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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the  
European Union**

**4-5 December 2017**

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More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm](http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm)

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## *European Union*

1. In an increasingly globalised economy, anticompetitive conduct engaged in by parties located in one country may produce harmful effects in other countries. It is therefore ever more relevant to understand how the European Commission (the Commission) exercises its power to apply European Union (EU) and/or European Economic Area (EEA) competition rules<sup>1</sup> to anticompetitive conduct capable of distorting competition within the EU/EEA in situations having an extraterritorial element (1), including how it determines appropriate remedies in that context (2).

### **1. The territorial application of EU/EEA competition rules**

2. The territorial application of EU competition rules is defined in the Treaty on the Functioning of the European Union<sup>2</sup> (TFEU) and in the EU Merger Regulation<sup>3</sup> (EUMR), respectively. Article 101 TFEU applies to agreements between undertakings having as their object or effect the restriction of competition "within the internal market". Article 102 TFEU applies to abusive exploitation of a dominant position "within the internal market or in a substantial part of it". Article 1(1) EUMR provides that the regulation applies to all concentrations "with a Community dimension" (read: EU dimension), as defined in Article 1(2) EUMR. For cases falling under the EEA Agreement, the geographic scope of the Commission's jurisdiction is extended to cover the EEA territory.

3. The territorial scope of application of EU competition rules may also cover conduct occurring outside of the EU. Indeed, the Court of Justice of the EU (the Court of Justice) has held that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of the TFEU if that agreement is operative on the territory of the internal market<sup>4</sup>. For conduct occurring outside the EU, the Commission's jurisdiction can be justified under public international law either on the basis of the implementation of conduct in the EU<sup>5</sup>, or by establishing the qualified effects of the practice in the EU<sup>6</sup>.

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<sup>1</sup> The EEA Agreement gives the Commission competence to apply EEA equivalents of Articles 101 and 102 TFEU, as well as to control concentrations of undertakings affecting competition within the EEA territory. Throughout this contribution, reference will be made to cases with an EU or EEA scope.

<sup>2</sup> Treaty on the Functioning of the European Union, Official Journal of the European Union C 326, 26/10/2012, 1 – 390.

<sup>3</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal of the European Union L 024 , 29/01/2004, 1 – 22.

<sup>4</sup> See for example, Case C-22/71 *Béguelin Import*, 1971, para. 11.

<sup>5</sup> Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, 1993.

<sup>6</sup> Case T-286/09 *Intel v Commission*, 2014, para. 244, confirmed by Case C-413/14, *Intel v Commission*, 2017, para. 47.

4. The *Woodpulp* judgment<sup>7</sup> confirmed that the Commission may extend its jurisdiction to cases in which an undertaking's conduct occurs outside the EU. The Court of Justice noted that anticompetitive conduct is composed of two elements, namely the formation of the agreement, decision, or concerted practice and the implementation thereof. The decisive factor of applicability of EU law is the place where the conduct is implemented, rather than the location of the undertaking. Indeed, undertakings could easily evade competition law prohibitions if the applicability of those prohibitions were made to depend on the place where the agreement, decision or concerted practice was formed<sup>8</sup>.

5. The recent *Intel* judgment of the Court of Justice confirmed that conduct which has foreseeable, immediate and substantial effects in the EU justifies the assertion of the Commission's jurisdiction. The Court of Justice in *Intel* noted that because the implementation test and the effects test pursue the same objective, namely to prevent conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the internal market, the effects test is a valid basis of jurisdiction<sup>9</sup>. The relevant criteria for establishing the Commission's jurisdiction is thus not based on a firm's location or nationality, but rather on the place where it implements its anticompetitive conduct or where it produces the conduct's effects.

6. Concerning mergers, the *Gencor* judgment, a case in which the disputed merger related to operations conducted entirely outside the EU, confirmed that the application of the EUMR to concentrations of undertakings conducting operations outside the EU is consistent with the EUMR and public international law "when it is foreseeable that a proposed concentration will have an immediate and substantial effect"<sup>10</sup> in the EU.

