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## **OECD Global Forum on Competition**

### **MERGER ENFORCEMENT AND INTERNATIONAL CO-OPERATION**

-- Documentation of WP3 Roundtable (May 2001) --

*This document contains the documentation of a Roundtable organised in May 2001 within Working Party No. 3 of the Committee on Competition Law and Policy. It is submitted in view of the discussion concerning Merger Review that will take place at the Global Forum on Competition on 18 October 2001. Background information and suggested issues FOR DISCUSSION are circulated separately as CCNM/GF/COMP(2001)1.*

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## I. ISSUES PAPER BY THE SECRETARIAT

1. The “merger wave” of the mid and late 1990s has been well documented.<sup>1</sup> In the United States, for example, the dollar value of all mergers notified to the competition agencies increased eleven-fold from 1991 to 1999.<sup>2</sup> The European Commission reported that the number of mergers notified to the Commission increased five-fold between 1993 and 1999.<sup>3</sup> The total value of all merger and acquisition activity worldwide was reported at \$3.4 trillion in 1999.<sup>4</sup> It is widely perceived that the incidence of transnational (or “cross-border”) mergers has increased at a corresponding rate.<sup>5</sup> As trade barriers have fallen, the geographic scope of markets has expanded. Enterprises have expanded correspondingly, often by merger and acquisition, in an effort to serve these broader markets.

2. Because transnational mergers may be subject to the competition laws of several countries, their increasing number has created new issues affecting both the parties to such mergers and national competition agencies.<sup>6</sup> Close to 100 countries now have competition laws and of these, 60 or so employ some form of merger control. These laws are each unique, procedurally if not substantively. The parties to such mergers may have to notify, and be subject to investigations by, the competition agencies of at least two and perhaps many competition agencies simultaneously. Apart from the financial burdens and delays associated with such multiple reviews, the merging parties run a risk of being subject to inconsistent and sometimes conflicting results in different countries. The competition agencies, for their part, face equally difficult conditions in such mergers. One or both of the merging companies may be foreign; the assets or operations that impact the domestic market may be located elsewhere; important information relevant to the competition analysis may, for jurisdictional reasons, not be accessible to the domestic agency; two agencies investigating a transaction, in ignorance of each other’s involvement, may be working at cross purposes, or at a minimum may be duplicating their efforts unnecessarily.

3. The benefits of international co-operation among competition agencies in such situations are obvious, and there has been dramatic growth in such co-operation in past few years. This roundtable discussion will focus on the practical aspects of international co-operation in investigating transnational mergers. It is intended to permit the delegates to share their experiences in such cases, perhaps resulting in progress toward developing best practices in international co-operation. The following discussion in this note presents some issues relevant to the topic. Suggested subjects for discussion are presented in the form of questions at the end of each section.

### **1. Types of mergers and relevant issues benefiting from co-operation**

4. If as many as half of all mergers have an international dimension of some kind, only a small fraction of those have been the subject of international co-operation, beyond the usual notifications under the 1995 Recommendation or applicable bilateral co-operation agreements. It could be useful to gain a better understanding of the characteristics of merger transactions that are likely to be the subject of active co-operation among competition agencies. In general, horizontal mergers attract the scrutiny of competition officials more often than any other type. There is no reason to think that mergers having an international scope would be different. It is probably true, however, that many international mergers are market extension mergers, which means that the parties do not compete directly in a given national market. Such mergers are conglomerate in character, which typically do not trouble competition authorities unless they involve potential competition. Potential competition could, in fact, be relatively more important in large, international merger transactions. That analysis, which involves both an assessment of entry barriers in the target market and of the relative positions of large players outside the market, could lend itself to co-operation among interested competition agencies, each with relatively better access to some portions of the relevant information.

5. Among horizontal transnational mergers, there could be two types: those in which the relevant geographic market is world-wide, or at least sufficiently big to encompass two or more countries, and those involving two or more discrete national markets (or regional markets within two or more countries). An example of the former is large passenger jet aircraft (*Boeing/McDonnell Douglas*), and of the latter, soft drinks (*Coca-Cola/Cadbury Schweppes*). The character and scope of international co-operation could be different in those two situations. Where the national competition agencies are each dealing with the same market, the opportunity for co-operation would seem to be greater, to include fact gathering, analysis and remedy, if any. There could be useful co-operation in the case of national markets as well, however, especially with respect to remedies, discussed further below.<sup>7</sup>

6. Co-operation between competition agencies could be fruitful on any of several issues. Experience to date suggests that market definition, assessment of competitive effects and remedies have most often been the subject of co-operation or exchange of information.<sup>8</sup> Market definition was the subject of discussions between the U.S. FTC and DG Competition in the *Boeing/McDonnell Douglas* case, in which both agencies reached the conclusion that the relevant geographic market was “large commercial jet aircraft.”<sup>9</sup> An example of a merger involving co-operation in assessment of competitive effects was the *Holnam/Lafarge* case, involving merger of two large cement producers. The relevant geographic market extended from Vancouver, Canada to Seattle, Washington. The U.S. and Canadian agencies worked together closely, having received a comprehensive waiver from the merging parties that permitted them to do so, to accurately assess the likely affects of the transaction and to fashion effective relief.<sup>10</sup>

7. Co-operation in the remedy phase has been especially fruitful. The benefits of co-ordination in this area are manifest in situations where the merger in question has anticompetitive effects in more than one country. A divestiture of assets in one country could eliminate the harm not only in that country but in others where those assets operate on the market. Conversely, remedies imposed in the absence of consultations with other affected countries could work at cross purposes, fixing the problem in one country and exacerbating it in another. There have been many examples of successful international co-operation in the remedy phase of merger cases in recent years. The *Federal Mogul/ T&N* transaction, which required the close co-operation of authorities in the U.S., UK, France, Germany and Italy on the appropriate relief is such a well-known case.<sup>11</sup> The U.S. and the EC worked closely together on the remedy in the *WorldCom/MCI* case,<sup>12</sup> and there have been several others.

8. The possibility of international co-operation exists, of course, even when only one country has competitive concerns about a merger. That is, the competition agency in the country where there may be adverse competitive effects might find it helpful to contact another country for assistance in gathering relevant information that exists in the requested country. Or, a given merger might not itself have any transnational effects, but the competition agency might find it useful to seek assistance from another country in analysing the transaction, or in providing general information about the sector or market involved. Instances of such co-operation are less well documented, and it is not clear how often such exchanges take place. There would seem to be opportunity for enhancement of this type of co-operation, as well as the more familiar kind where all the co-operating countries have a stake in the outcome.

9. It is often said that substantive convergence in merger control is problematic in the short run, and that more immediate progress can be achieved on the procedural side, including through the enhancement of international co-operation. Substance and procedure are not wholly separate, however. If the substance of the merger control laws of countries differ significantly, it would be more difficult for those countries to co-operate effectively. There has been, in fact, significant convergence in the substance of merger analysis across countries.<sup>13</sup> This convergence may be fostering more co-operation, or in turn it could be the result of that co-operation. In any case, it would seem that progress in international co-operation in merger control must parallel, to some extent, continuing convergence in substance as well.

*Possible issues for discussion:*

- *What are the current trends in transnational mergers? Are they growing in number relative to the total number of mergers proposed, as the globalisation process continues?*
- *Describe instances of particularly successful international co-operation. What were the characteristics of such cases that lent themselves to such an effort?*
- *Co-operation in the remedy phase has been the most common and most successful of all types of co-operation so far. Can co-operation in the analysis phase be enhanced? Is there a need to do so?*
- *How frequently do countries co-operate in situations in which only one country has concerns about a transaction? Is there opportunity for expanding this form of co-operation?*
- *What is the relationship between substantive convergence and international co-operation in merger control?*

## **2. The Methodology of International Co-operation**

9. The first step in the co-operative process may be the exchange of formal notifications pursuant to the 1995 Council Recommendation on Co-operation or applicable bilateral co-operation agreements, which could alert the relevant agencies of the transnational character of the transaction. Or, in the case of large, high profile mergers that are reported in the business and financial press, the dialogue could start even before the premerger notifications are made to the agencies.<sup>14</sup> In any case, the realisation that a merger may be scrutinised by another country can often come soon after an agency becomes aware of the transaction. How quickly this occurs may be a function of the extent to which the competition agencies in the two countries have worked together previously, and have developed ongoing working relationships.

10. The dialogue that follows may depend substantially on the degree to which the merging parties have granted the relevant competition agencies the authority to exchange confidential information, a topic that is discussed further below. The laws of virtually every country forbid the disclosure of all non-public information that a competition agency acquires in the course of a merger investigation. Competition agencies strictly respect those rules. They do not consider themselves constrained, however, from exchanging “deliberative process” information – analysis and conclusions about market definition or competitive effects, for example – that is non-public but does not contain business confidential information. They may also share information on the investigative process, such as the timing, and what documents and information have been requested.<sup>15</sup>

11. Competition officials have described the co-operation process as an informal, collaborative dialogue, usually between the case handlers in the participating agencies.<sup>16</sup> On occasion there is more formal co-operation, and this is true especially between the EC and U.S. agencies. Thus, for example, in the *MCI/WorldCom* case DG Competition and the US DOJ engaged in “joint negotiations” with the parties that led to a divestiture of assets that satisfied both countries.<sup>17</sup> In 1999 the EC and the U.S. extended their formal co-operation in two ways. They created a joint EU/U.S. Working Group, with the mandate of undertaking studies of enhancing the implementation of effective remedies in merger cases and of the possibilities for further convergence in substantive merger analysis. They also entered into an agreement on Administrative Arrangements on Attendance, which formalised the practice of permitting U.S. officials to attend oral hearings before the Commission as observers in appropriate cases, and in a reciprocal manner, permitting DG Competition officials to attend meetings between the merging parties and senior U.S. enforcement officials prior to the final decision by the U.S. agencies on a case.<sup>18</sup>

12. While international co-operation has become more formal and institutionalised, at least as between certain countries, it has not reached the level of formal participation by one country in the

analytical or prosecution phase in another country. Countries continue to conduct their own investigations and reach their own enforcement decisions in every case. It has been suggested in some circles, notably the ICPAC Report, that a logical next step in dealing with transnational mergers is for a form of “work sharing” between interested countries, in which one country that has a lesser interest in a merger would refrain from conducting its own investigation in favour of another country that has a greater interest, and which could reach a conclusion that would take the interests of the forbearing country into account. An even more far reaching process would have one country act formally as the co-ordinator in a given case, undertaking to evaluate the effects of the transaction on a global scale.<sup>19</sup> The report notes that such advanced work sharing is a “distant vision,” and is presently subject to significant legal and procedural uncertainties.<sup>20</sup>

#### *Possible Issues for Discussion*

- *Describe the co-operation process in one or more cases in which it was successful.*
- *What are the types of information that are most commonly exchanged in co-operation cases? Do agencies have any inhibitions about disclosing their deliberative processes to their fellow competition officials?*
- *What are the prospects for extending co-operation further in the analytical phase? For formalising participation in one another’s investigative processes? For ultimately engaging in some form of “work sharing?”*

### **3. Engaging the Merging Parties in the Co-operation Process – Obtaining Waivers of Confidentiality**

13. The constraints on disclosing confidential business information that apply to virtually every national competition agency can substantially inhibit the ability of the agencies to co-operate, even in sharing analyses and conclusions and in the remedy phase. Experience has shown that substantial co-operation among competition agencies is possible in most cases only with the consent of the merging parties. As noted above, there have been several cases in which the international co-operation was highly useful, and in many of these, if not most, the parties consented to some kind of waiver of confidentiality.

14. The business community approaches confidentiality waivers warily. They state several reservations about the practice, among them: that sensitive business information may be disclosed to competitors or to the public; that it could be disclosed to an agency in a country whose competition laws are substantially different from those in the originating country; that it may be disclosed to government agencies other than competition agencies in the receiving country and be used for purposes other than competition enforcement; that it may be disclosed in the course of litigation, or in response to subpoenas in private litigation; that disclosure to another agency would cause the loss of evidentiary privileges that otherwise apply to the information.<sup>21</sup> Notwithstanding the business community’s misgivings about the waiver procedure, however, its members have been heard to say that they feel that they are sometimes under undue pressure from competition agencies to grant waivers upon request. They may feel that they cannot refuse, given the power that the agencies have to approve or oppose the transaction under review.

15. Competition officials respond with scepticism about such reservations. They point out that they are regularly entrusted with confidential information provided to them in the course of merger investigations and that they have excellent records in protecting it. They note that there is no record to date of unauthorised leaks or disclosures resulting from international co-operation in merger investigations.<sup>22</sup> Regarding risks that shared information could find its way into other cases or investigations in the receiving country besides the merger investigation at hand, competition officials point out that the merging parties can assess the risk that the information might be relevant to other violations of law in the receiving country before deciding to grant a waiver.<sup>23</sup> For their part, competition officials sometimes express the view that

the business community's reticence about waivers has less to do with concerns about unauthorised downstream disclosure of confidential information and more to do with a desire to hinder the co-operative effort. In a given case, the merging parties may conclude that international co-operation would ultimately harm their chances of getting their deal through in the countries of concern.

16. In any case, confidentiality waivers have been granted, and it seems that the practice is growing. What types of waivers are most common? The practice has had an *ad hoc* nature to date. The parties and the competition agencies agree on the content of the waiver on a case by case basis. Waivers can range from the specific to the general: from, for example, "targeted" waivers to permit the agencies to discuss specific issues, such as remedy, to waivers permitting discussions on all issues, to waivers permitting the exchange of specified information and documents, to "blanket" waivers permitting unrestricted exchange of information and documents. Further, in place of granting waivers permitting exchange of information by the agencies, the parties may agree to provide specified information directly to another country, upon receiving assurances of confidential treatment in the receiving country.<sup>24</sup> The ICPAC Report provides three "model waiver" forms<sup>25</sup> exhibiting waivers of different scope. The forms also contain provisions ensuring that the participating agencies will respect the confidentiality of the information exchanged.

17. In sum, it is clear that ability to exchange most information obtained in merger investigations is severely limited by national laws, and it is likely to remain so for the foreseeable future. It is equally clear that effective international co-operation depends upon the ability to share confidential information, at least for limited purposes, which means that the willingness of the merging parties to grant such permission is critical to the success of a co-operative effort. It can fairly be asked whether the reluctance of the merging parties to grant confidentiality waivers is a significant impediment to international co-operation in merger control, and if so, whether there are means of encouraging a greater willingness by the business community to agree to such waivers.

*Possible Issues for Discussion*

- *What is the degree of success in persuading the merging parties to grant confidentiality waivers necessary for effective international co-operation? What tactics are most successful in that regard from the perspective of the competition agency?*
- *What types of waivers are most commonly employed?*
- *In negotiations about waivers, what are the reasons given by the parties for refusing to grant them or to restrict their scope? What can be done to alleviate the problems that they raise?*

#### **4. Bilateral Co-operation – the Degree of Activity among Jurisdictions**

18. That the United States and the European Commission have developed a close co-operative relationship in the past few years is well known. Robert Pitofsky, Chairman of the US FTC, remarked at the observance of the tenth anniversary of the promulgation of the EC merger regulation:

In my view, it is hard to imagine how day-to-day co-operation and co-ordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share, on a regular and continuing basis, views and information about particular transactions, co-ordinate the timing of our review process to the extent feasible, and almost always achieve consistent remedies.<sup>26</sup>

For his part, Mario Monti, European Commissioner for Competition Policy, recently noted that the co-operation and positive comity agreements between the EU and the U.S.

. . . have been a marked success. Our experience with bilateral EU/US co-operation has been that it works very effectively - and particularly so in merger cases, substantially reducing the

risk of divergent or incoherent rulings. Indeed, Commission staff are in close and daily contact with their counterparts at the Antitrust Division of the US Department of Justice and Federal Trade Commission.<sup>27</sup>

19. Most of the notable merger cases involving international co-operation have involved the U.S. and the EC, but some have involved one or more other countries. The *Federal Mogul/ T&N* merger, noted above, involved several countries, including the U.S., UK, French, Germany and Italy. The U.S. and Canada work together on mergers that affect those two countries. Other cases have been noted that involved bilateral co-operation on an *ad hoc* basis. There were communications between the UK and Canada regarding the *Air Canada/Canadian Airlines* transaction, for example, which had an effect on UK/Canadian routes.<sup>28</sup> There exist, of course, many co-operation agreements between national competition agencies, but until the very recent agreement between Denmark, Iceland and Norway, discussed below, none extended to permitting the exchange of business confidential information obtained in the course of merger investigations.

