positive contributions which multinational enterprises can make to economic and

social progress and to minimise and resolve the difficulties to which their various operations may give rise. In view of the transnational structure of such enterprises, this aim will be furthered by co-operation among the OECD countries where the headquarters of most of the multinational enterprises are established and which are the location of a substantial part of their operations. The guidelines set out hereafter are designed to assist in the achievement of this common aim and to contribute to improving the foreign investment climate.

3. Since the operations of multinational enterprises extend throughout the world, including countries that are not Members of the Organisation, international co-operation in this field should extend to all States. Member countries will give their full support to efforts undertaken in co-operation with non-member countries, and in particular with developing countries, with a view to improving the welfare and living standards of all people both by encouraging the positive contributions which multinational enterprises can make and by minimising and resolving the problems which may arise in connection with their activities.
4. Within the Organisation, the programme of co-operation to attain these ends will be a continuing, pragmatic and balanced one. It comes within the general aims of the Convention on the Organisation for Economic Cooperation and Development (OECD) and makes full use of the various specialised bodies of the Organisation, whose terms of reference already cover many aspects of the role of multinational enterprises, notably in matters of international trade and payments, competition, taxation, manpower, industrial development, science and technology. In these bodies, work is being carried out on the identification of issues, the improvement of relevant qualitative and statistical information and the elaboration of proposals for action designed to strengthen inter-governmental co-operation. In some of these areas procedures already exist through which issues related to the operations of multinational enterprises can be taken up. This work could result in the conclusions of further and complementary agreements and arrangements between governments.
5. The initial phase of the co-operation programme is composed of a Declaration and three Decisions promulgated simultaneously as they are complementary and inter-connected, in respect of guidelines for multinational enterprises, national treatment for foreign-controlled enterprises and international investment incentives and disincentives.
6. The guidelines set out below are recommendations jointly addressed by Member countries to multinational enterprises operating in their territories. These guidelines, which take into account the problems which can arise because of the international structure of these enterprises, lay down standards for the activities of these enterprises in the different Member countries. Observance of the guidelines is voluntary and not legally enforceable. However, they should help to ensure that the operations of

these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and States.

7. Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed. The entities of a multinational enterprise located in various countries are subject to the laws of these countries.
8. 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 cooperate 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.
9. 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.
10. The use of appropriate international dispute settlement mechanisms, including arbitration, should be encouraged as a means of facilitating the resolution of problems arising between enterprises and Member countries.
11. Member countries have agreed to establish appropriate review and consultation procedures concerning issues arising in respect of the guidelines. When multinational enterprises are made subject to conflicting requirements by Member countries, the governments concerned will cooperate in good faith with a view to resolving such problems either within the Committee on International Investment and Multinational Enterprises established by OECD Council on 21st January 1975 or through other mutually acceptable arrangements.

Having regard to the foregoing considerations, the Member countries set forth the following guidelines for multinational enterprises with the understanding that Member countries will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and

international agreements, as well as contractual obligations to which they have subscribed:

#### General policies

##### Enterprises should

1. take fully into account established general policy objectives of the Member countries in which they operate;
2. in particular, give due consideration to those countries' aims and priorities with regard to economic and social progress, including industrial and regional development, the protection of the environment, the creation of employment opportunities, the promotion of innovation and the transfer of technology;
3. while observing their legal obligations concerning information, supply their entities with supplementary information the latter may need in order to meet requests by the authorities of the countries in which those entities are located for information relevant to the activities of those entities, taking into account legitimate requirements of business confidentiality;
4. favour close co-operation with the local community and business interests;
5. allow their component entities freedom to develop their activities and to exploit their competitive advantage in domestic and foreign markets, consistent with the need for specialisation and sound commercial practice;
6. when filling responsible posts in each country of operation, take due account of individual qualifications without discrimination as to nationality, subject to particular national requirements in this respect;
7. not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
8. unless legally permissible, not make contributions to candidates for public office or to political parties or other political organisations;
9. abstain from any improper involvement in local political activities.

