BILATERAL ANTITRUST COOPERATION AGREEMENTS

The reasons and vires to make such agreements:

s. 18 of the Competition Act 2002 states that “subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in the markets in India; Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.”

Under principles of competition law and policy, the Effects Doctrine, allows domestic competition laws to be applicable to foreign firms - but also to domestic firms located outside the state's territory, when their behaviour or transactions produce an "effect" within the domestic territory. The "nationality" of firms is irrelevant for the purposes of competition law enforcement and the effects doctrine covers all firms irrespective of their nationality. This is reflected in the Indian Competition Act 2002, under s 32 which says that “the Commission shall, notwithstanding that, an agreement referred to in s 3 has been entered into outside India or any party to such agreement is outside India or any enterprise abusing the dominant position is outside India or an combination has taken place outside India or any party to a combination is outside India or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.”

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1 The "effects doctrine" was embraced by the Court of First Instance in Gencor when stating that the application of the Merger Regulation to a merger between companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." From the official website of the European Union.
These two sections interrelate when, to investigate and inquire into any combination, agreement or dominant position involving a foreign element, the Commission would need to have the power, subject to Government approval, to make memorandums or agreements with the foreign Competition Authorities or other agencies that could facilitate the investigation and enforcement of Indian Competition law. Previously under the *Monopolies and Restrictive Trade Practices Act 1969*, the MRTP Commission had no powers under extra-territoriality to pursue such actions as per the ruling of the Supreme Court in the *ANSAC* case. However, the new provisions under the Competition Act 2002 repeal these provisions and allow such actions to be pursued against foreign bodies or persons.

**A brief overview of developments:**

Internationally, cross-border competition is a much debated subject. An increasing number of antitrust agencies review many of the multinational mergers that characterize our global economy. There are international cartels and collusions that could affect the trade in many different jurisdictions and the investigation of such cases may be undertaken by many different authorities simultaneously. When transactions are reviewed by multiple authorities, the risk of substantive and procedural conflicts can increase dramatically, and effective cooperation among a large number of agencies can be extraordinarily difficult. On the substantive side, the potential for inconsistent outcomes increases substantially. On the procedural side, the burdens, costs, and uncertainties associated with filing in and dealing with a large number of reviewing jurisdictions pose serious concerns for the international business community. Among other things, they may discourage, unduly delay, or at best, constitute a tax on efficient, consumer-friendly transactions. These developments support the popular wisdom that increased cooperation between and among antitrust agencies is essential. But as important as cooperation is, it is sometimes quite difficult to achieve.²

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There have been many attempts to regulate the enforcement of competition related laws outside the territory of the state. This issue is well illustrated by the International Cartels for vitamins or graphite electrodes, as the companies were based in different jurisdictions as well as the effect of the cartel was felt in more than those countries. International cooperation becomes vital at such a level to ensure that wrongdoers are brought to justice based on the full facts of the situation. As far back as 1946\(^3\), the ITO initiated the Havana Charter on RBPs affecting trade, but met with opposition from the US. Under the World Trade Organisation (WTO) there are a few existing agreements on extra-territoriality. Under GATS a ‘full and sympathetic consideration of requests for consultations’ should be undertaken along with the supply of publicly available non-confidential information. Further WTO discussion however have shown that some developed countries were unwilling to control cartels or mergers having effects outside their markets; to apply or extend stricter standards to other areas of market competition and they were willing only to extend voluntary cooperation to the competition authorities of developing countries. On the other hand, developing countries were unwilling to make a large commitment of resources for international cooperation in this regard as they were mostly unfamiliar with this area and have many other demands on their resources.

Though no overall international agreement has resulted from the WTO discussion, some countries have made bilateral/multilateral/regional agreements with varying degrees of commitment to competition enforcement and investigation. These agreements deal with several issues such as supply of non-confidential information, assistance in investigation, supra-national enforcement in EU, CARICOM and MERCOSUR etc as well as the issue of comity (mutual recognition and respect of other legal systems). Agreements are also made on technical assistance and capacity building; consultation, information exchange and experience sharing; peer review of national policy; progressive cooperation in investigation and non-controversial forums.

The International Chamber Of Commerce had also issued a policy statement\(^4\) in this regard. The statement identified two major developments on cooperation between competition authorities of different countries. Firstly, in 1994 the US enacted the *International Antitrust Enforcement Assistance Act* authorising US authorities to cooperate with foreign antitrust authorities in antitrust investigations pursuant to an antitrust mutual assistance agreement that stipulates reciprocity and protection of sensitive business information. This legislation authorizes antitrust agreements under which otherwise confidential information can be shared, and antitrust authorities can use their investigative powers on one another's behalf. Secondly, the EC Council of Ministers in 1991 enacted the US-EC Antitrust Cooperation Agreement which obliged the US and EC authorities to take into account the important interests of other parties at all stages in their enforcement activities and to promote positive comity. It also provided for information exchange under confidentiality conditions and the restricting of certain categories of information that can be exchanged. The US since, has entered into several bilateral antitrust agreements with countries such as Australia, Austria, Belgium, Brazil, Canada, EU, France, Germany, Israel, Italy, Japan, Mexico, Spain, South Korea, Switzerland and UK\(^5\).