20. Co-operation between the EC and the EU Member States is formalised in the EU Merger Regulation. The Commission forwards copies of merger notifications to the competition authorities of Member States; the Commission is required to maintain “close and constant liaison” with competition authorities of Member States in its merger review process; and an Advisory Committee composed of representatives of Member States consults with the Commission before it decides on an enforcement action.<sup>29</sup> Of course, the one-stop shop feature of the EU law ensures that the Commission and a Member State will not both formally review the same merger.

21. There are not many documented cases of formal co-operation between EU Member States on mergers investigated at the national level, but the competition agencies in that region do maintain close, informal relationships.<sup>30</sup> In 1997, France, Germany and the UK jointly adopted a merger notification form that the parties to a merger that would be notified in any two of those countries could elect to use. In the initial period following adoption of the form it was not widely used, however. Most recently, on 16 March 2001 the countries of Denmark, Iceland and Norway entered into an “Agreement . . . Regarding Co-operation in Competition Cases,” which includes potentially significant and innovative provisions permitting the exchange of confidential information, including that relating to merger investigations. The relevant provisions are as follows:

#### Article IV

##### The exchange of confidential information

1. The parties agree that it is in their common interest to exchange confidential information. It is a condition for the competitive authorities' submission of confidential information that such information:
  - a) is subject to a duty of confidentiality in the competitive authority that receives the information that is at least equal to that of the competitive authority that provides the confidential information, and
  - b) may exclusively be used for the purposes stipulated in this agreement, and
  - c) may only be passed on by the competitive authority that receives the information if it has obtained in advance the express consent of the competitive authority that supplied the information, and that it is only used for the purpose covered by such consent.<sup>31</sup>

The agreement provides that new contracting parties (countries) may join.<sup>32</sup> While the laws of most countries forbid the exchange of business confidential information, the competition laws of Denmark,<sup>33</sup> the Netherlands<sup>34</sup> and Norway<sup>35</sup> permit it under certain circumstances, even in the absence of a bilateral agreement.

22. In general, it is clear that the EC/U.S. co-operation in merger control has been more comprehensive than any other bilateral arrangement to date. Some reasons for this are obvious. The two jurisdictions are the largest; mergers that have cross border effects are likely to have effects in the U.S. and the EU, if only because of their size. Also, as noted above, there has been significant substantive convergence between the two jurisdictions in merger analysis, which facilitates the co-operative effort. And over time the staffs in the two agencies have become increasingly comfortable in their co-operative relationship.

23. It could be asked whether there are other, less obvious reasons. In particular, could these two jurisdictions be informally assuming the role of joint arbiter in at least certain types of transnational mergers, to the extent that other countries do not find it necessary to intervene? In other words, has the arrangement evolved into an informal form of “work sharing,” like that advocated in the ICPAC Report? Such a role could be more likely in cases involving world (or at least regional) markets, in which the effect is mostly the same in all affected countries. (Interestingly, it would seem that the archetypal case of that sort was *Boeing/McDonnell Douglas*, which involved a world market, in which the EC and the U.S. did not agree on the competitive effects. The remedy ultimately imposed by the EC, however, did not interfere with consummation of the transaction.) Such cases are probably not numerous, however. In any event, the question arises as to whether there are opportunities for bilateral co-operation among other countries that are not being pursued, and if so, how can those opportunities be developed further?

*Possible Issues for Discussion*

- *What are the aspects of the EC/U.S relationship that contribute to the success of the co-operation between these two jurisdictions? If something more than their size is involved, how can these aspects be extended to other co-operation arrangements to enhance their effectiveness?*
- *What are the ramifications of the new agreement between Denmark, Norway and Iceland, permitting the exchange of confidential information in merger (and other) cases? Is the agreement, or others like it, likely to be extended to other countries in the near future?*

## NOTES

- 1        *See*, OECD Journal of Competition Law and Policy: Vol. 3, No. 1, March 2001; Vol. 2 No. 1, March 2000; Vol. 1 No. 1, February 1999.
- 2        Valentine, Merger Enforcement: Multijurisdictional Review and Restructuring Remedies, remarks before the International Bar Association, Santiago, Chile, March 24, 2000, available at <<http://www.ftc.gov/speeches/other/dvmergerenforcement.htm>>.
- 3        European Commission, XXIXth Report on Competition Policy, 1999, at 78.
- 4        Valentine, *supra*.
- 5        The phenomenon is difficult to quantify, however. Anecdotal evidence abounds. Thus, for example, the UK Office of Fair Trading reported that within a six month period in 1999, of a total of 115 mergers notified to the UK authorities, 21 were also notified to other countries, and of these 21, 7 were notified to more than two countries. Bridgeman, *Recent Developments in Co-operation Between National Competition Authorities*, remarks to Finsbury Limited, 5 October 2000, available at <<http://www.oft.gov.uk/html/rsearch/sp-arch/spe16-00.htm>>. The U.S. Federal Trade Commission reported that in the first ten months of fiscal year 1999, 38 merger investigations at the FTC progressed to the intensive, “second request” stage. Twenty-one of the 38 were notified to foreign governments pursuant to the 1995 OECD Recommendation on International Co-operation, and of the 21, 12 later involved “substantial” discussions with foreign authorities. Robert Pitofsky, Chairman of the USFTC, has been quoted as saying that fully 50% of the mergers now considered by the FTC have an impact on consumers of more than one country (ICPAC Report at 47).
- Interestingly, however, information from the UNCTAD cross-border M&A database shows that cross-border M&As as a percentage of total value and number of deals of all M&As worldwide increased only relatively slightly from 1987 to 1999, from 20% to 25% in number of deals, and from 25% to 30% in total value. UNCTAD, World Investment Report 2000, at 107.
- 6        *See*, Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, 2000 (“ICPAC Report”) chapters 2 and 3.
- 7        Some types of cases are hybrids in this respect. The relevant markets technically may be no larger than national because of regulatory barriers imposed by governments, but in other respects the markets resemble world markets, with the relevant product capable of being freely supplied from abroad. *See, e.g., In the Matter of SNIA S.p.A., a corporation*, FTC Dkt. No. C-3889, Decision and Order, Aug. 6, 1999, available at <<http://www.ftc.gov/os/1999/9908/c3889d%26o.htm>>. The merger involved two manufacturers of heart lung machines, one based in Italy and one based in the UK. National regulatory barriers effectively restricted the relevant markets to national markets, but the proposed merger had similar effects in both the U.S. and the UK. The U.S. FTC and the UK OFT co-operated closely in devising a remedy that solved the problem in both countries. Parker, *Global Merger Enforcement*, remarks before the International Bar Association, 1999, available at <<http://www.ftc.gov/speeches/other/barcelona.htm>> .
- 8        *See*, Parisi, *Enforcement Co-operation Among Antitrust Authorities*, remarks before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law, London, England, 1999,

available at <<http://www.ftc.gov/speeches/other/ibc99059911update.htm>> ; Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, 1999, at 3, available at <[http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000\\_0618en01.pdf](http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0618en01.pdf)>.

- 9 Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the United States of America Regarding the Application of their Competition Laws, for the year 1998, available at <[http://europa.eu.int/comm/competition/international/bilateral/usa/1998\\_comm\\_report\\_app\\_comp\\_law\\_en.pdf](http://europa.eu.int/comm/competition/international/bilateral/usa/1998_comm_report_app_comp_law_en.pdf)>, at 3.
- 10 See, Valentine, *Cross Border Canada/US Co-operation in Investigations and Enforcement Actions*, remarks before the Canada/U.S. Law Institute, Case Western Reserve University School of Law, 2000, available at <<http://www.ftc.gov/speeches/other/dvcrossborder.htm>>.
- 11 See, Parker, *supra*.
- 12 1998 European Commission Report on the EC/U.S. Co-operation Agreement, *supra* at 3.
- 13 “There has been remarkable convergence in substance between the EC and the U.S. in merger review in the last 10 years.” Pitofsky, *EU and U.S. Approaches to International Mergers-- Views from the U.S. Federal Trade Commission*, remarks before the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, 2000 available at <<http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm>>.
- 14 See, Parisi, *supra*.
- 15 See, Parisi, *supra*; Valentine, *Cross Border Canada/US Co-operation in Investigations and Enforcement Actions*, *supra*.
- 16 See, e.g., 1999 Report by the European Commission on the EC/U.S. Co-operation Agreement, *supra*, at 3: There is “close daily contact between case teams” in the two agencies.
- 17 1998 Report by the European Commission on the EC/U.S. Co-operation Agreement, *supra* at 3.
- 18 1999 Report by the European Commission on the EC/U.S. Co-operation Agreement, *supra* at 5-6; Stark, *Improving Bilateral Co-operation*, remarks before a Conference on Competition Policy in the Global Trading System, Washington, D.C., 2000, available at <<http://www.usdoj.gov/atr/public/speeches/5075.htm>>.
- 19 ICPAC Report, at 76-82.
- 20 In a joint response to the ICPAC Report, ICC and BIAC supported the concept of work sharing in transnational merger cases, but expressed doubt that countries would be willing to relinquish sufficient control in such cases to permit the concept to work. *ICC/BIAC Comments on Report of the U.S. International Competition Policy Advisory Committee (ICPAC)*, 2000, available at <[http://www.iccwbo.org/home/statements\\_rules/statements/2000/report\\_icpac.asp](http://www.iccwbo.org/home/statements_rules/statements/2000/report_icpac.asp)> .

- 21 *See, ICC recommendations to the International Competition Policy Advisory Committee (ICAPAC) on exchange of confidential information between competition authorities in the merger context*, 1999, available at <[http://www.iccwbo.org/home/statements\\_rules/statements/1999/icpac\\_confidential\\_info.asp](http://www.iccwbo.org/home/statements_rules/statements/1999/icpac_confidential_info.asp)>; ICC/BIAC joint report to ICPAC, *supra*.
- 22 *See, e.g.*, ICPAC Report at 67-68.
- 23 Parisi, *supra*.
- 24 ICC/BIAC prefer this approach. “This would allow companies to make any explanations of the information necessary and allow them more control over sensitive information.” ICC/BIAC report to ICPAC, *supra*.
- 25 Annex 2-D.
- 26 Pitofsky, *supra*.
- 27 Monti, *The EU Views on Global Competition Forum*, remarks before the ABA meetings, Washington, D.C., 2001, available at <[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/01/147|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/147|0|RAPID&lg=EN)>.
- 28 Bridgeman, *supra*. *See also*, Jones, *Mergers and Competition in a Global Environment*, remarks before the Victorian Commonwealth Executive Forum, Melbourne, Australia, 2000, available at <<http://www.accc.gov.au/speeches/fs-speeches.htm>>: The proposed acquisition by BHP of New Zealand Steel had an effect in the Australian market.
- 29 EC Merger Regulation, Article 19.
- 30 *See*, Bridgeman, *supra*.
- 31 Available on the websites of both the Danish and the Norwegian competition authorities, at <<http://www.ks.dk/>>, and <<http://www.konkurransetilsynet.no/velkommen.html>>.
- 32 Article VI.
- 33 Section 18a.
- 34 Article 91.
- 35 Section 1-8. The Netherlands law also permits such exchanges, pursuant to which Denmark and the Netherlands have already exchanged information in a cartel investigation.

## II. AIDE MEMOIRE OF THE DISCUSSION ON INTERNATIONAL CO-OPERATION IN INVESTIGATIONS OF TRANSNATIONAL MERGERS

### Introduction

1. The Chairman opened the roundtable by stating that the discussion would be organised on a thematic basis, employing the notes submitted by **Australia, Canada, the Czech Republic, the European Commission, Germany, Norway** (with the collaboration of **Denmark, Finland and Sweden**) and the **United States**. **BIAC** also participated in the roundtable discussion.

2. The Secretariat introduced the background note that was prepared for the discussion (DAFFE/CLP/WP3(2001)5). The note raises four issues that apply in international co-operation in merger control: the types of mergers most likely to be the subject of co-operation, the methodology of international co-operation, the process for engaging the merging parties in the co-operation process, and developing working relationships with other competition agencies. Transnational mergers – mergers that have effects in more than one country – could be classified into two categories: 1) those in which the relevant market is world-wide or regional, that is, larger than a national market, and 2) those that have different effects in different countries. The second type is probably more common. Countries also co-operate in situations where only one country is investigating a merger. The investigating country may request the assistance of another country in providing information about the market or sector in question, or the co-operating agencies may exchange information about their experiences in certain types of investigations.

3. The note points out that co-operation is usually conducted informally between case handlers, using the telephone or email. Competition agencies in almost every country are constrained by their laws from disclosing information obtained in the course of a merger investigation, but they often exchange information about the deliberative process – market definition and competitive effects, for example, as well as information about possible remedies. Effective co-operation requires the consent of the merging parties to exchanges of confidential information between co-operating agencies. It appears that parties are increasingly willing to grant such waivers. It is important that competition agencies foster confidence in the parties that the confidentiality of their business information will not be compromised if a waiver is granted. Finally, the Secretariat note discusses the types of international co-operation arrangements that have developed, noting in particular the close relationship that has developed between the United States and the European Commission.

### Timing

4. The Chairman noted that co-ordination of the timing of merger investigations by two or more competition agencies is critical. This seemed to be a common theme in all of the country submissions.

5. **Canada** stated that it often receives notification of a merger well after its counterparts in other countries, including the U.S. and the EC. Early communications with other agencies are important in this regard, so that Canada can co-ordinate its investigation with theirs. In that regard, Canada now requires that parties identify all other countries to which notification has been made in their notification to Canada.

6. **Germany** noted that differing time schedules have posed problems for the Bundeskartellamt to cooperate with other competition authorities in some transnational cases. This was true for example in a

case that involved both Germany and Finland. Under the rules in effect in Germany, notifications may be given later than they are made to other countries. At a recent meeting of the European Competition Authorities (ECA), Germany proposed that there be established an internet site that would facilitate the exchange of information about notifications.

7. The Chairman asked for further information about the ECA. The **Netherlands** explained that the organisation is an association of European competition authorities. Its first meeting was held in April 2001 in Amsterdam. The next one is scheduled for September in Ireland. There are two working groups in the ECA, one on leniency and one on multi-jurisdictional mergers. In the mergers working group there was a discussion of improving contacts between competition authorities, as noted by Germany, and on developing a common notification form. The form developed in 1997 by France, Germany and the U.K. has not been used by merging parties, principally because the systems of the three countries are substantially divergent. It is hoped that there will be convergence in the future, based on the EC merger regulation.

8. To facilitate contacts between competition agencies in transnational mergers the ECA mergers working group proposed: 1) that countries appoint contact persons for such mergers; 2) countries agree to ask merging parties to name other countries that have been or will be notified; and 3) countries give notice to other ECA countries when they have received merger notifications. It was also agreed that the ECA study further the effects of multi-jurisdictional mergers. A working group was established to study 1) the magnitude of the multi-jurisdictional merger problems, and 2) the extent to which there has been convergence in merger control substance and procedures among ECA countries in recent years. Germany has issued a questionnaire to ECA countries on these issues, and would be willing to share the results with the Working Party.

9. The **United States** asked about the intended use of an Internet site for sharing information about merger notifications. The Netherlands replied that the mergers working group decided not to proceed for the present with the Internet idea, but rather would use normal mail for this purpose.

### **Methodology of co-operation**

10. The Chairman introduced the subject of the means of co-operation, noting that several of the submissions emphasised the importance of frequent, informal communications between co-operating agencies.

