

WORLD TRADE ORGANIZATION

RESTRICTED

WT/WGTCP/W/48

24 November 1997

(97-5158)

**Working Group on the Interaction
between Trade and Competition Policy**

Original: English

SUBMISSION FROM THE UNITED STATES

The following communication, dated 21 November 1997, has been received from the Permanent Mission of the United States with the request that it be circulated to Members.

US Experience with Antitrust Cooperation Agreements

In this era of increased globalization, cooperation between governments in antitrust law enforcement is more and more necessary, and more and more common. The United States is currently a party to five antitrust cooperation agreements with other governments; a multilateral Recommendation of the Organization for Economic Cooperation and Development (OECD) and four bilateral cooperation agreements.¹ This paper describes the substance and the context of these agreements.

The OECD Recommendation², which was most recently amended in 1995, is the last in a series of such OECD Recommendations, the earliest of which was signed in 1967. The Recommendation provides for OECD member countries to notify other member countries when undertaking any antitrust enforcement activity which may affect such other member countries' important interests, and for consultation, upon request, with regard to such activity. (The United States made over 70 such notifications during fiscal 1997.) The Recommendation further exhorts member countries to take into account, in their enforcement activities, the significant national interests of other member countries that may be affected. It calls upon member countries to cooperate with one another in enforcement. It also calls upon members to consider taking action against anti-competitive practices that adversely impact upon another member country, when requested to do so by the latter. (This last principle, which has come to be known as "positive comity", was adopted and expanded upon in the 1991 agreement between the United States and the Commission of the European Communities ("EC").)

The OECD Recommendation also provides a mechanism for conciliation of disputes between member countries, if requested and agreed by all the member countries involved. The 1995 revisions to the Recommendation urge member countries to cooperate more extensively in the enforcement of their antitrust laws - including, where appropriate and consistent with national law, through the exchange of confidential investigative information and the obtaining of information on one another's behalf.

¹There are numerous legal instruments, such as Mutual Legal Assistance Treaties and letters rogatory, that are used generally by governments to obtain cooperation and assistance from other governments in law enforcement investigations, including antitrust investigations.

²Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Document No. C(95)130/Final (21 September 1995).

The United States is also a party to four formal bilateral antitrust cooperation agreements, the earliest of which was signed with the Federal Republic of Germany in 1976. Later agreements involved Australia (1982), Canada (1984, superseded by a new agreement in 1995), and the European Communities (EC) (1991).³ As with the OECD Recommendation, each of these bilateral agreements includes notification provisions, which contemplate that each party will provide the other with information about planned actions which may affect the others' important interests. While the specifics vary among the four agreements, each also contains a provision for consultations to resolve mutual or unilateral concerns, whether based on notified activities, or otherwise. Each agreement also articulates, in some form, the intention of both parties to cooperate in matters of antitrust enforcement, where such cooperation is feasible in both practical and legal terms. Both the 1991 US-EC and the 1995 US-Canada agreements also include "positive comity" provisions calling for each party to weigh the impact of anti-competitive conduct on the other party as an additional reason in favour of challenging conduct that also violates the enforcing party's antitrust laws. None of these agreements, however, permits the sharing of confidential information without the provider's consent and all specifically allow the requested party to take its own national interests into account in determining whether and to what extent to provide requested cooperation.⁴

Each of the four bilateral agreements reflects two themes - enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. The extent to which one or the other of these themes has predominated in a particular agreement has depended on the specific bilateral concerns and history from which the agreement emerged.

The German agreement is focused predominantly on law enforcement cooperation, reflecting the strong post-World War II German antitrust enforcement tradition. As the earliest of these agreements, it is the least detailed. Despite its brevity, however, it clearly reflects the intention of both parties to enhance their antitrust enforcement activities through increased cooperation. The German agreement has been the cornerstone of a close and cordial relationship between US and German antitrust agencies that has continued to the present day.

