CHAPTER FIVE

THE BILATERAL STRATEGY

I. Introduction

The previous chapters have criticised the unilateral strategy for its ineffectiveness to address global competition problems. This chapter starts the analysis of the different ideas that have been proposed regard to internationalisation of competition law. Such ideas may be subsumed into the bilateral strategy and the multilateral strategy. The bilateral strategy embraces those agreements entered into by two countries, whose aim is to promote the cooperation and coordination between the national competition authorities of the two signatory parties. The multilateral strategy, on the other hand, includes the agreements entered into by a higher number of countries.¹

This chapter focuses on the bilateral strategy, while the multilateral strategy is examined in the following chapters. The structure of the chapter is as follows. The second section provides an overview of the historic background of the bilateral cooperation. The third section briefly describes the contribution of the OECD to bilateral cooperation.² The fourth section examines the US/EC bilateral cooperation agreements and evaluates the achievements of this cooperation arrangement. The fifth section introduces the topic of regional trade agreements that include competition rules.³ The sixth section


² The OECD report of 2005 succinctly summarised this position: “(…) modernisation of the enforcement process, by eliminating notification and prior approval of exemptions while sharing enforcement responsibility with National agencies, is designed, among other things, to redirect resources so that DG Comp can concentrate on complex, community wide issues and investigations. Modernisation shares competence with National institutions in a different way than the community usually does. It does not follow the paradigm of a directive from Brussels to be implemented through National laws. There are no EU-level directives requiring National governments to adopt a particular substantive competition law, and modernisation does not require substantive harmonisation. Rather, it builds on the fact that National competition systems, so that over the years most National governments have adopted substantive rules that are generally consistent with those of the EU without being required to do so (…))”.

looks at the above regional trade agreements. The seventh section is about the Europe Agreements entered into by the EC with the neighbouring countries. The eighth section provides an assessment of the cooperation schemes contained by regional agreements. The ninth sections weigh the advantages of bilateral cooperation agreements against their disadvantages. The tenth section discusses the viability of bilateral strategy as regulatory approach for the assessment of anti-competitive effects of transnational merger and draws conclusions.

II. The origins of bilateral cooperation

Historically, the first generation of bilateral cooperation agreements incorporated a narrow idea of comity, so-called negative comity. The primary objective of these agreements was to avoid jurisdictional conflicts. Later, with the progress of international cooperation, countries developed a second generation of bilateral cooperation agreements, which are more complex and comprehensive and are based on a broader idea of comity, so-called positive comity.

A. The first generation of bilateral cooperation agreements

This category of cooperation agreements rests upon the principle of negative comity which includes a number of non legal rules of politeness and good manners. These rules recommend countries to conduct their international affairs in such a manner as to pay regard to the legitimate interests of other countries. This principle can be relevant to settle cases of concurrent jurisdictions, when two or more countries claim jurisdiction in the same situation. It suggests that the jurisdiction with the superior or more reasonable claim should prevail over the other concurrent jurisdictions. But the effectiveness of the principle in resolving jurisdictional disputes is undermined by its vagueness and its lack of legally binding force.