APPENDIX A:

1. **US - EU Merger Working Group, Best Practices on Cooperation in Merger Investigations** (October 2002)

2. **U.S. - Commission of the European Communities Cooperation Agreement** (September 1991)

Federal Trade Commission
Protecting America's Consumers

US-EU Merger Working Group

Best Practices on Cooperation in Merger Investigations

This document sets forth best practices which the United States federal antitrust agencies and the Commission of the European Union will seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they simultaneously review the same merger transaction.(1) A number of these best practices already are routinely employed informally between the US and EU. With that in mind, this statement of best practices seeks to set out the conditions under which trans-Atlantic inter-agency cooperation in merger investigations should be conducted, while at the same time confirming and building upon current good practice.

Objectives

1. In today's global economy, many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.(2) Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives.

2. These best practices are designed to further enhance cooperation in merger review between the United States Department of Justice ("DOJ") or the U.S. Federal Trade Commission ("FTC") (hereafter referred to as the "US"),(3) on the one hand, and the European Commission (hereafter referred to as the "EU"), on the other. They are intended to promote fully-informed decision-making on the part of both sides' authorities, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties, and to increase the overall transparency of the merger review processes.

3. Given legal constraints existing in both jurisdictions, effective inter-agency coordination between the US and the EU depends to a considerable extent on the cooperation and good will of the merging parties, and to a lesser extent on third parties. In particular, cooperation is more complete and effective when the merging parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions. In addition, coordination between the agencies is most effective when the investigation timetables of the US and the EU run more or less in parallel so that the investigative staffs of each agency can engage with one another and with the parties on substantive issues at similar points in their investigations. The agencies intend, therefore, to work cooperatively with one another and with the parties, as appropriate, to promote such timetable coordination. At the same time, the EU and US agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies' recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.

Coordination on Timing

4. Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel, recognizing there are differences between US and EU merger review processes. To that end, the agencies should endeavor to keep one another apprised of important developments related to the timing of their respective investigations throughout the course of their reviews of merger transactions subject to review by the US and the EU.

5. In appropriate cases, the reviewing agencies should offer the merging parties an opportunity to confer with the relevant EU and US staffs jointly to discuss timing issues. Such a conference will be most beneficial if held as soon as feasible after the transaction has been announced. At this conference, the agencies and parties should be prepared to discuss ways to synchronize the timing of the US and EU investigations, to the extent possible under EU and US law respectively. Topics addressed may include the appropriate times to file in the US and EU, suggested timeframes for the submission of documents

or other information, and, where appropriate, the prospect of a timing agreement (in the US) and/or a waiver from the obligation to notify within seven days of the conclusion of a binding agreement (in the EU). The success of this effort depends on the active participation and cooperation of the parties, and would, in most cases, require the parties to discuss timing with the agencies before filing in either jurisdiction.

Collection and Evaluation of Evidence

6. In significant matters under review by both jurisdictions, the agencies should seek to coordinate with one another throughout the course of their investigations and keep one another apprised of their progress. This may include sharing publicly available information and, consistent with their confidentiality obligations, discussing their respective analyses at various stages of an investigation, including tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories, and the empirical evidence needed to test those theories. Views on necessary remedial measures, and similar past investigations and cases, also may be discussed. The agencies also may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by the respective jurisdictions' laws and regulations.

7. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. This results in more informed decision-making and more effective coordination between the reviewing agencies, thereby helping to avoid divergent analyses and outcomes, as well as expediting merger review. Accordingly, as soon as feasible after the announcement of a transaction that requires review by the US and EU, the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the parties with a view to requesting the possible execution by the merging parties of confidentiality waivers, providing sample waiver letters if necessary. The reviewing agencies should, where appropriate and feasible, also encourage the merging parties to allow joint EU/US agency interviews with party executives and joint conferences with the parties.

8. Similarly, waivers of confidentiality executed by third parties enable more complete communication between the reviewing agencies and with third parties and can reduce the investigative burden imposed on third parties. Where appropriate, the reviewing agencies may, therefore, request that third parties waive confidentiality, or simply request that third parties provide the same information divulged to one reviewing agency to the other. The agencies may also encourage joint interviews and conferences with third parties, where appropriate and feasible.

Communication Between the Reviewing Agencies

9. The reviewing agencies will, via liaison officers or otherwise, contact one other upon learning of a transaction that appears to require review by both the US and EU.

10. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, each agency should designate a contact person who will be responsible for: setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables (see Section II above); and coordinating information gathering or discovery efforts, including seeking waivers from the merging parties and from third-parties.

11. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, the relevant DOJ Section Chiefs/FTC Assistant Directors and the EU Merger Task Force Unit Head (or their designees) should seek to agree on a tentative timetable for regular consultations between them on the progress of their investigations. The timetable for consultations will take into account the nature and timing of the transaction. Consultations normally should occur: (a) before the US closes its investigation without taking action; (b) before the US issues a second request; (c) no later than three weeks following the initiation of a Phase I investigation in the EU; (d) before the EU opens a Phase II investigation or clears the merger without going to Phase II; (e) before the EU closes a Phase II investigation without issuing a Statement of Objections or approximately two weeks before the EU anticipates issuing its Statement of Objections; (f) before the relevant US DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or the FTC Bureau Director; and (g) at the commencement of remedies negotiations with the merging parties. Discussions may also take place at any other point the DOJ Chiefs/FTC Assistant Directors and the EU Unit Head find useful.