By contrast, the Australian and 1984 Canadian agreements centred more on conflict avoidance. Each of those agreements grew out of differences between the United States and the other government over the uranium antitrust litigation of the late 1970s and early 1980s in US courts, and in the case of Australia, over a US antitrust investigation in the early 1980s involving ocean shipping in the US-Australia/New Zealand trade. Needless to say, the United States shared with Australia and Canada

³See Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, US-Federal Republic of Germany, 27 U.S.T. 1956, T.I.S. No. 8291, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,501; Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, 29 June 1982, US-Australia, T.I.A.S. No. 10365, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,502; Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, 9 March 1984, US-Canada, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,503A; Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, 3 August 1995, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,503; and Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 September 1991, 30 I.L.M. 1491 (Nov. 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504; and OJ L 95/45 (27 April 1995), corrected at OJ L 131/38 (15 June 1995).

⁴Each of the existing agreements is an "executive agreement" for purposes of US law. That is, they are formal, binding international agreements, but they have not been ratified by the US Senate as treaties and thus do not override any provisions of US law with which they may be inconsistent.

an interest in avoiding or minimizing conflicts over antitrust enforcement. In negotiating these agreements, the United States was concerned to preserve its ability to apply its antitrust laws to harmful anti-competitive conduct affecting US commerce, including conduct involving its trade with the other party to the agreement. Australia and Canada were concerned to ensure that when their interests were affected, they would have advance notice and an opportunity for consultation, and that their interest would be considered in any enforcement action the United States might take.

These two agreements have been highly successful. By creating conflict avoidance mechanisms in which the parties had confidence, they freed the parties to focus in their day-to-day relationships on cooperation. Cooperation rather than dispute resolution has been the principal basis on which both countries have interacted in antitrust matters with the United States since the agreements were signed. In fact, no significant differences over antitrust enforcement have arisen between the United States and Australia since 1982. For obvious reasons, Canada and the United States deal more often with each other on antitrust matters; from time to time, the 1984 agreement was used to eliminate potential misunderstandings or to seek to accommodate differences. But these occasions were far surpassed in frequency and significance by the extraordinary ongoing enforcement cooperation that has developed between the Canadian and US antitrust authorities. Accordingly, by 1995, the two countries were ready to conclude a new cooperation agreement that placed a very strong emphasis on law enforcement cooperation. The new agreement built on the successes that the US Department of Justice (DOJ) and the Canadian antitrust authorities have had in joint criminal price-fixing investigations, which investigations have resulted in convictions of numerous firms and individuals on both sides of the border. In the context of cooperation, the parties agree to exchange antitrust-related information, consistent with existing confidentiality constraints. As noted above, this agreement also includes a "positive comity" provision.

By contrast with the cooperation-oriented German agreement and the conflict avoidance-oriented Australian and 1984 Canadian agreements, the United States' 1991 agreement with the EC was aimed equally at both concerns. Moreover, the US-EC agreement did not arise from a history of bilateral antitrust cooperation or conflict between the two jurisdictions. Rather, it reflected a recognition on both sides that enforcement cooperation between them, and a mechanism for avoiding or minimizing potential differences, would be enormously important in the changing world economy.

Although the importance of US-EC antitrust cooperation is self-evident, three developments in Europe might be said to have made the need for an agreement seem especially compelling at the time negotiations began in 1990. First, the European Court of Justice in the Wood Pulp case⁵ had recently confirmed the application of Community antitrust law to offshore conduct. By bringing the US and EC approaches to jurisdiction closely into line, the decision broadened opportunities for enforcement cooperation and lessened the chance of disputes over jurisdictional principles. At the same time, the Wood Pulp decision served as a reminder of the need for amicable ways to deal with any differences that might arise from overlapping jurisdiction.

Second, this period was one of intense and visible expansion of Community-level regulation under the "1992" programme, aimed at the completion of the internal market. From a US perspective, the "1992" campaign spotlighted the importance in the economic landscape of EC antitrust enforcement, even though it did not involve extension of the European Commission's antitrust powers.

⁵See Cases 89/85, etc., *A. Ahlstrom Osakeyhtio v. Commission*, 1988 E.C.R. 5193, [1987-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14, 491 (1988).

