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I. INTRODUCTION

The antitrust agreement ("Agreement") between the United States and the European Commission, ("EC") [2] which has now passed its 20th birthday, constitutes a landmark achievement in international cooperation in the application of the parties' competition laws. It has served as a model for subsequent bilateral agreements by both parties. The 1991 agreement was innovative in a number of respects and has served as a foundation for the effective cooperation between the U.S. and EC antitrust agencies and very likely provided the groundwork for increased convergence of antitrust enforcement principles between the parties.

This paper will examine some of the events leading up to the Agreement, its innovative provisions, and its early application. The progress of cooperation in antitrust enforcement between the United States and the European Union is a rich and continuing history, complete with many successes and a few bumps along the road. It is worthy of book-length recitation; here, the focus is the beginnings and early story of the Agreement and its efficacy.

II. THE BEGINNINGS

For several decades prior to the Agreement antitrust enforcement activities, both by the U.S. agencies and private litigants, had reached out from the United States and embraced foreign entities which were alleged to have violated one or more of the U.S. antitrust laws. What was seen as an overly aggressive, intrusion in the business of firms outside the United States led challenged firms' host governments to enact various measures such as "blocking statutes" designed to preclude application of the U.S.-initiated discovery process. Particular concerns with the treble-damage aspect of U.S. private actions led foreign jurisdictions to enact "claw back" statutes as well, providing for recapture of the trebled award by the local defendant.

The prospect of increased controversy between the U.S. and European states engendered by these conditions took on an additional dimension as the EC intensified its antitrust enforcement efforts and outreach. In 1989, the European Union adopted the Merger Control Regulation, for the first time installing a mechanism for detailed merger review and enforcement beyond the broad language of the Treaty of Rome.[3] The prospect for increased EC involvement in transactions having an international dimension, coupled with the earlier interaction with the

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[2] Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504 (hereinafter "the Agreement").

[3] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 1.

U.S. enforcement activity, stimulated an undertaking to address possible conflicts and pave the road to enhanced cooperation between the U.S. and EU competition agencies.

III. THE INITIATIVE AND THE DEVELOPMENT

The initial impetus for the Agreement was provided by the then-Commissioner for Competition and Vice President of the EC, Sir Leon (now Lord) Brittan. Cognizant of both the history of apparent conflict and the expanded EC merger activity stemming from the recently adopted regulation, Sir Leon proposed a plan for both conflict avoidance and downstream cooperation. In discussion with both U.S. Attorney General Dick Thornburgh and the author, at the time Assistant Attorney General for Antitrust, in March of 1990 Sir Leon suggested that the United States and EC enter into an arrangement whereby the parties would recognize: (i) a priority of interest based on the geographic domicile of the parties subject to the challenge and effect of the conduct, including mergers, and (ii) enforcement would be the province of the lead party, while the other party would defer.

The proposal for an understanding to ameliorate conflict and enhance cooperation was welcomed by the U.S. authorities. It was thought, however, that a formal agreement providing for jurisdictional deference might be an unduly rigid and ambitious undertaking. Subsequent discussions involving Sir Leon, then-director of DG IV (Competition) Claus-Dieter Elhermann, the author, and then-U.S. Federal Trade Commission Chairman Janet Steiger led to a consensus that the parties should embark on a broad-based executive agreement for cooperation.

These discussions led to the formulation and execution of what became the Agreement. Numerous discussions among the principals took place in Brussels and Washington over the next year. The day-to-day working meetings and initial drafting were the responsibility of then-Chief of the Foreign Commerce Section of the U.S. Department of Justice ("DOJ"), Antitrust Division Charles S. Stark, and his counterpart at the EC, Auke Haagsma. The work of these participants produced the Agreement that introduced comprehensive and innovative principles for antitrust cooperation.

IV. PRINCIPAL INNOVATIONS

Although the United States had entered into several antitrust cooperation agreements with other jurisdictions, the U.S.-EC Agreement was more expansive and groundbreaking in a number of respects.