##### Disclosure of information

Enterprises should, having due regard to their nature and relative size in the economic context of their operations and to requirements of business confidentiality and to cost, publish in a form suited to improve public understanding a sufficient body of factual information on the structure, activities and policies of the enterprise as a whole, as a supplement, in so far as necessary for this purpose, to information to be disclosed under the national law of the individual countries in which they operate. To this end, they should publish within reasonable time limits, on a regular basis, but at least annually, financial statements and other pertinent information relating to the enterprise as a whole, comprising in particular:

- i. the structure of the enterprise, showing the name and location of the parent company, its main affiliates, its percentage ownership, direct and indirect, in these affiliates, including shareholdings between them;
- ii. the geographical areas\* where operations are carried out and the principal activities carried on therein by the parent company and the main affiliates;
- iii. the operating results and sales by geographical area and the sales in the major lines of business for the enterprise as a whole;
- iv. significant new capital investment by geographical area and, as far as practicable, by major lines of business for the enterprise as a whole;
- v. a statement of the sources and uses of funds by the enterprise as a whole;
- vi. the average number of employees in each geographical area;
- vii. research and development expenditure for the enterprise as a whole;
- viii. the policies followed in respect of intra-group pricing;
- ix. the accounting policies, including those on consolidation, observed in compiling the published information.

### Competition

Enterprises should, while conforming to official competition rules and established policies of the countries in which they operate,

1. refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example,
  - a. anti-competitive acquisitions,
  - b. predatory behaviour 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;
2. allow purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations consistent with law, trade conditions, the need for specialisation and sound commercial practice;
3. refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agree-

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\*For the purposes of the guideline on disclosure of information the term "geographical area" means groups of countries or individual countries as each enterprise determines is appropriate in its particular circumstances. While no single method of grouping is appropriate for all enterprises or for all purposes, the factors to be considered by an enterprise would include the significance of operations carried out in individual countries or areas as well as the effects on its competitiveness, geographic proximity, economic affinity, similarities in business environments and the nature, scale and degree of interrelationship of the enterprises' operations in the various countries.

ments which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation;

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.

### Financing

Enterprises should, in managing the financial and commercial operations of their activities, and especially their liquid foreign assets and liabilities, take into consideration the established objectives of the countries in which they operate regarding balance of payments and credit policies.

### Taxation

Enterprises should

1. upon request of the taxation authorities of the countries in which they operate, provide, in accordance with the safeguards and relevant procedures of the national laws of these countries, the information necessary to determine correctly the taxes to be assessed in connection with their operations, including relevant information concerning their operations in other countries;
2. refrain from making use of the particular facilities available to them, such as transfer pricing which does not conform to an arm's length standard, for modifying in ways contrary to national laws the tax base on which members of the group are assessed.

### Employment and industrial relations

Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate,

1. respect the right of their employees, to be represented by trade unions and other bona fide organisations of employees, and engage in constructive negotiations, either individually or through employers' associations, with such employee organisations with a view to reaching agreements on employment conditions, which should include provisions for dealing with disputes arising over the interpretation of such agreements, and for ensuring mutually respected rights and responsibilities;
2. a. provide such facilities to representatives of the employees as may be necessary to assist in the development of effective collective agreements,  
b. provide to representatives of employees information which is needed for meaningful negotiations on conditions of employment;

3. provide to representatives of employees where this accords with local law and practice, information which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole;
4. observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;
5. in their operations, to the greatest extent practicable, utilise, train and prepare for upgrading members of the local labour force in co-operation with representatives of their employees and, where appropriate, the relevant governmental authorities;
6. in considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and where appropriate to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects;
7. implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity;
8. in the context of bona fide negotiations\* with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of a right to organise;
9. enable authorised representatives of their employees to conduct negotiations on collective bargaining or labour management relations issues with representatives of management who are authorised to take decisions on the matters under negotiation.

