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Working Party No. 3 on International Co-operation

INFORMATION SHARING IN MERGER CONTROL PROCEDURES

-- United States --

The attached document is submitted by the delegation of the United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting on 13 May 2003.

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INFORMATION EXCHANGES IN INTERNATIONAL CO-OPERATION IN MERGER INVESTIGATIONS

1. The United States welcomes the opportunity to contribute to a further discussion of information exchanges among competition authorities cooperating in merger investigations. This paper reproduces the questions posed in the Secretariat's note, following each with the U.S. response thereto.

1. Scope of Information Exchanges

2. Some countries have more recently adopted statutes that unilaterally permit the exchange of confidential information with other jurisdictions under certain circumstances. There is a question whether these statutes already have been used to exchange information in the investigation of transnational mergers, and whether the adoption of such statutes should be encouraged to overcome existing limitations to the exchange of confidential information.

a. To what extent, absent a waiver by the merging parties and absent a specific co-operation treaty or agreement with another jurisdiction, can information obtained in the course of a merger investigation be disclosed to another jurisdiction?

Nothing has changed with respect to this issue in the United States since the submission of its answer to question 16 of the questionnaire on harmonization of merger control procedures:

Absent a waiver or a specific co-operation agreement, ... the U.S. cannot disclose confidential business information to other agencies. It can share what it labels "confidential agency information," which includes: the fact that the agencies have opened an investigation; the fact that the agencies have requested information from someone located outside U.S. territory; and how the investigative staff analyses the case, including product and geographic market definition, assessment of competitive effects and potential remedies.

Are there instances where the inability to obtain confidential information from another agency has significantly hindered the investigation of a merger, for example because relevant information was located outside the jurisdiction of an investigating authority and the parties were not willing to directly provide the information to the agency requesting it?

There have been instances in the past (over a decade ago) in which, during the course of a merger investigation, the agency encountered difficulty in obtaining relevant evidence located outside U.S. territory. These instances did not significantly hinder the investigations.

b. *Have statutes that authorize the exchange of confidential information with other countries even in the absence of an international agreement or waivers by the parties to a transaction in practice been used in merger investigations to provide information to another authority? If so, how often and under which circumstances? If not, what are the reasons that exchanges of information within this framework did not (yet) take place?*

The United States has entered into only one mutual assistance agreement (with Australia) under its statute, the International Antitrust Enforcement Assistance Act of 1994, authorizing the exchange of confidential information. That statute has not been used to exchange confidential information in a merger case; in fact, that statute exempts information obtained under the U.S. premerger notification law, the Hart-Scott-Rodino Act, thereby making information sharing in merger cases pursuant to agreements under that Act more circumscribed.

c. *Informal exchanges of information that is not considered "business confidential," but is not public information (i.e., "agency-confidential" information) has on several occasions been described as very useful in merger investigations. Are there any legal requirements in national laws that prevent authorities from sharing "agency-confidential" information?*

"Agency-confidential" information is information that the agencies may withhold from public disclosure under the U.S. Freedom of Information Act and that the agencies are not prohibited from disclosing, but normally treat as non-public.

What type of information typically can be exchanged and at what stage of the investigation do such exchanges typically occur?

Included in this category of information are: the fact that the agencies have opened an investigation; the fact that the agencies have requested information from someone located outside U.S. territory; and how the investigative staff analyzes the case, including product and geographic market definition, assessment of competitive effects and potential remedies. Depending on the precise nature of the specific information to be shared, exchanges of "agency-confidential" information occur at all stages of investigations. Typically, initial conversations confirm the existence of investigations, focus on affected markets, and exchange information about definition of markets. Subsequent conversations focus on competitive effects and possible remedies. From there the conversations shift to consideration of remedies proposed by the parties.

Would it be useful if the instances in which such information can be exchanged, and the number of agencies participating in these exchanges, increase?

Yes.

