

International Cooperation on Competition: Myth, Reality and Perspective

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Over the last decade, international cooperation between national competition authorities has become one of the hottest topics in the world of antitrust. Tools for cooperation have been developed and there is clear evidence that national antitrust agencies consider international cooperation to be crucially important for their agencies and are ready to devote increasingly important resources to this activity.

This paper looks at these developments and tries to put them in context. We investigate both the causes of successes and possible failures of cooperation in the area of competition law and policy and the reasons for which antitrust enforcers claim that international cooperation contributes so importantly to substantial convergence in the absence of clear evidence that this is true. A particular attention is given to the transatlantic cooperation between the US and the European Community. We also analyse the consequences of the globalisation of markets and of the proliferation of national competition laws on the role and organization of cooperation in the antitrust area.

Cooperation

One aspect of cooperation in the field of competition is related to law-enforcement issues but there is also a fair amount of cooperation on broader issues such as competition advocacy or the proper design of competition laws and competition law enforcement institutions.

Case specific cooperation (through consultations or exchange of confidential or non-confidential information, joint investigation etc....) is certainly a crucially important part of cooperation regarding competition law enforcement. Other non-case specific forms of

cooperation regarding competition law enforcement are exchanges of experiences among competition officials about substantive issues in antitrust law, the definition of best practices, the development of tools of cooperation (such as positive or negative comities), the adoption of recommendations pertaining to specific topics of law enforcement (such as the adoption of the OECD hard core cartel recommendation), peer reviews etc...

Besides cooperation (whether case specific or non case specific) on matters related to the enforcement of antitrust laws, other forms of cooperation on competition matters developed rapidly during the eighties and the nineties. Three types of forces led competition authorities to consult one another, to exchange experiences and to try whenever possible to define best practices in the broad areas of competition advocacy and regulatory reforms.

First, in many countries, competition authorities were faced with a common challenge. Because they tend to be independent institutions (independent from both the executive branch and the business community) and because this independence is, in most cases, guaranteed by provisions in the antitrust law (or in the law establishing the competition institutions), competition policy officials in developed countries usually do not have the possibility to intervene directly in the executive process. This did not create a particular problem as long as antitrust or competition law enforcement played a relatively minor role in economic policy and as long as the legal environment of business was fairly stable. However, things started to change drastically during the late eighties and the nineties.

On the one hand, the privatisation and regulatory reform movements which swept most of Europe, Asia and Latin America was most frequently initiated and administered by economic ministries, without national competition authorities being consulted on the desirable modalities or pitfalls to be avoided. Furthermore, in a number of sectors newly opened to competition, sector specific regulators were established and given wide powers to monitor and intervene in emerging markets. In many countries, antitrust officials led a fierce battle to retain full jurisdiction over the regulation of the competitive relationships in markets newly opened to competition¹. In most countries they lost because they were not considered to be qualified to take on the proactive task of building up new competitive markets or competent to understand the allegedly complicated technical issues involved in sectors like telecommunications, energy etc²... In the best of cases, national competition authorities had to share responsibility for the oversight of these new markets with specific regulators. The fact that these regulators could have a very different philosophy from that of the antitrust officials (either because they were too complacent vis-à-vis the incumbent or, on the contrary, because they adopted an asymmetric attitude designed to help the new entrants to the detriment of the established former monopolists, a practice which is often frowned upon by antitrust enforcers) together with the fact that legislators had usually not given much thought to the proper interface between the general regulator and the sector specific regulators made the situation particularly uncomfortable for national competition authorities.

On the other hand, as antitrust enforcement became more prominent and the fines or sanctions for violations of competition laws became more severe and as merger control

¹ See for example the case of Germany and the fight put up by the Bundeskartellamt to retain jurisdiction over the telecommunication sector.

² The US experience in telecommunications regulation starting with Judge Greene and ending with the telecommunication Act of 1995 or the New Zealand attempt to use competition law (the Commerce Act) to deregulate the telecommunications sector were particularly unsuccessful in convincing other countries that competition law enforcement was a useful tool for deregulating an industry.

became more stringent, the business community started to monitor the activity of antitrust agencies more closely. Antitrust agencies became more vulnerable to public criticism both by the legal and the business communities (which were prompt to make international comparisons pointing to the alleged weaknesses of some agencies and the alleged strong points of others³). In certain countries, they were hampered in their ability to react to such criticism by their quasi judicial status. In addition, in many countries, various trade organisations reinforced their active lobbying of governments and parliaments to get total or partial exemptions from the rigors of antitrust laws⁴. Thus national competition authorities in developed countries found themselves in a situation in which they were denied a leading role in the definition of the most important public policy decisions regarding markets, and partially upstaged by sector specific regulators in the economic sectors considered to be the most promising. They also had to justify their actions and fight for turf, powers, and resources in a more hostile environment than previously. In this partly hostile environment “competition advocacy” became a major activity and a major theme of reflection for competition authorities. Exchange of information or of experience on this topic multiplied.

Second, during the eighties and the nineties, many countries (particularly in Eastern Europe) switched from a command economy to market economy and decided to adopt some form of antitrust law. This transition again raised important issues related the proper design of a competition authority, the role such an authority should play in the regulatory reform program and/or in the privatisation process, the proper relationship between sector specific regulators and the competition authority etc...

Third, the eighties and the nineties were also a period during which many developing countries were urged by donors or international institutions to adopt market friendly policies including competition policy and laws. This again raised complex questions on the usefulness of antitrust law at different stages of economic development, the ways and means through which a local business community and or politicians could be convinced of the benefits of adopting such laws, the cost of antitrust law enforcement and the tradeoffs involved in trying to tailor national competition laws to the legal, economic and institutional capacity of the countries considered etc... A good part of what is usually referred to as “technical assistance” involves cooperation between agencies or serves as the basis on which future cooperation may develop. Thus, the difference between technical assistance and cooperation activities between two countries can be blurred and seems to be more related to the extent to which the costs of these activities are borne by one party or shared rather than to their content. For example the loaning of an officer to a young competition authority by the competition authority of a country with a longer experience is often useful to improve the level of technical expertise in the country with less experience (thereby contributing to soft convergence of enforcement techniques between the two countries involved), as well as fostering mutual understanding and future cooperation

All of this has meant that the role of advocacy (both for a competition authority and by a competition authority) and the optimal design(s) of the competition law instrument became topics of discussion, and led to exchanges of information and of experience among competition authorities.