11. The **United States** observed that there can be useful exchanges involving information other than company confidential information, which is subject to strict rules against disclosure, absent waiver by the parties. These other types of information include: 1) public information, of which there is a great deal, 2) procedural information, which includes identification of the parties to the merger and the timing of the investigation, and 3) "deliberative process" information. The latter includes disclosure of analysis of market definition, competitive effects and remedies.

12. **Australia** stated that it does not require premerger notification. Parties often seek clearance informally, on a confidential basis, which inhibits Australia's ability to share information with other countries. Also, the ACCC often becomes aware of a transnational merger long after its counterparts in other countries. In this context, informal contacts with other competition agencies are the most effective. Australia also has formal co-operation agreements with New Zealand, Canada and the U.S. In addition to co-operation in specific merger cases, Australia finds general discussions and information exchanges with other countries to be useful. For example, the ACCC conducted some interesting exchanges with other competition authorities on the subject of utility mergers.

13. **Norway** enjoys close co-operative relationships with other Scandinavian countries. There are both formal agreements and informal arrangements that work well among these competition agencies. In the recent *Carlsberg – Pripps/Ringes* merger there was extensive and useful co-operation among Finland, Norway and Sweden, particularly on the subject of market definition. Early in the investigation there was a meeting of representatives of the three agencies at which that topic was discussed. The agencies could not exchange confidential information, however. (Subsequently Norway, Denmark and Iceland entered into a co-operation agreement that would have permitted such an exchange.)

14. **BIAC** commented on the Australia's practice of giving confidential, informal clearances on mergers. Canada too has such a procedure, whereby parties can solicit informal guidance from the Competition Bureau on a proposed merger. As in Australia, this procedure is strictly confidential, and the Bureau may not disclose information that it receives in the process. The availability of such guidance has led the parties in some transnational mergers to come to Canada first, before notifying other countries.

### **Co-operation outside the transnational merger context**

15. The Chairman noted that competition agencies may co-operate in situations other than when two or more agencies are simultaneously investigating a merger. There may be more generalised exchanges of information, as noted previously by Australia, or a country may ask another for information or assistance in a case that only the requesting country is investigating.

16. The **Czech Republic** stated that it found non-case specific exchanges of information very useful. It has sought information from other agencies about markets or sectors, and about certain parties to mergers that it was handling. It has also responded to such requests from other countries.

17. The **European Commission** noted that there is great opportunity for useful information exchanges in that context, as the bulk of mergers examined by most national agencies do not have transnational effects. This type of co-operation is fostered by the long-term development of co-operating relationships between agencies, so that they feel comfortable consulting one another in situations not involving a specific case.

### **Returning to the timing issue**

18. **Sweden** noted that notification rules have a significant impact on the ability of national agencies to enter into co-operation. If some countries require notification and others do not, or if the time at which notification is required varies significantly across countries, they will have begun their inquiries at different times, making co-operation more difficult. The merging parties could facilitate co-operation in this context, by undertaking to notify affected countries at the same time, whether they are required to or not.

19. **BIAC** agreed with Sweden that timing significantly affects the ability and willingness of the parties to co-operate. They are more likely to be willing to grant waivers in situations where the investigation is underway in the countries concerned. In some countries notification cannot be made until a certain event occurs. Parties are less interested in pursuing co-operation in those instances. This situation is another example of how harmonisation of national merger control procedures could enhance the co-operative effort.

20. The **United Kingdom** stated that it, like Australia, had no mandatory merger notification, and thus was sometimes not informed of transnational mergers as early as other countries. This can hinder co-operation when countries are at significantly different places in their review. The U.K. also confirmed that the France/Germany/U.K. common notification form had not been used by merging parties to report their transactions. This was due in part because of differences in the laws of the three countries, but also because the parties, who had discretion to use it, simply chose not to. The U.K. lamented that the business community hadn't made an effort to make the form work, thereby possibly enhancing the opportunity for co-operation.

21. **Italy** stated the view that merging parties do not always want to facilitate co-operation. Sometimes it is in their strategic advantage to obtain sequential decisions on a transnational merger. The *Coca-Cola/Cadbury Schweppes* merger seemed to have been such a transaction. Changing the rules to make co-operation easier may not always bring it about; the parties will also have to support it.

22. The **U.S.** returned to the comment by BIAC to the effect that different "triggers" of notification obligations prevent simultaneous notifications to several countries. Couldn't the parties notify simultaneously all countries in which they were permitted to do so, including countries that had no notification requirements? More generally, is it accurate to say that businesses always have an interest in co-ordinated timing and reviews? Don't they sometimes take advantage of different schedules, even within a single country, where notifications of different agencies are required?

23. **BIAC** agreed that merging parties sometimes prefer not to proceed with all reviews simultaneously, especially in circumstances where it appears that the decision in one agency is likely to be determinative. The parties may wish to try to clear that hurdle first, and if they fail they would then abandon their transaction. Nevertheless, harmonising national procedures would make it easier for the parties to pursue simultaneous review, and they would have more incentive to do so.

## **Waivers**

24. The chairman noted that waivers by the parties of confidentiality restrictions are a critical part of the co-operation process in transnational merger review, and he asked the delegates to address that subject next.

25. The **U.S.** stated that waivers are obviously within the power of the merging parties to grant, and that in recent years they have been more willing to do so, especially in large transnational mergers. There are four benefits to parties from granting waivers: 1) they make it more likely that the investigating countries will reach the same conclusion; 2) they help to avoid conflicting remedies, if remedies are required; 3) they make the investigation process more efficient and ease discovery burdens on the parties; and 4) the agencies will attempt to co-operate anyway, and the parties may as well participate in that process.

26. **Canada** agreed that parties have become more willing to grant waivers in recent years, and also that the agencies can facilitate the process by pointing out to the parties the benefits that they receive from granting waivers. Parties can use the waiver process to their advantage not only by permitting access to information in the possession of another agency, but also by affirmatively providing such information to the requesting agency, including analyses and briefing material. This was done in the *JDS Uniphase/SDL* case investigated by Canada and the U.S.

27. The **U.K.** stated that from its perspective waivers were not needed in every case. They are not necessary, for example, to permit discussion of the analysis of a transaction, such as market definition. Waivers are important in the remedy phase. On another issue, the U.K. noted that it, like some other countries, gives confidential guidance on mergers. The result may be, however, that parties use this procedure as a means of forum shopping, since the results of the consultations are not disclosed.

28. The **EC** confirmed the experience of other countries, that parties have become more willing to grant waivers in transnational merger investigations. Another phenomenon has developed recently – waivers by third parties, such as complainants, to permit discussion of issues that they raise before the agencies. Complainants, in particular, are interested in having their views heard and discussed by all investigating agencies, and the agencies, for their part, wish to verify the complaints with their counterparts in other countries.

29. The **Netherlands** reported that it has had limited experience in co-operating on specific cases, but it has benefited from information exchanges on issues such as market definition and competitive effects. It noted a positive experience in one case, notified to the Netherlands, Germany and Finland, in which there was an issue of control. Initially the Netherlands authorities were told by the parties that definitive documents on this issue did not exist. They contacted the Finnish authority, however, and learned that such documents did exist, and on that same day the parties provided those documents to the Netherlands.

30. **BIAC** noted that the Secretariat paper dealt with almost all issues in a comprehensive manner. BIAC commented on a point made in the paper that parties may sometimes feel “undue pressure” from competition authorities to grant waivers. BIAC felt that occasionally this does happen. It also feels, however, that parties seldom refuse to grant waivers for strategic reasons – reasons associated with a desire to prevent co-operation.

31. **Mexico** has had good experience in international co-operation in mergers, especially with the U.S. It feels that perhaps too much information is considered confidential; the information necessary to conduct the basic competition analysis – definition of markets, market shares, and so forth – should not be confidential, for the most part. This could be an area for fruitful study on an international basis: a general understanding on the types of information that should receive confidential treatment.

32. **Brazil** stated its agreement with Mexico on the confidentiality issue. In Brazil there is a regulation that defines information to be considered confidential, and much that is used in merger analysis, such as market share information, is not so classified.

### **Structure of merger co-operation**

33. The Chairman noted that there are different types of co-operation arrangements – bilateral, multilateral, and so forth. It is recognised that co-operation between U.S. and the EC is considered the most advanced and most successful. He asked for comments from those two jurisdictions on their model.

34. The **EC** noted that there is a long-standing, formal agreement on co-operation between the two jurisdictions, but this agreement is merely the foundation for their relationship. More important is the mutual understanding that the competition agencies have reached through regular, informal contacts on many cases. Through these contacts the agencies have gained an understanding of each other’s institutions and procedures. One important aspect in the co-operative effort is collaboration in collecting information – using common definitions, for example. Rendering assistance in gathering information from a source within the other country’s jurisdiction is also a valuable part of the relationship.

35. It remains to be seen whether this kind of model, based on mutual understanding gained in the course of many investigations, can be translated into a global system. There are some aspects to the U.S. – EC relationship that are unique, principally the large number of cases that affect both jurisdictions. Other jurisdictions will not have the need for such frequent and long standing contacts. On the other hand, the continuing growth in world-wide trade may result in a need for closer co-operation between other countries as well.

36. The U.S. agreed with the EC that the close and constant contacts between the two jurisdictions are the basis for their confidence in one another and the success of the arrangement. In this regard the structure of the U.S. – EC relationship – the 1991 co-operation agreement – is less important than the practice. There have been other formal aspects to the arrangement that have been added, however. These include the 1998 positive comity agreement, the arrangement whereby case handlers from one agency are permitted to attend hearings and meetings held by the other, and the establishment of a joint working group that has been studying the issue of remedies in merger cases and will soon begin the study of oligopoly or joint dominance.

37. The U.S. stressed that the relationship centers on informal contacts between case handlers – those who are working on the investigation and are familiar with the facts and the analysis. An example of how the conversations benefited both agencies was in two recent telecommunications mergers, *WorldCom – MCI and WorldCom/MCI – Sprint*. The information exchanges facilitated quicker learning by both sides in these highly technical markets.

38. The Chairman noted that the U.S. has a much more comprehensive formal co-operation agreement with Australia than it does with the EC. Is this evidence that the structure of a co-operative relationship – the formal agreement – is less important than the practice?

39. The U.S. replied that it does, but it also noted that while the U.S. – Australia agreement does permit the exchange of some confidential information it does not extend to information obtained in the course of a merger investigation. **Australia** agreed that the agreement is applicable more to non-merger cases.

40. The Chairman invited Norway, Denmark and Iceland to comment on the effect of their recent information sharing agreement in merger investigations. They replied that the agreement is quite new, and hasn't been used yet in the merger context. **Sweden** noted that the Scandinavian countries are increasingly being integrated into a single market, which is likely to cause an increase in the number of mergers that will affect more than one country. Sweden cannot join the Nordic co-operation agreement without amending its laws, but it nevertheless expects co-operation in the region to grow even outside the formal agreement. For example, those countries treat less information as confidential than other countries do, which will enhance their ability to co-operate in the future.

41. The Secretariat noted that the three-country Nordic agreement is indeed quite new, with little or no experience having been gained under it, but it has the potential for significant impact as the first agreement that permits exchanges of confidential information in a merger investigation without the permission of the parties. The Chairman commented on Sweden's intervention – that it expected to deepen its co-operative efforts with its neighbours despite not being permitted under its laws to join the formal agreement – as evidence that structure is less important than practice; that co-operation can be enhanced informally when countries have the will and the opportunity to do so.

## Case discussions

42. The Chairman stated that the roundtable would conclude with brief discussions of a few specific cases on which there had been extensive co-operation, so that there might be a further understanding of how the principles of co-operation that had been outlined earlier were applied in practice.

43. The first case discussed was *Air Liquide/Air Products – BOC*, which was investigated by the U.S. and the EC. The **U.S.** stated that the merger involved parties based in the U.S., France and the UK. The relevant geographic markets were regional, and the merger affected various markets differently. The EC approved the merger, but the effects in the several U.S. markets were considered to be more severe, and the objections by the U.S. FTC ultimately caused the parties to abandon the agreement. Despite there having been different outcomes in the two jurisdictions, however, the U.S. considered that there had been significant co-operation between them, particularly on the subject of market definition. There were also discussions of remedies, until the merger was abandoned.

44. The **EC** confirmed that co-operation had been good in this case. The EC also discussed two common misperceptions in this area of multinational review of mergers: 1) That countries sometimes “compete” in negotiating remedies – that after one country obtains a satisfactory remedy the second will try to obtain a little more. This is not the case; countries merely try to tailor the remedies they seek to the perceived effects in their markets. When the effects are different, the remedies necessary to correct them will also be different. 2) That countries tend to be more favourable in their review of transnational mergers to the parties headquartered in the reviewing country. Again, the EC stressed that the reviews by national agencies are impartial, and that indeed, depending on the results of the investigation, an agency may impose stricter remedies on its national enterprises than on foreign ones.

45. The proposed merger of the *London Stock Exchange and Deutsche Börse AG* involved the **UK** and the **German** competition agencies. While the merger was ultimately abandoned for reasons other than competition issues, there was significant co-operation between the OFT and the Bundeskartellamt before the parties terminated the agreement. Their discussions centred on the topic of market definition, which involved new and difficult issues for both agencies. Representatives of the two agencies met in Bonn on one occasion to discuss the issue. While the termination of the agreement ended the co-operative effort in this case, the agencies felt that they had developed good relationships that would be useful in future cases.

46. The Chairman asked the countries involved in the investigation of the *Carlsberg – Pripps/Ringes* merger, which had been noted earlier in the discussion, to describe their co-operation. **Norway** stated that the merger was notified simultaneously to four countries – Norway, Finland, Denmark and Sweden. The fact that the notification was simultaneous was helpful in permitting the countries to co-ordinate their investigations at an early stage. Most of the discussions among the co-operating agencies had to do with market definition. To this end there was a meeting in Stockholm of representatives from Norway, Sweden and Finland. Each gained a good understanding of the others’ markets as a result of these discussions. No confidential information was exchanged, however. A principal lesson learned from this case was that timing is important in a successful co-operative effort, and it is necessary to begin the co-operation as early as possible.

47. **Finland** noted that the possibility existed for it to join the three-country Nordic agreement at some point in the future. This case pointed out, however, that co-operation can be useful even without the exchange of confidential information.

48. **Sweden** returned to the important issue of timing. Most significant transnational mergers are announced publicly soon after the agreement is reached. This permits the affected countries to begin discussions with one another even before the merger is notified to all of them. Exchange of background

information about the parties and the affected markets would be highly useful at this early stage of the investigation.

49. The last case discussed was *Alcoa – Reynolds*, which involved **Australia, Canada, the EC and the U.S.** There were bilateral discussions among the four countries, especially in the remedy phase. In the end, however, the remedies adopted by the U.S. and the EC proved sufficient for Australia and Canada, which therefore did not undertake separate enforcement actions.

50. The Chairman summarised some principal themes that were developed in the discussion. Timing is important to successful international co-operation in merger control. Co-operating competition agencies should begin their discussions as early as possible in the process. While the exchange of confidential information is sometimes important, there can be meaningful co-operation without it, as countries can exchange and discuss publicly available information as well as their theories and conclusions, for example about market definition and remedies. Finally, the roundtable established that while the structure of co-operation – bilateral and multilateral international agreements – can be useful in establishing the framework for co-operation, far more important is the development of a productive working relationship between competition agencies, which is nurtured by frequent and ongoing informal contacts between professionals at all levels in the agencies.

