# International Competition Law Enforcement: general approach

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*The article researches the general trends in International Competition Law Enforcement. The main attention was payed to the comparative characteristic of bilateral, regional (the European Union) and international levels of the competition relations regulation.*

**Key words:** *International Competition Law Enforcement, the European Union, competition relations regulation.*

*Статтю присвячено спробі дослідити загальні тенденції застосування міжнародних норм у регулюванні конкуренції на універсальному рівні. Основну увагу дослідження приділено порівнянню двостороннього, регіонального (Європейський Союз) і міжнародного рівнів регулювання конкуренції.*

**Ключові слова:** *застосування норм міжнародного конкурентного права, Європейський Союз, регулювання міжнародних відносин у сфері конкуренції.*

*Статья посвящена попытке исследовать общие тенденции применения международных норм в регулировании конкуренции на универсальном уровне. Основное внимание уделено сравнению двустороннего, регионального (Европейский Союз) и международного уровней регулирования конкуренции.*

**Ключевые слова:** *реализация норм международного конкурентного права, Европейский Союз, регулирование международных отношений в сфере конкуренции.*

### *Formulation of the problem researched*

This paper addresses one of the intricacies of international competition law enforcement, namely the diversification of legal instruments used for bilateral cooperation. The argument put forward in this paper is that a parallel can be drawn between the internal and external functions of competition law. As competition law is not a goal as such within the EU, but in general serves the optimal functioning of the Single Market, the function of international cooperation on competition law matters is not solely to be found in competition considerations, but serves other goals as well. Therefore, the fact that a number of different objectives are pursued may explain the use of several distinct instruments for cooperation on competition law issues.

### *Latest research and publication concerned*

The study of certain aspects of the EU law, within the science international law and international economic law, has been engaged by such national Ukrainian authors as M.O. Baymuratov, N.V. Buromenskiy, V.A Vasilenko, A.F. Vysockij, M.M. Hnatovskyj, V.N. Denisov, A.I. Dmitriev, A.S. Dovgert, A.A. Merezhko, M.N. Mykiyevych, V.I. Muravjov, R.A. Petrov, K.V. Smirnova, L.D. Timchenko, L.A. Timchenko and others. The results of their studies provide an opportunity to get a clearer picture of the international legal features of global economic processes and place them in the regulation of European economic integration and competitive relations in particular.

### *Unsolved parts of the general research problem*

As was recently demonstrated by the European Commission (Commission) case-law practice, the Commission deals with cases that go beyond the territorial scope of the European Union (EU), necessitating cooperation with the competition authorities of third countries. This article looks at the diversifica-

tion of legal instruments used for this bilateral competition law enforcement cooperation.

### *Formulation of the article aims*

The main focus of the article will be on bilateral cooperation. The multilateral track will be touched upon, but initiatives such as the OECD Competition Committee and Global Forum on Competition, the International Competition Network (ICN), UNCTAD or the attempts to include competition matters in the WTO, will not be dealt with. Apart from the United States of America, the EU has developed one of the most mature competition regimes in the world. Secondly, EU insights in international competition law cooperation may be useful, as competition law in the EU itself is applied transnationally. A final factor is that the EU has been very active in international negotiations on competition law and the internationalisation of competition law and policy.

The article will first elaborate on the context of international cooperation in the field of competition law by briefly explaining its necessity, benefits, and origins. Then a short overview will be given of the main axis around which current debates on international competition law cooperation revolve.

### *Presentation of the main research material*

A first reason why legal diversification in bilateral competition cooperation deserves to be highlighted relates to the importance of international competition law cooperation in itself. The emergence of the global market necessitates the creation of rules adapted to a globalised context, detached from territorialism. As protectionist influences often obstruct this type of evolution, cooperation to simplify international enforcement of national rules constitutes a necessary safeguard, as rules are without value if they cannot be effectively enforced.