#### Science and technology

##### Enterprises should

1. endeavour to ensure that their activities fit satisfactorily into the scientific and technological policies and plans of the countries in which they operate, and contribute to the development of national scientific and technological capacities, including as far as appropriate the establishment and improvement in host countries of their capacity to innovate;

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\*Bona fide negotiations may include labour disputes as part of the process of negotiation. Whether or not labour disputes are so included will be determined by the law and prevailing employment practices of particular countries.



2. to the fullest extent practicable, adopt in the course of their business activities practices which permit the rapid diffusion of technologies with due regard to the protection of industrial and intellectual property rights;
3. when granting licences for the use of industrial property rights or when otherwise transferring technology do so on reasonable terms and conditions.

*Decision of the Council on Inter-governmental Consultation Procedures on the Guidelines for Multinational Enterprises*

The Council,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960 and, in particular, to Articles 2(d), 3 and 5(a) thereof;

Having regard to the Resolution of the Council of 21st January, 1975 establishing a Committee on International Investment and Multinational Enterprises and, in particular, to paragraph 2 thereof [C(74)247(Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June, 1976 in which they jointly recommend to multinational enterprises the observance of guidelines for multinational enterprises;

Recognising the desirability of setting forth procedures by which consultations may take place on matters related to these guidelines;

On the proposal of the Committee on International Investment and Multinational Enterprises;

Decides:

1. The Committee on International Investment and Multinational Enterprises (hereinafter called "the Committee") shall periodically or at the request of a Member country hold an exchange of views on matters related to the guidelines and the experience gained in their application. The Committee shall periodically report to the Council on these matters.
2. The Committee shall periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to the guidelines and shall take account of such views in its reports to the Council.
3. On the proposal of a Member country the Committee may decide whether individual enterprises should be given the opportunity, if they so wish, to express their views concerning the application of the guidelines. The Committee shall not reach conclusions on the conduct of individual enterprises.
4. Member countries may request that consultations be held in the Committee on any problem arising from the fact that multinational enterprises are made subject to conflicting requirements. Governments concerned will co-operate in good faith with a view to resolving such problems,

either within the Committee or through other mutually acceptable arrangements.

5. This Decision shall be reviewed within a period of three years. The Committee shall make proposals for this purpose as appropriate.

ANNEX 4: EXCERPT FROM RESTRICTIVE BUSINESS PRACTICES OF  
MULTINATIONAL ENTERPRISES: REPORT OF THE COMMITTEE  
ON RESTRICTIVE BUSINESS PRACTICES (OECD, PARIS, 1977)

II. Possible remedies

195. The following possible remedies are discussed from two points of view: whether they are capable of solving or mitigating the problems identified in this report and whether they are useful and likely to be accepted by Member countries in the not too distant future. No attempt is made to suggest one measure to solve all problems, but rather a set of possible remedies is proposed which, taken together, may lead in this direction. A wide range of proposals is included, envisaging, among other things, the creation of new procedures to obtain more information about multinational enterprises at national and international levels, the development of international consultation, conciliation and arbitration procedures, or of voluntary codes of good conduct, standards of behaviour or guidelines for enterprises and governments, and even the creation of a binding international antitrust law and an international agency with powers of enforcement. In discussing such possible remedies, a distinction is made between possible action by the business community itself and possible remedies at national and at international levels.

*1. By the business community*

196. Action by the business community itself would be a first step, and would be of a voluntary nature. It would consist of avoiding conduct clearly at variance with competition guidelines<sup>200</sup> particularly in situations where affected countries may not apply their laws and policies effectively due to the international character of the enterprise or practices in question. Co-operation in furnishing information beyond legal obligations seems already to be taking place in some Member countries. It should be further encouraged, in particular with regard to relevant information located outside the national territory and in the possession of corporate entities other than the one doing business on national territory. To a certain extent, voluntary co-operation seems also to be possible in relation to the service of documents. Enterprises could occasionally waive any rights they might have as to methods or place of service in the interests of a speedy procedure and resolution of legal issues.