Third, the European Council had just adopted the new Merger Control Regulation. The Commission and the US antitrust authorities expected they would regularly be examining the same mergers under their respective laws and believed they would need, at the least, a regular channel of communication for those cases.

The immediate impact of the US-EC agreement has been a marked increase in communication between the US antitrust authorities and the European Commission. These communications have included formal notifications, regular consultations, informal contacts among the heads of the agencies, and a regular flow of phone calls and faxes between agency staffs. In fact, all of these things could legally have occurred before the agreement, and to some extent they did. But the agreement spurred the agencies to seek opportunities for cooperation in a more structured and proactive way that had not occurred before.

Before discussing examples of the kind of cooperation which has been achieved under these agreements, it is worth noting that antitrust cooperation agreements continue to evolve, with new agreements currently in the process of ratification and discussion. Last April, the United States and Australia announced a proposed agreement which, if finalized, would allow the two countries' antitrust agencies to exchange evidence on a reciprocal basis for use in antitrust enforcement, and assist each other in obtaining evidence located in the other's country, while assuring that the confidentiality of the information would be protected.⁶ The US and Australia are in the process of pursuing their respective procedures for finalizing the agreement.

In addition, the US has recently negotiated a new positive comity agreement with the EC. This proposed new agreement seeks to clarify the situations that would presumptively call for referrals and to flesh out the report-back and consultation mechanisms that would come into play once a referral has been made. Both the US and the EC are taking necessary steps to finalize this agreement.

Finally, the US and other OECD members have also been working over the past year in the OECD to underline the importance of enforcing national competition laws against hard-core cartels. The US is strongly supporting a proposed Recommendation that member countries have competition laws that effectively prohibit and deter hard-core cartels, with effective sanctions, enforcement procedures, and institutions. The proposed Recommendation also states that OECD countries have a common interest in preventing hard-core cartels and should cooperate with each other in enforcing their laws against such cartels, to the extent consistent with their own laws, regulations and important interests. More specifically, the proposed Recommendation would encourage member countries to enter into mutual assistance agreements that would permit the sharing of evidence with foreign antitrust authorities, to the extent permitted by national laws, and would encourage members to take another look at provisions in their laws that stand in the way of these cooperative efforts. This Recommendation is currently the subject of discussion within the OECD, and we hope it will be adopted in the near future.

⁶This agreement, if finalized, would be the first one completed by the US pursuant to the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA"), 15 U.S.C. 6201-6212.

Specific examples of cooperation

The spirit of cooperation engendered by the existence of these agreements has manifested itself in cooperation in numerous specific investigations over the past few years.⁷ In 1994, the Department of Justice and the European Commission's DG-IV conducted a joint investigation of anti-competitive practices by Microsoft that resulted in a single coordinated remedy, implemented by a virtually identical court decree in the US and an undertaking in Europe. This degree of cooperation was possible because Microsoft agreed to waive confidentiality restrictions, and the staffs on both sides of the Atlantic consequently were able to coordinate their investigations to a degree that could not have been achieved otherwise. While this degree of cooperation would have been possible in the absence of the US-EC cooperation agreement, as stated above, the spirit of cooperation which the agreement fostered certainly helped to facilitate the result achieved in this case.

In 1996, the DOJ conducted an investigation of AC Nielsen, a US firm that provides services tracking retail sales, to determine whether Nielsen offered customers more favourable terms in countries where Nielsen had market power if those customers also used Nielsen in countries where it faced significant competition. The European Commission also investigated, since most of the conduct occurred in Europe and had a direct impact on consumers there. There was close contact between the staffs of both agencies and it became apparent that the Commission would take action to remedy the situation. Consequently, the DOJ determined that it clearly made sense to allow DG-IV to take the lead, and closed its investigation when Nielsen signed its undertaking with the Commission. Again, the communications that took place between the investigating staffs of the two agencies in this matter could have occurred in the absence of a cooperation agreement, but the existence of the agreement certainly helped to foster the kind of atmosphere of mutual trust that made such communication and such a result possible.

