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Multinational Corporations: A Framework of Law for the European Community

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RECENT CHANGES in European business law have dynamically affected multinational corporations. More changes are necessary if MNC's are to flourish in Europe and compete with MNC's headquartered elsewhere. The strong competition of American-based MNC's which provide more than half of the MNC investment in the world today has provided the impetus for many developments.[1] But there is a further need above and beyond the challenge posed by American-based MNC's. Laws are needed which permit the integration of business enterprise and encourage business partnerships within the European Community, and promote competiton with MNC's headquartered elsewhere. Various problems have been raised by the growth of MNC's. In this paper I will consider seven areas in which developments in the law appear advisable:

I. Protection of the General Public: The Citizens of European Community (EC) Nations.
II. Protection of Employee Interests and Security.
III. Protection of Competition as Expansion of MNC's Increases.
IV. Regulation of Takeovers and Mergers by MNC's.
V. Equality of Laws Affecting Establishment and Operations of MNC's Within EC Countries.
VI. MNC's In Less Developed Countries (LDC's).

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This comment is a modified version of Wolff, *Multinational Corporations: A Framework of Law for the European Community*, 80 COM. L. J. 307 (1975).

[1] *See Multinationals on Record*, reproduced by the National Foreign Trade Council from DEVELOPMENT FORUM, Dec. 1973, NFTC Ref. No. M-955.

VII. MNC Council of Economic Development.
VIII. Consolidated Annual Report.[2]

I. PROTECTION OF THE GENERAL PUBLIC: THE CITIZENS OF EC NATIONS.

A. *Tax Approach*

Adoption of a European Community tax code which codifies a neutral and evenhanded European tax law is needed. The European Code would give MNC's equal treatment without regard to the country of headquarters establishment or subsidiary operations. This policy of neutrality would apply both to community and non-community nations. The present existence of uncoordinated and disproportionate tax laws within each national jurisdiction impedes the functioning of an MNC and may cause a company to locate a new subsidiary in a particular area for tax reasons rather than for reasons such as labor supply or capital.[3] If the European Community Secretariat fails to take the initiative in creating such a code, it may lose the opportunity to do so. Presently, tax authorities in several countries have begun to coordinate their efforts to ascertain whether a company's claims for deductions in one country correspond to its claims for deductions in another. It would be preferable for Community countries to act in a unified, constructive manner before they may become obliged to react with fragmented national efforts. Tax neutrality would not prevent programs of national and regional tax incentives encouraging development of new industry in less developed regions of the Community, such as southern Italy or southern France. Quite to the contrary, in these areas where unemployment may be high and where the need for new industrial activity is clear, exceptions to a neutral tax law could be made part of the policy of regional aid from the Community.

A section of the European Community Secretariat should be established to deal directly with the problems of MNC's. Subsections should be formed to deal with specific areas. One of the subsections would deal with the formation of a rational tax policy

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[2] This outline and the general format of the text is similar to that used by the Commission of the European Communities, *Multinational Undertakings and Community Relations,* Commission Communication to the Council, Nov. 1973.

[3] An analysis of these factors and a consideration of the need for a uniform tax code throughout the Community may be found in the statement of Arthur Andersen & Co., *Presentation to the Commissioner of Internal Revenue; Comments Regarding Proposed Regulation 1.861-8 and Analysis of their Effect on Competitive Position of United States International Business*, Nov. 1973.

and another would deal with questions of regional aid and tax incentive programs in which MNC's would be involved. National "no tax" or "low tax" havens should be eliminated through the implementation of a rational tax policy for the Community.[4] If the Community has been able to achieve a common customs and tariff program from the multitude of programs that existed before, it can certainly develop a rational tax policy so that MNC's and their subsidiaries can locate new operations in the most economically desirable sites within the Community.