*2. At the national level*

197. Probably the most effective measures to solve or mitigate the problems identified in this report would consist of national legislative action. At the present time, there are no institutions in the world with powers comparable to those of governments. The experience of countries with more sophisticated competition laws and policies shows that the introduction or strengthening of antitrust laws and competition policies could substantially contribute to solving not only a significant number of the problems connected with

the activities of multinational enterprises but also those of national enterprises. As only governments have the power to take such legislative measures, they also have the responsibility for considering such action in the first instance.

198. Legislative action could solve a substantial number of the problems of national and international economic concentration in relevant markets in which multinational enterprises play a significant role. This could be done by introducing or strengthening, if one already exists, a system of merger control utilising an analysis of the competitive effects of mergers, whether involving multinational or domestic enterprises, with, if deemed necessary, appropriate powers of divestiture or dissolution according to the needs of the countries concerned.

199. Legislative action by Member countries could also include the introduction or, if one already exists, the strengthening of a system of abuse control over economically powerful or market dominating enterprises, among which most multinational enterprises are to be found. Experience in those Member countries which already have a workable system of abuse control shows that many substantive problems relating to powerful enterprises, not necessarily excluding those which may be created by arrangements among affiliated enterprises, can be alleviated under such a system.

200. It does not appear that restrictive agreement legislation is directed at purely intra-corporate conduct for the reasons discussed below. Competition laws and policies in the OECD Member nations generally provide that intra-enterprise practices such as allocation of functions among branches or subsidiaries of a single enterprise are not considered in themselves as an unreasonable restraint of trade. Holding such practices unlawful would be likely to discourage internal growth and decrease efficiency. It might also force upon competition authorities the impracticable task of seeking to create and maintain competition within a single enterprise on an ongoing basis. In no case have arrangements within the same legal entity, such as between branches or operating divisions of the same company, been held to be unlawful. Even in cases involving separate legal entities under common control, findings of illegality have been rare and have been based upon exhaustive factual analysis of the particular cases. In certain instances of arrangements between legally separate entities with partial common ownership which eliminated significant pre-existing or potential competition among the entities or which injured competition outside the enterprise by means for instance, of agreed refusals to deal, illegality has been found.

201. A third field in which legislative action by governments could help to resolve problems is that of industrial, commercial and intellectual property rights. Legislation or regulatory action might follow the lines suggested in the OECD Recommendation concerning action against restrictive business

practices relating to the use of patents and licences of 22nd January, 1974 referred to in paragraph 100 above (see Annex III).

202. Governmental action introducing or strengthening merger control systems, control over abuses by economically powerful enterprises and competition rules prohibiting the abuse of industrial, commercial and intellectual property rights are not the only measures capable of diminishing the problems identified in this report although they would certainly be among those which might be expected to have the most far-reaching results. Taking into account the great diversity of laws and policies existing in Member countries it seems to be impossible to draw up a complete list of possibilities for legislative action. In those Member countries, however, which do not yet have legislation prohibiting horizontal and vertical restrictive agreements or a workable abuse control system regulating them, serious consideration might be given to introducing such legislation. A number of Member countries have found it effective to apply their legislation to restrictive conduct which has a substantial, direct and foreseeable effect on the country applying its law.

203. A further possibility for action by governments relates more specifically to antitrust procedure. One of the central problems identified in this report is that of collecting relevant information controlled by a multinational enterprise which is located outside the national territory, for purposes of an investigation of conduct affecting the jurisdiction. One of the elements contributing to this problem is the very nature of the multinational enterprise with units in various countries. Additional problems may be created by the reluctance of enterprises to co-operate in providing such information. It therefore seems appropriate that countries should consider, in conformity with the established rules of international law and taking into account international comity, the development of national procedures with a view to enhancing their ability to obtain relevant information which is outside of their territory but which is within the control of the multinational enterprise concerned and which is necessary to the enforcement of national antitrust laws and the disclosure of which is not contrary to the law of the place where the information is located. For example, in certain circumstances, it might be appropriate to interpret non-compliance to the disadvantage of the enterprise which cannot justify such non-compliance. An appropriate legal test for demanding such information may be whether the parent or subsidiary outside the jurisdiction and its affiliate in the jurisdiction both participated actively in the transaction being investigated, or whether the foreign parent actively supervised a local affiliate which did participate.