7. Importantly, the Commission cooperates and coordinates with competition agencies around the world when dealing with cases having an extraterritorial element, including as regards identifying appropriate remedies, in order to efficiently address harm to competition and provide legal certainty for undertakings by minimising the risk of diverging outcomes. The Commission applies the principle of international comity and cooperates on competition cases on the basis of international agreements concluded between the EU and third countries and memoranda of understanding entered into with other agencies<sup>11</sup>. The Commission also cooperates with other agencies on competition matters in multilateral fora such as the OECD and the ICN<sup>12</sup>.

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<sup>7</sup> Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö and others v Commission of the European Communities, 1993.

<sup>8</sup> Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö and others v Commission of the European Communities, 1993, para. 16.

<sup>9</sup> Case C-413/14, *Intel v Commission*, 2017, para. 45 and 46.

<sup>10</sup> Case T-102/96 *Gencor Ltd v Commission*, ECR II-753, 1999, para. 90.

<sup>11</sup> See in particular: <<http://ec.europa.eu/competition/international/legislation/legislation.html>>.

<sup>12</sup> See for example: ICN Merger Working Group Merger Remedies Guide, 2016; ICN Merger Working Group Practical Guide to International Enforcement Cooperation in Mergers, 2015.

## 2. The determination of appropriate remedies

8. The following five questions proposed by the OECD Competition Committee will address the Commission's practice in the determination of appropriate extraterritorial remedies.

### **1. How do you decide on the appropriate territorial scope of remedies against foreign conduct? How do you assess the effectiveness and proportionality of remedies extending beyond your territory to redressing harm to domestic interests? Please provide a brief description of relevant cases.**

9. Concerning mergers, EU merger control applies to foreign companies in the same way as it applies to EU companies. Concentrations falling under the EUMR have to be assessed by the Commission and can only be cleared if they do not lead to a significant impediment to effective competition in the internal market or in a substantial part of it. If the Commission comes to the preliminary conclusion that a notifiable concentration leads to serious doubts as to its compatibility with the internal market, the notifying parties may submit appropriate remedies to address those doubts. The Commission is not in a position to impose unilaterally any conditions to an authorisation decision, but only on the basis of the parties' commitments.

10. The principles pursuant to which the Commission assesses commitments proposed by the notifying parties are laid down in the Commission Remedies Notice.<sup>13</sup> In essence, in order to be acceptable, the commitments have to eliminate the competition concerns entirely and have to be comprehensive and effective from all points of view. Furthermore, commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled. Commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation's objective.

11. Against this background, the Commission is open to accept as a remedy, for example, the divestment of a business located outside of the EU or the divestment of a business including assets located outside the EU, if such divestment meets the requirements for acceptable commitments. Those types of remedies might, however, strictly speaking not be labelled "extraterritorial", because they can only be accepted if they have an impact within the territory of the EU and address the significant impediment to effective competition within the EU. The Commission's conditional clearance of the acquisition of Alere by Abbott Laboratories<sup>14</sup> can serve as an example for such a case constellation. The merging parties were both US companies that supply clinical test systems. In order to address the competition concerns identified by the Commission in several national markets in EU Member States, Abbott offered to fully divest (i) Alere's global Epoc business, including its manufacturing site in Ottawa, Canada, (ii) Alere's global Triage business, including its manufacturing site in San Diego, US, and (iii) Alere BNP reagents business, located in the US. Another example is the Commission's conditional clearance of the proposed merger between US-based chemical companies Dow and DuPont.<sup>15</sup> In order to address competition concerns and thus obtain the

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<sup>13</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, page 1.

<sup>14</sup> M.7982- Commission Decision 25 January 2017.

<sup>15</sup> M.7932 – Commission Decision of 27 March 2017.

Commission's approval, the notifying party committed to divest a significant part of DuPont's existing pesticide business, including its research and development organisation based in the US.

12. While remedies have to be effective in order to address the competition concerns identified, the Commission is also bound by the principle of proportionality. Therefore, the territorial reach of remedies will be limited to the EU/EEA or even to the territory of individual EU/EEA countries, if such territorial limitation does not negatively impact on the effectiveness or viability of the remedy.

