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Managing cross-border antitrust investigations

Damien Gerard (College of Europe, Belgium) · Tuesday, May 29th, 2012

Cross-border antitrust enforcement issues are back on the agenda. The recent Toshiba judgment of the European Court of Justice ("ECJ") has confirmed a number of principles governing the network enforcement system set forth in the EU by Regulation 1/2003. Recent national decisions involving the same companies and/or closely related sectors (*e.g.*, the flour milling industry) testify of the dynamic cooperation among national competition authorities ("NCAs"). Yet, lasting uncertainties remain. In Toshiba, the ECJ has largely left open the *ne bis in idem* question and the reliance on the cooperation mechanisms provided for by Regulation 1/2003 – *i.e.*, the cross-border exchange of information (Art. 12) and the execution of cross-border fact-finding measures (Art. 22) – is not fully stable and operational.

In a system that defers to the procedural autonomy of Member States and thus ambitions to tolerate the diversity of national procedural rules and standards, cooperation mechanisms can only work if they are supplemented by clear coordination rules. Coordination rules serve to designate the domestic law applicable to each step in the cooperation process, whether it is the collection of evidence or its use in adversarial proceedings, knowing that the transmission thereof is regulated directly by Regulation 1/2003. Unfortunately, ambiguity still prevails to date as to the exact substance of these rules.

Admittedly, a combined reading of Article 22 of Regulation 1/2003 and of the relevant paragraphs of the ECN Notice suggests that the cross-border collection of evidence is governed by the domestic law applicable to the NCA to which the request for such collection is made (*i.e.*, the so-called "transmitting" NCA). As a result, the evidence-gathering process (*e.g.*, an inspection) can be contested before the competent authority in the country of the transmitting NCA and according to the rules and standards provided for under its domestic law. Complex practical questions arise as to whether and when parties to the proceedings should be informed of the request made to a foreign NCA for the collection and/or transmission of evidence, with obvious consequences on the effectiveness of their right to appeal against aspects of that procedure.

However, the main uncertainty lies in the law applicable to the use in domestic proceedings of evidence obtained from and transmitted by a foreign NCA. More specifically, can the rules and circumstances governing the collection of evidence abroad according to foreign law impact the reliance thereon by the domestic "requesting" NCA? Stated otherwise, could an NCA rely in local proceedings on evidence that it could not have obtained itself under the rules and standards applicable domestically?

A commonly held "official" view considers that, if and once it has been lawfully collected by the transmitting NCA, evidence can be "freely" and "unconditionally" used by the requesting NCA in domestic proceedings. It finds support in Recital 16 of Regulation 1/2003 and paragraph 8 of the Joint Statement of the Council and the Commission entered into at the time of the entry into force of Regulation 1/2003 and according to which: "*Member States accept that their enforcement systems differ but nonetheless mutually recognise the standards of each other's system as a basis for cooperation*". In a volume entitled International Antitrust Litigation – Conflict of Laws and Coordination edited by J. Basedow, S. Francq and L. Idot, which is remarkable for many (and mainly) other reasons, I argue that such a solution is unwarranted and could not have received the consent of Member States. Aside from technical reasons, this is notably because it would force Member States' authorities to relinquish the application of rules reflecting entrenched domestic public policy/due process objectives, which have a natural vocation to apply and must necessarily govern the admissibility of evidence in the forum. Moreover, it would also go further than any other mechanisms put in place in recent years in the areas of cooperation in civil and criminal matters. Eventually, by evacuating the remaining diversity of national rules and standards, it would contradict the rationality inherent to the system set forth by Regulation 1/2003.

Instead, a cumulative approach whereby (i) the legality of the collection of evidence is assessed according to the law applicable to the transmitting NCA and (ii) the admissibility of evidence is assessed according to the law applicable to the receiving/deciding NCA, appears better suited to balance the interests of due process and of effective cross-border antitrust enforcement and, hence, to serve the legitimacy of the system put in place by Regulation 1/2003. In turn, it should be easier to administer by NCAs and review courts and, last but not least, more prone to trigger procedural convergence, thereby reducing diversity and limiting coordination issues characteristic of cross-border antitrust investigations (in the EU and beyond).

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