

CPRC Discussion Paper Series

Competition Policy Research Center Fair Trade Commission of Japan

The Benefits of Cooperation between Competition Authorities*

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CPDP-9-E December 2003

** This article is written text of the Panel Speech delivered at the
Competition Policy Symposium on November 20, 2003.*

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**Inaugural Symposium of the
Competition Policy Research Center**

Tokyo, 20 November 2003

**Session II: The Global Interface of Competition
Policies**

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**“The Benefits of Cooperation between
Competition Authorities”**

* The views expressed are personal and do not necessarily reflect the position of the European Commission.

Ladies and Gentlemen!

I. Introduction

It is a great honour to address this distinguished audience today concerning the global interface of competition. I believe that the choice of metaphor in the title of this session is a very good one.

The dictionary defines an interface “as the place where two different systems meet and communicate”. And this is exactly what international cooperation in competition enforcement is about. Two or more independent competition systems meet and have to interact. The systems may be different; they may have different substantive and procedural rules and sometimes even different objectives. Nevertheless, they have to find a way to work together. The challenge is to optimise the way in which these systems can run together and how this interaction can maximise benefits for both sides.

Let me begin by recalling the environment in which competition enforcement is operating today. The reference to globalisation is commonplace. Many companies have become global actors and their business transactions are global as well.

World-wide cartels and cross-border mergers present major challenges for competition authorities. The increasingly transnational character of competition cases is in contrast with the legal and practical limits of competition law enforcement. The scope of competition law is territorial and the enforcement

competences of competition agencies are territorial as well. This means that enforcement actions and decisions are limited to the territory in which the competition authority has jurisdiction.

Cooperation between competition authorities can help to overcome these barriers. How, for example, could one competition authority otherwise become aware of an infringement taking place outside of its territory? How could it otherwise learn of enforcement activities by another authority addressing the same anticompetitive practices?

In fact, efficient competition enforcement is often not possible without cooperation. Cooperation leads to a better use of resources. It also seeks to avoid conflicts with other laws and rulings. The coordination of procedures can even result in a more predictable outcome, which is very much in the interest of business. Therefore, there is a clear need for competition authorities to work together.

Secondly, the worldwide acceptance of the market system means that many more countries have competition laws and that there are more competition authorities than ever before. While this increases the need for cooperation, it also means that there is a greater chance for cooperation. And, what we can observe is that enforcement cooperation is broadening and deepening.

II. The tools of cooperation

I will not go into the legal framework of cooperation in much detail. Already in 1967 the OECD adopted a recommendation on cooperation of its member countries in competition matters. We have come a long way since then.

Not only has the OECD modified and updated its recommendation several times. Many countries have moved a step further and have chosen to intensify their relations. They have concluded bilateral agreements on cooperation in competition matters. These agreements usually provide for the traditional instruments of cooperation, i.e. regular inter-agency consultation, reciprocal notification of enforcement activities and exchange of non-confidential information. I am not going to talk about the possibility of using Mutual Legal Assistant Agreements as they often relate to the field of criminal law, whereas the competition law of the European Union is administrative in nature.

The European Union has dedicated Cooperation Agreements in competition matters with Japan, with the United States and with Canada. 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.

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.

It is important to stress that the cooperation agreements do not allow for the exchange of any legally protected information. In the case of the European Commission this means that no information obtained from companies may be given to another agency, unless the law allows this. Of course, the companies concerned can agree to this exchange by giving a waiver. Such waivers occur quite frequently, in particular in merger cases.

The existence of dedicated agreements does not preclude that the European Commission cooperates with antitrust authorities of many other jurisdictions around the world. Many trade-related agreements contain provisions on competition cooperation. And even in the absence of any agreement, cooperation can take place on an ad-hoc basis. In fact, taking the case of Japan as an example, the tradition of cooperation between the European Commission and the Japan Fair Trade Commission including regular high level meetings started much earlier than the conclusion of the cooperation agreement in July this year.

However, experience shows that dedicated cooperation agreements have advantages. They provide for better structured and therefore more effective dialogue. A dedicated agreement creates a framework within which cooperation can

be conducted. The increased contact between the Commission and the other party leads to a closer relationship and to mutual confidence-building. A further benefit is a mutual learning experience which leads to a greater understanding of the respective competition policies. It advances convergence in competition analysis and can lead to the reduction of the risk of divergent or incoherent rulings.

Of course, each authority ultimately has to conduct its own assessment of its cases and even if co-operation works well, there may be no consensus in the final assessment of a case. The European Commission applies European law while other authorities apply their respective laws. Perfect convergence will never be achieved; a degree of divergence may be unavoidable in a world composed of sovereign jurisdictions, each with its own laws, enforcement authorities and courts.

III. How does cooperation in the framework of an agreement work?

Let me now describe the results which cooperation in the framework of an agreement can bring about. Bilateral cooperation evolves around **two axes**. One is case-specific cooperation; the other is a continuous dialogue on policy. The examples for the policy dialogue I will give are mainly derived from our relationship with the US authorities. This is easily explained by the fact that our cooperation with the US has the longest tradition.

Case-specific cooperation takes place on all cases which are examined concurrently by both authorities. Although cooperation in global mergers or in the fight against international cartels may make the most headlines, I want to emphasise that no area of antitrust is excluded.

In merger cases these contacts cover not only the substantive analysis but also the discussion of remedies. In cartel cases we have found it particularly useful to coordinate our respective inquiries, and in particular, to carry out on-the-spot inspections simultaneously. Such coordinated inspections offer the advantage of maintaining the “element of surprise” thus increasing the likelihood of a successful outcome.

We also benefit from each other’s experience. Even if we are not dealing with the same case, we benefit from the other party’s experience in a particular market or with a particular problem.

