

## Jurisdiction and cooperation issues in the investigation of international cartels\*

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### Introduction

One of the main issues the European Commission ("the Commission") has to deal with, when it investigates international cartels, relates to the discovery of evidence located outside the Community borders.

This is first of all a matter of jurisdiction. If a sufficient connection<sup>1</sup> can be established, pursuant to domestic competition rules, between the cartel activity carried out abroad by foreign firms and the territory of the European Communities ("the EC") in order to assert legislative jurisdiction<sup>2</sup> over such cases, it is less obvious whether the Commission can claim (and if so, to what extent) enforcement jurisdiction<sup>3</sup> in order to exercise its investigation powers and compel the production of evidence found outside its borders. Most commentators tend to agree that jurisdiction to impose penalties, demand information and, generally, carry out an investigation is inherently territorial in scope<sup>4</sup>.

Against this background, strengthened international cooperation<sup>5</sup> on the basis of bilateral agreements<sup>6</sup> enables enforcement agencies to share case related information, albeit subject to a number of limitations, conditions and guarantees. It is obvious that the effectiveness of cooperation on specific cases pursuant to these bilateral agreements depends greatly upon the ability of the agencies involved to exchange different types of information and use it as needed in their respective internal procedures.

The ability to exchange information is an element that sometimes serves to distinguish antitrust cooperation agreements in 1<sup>st</sup> and 2<sup>nd</sup> Generation ones. Agreements such as the 1991 and 1998 EC/US ones are considered 1<sup>st</sup> Generation Agreements since they enable the parties to exchange

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<sup>1</sup> See Faull & Nickpay, *The EC Law of Competition*, 1999, at paras. 2.115 - 2.119; see also Ritter/Braun/Rawlinson, *European Competition Law: a Practitioner's Guide*, 2nd ed. 2000, at pp. 61-64.

<sup>2</sup> Or "subject-matter jurisdiction": the power of states or institutions like the EC to make their laws applicable to the activities, relations or status of persons, and to the interests of persons in property; this jurisdiction is exercised by the enactment of legislation, such as Article 81§1 EC Treaty or by the laying down of rules by administrative agencies or by courts. As opposed to enforcement jurisdiction which is the power of a state or a body such as the EC to compel compliance or punish non-compliance with its laws, in Butterworths Competition Law (loose-leaf edition), Issue 37, May 2000, at para. XII.2.

<sup>3</sup> On the distinction in public international law of the legislative jurisdiction as opposed to the enforcement jurisdiction see C.S.Kerse, *EC Antitrust Procedure*, 4th ed. 1998, at para. 8.09. According to Kerse, *ibid.*, "it seems to be not inconceivable that, notwithstanding the restraints of international law, the Court might uphold the Commission's use of Article 11 of Regulation 17 to obtain information from undertakings outside the Community".

<sup>4</sup> Butterworths, *op.cit.*, at para. XII.9 with further references.

<sup>5</sup> For an extensive presentation of international cooperation modalities and instruments see J.Parisi, *Enforcement Cooperation Among Antitrust Authorities*, November 1999, available at [www.ftc.gov/speeches/other/ibc99059911update.htm](http://www.ftc.gov/speeches/other/ibc99059911update.htm)

<sup>6</sup> E.g. the 1991 EC/US Agreement regarding the application of their competition laws, at [www.usdoj.gov/atr/public/international/docs/ec.htm](http://www.usdoj.gov/atr/public/international/docs/ec.htm); the 1998 EC/US Agreement on the application of positive comity principles in the enforcement of their competition laws, at [www.usdoj.gov/atr/public/international/docs/1781.htm](http://www.usdoj.gov/atr/public/international/docs/1781.htm); other similar agreements are available at [www.usdoj.gov/atr/public/international/docs](http://www.usdoj.gov/atr/public/international/docs).

mainly non-confidential information. Under these agreements confidential information can only be disclosed, if the source of the information in question consents to such disclosure in advance. In practice this consent ("waiver") is often granted subject to numerous conditions and limitations. On the contrary, 2<sup>nd</sup> Generation Agreements, such as the 1999 US/Australia<sup>7</sup> one, enable the authorities involved to exchange confidential information without the prior consent of the source concerned.

This paper explores issues related to the investigation of international cartels<sup>8</sup> within the current substantive and procedural rules in the EU, including the exchange of information under the existing EC/US cooperation agreements.

## A. Jurisdiction over International Cartels

As mentioned above, the Commission's jurisdiction to apprehend and eliminate almost any type<sup>9</sup> of international cartel operating in the EC has been rather undisputed. Article 81§1 EC-Treaty applies to agreements and practices having as their object or effect the prevention, restriction or distortion of competition within the common market. It does not matter whether some or all the firms involved have their seat inside or outside the EC, or where the restrictive agreement was entered into or whether acts were committed or business conducted within the territory of the Community or elsewhere in the world. Gradually, the European Courts acknowledged the existence of such jurisdiction using a number of different doctrines<sup>10</sup>.

### 1. The "intra-enterprise doctrine"

The Court of Justice in its first opportunity to rule on the application of European competition law to international cartels grounded jurisdiction on the so-called "economic entity" doctrine in *Dyestuffs*<sup>11</sup> (also called the "group economic unit" doctrine), whereby the conduct of a subsidiary active in the EC is attributed for antitrust purposes to the parent company seated outside the EC but exercising its corporate control on the subsidiary.