13. For example, the behavioural commitments accepted by the Commission in the Microsoft /LinkedIn case are limited to the EEA. An example of the geographical limitation to an individual Member State is the Commission's conditional clearance of Advent International's acquisition of Morpho.<sup>16</sup> Both companies are worldwide suppliers of smart cards, but the Commission's competition concerns related only to the market for payment smart cards in France. In order to remedy the Commission's concerns, Morpho divested its payment smart card business in France. It did this by divesting its French subsidiary, which supplied payment smart cards to banking customers in France.

14. Conversely, in order to ensure the viability of the remedy, it may sometimes be necessary to extend its geographic reach beyond the EU territory. Hence, for instance, in the case of Syngenta's acquisition of Monsanto's sunflower seed business,<sup>17</sup> in order to remedy the concerns related to the parties' activities in the exchange and licensing of sunflower varieties, Syngenta offered to divest Monsanto's parental lines used to develop sunflower hybrids, as well as pipeline parental lines under development. In some cases, the geographic scope of the rights to commercialize the resulting hybrids extended not only to the EU but also Russia, the Ukraine or Turkey, the most significant European sunflower growing countries outside the EU. The extension of these rights was necessary to fully guarantee the long term viability of the divested businesses.

15. Concerning antitrust, under Regulation 1/2003,<sup>18</sup> there are two different scenarios for the application of what is traditionally called a "remedy" in EU antitrust cases. First, pursuant to Article 7(1) of Regulation 1/2003, the Commission can "*impose*" remedies on undertakings where it finds an infringement of Article 101 or 102 TFUE. Second, pursuant to Article 9(1) of Regulation 1/2003, the Commission can "*make binding*" remedies (*rectius*, commitments) proposed by the undertakings concerned if these remedies meet the concerns expressed by the Commission in its preliminary assessment, and on this basis close the investigation.

16. In both scenarios, the guiding principle for the Commission is that the geographic scope of the remedies should reflect the scope of application of the EU competition rules, be the conduct occurring, implemented within, or producing effects in the EU/EEA. The Commission's approach is well illustrated by the 2014 *Motorola* and *Samsung* decisions, concerning standard-essential patents ("SEPs", which are patents that cover technology which is essential to use in order to comply with a technical standard). In both cases, the

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<sup>16</sup> M.8258 – *Advent International / Morpho*, Commission Decision of 19 April 2017.

<sup>17</sup> M.5675 – *Syngenta / Monsanto's Sunflower Seed Business*, Commission Decision of 17 November 2010.

<sup>18</sup> Council Regulation (EC) No 1/2003, of 16 December 2002 on the implementation of the rules on competition laid down in Articles [10]1 and [10]2 of the Treaty; OJ L 1, 4.1.2003, p. 1.

Commission specifically limited its remedies to conduct occurring in the EEA, and only on SEPs granted in the EEA.

17. In the *Motorola* infringement decision,<sup>19</sup> the Commission concluded that Motorola abused its dominant position as a SEP holder by seeking and enforcing an injunction against Apple in Germany, based on one of its European second generation (GSM) SEPs. The decision therefore only concerned – and had an impact on – Motorola's ability to enforce its European SEP in Germany, even if Motorola was adopting similar conduct outside the EEA based on its non-European SEPs. The Commission also acknowledged in its decision<sup>20</sup> that, on 24 July 2013, the US Federal Trade Commission ("FTC") had adopted a Consent Order in its investigation against Google/Motorola, addressing concerns very similar to those underlying the Commission's investigation and prohibiting Google/Motorola from seeking injunctions worldwide on the basis of SEPs against a willing licensee within the jurisdiction of the United States District Courts. The Commission however noted that the FTC's Consent Order did not apply to licence agreements entered into prior to the Order and, also on this basis, dismissed Motorola's claim that the FTC's Consent Order would have neutralised any likely negative effect of its conduct vis-à-vis Apple in Germany<sup>21</sup>.

