



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION 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*

1 July 1996 to 31 December 1996

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1. INTRODUCTION

On 23 September 1991 the Commission concluded an Agreement with the Government of the United States of America regarding the application of their competition laws¹ ("the Agreement"). By a joint decision of the Council and the Commission of 10 April 1995² the Agreement was approved and declared applicable from the date it was first signed by the Commission.

On 8 October 1996 the Commission adopted the first report on the application of the Agreement for the period 10 April 1995 to 30 June 1996³. This present report completes the 1996 calendar year, covering the period of 1 July 1996 to 31 December 1996 and is intended to supplement the first report. It was decided to report on this relatively short period of six months so that in subsequent years it will be possible to report on the same calendar year as the Annual Report on Competition Policy.

This report should be read in conjunction with the first report which sets out in detail the main provisions of the Agreement and the advantages and limitations of cooperation.

¹ *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, 27.4.95, pp.47 - 50).

² See OJ L 95, 27.4.95, pp.45 and 46.

³ Com (96)479final.

2. COOPERATION UNDER THE AGREEMENT

2.1 Notifications

2.1.1 Number of cases notified⁴.

Notifications were made by the Commission to the US authorities in twenty-seven cases during the period between 1 July 1996 and 31 December 1996. These cases, divided into merger and non-merger cases, are listed in Annex 1. Of the twenty-seven cases notified by the Commission eighteen were merger cases.

During the same period, the Commission received notifications from the US authorities in twenty-one cases, ten from the Antitrust Division of the US Department of Justice ("the DoJ") and eleven from the Federal Trade Commission ("the FTC"). These cases, in so far as they have been made public by the US authorities, are listed in Annex 2 and again are divided into merger and non-merger cases. Of the twenty-one cases notified by the US agencies to the Commission seventeen were merger cases.

The figures given represent the number of cases in which a first notification took place during the period under review and not the total number of notifications. Under Article II of the Agreement, notifications are made at a number of specified stages and so several notifications may be made concerning the same case.

Table 1 sets out in figures the notifications made under the Agreement and the OECD Recommendation during the six month period of 1 July 1996 to 31 December 1996. Table 2 sets out in figures the notifications made under the Agreement and the OECD Recommendation since 23 September 1991.

NOTIFICATIONS

Table 1

Year	No. of EC notifications	No. of US notifications		No. of Merger notifications
		FTC	DoJ	
1/7/96-31/12/96	27	11	10 (=21)	18(EC) + 17(US)

⁴ A distinction has not been made between notifications made under the 1991 Agreement and those made under the Revised OECD Recommendation of 27 & 28 July 1995 due to the partly overlapping nature of these two instruments.

Table 2

Year	No. of EC notifications	No. of US notifications		No. of Merger notifications
		FTC	DoJ	
1991	5	10	2 (=12)	3(EC) + 9(US)
1992	26	20	20 (=40)	11(EC) + 31(US)
1993	44	22	18 (=40)	20(EC) + 20(US)
1994	29	16	19 (=35)	18(EC) + 20(US)
1995	42	14	21 (=35)	31(EC) + 18(US)
1996	48	20	18 (=38)	35(EC) + 27(US)

2.1.2 Notifications to the Member States.

To ensure that Member States are kept duly informed the Commission has continued to send copies of notifications received from the US authorities and notifications sent by the Commission to any Member State whose interests are affected. The Commission also informs interested Member States of any cooperation that has occurred in an individual case and the nature of that cooperation.

2.2 Cooperation

Cooperation between the Commission and its counterparts in the United States has continued to be very positive and has contributed greatly to the effective resolution of a number of cases.

Due to the short period of time under review many of the cases involving cooperation under the Agreement are still ongoing and so cannot be discussed in detail or mentioned by name in this report.

2.2.1 Timing

Contacts between the Commission and the US agencies are often established at a very early stage where a common interest has been identified. It is not unusual for contacts to be established even before official procedures have been activated or a case opened. Case handlers have found it helpful to be aware of the other authority's intended approach to an individual case right from the beginning. The authorities have also continued to inform each other on the timing of their respective investigations and procedures. The advantages of this approach were outlined in the first report on cooperation (paragraph 4.1).

2.2.2 *Supply of non-confidential background information*

Non-confidential information supplied by both parties has been particularly helpful in drawing attention to possible anticompetitive behaviour. The Commission has opened an ex-officio investigation under Article 85 in a high technology industry following the supply of non-confidential background information by the DoJ. This information included US media reports which were not readily available in Europe.

For the first time under the Agreement the competition authorities have commenced cooperation in a cartel investigation. The US have supplied background non-confidential information on a cartel which they have already successfully prosecuted. Cooperation between the authorities is still ongoing. This is an important development in particular due to the high priority given by both the Commission and the US agencies to the elimination of cartels. However, where the US authorities have obtained a judgment on the basis of a plea bargain only a severely limited amount of information will have been made publicly available. This restriction on the availability of information may limit the extent of cooperation.

