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HEARING ON ENHANCED ENFORCEMENT CO-OPERATION

-- Paper by John Temple Lang --

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AIMS OF ENHANCED INTERNATIONAL COOPERATION IN COMPETITION CASES

*By Dr. John Temple Lang**

1. Aims of Enhanced Cooperation

1. The aims of enhanced international cooperation should be:

- to minimize duplication and maximize efficiency overall of all the competition authorities involved;
- to impose no more cost or burdens on companies than necessary;
- to agree on priorities such as cartels, and avoid areas in which cooperation is difficult;
- to make the most effective use of all available resources;

2. Enhanced cooperation may be achieved in two ways:

- by having a one-stop-shop; or
- by having closer cooperation between two (or more) agencies.

3. These two approaches are not mutually exclusive. Some cooperation would be needed to arrange a one-stop approach in any given case, and if one stop is not appropriate, close cooperation is always an alternative. In addition, even if one stop is agreed, it will normally be necessary to ensure that the result is accepted as satisfactory by the second (and other) agencies: in general, one agency will not give another a blank cheque in any case which is important to the agency being asked to waive its jurisdiction. So some cooperation is always necessary.

2. Cooperation should be designed to avoid a number of problems

4. So cooperation should:

- avoid uncoordinated questionnaires and unnecessary questions, and as far as possible ask the same questions and apply the same theory of harm.
- avoid divergent remedies.
- avoid divergent timing of stages in merger cases (if necessary by modifying and harmonising statutory procedures).

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- avoid fining twice for the same conduct, and unnecessarily dividing up a case. If a case is to be the subject of separate procedures by two competition authorities, this should be done only when there is a strong reason and when the distinction between the two parts of the case is very clear. In general it is not desirable to have different cartellists fined by different agencies, or to have any company involved in more than one procedure.
- avoid positively anticompetitive decisions discouraging price competition, or discouraging discriminatory price reductions. (Decisions having these ill-effects are unfortunately possible under current interpretations of some competition laws).
- avoid compulsory licences of intellectual property rights, except when they are the appropriate remedy for an “additional” abuse (that is, an abuse that is not merely refusal to licence).
- avoid using competition law for regulatory or protectionist purposes, or for industrial policy.
- avoid innovative and controversial interpretations of competition law, as far as possible. They use too much resources, and most competition agencies have plenty of work to do with conventional cases.

3. Agencies should remember

- Jurisdiction is normally territorial and only exceptionally extra-territorial. The extra-territorial exercise of jurisdiction is likely to cause many complications. As far as possible, it should be exercised only with the agreement of the other agency or agencies involved.
- Uniform results cannot be guaranteed. The facts may be different. If the substantive law rules are different, uniform results cannot be expected. Differences in substantive rules are less likely in connection with price fixing, rather more likely in connection with mergers, and most likely in connection with unilateral conduct by dominant companies. As far as possible divergent results due to different procedures should be avoided.
- Serious distortions of competition result from State monopolies, State subsidies, and trade safeguard measures (e.g. anti-dumping duties). It is a waste of time for a competition agency to apply competition law if the beneficial effects will be offset by other policies in the same industry in the same State. Competition advocacy should be used instead.
- Cooperation is particularly important in cases in which the companies have allocated markets.
- Foreign direct investment is likely to be discouraged in any jurisdiction in which there is an active competition agency that does not cooperate with other agencies, and that therefore involves companies in investigations unnecessarily.¹

4. A fundamental distinction between merger and price – fixing cases

5. There is a fundamental distinction between merger cases and price fixing cases, because in merger cases the companies almost always have an incentive to encourage and facilitate close cooperation between the competition agencies. This is not the same in price-fixing cases.

¹ See Price Waterhouse Coopers, A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews: a study commissioned by the International Bar Association and the American Bar Association (2003). This study concluded that “*the lack of consistency between jurisdictional filing requirements is a real issue for business worldwide*”.