18. The Commission took the same approach in the *Samsung* commitment decision,<sup>22</sup> adopted on the same day as the *Motorola* decision. In this case, Samsung had sought injunctions against Apple in various EU Member States on the basis of its EEA SEPs for the 3G standard. The Commission informed Samsung of its preliminary view that it considered Apple a willing licensee on FRAND terms for Samsung's SEPs and that against this background, the seeking of injunctions against Apple based on Samsung's SEPs in several EU Member States may constitute an abuse of a dominant position in breach of Article 102 TFEU. To address these concerns, Samsung committed not to seek injunctions for five years in the EEA on the basis of its EEA SEPs relating to technologies implemented in smartphones and tablets, against licensees who sign up to a specified licensing framework. In this case too, therefore, the Commission did not interfere with the enforcement of foreign patents outside the EEA territory, even though Samsung was adopting the same conduct outside the EEA, based on its non-EEA SEPs. It is also worth noting that certain respondents to the market test had suggested that the commitments should have been worldwide in scope to prevent Samsung from using SEP-based injunctions outside the EEA as leverage for negotiations that have an impact within the EEA. The Commission ultimately did not expand the geographic scope of the commitments in the absence of evidence that Samsung's seeking of injunctions in jurisdictions outside the EEA on the basis of its EEA SEPs had an appreciable anti-competitive effect in the internal market<sup>23</sup>.

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<sup>19</sup> AT.39985 – *Motorola - Enforcement of GPRS standard essential patents*, Commission Decision of 29 April 2014.

<sup>20</sup> *Ibid*, section 5.8.

<sup>21</sup> *Ibid*, section 5.8 and recitals 371-374.

<sup>22</sup> AT.39939 – *Samsung - Enforcement of UMTS standard essential patents*, Commission Decision of 29 April 2014.

<sup>23</sup> *Ibid*, para. 92 and 114; See also Commission decision of 15 November 2011 in Case COMP/39.592 – *Standard & Poor's* (section 6.4), in which the Commission rejected a similar request to broaden the geographic scope of the commitments beyond the EEA.

**2. When designing remedies, do you consider potential conflicts with a foreign jurisdiction's law or policy? Do you consider whether the enforcement activities of another jurisdiction, including foreign remedies, may be affected? Do you consider whether your enforcement objectives can be achieved by foreign enforcement? What processes or actions do you follow to carry out such assessments?**

19. Concerning mergers, it is typically in the context of enforcement cooperation between competition agencies that the Commission faces the question of how a potential remedy submitted to the Commission may impact the merger review undertaken in a different jurisdiction. This question is of great practical relevance given that in recent years the Commission cooperated with one or several competition agencies from outside the EU in roughly half of its complex merger investigations, that is to say in cases that were cleared in phase 1 subject to remedies, or required a phase 2 investigation.

20. The cooperation with other agencies at the stage of the design of remedies typically follows cooperation with those agencies at the stage of investigation. Hence a working relationship with those agencies will have already been established. The principles and methods applied by the Commission in cooperating with other agencies are outlined and illustrated by its *Policy brief on International enforcement cooperation in mergers: main principles and recent experiences of May 2016*<sup>24</sup>. Moreover, the Commission's submission to the OECD in the context of the 2013 Round on Remedies in Cross-Border Merger Cases<sup>25</sup> remains valid.

21. As regards particularly enforcement cooperation at the stage of remedies, the following examples illustrate the Commission's approach.

22. The *Baxter International/Gambro* case<sup>26</sup> concerned the markets for renal failure therapy which, in the EEA, were likely to be national in scope. The Commission cooperated closely with the Australian Competition and Consumer Commission (ACCC) and the Commerce Commission of New Zealand. Timing was aligned to facilitate not only discussion regarding the competitive assessment in the respective jurisdictions at key-decision making stages, but also discussion on remedies at a time when these were being crafted in the different jurisdictions. The three authorities held joint calls to discuss, on the basis of confidentiality waivers, key remedy design issues. It was acknowledged that even if the transaction affected separate national/regional markets, cooperation would be beneficial given that remedies eliminating concerns in the different jurisdictions were likely to be global in scope. Ultimately, all three agencies accepted the global divestment of Baxter's continuous renal replacement therapy business as a remedy. Given the global scope of the divestment business, the three agencies continued to cooperate in the remedy implementation stage. The same trustee was appointed and the same purchaser was accepted by the three agencies.

23. The *UTC/Goodrich* case<sup>27</sup> was characterised by extensive cooperation between the Commission and the US Department of Justice (DOJ). Timing alignment and confidentiality waivers allowed not only for synergies for the agencies and the parties resulting from joint investigative efforts, but also coordination on remedy design,

<sup>24</sup> Available under: [http://ec.europa.eu/competition/publications/cpb/2016/2016\\_002\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf).

