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Organisation de Coopération et de Développement Economiques
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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

1995 COOPERATION RECOMMENDATION

STOCKTAKING OF MEMBER COUNTRIES' EXPERIENCES

-- United States --

The attached document is submitted by the delegation of the United States to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item VI of the agenda at its forthcoming meeting on 12 October 2004.

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Notifications

1. The U.S. agencies have always been careful to comply with the notification provisions of the 1995 Recommendation. For example, at the DOJ, internal guidelines direct staff attorneys to work closely with the Foreign Commerce Section whenever an investigation has an international dimension, and a senior paralegal in that section is dedicated to preparing and transmitting notifications through State Department channels. The FTC has similar staff directives and has created a section on its intranet site to provide staff with up-to-date information on notification obligations and the relevant internal contact in the International Division responsible for the notification. In recent years the DOJ has transmitted over 110 notifications per year in accordance with the terms of the 1995 Recommendation and bilateral cooperation agreements, and the FTC over 40 notifications; the U.S. agencies have received notifications from a handful of OECD countries. Both the DOJ and the FTC, in the past, also followed the 1995 Recommendation in notifying a number of non-OECD countries with which they were developing a cooperative relationship; most of those countries have since become OECD members or observers.

2. The notification procedures specified in the recommendation have served their purpose well. Although countries should indicate any formal channels they require for notifications, in practice we have found it useful for agencies to maintain an informal agency-to-agency channel to ensure timely delivery to a regular contact person familiar with the system and with cooperation procedures.

3. Our experience with notifications over the last 30 years, however, leads us to question the continued utility of formal notification. At the time that the notification provisions were first adopted, antitrust investigations implicating foreign interests were much less common than they are today. The shared commitment to vigorous enforcement focused on consumer welfare and economic efficiency that exists today, and the web of relationships between agencies accustomed to cooperating in a common endeavor, did not exist. Indeed, much of the motivation for the original notification requirement was concerned with shielding domestic firms from foreign enforcement actions. Notification was essentially a "confidence building measure" intended to avoid any surprises and express the willingness of authorities to discuss any activity that might affect other countries.

4. These concerns are much less relevant today. In fact our experience has been that formal notifications made to us rarely provide useful information. The cases notified to us either concern large transactions or practices that are already reported in the media, or situations for which we have no reason to be concerned about the existence of a foreign proceeding. In the rare situation where a U.S.-based or U.S.-headquartered firm believes that a foreign proceeding "may affect important interests" of the U.S. and that the U.S. agencies should be made aware of it, that firm can be expected to notify the agencies on its own.

5. Thus we question the need to continue the burdensome task of notifying routine proceedings that meet the broad categories identified in para 3(a-f) of the appendix to the 1995 Recommendation. Notifications could instead be reserved for cases that are known to involve particular sensitivities in the affected country. In many cases, agencies will want to notify other countries, often informally, in order to advance a common enforcement interest and to further cooperation in securing a mutually advantageous outcome. With strict deadlines for completion of the review in many jurisdictions, informal communications, via telephone or e-mail, aimed at coordinating reviews have proved most useful in practice.

Coordination

6. The provisions of the 1995 Recommendation relating to coordination reflect current practice and appear adequate. U.S. agencies have coordinated their enforcement efforts with fellow OECD Member Countries under the terms of the 1995 Recommendation in the

7. absence of a formal bilateral agreement such as exists between the U.S. and a number of OECD Members. For example, the settlement of the Federal-Mogul/T&N merger of 1998, involving the divestiture of assets on both sides of the Atlantic, was coordinated among the FTC, the UK Office of Fair Trading, France's DGCCRF, Italy's AGCM, and Germany's Bundeskartellamt pursuant to the terms of the 1995 Recommendation.

Information Exchange

8. The provisions relating to information exchange reflect current practice and appear adequate.

Comity/Consultations

9. The “negative”(para I.B.4) and “positive” (para I.B.5) comity provisions are less detailed than similar provisions in bilateral cooperation agreements, but appear adequate, as do the consultations provisions in para I.B.6.

Conciliation

10. The conciliation and report of successful consultations provisions (paras I.B.7 and 8) have never been invoked and could be dropped from the 1995 Recommendation.

International Agreements

11. The 1995 Recommendation has proven to be a useful model for negotiation of bilateral cooperation agreements, and includes the core elements of such agreements. It could prove useful to open the Recommendation to non-members, and thus avoid the need to negotiate numerous individual bilateral agreements.