Working Party No. 3 on Co-operation and Enforcement

INVENTORY ON EFFECTIVE COOPERATION PRACTICES

-- European Commission --

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INVENTORY ON EFFECTIVE COOPERATION PRACTICES

European Commission

1. The European Commission cooperates with numerous competition authorities on a bilateral basis and in particular with the authorities of the Community's major trading partners. This note only refers to cooperation in specific enforcement situations (i.e. cases) and not to policy discussions.

I. The Legal Framework

1. Dedicated Cooperation Agreements

2. The European Union has dedicated Cooperation Agreements in competition matters with the United States, Canada and Japan. The main provisions of these agreements deal with information on cases of interest to the other agency, cooperation and coordination of enforcement actions (i.e. on specific cases), and with the obligation of each party to take into account the important interests of the other party.

3. The agreements also contain so-called “positive comity” provisions. Under these rules one party may request the other party to remedy anticompetitive behaviour which originates in another parties’ jurisdiction but affects the requesting party as well. This allows a particular problem to be dealt with by the authority best placed to do so (in the Sabre/Amadeus case the Commission solved a competition problem upon a positive comity request by the US DoJ).

2. Cooperation outside dedicated agreements

4. The existence of a dedicated agreement is not a necessary condition for cooperation. The European Commission cooperates with many other antitrust authorities of jurisdictions around the world. Many trade-related agreements contain provisions on competition cooperation. The Commission cooperates with the competition authority of South Korea on the basis of a Memorandum of Understanding. In the absence of any agreement, cooperation can take place in the spirit of the 1995 "OECD Recommendation on Cooperation between Member Countries on Anticompetitive Practices affecting International Trade".

II. Forms of cooperation

5. A good example for a structured framework for cooperation are the "EU-US Best Practices concerning cooperation in merger investigations". In these guidelines the European Commission and the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission set forth practices to be followed when they review the same transaction. These include coordination of time tables if possible, collection and evaluation of evidence, and communication between the authorities. These best
practices largely institutionalise existing practices but making them more transparent so that they can be used more widely. It is possible to achieve this aim in the existing procedural framework of both sides. The principles mentioned are also valid in relation to the cooperation with other third country authorities.

1. Determination of cases of joint interest

6. An important element of cooperation in all types of competition cases (mergers, cartels, abuse of dominance cases) is the communication between the agencies to determine if they treat a case in common. The communication can take place through informal means or through a formal notification under a bilateral agreement or the OECD Recommendation on Cooperation. Experience has shown that such communication should take place at an early stage of the procedure and not necessarily only at time when a formal notification is necessary. This does not diminish the importance of notifications which usually inform another authority that an enforcement activity (issuance of a statement of objections, adoption of a decision or a settlement) may affect the important interests of another country. Furthermore, it can be important to compare the schedules of the inquiries. Checking and comparing when each step in the procedure is likely to be taken can be a key element in determining the evolution of future cooperation and the scope for coordination of enforcement activities.

7. These discussions can usually be conducted without resorting to confidential information. In a situation where the discussion is based on confidential information (leniency applications, merger operations before notification or public announcement) a waiver from the parties is necessary.

2. Timing and coordination of investigative measures

8. In cartel cases, the coordination of inspections/searches or other investigative measures is common to maintain the element of surprise thus limiting the risk that companies might destroy evidence (in the Impact Modifier case coordination of inspections/searches took place between the Commission and the US, Canadian and Japanese authorities). At this stage of the investigation also the sharing of leads can occur and the sharing of background information about the industry and relevant actors is common.

9. In merger cases coordination of timing is also an important element. The "EU-US Best Practices” recognise that cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel. Merging companies will therefore be offered the possibility of meeting with the agencies at an early stage to discuss timing issues in order to allow synchronizing the timing of the respective investigations. Companies are also encouraged to permit the agencies to exchange information which they have submitted during the course of an investigation and, where appropriate, to allow joint EU/US interviews of the companies concerned (examples for joint interviews are MCI/Worldcom and GE/Honeywell). The best practices moreover designate key points in the respective EU and US merger investigations when it may be appropriate for direct contacts to occur between senior officials on both sides.

3. Competition analysis

10. The discussion on the competition analysis allows for the competition authorities to compare notes on a specific case and exchange views on the economic and legal analysis of the case on each side. The market definition is usually the starting point and discussions initially frequently focus on this issue. These discussions can generally be based on information that is publicly available. Exchange of confidential information can only occur with the agreement of the firms through the grant of a waiver. When an investigation progresses the discussion will focus more on the competitive effects and the evaluation of possible remedies (examples include Oracle/Peoplesoft, Sony/BMG and Air France/KLM).
4. Coordination of remedies

11. In the final phase of an investigation it is important to coordinate the remedies that each side intends to impose (in Johnson&Johnson Guidant and in Procter&Gamble/Gilette common remedies both for the European as well as for the US market were found). This coordination is particularly important in merger cases but also takes place in other cases; e.g. dominance cases (in Microsoft the Commission had regular contacts with the DoJ to discuss common issues relating to the respective remedies; this cooperation included contacts between the Commission's Monitoring Trustee and the US Technical Committee). Cooperation at this stage includes discussions on the timing of divestitures, the designation of assets to be divested and the evaluation of potential purchasers. Where appropriate the authorities can hold joint meetings with the merging parties to discuss remedies.

III. Conclusion

12. Cooperation with third country competition authorities is part of the daily enforcement culture of the European Commission. There are almost daily contacts on the operational level. For the enforcer, cooperation is a key element of efficient competition law enforcement. For globally active companies it is made easier to comply with a multitude of rules the more national approaches converge. It is very much in the interest of companies that the remedies imposed by competition authorities are coordinated in order to avoid contradictions and to make it the least burdensome for the companies concerned.