



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 08.10.1996  
COM(96) 479 final

**COMMISSION REPORT TO  
THE COUNCIL AND THE EUROPEAN PARLIAMENT  
ON THE APPLICATION OF THE**

*Agreement between  
the European Communities and  
the Government of the United States of America  
regarding the application of their competition laws*

**10 APRIL 1995 TO 30 JUNE 1996**



**COMMISSION REPORT TO  
THE COUNCIL AND THE EUROPEAN PARLIAMENT  
ON THE APPLICATION OF THE**

*Agreement between  
the European Communities and  
the Government of the United States of America  
regarding the application of their competition laws*

**10 APRIL 1995 TO 30 JUNE 1996**

**1. Introduction**

On 23 September 1991 the European Commission concluded an Agreement with the Government of the United States of America regarding the application of their competition laws<sup>1</sup> ("the Agreement"), the aim of which is to promote cooperation between the competition authorities<sup>2</sup>.

However, in a judgment<sup>3</sup> of 9 August 1994, the Court of Justice held that, under the EEC Treaty, it was for the Council to conclude such an act.

Because the Agreement had not been concluded by the competent institution under Community law, the defect had to be remedied. This was done by a joint Decision of the Council and the Commission of 10 April 1995<sup>4</sup> approving the Agreement and declaring it applicable from the date it was first signed by the Commission. On that occasion, the Council and the Commission also approved the text of an interpretative letter addressed to the

---

<sup>1</sup> *Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws*, OJ L 95 of 27.4.95, pp.47 - 50.

<sup>2</sup> In this Report, "the Commission" or "the European Commission" means the Commission of the European Communities; "the DoJ" means the Antitrust Division of the US Department of Justice; and, "the FTC" means the US Federal Trade Commission.

<sup>3</sup> *France v. Commission*, Case C-327/91

<sup>4</sup> See OJ L 95 of 27.4.95, pp. 45 and 46.

---

US clarifying the provisions of the Agreement relating to confidentiality<sup>5</sup>.

It was also jointly agreed that the Commission should present an annual report evaluating the application of the Agreement to the Council and the European Parliament. This is the first of these reports, covering the period since the approval of the Agreement, up to 30 June 1996.

The legal certainty regarding the status of the Agreement enjoyed since its approval on 10 April 1995 has allowed the European Commission to pursue its efforts to cooperate with its US counterparts.

Nonetheless, the period covered by this first report is relatively short and therefore in many instances it has not been possible to identify significant trends or to draw definite conclusions. Moreover, the limited scope of cooperation during the period prior to 10 April 1995 has meant that the information available for that period does not provide a good basis for comparison. In particular, during the period following the judgment of the Court of Justice, notifications under the Agreement were suspended pending approval of the Agreement by the Council<sup>6</sup>. Notifications were made nonetheless, in accordance with the 1986 OECD Recommendation<sup>7</sup>.

Many of the cases notified during the period under review are still active, particularly matters falling under Articles 85 and 86 of the EC Treaty and, therefore, it is not possible to discuss them in detail or to mention them by name, save where they have already been the subject of a Commission statement or notice.

At the same time, many merger cases, which gave rise to notifications and cooperation under the Agreement, are now closed because of the strict deadlines applied under the Merger Regulation<sup>8</sup> and these can therefore be discussed in this report.

In addition, the confidentiality surrounding the US' own procedures and the obligation of confidentiality to which the European Communities are subject by virtue of Article VIII.2 of the Agreement, has meant that even where the European Commission has completed its investigations and closed cases, references to specific cases which are still being pursued by the US authorities, or are otherwise covered by confidentiality requirements, have had to be limited.

Despite these limitations, it is intended that this report will give some sense of the

---

<sup>5</sup> See OJ L 131 of 15.6.95, pp. 38-39

<sup>6</sup> Twenty-fourth Competition Report, point 413.

<sup>7</sup> 1986 OECD Revised Recommendation concerning cooperation between Member countries on restrictive business practices affecting international trade [(86) 44 (Final)].

<sup>8</sup> Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1; as corrected in OJ L 257, 21.9.90, p.13.

nature and degree of cooperation between the Commission and the US authorities.