It might be tempting to narrow the definition of cooperation between competition authorities to the cooperative procedures used to facilitate the enforcement of national

³ See for example the Competition Review ranking of competition agencies based on interviews with lawyers

⁴ Book publishers, newspapers (in Japan), CD publishers, etc....

antitrust laws. However, the successful enforcement of a meaningful national antitrust law does not exclusively depend on protocols to exchange case specific information. It also depends on the design and coverage of the national laws of the cooperating countries, on the powers of the national competition agencies involved, on the similarity of the concepts used in substantive analysis etc...Cooperation on these larger issues is just as important as cooperation on case specific exchange of information, even if one believes that the main purpose of cooperation is to facilitate the treatment of transnational cases (an issue which we discuss below)

2) The tools of cooperation

Cooperative activities can take place at the bilateral, plurilateral, regional, or multilateral levels. Cooperation between competition authorities can also be either formal or informal. This multiplicity of forms (together with the previously discussed difficulty of defining the scope of cooperation between competition authorities) makes it difficult to assess the usefulness of each of these activities and of their various instruments.

In a number of instances, countries cooperating on competition issues have negotiated formal bilateral cooperation agreements. The best known of these agreements are the agreement between the US and the EU, the US/ Japan agreement and the EU/Japan agreement. Other bilateral agreements on competition include the agreements between the US and Canada, Brazil, Germany, Israel and Japan, the tripartite agreements between Australia, New Zealand and Canada and the bilateral agreements between Australia and Papua New Guinea and Australia and Chinese Taipei or the mutual enforcement agreement agreement between Australia and the US.

Most of these agreements provide for case specific cooperation (although they may not be limited to this type of cooperation). They usually allow for exchange of non confidential information, consultations, periodic visits, and exchange of staff between the signatories.

In 1994, the US passed legislation to allow its antitrust authorities to enter into fuller cooperation with foreign authorities, in particular by exchange of confidential information with competition authorities in other countries (International Enforcement Assistance Agreement⁵). However, differences between legal systems or between national competition regimes have limited the scope of such “deep” cooperation and only Australia has so far entered an agreement with the US under the new law. The fact, in particular, that some antitrust violations are criminal in the US whereas they are not in other jurisdictions (for example, in the EU and in a number of its member states) and that civil suit for treble damages can be initiated in the US against antitrust violators (whereas other countries only have single damages) have been major obstacle in the development of exchanges of confidential information. National authorities often do not have the political clout to convince politicians that it is in the best interest of their country to allow them to share information on domestic firms with a foreign agency, thus exposing the domestic firms to a harsher treatment in a foreign country than the firms of this foreign country would face in the country of the cooperating agency.

Cooperation at the bilateral or the regional levels is nearly always voluntary. This means two things: first, each country chooses with which other country(ies) it wants to cooperate with and, second, the cooperation agreements generally provide that each country

⁵ Mutual legal assistance treaties (MLAT) in criminal matters may also be used to foster cooperation in antitrust enforcement for countries in which antitrust violations are criminal violations.

reserves the right to decide on a case by case basis whether it will cooperate with the co-signatory. The result of this is, first, that there are few agreements between developed and developing countries or between large and small countries. Indeed large developed countries may consider that large international firms operating in their territories have a higher probability of being investigated by competition authorities in small countries (because they are likely to have a large market share in those countries), than the presumably small firms of developing countries (which more rarely achieve a position of dominance on markets in developed countries). Thus competition authorities from major developed countries may fear that entering a cooperation agreement with the competition authority of a small or a developing country will merely expose them to numerous requests for assistance whereas they will have little use for the agreement themselves.

Besides bilateral agreements, cooperation on competition law and policy can also result from regional and plurilateral agreements. It should be noted that developing countries and/or small countries have developed cooperative tools at the regional or sub-regional level. For example, in the context of the Mercosur, the “Protocol of the defense of competition”, signed in 1996, would allow cooperation between the competition authorities of Brazil, Argentina, Paraguay and Uruguay if it were to get congressional approval by each member country, which does not seem likely in the near future. Similarly there is some effort to develop a system of cooperation between Caribbean countries in the context of Caricom or between African countries in the context of Comesa or between Asian countries in the context of APEC.

An interesting recent development is that more and more frequently trade agreements include provisions relating to case specific cooperation on antitrust enforcement. For example both the GATS and the TRIPS agreement have competition policy provisions. Provisions regarding cooperation on competition have also been negotiated in the context of trade agreements such as the Free Trade Agreement between the Governments of Central America⁶ (which provides in its article 15.01 that “The parties shall seek to ensure that the benefits of this Agreement are not impaired by anticompetitive business practices and shall seek to move toward adopting common provisions to prevent such practices” and that “the parties shall also attempt to establish mechanisms that facilitate and promote the development of competition policies that ensure the application of rules on free competition between and among the parties , in order to prevent negative effects from anticompetitive business practices in the free trade area”), or the Free Trade Agreement Between the Government of Chile and the Government of Mexico or the Free Trade Agreement between Canada and Chile (which provide that “each party recognizes the importance of cooperation and coordination between the respective authorities in promoting the effective application of legislation on competition in the free trade area. The Parties shall also co-operate on matters related to enforcing legislation regarding competition, including mutual legal assistance, communication, consultation and exchange of information related to the application of laws and policies in matters of competition in the free trade area”). NAFTA contains similar clauses. Underlying these agreements is the notion that more competitive markets and a better control of anticompetitive practices would help alleviate some trade concerns (including concerns with dumping). Similarly at the regional level, in the context of the negotiations of the FTAA, a chapter on competition is currently being discussed.

⁶ Costa Rica , El Salvador, Guatemala, Honduras , Nicaragua, Chile

At the plurilateral level, the OECD competition committee has been a major vehicle for exchange of views between the member countries of this organization and observers regarding competition law and policy issues, exchanges of experience, definition of best practices, peer reviews, adoption of recommendations⁷ etc..... APEC is another plurilateral framework in which general cooperation on competition is pursued. However, neither OECD nor APEC deal with case specific cooperation regarding enforcement.