B. *Raw Material for European Industry*

The continuing "energy crisis" has been effectively used by OPEC countries as an opportunity to increase prices by withholding supply and to divide the European Community member nations. Energy at reasonable and stable prices will be needed by manufacturing companies within Europe if production is to flourish. In order to protect the development of MNC manufacturing units within Europe in the coming years, direct negotiation and agreements between the Community and OPEC would be a bold but necessary endeavor. The Community as a whole has greater bargaining power than does each member country individually. Unprepared, or at least uncoordinated, the Community could do little when the Netherlands was selected for discriminatory treatment in early 1974. Now, while the present crisis has eased, a draft agreement should be prepared by legal experts of the European Community Secretariat for consideration by member nations as a bloc and, after the signatures of member nations are obtained, the proposal should be presented to OPEC for purposes of negotiation. The treaty would provide that countries within the Community would receive equal treatment and would require that OPEC governments permit the flow of oil to reach reasonable price levels which would not add further inflationary pressures. The agreements could perhaps be framed as long term supply contracts or "non-interference with supply" agreements. These are details for the diplomats and legal counsel to determine. Negotiations will be delicate and may need to be delayed until an alternative source of oil is available if the bargaining is to be effective.[5] Community "bloc power" can protect individual states against discrimination.

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[4] Examples of such tax havens are presented in *Holding Companies and Tax Havens are Subject of EEC Scrutiny, Weekly Report to Managers of European operations*, 8 BUS. EUROPE 209 (1973).

[5] Measures taken to alleviate the dependence on Arab Oil as an energy

C. *Movement of Monies by MNC's*

Financial cooperation throughout Europe is developing rapidly. One striking example is the creation of flexible European service companies in banking, insurance, and factoring. As national central banks lose power to regional institutions, London, Zurich, Brussels and Frankfurt will become the dominant regional capital centers of the European Community. Eurodollars will continue to grow as a source of all types of corporate borrowings at costs competitive with or more favorable than domestic borrowing. Eurobonds will be easier to float as a stronger institutional and regulatory basis is built.[6] High interest rates with rates for long-term capital never falling below 7 percent will characterize the money market environment. In considering this scenario, some have said that MNC's will possess the power to destabilize currency rates, interest rates, and the health of national economics by being able to move capital suddenly from country to country. This threat could be eliminated by an appropriate Community law requiring all companies, both MNC's and national companies, to disclose to Community headquarters at least 10 days in advance its intention to transfer funds exceeding $50,000 from one country to another. A financial unit within the MNC's divisions of the Secretariat headquarters would be empowered to issue a "stop order" for any movement of funds in excess of $50,000 which it determined was for the purpose of speculation. In addition, such a "stop order" might be issued if the financial unit determined that the movement would be harmful to the financial condition of the currency of either the sending or receiving country. Efforts to evade the regulation by sending amounts smaller than $50,000 would not be ignored; such efforts would be considered as one effort, and would be halted unless the European Community Secretariat made a specific finding that the movement was for capital investment purposes and not for speculation.

D. *Protection of Shareholders and Bondholders of MNC's*

Securities regulations in the United States and in Europe presently protect only the nationals of a particular country against fraudulent action taken by a company within that country. Regu-

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source are outlined by Martin O. Mauthover, *European Investment Bank*, EUROPEAN COMMUNITY (1974).

[6] For a current status report on the International Monetary System refer to J. Watts, *Strategies for Financial Risk in Multinational Operations*, 6 COLUM. J. OF WORLD BUS. 15 (1971), and a more recent article, S. Davis, *A Buyers Market in Eurodollars*, 51 HARV. BUS. REV. 119 (1973).

lations protecting a Belgian or French shareholder for the fraud or misrepresentation of a foreign-based company have not yet been adopted. Community laws are needed requiring full disclosure and punishment for fraudulent acts in the securities filed without regard to national borders. United States security laws, particularly the disclosure provisions and reporting system and the strengthened 10(b)(5) fraud provisions and penalties, are appropriate models for protection of the European public. A strong regulatory agency within the Community for the control and regulation of MNC's securities issuance would help protect the general public and encourage the financial community to support MNC growth with the private funds MNC's need for expansion and improvement of present operations.