## 2. The Agreement

As a brief reminder, the main provisions of the Agreement are recalled. They include:

- notification of cases handled by the competition authorities of one Party, when these cases concern the important interests of the other Party (Article II), and exchange of information on general matters relating to the implementation of the competition rules (Article III);
- cooperation and coordination of the actions of both Parties' competition authorities (Article IV) ;
- a "traditional comity" procedure by virtue of which each Party undertakes to take into account the important interests of the other Party when it takes measures to enforce its competition rules (Article VI);
- a "positive comity" procedure by virtue of which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting Party (Article V).

In addition, the Agreement makes clear that none of its provisions may be interpreted in a manner which is inconsistent with the legislation in force in the European Union and the United States of America (Article IX). In particular, the competition authorities remain bound by their internal rules regarding the protection of the confidentiality of information gathered by them during their respective investigations (Article VIII).

## 3. Notifications

### *3.1 Number of cases notified<sup>9</sup>*

Notifications were made by the Commission in fifty-four cases during the period between 10 April 1995 and 30 June 1996. These cases are listed in Annex 1.

During the same period, the Commission received notifications from the US authorities in forty-four cases, twenty-four from the DoJ and twenty from the FTC. These cases are listed in Annex 2.

---

<sup>9</sup> The figures given represent the number of cases in which notifications were made and not the total number of notifications. Under Article II of the Agreement, notifications are made at a number of specified stages of the investigation and formal procedure in a case.

The majority of notifications in both directions concerned merger cases (44 EC and 22 US). The number is particularly high in the case of the notifications made by the Commission and reflects the procedure under the Merger Regulation whereby, on receipt of a notification, the Commission publishes a notice of the fact of the notification in the Official Journal. Thus the proposed merger is made public at the outset and all mergers meeting the criteria for notification to the US are notified, even where, on subsequent examination, they do not raise competitive concerns. The corresponding US legislation<sup>10</sup> requires that the fact of a merger filing, as well as its content, remain confidential. Thus the US authorities notify the Commission only when, after a preliminary examination, they decide to open an investigation into the proposed merger.

*Table 1* sets out in figures the notifications made under the Agreement and the OECD Recommendation since 23 September 1991.

*Table 1*

Year	No. of EC notifications	NOTIFICATIONS		No. of merger notifications
		No. of US notifications FTC	DoJ	
1991	5	10	2	3 (EC) + 9 (US)
1992	26	20	20	11 (EC) + 31 (US)
1993	44	22	18	20 (EC) + 28 (US)
1994	29	16	19	18 (EC) + 20 (US)
1995 (to 9/4)	9	3	5	4 (EC) + 6 (US)
1995 (from 10/4)	33	11	16	27 (EC) + 12 (US)
1996 (to 30/6)	21	9	8	17 (EC) + 10 (US)

<sup>10</sup>

Hart-Scott-Rodino Act, 1976, 15 U.S.C. § 18A(h)

### *3.2 Practical steps*

During the period under review, the Commission took some practical steps to improve internal coordination and to ensure that cases meeting the criteria for notification are duly notified.

The first practical step taken by DG IV<sup>11</sup> was the elaboration of a set of guidelines for its case handlers, identifying the criteria which would trigger notification and the stages in the procedure when notification should be made. These guidelines have now been inserted in DG IV's internal manual of procedures.

The second DG IV initiative was the development of a database recording the details of notifications made under the Agreement, in line with DG IV's policy of computerizing its work, wherever this brings efficiencies. This allows case handlers in the operational units to feed into the database the information necessary to make a notification. This is done by creating a link between the various databases used within DG IV. The notifications database does not, however, contain any of the confidential information collected by DG IV during the investigation of the case as this is contained in a file to which access has been restricted. The new database will facilitate making notifications - they should be made more quickly and be more complete - and following up on notified cases.