204. Another problem is the existence in some states of legislation or policies which preclude an enterprise from providing business-related information to foreign governments. A possibility for action by governments to solve this problem would be, perhaps in the context of bilateral or multilateral understandings, appropriate modification of national laws preventing disclosure of

relevant information by or concerning multinational enterprises so as to allow disclosure to competition authorities of other jurisdictions under proper procedures and safeguards. However, where these laws are of general application, such modification may raise problems which go beyond issues of competition policy.

### 3. *At international level*

205. At the international level, action may mainly be taken by governments and by international organisations. As to the action of governments at the international level, the least complicated possibility seems to be that of bilateral arrangements, agreements or formal treaties. They could cover a wide variety of subjects, ranging from the exchange of generally available information to the creation of a common antitrust law. As to the first possibility, it should be noted that OECD Member countries already have the opportunity to utilise or develop other procedures dealing with the exchange of information at the OECD level (cf. paragraph 206 below). However, Member countries might more readily exchange information which is not generally available on a bilateral basis with countries with similar antitrust and competition philosophies. Bilateral agreements relating to the exchange of information, consultation, conciliation or mutual administrative and judicial aid might well be useful and could lead to further developments which would help to overcome the problems identified in this report. Effectively functioning co-operation may lead the participating countries towards further harmonization of their antitrust laws and competition policies or co-ordination of investigations or procedures, a development which is also desirable from the viewpoint of enterprises doing business in these countries, since it would provide more certainty than currently exists. Also, third countries might, if co-operation was effective between the parties to a bilateral treaty, either wish to join the arrangement in order to mitigate their own problems in the field of antitrust and competition policy, or decide to conclude similar agreements with other countries closer to them in terms of their laws and policies.

206. On a more than bilateral and less than global level, a number of international organisations can and do help to reduce the problems identified in this report. The OECD Recommendation of 5th October, 1967 concerning co-operation between Member countries on restrictive business practices affecting international trade (see Annex I) and the OECD Recommendation of 3rd July, 1973 concerning a consultation and conciliation procedure on restrictive business practices affecting international trade (see Annex II) are procedures which, without discriminating between national and multinational enterprises, may help to iron out some of the problems in question here. The 1967 Recommendation established a voluntary procedure for prior notification of antitrust investigations and proceedings by Member countries when important interests of another Member country are involved. It also provided for the co-ordination of antitrust enforcement, co-operation in devel-

oping or applying mutually beneficial methods of dealing with restrictive business practices in international trade and exchanges of information on antitrust matters to the extent possible. Most of the notifications and requests for information which have been made since 1968 related to multinational enterprises. Certain of these notifications have approached being a form of voluntary consultation procedure aimed at achieving mutually agreed adjustments through discussions among the Member countries concerned. Such a development is in line with the 1973 Council Recommendation, although this Recommendation has never been specifically invoked in practice. Member countries may consider making specific use of this Recommendation, altering it or suggesting alternative proposals.

207. At the regional level, the European Communities have adopted a highly sophisticated antitrust law which, once a system of merger control is introduced, will be among the most comprehensive legislations in the world. It is no more difficult for the Commission, which is the regional antitrust authority having its own powers of enforcement, to enforce its legislation than it is for a national authority to enforce national law; it may take action directly within the territory of all Member States and not only in one of them. Although in the European Communities national laws relating to competition may apply simultaneously, implying that there may be parallel procedures, the fact that there is a fairly comprehensive legislation and an effective competition policy in the European Communities has allowed substantial results to be achieved in regard to the restrictive practices of multinational enterprises the scope of which extends beyond purely national territory.

