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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **09-Feb-2005**

English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2005)7
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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON CROSS-BORDER REMEDIES IN MERGER REVIEW

-- 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 IV of the agenda at its forthcoming meeting on 15 February 2005.

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JT00178278

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1. This paper briefly discusses three of the broad topics covered in the Secretariat's Issues Paper and then presents several case studies involving past U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) merger investigations that illustrate issues raised in the Secretariat's paper.

2. **Comity Issues:** In merger (as well as other) investigations, the U.S. antitrust agencies may, in appropriate circumstances, exercise their prosecutorial discretion to take into account another country's investigation. As noted in the 1995 *Antitrust Enforcement Guidelines for International Operations*, "in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected."[1] The agencies will listen to the views of foreign agencies regarding particular remedies and, provided that competition concerns in the U.S. market are addressed, will make efforts to accommodate the interests of foreign governments. The FTC has in at least one non-public matter benefited from a remedy obtained by a foreign agency that addressed completely the competition concerns in the United States so that the FTC did not have to bring its own enforcement action.

3. Beyond technical comity, the U.S. agencies follow a regular practice of consulting closely with foreign competition enforcement agencies whenever it becomes clear that a particular transaction may be subject to concurrent review. As some of the cases discussed below reveal, this close consultation and cooperation has prevented situations where one agency seeks remedies that interfere or conflict with those obtained by an agency in another jurisdiction.

4. **Effect of Foreign-Located Assets or Conduct on Remedies:** The U.S. agencies have not experienced difficulties in enforcing merger remedies involving foreign-located assets or conduct taking place outside U.S. territory. The agencies are careful to ensure that all parties necessary for effective relief, including future assignees, are bound by any judicial or administrative decree and that the agencies have access to the relevant information to investigate and monitor compliance. For example, the DOJ's *Antitrust Division Policy Guide to Merger Remedies* states that:

> Consent decrees must have provisions allowing the Division to monitor compliance. They may require defendants to submit written reports and permit the Division to inspect and copy all books and records, and to interview defendants' officers, directors, employees, and agents as necessary to investigate any possible violation of the decree. Although civil investigative demands may also be issued to investigate compliance, access terms should nonetheless be included in the decree, both to monitor compliance and to examine possible decree modification or termination.

5. The FTC has statutory authority to conduct investigations of compliance with its orders, including by issuing subpoenas for documents and testimony. Its orders also routinely include access terms. These tools have provided the U.S. agencies the ability to obtain all information needed to monitor compliance. The agencies have not faced situations where foreign based parties have refused to meet their obligations under decrees or orders.

6. **"Work sharing" arrangements:** The U.S. agencies have not formally engaged in "work sharing" arrangements, whereby the agencies obtain a remedy to address a competitive concern in a non-U.S. jurisdiction. As a legal matter, it would be difficult for the U.S. agencies to assert jurisdiction to obtain remedies for problems that do not affect U.S. commerce. Nevertheless, mergers often raise concerns in relevant geographic markets that include the U.S. and another jurisdiction, and a single remedy can often resolve all such concerns if entered and enforced by a single agency.

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[1] International Guidelines at §3.2.

Past Merger Cases

7. The following descriptions of some past merger cases involving transactions with an impact on another jurisdiction in addition to the U.S. discuss the cooperation between the relevant agencies in implementing cross-border remedies.

8. **Halliburton/Dresser**: Halliburton/Dresser was a merger involving a world market where a competition authority in one jurisdiction was able to benefit from commitments by the parties to the authorities of the jurisdiction in which the parties were based to resolve a common competition concern. In 1998, both the European Commission and the DOJ reviewed the proposed merger of the U.S. companies, Halliburton Co. and Dresser Industries Inc. One of the areas of concern was the world market for drilling fluids, (a combination of chemical compounds and minerals), which are the second largest cost – after rental of the rig – of drilling for oil and natural gas. Drilling fluids, a $3 billion/year global business, are critical for cooling and lubricating the drill bit and controlling downhole pressure. The Department and the European Commission cooperated closely throughout their investigations, and both concluded that Halliburton would have to sell its 36 percent interest in M-I Drilling to avoid an anticompetitive result from the combination of the two largest drilling fluid competitors.

