Aspects of International Competition Policy of the European Union

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Introduction: Antitrust policies and enforcement in a global environment

Liberalisation of trade flows and globalisation of markets are challenging competition authorities world-wide. Competition regulators and enforcement agencies increasingly need to take both developments into account when determining their policies and setting their priorities.

This may be explained by a multiplicity of reasons. For instance, firms, which operate beyond the limits of national markets are increasingly subject to multiple sets of competition rules. At this moment, competition rules have been, or are at the process of being adopted, in more than 80 WTO Member countries. These rules may diverge in substance and lay down different procedures for the control of restrictive business practices. This state of play increases legal costs and decreases legal certainty for multinational firms.

Further, action in some countries against anti-competitive practices may be less rigorous than in others. This can produce foreclosure effects in some markets and result in trade frictions. Trade disputes, in turn, undermine the positive results of efforts deployed in multilateral fora to open up international trade.

Finally, antitrust authorities may lack the necessary instruments to investigate cartels or other anti-competitive transactions, which affect competition

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in their territory but are organised or carried out in third countries. Even when an authority has the means to intervene, the remedies it must adopt in order to ensure competition within its jurisdiction may be perfectly legitimate, but may sometimes adversely affect the interests of another country. They may also directly conflict with remedies adopted in the same case by another authority.

To overcome these difficulties, competition authorities need to take into consideration each other's concerns and, to the fullest extent possible, devise compatible remedies which can be applied coherently throughout the relevant market. Failing to do so, they risk treating companies in an inefficient manner, or expose them to fragmentary and incoherent solutions imposed by separate authorities.

The problem stems from the fact that, currently, there are no internationally agreed rules prescribing which authority has jurisdiction over a specific antitrust case. Most domestic (and regional) competition statutes do not expressly regulate their scope as regards trans-national situations. Often the competition statutes of a given country are applicable to agreements and acts that restrict or are liable to restrict competition within that country; the geographical location where the anti-competitive act takes place or where the agent that carries out this act has its residence or company seat (territoriality) are usually irrelevant. The nationality of the actor is also mostly irrelevant.

The so called "effects doctrine" in competition law has been used by government agencies and courts to claim jurisdiction and apply their domestic competition rules in order to regulate behaviour of foreigners occurring outside their borders. The doctrine's major advantage is that it achieves a proper regulation of the domestic market from a competition point of view. But it has two major drawbacks: in some situations it is ineffective in terms of enforcement and it can also cause frictions between sovereign states in the area of public international law.

In recent years, competition authorities have explored a number of ways to counter the undesirable effects of unilateral extraterritorial jurisdiction and, at the same time, adapt to the challenges of globalisation. The most obvious avenue was the development of *bilateral* or *multilateral* co-operation instruments including provisions of traditional and positive comity. This approach takes substantive and procedural divergences of antitrust systems in different countries for granted and strives to resolve conflicts and enhance the effectiveness of the rules governing cross-border cases. On the opposite end of the scales, one finds so-called "*convergence*" approaches in which a

number of countries voluntarily envisage bringing their competition statutes closer to each other or even adopting identical rules in the interest of seamless integration of their economies and markets. EU international competition policy is pursuing these approaches in different contexts and situations by promoting multilateral antitrust co-operation in fora like the OECD or the WTO and concluding bilateral co-operation agreements with major trading partners (US and Canada).

Part I: Multilateral co-operation in the area of competition

1. The OECD work

A first mechanism for both regulatory and more specific co-operation in the area of competition was introduced by the OECD. Member countries were able to use a "first generation"[1] instrument for co-operation in the form of a Recommendation, last revised in 1995[2]. The basic co-operation options under this instrument are, for all practical purposes, similar to the ones found in bilateral agreements: notification of cases affecting interests of another member, consultations between enforcement agencies dealing with a case, co-ordination of investigations, provisions for providing assistance and avoiding conflicts, traditional and positive comity, conciliation etc. The Recommendation is not binding and each authority determines the co-operation framework depending on its own interests, priorities and capabilities. To this effect, certain OECD Member states (for instance the US, Canada and Australia), as well as the EU have entered into bilateral agreements which set the conditions for more specific co-operation.

A similar approach would be necessary in order to give effect to the second relevant OECD Recommendation, adopted in 1998[3]. This Recommendation

1 This term is used to define co-operation instruments that do not enable parties to exchange confidential information or carry out investigations or other compulsory processes (identify and produce witnesses, collect testimonies, enforce remedies etc.) upon request and on behalf of another party.