<sup>25</sup> OECD, DAF/COMP(2013)28.

<sup>26</sup> M.6851 - Commission Decision of 22 July 2013

<sup>27</sup> M.6410 - Commission Decision of 26 July 2012.

including the exchange of remedy proposals received from the parties and detailed discussions (involving the sharing of confidential information) on the design of remedies suitable to remedying the competition concerns. The agencies discussed the scope of divestment remedies, including the details and the duration of transitional arrangements between the merged entity and the divestment business, as well as key timelines for implementation of the remedies. Non-conflicting remedies were achieved as a result of this extensive cooperation. Cooperation continued at the remedy implementation stage.

24. The *GSK/Novartis vaccines business* (excl. influenza)/Novartis Consumer Health Business<sup>28</sup> is a case in point. Cooperation between the Commission and the ACCC also covered remedy implementation issues and on that basis, the ACCC accepted an arrangement whereby the monitoring trustee approved by the Commission would send its periodic reports (including a specific section relating to Australia) to the ACCC.

25. The Commission is, however, not empowered to seek any remedy curing a competition concern in a foreign jurisdiction that does not remedy a significant impediment to effective competition in the internal market or a substantive part of it. In other words, the Commission cannot seek a remedy on behalf of another competition authority from outside the EU. Conversely, if the Commission finds that a notifiable concentration would significantly impede effective competition within the internal market or a substantive part of that, it can only clear the case if the merging parties submit effective remedies to the Commission. While those remedies may be identical to the remedies submitted in other jurisdictions, it is legally not possible for the Commission to simply refer to the remedies accepted by another competition authority in order to conditionally clear a merger.

26. Concerning antitrust, as regards the infringement decisions under Article 7(1) of Regulation 1/2003, most of such decisions are accompanied by a mere "cease-and-desist" order, i.e. the Commission does not prescribe any specific behavioural or structural remedy, but rather simply orders the undertaking concerned to cease the infringement and not to commit again the same conduct or a conduct having the same or similar object or effect.<sup>29</sup> If the infringement is identified as a conduct implemented and/or having effects in the EU, then the undertaking concerned will need to change its behaviour in so far as it is implemented and/or produces its effects in the EU, while remaining free to continue to carry out its business as it wishes in the rest of the world. Where it intends to prescribe a specific remedy, the Commission is bound by the principle of proportionality. It follows from this principle that any burden imposed must not exceed what is appropriate and necessary to reach the objective of bringing the infringement effectively to an end. This means that there is an inherent link between the nature of the infringement and the remedies available to the Commission, based on the facts and circumstances of the individual case, including with respect to the territory concerned.

27. As regards the commitments decision pursuant to Article 9(1) of Regulation 1/2003, it is up to the undertakings concerned to propose remedies to settle the case. The undertakings concerned are best placed to identify remedies that can meet the Commission's competition concerns without unduly interfering with their own business, and have a duty to propose remedies which comply with applicable foreign laws and

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<sup>28</sup> M.7276 - Commission Decision of 28 January 2010.

<sup>29</sup> See Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003, paragraph 188: "The standard (baseline) remedy in Article 7 decisions are cease and desist orders".

regulatory obligations, especially if they face parallel investigations by different competition agencies.

28. The Commission also cooperates in antitrust matters with other competition agencies in order to reach common solutions or at least pre-empt or solve possible conflicts, especially in case of parallel investigations or conduct which are extraterritorial by their very nature. This benefits the undertakings concerned which should therefore have an interest in making this cooperation possible by providing waivers to the competition agencies. The *E-book* and *Oneworld* cases are illustrative of the benefits of cooperation with foreign agencies.

29. The *Apple E-books* case is a very good example of how close cooperation and a common approach between competition authorities (in this case, between the Commission and the US DOJ) can be effective to seek a global (and rapid) solution to similar competition concerns stemming from conduct implemented in different jurisdictions.