12. In some cases, consultations may be appropriate between senior competition officials for the EU (the Competition Commissioner, Director General for Competition, or Deputy Director General for Mergers, as appropriate) and their counterparts at the Antitrust Division of the Department of Justice (the Assistant Attorney General for Antitrust or the relevant DOJ Deputy Assistant Attorney General ("DAAG"), as appropriate) or the Federal Trade Commission (the Chairman, Director of the Bureau of Competition, or Deputy Director of the Bureau of Competition, as appropriate). In such cases, consultations are likely to be particularly useful: (a) shortly before or after the US issues a second request and the EU initiates a Phase II investigation; (b) approximately one week before the EU anticipates issuing its Statement of Objections; (c) approximately one week after the relevant DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant

DOJ DAAG or FTC Bureau Director; and (d) prior to a decision by the Antitrust Division or FTC to challenge a merger or by the Competition Commissioner to recommend that the European Commission prohibit a merger. Consultations may also take place between their economic counterparts. These officials may find it useful to confer at other points in the investigation as well.

13. Pursuant to the terms of the Administrative Arrangements on Attendance of 1999, the US and EU, as appropriate, may attend certain key events in the other's investigative process. These include (a) the EU's Oral Hearing and (b) the merging parties' presentations to the Assistant Attorney General or Deputy Assistant Attorney General or to the Director or Deputy Director of the Bureau of Competition at which the parties present their arguments prior to the agency's decision whether to take enforcement action.

Remedies/Settlements

14. The reviewing agencies recognize that the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU. Nevertheless, a remedy accepted in one jurisdiction may have an impact on the other. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties. The agencies should, therefore, advise that the parties consider coordinating the timing and substance of remedy proposals being made to the EU and US agencies, so as to minimize the risk of inconsistent results or subsequent difficulties in implementation.

15. Consistent with their confidentiality and/or non-disclosure obligations, the reviewing agencies should seek to keep one another informed of remedy offers being considered and of other relevant developments with respect to remedies to the extent they may impact the other jurisdiction's review. Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the agencies should share draft remedy proposals or settlement papers, on which they may provide comments to one another, and participate in joint conferences with the parties, buyers, and trustees.

Endnotes:

1. This document is intended to set forth an advisory framework for interagency cooperation. The agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights.

2. Cooperation between the US and EU agencies is based primarily upon the 1991 US-EC Agreement on the Application of their Competition Laws, a principal purpose of which is to avoid conflict in the enforcement of their antitrust laws.

3. This document assumes that, consistent with past practice, only one US agency - either the DOJ or FTC - reviews each pertinent transaction and, accordingly, coordinates with the EU regarding that transaction.

E-mail this News Release
If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

Related Documents:

Last Modified: Monday, 25-Jun-2007 16:14:00 EDT

AGREEMENT
BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND
THE COMMISSION OF THE EUROPEAN COMMUNITIES
REGARDING THE APPLICATION OF THEIR COMPETITION LAWS

The Government of the United States of America and the Commission of the European Communities:

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986; and

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990;

Have agreed as follows:

Article I

PURPOSE AND DEFINITIONS

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

2. For the purposes of this Agreement, the following terms shall have the following definitions:

a) "Competition law(s)" shall mean

(i) for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) no. 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision no. 24-54, and

(ii) for the United States of America, the Sherman Act (15 U.S.C. §§1-7), the Clayton Act (15 U.S.C. §§12-27), the Wilson Tariff Act (15 U.S.C. §§8-11), and the Federal Trade Commission Act (15U.S.C. §§41-68, except as these sections relate to consumer protection functions), as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for purposes of this Agreement;

b) "Competition authorities" shall mean (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

c) "Enforcement activities" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party; and

d) "Anticompetitive activities" shall mean any conduct or transaction that is impermissible under the competition laws of a Party.

Article II

NOTIFICATION

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

a) Are relevant to enforcement activities of the other Party;

b) Involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;

c) Involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its states or member states;

d) Involve conduct believed to have been required, encouraged or approved by the other Party; or

e) Involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

3. With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:

a) In the case of the Government of the United States of America,

(i) not later than the time its competition authorities request, pursuant to 15 U.S.C. §18a(e), additional information or documentary material concerning the proposed transaction,

(ii) when its competition authorities decide to file a complaint challenging the transaction, and

(iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and

b) In the case of the Commission of the European Communities,

(i) when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

(ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation no. 4064/89, and

(iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of

a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America, and

b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America, to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to

a) regulatory or judicial proceedings that are public,

b) intervention or participation that is public and pursuant to formal procedures, and

c) in the case of regulatory proceedings in the United States, only proceedings before federal agencies.

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notifications under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Article III

EXCHANGE OF INFORMATION

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II, paragraph 5.

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article IV

COOPERATION AND COORDINATION IN ENFORCEMENT ACTIVITIES

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;

b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and

d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V

COOPERATION REGARDING ANTICOMPETITIVE ACTIVITIES IN THE TERRITORY OF ONE PARTY THAT ADVERSELY AFFECT THE INTERESTS OF THE OTHER PARTY

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive

activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.

3. Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI

AVOIDANCE OF CONFLICTS OVER ENFORCEMENT ACTIVITIES

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.

2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.

3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:

a) the relative significance to the anticompetitive activities involved of conduct within the enforcingParty's territory as compared to conduct within the other Party's territory;

b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the enforcing Party's territory;

c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests;

d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and

f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

Article VII

CONSULTATION

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

Article VIII

CONFIDENTIALITY OF INFORMATION

1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article IX

EXISTING LAW

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states.

Article X

COMMUNICATIONS UNDER THIS AGREEMENT

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI

ENTRY INTO FORCE, TERMINATION AND REVIEW

1. This Agreement shall enter into force upon signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at Washington, in duplicate, this twenty-third day of September, 1991, in the English language.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE COMMISSION OF THE EUROPEAN COMMUNITIES:

By Direction of the
Federal Trade Commission: