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**COMMITTEE ON COMPETITION LAW AND POLICY**

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## Working Party No. 3 on International Co-operation

### INTERNATIONAL CO-OPERATION IN TRANSNATIONAL MERGERS

**-- United States --**

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# INTERNATIONAL CO-OPERATION IN TRANSNATIONAL MERGERS

## United States

1. It is timely and appropriate for the OECD Competition Law and Policy Committee (CLP) to take stock of international cooperation in transnational mergers. Almost ten years ago, in November 1991, the CLP mandated a study, conducted by Professors Richard Whish and Diane Wood, of multi-jurisdiction merger review. The report was published at about the same time as the 1990s merger wave gathered force.[1] This wave was marked by transnational mergers that presented both a challenge and an opportunity to OECD Members' antitrust authorities - a challenge to their ability to enforce their laws effectively on behalf of their consumers and an opportunity to utilize the cooperative mechanisms provided in the OECD Recommendation and in comparable bilateral cooperation agreements to enhance their enforcement efficiency and effectiveness. The challenge has been met and the opportunity was grasped. However, as the Secretariat's paper[2] notes, there are issues that merit further examination in light of the experience gained during the past decade.

2. The purpose of this paper to comment on some of the issues raised by the Secretariat's issues paper, specifically the types of mergers and issues that benefit from cooperation and the methodology of cooperation. First, however, we suggest some lessons learned from the past decade of cooperation based on the experience of the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice:

- Informing other jurisdictions whose interests are implicated by an investigation or enforcement action remains a key, initial element in effective cooperation.
- Procedural differences do not defeat cooperation.
- Cooperation has fostered convergence in merger analysis, especially in market definition, assessment of competitive effects, and remedies.
- Cooperation can minimize or even avoid conflict, but it cannot be expected to override all differences including those based upon application of different substantive standards, or on different competitive impacts in different jurisdictions.
- It may be more difficult to change and harmonize the procedural aspects of merger control than substantive standards.
- Cooperation can be multilateral as well as bilateral (*e.g., Federal-Mogul/T&N*).

### The Range of Opportunities for Beneficial Cooperation

3. The potential benefits of cooperation do not appear to be concentrated upon, or limited to, any particular types of mergers. In the past year alone, fruitful cooperation among U.S. and foreign authorities has occurred in: horizontal mergers (*e.g., WorldComMCI/Sprint*); vertical mergers (*e.g., Boeing/Hughes*); mergers that raised concern as to both unilateral effects and potential coordinated interaction (*e.g., Time Warner/EMI*); mergers in which the geographic scope of the effects was world-wide (*e.g., Boeing/Hughes, Alcoa/Reynolds*) or differentiated among several geographic markets (*e.g., Air Liquide-Air Products/BOC* and *AOL/Time Warner*); and in agreements that raised both merger and non-merger issues (*Covisint*).

4. While the opportunity for cooperation among authorities may appear to be greater in cases in which the relevant geographic market is worldwide, as suggested by the Secretariat (¶ 5), experience teaches that authorities must remain vigilant in cases affecting several geographic markets to avoid

potentially conflicting remedies. For example, in *Ciba-Geigy/Sandoz*, both the European Commission and the FTC sought remedies that involved Sandoz's production of Methoprene; coordination was necessary to avoid placing Sandoz under conflicting obligations.

5. There are many transnational mergers that require little, if any, communication or cooperation among authorities. For example, a foreign direct investment that affects a market that is local, or even national, in scope, may be of no concern to the authorities in the investor's home country (*e.g.*, a supermarket chain based in Europe, that acquires a group of supermarkets in the United States).

6. The Secretariat's paper (¶ 8) correctly notes, however, that "[t]he possibility of international co-operation exists, of course, even when only one country has competitive concerns about a merger." The experience of the U.S. agencies bears this out. There have been numerous instances in which a proposed merger has not been challenged in the United States and thereafter the relevant U.S. agency is contacted by a foreign agency that is reviewing the transaction. In some such cases, the U.S. agencies may have non-confidential information that may be useful to the foreign enforcement authority - for example, the identification of a circumstance in the United States that would differentiate the market effects there from those outside the United States. There also have been many instances in which foreign authorities have sought the advice of the U.S. agencies in merger cases that affect product markets in which the United States agencies have much experience (*e.g.*, soft drinks). Likewise, the U.S. agencies have sought information from their foreign counterparts concerning, for example, previous cases in the same industry in which those agencies can share non-confidential information that may validate or differentiate a market definition or the assessment of competitive effects.