2 OECD Recommendation of 27 and 28 July 1995: Revised recommendation of the Council concerning co-operation between member countries on anti-competitive practices affecting international trade; (C(95) 130 final); based on the earlier Recommendations of the OECD Council of 5 October 1967 (C(67) 53 final), 3 July 1973 (C(73) 99 final), 25 September 1979 (C(79) 154 final) and 21 May 1986 (C(86) 44 final). See text at [http://europa.eu.int/comm/competition/international/3a@4en.html]

3 OECD Recommendation of 27 and 28 April 1998: Recommendation of the Council concerning effective action against hard core cartels; [C(98)35/final]. See text at [http://www.oecd.org/daf/clp/Recommendations/Rec9com.htm.]

encourages members to co-operate in the fight against hard core cartels[4] and to consider improving the effectiveness and efficiency of their law enforcement against such practices. This implies eliminating or reducing statutory exceptions that create gaps in the coverage of competition laws and removing legal restrictions that deny competition agencies the authorisation (granted in other fields like securities or taxation) to provide investigative assistance to foreign competition agencies upon finding that such assistance would not be inconsistent with their own interests. Such assistance would also include use of investigative powers ("compulsory process") on behalf of foreign competition authorities, and providing them with what is currently non-disclosable information.

As stated in the OECD Communique "it is important to take effective action against hard core cartels because they distort world trade and create waste and inefficiency in countries where markets would otherwise be competitive"[5].

An important feature of this Recommendation is the definition of a hard core cartel as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce"[6]. The lengthy discussion which took place around the wording of this definition made clear that even in this area of restrictive business practices which are most damaging to consumers, substantial divergence exist among the relatively homogeneous club of OECD Members. This is further evidenced by the second section of the definition which excludes from the category of hard core cartels "agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws"[7].

Apart from the above Recommendations on antitrust co-operation the OECD has deployed considerable efforts to in a number of areas such as:

4 *Ibid*, at Point I.B.2, last phrase urging OECD Members to enter into bilateral or multilateral co-operation agreements in this area.

5 Issued on 30.3.1998, see text at [http://www.oecd.org/daf/clp/recommendations/nw98-33a.htm.]

6 *Supra* note 3, at Section I.A.2.a.

7 *Ibid*, at Section I.A.2.b.

- review of patent and know-how licensing agreements from the perspective of competition law and policy[8]
- co-operation between Member Countries in areas of potential conflict between competition and trade policies[9]
- co-ordination of competition policy and exempted or regulated sectors[10], and
- harmonisation/approximation of merger notification and filing requirements;

On this last matter, increasingly important for firms in this era of mega-merger proliferation, a 1994 OECD Report recommends:

- the development of a common waiver system,
- the creation of model report forms with two parts: a first part with standard information needed in practically all jurisdictions, and a second part tailored to individual/national/second phase requirements,
- the harmonisation of time periods, and
- the preparation of a multilateral treaty setting forth principles of analysis and jurisdiction[11].

2. The WTO Working Group on Trade and Competition[12]

The "Wise Men Group", set up by Commissioner Van Miert in 1994, made some quite interesting proposals for a multilateral framework of competition rules. Its recommendation for a fully fledged international instrument, including adequate enforcement structures, a core of common principles and a positive comity provision remains valid. The same applies to the proposed dispute settlement mechanism. This mechanism should not aim at reviewing individual decisions made by antitrust authorities, but to settle disputes between Members on their compliance with agreed rules and principles[13].

8 OECD Council Recommendation of 31st March 1989; C(89)32(Final); see text at [http://www.oecd.org/daf/clp/ Recommendations/REC7COM.HTM]

9 OECD Council Recommendation of 23rd October 1986 — C(86)65(Final); see text at [http://www.oecd.org/daf/clp/ Recommendations/REC6COM.HTM]

10 OECD Council Recommendation of 25th September 1979 — C(79)155(Final); see text at [http://www.oecd.org/daf/ clp/Recommendations/REC4COM.HTM]

11 *Merger Cases in the real World: A study of Merger Control Practices*, OECD 1994.

12 1996 Singapore Ministerial Decision to "establish a working group to study the interaction between trade and competition policy".

13 *Competition policy in the new trade order: strengthening international co-operation and rules* (European Commission, Brussels, 1995).