Finally, at the multilateral level, UNCTAD is also a long established forum for non case specific cooperation on competition. This cooperation led to the adoption in 1980 by the United Nations General Assembly of a voluntary code condemning collusive anticompetitive practices and abuses of dominant position: the UNCTAD's "Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices". The "Set", as it is called, remains of considerable importance for developing countries because it contains provisions calling for special concern to the problems facing developing nations.

At the WTO, a Working Group on the interaction between trade and competition policy has been active since 1997. It acts as a study group on the issue of competition in the context of international trade.

3) The goals of bilateral regional and plurilateral cooperation agreements on competition

Before attempting to assess the effect of cooperation on competition law and policy, it may be useful to discuss briefly the possible goals of international cooperation in this domain. Knowledge of these goals will tell us which criteria should be used for our assessment.

There are a number of factors underlying international cooperation in the antitrust area:

- The rapid spread of national competition laws has created a need for less experienced authorities to benefit from the experience of other countries.
- The rapid technological and institutional changes of the late nineties has created new challenges for competition authorities. With increasing frequency, competition authorities have had to apply their traditional tools of analysis in situations in which neither the technology nor the definition of markets were stable (particularly in the media sector) or in situations where firms held essential facilities (in telecom or electricity), or to situations in which the impact of the emerging technology on competition was difficult to guess (for example in the case of BtoB electronic commerce). Debating these new issues and finding out what had been the reasoning followed in cases in other jurisdictions was extremely important for antitrust authorities which could not count on their past experience (or on economic theory) for guidance in handling such new cases.

⁷ See in particular the 1998 OECD Recommendation on Hardcore Cartels and the 1995 Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International trade

- The increasing globalisation of markets has also been an important factor for the development of international cooperation on antitrust matters. As business strategies become more international, the same behaviours or transactions come within the purview of a larger number of national competition authorities and the decision of each one, although having limited territorial effect, may have significant consequences on what happens in other jurisdictions. Hence there is a need for competition authorities to cooperate both at the investigatory level and when designing remedies.

- The international merger wave of the 90's has brought to the fore all the problems associated with the fragmentation of national antitrust laws and has convinced the business community of developed countries to lobby for closer international cooperation between national competition authorities as well as for more consistency and convergence both at the substantive and at the procedural levels in national merger control laws. The international business community has thus generally been supportive of attempts to limit the procedural complexities associated with filing the same transaction in several countries (for example through common or harmonized notification forms), of attempts to harmonize the delays in which such mergers are examined by separate competition authorities, or of efforts by national competition authorities to coordinate in order to arrive at consistent solutions in cases involving multi-jurisdictional merger reviews (for example by supporting protocols through which the merging parties could allow the exchange of information between national competition authorities in order to facilitate their cooperation).

- Finally, the fact that competition authorities were facing closer scrutiny (and intensified criticism) at home and that their actions were met with a certain amount of scepticism by other branches of government in their own countries, together with the fact that each authority was quite concerned about its reputation, were important considerations that led these authorities to use international cooperation as a defensive device. Indeed when faced with domestic criticism on a particular case or attempts to curtail their powers or scope of intervention, national competition authorities could attempt to argue that their practice or scope of intervention was in line with the international standards established through international cooperation. When it came to specific cases being examined simultaneously in several national jurisdictions, the wisdom of judgement of each national competition authority could be called into question if all the competition authorities involved in the case did not adopt the same position (even if from a technical standpoint their differing views could be justified by the fact that the same practices did not necessarily have the same impact in all jurisdictions). For example, during the nineties some competition authorities deliberately used the peer review system of OCDE to push domestic reforms (or in certain cases to avoid some reforms that they feared would undermine their effectiveness)⁸.

⁸ Similarly, in the spring of 2002 the US Assistant Attorney General in charge of the antitrust division, who had earlier reached a settlement with Microsoft in the monopolization case against this firm, was legally challenged by nine US States who considered that the terms of the proposed settlement were too generous for Microsoft and

4) The effectiveness of international cooperation

Given the diversity of factors underlying the development of international cooperation in the area of competition law and policy, diverse criteria can be used or diverse questions can be asked to assess the effectiveness of cooperation. Have the developing countries received significant help from the competition agencies of developed countries to draft their laws, establish their competition authority and acquire the essential investigative techniques necessary to get started? Has there been convergence of laws and practices between developing and developed countries? Have the developed countries been able to use the consultations, exchange of views and experience they have had to tackle the complex competition issues associated with the information society? How often has international cooperation been used as a tool against transnational anticompetitive practices and transactions and has it significantly contributed to increasing the level of enforcement, to improving the quality of enforcement, and/or to reducing the cost of enforcement by providing for a higher level of consistency? Have competition authorities been able to protect themselves through international against various lobbies critical either of competition or of competition authorities inside or outside government?

It is nearly impossible to assess the effect of cooperation in a scientific way even if one distinguishes between general cooperation and case specific cooperation. Therefore we will limit ourselves to some qualitative comments.

At the level of general (non case specific) cooperation regarding laws, institutions, best practices etc..., it is likely that, over the last decade, international cooperation has been quite effective among developed countries and is increasingly successful between developed and developing countries. The means devoted to bilateral and regional cooperation of a general nature are increasingly impressive and include regular contacts between competition officials of different countries, the organization of seminars, exchange of competition authority officials for extended periods, etc.

The fact that Eastern European countries which are candidates for admission in the EU, have had to adopt domestic competition laws has contributed to the development of cooperative ties regarding competition between the Commission, member countries of the EU, and these Eastern European countries. The possibilities of association offered by the EU to some African countries has also meant the development of cooperation on competition law and policy between the Commission and these countries. The current negotiations of the Free Trade of the Americas Treaty has also led to closer cooperation on competition of a general nature between countries in Central and Latin American. At the regional level APEC or the Arab League, Caricom (Caribbean Islands), Comesa (Eastern Africa), have been actively trying to raise the level of consciousness of their member states on the issue of competition law and policy. As a larger number of developing (or formerly developing) countries have gained experience (for example Korea, Tunisia, Turkey, South Africa, Mexico and Brazil) they have initiated bilateral or regional cooperation on competition with other developing countries.

did not constitute an effective way to restore competition. Knowing that the EU Commission was investigating the same kind of issues and fearing that the EU might take a tougher stand than it had taken against Microsoft, the US Assistant attorney general in charge of antitrust consulted with the EU Commissioner to try to convince his European counterpart both privately and publicly to adopt a stand similar to his, no doubt not only because he was convinced of the wisdom of that position, but also so as not to see his position undermined in the US.

