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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contributions from the United States --

4-5 April 2017, Managua, Nicaragua

The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



**15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua**

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- CONTRIBUTION FROM UNITED STATES --

1. Issues surrounding merger control frequently cross borders. As merger control has evolved in Latin America and the Caribbean, the United States Federal Trade Commission (“FTC”) and the Antitrust Division of the United States Department of Justice (“DOJ”) (collectively “the U.S. Agencies” or “Agencies”) have worked closely with their counterparts elsewhere in the region on merger cases and, increasingly, on the design of remedies. This submission will address recent developments related to merger remedies and international cooperation that affect the common enforcement interests across the hemisphere.

1. Merger Remedies

2. In February 2017, the FTC released a study examining the effectiveness of its orders issued between 2006 and 2012 (“Divestiture Study”).¹ The study found that FTC practices relating to designing, drafting, and implementing its merger remedies are generally effective and that most of the remedies in the study maintained or restored competition in relevant markets. While the study focused on FTC cases, the processes used by the FTC are similar to those of the DOJ. This paper articulates some central principles and practices employed by the Agencies in designing horizontal merger² remedies.

¹ The FTC’s Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics, available at https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

² The term “merger” is used throughout this paper to include acquisitions and any other similar transactions subject to the statutes enforced by the Agencies.

1.1 The US Merger Control System

3. Understanding the United States' approach to horizontal merger remedies requires an appreciation of how the United States' premerger notification system functions. The United States merger legislation requires merging parties whose mergers meet certain dollar thresholds to notify the Government and observe waiting periods before consummating their merger. One of the Agencies will then review the proposed merger and determine whether it is likely to be anticompetitive.

4. If the reviewing Agency determines that a proposed horizontal merger is likely anticompetitive, it may seek a preliminary injunction in federal court before the merger takes place.³ In practice, however, most parties propose and negotiate a settlement with the Agency before litigation, usually by offering to eliminate the anticompetitive aspects of the merger through a divestiture. In relatively rare cases, a proposed merger may raise competitive problems that cannot be solved through remedies, and in those cases the Agencies will seek to block the merger outright. While the issues posed by most anticompetitive horizontal mergers are resolved through negotiation rather than litigation, the possibility that the reviewing Agency will seek to block the merger drives the negotiation process, including the remedy policies discussed in this paper.

1.2 Key Horizontal Merger Principles

5. Because horizontal mergers can vary significantly, effective merger remedies also vary from case to case. The Agencies' remedies analysis is fact-intensive, as is the case analysis itself. However, certain basic principles apply to all horizontal merger remedies. First, effectively preserving (or restoring) competition is the key to an appropriate horizontal merger remedy. The Agencies will consider only remedies that resolve the competitive problems posed by a merger. Second, the Agencies' central goal is preserving competition, not determining market outcomes. Therefore, the Agencies' remedy provisions are designed to preserve competition and the competitive process, rather than protect or favor particular competitors.

6. The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts. An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis.⁴

1.2.1 Divestitures

7. The Agencies rely on structural remedies to preserve competition in the vast majority of cases when a competitive problem is likely to result from a horizontal merger. For a structural remedy to be effective, the purchaser of the divested assets must possess both the means and the incentive to preserve competition in the affected market(s). Therefore, the divestiture must include all the assets, physical and intangible, necessary for the purchaser to compete effectively with the merged entity.

³ A preliminary injunction halts the merger until the reviewing Agency can litigate the merger's likely competitive effects in a full trial. While most cases are resolved at that stage, the Federal Trade Commission generally conducts such full trials that go forward under its own rules for administrative adjudication, and the result is an order from the Commission allowing the merger to go forward or prohibiting it. The Department of Justice conducts such trials before the court that issued the preliminary injunction.

⁴ Antitrust Guidelines For International Enforcement and Cooperation at p. 47, available at <https://www.justice.gov/atr/internationalguidelines/download>.