The EU, acting on a proposal submitted by the Commission [14], suggested addressing these problems in the WTO. The mandate handed to the Working Group on Trade and Competition set up in December 1996 by the Singapore Conference is one of limited scope. The Group was expected to examine "issues ... relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework". It was also supposed to consider whether it is worthwhile to pursue on attempt to increase international consciousness of the importance of competition policy and of international co-operation in this field. After a rich and constructive debate, which started on 7.7.1997 in Geneva — and has already produced a considerable amount of valuable information [15], the Working Group will make recommendations and it will be for the WTO's General Council to decide how to proceed further.

Arguing for the rapid development of a multilateral framework for competition rules the EU has put forward a proposal focusing on the following four points [16]:

— First, the contracting parties could agree to adopt domestic competition rules and structures based on "core principles". These would entail basic competition rules, on restrictive business practices, and abuse of market power. Of course, the mere adoption of national legislation does not guarantee that competition law is to be enforced in an effective way. Nor does it ensure that there is no discrimination between domestic and foreign firms. This legislation should therefore be coupled with adequate enforcement provisions and a right of access for companies to domestic enforcement authorities and national courts. The fundamental WTO principles of transparency and non-discrimination would also govern the proposed legislative measures.

— Second, this domestic competition structure could include common approaches to addressing anti-competitive practices having an inter-

14 Towards an international framework of competition rules, Communication from the Commission to the Council of 18 June 1996, COM(96)284.

15 197 documents on 11.11.1999: available at [http://www.wto.org/wto/ddf/ep/public.html] under the Symbols WT/WGTCP/INF for submissions by delegations, WT/WGTCP/M for minutes of the meetings by the Secretariat and WT/WGTCP/W for other working documents.

16 See the numerous communications from the European Community and its Member States to the Working Group, texts available at the URL, *ibid.*

national dimension. It seems reasonable to concentrate initially on areas where international consensus can be reached at an early stage. Horizontal restrictions are envisaged here, the obvious ones being price and output fixing, market sharing and bid-rigging. Setting up an international competition authority with its own powers of investigation and enforcement is not a feasible option, at present.

— Third, elements of co-operation could also be developed. They would be based to a large extent on experience with bilateral instruments. This means that an instrument of co-oporation should include, for instance, provisions for exchange of non-confidential information, notification and positive and negative comity. This point will be further developed below.

— Finally, the first three points suggest that a mechanism should be set up to settle disputes in clearly specified circumstances. For instance, a panel could pronounce itself on whether the domestic competition law of a Member state is in breach of common principles, or on whether rules relating to the adoption of a competition law structure appropriately cover agreed disciplines on anti-competitive practices with an international dimension. On the other hand, no dispute settlement should be envisaged in individual cases, since this would lead panels to second-guess administrative or judicial decisions. It is finally unclear whether the traditional trade geared sanctions provided for in the WTO Dispute Settlement Mechanism [17] are compatible with competition policy or whether one should create a new mechanism adapted to the particularities of competition.

Part II. The bilateral competition co-operation agreements

1. The 1991 EC/US bilateral competition co-operation agreement [18]

i. Background

The first EC/US competition co-operation agreement was concluded on 23 September 1991 between the European Commission and the Government of

17 Agreement Establishing World Trade Organisation Understanding on Dispute Settlement, 15 April 1994, *33 I.L.M.* (1994) 1263.

18 Agreement between the Government of the United States of America and the European Communities regarding the application of their competition laws (OJ L 95, 27.4.95, pp. 45–50 as corrected by OJ L 131/38 of 15.6.95).

the US. Following the conclusion of the agreement, France argued that the Commission was not competent to conclude it and asked the Court of Justice to annul it. The Court, in August 1994 accepted these arguments, ruled that the Commission had acted *ultra vires* and annulled the act through which the Commission concluded the Agreement[19].

The Court also found that at the international level, the Agreement satisfied the definitions of the Vienna Convention for Agreements between a State and an International Organisation and as such produced effects. Thus, clearly the Community would have incurred liability in the event of its non-performance. The EC could have either formally terminated the Agreement or put the record straight regarding the internal EC adoption procedures. The second solution was preferred and the Agreement was adopted by a Joint decision of the Council (for the EEC) and the Commission (for the ECSC) in April 1995.

ii. Basic co-operation tools listed in the 1991 EC/US Agreement

** Notifications (art. II)*

The exchange of basic information in the form of notification, or in less formal ways, is the clearest obligation stemming from the agreement. The agreement provides for an alert system whereby each party notifies its partner when dealing with cases which may affect important interests of the latter. Successive notifications may occur in the same case: e.g. in a merger case notification should be made at the outset of the case, then, after the Commission has decided to initiate proceedings and, eventually, " far enough in advance ... to enable the other Party's views to be taken into account", before a final decision has been adopted.