A brief word on the facts of this case: at a meeting in Switzerland in 1976 various European dyestuff manufacturers had agreed on uniform price rises for certain products in the countries of the Common Market. The British firm Imperial Chemical Industries also participated in this agreement. The United Kingdom was not yet a member of the EC at that time. ICI did not implement the price rises in the EC member states itself: this was instead done via subsidiaries in these countries. However the Commission imposed a fine on the British parent company and the company appealed to the Court, arguing that it could not be held to account for the conduct of its subsidiaries. The Court did not allow the appeal and stated that

"the fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company",

putting emphasis on

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<sup>7</sup> 1999 US/Australia Agreement on mutual antitrust enforcement assistance, at [www.usdoj.gov/atr/public/international/docs/usaus7.htm](http://www.usdoj.gov/atr/public/international/docs/usaus7.htm)

<sup>8</sup> Similar issues arising during merger control are not discussed.

<sup>9</sup> "Pure" export cartels organised in the EC and having no effects whatsoever on EC markets being the obvious exception.

<sup>10</sup> See a critical view in I.Schwarz/J.Basedow, *Restrictions on Competition*, Chapter 35, Vol. III, Private Int'l Law, Int'l Encyclopedia of Comparative Law, 1995, at p. 48.

<sup>11</sup> Case 48/69, *ICI v Commission (Dyestuffs)*, [1972] ECR 619, 661-663, at paras. 125-141; see also D.G.Goyder, *EC Competition Law*, 3rd ed. 1998, at pp. 548-549.

"the unity of their conduct on the market for the purposes of applying the rules of competition".

The test introduced by the Court in order to conclude that the Commission has jurisdiction in such cases was based on the cumulative presence of three factors: the subsidiary must carry out the parent's instructions, it must have no real autonomy (Article 81 must not apply in its relationship with the parent) and the parent must exercise decisive influence over the subsidiary in respect of the infringement.

This test was relaxed in *Viho*<sup>12</sup>. The Court confirmed that, on the basis of the so-called "intra-enterprise doctrine", Article 81§1 does not normally apply to intracorporate agreements or practices between a parent and its subsidiaries, if they form an economic unit in which the subsidiary has no real freedom to determine its course of action on the market. Under this doctrine several companies form an "economic entity", if a control relationship exists between them and the parent has the possibility of exercising control<sup>13</sup>. This is more in keep with economic reality and the approach prevalent in modern merger control. In fact, in a complex business organization the management of each division is allowed a high degree of operational autonomy and the parent is not expected to issue instructions on a "day-to-day" basis. Despite this hands-off attitude, in essence, the parent has the possibility to exercise a decisive influence over the controlled company and any apparent autonomy can be removed at any time.

## 2. The "implementation doctrine"

Following *Dyestuffs*, a further step was taken when the "implementation doctrine" was introduced in *Woodpulp*<sup>14</sup>. The Court held that under Article 81 EC-Treaty jurisdiction exists over non-European firms (in this case Scandinavian bleached sulfate woodpulp producers) outside the EC, if they "implement" an anticompetitive agreement reached outside the Union by selling their products to purchasers inside the Union. In that case the Commission found that shipments to the EC affected by the restrictive agreements and practices amounted to about two-thirds of total shipments of the product into the EC and some 60% of EC consumption. The concept of "implementation" was admittedly hard to work with and raised some doubts as to whether, in borderline cases and in the absence of any kind of marketing organization within the EC (branch, agency or subsidiary), foreign cartel members relying solely on direct sales to EC customers would be considered falling within Community jurisdiction<sup>15</sup>.

## 3. The "effects doctrine"

Finally, the "effects doctrine" was embraced by the Court of First Instance in *Gencor*<sup>16</sup>. The CFI stated that the application of the EC Merger Control Regulation

"is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."

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<sup>12</sup> *Viho v Commission*, ECJ judgment of 24.10.1996, [1996] ECR I-5457, at para. 16.

<sup>13</sup> See Ritter/Braun/Rawlinson, *op.cit.*, at pp. 41-44.

<sup>14</sup> Joined Cases 89, 104, 114, 116, 117 & 125-129/85, *A. Ahlström Osakeyhtiö and Others v Commission (Woodpulp-I)*, [1988] ECR 5193, 5242-5243, at paras. 11-18.

<sup>15</sup> Goyder, *op.cit.*, at 551, who also mentions the potentially different results of this doctrine (compared to the "effects" doctrine) as regards collective boycott cases.

<sup>16</sup> Case T-102/96 *Gencor Ltd v Commission* [1999] 4 CMLR 971, at paras. 90-92.

The Court went on to verify<sup>17</sup> whether the criteria of "immediate", "substantial" and "foreseeable" effect were satisfied in the particular case. It must be noted that the Court did not overrule the "implementation" doctrine. In particular it held<sup>18</sup> that the applicant could not

"by reference to the judgment in Woodpulp, rely on the criterion as to the implementation of an agreement to support its interpretation of the territorial scope of the Regulation. Far from supporting the applicant's view, that criterion for assessing the link between an agreement and Community territory in fact precludes it. According to Woodpulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lohmro carried out sales in the Community before the concentration and would have continued to do so after".

Despite the fact that this judgment dealt only with the question of jurisdiction under the EC merger control rules on one hand, and, on the other, that this was a CFI judgment and not one by the ECJ as in Woodpulp, it is submitted that the effects doctrine is equally applicable to agreements and conduct qualified as horizontal cartels: the jurisdictional questions are identical and the wording of the provision can not cast doubts on the Commission's jurisdiction to apply Article 81§1 to international cartels producing effects on the common market<sup>19</sup>.

## **B. Asserting the jurisdiction in practice: the enforcement record**

A different question is how often has the Commission indeed opened proceedings to investigate international cartels and what means it has to uncover evidence of sufficiently probative value to be used in a decision imposing fines. Having most probably in mind international cartels such as the one in lysine, the ICPAC Report<sup>20</sup> states that the "EC has a very low incidence of prosecuting cartels outside its borders".