30. In December 2011, the Commission initiated formal proceedings against five publishers<sup>30</sup> and Apple for a suspected breach of Article 101 TFEU in connection with the sale of e-books in the EEA. The Commission had concerns that the five publishers and Apple may have breached Article 101 TFEU by jointly switching the sale of e-books from a wholesale model to agency contracts containing the same key terms (in particular an unusual so-called "Most Favoured Nation" ("MFN") clause for retail prices). The agency model allowing more control by publishers over retail prices, the Commission had concerns that this switch might have been the result of collusion between competing publishers, with the help of Apple, and might have aimed at raising retail prices of e-books in the EEA or preventing the emergence of lower prices.

31. The same conduct had already been implemented in the US and was under investigation by the DOJ, based on similar concerns. The Commission and the DOJ cooperated very closely and extensively, on the basis of waivers from the parties. The cooperation spanned all phases of the case, through regular phone calls and document exchanges. The case teams discussed in details all key steps of their respective investigations and even co-ordinated the timing of major steps to the extent possible, in view of the procedural differences. Such cooperation allowed both authorities to reach a common solution.

32. To address the Commission's and the DOJ's concerns, the companies offered in particular to terminate on-going agency agreements and to exclude certain clauses in their agency agreements during the next five years. The publishers also offered to give retailers freedom to discount e-books, subject to certain conditions, during a two-year period. On this basis, on 12 December 2012, the Commission adopted a decision pursuant to Article 9 of Regulation 1/2003 addressed to Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster and Apple to make these commitment legally binding.<sup>31</sup> On similar terms, the DOJ settled the case with the publishers and successfully took Apple to court.

33. Concerning the *Oneworld* case, the EU-US Air Transport Agreement of 30 April 2007 (so-called "Open Skies Agreement") formalised cooperation on competition matters

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<sup>30</sup> The five publishers are Penguin, Simon & Schuster, HarperCollins, Hachette Livre, Verlagsgruppe Georg von Holtzbrinck/Macmillan).

<sup>31</sup> On 25 July 2013, the Commission adopted an Article 9 decision addressed to Penguin.

between the Commission and the US Department of Transport (DOT), which is responsible for applying US competition law to international aviation. Annex 2 to the agreement allows for general exchange of views and experience between the two authorities and aims at inter alia reducing the potential conflicts in the application of the competition regimes in the EU and US and promoting compatible regulatory approaches through a better understanding of the methodologies, analytical techniques and remedies used in the respective competition reviews of the Commission and DOT. The Oneworld joint venture agreement among British Airways, American Airlines and Iberia was the first test of this cooperation. The prospected joint venture covered all the parties' passenger air transport services on the transatlantic routes between Europe and North America. In their parallel but independent reviews of the proposed joint venture, the Commission and the DOT discussed their respective competitive assessments with a view aimed at avoiding an unnecessary burden on the parties and conflicting applications of remedies, as a result of the separate investigations in the two jurisdictions.

34. In September 2009, the Commission sent a Statement of Objections to the parties, outlining the Commission's preliminary view that the extensive cooperation between the parties, which involved revenue-sharing and joint management of schedules, pricing and capacity on all routes between North America and Europe, might have breached Article 101 TFEU.<sup>32</sup> To address the Commission's concerns, the parties proposed commitments aimed at enabling competing airlines to start operating or increase their services on the affected routes by lowering barriers to entry. In particular, the parties have notably offered to make landing and take-off slots available at London Heathrow or London Gatwick airports to facilitate the entry or expansion of competitors on routes between London and New York, Boston, Dallas and Miami.

35. On 14 July 2010, the Commission adopted a decision pursuant to Article 9 of Regulation 1/2003 to make the commitment legally binding.<sup>33</sup> The Commission's decision provides for a close involvement of the DOT during the key steps of the implementation procedure, in particular when selecting the airlines to obtain slots from the parties. One week later, on 20 July 2010, the DOT also issued its Order approving the joint venture, explicitly referring to the Commission's decision making legally binding the commitments offered by the parties.

**3. When you imposed remedies extending beyond your territory, were the remedies applied? How did you monitor implementation? What were the difficulties you faced during this process, and what actions did you take?**

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<sup>32</sup> On these routes, the parties' position was particularly strong and there were high barriers to entry or expansion, in particular lack of peak-time slots at London Heathrow/Gatwick and New York Newark/JFK airports, frequency advantage of the parties, limited access to connecting traffic and the parties' strength in terms of frequent flyer programmes, corporate contracts and marketing. The agreements would eliminate competition between the parties, which the competitors would not be able to replicate on the routes of concern. In addition, the Commission provisionally concluded that the anti-competitive effects were also likely to arise due to restriction of competition between the parties and third parties. Hence, on London-Chicago and London-Miami, the agreements would result in further actual or potential anti-competitive effects by means of the parties restricting their competitors' access to connecting traffic, which is of key importance for operations on these transatlantic routes.

<sup>33</sup> COMP/39.596 – BA/AA/IB, Commission Decision of 14 July 2010.

36. Concerning mergers, in the Commission's experience, remedies that are submitted by the merging parties and made binding upon them in order to allow the Commission to conditionally clear a merger are complied with regardless of their territorial reach. In case a company intentionally or negligently fails to comply with remedies, the Commission is empowered to impose sanctions up to 10% of the aggregated worldwide turnover of the undertakings concerned (Article 14(2) lit. d of the EUMR). Moreover, if the merging parties do not comply with a condition<sup>34</sup> under which a clearance decision pursuant to Articles 6(2), or Article 8(2) of the EUMR was granted, the conditional clearance decision automatically no longer applies and the transaction is to be considered as unauthorised. If in such situations the conditions of Article 8(4) lit. b EUMR are fulfilled, the Commission may order the dissolution of an implemented concentration, as well as appropriate measures to this effect. Furthermore, pursuant to Article 8(5) lit. b of the EUMR, the Commission may take interim measures appropriate to restore or maintain conditions for effective competition. Finally, if the merging parties do not comply with an obligation (as opposed to a condition) that was attached to the conditional clearance decision, the Commission may revoke that decision (see Articles 6(3) lit. b and 8(6) lit. b of the EUMR). The remedy implementation is typically supervised by a monitoring trustee who reports to the Commission.

37. Concerning antitrust, Article 24(1) of Regulation 1/2003 provides for the Commission to impose periodic penalty payments to enforce compliance with remedies, whether imposed under Article 7 or rendered binding under Article 9, of up to 5% of the daily turnover (of the preceding business year) per day. In case of non-compliance with a commitment decision, the Commission can also impose a fine of up to 10% of the undertaking's annual turnover in the preceding business year pursuant to Article 23(2) of Regulation 1/2003. To date, the Commission has imposed a fine or periodic penalty payments for non-compliance in three cases only, but in none of these cases extraterritoriality was a relevant issue. Monitoring is however an aspect where cooperation between agencies can be particularly important.

#### **4. Do you have working relationships with other competition agencies that you rely on when handling cases (mergers, cartels, abuse of dominant position) involving their territory?**

38. The Commission has established close working relationships with other agencies with whom it frequently cooperates in merger and antitrust investigations that affect both jurisdictions<sup>35</sup>. At the same time, the Commission regularly establishes contact with other agencies on an *ad hoc* basis where this is required in light of the specific features of a merger or antitrust case under scrutiny. Cooperation with other competition agencies is intensified if the parties to a case grant a waiver. Waivers enable more complete communication between relevant agencies and with the parties to a case, leading to a

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<sup>34</sup> Note that the EUMR distinguishes between conditions and obligations which may be attached to a clearance decision in order to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to remedying the competition concerns. Conditions are requirements for an achievement of the structural change of the market (e.g. the divestiture as such in the event of a divestiture remedy). Obligations concern the implementing steps which support the structural change (e.g. hold-separate and ring-fencing obligations).

<sup>35</sup> See in particular: <<http://ec.europa.eu/competition/international/legislation/legislation.html>>.

more informed decision-making process and more effective coordination among agencies.

**5. Do you consider that some types of competition issues raise more frequently than others questions about the extraterritorial reach of remedies? If so, can you describe those issues?**

39. Mergers that are notifiable in several jurisdictions and that raise competition issues of common concern are likely to warrant at least some level of cooperation and coordination between the agencies concerned. This is particularly the case for mergers affecting global or cross-border regional markets. However, it may also be relevant where the geographic scope of the markets is confined to the respective jurisdictions if, for instance, competition problems in different national or regional markets are remedied through the divestiture of a global business.