208. At the OECD level, a common antitrust law comparable to that of the European Communities is not realistically achievable. There are, however, a number of ways other than the OECD Recommendations of 1967 and 1973 in which OECD could help to reduce some of the problems identified above. The Committee believes that the OECD voluntary guidelines contained in the Declaration on International Investment and Multinational Enterprises adopted by the OECD Council, meeting at Ministerial level, on 21st June, 1976, relating to competition and the shaping of corporate conduct in a general way (see Annex IV), should serve useful purposes. Of course, to some extent guidelines dealing with difficult legal and economic concepts such as abuse of a dominant position and adverse effects on competition cannot in themselves provide precise rules for business executives to follow in specific circumstances. Under the national law of various countries, these concepts have been given meaning only through interpretation by the competent tribunals. However, the Committee considered that such guidelines could nonetheless provide useful standards for enterprises and could be of value in helping to achieve a common approach towards multinational enterprises as well as acceptable relationships between multinational enterprises and countries whose trade they affect. In addition, they could contribute to the further development of widely accepted standards within OECD and at world level.

209. Even though certain courses of action may be suggested to Member governments this does not mean that the OECD should cease to study multinational enterprises from various antitrust and competition policy viewpoints. Although the development of an international antitrust law and the creation of an international antitrust authority can only be a long-run possibility, this issue is still being discussed at international level. As most parent companies of multinational enterprises are located in OECD Member countries, among which are to be found those with the most developed antitrust laws, it seems appropriate for the OECD to keep in touch through its Committee of Experts on Restrictive Business Practices with endeavours to establish international antitrust principles and institutions. In addition, it seems appropriate for the OECD to study, through the same Committee, other means of coping with the problems identified in the report in connection with its other work and, at the same time, to endeavour to identify the problems still more precisely in order to achieve a better understanding of their importance and a better basis for the consideration of possible remedies.

### III. Suggestions for action

210. In accordance with the considerations set forth in paragraph 198, it is suggested that Member countries which have not yet done so consider the introduction of a workable system of merger control or the strengthening of an already introduced but not effectively functioning merger control system. As regards the criteria to be observed, it is sufficient to refer to the Committee's report on mergers, published by OECD in 1975, paragraphs 170 and 186 of which read as follows:

"185. The accelerating trend towards merger together with the already high level of concentration in a number of economic sectors draws attention to the problems of competition which are created by changing market structures and it seems therefore appropriate at the present time to suggest to Member countries which have not yet done so to consider the adoption of an effective system of merger control.

186. The following characteristics might be taken into account:

- i. a procedure for registering mergers, wherever this is felt necessary;
- ii. a system to facilitate obtaining information about occurrence of major mergers, such as requiring their prior notification;
- iii. minimum quantitative criteria below which mergers would not be subject to control;
- iv. objective criteria or presumptions for use in evaluating mergers;
- v. reasonable time limits for deciding initially whether to allow or challenge certain mergers."

211. In accordance with paragraph 199 above, it is suggested that Member countries which have not yet done so consider the creation of a workable abuse control procedure, the strengthening of an already existing abuse con-



control procedure for market dominating and economically powerful enterprises or the creation or strengthening of legislation against monopolisation or attempts to monopolise.

212. With reference to the matters considered in paragraph 200 above, the Committee has no changes to recommend at this time in relation to the treatment of intra-corporate arrangements.

213. In accordance with paragraph 201 above, it is suggested that Member countries consider legislation or regulatory action against restrictive business practices relating to the use of patents and licences.

214. In accordance with paragraph 203 above, it is suggested that Member countries consider how they could develop appropriate procedures to facilitate investigation and discovery by their antitrust authorities in regard to information located outside their national territory, in conformity with the rules of public international law and taking into account international comity.

215. Also, in accordance with paragraphs 203 and 204 above, it is suggested that Member countries might, where discretion exists, consider whether and, if so, how and under what safeguards to provide or allow disclosure of information relevant to the enforcement of national antitrust laws and to national competition policy purposes but which at present may not be obtainable or transmissible to other Member countries for legal reasons.

