

## **CHAPTER 9**

### **INTERNATIONAL ANTITRUST I**

### **ENFORCEMENT COOPERATION**

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Following the conflicts over aggressive private and public antitrust enforcement in the 1970s and the 1980s, important changes began to occur. The United States government began to take comity more seriously in the exercise of its prosecutorial discretion. The United States also began to consult more regularly with its trading partners when its investigations and cases affected the important national interests of those countries. Slowly, those informal understandings began to be embodied in more formal cooperation agreements. The early agreements were little more than obligations to notify and consult when there was a potential conflict over antitrust enforcement, but quickly evolved into more meaningful obligations to actually cooperate in cases that affected more than one country's market. We began with the text of the 1976 US-German cooperation, an example of a first generation notify/consult type of agreement.

#### **1976 U. S. - GERMANY ANTITRUST ACCORD**

Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices

The Government of the United States of America and the Government of the Federal Republic of Germany, considering that restrictive business practices affecting their domestic or international trade are prejudicial to the economic and commercial interests of their countries,

Convinced that action against these practices can be made more effective by the regularization of cooperation between their antitrust authorities, and

Having regard, in this respect, to their Treaty of Friendship, Commerce, and Navigation and to the Recommendations of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade adopted on October 5, 1967, and on July 3, 1973,

Have agreed as follows:

Article 1

For the purpose of this Agreement, the following terms shall have the meanings indicated:

1. "Antitrust laws" shall mean, in the United States of America, the Sherman Act (15 U.S.C. §§

1-11), the Clayton Act (15 U.S.C. § 12 et seq.), and the Federal Trade Commission Act (15 U.S.C. § 41 et seq.), and in the Federal Republic of Germany, the Act Against Restraints on Competition ("Gesetz gegen Wettbewerbsbeschränkungen") (BGB1. I 1974, 869) as those Acts have been and may from time to time be amended.

2. "Antitrust authorities" shall mean, in the United States of America, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission, and, in the Federal Republic of Germany, the Federal Minister of Economics ("Bundesminister für Wirtschaft") and the Federal Cartel Office ("Bundeskartellamt") and successors in each country.

3. "Information" shall include reports, documents, memoranda, expert opinions, legal briefs and pleadings, decisions of administrative or judicial bodies, and other written or computerized records.

4. "Restrictive business practices" shall include all practices which may violate, or are regulated under, the antitrust laws of either party.

5. "Antitrust investigation or proceeding" shall mean any investigation or proceeding related to restrictive business practices and conducted by an antitrust authority under its antitrust laws.

## Article 2

(1) Each party agrees that its antitrust authorities will cooperate and render assistance to the antitrust authorities of the other party, to the extent set forth in this Agreement, in connection with:

1. antitrust investigations or proceedings,
2. studies related to competition policy and possible changes in antitrust laws, and
3. activities related to the restrictive business practice work of international organizations of which both parties are members.

(2) Each party agrees that it will provide the other party with any significant information which comes to the attention of its antitrust authorities and which involves restrictive business practices which, regardless of origin, have a substantial effect on the domestic or international trade of such other party.

(3) Each party agrees that, upon request of the other party, its antitrust authorities will obtain for and furnish such other party with such information as such other party may request in connection with a matter referred to in Article 2, paragraph 1, and will otherwise provide advice and assistance in connection therewith. Such advice and assistance shall include, but not necessarily be limited to, the exchange of information and a summary of experience relating to particular

practices where either of the antitrust authorities of the requested party has dealt with or has information relating to a practice involved in the request. Such assistance shall also include the attendance of public officials of the requested party to give information, views or testimony in regard to any antitrust investigation or proceeding, legislation or policy, and the transmittal or the making available of documents and legal briefs and pleadings of the antitrust authorities of the requested party (or duly authenticated or certified copies thereof).

(4) An antitrust authority of a party, in seeking to obtain information or interviews on a voluntary basis from a person or enterprise within the jurisdiction of the other party, may request such other party to transmit a communication seeking such information or interviews to such person or enterprise. In that event, the other party will transmit such communication and, if so requested, will (if such is the case) notify such person or enterprise that the requested party has no objection to voluntary compliance with the request.

(5) Each party agrees that, upon the request of an antitrust authority of the other party, its antitrust authorities will consult with the requesting party concerning possible coordination of concurrent antitrust investigations or proceedings in the two countries which are related or affect each other.