5. The Means to be adopted to increase cooperation

6. Strict coordination between competition agencies is needed on some issues:

- there should be no disclosure of applications for immunity or leniency, since disclosure would make the immunity / leniency policy ineffective.
- rules and criteria for identifying and handling confidential information (for what purpose it may be collected, how it may be obtained, who can challenge its use, which agency may be challenged², and how the company whose information it is can be sure to know when the information has been disclosed). Agencies must know exactly what information they can and cannot disclose to one another, and to whom it can be disclosed. Close cooperation is not possible, and not even desirable, unless confidentiality can be relied on absolutely. This cannot be assumed, and this should be understood and admitted frankly. Very few countries anywhere are totally immune from corruption. Absolute security for confidential information is an absolute precondition for close cooperation. There can be cooperation without exchange of confidential information, but its limitations must be recognised. There must be legislative protection for information received from other agencies, and for leniency and settlement statements.

6. Confidential treatment of evidence by agencies with regulatory (non-competition) powers

7. Some agencies have regulatory powers as well as competition powers. It is essential for other agencies to know whether the competition department of the “mixed” agency is or is not free to give information received from other agencies to the regulatory departments, and if so, what safeguards are applied.

7. Procedural Rights and Legal Privilege – the need for standard model legislation on legal privilege

8. Both legal systems involved in cooperation should have the same or similar procedural rights for the parties *e.g.* to object to disclosure of information as confidential. Rules about legal professional privilege are essential, and should be clarified and harmonized. Legislation in all countries should make it clear that legal advice from appropriately qualified lawyers is privileged and immune from disclosure, since this encourages voluntary compliance. It would be useful for OECD to have standard model legislation on legal privilege prepared.³ Common rules on legal privilege would greatly facilitate cooperation between competition agencies. This legislation on legal privilege would need to apply to all

² If any agency which lawfully obtained confidential information improperly discloses it to another agency, the company having the right to confidentiality should not need to sue both agencies, or in two jurisdictions.

³ The OECD 2005 Best Practices for the Formal Exchange of Information in Cartel Investigations mentions legal professional privilege, as follows: “*The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information. The requesting jurisdiction should, to the fullest extent possible (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is subject to legal profession privilege protections in the requesting jurisdiction*”. This is obviously desirable, but not sufficient. A wise policy for all competition agencies is to recognize legal professional privilege clearly, to encourage voluntary compliance, while insisting that lawyers should recognize duties of professional ethics not to help clients do anything in any jurisdiction that is known to be illegal, and not to mislead any court or competition agency, including courts and agencies in other States. Encouraging voluntary compliance, including compliance with the laws of other States, should be part of every competition agency’s policy, and a key element in international cooperation.

competition procedures. There should also be a right not to answer self-incriminating questions. The criteria for identifying confidential information should be as explicit and precise as possible. Standards of what is confidential differ significantly between States, and need to be discussed and harmonised.

8. Coordination is desirable

9. Coordination is desirable in connection with:

- approaches to cases, theories of harm, analyses;
- to decide whether there is one infringement or several;
- disclosure of information, and
- remedies, in particular compulsory licences, in all cases where what is done in one State will automatically have effects elsewhere.

10. Harmonisation of procedures should be accepted as a necessary long term objective, because without harmonization, cooperation will always be more difficult, time-consuming and unsatisfactory than necessary. A model set of procedural principles should be developed by OECD, or elsewhere *e.g.* in the International Competition Network. The procedures of each authority should be discussed and reviewed by several other authorities, to identify weaknesses and problems. (OECD already carries out “peer review” of competition agencies). Most competition authorities could significantly improve their procedures, and peer review can help them to do this.

11. Unfortunately, certain features of some authorities’ procedures should be frankly recognized as being undesirable, and should not be copied. First, competition decisions should be taken only by officials who have read or heard the evidence and the arguments and attended the hearings. Second, the case against the companies (the “statement of objections” in European Commission procedure) and the final decision should not be written by the same officials, since that inevitably means that the arguments for the companies are not fairly and objectively considered. International cooperation will not be accepted unless it is generally believed to be fair. In some countries the courts will not allow decisions of foreign agencies or courts to be enforced if they have not been adopted by procedures complying with international standards of due process and subject to thorough judicial review, and this safeguard is required by international agreements such as the European Convention on Human Rights giving a right to a fair trial.

