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Frank Montag & Daniel Colgan[1]

I. TWENTY YEARS OF EU/U.S. COOPERATION IN COMPETITION LAW: A SIGNIFICANT MILESTONE

On the twentieth anniversary of the signing of a Cooperation Agreement between the United States government and the European Commission ("EC") to enhance the effective application of their respective competition laws, it is fitting to undertake a review of the continuing significance of the relationship between the European Union and the United States in the current context of ever greater "globalization" of competition law. Indeed, much has changed in the intervening two decades, both in terms of the nature and output of the EU/U.S. relationship and in terms of the backdrop created by the ever-tightening network of antitrust agencies around the world.

The EU/U.S. cooperative relationship has not always progressed smoothly. There is an inevitable amount of divergence in substantive law and policy but, by common consensus, the positive approach taken by both agencies has been a hallmark of the global competitive order for twenty years. This paper seeks to put this relationship in a contemporary context, highlighting how the globalization of competition law adds complexity to cartel enforcement, thereby rendering the ground for companies that are under investigation more challenging.

II. INCREASING GLOBALIZATION OF COMPETITION ENFORCEMENT: THE EMERGENCE OF MORE REGIMES AND GREATER INTERACTION BETWEEN THEM

Twenty years on, the fabric of global competition law is much altered. The United States was unquestionably the antitrust pioneer[2] until the adoption of the European Community Merger Regulation in 1989.[3] European recognition of the importance of competition law and its practical enforcement ushered in a new era, formalized by the 1991 Cooperation Agreement between the U.S. government and the EC.

Both the European Union and the United States have served as benchmarks for the proliferation of competition law in other jurisdictions.[4] Agendas continue to be set in Washington D.C. and Brussels, but now also in Beijing, Brasilia, Moscow, Ottawa, Pretoria, Seoul, Tokyo, and many others. Other jurisdictions can also now be observed to be shaping global competition

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[2] By passing the Sherman Act in 1890, the United States established the world's first national competition regime.

[3] Council Regulation (EEC) No 4064/89 (OJ 1989 L 395/1, December 30, 1989).

[4] For further discussion of the influence exerted by the European Union and the United States in this area, *see* for example William E. Kovacic, *Dominance, duopoly and oligopoly: the United States and the development of global competition policy*, GLOBAL COMPETITION REV., (December 6, 2010).

policy as they tackle contemporary problems and enforcement issues of a dimension that frequently cannot be confined to national boundaries.[5]

The emergence of ever more competition regimes, to the extent that over 100 now exist with more expected imminently,[6] has fundamentally changed the fabric of competition law and enforcement in the last decade. Allied to an increased number of jurisdictions has been the growing interaction between competitive agencies. For example, the EC has recently signed memoranda of understanding with Russia and Brazil, and the European Union and the government of South Korea have recently entered into a cooperation agreement. In July 2011, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") signed a memorandum of understanding with their Chinese counterparts. Developments have also seen the creation of forums enabling engagement between competition authorities, most notably the International Competition Network or ICN. The global picture is thus one of greater interaction between competition agencies worldwide with respect to specific investigations and with respect to enforcement generally.

III. THE EU/U.S. RELATIONSHIP: KEY ROLE IN INTERNATIONAL ANTITRUST ENFORCEMENT

In this context of the globalization of competition law, this paper proposes to focus in particular on the EU/U.S. relationship as a cornerstone of, and driving force behind, global competition law enforcement. In this respect, it will attempt, using the example of the international dynamics in the enforcement of the prohibition of cartels, to sketch out the significant impact on companies involved in antitrust investigations.

The EU/U.S. relationship characterizes the spirit of international cooperation that increasingly epitomizes the global competition order. It is codified in the Cooperation Agreement between the U.S. government and the EC dated September 23, 1991[7] and the Agreement on Positive Comity Principles between the U.S. government and the European Union dated June 4, 1998.[8]

These twin agreements represent an advanced level of bilateral cooperation, and could indeed be considered a blueprint for the continued development of other bilateral or even multilateral relationships. Outside of the bilateral context, the EU and U.S. regimes represent individual exemplars to the global community and, for a variety of reasons, have been important

[5] For example, Brazil's Secretariat of Economic Law or SDE has recently announced plans to significantly increase criminal sentences imposed on individuals for cartel offences (Global Competition Review, September 26, 2011, Rosalind Donald); for the public consultation of the Brazilian Ministry of Justice on the changes, *see*: http://portal.mj.gov.br/sde/data/Pages/MJ34431BE8ITEMID0C9C698FDDE8485EB7DB43316F6FD714PTBRIE.htm.

[6] The International Competition Network reported 117 member agencies from 103 jurisdictions at its 10th annual conference in May 2011 (*The ICN's Vision for its Second Decade*, The Hague, The Netherlands, p. 1 (May 17-20, 2011)).

[7] The 1991 agreement provides for matters such as reciprocal notification where the important interests of the other party are affected; information sharing; mutual enforcement assistance and the coordination of parallel investigations; negative comity (consideration of important interests of the other party in making enforcement decisions); and positive comity (the ability to request the other party to commence enforcement proceedings where important interests are affected).

[8] The 1998 agreement re-emphasized the circumstances in which the positive comity principle applies and provided for the mechanics of positive comity in practice.

in establishing areas of convergence in global competition law. In the words of the then Chairman of the FTC, "What happens in the EU and the US does not stay there."[9]

The European Union and the United States have invested significantly in public enforcement and international cooperative projects, which provide their enforcement practices with global exposure. Their history as pioneers in the field has created a corpus of case law precedent and policy-making experience that has arguably influenced a large number of more recently established competition regimes.[10] Their influence combined has been profound; their influence individually scarcely less so.

Crucially for companies under investigation, however, the EU/U.S. relationship also demonstrates that one should not expect bilateral relationships to always result in aligned outcomes. In the context of merger control, the decisions of the two agencies in *General Electric/Honeywell*[11] (conditional clearance in the United States and prohibition in the European Union) indicated that, even after months of continuous discussions between the authorities, different conclusions can be reached on substantive issues. This situation is hardly unique, with the EU/U.S. authorities also differing notably in the *Oracle/Sun Microsystems*[12] and *Boeing/McDonnell Douglas*[13] cases.

In other areas, the *Intel* dominance investigation,[14] and the divergent conclusions reached by the EC and the FTC in respect of the anticompetitive effect of Intel's conduct, emphasized to some that a clear enforcement delineation continues to exist. This delineation was also apparent in the seminal *Microsoft* investigation,[15] in the aftermath of which the U.S. Assistant Attorney General for the DOJ's antitrust division expressed that the "standard applied to unilateral conduct by the [European Union's Court of First Instance] […] may have the unfortunate consequence of harming consumers."[16]

IV. IMPLICATIONS FOR GLOBAL CARTEL ENFORCEMENT

The increased globalization of competition enforcement described above has had dramatic consequences for the manner in which companies under investigation must conduct their defenses. While the scope of this paper makes an in-depth discussion of the various aspects impossible, points of particular interest have been briefly delineated below.

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[9] William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, June 2, 2008 at the Bates White Fifth Annual Antitrust Conference, Washington D.C.

[10] For example, the competition law regimes in China and India draw from the European Union competition law system.

[11] *General Electric/Honeywell*, Case No COMP/M.2220, July 3, 2001; DOJ press release dated July 3, 2001, *http://www.justice.gov/atr/public/press_releases/2001/8510.htm*.

[12] *Oracle/Sun Microsystems*, Case No COMP/M.5529, January 21, 2010; DOJ press release dated November 9, 2009, *http://www.justice.gov/atr/public/press_releases/2009/251782.htm*.

[13] *Boeing/McDonnell Douglas*, Case No COMP/M.877, July 30, 1997; FTC File Number 971 0051 (July 1, 1997). *See also*: *Boeing/Lockheed Martin/United Launch Alliance JV*, Case No COMP/M.3856, August 9, 2005; FTC File Number 051 0165 (October 3, 2006).

[14] *Intel*, Case No COMP/37990, May 13, 2009; FTC File Number 061 0247, (August 4, 2010). *See also*: speech by Christine Varney (*Striving for the Optimal Balance in Antitrust Enforcement: Single Firm Conduct, Antitrust Remedies, and Procedural Fairness*, October 8, 2009, p. 6) – "There still may be some level of disconnect between the U.S. and EC in our fundamental attitudes…about what it means to protect the competitive process."