### *3.3 Notifications to the Member States*

The text of the interpretative letter sent by the European Communities to the US provides that the Commission, after notice to the US competition authorities, will inform the Member State or Member States, whose interests are affected, of the notifications sent to it by the US antitrust authorities. Thus, when notifications are received from the US authorities, they are forwarded immediately to the relevant units of DG IV and at the same time copies are sent to the Member States, if any, whose interests were affected. Equally, at the same time that DG IV makes notifications to the US authorities, copies are sent to the Member State(s) whose interests are affected.

The assessment of which Member State should be notified is made on the basis of the Commission's statement to Council of 10 April 1995, which largely reproduces the provisions of Article II.2 of the Agreement. In most instances, the US authorities also notify the Member States directly, under the OECD Recommendation<sup>12</sup>.

---

<sup>11</sup> The Directorate General for Competition of the Commission of the European Communities, which is primarily responsible within the Commission structure for the application of the Community's competition rules.

<sup>12</sup> Revised recommendation of the OECD Council concerning co-operation between Member countries on anti-competitive practices affecting international trade, adopted 27/28 July 1995

## 4. Cooperation

The Commission's experience of cooperation with its US counterparts in individual cases since 10 April 1995 has been very positive. However, as stated above, many of the cases where there have been contacts are still under investigation, on one side or the other, and so cannot be discussed. Therefore, of the recent cases of cooperation, it is mainly the merger cases which are discussed in this report. This is not to say that non-merger cases are less important from the point of view of cooperation. In fact non-merger cases probably lend themselves to greater cooperation and coordination of enforcement activities because, on both sides of the Atlantic, the competition authorities have greater scope for control of timing. Indeed, there may ultimately be more to be gained from coordination of enforcement activities in non-merger cases, in particular if greater cooperation facilitates the investigation and prosecution of hard-core cartels.

The nature of cooperation depends on the individual case, and can relate to such matters as simple enquiries regarding the timing of procedures or to coordination of the proposed remedy in a case.

### 4.1 Timing

Most cases of cooperation between the Commission and the US agencies start by a discussion of the timing of the respective procedures. Checking when each step in the procedure is likely to be taken is a key element in determining the evolution of future cooperation and the scope for coordination of enforcement activities. It is important that the cooperating authorities know approximately when important steps may be reached in their respective procedures,

- a) to ensure that they do not undermine the other side's investigation
- b) to see whether coordination in the timing of certain events can in itself be a useful tool in case handling  
and
- c) in cases having a common interest for both jurisdictions, it is clearly useful to arrive at a point where coordinated action may be taken at more or less the same time, as was done in the *Microsoft* case.

On occasion, an undertaking may be tempted to put pressure on one authority to finish its enquiry quickly by misstating the stage reached in the enquiry on the other side. It is therefore useful to know the approximate timing of the other authority's procedure in order to resist such pressure.

### 4.2 Assessing each other's view of the competitive effects of a transaction or certain kinds of behaviour

#### 4.2.1 Product market

Discussions between the case handlers frequently focus on the product market to determine whether both sides have arrived at similar conclusions. These discussions are based on general information which is publicly available. There is no doubt that exchanges of this



sort have disclosed a high degree of similarity between the market analyses of the Commission and the US authorities. This is very important, given the need to have meaningful exchanges while observing the rules on confidentiality. If the Commission and the US authorities took different initial views on market definition, it might not be possible to explore fully the reasons for the different approaches without discussing confidential information which the parties had provided. Under our present rules, this could only be done with the agreement of the parties.

In *Kimberly-Clark/Scott Paper* the different product markets involved in the merger were one of the first topics discussed. There was considerable satisfaction that the definition of the product markets reached independently in the DoJ and in the Commission was identical. However, the different geographical markets in question meant that the product markets presenting competition problems for each authority differed. In the Commission's decision the parties were required to divest the KC's Kleenex brand toilet tissue and Scott's Andrex brand facial tissue and hankies in the UK and Irish markets. In the US, divestiture of Scott's facial tissue and baby wipes business was required.