2.2.3 *Mergers notified to both the Commission and the US authorities*

Proposed mergers which were notified to both the Commission and the US agencies provided ample scope for cooperation and the exchange of opinions. Two merger investigations which were closed in the period under review and which provided scope for cooperation are *Sandoz/Ciba-Geigy* and *Baxter/Immuno*. Cooperation occurred despite difficulties encountered due to the different time scales in place in the US and in the EU and the existence, in some cases, of objectively different market conditions which have often justified different, but compatible, solutions.

Cooperation in the *Sandoz/Ciba-Geigy* merger involved detailed discussions on the various product markets in the areas of pharmaceuticals, animal health, crop protection and seeds, as well as on how each party defined the geographical markets. Discussions also concerned to a large extent the terms on which the merger could be approved. The parties granted a waiver for the exchange of confidential information in certain sectors. Contacts were regular and the discussions on settlement were of great importance in attempting to ensure that both the Commission and the FTC sought undertakings from the parties that were compatible. Difficulties arose due to the different time scales applicable in the EC and the US. The Commission was obliged under the Merger Regulation to come to a decision in July 1996 while the FTC did not conclude its investigation until 3 January 1997 when it entered into a consent decree with the parties. In the circumstances the agencies cooperated as best they could and in the final analysis the undertakings sought separately by both the Commission and the FTC are not contradictory.

2.2.4 *Allowing one authority to take the lead*

The investigation into the practices of *AC Nielsen Company* ("Nielsen"), a provider of retail tracking services, provides a clear example of successful cooperation between the Commission and the US Department of Justice and anticipates a new pattern of cooperation. Both the Commission

and the DoJ received a complaint from IRI that Nielsen was abusing its dominant position in Europe and thus prevented IRI from establishing a competitive presence there. During the investigation the case handlers from both authorities were in close contact, exchanging documents as well as points of view on different aspects of the case. The ability of the authorities to cooperate was greatly enhanced by the waivers which were obtained from both IRI and Nielsen permitting the exchange of confidential information.

As the complaint was primarily addressed to contractual practices implemented in Europe and had its greatest impact within Europe, the DoJ let the Commission take the lead once it was confident that it had a firm intention to act. The Commission conducted negotiations with Nielsen to arrive at an acceptable solution ensuring that competition was not distorted. At every stage during negotiations the DoJ was informed of progress and given an opportunity to comment on the undertakings it was proposed to seek from Nielsen. Once the Commission had secured the necessary undertakings from Nielsen, the DoJ was able to conclude that the practices it had been investigating would not continue, and thus it closed its investigation.

Although the US did not request the Commission to take action in the IRI/Nielsen case, the approach taken by the US of standing back and awaiting the results of the Commission's investigation may provide an example of how positive comity may operate in the future.

3. NEW DEVELOPMENTS

In light of the 1996 communication from the Commission to the Council entitled "Towards an International Framework of Competition Rules"⁵ the Commission has continued to seek to strengthen cooperation between competition authorities around the world by both building a network of bilateral agreements and promoting common competition rules at the multilateral level in the WTO and OECD.

On the 25th of October 1996 the Commission was granted a mandate by the Council to enter into negotiations with the United States in order to reach an agreement which would strengthen the positive comity provisions of the 1991 bilateral Agreement on cooperation in the application of competition laws.

Negotiations have been extremely productive and a draft Agreement, provisionally approved by the US authorities, has been submitted to the EC Member States, industry and other interested parties to obtain their views. It is expected that the Council, having received the opinion of the European Parliament, will approve the Agreement in the course of 1997.

The draft Agreement provides that a competition authority will normally defer or suspend its own enforcement activities in respect of certain anti-competitive activities which occur principally in and are directed principally towards the other Party's territory, where that other Party is prepared to deal with the matter.

⁵ Com(96) 284 final

4. BILATERAL MEETING

There was a high level meeting in Washington on the 16th of October 1996 between officials from the Commission, the FTC and the DoJ.

A number of wide ranging issues were dealt with during the bilateral meeting, including; cooperation and notification issues, the draft Positive Comity Agreement, proposed amendments to policy and legislation, cartels, air transport, telecoms and media, the EU proposal in the WTO on competition policy and the New Transatlantic Agenda and Transatlantic Business Dialogue proposals on competition.

5. CONCLUSIONS

The Agreement continues to provide a framework for meaningful and useful cooperation between the Commission and the United States. The cooperation that was described in the first report to the Council and the European Parliament has continued to bring benefits on both sides of the Atlantic. Benefits, not only to the competition authorities but also to the companies involved. It is everyone's interest that compatible solutions be found. This has been particularly true in merger cases, where parties have been willing to grant waivers allowing the exchange of confidential information.