12. Agencies must be careful to respect and not to interfere with or frustrate the rules and constraints of other agencies, and must do nothing to interfere with the rights of employees of companies under the law applying to the other agency. This is particularly important where the individual employee may be responsible under criminal law. Just as harmonisation of leniency programmes is desirable, so is harmonisation of national rules on personal criminal liability, since these can significantly affect the usefulness of leniency programmes, and can interfere with their coordination.

9. Possible arrangements for cooperation: the One-stop-shop approach

13. The “lead agency” approach By agreement, two or more agencies could agree that only one needs to deal with a cartel or merger case. (For example, in the *GE-Avio* case the European Commission relied on the remedies imposed by the US Federal Trade Commission).⁴ This would be best done informally, where the remedy imposed by the first agency is sufficient to deal with the case in the second jurisdiction (if indeed a remedy is needed there at all).

14. It is essential to decide quickly which agency will deal with a case. Otherwise much time could be lost. An agency should not agree to handle a case unless it is clear that it will have the staff available to decide it within a reasonable time.

15. Where a case clearly involves more than one jurisdiction, the agencies involved should always have an initial discussion to see whether the case could be dealt with by a single agency, because that may be the most efficient solution.

16. The initial agreement that one agency will “lead” should not commit the second agency necessarily to accept the result: it must have the option of taking up the case until it can be sure that the result is satisfactory for its jurisdiction. The second agency needs to be closely involved with the “lead” agency to ensure that it is satisfied with the result. The companies should see the advice and evidence that is being exchanged, and in particular the evidence the second agency is sending to the “lead” agency. Each agency should have the right to appear in the procedure of the other.

17. When such an arrangement seems likely to be satisfactory, the two agencies should plan accordingly, and the agency dealing with the case should cooperate particularly closely with the other, so as to make sure, as far as possible, that its decision would be sufficient and satisfactory for the second agency.

18. Under this informal approach, there would be no powers delegated to the lead agency. It would simply exercise its usual powers, but doing so in close cooperation with the other agency or agencies involved.

19. The lead agency approach: formal arrangements. For more formal cases, legislation could be adopted in the State where the agency is relying on another “lead” agency in another State by which the two agencies would agree that the decision of the “lead” agency would have extra-territorial effect.

20. The companies would need to be notified by the first agency that its decision might be extended to apply to the jurisdiction of the second agency.

21. As with the informal approach, each agency would need to have the right to appear in the procedures of the other.

22. The second agency must be free to decide not to accept the action of the first agency, without giving a reason. (The facts might be different, or the second agency might not have confidence in the decision of the first agency, for substantive or procedural reasons, but it should not be obliged to criticize the first agency).⁵

⁴ In contrast, in *UTC / Goodrich* the Commission and the US authorities adopted essentially the same decisions on the same day: Commission decision M.6410, July 26, 2012.

⁵ See Temple Lang, *The Private Claims Directive*, Competition Law Insight December 2013, pp. 8-9.

23. Legislation in both States would be needed to allow extra-territorial effect to be given to the decisions of the agency acting as the “lead” agency, but such decisions should be adopted only with the express agreement of the other agency involved in each case. The legislation should allow the first agency to adopt an initial decision applying in its own jurisdiction, and if necessary a separate decision later extending the effect of the decision to the other jurisdiction.

24. The companies must have the right to challenge the decision in the courts of the first agency.

25. This formal approach would be so complicated that it does not seem desirable. If it also involves a challengeable decision by the second agency, agreeing to the extraterritorial application, much of the efficiency benefit of having a single “lead” agency is lost.