In *Glaxo/Wellcome* there were numerous product markets to be considered. Initial contacts were useful to assure both sides that they had concentrated their analysis on the same product market - migraine treatments. While there were several competing products to those already marketed separately by Glaxo and Wellcome, the effect of the parties' individual R&D programmes in developing new drugs was also a factor which had to be taken into account. Both Glaxo and Wellcome had similar anti-migraine treatments at an advanced stage of development and it was considered that the time and cost involved for a competitor in reaching the same stage of development were such that it was essential to maintain both products in competition with each other. The approaches taken by the European Commission and the FTC to resolve this problem were different; the FTC considered a horizontal market for R&D for anti-migraine drugs on its own, while the Commission looked at the spill-over effects of R&D in the market for the sales of medicines. The Commission decision therefore provided for the merged company to license one of the two anti-migraine treatments in development and so retain a potential competitor, while the FTC required full divestiture of Wellcome's R&D for this anti-migraine treatment.

It is interesting to note that, during 1995, there have been contacts between Commission officials and their US counterparts outside the framework of a specific case to exchange views on the manner in which product market analysis is carried out in the pharmaceutical sector, following a series of mergers in that sector (*Hoechst/Marion Merrill Dow, Glaxo/Wellcome* and *Upjohn/Pharmacia*).

#### 4.2.2 Geographical market

Discussion of the geographical market tends to be more limited, as usually the Commission and the US authorities are concentrating on the competitive effects of the behaviour or transaction on their own markets, even in cases where the activity under investigation is organized on a transatlantic or worldwide scale, as in the *Microsoft* or *Shell/Montecatini* cases.

As already mentioned, the different geographical markets identified in the *Kimberly Clark/Scott Paper* case resulted in different divestiture requirements.

In *Lockheed Martin/Loral* the effect of the merger on the satellites market was investigated and the question of the relevant geographical market discussed. The Commission had, in its previous decisions relating to satellites, considered the relevant market to be global and did so also in this case. However, the US ultimately considered the relevant market to be the US, because of, among other things, differences in price, quality and/or technology between US and non-US manufacturers.

In another merger case, again the relevant geographical market was discussed. Although the merger ultimately raised no problems for the FTC, and was cleared by the European Commission in the first phase, the discussions demonstrated a different approach to geographical markets, with the European Commission considering the Community as the relevant market while the US considered the market to be global.

#### 4.2.3 *Anti-competitive effect*

In the *Atlas* case, which was of concern to the DoJ because of its implications for the *Phoenix* joint venture it was reviewing during 1995, the Commission provided the DoJ with a version of the warning letters to Deutsche Telekom and France Telecom, from which all the confidential elements had been removed. This enabled the DoJ to understand fully the Commission's concerns relating to the *Atlas* joint venture which had previously been the subject of a Commission press release and public comment by the parties. The US authorities also received advance copies of the draft Article 19(3) notices in the *Atlas* and *Phoenix* cases, with the consent of the parties.

In certain cases under Articles 85 and 86 of the EC Treaty, with the consent of the complainants, the Commission and the US authorities have been able to discuss the evidence offered by complainants in relation to anti-competitive behaviour. In one case still pending under Articles 85 and 86 and the US antitrust legislation, the US complainant agreed to copies of its depositions being provided to the Commission to assist in its enquiries. In the same case, the Commission was able to provide the US side with copies of requests for information pursuant to Article 11 of Council Regulation No. 17/62 drawn up on the basis of information provided by the complainant, again with the complainant's consent.

In another case pending under Articles 85 and 86 and under US legislation, the complainant provided each authority with copies of the complaint lodged with the other and so facilitated a first meeting between the competition authorities to discuss how each would deal with the complaint.

In the shipping sector, Commission and DoJ officials considering distinct cases were able to exchange views on the anti-competitive effect or otherwise of a contingency clause (price changes dependent upon an event not connected with the contract) which was common to the contracts offered in both cases. What appeared from press reports to be different treatment of similar problems on further examination turned out to be a similar economic analysis applied to dissimilar problems.

#### 4.3. *Ascertaining law and fact in the other jurisdiction*

Cooperation between the competition authorities can help clarify a point of foreign law relevant to the interpretation of an agreement or to the efficacy of a remedy. Similarly news media may be readily available only to one authority. The public filing with other regulatory agencies in the US can supply valuable information; the US authorities examine this as a routine part of their enquiries and can direct the Commission's attention to relevant aspects.