Even though there are still lingering questions in many parts of the world about the relationship between competition and economic development and about the cost of enforcement of competition laws in small countries, more than one hundred countries now have some sort of competition law and these countries interact and exchange experience, define best practices etc... constantly and all the more easily that the cost of telecommunication has been greatly diminished in the last few years. These laws tend to fall into three categories: the US model in which the enforcement of the antitrust laws rests primarily with the criminal and civil courts, the EU model which relies more on administrative sanctions rather than on criminal sanctions and in which the enforcement body is usually an independent administrative body whose decisions can be appealed to the civil or administrative courts and the Asian model in which the enforcement agency is usually part of the executive, and in which warnings are more extensively used than in the other systems.

Some of the important consequences of the general cooperation on competition in the nineties (and of the fact that a very diverse set of countries from the point of view of their legal system, their economic level of development, their history, and their culture were interacting) has been to move the competition community away from the notion that there was (or should be) a one size fits all competition law or policy and to recognize that laws had to adapted to the local realities of each country and that competition law could not be a stand alone law⁹. In the nineties, thanks to the intensification of cooperation on competition matters, members of the competition community were exposed more frequently than in the past to national differences in approaches to competition policies and laws and they became more tolerant of each other's competition laws. For example, it became clear that western style antitrust laws were not necessarily the most relevant in countries in transition in which, typically, central or local government offices were involved in regulating certain sectors while at the same time having a major business activity in the sector which they regulated. It also came to be recognized that, particularly in transition economies, fairness issues could not be ignored (even if they could occasionally clash or sit uncomfortably with the overriding goal of antitrust policy which is to promote efficiency). For example, everyone understood that local political consideration dictated that one of the (secondary) goals of the South African competition law should be the empowerment of the disenfranchised black community. Similarly, even if it was clear that the fight of the Korean Fair Trade Commission against the economic domination of the diversified chaebols or that the provisions limiting the possibilities of interlocking directorates in Japan were not necessarily consistent with what classical economic analysis would suggest , the past political history of Japan and Korea explained concerns in those countries that economic power might corrupt the political process. Similarly, it seemed clear that the Robinson Patman Act in the US was the result of a political compromise rather than deep economic insight.

Simultaneously, international cooperation on competition issues in the nineties was characterized by a higher level of sophistication on economic analysis and the notion that the promotion of efficiency and consumer welfare were fundamental goals of any competition law became widely accepted.

The OECD Competition Law and Policy Committee was an important forum for cooperation on competition between developed countries during the past decade. Indeed the Committee changed its production function at the beginning of the nineties and greatly

⁹ See European Competition Law Annual 1997 « Objectives of Competition Policy», Claus Dieter Ehlermann & Laraine Laudati ed, Hart publishing , Oxford 1998

increased its productivity. Previously, the work of the Committee was largely devoted to three types of cooperation activities: periodic examinations of national laws and law enforcement systems, the production of collective reports on substantive issues in competition law and the adoption of recommendations. The first two types of cooperative efforts were modified because of a dissatisfaction with the way the Committee worked. First the periodic examinations of national laws and law enforcement activities were perceived as ineffective to the extent that they were based on self-assessment (and often on self-justification). Second, the attempt by the OECD countries to come up with a common approach to substantive competition issues (such as “franchising” or “predatory pricing”) proved to be excruciatingly slow and painful. The idea of producing reports was dropped and replaced by the publication of background papers and member states’ contributions to round-tables on substantive issues without any attempt to resolve possibly divergent national approaches. To some extent the OECD Competition Law and Policy Committee moved from defining best practices or best approaches to the simpler but more concrete exercise of exchanging experiences and approaches. In the process, the Committee’s productivity increased considerably because six or seven round tables could be organized each year on different topics whereas previously the negotiation of a report on one topic would take several years. The former annual reports on competition law and enforcement by the OECD members were replaced by the in-depth examination of the competition policies of selected countries in the context of a broader OECD program on Regulatory Reform. The success of these in-depth examinations of national competition policies rested on two main elements: first, an assessment of the situation of each country made by independent and highly respected experts working for the OECD secretariat combined with the possibility for the country examined to complete, contradict or agree with the assessment of the experts through a transparent procedure within the Committee itself; second, the fact that the reviews were not limited to the narrow question of competition law enforcement but also examined the regulatory environment of the countries concerned to assess the reality and importance of competitive forces . As was said earlier, these country examinations were used by competition authorities domestically to promote pro-competitive changes or to prevent the adoption of protectionist policies.

If we now turn to case specific cooperation, it is extremely difficult to find reliable data to answer questions such as whether this kind of cooperation has indeed progressed between parties to bilateral or regional agreements, whether the agreements themselves have been useful tools of cooperation (or whether the kind of cooperation which takes place between competition authorities would have taken place even if no bilateral agreement had existed between the countries involved), how many cases where the competition authorities would have been unable to uncover and /or to act against an illegal behavior if no cooperation agreement had existed, whether some cases would have been decided differently had there not been cooperation between competition authorities, whether cooperation has led to convergence of law enforcement or not etc... In short the reality and measurable importance of international cooperation agreements in competition law enforcement remain to a large extent unknown. If what appears to be known is indeed true to reality, it may be that the importance of cooperation in antitrust enforcement is overestimated at least as far as case-specific cooperation is concerned.

As reported in the ICPAC report, the most important known cases of international cooperation on antitrust enforcements against cartels as of 2000 were the following :

-The Industrial Diamonds price fixing cartel. Cooperation between the Belgian judicial police and the United States authorities was obtained through traditional international law

mechanisms. However, it seems that the inability of the Department of Justice to secure the necessary documents and witnesses contributed to its failure in its attempt to prosecute GE and De Beer's.