26. It does not seem practicable to have a mandatory system for appointing a lead agency. That would introduce undesirable rigidity, and scope for obstruction. The circumstances might make it inappropriate to have any one lead agency. There would be no way to guarantee, in advance, that the non-lead agency would be satisfied with the result reached by the lead agency. Any system that placed conditions on the right of the non-lead agency to take up the case would give rise to further legal issues. The object of any lead agency approach is to simplify the entire procedure, and case allocation criteria, mandatory selection of a lead agency, and special rules to protect the rights of non-lead agencies to protect certain kinds of interests would all complicate the situation excessively, and defeat the purpose.

10. The lead agency approach – by treaty or by national legislation?

27. If formal arrangements for a lead agency approach were thought desirable, they could in theory be made either by national legislation or by international agreement. National legislation would be preferable, because it would be easier to amend if necessary, and it could be extended to apply to cooperation with additional States. It would rarely if ever be appropriate for one State to rely on a treaty to insist that another State should not exercise jurisdiction, and if that occurred it would be inconsistent with the cooperation that is essential to make any such arrangement work satisfactorily. So a treaty would be both unnecessary and undesirable, because it would be inflexible.

11. The limits of the “lead agency” approach – fining cases

28. One important limit on the lead agency approach must be stressed. If a cartel has caused economic harm in more than one jurisdiction, it cannot be left to one lead agency to impose a fine appropriate to all of the harm caused in both jurisdictions. Even if the lead agency was in a position to exercise extraterritorial powers, it would be inappropriate for the lead agency to collect and retain a fine for the harm done in the other State. That fine should be paid to the authorities in the other State.⁶ So multiple procedures are unavoidable in cases where substantial fines are appropriate in more than one jurisdiction.

29. However, if the facts in both jurisdictions are sufficiently similar, the agencies could cooperate and adopt decisions in substantially similar terms, imposing fines in each jurisdiction.

⁶ There is one exception, or apparent exception, to this. If a number of companies agree that each will sell only in its own State, the competition agency in each State should fine the company there partly for the economic harm it has caused in the other States. The competition agencies need to coordinate their decisions to achieve this result. Fines in these circumstances cannot be criticised on the grounds that they are based on economic harm caused outside the jurisdiction in which the fine is imposed.

12. Mergers and the One-stop-shop principle

30. Under the informal “lead agency” approach suggested above, there is only one procedure, and any other agency that might be involved simply assents to the conclusion reached. However, it may be unrealistic for the other agencies in all cases to guarantee at an early stage that they will accept the result. So the companies cannot be certain that they will have to deal with only one agency, even if they can be sure which agency it will be, which is not necessarily the case. Agencies and companies would need to accept that the non-lead agencies would simply take no decisions, and that the companies would obtain legal security only when the time limit for the action of the non-lead agency had expired. Non-lead agencies could, if they were willing, give assurances before the time limit expired.

31. In practice, solutions would be found more easily if agencies admitted more frankly that many merger cases have no significance for their national markets, and that notification and approval are often unnecessary formalities. Companies could suggest this explicitly, when appropriate, and if they do this frankly and objectively the agencies should normally accept the suggestion. However, agencies may be reluctant to admit this, since it could be regarded as admitting that their notification requirements are excessive and badly designed, and that they were collecting notification fees unjustifiably.

32. Probably there should be a general understanding that a one-stop-shop is always desirable, and that the companies and the agencies should always try to arrange it unless there is some very strong reason why it is undesirable. Such a reason might exist if there is a specific smaller market in which the merger is likely to cause problems, even if it will cause no difficulties elsewhere. This would be analogous to cases in the EU in which national agencies deal with their national markets if the market is sufficiently distinct, or if each company has two thirds of its EU revenues in that State. In many such cases the companies should be able to anticipate that this solution should be adopted, and if that were clear, the agency in question would be the lead agency, even though its decision might apply to only a small proportion of the total activities of the merging parties.