The *Lockheed Martin/Loral* merger was an example of this. Early in the investigation, the FTC was able to draw the Commission's attention to information filed with the Securities and Exchange Commission and thus on public record in the US. This proved helpful in evaluating the effects of the merger on the satellites market.

In the same case, the Commission had concerns about the relationship between the merged company and a company which was being spun off in the course of the merger. The parties provided the Commission with a written agreement which satisfied the Commission, under the Merger Regulation, that the merged company would not have control over the spun-off company. However, as the agreement had been drafted in conformity with US law, it proved useful to discuss with the FTC the implications of its different provisions.

#### 4.4 *Remedies*

It is clearly desirable that two competition authorities dealing with the same case should not reach conflicting results in a *common jurisdiction*, that the results in their *respective jurisdictions* should not be contradictory and that, all things being equal, the remedy imposed *in its own jurisdiction* by one authority should not be much more or much less rigorous than the remedy imposed *in its own jurisdiction* by the other. Joint consultation on drafting can help to tighten remedies, particularly where undertakings are given by the parties.

Where case handlers could not enter into detail on the proposed remedies without disclosing confidential information, discussions have been limited to the remedies the Commission and the US authorities have adopted in previous cases raising similar problems. For example, in the *Atlas* and *Phoenix* joint ventures, an early discussion of the US investigation of the *Phoenix* case was related to the outcome of the *BT/MCI* case.

However, with the consent of the parties, it has been possible to discuss the specific remedies in detail, as in the *Lockheed Martin/Loral* and *Kimberly Clark/Scott Paper* merger cases.

#### 4.5 *Use of waivers*

The positive experience of the *Microsoft* case, and the use of waivers of confidentiality to permit the competition authorities to exchange information, encouraged both agencies to seek waivers wherever this would be helpful to the investigation.

- 
- Waivers were requested and granted in order
- to permit agencies to discuss remedies in specific cases (*Kimberly Clark/Scott Paper, Lockheed Martin/Loral*)
  - to exchange specific documents disclosing anti-competitive behaviour (in two pending cases under Articles 85 and 86 of the EC Treaty and under US antitrust legislation)
  - to disclose the decision of the Commission is a case where it had not yet been made public
  - to permit the Commission to provide Article 11 letters containing confidential information to the US agencies (in a case pending under Articles 85 and 86).
  - to allow the Commission to provide advance copies of official notices setting out its analysis and the terms of the proposed settlement of a case (*Atlas/Phoenix*)
  - to permit the Commission and the DoJ to discuss in detail all aspects of a case pending under Articles 85 and 86 and under US antitrust legislation.

Early last year, the Commission requested the complainants in a case to waive confidentiality and to provide the DoJ with copies of the complaints and the incriminating documents they contained. The complainants refused however. The effects of this refusal cannot be fully assessed although it placed serious limitations on discussion of the case with the US authorities.

## **5. Confidentiality**

The Commission is very conscious in the application of the Agreement of the importance of respecting the EU's rules on confidentiality. In the guidelines introduced into DG IV's internal manual of procedures, case handlers are reminded of their obligation as regards the confidentiality of information. In addition, telephone contacts with the US agencies are normally conducted in the presence of at least two officials from DG IV, one of whom is from the unit responsible for the international aspects of competition policy. In this manner, officials can act as a check on one another and so ensure that the confidentiality rules are fully respected.

## **6. Information to Member States on cooperation**

In its interpretative letter to the US Government, the European Communities provide that the Commission, after consultation with the US competition authorities, will inform the Member State or Member States whose interest are affected of any cooperation or coordination of enforcement activities. However, as regards such activities, either competition authority will respect the other's request not to disclose the information which it provides when necessary to ensure confidentiality, subject to any contrary requirement of the applicable law.

When there have been contacts on a particular case, DG IV has informed the Member State(s) whose interests are affected by letter of the contacts and their subject matter. These letters are intended to keep such Member State(s) informed that there has been a follow-up to the notification.

To date, the US has not relied on the terms of the interpretative letter to ask the Commission not to disclose information nor to defer the disclosure of information to a Member State.