8. Divestiture of an ongoing business is preferable to divestiture of selected assets. An existing business entity has already demonstrated its ability to compete in the relevant market and typically possesses the physical assets, personnel, intangible assets, and management infrastructure necessary for the efficient production and distribution of the relevant product(s). All divestitures of ongoing businesses included in the Divestiture Study were successful, reinforcing the Agencies' preference for this remedy in horizontal merger cases. When evaluating a proposed divestiture of an ongoing business, the reviewing Agency must confirm that all aspects of the business are being divested.⁵ And, if a post-Order divestiture⁶ is being considered, the merging parties may need to be prepared to identify potential buyers that are interested and approvable buyers for the assets. The Agencies sometimes will accept divestiture of less than an existing business entity. However, these divestitures can pose more risk than divestitures of ongoing businesses and must be carefully reviewed.⁷ The Agencies will accept a proposal to divest selected assets only if the merging parties and the proposed buyer of the assets demonstrate that divesting the more limited asset package is likely to maintain or restore competition.⁸ In addition, the proposed buyer will need to demonstrate that it will be able to compete effectively in all affected relevant markets without all of the assets relating to the entire ongoing business.⁹

9. When evaluating whether a proposed horizontal merger remedy is sufficient, the Agencies also consider whether divestiture of more than the overlapping assets may be necessary to ensure the viability of divested assets and preserve competition. For example, in some industries, it is difficult to compete without offering a "full line" of products. In those circumstances, the Agencies may seek to include a full line of products in the divestiture package or prefer a buyer that already offers products that, combined with divested assets, will offer a "full line," even if their antitrust concern relates to only a subset of those products. This helps the purchaser to have similar "scope" economies to the merged firms.

10. In some situations, a purchaser requires intangible assets to compete effectively. For example, when firms with alternative patent rights for producing the same final product are merging, a divestiture must provide one or more purchasers with rights to those assets, either through sale or through licensing. In other cases, a divestiture may include a real estate lease or supply contract that cannot be transferred without the consent of the lessor or supplier. An acceptable divestiture proposal must include all necessary

⁵ The merging parties must explain how the proposed business contains all aspects needed to operate on its own and explain how a buyer can acquire the ongoing business and begin competing right away.

⁶ In a post-order divestiture, the buyer of divested assets is approved by the reviewing Agency following the issuance of the divestiture order or decree. In a post-order divestiture, the merging parties have a deadline by which the divested assets must be transferred.

⁷ While all divestitures of ongoing businesses examined in the case studies were successful, the Divestiture Study found that in nine orders requiring divestiture of a smaller package of assets, the divestitures did not maintain competition. Therefore, proposals to divest selected assets generally warrant more detailed examination.

⁸ The merging parties should be prepared to (i) explain why an alternative ongoing business divestiture is inappropriate or infeasible; (ii) demonstrate how the selected assets can operate as a viable and competitive business in the relevant market; (iii) explain what aspects of an ongoing business are excluded from the package and, for each aspect that is excluded, how a proposed buyer would be able to address that gap, at what cost, and how quickly; and (iv) provide the buyer with adequate time and access to employees, facilities, and information to conduct due diligence.

⁹ The proposed buyer should (i) explain how it plans to maintain or restore competition with the selected asset package; (ii) assess what additional assets and services it will need to operate the selected assets as a viable and competitive business in the relevant market; (iii) explain how it will obtain these additional assets and services, at what cost, and how quickly; and (iv) document its cost and time estimates to obtain these additional assets and service.

intangible assets and the merging parties must obtain requisite third-party consents to transfer the assets included in the proposal.

1.2.2 Ancillary remedies

11. Although the anticompetitive effects of horizontal mergers are typically remedied through structural divestitures, the Agencies also consider whether temporary conduct relief may be necessary to help strengthen the structural relief. For example, the Agencies might require a supply agreement to accompany a divestiture if the purchaser is unable to manufacture the product for a transitional period (perhaps as plants are reconfigured, product mixes are altered, or the purchaser obtains government approvals or customer qualification). In those circumstances, a supply agreement can help prevent the loss of a competitor from the market, even temporarily. Similarly, temporary limits on the merged firm's ability to reacquire personnel may, at times, be appropriate as part of a divestiture to ensure that the purchaser will be a viable competitor. The Agencies may also require the merged firm to provide certain interim technical assistance to a purchaser, especially in cases involving highly technical and complex production markets.