9. The EC cleared the merger in July 1998, noting that the parties had attached to their notification a proposed undertaking to the Department by Halliburton to divest its interest in M-I. As the EC noted in its press release, "Concerns that the merger might create or strengthen a dominant position in the drilling fluids segments have been removed by undertakings submitted by the parties to the US Department of Justice, which is concurrently reviewing the transaction."[2] The European Commission, invoking the 1991 U.S.-EC bilateral cooperation agreement, requested that the DOJ take appropriate enforcement action to ensure that the divestiture was implemented.[3] In response to the competition concerns expressed by the Department and the EC, Halliburton sold its interest in M-I to Smith International Inc. in August 1998, and the DOJ in September filed its complaint and proposed consent decree resolving competition issues in the "logging-while-drilling" services market, which was not of concern in Europe. One factor that supported this outcome was that resolution of the problem in the drilling fluids market, which called for a worldwide remedy, allowed the Commission to close its investigation at the end of the first phase of its inquiry; the DOJ in any event had to pursue a complaint and consent decree because of its concerns in the related services market.[4]

10. **GE-Instrumentarium**: In 2003, the Department and European Commission both challenged the acquisition by General Electric Corporation of Instrumentarium OYJ, a Finnish hospital equipment manufacturer, and eventually approved it subject to specific remedies. The markets of concern to the DOJ and EC differed. The Department identified competitive problems in two markets: (1) critical care patient monitors, and (2) C-arms. The EC challenged the transaction based on competitive problems in a market for peri-operative patient monitors, a different patient monitor market. These differences were based on different market conditions in Europe and in the U.S. The divestiture of Spacelabs, a U.S.-based

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2 European Commission press release IP/98/643, July 8, 19988.

3 Merger remedy decree provisions that ensure strict implementation of and compliance with the agreed-upon remedy are fundamental aspects of all DOJ merger remedies. These provisions helped give the EC confidence that it could rely on the DOJ remedy in this case. As stated in the Policy Guide to Merger Remedies, "For a decree to be effective, it must bind the parties needed to fulfill the consent decree objectives." DOJ will devote resources "before and after a decree is entered to ensure that the decree is fully implemented," and if DOJ "concludes that a consent decree has been violated, the Division will institute an enforcement action."

4 A remedy imposed by one jurisdiction is most likely to resolve concerns in another jurisdiction in cases in which the relevant geographic market encompasses both jurisdictions.

subsidiary of Instrumentarium, was accepted by both the EC and DOJ to resolve their respective competitive concerns in patient monitor markets.[5]

11. DOJ staff communicated and cooperated extensively with their EC colleagues during the course of the investigations and in reaching our respective settlements. The agencies kept each other apprised of the status and timetables of their respective investigations, including when decisions would be reached. When the Department reached a decision to challenge, and to seek divestiture of Spacelabs, it discussed the coordination of the relief sought with the EC. The DOJ and EC worked together to harmonize terms in DOJ's proposed consent decree with the EC's undertakings (e.g., timing of divestiture; definition of the assets to be divested; coordination between the agencies if a trustee would become necessary to make the sale).[6] DOJ also consulted with the EC in assessing the proposed purchaser of Spacelabs. DOJ staff continued to consult during the divestiture process, as both agencies evaluated the proposed purchaser of the Spacelabs business to ensure that competition would be maintained in their respective jurisdictions. Both agencies approved the proposed divestiture, which has been completed. The EC hired a trustee to assess OSI Systems, Inc. as a possible purchaser, and provided DOJ with several reports that the trustee had prepared.[7] DOJ found these reports to be quite helpful in its own evaluation of OSI; DOJ and the EC both approved OSI as a purchaser.