As regards the policy discussion, this has enabled us to understand each other’s views better and to learn from each other. The US authorities and the European Commission have set up several working groups to discuss competition policy issues of common interest. The focus was first on the area of merger control and covered the topics of remedies, procedures, conglomerates and efficiencies. The most recent working group deals with intellectual property rights issues. The positive impact of these working groups is well beyond the immediate topic of the working group: it helps to better understanding the context in which both sides are operating.

Outside the formal working groups, the policy dialogue has also been fruitful. A good example in this respect is the European Commission's leniency program. The European Commission paid a lot of attention to the success of the US corporate leniency programme in the process of drafting the Commission guidelines.

1. Case specific cooperation

Let me now describe briefly how case-related cooperation can be conducted:

First of all, there is constant communication between the agencies to determine if they treat cases in common. If this has been established, many of the cases start by a discussion of the timing of the respective investigations. Experience has shown that it is important to compare the schedules of the inquiries. Checking and comparing when each step in the procedure is likely to be taken is a key element in determining the evolution of future co-operation and the scope for coordination of enforcement activities.

Further discussions frequently focus on the product market; the market definition is the starting point of each competition analysis. This discussion 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. These discussions can usually be based on information that is publicly available. As I said before, exchange of confidential information can only occur at present with the agreement of the firms

through the grant of a waiver.

In the final phase of an investigation it is important to coordinate the remedies that each side intends to impose. Take the example of a divestiture in a merger case. It is very much in the interest of merging 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.

Throughout the whole exercise of case-related cooperation, it is important to take into consideration the views of the other authority – to the extent that this is possible and compatible with domestic rules. In this way the risk of conflicting solutions can be diminished and their negative effects are kept to a minimum.

2. Best practice guidelines in mergers

A good example of how a policy dialogue on procedures can improve case cooperation is the "EU-US Best Practices concerning cooperation in merger investigations". These guidelines are the result of the EU-US merger working group on procedures which had been studying how the effectiveness of EU-US cooperation in merger cases could be improved further.

In these guidelines both sides set forth practices to be followed by our respective agencies when they review the same transaction. These include coordination of time tables if possible, collection and evaluation of evidence, and

communication between the authorities.

They introduce a certain discipline into cooperation in individual cases. In particular, they should ensure that both sides are always aware of the stage their respective investigations have reached, and how they are both thinking in terms of substantive competition analysis at any given point. This should serve to avoid misunderstandings or surprises.

I should point out that it is possible to achieve this aim in the existing procedural framework of both sides. In merger cases the parties usually grant waivers to permit the exchange of information between the enforcement agencies as they recognise the importance to share the available information and evidence. The merging parties want clearance and they need it in both jurisdictions.

The 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. 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. 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.

These best practices largely institutionalise existing practices but making them more transparent so that they can be used more widely. A more innovative feature is that they provide parties an opportunity to meet, the European Commission and the US authorities together, prior to initial notification to set a schedule for the investigation and to identify issues. Furthermore, high-level consultations between senior decision-makers are foreseen from the very outset of the decision to enter into an in-depth investigation of a case.

3. The fight against international hard-core cartels

As cartels do not know any borders, the fight against cartels must go beyond borders as well. The past few years have witnessed a remarkable acceleration in the uncovering and sanctioning of price-fixing, market-sharing and bid-rigging cartels on a world wide level. The respective legal and enforcement regimes which are used to tackling cartels today are quite different. In some jurisdiction cartels are prosecuted as criminal conspiracies, and can result in the imposition of fines as well in imprisonment. Under EU law, cartels are not criminalised and only fines can be imposed.

Notwithstanding these differences, improved cooperation among anti-cartel authorities has proven to be instrumental in attacking these international cartels. As cartels tend to become international and increasingly cover European, US and other world markets, they are often treated simultaneously by several competition authorities. One of the most important

aims was to maintain the effectiveness of investigations.

One motivation for increased co-operation is that the fight against cartels is a priority area for many competition authorities. The increased attention for cartel enforcement and the resources attributed to it has also lead to follow-up discussions of a more general nature, for instance on the most effective investigation techniques. Good examples are the discussions and workshops which took place at the occasion of the 5th International Cartel conference in Brussels in October of this year.

An important factor in attacking hard-core cartels is to penetrate their cover of secrecy. In cartel cases, the Commission and its counterparts have been able to exchange sufficient information in order to synchronise investigative actions and searches, thus limiting the risk that companies might destroy evidence. This has already happened on many occasions between the European Commission and the US Department of Justice. In February this year, in the impact modifier case, the Commission carried out its inspections in the European Union simultaneously with the searches conducted by the Japan Fair Trade Commission, the US Department of Justice and the Canadian Competition Bureau in their respective jurisdiction. I am confident that these coordinated actions will happen more often in the future.

Furthermore, the increased use of leniency programmes also leads to increased cooperation. Under these programmes

companies that report their involvement in a cartel can obtain full immunity or significant reduction in fines. A tendency that we have seen in recent years is that companies involved in international cartels did their leniency applications in several jurisdictions, in any case in the US and in Europe. Naturally, this lays the ground for further co-operation in this case. If the Japan Fair Trade Commission adopts a leniency policy as well, I am confident that this can only intensify co-operation with Japan.

IV. Concluding remarks:

To sum up: Effective cooperation can take place in all areas of competition law and experience has shown that it leads to results. Cooperation between competition authorities can take place despite differences in their law and their procedure. Regular cooperation creates an atmosphere of mutual trust. It allows enforcement agencies to use their resources better and to become more efficient. It is also the key to avoiding contradictory or incoherent results and hence, offers business greater certainty as to the outcome of procedures.

Thank you very much for your attention.