### Article 3

(1) Either party may decline, in whole or in part, to render assistance under Article 2 of this Agreement, or may comply with any request for such assistance subject to such terms and conditions as the complying party may establish, if such party determines that:

1. compliance would be prohibited by legal protections of confidentiality or by other domestic law of the complying party; or

2. compliance would be inconsistent with its security, public policy or other important national interests;

3. the requesting party is unable or unwilling to comply with terms or conditions established by the complying party, including conditions designed to protect the confidentiality of information requested; or

4. the requesting party would not be obligated to comply with such request, by reason of any grounds set forth in items (a), (b) or © above, if such request had been made by the requested party.

(2) Neither party shall be obligated to employ compulsory powers in order to obtain information for, or otherwise provide advice and assistance to, the other party pursuant to this Agreement.

(3) Neither party shall be obligated to undertake efforts in connection with this Agreement which

are likely to require such substantial utilization of personnel or resources as to burden unreasonably its own enforcement duties.

#### Article 4

(1) Each party agrees that it will act, to the extent compatible with its domestic law, security, public policy or other important national interests, so as not to inhibit or interfere with any antitrust investigation or proceeding of the other party.

(2) Where the application of the antitrust laws of one party, including antitrust investigations or proceedings, will be likely to affect important interests of the other party, such party will notify such other party and will consult and coordinate with such other party to the extent appropriate under the circumstances.

#### Article 5

The confidentiality of information transmitted shall be maintained in accordance with the law of the party receiving such information, subject to such terms and conditions as may be established by the complying party furnishing such information. Each party agrees that it will use information received under this Agreement only for purposes of its antitrust authorities as set forth in Article 2, paragraph 1.

#### Article 6

(1) The terms of this Agreement shall be implemented, and obligations under this Agreement shall be discharged, in accordance with the laws of the respective parties, by their respective antitrust authorities which shall develop appropriate procedures in connection therewith.

(2) Requests for assistance pursuant to this Agreement shall be made or confirmed in writing, shall be reasonably specific and shall include the following information as appropriate:

1. the antitrust authority or authorities to whom the request is directed;
2. the antitrust authority or authorities making the request;
3. the nature of the antitrust investigation or proceeding, study or other activity involved;
4. the object of and reason for the request; and
5. the names and addresses of relevant persons or enterprises, if known.

Such requests may specify that particular procedures be followed or that a representative of the requesting party be present at requested proceedings or in connection with other requested

actions.

(3) The requesting party shall be advised, to the extent feasible, of the time, place and type of action to be taken by the requested party in response to any request for assistance under this Agreement.

(4) If any such request cannot be fully complied with, the requested party shall promptly notify the requesting party of its refusal or inability to so comply, stating the grounds for such refusal, any terms or conditions which it may establish in connection therewith and any other information which it considers relevant to the subject of the request.

#### Article 7

All direct expenses incurred by the requested party in complying with a request for assistance under this Agreement shall, upon request, be paid or reimbursed by the requesting party. Such direct expenses may include fees of experts, costs of interpreters, travel and maintenance expenses of experts, interpreters and employees of antitrust authorities, transcript and reproduction costs, and other incidental expenses, but shall not include any part of the salaries of employees of antitrust authorities.

#### Notes

- 1) One important aspect of the first generation agreements with Canada and Australia was the promise of those countries not to automatically apply their blocking statutes merely because a US antitrust investigation involves the conduct of one of their nationals or included the seeking of evidence located in their territory. Instead, each party promised to invoke their blocking statutes only in situations of fundamental national interest. There have been few if any conflicts involving blocking statutes in governmental cases since these agreements.
- 2) The second generation of cooperation agreements went beyond mere notification and consultation obligations and included provisions obligating each partner to assist the other in appropriate cases.
- 3) A typical agreement of this type is the agreement between the United States and the European Commission of the European Union. A full list of the first and second generation type agreements can be found on the web site of the Antitrust Division at [http://www.usdoj.gov/atr/public/international/int\\_arrangements.htm](http://www.usdoj.gov/atr/public/international/int_arrangements.htm)

**1991 Agreement Between The Government of The United States of America and The Commission of the European Communities Regarding The Application of Their Competition Laws**

The Government of the United States of America and the Commission of the European Communities:

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

....