216. In accordance with paragraph 205 above, it is suggested that Member countries consider the possibility of concluding bilateral or multilateral treaties on mutual administrative and judicial aid with other Member countries which would be applicable to the enforcement of restrictive business practices laws.

217. In view of the advisability of taking action in regard to the problems identified in this report not only at national and bilateral levels, it is suggested that Member countries make use as far as possible of the OECD Recommendation of 1967 concerning co-operation between Member countries on restrictive business practices affecting international trade and continue to explore possible use of the Recommendation of 1973 concerning a consultation and conciliation procedure on restrictive business practices affecting international trade.

218. The OECD Committee of Experts on Restrictive Business Practices will keep under review antitrust and competition policy problems identified in this report and try, as part of its future programme of work, to study these problems in greater depth in order to develop more adequate measures to remedy them. The Committee will in particular keep in touch with all endeavours at the international level to deal with antitrust and competition policy problems connected with multinational enterprises.

ANNEX 5: RECOMMENDATION OF THE COUNCIL CONCERNING ACTION AGAINST RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE INCLUDING THOSE INVOLVING MULTINATIONAL ENTERPRISES (Adopted by the Council at its 469th Meeting on 20th July, 1978)  
[The Representative for Turkey abstained]

The Council,

Having regard to Article 5(b) of the Convention on the Organisation for Economic Co-Operation and Development of 14th December, 1960;

Having regard to the Declaration on International Investment and Multinational Enterprises adopted by the Governments of OECD Member countries on 21st June, 1976;

Having regard to the Report of the Committee of Experts on Restrictive Business Practices of 10th February, 1977 on the restrictive business practices of multinational enterprises [RBP(77)1-MNE];

Considering that restrictive business practices may have harmful effects on international trade whether they emanate from purely national or from multinational enterprises;

Considering that the restrictive business practices of multinational enterprises do not differ in form from those operated by purely national enterprises but that they may have a more significant impact on trade and competition due to the fact that multinational enterprises generally tend to wield greater market power, that they play a relatively greater role in the process of national and international concentration and that the restrictive business practices they engage in have more often an international character;

Recognising that, in the present state of international law and of the laws on restrictive business practices of Member countries, control of practices affecting international trade, including those involving multinational enterprises, raises many difficulties, especially in assembling necessary information held outside the jurisdiction of the country applying its law, in serving process and in enforcing decisions in relation to enterprises located abroad;

Recognising that the solution to these difficulties cannot at present be found in an international convention establishing control of restrictive business practices affecting international trade owing mainly to the still differing attitudes adopted by countries toward restrictive business practices and in particular to their varying national legislations in this field.

Considering, however, that the difficulties in controlling restrictive business practices affecting international trade, including those involving multinational enterprises, may be alleviated by simultaneous efforts in the fields of national legislation on restrictive business practices and of international co-operation particularly within the OECD framework, it being understood that such co-operation should not in any way be construed to affect the legal positions of Member countries, in particular with regard to such questions of sovereignty and extraterritorial application of laws concerning restrictive business practices as may arise;

I. RECOMMENDS the Governments of Member countries to consider the following action:

- (1) to adopt new or supplement existing measures on restrictive business practices so as to prohibit or control effectively such practices, particularly:
  - (a) actions adversely affecting competition in the relevant market by abusing a dominant position of market power by means of, for example, anti-competitive acquisitions; predatory behaviour toward competitors; unreasonable refusal to deal; anti-competitive abuse of industrial property rights; discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises;
  - (b) cartels or other restrictive agreements which without justification adversely affect or eliminate competition;
- (2) to develop, consistent with established rules of international law and taking international comity into account appropriate national rules to facilitate investigation and discovery by their respective competition authorities of relevant information within the control of an enterprise under investigation, where such information is located outside their respective national territories and when its provision is not contrary to the law or established policies of the country where the information is located;
- (3) to allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests;
- (4) to facilitate, through conclusion of or adherence to bilateral or multilateral agreements or understandings, mutual administrative or judicial aid in the field of restrictive business practices;
- (5) whilst vigorously enforcing their legislation on restrictive business practices, to make use as far as possible of the OECD procedures on co-operation between Member countries in the field of restrictive business practices affecting international trade so as to facilitate consultation and resolution of problems.