**Procedural Issues**

***1. The need for timely contact***

7. It is to be expected that "mega-mergers" - for example, *Exxon/Mobil*, *AOL/Time Warner*, *WorldCom-MCI/Sprint* - will receive thorough attention from the enforcers. But there are many lower profile transnational mergers that nevertheless raise concerns in one or more countries. In some cases, potential concerns in other jurisdictions are not readily apparent, but authorities must recognize important interests of other Members and notify accordingly under the 1995 OECD Recommendation concerning cooperation.[3] (There have been recent cases involving clear U.S. interest in which the United States was not notified.)

8. In addition to formal notifications, informal contacts are a valuable aid to cooperation. Advances in communications technology during the 1990s, especially electronic mail, have increased the number and level of contacts between enforcement agencies. Similarly, the increased availability of documents, such as decisions, reports, and press releases, in electronic format, has facilitated sharing public information that was heretofore not readily available in foreign countries. These technologies make it easier for officials in one jurisdiction to informally contact their counterparts in other jurisdictions to inform and inquire about matters that may be of interest in the other jurisdiction. Although the merger wave and other business activities have put great pressure on antitrust enforcement agencies around the world, these communications technologies make it quick and easy to send informal inquiries. The Members' antitrust authorities need to remain aware of the increased potential for mergers to have competitive effects outside their jurisdiction, and to make informal inquiries when foreign interests, potential or apparent, are present.

9. Although the EC-U.S. cooperation agreement[4] calls for the U.S. authorities to make notification in merger cases no later than the issuance of the so-called "second request," the agencies typically are in contact much earlier than that; in fact, U.S. and EC authorities regularly consult during the first phase of

investigations. Establishing contact early in the process can facilitate expeditious focus on issues of concern, or on clearance where the analysis and consultation leads to the conclusion that there is no need for further investigation.

### *2. Cooperation in the analysis phase*

10. Much recent attention to international enforcement cooperation has focused on coordination in the remedial phase of a multi-jurisdictional case. The Secretariat's paper (following ¶ 8) states that, "Co-operation in the remedy phase has been the most common and most successful of all types of co-operation so far." Less well-known to the general public - but certainly well-known to counselors and companies whose mergers have been cleared - is the extent to which the authorities consult and share information and analyses, either non-confidential or subject to a confidentiality waiver, that result in decisions to clear mergers.

11. Cooperation in the analysis phase is no less prevalent or important than in the remedial phase. Remedial action is based on a finding of competitive harm, measured against the merger laws enforced by the reviewing jurisdictions. Before reaching that finding, the enforcers must define the product and geographic markets affected by the proposed merger, determine the nature of the competitive harm that would result (*e.g.*, single firm dominance or coordinated interaction in an oligopolistic market), and consider whether there are factors (such as entry) that would counter the competitive harm.

12. It is in these areas of analysis that there has been the most progress in convergence among enforcement agencies during the 1990s. A notable example is market definition, where, for example, the provisions of the United States' Horizontal Merger Guidelines[5] and the European Commission's Notice on the definition of the relevant market[6] are very similar, and the agencies usually arrive at similar results. Experienced counselors have also noted substantial convergence in the assessment of competitive effects,[7] although there continue to be significant differences in approaches to some important issues (*e.g.,* bundling theories, efficiencies).

13. It is still necessary, of course, for the respective authorities to work through the issues in each case. Several recent cases have posed complicated market definition issues. In some cases, the evolution of product markets in Europe and the United States have not proceeded at the same pace, so that the relevant product market may be different in the reviewing jurisdictions. In the case of a recent merger reviewed, but not challenged, by U.S. and EC authorities, the staffs had several lengthy telephone conversations about the scope of the relevant market, the definition of which would determine whether the merger ought to be challenged.