- The Thermal Fax Paper cartel. In this case, there was coordination of investigations between the US and Canada pursuant to a Mutual Legal Assistance Treaty between these two countries. Also, the Japanese's Prosecutor Office cooperated with the US antitrust authorities.

- The Disposable Dinnerware cartel. This is also a case in which there was coordination of investigations between the US and Canada pursuant to their Mutual Legal Assistance Treaty.

-The Ductile Pipe cartel. In this case there were parallel investigations in the US and Canada followed by an Mutual Legal Assistance Treaty request from the United States for Canadian located evidence (the US did not prosecute for lack of evidence, but Canada did in 1995).

The 2000 ICPAC report adds the following comment¹⁰: “ The Antitrust division also indicates that it has received assistance through MLAT requests in criminal antitrust investigations that have not been made public and further, that it has used informal mechanisms on a case by case basis to elicit aid from foreign governments in its enforcement efforts. Despite this assistance , US antitrust acknowledges that significant obstacles remain to US antitrust investigatory efforts.

Based on the evidence, recent achievements in prosecuting international cartels suggest that while foreign assistance has and can facilitate antitrust enforcement efforts, only periodically does it prove crucial to their outcome.”

As of 2000 there had been only one positive comity referral under the US-EC 1991 Agreement. In 1997 the US asked the EC to investigate anticompetitive practices in the computer reservation system industry (investigation of the practices of Amadeus). The EU reacted slowly to this request and the statement of objections was not sent until March 1999. The ICPAC report states¹¹: “While the positive comity provisions encompassed in current bilateral agreements have resulted in only one formal referral thus far, competition enforcement officials have publicly endorsed several informal referrals. In these instances a country may informally request that another country investigate potentially anticompetitive practices occurring within its borders. One of the most widely publicized informal positive comity referrals involves the retail sales tracking industry”. In this case The Antitrust division which had been investigating tying practices of Nielsen Co allowed the EU which was investigating the same practice to take the lead since the majority of the disputed conduct occurred in Europe..

Turning to another source of information, it is interesting to compare the answers to a 1999 OECD questionnaire on international cooperation in anti-cartel enforcement (answered by eighteen OECD members) to the answers given to a 2001 OECD questionnaire (answered by thirteen members and twelve non members). There seem to be some evolution across time in the practice of cooperation .

¹⁰ International Competition Policy Advisory Committee final report, US Department of Justice Antitrust Division, 2000, p 182-185.

¹¹ ICPAC Report, p 234

The OECD secretariat paper summarizing the results of the 1999 questionnaire states: “The responses, perhaps not surprisingly, disclosed that there had been relatively little co-operation among national competition agencies in cartel investigations and cases prior to 1999. Most of the responding Members had neither made nor received any requests for co-operation in the period covered by the questionnaire. Of those that did, the most active were the US and Canada. One important reason for there being so few instances of co-operation was that many cartel cases that were prosecuted in the relevant period did not have an international dimension, that is they occurred in and affected solely one jurisdiction. In other instances, members had not prosecuted any cartel case in the period. It was also clear however, that where co-operation would have been useful it was significantly constrained by the inability of Members to disclose confidential information to foreign agencies”.

The Secretariat note on the answers to the 2001 questionnaire make the following points:

-“ The questionnaire responses seemed to disclose a growing incidence of formal co-operation between jurisdictions in cartel investigations compared to the pre-1999 period, but it cannot be said that such co-operation is widespread. (...) The increase in co-operation is indeed only modest and it has been confined, for the most part, to specific pairs or groups of jurisdictions. Co-operation seems to be most productive among jurisdictions that share common systems or concepts or cartel activity e.g. the European Commission and EU member states (part of one system, subject to a single competition law), Canada and the US (where cartel conduct is a crime in both jurisdictions, and co-operation is conducted through a mutual legal assistance treaty). In other respects, co-operation appears to be more common among jurisdictions that are parties to a formal cooperation agreement. The relationship between the US and the EC is the best example of this type of bilateral co-operation”.

More specifically the report pointed out that the most active (formal) cooperative relationship in cartel investigations are between the EU and EU Member states (even though there are no formal cooperative agreements between the Commission and its member states and the Commission cannot make available to national authorities documents which it has received in a different context, even when the national competition authority is investigating on the basis of a possible EU law infraction), the US and Canada, the US and the EU. The US has reported that it has made approximately 15 requests to about 10 jurisdictions over a 30 month period. The European Commission has reported that there were about 10 cartel cases in which it has cooperated with a non EU competition agency, most of them with the US. Germany had received several requests from the US and made one request to the US. Australia, Brazil, Denmark, Israel, the Netherlands, Korea and the Russian Federation reported one or a few requests to or from another jurisdiction. Almost all requests made were granted.. The requests were for documents, including documents seized in a search or a dawn raid, as well as for assistance in obtaining testimony or information from a witness, for “evidence” or information in the files or the competition authority receiving the request.

The report continues to point out that “one of the most interesting results from the questionnaire responses is the apparently significant and growing practice of “informal” co-operation in cartel investigations” (including exchanges about non confidential information such as markets and sectors, investigation strategies and evaluation of evidence). Thus in its answer to the questionnaire Australia discussed its informal contacts with the US, the EU, the UK, Canada, and New Zealand pertaining to five cartel matters. Canada emphasized its informal communications with the EU and EU member states on the theory of a particular

case, the description of parties, the nature of evidence , the role played by the parties and potential witnesses. Denmark, Israel, Italy, the Netherlands, Spain and the United States also reported that they had had informal contacts with foreign competition agencies on cartel matters. It should be noted however, that in some cases the information exchanged amounted to little more than general information about cases similar to the one being investigated by the requesting competition authority. Brazil reported obtaining some useful background information from the US relating to Brazil 's airlines cartel investigation. Estonia and Lithuania reported some communications with neighbouring jurisdictions and Romania reported some communications with various jurisdictions regarding its pharmaceutical cartel investigation.