More specifically, the agreement requires to report to the competition authorities notifications regarding mergers or acquisitions in the following cases:

— in the case of the US: not later than the issuing of second request, when the Department of Justice or the Federal Trade Commission decide to file a complaint challenging the transaction and (where possible) before the entry of a consent decree[20].

— in the case of the EC: when notice of the transaction is published in the Official Journal (under art. 4(3) of Reg. 4064/89) or when notice of

19 Case C-3217/91 *French Republic v. Commission*, 1994 E.C.R. I-3641.

20 An agreement between parties to a suit to cease activities alleged illegal in return for dismissal of charges.

the transaction is received under Art. 66 of the Treaty Establishing the European Coal and Steel Community and concentrations in this sector can not go ahead before they receive the approval of the Commission.

In all other matters notifications are made in the following circumstances:

In principle, at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any case, far enough in advance of the issuance of a statement of objections (EC), of a complaint or indictment (US), and of the adoption of a decision or a settlement (EC) or the entry of a consent decree (US).

A more specific notification requirement includes the intervention or participation of the competition authorities in regulatory or judicial proceedings that do not arise from their enforcement activities. These include:

— regulatory or judicial proceedings that are public;
— intervention or participation that is public and pursuant to formal proceedings;
— for the US only, proceedings before federal agencies.

** Co-ordination of enforcement activities (art. IV)*

The competition authorities of each Party are expected to provide assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

In all cases of mutual interest it has become the norm to establish contacts as early as possible in the life of a case in order to exchange views and, when appropriate, to co-ordinate activities.

The basic enforcement activities listed by the Agreement include those that:

— are relevant to the activities of the other party,
— involve significant anti-competitive conduct (other than a merger or acquisition) carried out in significant part in the other Party's territory,
— involve a merger or acquisition where one or more parties to the transaction (or a company controlling such a party) is a company incorporated/organised under the laws of the other Party or one of its constitutive units (States or Member States),
— involve conduct believed to have been required, encouraged or approved by the other Party,
— involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

In considering whether particular enforcement activities should be co-ordinated, the following factors are to be taken into account (among others):

— the possibility of making more efficient use of respective resources devoted to enforcement activities;
— the relative abilities of the Parties to obtain information necessary to conduct the enforcement activities;
— the effect of such co-ordination on the ability of both parties to achieve the objectives of their enforcement activities;
— the possibility of reducing costs incurred by persons subject to the enforcement activities.

* *Exchange of (non-confidential) information (art. III)*

The Parties may share information that will a) facilitate effective application of their respective competition laws; or b) promote better mutual understanding of economic conditions and theories relevant to their competition authorities' enforcement activities and to intervention or participation of a public regulatory or judicial nature (art. II§5).

The respective approaches on the definition of relevant markets are very often central to co-ordination discussions. Furthermore, the parties to the agreement will often exchange views on possible remedies in order to ensure that they do not conflict. Co-operation may also, in certain cases, help to clarify a point of foreign law relevant to the interpretation of an agreement or to the effectiveness of a remedy. Factual elements relevant to the case are also exchanged within the limits of legal constraints on the protection of confidential information. Co-operation under this heading has already involved the synchronisation of investigations and searches. This is designed to make fact-finding activities more effective. It also helps preventing companies suspected of cartel activity from destroying evidence located in the territory of the agency investigating the same conduct after its counterpart on the other side of the Atlantic has acted.

* *Meetings and consultations (art. II§2 and VII)*

Officials from the competition authorities are expected to meet at least twice each year to a) exchange information on their current enforcement activities and priorities; b) exchange information on economic sectors of common interest; c) discuss policy changes which they are considering; and d) discuss other matters of mutual interest relating to the application of competition laws.

In addition, each Party may request consultations regarding any matter

related to the Agreement (by way of a motivated request). Such consultations are to be expedited and can be at the head of authority level.

iii. The principle of confidentiality (art. VIII, art. 20 of Reg. 17/62) and the use of waivers

When two competition authorities co-operate on a specific case of mutual interest, issues regarding the disclosure and the utilisation of confidential or other commercially sensitive information immediately crop up.