Indeed *Lysine*<sup>21</sup> was probably the first ever case where the Commission has imposed fines totaling nearly € 110 million on a cartel composed entirely of non-EC firms being active in the common market. The cartel members - Archer Daniels Midland Co (USA), Ajinomoto Co (Japan), Cheil (Korea), Kyowa Hakko (Japan) and Sewon (Korea) fixed lysine<sup>22</sup> prices and sales quotas world-wide (and in the European Economic Area - "EEA") and operated an information exchange scheme in order to underpin the quotas from July 1990 to June 1995.

It should be noted that there have been other cartel cases brought by the Commission which involved mixed packs of EC and non-EC firms being active in the common market and which affected not only the EC markets but also foreign and international markets. The combination of two factors - the tendency to focus on the EC subsidiaries of foreign parents on one hand and to consider mainly the effects on the common market on the other, mostly in order to remain firmly within the jurisdictional ambit of Article 81§1, has placed the international aspects of such cartels somewhat in the background.

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<sup>17</sup> *ibid.*, at paras. 93-100.

<sup>18</sup> *ibid.*, at para. 87.

<sup>19</sup> Faull & Nikpay, *op.cit.*, at paras. 2.117-2.118, in particular note 163.

<sup>20</sup> ICPAC Final Report 2000, available at [www.usdoj.gov/atr/icpac/icpac.htm](http://www.usdoj.gov/atr/icpac/icpac.htm), at p. 189.

<sup>21</sup> Commission Decision on 7.6.2000, not reported yet; see G. de Bronett, *Commission fines ADM, Ajinomoto and others in lysine cartel*, Competition Policy Newsletter n° 3/2000 at pp. 39-40, available at [europa.eu.int/comm/competition/publications/cpn](http://europa.eu.int/comm/competition/publications/cpn)

<sup>22</sup> An amino-acid used in animal foodstuffs for nutritional purposes.

In *Seamless Steel Tubes*<sup>23</sup> the Commission imposed fines totaling € 99 million on eight producers of steel tubes: four from the EC - British Steel Limited (United Kingdom), Dalmine S.p.A. (Italy), Mannesmannröhren-Werke A.G. (Germany), Vallourec S.A (France) -, and four from Japan - Kawasaki Steel Corporation, NKK Corporation, Nippon Steel Corporation and Sumitomo Metal Industries Ltd. The producers colluded from 1990 to 1995<sup>24</sup> over the observance of their respective domestic markets for certain tubes used in oil and gas prospecting and transportation. However, it is important to note that other parts of the cartel agreement, which related to certain third markets, were not covered by the decision, since the Commission could not provide sufficient evidence of a restrictive effect within the EC.

In *Pre-insulated pipes*<sup>25</sup> the Commission has fined ten companies a total of € 92 million for running a secret market-sharing, price-fixing and bid-rigging cartel in pipes used for district heating systems and for attempting to eliminate a competitor. A non-EC firm, ABB (Switzerland), received the biggest fine (€ 70 million) because the violation represented corporate policy at the highest level; one of its executive vice-presidents in Zurich master-minded and directed the cartel. Apart from ABB (largest producer with 40% of the EC market), the cartel included a.o. Løgstør, EC's n° 2 producer, Tarco and Dansk Rør (Denmark), Henss/Isoplus (Germany), KWH (Finland), Brugg (Germany), Sigma (Italy) and Ke-Kelit (Austria).

### **C. Obtaining evidence located abroad using its own investigation powers**

While the number of "detected international cartels" is undoubtedly on the increase as is the level of fines overall, the Commission has limited means at its disposal in order to obtain, on its own, evidence located outside its borders. Under international law, the Commission is not empowered to conduct investigations outside the bounds of its territorial competence, if they would impinge upon the national sovereignty of the foreign country in whose territory it is purporting to act<sup>26</sup>. Accordingly, "on-the-spot" inspections of firms based in third countries are out of the question<sup>27</sup>.

Apart from complaints/evidence submitted by victims of the cartel and information available in the public domain, the Commission has three main instruments enabling it to collect such information :

#### **1. Requests for Information**

Article 11 of Council Regulation 17/62<sup>28</sup> enables the Commission to address requests for information "throughout the Common Market". When the information regarding the activities of a non-EC firm is available within the Community, that is in the premises of its European sales office, branch or wholly owned or controlled subsidiary, or even in the premises of a third European company (for instance a supplier or a customer), the Commission can compel its production<sup>29</sup> under Article 11, provided that the Commission has subject-matter jurisdiction over the specific cartel case.

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<sup>23</sup> Commission Decision on 8.12.1999, not yet reported, see Commission Press Release n° IP/99/957 of 8.12.99.

<sup>24</sup> 1994 for British Steel.

<sup>25</sup> Commission Decision of 21.10.1998, [1999] OJ L 24/1 of 30.01.1999; see also Commission Press Release n° IP/98/917 of 21.10.98.

<sup>26</sup> *Dealing with the Commission*, Handbook 1997, at para. 3.1, available at [europa.eu.int/comm/competition/publications/dealen1\\_en.pdf](http://europa.eu.int/comm/competition/publications/dealen1_en.pdf)

<sup>27</sup> At least without the authorisation of the state concerned, see M.Guerrin and G.Kiriazis, *Cartels: Proof and Procedural Issues*, Fordham Int'l LJ, Vol. 16, 1992-1993, p. 266, at p. 318.

<sup>28</sup> [1959-62] OJ Special Edition, p. 87.

<sup>29</sup> Commission Decision of 25.6.75, *CSV (discovery)*, [1976] OJ L 192/27.

But what if the information is physically located outside the EC? Is the Commission in a position to exercise its enforcement jurisdiction by serving the request for information within the EC to a subsidiary or a company belonging to the non-EC parent firm or group involved in the cartel? This issue is still debated. Some commentators deny the existence of enforcement jurisdiction in such a case, arguing that it would constitute an assertion of extraterritorial enforcement jurisdiction violating a 3<sup>rd</sup> country's sovereignty<sup>30</sup>.