II. Protection of Employee Interests and Security.

MNC's operating in several parts of Europe find themselves face-to-face with concerted cross-border labor demands and multi-country strike movements. Saint Gobain of France, Philips of the Netherlands, and Hoechat of Germany have already discovered that the unions with which they have signed agreements in one national territory have met with their counterparts in other countries where the firms have subsidiaries and affiliates in order to plan cross-border demands. These loose liasons are being established to prevent MNC's from switching production from one country to another when faced with labor disputes in the first. As the labor-in-management concept makes progress in Western Europe, unions will seek codeterminative rights with international companies on a cross-border basis.[7]

In the near future, executives of MNC's will be called upon to enter bargaining agreements with representatives of multinational labor unions for the protection of union members in:

> 1. The establishment of procedures for consultation with employees at such time as an MNC shall decide to negotiate for a social plan for persons left unemployed as a result of a merger or otherwise as a result of a consolidation of work forces.
> 2. Existing rights such as seniority of union members in the event of mergers and acquisitions.
> 3. Representation of workers' interests by participation of union officials on MNC boards of directors.
> 4. Collective bargaining agreements to assure workers of MNC subsidiaries the opportunity to participate in the decisions of the parent company.

[7] A valuable source of further information on Labor and the Multinational Enterprise is The Multinational Enterprise, Ch. 2 (John H. Dunning ed. 1971).

MNC executives need to study these problems and plan long-range strategies and policies now so that when these demands are made in the future, they will not cripple the development of the company.

III. Protection of Competition as Expansion of MNC's Increases.

Although European governments will actively continue to promote corporate mergers, antitrust authorities in the coming years will watch newly formed MNC's to make sure they do not maintain artificially high prices. To prevent abuses, the European Community should request that all mergers between large Community firms be submitted for prior approval to prevent MNC's monopolizing markets and raising prices. While Europe has been less restrictive in preventing mergers than the United States, Germany is beginning to move in this direction as is the European Community Commission, as illustrated by the decision in the *Continental Can* case.[8] Antitrust law is one area where the national approach has given way to a European approach, an approach provided for under Articles 85 and 86 of the Treaty of Rome.[9] With these laws as the groundwork, proposed mergers across national boundaries would be submitted to antitrust monitoring unit within the Commission for approval prior to merger.[10] Confidentiality of review could be maintained so that the market situation of the parties would not be affected. In addition, the market situation within the Community could be fully studied by the monitoring unit before approval would be granted. The approval letter could precisely indicate the specific terms of the permitted merger so that the elimination of competition would be avoided.

IV. Regulation of MNC Takeovers and Mergers.

During the next few years the drive towards corporate concentration of MNC's within Europe will accelerate. We will continue to see large MNC's pooling services and expertise in specialized areas. The recent agreement among Siemens, Phillips,

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[8] Europemballage Corporation and Continental Can Company, Inc. v. E. C. Commission, 10 C.M.L. Rev. 311 (1973).

[9] Application of EEC antitrust legislation and Articles 85 and 86 of the Rome Treaty of 1957 are reported in *EEC Antitrust Ruling Demands Costly Reorganization*, 13 Bus. Europe 177 (1973).

