

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 26 September 2012

Working Party No. 3 on Co-operation and Enforcement

LIMITATIONS AND CONSTRAINTS TO INTERNATIONAL CO-OPERATION

-- Issues Paper by the Secretariat --

23 October 2012

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item V of the agenda at its forthcoming meeting on 23 October 2012.

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JT03328621

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LIMITATIONS AND CONSTRAINTS TO INTERNATIONAL CO-OPERATION

Issues Paper by the Secretariat

1. Introduction

1. International co-operation and limitations to effective co-operation between enforcement agencies have occupied the Competition Committee (the Committee) for many years. Significant work has been carried out to identify these challenges, whether legal or practical. However, with the exception of the constraint related to limitations on the exchange of confidential information, the Committee has not devoted significant resources to discussing practicable solutions to these constraints. At national level, however, certain jurisdictions have explored solutions to overcome some of these constraints. A few examples are discussed in the paper. However, these national solutions have rarely had a wide-spread relevance but remained limited to those few jurisdictions who adopted them. Hence, when successful, their benefits have not spread across the international competition community. The lack of political imperative for co-operation is partly to be blamed for this. Policy makers have not yet fully appreciated the truly global dimension to competition law enforcement, and the benefits that a co-ordinated enforcement activity could yield for the domestic economies, and for a better level playing field at an international level.

2. Without a real political commitment at government level to address the limits that affect co-operation between competition enforcement agencies, improvements can only be marginal. The Competition Committee project on international co-operation is an opportunity for OECD competition authorities to create the momentum for a broader political and policy debate on the significance of international co-operation. This is especially timing in light of the fact that the costs of ineffective international co-operation are likely to increase as economic integration progresses. In this context, on 23 October 2012, Working Party No. 3 (WP3) will hold a roundtable discussion on the 'Limitations and Constraints to International Co-operation.' This Issues Paper identifies some of the main constraints and limitations which impede effective international co-operation and suggests some questions that delegates may want to address in their contributions and during the discussion on 23 October 2012.

3. The main constraints and limitations discussed in this paper include: (i) limitations on confidential information sharing; (ii) limitations due to differences in legal frameworks: criminal v civil enforcement; (iii) institutional and investigatory impediments: resource constraints and practical difficulties; (iv) jurisdictional constraints: differences in legal standards; and (v) lack of trust and confidence in legal systems. Delegations are invited to take a critical view of the existing limits which effective co-operation encounters and address broad question to discuss what legal and practical factors are really a constraint to international co-operation. How important are these constraints, and how could they be overcome? What would actually happen if competition authorities tried to co-operate despite these constraints? What is the maximum they could do to co-operate even within this constraint? If there are specific examples of the constraint being overcome, why do they not work in general?

General Questions and Issues for Discussion

For existing constraints and limitations to effective international co-operation, delegations could address the following questions:

1. What are your experiences with a particular limitation or constraint, and how has this limitation or constraint affected your ability to effectively enforce competition rules?
2. What solutions, if any, has your agency put into place to reduce the impact of a particular limitation or constraint on its enforcement action?
3. What solutions could not be put in place, but might have addressed effectively a particular limitation or constraint? Why were they not put in place?
4. What are the benefits for your agency's enforcement actions that could flow from the removal of a particular limitation or constraint? What are the possible costs associated with lifting such a limitation or constraint?

2. Sharing confidential information: legal limitations and definition issues

4. The ability of competition authorities to co-operate effectively in the investigation and resolution of cases investigated by multiple agencies relies on the ability of such agencies to communicate amongst themselves, to exchange views and, where necessary, documents and other evidence. There are generally three types of information that agencies may wish to exchange in the course of an investigation.