### III. COUNTRY SUBMISSIONS AT THE ROUNDTABLE

#### CANADA

1. The growth in both transnational mergers and national merger review systems has raised several important issues for antitrust authorities around the globe, such as information sharing, potential duplication of work and conflicts between competition agencies involved in parallel reviews. Co-operation can help overcome these problems and enhance the effectiveness of enforcement.
2. This paper will focus on the Canadian Competition Bureau's perspective on international co-operation and its experiences with co-operation on the review of transnational mergers. Before discussing the Bureau's experiences and lessons learned, however, the paper will commence with a brief discussion about the similarities and differences of Canada's merger review systems compared to other competition agencies and the resulting implications for co-operation, as well as the co-operation tools currently utilised by Bureau. The paper will end by examining the recommendations in the *Whish Wood Report*, and highlighting those most pertinent from the Bureau's perspective

#### **Comparison of Merger Laws**

3. The majority of the Bureau's experience with international co-operation in merger review is with the US Department of Justice (DOJ) and the Federal Trade Commission (FTC), and in more recent years with the DG Competition at the European Commission (EC). The discussion, therefore, will focus on the laws of these two jurisdictions. This is not to say that the Bureau does not co-operate with other agencies; The Bureau has consulted with the Australian Competition and Consumer Commission (ACCC) and others, such as the Mexican, German and UK authorities, on several merger cases.
4. Before examining the different merger laws, it is important to note the distinction between the substantive and procedural aspects of merger review. Substantively, Canada's legislation is very similar to those of the US and the EC (with the exception of efficiencies).<sup>1</sup> Procedurally, however, Canada's merger notification system is significantly different compared to the US and EC systems. As the following discussion illustrates, the lack of convergence on procedures is the greatest hindrance to co-operation.

#### **Substantive Laws**

5. From the considerable communication the Bureau has with its US counterparts, it is apparent that there is a high degree of similarity in the practical methodology of merger review in Canada and the US. Though some differences exist in terms of thresholds of concern regarding concentration levels and factual differences between markets, officials from both jurisdictions largely adopt the same approach and take into consideration similar factors when doing the nuts and bolts of merger analysis, such as defining markets and evaluating barriers to entry. These observations also apply largely to the Bureau's experiences with the EC. In the end, officials from the competition authorities in the US, EC and Canada deal with very similar practical considerations and analytical processes which makes co-operation beneficial.

## **Pre- Notification Laws**

6. Canada's merger notification laws are substantially different from that of the US and EC with respect to pre-notification requirements and waiting periods. The EC Form CO and the US Hart Scott Rodino filing provide for initial 30 day waiting periods, compared to the Bureau's 14 calendar day waiting period. As for content, the US and EC's initial filings include more extensive market share information and business documents. The Bureau's long form filing, which has a 42 day waiting period, provides some of this information, although it is still not as extensive as the Form CO or HSR filing and is only used in a small number of cases.<sup>2</sup>

7. The differences in waiting periods and subsequent two phase reviews of the US and EC (i.e. second request or phase II investigation) tend to result in substantial disparities in terms of timing of reviews. These inconsistencies are intensified for the Bureau by the fact the US and EC may receive a notification well ahead of the parties filing in Canada.

8. From the Bureau's perspective, there are two issues regarding notification and timing that can impede co-operation: 1) staggered notifications and 2) the resulting differences in the deadlines for each agency. First, when one regulatory authority is notified weeks or even months before another, this results in an asymmetric and less-than-efficient exchange of information given that one agency's review may be more advanced than that of the other. If all authorities were notified concurrently and with similar information, then discussion of issues would be more meaningful and productive for all authorities involved. Secondly, given the differences in pre-merger notification laws and waiting periods, each competition authority will have different deadlines for their respective reviews. Clearly, this is an obstacle for co-ordinating reviews and potential remedies.

## **Remedial Phase**

9. The extent to which the Bureau can co-ordinate remedies with foreign authorities is an important consideration for co-operation. Due to the relatively smaller size of the Canadian economy compared to those of the US and the European Union, Canada is often faced with mergers that are essentially subsidiary transactions of mergers taking place on a larger scale elsewhere.

10. In cases where a problem is identified by more than one agency that requires remedial action, it is necessary to weigh a number of competing considerations, such as the costs of potentially redundant or conflicting enforcement versus the particularities of the competition interests in Canada. In some cases, a straightforward divestiture effected in the US may remove the competition concern in Canada, while in other cases, there are particular Canadian considerations which may require supplementary remedial action in Canada.

11. Institutional differences between Canada, the U.S. and Europe can also have implications on co-ordinating remedies. The institutional set-up in Canada between the Commissioner of Competition and the Competition Tribunal is unique from the Commission-models of the FTC and EC. Given the distinction in Canada between the investigator and adjudicator, the consent order process in Canada can take more time than the consent order and undertaking processes in the EC and the US, making simultaneous remedies more difficult.

## Co-operation Arrangements

12. Co-operation can take place both formally and informally. Although a formal framework is not a prerequisite to co-operation, it can foster communication and co-ordination between competition authorities and is more germane to the use of more advanced co-operation tools such as the exchange of confidential information.

13. The Bureau is actively involved in international initiatives, both bilaterally and multilaterally, to promote co-operation among competition agencies. Important co-operation instruments for the Bureau are the co-operation arrangements with foreign jurisdictions, notably the US, European, Australian and New Zealand competition authorities, which generally resemble the OECD Recommendation.<sup>3</sup> A significant number of notifications under these co-operation arrangements and the OECD Recommendation involve merger matters. Since 1995, almost half of the notifications received and sent by the Bureau related to merger cases.<sup>4</sup>

14. Under these arrangements, neither Party is required to communicate information to the other Party if such communication is prohibited under existing law. Confidentiality provisions in domestic laws relating to the treatment of information provided pursuant to competition investigations continue to pose difficulties for international co-operation. In Canada, the Commissioner of Competition can communicate confidential information otherwise protected under section 29 of the *Competition Act*<sup>5</sup> to foreign authorities if doing so is for the purposes of the “administration or enforcement” of the *Act*.

15. The preceding discussion illustrates that the main barriers to co-operation are the differences in notification filings and timelines, and confidentiality limitations.

## Recent mergers reviewed with significant co-operation

16. With the growth of transnational mergers and co-operation arrangements as outlined above, the number of cases involving co-operation between the Bureau and foreign competition agencies rises steadily every year. In addition to the mere increase in the number of shared cases and informal exchanges, the breadth of co-ordination between agencies has also become more significant. Co-operation now begins earlier in the merger review process, involves more detailed discussion of substantive issues, and often follows through to co-ordination at the remedial stage.

17. Though many instances of co-operation have occurred in recent years, the following is a discussion of a few cases involving significant and successful co-operation in the last 2 or 3 years.

18. The Bureau co-operated extensively with the FTC in the review of two mergers in the cement industry: *Lafarge/certain assets of Holnam* (1998) and *Lafarge/Blue Circle* (2000-01). Waivers were granted by the parties in both cases, allowing officials from the FTC and the Bureau to share views on substantive matters such as relevant market definitions, entry conditions and potential remedies. In the Holnam review, co-operation was more focussed on the investigative stage, but in the Blue Circle acquisition there was an unparalleled amount of co-operation in all aspects of the review, and especially noteworthy at the remedy stage. In many of the other cases discussed, Canadian concerns were often resolved through remedies in other jurisdictions. The Blue Circle case is an example of the less frequent situation where the remedy sought in Canada will resolve problems in the US where concurrent orders are likely to apply over the same assets.

19. Significant co-operation occurred in the review of two global aluminum mergers - *Alcan/Algroup/Pechiney* and *Alcoa Inc/Reynolds Metals Company* (1999-2000). In light of the

international and regional geographic markets involved, co-operation occurred with respect to both mergers between the EC, US, Canada and Australia and was facilitated by confidentiality waivers. Throughout the review, the Bureau had contact on several occasions with officials from the US DOJ, the EC and ACCC. These consultations allowed the agencies to assess the competitive effects and identify problematic areas of overlap, as well as discuss timing issues. The Bureau and the US DOJ also attended the EC oral hearing as observers in the *Alcoa/Reynolds* matter. Remedies were co-ordinated between the US, EC and ACCC, which addressed any competition concerns in Canada.

20. The *Dow/Union Carbide* merger (1999-2001) in the chemical industry involved extensive tri-lateral co-operation between the US, EC and Canada. The three agencies consulted on market definition, which disclosed common issues due to the international nature of the markets for many of the products of concern and resulted in frequent bilateral and trilateral communications. Confidentiality waivers made it possible for the three agencies to have in-depth discussions regarding analysis of evidence and issues, particularly with respect to market definition and remedies. The Bureau also attended the EC oral hearing in this matter. Discussions regarding remedies led to US and EC resolutions which addressed the competition issues in Canada.

21. The Bureau consulted with the US DOJ in its review of the *Abitibi/Donohue* merger (2000) given the North American dimension of trade in the newsprint products involved. A waiver was provided by the parties, and the agencies contacted each other regularly to update one another on issues, such as timing, theory of the case, and complaints. In the end, the US did not seek a second request, and the Bureau proceeded to obtain a divestiture remedy from the parties. Co-operation was helpful, however, at earlier stages in assessing the merits of the case.

22. The *JDS Uniphase/SDL Inc.* merger (2000) was a particularly successful instance of co-operation for the Bureau, in large part due to the role of the parties. In this case, the parties offered to provide the Bureau with all of the information they provided to the US authorities. This included access to all documentation provided to the US, such as competitive analysis briefing material with respect to product overlap and market definition. This was extremely useful to narrow down the analysis and identify problematic areas in the very complex global fibre optics industry. In addition to the documentation, the oral briefings provided to the Bureau by the parties were similar to the ones provided to the US DOJ. The fact that JDS is a Canadian company was a large factor in the parties' decision to proceed in this fashion, and the ensuing co-operation was beneficial for all involved. In the end, the remedies involved the divestiture of a plant in the UK, which resolved any potential negative impact in Canada.

23. The Bureau's review of the *GE/Honeywell* transaction, the largest industrial merger ever, has not surprisingly involved significant co-operation with the US and EC. Waivers to the relevant competition authorities were provided by the parties as well as from some third parties at an early stage in the review. With multiple international markets to consider, officials from all three agencies have exchanged views and theories regarding the case and have shared documents, such as the DOJ's second request and the EC's Article 6.1 decision, which outlines the rationale for proceeding to a phase two investigation. At the latter stages of the review, case officers from these authorities met face to face in Washington.

24. Co-operation in the investigation of issues regarding the domestic airline industry, though somewhat unique from the cases listed above, is worth mentioning since it illustrates the importance of co-operation on policy issues (vs. case specific issues). While some case-specific discussions occurred between the Bureau and the Office of Fair Trading in the UK and the EC when the *Air Canada/Canadian Airlines* merger (2000) was being considered, more debate has occurred on a policy level with several countries (e.g. Mexico, Sweden, US, Australia and EC) on an ongoing basis since completion of the merger. Though the airline industry has unique circumstances from country to country, at the same time, the competition authorities of these countries are examining the same issues, such as concern over travel

agent overrides, access to slots, or predation of a dominant carrier, which has led to substantive dialogue on a policy level.

25. In addition to these case-specific examples, it is worthwhile noting that co-operation on other matters is very common as well. For example, the Bureau often contacts other foreign authorities to discuss general industry information or previous mergers reviews.

26. The following are some observations or lessons learned from the Bureau's experiences with international co-operation:

It is important to engage the parties in the co-operation process: Parties are generally willing to provide competition authorities with voluntary waivers to allow the authorities to exchange confidential information, and all of the cases discussed above (with the exception of the airline example) involved waivers from the parties.<sup>6</sup> While the provision of waivers is an obvious instance of the parties role in the co-operation process, this role can go beyond the mere exchange of waivers, as highlighted in the *JDS Uniphase/SDL* case. From Canada's perspective, it is also important to engage the parties at an early stage to ensure they provide the Bureau with their notification filing on a timely basis, concurrently with filings in other jurisdictions.

Early and frequent contact between competition agencies is essential: This point cannot be overemphasized, especially given the different timelines for review of the various authorities. At the moment, the main avenue for the Bureau to overcome the problem of staggered timelines is to keep the lines of communication open and up to date. Notifying other agencies of important case developments and timing considerations is crucial for successful coordination of parallel reviews.

The benefits of coordinating remedies or complementary action can be considerable: Coordination of remedies is very useful for ensuring an effective remedy and for avoiding potential duplication or possible conflicts. Small and medium sized countries are more likely to benefit from remedies in other countries due to the relative size of the respective economies, but a complementary remedy in the smaller jurisdiction is often required. This is not to say that there are no instances where coordination of remedies can benefit the larger jurisdiction, for example the remedies sought by Canada in the *Lafarge/Blue Circle* case will resolve concerns on both sides of the Canada-US border.

Co-operation can be useful on both case-specific and general policy issues: One area where a substantial amount of consultation and discussion occurs between competition authorities is on market definition issues and other factors, such as barriers to entry, involved in analysing markets. This type of debate is relevant on a case-specific and policy level. The discussion of the airline industry is a good example of co-operation and consultation on a policy level.

### **Recommendations in the Whish Wood Report**

27. The discussion above clearly illustrates that two of the factors identified in the *Whish Wood Report* as limiting the scope of co-operation correspond closely to the Bureau's experiences with co-operation. From Canada's perspective, 1) timing and notification procedures and 2) confidentiality rules are the major difficulties for co-operation.

28. These two obstacles require both short and long term solutions. For example, a long term solution for the first obstacle is procedural convergence on time periods for notification and review as the report recommends. In the short term, however, competition agencies and the working group can consider

measures to overcome these problems, for example by ensuring competition agencies are notified by their counterparts as soon as possible regarding parallel reviews.

29. Given the importance of international co-operation in the review of mergers and other competition matters, the Bureau regularly considers measures to improve such co-operation. The following four developments are noteworthy in this respect:

1. In Canada, the notification legislation has been amended to require parties to provide a list of other foreign authorities which have been notified of the proposed transaction and the date of the notification.
2. A Bill has recently been tabled to amend the *Competition Act* which includes, among other things, a framework enabling Canada to enter into mutual legal assistance agreements for non-criminal competition matters with foreign states. For example, such an agreement would allow the Competition Bureau to gather evidence on behalf of a foreign state in merger cases.
3. The Bureau will complete shortly a benchmarking study of the merger review process in Canada. Through interviews with staff, stakeholders, other antitrust agencies and members of the international competition bar, the report will identify "best practices" both in Canada and abroad, in order to ensure that the Canadian merger review process remains efficient, effective, timely and transparent.

## **Conclusion**

30. Given that a certain amount of co-operation already takes place, standardising or simplifying some of these processes, for example the exchange of waivers, is a practical starting point. Addressing the obstacles involved with different notification systems and limitations on document sharing is a reasonable first step, but there are certainly other measures to intensify co-operation between agencies. In the future, the working group could study the feasibility and adequacy of measures for more extensive co-operation, such as work sharing.

**NOTES**

- 1 For example, while the US antitrust authorities acknowledge the importance of efficiencies to mergers, Canadian law goes further to explicitly recognize the role of efficiencies as a potentially overriding consideration in determining whether to block a merger (*Competition Act*, section 96). For a fuller analysis of the issue of efficiencies in Canadian merger analysis, please see *The Commissioner of Competition vs. Superior Propane Inc. and ICG Propane Inc.*, [2001] FCA 104.
- 2 In addition to this short and long form notification filing system, the Bureau has established a unique three part classification service standards policy for the review of proposed mergers. A service standard timeframe is paired with the transaction's complexity category. For a non-complex transaction, the Bureau will conclude its review within 14 days, for a complex transaction, within 10 weeks and for a very complex transaction, within 5 months.
- 3 The competition chapter in the Canada-Costa Rica Free Trade Agreement also contains a framework for notification, co-operation and consultation.
- 4 As of April 30, 2001, 202 of 476 notifications were related to merger cases.
- 5 Section 29 prohibits the communication to any person (except with a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act) of (1) the identity of any person from whom information was obtained pursuant to the Act; (2) any information obtained by the exercise of compulsory powers under the Act; (3) whether a proposed transaction was pre-notified or any information supplied in respect of a pre-notification; (4) any information obtained from a person requesting an advance ruling certificate.
- 6 As noted previously, the Commissioner of Competition can exchange confidential information to foreign authorities if doing so is for the purposes of the "administration and enforcement" of the *Act*. As such, the Bureau does not require a waiver from the parties to exchange such information, however other authorities do require a waiver in order for a reciprocal exchange of information with the Bureau.



