

Current issues in transatlantic competition cooperation

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In response to the globalisation of business and markets, the United States and the European Community entered into their first cooperation agreement specifically relating to competition matters—the Agreement between the Government of the United States of America and the European Communities Regarding the Application of their Competition Laws—over 10 years ago.¹ That agreement was supplemented in 1998 by an agreement designed to strengthen the positive comity provisions of the earlier agreement.² Today, these agreements are generally well known to include provisions relating to cooperation, coordination, notification, and comity. Once thought extraordinary, cooperation between US and Commission competition authorities (as well as Canadian authorities) is now known to take place on a daily basis on most transatlantic matters.³ Such cooperation has had a profound effect on transatlantic investigations and prosecutions. Now that a routine of cooperation has been established within the current framework, new dynamics are emerging that may once again shift the paradigm of transatlantic cooperation in competition matters.

New and improved cooperation agreements

One of the by-products of the US war on terrorism has been the negotiation of new and improved Mutual Legal Assistance Treaties (MLATs) and Extradition Treaties. Although driven by terrorism concerns, such changes may nevertheless benefit competition authorities as well. For instance, in March 2003, the United States and United Kingdom negotiated a new Extradition Treaty⁴ that, once entered into force, will replace the currently effective 1972 treaty.⁵ The 1972 treaty was applicable only to certain enumerated offences and was inapplicable to competition law related offences. The new treaty applies to all offences punishable under the laws of both the United States and United Kingdom by at least a year in prison. With the recent criminalisation of cartel offences in the United Kingdom, the new treaty may permit extradition of competition law violators.

Similarly, in June 2003, the United States and European Union entered into their first MLAT and Extradition Treaty.⁶ These treaties will supplement, rather than replace, the network of bilateral treaties currently existing between the United States and individual Member States. The US-EU Extradition Treaty will have little impact on competition cases. The Treaty is applicable only to criminal violations found in both the state seeking extradition and the state providing extradition.⁷ Article 81 and 82 violations are not crimes punishable by imprisonment and most Member States impose only limited, or no, criminal liability for competition law violations. The MLAT though may impact the investigation of competition law violations.

If the US-EU MLAT applies to a particular competition case, it may enable certain assistance to be provided that generally may not be available pursuant to existing bilateral MLATs between

the United States and the Member States. For instance, the US-EU MLAT explicitly permits requests for bank and financial institution account information regarding persons or companies convicted of, or ‘otherwise involved in’, a criminal offence. The MLAT also explicitly provides that testimony may be taken pursuant to it by videoconference. Notably, national or local administrative authorities may also submit requests for assistance in connection with investigations so long as the administrative authority is investigating ‘with a view to’ criminal prosecution or referral to prosecutorial authorities. This provision allows a national competition authority, itself lacking prosecutorial authority, to request assistance so long as its investigation may lead to a referral to the actual prosecuting authority. The MLAT also includes provisions limiting the ability of Member States to use applicable data protection laws to refuse to provide requested information.

Changes to domestic law permitting greater cooperation

A number of changes to Member State domestic law also may affect transatlantic cooperation in competition cases. For example, as noted above, with the effect of the Enterprise Act,⁸ the United Kingdom may criminally prosecute individuals that commit certain competition law violations. The criminalisation of competition law offences brings those offences within the scope of the new bilateral MLAT and Extradition Treaty between the United States and United Kingdom as well as the analogous US-EU treaties. This will enable the US antitrust agencies and the Office of Fair Trading/Serious Fraud Office to take greater advantage of the existing cooperative treaty relationship between the United States and the United Kingdom in connection with competition law matters. Amendments to the French Commercial Code resulting from the New Economic Regulation Law⁹ also may affect transatlantic cooperation. The revisions provide that French competition authorities may share information pursuant to international cooperation agreements that would otherwise be subject to domestic confidentiality laws. Such liberalisation of confidentiality law may pave the way for France to enter into so-called ‘second-generation’ cooperation agreements, similar to the agreement existing between the United States and Australia.

Discoverability in the United States of leniency materials

Leniency policies in several jurisdictions outside the United States require written submissions outlining a company and individual participation in cartel activity. Such information generally is treated as confidential by the relevant competition authority and is not subject to disclosure. However, two US judges (in the District Courts for the District of Columbia and the Northern District of California) recently ruled that parties must produce such materials in the course

of discovery in connection with private actions seeking civil damages pursuant to the treble damage provision of US antitrust law. The work-product privilege that might otherwise protect this material was considered waived upon submission of the material to the competition authority. The rulings were made in the *Vitamins* and *Sorbates* cases over the objections of the European Commission that requiring such disclosure would be detrimental to the effectiveness of its leniency programme. A third judge (also in the District Court for the Northern District of California) declined to order the production of such materials in the *Methionine* case on several grounds including international comity and the applicability of the investigative and self-evaluative privileges.

Conclusion

Continued development of inter-agency relationships combined with improved tools for cooperation will undoubtedly enable greater coordination of transatlantic competition investigations and prosecutions. As a result, private parties will have to navigate an increasing number of pitfalls associated with multi-jurisdictional matters. Greater coordination among counsel on both sides of the Atlantic will be necessary to successfully avoid such pitfalls.

Notes

- 1 1995 OJ L 95/47 (27 April 1995) (entered into in 1995 with retroactive effect to 1991).
- 2 Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, 1998 OJ 173/26 (18 June 1988).
- 3 See eg, Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws, COM (2003) 500 final (13 August 2003) discussing matters notified and cooperation taken place in the year 2002.
- 4 Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, United States No. 1 (2003) (31 March 2003).
- 5 Treaty on Extradition, 8 June 1972, US-UK, 28 UST 227, as amended and supplemented by the Supplementary Extradition Treaty with the United Kingdom, 25 June 1985, US-UK, TIAS No. 12050 (1985).
- 6 See Council of the European Union, Agreements on Extradition and on Mutual Legal Assistance between the European Union and the United States of America, Legislative Acts and Other Instruments, 0153/03, CATS 28 (3 June 2003).
- 7 The US-EU Extradition Treaty will overrule existing bilateral extradition provisions that explicitly limit the bilateral treaty to a specific list of offences. Pursuant to the US-EU Extradition Treaty, all bilateral treaties will be applicable to any offence punishable by at least a year in prison in both the United States and the relevant Member State. Few Member States though impose criminal liability for competition law violations.
- 8 Enterprise Act 2002 (c. 40).
- 9 New Economic Regulation, Law No. 2001-420 of 15 May 2001 revising the Commercial Code Article L462-9, published in 113 *Journal Officiel* (JO) p. 7,776 (16 May 2001).

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Morgan Lewis has substantial expertise in international cartel investigations and prosecutions from both the government enforcement and defence perspectives. Its lawyers have defended corporations and corporate officials from six continents in major cartel investigations. Morgan Lewis lawyers have served as international coordinating counsel in cartel matters with proceedings in the United States, Canada and the European Commission and damage litigation in the US, Canada and Europe. With its competition lawyers in the United States and Europe, the firm can utilise the resources of its offices in Washington, Brussels, Frankfurt, London, New York, Philadelphia, San Francisco, Palo Alto, Los Angeles, Irvine, Pittsburgh, Miami, Princeton, Harrisburg and Tokyo to assist in the investigation and litigation of these matters.