- *Public information.* This is information on the parties, the market or the business context of the investigation which is in the public domain. There is no particular *legal* constraint that would prevent enforcement agencies from exchanging this information; there might be, however, *practical* constraints related to language issues and lack of resources, which will be discussed further below.
- *Agency information.* This information is generated within the agency itself, rather than provided by parties to the investigation (although it may be based on information supplied by the parties), and it may or not be in public domain (e.g. final decisions of enforcement agencies may be publicly available, while internal notes are generally not). Agency information can be very diversified, e.g; it may deal with the stage which the investigation has reached, the planned timing of further steps, the provisional orientation of the investigation and conclusions reached. Agencies are generally allowed to use this information to discuss a case and progress with their respective investigation with the aim of ensuring consistency of enforcement across jurisdiction and to preserve the effectiveness of the enforcement action (e.g. when co-ordinating dawn-raids), subject to the confidentiality constraints discussed in the next point.
- *Information received from the parties.* This kind of material can be evidence of an infringement or background information on the market or the activities of the parties (such as turnover figures). The information may have been provided voluntarily or under compulsion. This type of information may include facts and data of a very different nature, ranging from general information on commercial practice or market features, to detailed and sensitive information on the business strategy of the provider (such as, prices, costs, customers data, etc.), to information that can be used as evidence to establish that the provider has infringed competition law.

5. The exchange of information in the public domain and of agency information is now customary and has increased significantly with the internationalisation of competition enforcement. However the

exchange of confidential information and data between competition authorities is one of the most sensitive areas of international co-operation. The success of co-operation between enforcers rests on the ability of agencies involved in cross-border cases to discuss the case itself. Competition agencies continue to identify the inability to engage in confidential information sharing as the one constraint that currently limits international co-operation.

6. Sharing confidential information poses particular problems because of the limits imposed by domestic laws. With very few exceptions, the majority of instruments and agreements in the antitrust field do not permit the exchange of confidential information. The rationale behind this prohibition rests on a number of justifications:

- i. To avoid enforcement agencies “abusing” their investigatory powers, many countries only allow the information gathered in an investigation to be used *for the purpose for which it was collected*. This prevents, for example, a search in the context of a merger investigation being used to collect evidence for a cartel investigation; or that evidence collected in the context of a competition case in country A being used to pursue the firm for having infringed the law in country B.
- ii. To preserve the incentives of firms and individuals to co-operate with the enforcement agency. Incentives to provide information to the government would significantly decrease if those firms and individuals risked being exposed to enforcement actions in investigations other than those for which they are co-operating (see (i) above), or to enforcement actions in other jurisdictions. This is a particular concern in cartel cases, where it is important to preserve the effectiveness of leniency programs.
- iii. To guarantee the due process rights of the parties involved in the investigations. Once information is released to another jurisdiction, the disclosing agency loses control of how the information is used. The agency cannot guarantee that the parties will have the same procedural rights and safeguards afforded in its own jurisdiction if a case is opened based on the information disclosed.
- iv. To ensure compliance with other statutes, e.g. laws on privacy and data protection.¹ These statutes generally prevent government agencies from disclosing to third parties any personal and confidential information collected in the course of their activities. This includes to other (domestic and foreign) government agencies. There are generally exemptions to these rules (e.g. disclosure in the interest of public safety, criminal justice and taxation), but outside these exemptions the information cannot be disclosed without the consent of the individuals and firms involved (so called, confidentiality waivers).

7. All this may affect the ability of countries to share confidential information on competition cases, and can significantly hamper the enforcement action of competition authorities engaged in cross-border investigations.² The situation, however, differs significantly across enforcement areas:

¹ See for example the proposed reform of the EU's 1995 data protection rules, including a Directive on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities: 25.01.2012 COM (2012) 10.

² See for example the challenges faced by Turkey in the absence of a formal co-operation mechanism: OECD Implementation of the Council Recommendation Concerning Effective Action against Hard Core Cartels: Third Report by the Competition Committee (2005), p. 32.

- In *merger reviews*, the incentives of the parties to grant confidentiality waivers are strong, as they wish the agencies involved to speedily reach a similar conclusion on the merger under review. For third parties (customers and competitors) these incentives may not necessarily exist and that may limit the agencies' ability to exchange third party information.
- In *cartel cases*, firms under investigation have few incentives to allow the dissemination of confidential information among enforcers as this will potentially increase their exposure to antitrust liability in multiple jurisdictions. For this reason confidentiality waivers are rare, with the exception of companies which have applied for amnesty/leniency as applicants may have an interest in agencies coordinating their investigations. This, however, does not normally apply where co-operation requires dealing with jurisdictions where firms have strategically decided not to apply for leniency, or where leniency is not available.
- In *abuse of dominance/monopolisation* cases, where leniency is not available, the incentives of the parties subject to the investigation to offer waivers are very low.

8. Beyond the possibility to rely on confidentiality waivers, challenges associated with sharing confidential information can only be overcome if soft and/or hard legal solutions are put in place. This is the reason why the Committee has frequently looked at issues related to the exchange of confidential information, and has also developed instruments and best practices in this area.³ Some countries have also taken steps to address the issue. The examples in the box below illustrate some of the solutions adopted both at national and international level to overcome such limitations. It is an open question why these initiatives have remained isolated and have not triggered similar initiatives in other countries. Reform of national legal frameworks similar to those described below would allow for more and better co-operation.

³ OECD Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations ([DAF/COMP\(2005\)25/FINAL](#)), Recommendation of the Council on Merger Review ([C\(2005\)34](#)) and Revised Recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade ([C\(95\)130/FINAL](#)).

The US International Antitrust Enforcement Assistance Act

In 1994, the United States (US) introduced the International Antitrust Enforcement Assistance Act (IAEAA). The IAEAA allows the US to enter into antitrust mutual legal assistance agreements on a bilateral basis. These agreements facilitate assistance to, and information exchange with, foreign authorities in civil or criminal investigations. This type of co-operation would ordinarily be prohibited by law. However, the IAEAA requires reciprocal commitments from the foreign jurisdiction, including equivalent legislation guaranteeing sufficient protection for any confidential information that is shared. Most countries currently lack the legal framework which would permit them to enter into this type of agreement with the US, either because of the dual criminality requirements, or the explicit exclusion of competition matters from these types of agreements. So far only Australia has taken advantage of the IAEAA, entering into a US-Australia Mutual Assistance Agreement in 1999. One deterrent is the requirement to consent to the use of the information that has been shared for non-competition matters; foreign partners may be legally restrained or simply unwilling to do this.⁴

The UK overseas information “gateway”

In the United Kingdom (UK), the Enterprise Act provides for a statutory overseas information ‘gateway’. This allows the Office of Fair Trading (OFT) to voluntarily disclose information obtained under its statutory powers of investigation, in order to facilitate the exercise by an overseas authority of any function relating to the purposes of civil or criminal antitrust cases in those jurisdictions.⁵ The OFT must conduct an individual case assessment of the safeguards that exist in the overseas jurisdiction for the handling of the information, each time a disclosure is made. It must also consider whether the legitimate business interests of the undertaking, or individual, to which the information relates may be harmed.⁶ The UK’s information gateway was used in the Marine Hose cartel investigation,⁷ and described by the Australian Competition and Consumer Commission as ‘decisive’ for its investigation.⁸ However, the process can be both resource-intensive and lengthy for the authorities involved.⁹

EU/Switzerland “Second Generation” Co-operation Agreement¹⁰

The EU and Switzerland recently signed a so called ‘second generation agreement’ (the ‘Agreement’) which allows closer co-operation between the European Commission and the Swiss Competition Commission.¹¹ The two jurisdictions were seeking ways to overcome the existing limitations preventing them from sharing confidential

⁴ See Swaine (2011) p. 19.

⁵ United Kingdom Enterprise Act, Chapter 40, s243 (2002), the overseas disclosure information gateway.

⁶ The OFT suggested amending the process to allow upfront assessment of jurisdictions which have sufficient legal safeguards in place, rather than having to conduct a full assessment of the conditions under s.243(6) each time. However, the UK Government rejected the proposals, deciding that a public list would be controversial, complex to run and difficult to keep up to date. See BIS, *Growth, Competition and the Competition Regime: Government Response to Consultation*, March 2012, p114.

⁷ ACCC v Bridgestone Corporation & Ors [2010] FCA 584.

⁸ See Australia’s contribution to the 2012 Global Forum on Competition [DAF/COMP/GF/WD\(2012\)36](http://www.dafcomp.org/DAF/COMP/GF/WD(2012)36).

⁹ See OECD Roundtable on Improving International Co-operation in Cartel Investigations (2012).

¹⁰ Proposal for a Council Decision on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Brussels 1.6.2012, COM(2012) 345 final.

¹¹ The EU has also signed four first generation agreements with the US (1991), Canada (1999), Japan (2003) and South Korea (2009). However, these agreements expressly exclude the exchange of protected or confidential information.

information. The challenge was to develop a balanced system that was useful and workable for case teams, and at the same time provided adequate safeguards to protect confidential information, personal data and due process rights of the parties involved in the investigations. The EU and Swiss substantive rules are very similar. This means the authorities are more likely to investigate the same practices and to have information that is relevant to the other authority. Both enforcement systems also have comparable sanctions (they impose administrative sanctions on undertakings only and individuals can neither be prosecuted, nor fined), and recognise similar procedural rights of the parties, and rights of legal privilege and non self incrimination.

Under the Agreement, information exchange will only take place when both sides are investigating the ‘same or related conduct or transaction.’ The Agreement provides for discussion and transmission of information covered by waivers, and information not covered by waivers subject to three conditions: (i) both competition authorities are investigating the same or related conduct or transaction, (ii) the request is made in writing, identifies the undertakings concerned and includes a general description of the subject matter, nature of investigation and specific legal provisions and (iii) the two competition authorities will consult to determine what information is relevant and may be transmitted.¹²

The agreement specifies various limits on the discussion, transmission and use of the information. There can be no exchange of leniency or settlement information without waivers, and there can be no exchange of information protected under the legal privilege. The information exchanged can only be used for the application of competition laws by the respective competition authorities to the same, or related, conduct. Information exchanged cannot be used to impose sanctions on individuals.

Identification and protection of business secrets is carried out by the receiving competition authority. Both competition authorities will oppose any application of a third party or another authority for disclosure of information received, and will ensure the protection of personal data. However, information may be disclosed (i) to obtain a court order in relation to the enforcement of competition laws, (ii) to undertakings subject to the investigation and against whom the information may be used, (iii) to courts in appeal procedures, and (iv) if it is indispensable for the exercise of the right of access to documents under the laws of either country.¹³

9. Another discouraging factor for international co-operation is the lack of a commonly agreed definition at international level of what is “confidential information” in the competition field. These definitions, rarely included in legal statutes, are often developed by the practice of the enforcement agency and that of the courts. Some jurisdictions define information as confidential by the way it is collected (i.e. any information collected during an investigation is confidential). Others consider the nature of the information, whereby information is confidential if its disclosure would harm the commercial interest of the source which provided it (i.e. information related to price, sales, costs, customers and suppliers). In the latter case, it can be difficult to distinguish between what is commercially sensitive or not.¹⁴

10. These differences in how competition authorities or courts define confidential information in competition investigations can represent an obstacle to effective co-operation. Agreeing on whether a specific piece of information is confidential or not can be a time consuming process and errors can expose the requested authority to legal liabilities. If in doubt, the risk of litigation may discourage authorities from disclosing such information to foreign authorities when requested.

¹² Article VII (4).

¹³ Article IX.

¹⁴ For example the EU states that to claim confidentiality, the information must be known only to a limited number of persons, and if disclosed, be liable to cause serious harm to the person who provided it or to third parties with regard to interests which, objectively, are worthy of protection. See http://ec.europa.eu/competition/antitrust/business_secrets_en.pdf and Article 339 TFEU which restricts the disclosure of information “*of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*”

3. Legal framework: criminal v civil/administrative enforcement

11. In some jurisdictions, competition law infringements can be criminally prosecuted. This places additional limitations on the ability of competition authorities from civil/administrative and criminal jurisdictions to assist each other, and exchange information and evidence on their respective investigations,¹⁵ because of the so called ‘dual criminality’ requirement. The requirement is a common feature of extradition law of many countries. These statutes state that a suspect can be extradited from one country to stand trial for breaking a second country's laws only when a similar law exists in the extraditing country.¹⁶ Many MLATs, including those applicable to competition cases, include a dual criminal requirement.¹⁷

12. Dual criminality requirements and discretionary provisions may make MLATs toothless in antitrust cases where the counterparty does not criminalise antitrust offences. This requirement *de facto* prevents the exchange of confidential information to assist in a cartel investigation/prosecution if the same case is prosecuted as a criminal offence in one jurisdiction and as a civil/administrative infringement in another. Consequently the level of co-operation attainable between competition authorities operating in criminal jurisdictions, with those operating in civil jurisdictions, is significantly impeded. Pursuing sanctions against individuals (in particular through jail sentences) is considered one of the most effective ways to deter and punish cartel activity. Criminal sanctions for cartel conduct have consequently been introduced, or are currently being considered, in a number of countries. In the future this could, potentially, facilitate co-operation and create a ‘virtual’ alliance among jurisdictions that have criminalised cartels.¹⁸ However, the criminalisation of cartel conduct has some way to evolve as the trend towards criminalisation is not yet matched by a comparable criminal enforcement record. Outside of the US, very few jurisdictions have actually prosecuted cartels under their criminal provisions. Instead they continue to investigate their cartels using their civil or administrative powers.