The debates on international cooperation on competition law issues mostly focus on different peculiarities, such as the discussion concerning bilateral versus multilateral cooperation, or the debate revolving around convergence versus cooperation. It is nevertheless also interesting to note that the EU is currently negotiating second generation bilateral competition agreements with Switzerland and Canada, while at the same time negotiating MoUs with India and China, and it includes competition provisions in its bilateral FTAs. What are the causes of this differentiation and what are the benefits and flaws of each instrument? These questions have not yet been fully answered from a legal perspective. A clearer view on this diversification could help improve the effectiveness of international cooperation on competition issues, by making the flaws and benefits of each approach more explicit, and being a cause for reflexion. Are clear goals of cooperation stated in advance, and is the legal instrument to attain that goal chosen accordingly? Or do other considerations determine the preferred instrument for cooperation? This paper will try to bring some clarity to this matter, aimed at facilitating the choice of instrument in the future. Apparently, the Commission itself is aware of this problem. According to a Commission official: The Directorate-General for Competition of the European Commission ('DG Competition') is now adopting a more strategic approach towards international agreements tailoring the instrument to the real needs of the relationship and to facts such as the size and importance of the country's economy, the intensity of the trade and investment relationship with the country concerned and the degree of maturity of its competition regime [1]. This implies that the diversification of existing instruments is not caused by the need to tailor the agreements to the real needs of the relationship. Another question that comes to mind when reading this statement is who defines the 'needs' of the relationship? What are these 'needs' and from whose perspective are they seen? This article would like to provide some clarity by conducting a comparative analysis with a narrower focus than is typically adopted. More precisely it will link the needs of international enforcement and the goals of international cooperation with the legal instruments used to attain this cooperation.

It has been said that any system of law is only as effective as its enforcement mecha-

nism and that the 'life blood' of competition law lies in its effective enforcement. In the field of competition law, the effectiveness of this enforcement mechanism can be completely undone if it lacks an international character. This aspect of competition law enforcement therefore cannot be ignored. Why is this international dimension so valuable and how did it develop?

International competition law enforcement is necessitated first of all by globalisation.[2] Looking at the international section of the website of Directorate General (DG) Competition, one is confronted with the heading 'Facing the challenges of globalisation'.[3] The Commission explains its international engagements through the need for effective enforcement in a globalised economy, where a majority of companies operate across borders, thus affecting several distinct national markets. The most important anticompetitive practices that have an international effect deserve to be mentioned. Firstly, there is the existence of international cartels. While no concrete recent data on the Commission's international cooperation efforts in the fight against international cartels are publicly available, the importance the Commission places on fighting international cartels is clear from many of its formal and informal communications. For example, competition Commissioner Almunia invited his audience to 'consider that at present my services are investigating over 25 cartel cases, ... only about half of them are limited to Europe in scope.'[4] Given the increase in multinational firms, and due to the potential existence of exclusive distribution agreements in the territory of one state, such agreements can have a significant impact on an international level. Also, multi-jurisdictional mergers are becoming increasingly common. Again, the rise of multinational firms and the global economy increase the emergence of this type of merger dramatically. As increasing economic liberalisation leads to the removal of trade barriers, this creates fresh incentives for anti-competitive behaviour by firms becoming more vulnerable to foreign competition. Competition laws thus need to supplement this liberalisation in order to protect its effects, and cooperation is required to avoid gaps in the legislation or its enforcement.[5] This necessity is not only put forward by the Commission, it is also supported by legal doctrine, confirming that assistance between states, for instance during investigations, proceedings or enforcement action, is essential for the effective enforcement of national competition laws. It is recognised that companies as well as business transactions have become global, and that the effects of such global transactions cannot be confined to one jurisdiction.[6] Therefore, international cooperation to ensure the competitiveness of these transactions has become a necessity. Another factor explaining the need for (increased) international cooperation on competition matters is the proliferation of competition laws. Even though competition law is a relatively young branch of law, the first competition laws having been enacted in 1889 in Canada and in 1923 in Europe (Germany), today over a hundred countries have competition laws in force. [7] This phenomenon increases the risk of different national laws being applicable to the same case. These legislations may be based on different legal or economic standards, resulting in conflicting or divergent outcomes. Although international competition cooperation does not solve this problem entirely, it can foster greater understanding of different competition systems and can cause competition authorities to take into account considerations of other competition authorities.

Not only conflicting outcomes are a concern, efficiency considerations should also be taken into account. International competition cases will often be treated simultaneously by several competition authorities. In order to avoid a duplication of effort by competition authorities and to reduce the procedural burden on the companies involved, competition authorities should communicate with each other and coordinate their investigations to the largest possible extent. For instance, in the case of multi-jurisdictional mergers, one procedural problem consists of the fact that several national notification procedures with different deadlines and requirements will have to be fulfilled, subjecting the undertakings involved to both additional costs and

legal unpredictability. These two problems can be described as consequences of 'over-regulation', in the sense that they are caused by the applicability of more than one set of national competition rules. However, under-regulation can occur as well. Substantive law that is too lenient, restrictions in its scope of application or procedural enforcement difficulties can cause gaps in the protection of competition. Companies engaging in anti-competitive behaviour can benefit from these gaps and undermine the entire competition system. Again, international cooperation can help overcome this problem.