12. **Alcan/Pechiney**: After reviewing the 2003 acquisition by the Canadian firm, Alcan Inc., of the French firm, Pechiney S.A., the DOJ agreed to a consent decree in order to preserve competition in the market for brazing sheet, an aluminum alloy used in fabricating radiators, oil coolers, heaters, and air conditioning units for motor vehicles. The relevant geographic market was North America, where the acquisition would reduce the number of major producers of brazing sheet from four to three, and increase the prospect of future cooperative price increases. Pechiney's North American production accounted for more than 30 percent, and Alcan's for more than 10 percent, of all brazing sheet sold in North America, and after the acquisition Alcan and one other competitor would account for more than 80 percent. The proposed consent decree required the parties to divest either Alcan's aluminum rolling mills in New York and West Virginia, or Pechiney's mill in West Virginia.

13. Throughout the investigation, DOJ staff cooperated with their Canadian and EC counterparts. DOJ and Canadian staff conducted some joint interviews, and Canada concurred with DOJ's analysis and resolution of the case. Brazing sheet was not a concern in Europe, where Alcan did not make or sell the product. The EC investigation focused on various rolled aluminum products and packing material markets that were not competitive issues in the U.S. To meet the EC's concerns, Alcan agreed to divest its interest in various European rolling mills and eliminate any overlap between the two firms' activities in aluminum aerosol cans and aluminum cartridges.

14. One issue that raised potential conflicts between the U.S. and EC remedies, and thus needed to be carefully monitored between the two agencies, involved facilities that supported the respective divested

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5 DOJ also sought the divestiture of Ziehm (another Instrumentarium subsidiary) to resolve its concerns in the market for C-arms.

6 In particular, the decree obtained by DOJ specifically defined the Spacelabs assets with reference to the EC's commitments and stated that, if a trustee became necessary, DOJ would consult with the EC to "ensure selection of a trustee acceptable to both the United States and the European Commission." Decree at ¶V.A.

7 Every decree in a DOJ merger case includes provisions for the appointment of a selling trustee. As described in the Policy Guide to Merger Remedies, "For divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree. A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner."

assets. The DOJ consent decree required that Alcan and Pechiney divest not only all intellectual property associated with the production of aluminum products at the divested plant, but also any research, development, and engineering facilities that support it, regardless of where such facilities were located. There was a risk that the patent and process technology that could be divested to satisfy the DOJ decree was also used in Pechiney aluminum rolling mills that the EC had ordered sold; in addition, much of the related research and development support was carried out in a large R&D center in France. If the U.S.-located Pechiney facility were divested to a firm other than the one that bought the package of assets under the EC divestiture order, then the DOJ decree could create serious problems for completing the asset divestiture ordered by the EC.

15. DOJ staff worked closely with their EC counterparts to ensure that the divestiture would not interfere with the sale of assets under the EC settlement. For instance, DOJ coordinated with the parties to ensure that whoever purchased the American mill acquired only those R&D assets that were necessary for it to effectively compete in the sale of rolled aluminum products produced by that facility.

16. In addition, the worldwide licensing of primary aluminum smelting technology was a competitive concern that needed to be considered in both jurisdictions. DOJ staff benefited from the EC investigation in this area, in part because any adverse effects would not affect U.S. consumers as much as consumers in other countries, including EC member states, since no new aluminum smelters would be constructed in the U.S. in the foreseeable future.