¹⁵ See OECD Roundtable on Improving International Co-operation in Cartel Investigations (2012).

¹⁶ Ian Norris, former CEO of Morgan Crucible and a UK national, is the first foreign national extradited by the DoJ Antitrust Division. Mr Norris was not ultimately extradited for antitrust violations. The DoJ tried in 2008 to extradite him for antitrust offences, but the court held that the dual criminality requirement of extradition was not met because price fixing was not a crime in the United Kingdom at the time (Norris v Judgments, [2008] UKHL 16 (H.L.) (appeal taken from EWHC)). Undeterred, the DoJ sought and successfully extradited Mr Norris on obstruction of justice charges.

¹⁷ It is however noteworthy that sometimes dual criminality is not a requirement for the application of MLATs. Thus their use might in theory be extended into the area of competition law enforcement, even if only one of the parties to the agreement is a criminal jurisdiction as regards competition law. For example, the US-Spain and US-Italy MLATs theoretically may also be used in antitrust cases as they do not include the requirement of dual criminality. However, in cases where there is no dual criminality some means of co-operation may be unavailable to the parties. An exclusion for competition matters in the UK-US MLAT was removed in 2001.

¹⁸ As a previous Assistant Attorney General at the US DOJ remarked “[h]aving colleagues in other jurisdictions focused on criminal enforcement also leads to greater success in our own prosecutions here at home, with easier access to evidence and witnesses.” See Barnett (2006).

The Speciality Chemicals Cartel¹⁹

In February 2003 the European Commission (EC), the US Department of Justice (DOJ), the Japan Fair Trade Commission and the Canadian Competition Bureau (CCB) brought co-ordinated actions against companies suspected to be involved in a worldwide chemicals cartel. The EC (as an administrative agency) was strictly prohibited from sharing the evidence it had gathered in its dawn raids with the DOJ (operating in a criminal jurisdiction). This was due to the restrictions imposed by Article 20 of EU Regulation 17/1962²⁰ preventing the use of evidence gathered for criminal purposes. In contrast, the Canadian authority (also operating in a criminal jurisdiction) was not faced with the same constraints. Consequently the CCB was able to share the evidence they had collected with their US counterparts at the DOJ.

13. In addition to a dual criminality requirement preventing a criminal jurisdiction from co-operating with a civil/administrative jurisdiction, there are also legal provisions in civil/administrative enforcement systems which may render co-operation with criminal jurisdictions arduous. While national provisions in this area vary significantly from country to country, there are some common features. In particular, as discussed above, many legal systems limit the use of the information only to the purposes for which it was collected. This prevents an authority from a civil/administrative system from sharing information with a criminal jurisdiction if the information can ultimately be used to impose criminal sanctions. Similarly this would prevent an authority from a civil/administrative system which provides only for corporate fines from sharing information with another authority (whether with a criminal or a civil/administrative enforcement system) which can impose sanction on individuals.

14. Due process considerations come into play as well. Often countries do not allow the exchange of information with jurisdictions where due process rights do not have a similar level of protection. This issue can be particularly relevant when a criminal jurisdiction wishes to co-operate with a civil/administrative jurisdiction, as due process rights in a criminal context may be higher than in a civil administrative case. For example, in many civil/administrative jurisdictions there is no right to cross-examine a witness in an antitrust investigation. This raises the question if the statement released by the particular witness can be disclosed to a criminal jurisdiction investigating the same conduct and used as evidence, if a right to cross-examination exists in that jurisdiction.

¹⁹ See Joshua, Camesasca, Jung (2008).

²⁰ EEC Council, Regulation No.17: First Regulation Implementing Articles 85 and 86 of the Treaty, 1962 OJ (013) 204.

Reg. 1/2003, Article 12 - Exchange of information

As an illustration of the approach to information exchange taken by some jurisdictions, this box includes the wording of Art.12 of the EU Regulation 1/2003 on Exchange of Information in EU antitrust cases between competition authorities in the European Union.