Currently, the most intensive case related co-operation between the European Commission and competition authorities in third countries has been carried out either on the basis of specific bilateral agreements such as the 1991 EC/US Competition Co-operation Agreement (and in the near future the envisaged EC/US Positive Comity Agreement[21] and EC/Canadian Competition Co-operation Agreement[22]), or under the 1995 Revised OECD Recommendation[23].

All these instruments provide explicitly under the heading "Confidentiality and Use of Information" that:

> "neither Party is required to disclose information to the other Party where such disclosure is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests."[24]

The first and (up to now) most comprehensive clarification regarding the scope of the protection of confidential information was contained in the "Statement on Confidentiality of Information" made by the Commission to the Council during the adoption on 10.04.1995 of the Joint Council and Commission Decision regarding the entry into force of the 1991 EC/US Agreement[25].

21 Commission Communication to the Council concerning an Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition laws; COM (97) 233. NB: This Agreement was finally signed on 4.6.1998; see text at [http://europa.eu.int/comm/competition/international/dftusa_en.html].

22 NB: This Agreement was finally signed on 17.6.1999; see text at [http://strategis.ic.gc.ca/SSG/ct01242e.html].

23 *Supra* note 2.

24 *Ibid*, i) Article VIII of the 1991 EC/US Agreement, ii) Article V of the Proposed EC/US Positive Comity Agreement, iii) Section 10 of the Draft EC/Canadian Agreement, and iv) Section 10 of the Guiding Principles annexed to the 1995 OECD Recommendation.

25 See Commission report to the Council and the European Parliament on the application

In this Statement, the Commission distinguished between two types of information which may, under different circumstances, be considered confidential:

— First, information acquired by the Commission and the authorities of the Member States in the course of an investigation which is of the kind covered by professional secrecy and, as such, is subject to Article 20 of Council Regulation 17/62[26] and to similar provisions in the equivalent implementing Regulations. Essentially, this refers to information which is not in the public domain and which may be discovered during the course of an investigation or which may be voluntarily notified to the Commission under Regulation 17/62 or in reply to a request for information. This also encompasses business or trade secrets. Such information shall not be disclosed to the US antitrust authorities save with the express agreement of the source concerned.

— Second, information which relates to the conduct of an investigation or the possible conduct of an investigation and which is not subject to Article 20 of Regulation 17/62 or to similar provisions in the equivalent implementing Regulations. Such information (sometimes also called "agency information" or "work product") includes the fact that investigation is taking place, the subject-matter of the investigation (for example, an agreement on prices or sharing out of markets or abuse of a dominant position, such as tied selling or discriminatory prices), the identity of the undertaking being investigated and the steps which are considered in the course of the investigation. This information is kept confidential to ensure the proper handling of the investigation. However, it may be communicated to the US competition authorities as these are obliged to maintain the confidentiality of the information

of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, May 11, 1998; available at [http://europa.eu.int/comm/competition/international/rapport0598.pdf], at page 3.

26 *Ibid*, Article 20§1 provides that information gathered pursuant to art. 11, 12, 13 and 14 may be used only for the purpose for which they were gathered. Art. 20§2 provides that, notwithstanding art. 19 (hearings and OJ notices) and 21 (publication of decisions) the Commission, national competition authorities, their officials and other agents are prohibited from using information gathered pursuant to this regulation and which, by their nature, are covered by professional secrecy.

under the terms of Articles VIII and IX of the Agreement and by the exchange of letters between the parties.

As regards notifications carried out between the two Parties (under Article II(4) of the 1991 EC/US Agreement), they may not include either the draft statement of objections, or any other confidential element. The undertakings concerned are informed of the existence of such notifications, at the latest when the statement of objections is issued.

In general it must be noted that, where it is appropriate to provide confidential information to the US antitrust authorities in order to keep them informed of a development in a specific case, the consent of the source of that information must be obtained. Community law provides a high level of protection to confidential information provided to the Commission, and it will be necessary to demonstrate that any consent obtained has been sufficient to discharge the Commission from its obligation of confidentiality under the general principles of Community Law, the case law of the European Court of Justice and Article 20 of Regulation No. 17.