The advantages of international competition cooperation by facing the challenges mentioned above, can be summarised as follows: a better use of resources, avoidance of conflicts with other laws and rulings and a more predictable and (cost-) efficient outcome, which is beneficial to the business environment. In a broader perspective, cooperation can also stimulate a learning process that can lead to a more mature and sophisticated competition system. Regular interaction can lead to convergence in the economic and legal analysis of competition cases, and in this way can reduce the risk of incoherent rulings. Competition authorities can benefit from the experience that another competition authority may have with a particular market or problem, even when they are not working on the same case. By stimulating regular contact between different competition authorities, a close working relationship and mutual confidence in each other's capabilities is encouraged. This can play an important role in generating deeper cooperation in the future.

Another benefit of cooperation, especially for younger or less established competition authorities, is that international cooperation can enhance their autonomy vis-à-vis politics, judges, and firms. When different national competition authorities come to conflicting outcomes in cases, '[t]hen, governments may try to intervene; firms can choose forums; and judges get the ultimate say.'[8] If however they cooperate, and their decisions are 'backed' by other authorities, this provides the decisions with more authority and will make the competition authorities less institutionally dependent.

There are also less idealistic benefits to international cooperation for the EU, such as more effective and efficient enforcement of EU competition rules, fairer treatment of EU companies in foreign markets, and the creation of a level-playing field between EU companies and their foreign competitors. The remark should be made that this section has dealt with the benefits of international competition cooperation in general, not the way in which this cooperation should happen.

Restrictions of competition within a state can be caused by anticompetitive behaviour situated outside the territory of that state. For instance, foreign firms may decide to divide a national market between them or fix prices for that market, or a foreign firm may hold a dominant position and abuse it in another state. The first strategy of states (and the EU) to deal with this type of situation was to unilaterally apply their laws extraterritorially. It thus needed to be determined to what extent these 'foreign' situations could be governed by national rules and to what extent they fell under the jurisdiction of the national authorities.[9] The extraterritorial application of laws is not regulated (formally or informally) in a uniform manner. While this paper does not offer the framework to discuss all different approaches in detail, the situation in the EU will be clarified briefly. The main articles concerning competition law in the Treaty on the Functioning of the European Union (TFEU), Articles 101 and 102 TFEU,[10] do not mention whether they apply extraterritorially. Therefore, the Court of Justice of the EU (the Court), often confirming Commission practice, has developed their extraterritorial application in its case-law.[11] Three legal doctrines have been put forward, two of which were explicitly confirmed by the Court. The first doctrine, the economic entity doctrine, was based on the nationality of the undertakings engaging in anticompetitive behaviour. Evidently this theory has its limits, as it cannot be applied to assume jurisdiction over purely non- European players distorting the Single Market. Therefore an alternative doctrine was developed, the implementation

doctrine. This doctrine finds its origins in the territoriality principle, and confers jurisdiction to the EU over conduct having a sufficiently close link to its territory. The core of the doctrine is that in case agreements or practices are implemented within the EU and trade between member states is affected, they fall under the scope of Articles 101 and 102 TFEU, irrespective of their geographic origin, or whether or not EU subsidiaries, (sub-) agents or branches were used. This was clarified by the Court in the Woodpulp case.[12] What actions constitute an implementation was clarified in the Gencor case, stating that the mere sale in the EU is an implementation act, irrespective of where the sources of supply or the production plants are located.[13] The final doctrine is recognised by the Commission, but disagreement exists on whether it is generally confirmed by the Court, which prefers to rely on the two other doctrines, as they are less politically sensitive. This doctrine is the effects doctrine, also based on the territoriality principle and extending jurisdiction to situations where the effects in the EU of foreign anticompetitive actions are immediate, reasonably foreseeable, and substantial. While noticeably widening the scope of jurisdiction, extraterritorial application of the law does have its obvious limits. In a globalised economy, with a proliferation of competition laws, companies will often find themselves subject to different national laws, creating an excessive burden for companies, for instance in the case of an international merger when complying with all the formalities of the different affected states. Moreover, extraterritorial application of national laws can result in irreconcilable remedies and diplomatic problems can arise. Another limitation is that in order for extraterritorial enforcement to be effective, very often the assistance of other states will still be needed, for instance during the proceedings, in gathering evidence or during the enforcement.