Similarly, the US Federal Trade Commission (FTC) closed an investigation last year in view of an enforcement action by the Italian Competition Authority. A production quota maintained by Parma ham producers adversely affected consumers both in Italy and in export markets, including the United States. At the outset of its investigation, the FTC consulted the Italian Competition Authority. The Italians had an investigation under way that would result in a decision by a date certain. The FTC accordingly decided to stay its hand. The Italian authority's decision⁸ and remedy addressed the FTC's concerns, and, consequently, the FTC closed its investigation.

In April 1997, the DOJ announced its first positive comity request to the EC under the 1991 agreement. The agency asked the Commission's DG-IV to investigate possible anti-competitive conduct by certain European airlines that may be preventing US-based computer reservation systems from competing effectively in certain European countries. Since the alleged conduct took place in Europe and European consumers would suffer if competition had been diminished, it became clear that the EC was in the best position to investigate. DG-IV has announced that it is actively pursuing the matter.

⁷The European Commission has issued two informative reports on cooperation under the 1991 US-EC Agreement, the first on 8 October 1996 (COM(96)479 final) and the second on 4 July 1997 (COM(97)346 final), both of which are available on the World Wide Web Homepage of the EC's antitrust authority, DG-IV. These reports contain statistics on the number of notifications and a discussion of the nature and mechanics of the cooperation that has taken place between the EC and US authorities.

⁸Consorzio del Prosciutto di San Daniele - Consorzio del Prosciutto di Parma (Rif. I138) Delibera del 19.06.96 - Boll. N. 25/1996 (available on the Homepage of the Italian Competition Authority).

In addition to this formal referral, other matters have been referred by one side to the other informally. Complainants sometimes need to maintain anonymity and also sometimes do not know where to turn when they feel harmed by conduct occurring on the other side of the Atlantic.

Through their contacts with other competition authorities, US enforcement authorities are often able to find a sympathetic and authoritative ear in the place where the anti-competitive conduct is occurring. So, despite the infrequency of formal positive comity referrals, informal referrals have taken place and have been pursued by the receiving authority.

As noted above, the DOJ has engaged in several instances of close cooperation with Canada on individual investigations. Prominent among these instances of cooperation was the jointly conducted criminal investigation into price-fixing of thermal facsimile paper by US, Canadian, and Japanese firms. Working closely together in the context of the US-Canada Treaty on Mutual Legal Assistance in Criminal Matters, the Canadian and US investigative staffs dealt with issues such as: sharing of documents obtained by subpoena and search warrant; sharing of documents obtained from foreign defendants pursuant to plea agreements; jointly interviewing witnesses; joint document analysis; and conducting parallel and coordinated plea negotiations. The results were impressive on both sides of the border. In the United States, three US corporations, four Japanese corporations, and a Japanese national thus far have pled guilty to antitrust violations. The corporations and one individual paid criminal fines totalling more than US\$10 million, although one US corporation and one of its executives were acquitted at trial earlier this year. In Canada, five corporations - three US, one Canadian, and one Japanese firm - have pled guilty and have paid fines of roughly US\$3 million.

Significant cooperation has taken place in many multinational merger cases, despite the differences in the procedural and substantive rules of the reviewing authorities. The Shell/Montedison⁹ case is a good example of the potential scope and benefits of cooperation in such merger cases. During the initial phase of the FTC and EC investigations, in addition to the routine discussion of review process and timing, questions concerning intellectual property and contract law (particularly as to joint venture contracts) in the US and European countries were raised and explanations exchanged. EC and FTC staff also shared their respective views on the appropriate definition of the product and geographic markets, likely competitive effects and potential remedies. All such conversations were conducted with care that information obtained subject to confidentiality restrictions was not disclosed. In this case, both the EC and the FTC came to the same conclusions as to the relevant product and geographic markets.

Finally, cooperative discussions were particularly useful on the issue of remedy. Both the EC and FTC staff agreed that the most effective remedy would be a divestiture of Shell's interest in its 50-50 joint venture with Union Carbide. Union Carbide's opposition to such a divestiture resulted in the EC accepting a settlement involving Montedison assets. Ultimately, the FTC reached a consent agreement with the parties that required divestiture of the Union Carbide joint venture. But, before reaching that settlement, the FTC continued to consult with the EC in order to obtain a settlement that would not only satisfy the FTC's competitive concerns but also that would not conflict with provisions of the EC's decision.