12. If the divestiture consists of ongoing businesses and there are multiple suitable purchasers, the Agencies may accept a consent decree or order mandating a post-consummation divestiture. However, the agencies must still approve the proposed purchaser of divested assets. Further, the merged firm often will be required to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. The remedy also often requires the merged party to preserve and maintain the value and goodwill of the divestiture assets during the divestiture process. Because hold separate and asset preservation provisions will not entirely preserve competition in all cases, these provisions do not eliminate the need for a speedy divestiture.

1.3 Further Guidance

13. The remedies principles described in this paper are addressed in more detail in publicly available guidelines documents issued by the Agencies. The Antitrust Division has released a Policy Guide to Merger Remedies.¹⁰ In addition to the Divestiture Study, the Federal Trade Commission's Bureau of Competition released two related guides: a statement on negotiating merger remedies, and frequently asked questions about merger remedies.¹¹

2. International Cooperation in Merger Cases

14. Over the past two decades, the number of agencies reviewing mergers has increased dramatically. Increasingly, cross-border merger transactions are investigated by more than one competition agency.¹² The U.S. Agencies continue to engage in international case cooperation involving competition agencies from an increasing number of jurisdictions, and cooperation has deepened between competition agencies that work together most often. This is particularly the case in merger case cooperation. We expect this trend of expanding and deepening cooperation to continue.

¹⁰ <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf>.

¹¹ <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm> and <http://www.ftc.gov/bc/mergerfaq.shtm>.

¹² See, e.g., OECD Competition Committee, "International Enforcement Co-operation: Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation," 2013, at 66, available at <http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf>.

15. Through cooperation, a competition agency coordinates its domestic investigation with those of other competition agencies reviewing the merger. Cooperation can improve the effectiveness of individual agency investigations and produce compatible outcomes in the review of the same matter.¹³ Cooperation can benefit both parties and cooperating agencies. Parties benefit from more efficient reviews and a reduced risk of conflicting outcomes. Agencies enjoy these benefits and are better able to compare their own approaches and analyses with those of other jurisdictions, to learn from one another, and to engage in a process of continuous improvement and convergence.

16. For the U.S. Agencies, merger cooperation has worked most effectively when reviewing agencies reach out to one another early in their respective investigations. Early informal contact allows agencies to understand whether further cooperation is warranted. Such contacts are limited to public and non-confidential information. While a written cooperation agreement is not necessary for the U.S. Agencies to cooperate with other competition agencies, it can facilitate cooperation in some cases, such as by articulating a commitment to confidentiality. When it is in both reviewing agencies' and merging parties' interests to have more in-depth cooperation, parties may choose to provide agencies with waivers of confidentiality to enable cooperation based on the parties' confidential information.

17. In January 2017, the U.S. Agencies released revised Antitrust Guides for International Enforcement and Cooperation,¹⁴ which update the 1995 version of the guidelines. The revised guidelines, among other things, were expanded to describe how the U.S. Agencies cooperate with foreign authorities. The revised guidelines reflect the growing importance of antitrust enforcement in a globalized economy and the U.S. Agencies' commitment to cooperating with foreign authorities on both policy and investigative matters. The chapter on international cooperation addresses the U.S. Agencies' investigative tools, confidentiality safeguards, the legal basis for cooperation, types of information exchanged and waivers of confidentiality, remedies and special considerations in criminal investigations.

2.1 Cooperation and Confidentiality

18. Effective cooperation in merger cases depends on cooperating agencies' ability to conduct informed discussions about mergers, their anticipated effects, and, if required, possible remedies. Consequently, it is critical to find ways to hold those discussions without infringing on confidentiality restrictions provided by competition laws and regulations.

