EC/United States agreement: application of positive comity principles in the enforcement of their competition laws

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In a Commission report presented to the Council and the European Parliament on the implementation of the 1991 agreement between the Communities and the United States on the application of their rules of competition, the Commission summarised the functioning of that agreement between 1 July 1996 and 31 December 1996. As a whole, it transpired that cooperation between the Commission and its American counterparts had worked well and had made a considerable contribution to clarifying certain issues. Over the brief period considered (six months), the Commission had sent 27 notifications to the American authorities, 18 of which related to mergers, while the Commission had received 21 notifications from the American authorities, including 17 on mergers. At the procedural level, the report emphasised the prompt nature of contacts between the parties: in some cases, contact was established even before an official procedure has been initiated, with a view to establishing from the outset the approach the respective authorities intend to adopt in dealing with a case. At the level of notifications as such, again, the cooperation had clearly worked well. It had generally taken the form of detailed discussions on the various markets affected by the merger operations and on the conditions under which the merger might be authorised. In some cases, the parties concerned had agreed to derogations such as to allow the exchange of confidential information. In other circumstances, one authority had taken the decision to withdraw so as to enable the other more freedom of action. This occurred in the IRI/Nielsen case, where the DOJ (US Department of Justice Antitrust Division), approached by IRI at the same time as the European Commission, had withdrawn in favour of the Commission because the practices involved particularly concerned the territory of Europe. It was the Commission that had conducted the negotiations and reached an acceptable solution with Nielsen, guaranteeing that competition would not be distorted. The DOJ had then terminated its own inquiry. For the Commission, this case illustrated the way in which the instrument of positive comity could be used in future under the agreement, which is currently at the approval stage. As a reminder, this draft agreement provides that a competition authority shall, in principle, defer or suspend its inquiries in the event that certain anticompetitive activities are being committed primarily within the territory of the other party or primarily affect that territory, provided that the said other party is prepared to solve the problem. In conclusion, the Commission found that the agreement continued to offer a framework that allowed constructive cooperation between the authorities concerned and also for the undertakings participating in it. The Commission was nevertheless concerned by the limitation on exchanges of confidential information in connection with certain inquiries, even when such exchanges could prove useful in settling certain cases (for example, international understandings). For this reason, the Commission was currently studying what forms of protection could be provided for information exchanged under a future cooperation agreement.