[10] Merger control regulations were submitted to the EEC Council before the 1973 summer recess. For details *see EEC Commission Reveals Merger-Control Regulations*, 13 Bus. Europe 203 (1973).

and SII to jointly develop computer activities while competing in other areas is an example. The heavy duty truck manufacturing agreement between Saviem of France, DAF of Holland, and Volvo of Sweden for supply of products and distribution of truck parts is a good example of the development of an MNC joint venture with national companies as the constituent parts.[11]

The existence of conflicting national corporate laws and unfavorable capital gains tax systems remains obstacles to this development. European firms have resorted to complex formulas which play down the equity control of an MNC in order to please governments and avoid tax problems. Joint holding companies which own the two-parent manufacturing subsidiaries such as Agfa-Gevaert, limited cross-ownership agreements between two parents, as, for example, the Dunlop-Pirelli joint management committees, joint purchasing and manufacturing of parts and their reciprocal distribution agreements, merger of parent company international sales networks, and adoption of common trademarks, are examples of the way in which companies are able to join efforts without merging operations. These arrangements often give the partners the same advantage of mass production, purchasing and marketing which they would derive from actual mergers. The biggest obstacle to binational mergers is concern over loss of prestige, impaired national security, and increased unemployment. Perhaps these concerns would decrease substantially if the artificial barriers to growth throughout Europe are replaced by a uniform merger law applying to all companies within the community.[12]

V. Equality of Laws Affecting the Operation of MNC Within the Community.

The European Community Commission should draft a uniform code of laws which would equalize the treatment which MNC's receive while commencing operations in a new country.[13] These laws need neutralization and harmonization within the Community, not only in establishing a rational tax policy, but in creating a

[11] Unfortunately, these barriers seem to be more and more prevalent throughout Europe as nations seek to protect themselves from the harmful effects which a multinational corporation may have. *See European Acquisitions 11: Two Takeover Laws*, 2 Bus. Int'l 38 (1971).

[12] Such a code has been drafted. Refer to the Draft Convention of the International Merger of Societes Anonymes and Report of the Draft, 6 Bulletin of the European Communities Supp. 13 (1973).

[13] Multinationaly on record, *supra* note 1.

commercial code applicable to all nations similar to the American Uniform Commercial Code. Indeed, laws addressed to the right of establishment, the right of foreigners to own stock or to be directors in companies, the ability to borrow money, and restrictions on repatriation of profits, need to be made nondiscriminatory and uniform throughout the Community.

VI. MNC's in Less Developed Countries (LDC's).

A new approach for developing countries in dealing with MNC's was recently reported by Nigeria's Secretary of Finance, Mr. Ahimie.[14] Nigeria has passed strict legislation on selective entry for foreign industry. Government licenses must be obtained for setting up businesses. In addition to defining the nature of the business, the foreign investor must specify the desired location of his activities, the plans for company training of Nigerians to acquire the skills necessary for running the enterprise in the future, and a program for "phasing out" expatriates brought into the country; Nigeria reserves majority control of all newly established business except for banking. Further, foreign investors must contribute to a training fund used by the state for the national education program. According to Mr. Ahimie, "A host country can derive lasting benefit from the transfer of technology only if it is accompanied by domestic value added and the formation of local skills." Unilever's president, Sir Ernest Woodroofe, reported that the "percentage return of capital employed in Nigeria has been similar to that in Germany."[15] The Nigerian law may be a model for other LDC's to follow.[16] LDC's are no longer willing to have MNC's exploit natural resources without providing training for LDC nationals. Fragmentation of business development by the removal of raw materials from one country to another for processing is becoming a practice of the past. Developing countries want an MNC register which lists known international activities of corporations and such information as the size and nature

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[14] *Id.*

[15] Concurring remarks were made by Philippe DeSeynes, Undersecretary General for Economic and Social Affairs, *Multinational Corporations: A View From the United States*, at the Academy of International Business Annual Meeting, New York Sheraton Hotel, Dec. 1973. *See also* P. Drucker, Multinationals and Developing Countries: Myths and Realities, 53 Foreign Affairs 121 (1974).

[16] Disclosure of such pertinent information was recommended by the Report of the "Group of Eminent Persons" to study the role of Multinational Corporations on Development and International Relations, U.N. ECOSOC as reproduced in 13 Int'l Legal Materials 800 (1974).

of the company. Presently, data on MNC's are scarce, even in the industrialized countries; more data will help to guide developing countries which must make investment decisions.