19. National laws and rules that protect confidential information from disclosure ("confidentiality protections") serve a vital purpose, and cooperation in merger investigations should not undermine such protections. In most jurisdictions, confidentiality protections prohibit the misuse of sensitive commercial and financial information provided by parties or witnesses. In the United States, for example, all information provided to the Agencies pursuant to the U.S. pre-merger notification system, and all information produced in response to the agencies compulsory process, is deemed confidential. The

¹³ Compatible outcomes are not necessarily identical outcomes, but rest on consistent analysis even if that analysis produces different results under different market conditions. In a case in which the same merger affects jurisdictions with differing market structures (such as where a merger reduces the number of competitors from eight to seven in one jurisdiction but from two to one in another), it is possible that two jurisdictions will conduct entirely consistent analyses, conclude that the competitive effects in their own countries will differ, and reach different conclusions on the competitive impact of the transaction within their jurisdictions.

¹⁴ Antitrust Guidelines For International Enforcement and Cooperation, *available at* <https://www.justice.gov/atr/internationalguidelines/download>.

agencies are also committed to maintaining the confidentiality of information submitted voluntarily as part of a merger investigation, and have rules and practices dedicated to this end.¹⁵

20. Staff must understand confidentiality protections to know what they may legally share with other agencies, and how information they receive can be used. Reviewing agencies scrupulous protection of confidential information gives firms confidence that their confidential information will not be misused, and greater confidence in providing relevant information to reviewing agencies. Even pursuant to these rules, agencies can exchange a significant amount of useful information, as explained below. Such cooperation can be based on different categories of information, including publicly available information, “agency confidential” information, and, in certain circumstances, confidential information.

21. A considerable amount of useful cooperation can take place based on publicly available information. For example, agency staff often develops substantial expertise in particular industries, and they can share their understanding of how an industry operates, or can direct sister agencies to publicly available information such as that found on the website of securities regulators.

22. Cooperation can be also based on what the U.S. Agencies call “agency confidential” information. This consists of information that the U.S. Agencies are not statutorily prohibited from disclosing but normally treat as non-public,¹⁶ such as the existence of an investigation, staff’s analysis of the relevant product and geographic markets, the likely competitive effects of the transaction or conduct, the timing of the investigation, and potential remedies, but that does not disclose statutorily protected information. The U.S. Agencies have generally been willing to share this type of information with other agencies that have given it appropriate assurances of confidentiality, either through a bilateral or multilateral arrangement, such as the OECD Council Recommendation concerning International Co-operation in Competition Investigations and Proceedings¹⁷ or the ICN Framework for Merger Review Cooperation.¹⁸

23. In certain matters, the U.S. Agencies find that the exchange of confidential information is valuable to effectively engage in in-depth cooperation, which may include jointly analyzing theories of harm and designing appropriate remedies. The party providing the information is permitted to waive the protection of U.S. confidentiality laws to allow the cooperating agencies to discuss and share a party’s or third party’s confidential information. In merger investigations conducted by the U.S. Agencies, parties routinely provide voluntary waivers of statutory confidentiality protections to facilitate cooperation. The U.S. Agencies have found that waivers can make investigations more efficient and facilitate more consistent analysis and remedies by agencies investigating the same matter. The parties usually find that it is in their interest to grant waivers, as agencies in regular and frank communication with each other are more likely to reach consistent results.

¹⁵ See e.g., Antitrust Guidelines for International Enforcement and Cooperation, *available at* https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf, for discussion of the agencies’ confidentiality protections.

¹⁶ See United States, “Discussion on How to Define Confidential Information,” October 2013, <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310us-confidentialinfo.pdf>.

¹⁷ OECD, “Recommendation concerning International Co-operation on Competition Investigations and Proceedings” (“Recommendation”), 2014, at §VII *available at* <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>.