## CZECH REPUBLIC

### 1. Introduction

1. Globalisation creates an increasing number of competition problems exceeding the national borders. One of the most frequent cases in this respect are cross-border mergers and acquisitions affecting conditions of competition at the supranational or even world-wide markets. Such transactions are usually reviewed by multiple competition authorities. The multiple administrative proceedings conducted by several competition authorities can lead to greater uncertainty of the undertakings because of increased likelihood of the application of different legal standards. Apart from this, the competition authorities are equally in a difficult situation since concentrations affecting the domestic market may be often realised abroad. For these reasons international co-operation between the competition authorities is necessary.

### 2. Office's approach to international co-operation

2. The Office for the Protection of Competition of the Czech Republic (hereinafter referred to as „the Office“) supports active co-operation between the competition authorities in dealing with transnational mergers.

3. The Act on the Protection of Competition (hereinafter referred to as „the Act“) is based on the effect principle. The Act therefore applies not only to activities within the Czech Republic but also to actions of undertakings occurred abroad which distort or may distort competition in the territory of the Czech Republic.

4. Practical application of this principle, however, faces the problem of state sovereignty. The biggest issues include in particular (i) finding documents for the decisions, where there is a rule that investigations by a domestic organ of state administration abroad are not allowed and are only possible on the voluntary basis, or on the basis of an international agreement, and (ii) execution of the final decision which can not take place abroad. To overcome those problems it is necessary to conclude international agreements on co-operation in competition law enforcement.

5. The Czech Republic has concluded a number of such agreements, in particular Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, Customs Union Agreement between the Czech Republic and the Slovak Republic, Free Trade Agreement among states of Central and Eastern Europe (CEFTA), Agreement between the Czech Republic and EFTA states, and other bilateral agreements on free trade with Latvia, Lithuania, Estonia, Israel and Turkey.

6. The Office has always been consistent in the above free trade agreements containing competition rules on prohibition agreements restricting competition and abuse of a dominant position corresponding with Articles 81 (1) and 82 of the EC Treaty. All of the agreements also envisage solution of competition rules violation. In case of the Europe Agreement there are **implementing rules** adopted by the EU-Czech Republic Association Council on 30 January 1996. It follows from the provisions of the implementing rules which cases shall be dealt with, which bodies are competent to solve them, according to which principles and how the information provided will be protected. In case of other international agreements no special implementing rules were adopted, but the solution of such cases is possible through direct consultations between competition authorities or through Joint Committees exercising surveillance over the agreements in question.

7. As far as the merger control is concerned Article 7 of the implementing rules entitles the Office with regard to mergers, which fall within Council Regulation No. 4064/89 and have significant impact on the Czech economy to express its view. The European Commission shall give due consideration to that view.

8. In connection with merger control under the Europe Agreement it is worth noting that the Office has jurisdiction to apply the Act on the Protection of Competition even on mergers exceeding a Community dimension within the meaning of Council Regulation No 4064/89 and which thus fall under the Commission's jurisdiction. In relation to the Czech Republic (and other associated countries) the *one-stop-shop* principle is not applied. This fact may potentially lead to the different decisions adopted by the Office and Commission concerning the same merger. With regard to the necessity of legal certainty of the undertakings it is necessary to limit this danger to the lowest possible extent.

9. The procedure envisaged by the implementing rules for the application of the competition provisions of the Europe Agreement has been applied in the following merger cases:

1. The Office notified European Commission merger between the undertakings *Exxon / Shell*. The reason for the notification was effort to ensure identical assessment of both competition authorities resulting in identical decision about the same merger.
2. Further the Office notified concentration between *South African Breweries /Plzeňský prazdroj*. The reason for the notification was to inform the European Commission about this acquisition.
3. The European Commission notified the Office about the merger between the undertakings *RWA / BayWa*, who planned to use the merger for acquiring a stronger position for entry to the Central and Eastern Markets, in particular in the Czech Republic, the Slovak Republic, Poland, Hungary and Slovenia.
4. Further the European Commission notified the Office concentration between the undertakings *E.ON + Energie Oberösterreich / Jihočeská Energetika + Jihomoravská Energetika*. In this case the company E.ON (Germany) and the company Energie Oberösterreich (Austria) acquired joint control over the domestic undertakings Jihočeská energetika and Jihomoravská energetika. The European Commission approved the concentration on 12 February 2001 while the Office received the concentration notification on 23 April 2001. The Office has not adopted decision in this case so far.

10. Nowadays the activities of the Office can be characterised by an **informal co-operation** with experts from foreign competition authorities in solving individual cases. Although these cases do not have itself any transnational effects, the Office considers useful to seek information from another competition authorities. The co-operation concerned in particular information about the market in question, proceedings information or information about the undertakings concerned. Very good co-operation has been developed with German, Spanish, Slovak, Swedish, Dutch, English and French competition authorities. Also the Czech Office has provided information for the Brazilian competition authority concerning beer market definition.

11. As far as the merger control is concerned the informal co-operation has been realised namely in the following cases:

1. In case *Deutsche Steinzeug Cremer & Breur / Lasselberger Holding-International* the Office sought information about experience of the foreign competition authorities with defining the relevant market for veneer and pavement.
2. In case of concentration between undertakings *Linde / Technopolyn* there was a complex case of vertical integration in the field of technical gas. In the case the dominant distributor of gas would acquire sole control over the dominant producer of gas. With regard to the fact that the Office has not dealt with vertical concentration where the undertakings concerned hold so strong position on the relevant markets, it sought experience of the foreign competition authorities with similar cases.

12. The Office has very good experience with the informal co-operation since the foreign competition authorities in all cases provided valuable assistance and information provided was used in drafting of the Office's decisions.

### **3. New Act on the Protection of Competition fully aligned with Regulation No. 4064/89**

13. Harmonisation of competitive legislations across countries reduces legal uncertainty in cases of transnational mergers and acquisitions. In this regard it is worth noting that the Office has worked out a draft of a new Competition Act whose aim is to achieve full compatibility with the EC competition law. The new Act was approved by the Parliament of the Czech Republic in April 2001 and will enter into force on 1 July 2001.

14. The new Competition Act brings about considerable changes in particular in the field of concentration control that is now fully aligned (both from the substantive and procedural point of view) with Council Regulation No. 4064/89 in the wording of Regulation No. 1310/97. As regards the control of concentrations the new Competition Act contains in particular the following changes:

1. Clarification of the definition of concentration. A precise definition of concentration is one of the basic prerequisites for the effective control of concentrations and for ensuring of legal certainty. Therefore, the definition of concentration contained in the new Competition Act is based on the notion of concentration laid down in Article 3 of Council Regulation No. 4064/89.
2. Introduction of the turnover criterion for the concentration notification. Current criterion for the concentration notification based on the market share of the merging companies will be replaced by turnover threshold of the merging companies achieved for the last accounting period on the Czech or world-wide market. Introduction of the notification obligation based on the precisely defined amounts of turnover will increase legal certainty of the undertakings.
3. Introduction of precise time-limits in the merger control. The new Competition Act includes precise time-limits within which the Office's decisions must be taken in order to enhance legal certainty of the undertakings.
4. Appraisal of concentrations exclusively on competition principles. The new Competition Act will introduce the criteria for permission of concentrations that will be based on competition principles only, i.e. concentrations will be assessed whether create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

5. Details of concentrations notifications will be laid down by the implementing Decree that shall follow CO form contained in Commission Regulation No 447/98. Stipulation of merger notifications requirements corresponding to the CO form shall reduce costs for the merging parties since they will prepare and present substantially the same information both to the Office and e.g. to the European Commission. Further, harmonisation of information requirements will make easier co-operation between the competition authorities since they will review the same or similar information.

#### **4. Conclusion**

15. The Office for the Protection of Competition is well aware of importance of co-operation between the competition authorities. International co-operation is realised in particular with the European Commission on the basis of the implementing rules for the application of Article 64 of the Europe Agreement. According to this rules the Office is entitled to express its view with regard to the mergers assessed by the European Commission and also provides the Commission with information about its own proceedings in cases that are dealt with simultaneously by the Commission. Further, co-operation of the Office with foreign competition authorities consisting of informal consultations and exchange of information is being developed very intensively.

## GERMANY

### 1. Transnational mergers and international co-operation of competition authorities

1. In recent years the number of transnational mergers and thus also the proportion of international cases that had to be subjected to an examination by the Bundeskartellamt before they were put into effect has increased considerably. This development calls for the enhanced co-operation of national competition authorities involved in the examination of mergers. It is not only the joint collection and, as far as this is legally possible, the exchange of information that create scope for a broader perspective, making it easier to establish the economic effects of a transaction, but also discussions with colleagues from other competition authorities about how to evaluate a particular merger project. It allows the economic focus and geographic dimension of a merger to be established faster and more precisely. In addition, there are possibilities to co-operate through co-ordinating the negotiation of obligations. When different obligations are imposed by different authorities, the effect may be amplified or cancelled out. This may be avoided by means of such co-ordination. At this stage of the proceedings, joint action is particularly valuable if a competition authority lacks direct access to a merger that has only been put into effect abroad, but still has strong domestic effects.

2. The Bundeskartellamt has in the past sought closer contacts with foreign authorities in cases with a significant foreign connection, and in turn has accepted similar requests from other countries. In addition, there are an increasing number of day-to-day contacts with other competition authorities abroad. There is thus a clear trend towards more intensive co-operation. In the Bundeskartellamt's view, this trend should be further promoted and extended in order to be able to fully benefit from the advantages described above.

3. A number of cases in which there has been enhanced co-operation between the Bundeskartellamt and other competition authorities will be outlined in the examples below (section 2). From the reports by Rapporteurs and Chairmen of the competent Decision Divisions of the Bundeskartellamt who were responsible in each case, the extent of previous co-operation and factors which appear to make a major contribution to the success of co-operation emerge (section 3). The Bundeskartellamt recently presented proposals for improving international co-operation at the constitutive meeting of the European Association of Competition Authorities (ECA), which will be described briefly in section 4. In our opinion these approaches should also be considered in connection with the question of enhanced co-operation within the OECD.

### 2. Examples of co-operation between the Bundeskartellamt and other competition authorities

#### 2.1 *London Stock Exchange/Deutsche Börse AG*

4. In August 2000, Deutsche Börse AG and the London Stock Exchange notified both the Bundeskartellamt and the Office of Fair Trading (OFT) in the UK of their intention to each acquire 50 per cent of iX-international Exchanges, which was to be newly founded. The aim of the new enterprise was to combine securities exchanges in order to gain advantages in the emerging European capital market through the concentration of liquidity. Both the Bundeskartellamt and the OFT were faced with the difficult task of defining product and geographic markets in financial services markets, some of which are extremely complex. The two competition authorities therefore agreed at an early stage to co-operate on this case. The enterprises involved, which were informed about those contacts from the outset, did not express any concerns but even supported the co-operation, probably also because they correctly expected that such a co-operation would accelerate the examination of the case. The enterprises agreed to information being exchanged. The dialogue with OFT colleagues took place mainly by telephone and e-mail. At a meeting in

Bonn, information was collated and the preliminary assessment of the merger discussed. The Bundeskartellamt benefited greatly from this co-operation, in spite of the fact that, as we all know, the merger eventually failed and the application was withdrawn.

## **2.2 RWE/VEW**

5. The merger projects RWE/VWE and Veba/Viag that were notified in late 1999 called for particularly close co-operation. While the Veba/Viag case fell within the European Commission's competency, the RWE/VEW merger had to be examined by the Bundeskartellamt. The economic and competitive focus of both mergers lay in the German energy market. The uniform examination that was thus required was guaranteed by close co-operation between the competition authorities involved. The Bundeskartellamt and the Commission particularly co-ordinated the negotiation of obligations. This was necessary, if only because of the great number of interlocks, some of them mutual, that existed between the two merging parties in the electricity market. Accordingly, at the initiative of the Bundeskartellamt and the Commission, RWE/VEW and Veba/Viag committed themselves, inter alia, to selling their stakes in the eastern German grid enterprise Vereinigte Energiewerke AG (Veag), which together amounted to more than 80 per cent, and in its brown coal supplier, Laubag. This fulfilled one of the conditions for increased domestic competition and promoted the creation of an equally powerful competitor in the form of Veag. The competition authorities' close co-operation thus created the possibility of formulating appropriate conditions for maintaining competition. The mergers were subsequently cleared subject to obligations.

## **2.3 Covisint**

6. Close co-operation was also involved with the US Federal Trade Commission (FTC) in the Covisint case. Covisint is a joint venture of the car manufacturers DaimlerChrysler, Ford, General Motors and Renault/Nissan, which is intended to serve as a joint Internet exchange in e-commerce between enterprises and to provide Internet services for procurement, supply management and product development. With the enterprises' consent, the competition authorities were also able to exchange and discuss confidential information during a number of telephone conferences in the examination of the merger. The FTC, whose proceedings had reached a more advanced stage, negotiated the preconditions for clearance with the enterprises. Basically, changes and amendments to the founding contracts of Covisint were discussed with a view to overcoming competition concerns. The Bundeskartellamt supported those negotiations by providing information from its own investigations. As a result, the outcome of the negotiations also covered the concerns expressed by the Bundeskartellamt so that the competent Decision Divisions did not make any further demands on the enterprises and the merger could be cleared.

7. There were also contacts in this case with the European Commission, the Austrian Ministry of Economics and Labour as well as the Japanese competition authority.

## **2.4 Oy Transfennica/Finlines Oyi**

8. Oy Transfennica and Finlines Oyi are two Finnish ferry lines covering both the route between Finland and continental Europe and the route between Finland and the British Isles. Their planned merger was initially only notified to the Finnish competition authority Kilpailuvirastu, which announced entry into the second phase of merger control in a press statement on 11 September 2000. Since the Finnish competition authority assumed that the merger was subject to notification in Germany, too, it pointed this out to the enterprises involved and at the same time contacted the Bundeskartellamt. However, the Bundeskartellamt was notified only on 27 November 2000. In the discussions with the Finnish competition authority, during which non-confidential information was exchanged by telephone, both sides' evaluations of the case were discussed and complemented. As a result, both competition authorities considered the merger to be extremely problematic. While the Bundeskartellamt informed the enterprises beforehand that

the second phase of the examination was to be entered and that the case would probably be considered to be problematic, the Finnish competition authority already imposed restrictive obligations on the merger on account of the advanced stage of the proceedings in Finland. The enterprises subsequently withdrew their application.

### **2.5 Grundfos/Baxi**

9. A further case in which the Bundeskartellamt co-operated with the OFT was the Grundfos/Baxi merger case relating mainly to the market for circulating pumps. The discussions between the two competition authorities showed that there were serious concerns about the merger in the United Kingdom while the German market structure was affected far less. Nevertheless, the market definitions that had been made by the authorities were compared and discussed. Non-confidential information was also exchanged in order to verify the correctness and reliability of the individual evaluations. It was also considered whether to co-ordinate the time limits for the proceedings within the existing legal framework. The enterprises involved subsequently withdrew their notification in this case as well.

### **2.6 Fresenius/Pharmacia Upjohn**

10. The Fresenius/Pharmacia Upjohn merger project was a special case in international co-operation. Since the merger clearly affected not only Germany but many other Member States of the European Union, probably in a similar way, at the same time, the Bundeskartellamt considered whether to refer the case to the Commission under Article 22 (3) of Merger Regulation No. 4064/89. For this purpose the competent Decision Division contacted all the Member States affected by the merger. This was followed by a variety of correspondence exchanging initial evaluations of the case. However, the case was not referred in the end since despite the broad agreement for it at first, it was later only supported by a few Member States. Referral was also prevented because many Member States do not have an obligation to notify and it is difficult to co-ordinate the various time limits. The Bundeskartellamt cleared the case after the enterprises involved had sold a division that was particularly problematic for the competition law evaluation.

## **3. Evaluation of co-operation**

### **3.1 Forms of previous co-operation**

11. The examples described above and experience of international co-operation on other occasions show that co-operation took place mainly during the investigation and evaluation phases. Information exchange during investigations and mutual consultation with regard to questions of market definition appear to be the main advantages of international co-operation. So far, the negotiation of obligations has been co-ordinated on only a few occasions. In the case of extremely different time limits, more extensive co-ordination at that stage of proceedings was sometimes impeded because investigations progressed at different speeds, as the Oy Transfennica/Finnlines Oyi example shows. The benefit that co-operation in negotiating obligations may offer to enterprises and competition authorities is demonstrated by the successful co-ordination of obligations in the RWE/VEW and Veba/Viag cases. The co-operation between the Bundeskartellamt and the Commission enabled appropriate preconditions for clearance to be drafted.