17. **Sanofi-Synthélabo/Aventis, S.A.:** Sanofi-Synthélabo's 2004 acquisition of Aventis, S.A. raised competitive issues in several pharmaceuticals markets. In particular, however, the market for cytotoxic drugs for the treatment of colorectal cancer required close consultation and cooperation between the FTC and the EC.[8]

18. In Europe, Sanofi and Aventis competed directly -- Sanofi with its Eloxatin®, and Aventis with Campto®. The parties competed less directly on this market in the U.S.; Sanofi's Eloxatin® competes directly against Camptosar®, which is marketed by Pfizer. Campto® and Camptosar® are the same drug, produced by Pfizer and Aventis under licenses from Yakult Honsha of Japan. Because Aventis and Pfizer had certain information-sharing agreements, including with respect to results on key clinical trials, and because Aventis licenses certain patents to Pfizer in the U.S., the FTC was concerned that Sanofi, following its acquisition of Aventis, would be in a position to influence the competition Eloxatin® would face from Camptosar®. Accordingly, the FTC's order required Sanofi to divest to Pfizer Aventis's intellectual property in the United States and related business information. To resolve the EC's concerns, Sanofi committed to divest Campto® within nine months. Sanofi divested Campto® to Pfizer, and thus no conflict was created between Campto® and Camptosar®.

19. Divesting Aventis's direct interest in Camptosar® in the United States, however, would not provide a complete remedy. Pfizer needed to continue to receive the results of Aventis's ongoing European clinical studies, to preserve its ability to pursue new indications for the drug in the United States.

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[8] In another market, factor Xa inhibitors to treat venous thromboembolism, both agencies required Sanofi to divest its product, Arixtra®. As is common for pharmaceutical divestitures at the FTC, the agency required the parties to find an acceptable acquirer and negotiate an acceptable contract before the agency would accept a settlement. See, generally, "Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies," and "Frequently Asked Questions About Merger Consent Order Provisions," both available on the FTC's website (www.ftc.gov). Sanofi negotiated a divestiture to GlaxoSmithKline, which the FTC accepted when it made the order final in September. The EC did not technically require an up-front divestiture, but noted in its press release on the matter that Sanofi would be divesting to GSK. In addition, the EC alleged competitive problems in a number of national markets within the EEA.

Accordingly, the FTC's order required Sanofi (Aventis) to divest those clinical studies as well to Pfizer. The divestiture of Aventis's European assets relating to Pfizer's operations in the United States was negotiated and completed before the agencies concluded their review, and was handled in very close coordination with the EC staff conducting its review. In addition, although Sanofi/Aventis had nine months under its EC commitments to complete the European Campto® divestiture, the need to preserve Pfizer's competitive posture in the United States accelerated Sanofi's obligation to complete those portions of the European remedy relating to the clinical studies. Sanofi then had the remaining nine months to divest the exclusively European assets.

20. The Sanofi/Aventis acquisition raised issues in two separate but related markets, and obtaining effective remedies in both markets required close FTC and EC cooperation and consultation. The FTC worked closely with the EC to assure that the clinical studies remedy would not interfere with the EC's remedy. Although the EC did not address Pfizer's U.S. situation in its negotiated remedy, EC staff was closely involved with FTC staff as Sanofi and Pfizer negotiated their agreements and the FTC completed its review. Those close efforts allowed the agencies to obtain relief that fully resolved their concerns within their own markets without creating conflicts between remedies.

21. **Bayer/Aventis CropScience:** Bayer AG's 2002 acquisition of Aventis CropScience Holding S.A. (ACS) from Aventis S.A. involved a large number of chemicals and products for agricultural crop protection in various national markets. The FTC, the EC, and the Competition Tribunal of Canada each accepted remedies that had to be coordinated as they were negotiated. In addition to a number of separate national markets (and remedies),[9] certain divestitures were undertaken on a world-wide basis.

22. The FTC identified problems in two related U.S. markets: "new generation chemical insecticide active ingredients," and "new generation chemical insecticide products." These are newer, less environmentally harmful insecticides in the chloronicotinyls (CNI) and phenylpyrazoles (Pyrazoles) families. The EC similarly alleged that the parties would have market power in these products in the EEA market.[10] The Competition Bureau of Canada alleged similar concerns in the insecticides market for certain crops in Canada. Thus, for the competition enforcement agencies, the Bayer/ACS merger presented significant competitive problems in crop protection chemicals markets in, respectively, the United States, Canada, and the European Union.