The bilateral competition co-operation agreements make it clear that information provided under these instruments may only be used for their implementation, unless the competition authority that provided the information has consented to another use. A further safeguard is provided in that disclosed information may not be used for any purpose other than the one that the competition authority and the source of the information have consented to.

Parties to a merger or a monopolisation proceeding are often willing to grant waivers in order to speed up of facilitate the investigation. Waivers have been requested and granted in order:

- to permit agencies to discuss remedies;
- to exchange specific documents disclosing anti-competitive behaviour;
- to disclose the decision of the Commission in a case which had not yet been made public;
- to permit the Commission to provide Art. 11 letters containing confidential information to the US agencies;
- to allow the Commission to obtain advance copies of official notices setting out its analysis and the terms of the proposed settlement of a case;
- to permit the Commission and the Department of Justice to discuss in detail all aspects of a case.

While "specific" waivers had been more frequently used in the past,

"general" waivers of confidentiality are becoming more common. There have also been several refusals to grant waivers.

iv. Traditional (or negative) comity and the avoidance of conflicts (art. VI);
Partners in bilateral agreements such as the 1991 EC/US Agreement enter the realm of traditional (or negative) comity when they co-operate in a certain case to bring their respective positions and remedies closer to each other, in order to avoid creating a harmful effect in the partner's market. The EC may draw the attention of its overseas partner to its concerns in a specific case. This may open a new direction for the investigation and lead to a final result taking everyone's interests into consideration in a more appropriate way.

Pursuant to art. VI, each party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as deemed appropriate.

The following principles govern the exercise of traditional comity under the 1991 EC/US Agreement:

While an important interest of a party may exist in the absence of official involvement relating to the activity in question, it is recognised that such interests would normally be reflected in antecedent laws, decisions or statements of policy by that party's competent authorities. The potential for adverse impact is smaller at the investigative stage and greater at the time in which the investigated conduct is prohibited or penalised, or when other forms of remedial orders are imposed.

In exercising traditional comity, a party is expected to take into consideration, (inter alia), the following factors:

the relative significance of the anti-competitive activities undertaken within the enforcing party's territory as compared with the conduct undertaken within the other party's territory;

the presence or absence of intent on the part of those engaged in the anti-competitive activities to affect consumers, suppliers or competitors within the enforcing party's territory;

the relative significance of the effects of the anti-competitive activities on the enforcing party's interests as compared with the effects on the other Party's interests;

the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

the degree of conflict or consistency between the enforcement activities and the other party's laws or articulated economic policies; and

the extent to which enforcement activities of the other party with respect to the same persons, including judgements or undertakings resulting from such activities, may be affected.

v. Positive (or active) comity (art. V);

Under the 1991 EC/US Agreement, the principle of positive comity provides that a party adversely affected by anti-competitive behaviour occurring, in whole or in part, in the territory of another party and violating that party's competition laws may request that other Party to take action.

vi. The principle of transparency;

Member States are kept informed of co-operation activities under the 1991 EC/US Agreement in accordance with the "Statement on Transparency" made by the Commission to the Council during the adoption on 10 April 1995 of the Joint Council and Commission Decision regarding the entry into force of the 1991 EC/US Agreement[27].

Pursuant to this Statement the Commission is to forward to the Member State or Member States whose interests are affected, a copy of the notification sent by the Commission or received from the US competition authorities under the 1991 EC/US Agreement. Member States are to be notified as soon as is reasonably possible. When the Commission sends information to the US authorities, Member States are to be notified at the same time.

The Commission should also notifiy the Member States whose interests are affected of any co-operation or co-ordination of enforcement activities, as soon as is reasonably possible.

It is considered that the interests of a Member State are affected where the enforcement activities in question:

— are relevant to the enforcement activities of the Member State;
— involve anti-competitive activities (other than a merger or acquisition) carried out in the Member State's territory;
— involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more parties to the transaction, is a company incorporated or organised under the laws of the Member State;

27 *Supra* note 25, at p. 4.

— involve conduct believed to have been required, encouraged or approved by the Member State;
— involve remedies that would, in significant respects, require, or prohibit conduct in the Member State's territory.

In addition, at least twice a year, at meetings of government competition specialists, the Commission will inform all the Member States about the implementation of the Agreement, and particularly about contacts which have taken place with the US authorities as regards the forwarding to the Member States of information received by the Commission under the Agreement.

vii. Facts and figures about the implementation of the agreement;

Each Annual Report on Competition Policy published by the European Commission incorporates the Report to the Council and the European Parliament on EC/US co-operation during a certain time period. On 8 October 1996 the Commission adopted the first report on the application of the Agreement for the period from 10 April 1995 to 30 June 1996[28]. The second report completes the 1996 calendaric year, covering the period from 1 July 1996 to 31 December 1996[29]. The third report covers the year 1997[30], and the last available report covers 1998[31].

Since the signature of the 1991 Agreement the EC has notified 288 cases to the US competition authorities and has received from them about the same number of notifications (roughly 48% originated from the Federal Trade Commission and 52% from the Department of Justice). Slightly less than two thirds of both EC and US notifications concern merger cases. The detailed statistics have as follows:

Year	*No. of EC notifications*	*No. of US notifications*			*No. of merger notifications*	
		FTC	*DoJ*	*Tot US*	*EC*	*US*
1991	5	10	2	(12)	3	9
1992	26	20	20	(40)	11	31
1993	44	22	18	(40)	20	20
1994	29	16	19	(35)	18	20

28 Com(96) 479 final, see XXVIth Report on Competition Policy, pp. 299–311.
29 Com(96) 346 final, see XXVIth Report on Competition Policy, pp. 312–318.
30 Com(97) 510 final, see XXVIIth Report on Competition Policy, pp. 317–327.
31 Com(1999) 439 final, see XXVIIIth Report on Competition Policy, pp. 313–328.

1995	42	14	21	(35)	31	18
1996	48	20	18	(38)	35	27
1997	42	12	24	(36)	30	20
1998	52	22	24	(46)	43	39
total	*288*	*136*	*146*	*(282)*	*191*	*184*

viii. limitations

The basic limitation of the agreement is that it cannot address "true conflicts" [32] completely, but can only limit their impact.

Timing of merger procedures is also a delicate issue. On the EU side, the deadlines imposed by the Merger Regulation are strict and cannot be influenced by the parties. On the other hand, when the Antitrust Division of the US Department of Justice or the Federal Trade Commission issue a request for additional information ("second request") in a complex merger case, the parties can, to a certain extent, control the timing of the procedure by "starting the 20-day clock" [33] at their convenience.

Thus, even when parties notify simultaneously the Commission and the US authorities, they might be tempted to adjust the pace of the US procedure in order to obtain first decision from the authority that has fewer reservations regarding the notified concentrations.

Confidentiality requirements may further curtail co-operation in a certain case. Some aspects of co-operation do not require an exchange of confidential information. This is for instance the case with the timing of the procedures

32 This term refers to a US Supreme Court ruling from 1993 which uses this distinction between "substantive" or "true" conflicts and other situations in order to decide where extraterritorial jurisdiction ends and international comity begins. In its controversial opinion (5 to 4 majority ruling) in *Hartford Fire Insurance v. California* 509 U.S. 764, 113 S.Ct. 2891 (1993) the US Supreme Court found that the Sherman Act applied to foreign conduct which was meant to produce and did in fact produce a substantial effect in the United States. Comity considerations could only be taken into account once the court had established its jurisdiction. And even in such a case it would only influence the outcome if there existed a "true conflict" between United States law and the foreign law. According to the majority this situation could only arise when the foreign law requires the defendant to act in a manner prohibited by US law or in any other circumstances where it is impossible for the defendant to comply with both his or her domestic law and with US law.

33 The term means that an additional period of no more than 20 days to receive information and documents will be granted. For more information see the relevant statutes at [http://www.ftc.gov/bc/docs/statute.htm] (Sec. 18a. Premerger notification and waiting period; (e)(2) Additional information; waiting period extensions).

or market analysis where much of the product information has already been filed with public agencies (as frequently happens in the pharmaceutical and chemical sectors). However, restrictions on the information, which can be provided make discussions more difficult. In cases of significant divergences of analysis if a case falling within both EC and US jurisdictions, the confidentiality rules make it more difficult to discuss in detail the reasons why conflicting views are arrived at, based on the respective analyses of a case. Refusals to grant a waiver might further frustrate efforts to fully engage in combined investigation of alleged anti-competitive conduct.

2. The envisaged EC-Canadian Competition co-operation agreement[34]

A draft agreement between the European Communities and the Canadian Government on the enforcement of their competition laws was finalised in July 1999 and is still being discussed by the institutions. The agreement is to be adopted jointly by the Council and Commission after Parliament has been consulted.