It would seem however, that it is possible for the Commission to serve Article 11 letters or orders in this manner. Such a service would fulfill the basic requirement that the request "arrives in due course within the control of the addressee"<sup>31</sup> and, hence, the request for information would become effective as soon as it reaches the sales office or subsidiary. As mentioned in para. A.1 above, for the purposes of enforcing competition rules the Commission will retain as subject of the law the entire economic entity (the "Group") within the meaning of the "intra-enterprise" doctrine. But since for the purposes of serving or enforcing a decision, and for practical reasons, the Commission must address itself to legal persons, it may do so at whichever level of the corporate hierarchy it considers appropriate. It may also serve an act to more than one member of the Group, if this appears advisable in order to ensure enforcement.

Such was the case in *Commercial Solvents*<sup>32</sup> where a decision was addressed to both the parent (the American company CSC) and the subsidiary (the Italian company Ist.C.I.). The same would apply not only as regards enforcement of the substantive rules but also of procedural rules. For instance, as regards the initiation of proceedings, in *Geigy*<sup>33</sup> the Commission sent its Statement of Objections to Geigy's Swiss offices. The SO was returned by the firm, under instruction from the Swiss authorities, arguing that the act was served in violation of internal and public international law. The ECJ rejected the argument that service without the consent of the foreign State is invalid and vitiates the EC proceedings, and stated that such service is valid provided that the non-EC firm has received the statement in circumstances which enabled it to take cognizance of the objections held against it. Further, in *United Brands*<sup>34</sup> the Court considered that the Commission should have ordered UBC - viewed as a corporate group - to produce information relating to its production costs. The subsidiary of UBC seated in the Netherlands could have been required to produce the information needed (UBC's costs in Latin America) notwithstanding the fact that this information was located outside the Community<sup>35</sup>.

Referring to the above case law, Kerse<sup>36</sup> submits that one should apply here the test of ownership or control over the information rather than that of the physical location of the documents concerned. According to Kerse a firm "which has its domicile, resides or carries on business within the Community must accept the responsibilities as well as the benefits from doing so and should not be able to avoid those responsibilities, for example by transferring or storing information outside the Community, even if this is legitimate and practicable in the day to day conduct of business".

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<sup>30</sup> See M. Slater, *L'application extraterritoriale du droit communautaire*, Cahiers de Droit Européen, 1986, p. 309, at pp. 312 and 315-319; P. Torremans, *Extraterritorial application of EC and US competition laws*, ELR, 1996, p. 280, at p. 285.

<sup>31</sup> Case 8/56, *ALMA v High Authority*, [1957] ECR 95, at p. 99.

<sup>32</sup> Cases 6 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents Corp. v Commission*, [1974] ECR 223, at paras. 42-50; Kerse, *op.cit.* at para. 8.09.

<sup>33</sup> Case 52/62, *Geigy v EC Commission*, [1972] ECR 787; Butterworths, *op.cit.*, at para. XII.87.

<sup>34</sup> Case 27/76, *United Brands v Commission*, [1978] ECR 207, at para. 256.

<sup>35</sup> See N.Green, *Evidence and proof in EC competition cases*, in *Procedure and Enforcement in EC and US Competition Law*, ed. by P.J.Slot and A.McDonnell, London, 1993, p. 125, at p. 139.

<sup>36</sup> *Op.cit.* at paras. 3.12-3.14 and 8.09 with inferences from *Commercial Solvents*, [1974] ECR 223, at paras. 42-50 and *United Brands*, [1978] ECR 207, at para. 256.

Information technology obviously enables firms to store information in electronic form on remote servers and access it via terminals anywhere in the world.

On the contrary, where a firm has no physical presence whatsoever within the Community, the Commission can not use this instrument in order to obtain information directly. In such cases, the Commission can - and does - send out informal letters requesting information without reference to Article 11 at all. Apart from these letters, the Commission sends out requests for information referring to Article 11(1) of Reg. 17, but without any reference to the penalties (Article 11(3) and 11(5), 15(1)(b) and 16(1)(c) of Reg. 17) that are usually applicable when a firm totally fails to comply with the request or supplies incomplete, false or misleading information. In fact the Commission cannot impose sanctions in such cases<sup>37</sup>.

## 2. Voluntary Submissions under the Leniency Scheme

The introduction of the leniency scheme in July 1996<sup>38</sup> has undoubtedly been of considerable help in obtaining information and evidence that would have been impossible to obtain by other means in a number of international cartel cases.

The *Lysine* case started in July 1996 - shortly before the US DoJ charged several cartel participants with engaging in this illegal conspiracy<sup>39</sup> and after the publication of the Leniency Notice - when Ajinomoto (Japan) informed the Commission about the existence of the cartel covering the period from ADM's entry to the EC market (July 1992) up to June 1995. Since Ajinomoto was a ring-leader and has failed to provide evidence regarding an earlier phase of the cartel, it was only granted 50% reduction under the Notice. The same 50% reduction was granted to Sewon (Korea) for the evidence it provided on the earlier "Asian" cartel between Ajinomoto, Sewon and Kyowa (Japan) dating back to July 1990 and for supplementing the evidence on the later period of the cartel. Smaller reductions (30%) were given to Cheil (Korea) and Kyowa for providing additional evidence and to ADM (10%) for not contesting the facts in the Statement of Objections.

In *Pre-insulated Pipes* the fines were reduced for Løgstør, Tarco and KWH that provided cartel documents to the Commission which had escaped the surprise investigations in June 1995. ABB expressed its wish to co-operate and supplied a full historical account of the cartel's activities to the Commission. Further, in *Seamless Steel Tubes* the fines on Vallourec and Dalmine were reduced, since the firms cooperated with the Commission in the establishment of the facts. Finally, in *FETTCSA* the Commission received some cooperation from the parties which, although limited, justified a reduction in fines in the order of 10%.