This experience has been repeated many times in other merger cases. Even in cases where the market structures in Europe and America differed, consultations have been useful in confirming respective analyses and avoiding conflicts in remedies where action taken by one authority might have the unintended consequence of limiting the range of remedies available to another reviewing authority.

⁹Shell/Montecatini, Commission Decision 94/811/EC of 8 June 1994, Case IV/M.0269, OJ L 332/48 (22 November 1994)(hereinafter "EC Decision"); Montedison/Shell, FTC Docket No. C-3580 (25 May 1995).

Cooperation between enforcement agencies and communication between investigating staffs do not always, however, result in both agencies arriving at coordinated or even similar outcomes. Perhaps the best-known example of parallel antitrust investigations during the past year was the Boeing/McDonnell Douglas merger case, in which the FTC and DG-IV reached different enforcement decisions. While ultimate resolution of this matter presented difficult issues for both US and EC antitrust enforcers, the discussions leading to its resolution would have been far more difficult had both agencies not already established a strong basis of communication arising from common antitrust enforcement interests and relationships.

Differing results have also been reached in parallel investigations that are not as well-known as Boeing/McDonnell Douglas. The DOJ and Canadian enforcement authorities conducted parallel investigations into anti-competitive behaviour in the ductile pipe industry. While the US authorities concluded that there was insufficient evidence to prosecute under US law, the Canadian authorities assembled a different body of evidence that was sufficient to obtain a guilty plea and record criminal fine from a Canadian subsidiary of a US firm.

Both the FTC and the EC also examined Upjohn's merger with Pharmacia of Sweden. Following its examination of 14 product overlaps in various European Economic Area nations as well as four compounds in the R&D stage, the EC cleared the merger last year. The FTC subsequently issued a consent order that required the merged company to divest Pharmacia's US assets relating to R&D for "9-AC", a colorectal cancer drug that Pharmacia is developing under a license from the US National Cancer Institute. Upjohn produced "CPT-11", a competing compound which was closer than 9-AC to receiving approval by the US Food and Drug Administration. The FTC's complaint and order were based on the desire to keep both compounds in the running to the market-place.

US and EC antitrust authorities held quite similar views on what markets would be affected by last year's US\$3 billion merger between the Swiss pharmaceutical firms Ciba-Geigy and Sandoz. For example, both the FTC and its European counterpart focused on the merger's expected impact on a world market for certain types of gene therapy research and development. Nevertheless, the FTC and the EC reached different ultimate conclusions about competitive effects. Citing a number of factors, the European authorities concluded that potential anti-competitive effects in this market were too speculative to warrant antitrust relief. The FTC, on the other hand, determined that the merging firms were the leading commercial developers in a highly concentrated gene therapy market and that new entry was not expected to deter or counteract the merger's anti-competitive effects. An FTC consent order required the merged firm to license certain gene therapy patent rights and other technology to Rhone-Poulenc Rorer, Inc.

The Ciba-Geigy/Sandoz case illustrates why cooperation is beneficial even if reviewing authorities differ at the "bottom line". The different conclusions in this case do not mean that the FTC's theory of innovation competition is necessarily "right" or more "aggressive", while the EC's approach in this area is more "cautious". Rather, objective, important differences between US and European intellectual property rights contributed to different conclusions as to the potential foreclosure effect of pending patent applications. What is important is that, while our conclusions differed, our routes to these conclusions were the same. And, had the European Commission concluded that relief in the gene therapy market was necessary, cooperation in the fashioning of remedies would have been vital for the enforcers and the parties alike.

Conclusion

As the foregoing discussion demonstrates, antitrust cooperation agreements serve an important function, and continue to evolve to meet the changing needs of antitrust enforcement. The spirit of cooperation which these agreements have helped to foster is resulting in more effective antitrust enforcement in the countries that are party to such agreements, to the benefit of consumers in those countries.