2. Safeguards

3. The business community, while in principle welcoming increased co-operation in merger review proceedings, frequently has expressed concerns that exchanges of confidential information should take place only if adequate safeguards are in place to prevent unauthorized disclosures of confidential information. On the other hand, despite an increasing number of cases where competition agencies co-operate and exchange information in merger review proceedings, there have been no reported cases of such unauthorized disclosures as a result of information exchanges. Thus, it can be asked what safeguards competition authorities currently use to prevent unauthorized disclosures of information and whether any additional safeguards should be considered.

a. *If exchanges of confidential information occur (based on treaties or waivers), are there safeguards that authorities typically apply to ensure continued protection of confidentiality, such as explicit assurances that information will be protected "downstream," requirements to return information at the end of an investigation, or others?*

Certain safeguards are provided to information shared pursuant to either a Mutual Assistance Agreement under the IAEAA or a waiver of confidentiality - such as maintaining confidentiality and return or destruction of documentary information shared. See, for example, the model waiver form appended to DAFFE/COMP/WP3(2003)3. An example of the treatment of possible "downstream" use of shared information may be found in Article VII of the US-Australia Mutual Assistance Agreement. The U.S./Japan cooperation agreement contains a provision governing "downstream" use (Art. IX.1.(a)). These provisions require consultation prior to use of shared information for other purposes.

b. *Is there a practice of notifying parties when information exchanges (business confidential or agency confidential) occur?*

There is no routine practice of notifying parties when information exchanges occur, but the agencies can do so in their discretion and sometimes do.

c. *The scope of protection granted to legally privileged documents varies widely between jurisdictions and exchanges of information might affect the protection of privileged material. What measures are taken to ensure that documents that are considered privileged in one, but no the other jurisdiction, do not lose their privileged status as a result of the information exchange authorized by an international treaty or a waiver by the parties?*

This issue has arisen in particular in the context of cooperation between the U.S. authorities and the European Commission, specifically, for example, because in-house counsel enjoy the protection of the privilege under U.S. law, but not under European Community law. It has been discussed by EC and U.S. officials. The U.S. agencies have asked the EC not to send, or discuss, information that could be considered privileged under U.S. law and the U.S. agencies will refuse to consider and will return such information if it is provided inadvertently.

3. Waivers

4. Past discussions and reports indicate that waivers have become a highly useful tool in merger investigations that facilitate information exchanges and allow agencies to engage in a fuller discussion of a case notified to them. Yet, it appears that relatively few jurisdictions obtain waivers on a regular basis. This raises the question why waivers are not used more frequently and not by a larger number of agencies.

a. *To what extent are waivers of confidentiality in review of transnational mergers being utilised? What problems, if any, have been encountered with the use of waivers?*

The United States reiterates its answer to the previous questionnaire:

The use of waivers is "common practice" in the U.S. They have been employed in most mergers that have been reviewed by both the U.S. and the European Commission. . . . Waivers have also been granted in cases involving other countries. . . . [including Canada and the United Kingdom].

The U.S. agencies have not encountered significant problems with the use of waivers.

b. *Even though waivers are case-specific, are there issues that typically are addressed in a waiver? Are there any issues and concerns that typically/repeatedly are raised by the parties when negotiating waivers and that are more difficult to resolve than others? If so, what measures can be taken to address such issues and concerns?*

Issues typically addressed in a waiver can be seen in the model waiver appended to DAFFE/COMP/WP3(2003)3. Occasionally, parties inquire about the privilege issue described in response to a previous question, notification, and possible downstream use. It has been the agencies' practice to stay with the terms provided in the model form and parties have been content with that.

c. *What are the reasons that waivers are not being obtained from the parties on a more or less regular basis? Do authorities that do not typically request parties to grant waivers consider that waivers are not useful for the investigation because, for example, all the necessary confidential information can be obtained directly from the parties or that information exchanges with other agencies that do not require a waiver are sufficient?*

This question does not reflect the U.S. experience with waivers. Once the U.S. agencies engage in cooperative communication with other enforcement authorities and it appears that the case raises issues requiring investigation, the agencies often ask the parties to consider granting a waiver of confidentiality.

d. *Does the willingness of parties to grant waivers depend on the countries potentially involved in the information exchange? For example, are parties typically reluctant to grant waivers with respect to countries that do not have a track record of successful co-operation with other countries? If so, how can parties be encouraged to grant waivers in those circumstances as well?*

This question might better be addressed to BIAC. The U.S. agencies' experience does not enable them to answer these questions.

e. *One can expect that protecting legally privileged information might be an issue frequently raised in negotiations of waivers. How have waivers addressed the issue of legal privilege?*

Occasionally, the waiver granted to the European Commission has included, at the request of the parties, a provision stipulating that information obtained from the parties by the Commission that is privileged under U.S. law may not be shared with U.S. authorities.