In the IRI/Nielsen case it was clearly in the complainant's interest to facilitate cooperation between the Commission and the DoJ to ensure that a remedy was put in place as quickly and effectively as possible. It is interesting to note that it was also in the defendant company's interest to avoid lengthy investigations and the risk of incompatible remedies being imposed by both the Commission and the DoJ. In this instance both the complainant and the company under investigation granted waivers permitting the exchange of confidential information.

However, while a good deal of cooperation can take place without the exchange of confidential information, in cases where a waiver cannot be obtained, the effectiveness of cooperation may be curtailed. For example, difficulties may arise in explaining the suitability of a particular remedy if the confidential information justifying that decision cannot be discussed. At present it is not possible for the Commission and the US authorities to exchange confidential information due to the existence of confidentiality rules in domestic legislation. Before measures can be taken to remove these legal obstacles to the exchange of information, it is necessary to address the real concerns expressed by Member States and the business community on the safeguards which could be provided to information exchanged under a future cooperation agreement. The Commission is at present studying the safeguards which can be provided under US law and the possibility of overcoming the existing obstacles to the exchange of confidential information. The exchange of confidential information would be particularly useful in the investigation of international cartels, where the companies involved are unlikely to grant waivers for the exchange of confidential information and problems may be encountered in the collection of incriminating evidence.

ANNEX 1**NOTIFICATIONS BY THE EUROPEAN COMMISSION TO THE US AUTHORITIES
01.07.96 - 31.12.96⁶****Merger Cases:**

1. IV/M.747 - Chevron Corp./British Gas/NOVA Corp./NGC Corp.
2. IV/M.734 - Melitta /Dow - Newco
3. IV/M.727 - BP/Mobil
4. IV/M.774 - Saint Gobain / Wacker Chemie / NOM
5. IV/M.800 - Siemens/Sommer Allibert Industrie
6. IV/M.706 - GEC Alsthom/AEG
7. IV/M.823 - John Deere Capital Corp/Lombard North Central plc
8. IV/M.829 - Thyssen / Böhler Uddeholm
9. IV/M.821 - Baxter / Immuno
10. IV/M.779 - Bertelsmann / CLT
11. IV/M.836 - Gillette / Duracell
12. IV/M.826 - ESPN/STAR
13. IV/M.794 - Coca-Cola/Amalgamated Beverages
14. IV/M.841 - Lagardère / Thomson-CSF
15. IV/M.865 - Cable & Wireless/Nynex/Bell Canada
16. IV/36.213 - GEAE / Pratt & Whitney
17. IV/M.773 - Westinghouse / Equipos Nucleares
18. IV/M.862 - Textron / Kautex

⁶ Due to confidentiality requirements, this list includes only those investigations or cases which have been made public.

ANNEX 1 (continued)**NOTIFICATIONS BY THE EUROPEAN COMMISSION TO THE US AUTHORITIES
01.07.96 - 31.12.96****Non-merger cases:**

1. Air Transport agreements
2. IV/35.134 - trans-Atlantic Conference Agreement
3. IV/35.962 - De Agostini - Rand McNally
4. IV/4722, 33690 - Caterpillar
5. IV/36.183/F-3 - Coca-Cola Enterprises Inc/Amalgamated Beverages Great Britain Ltd
6. IV/D-5/35.935 - Murex/Chiron + 4
7. IV/36.194 - Digital Video Discs
8. IV/36.089 - British Airways / American Airlines
9. IV/30.373 R - P&I Clubs

ANNEX 2**NOTIFICATIONS BY US AUTHORITIES TO THE EUROPEAN COMMISSION
01.07.96 - 31.12.96⁷****Merger cases:**

1. Lucas Industries plc / Variety Corp.
2. Tilcon Inc. / Oldcastle Northeast Inc.
3. National Medical Care Inc / Fresenius AG
4. Metal Leve S.A. / Mahle GmbH
5. Kolbenschmidt AG / T&N plc
6. Soivay SA / American Home Products Corp.
7. Immuno International AG / Baxter International Inc.
8. General Electric Company / Pratt & Whitney / United Technologies Corp.
9. Sandoz / Ciba-Geigy

⁷ Due to confidentiality requirements, this list includes only those US investigations or cases which have been made public by the US authorities.

ANNEX 2 (continued)

**NOTIFICATIONS BY US AUTHORITIES TO THE EUROPEAN COMMISSION
01.07.96 - 31.12.96⁸**

Non-merger cases:

1. International Association of Conference Interpreters
2. Lykes Bros. Steamship Co Inc / Universal Shippers Association
3. A&L Mayer Associates Inc

⁸ Due to confidentiality requirements, this list includes only those US investigations or cases which have been made public by the US authorities

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