23. The FTC required Bayer to divest ACS's worldwide acetamiprid and fipronil businesses. A worldwide divestiture was required to reflect that ACS conducted its business on a worldwide basis. ACS, however, operated under a license from the parent of Japanese Nippon Soda. Accordingly, the FTC's order relieved Bayer of its obligation to divest acetamiprid in Mexico, South America, Central America, or Africa, if Nippon Soda would not consent to the assignment of those licenses in those territories.[11] With that possible condition, a remedy could still be achieved in the United States, if the third-party licensor would not approve. Regarding fipronil, the FTC's order specifically allows Bayer to negotiate a license back for non-agricultural uses, subject to the FTC's approval. Thus, for both divested products, the thrust of the FTC's remedy was a worldwide divestiture, subject to certain limitations.

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[9] The FTC's Complaint alleged effects in markets for two additional products: cotton harvest aids and herbicides. The FTC staff and Canada's Competition Bureau staff coordinated closely as each obtained remedies unique to the United States and Canada relating to these products.

[10] The EC Decision also provided for remedies in a number of national and product-specific markets.

[11] Bayer in fact divested the acetamiprid business to Nippon Soda.

24. The EC obtained similar remedies for acetamiprid and fipronil in the EU member states. Through close consultation with FTC staff, EC staff negotiated commitments to divest acetamiprid in Europe and the United States, excluding the same territories excluded in the FTC's Order. This avoided the possibility that the EC commitments and FTC order obligations would impose conflicting obligations. The Canadian divestiture obligations also tracked those of its sister agencies. The EC's fipronil divestiture requirement is similarly aligned with the FTC's: the divestiture requirement applies worldwide, except that for non-agricultural uses the obligation applies only to Europe.

25. Bayer's acquisition of ACS raised issues regarding intellectual property that is critical to this industry. The competition agencies consulted closely to devise consistent obligations requiring divestiture of: 1) technology unique to the divested products; 2) technology primarily used for the products; and 3) other, more widely used technology. First, Bayer had to divest all intellectual property relating *primarily* to the Acetamiprid Business. This gave the acquirer possession outright of such intellectual property. Next, Bayer had to grant the acetamiprid acquirer a "worldwide, royalty-free, perpetual, irrevocable, sublicensable, transferable *license*" to Bayer's rights to all intellectual property that relates, *but not primarily*, to the acetamiprid business. This required Bayer to allow the acetamiprid acquirer to practice in the field with impunity, whether or not the technology is also used by Bayer in other areas. Finally, Bayer had to grant a similarly broad *immunity from suit* to the acetamiprid acquirer for making or selling acetamiprid anywhere in the world . The EC and Canada dealt with this issue similarly. The FTC's Order required a similar divestiture of the intellectual property relating to fipronil. The result was a consistent divestiture requirement that would establish competitors in these products throughout the geographic areas where the competitive harm was alleged. A successful outcome was possible only because the FTC, Canada, and the EC consulted frequently, and because the merging parties understood the need for that consultation.

26. **Lafarge S.A./Blue Circle Industries:** Lafarge S.A's 2001 acquisition of Blue Circle Industries raised competitive problems in the cement product market in three geographic markets: 1) a "Great Lakes" market that included portions of Canada; 2) Syracuse, New York; and 3) the Southeastern U.S. Although the competition analysis was straightforward, the cross-border geographic market required the staffs of the FTC and the Canadian Competition Bureau to consult closely. As a result, when the multi-plant divestiture settlement was announced, each agency publicly acknowledged their close cooperation. The FTC's June 18, 2001, press release noted, "By working together, the two agencies were able to protect consumers' interests . . . ." Similarly, the Competition Bureau of Canada stated, "The unprecedented degree of cooperation and coordination between the Competition Bureau and the FTC has led to a landmark settlement which will protect the interests of consumers and industry participants in both Canada and the United States."