VII. MNC Council for Economic Development.

In recent years, MNC's have been criticized in certain countries for interfering with internal political processes. Ample evidence of the detrimental possibilities of MNC behavior has been demonstrated. It is now time to focus on positive potential. Global corporations can and should form a new consortium, an MNC Council for Economic Development. This council could identify geographic areas of potential economic development and marshal financial and technological resources from among member companies to work on projects.

For example, there exists in northern Colombia a rich coal supply in an area heretofore inaccessible because of poor roads and a lack of funds and expertise for development. The MNC Council, on invitation from Colombia, could send a "systems team" consisting of financial, engineering, and mining experts.

The team would research the potential revenue production, job development, and environmental impact and other factors of interest to the host country.

Were the feasibility study to support a decision to develop the resource, Council members would be invited to participate in financing and developing the project. The host country, in cooperation with the Council, would determine a fair arrangement for compensation, taking into consideration the benefits of increased employment, diversification of economy, training of a skilled work force and any other advantages of the program. The agreement would provide for third party arbitration to protect the interests of the participating companies. Ownership of the natural resource would remain with the host country and a development contract would be signed with the MNC Council.

The Council could maintain a research group to continually review the world geographic situation in order to determine appropriate locations where dormant resources could be developed for the benefit of the host country while providing for world consumption at reasonable prices. The same approach could be used in areas where an inadequate food supply and outright famine has been a problem. Experienced MNC's with proven expertise in analyzing food production systems would be invited to analyze the famine situation in cooperation with FAO and other world organizations to determine the best methods for resolving such problems of global importance.

By moving towards solving world problems, MNC's not only will be able to answer criticism concerning their responsibility for international development, but they will provide welcome programs of lasting value.

VIII. Consolidated Annual Report.

The distribution of a consolidated annual report containing straightforward information on large national and multinational undertakings would permit all interested parties to reach their own conclusions concerning the policies of MNC's. A public information law which would require distribution of such reports to all national governments, international organizations, and other members of the public, including shareholders should be adopted by the European Community.[17] The information required would include the following:

1. The amount of funds invested, reinvested and transferred between countries within the year.
2. The origin, source, and composition of capital.
3. The number of jobs created and abolished during the year, either by merger, acquisition, or as part of continued corporate existence.
4. Declared profits and taxes paid.
5. The amount of funds repatriated to host country.
6. The expenditure on research.
7. The income from licenses on a country-by-country basis.
8. The payment of dividends.
9. Trade-off of operations with competitors ("hiving").
10. The investment of profit in social programs of host countries, particularly in developing countries.

Conclusion

The laws necessary to accomplish the objectives set forth in the above seven categories cannot be drafted and approved overnight, but the creation of a framework for discussions among businessmen, economists, legal experts and legislators can be established immediately. Certain actions can be taken by the European Community Commission. The establishment of an MNC Authority within the Commission with specific subdivisions such as merger, antitrust, and capital transfer units considered above deserves close study. The MNC Authority would have rule making responsibilities and the power and capacity for mediation between countries; the rules it would issue would be submitted to national parliaments for ratification. National parliaments outside the European Community could also be invited to ratify the rules and to receive the same benefits as Community nations. Though the process will take several years to complete, the first steps can be taken now.

Woodrow Wilson, in accepting the nomination for the governorship of New Jersey, issued this call for action:

> Some days when we are dead, men will come and point at the distant upland with a great shout of joy and triumph and thank God that there were men who undertook to lead in the struggle. What difference does it make if we ourselves do not reach the uplands? We have given our lives to the enterprise. The world is made happier and humankind better because we have lived.

In 1910, Woodrow Wilson was one of the first men in this century to recognize the absolute necessity of nations acting in concert in order to produce a greater good for their citizens. Let us commit ourselves to this enterprise and respect its possibilities. Let us work together for its eventual accomplishment.

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