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Working Group VI

International Cooperation in Antitrust Enforcement

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Introduction

1. Regulation 1/2003 is silent on extra-EC aspect of EC competition law and its enforcement
 - Why?
 - Consequences
 - Regulating « two sides of the same coin »?
2. This presentation is selective. It addresses:
 - EC jurisdiction over undertakings established outside the EC in general
 - Comity
 - Exchange of information between competition authorities
 - An EC blocking statute?

This presentation raises more questions than it suggests answers

EC Jurisdiction over Undertakings established outside the EC in general

1. ECJ/CFI three-fold line of case law
 - The «economic entity » doctrine (Dyestuffs)
 - The « implementation » doctrine (Woodpulp)
 - The qualified « effects » doctrine (Gencor) in merger control
2. Commission Practice
 - Effect on Trade guidelines
 - In merger control the Gencor qualified « effects » doctrine is taken on board in the simplified procedure... more or less

Issues

- a) Codifying or not in Regulation 1/2003?
- b) If so, codifying the Gencor doctrine?

Comity

1. « Negative » and « positive » comity
2. Limited scope of negative comity, alternatively uncertainty on its status as customary rule of international law in the case law
3. Inclusion of positive comity clauses in EC international agreements – « best efforts » at most
4. A few examples of application of comity reported in the draft paper

Issues

Discretionary nature and balance of interests → uncertainty for undertakings

Yet, what would be the added value of including a comity provision in Regulation 1/2003?



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Exchange of information between competition authorities (1)

- Information collected by the European Commission in competition cases
 - May be business confidential information
 - If not supplied voluntarily, it may be compelled
- Such information
 - May, under Regulation 1/2003, only be used for the purpose of the relevant request (Art. 28(1))
 - Is covered by the obligation of official secrecy and may not be disclosed by the Institutions and officials of the EC (Art. 287 EC Treaty)

Exchange of information between competition authorities (2)

- The exchange of information between the Commission and NCAs is organised by Regulation 1/2003
- It may be exchanged and used as evidence by the Commission and NCAs
 - Provided it is for the purpose of applying Articles 81 or 82
 - In respect of the subjectmatter for which it was collected by the transmitting authority
 - The Commission and the NCAs may not disclose such information of the kind covered by the obligation of professional secrecy



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Exchange of information between competition authorities (3)

→ The exchange of information with third countries

- Is not regulated by Regulation 1/2003
- Is organised in cooperation agreements with certain third countries providing that:
 - i. The Parties are not required to disclose information where such disclosure
 - Is prohibited by the laws of the Party providing the information
 - Is incompatible with that Party's important interests
 - ii. The Parties agree to maintain the confidentiality of any information provided by the other Party

Exchange of information between competition authorities (4)

Issues:

- Does the EC have the authority to agree to transmit such information – collected for the purpose of applying Articles 81 and 82 – to third countries for the purpose of applying their competition rules? Alternatively, what is the relationship between Regulation 1/2003 and cooperation agreements with third countries?
- The current cooperation agreements leave quite a bit of wiggleroom. Yet, this also creates uncertainty: e.g. what information collected by the Commission is information of which the disclosure is prohibited by Regulation 1/2003 within the meaning of the cooperation agreements? What legal guarantees are there that confidentiality will be maintained by the other Party?

Exchange of information between competition authorities (5)

Issues:

- Regulation 1/2003 subjects the transmission of information to NCAs to the condition that the application of national competition law does not lead to an outcome different from that of EC competition law. Should this condition also be inserted in cooperation agreements? Or should it be deleted from Regulation 1/2003?
- Should Regulation 1/2003 or cooperation agreement provide that the information exchanged may not be used in criminal proceedings?

An EC « Blocking Statute »? (1)

Definition:

A provision designed to block extraterritorial application of foreign antitrust rules by:

- Prohibiting disclosure of information to foreign competition authorities
- Rendering certain types of foreign competition judgments unenforceable
- Ordering recovery of damages paid following foreign competition judgments

Rationale:

- Absence of common competition standards and thus divergence of substantive rules
- Divergence of procedural rules

An EC « Blocking Statute »? (2)

The case of US discovery rules:

Two scenarios addressed in the draft report

Focus on Scenario 1

In US judicial proceedings a US court orders litigants to produce documents submitted by them to the European Commission

Impact on: leniency applications and settlement procedures

Prompted the European Commission to file amicus curiae briefs in US judicial proceedings to protect its leniency policy. So far with mixed results.

The Commission has also endeavoured to minimize the risk of international discovery by introducing some procedural measures

Query: why limit protective measures to leniency applications?

An EC « Blocking Statute »? (3)

Issue:

Is there a case for an EC « blocking statute »? i.e. a provision on Regulation 1/2003 that would prohibit undertakings to comply with orders of third country competition authorities or courts on disclosure of documents and information submitted tot the Commission?

– Contra:

- Existing competition «blocking statutes » of Member States have not or rarely been applied
- Comity considerations have lead foreign authorities and courts to avoid such orders or enforcing them

– Pro:

- Their very existence may have had a dissuasive effect
- Comity involves a balancing of interests