¹⁸ ICN, “International Competition Network’s Framework for Merger Review Cooperation,” 2012, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

24. Waivers can be helpful at different stages of merger review. For example, when they are provided early in an investigation, they can allow cooperating agencies to engage in in-depth discussions of relevant markets, theories of harm, and supporting evidence. Such discussions between cooperating agencies can help focus investigations more quickly on key issues and competitive concerns. Waivers can also be particularly important when the parties begin to discuss remedy proposals, including divestitures. Remedial orders can be very complex, and it is important that orders allow interoperability across jurisdictions. Through discussion and mutual understanding of the terms and operation of a remedy, agencies can, to the extent possible, ensure that consistent orders will be drafted. The discussion of confidential information is helpful and may be necessary to these discussions, and waivers can prove critical in these instances.

25. To facilitate understanding and use of waivers, the U.S. Agencies released a model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities and an FAQ about confidentiality protections and providing waivers.¹⁹ The ICN has also created a model waiver of confidentiality accompanying its report on Waivers of Confidentiality in Merger Investigations.²⁰

2.2 *Cooperation in Practice*

26. Cooperation is most effective when agencies have developed a relationship of trust and an understanding of each other's competition laws and practices. This understanding is gained most effectively through contacts between competition agency staffs. International organizations, such as the ICN, OECD and UNCTAD, as well as regional groups, are important fora in which such relationships and understanding can be developed. Once staffs understand each other's laws and have developed contacts at sister competition agencies, it is easier for staff to reach out to engage in merger cooperation.

27. An example of a joint regional initiative that has enhanced newer agencies' ability to review mergers is the Inter-American Competition Alliance,²¹ which was formed by Latin American competition agencies in cooperation with the U.S. Agencies. It holds monthly Spanish-language teleseminars with officials from competition agencies throughout North, Central, and South America. Each member agency proposes and selects topics to present. The programs focus on practical enforcement issues, many of which involve mergers. This experience sharing has increased the contacts among agencies.

28. In addition to developing relationships with newer agencies through work in international organizations, the U.S. Agencies routinely work bilaterally with newer agencies. For example, our staffs may work together to share practices related to merger review and other aspects of competition law and policy. This often takes place during study visits and through a robust technical assistance program²² that includes the FTC's International Fellows and Interns Program²³ and DOJ's Visiting International Enforcers

¹⁹ "Joint Model Waiver of Confidentiality for Use in Civil Matters Involving Non-U.S. Competition Authorities," and "FAQ," available at <https://www.justice.gov/atr/pr/justice-department-and-federal-trade-commission-issue-updated-model-waiver-confidentiality>.

²⁰ ICN, "Waivers of Confidentiality in Merger Investigations," available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

²¹ See "Quines somos?," <http://www.crcal.org/alianza-interamericana/quienes-somos>.

²² See, "U.S. Federal Trade Commission's and Department of Justice's Experience With Technical Assistance For The Effective Application of Competition Laws," 2008, at 7, available at <http://www.ftc.gov/sites/default/files/attachments/international-assistance-program/ftcdojtechnicalassist.pdf>.

²³ FTC, "International Fellows Program," available at <https://www.ftc.gov/internationalfellows>.

Program.²⁴ These programs serve to increase mutual understanding and build relations with enforcement partners around the world. Relationships and merger review practices built and strengthened through these contacts support cooperation on individual matters.

29. The U.S. Agencies look forward to working with others, including through multilateral fora, to ensure effective cooperation as the international competition community further develops informal and practical approaches to cooperation.

REFERENCES

FTC's recent study on merger remedies:

- https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; and

- the joint FTC/DOJ Antitrust Guidelines for Enforcement and Cooperation:

https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf (identical document also available on DOJ website).

²⁴ See Patricia Brink, Director of Civil Enforcement, Antitrust Division, U.S. Department of Justice, "International Cooperation: A View from the Trenches," Chicago, 2013, available at <http://www.justice.gov/atr/public/speeches/296073.pdf>.