27. **Hoechst/Rhone-Poulenc:** Hoechst's 1999 acquisition of Rhone Poulenc, which resulted in the newly named Aventis, S.A., raised competition concerns in both the U.S. and the EC in the pharmaceutical market for direct thrombin inhibitors (to prevent deep-vein thrombosis, frequently in the leg). Hoechst had the only FDA-approved drug for use in the U.S.: Refludan®. Rhone-Poulenc was in final-stage development of Revasc®. Following investigation and negotiation, Hoechst agreed with both the FTC and the EC to divest Rhone-Poulenc's product. Both the FTC's order and the EC's undertaking contained a provision that should Hoechst fail to divest Revasc® by the order's deadline, the agencies could appoint a trustee to complete the divestiture. The FTC's order, however, provided that the trustee would have the option of divesting either Revasc® or Hoechst's Refludan®.

28. Hoechst did not succeed in divesting Revasc® by the required date, and both the FTC and the EC appointed Ferghana Partners to act as divestiture trustee. Ferghana was selected only after a coordinated review by FTC and EC staff, to avoid having two trustees attempt to divest the same asset. Ferghana Partners determined that a divestiture of Refludan® would most quickly achieve the outstanding

divestiture obligation. Accordingly, Ferghana negotiated a purchase and sale agreement with Schering A.G. of Germany. The FTC approved the divestiture of Refludan® to Schering, and the EC considered Hoechst's obligations satisfied.

29. **Federal Mogul/T&N:** In 1998, Federal Mogul Corp. acquired T&N plc. The FTC's investigation concluded that the deal posed competitive problems in a number of thinwall engine bearings end-use markets, and the Complaint alleged a worldwide geographic market. The FTC conducted its review in close coordination with competition agencies in France, Germany, Italy, and the United Kingdom.

30. The two firms allegedly would have accounted for 80 percent of sales in a worldwide market for thinwall bearings used in car, truck and heavy equipment engines. The parties originally proposed to divest a package of assets in Europe and the U.S. comprising parts of both firms, including some assets from the T&N research facility. Upon close examination, FTC staff concluded that this offer included some less than efficient production facilities and insufficient research and development assets. Accordingly, the FTC required T&N to divest its entire thinwall bearings business, which consisted of the assets and plants that T&N used to make thinwall bearings, including intellectual property that T&N used to develop and design new bearings in the future. The FTC's order also included certain ancillary provisions regarding critical employees. In addition, however, to assure that a viable package of assets was divested, the FTC's order included assets related to dry bearings or polymer bearings. As the FTC's public documents described the remedy, "These bearings are produced at T&N plants that also produce thinwall bearings, and the inclusion of these bearings in the assets to be divested may be important to the viability of the T&N plants to be divested. Absent the specific references to polymer bearings, the identification of the plants to be divested would require the divestiture of the manufacturing lines for these dry or polymer bearings that are contained in the named plants."[12]

31. The German Federal Cartel Office's review had identified competitive problems in a dry bearings market. The FTC expressly referenced this concern in its description of the remedy:

> Federal-Mogul wishes to include these products by name in the proposed Order, to insure the German Federal Cartel Office that the dry bearing products listed will be divested. The German Federal Cartel Office has raised concerns about a product overlap between Federal-Mogul and T&N in dry bearings that would adversely impact competition in dry bearings in Germany. By including these products in the Commission's proposed Order, Federal-Mogul avoids having to enter into a separate divestiture procedure, relating to the same plants, to satisfy the Federal Cartel Office.[13]

32. Thus, the FTC's remedy, reaching more broadly than the specific identified product markets, sought both to assure a viable purchaser and clarity in the order, as well as to accommodate the concerns of the German competition agency.

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12 FTC, Analysis of Proposed Consent Order to Aid Public Comment, 1998.

13 *Id.*