A more complete evaluation of the leniency scheme will be possible after the closure of a number of further international cartel cases which are still pending. However, already at this stage two observations can be made :

- the scheme has influenced considerably the defense strategy of the firms involved. Cartel members are now subject to a "domino effect"<sup>40</sup> from the moment the first firm applies for leniency (in the EC) or immunity (in the US). The previously observed "collective" defense, whereby the companies presented the Commission with a united front denying all accusations of

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<sup>37</sup> *Dealing with the Commission*, *op.cit.* at para 3.1; Ortiz Blanco, *EC Competition Procedure*, 1996, at p. 103-104 and 111; Ritter/Braun/Rawlinson, *op.cit.*, at p. 835, note 257.

<sup>38</sup> *Notice on the non-imposition or reduction of fines in cartel cases*, [1996] OJ C 207/4.

<sup>39</sup> De Bronett, *op.cit.*.

<sup>40</sup> A. Weitbrecht, *Hard Core Cartels: between stricter fining guidelines and leniency programs*, Global Counsel, Competition Handbook 2000, at p. 47.

illegal activity, is gradually losing ground to a more individualized defense strategy, whereby each company calculates its own exposure and adapts its defense line accordingly;

- in view of the considerable increase of fines in the US<sup>41</sup> and the successful application of the corporate immunity scheme, firms are acutely aware that at the moment the first firm contacts an authority in the US or the EC to obtain immunity or leniency, the clock starts ticking and there is only limited time to cooperate with maximum gain. Latecomers risk picking up the bill.

It is obvious also that once a firm has started cooperating with both jurisdictions simultaneously, the conditions are favorable for it to provide on a voluntary basis the relevant evidence to each jurisdiction.

## **D. Obtaining evidence located abroad using cooperation tools**

### **1. Exchanges of Evidence under Bilateral Agreements with 3<sup>rd</sup> Countries**

One of the reasons for entering into cooperation agreements with other countries is indeed in order to obtain from their authorities evidence located in their territory that is difficult or legally impossible to obtain otherwise. The EC has entered into such agreements with the US and Canada. A similar agreement has been negotiated with Japan and is currently in the process of being adopted. The EC/US Agreements provide most of the experience the Commission has gathered in the past on this aspect of bilateral cooperation in cartel cases. The 1991 and 1998 EC/US Agreements envisage the exchange of information under a number of provisions and interpretative letters.

#### *a) The 1991 EC/US Agreement*

Exchanges of information under the Agreement (Article III) may take place when officials from the respective competition authorities (DG Competition, US DoJ Antitrust Division, FTC) meet. This happens in regular internals and on an ad hoc basis when needed. In such meetings they discuss their current enforcement activities, their priorities and their investigations in various economic sectors of common interest. In principle, each agency is expected to provide the other with any significant information that comes to its attention about cartel activities that it considers relevant to ongoing enforcement activities of the other agency, or that may warrant the initiation of investigations by the other agency. There is also a possibility to make specific requests to the other agency for information that is relevant to an ongoing or envisaged enforcement activity.

Further, as regards in particular the timing of information exchanges in non-merger cases, Article II.4 (Notifications) specifies that they shall take place "in any event" far enough in advance of the issuance of a statement of objections in the case of the Commission, or a complaint or indictment in the case of the DoJ/FTC. At the final states of the investigation the same is provided in advance of the adoption of a decision or settlement of the case by the Commission, or the entry of a consent decree by the DoJ/FTC. Such advance notifications are intended to enable the other Party's views to be taken into account. In this respect Article II.6 states that notifications shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

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<sup>41</sup> Graphite Electrodes case – US\$ 300 million, see the US-Doj press release on 10.05.01 at [http://www.usdoj.gov/atr/public/press\\_releases/2001/8186.htm](http://www.usdoj.gov/atr/public/press_releases/2001/8186.htm); and the Vitamin cases – more than US\$ 900 million see the US-Doj press releases at [http://www.usdoj.gov/atr/public/press\\_releases/1999/3659.htm](http://www.usdoj.gov/atr/public/press_releases/1999/3659.htm); [/1999/3726.htm](http://www.usdoj.gov/atr/public/press_releases/1999/3726.htm); [/2000/4684.htm](http://www.usdoj.gov/atr/public/press_releases/2000/4684.htm); [/2000/4494.htm](http://www.usdoj.gov/atr/public/press_releases/2000/4494.htm).



All this sounds reasonable and adequate. Indeed in merger cases where "waivers" of confidentiality are commonplace this agreement has provided for a smooth cooperation between the EC and the US competition authorities. Why then is EU/US cooperation in cartel cases described as a "wedding, where the bride didn't show up"<sup>42</sup>?

This is mainly due to the fact that the above "potential" exchanges of information are in reality severely limited by the confidentiality rules on each side. On one hand Article IX (Existing law) makes clear that the Agreement can not be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws of the Parties (including obviously the rules on the protection, disclosure and use of confidential information). On the other, Article VIII.1 of the Agreement (Confidentiality of information) enables each side to refuse to provide information to the other side, if disclosure is prohibited by its laws or would be incompatible with its important interests. Finally, under Article VIII.2 the two sides agree to maintain, to the fullest extent possible, the confidentiality of any information provided to them in confidence under the Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party, when such disclosure is not authorized by the Party that supplied the information.

