



Resolution of Conflict of Remedies between Jurisdictions

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Overview

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- Principle of Proportionality
- International Cooperation
- Conclusion

Introduction

- A conflict of remedies may arise when the imposition of a particular remedy by a given jurisdiction may impinge on the vital interest of another jurisdiction
- A conflict of remedies may also arise when the imposition of a given remedy by one jurisdiction may lead to either the impossibility to carry out the transaction or to a situation where its execution becomes exceedingly onerous to the parties
- Both types of conflicts can be resolved mainly by reference to two basic principles of law: international comity and proportionality

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Principle of International Comity

Principle of International Comity

- General principle of the public international law applied in the field of international co-operation on competition policy
- By positive comity, a country may ask another country to take appropriate measures, under their competition law, against anti-competitive behavior taking place on their territory and affecting important interests of the requesting country
- By negative comity, a given country ought to take account of the important interests of another country when applying its own competition law

Principle of International Comity: EU Court Decisions

- In *Gencor*, the EU General Court referred to the parties' contention that there was such a principle of "non-interference" or comity but found on the facts that there was neither a conflict between what was required by the EU and by the South African government nor any basis for showing that the concentration would affect South Africa's vital economic or commercial interests
 - The fact that the Court considered these issues reflect that it is willing to hear arguments based on comity considerations and to examine to what extent these arguments are or are not well founded. This approach seems therefore to support the Commission's policy with regard to comity as reflected in its co-operation agreements in the merger field

Principle of International Comity: EU Commission Enforcement

- In *Eastern Aluminium*, the Commission indicated that it would be appropriate to show self-restraint in the exercise of jurisdiction when it would require any of the undertakings to act in a way contrary to the requirements of their domestic laws, or when the application of EU law might adversely affect the important interests of a non-Member State. But such an interest “would have to be so important as to prevail over the fundamental interest of the EU that competition within the common market is not distorted”
- This principle can be enforced through international cooperation agreements where the EU and the other contracting States agree to consult and have regard to the important interests of each other when deciding on investigations and remedies

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Principle of Proportionality

Principle of Proportionality

- Proportionality is one of the general principles of EU law
- Any commitments proposed by the merging parties must “be proportional to the competition problem” (EU Merger Regulation)
- The General Court has held that “the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued”

Conclusion

- To conclude: the principles of international comity and proportionality can be best executed by means of close cooperation and consultation between enforcement authorities

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International Cooperation

International Cooperation (I)

- International cooperation in merger control is a natural consequence of increased enforcement by national and supranational regulatory authorities, the internationalization of the world's economy, and the desirability of avoiding significant divergence in the application of different competition rules by different antitrust agencies
- Because the same transaction may be subject to the concurrent application of different competition laws, there are sound reasons for antitrust agencies to avoid conflicting analyses and remedial action
- Various initiatives have been pursued to facilitate convergence and minimize conflict, notwithstanding differences in procedures, substantive analysis, and policy objectives
 - Multilateral Cooperation: ICN, OECD, WTO, etc.
 - Bilateral Cooperation: EU/US, EU/Korea, EU/Canada, EU/China agreements

International Cooperation (II): Multilateral Cooperation

- The ICN has emerged as the most effective means of encouraging streamlined merger review based on sound analytical principles
- In January 2010, ICN published Recommended Practices for Merger Notification and Review Procedures that encompass the following principles:
 - Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with other reviewing jurisdictions.
 - Because a remedy accepted in one jurisdiction may have an impact in another jurisdiction, the competition agencies should invite the merging parties to consider coordinating the timing and substance of their remedy proposals.
 - Interagency coordination on remedies may avoid unnecessary costs and burdens resulting from duplicative remedies. Subject to confidentiality and nondisclosure rules, coordinating agencies should keep one another informed as to remedies under consideration to the extent that they may affect the other competition agency's review and/or consideration of remedies.
 - Where possible, coordinating agencies should seek to coordinate administrative aspects of proposed remedies of common interest to avoid unnecessarily duplicative requirements and unnecessary costs and burdens. Such aspects might include, for example, arranging common timetables for compliance with undertakings, appointing common trustees to effectuate required divestitures, and harmonizing reporting requirements.

International Cooperation (III): Bilateral Cooperation

■ EU/US Agreement (1991)

➤ The EU/U.S. Agreement contains five principal obligations on each party: (1) to notify the other where its enforcement activities may affect the activities of the other; (2) to exchange information; (3) to render assistance; (4) to cooperate in the enforcement of the other's competition laws; and (5) to have regard to the important interests of the other.

■ The application of the EU/US agreement covers a variety of topics, including remedies

➤ Where cross-border remedies appear inevitable, the Commission and the U.S. authorities have increasingly sought to devise compatible remedies to minimize disruption to the proposed transaction and reduc[e] the risk of divergent or incoherent rulings .

➤ In *Exxon/Shell* and *WorldCom/MCI (II)*, the EU and U.S. authorities engaged in extensive discussions regarding the scope of the appropriate remedy before either authority arrived at a final position.

➤ Following *Boeing/McDonnell Douglas*, EU and U.S. officials emphasized that their well-publicized differences in that case had been exceptional and that, in general, their policies were converging. Such convergence was attributed to increased cooperation and information-sharing among antitrust authorities.

International Cooperation (IV): Bilateral Cooperation

■ EU/Korea Agreement (2009)

- EU and South Korea signed an agreement in 2009 concerning cooperation on anti-competitive activities
- The agreement provides that the competition authority of each Party shall notify the other with respect to the enforcement activities that the notifying competition authority considers may affect the important interests of the other
 - These involve enforcement activities which involve remedies that expressly require or prohibit conduct in the other Party's territory or contain binding obligations for the undertakings in that territory

■ EU/China

- In May 2004, the Commission signed detailed terms of reference for a dialogue with China on competition matters
- The primary aim of this agreement is to establish a permanent forum of consultation and transparency between China and the EU in this area and to enhance the EU's technical and capacity-building assistance to China with regard to competition policy
- Currently does not have detailed agreement on remedies

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Conclusion

Conclusion

- The Chinese AML prescribes that it is applicable to anti-competitive conduct outside the territory of China (Article 2) and China has reviewed and issued conditional/prohibition decisions on transactions involving non-Chinese undertakings
 - Since the AML entered into force, MOFCOM has imposed conditions on nine deals (three in 2011), eight of which involved non-Chinese acquirers and targets and one of which (GE China/Shenhua JV decision) involved a joint venture between a non-Chinese and a Chinese company
- The resolution of potential conflict of remedies between jurisdictions is complex but China can do a number of things:
 - Follow international law principles, i.e., comity and proportionality
 - Refer to traditional antitrust jurisdictions' experience
 - Develop multilateral and bilateral cooperation with other countries

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