Have agreed as follows:

Article I  
PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

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b) "Competition authorities" shall mean (I) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

c) "Enforcement activities" shall mean any application of competition law by way of

investigation or proceeding conducted by the competition authorities of a Party; and

d) "Anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.

## Article II NOTIFICATION

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

- a) Are relevant to enforcement activities of the other Party;
- b) Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;
- c) Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;
- d) Involve conduct believed to have been required, encouraged or approved by the other Party; or
- e) Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

3. With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:

- a) In the case of the Government of the United States of America,
  - (I) not later than the time its competition authorities request, pursuant to 15 U.S.C. §18a(e), additional information or documentary material concerning the proposed transaction,
  - (ii) when its competition authorities decide to file a complaint challenging the transaction, and
  - (iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and
- b) In the case of the Commission of the European Communities,
  - (I) when notice of the transaction is published in the Official Journal, pursuant to

Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

(ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)© of Council Regulation no. 4064/89, and

(iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of

a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America, and

b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America, to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to

a) regulatory or judicial proceedings that are public,

b) intervention or participation that is public and pursuant to formal procedures, and

c) in the case of regulatory proceedings in the United States, only proceedings before federal agencies.

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

### Article III EXCHANGE OF INFORMATION

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by



them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II, paragraph 5.

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

#### Article IV COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;

b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and

d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities

expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

#### Article V COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.

3. Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

#### Article VI AVOIDANCE OF CONFLICTS OVER ENFORCEMENT ACTIVITIES

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in

decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:

a) the relative significance to the anticompetitive activities involved of conduct within the enforcing party's territory as compared to conduct within the other Party's territory;

b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;

c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

## Article VII CONSULTATION

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude

consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

#### Article VIII CONFIDENTIALITY OF INFORMATION

1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

#### Article IX EXISTING LAW

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states.

#### Article X COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

## Notes

- 1) What accounted for the change from the first generation of agreement geared to conflict avoidance to the second generation of agreements geared to actual cooperation on cases and investigations?
- 2) Given that EU law is supreme to conflicting member state law, what is the effect of this cooperation agreement on the older member state blocking statutes?
- 2) In some cases it is much easier for the host country to take action against anticompetitive activity that affects a trading partner, then for the trading partner to try to use extraterritoriality to attack the same conduct. Several cooperation agreements have included so-called "positive comity" provisions to address this situation. The 1998 US-EU positive comity agreement is typical of these provisions.

### **1998 AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE EUROPEAN COMMUNITIES ON THE APPLICATION OF POSITIVE COMITY PRINCIPLES IN THE ENFORCEMENT OF THEIR COMPETITION LAWS**

The Government of the United States of America of the one part, and the European Community and the European Coal and Steel Community of the other part (hereinafter "the European Communities"):

Having regard to the 23 September 1991 Agreement between the Government of the United States of America and the European Communities Regarding the Application of Their Competition Laws, and the exchange of interpretative letters dated 31 May and 31 July 1995 in relation to that Agreement (together hereinafter "the 1991 Agreement");

Recognizing that the 1991 Agreement has contributed to coordination, cooperation, and avoidance of conflicts in competition law enforcement;

Noting in particular Article V of the 1991 Agreement, commonly referred to as the "Positive Comity" article, which calls for cooperation regarding anticompetitive activities occurring in the territory of one Party that adversely affect the interests of the other Party;

Believing that further elaboration of the principles of positive comity and of the implementation of those principles would enhance the 1991 Agreement's effectiveness in relation to such conduct; and

Noting that nothing in this Agreement or its implementation shall be construed as prejudicing

either Party's position on issues of competition law jurisdiction in the international context,

Have agreed as follows:

#### Article I Scope and Purpose of this Agreement

1. This Agreement applies where a Party satisfies the other that there is reason to believe that the following circumstances are present:

1. Anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other Party; and

2. The activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring.

2. The purposes of this Agreement are to:

1. Help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the Parties are not impeded by anticompetitive activities for which the competition laws of one or both Parties can provide a remedy, and

2. Establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.

#### Article II Definitions

As used in this Agreement:

1. "Adverse effects" and "adversely affected" mean harm caused by anticompetitive activities to:

1. the ability of firms in the territory of a Party to export to, invest in, or otherwise compete in the territory of the other Party, or

2. competition in a Party's domestic or import markets.