For an antitrust agency it would rarely be necessary to object to sharing valuable information with its counterparts because it would be incompatible with its important interests. In general, antitrust agencies have a mutual interest in eliminating cartels and abuses of dominance affecting their respective markets. The nationality of firms involved is irrelevant. Further, useful evidence in cartel cases rarely involves information such as national security, military or trade secrets. Even business secrets are mostly absent from the corpus of evidence submitted in the prosecution of cartel cases. The transcripts of video and audio tapes from the US lysine investigation presented<sup>43</sup> in the OECD CLP Committee in May 1999 provide a demonstration of evidentiary materials that do not contain any business or trade secrets. What the transcripts contain (and this is all enforcement agencies need in a cartel case) are jovial conversations between competitors about fixing the price, sharing the market and "*en passant*" making illegal profits to the detriment of consumers and competitors.

#### *b) The 1998 EC/US Agreement*

The same possibilities are open under the 1998 EC/US Agreement on positive comity. This Agreement supplements and reinforces the previous one, but has to be interpreted consistently with the 1991 Agreement, which remains fully in force (Article VI).

In particular, under Article IV.2 ©(iii), the agency receiving a "positive comity" request, agrees that in conducting its own enforcement activities, it will inform the agency that made the request of the status of its activities and intentions, and where appropriate provide it with relevant confidential information, if consent has been obtained from the source concerned.

The use and disclosure of such information is governed by Article V (Confidentiality and Use of Information). This clause provides that the information (including confidential information) shared between the agencies involved shall be used only for the purpose of implementing the Agreement. It adds though that the competition authorities that provided the information may consent to another use, on condition that where confidential information has been provided – pursuant to Article IV.2 © (iii) and on the basis of a waiver from the source concerned -, that source also agrees to the other use.

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<sup>42</sup> S. Weber Waller, *Anticartel Cooperation*, in *Antitrust Goes Global - What future for transatlantic cooperation*, Evenett/Lehmann/Steil editors, 2000, at pp. 98-116, mentioning that there has been next to nothing that either the US or the EC can point to by way of significant cooperation in cartel cases.

<sup>43</sup> G.R. Spratling, *International Cartel Enforcement*, OECD CLP Meeting, 7.5.99, Paris.

Article V states finally that the disclosure of such information shall be governed by the provisions of Article VIII of the 1991 Agreement and the exchange of interpretative letters dated May 31 and July 31, 1995.

## 2. The EC rules on confidentiality in the area of antitrust enforcement

Article 287 (ex Article 214) of the EC Treaty requires "the members of the institutions of the Community, the members of committees, and the officials and other servants of the Community, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components".

Article 20 of Reg. 17 deals with this obligation of professional secrecy in the area of antitrust enforcement and lays down rules for the use and disclosure of information. The scope of Article 20 is broad. Pursuant to para. 1 information acquired as a result of the application of Arts. 11 (requests for information), 12 (inquiries into sectors of the economy), 13 (investigations by the authorities of Member States) and 14 (on the spot investigations) can only be used for the purpose of the relevant request or investigation<sup>44</sup>. The same limitation applies to the information contained in the applications and notifications to the Commission provided for in Articles 2 (application in view of obtaining negative clearance), 4 (notification in view of obtaining an exemption) and 5 (notification of existing agreements) of Reg. 17<sup>45</sup>. Para. 2 of Art. 20 states that the Commission and the competent authorities of the Member States, their officials and other servants "shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy".

What is important to the Commission as an antitrust enforcement agency is to provide adequate protection for the business secrets and other confidential information provided by companies, physical persons and public authorities involved or cooperating in proceedings under EC competition rules. Failing to provide adequate protection not only exposes it to claims for damages<sup>46</sup> but can render firms under its jurisdiction hesitant to provide it with the information it needs to carry out its tasks. According to the Commission Notice on Access to the File<sup>47</sup> information in the case file, which falls into one of the following three categories, is not to be disclosed ("non-communicable") unless they provide evidence proving an alleged infringement ("inculpatory documents") or if they contain information that invalidates or rebuts the Commission's reasoning or tends to exonerate a firm suspected of infringing the rules ("exculpatory documents").

### *a) Business secrets*

The terms "business secrets" describes information that firms keep secret in order to prevent third parties from obtaining an insight on their essential interests and on the operation or development of their business. They include methods of assessing manufacturing and distribution costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and

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<sup>44</sup> Case C-67/91, *Dirección General de Defensa de la Competencia (DGDC) v Asociación Española de Banca Privada (AEB) and others ("Spanish Banks")*, [1992] ECR I-4785, at paras 44-55; Ortiz Blanco, *op.cit.*, at p. 159.

<sup>45</sup> *Ibid*, "Spanish Banks", at para. 55.

<sup>46</sup> Case 145/83, *Stanley Adams v. Commission*, [1985] ECR 3539.

<sup>47</sup> *Commission Notice on the Internal Rules of Procedure for Processing Requests for Access to the File ("Notice on Access to File")*, [1997] OJ C 23/3: this notice concerns addressees of Commission decisions and does not deal with complainants or other 3rd parties firms; on the access of 3rd parties to Commission files see the *Commission Decision on Public Access to Commission Documents*, [1994] OJ L 46/58 as amended by Decision 96/567/ECSC, Euratom, [1996] OJ L 247/45.

distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organization of the firm. The criteria for determining what constitutes a business secret have not as yet been defined in full: the case law of the European Courts<sup>48</sup>, the criteria used in antidumping procedures<sup>49</sup>, and the decisions on the subject by the Hearing Officer<sup>50</sup> provide useful guidance. Business secrets will no longer be protected when they are known outside the firm to which they relate or if, owing to the passage of time or for any other reason, they are no longer commercially important.

#### *b) Other confidential documents*

This category includes information making it possible to identify the suppliers of the information who wish to remain anonymous to the other parties, and certain types of information communicated to the Commission on condition that confidentiality is observed, such as documents obtained during an investigation which form part of a firm's property and are the subject of a nondisclosure request (such as for instance a market study commissioned by the firm and forming part of its property). Military secrets also belong in this category.

