



Revised Recommendation of the
Council concerning co-operation
between Member Countries on
Restrictive Business
Practices affecting
International Trade

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Background Information

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 25th September 1979, concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade - C(79)154(Final) - which repealed and superseded the Recommendations of the Council of 5th October 1967 and of 3rd July 1973 on the same subject;

HAVING REGARD to the request made by the Council meeting at Ministerial level in May 1982 to the Committee of Experts on Restrictive Business Practices to undertake a review of the 1979 Council Recommendation - C/M(82)12 Part I (Final), Items 114 and 115, paragraph 12 a);

HAVING REGARD to the Report by the Committee of Experts on Restrictive Business Practices on the operation of the 1979 Council Recommendation during the period 1980 to mid-1985 - RBP(86)2(1st Revision), Part A;

HAVING REGARD to the Report by the Committee of Experts on Restrictive Business Practices on international co-operation in the collection of information for purposes of competition law enforcement and, in particular, the suggestions for action contained in that report (paragraphs 173 to 179);

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 the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation in the field of restrictive business practices;

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;

RECOGNISING the desirability of setting forth procedures by which the Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to restrictive business practices affecting international trade;

CONSIDERING that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles annexed hereto;

- 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 which may affect important interests of another Member country or countries, it should notify such Member country or countries, 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 which considers that a restrictive business practice investigation or proceeding being conducted by another Member country may 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 proceeding;
- 4.
- a) A Member country which 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 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 and 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 conclusion to the consultations under paragraphs 3 and 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 conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of 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, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. RECOMMENDS that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III. INSTRUCTS the Committee of Experts on Restrictive Business Practices:

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;

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 matter between the Member countries concerned;

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

IV. DECIDES that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 25th September 1979 - C(79)154(Final).

APPENDIX

GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION, CONSULTATIONS AND CONCILIATION ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws.

Notification

2. The circumstances in which a notification of an investigation or proceeding should be made include:

- a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;
- b) When it concerns a practice carried out wholly or in part in the territory of another Member

country or countries, whether the practice is purely private or whether it is required, encouraged or approved by the government or governments of another country or countries;

- c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;
- d) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

Procedure for notifying

3.

- a) Under the Recommendation notification should be "if possible in advance". However there may be cases, for example relating to certain kinds of mergers, where advance notification could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.
- b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Committee of Experts on Restrictive Business Practices.
- c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned.

Collection of information from persons or enterprises located abroad

4.

- a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.
- b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.
- c) Any requests for information located abroad should be framed in terms that are as specific as possible.

Consultations between Member countries

5.

- a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.
- b) Requests for consultation under paragraphs 3 and 4 of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be given to them.
- c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.
- d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

Conciliation

6.

- a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph 7, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invoking conciliation.
- b) The Secretariat should continue to compile a list of persons willing to act as conciliators.
- c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.
- d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

Confidentiality

7. When engaging in notification, consultation or any other form of co-operation under this Recommendation, the degree to which a Member country discloses information to another Member country may be subject to and dependent upon the assurances of confidentiality given by the other Member country. When supplying information, Member countries should indicate the degree to which and the length of time during which the information should be treated as confidential. At the request of the country providing information, the receiving country should consider the information exchanged to be confidential and that it will not be disclosed unless the country providing the information agrees to its disclosure or disclosure is compelled by law. Member countries receiving such information should take all reasonable steps to ensure observance of the confidentiality request.

In adopting the above-mentioned revised Recommendation, the Council:

1. **NOTED** the Note by the Secretary-General - C(86)44;
2. **NOTED** the Report on the Operation of the 1979 Council Recommendation Concerning Co-operation between Member countries on Restrictive Business Practices Affecting International Trade - RBP(86)2(1st Revision), Part A - and **AGREED** to its derestriction;
3. **AGREED** to the derestriction of the revised Recommendation;
4. **NOTED** the statement by the Permanent Representative of the Commission of the European Communities.

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