

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(81) 167 final

Brussels, 9th April 1981

INTRODUCTION OF A COMMUNITY CLAUSE IN THE
UN CODE OF CONDUCT FOR TRANSNATIONAL CORPORATIONS
(New York, Spring 1981)

(Communication from the Commission to the Council)

COM(81) 167 final

1. The endeavour by the United Nations to establish a code of conduct for Transnational Corporations (TNCs) originates in the Economic and Social Council's resolution of 5th December 1974 which created the Commission on Transnational Corporations (CTNC). At its first session in March 1975 the CTNC decided to assign top priority to the formulation of a code of conduct and during its second session in March 1976 the CTNC established an Intergovernmental Working Group. This group was directed to prepare an annotated outline of the code of conduct to be submitted to the CTNC at its third session in April/May 1977, following which the group was to prepare the final text of a draft code of conduct to be considered by the CTNC.

The Community has from the start participated as an observer in the negotiations both in the CTNC and in the Intergovernmental Working Group sessions.

2. In accordance with UN - ECOSOC decision 1980/171 the Intergovernmental Working Group on a code of conduct for TNCs will try to finalise its work on a draft code of conduct for transnational corporations (TNCs) before the next session of the CTNC, now scheduled for September 1981.

Before this CTNC session, the Intergovernmental Working Group will hold two more sessions, in April and in May 1981, in New York, in order to complete its work.

Although the Working Group will be faced with negotiations on a number of difficult items, completion of its tasks within the set time limits is not entirely impossible.

In this situation the Community will soon be obliged to raise the problem of its position with regard to the code and its institutional machinery in the negotiations in New York.

3. The proposed code raises similar problems for the Community as the proposed code of conduct on the Transfer of Technology and the code on

Restrictive Business Practices, the principal ones being the participation by the Community as such in the adoption of the code and the latter's compatibility with Community law, independently of its final legal nature, as well as the Community's role in the institutional machinery set up in connection with the code.

Code of Conduct on Transfer of Technology

4. As stated in the Commission workingpaper (1) on the introduction of a Community clause in the proposed code of conduct on the Transfer of Technology, these problems make it necessary for the Community to propose in the final negotiations on the code:

- that it participates as such in the adoption of the code
- and that appropriate provisions in the code will ensure that
 - . the code will not affect any existing or future application and implementation of the Community Treaties, .
 - . the Community as such will, in so far as the areas of its competence are concerned, be a party to the code in the same manner as States and hence participate on this basis in the institutional machinery.

5. Prior to the first session of the UN-Conference on the code of conduct on the Transfer of Technology, in its Communication to the Council of 20 September 1978 (2), the Commission presented the reasons, legal and otherwise, for including a "Community clause" in the code concerning the Transfer of Technology. This analysis was further developed in a Commission staff paper of 27 October 1978 (3), which discussed in particular the question of the Community's competence on the basis of the jurisdiction of the European Court of Justice.

(1) COM(80) 595 of 21 April 1980.

(2) See doc.R/2421/78 (COMER 49) of 25.9.1978 or COM(78) 447 final of 20.9.1978 respectively.

(3) See doc. VIII (78)1217 of 27.10.1978.

6. The communication of the Commission gave rise to a thorough discussion of the problem by the RELEX-Group of the Council. The Group proposed a compromise formula to be introduced in the negotiations on the code of conduct. As to the general context for putting forward this formula, the Group indicated in particular that (1):

"the compromise had been devised on the assumption of a non-binding Code which would be adopted by the United Nations General Assembly (in which case the problem of adoption of the Code by the Community as such would not arise);

- in those fields where the Community undeniably had competence, the Community should be able to participate in the negotiation of the Code."

At its 919th session of 7 November 1978, the COREPER adopted, on the basis of the proposal of the RELEX-Group, the following formula and agreed that it should be introduced in the negotiations on the code in case of necessity:

"In the case of groups which possess or are liable to attain powers relating to questions falling within the scope of this code, the provisions of the code will also apply to those groups.

The provisions of this code will not affect the rules in force within these groups".

On the basis of the Commission Working Paper (2) of 21 April 1980, consultations continued both in Brussels and on the spot in Geneva during the UNCTAD-TOF Conference, where agreement finally was reached on 5.5.1980 (3) to propose the introduction of the following text in the Code:

(1) See doc. S/1778/78 (RELEX 172) + Add. 1 of 25.10.1978.

(2) See doc. COM(80) 595 final of 21 April 1980.

(3) See Council doc. 6891/80 of 6 May 1980.

"Any reference in the code to "States" or "Governments" shall be construed as including any regional grouping of states to the extent that they have competence in the field of Transfer of Technology, with respect to such competence".

Group B was notified of this text. However, due to lack of time this text was not tabled formally in the Conference.

Negotiations within UNCTAD on the Transfer of Technology Code are still continuing.

Restrictive Business Practices

7. Similar questions with regard to Community competence and participation arose in the context of the preparation of the United Nations Conference on Restrictive Business Practices which held its first session in Geneva from 19 November to 7 December 1979. In its communication to the Council concerning the preparation of a Community position for this Conference (1) the Commission asked the Council in particular:
 - to agree that the Community as such participates in the negotiation of the code for the control of restrictive business practices and ensures that its provisions apply to the Community as such in the areas of its competences;
 - to agree that the Community must make sure in the forthcoming negotiations that the code is compatible with Community law and does not interfere with the application and implementation of Community competition policy.
8. The Council in its meeting of 20/21 November 1979 upon recommendation of the Committee of Permanent Representatives of 15 November 1979 (2) decided that the questions negotiated in the framework of this conference could, depending on the situation, fall within the competence of the Member States as well as that of the Community. As a consequence the Community must participate as such in the negotiation together with the Member States.

