THE APPROACH AND EXPERIENCE OF THE UNITED STATES TO COOPERATION WITH THE EUROPEAN UNION IN THE REVIEW OF TRANSNATIONAL MERGERS

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The United States submits a report annually to the Organization for Economic Co-operation and Development (the OECD), as part of its participation in "Working Party No. 3 on International Cooperation," conducted under the auspices of the OECD's Committee on Competition Law and Policy within the Directorate for Financial, Fiscal and Enterprise Affairs.

Those submissions summarize the experience of the Antitrust Division and the Federal Trade Commission in the coordination of their merger enforcement activities with foreign agencies, including the European Union. The relevant submissions are attached to this outline and the following outline highlights important observations that the United States has made in these submissions regarding the nature and effect of its international coordination in the antitrust review of mergers.

The basic policy approach to international coordination was set forth by then-Assistant Attorney General Joel Klein in testimony to Congress in 1998.

I. POLICY

Joel Klein, Assistant Attorney General for the Antitrust Division, testifying to Congress on June 24, 1998: "With increasing frequency . . . the Justice Department finds itself reviewing merger transactions and joint ventures that are also being considered by foreign competition authorities. We have endeavored to work constructively with our foreign counterparts – again, consistent with confidentiality requirements. * * * It is our expectation that this trend will continue and accelerate. . . . * * * Some foreign antitrust authorities have enforcement standards that differ in some respects from ours. Because of these different standards, and because we make our own independent sovereign decisions, there is always the possibility of divergent decisions, such as arose last summer when the Federal Trade Commission and the DG IV of the Commission of European Communities reached different conclusions with respect to the Boeing/McDonnell-Douglas merger. While that kind of divergence is unique in our experience, we should explore ways to temper any recurrence and, to that end, we and the FTC have been working closely with DG IV. Given concerns about national sovereignty, navigating these waters – along with other issues raised by multi-jurisdictional merger review – will not be easy."

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II. GENERAL LESSONS LEARNED ABOUT INTERNATIONAL MERGER ENFORCEMENT COORDINATION (*OECD SUBMISSION*, MAY 22, 2001)

A. Specific observations:

1. Informing other jurisdictions whose interests are implicated by an investigation or enforcement action remains a key, initial element in effective coordination.

2. Procedural differences do not defeat cooperation.

3. Cooperation has fostered convergence in merger analysis, especially in market definition, assessment of competitive effects, and remedies.

4. 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.

5. It may be more difficult to change and harmonize the procedural aspects of merger control than the substantive standards.

6. Cooperation can be multilateral as well as bilateral.

B. "The potential benefits of cooperation do not appear to be concentrated upon, or limited to, any particular types of mergers." The report cites examples of horizontal mergers, vertical mergers, mergers raising unilateral and coordinated effects concerns, mergers with world-wide effects as well as those with effects differentiated among several geographic markets, and matters with both merger and conduct issues presented.

III. SHARING OF INFORMATION

A. When: "Much recent attention to international enforcement cooperation has focused on coordination in the remedial phase of a multi-jurisdictional case. . . . 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." (*OECD submission*, May 22, 2001)

B. Private Parties' Information

1. Confidential Information: "Waivers of confidentiality permit the agencies that have been granted waivers to discuss confidential documents and information, and theories or analyses based on confidential materials provided by parties and third parties. They are often used in U.S. merger investigations. . . ." (*OECD submission*, May 23, 2007).

2. Help in gathering information:

   a. What has worked: "In merger investigations, cooperation in gathering evidence can involve joint third-party survey/information requests . . . and joint interviews of third parties. . . . Drafts of requests for documents from the parties have been shared with a cooperating agency so that its staff can see what evidence the U.S. agency considers relevant; the agencies have compared approaches to optimize data collection in each other's investigations. * * * In another agency's merger investigation, DOJ staff accompanied the other agency's staff to interviews of U.S. third parties, although DOJ never opened its own investigation." (*OECD submission*, May 23, 2007).

   b. What is less common: "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. . . . [F]ew countries authorize their agencies to assist other agencies in obtaining information, especially through a compulsory process, and [] such requests for assistance apparently are relatively rarely used. * * * 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 U.S. agencies have not experienced the kind of formal requests suggested. . . . (*OECD submission*, May 9, 2003).

C. 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. * * * 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 investigation." (*OECD submission*, May 9, 2003).

D. Process:

1. "There is no routine practice of notifying parties when information exchanges occur, but the agencies can do so in their discretion and sometimes do." (*OECD submission*, May 23, 2007).

2. "Informal (telephone, fax, or e-mail) inquiries and communication among potential reviewing enforcers often occurs [sic] contemporaneous with opening a merger investigation . . . [The agencies a]sk subjects of investigations to identify other agencies investigating the same transaction. * * * The agencies have seen opportunities for cooperation delayed or missed due to a failure of such early, informed contact. Given concerns over potentially conflicting enforcement actions, it is important for agencies to become aware of their enforcement counterparts' interests as early as possible." (*OECD submission*, May 23, 2007).

3. "For mergers, coordination of timing is critical . . . . The parties have significant influence on the extent to which the agencies can coordinate their review timetables through their decisions on when to file their notifications with the reviewing agencies." (*OECD submission*, May 23, 2007).

4. "In merger cases, the more complex the issues, the more frequently the case teams speak with one another to clarify and refine their respective analyses of the relevant markets, the competitive effects, and alternative remedial measures." (*OECD submission*, May 23, 2007).

5. "Under the 1999 US-EU Administrative Arrangement on Attendance (AAA): DOJ and FTC staff have attended about a dozen oral hearings in EC merger investigations." (*OECD submission*, May 23, 2007).

IV. OUTCOMES

A. To Bring or Not to Bring a Challenge

1. "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 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. * * * 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. * * * [T]ransnational 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." (*OECD submission*, May 22, 2001).

B. Remedies

1. "In some merger cases, close coordination is necessary to assure a common resolution and non-conflicting remedies (for example, to avoid a situation in which one agency requires a 'buyer up front' that might be deemed unacceptable to another agency following consummation). * * * Staffs have jointly interviewed potential buyers of divested assets. * * * In merger investigations, staffs have also discussed drafts of proposed IP licenses. * * * In numerous merger investigations, cooperating staffs have agreed on the hiring of a monitoring trustee and have continued to consult throughout the divestiture process, including sharing the other agency's trustee's reports on a potential purchaser. * * * In merger investigations, the U.S. agencies have relied on other agencies to solve a particular competition issue when the other agency was able to present a strong evidentiary record. Other agencies have relied on the U.S. agencies to ensure that necessary divestitures took place." (*OECD submission*, May 23, 2007).

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. . . . 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." (*OECD submission*, February 9, 2005).

3. Specific examples of remedial coordination. (*OECD submission*, February 9, 2005).

   a. The EC closed its investigation in light of the U.S. remedy that addressed the concerns in the world market that both agencies shared. Halliburton/Dresser (1998).

   b. The U.S. and the EC coordinated the terms of the remedy (timing, divestiture assets, trustee conditions, potential purchaser) to fashion a single remedy for separate concerns each agency had in different markets ("The differences were based on different market conditions in Europe and in the U.S.") GE/Instrumentarium (2003).

   c. Coordination of divestiture of intellectual property and and R&D and engineering facilities to avoid undermining separate production plant divestitures obtained by the U.S. and EC to remedy different competitive concerns arising in different markets in the U.S. and Europe. Alcan/Pechiney (2003). *See also* Sanofi-Synthelabo/Aventis, S.A.