[15] *Microsoft*, Case No COMP/37992, March 24, 2004.

[16] DOJ press release dated September 17, 2007, *http://www.justice.gov/atr/public/press_releases/2007/226070.htm*.

Many bilateral cooperation agreements between investigating authorities may not provide for cooperation in individual investigations or the exchange of confidential information between the authorities. Nevertheless, a certain degree of coordination between the investigating authorities (often first apparent from the coordinated, unannounced inspections at the companies' premises, but also evident during the subsequent proceedings) can frequently be observed.

Indeed, a significant implication of the globalization of competition law (e.g., EU/U.S. cooperation, the greater number of jurisdictions with competition law regimes in place, and the tightening network of competition authorities globally) is that competition authorities will frequently coordinate their investigations of cartel infringements that have a global character (in the sense that the effect of the cartel might have materialized in multiple jurisdictions). The *Air Cargo* (officials from investigating authorities in Europe, South Korea, and the United States inspected the offices of several air cargo carriers in a coordinated fashion)[17] and *Marine Hoses* (searches were coordinated by the DOJ, the EC, and the Office of Fair Trading in the United Kingdom)[18] investigations are good examples of such instances.

Any degree of coordination by the investigating authorities, no matter how tenuous, necessarily requires a globally coordinated approach of a target company in responding to the investigations. Such a global strategy will need to be based upon the premise that the cooperation between the enforcement agencies will result in at least the risk of key information becoming known to the relevant authorities involved. This risk is often aggravated by a global whistleblower who will usually have made immunity applications to all relevant authorities in question.

Despite the strong cooperation between the EU and U.S. authorities, differences in enforcement techniques and differences in the underlying legal systems continue to create potential complications for the defense. Assuming the immunity spot (i.e., "first in") has been taken, the EU system provides for clearly defined possible fine reductions for subsequent applicants (30-50 percent reduction for the second, 20-30 percent reduction for the third, and up to a 20 percent reduction for subsequent companies). In the United States, the benefits for any company that is "second through the door" may be more uncertain and, in some instances, be considered too risky. In some cases, this could lead to the decision not to apply for a leniency position in the European Union either, so that the case can be more effectively defended.

Further, it is a condition in the European Union that leniency applicants put an immediate stop to their involvement in the infringement.[19] The DOJ, on the other hand, may require an applicant to continue its involvement in the infringement, so that the investigative authorities can engage in further fact-finding; for example, by means of wire-tapping or the filming of cartel meetings.[20] In such cases, it is of the utmost importance to draw upon the strong EU/U.S. relationship in order for the regulators to agree on a common approach affording the applicant the protection necessary not to fall foul of either system.

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[17] Reported widely by mainstream media.

[18] DOJ press release of May 2, 2007, *http://www.justice.gov/atr/public/press_releases/2007/223037.htm*.

[19] Commission Notice on Immunity from fines and reduction of fines in cartel cases ("Leniency Notice"), OJ 2006 C 298/17, December 8, 2006, point 12(b).

[20] *See*, for example, the DOJ investigation of the *Lysine* cartel discussed by Scott D. Hammond in his speech, *The fly on the wall has been bugged – catching an international cartel in the act*, presented on May 15, 2001.

If it is decided that a leniency application is to be made, this will also create the additional complication that some jurisdictions, such as the European Union, require the submission of all relevant evidence within the applicant's possession.[21] Once such information is submitted to one authority, a defending company would, in light of the cooperation between authorities, be well advised not to withhold it in any other relevant jurisdiction. The required degree of cooperation in each jurisdiction must therefore be mapped out in light of the scope of the information that must be submitted globally. This, in effect, creates a "highest common denominator" of information that must be submitted in all jurisdictions. This global body of evidence may need to be supplemented with local information on a jurisdiction-by-jurisdiction basis.