12. In many cases enterprises agreed to an information exchange, thereby considerably extending the scope of co-operation. However, enterprises' resistance to co-operation between competition authorities should not be overlooked. The fact that the projects were notified in the various countries concerned at very different times could be regarded as an indication of this. The fact that it is impossible to co-ordinate time limits may prevent co-operation between authorities.

13. The examples also show that international co-operation does not necessarily have to involve concerns on both sides. In the Grundfos/Baxi case, reciprocal support was given in spite of differing evaluations.

### **3.2 *Factors contributing to the success of co-operation***

14. There appear to be various criteria promoting successful co-ordination.

- Usually, co-operation appears to be particularly beneficial to all the parties involved if both sides get in touch with each other at a very early stage. The reason for this might be that investigations are started at the same time and results are thus achieved in parallel. In this way, it is possible to make full use of the advantages of co-operation throughout the entire proceedings.
- It also appears to be important how contacts are made and how they are continued. In the experience of the Bundeskartellamt, a cross-border exchange of ideas is most intensive if contacts are not only in writing but also by telephone or, even better, in personal meetings (example: London Stock Exchange/Deutsche Börse). The use of e-mail as a back-up is becoming increasingly important since it combines the advantages of verbal exchange in the form of informal and quick information with the advantages of written contact (e.g., accuracy of descriptions; reduction of linguistic problems, particularly regarding technical terms).
- However, it is the competent case handlers' willingness and inclination to contact colleagues from abroad which appears to be of particular importance. In cases involving individuals on both sides who had a particularly positive attitude towards an international exchange of ideas, co-operation involved a very informal and frequent exchange of ideas, usually by telephone, and was backed up by e-mail. In such cases, co-operation was felt to be of great benefit and the attitude to it was positive. The resulting personal relationships are valuable as well. These are sometimes maintained even beyond the actual case in hand and can subsequently be used as a permanent contact abroad or can be reactivated easily in any new case of international significance.

15. The present considerations show that a more intensive co-operation that also extends to subsequent examination phases can only be achieved through formal co-operation arrangements to a limited extent. It is also important to introduce an "international culture of co-operation", i.e. including international contacts in daily investigation work on a regular basis. This may be promoted, for example, by explicitly encouraging the international exchange of ideas, by enabling personal international contacts to be made and by promoting language training. Formalising co-operation can support this to some extent. It should be considered, however, that the personal factor contributing to success may even be stifled by too great a degree of formalisation. Wherever formal requests and obligations to provide information take the place of informal, spontaneous contacts, potential for closer co-operation of a kind that is personally pursued by motivated staff may be lost. On the other hand, certain formal requirements could be very useful. The "automatised" provision of information to other competition authorities on notifications received could prompt co-operation and make it possible. Engaging in co-operation even before an expected notification is submitted may counteract the problem of different procedural deadlines.

16. Co-operation is often particularly successful when the undertakings agree to the comprehensive exchange of information. They therefore have to be certain that their business secrets will be protected. Confidence-building measures in the form of assurances that this is indeed the case and through open dealings with one another e.g. through providing information on the co-operation between the authorities at

an early stage, appear to contribute to agreement being given to an exchange of information. Any culture of co-operation should thus also involve the companies concerned to the extent described.

#### **4. Proposals by the Bundeskartellamt presented at the constituent meeting of the European Association of Competition Authorities**

17. On the occasion of the constitutive meeting of the ECA held in April of this year, the Bundeskartellamt compiled proposals with a view to simplifying co-operation. In the view of the Bundeskartellamt, realising these ideas could make a valuable contribution to intensifying and extending co-operation. This could also contribute to promoting the culture of international co-operation referred to above, which must remain our goal. In our view the measures outlined could also be of great benefit to the OECD countries. The most important elements of the proposed procedures are thus summed up below.

18. In order to become aware of notifications and to find out who is the desk officer handling a case, a joint Internet exchange could be used to exchange information simply and effectively. That would make it possible for the "automatic" information referred to above to be provided relatively easily. The national competition authorities could very quickly find out about notifications received by other authorities and check whether they were competent to deal with the merger. An exchange of organisation charts and telephone lists was agreed in order to make it easier to take up direct contact with the right person. In addition, waivers could be requested as a matter of routine on notification and the explanation given that the competition authorities are working towards co-operation with one another.

19. At a first co-operation stage, the partner authorities could find out about important developments relating to proceedings and deadlines. Intensified co-operation could also involve co-ordinating the enquiries to be carried out and subsequently exchanging information. In addition, a co-ordinated approach should be taken to negotiating obligations and conditions.

#### **5. Prospects**

20. The examples given show that co-operation between competition authorities can be very useful and rewarding. The beginnings of intensive co-operation can be clearly seen and there some examples of its success. At the same time there is still plenty of scope to extend these efforts. The proposals referred to, which were drafted by the Bundeskartellamt on the occasion of the constitutive meeting of the ECA, could offer one approach. In particular, a culture where international co-operation is integrated into day-to-day investigative work as a matter of course is a major factor contributing to the success of intensified co-operation. Developing and promoting such a culture should therefore be a central concern of all competition authorities.



## NORWAY

### Introduction

1. In the Nordic countries there are relatively close informal ties between the national competition authorities. The Competition Authorities have worked out general guidelines for co-operation. As of April 2001, there is also a formal agreement concerning the exchange of confidential information between Denmark, Iceland and Norway. This agreement is enclosed in Annex 1 of this paper.

2. After making some general points about transnational mergers and co-operation, two cases that have been assessed by two or more Nordic competition authorities are described in some detail. The description of each case includes a section on any co-operation between the national competition authorities related to the case.

3. This contribution has been worked out with the assistance of the competition authorities of Denmark, Finland and Sweden.

### Transnational Mergers and Co-operation

#### Introduction

4. Transnational mergers involve business activities in more than one country. Such mergers may be handled by several national competition authorities – each relating to the aspects of the merger being within its jurisdiction. Normally, a merger may fall under the jurisdiction of a specific national competition authority if it has an *effect* within the national territory of that authority.

5. When more than one national competition authority assesses a specific transnational merger, problems related to the following issues may occur:

- Divergence concerning whether the merger should be cleared.
- Divergence concerning remedies.
- Requesting and exchanging *information*.
- The limits of the jurisdictions.
- Inefficiencies as a result of double work.
- Differences in national legislation.

6. This creates a need for the co-ordination of decisions and remedies, and for co-operation related to the actual case handling. Co-operation concerning case handling may include notification routines, exchange of expertise, information about and co-ordination of time limits/deadlines, request and exchange of information, analyses of the markets and work sharing.

7. Co-ordination of decisions and remedies may be difficult for several reasons.

8. The decisions made by a competition authority have to comply with the national competition legislations. Hence, the scope for co-ordinating decisions and remedies is limited. In this context it would be useful for national competition authorities to clarify to what extent international aspects of actual cases can play a part within the framework of national legislations.

9. Co-ordination of decisions and remedies beyond this scope may be conditional on changes in national legislation.

### ***Different Types of Co-operation***

10. One form of co-operation is that the competition authorities concerned consult each other in actual transnational merger cases. This may imply stronger enforcement and may also represent cost efficiencies related to the case handling.

11. A more substantial form of co-operation could be that the competition authority in the most affected country is given a leading role in the handling of a merger. This could imply having exclusive competence to make the final decision in the case. The other country (countries) should receive assurances that their interests will be taken into account.

12. Accordingly, a country not wishing to intervene against a merger could give the competence to handle the case to another country that wishes to undertake further investigations. If the latter blocks the merger, the former has missed the opportunity to realise a positive effect that the merger could have had in its country. The advantages of this method are that any divergence concerning decisions will be eliminated, that double work is avoided and that the parties relate to only one authority. The disadvantages may be that it, partly because of legal barriers, will require a lot of resources to establish the necessary framework. Also, it is not clear to what extent it is politically feasible.

### **Exchange of Confidential Information**

13. In May 2000 Section 1-8 was added to the Norwegian Competition Act:

*“ In order to fulfil Norway's contractual obligations towards a foreign State or international organisation, the Competition Authority may regardless of the statutory duty of secrecy furnish the competition authorities of foreign States with such information as is necessary to promote the competition rules of Norway or of the State or organisation concerned.*

*Where information is handed over in accordance with the first paragraph, the Competition Authority shall make it a condition that the information may only be passed on to other parties with the consent of the Competition Authority, and only for the purpose covered by such consent.*

*The King may lay down regulations concerning the handing over of information under the first and second paragraph.”*

14. Similar amendments were made in the competition legislation of Denmark and Iceland.

15. On this background Denmark, Iceland and Norway have entered into a formal agreement concerning the exchange of confidential information. The agreement is enclosed in Annex 1.

### **The Question of Competent Authority - EU, EFTA or National Authorities?**

16. An important question concerning transnational mergers is who is the competent authority with respect to approving or intervening against actual mergers. If the threshold levels of the EU Merger Regulation are met, the Commission will be the competent authority and the Merger Regulation will be applied.

17. As an EFTA<sup>1</sup> country within the EEA, Norway is in a particular situation. According to the EEA agreement, the application of EEA legislation to actual mergers is conditional on the threshold values being met within either the EU- or the EFTA States. The competent authority is the European Commission or the EFTA Surveillance Authority respectively. In most cases this implies that the Commission will be the competent authority. So far, there have not been mergers where the threshold values have been met within the territory of EFTA.

18. Another issue regarding the EEA Agreement is that it does not comprise all goods. This is i.a. the case for certain agricultural and fishery products.

19. Mergers between Nordic undertakings have in most cases not met the threshold values within the EFTA or the EU area. Thus, national competition authorities will be competent and national legislation will be applied. National legislation has also been applied when for example goods like beer or carbonated soft drinks have been involved, since they are not subject to the EEA agreement.

### **Experience concerning Co-operation in Investigating Transnational Mergers**

#### ***Merger Case: Carlsberg and Pripps/Ringnes***

20. Three Nordic competition authorities – Finland, Norway and Sweden – investigated the merger. The Danish Competition Authority did not investigate the merger since their merger legislation first entered into power on 1 October 2000.

#### *Facts*

##### a) Parties to the transaction<sup>2</sup>

Carlsberg AS, Denmark

Pripps/Ringnes AB, Norway

##### b) The transaction

21. The transaction was a merger between Pripps Ringnes AB and the beer and beverage activities of Carlsberg. The merged company, Carlsberg Brewries AS, is 60 percent owned by Carlsberg and 40 percent owned by Orkla AS (Norway).

##### c) The relevant product market

i) *Norway*

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<sup>1</sup> The member countries of the EFTA are Island, Liechtenstein and Norway.

<sup>2</sup> In Sweden Carlsberg A/S and Carlsberg Brewries A/S notified the acquisition of Pripps/Ringnes AB. Other parties involved were Orkla AB (Sweden) and Orkla ASA (Norway)

22. The markets for:

- Beer
- Carbonated Soft Drinks
- Mineral Water

*ii) Sweden*

23. The markets for:

- Light beer sold in groceries
- Medium strong beer sold in groceries
- Carbonated Soft Drinks sold in groceries
- Mineral water sold in groceries
- Beer sold in the hotel, restaurant and catering markets
- Carbonated Soft Drinks sold in the hotel, restaurant and catering markets
- Mineral water sold in the hotel, restaurant and catering markets
- Strong beer sold in the Systembolaget (a retail State monopoly for strong beer, wine and liqueur).

*iii) Finland*

24. The markets for:

- Beer
- Cider
- Long-drink
- Soft-drink

d) The relevant geographical markets

Norway, Sweden and Finland - respectively.

e) Issues being assess by the competition authorities

*i) Norway*

25. Without an intervention by the Norwegian Competition Authority, the merged company would have had exclusive rights to the trademarks of both The Coca Cola Company's (TCCC) and Pepsi in Norway. Coca Cola Drikker (Norway) has a very strong position on the Norwegian market, which implies that it, either alone or with Ringnes/Pepsi, could exercise market power in conflict with the objective of efficient use of the society's resources stated in Section 1-1 of the Norwegian Competition Act.

26. Furthermore, an eventual co-operation between The Coca Cola Company/Coca Cola Drikker and the merged company – which has strong beer trade marks and a co-operation agreement with Pepsi – enhance an anti competitive restriction in the beer market.

*ii) Sweden*

27. The Swedish Competition Authority found that the merger could create or enhance a dominant position, which could substantially restrict competition in all the relevant markets, except the market for mineral water sold in groceries.

*iii) Finland*

28. The Finnish Competition Authority found that the merger could lead to collective dominance by the two leading competitors in the relevant markets: Sinebrychoff (a fully owned subsidiary of Carlsberg) and Hartwall (the main competitor of Sinebrychoff). Hartwall has a connection with Carlsberg through their shared ownership of Baltic Beverages Holding. Furthermore, the minority owner of the merged company, Orkla, owned 20 percent of the shares in Baltic Beverages Holding.

f) Conclusions

*i) Norway*

29. The merger was approved on 13 December 2000, on the following conditions:

- 1) Carlsberg had to divest its interests in Coca-cola Drikker AS.
- 2) The merged company should not have ownership in – or sales, production or distribution agreements with:
  - Companies having exclusive rights to The Coca Cola Company's trade marks in the Norwegian mineral water market.
  - Companies producing, distributing or selling The Coca Cola Company's beverages in Norway.

*ii) Sweden*

30. The merger was approved on 12 December 2000, on the following conditions (proposed by Carlsberg):

- 1) The Beer market:

31. Carlsberg had to divest several trademarks, and was obliged not to sell goods of certain trademarks licensed from other companies.

- 2) Carbonated Soft Drinks

32. Carlsberg had to divest its shares in DryckesDistributören AB (distribution company 50 percent owned by Coca Cola Drycker Sverige AB), and Coca Cola Drycker Sverige AB. Furthermore, Carlsberg had to stop distributing Coca Cola and other beverages produced by Coca Cola Drycker Sweden AB.

*iii) Finland*

33. The merger was approved on 4 January 2000, on the following conditions:

- 1) Orkla should sell its shares in Hartwall, and may not appoint members to the board or other organs in the company.

- 2) Carlsberg may not appoint the same person to the boards of Sinebrychoff and Baltic Beverages Holding..
- 3) AB Pripps had to get out of certain agreements with Hartwall.

### *Co-operation between National Competition Authorities*

- The Danish, Finnish, Norwegian and Swedish Competition Authorities were notified of the merger almost simultaneously, in mid August 2000.
- The Finnish, Norwegian and Swedish Competition Authorities entered into an informal dialogue at an early stage. The Swedish Authority had, in a preliminary meeting with the parties, stated that it had certain objections related to the merger. However, substantial matters concerning the merger was not discussed until competition authorities met in Stockholm:
- On 24 October 2000 a meeting between the Danish, Finnish, Norwegian and Swedish Competition Authorities took place in Stockholm. A few days in advance the Norwegian Competition Authority had informed the parties that it would investigate the case further. During the meeting views on the case was exchanged. It was i.a. learned that the Finnish and Swedish Competition Authorities used narrower market definitions than the Norwegian Authority.
- The Norwegian Competition Authority contacted the Swedish Authority the day before the decision was sent to the parties - and learned i.a. that the Swedish would oblige Carlsberg to stop co-operation with Coca Cola Drycker Sverige AB.