2. "Requesting Party" means a Party that is adversely affected by anticompetitive activities occurring in whole or in substantial part in the territory of the other Party.

3. "Requested Party" means a Party in the territory of which such anticompetitive activities appear to be occurring.

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6. "Enforcement activities" means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party.

7. "Anticompetitive activities" means any conduct or transaction that is impermissible under the competition laws of a Party.

### Article III Positive Comity

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

### Article IV Deferral or Suspension of Investigations in Reliance On Enforcement Activity by the Requested Party

1. The competition authorities of the Parties may agree that the competition authorities of the Requesting Party will defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the Requested Party.

2. The competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party when the following conditions are satisfied:

1. The anticompetitive activities at issue:

1. do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party's territory, or

2. where the anticompetitive activities do have such an impact on the Requesting Party's consumers, they occur principally in and are directed principally towards the other Party's territory;

2. The adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the Requested Party. The Parties recognize

that it may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions; and

3. The competition authorities of the Requested Party agree that in conducting their own enforcement activities, they will:

1. devote adequate resources to investigate the anticompetitive activities and, where appropriate, promptly pursue adequate enforcement activities;

2. use their best efforts to pursue all reasonably available sources of information, including such sources of information as may be suggested by the competition authorities of the Requesting Party;

3. inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and where appropriate provide to the competition authorities of the Requesting Party relevant confidential information if consent has been obtained from the source concerned. The use and disclosure of such information shall be governed by Article V;

4. promptly notify the competition authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement;

5. use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months, or such other time as agreed to by the competition authorities of the Parties, of the deferral or suspension of enforcement activities by the competition authorities of the Requesting Party;

6. fully inform the competition authorities of the Requesting Party of the results of their investigation, and take into account the views of the competition authorities of the Requesting Party, prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation; and

7. comply with any reasonable request that may be made by the competition authorities of the Requesting Party.

When the above conditions are satisfied, a Requesting Party which chooses not to defer or suspend its enforcement activities shall inform the competition authorities of the Requested Party of its reasons.

3. The competition authorities of the Requesting Party may defer or suspend their own enforcement activities if fewer than all of the conditions set out in paragraph 2 are satisfied.



4. Nothing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstating such activities. In such circumstances, the competition authorities of the Requesting Party will promptly inform the competition authorities of the Requested Party of their intentions and reasons. If the competition authorities of the Requested Party continue with their own investigation, the competition authorities of the two Parties shall, where appropriate, coordinate their respective investigations under the criteria and procedures of Article IV of the 1991 Agreement.

#### Article V Confidentiality and Use of Information

Where pursuant to this Agreement the competition authorities of one Party provide information to the competition authorities of the other Party for the purpose of implementing this Agreement, that information shall be used by the latter competition authorities only for that purpose. However, 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) on the basis of the consent of the source concerned, that source also agrees to the other use . Disclosure of such information shall be governed by the provisions of Article VIII of the 1991 Agreement and the exchange of interpretative letters dated 31 May and 31 July 1995.

#### Article VI Relationship to the 1991 Agreement

This Agreement shall supplement and be interpreted consistently with the 1991 Agreement, which remains fully in force.

#### Notes

- 1) There have been only a couple of formal or informal uses of the positive comity provisions. What do you think accounts for this paucity of activity?
- 2) In civil antitrust investigations, particularly merger cases, United States enforcement officials are in almost daily contact with their foreign counterparts discussing the full range of publicly available information about the relevant markets, market shares, likelihood of entry, potential efficiencies, the failing firm doctrine, the likelihood of challenge by the enforcement agency, and the likely remedies that will be sought. However, US officials are barred from discussing or sharing information contained in the Hart-Scott-Rodino pre-merger filings and foreign officials often are subject to similar restrictions. What are the grounds for barring the exchange of such pre-merger filings from sharing with other governments?