1. For the purpose of applying Articles [101] and [102] of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article [101] or Article [102] of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.
3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:
 - the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article [101] or Article [102] of the Treaty or, in the absence thereof,
 - the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

15. Other jurisdictional constraints may also hinder international co-operation. A particular conduct, for example, may be exempted from competition in one jurisdiction and not in another, or considered anti-competitive in one country but not in another. These differences in legal standards can hamper co-operation. Export cartels also present a particular challenge for international co-operation. Export cartels are based in one jurisdiction but produce their effects exclusively in another jurisdiction.²¹ Often they are not prohibited by their ‘home’ jurisdiction, if the competition law only prohibits cartels which have an effect within its own territory. Several countries, including both developed and developing countries, maintain explicit exemptions for export cartels. Some require notification of their activities and a few others require official authorisation. If the relevant documents are in the public domain, foreign competition authorities can obtain information about the cartels’ existence and membership. However, exclusion of export cartels from domestic antitrust laws effectively cloaks their cartels from foreign authorities.²² Export cartel exemptions prevent the competition authorities of the state in which a company is domiciled – and therefore holding the most information about the conduct and having the best access to the companies in question – from assisting those that are harmed by anti-competitive behaviour (the target states).²³

²¹ See OECD Roundtable on Improving International Co-operation in Cartel Investigations (2012).

²² See OECD Roundtable on Improving International Co-operation in Cartel Investigations (2012).

²³ See Becker (2007).

4. Institutional limitations and other practical constraints

16. Shortcomings in the internal organisation of competition authorities may result in a lack of competences to co-operate effectively. New and less experienced competition regimes need to establish credible competition institutions and develop the necessary tools and policies to become effective enforcers of competition law. Until they do so, they may not have the resources, experience or credibility to harness the benefits of greater co-operation in the same manner as more experienced jurisdictions.

17. Resource constraints may restrict agencies from engaging in extensive co-operation efforts. Merger control and cartel investigations are both very resource intensive processes. Some competition authorities lack the human and financial resources, as well as sufficient expertise in law and economics, to carry out the necessary tasks. In particular, the local skills markets of some economies (particularly developing and emerging countries) do not always have the necessary expertise in the field of competition law.²⁴ Making or responding to co-operation requests can detract scarce resources from other enforcement activities. This is particularly the case where co-operation requires formal channels.

18. Lack of investigatory powers, such as being able to conduct unannounced on-site inspections, impedes the ability of an authority to take part in co-ordinated dawn raids with their foreign counterparts. In order to overcome this problem, a number of countries have amended their laws to align themselves to the standard of more experienced jurisdictions.²⁵ This increases their likelihood of being considered for joint evidence gathering exercises.

19. Practical difficulties may arise in the co-ordination of investigations. These may occur, for example, if investigations are at different stages between the various authorities involved or if difficulties arise due to the different time zones. Language barriers between agencies may also hinder, or significantly slow down the ability to co-operate as translations of documents and interpreters are required. Competition law is a very dynamic, fast-evolving and technical legal discipline. The technical language used is consequently fluid and in constant development to reflect the evolving economic principles and theories on which it rests. Competition law jargon may result in unfamiliar language which can render communication with foreign competition authorities challenging, particularly if less experienced competition authorities are involved.²⁶

²⁴ See OECD Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies (2011).

²⁵ Both Chile and Mexico, for example, have recently amended their competition laws (in 2009 and 2010 respectively) to improve their investigatory powers, including the ability to conduct surprise inspections. See OECD Roundtable on Improving International Co-operation in Cartel Investigations (2012).

²⁶ See Gerber (2010).

Jurisdictional restrictions on serving documents and evidence gathering: Japan

In the absence of co-operation agreements, competition authorities may be unable to serve and enforce legal orders in jurisdictions where respondents are physically located.²⁷ Prior to 2002, the Japanese Fair Trade Commission (JFTC) had no ability to serve documents on persons or companies outside Japan. The JFTC was therefore unable to enforce the Antimonopoly Act (AML) against foreign companies unless they:

- had offices in Japan,
- retained an attorney in Japan with the representative power to receive documents, or
- voluntarily accepted documents.