Finally the OECD report on the answers to the 2001 questionnaire notes that “ invitees (ie non OECD members) rarely co-operate in cartel cases according to their responses. The principal reason for the low incidence of co-operation by invitees is undoubtedly that for the most part they have engaged in enforcement of competition law for a relatively short time. Some may not have begun to target cartel activity as a priority in their enforcement programmes. It is also true, however, that many have not developed ongoing bilateral or multilateral relationships with other jurisdictions that could promote enhanced co-operation”. This lack of cooperation with non OECD members seems to extend to international cartels which were first prosecuted in the US such as the vitamins cartel or the graphite electrodes cartel. These worldwide cartels were originally uncovered and prosecuted in the US without any need to resort to international cooperation. The vitamins cartel was subsequently prosecuted in the European Union and Australia. Japan issued an order against the cartel, Brazil and Lithuania are still investigating it. According to OECD there was apparently no prosecution of the vitamins cartel in Central and Eastern Europe, Asia, Africa and Latin America. The story is similar for the graphite electrode cartel which was prosecuted only in the US, Canada and the EU. This latter case is particularly interesting because Korea tried to prosecute it but was “unable to obtain much information from the jurisdictions in which the cartel was prosecuted and it has encountered significant difficulties in developing its own case in the matter”.

The pattern which emerges from these authorized sources can be summarized as follow

- International cooperation (whether formal or informal) between competition authorities in the fight against (international) cartels remains quite limited; it is the exception rather than the norm; however it is considered to be useful by competition authorities which have cooperated.
- The fact that a formal co-operation agreement exists between two countries is not a guarantee that they will cooperate on every case.
- Furthermore, most cooperation agreements do not allow the exchange of confidential information.
- Informal international cooperation has increased somewhat over the last few years; the precise extent of this informal co-operation is still difficult to assess.

- Informal cooperation against a cartel, often takes place between countries which have entered formal cooperation agreements.

- There are few international cooperation agreements between developed countries and developing countries (and therefore few opportunities for developing countries to develop formal or informal cooperative relationships with developed countries).

If we now turn to cooperation in the merger area, there is a rather impressive list of documented cases of cooperation during recent years.

- The Shell/Montedison case in 1994-1995 (cooperation between the US and the EU on remedies in a case of overlapping concern over potential anticompetitive effects).

- The Guinness/Grand Metropolitan case in 1997 (cooperation on remedies in a case of overlapping concern over potential anticompetitive effects. Australia, the EU, the US, Canada and Mexico cooperated).

- The DeBeers/Ashton Mining limited case (cooperation between Canada, the US , the EU and Australia on the global trade in diamonds).

- The Boeing/ Mc Donnell Douglas case in 1997 (between the US and the EU).

- The Ciba Geigy/Sandoz case in 1997 (cooperation on complementary remedies in a case where the competitive concerns were not the same in the EU and the US).

- The WorldCom/MCI/Sprint case in 1998 (a horizontal merger blocked both in the EU and the US).

- The ABB/Elsag-Bailey in 1998 (cooperation on remedies between the US and the EU in a case of overlapping concern over potential anticompetitive effects).

- The Federal-Mogul/T&N plc case in 1998, the IMS-Health Inc and Pharmaceutical Marketing Services Inc in 1999 (in both cases the cooperation was between the US authorities and the authorities in the UK, France, Germany, and Italy).

- The MCI/ WorldCom case in 1999 (the EU DG Competition and the US DoJ engaged in joint negotiations with the parties).

- The Air Liquide/BOC case in 1999 (a case in which the remedy found to be satisfactory in the EU was not considered adequate in the US because the situation in both countries was not the same).

- the Dow Chemical/ Union Carbide in 1999 (a case in which there was a trilateral cooperation between the EU, the US and Canada).

- the Metso/Svedala case in 2000 (cooperation between the EU and Australia).

-the Boeing/Hughes merger in 2000 (cooperation between the US and the EU on a vertical merger).

-The Time Warner/EMI merger in 2000 (cooperation between the US and the EU on a merger that raised concerns as to both unilateral effects and potential coordinated interaction).

-The Alcoa/ Reynolds case in 2000 (tri lateral co-operation by the US, the EU and Australia on remedies in a case of merger on the worldwide market).

-The AstraZeneca/Novartis case in 2000 (cooperation on remedies between the US and the EU).

-The General Electric/Honeywell case in 2001 (substantive differences between the US and the EU authorities).

There are also instances of merger cooperation between the US and Canada and Canada and European Union member states (such as, for example, the cooperation between the UK and Canada regarding the AirCanada/Canadian Airlines merger) as well as between Australia and the US. However there are relatively few known cases of cooperation on mergers between the EU member states.

The first legal basis for cooperation on mergers is the 1967 OECD recommendation (last revised in 1995) that its member countries cooperate with one another in the enforcement of their national competition laws . Inter alia, this recommendation provides that “Member countries timely notify other members when the latter’s “important interest” are affected by an investigation or enforcement action”. The second legal basis is constituted by bilateral or regional co-operation agreements on competition. The third legal basis is that of waivers of confidentiality occasionally granted to the reviewing authorities by the parties to a merger. Finally, as we shall see below, some cooperation takes place informally, ie without a legal basis.

One of the reasons for which cooperation on merger cases (at least between the US and the EU) is more active than cooperation on cartels is that the business community is in general more favourable to cooperation on merger control than it is to cooperation between antitrust authorities on cartels or on other anticompetitive practices.

The main limitation to transatlantic cooperation in the merger area lies in the impossibility for the authorities to exchange confidential information unless the parties to the merger grant them a waiver.

In a speech before the IBC UK Conference in May 1999, John Parisi described in great detail the kind of cooperation which takes place when the parties to the merger do not give a waiver¹². In such a case, the US and EU authorities consider that they can share not only publicly available information but also confidential “ agency” information (ex: the fact that the agencies have opened an investigation, the timetable of the merger control, how the staff analyses the case, including product and geographic market definition, assessment of competitive effects and potential remedies). However the competition authorities of the US and the EU will not share premerger notifications, the responses to investigational inquiries

¹² John Parisi « Enforcement co-operation among antitrust authorities” Sixth annual London Conference on EC Competition law IBC UK Conference, 19 May 1999

or the identities of complainants or witnesses. It is thus quite obvious that exchanges of “non business confidential” information between the US and the EU competition authorities on merger cases can be quite extensive.