14. Likewise, transnational mergers can have different competitive effects across jurisdictions. For example, market concentration levels may vary significantly among reviewing jurisdictions, or the likelihood of coordinated interaction in an oligopolistic market may be greater in one jurisdiction than in another.

15. The reviewing authorities must address each of these factors. Some cases present clear-cut competitive problems that enable the reviewing authorities to come to quick agreement on the analysis and move on to the subject of remedies. When that is not the case, the officials must keep their priorities in order and focus on the basic elements of merger analysis.

### *3. Cooperation between enforcers and parties*

16. Although restraints on disclosure of confidential business information can limit cooperation among enforcement agencies (Secretariat paper, ¶ 13), this has not precluded cooperation. There is much

useful information that the agencies can share,[8] and the authorities have successfully cooperated in the absence of confidentiality waivers.

17. As multi-jurisdictional review has become more common, parties have been increasingly willing to grant limited waivers of confidentiality - limited in the sense that they permit the enforcers to share information the parties submit, subject to the continuing obligation to maintain its confidentiality as to third parties and the general public. The earliest waivers in merger cases were typically granted in the remedy phase, after agreement had been reached that the merger would be cleared subject to conditions. Parties readily recognized the potential for conflicting obligations and began to share their settlement proposals with each reviewing agency and, in some cases, took further steps to facilitate a coordinated review of the settlement proposals.

18. Over the last few years, parties have more frequently granted unlimited waivers at the beginning of the review. The grant of a waiver makes it easier for the reviewing authorities and the parties to identify and address issues of concern as early as possible. Of course, it is the parties' choice whether to grant a waiver, and there is no penalty or adverse inference if they choose to maintain their confidentiality protections and rights.

19. Whether parties will continue this trend remains to be seen. The authorities can encourage it by continued scrupulous adherence to their confidentiality rules and by appropriately focused use of the waiver authority granted by the parties.

20. The Secretariat's paper (¶ 15) states that "competition officials sometimes express the view that the business community's reticence about waivers has less to do with concerns about unauthorised downstream disclosure and more to do with a desire to hinder the cooperative effort." There may be some cases in which parties do not wish to facilitate cooperation, but they have become increasingly rare. Parties realize that to "get the deal through" they must deal with each of the reviewing authorities and it appears that they have learned that it is more efficient to do so when they facilitate communication, cooperation, and coordination among the reviewing authorities.

**Conclusion**

21. Cooperation is built upon communication, mutual respect, and a commitment to minimize conflicts in enforcement. Where cooperation exists, coordination can take place. Convergence in analysis can be a valuable by-product. But cooperation requires maintenance; in the first instance, it requires timely communication and a nurturing of relationships among the authorities. Just as the authorities must be vigilant for anti-competitive activities, they must likewise faithfully carry out the cooperative measures recommended by the OECD and contained in the numerous antitrust enforcement cooperation agreements.

## NOTES

1 OECD, Merger Cases in the Real World: A Study of Merger Control Procedures, Paris, 1994.

2 DAFFE/CLP/WP3(2001)5, 27 Apr 2001.

3 Revised Recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, C(95)130/FINAL (27-28 July 1995), *available at:* http://www.oecd.fr/daf/clp/Recommendations/REC8COM.HTM.

4 Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <http://www.usdoj.gov/atr/public/international/docs/ec.htmt>, at Art. II.3.(a)(i).

5 U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, *available at:* http://www.ftc.gov/bc/docs/horizmer.htm.

6 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9 Dec. 1997; *available at:* http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

7 *See, e.g.*, Robert D. Stoner, "Convergence of U.S. and E.U. Merger Enforcement," Economists Ink, Economists Incorporated, Spring/Summer 2000, at 1; and William J. Kolasky, Jr. and Leon B. Greenfield, "Merger review in the EU and US: substantive convergence and procedural dissonance," Global Competition Rev., Oct./Nov. 1998, at 22.

8 *See, e.g.*, the depiction in Parisi, Enforcement Cooperation Among Antitrust Authorities, 20 ECLR 133 (Mar. 99) or http://www.ftc.gov/speeches/other/ibc99059911update.htm