33. It will be seen that in practice a one-stop-shop solution can be arranged only if there is close and frank cooperation between the companies and the agencies, and if there is little doubt about which agency should take the lead. Even an unrealistic degree of harmonization of agencies’ procedures cannot prevent situations arising in which the facts in different.⁷ States are very different, and separate procedures and different results may be necessary and appropriate. Also, there will always be borderline cases, in which a one-stop-shop is unlikely to be obtainable.

34. Legislation giving extra-territorial powers, to be exercised in “lead agency” cases only with the consent of the other State involved, should be considered, although it may be considered too complicated. Without such legislation, it is hard to see how e.g. “lead” agency approaches can be guaranteed to work. Without it, the “lead” agency approach merely means that the second agency decides that it need do nothing, but the first agency measure would have no legal effect outside its jurisdiction. If there is to be an effect outside the first agency’s jurisdiction, there may be a need for legislation in the “second” jurisdiction also, allowing the second agency to allow the decision of the first agency to have extra-territorial effects in the second jurisdiction.

⁷ For example, in the *Crane / MEI* merger case in 2013, the European Commission imposed conditions on the automatic payment systems companies because in Europe there is a practice of mass transportation aid cash payments. In the USA the Federal Trade Commission had imposed no such conditions, since US consumers usually pay without using cash. This made different remedies appropriate, but other differences might lead to different conclusions about whether a merger was restrictive or not.

13. Possible arrangements for closer cooperation without a One Stop Shop

35. Recognition of leniency applications; A leniency or immunity application to one agency could be treated, if the company so chose, as an application to all the other agencies specified by the company, to which the company would send the application. The company would simply send a single application to all the agencies, with supplementary materials as far as necessary. The agencies would need initially to accept applications in languages with which they were not necessarily familiar.

36. It has also been suggested that a leniency “marker” application sent to one agency should be treated as a “marker” to other agencies. However, what is called a “marker” is merely an incomplete immunity/leniency application. There would be nothing to ensure that a “marker” sent to one agency would be enough to give the company submitting the “marker” priority, in all other agencies, over all other companies that later submit complete applications to the other agencies. This would be hard to justify unless the “marker” gave almost as much information as a complete application for immunity or leniency, and gave almost complete information for all the jurisdictions in which the “marker” was intended to take effect. This seems most unlikely to work satisfactorily. It would be extremely difficult to decide whether a “marker” addressed to one agency was sufficient to take precedence over a proper application made subsequently to another agency in another jurisdiction. Markers are not a clear cut device, and an agency should not be asked to give priority to a marker not designed for it. If a company wishes to make advantage of a “marker” procedure, it seems reasonable to require it to fulfill all the relevant requirements in each jurisdiction. But it might be useful to harmonise those requirements, so that the differences between the applications for markers would result from different circumstances in the States concerned. Basically, each agency should determine for itself whether a “marker” addressed to it is enough to take precedence over a full application addressed to it by another company.

37. Cooperation in detection of infringements - Investigations on behalf of other agencies. Legislation should be adopted giving each agency power to obtain evidence in its jurisdiction on behalf of other agencies (as under EU Regulation 1/2003, in the European Competition Network). Various versions of this are referred to as “positive comity” or “investigative assistance”.

38. Legislation should also authorise each agency to give (non-confidential) information to other agencies. This would allow the authorities to exchange computerised information about public contracts, to detect bid-rigging. Information on the prices offered by companies bidding and bid allocation, unsuccessfully for public contracts, which would be more useful to detect bid-rigging, would normally be confidential, and would have to be treated as such. Supervision of competition in connection with public contracts is particularly important, and cooperation should be ensured as far as possible.⁸ It should be kept in mind that bribery is especially likely in connection with public contracts.

39. Representation of foreign agencies in competition courts should be allowed by legislation, to enable them to explain or defend their decisions. This would be useful for example if the local agency had approved the extraterritorial application of the foreign agency’s decision, or even if it had simply decided that the decision made it unnecessary to take action. (The local agency might have refused to act on a complaint, and its refusal might be challenged in its administrative courts).