#### *c) Internal documents*

Internal documents are, by their nature, not the sort of evidence on which the Commission will rely in its assessment of a case. The following, for example, will be deemed to be internal documents: requests for instructions made to, and instructions received from, hierarchical superiors on the treatment of cases, consultations with other Commission departments on a case, drafts and other working documents, as well as individual technical assistance contracts (languages, computing, etc.) relating to a specific aspect of a case.

Correspondence with and documents obtained from other public authorities concerning a case are also considered "internal documents" and their confidentiality is protected<sup>51</sup>. This rule applies not only to documents from competition authorities, but also to those from other public authorities, Member States or non-member countries. Any exception to the principle of nondisclosure of these documents must be firmly justified on the grounds of safeguarding the rights of the defence. Letters simply expressing interest, whether from a public authority of a Member State or of a third country, are non-communicable in principle to the defence. A distinction is made, however, between the opinions or comments expressed by other public authorities, which are afforded absolute protection, and any specific documents they may have supplied, which are not always covered by the exception. In the latter case, the Commission will proceed with circumspection, especially if the documents are from a nonmember country, as it is considered of prime importance for the development of international cooperation in the application of the competition rules, to safeguard the relationship of trust between the Commission and nonmember countries. When the EC has entered into an agreement governing the confidentiality of the information exchanged, as for instance Article VIII.2 of the 1991 EC/US Agreement, which stipulates that exchanges of information and information received under the Agreement must be protected "to the fullest extent possible", the Commission will consider that the relevant provisions of such agreements lay down a point of international law which must be complied with. In the absence of an agreement, the same principle of guaranteed confidentiality should be observed.

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<sup>48</sup> Case 53/85, *Akzo*, [1986] ECR 1965, at paras. 24-28; Cases 142 and 156/84, *BAT and Reynolds v Commission*, [1987] ECR 4487, at para. 21.

<sup>49</sup> Order of the Court of 30.3.1982 in Case 236/81, *Celanese v Commission and Council*, [1982] ECR 1183.

<sup>50</sup> Pursuant to Article 5(4) of the *Commission Decision on the Terms of Reference of Hearing Officers*, 12.12.1995, [1994] OJ L 330/67; see also Commission Regulation n° 2842/98 on Hearing Procedure, [1998] OJ L 354/18.

<sup>51</sup> *Notice on Access to File*, 1997, *ibid*, at para. II.A.2c and footnote 19.

### 3. Interpretation and application of the EC/US Agreements in practice

In order to obtain the approval of the Council to conclude the first EC/US Agreement in 1995, the Commission had to provide it with a Statement<sup>52</sup> regarding a.o. the exchanges of confidential information under the Agreement. The Statement introduced a distinction between two types of situations where confidential information could be exchanged.

#### *a) On the basis of different types of "waivers" of confidentiality*

According to the Statement, the first category refers to information,

"acquired by the Commission and the authorities of the Member States in the course of an investigation and which is of the kind covered by professional secrecy [...] subject to Article 20 of Council Regulation 17/62 and to similar provisions in the equivalent implementing Regulations. Essentially, this refers to information which is not in the public domain and which may be discovered during the course of an investigation or which may be voluntarily notified to the Commission under Regulation 17/62 or in reply to a request for information. This information also includes business or trade secrets. Such information is not to be disclosed to the US antitrust authorities save with the express agreement of the source concerned".

This interpretative statement introduced the use of "waivers". In view of the wide scope of Art. 20 of Reg. 17/62 it rendered any transfer of information contained in the Commission's file on a specific cartel case subject to the consent of the source of the information granted in advance of the transfer. Such waivers are understandably more easily granted in merger cases than in cartel cases. Further, the formulation used in the Statement ("the source concerned") gives rise to a number of questions regarding the exact scope of the Commission's obligation and the proper way to obtain discharge. Who is exactly "the source concerned": the firm ("company A") that supplied the information to the Commission in response to an investigative measure or the legal owner ("company B") of the information? If the owner of the information is a third firm, is a "waiver" granted by company A sufficient to discharge the Commission from its confidentiality obligations? Or should the Commission also request a waiver from company B ?

There is limited practical experience with these matters as regards cooperation in cartel cases where the use of waivers has been rare and unreported. In principle a waiver should be requested from company A unless it is evident from the document itself that the waiver must be requested from company B (for instance because company A has obtained it in an illegal manner, or when company B has given it to company A expressly prohibiting any further disclosure to third parties). When providing a waiver, company A should draw the Commission's attention to authorisations that should be obtained from other companies regarding the disclosure of information it has submitted to the Commission or information found in its premises during an inspection.

A further possibility open through the use of waivers is the one based upon Article IV.1 of the 1991 Agreement (Cooperation and coordination in enforcement activities) which states that the agencies will render assistance to each other in their enforcement activities. This can take place in cases where both Parties pursue parallel enforcement activities with regard to related situations and they have a mutual interest to coordinate these activities. Assistance under Article IV may for instance relate to the discovery of evidence located abroad. In providing assistance to each other in this respect, under Article IV.2(b), the cooperating agencies take account a.o. of the relative ability of each competition authority to obtain information necessary to conduct the enforcement activities.

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<sup>52</sup> Reprinted in the *3rd Commission Report to the Council and the European Parliament on the Application of the 1991 EC/US Agreement during 1997*, Com(98) 510 final, 11.5.1998, at para. 3; available at [europa.eu.int/comm/competition/international/rapport0598\\_en.pdf](http://europa.eu.int/comm/competition/international/rapport0598_en.pdf)

In other terms, if an agency for whatever reason is unable to use its own discovery tools to obtain a specific information located in the territory of the other agency, it can request its counterpart to "assist" it by using its own investigation powers in order to acquire the information in question and incorporate it in its case file. This is the first step of the operation and can be carried out if the following conditions are satisfied:

- a "parallel" case concerning the same anticompetitive conduct (e.g. an international cartel) must be open and actively investigated by both sides, and
- the information in question must also be useful to the investigation carried out by the requested agency.