- 3) Even the information in HSR filings can be shared with the consent of the parties. Such consent is routinely sought when the US agencies anticipate cooperating with other jurisdictions. Is seeking such consent legitimate? Do the parties really have a choice? How would you counsel a client which has received such a request?
- 4) Much of United States antitrust enforcement is criminal in nature, particularly in the cartel area. Criminal investigations and prosecutions of international cartels frequently require coordination between law enforcement agencies in more than one country. Cooperation in the criminal area is covered by Mutual Legal Assistance Treaties (MLATs) which are general in nature, but include competition crimes when both jurisdiction impose criminal penalties for the same type of conduct. A full list of the MLATS in force with other countries can be found at [http://travel.state.gov/law/info/judicial/judicial\\_690.html](http://travel.state.gov/law/info/judicial/judicial_690.html). Each MLAT defines whether competition crimes are included and excluded.
- 5) In the United States, criminal activity is investigated through the grand jury process which contains strict confidentiality provisions. This makes it difficult if not impossible to share such material with foreign governments who may need our assistance in a particular investigation or where we need their help on a reciprocal basis to assist the United States in a particular case. To surmount these difficulties, Congress passed a new law in the 1990s to allow the mutual sharing of grand jury and other confidential materials (but not HSR filings) on a mutual basis with foreign governments under strict conditions.

**International Antitrust Enforcement Assistance Act, 15 U.S.C. § 6201 et seq.**

Sec. 6201. Disclosure to foreign antitrust authority of antitrust evidence

In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204 of this title, the Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under this chapter, antitrust evidence to assist the foreign antitrust authority--

- (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or
- (2) in enforcing any of such foreign antitrust laws.

Sec. 6202. Investigations to assist foreign antitrust authority in obtaining antitrust evidence

- (a) Request for investigative assistance

A request by a foreign antitrust authority for investigative assistance under this section shall be made to the Attorney General, who may deny the request in whole or in part. No further action shall be taken under this section with respect to any part of a request that has been denied by the Attorney General.

(b) Authority to investigate

In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204 of this title, the Attorney General and the Commission may, using their respective authority to investigate possible violations of the Federal antitrust laws, conduct investigations to obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such agreement is in effect under this chapter, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority--

(1) in determining whether a person has violated or is about to violate any of such foreign antitrust laws, or

(2) in enforcing any of such foreign antitrust laws.

© Special scope of authority

An investigation may be conducted under subsection (b) of this section, and antitrust evidence obtained through such investigation may be provided, without regard to whether the conduct investigated violates any of the Federal antitrust laws.

(d) Rights and privileges preserved

A person may not be compelled in connection with an investigation under this section to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

Sec. 6203. Jurisdiction of district courts of United States

(a) Authority of district courts

On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect under this chapter, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist a foreign antitrust authority with respect to which such agreement is in effect under this chapter--

(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) in enforcing any of such foreign antitrust laws.

(b) Contents of order

(1) Use of appointee to receive evidence

(A) An order issued under subsection (a) of this section may direct that testimony or a statement be given, or a document or other thing be produced, to a person who shall be recommended by the Attorney General and appointed by the court.

(B) A person appointed under subparagraph (A) shall have power to administer any necessary oath and to take such testimony or such statement.

(2) Practice and procedure

(A) An order issued under subsection (a) of this section may prescribe the practice and procedure for taking testimony and statements and for producing documents and other things.

(B) Such practice and procedure may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the Attorney General requests such order.

© To the extent such order does not prescribe otherwise, any testimony and statements required to be taken shall be taken, and any documents and other things required to be produced shall be produced, in accordance with the Federal Rules of Civil Procedure.

© Rights and privileges preserved

A person may not be compelled under an order issued under subsection (a) of this section to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

(d) Voluntary conduct

This section does not preclude a person in the United States from voluntarily giving testimony or a statement, or producing a document or other thing, in any manner acceptable to such person for use in an investigation by a foreign antitrust authority.

Sec. 6204. Limitations on authority

Sections 6201, 6202, and 6203 of this title shall not apply with respect to the following antitrust evidence:

(1) Antitrust evidence that is received by the Attorney General or the Commission under section 18a of this title. Nothing in this paragraph shall affect the ability of the Attorney General or the Commission to disclose to a foreign antitrust authority antitrust evidence that is obtained otherwise than under section 18a of this title.

(2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for the purpose of applying Rule 6(e)(3)(C)(iv) of the Federal Rules of Criminal Procedure with respect to this section--

(A) a foreign antitrust authority with respect to which a particularized need for such antitrust evidence is shown shall be considered to be an appropriate official of any of the several States, and

(B) a foreign antitrust law administered or enforced by the foreign antitrust authority shall be considered to be a State criminal law.