⁸ Competition agencies should encourage all public authorities to include clauses in public contracts saying that if the contractor is found to have fixed prices or rigged bids, it will pay compensation equivalent to a specified percentage of the total value of the contract. Contractors can hardly object to such clauses, and they make enforcement of competition law more efficient and much more valuable for taxpayers.

40. Merger cases – means to be considered, Almost everywhere, too many mergers now need to be notified unnecessarily. All authorities need to reduce or eliminate notifications of mergers with only marginal connections or effects in their jurisdiction.
41. This is particularly important for joint ventures outside the jurisdiction of the agency concerned.
42. All authorities need to adopt measures allowing simple notifications of mergers which, although notifiable, in fact do not need examination. It is essential to make sure that what should be simple procedures are not made complicated by asking unnecessary questions.
43. It is not desirable for agencies to be required or authorized to examine or approve minority shareholdings giving or said to give influence that is less than control, since all such powers are extremely complicated and the cost and effort involved is out of proportion to the benefit of being able to deal with very rare cases. Such cases can usually be dealt with under the rules on restrictive agreements⁹, and should be dealt with in that way. The risk of discouraging procompetitive investments and equity capital is a serious one.
44. It seems clear that in some States merger control laws are used merely as a revenue raising device, imposing substantial filing fees even where there is little or no significant economic effect. This imposes unjustifiable costs on companies, and is thoroughly undesirable.
45. The wish to use competition law to raise revenue may also lead to imposing unnecessary high fines.
46. Remedies. Close coordination is particularly essential in cases involving remedies. Some remedies are much too time-consuming and complicated, even for large and sophisticated agencies. Duplication of remedies should be avoided in almost all cases. Under no circumstances should remedies be considered that would be inconsistent with each other. Remember that behavioural remedies are difficult and troublesome to monitor, and never clear-cut, and create opportunities for bribery that are less likely to arise with structural remedies such as divestiture. Approval conditional on subsequent adoption of remedies should be avoided, in case the remedy is not carried out.
47. However, behavioural remedies may have the advantage that they can be limited to the jurisdiction imposing them, thus avoiding direct conflicts with other jurisdictions. But this does not, of course, avoid inconsistent remedies, and it may lead to companies having very different obligations in different countries, which is inconvenient and may be costly. It is not always possible to adopt efficient remedies on a purely national basis.
48. It must be recognised that in some cases even an agency in a large jurisdiction may be unable effectively to prevent an international merger. For example, the United Kingdom competition authority in 2004 decided not to prohibit a merger or to require divestiture by a German company, Dräger, because it would have been too difficult to enforce the remedies considered.¹⁰ Competition agencies should be realistic and should avoid actions that are inherently likely to be ineffective.

⁹ Levy, EU Merger Control and Non-Controlling Minority Shareholdings: The case against change, 9 European Competition Journal (2013), 721-753.

¹⁰ *Dräger /Air-Shields*, U:K: Competition Commission, 2004: “*In this case the global nature of the merger and the fact that manufacturing of the relevant equipment takes place overseas makes it likely that prohibition would be impractical, even if we had found it to be an appropriate remedy*” (page 41). See also pp. 48-49.

49. More generally, cooperation can apply to deciding enforcement priorities, gathering digital evidence, interim measures, commitments, and structural remedies in merger and abuse cases.

14. Close cooperation with companies

50. Competition agencies should allow companies to work closely with them to avoid or minimize cost or difficulties for the companies. The companies must understand that the agencies will be working closely with one another. The companies must not be allowed to play one agency off against the other.

51. Competition agencies can cooperate usefully by obtaining waivers from companies which allow information obtained by the first agency to be shared with other agencies.

15. Proportionality

52. Agencies must ensure that they always respect the principle of proportionality, that is, the rule that official action must not impose cost or inconvenience that is unnecessary or inappropriate to the problem, or which imposes more cost or inconvenience than is reasonable to achieve the result required. Agencies should recognize that they may seriously underestimate the work that they impose on companies by *e.g.* asking unnecessary questions or questions that cannot be easily answered from available information. Agencies should therefore listen carefully, and be flexible, when companies complain about this.