### *Lessons*

34. As soon as a case is initiated one should contact the competition authorities in the relevant countries. The four-country meeting would have been even more useful if it had been held at an earlier stage. Some countries give notices to the parties on an early stage, whether they find reason for further investigation of a case or not. Also, one discovered that the country's definitions of the relevant markets were quite different. One aspect of this is that the requests for information from the parties could be based on these definitions. One does often not have the time to ask for substantial amounts of information more than once during an investigation procedure. The Swedish Competition Authority had pre-notification meetings with the parties, and identified a number of relevant product markets

35. The merger had different effects in the three geographical markets (countries). The Finnish Competition Authority was concerned about collective dominance of the merged company and its largest competitor. In Norway one was mainly concerned with the market for carbonated soft drinks. In Sweden and Norway the merged company would gain control over the trademarks of both Pepsi and Coca Cola. Also, The Swedish Competition Authority looked at the increased concentration in the beer markets, which was more substantial than in Norway (in rough estimates from 30 to 60 percent in Sweden and from 59 to 62 percent in Norway). The Swedish Authority also investigated the soft drinks market. We were also aware of the Finnish Competition Authority investigating the acquisition.

36. A question that should be discussed at an early stage is whether the European Commission can handle such cases, and whether this would entail more balanced analyses and decisions/remedies?

37. In light of the Nordic agreement concerning exchange of information it has now become easier to exchange experiences. But, the agreement is limited to Denmark, Iceland and Norway.

ANNEXAgreement between Denmark, Iceland and Norway on Co-operation in Competition Cases

Denmark, Iceland and Norway,

- wishing to further strengthen and formalise co-operation between the Danish, Icelandic and Norwegian Competition Authorities for the purpose of achieving more effective enforcement of the three countries' national competition legislation,
- which may, pursuant to their national competition legislation, exchange information that is subject to a duty of confidentiality with other countries' Competition Authorities provided the furnishing of information is necessary in order to foster enforcement of these countries' competition legislation, and if the provision of such information occurs with a view to fulfilling Denmark, Iceland and Norway's bilateral or multilateral obligations,

agree on the following:

**Article I**  
**Definitions**

In this Agreement, the following expressions and terms have the following meaning:

- a) "Competition legislation" means applicable legislation, which is currently:
- i) in the case of Denmark, Act No. 384 of 17 June 1997 with subsequent amendments, cf. Consolidated Act No. 687 of 12 July 2000, and executive order issued under this Act
  - ii) in the case of Iceland, Act No. 8 of 25 February 1993, Competition Act with subsequent amendments,
  - iii) in the case of Norway, Act No. 65 of 11 June 1993 relating to Competition in Commercial Activity, Act No. 66 of 11 June 1993 relating to Price Policy, with subsequent amendments.

"Competition Authority/Authorities", "Authority/Authorities" and "Party/Parties" mean

- i) in the case of Denmark: Konkurrencestyrelsen,
- ii) in the case of Iceland: Samkeppnisstofnun,
- iii) in the case of Norway: Konkurransetilsynet.

"Enforcement measures" means:

- i) use of competition legislation in connection with investigations, control, decisions and procedures by one or more of the Authorities.

- b) "Anti-competitive activities" or "behaviour" will depend on the respective Parties competition legislation and may, for example, consist in:

- i) fixing purchase or selling prices or any other trading conditions,
- ii) limiting or controlling production, sales, technical development or investment,
- iii) share markets or sources of supply,
- iv) applying dissimilar condition to equivalent transactions with other trading parties,

- v) making the conclusion of contracts subject to acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract, or
  - vi) abusing a dominant or collectively dominant position.
- c) "Mergers" and the "acquisition of undertakings" are defined in:
- i) in the case of Denmark: § 12 a in Act No. 416 of 12 July 2000,
  - ii) in the case of Iceland: § 4 and 18 in Act No. 8 of 25 February 1993, cf. Act No. 107 of 25 May 2000,
  - iii) in the case of Norway: § 3-11 in Act No. 65 of 11 June 1993 relating to Competition in Commercial Activity.

## **Article II Notification**

1. The Danish, Icelandic and Norwegian Competition Authorities provide each other with information concerning matters where one Authority becomes aware of the fact that its enforcement measures could have a bearing on significant competitive interests that come under the competence of another Authority.

Enforcement measures for which it would normally be suitable to provide notification include such measures that:

- a) are relevant to the enforcement measures of one, two or all three of the Competition Authorities,
  - b) concern anti-competitive activities that largely originate or take place in the territories of one, two or all three of the Authorities,
  - c) concern a merger or acquisition of an undertaking in which one or more of the parties to the transaction is an undertaking that is registered, founded pursuant to the legislation of, or domiciled in Denmark, Iceland or Norway, or in two or all three countries,
  - d) concern anti-competitive behaviour which one assumes a contracting country has required, fostered or approved,
  - e) concern decisions of an intervening nature which will require or prohibit a specific anti-competitive behaviour in another Party's territory.
2. In the case of mergers or the acquisition of undertakings that could have a substantial effect on competitive interests that come under the competence of another Authority, and which pursuant to the legislation shall be reported to the Competition Authorities and/or the Authorities become aware of and/or they themselves take up for discussion, advance notice shall be given pursuant to this article:
- a) in the case of Denmark: to Konkurrencestyrelsen,
  - b) in the case of Iceland: to Samkeppnisstofnun,
  - c) in the case of Norway: to Konkurransetilsynet.

3. The Danish, Icelandic and Norwegian Competition Authorities will also provide each other with information about cases where the Competition Authorities intervene or otherwise participate in an administrative or judicial process that is not followed by enforcement measures, in which the questions raised during the intervention or participation may have a bearing on significant competitive interests of one of the other Parties to the Agreement.

## **Article III The exchange of non-confidential information**

1. The Parties agree that it is in their common interest to exchange non-confidential information which
- a) facilitates the more effective application of their respective competition legislation, or

b) improves their understanding of the legal and financial conditions and theories that are relevant to the Parties' enforcement measures etc., or to matters mentioned in Article II(3).

**Article IV**  
**The exchange of confidential information**

1. The Parties agree that it is in their common interest to exchange confidential information. It is a condition for the Competition Authorities' submission of confidential information that such information:
- a) is subject to a duty of confidentiality in the Competition Authority that receives the information that is at least equal to that of the Competition Authority that provides the confidential information, and
  - b) may exclusively be used for the purposes stipulated in this Agreement, and
  - c) may only be passed on by the Competition Authority that receives the information if it has obtained in advance the express consent of the Competition Authority that supplied the information, and that it is only used for the purpose covered by such consent.

**Article V**  
**Formal requirements, etc.**

Information passed from one Competition Authority to another Competition Authority pursuant to Article II of this Agreement shall be in writing (including by facsimile and e-mail). Other communications shall be verbal or in writing.

The Parties shall keep each other informed in writing about any changes that occur in their competition legislation or other legislation subsequent to the signing of this Agreement that may have a bearing on this Agreement.

**Article VI**  
**New contracting parties**

Provided all Parties to the Agreement consent, this Agreement may be extended to embrace new contracting parties.

**Article VII**  
**Entry into force**

This Agreement enters into force on 1st April 2001.

**Article VIII**  
**Revision and termination**

This Agreement may be revised at any time.

This Agreement may be terminated by any Party provided sixty - 60 - days' advance notice is given in writing.

Done at Copenhagen, on 16 March 2001, with one copy in each of the languages Danish, Icelandic and Norwegian, which texts shall each have the same validity.



## UNITED STATES

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

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

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

### **The Range of Opportunities for Beneficial Co-operation**

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

4. While the opportunity for Co-operation among authorities may appear to be greater in cases in which the relevant geographic market is world-wide, as suggested by the Secretariat (¶ 5), experience teaches that authorities must remain vigilant in cases affecting several geographic markets to avoid potentially conflicting remedies. For example, in *Ciba-Geigy/Sandoz*, both the European Commission and

the FTC sought remedies that involved Sandoz's production of Methoprene; coordination was necessary to avoid placing Sandoz under conflicting obligations.

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

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

## **Procedural Issues**

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

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

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

9. Although the EC-U.S. co-operation agreement<sup>4</sup> calls for the U.S. authorities to make notification in merger cases no later than the issuance of the so-called "second request," the agencies typically are in contact much earlier than that; in fact, U.S. and EC authorities regularly consult during the first phase of investigations. Establishing contact early in the process can facilitate expeditious focus on issues of

concern, or on clearance where the analysis and consultation leads to the conclusion that there is no need for further investigation.

## ***2. Co-operation in the analysis phase***

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

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

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

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

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

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

## ***3. Co-operation between enforcers and parties***

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

useful information that the agencies can share,<sup>8</sup> and the authorities have successfully co-operated in the absence of confidentiality waivers.

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

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

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

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

## **Conclusion**

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

## NOTES

- 1 OECD, *Merger Cases in the Real World: A Study of Merger Control Procedures*, Paris, 1994.
- 2 DAFPE/CLP/WP3(2001)5, 27 Apr 2001.
- 3 Revised Recommendation of the Council concerning co-operation between member countries on anticompetitive practices affecting international trade, C(95)130/FINAL (27-28 July 1995), *available at*: <http://www.oecd.fr/daf/clp/Recommendations/REC8COM.HTM>.
- 4 Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <<http://www.usdoj.gov/atr/public/international/docs/ec.html>>, at Art. II.3.(a)(i).
- 5 U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, *available at*: <http://www.ftc.gov/bc/docs/horizmer.htm>.
- 6 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9 Dec. 1997; *available at*: [http://europa.eu.int/comm/competition/antitrust/relevma\\_en.html](http://europa.eu.int/comm/competition/antitrust/relevma_en.html).
- 7 *See, e.g.*, Robert D. Stoner, "Convergence of U.S. and E.U. Merger Enforcement," *Economists Ink*, Economists Incorporated, Spring/Summer 2000, at 1; and William J. Kolasky, Jr. and Leon B. Greenfield, "Merger review in the EU and US: substantive convergence and procedural dissonance," *Global Competition Rev.*, Oct./Nov. 1998, at 22.
- 8 *See, e.g.*, the depiction in Parisi, *Enforcement Co-operation Among Antitrust Authorities*, 20 *ECLR* 133 (Mar. 99) or <http://www.ftc.gov/speeches/other/ibc99059911update.htm>



## EUROPEAN COMMISSION

1. Over the last decade, the European Commission has, as will be described in more detail below, accumulated a certain level of experience in co-operating with other competition authorities in the field of merger control. The Commission obviously has a very close working relationship with the competition authorities of the Member States. However, for the purpose of the issues of interest to the Roundtable, the experience relating to co-operation with the US authorities will be used as a basis for this paper.

2. Overall co-ordination can and should be of mutual benefit for all involved. It must be stressed, however, that preconditions involve:

- each participant to have sufficient understanding of the other one's legal and procedural framework,
- each participant's willingness and ability to invest sufficient time and resources to further real progress,
- ability to discuss relevant issues in a sufficiently open manner.

### **A. The EU-US co-operation is today a necessity because of the globalisation**

#### **The globalisation process**

3. The merger boom of the 1990s has been the result of several events: the increasing liberalisation and globalisation of industry, the closer integration of world markets through finance and trade, and the creation of the European Single Market, among other factors.

4. This recent merger wave is noteworthy – not just for its sheer size in terms of value and range of industries involved – but for its truly global scale. Global mergers of today go beyond the simple combination of activities of different regions of the world: they might better be described as the worldwide integration and consolidation of such activities. They also tend to occur on a more frequent basis, albeit with a certain relationship to general economic cycles as well as industry cycles. As a result, many of the transactions which have taken place in recent years have significantly modified the fundamentals of competition in the industries concerned, and this on a global scale.

#### **What is co-operation about?**

5. Traditionally, the Commission has co-operated on a bilateral basis with the US agencies and later with the Canadian and the Japanese authorities. Multilateral aspects will be addressed below. However, given the sheer importance of the US and the EU markets and companies - reflected in a number of recent high-profile mega-mergers - much focus is of course on the EU - US co-operation.

#### Legal basis : treaty and waivers : can only work on a voluntary basis

6. The legal basis for the EU/US co-operation is both the existing bilateral co-operation agreements between the US and the EU and the ad-hoc waivers granted by companies in the course of individual merger reviews.

7. In 1991, the Commission concluded a co-operation agreement with the US regarding the application of our respective competition laws. This was one of the first agreements of its kind. Some

important features should be pointed out. The main provisions of the agreement relevant to merger control deal with information on cases of interest to the other agency, co-operation and co-ordination of the enforcement actions of both parties' competition agencies and "traditional comity" procedure under which each party undertakes to take into account the important interests of the other party.

8. It is important to stress that the agreement does not in itself make in-depth co-operation between agencies possible on a case-basis. Indeed it does not allow for the exchange of any confidential information, unless the companies involved agree to it.

9. In fact, the co-operation between US and EU agencies in the review of concentrations made its first real advances only because the parties to these mergers granted waivers allowing each agency to exchange confidential information. This practice has over time increased the familiarity of companies and their legal representatives of the benefits involved in an open dialogue between the agencies. It reflects a very important point, namely that the EU-US co-operation benefits all parties involved - merging parties and competition agencies.

Object of the co-operation : procedure, facts, assessment and remedies

10. Roughly speaking, a merger review consists of the following successive stages or steps : fact gathering, issue identification, assessment, statement to the parties of the agency's position and, eventually, negotiation and definition of remedies. Whereas these steps are common to the US and EU process, it is stating the obvious that they take place under different legal and procedural rules. The co-operation aims at ensuring maximum consistency throughout these steps in the context of separate legal tests and procedures.

11. In cases of mutual interest, close EU/US co-operation has become standard practice. In high profile cases, this occurs at several stages of the procedure, with staff-level contacts on an almost daily basis via telephone, e-mail, video conferences and, on some occasions, face-to-face meetings. These contacts, together with the exchange of confidential information under our confidentiality waiver provisions, are most fruitful as they lead to a mutual awareness of the other side's view of the competition "picture." It helps to identify as quickly as possible what each side considers to be the competition problems and to clarify the extent to which this, as is often the case, differs in each jurisdiction. In this context, different outcomes therefore need not reflect divergent or even conflicting approaches but simply different competition problems (or degrees thereof).

12. For instance, in the WorldCom / Sprint review, the co-operation between the Commission and the US Department of Justice involved exchanges of and concerning information submitted by the parties. In addition, many of the responses from third parties were shared by the agencies on the basis of waivers. The EU had to collect Internet traffic and revenue data from a large number of companies domiciled in the US. This was only made possible due to the intense co-operation that took place between the European Commission and the US Department of Justice. Such an extensive sharing of information allowed both case teams to discuss in-depth the merits of the case and of the submissions from the parties and third parties and to reach consistent assessments of the competitive impact of the transaction on the area of joint concern.

13. At the stage of stating formally the competition concerns to WorldCom and Sprint, representatives of the other agency were attending such meetings. Thus, representatives of the US Department of Justice attended the oral hearing in Brussels, and a representative of the Commission was present in one of the pitch-meetings that took place at the US Department of Justice. Clearly this procedure is beneficial to all parties, and it will be a practice that will be continued whenever relevant. Finally, we

discussed at length the proposed divestiture of the Sprint Internet business that the parties submitted and eventually withdrew in the face of our opposition.

14. We have also seen co-operation efforts at the remedy stage of proceedings coming into greater prominence recently. Last year, for example, this included the parallel negotiation and assessment of remedies, with a view to preventing incompatible results in the various remedies agreed, as was done in *Alcoa / Reynolds* and *AstraZeneca / Novartis*. In the latter case this was important because, even though the relevant geographic markets were national, the implementation of the commitments had, owing to the nature of the intellectual property rights involved, to be executed on a world-wide basis.

### **The limits of co-operation**

*The aim of co-operation is to ensure a maximum of consistency not to reach a single end-result*

15. As was stated earlier, the aim of co-operation is to ensure maximum consistency throughout the various stages of the respective procedures and in the context of separate legal tests and procedures. This imposes limits, which are perfectly legitimate, on what can be expected from co-operation.

16. Despite different substantive standards, when the investigated markets are similar, we have produced similar results in such major cases as *WorldCom/Sprint* and *Alcoa/Reynolds*. In the former case, both the Commission and the FTC concluded that a prohibition was warranted. In the latter transaction, we both agreed there were competition problems that required serious remedial action. We also agreed on the existence of a world-wide relevant geographic market with different effects found in the US *vis-à-vis* the Community. Ultimately the most significant part of the remedy involved divestiture of one of the party's major production plants that happened to be located, neither in the EU nor in the US, but in Australia.