The next step was thus to find a solution to address these problems, and this solution was found in international cooperation. Evidently, considering the sensitivity of competition law for states, this cooperation only developed gradually, and the debate is not over yet. This article does not seek to provide a detailed overview of the history of international cooperation on competition issues. Nevertheless, the issuing of a set of recommendations concerning cooperation between member countries on anticompetitive practices affecting international trade by the Organisation for Economic Co-operation and Development (OECD) in 1967 is important to mention.[14] These recommendations have been revised on several occasions, most recently in 1995. They have certainly demonstrated their value. The content of many (bilateral) cooperation agreements strongly resembles the content of the recommendations. The recommendations contain detailed provisions on notification, exchange of information, consultation and conciliation.

After having reviewed the origins and early evolution of competition law cooperation, it is time to look at the current situation. Before analysing some of the existing legal instruments used for bilateral competition cooperation, it is important to point out that cooperation is not the only option, and there is more than one way to do it. Today, a strong debate continues concerning the best way for competition law on a global level. In the author's view, current discussions resolve around three main axis.

The discussion on multilateral versus bilateral cooperation naturally concerns the number of parties that should be involved in cooperation. Some of the most recurring arguments for and against both tracks will be mentioned. As the benefits of one track will often be linked to the drawbacks of the other track, these two opponents will be dealt with together. As there are only two parties involved in bilateral cooperation, it is clear that this environment is more beneficial to create trust between the parties and to promote an intense level of continuous cooperation and interaction. In the same vein, it is logical to assume that cooperation and interaction will in general be more superficial in multilateral frameworks, as there are more and often more diverse partners involved than in the case of bilateral cooperation, where the chance is higher that parties are more similar. In a multilateral framework, developed and less de-

veloped countries, in general and with regard to their experience with competition law, will be involved. As there is a greater matter of trust between more similar parties in bilateral cooperation, this may also increase the chances of an evolution towards substantial and procedural convergence.

On the other hand, in case of bilateral cooperation between partners that are rather distinct, this framework is beneficial for clauses involving technical assistance. As technical assistance is both time and resource consuming, it is clear that this kind of commitment is more difficult to offer in a multilateral context.

Considering the sensitive nature of competition policy to nation-states – it being closely linked to other policy areas such as industrial policy and trade – and the differing levels of experience with it, it is foreseeable that in a diverse multilateral framework the chance to reach agreement on certain issues is much smaller than in a bilateral context. Many parties do not even agree on the goal(s) of competition law and its substantial functions, which is the common basis needed to work out further issues.[15] What would be agreed upon would reflect only a lowest common denominator and could have a perverse effect on the development of a sound competition policy.

As mentioned before, more diverse partners will be involved in multilateral discussions. This also has positive implications. Not only does it allow to learn from a broader range of experiences, it also offers less developed countries, who would not be a selected partner for bilateral cooperation, or would not have sufficient negotiation powers, to be involved and have the chance to benefit of the experience and expertise of others, and coordinate their actions with other less developed countries.

Also, a true global competition culture can only be attained when many countries are involved. If a certain degree of convergence could be attained, even if it is a superficial one, the geographical scope would be much broader than in a bilateral context. As the economy becomes more and more globally integrated, bilateral agreements do encounter their limitations. A proliferation of bilateral agreements in the long term might prove to be counter-effective and confusing.

As mentioned, bilateral agreements are only concluded with a limited number of selected partners, but multilateral forums as well have their disadvantages. Some regional groupings have limited membership, while others have a small geographical scope. Others have a substantive limitation, for instance, WTO and UNCTAD cooperation will only involve competition issues with a direct trade dimension.

Considering the relatively young age of competition law, the great diversity between countries that have a competition policy, and their national sensitivities, a multilateral agreement that is more than the lowest common denominator, is hard to imagine. Therefore bilateral agreements appear to be the correct way to move forward at the moment, where appropriate in a network-environment. This appears to have been the evolution after the failure to include the Singapore issues in the Doha-Round.[16] This of course can and should be complemented by networks such as the ICN, whose potential should not be underestimated.