(3) Antitrust evidence that is specifically authorized under criteria established by Executive Order 12356, or any successor to such order, to be kept secret in the interest of national defense or

foreign policy, and--

(A) that is classified pursuant to such order or such successor, or

(B) with respect to which a determination of classification is pending under such order or such successor.

(4) Antitrust evidence that is classified under section 2162 of title 42.

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#### Sec. 6207. Conditions on use of antitrust mutual assistance agreements

##### (a) Determinations

Neither the Attorney General nor the Commission may conduct an investigation under section 6202 of this title, apply for an order under section 6203 of this title, or provide antitrust evidence to a foreign antitrust authority under an antitrust mutual assistance agreement, unless the Attorney General or the Commission, as the case may be, determines in the particular instance in which the investigation, application, or antitrust evidence is requested that--

(1) the foreign antitrust authority--

(A) will satisfy the assurances, terms, and conditions described in subparagraphs (A), (B), and (E) of section 6211(2) of this title, and

(B) is capable of complying with and will comply with the confidentiality requirements applicable under such agreement to the requested antitrust evidence,

(2) providing the requested antitrust evidence will not violate section 6204 of this title, and

(3) conducting such investigation, applying for such order, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States, taking into consideration, among other factors, whether the foreign state or regional economic integration organization represented by the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by such investigation, by the granting of such order, or by the provision of such antitrust evidence.

(b) Limitation on disclosure of certain antitrust evidence

Neither the Attorney General nor the Commission may disclose in violation of an antitrust mutual assistance agreement any antitrust evidence received under such agreement, except that such agreement may not prevent the disclosure of such antitrust evidence to a defendant in an action or proceeding brought by the Attorney General or the Commission for a violation of any of the Federal laws if such disclosure would otherwise be required by Federal law.

© Required disclosure of notice received

If the Attorney General or the Commission receives a notice described in section 6211(2)(H) of this title, the Attorney General or the Commission, as the case may be, shall transmit such notice to the person that provided the evidence with respect to which such notice is received.

**Notes**

- 1) A grand total of one country (Australia) has signed an antitrust mutual assistance agreement with the United States pursuant to the IAEEA. See <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>
- 2) What do you think accounts for the relative lack of interest?
- 3) A United States court may also assist a foreign “tribunal” in the gathering of evidence for use in a proceeding abroad under 28 U.S.C. § 1782 which states:
  - a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

- 4) The United States Supreme Court has interpreted the provisions of 28 U.S.C. § 1782 in an antitrust context in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).
- 5) What accounts for the strong interest in antitrust enforcement cooperation and the relative lack of interest in creating true substantive international antitrust rules?
- 6) This question is explored in greater detail in Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B. U. L. REV. 343 (1997), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=956669&high=%20Spencer%20Waller](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956669&high=%20Spencer%20Waller). Please read pages 360-391.
- 7) In contrast, to the growth of bilateral cooperation agreements, there has been relatively little *multilateral* cooperation and assistance agreements outside of the European Union. Examples of “soft” cooperation provisions in multilateral instruments include Chapter 15 of NAFTA and the OECD Recommendation Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, available at [http://www.usdoj.gov/atr/public/international/docs/council\\_recs.htm](http://www.usdoj.gov/atr/public/international/docs/council_recs.htm). What accounts for this lack of multilateral progress on this issue?
- 2) What is the next step in antitrust cooperation?

## Problem 9

You are the head of the competition authority of Freedonia, a country with a former socialist economy strongly tied to the former Soviet Union. Freedonia has had a competition statute since 1990 and a functioning competition authority since 1993.

Freedonia has been approached by the United States by signing an antitrust cooperation. The United States has proposed three basic options, a pure notification and consultation agreement, a cooperation agreement with or without positive comity provisions similar to the U.S.- E.U. agreement, and an agreement modeled on the IAEAA.

What are the potential upsides and downsides for Freedonia entering into any type of

agreement with the United States? What potential consequences would you expect if Freedonia declines to enter into such an agreement?

If you believe that an antitrust cooperation of some sort is either desirable or inevitable, which type of agreement best suits Freedonia's needs? Which country do you believe will benefit from the agreement over the initial years of cooperation?