A. Notification

The Agreement, for the first time, set forth not only the obligation of each party to notify the other of competition activities affecting the interest of the other party, but described in detail the circumstances and timing when notification should take place.[4] The triggers for notification included enforcement activities by one party that would be relevant to enforcement activities of the other party that involved: (i) conduct carried out in the other party's territory; (ii) merger where a participant is incorporated or organized in the other party's territory; (iii) conduct required, encouraged, or approved by the other party; or (iv) the provision for remedies that would require or permit conduct in the other party's territory. In addition, the parties obliged themselves to notify each other when they were participating in a judicial or regulatory

[4] Agreement, *supra* note 2, Art. II.

proceeding that did not arise from the party's own enforcement activity but which may have affected the other party's important interests.

By spelling out in detail the circumstances giving rise to notification, the Agreement not only eliminated the risk of surprise, but also laid the foundation for discussion and cooperation between the parties. As a consequence, the notification article served, and continues to serve, as the basis for the effective implementation of the Agreement and the following provisions covering additional aspects of collaboration.

The detailed timing provisions are designed to facilitate timely interface between the agencies. The specific terms for the timing of notification in the case of mergers evidences the influence of the likelihood of increased merger activity having cross-border ramifications as a stimulus for the Agreement.

B. Cooperation

The Agreement announces the parties' commitment to cooperate in antitrust enforcement in matters where both parties have an interest. Unlike prior agreements, the Agreement sets forth in some detail the nature of that cooperation. The factors conducive to effective cooperation included more efficient use of resources, improved access to information, enhanced ability for each party to achieve its enforcement objective, and reduced costs for parties subject to enforcement.[5]

The enhanced cooperation feature of the Agreement is probably its most important feature and one that has provided its most significant benefits. As noted by Sir Leon on the occasion of the Agreement's execution, the provision for cooperation establishes that the Agreement not only serves as a mechanism for conflict avoidance but also, importantly, provides the avenue for effective collaboration and efficient management of future matters.[6]

Cooperation under the Agreement is supported by provisions for the exchange of information.[7] Contrary to the fears voiced by some practitioners at the time, the information exchange provision does not constitute a vehicle for the sharing of confidential information. No exchange can take place that is prohibited by the laws of the party to whom a request for information is made.

This phase of the Agreement, in particular, is supported by the provision calling for general consultations twice a year and consulting on specific issues as needed.[8] The regular consultation was designed to further mutual understanding, deepen personal relationships, and facilitate both further convergence and traditional comity.

During the discussions leading up to the Agreement, the EC participants requested the U.S. delegation add a provision that would oblige a party which had been satisfied with a remedy or other outcome achieved by the other party to formally notify any other third-party authority;

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[5] *Id.*, Art. IV.

[6] Press Release, Eur. Com'n, Eur. Comm'n and U.S. Sign Antitrust Agreement (Sept. 23, 1991) *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/91/848&format=HTML&aged=1&language=EN&guiLanguage=en.

[7] Agreement, *supra* note 2, Art. III.

[8] *Id.*, Arts III(2) and VII.

e.g., a U.S. state or EU Member State, which is pursuing the same matter of its conclusion. This suggestion did not find its way into the Agreement, unfortunately.

C. Traditional Comity

Article VI of the Agreement spells out for the first time in an antitrust cooperation agreement the principles of comity under the rubric of avoidance of conflict.[9] True to the objective, the Agreement sets forth considerations similar to those set forth in *Timberlane Lumber Co.*[10] Coupled with the notification obligation, the comity provision provides an effective foundation for conflict avoidance. Specifically, the Agreement provides that where one party's enforcement activities may adversely affect the important interests of the other party, the parties will consider the following factors in seeking to avoid a conflict:

- the relative significance of the conduct within the enforcing party's territory compared to the conduct within the other party's territory;
- the presence or absence of a purpose of those engaged in the conduct to affect consumers, suppliers, or competitors within the enforcing party's territory;
- the relative significance of anticompetitive effects on the enforcing party's interests compared to the effects on the other party's interests;
- the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- the degree of conflict or consistency between the enforcement activities and the other party's laws or articulated economic policies; and
- the extent to which enforcement activities of the other party with respect to the same persons may be affected.