17. Merger assessment in certain industries may be less likely to lead to similar remedies being imposed. This occurs notably when the markets have a more regional scope. For example, while the major competitors in such industries as pharmaceuticals and chemicals are present throughout the world, the main competition effects in these industries have often differed as between the US and EU. (See for example the recent cases of *AstraZeneca/Novartis* and *Dow Chemicals/UCC*, where the remedies that were fashioned by the EU and US authorities, respectively, were customised to meet the specific problems identified in each jurisdiction.)

18. Another case worth commenting on is *Air Liquide/BOC*, where EU/US co-operation was extremely thorough throughout the proceedings. Here, too, the competitive effects and thus the remedial results were quite different as between the EU and US. And this was as a result of different competition concerns. In the Community, the Commission found that the concerns raised by the combination of two competitors – one with a dominant position in France, and the other with a dominant position in the UK – could be resolved by a remedy requiring BOC's divestiture of its 25% share in the UK market, thereby immediately introducing the competition of a new competitor to balance out the loss of competitive pressure. In the US, however, the issue was one of elimination of actual, not potential, competition – and the consequent reduction of players from 4 to 3 in a highly concentrated market. Thus, the type of remedy that was found satisfactory in the EU was not considered to be adequate in the US. Consequently, the US government sought to impose stricter measures – measures that the parties found so burdensome that they abandoned the deal entirely. Thus, despite being cleared conditionally in the EU, the deal finally fell apart.

19. In such instances where the markets may be different, but also where the time scales of the investigations may be incompatible, co-operation can still have two important functions. The first is to ensure that action undertaken by one agency does not unnecessarily impinge on the other's ability to react. Sharing of information in a timely manner significantly reduces this risk. Second, it is important to ensure that companies are not unduly harmed by the two parallel investigations and remedies. The latter can be

exemplified with the *Exxon / Mobil* case, where we accepted a provision that if another jurisdiction imposed remedies that were incompatible with those negotiated with the Commission, the parties were entitled to demonstrate this and suggest means to remove the incongruity. Of course, this would have to be done in keeping with the competition goals of the agreed upon remedies to the greatest extent possible.

*Co-operation does not necessarily lead to the same conclusion : The Boeing / McDonnell Douglas case*

20. Naturally, co-operation does not provide absolute protection to the merging parties against diverging analysis on a similar issue from the competition agencies. The one, high-profile, example is of course the *Boeing/McDonnell Douglas* case. Following this case, many asserted that the case showed the weakness and failure of the EU/US co-operation in the field of merger control. I believe this to be a very exaggerated view and that, in fact, these commentators have been proven wrong. This is certainly the case looking at the subsequent practice, where many successful instances of co-operation has demonstrated both agencies ability to look beyond the results of that case. However, even when looking at the way the co-operation was handled in that case, the striking point is that both agencies communicated and exchanged opinions and facts all throughout the procedure. Thus, whilst not leading to the same conclusion, the case was indeed an instance of very professional co-operation.

21. The reason why the Commission felt the need to act in a merger between two US companies which had no manufacturing operations in the Community was of course that the sale of commercial aircraft is a truly global business. Although the agreement and the merger itself took place in the US, the merged entity would be active all over the world – including the Community. Thus, no single national geographic market could be separated out and analysed separately. In simple terms, by exporting aircraft into the EU, the parties to this merger were economically active here in Europe.

22. The substantive concerns related to Boeing's dominant position in the world civil aircraft industry. The investigation showed that the merger would have strengthened Boeing's position in this world market by raising incentives to lock in customers (foreclosure effects of long-term exclusive contracts with airlines active in Europe) and by the ownership of important technological rights. The remedies agreed with Boeing were therefore aimed at addressing these concerns.

Thus, *Boeing* teaches us that certain complex multinational transactions will expose differences in approach, in fact-finding, in analysis – and sometimes, in the ultimate conclusion. Such disparity will, no doubt, occur again. No co-operation agreement will ever be able to exclude this but, if anything, the case demonstrated that many mergers raise global issues and that co-operation between agencies in such cases is important.

*There are some unavoidable differences (procedures, efficiencies, legal test)*

23. Notwithstanding broad areas of substantive convergence, there still remain some divergences in the enforcement approaches of the EU and US agencies (as well as between most other agencies world-wide).

24. There are well-known differences between the substantive test employed in the EU (i.e. dominance) and the American test of substantial lessening of competition, coupled with provisions for considering efficiency claims. Most commentators, however, agree that the end-result of applying these tests has today become difficult to measure.

25. It should also be mentioned that the EU and US test can be said to converge in one very important respect, namely that both are focussed on essentially only a competition based test. In other words, neither system attaches any significant weight to non-competition based arguments, such as

industrial, regional or social policy type of considerations. This similarity in approach is certainly a factor behind the successful track-record of co-operation.

26. While the analytical approaches of the EU and US agencies are increasingly convergent, it is true that the procedures – and particularly the time limits – differ to a considerable extent. This can lead to some practical difficulties, though not insurmountable ones, in that one jurisdiction (very often it is the EU, given our strict deadlines of maximum 5 months) has to take a decision first.

27. A second area in which there is divergence in timing is the point at which parties are allowed to submit their initial filings. In this regard, the US approach is generally considered more flexible than that of the Merger Regulation. In the US, the HSR pre-merger notification system permits filing at any time after the execution of a letter of intent, agreement in principle, contract, or a public bid.

28. In practice it is often difficult to fully harmonise the EU and US deadlines in second-phase cases, although the scope for harmonisation increases if the merging parties plan their filings with a view to accommodate such convergence. The Commission has a statutorily four-month deadline fixed for Phase II cases. This fixed deadline is generally praised for the legal certainty that follows from its straightforward, objective time limit. Under the Second Request procedure in the US, the second-phase time frame is not fixed, but dependent on compliance with the request. It is actually established only after the parties show “substantial compliance” with the second request for information (though it should be noted that this time frame is, thus, fully within the control of the notifying parties).

#### **B. Where can we go from the current state of affairs?**

29. One may wonder what could be added to the existing co-operation between the US and the EU. Many people have ambitious ideas on possible improvements of the review of global mergers. Some speak about setting up a global agency or a form of a clearing house, some other say that we should forget about bilateral co-operation and enter into wide-ranging multilateral negotiations. All these ideas are probably worthwhile exploring (some more than others). However, considering the respective objectives of companies and competition agencies in relation to merger control, it is clear that all involved stand to gain if we develop the tools further, whilst remaining essentially pragmatic in our approach to international enforcement co-operation.

#### **A reminder : the reasons why we co-operate**

30. As stated above, effective co-operation can only be put in place if there is a shared willingness by the agencies and parties. Co-operation takes place because agencies expect to be put in a position to increase the efficiency of their action, to adopt better-informed positions and ultimately to increase the public welfare. The most notable case where an agency has such an interest is probably when action is needed outside of its own geographic territory. One example may be when facts need to be gathered from companies located outside of the territorial jurisdiction. The same goes for cases that involve assessment of effects on competition on a global scale and where possible remedies involve wider than national activities.

31. It should be stressed that enforcement agencies have a very strong incentive to find practical ways to implement such co-operation. A unified approach is simply much more effective to achieve the public welfare than any alternative solution. For instance, it is certainly not in the interest of the Commission or any other enforcement agency to find its efforts to ensure compliance with an agreed remedy frustrated by conflicting demands from another jurisdiction. It follows from this that lack of co-ordination should not automatically be assumed to result from a lack of willingness among the enforcement agencies.

32. Let me turn now to companies, and the reasons why they normally are also in favour of co-operation. The cost for companies of merger control can roughly speaking be put into two categories : legal and other advisers fees and opportunity cost/legal uncertainties raised by the existence of multiple reviews. International co-operation cannot reduce the number of procedures and therefore has no direct impact on legal and other advisers fees. (This is in contrast with the "one-stop-shop" system for merger control within the EU.)

33. However, co-operation can certainly help in reducing legal uncertainty for companies. Indeed, ensuring that competition agencies co-ordinate to the fullest possible extent at all stages of the procedure will increase the likelihood of compatible timetable and consistent assessments and solutions to possible concerns.

34. This is further reflected in a growing phenomenon: the granting of waivers by third parties. This happened, for instance, the case in the WorldCom / Sprint case. It shows that also third parties have started to realise the added value of being sure that their concerns are voiced and discussed not only within each agency but also between agencies.

### **How to improve EU-US co-operation**

35. The best way to ensure continued and increasing quality of merger assessments is certainly to never be fully satisfied with the current state of affairs. International co-operation is no exception, and there are certainly still ways to make it even more satisfying to both merging parties and competition agencies.

36. To begin with the co-operation on cases, there is still scope for the competition agencies involved to identify best practices and make sure that in the future they are consistently applied. One such area would definitely relate to standardisation of some instruments such as waivers. Agencies also have a common interest to consider the possibility of collaborating to standardise the manner in which the most rudimentary types of sales and market data are provided in these cases. Clearly, in such circumstances there would be no loss of information obtained by the agencies involved, while there would be time- and cost-savings for the notifying parties in compiling the data, by eliminating the duplication of efforts. This would be a most useful preliminary step in the direction of harmonisation. Similarly, requests for information on a common issue could feature jointly prepared text asking for the possibility to share the information under confidentiality guaranties both in the EU and in the US. These are measures that could be taken without pursuing a more ambitious project aiming for convergence between the filing requirements or filing forms.

37. A last example could be on letters requesting co-operation of the other agency. This may occur when the implementation of a remedy may take place on another agency territory. This was made for instance in the WorldCom / MCI case. Another instance would be when the creation or strengthening of dominance on a market under the jurisdiction of the other agency may lead to competitive effects on the territory of the first. This was made for instance in the WorldCom / Sprint case.

38. Going further than co-operation on cases, bilateral co-operation with the competent US authorities (DOJ, FTC) has been further enhanced during the course of recent years through such exercises as mutual attendance of conferences, and exchanges of high level visits and meetings, all helping to promote understanding and to minimise the risk of friction.

39. A joint EU/US Working Group has been set up to explore the scope for further convergence in merger cases being treated in both jurisdictions, with a mandate to focus on two important areas in particular: (1) the review of our respective approaches towards remedies; and (2) the scope for further

convergence of analysis/methodology in merger cases, particularly regarding oligopoly/collective dominance/co-ordinated interaction. To date, discussions have focused on assessment, acceptance and implementation of remedies under the EU and US merger control rules.

40. In view of the extensive experience that the US agencies have had over the years in executing remedies in merger cases, the exchange of views provided valuable input to the formulation of the Commission Notice on remedies. The Notice, adopted by the Commission in December of last year, is the first effort by an antitrust authority to provide written guidelines in the area of remedies, thereby increasing transparency. Although the primary users of the Notice will be companies and their advisors, the increased transparency should also facilitate co-operation. An interesting fact is that the discussions in the Working Group showed the extensive degree of convergence that already existed between the agencies in the area of remedies.

### **How to deal with globalisation of merger control**

#### *No need for a global agency (too few real global cases and insurmountable problems and legal issues)*

41. Beyond US and EU agencies, companies that are active on a global scale and intend to proceed with a concentration have to comply with an increasing number of regulatory reviews and approvals. The complexity of the processes that needs to be followed is illustrated by, *inter alia*, the publication of guidelines by international law firms on the high and increasing number of regulatory regimes that companies have to abide by in order to realise a transaction. This results in higher transaction costs (legal fees) and it also raises risks of diverging assessments by the various involved competition agencies (including possible remedies) and therefore increases the legal costs and uncertainty that companies face. Obviously, it also makes the provision of advice a more complicated task for legal practitioners. Finally, it should not be overlooked that the same development may increase the complexity from the viewpoint of the involved competition authorities.

42. Some have raised the issue of whether a single agency whose aim would be to assess global mergers would not be more efficient than co-operation. One argument is that this would be similar to the track that EU Member States have followed by agreeing on the Merger Regulation and its "one-stop-shop" principle for mergers having a "Community dimension". Clearly, in an integrated economic area, it makes little sense to have multiplication of local merger control authorities dealing with the same issue involving companies that are active across political frontiers and in markets that are often wider than national.

43. However, at this stage, we have not yet reached the stage where the world is a fully integrated market. Furthermore, even assuming that it would consist of one market, a number of conditions must be met in order to have a supranational merger control such as a unified legal system (common evaluation rules, rules on solving conflict between national laws etc). Secondly, a global agency would need to be able to enforce or to have enforced its decisions. Thirdly, it would need to have global political legitimacy.

44. Today, a global agency would fail to meet any of these tests. Even in sectors in which global strategies are pursued, competition does not necessarily take place at a global market level. Furthermore, there is no uniform legal system either in terms of substantive test, procedure rules or enforcement action.

45. So, how should cases falling under more than one jurisdiction be tackled? It is clear that international co-operation cannot, and should not, be pursued exclusively by one means alone. It must be taken forward in parallel on both bilateral and multilateral levels. This is the essence of the Commission's policy.

#### *Deepen understanding and compatibility of procedures (current initiatives and the European experience)*

46. Based on the EU/US bilateral co-operation model, the EU, in 1999, concluded a competition co-operation agreement with Canada. A similar agreement has recently been signed with Japan. The existing co-operation agreements have proven to be very useful not only at the level of joint analysis and negotiation, but also for avoiding confrontations and co-ordinating enforcement efforts.

47. Indeed, following the bilateral agreement of 1999, there was also increased co-operation with the Canadian authorities on a number of cases. A noteworthy outcome of this strengthened partnership was a series of trilateral EU/US/Canadian teleconferences (e.g. on *Dow Chemical / Union Carbide*), and a trilateral EU/US/Canadian meeting in Washington in the context of proceedings on a specific merger case (*Alcoa / Reynolds*).

48. Turning to the issue of multilateral co-ordination, it is obviously true, as many commentators have said that the increased number of merger control systems in the world produces new challenges. A debate on how to avoid the potential pitfalls that this may create is certainly valuable.

49. There have been numerous efforts to put in place a multilateral framework ensuring the respect of certain basic competition principles by organisations such as OECD, the WTO, and UNCTAD. This must of course continue and will over time contribute to the development of common approaches to global mergers.

50. In addition, a number of competition authorities have already studied the problems in depth and a number of proposals are on the table. Both the European Commission in July 1996 and the International Competition Policy Advisory Committee (ICPAC) in February 2000 have recommended the strengthening of international co-operation amongst competition authorities world-wide. A key recommendation in the ICPAC Report, embraced by the US competition authorities, has called for collaboration among interested governments and international organisations, to create a “global competition initiative” in the words of ICPAC.

51. Commissioner Monti has added to this debate by supporting the creation of a Global Competition Forum, which should be dedicated to the following aims:

- first, to create a forum where those responsible for the development and management of competition policy world-wide could meet and exchange their experiences on enforcement policy and practice;
- secondly, participants should strive to achieve a maximum of convergence and consensus on fundamental issues, such as the substance and economics of competition policy and the enforcement priorities of competition authorities; and
- the Forum should also foster and develop a common world-wide “competition culture,” open to dealing with issues of importance to developing economies and economies in transition.

52. The Forum would be intended to complement, rather than rival, other existing organisations. It would be dedicated to promoting the structured dialogue on international competition policy, and is to be set up with the support of antitrust authorities from developed and developing countries

53. While ongoing co-operation efforts towards convergence have produced many worthwhile results, it should be repeated that the success of such co-operation initiatives does not come easily. At times, this framework of co-operation is also quite heavy and its benefits may in some instances appear disproportionate to its costs. Indeed, the success of previous efforts has been dependent on intensive, ongoing efforts that are certainly time-consuming – and thus the high costs of such efforts should be

appreciated. Moreover, it should be accepted that there is no programme that suits ideally the needs of all jurisdictions and thus “one size does not fit all.” Finally, one should keep in mind that, even in the absence of an agreement, when the pressing interest is there, competition authorities will find a way to co-operate.

54. Merger issues will certainly figure on the agenda of the Forum. In the long run, the success of such efforts is the best hope for reducing transaction costs in our respective merger review processes.