4. Requesting Another Agency to Obtain and Provide Information

5. There is a question whether requesting another agency to obtain information from a party in the requested agency's territory on behalf of the requesting agency generally is considered a useful tool in merger investigations. Previous discussions and reports indicate that only few countries authorize their agencies to assist other agencies in obtaining information, especially through a compulsory process, and that such requests for assistance apparently are relatively rarely used. Exceptions exist, for example under the EC Merger Regulation which imposes an obligation on national agencies to assist the European Commission by conducting investigations, and under an agreement between Australia and New Zealand. It could be discussed under which circumstances, if any, an authority can respond to such a request for assistance, whether there are examples where such assistance has been useful in past cases, and why the process is not used more frequently with respect to countries that do permit such assistance.

a. *Under which circumstances, if any, is it permissible for an agency to respond to a request by a foreign competition authority to acquire for the requesting agency evidence directly from a third party a) voluntarily or b) pursuant to compulsory process?*

The U.S. agencies may use compulsory process on behalf of a foreign competition authority only under the terms of a Mutual Assistance Agreement pursuant to the IAEAA between the United States and that foreign authority's government. The ability of the U.S. agencies to share information obtained voluntarily from a third party depends upon the grant of a waiver of confidentiality by that third party, authorizing the sharing of that information with a specific foreign authority.

b. *If your agency has been involved in such requests, either as the requesting agency or the requested agency, please describe the context in which such a request occurred, and whether the process was useful for the investigation of a merger.*

The U.S. agencies have not experienced the kind of formal requests suggested in this question. There have been, however, a number of instances in merger cases in which third parties provide information to each of the reviewing authorities, sometimes on their own initiative, but sometimes at the suggestion of one of the reviewing authorities. This is an outgrowth of the trend in recent years of the merging parties providing the same information to reviewing authorities.

c. *Are there instances where an authority in the context of a merger investigation requested an authority in another jurisdiction to acquire evidence from a third party a) voluntarily or b) pursuant to o compulsory process, but the requested authority was not able to respond to the request?*

The U.S. agencies have not encountered such an instance.

5. Statistical Information

Please update for 2002 the information concerning the number of merger investigations conducted by your agency in which your agency exchanged information in any way with a foreign competition agency. Describe the kind of information exchanged, and if possible, indicate the relative frequency of the following types of information exchanges:

a. *exchange of publicly-available information;*

b. *exchange of confidential information without a waiver;*

c. *exchange of confidential information with a waiver;*

d. *informal discussions and meetings with foreign officials in which there were discussions of theories and findings, without disclosing specific confidential information;*

e. *co-ordination of remedies;*

f. *other (please specify).*

The U.S. agencies have not updated their statistics since the last questionnaire on this topic. Even so, the answers have not changed in substance: There was contact with the foreign agency in a significant percentage of the matters notified. In most of these matters, publicly-available

information was exchanged, and in many of them confidential information relating to case analysis or the state of the investigation (what the FTC classifies as confidential agency information) was also exchanged. In no case was confidential business information exchanged without a waiver.

For reference, we are reproducing the answer from the last questionaire:

The two U.S. agencies notified foreign governments of about 120 mergers in the two-year period, and in 64 of them there was some additional contact with the foreign agency. In all of these 64 cases, publicly-available information was exchanged, and in many of them confidential information relating to case analysis or state of the investigation (what the FTC classifies as confidential agency information) was also exchanged. In no case was there exchange of confidential business information without a waiver. The FTC estimated that formal, blanket waivers were granted by the parties in 16 of the 40 cases in which it engaged in some level of co-operation, and it could identify 15 cases in which there were discussions of remedy (in some of these the parties ultimately abandoned the transaction). In some cases the co-operation extended to the common conduct of interviews and to informal participation in one another's proceedings.