(1) See doc. COM(79) 526 final or doc. 9752(79) respectively.

(2) See doc. 10683/79 of 15.11.1979.

9. In the UN Conference on Restrictive Business Practices an understanding among the spokesmen of all groups was reached enabling the Community to participate as such in the negotiations. In particular, two clauses were negotiated extending the scope of application of the principles and rules on RBP's to the Community as such and enabling the Community to participate in the international institutional machinery.

With respect to first question, the following wording was submitted by the president of the conference (Mr. Sanchis-Muñoz, Argentina):

"Any reference to "States" or "Governments" shall be construed as including any regional grouping of States such as the European Economic Community, to the extent that they have competence in the area of restrictive business practices" (1).

With respect to the institutional machinery the chairman of the negotiating group submitted the following text to the President of the Conference:

"The Intergovernmental group open to all members of UNCTAD as well as regional groupings having competence in this field, should meet as often as necessary, but at least once a year" (2).

Group B and the Group of 77 accepted both clauses, Group D eventually rejected the second clause, just before the conference closed. At that stage Group B did not think it appropriate to insist, especially since the matter of setting up the institutional machinery was referred to the UNCTAD Trade Development Board.

The RBP Code, including the first clause given above, was adopted by the UN General Assembly by way of Resolution on 5 December 1980.

Code of Conduct for TNCs

10. The Community interests at stake in the negotiations on the Code of conduct for TNCs are entirely similar to those in the negotiations on the codes mentioned above.

With regard to the question of Community competence and participation, it would suffice to point out, by way of examples, the chapters of the TNC Code on accounting and disclosure of information, competition

1) See doc. TD/RBP/CONF/8 - p. 21.

2) See doc. TD/RBP/CONF/8 - p. 18.

and RBP, taxation. The bases for Community competence¹⁾ in these areas inter alia are found in the Rome Treaty, especially in articles 85 and 86 as well as in Community legislation, such as the Fourth Council Directive (78/660/EEC) on the annual accounts of certain types of companies and the Council Directive (77/799/EEC) concerning mutual assistance in the field of direct taxation. Further Community legislation providing new bases for community competence in these and other areas (e.g. consumer protection) covered by the TNC code is in process.

It is furthermore noted that the Commission already has an authorisation to negotiate for the Community in discussions on the development of international accounting and reporting standards²⁾.

In view of the fact that the COREPER has asked previously on the occasion of the negotiations on a code of conduct on the Transfer of Technology for the introduction of a Community clause into that code, and taking into account the adoption of such a clause in the RBP Code, as indicated above, it would seem consistent that it should now likewise agree on the introduction of a community clause into the present code of conduct for TNC's. It would therefore seem indispensable to raise this problem during the April and May sessions of the Intergovernmental Working Group, which is expected to conclude the drafting exercise on the implementation chapter of the code.

1) The matter of Community competence has been explained by the Commission in its Communication to the Council of 20 September 1978 (see doc. R/2421/78 (COMER 49) of 25.9.1978 or COM(78) 447 final of 20.9.1978 respectively) and was further developed in Commission Staff Paper VIII(78) 1217 of 27.10.1978.

2) See Council Document 10096/79 of 30 October 1979.

For this purpose it seems advisable to propose the introduction into the code of the clause already adopted with regard to the RBP instrument. The text of this clause was the result of extensive and difficult negotiations. It will have to be emphasized, therefore, that there is no real scope for further negotiation and that the clause should, in substance, remain as presently drafted.

This clause would, as it reads now, also enable the Community to participate adequately in the work of the institutional machinery, which, in any way, is indispensable with respect to all questions relating to settled as well as future EEC policy. It would, however, also seem useful to agree to propose, if necessary, the introduction of a community clause in the chapter on the institutional machinery, along the lines of the drafting results in this respect at the RBP conference. Such a clause would guarantee the Community's participation in the work of the institutional machinery should this be left in doubt by the results of the negotiations on the first clause.

11. The Commission therefore asks the Council:

- to agree that the introduction of such clauses in any appropriate place of the code be proposed by the Commission on behalf of the Community at an early stage in the forthcoming sessions of the Intergovernmental Working Group;
- to bring its decision to the attention of the delegations of Member States on the spot in New York.

ANNEX

I. COREPER formula

In the case of groups which possess or are liable to attain powers relating to questions falling within the scope of this code, the provisions of the code will also apply to those groups.

The provisions of this code will not affect the rules in force within these groups.

II. UNCTAD RBP-Code formula (drafting results)

- 1) Any reference to "States" or "Governments" shall be construed as including any regional grouping of States such as the European Economic Community, to the extent that they have competence in the area of restrictive business practices. *)
- 2) The Intergovernmental group open to all members of UNCTAD as well as regional groupings having competence in this field, should meet as often as necessary, but at least once a year

N.B.: Only the formula sub 1) was finally adopted.

*) This should read for the code of conduct for TNC's:
competence in all or any of the areas covered by
 this code