In addition, the criminal aspects of a cartel investigation, especially criminal enforcement in the United States, are often a driving factor in mapping out the defense strategies in international investigations. The DOJ's policy is usually to target the most senior members of management that were involved in, or oversaw, the conduct. The prospect of one or more members of their top management being incarcerated for periods of, for example, 30 months or more,[22] may weigh heavier on companies in terms of pecuniary consequences and reputational damage than forfeiting potential fine reductions. Indeed, the company's interests, as well as the individual interests of the members of management in question, will have to be weighed. While, in many cases, these interests might be aligned (for example, cooperation by the company creating a scope of protection equally benefiting the individuals), this will not always be the case (for example, where individuals would not be covered by the company's application and where the company's cooperation would provide "ammunition" the authority could use for the prosecution of the individuals in question).

A company might decide that, in order to effectively protect its management from criminal prosecution, it cannot cooperate in the United States. In order to prevent undermining its defensive strategy in light of the increasing cooperation between authorities, this might also mean that the company will choose not to cooperate with the authorities elsewhere either.

Given the dynamics outlined above, companies under investigation will require legal counsel in all relevant jurisdictions. In addition, it is essential that global efforts are centrally coordinated to ensure that the agreed consistency in approach is rigorously maintained. This will, of course, necessitate the exchange of information between counsels in the respective jurisdictions. It is crucial that the coordination between defense counsels for the company worldwide is conducted in a manner that guarantees the greatest possible protection of legal privilege. In addition to being necessary for the purpose of resisting discovery in the context of the private damage claims that nowadays arise almost as a matter of course following cartel investigations by competition authorities, it is also necessary to protect privileged documents in the context of investigations by other regulators. Where, for example, documents based in the European Union might need to be made available to defense counsel in the United States, it is important that mechanisms are put in place allowing U.S. defense counsel access to these

[21] Leniency Notice, point 12(a), first indent.

[22] In the *Marine Hoses* cartel the Court of Appeal in the United Kingdom reduced the sentences of Peter Whittle, David Brammar, and Bryan Allison to the level of their sentences under the U.S. plea agreement. Whittle was sentenced to 30 months, Brammer 20 months, and Allison 24 months. *See* Whittle & Ors, R. v [2008] EWCA Crim 2560, and the DOJ press release of July 28, 2008, http://www.justice.gov/atr/public/press_releases/2008/235515.htm.

materials without the documents being "imported" into the United States and thereby becoming subject to DOJ requests.[23]

V. CONCLUSION: IMPLICATIONS AND LESSONS FOR THE FUTURE

Companies involved in transatlantic or global competition cases such as cartel investigations would be well advised to heed the lessons to be learned from the ever closer cooperation between competition authorities.

It is no longer possible to confine the legal analysis in such cases to the findings concerning particular jurisdictions. Any such restrictive approach would be highly dangerous.

Rather, it is crucial that companies under investigation adapt the nature and scope of their investigation and defense in a way that takes into account the global dynamics of competition enforcement.

The response by companies under investigation in an international cartel matter therefore necessitates putting in place a global defense strategy. In cases where the authorities in the European Union and/or the United States, as well as the authorities in other jurisdictions, are investigating the conduct in question, such a global defense strategy will often have to be shaped around optimizing the outcomes in the European Union and the United States; i.e. the jurisdictions in which the highest fines can be expected and, in the case of the United States, the jurisdiction in which criminal enforcement against the individuals involved is usually at its most severe. However, based upon the specificities of the case, the global defense strategy will increasingly also have to take into account the size of fines and criminal risks presented in other jurisdictions such as, for example, Brazil.

The globalization of competition law enforcement that saw its origins in the EU/U.S. cooperation described and that has now embarked on the process of the creation of a truly global network has already radically changed the way in which companies under investigation for global cartel infringements must deploy their defenses. In many respects, this fast evolving and dynamic environment represents one of the most challenging and exciting fields of competition law, requiring cutting-edge, globally coordinated responses by companies under investigation. This trend can only be expected to become significantly more pronounced in the future.

[23] It should be noted that, while DOJ subpoenas are often phrased to request documents globally, it is often (especially in cases of non-cooperation) possible to object to handing over non-U.S. documents. Mechanisms for preventing the "import" of documents into the United States vary and their actual workability has often not yet been confirmed by the courts. (For example, one possibility could be for U.S. counsel to review these documents at a location outside of the United States. Another method might be for these documents to be made available on a "read only" basis through an internationally accessible IT platform hosted outside of the United States.)