The AML was amended in 2002 to allow the JFTC to serve documents on companies or persons outside Japan. The revised process requires the JFTC to deliver the documents to the Japanese ambassador, minister or consul in the country where the addressee of the document is located. However, as yet no country has authorized its government agency to serve documents pursuant to the AML. Therefore documents can only be effectively served abroad if the government of the foreign country agrees. This means that the JFTC must rely on international or bilateral agreements, which allow for the service of documents through foreign counterparts, before the AML can be enforced against foreign companies.²⁸

In the Marine Hose Cartel case, the JFTC was faced with additional obstacles related to evidence gathering. In many international cartel cases, evidence cannot be gathered through dawn raids as the company under investigation does not have a physical presence (i.e. a registered office) in that particular jurisdiction. To overcome this problem, the JFTC requested relevant foreign enterprises to select and appoint representative attorneys in Japan. Through these appointed attorneys, the JFTC was able to obtain evidentiary materials. However, if the companies do not co-operate there is no way to request foreign enterprises to directly provide material to the JFTC. This highlights the need for competition authorities to be able to share information about their investigations.

20. It is difficult to pinpoint specific solutions that authorities have adopted to overcome these types of constraints. On the institutional side, raising awareness of the importance of co-operation in the international competition community led many authorities to established internal offices dedicated to facilitate co-operation among case handlers across agencies. The existence of a dedicated international team has to some extent attenuated the practical constraints that case teams may experience on an operational basis. For example, constraints due to the fact that case teams in different agencies may not have a common working language or constraints due to the fact that the two agencies operate in different time zones. Fostering internal awareness of the significance of international co-operation should also increase the willingness of case teams to engage in constructive exchanges with colleagues in other agencies. Time invested in supporting an investigation of another jurisdiction should not be perceived as precious time detracted from the domestic investigations but valuable time invested in building stronger enforcement across-borders.

²⁷ See South Africa's written contribution to the Roundtable on Improving International Co-operation in Cartel Investigations [DAF/COMP/GF/WD\(2012\)51](#).

²⁸ See Ohkubo and Shishido (2010), p. 91.

5. Lack of trust and confidence in legal systems

21. Trust is central to building co-operative relationships between competition authorities. Co-operation in competition investigations may involve exchange of information, discussions on general approaches to an investigation, gathering of information, interviewing of witnesses on behalf of another agency and co-ordination of simultaneous searches, raids or inspections. In India's written submission to the 2012 Global Forum it was emphasised that mutual understanding and trust building between agencies (through both formal and informal mechanisms) is essential, before such co-operation initiatives can take place.²⁹

22. A lack of trust can be caused by a weak legal framework in the country seeking co-operation, insufficient transparency of the competition authority's procedures and inadequate safeguards for due process. This heightens perceptions that information may be leaked. The investigations of foreign authorities may be put at risk, undermining the effectiveness of their cartel enforcement programmes and associated tools. The lack of confidence may concern the ability of the requested country to provide information of the quality or standard necessary for the requesting country to use it in its own investigation. This is a higher risk with newer authorities that have not yet established the necessary safeguards or acquired sufficient experience to handle such requests.

6. Conclusion

23. International co-operation between competition authorities has increased steadily over the years, through both formal and informal channels. However, significant limitations and constraints remain. This has serious ramifications for the investigation and prosecution of competition law infringements on a global scale. Some competition authorities have taken steps to overcome the hurdles to co-operation, specifically in the area of exchanging confidential information. However, many of these solutions have required legislative change. These initiatives, however, remained isolated and many agencies continue to be constrained in their co-operation efforts by one or more of the limitations discussed in this paper.

24. The lack of appropriate tools (e.g. to exchange confidential information), procedures, institutions and resources are problems whose solutions go beyond the remit of competition authorities. Perhaps a political imperative, based on an understanding of the increasing economic costs of uncoordinated enforcement, is required for policy makers to make the necessary legal and institutional changes to improve enforcement against anti-competitive practices that have increasingly a cross-border dimension. Further discussion is also required to identify practical tools and realistic solutions in order to improve the intensity and quality of international co-operation. Until solutions can be found to overcome these barriers, effective international co-operation will not be achieved.

²⁹ See India's written contribution to the Roundtable on Improving International Co-operation in Cartel Investigations, [DAF/COMP/GF/WD\(2012\)52](#).

FURTHER READING

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