II. INSTRUCTS the Committee of Experts on Restrictive Business Practices to keep under review this Recommendation and to report to the Council when appropriate.

ANNEX 6: RECOMMENDATION OF THE COUNCIL CONCERNING  
CO-OPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE  
BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE  
(Adopted by the Council at its 501st Meeting on 25th September, 1979)

The Council,

Having regard to Article 5(b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

Having regard to the Recommendation of the Council of 5th October, 1967, concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(67)53(Final)];

Having regard to the Recommendation of the Council of 3rd July, 1973, concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)];

Having regard to the Note by the Committee of Experts on Restrictive Business Practices on Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(79)154];

Recognising that restrictive business practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries such as the control of inflation;

Recognising that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognising that restrictive business practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of restrictive business practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with restrictive business practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning restrictive business practices, as may arise;

I. RECOMMENDS to the Governments of Member countries that insofar as their laws permit:

#### A. Notification, Exchange of Information and Co-ordination of Action

1.(a) when a Member country undertakes under its restrictive business practices laws an investigation or proceeding involving important interests of another Member country or countries, it should notify such Member country or countries in a manner and at a time deemed appropriate, if possible in advance and in any event at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws to deal with the restrictive business practices;

(b) where two or more Member countries proceed against a restrictive business practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

2. through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with restrictive business practices in international trade. In this connection, they should supply each other with such relevant information on restrictive business practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

#### B. CONSULTATION AND CONCILIATION

3.(a) a Member country that considers a restrictive business practice investigation or proceeding being conducted by another Member country to affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

(b) without prejudice to the continuation of its action under its restrictive business practices law and to its full freedom of ultimate decision, the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the restrictive business practice investigation or proceedings;

4.(a) a Member country that considers that one or more enterprises situated in one or more other Member countries are or have been engaged in restrictive business practices of whatever origin that are substantially and adversely affecting its interests may request consultation with such other Member country or countries, recognising that the entering into such consultations is without prejudice to any action under its restrictive business practices law and to the full freedom of ultimate decision of the Member countries concerned;

(b) any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the restrictive business practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

(c) the Member country addressed which agrees that enterprises situated in its territory are engaged in restrictive business practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on restrictive business practices or administrative measures, on a voluntary basis and considering its legitimate interests;

5. without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 3. or 4. above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

6. in the event of a satisfactory settlement of the consultations under paragraphs 3. or 4. above, the requesting country, in agreement with, and in the form accepted by, the Member country or countries addressed, should inform the Committee of Experts on Restrictive Business Practices of the nature of the restrictive business practices in question and of the settlement reached;

7. in the event that no satisfactory solution can be found, the Member countries concerned, if they so agree, should submit the case to the Committee of Experts on Restrictive Business Practices with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement and do not therefore submit the case to the Committee they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

## II. INSTRUCTS the Committee of Experts on Restrictive Business Practices:

1. to examine periodically the progress made in the implementation of the provisions set out in paragraphs 1 and 2 of Section I above;

2. to consider the reports submitted by Member countries in accordance with paragraph 6 of Section I above;

3. to consider the requests for conciliation submitted by Member countries in accordance with paragraph 7 of Section I above and to assist, by offering advice or by any other means, in the settlement of the case between the Member countries concerned;

4. to report to the Council as appropriate on the application of the present Recommendation.

III. DECIDES that this Recommendation repeals and supersedes the Recommendations of the Council of 5th October, 1967 and of 3rd July, 1973 referred to above.