**The types of bilateral antitrust agreements:**

The simplest and most common of the tools available to enhance cooperation is informal communication between antitrust agencies. While there are important statutory and prudential limits that constrain the ability to share confidential information with colleagues in foreign antitrust agencies, there is a wealth of useful non-confidential information that can be and is shared.

At a more formal level, the various types of agreements they use are antitrust cooperation agreements, antitrust mutual assistance agreements, mutual legal assistance agreements (Mutual Legal Assistance Agreements "MLATs" are agreements that provide generally for assistance in criminal law enforcement, including the obtaining of evidence and


sharing of information. They provide an opportunity to cooperate in such a way to make sure that cartels operating across borders have no opportunity to use the border as a shield\(^6\) and extradition treaties.

They cover the topics of information sharing, foreign-located evidence, coordination (for example to coordinate searches in international cartel cases and pool the evidence obtained by the respective efforts - something that would enhance both jurisdictions' anticartel efforts\(^7\)) and notification as well as extradition when needed. These may also address technical assistance and capacity building; consultation (for example, in cases in which both sides are examining the same matter, to let one another's officials attend the hearings, as the case may be, subject to the parties' consent. The Companies being investigated are often concluding that it is in their interest as well as that of the agencies to facilitate this kind of coordination.\(^8\)), experience sharing and peer review of national policy.

Provisions are made for notification about antitrust enforcement activities, enforcement cooperation and coordination, conflict avoidance and consultations, positive comity, and confidentiality and use limitations. Each antitrust agency should notify the other of antitrust enforcement activities that may affect the other's important interests. Each antitrust agency should give careful consideration to a request by the other to take antitrust enforcement action against illegal behaviour occurring within its jurisdiction that injures the other party's interests and consider carefully one another's interests in carrying out enforcement activities, and the agreement includes a non-exhaustive list of factors to be considered in this regard. The antitrust agencies, and the parties, should agree to consult with each other on matters that arise under the agreement. The parties should agree to exchange antitrust-related information, within applicable confidentiality constraints. These agreements could be executive agreements that are subordinate to and don't change or override the existing laws of either party - including, in particular,


\(^7\) Extracted from speech by Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice- http://www.usdoj.gov/atr/public/speeches/5075.htm

\(^8\) ibid
confidentiality laws that restrict the sharing of information, such that they differ from other forms of international agreements.\textsuperscript{9}

**The issues that can arise:**

The non convergence of aims of the competition laws and underlying economic parameters to be applied such as protection of competition or competitor, consumer interest and the extra territoriality concept can create problems in cooperation. The *General Electric/Honeywell\textsuperscript{10}* merger demonstrates, however, that close cooperation and goodwill between antitrust agencies does not guarantee consistent results in individual cases. A good working relationship cannot overcome significant differences in views about the proper scope of antitrust law in national and world markets. The ICC urged a move towards harmonisation if these aims are to be met, but also recognised that there could be problems when certain information when taken out of context, may not travel well to other regulatory regimes. Harmonisation at a basic level would be essential to resolve this. Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicious that can extend beyond the antitrust arena as witnessed in the *Boeing/McDonnell Douglas* matter.

Confidential information and the exchange of such information under any agreement is of great concern to businesses in both the sending and receiving countries as the competitive position of the company whose position is being investigated could be jeopardised by a leak at either end. The ICC policy statement also stressed the importance of the agreements in outlining how the various authorities when exchanging information both publicly available and confidential, will ensure that there is no abuse of such information

\textsuperscript{9} ibid

\textsuperscript{10} The merger was passed by the US authorities but blocked by the EU authority. This was not a result of lack of cooperation as discussion and information exchange was fully facilitated by both countries, but the way in which the aims of antitrust legislation are viewed in the 2 countries. The US treats economies of scale that lead to better, cheaper and more efficient products with more leniency than the EU who felt that the merger would have forced other competitors out of the market. Further, the US believes that the antitrust law should protect the public from market failures rather than protect business from workings of the market, i.e., that the laws should protect competition and not the competitors.
at either end. This is essential to the confidence of the business community members whom are being investigated with regards confidential information, resources and investment that are price sensitive. One of the solutions to this could be to ask for the company’s consent to pass on the information to the foreign authority, but with respect to the investigation aspect, the company would not voluntarily divulge much of its confidential information, which would defeat the purpose of the investigation. Prior notice to the company whose information is being exchanged is another solution that could be used, with the obvious exception where it would prejudice the case against the company. It is also possible to include legislative provision for the exchange of information that has certain procedural safeguards regulating the use of the information concerned and to reaffirm the need for its confidentiality.

Though the Competition Commission in India has the authority to enter into such agreements (subject to government approval), it may not be so in other countries where the authority could need the government to make such an agreement on its behalf. The CCI should be aware of the capacity of any such agency to enter into such international agreements.
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