As soon as the requested agency has obtained the relevant information, it would request a waiver from the company concerned enabling to provide this information to the requesting agency. This waiver may set conditions relating to the disclosure and use of the information and the practical manner in which it will be transferred. Once the waive is obtained, the information in question would be communicated to the requesting agency according to the modalities specified in the waiver.

Finally, it is possible to obtain information through direct participation in each other's proceedings<sup>53</sup>. The Commission made on 31.3.1999 certain administrative arrangements with the US DoJ and the FTC concerning their mutual attendance at hearings held in certain stages of the procedure in individual cases<sup>54</sup>. These arrangements were concluded in the framework of the 1991 EC/US Agreements and in particular the provisions regarding coordination of enforcement activities (Article IV). They contribute to improving mutual understanding by the agencies of their respective procedures, as well as to enhancing coordination, cooperation and avoidance of conflicts in appropriate cases of mutual interest.

The arrangements are bilateral and reciprocal in nature. They provide for the possibility of the US competition authorities attending as observers oral hearings in competition proceedings before the Commission; they provide, in like manner, for the possibility of the Commission attending equivalent meetings (so-called "pitch meetings") between the US competition authorities and the parties to enforcement proceedings involving the application of US antitrust law. The arrangements provide that a request for attendance at a hearing or meeting may be granted in appropriate cases, subject to confirmation of satisfactory assurances or arrangements regarding confidentiality and the use of information. Attendance is possible only with the express consent of the persons concerned by the enforcement proceedings in either jurisdiction, and they do not in any way limit the rights enjoyed by those persons. The new administrative arrangements were invoked for the first time in December 1999, when representatives of the US FTC attended the Commission's oral hearing in the BOC/Air Liquide merger case.

#### *b) Sharing the "work product" of the agencies*

A second category of information identified in the Statement concerned information

"which relates to the conduct of an investigation or the possible conduct of an investigation and which is not subject to Article 20 of Regulation 17/62 or to similar provisions in the equivalent implementing Regulations. Such information includes the fact of the investigation taking place, the subject-matter of the investigation (for

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<sup>53</sup> 5th Commission Report to the Council and the European Parliament on the Application of the 1991 EC/US Agreement during 1999, COM(2000) 618 final, 04.10.2000, at para. 3; available on-line at [europa.eu.int/eur-lex/en/com/rpt/2000/com2000\\_0618en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0618en01.pdf)

<sup>54</sup> Bulletin EU 3-1999, Competition (18/43).

example, an agreement on prices or sharing out of markets or abuse of a dominant position, such as tied selling or discriminatory prices), the identity of the undertaking being investigated and the steps which it is proposed to take in the course of the investigation. This information is kept confidential to ensure the proper handling of the investigation. However, it may be communicated to the US competition authorities as these are obliged to maintain the confidentiality of the information under the terms of Articles VIII and IX of the Agreement and by the exchange of letters between the parties".

This information refers notably to what is called the "work product" of a competition enforcement agency. It covers the definition of the relevant product and geographic market, the agency's views on the nature of the anti-competitive behaviour, as well as general non-public information relating to the conduct of the investigation, the possible targets and the timing of dawn raids<sup>55</sup>. Despite the fact that under this heading a certain amount of information can be shared with US or Canadian competition agencies, and can often be of some use in the coordination of the initial stages of an investigation, it is not always easy to draw the line between information falling under the 1<sup>st</sup> (which necessitates a waiver in order to be shared) or the 2<sup>nd</sup> category (which may be shared without a waiver). It must also be noted that it is easier to share this category of information during the initial stages of an investigation, that is in the EC before the first wave of dawn raids and in the US before a Grand Jury is constituted to discover the evidence. After such procedural events it becomes increasingly difficult to share any confidential information without obtaining waivers since the confidentiality rules covering evidence obtained by using formal investigation powers (Art. 20) on the EC side, as well as the rules covering Grand Jury investigations on the US side are very strict.

## **Conclusions**

It is obvious that, as regards cooperation in non-merger cases and in particular the discovery and sharing of information in international cartel cases, the Commission is constrained by the limitations on the exercise of extraterritorial enforcement jurisdiction and by the operation of confidentiality rules in both jurisdictions.

The current procedural framework and the terms of the existing cooperation instruments make it, however, possible under the existing bilateral cooperation agreements to go some way down this path without breaking any rules or harming legitimate rights of firms involved in this type of cases. To go any further it would be necessary either to amend the substantive and procedural rules on both sides or to enter into a 2<sup>nd</sup> Generation cooperation agreement, for instance a so-called "Mutual Antitrust Enforcement Assistance Treaty" within the framework of the US International Antitrust Enforcement Assistance Act (IAEAA<sup>56</sup>).

The first option appears more complicated than the second. As far as the EC is concerned, the Commission has already put on the table detailed proposals<sup>57</sup> towards a reform of its procedural framework. These proposals do not include provisions in the area of cooperation and information exchanges with 3<sup>rd</sup> countries in cartel cases. The second option appears in theory possible but, in reality, is saddled with a number of legal and practical difficulties<sup>58</sup>.

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<sup>55</sup> See Wakil/Clifford/Johnson, *Canada-EU Cooperation Agreement*, in Int'l Antitrust Committee Newsletter, Autumn - Winter 1998, at para. 7, available on line at [www.abanet.org/antitrust/committees/international/win98canada.html](http://www.abanet.org/antitrust/committees/international/win98canada.html)

<sup>56</sup> 15 U.S.C. § 6201 et seq. (Supp. 1996).

<sup>57</sup> Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty - COM(2000) 582 - 27.09.2000.

<sup>58</sup> A separate article would be necessary to discuss these issues in detail.