16. Other issues

53. Some agencies have no powers to apply their national competition laws to certain sectors or certain types of companies, such as State companies or former State owned monopolies. This would mean that they could not cooperate formally with other agencies if these sectors or companies were involved.

54. The more similar the substantive national laws are, the easier it is for the agencies to cooperate. It is probably not useful for agencies with very different laws to try to cooperate closely. Similar procedures would also greatly facilitate cooperation. Whenever substantive or procedural rules are revised, efforts should be made to harmonise them.

17. Case allocation criteria?

55. It is probably not useful to have detailed rules for allocation of cases. Too much will depend on the resources available to each agency at the relevant time, on where most of the evidence (including statistical evidence) is likely to be found, and on how much experience (if any) each agency has with the industry in question. Detailed rules on allocation of cases also give companies opportunities for making procedural difficulties. It must be remembered that at the early stages of an investigation neither agency may have all the information needed to decide which agency should ideally decide the case, and a practical decision may have to be made on the basis of the manpower and the information available. That decision may later prove to be inconvenient or wrong. The case allocation criteria should not be legally binding, because that would introduce too much rigidity and too much scope for obstruction, and if they are not legally binding, they should be as flexible as possible.

56. It is more difficult to cooperate with a State if it has more than one competition authority, or if other agencies need to cooperate with both the competition agency and a Ministry in individual cases.

18. Monitoring

57. It is important to learn from experience, by assessing what has happened after decisions have been taken. So it is necessary to monitor the markets in important cases, to see whether the decisions taken have had the effects intended. Monitoring should be done jointly by two agencies, not only by the agency that took the first decision.

19. The advantages of informal cooperation

58. The outline, above, of the alternative ways of using the “lead agency” approach show that an informal, flexible approach with minimal legal framework is better than an elaborate structure. Agencies should not use their resources to construct elaborate arrangements or rules. At most, probably all that is necessary is that each State should legislate to give its competition agency power, with the consent of the other agencies involved, to adopt decisions having extraterritorial effects.

59. Informal cooperation is easier and less bureaucratic, and can be quicker and more efficient, than formal arrangements. However, it involves the serious danger that the rights of the companies may not be respected. In particular, if one agency makes comments to another, the agency receiving the comments must give the companies an opportunity to see the comments, and to answer or criticize them. If this is not done, international cooperation will get a bad reputation, procedural errors will occur, and unnecessary litigation will be brought about.

60. This informal or minimalist approach has the important advantage that there is only one decision, and that it can be challenged in the courts of the State whose agency took the decision.

61. It is important to realise that the rights of defence of the companies must not be reduced because the investigation has been carried out by two agencies instead of one. This means, for example, that since the agency dealing with the case must disclose evidence favourable to the companies as well as evidence against them, it must also disclose favourable evidence in the possession of the other agency. In other words, if one agency sends evidence against the companies to the agency which ultimately handles the case, the latter agency must obtain, and disclose to the companies, all the evidence in the possession of the sending agency, and not only the incriminating evidence initially sent. Similarly, the agencies must comply with all the rules binding on both of them concerning legal privilege, and the *ne bis in idem* principle must be respected if they both deal with the same conduct. The transfer, however described, of a case to another jurisdiction should not be allowed seriously to alter the procedural rights of the companies concerned.¹¹

62. If it is believed that informal cooperation is insufficient, it would be better to work towards harmonisation of procedures rather than complicated arrangements to coordinate unharmonised practices. Even partial harmonisation of procedures would greatly facilitate coordination, and would be much easier to obtain than frameworks for coordination.

63. Among the possibilities for informal cooperation, temporary exchanges of officials between agencies should be considered, if possible on a regular basis.

¹¹ Case T-119/02, *Royal Phillips Electronics*, [2003] E.C.R. I-1433.