D. "Positive" Comity

A unique feature of the Agreement has become known as "positive comity." Under this provision, a party whose interests are being adversely affected by conduct occurring within the jurisdiction of the other party, and violative of that party's competition law, may request that party to take appropriate enforcement action.[11] This provision is unprecedented and held out the promises of effective enforcement action by a party in a better position to take such action as well as as a means of minimizing conflicts arising from extraterritorial enforcement by the requesting party.

V. EARLY IMPLEMENTATION

The provisions of the Agreement were realized, for the most part, in the years immediately following its execution. A pattern was thus set for the steadily enhanced cooperation and convergence between the U.S. agencies and the EC that continues to grow to the present

[9] *Id.*, Art. VI.

[10] *Timberlane Lumber Co. v. Bank of America Nat. Trust and Sav. Ass'n*, 749 F.2d 1378 (9th Cir. 1984).

[11] Agreement, *supra* note 2, Art. V.

time. Even where potholes have been hit along the road, the Agreement and its progeny have furnished a medium for prompt resolution and implementation of means for future avoidance.

A. Notification

Together with the provision for cooperation, the notification obligation may be the most important lasting contribution of the Agreement. The element of surprise was eliminated and the formulation was set for cooperation and convergence. The effect was immediately realized. As explained in the article written by Joseph P. Griffin, "In the first two years, U.S. enforcers sent about sixty notifications to Brussels and received about forty from the EC Commission. In the year prior to the Agreement, U.S. enforcers sent four notifications and received two."[12]

B. Cooperation

An early example of the fruits of cooperation flowing from the Agreement involved a complaint filed in 1994 with both the DOJ and the EC charging A.C. Nielsen with bundling its sale of retail sales information in countries, principally within the EU, where it possessed market power with a requirement that customers also purchase Nielsen's information product in countries where the firm faced competition. Both the EC and the DOJ launched investigations. In May of 1996, the EC issued a statement of objections, and in December 1996 both enforcement agencies announced that Nielsen had entered into undertakings with the EC that satisfied both the issued SO and the concerns of the DOJ. The agencies explained that intensive cooperation had taken place through the discussion of legal and economic theories and exchange of confidential information, with the consent of the parties. With the most substantial impact having occurred in the European Union, the U.S. deferred to the EC and provided input and support.[13]

The exclusion of statutorily protected confidential information from that which could be shared when the Agreement was signed was thought to be a major impediment to optimum cooperation. As evidenced by the path set in *A.C. Nielsen*, however, the waiver provided by the parties has furnished a generally effective way of surmounting the barrier. Experience demonstrates that the parties' waiver has been particularly prevalent and effective in merger investigations.

The case is an early example of the realization of the objectives of the Agreement in both efficient enforcement cooperation and effective deference. Soon thereafter, the extent of cooperation became more full blown leading up to the 1998 resolution of the *WorldCom/MCI* merger. The DOJ and the EC coordinated information requests and jointly negotiated remedies with the parties. Moreover, attorneys for DOJ attended the EC Brussels hearings on the matter.[14]

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[12] Joseph P. Griffin, *EC/US Cooperation Agreement: Impact on International Business*, 24 LAW & POL'Y INT'L BUS., 1051, 1063 (1993).

[13] Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Closes Investigation Into the Way AC Nielsen Co. Contracts Its Services For Tracking Retail Sales (Dec. 3, 1996), *available at* http://www.justice.gov/atr/public/press_releases/1996/1031.pdf; Press Release, Eur. Comm'n, Following an Undertaking By AC Nielsen to Change Its Contractual Practices, The European Commission Suspends Its Action For Breach of the Competition Rules (Dec. 4, 1996), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/96/1117&format=HTML&aged=1&language=EN&guiLanguage=en.

[14] Press Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Clears Worldcom/MCI Merger After MCI Agrees to Sell Its Internet Business (July 15, 1998), *available at*

Undertakings entered into by both agencies to resolve the issue were parallel. Similar coordination has since become commonplace.