The second point of discussion opposes substantial or procedural convergence/harmonisation to (enforcement) cooperation. Convergence can be seen as ‘the tendency of societies to grow more alike, to develop similarities in structures, processes and performance. It is thus a rather passive process. Harmonisation on the other hand can be described as active convergence. It is conscious, intended and works towards a predefined standard.

The risks, costs, and inconveniencies for companies of having to operate in a fragmented global legal environment with a great diversity of national competition laws are obvious. Substantial or procedural convergence would certainly simplify the international business environment, and make it more transparent and predictable while also promoting better and smoother enforcement, but there is too little agreement globally on what competition law should try to accomplish and how it should be done. Even though there is

a global economy, nations 'are at different stages of economic development and have different capabilities, perceptions, and priorities.' It is more realistic to start a process of convergence on a firm basis of daily intense cooperation to create trust between competition authorities and familiarity with other systems. Moreover, diversity does have benefits, 'and openness of the channels for experimentation and adjustment has its own dynamic, pro-competitive rewards.' Through cooperation one can learn from the coexistence of different competition laws worldwide, and in this way one is continuously stimulated to review one's own national competition laws. A minimum harmonisation would however not undo this benefit. While Basedow stated in 2004 that a minimum harmonisation was the only realistic option at that time, it seems that the international climate is still not optimal to reach such level of convergence. Even though it is evolving rapidly, competition law is a young branch of law, and there is too much disagreement in the international community on the meaning and function of competition law, while national sensitivities continue to play a big role.

Another argument in favour of cooperation is that differences in substantive law are not the main cause of deficits in the protection of competition – the main substantive problems being the regulation of export cartels and protectionist behaviour by governments – but the difficulties rather lay in the enforcement of competition law in the international arena. This indicates that the most urgent problems to be treated are not to be found in substantive law issues and therefore convergence should not be the main priority.

Convergence as well is not a solution to all problems. Different factual situations in distinct national markets, for instance in the field of intellectual property rights, can result in divergent outcomes, even if the rules applied and analysis followed are similar.

This discussion revolves around the level of legalisation and formalisation of the cooperation. One continuum is the one between hard and soft law. A generic definition of soft law includes 'instruments that are not legally binding but can produce practical and legal effects'. Often the place of a certain provision along the continuum is determined by three characteristics: obligation, precision, and delegation. Obligation measures the degree in which the subjects of the rule are legally bound by them, precision refers to the extent to which the rules unambiguously define the required or forbidden behaviour or stick to vague principles, and delegation refers to whether or not third parties are entitled to implement, interpret and apply the rules. A second continuum is the one between formal and informal cooperation. Informal competition cooperation can be described as the free and voluntary exchange of information and ideas between competition officials. Semi-formal and formal cooperation imply that the timing, scope, manner and/or content of the cooperation is determined in an agreement. This agreement can be binding to a greater or lesser extent, and may contain provisions of hard or soft law. Of course informal cooperation may lead to or may pave the way for formal cooperation, and formal cooperation may be complemented by informal contacts.

One argument opposing hard law is that once rules are negotiated and formalised, they are difficult to change and adapt to societal evolutions, thus risking obsolescence. Indeed, soft rules are more flexible in a rapidly changing environment and therefore seem more appropriate. Furthermore, looking at the majority of existing agreements, the international environment does not seem ready to accept the imposition of rules, and formal cooperation through soft law, or informal cooperation therefore are the leading trends today in international competition cooperation. As will become clear, even the formal instruments contain rules that are so vague or general that they can be considered as soft law. On the other hand, not all aspects of cooperation can be regulated via soft law, for instance the exchange of confidential information, which requires stronger safeguards against abuse.

### *Conclusion*

While these are the main points around which discussions on competition law cooperation revolve today, some other elements can

be added to the debate. One issue is whether cooperation should take place in full transparency, or whether competition authorities benefit from some degree of secrecy. Today, little information is available on concrete cases where cooperation has taken place and in which form this cooperation occurred. Another debate that might gain importance, is the one on enforcement versus compliance. While once again one does not exclude the other, one might wonder whether it would not be wise to invest on joint efforts to promote compliance, as cooperation on enforcement still seems troublesome today.

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