Cooperation in transnational merger cases can also be informal. For example, the Australian contribution to the round table on “International Co-operation in Transnational Mergers” organized at OECD in 2001 states¹³: “the ACCC makes contact with overseas agencies on a fairly regular basis. Essentially this is to “compare notes” on matters such as market definition and barriers to entry in the industry under investigation. While circumstances may differ from country to country, the insights of investigations and decision makers in other jurisdictions give a point of reference for work done in Australia. It is very useful to know what action other jurisdictions are taking in their inquiries on the same merger, and valuable to test any differences in approach or findings. Much of this contact is currently undertaken on a relatively informal officer to officer basis.” The US contribution to the same round table states¹⁴: “ In addition to formal notifications, informal contacts are a valuable aid to cooperation. Advances in communications technology during the 1990’s, especially electronic mail, have increased the number and level of contacts between enforcement agencies(...) these technologies make it easier for officials in one jurisdiction to informally contact their counterparts in other jurisdictions to inform and inquire about matters that may be of interest in the other jurisdiction”.

Finally cooperation on merger enforcement can extend to mergers which do not have a transnational character. For example, the US contribution to the above mentioned round table states “There have been numerous instances in which a proposed merger has not been challenged in the United States and thereafter the relevant US agency is contacted by a foreign agency that is reviewing the transaction. In some such cases, the US agencies may have non confidential information that may be useful to the foreign enforcement authority- for example the identification of a circumstance in the United States that would differentiate the markets in which the United States agencies have much experience (e.g. soft drinks). Likewise the US agencies have sought information from their foreign counterparts concerning, for example, previous cases in the same industry in which those agencies can share non confidential information that may validate or differentiate a market definition or the assessment of competitive effects”.

The business community is critical of the lack of transparency of the cooperation process in merger cases and has recommended the development of a framework or “protocol” for cooperation. Some segments of the business community also question whether the case for cooperation between competition authorities on mergers is always compelling. For example, the ICPAC report states¹⁵ “ Several participants at ICPAC hearings have suggested (...) that the benefits to private parties arising from information sharing and other forms of cooperation often will not be substantial or assured and may be outweighed by a variety of perceived disadvantages. These potential disadvantages include exposure to additional legal risks, particularly when substantive laws are different and there are significant potential sanctions or private rights of action in the jurisdiction to which information is disclosed ; differences in investigation timetables, which may inhibit the realization of time and cost savings; the

¹³ Contribution from Australia to the round table on International co-operation in transnational mergers organized by the Working party n°3 of the OECD Competition committee, 23 May 2001, doc DAF/CLP/WP3/WD(2001)24 p3

¹⁴ doc DAF/CLP/WP3/WD(2001)23

¹⁵ ICPAC Report, p 72

overburdening of competition authorities with so much information that the investigations would be slowed down rather than hastened; and possible misinterpretation when one authority reviews information that has been prepared to address issues under a different legal regime”.

The lack of transparency of the process of cooperation in merger cases is a serious obstacle when one wants to assess the effectiveness and the usefulness of this cooperation. Two major claims are made by antitrust enforcers in this regard. First, transatlantic cooperation on mergers is intense; second it is good because it fosters convergence of analysis between the cooperating authorities. Typical of this view are the following statements by former FTC Chairman Robert Pitofsky : “ There has been remarkable convergence in substance between the EC and the US in merger review in the last ten years” and “In my view, it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share on a regular and continuing basis, views and information about particular transactions, coordinate the timing of our review process to the extent feasible and almost always achieve consistent remedies”¹⁶.

Because co-operation between antitrust agencies partly takes place outside the scrutiny of the merging parties or of the complainants, it is difficult to assess the extent to which it is substantial in each of the cases in which competition officials state that it has taken place. Yet, it is obvious that the level of cooperation cannot be the same for all merger cases. In some cases the parties will have given a waiver to antitrust authorities to exchange confidential information but will not have done so in other cases. In some cases, the relevant market extends over several jurisdictions which may give a strong incentive to antitrust authorities to co-operate. In other cases the same merger may have effects in several geographically separate markets, which may lead the antitrust authorities to have less of an incentive to cooperate on certain issues.

Occasionally, even the antitrust officials who have co-operated with each other seem to have different views on the extent of their cooperation. The most famous case of controversy between US DoJ officials and EU Commission officials on the depth of cooperation between them concerns the General Electric/Honeywell merger case. The DoJ publicly claimed that deep cooperation on this case had taken place with the European Commission and that the differences of appreciation between the US authorities and the EU Commission came from the fact that the Commission was clinging to the discredited “portfolio theory”. On this same merger, the EU Commission officials claimed that, even if some cooperation had taken place at the case officers’ level, cooperation at the top level had not occurred because, at the time of the merger, the new team of senior US DoJ officials had not yet been confirmed by the US Senate and therefore refused to participate in any conversation pending their confirmation.

Even if we assume that transatlantic cooperation in merger cases is always meaningful, it is difficult to assess whether it leads to substantive convergence between the US and the EU. For sure, when examining a merger North American and European authorities usually arrive at the same definition of the relevant market, consistent competition analysis and, in the cases in which there is a common competitive concern, consistent remedies. However, this, in itself is insufficient evidence that cooperation between these authorities

¹⁶ Robert Pitofsky in « EU and US approaches to international mergers-Views from the US Federal Trade Commission, remarks before the EC Merger Control 10th Anniversary Conference, Brussels 2000

promotes convergence. Two competition authorities, can arrive at the same conclusion concerning a set of mergers even if they do not cooperate. This is likely to happen whenever the mergers they consider do not raise any competitive concerns (the majority of the cases) or when the mergers have obvious and symmetrical potential anticompetitive effects in both jurisdiction (for example because the merging parties have very high market shares in both countries and are protected by barriers to entry). Thus the fact that competition authorities tend to agree with each other is insufficient to establish that cooperation promotes substantive convergence between them. To establish whether cooperation between competition authorities promotes convergence, one would have to prove that, as a result of their cooperation, these competition authorities agree (on the relevant market definition, on the substantive criteria of the competitive analysis or on appropriate remedies) in cases where they would have differed had they not cooperated.