## **7. Positive comity**

The positive comity provision of the agreement (Article V) has not been formally invoked by either side, although a number of matters have been identified by one side or the other as raising comity questions. In several cases under active investigation by the Commission, the US authorities have chosen to defer possible action of their own while maintaining regular contact with Commission pending the outcome of its investigations and any remedial action taken as a consequence. This experience shows that, in many instances, a formal request under Article V is unnecessary if a case can be dealt with through cooperation. At the same time, the use of the positive comity provisions can be seen in a positive light in that it marks a commitment by one Party to forego unilateral action in favour of the other Party enforcing its rules in cases falling within its jurisdiction. Therefore, the Commission would not be concerned by the use of Article V by the US authorities and would in its turn invoke Article V in cases affecting the Community's important interests.

It may appear that the US has greater scope than the EU to apply the positive comity instrument in that the extraterritorial nature of its legislation has encouraged companies to complain to the US authorities when anti-competitive activity on foreign markets affects their exports. By contrast, the Community's competition rules have been more inward looking. Nonetheless, the Commission considers that the positive comity instrument in the Agreement can be applied in both directions and that the Community may ask the US authorities to take action where anti-competitive behaviour on the US market threatens European companies' ability to compete. In order to do this, the Commission would welcome European business bringing such situations to its attention.

## **8. Bilateral meeting of 13 November 1995**

The high level meeting with the US authorities on 13 November was the first formal meeting since 20 September 1993.

As this was the first meeting since the approval of the Agreement by the Council, it was felt appropriate to depart from the previous format and concentrate in the main on the mechanics of cooperation: reviewing the current notification system and the timeliness and content of notifications; determining whether requests for cooperation were being adequately dealt with; and, possible improvements to current practices, e.g. greater use of waivers where appropriate.

It was agreed that, whenever possible, the Commission and the US authorities would give greater recognition to cooperation under the Agreement in press releases on individual cases and in speeches, while respecting each side's confidentiality rules and the provisions of the Agreement in this regard.

The meeting also gave rise to a brief exchange of views on future international cooperation, both in the context of the US International Antitrust Enforcement Assistance Act, which the US delegation presented to the Commission, and the recommendations of the Report of the Group of Experts entitled, "Competition Policy in the New Trade Order: Strengthening Cooperation and Rules". In this regard, the Commission was able to inform the US of the creation of a working group by the Community's Directors General for Competition and the Commission in order to consider issues related to deeper bilateral cooperation. On the multilateral side, the US expressed its sympathy for efforts to promote greater debate on trade and competition, but had doubts about the likelihood of achieving much progress in the short to medium term. However, the US authorities proposed that it would be useful to identify the core of competition principles on which all countries agree (e.g. cartels) as well as identify the various exceptions which exist.

The final session of the meeting was devoted to a discussion of innovation markets, the rapidly developing sectors on which competition authorities are increasingly concentrating. This was particularly interesting in the light of the FTC hearings on innovation and globalization, held in the latter part of 1995.

## 9. Conclusions

As indicated at the outset, it is hard to draw firm conclusions from the relatively limited experience since 10 April 1995. However, an overall assessment of the application of the Agreement is that it has proved to be a useful vehicle for cooperation, for exchanging views on competition policy generally, e.g. at the meetings anticipated in its Article III.2, and for cooperating in individual cases. It is probably in this latter area that the experience since 10 April 1995 has been most interesting.

### *9.1 Cases where cooperation has improved case handling*

As previously stated, cooperation on individual cases has shown a remarkable similarity in the analyses of the Commission and its US counterparts. There have been relatively limited divergences of view. This is, in the main, attributable to the consistency of the economic analysis of the competition authorities, but also to the working method adopted under the Agreement. Once a case has been identified as being of common interest, there are contacts between officials in the Commission and the US authority dealing with the case and these contacts allow any potential differences in appreciation of the case to be identified at an early stage.

Although EU merger deadlines offer only limited scope for cooperation, experience to date in cases such as *Lockheed Martin/Loral* and *Kimberly Clark/Scott Paper* has proved to be very valuable, in assessing the product market and in ensuring that the remedies imposed by each authority do not conflict.

