International Chamber of Commerce
The world business organization

ICC Policy Statement

International Cooperation between Antitrust Authorities

Commission on Law and Practice relating to Competition, 28 March 1996

Introduction

The increasing globalisation of business and competition is creating new challenges for both enterprises and competition authorities. A rising number of mergers and cooperation projects are falling within the scope of several antitrust jurisdictions at the same time. This is causing a considerable amount of bureaucracy and legal uncertainty to enterprises, since national antitrust legislations and procedures differ considerably from each other. Understandably enough, national antitrust authorities are greatly interested in increased cooperation, especially through the exchange of information in the individual cases notified, and in coordinating their decisions.

It is thus no surprise that the last two years have seen important developments in this area at various levels:

a. In August 1994 the US enacted the International Antitrust Enforcement Assistance Act ('the IAEAA') authorising the US authorities to cooperate with foreign antitrust authorities in antitrust investigations pursuant to an antitrust mutual assistance agreement that stipulates reciprocity and the protection of sensitive business information. The US has not yet entered into any MOUs under the terms of the IAEAA.

b. In a parallel move the EC Council of Ministers has now adopted the 1991 US/EC antitrust cooperation agreement. This agreement obliges the US and EC authorities to take into account the important interests of the other party at all stages in their enforcement activities and to promote positive comity. It provides for information exchange under conditions of confidentiality, restricting the categories of information that can be exchanged. (See further ICC paper reference no. 225/435 Rev 1.)

c. Recently a group of experts nominated by the European Commission published a report entitled " Competition Policy in the New Trade Order : Strengthening International Cooperation and Rules ", (`the EC Report'). This report encourages work to begin on some form of international agreement on competition law enforcement, involving exchange of information between antitrust agencies `with watertight guarantees with respect to the protection of its confidential nature' (although those are not actually the terms of the proposal of the discussion paper). These developments do not stand in isolation. There are a number of bilateral antitrust cooperation agreements around the world as well as continuing work in the OECD and other international fora on international antitrust cooperation and convergence. The ICC wishes to participate in this debate to ensure that the interests of business are safeguarded.

Business views

Convergence

Although certain overarching competition law principles are generally accepted in the major trading countries, considerable differences between national antitrust laws do exist. There is a basic disagreement around the world about certain functions of antitrust or competition law and the underlying economic parameters to be applied, e.g. protection of competition or competitors, the consumer interest, concepts of extra-territoriality. Antitrust policies are an expression of particular

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economic constraints applicable at a particular time and in a particular jurisdiction. The ICC supports the concept of carefully evolving convergence of national competition laws which currently can be very different in nature, even to the point of conflict. The ICC perceives advantages to exist from a levelling of the playing field in which business is not subjected to conflicting or differing levels of requirements.

Cooperation and information exchange

Against this background, ICC members in Europe think that in the absence of sufficient convergence of substantive antitrust laws the EC Report's recommendations go too far too quickly. Pending harmonisation of substantive antitrust rules, there is, in their view, a significant risk of misunderstanding and inappropriate action when material prepared, for example, for the purposes of the European Commission finds its way to the US Justice Department and/or the Federal Trade Commission. The dangers of misapprehension and 'reading between the lines' are very great. Without in any way being misleading, a party will craft its submission to address the detailed and particular concerns of a particular regulatory regime : as with wine, the information may not travel well when transmitted overseas.

Therefore they believe that extending cooperation to the exchange of confidential information would not be appropriate at this point in time and at the existing low level of substantive convergence. This, in their view, is especially true with respect to US and EC antitrust law, the differences between which are of particular interest because a key recommendation of the EC Report is to substantially extend the existing US/EC antitrust cooperation agreement. These differences are significant, in their view, and are detailed in the Appendix to this paper.

Other ICC members, mainly in North America, take the view that it is not appropriate to call for sufficient substantive convergence of antitrust laws before countries can proceed with greater cooperation and exchange of information. If there is sufficient basic level convergence in substantive laws between two or more countries, there is no reason why information should not be exchanged pursuant to a bilateral or multilateral arrangement. With respect to the differences between the US and EU antitrust regimes they feel that these regimes are not dissimilar to an extent that would undercut the basis of EU/US information sharing. They point out that in broad terms, both systems to a significant extent deal with the same kinds of conduct and have similar regulatory mechanisms.

Protection of business information

a. Notwithstanding these differences as to whether or not an exchange of confidential information should be subject to prior convergence, it is the unanimous and grave concern of all ICC members that information should be properly protected. In many situations, the company whose information is at issue may be able to point out competitive dangers not apparent to others that could result from disclosing that information to a foreign government. Hence providing the company with notice before its information - possibly involving trade secrets - is disclosed to a foreign government will help the domestic antitrust enforcement agency to make the most informed possible decision as to whether such information should be shared.

   The dangers of disclosing confidential information or trade secrets to foreign agencies derive from the fact that if such information falls into the hands of competitors of the company involved, the competitive position of the company may be adversely affected. There is a real possibility that such information may include extremely sensitive material relating to the strategic plans of the company, its investment plans and its marketing goals and methods.

Furthermore, any erosion of the confidence that companies currently have that confidential information will not be disclosed to competitors is bound to limit the nature and extent of the data that companies are willing to supply voluntarily and to impair the open dialogue between such companies and antitrust agencies.

The ICC therefore feels that, unless doing so would jeopardize an investigation, it is essential that there be prior notification to a company before its confidential information is disclosed to a foreign administration.

b. Even under the present US/EC agreement there are problems regarding the confidential treatment of information. There remains doubt over what amounts to 'confidential' information. The obligation of confidentiality in Art. 20(1) of EC Regulation 17/62 only relates to information formally obtained through notification or under Articles 11-14. This contrasts with the view of the Merger Task Force which regards all (including informally obtained) information as confidential. In this context the ECJ decision in the SEP case (C36/92 of 19/5/94), which affirms that enterprises should always be able to discuss with the European Commission in advance whether or not information has confidential status with right of appeal to the Court, must be noted.