C. "Positive Comity"

The Agreement's provision for "positive comity" was touted as the most innovative feature of the undertaking. The first, and so far as can be determined only, formal, publicly announced application of positive comity involved a request by the DOJ to the EC for enforcement action against the dominant European computer reservation system, Amadeus, and three national flag air carriers. The allegation was that these firms had conspired to disadvantage the U.S. computer reservation system Sabre, at the time a subsidiary of American Airlines. In January, 1997, the DOJ formally requested the Competition Directorate of the EC to investigate the conduct of these parties and take enforcement action as appropriate. Later in the year, then-DG Comp Director Alexander Schaub acknowledged the referral and stated that the matter would be accorded a high priority.

A year later, the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights conducted a hearing on international antitrust issues. During the hearing, the General Counsel of Sabre testified and asserted that major improvements were needed to enhance the efficacy of positive comity. He expressed concern with the delay and procedural shortcomings underlying the formal process. The EC did issue a statement of objections against Air France and, ultimately, the matter was closed on the basis of a private settlement agreement between Air France and Sabre.

The pace of action pursuant to the formal positive comity provisions of the Agreement and the disparity of the discovery process suggest that the formal process will not produce results living up to early expectations. Distinct cultural and economic characteristics of the parties may also indicate that formal positive comity is not a fully effective mechanism. The effort was made in the 1998 "positive comity" agreement to enhance the effectiveness of the vehicle by providing for a priority of action by the jurisdiction with the closest nexus to the conduct, other than a merger. The EC had initially requested this provision for the 1991 Agreement, but it was not included.[15] Nevertheless, formal or informal cooperation in pursuit of the principles underlying the positive comity provision could offer a far better means of addressing the conduct at issue than extraterritorial enforcement by the aggrieved party.

VI. CONCLUDING OBSERVATIONS

In the 20 years since the United States and EC adopted the Agreement, many steps have been taken toward cooperation and convergence between the two most experienced antitrust regimes. The full reach of these accomplishments is for another paper. Suffice it to conclude that, especially in the case of mergers and cartel enforcement, the consultation and convergence of the parties are closely coordinated. Whether these advances could have been realized in the absence

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http://www.justice.gov/atr/public/press_releases/1998/1829.pdf; Press Release, Eur. Comm'n, Commission Clears WorldCom and MCI Merger Subject to Conditions (July 8, 1998), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/639. *See also*, Alex Nourry, *The WorldCom - MCI Case*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 188 (Evenett et al., eds., 2000). These joint activities were strengthened by an exchange of letters in 1999 that provided for U.S. agency participation in EC hearings and, in appropriate circumstances, EC representatives participating in U.S. "pitch" meetings.

[15] *See*, Charles S. Stark, *EU-US Cooperation*, THE EUROPEAN ANTITRUST REVIEW 28, 29 (2002).

of the Agreement could be debated. The adoption and implementation of the Agreement has unquestionably, however, provided a strong foundation for the very strong relationship, cooperation, and, in many respects, convergence that the U.S. and EC enforcement agencies now enjoy.

Additionally, many of the Agreement's provisions, such as those covering the detailed procedure for notification, the commitment to cooperate in enforcement activities, information sharing, and traditional comity, have served as a model for subsequent cooperation agreements entered into by both the United States and European Union.[16] In this way, the Agreement has served as a basis for a network of similar agreements that facilitate effective antitrust enforcement across national boundaries and foster greater cooperation and convergence among enforcement authorities and antitrust and competition laws worldwide.

[16] For U.S. agreements, *see, e.g.,* Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (Aug. 3, 1995) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,503; Agreement Between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws (July 11, 2000) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,509; Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Fiscalía Nacional Económica of Chile, of the Other Part (Mar. 31, 2011) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,511. For EC agreements, *see, e.g.*, Agreement between the European Communities and the Government of Canada Regarding the Application of Their Competition Laws, 1999 O.J. (L 175) 49; Agreement Between The European Community and the Government of Japan Concerning Cooperation on Anti-Competitive Activities, 2003 O.J. (L 183) 12; Agreement Between the European Community and the Government of the Republic of Korea Concerning Cooperation on Anti-Competitive Activities, 2009 O.J. (L 202) 36.