Non-merger cases offer greater possibilities for coordination of enforcement activities. Neither agency is subject to the same time constraints as in merger cases. However, it is also the case that parties may be more reluctant to allow information to be shared between the

competition authorities if it might disclose anti-competitive behaviour on their part and expose them to sanction in both jurisdictions.

### *9.2 Positive comity and limitation of unilateral action*

One of the main aims of the Agreement is to promote greater cooperation between competition authorities and to reduce the need for unilateral action. In its dealings with the US, the Commission has seen evidence of the US authorities' preparedness to forego unilateral action in preference for closer cooperation with the Commission. As previously mentioned, a number of cases have raised comity questions, although Article V has not been formally invoked. In several of the cases investigated by the Commission, the US authorities have aligned their enforcement activity to that of the Commission, as the anti-competitive behaviour in question is targeted on the European market and the (secondary) effects on the US market may be resolved indirectly through a resolution of the problem within the EU.

### *9.3 Cases where cooperation has been curtailed because of the limits of the Agreement*

Some aspects of cooperation do not require an exchange of confidential information, e.g. timing of procedures or market analysis where much of the product information has already been filed with public agencies (as frequently happens in the pharmaceutical and chemical sectors etc.) However, restrictions on the information which can be provided make discussions more difficult, and although there have been no significant divergences of analysis in cases falling within both EU and US jurisdictions, the confidentiality rules would make it more difficult to discuss in detail the reasons why conflicting views might be arrived at, based on our respective analyses of a case.

The experience of cooperation since 10 April 1995 has demonstrated that restrictions on the exchange of confidential information have been felt in a number of cases. The increasing use of waivers by the Commission and its US counterparts demonstrates that there are clear advantages to be obtained where both sides are able to share their knowledge in a case. Waivers have thus been successfully requested in a number of cases. In all these cases, however, it was clearly in the interests of the parties granting the waiver to see that the investigation was pursued or that there was a speedy resolution of the matter.

In one case, the failure to obtain the complainants' consent to share information may have frustrated DG IV's attempts to engage fully the US authorities in an investigation of alleged anti-competitive conduct.

It is interesting to note that none of the cases of cooperation cited in this report is a cartel investigation, and it is in this area particularly that the confidentiality rules restrict cooperation between the EU and the US. Yet, both the EU and US authorities have affirmed on numerous occasions that the elimination of cartels is a priority. US enforcement activity in this area increased significantly over recent years and the EU has imposed an unprecedented level of fines in cartel cases. It is therefore perhaps to this area that we must look to find a means of improving and deepening cooperation where there is a common interest in a case.

---

**ANNEX 1****NOTIFICATIONS BY THE EUROPEAN COMMISSION TO THE US AUTHORITIES<sup>13</sup>**

---

**MERGER CASES:**

1. IV/M.269 - Shell/Montecatini (review of commitment)
2. IV/M. 551 - ATR/BAe
3. IV/M.553 - RTL/Veronica/Endemol
4. IV/M.560 - EDS/Lufthansa
5. IV/M.566 - CLT/Disney/SuperRTL
6. IV/M.573 - ING/Barings
7. IV/M.577 - GE/Power Controls B.V.
8. IV/M.580 - ABB/Daimler-Benz AG
9. IV/M.587 - Hoechst A.G./Marion Merrill Dow, US
10. IV/M.588 - Ingersoll-Rand Co., US/Clark Equipment, US
11. IV/M.589 - Seagram Company Ltd./MCA
12. IV/M.591 - Dow Europe SA/Buna Sow Leuna
13. IV/M.600 - Employers Reinsurance Corp AG/Frankona Ruckversicherung
14. IV/M.601 - Employers Reinsurance Corp AG/Aachener Ruckversicherung
15. IV/M.603 - Crown Cork & Seal/Carnaud Metalbox
16. IV/M.612 - RWE-DEA-Enichem-Augusta
17. IV/M.613 - Jefferson Smurfit Group plc/Munksjo AB
18. IV/M.615 - Rhone-Poulenc/Engelhard
19. IV/M.617 - Crédit Local de France/Hypothekenbank in Berlin
20. IV/M.623 - Kimberly-Clark Corporation/Scott Paper Co.
21. IV/M.631 - Upjohn/Pharmacia

---

<sup>13</sup> Due to confidentiality requirements, this list includes only those investigations or cases which have been made public.



