

# International Agreements Regarding Cooperation in the Field of Competition: The New Strategy of the European Commission

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## Legal Context

Globalisation of the economy calls for more international cooperation in the area of competition policy. This need for more international cooperation and for greater convergence in the competition area is stressed in the 'Global Europe' Communication,<sup>1</sup> in which the European Commission announced its intention to include stronger provisions on competition in the new generation of Free Trade Agreements. Cooperation with other competition agencies can be expected to bring significant benefits for the EU: direct benefits in terms of more effective/efficient enforcement of EU competition rules, but also indirect benefits, such as fair treatment of EU companies in non-EU markets, and the creation of a level-playing field between EU companies and foreign competitors.

The initial response of competition agencies to globalisation was to apply their laws unilaterally to business practices that originated abroad, but which had effects within their jurisdiction. The so-called 'effects doctrine', however, had limits, notably the confinement of the coercive power of a competition authority to the territory over which it has jurisdiction. These limitations were aggravated by the proliferation of competition regimes across the world which brought about legal uncertainty (i.e. the risk of divergent evaluations by different competition authorities) and increased costs for undertakings of complying with the competition rules of several jurisdictions.

In order to overcome these shortcomings, a large number of agreements comprising competition provisions have been concluded between the Community and third countries. They can be arranged as follows:

- Agreement on the European Economic Area;
- bilateral agreements with Candidate Countries and Western Balkan Countries;

## Key Points

- Many countries now have a system of competition control, which represents a challenge for multinational companies.
- Potential issues may be dealt with through increased cooperation between competition agencies.
- The last agreement signed by the European Commission points towards a new strategy.

- dedicated competition cooperation agreements with competition authorities (first and second generation agreements as well as so-called Memoranda of Understanding);
- competition chapters or protocols in bilateral general agreements (Free Trade Agreements, Association Agreements, Economic Partnership Agreements . . . );
- and, finally, multilateral texts (WTO Agreements, OECD Recommendations and Best Practices and UNCTAD Sets of Principles and Rules).<sup>2</sup>

These texts have mushroomed over the last decades. Some agreements are more intensively used than others. Some are fully fledged international Treaties requiring a mandate of the Council to be negotiated, some are administrative arrangements fully within the competence of the Commission. Their importance and significance is not necessarily linked to the name of the instrument (one can find Memoranda of Understanding which are fully fledged International Treaties, despite their name and vice versa), just as their extent and complexity are not necessarily linked to the importance of the relations between the EU and the coun-

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1 Global Europe: Competing in the world – A contribution to the EU's Growth and Jobs Strategy, Communication from the Commission of 4 October 2006, COM(2006) 567 final.

2 [http://ec.europa.eu/competition/international/overview/index\\_en.html](http://ec.europa.eu/competition/international/overview/index_en.html).

try(ies) concerned (one can find examples of lengthy and detailed competition chapters in agreements with partners with which trade relations are not quite as intense).

The Directorate-General for Competition of the European Commission ('DG Competition') is now adopting a more strategic approach towards international agreements tailoring the instrument to the real needs of the relationship and to facts such as the size and importance of the country's economy, the intensity of the trade and investment relationship with the country concerned and the degree of maturity of its competition regime.

### **Illustration: the Memorandum of Understanding signed with Brazil**

It is within this line of reasoning that Brazil was identified as a country with which DG Competition had an interest in cooperating more closely. Brazil is an important economy and a major trading partner for the EU. Correspondingly, the EU is Brazil's main foreign investor. Together with China and India, Brazil's economy represents 15 per cent of global trade flows. In addition, Brazil has a sophisticated and trusted competition regime in place enforced by three agencies which make up the Brazilian Competition Policy System (BCPS): the Council for Economic Defense (CADE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE).

Moreover, there is already a history of cooperation between DG Competition and the Brazilian competition authorities: DG Competition has welcomed officials of CADE for study visits and there have been successful cases of cooperation between both administrations, such as in a cartel investigation concerning the refrigeration compressor industry in February 2009 entailing inspections coordinated between the Brazilian SDE, the US Department of Justice, and the European Commission.

Given all these facts, it is no surprise that the idea of concluding a Memorandum of Understanding (MoU) between DG Competition and the authorities of the BCPS arose. Discussions on the text were fast and uncomplicated given the shared objective of both administrations. On 8 October, the MoU was signed by Commissioner Kroes, Brazilian Justice Minister Tarso Genro, and the heads of the three authorities of the BCPS. The signing ceremony took place in Brasilia on Brazil's anti-cartel day and in the presence of President Lula.

### **Main features of the Memorandum**

The purpose of the MoU is to promote cooperation and coordination between the Brazilian competition authorities and DG Competition and to increase understanding and awareness of policy approaches, legislation, and enforcement. Where both Sides are pursuing enforcement activities in the same or related matters, they will endeavour to coordinate their enforcement activities. Cooperation is subject to the Sides' respective laws in particular those protecting confidential information.

The MoU contains classic provisions on positive comity:

If a Side believes that anti-competitive activities carried out in the jurisdiction of the other Side adversely affect important interests of the first side, it may request that the other Side initiates appropriate enforcement activities.

Provisions on negative comity are built in within the section 'Avoidance of conflict':

Should one Side inform the other Side that an enforcement activity of the latter may affect the informing Side's important interests in the application of its competition law, the other Side will endeavour to provide an opportunity to exchange views and to update the informing Side on significant developments relating to those interests.

The objective is to minimize any potentially adverse effects of one Side's enforcement activities on the other Side's interests in the application of their respective competition laws.

Under the MoU, the Sides also agree that it is in their common interest to exchange experience and non-confidential information through study visits, seminars, or comparable initiatives. The Sides intend to meet periodically, as necessary, to discuss developments in competition policy, legislation, and enforcement; to exchange information on economic sectors of common interest and exchange views on competition issues of major concerns to the two Sides, including multilateral competition initiatives.

### **Conclusion**

An MoU is a classic and efficient means of articulating cooperation between competition authorities. It was not DG Competition's instrument of choice in the past. It is, however, a flexible instrument to articulate cooperation, which can be put in place in a relatively short period of time, provided the Commission remains within the limits of its competences. This is precisely the case of the MoU with the Brazilian competition authorities, which becomes DG Competition's

template for the future: an MoU is under negotiation with the Indian competition authorities and further memoranda could be envisaged if called for by the relationship with the competition authorities of third countries.

The conclusion of an MoU with the Brazilian competition authorities sends a positive signal of DG Competition's readiness to intensify its cooperation with the competition authorities of the most important economy of South America. It sets up a formal structure

to allow the relationship between both administrations to grow and deepen. The first materialization of the enhanced cooperation under this MoU is already underway: DG Competition is to participate in a conference on payment systems organised by the Brazilian Ministry of Finance under a programme to enhance policy cooperation between the EU and Brazil.

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