   These problems would be compounded if the cooperation proposals recommended in the EC Report were adopted. Indeed, contrary to existing Community rules under Regulation 17, the EC/US Cooperation Agreement and the spirit of the SEP ruling, a more encompassing confidential information exchange is advocated in the EC Report, which entirely glosses over the question of how watertight confidentiality is to be maintained.

c. Similarly, the ICC is concerned that information, passed on by one authority to the other should not be at risk of further disclosure, e.g. information passed on by the Brussels authorities to the Department of Justice, may become the subject of civil litigation in the US leading to broad-ranging discovery procedures against the Department of Justice.

d. Besides information-sharing agreements between countries, other cooperation is possible that will not raise the problems discussed above. The Microsoft case demonstrates that ad hoc cooperation with the companies' consent may also be useful to companies and enforcement agencies alike.

e. Even where the consent of the companies is forthcoming, it is essential that any legislative provisions made for the exchange of confidential information should contain certain procedural safeguards, strictly regulating the use of information concerned and reaffirming the need for the maintenance of confidentiality.

   - As mentioned earlier, enterprises should be given prior notification of any proposed exchange of information and granted an opportunity to be heard on the necessity of such an exchange and on whether information is confidential or not, unless doing so would be prejudicial to the investigation. In the latter case, notice should be given as soon as such prejudice no longer exists with a right to a retroactive review with appropriate remedies;

   - There should be the possibility for an independent review of any adverse decisions;

- There should be substantial convergence and similarity in the laws protecting solicitor-client privilege between one jurisdiction and another;
- The foreign jurisdiction must provide competition law enforcement immunity of a similar or greater nature than that which would be available or which has been provided in the jurisdiction disclosing the information;
- The receiving party must agree to reciprocate ; and
- Any exchange of information should speed up the investigation process rather than lead to extra delays.

In addition, any request for information should include:

- precise identification of the information required;
- an assurance that there is a substantive case as well as jurisdiction over the parties and matters at issue rather than a mere suspicion;
- a clear statement of the reasons for the request and the manner in which the information is to be used;
- an assurance that the information will not be disclosed to any parties outside the receiving authority, in particular potential third party plantiffs, other agencies or foreign governments;
- an assurance that the information will be used by the receiving authority only for the purpose for which it was disclosed;
- an assurance that the authority has exhausted its own administrative procedures and possibilities before making the request;
- an assurance that the information will be subject to conditions of confidentiality at least as stringent as those of the jurisdiction supplying the information.

Summary

The globalisation of markets and competition has created new challenges for business as well as antitrust authorities.

The ICC perceives advantages to exist from a levelling of the playing field in which the business community is not subjected to conflicting requirements. The ICC therefore supports the concept of carefully evolving convergence of national competition laws.

This process may be facilitated by increased cooperation between antitrust authorities. However, one should not under-estimate the problems caused by the current differences between antitrust laws both in substance and in procedure.

ICC members in Europe think that with the current low level of substantive convergence, cooperation between antitrust authorities should not include the exchange of confidential information. In their view, this is especially true with respect to cooperation between the United States and the European Union.

Other ICC members, mainly in North America, think that convergence need not be a precondition for closer cooperation between antitrust authorities as the antitrust laws of particularly the United States and the European Union are already broadly similar.

However, a serious concern shared by all ICC members is that information exchanged should be properly protected. Most importantly, unless doing so would jeopardize an investigation, enterprises should be notified of any proposed exchange and granted an opportunity to be heard. In addition, numerous other safeguards are required which are set out above.

The ICC also points out that, besides information sharing agreements, other forms of cooperation are possible that do not raise the problems discussed above. The Microsoft case demonstrates that ad hoc cooperation with the companies' consent may also be useful to companies and enforcement agencies alike.

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Appendix

Differences between US and EU competition systems referred to in paragraph two under "Cooperation and information exchange":

a. Only the US has antitrust laws which protect both domestic and foreign trade. The EC and its Member States do not. The EC system is focused on the internal market and does not apparently work to protect foreign trade. It is possible that the 1996 Intergovernmental Conference will act to change the EC system. Without such change there will be a significant lack of reciprocity with the US whose laws will be available to be used to open foreign markets. To achieve the same objective as regards the US market, EC enterprises encounter much greater difficulties.

b. Article 85 of the Rome Treaty provides for voluntary notification and exemption, whereas Section 1 of the Sherman Act is a prohibition system. Article 85(1) has a low threshold under which significant information is passed to Brussels even where no antitrust violation exists. Many agreements are caught by Article 85 which would not be caught by the American model. In aggregate, EC antitrust authorities would have significantly more information on commercial dealings than their US counterparts.

c. Under the European Community system, information is supplied to gain immunity from administrative enforcement and penalty which follows from notification itself. Exemption under Article 85(3) improves the quality of immunity. If passed to the US system, the same information could lead to crimi nal sanctions against the company or individual concerned. This would be an unacceptable result which must be avoided by all means.

d. The US process tends to be litigious and driven by private parties. In contrast, the EC and national approaches within it are cooperative and rely to a greater extent on filings with regulatory authorities. If information provided under the EC system is to find its way to US authorities and be subject to tougher (and sometimes criminal) sanctions, this will over time reduce the willingness of parties to supply information. It is likely also to have a significant effect on the EC enforcement process itself, leading to a more confrontational approach on US lines.