20. Judicial review

64. It is essential to consider the arrangements for judicial review of agencies' decisions as part of the overall arrangements. Companies cannot be expected to have confidence in any national competition law if either the agency or the courts in the State concerned is known to be superficial, inefficient, unreliable, or corrupt. Informal cooperation between judges may be useful, as in the Association of European Competition Law Judges, and training for judges in competition economics should be considered.

21. Mutual recognition?

65. Legislation should allow the competition agency and national courts to give appropriate weight to judgments of courts in other States, without necessarily being bound by them. The courts will be able to judge how far they should do this. (The EFTA Court under the EEA Agreement follows the judgments of the EU Courts, and vice versa).

66. What would amount in practice to mutual recognition would result from informal acceptance by one agency of the decisions of another. However, it would be very much more difficult to try to introduce any system under which the courts or competition agency of one State would be required to act on or accept the decisions or judgments in another State. That does not seem to be feasible or desirable even as between Member States of the European Union, although they are subject to many of the same rules.¹² A fortiori, there could be no question of requiring recognition of foreign decisions or judgments in the absence of harmonized procedures, guarantees of due process, and assurances of strict judicial review. In the EU recognition could be justified only if the procedural safeguards imposed by the European Charter of Fundamental Rights and the European Convention on Human Rights had been respected in the first State. But this means that the courts in the second State (the "recognizing" State) would need to decide whether the procedures in the first State had infringed these requirements. Even in the EU, it is clear that the procedures of competition agencies and of national courts reviewing agency decisions are sometimes seriously defective. It would be most undesirable to oblige the courts of one State to try to decide whether the agency or courts of another State had infringed basic procedural requirements, and any such assessment, whatever the outcome, would produce ill-feeling between authorities which are intended to cooperate with one another. If the courts of the second State do not think it appropriate to follow the judgment in the first State, they can usually point out that the facts seem to be different, or that different arguments have been made or different evidence produced.¹³

¹² Temple Lang, *The Private Claims Directive*, Competition Law Insight December 2013.

¹³ It has been suggested that mutual recognition might be limited to findings of fact, and should not extend to legal assessments. However, this approach would seem unlikely to be useful. Findings of fact cannot always be separated from legal conclusions. Findings of fact are made on the basis of a legal view of the case, and a different legal view would be likely to require different findings of fact. In general cases should not be divided into separate pieces. The approach would not achieve the aim of ensuring that results reached by one agency or court cannot be reconsidered later by another. Courts should be allowed to judge for themselves whether judgments of other courts are sufficiently similar and sufficiently convincing to be followed, and they should not be followed without careful consideration. The facts may be different. Even in Germany, where courts are required by legislation to follow the judgments of courts and the decisions of competition agencies in other States, difficulties can arise if the German court finds the foreign judgment or decision unsatisfactory, or considers that proper procedures have not been followed.

22. Bribery and informal influence

67. It should be a general practice for agency officials to be accompanied by at least one colleague when they meet company representatives, and to avoid informal social contacts with representatives of companies. Written records of all meetings should always be made.

68. It is particularly important to take precautions against bribery in cases where commitments and settlement agreements on the amounts of fines are being discussed by a single agency.

23. Cooperation with Regulators

69. Legislation on competition should allow agencies to cooperate with economic regulators in the same State and in other States, in particular if the regulators have powers to apply competition law. However, care must be taken with confidential information, and competition agencies should remember that “regulatory capture” (regulators becoming too much influenced by those they are supposed to regulate) is more likely to affect economic regulators.

24. Avoiding double fines

70. Agencies can usually avoid causing double fines to be imposed for the same conduct if they fine only for effects within their jurisdiction. However, sometimes that is difficult to do, especially in an international cartel, and they may need to try to agree on the extent of the effects in each jurisdiction. The companies involved should give each agency all the information available to them, and they should agree to allow the agencies to exchange information. This may be particularly important when agencies are considering basing fines on both direct and indirect sales within their jurisdictions.