---

**ANNEX 1 (CONTINUED)**

22. IV/M.632 - Rhone Poulenc/Fisons
23. IV/M.642 - Chase Manhattan/Chemical Banking
24. IV-M.651- AT&T/Philips Electronics N.V.
25. IV/M.656 - Seagate/Conner
26. IV/M.659 - GE Capital/Solvac
27. IV/M.660 - RTZ/CRA
28. IV/M.663 - Dow/Dupont
29. IV/M.666 - Johnson Controls/Roth Frères
30. IV/M.675 - Alumix/Alcoa
31. IV/M.673 - Channel Five
32. IV-M.681- Royal Bank of Scotland/Bank of Ireland
33. IV/M.683 - GTS-Hermes Inc/HIT Rail BV
34. IV/M.689 - ADSB/Belgacom
35. IV-M.697 - Lockheed Martin Corp/Loral Corp
36. IV-M.699 - Tomkins/Gates
37. IV/M.700 - Emerson/Caterpillar
38. IV/M.717 - Viacom/ Bear Stearns
39. IV/M.721- Textron/Valois
40. IV/M.726 - Bosch/Allied Signal
41. IV/M.737 - Sandoz/Ciba-Geigy
42. IV/M.741 - Ford/Mazda
43. IV/M.758 - Sara Lee/Aoste Holding SA
44. IV/M.768 - Lucas/Varity

---

**ANNEX 1 (CONTINUED)**

**NON-MERGER CASES:**

1. IV/35.147 - Microsoft
2. IV/35.239 - IRI/A.C. Nielsen
3. IV/35.652 - Europe On Line (Meigher Communications Ltd. Partnership/Interchange Network Holding Co.)
4. IV/35.836 - Austrian Airlines/Swissair/Sabena/Delta Airlines Inc.
5. IV/35.897 - American Express/Visa
6. IV/35.972 - Deutsche Lufthansa/United Airlines

---

**ANNEX 2****NOTIFICATIONS BY THE US AUTHORITIES TO THE EUROPEAN COMMISSION<sup>14</sup>**

---

**MERGER CASES:**

1. Oerlikon-Bührle/Toolex Alpha (divestiture of assets following merger)
2. Kimberly-Clark Corporation/Scott Paper Co.
3. British Petroleum Company, PLC, Britain/Campaign de Saint Gobain, France
4. T&N PLC, UK/Kolbenschmidt AG, Germany
5. Hoechst A.G./Marion Merrill Dow, U.S.
6. Ingersoll-Rand Co., New Jersey/Clark Equipment, Indiana
7. Devro International PLC, UK/Teepak International, Inc., US
8. Lockheed Martin Corporation / Loral Corporation
9. St. Gobain/Carborundum Company
10. Genencor International Inc./Solvay SA
11. Koninklijke Ahold nv/ Stop and Shop Companies Inc.
12. Fresenius A.G./ National Medical Care
13. T&N plc (modification of consent order)

---

<sup>14</sup>

Due to confidentiality requirements, this list includes only those US investigations or cases which have been made public by the US antitrust authorities.

**ANNEX 2 (CONTINUED)**

**NON-MERGER CASES:**

1. **Lykes Bros. Steamship Co., Inc. /Universal Shippers Association**
2. **IBM**
3. **International Association of Conference Interpreters ("AIIC")**
4. **Delta Air Lines, Swissair, Austrian Airlines, Sabena Belgian World Airlines**
5. **United Airlines Inc./ Deutsche Lufthansa AG**
6. **American Airlines/British Airways**



COM(96) 479 final

# DOCUMENTS

EN

11 08

---

Catalogue number : CB-CO-96-486-EN-C

ISBN 92-78-09694-6

---

Office for Official Publications of the European Communities

L-2985 Luxembourg