The Boeing/Mc Donnell Douglas and the General Electric/Honeywell cases belong to the category of mergers for which the US and EU authorities disagreed a priori and were not able to overcome their differences. The question raised is whether these two cases are exceptional cases and whether there are many other transnational merger cases in which the US and EU antitrust authorities were able to overcome their initial differences. If there has been “ remarkable” substantive convergence over the last ten years between the US and the EU what are the issues on which this convergence has occurred ?

Antitrust enforcers on both sides of the Atlantic argue that, over the last ten years, transatlantic cooperation has contributed to substantive convergence between them in the merger control area. Yet, these statements are difficult to reconcile and the views of a senior official of the US DoJ in 2002¹⁷ outlining “five areas of historical divergence between US and EU competition policy”. The five areas outlined were: efficiencies, predatory pricing, essential facilities, monopoly leveraging and fidelity discounts. At least the first four areas are critical issues which come up in many merger reviews. If one adds that the threshold for single dominance in the EU is much lower than the threshold for monopolization in the US, and that the EU case law on collective dominance is undergoing wild swings, the assessment of “remarkable substantive convergence” on merger analysis between the US and the EC needs to be qualified.

What is no doubt true is that there has been considerable convergence of methodologies used on both sides of the Atlantic to analyse merger. For example, it is clear that the tests used to delineate relevant markets are now very similar in the US and in the EU¹⁸. it is equally clear that the distinction between unilateral and coordination effects has become a classic distinction in the examination of the potential effects of a merger in both jurisdictions. Over the last decade new tools derived from applied economic and econometric analysis have become important instruments for investigations in merger reviews in many jurisdictions and in particular in the US and in the EU. Finally, it appears that there has been real attempts to find consistent remedies in cases in which it was clear that both jurisdictions

¹⁷ William J Kolasky “North Atlantic Competition Policy : converging toward what ?” Address before the BIICL Second Annual International and Comparative Law Conference, London , May 2002

¹⁸ for example the US contribution to the OECD round table on “ international co-operation in transnational mergers” states : “a notable example (of progress in convergence among enforcement agencies during the 1990s) is market definition where, for example, the provisions of the United States’ Horizontal Merger Guidelines and the European Commission’s Notice on the definition of the relevant market are very similar, and the agencies usually arrive at similar results”. See OECD Document DAFFE/CLP/WP3/WD(2001)23 p4

might be leaning toward imposing conditions on the same merger and in which the geographical dimension of the relevant market or markets concerned were larger than either the US or the EU. But there seems to have been much less convergence on the assessment of competitive effects.

Thus, it is at least conceivable that competition officials on both sides of the Atlantic have publicly painted a picture of co-operation in transatlantic merger enforcement slightly rosier than reality shows. On the one hand, an optimistic assessment of the benefits of co-operation as it is practiced could serve the purpose of discouraging attempts to create a more formal cooperation protocol which would be likely to constrain the antitrust agencies in their freedom to exchange information. On the other hand, as mentioned earlier, claiming that co-operation has never been better or that it is hard to see how it could be improved may have the added benefit of allowing each antitrust agency to be more respected (or less easily criticized) by its business community or other governmental bodies. Indeed, when there is no overt contradiction between their stands on a merger, each authority can claim that its approach to the merger has been validated by the other “most important antitrust authority in the world”, and that therefore its decision is neither extreme, nor unjustified. This may be of value both to a US antitrust agency whenever it fears that it might be considered too activist (and therefore be accused of stifling market forces rather than promoting efficiency) and to the EU Commission which is frequently criticized (and more often than not unfairly criticized) by the governments or the business communities of member states which object to merger control decisions not going in the direction of their own immediate local interests¹⁹. In such cases, if the EU Commission can argue that the US authorities with whom it has cooperated have come to the same conclusion with respect to market definition, effects and competition and remedies, it may have at its disposal a useful argument to quiet discontent.

5) Perspective

An important question for the future is whether international co-operation on antitrust enforcement can remain largely an informal process initiated on a selective basis by a small group of competition authorities for their own benefit or for the benefit of firms in their jurisdiction.

There are two major reasons for the development of international cooperation on antitrust enforcement: the rapid globalization of a number of markets and the proliferation of countries adopting an antitrust law. Neither one of these reasons seems to be on the verge of disappearing. Quite the contrary, the number of transnational anti-competitive practices or of transactions which may have effects outside the boundaries of the jurisdiction in which they take place will continue to increase just as the number of jurisdictions adopting a competition law (Egypt, Vietnam, and China are in the process of adopting such a law). In the near future competition authorities of developed countries are going to have to (and to want to) cooperate with the competition authorities of the above mentioned developing countries or of other countries such as India, Malaysia, Indonesia etc... because all those countries are fast growing markets economically important for western business interests. Conversely, developing countries like Zambia, South Africa, Brazil, etc.. already feel that their domestic situation is adversely affected by off-shore transactions or the practices of transnational firms.

¹⁹ reactions to the Volvo/Scania EU merger decision in Sweden or to the Schneider/Legrand EU merger decision in France are good examples of this kind of reaction

The above elements point toward the fact that even if bilateral or regional cooperation agreements initiated by competition authorities can lead to very useful formal and informal cooperation on transnational anticompetitive practices and mergers between the authorities of (mostly) developed countries, these agreements are increasingly cumbersome and inadequate to meet the challenges of globalization. The informal nature of most of the cooperation taking place between these authorities does not meet the growing need for procedural fairness. The fact that a number of developing countries are de facto excluded from the benefits of cooperation on competition and prevented from effectively enforcing their domestic competition laws against powerful foreign firms will in time be shown to be unfair and prove unacceptable. Finally the fact that there is very little international cooperation about the most egregious trans-national anticompetitive practices (international cartels) through which powerful oligopolists can confiscate the benefits of trade liberalization or even defeat the purpose of trade liberalization diminishes the credibility of those who claim that trade liberalization can be a positive sum game. There is thus a growing need to elaborate a multilateral framework for cooperation on competition which will provide for transparent, fair and effective co-operative mechanisms while at the same time respecting the national sovereignty of all countries.

