Foreword

to the presentation by the Swiss Review of International Antitrust Law of the United States Department of Justice's "Antitrust Guide for International Operations"

by

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This is a period of increasing international interest in issues related to cartels and the control of restrictive business practices, particularly those engaged in by multinational enterprises. In 1976, the OECD published guidelines for multinational corporations, which included four principles directly related to competition issues. The United Nations has established a Center for the Study of Transnational Enterprises, and has embarked on the drafting of a worldwide code of conduct for such enterprises. The competition sections of such a code are now being worked on in Geneva, through the UNCTAD Committee on Transfer of Technology, which is dealing with licensing abuses, and the UNCTAD Committee on Manufactures, which has appointed an ad hoc committee of experts to draft multilaterally agreeable principles for nations and enterprises, as well as a model restrictive business practice law for developing countries.

Certainly, these international exercises are potentially valuable. They serve to educate nations concerning various approaches to the control of restrictive business practices and the types of concerns felt by countries who believe themselves victimized by such practices. Also, international codes may serve to harmonize the rules for international competition and may produce the voluntary abandonment of certain practices which are widely condemned. Nevertheless, a review of past efforts in this direction and of present differences in approach indicates that achievement of international consensus on cartel questions is problematical, and that it is particularly doubtful that there can be agreement in the near future on an enforceable scheme for international control of restrictive practices. Accordingly, it remains the case that the most important methods of

antitrust enforcement in the near future will be national or regional legislation. The experience of the United States and the EEC demonstrates that such legislation, vigorously and imaginatively applied and interpreted, can deal quite effectively with most restrictive business practices, even those of an international character or involving multinational enterprises. Strong enforcement can aid in the development of large common market areas and can create a competitive ambiance conducive to innovation, efficiency and growth. On the other hand, it cannot be doubted that a vigorous competition policy emanating from a single nation or region onto international trade will produce some conflicts with the policies of neighboring states and will place multinational enterprises in situations in which they are subject to differing or even conflicting laws and policies relating to their competitive behavior and the evidence of it.

This problem is further complicated by the fact that almost all countries seek a " favorable " balance of payments to be obtained by an encouragement of exports or discouragement of imports. Legislators of most nations have traditionally been reluctant to support antitrust law or enforcement which may hamper the export competitiveness of that nation's enterprises.

In January 1977 the Antitrust Division of the U.S. Justice Department published its *Antitrust Guide for International Operations*. As is stated in the preface, the *Guide* is responsive to arguments by American exporters that uncertainty over the possible application of U.S. antitrust law to international operations was hampering the successful participation of American firms in international trade and investment. The *Guide* begins with an introduction which explains the bases for U.S. jurisdiction (personal jurisdiction plus an " effects " test) and the primary criteria for enforcement (whether the international transaction would raise prices or deny alternatives to U.S. consumers or injure the export opportunities of U.S. firms outside the transaction).

In the common law tradition, the guidelines are then set forth in the form of illustrative cases, followed by analysis of likely approaches by the Antitrust Division to such factual patterns. It may be of interest to note that very few of the cases deal with agreements among U.S. firms only. Most of the hypotheticals involve a transaction with a foreign partner or licensee, or presume the involvement of a foreign government. Thus, the *Antitrust Guide*, though not intended primarily for the guidance of non-U.S. firms, has considerable relevance to such firms. For instance, it is well-settled U.S. law and enforcement policy that international mergers will be judged under the same standards regardless of whether the U.S. or the non-U.S. firm is the acquiring party. Of course, foreign-based firms have been named as defendants in U.S. cases, particularly when they have joined U.S. firms in cartel or restrictive activity of the types described in the guidelines.

It is rumored that on occasion some U.S. firms have utilized exaggerated antitrust concerns to justify their opposition to certain suggestions made by their foreign business partners. The availability of these guidelines in Europe and Asia may have the effect of equalizing knowledge in this area and thus preventing a distorted picture from being presented.

The introduction to the *Guide* points out that such a document cannot in itself serve as a substitute for the advice of an expert lawyer familiar with all the facts regarding a particular transaction, nor can it replace the Business Review Procedure under which enterprises doing business in or with the U.S. may submit facts and receive a letter of enforcement intentions from the Department of Justice.

It is likely that the *Guide* will be modified in light of experience and critiques, and it is possible that the Department of Justice might some day work on guidelines specifically intended for foreign firms interested in the U.S. market. However, it seems doubtful that such guidelines would be substantially different than those included in the 1977 *Antitrust Guide*. Also, it is our hope that a growing appreciation of the benefits of a strong competition policy and increasing international work in this area will make the principles underlying antitrust so appreciated and accepted that international explanation of them will become less and less necessary.