The co-operation agreement has become necessary as a result of the growing number of cases involving the competition authorities of the contracting parties. It is designed to avoid contradictory decisions being taken, particularly as regards solutions to identified competition problems. The draft agreement is very similar to the agreement between the Communities and the United States.

The main features of the EC-Canadian draft agreement are as follows:

— notification of pending cases involving the interests of the other party;
— co-operation and co-ordination procedures between competition authorities;
— provisions on positive and traditional comity;
— compliance with confidentiality rules in exchanges of information.

3. Enhancements of the bilateral co-operation framework

i. The presumption in the envisaged EC/US "positive comity" agreement[35];

The proposed agreement builds on the successful co-operation which has taken place between DG IV and its US counterparts, the Department of

34 In the meantime, this Agreement has been concluded, see *supra* note 22.

35 In the meantime, this Agreement has been concluded, see *supra* note 21. For more information see G. Kiriazis "Positive Comity in EU/US Co-operation in Competition Matters" *EC Competition Policy Newsletter*, no. 3/1998, at page 11, text available at [http://europa.eu.int/comm/competition/publications/cpn/cpn19983.pdf].

Justice and the Federal Trade Commission, under the 1991 Agreement regarding the application of competition laws.

Positive comity, which was introduced into EC/US relations by Article V of the 1991 Agreement, is to be reinforced by the proposed Agreement. The circumstances in which a request for positive comity will normally be made and the manner in which such requests should be treated are laid down more clearly. More importantly the proposed Agreement creates a presumption that in certain circumstances a Party will normally defer or suspend its own enforcement activities. This will be particularly the case where anti-competitive behaviour does not affect consumers in the territory of the Requesting Party or, even if it has such effects, the behaviour is occurring principally in and directed principally towards the other Party's territory.

In contrast to the 1991 Agreement, mergers are not within the scope of the proposed Agreement, due to EC and US merger legislation, which does not allow deferral or suspension of action as envisaged by the Agreement.

The proposed positive comity Agreement is an important development in the relations between the EC and the US and represents a commitment on the part of the US and the EC to co-operate with respect to antitrust enforcement, rather than to seek to unilaterally apply their antitrust laws extraterritorially.

ii. Prospects for a second generation "antitrust mutual assistance agreement" under the US-IAEAA[36];

A further possible way to improve international co-operation in antitrust matters is to conclude a so-called "second generation" agreement, making it possible to share confidential information and use compulsory process on behalf of the other party.

The current constraints imposed by internal rules on protection of confidentiality under EC law can limit the scope of co-operation with EC partners in certain antitrust matters. At present, a waiver from the company concerned is needed in order to share confidential information. In cases of serious infringements (cartels, abuses of dominant position) the necessary "good will" is absent, unless the companies are willing to co-operate in order to get a more lenient treatment. The possibility of exchanging information in cartel cases would enhance the efforts of both sides to focus their actions on the most serious infringements of competition law.

36 International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. 6201.

This being said, we are also aware of concerns expressed by firms about their legitimate right to have information disclosed to EU competition authorities duly protected. Furthermore, many voices have pointed to the differences between substantive European rules and rules applied by an overseas partner, and the risk that the partner to such a co-operation agreement might use and disclose information supplied by the Commission in a context that could prejudice European interests. These concerns are being taken seriously by the Commission but there are reasons to believe that some move forward may be appropriate. First, the EC's experience in implementing the current co-operation agreement with the US has shown that views on antitrust cases more often coincide than differ. Secondly, differences between European rules and the rules of potential partners to such agreements (USA, Canada etc.) are less important when it comes to the most serious infringements, such as hard core cartels and the most serious cases of abuse of market power by dominant firms. This may open the way for co-operation limited to this type of situations. Finally, in other areas where the regulators of our Member States have developed close co-operation with third countries (customs, securities, drugs), discrepancies between rules do not seem to have precluded effective co-operation.

Conclusions

As it is now time to conclude, I would like to add that close co-operation between antitrust authorities is probably the best short term solution to the challenges raised by increasingly integrated world markets. It deserves attention and constructive efforts from all sides to build the trust and capacity necessary for day to day co-ordination and enable the agencies involved to adopt the most adequate remedies to the complex competition concerns raised by global cases.

I am convinced however that in the longer term bilateral co-operation agreements can only survive as complements to more comprehensive multilateral instruments. It is in this context that efforts in the OECD and the WTO are important and should be pursued without delay.