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ENFORCEMENT COOPERATION AMONG ANTITRUST AUTHORITIES

by John J. Parisi,

U.S. Federal Trade Commission before the IBC UK Conferences

Sixth Annual London Conference on EC Competition Law
London, England
19 May 1999
(Updated March 2000)

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I. INTRODUCTION

Cooperation among antitrust authorities facilitates the effective and efficient enforcement of antitrust laws and, thus, the maintenance of competition in markets. That's not an expression of economic theory, but rather a fact of life. As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and, thus, have led antitrust authorities in the affected jurisdictions to communicate, cooperate, and coordinate their efforts to achieve compatible enforcement results.

These efforts succeed in the vast majority of cases, despite differences in laws, procedures, and, sometimes, the interests of the affected countries. Like taxes, environmental regulations, and employment laws, antitrust rules differ somewhat from jurisdiction to jurisdiction, both as to scope and threshold levels of violations as well as the procedures which are followed in order to obtain and assure compliance. These differences reflect policy-makers' choices based upon assessments of the economic structures in their jurisdictions and the role that competition should play in them. And these differences occasionally result in a transaction or conduct being found in violation of one reviewing jurisdiction's laws, but not another's. Also, a nation's "important interests" may include some whose defense (*e.g.,* jobs, "national champions," etc.) is not necessarily compatible with antitrust enforcement. When competition enforcers reach different, albeit compatible, results -- as in *Boeing/McDonnell Douglas* or *Ciba-Geigy/Sandoz* — some question -- wrongly, given the overall record -- the efficacy of cooperation.

Given the growth of competition policy enforcement around the world -- especially over the last ten years -- companies and their counselors should understand how antitrust authorities effectively

cooperate with one another and how, thereby, their transborder business dealings can be efficiently reviewed. The purpose of this paper is to describe how enforcers cooperate with one another and to advise those concerned about antitrust enforcement how they can facilitate — or, if they so choose, hinder — cooperation. The paper starts from the following premises:

- first, that the similarities among competition laws and their enforcement are greater than the differences;

- second, that cooperation in enforcement is just as necessary when common enforcement goals are sought as when differences arise;

- third, that enforcement cooperation is broadening and deepening. It is broadening, as evidenced by new bilateral cooperation agreements like the new bilateral agreements between the U.S. and Israel, Japan, and Brazil; the U.S./Australia Mutual Assistance Agreement; and the bilateral agreement adopted this year between the European Communities and Canada. It is deepening through the almost-daily contacts the U.S. antitrust agencies -- the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) -- have with their counterparts in foreign antitrust enforcement authorities;

- fourth, that in a world of increased transborder trade and investment, the private sector and the economy as a whole benefit from sound antitrust enforcement, the effective and efficient enforcement of which is enhanced by international cooperation; and,

- fifth, that there appears to be some confusion about how cooperation "works" and how private parties can be affected by it -- as well as how they can influence it.

Therefore, this paper will review the instruments through which antitrust enforcers cooperate; clarify their essential provisions; and, then address four topics commonly raised by practitioners: (1) what types of matters are covered by cooperation instruments; (2) how cooperation "works" in day-to-day practice; (3) what types of information are exchanged thereunder; (4) pros and cons of waiving confidentiality rights; and, (5) effective participation in the process of bi- or multijurisdictional enforcement.

II. THE INSTRUMENTS OF COOPERATION

International cooperation in antitrust enforcement evolved from conflicts that arose out of the differences in law and policy noted above and which highlighted the need for mechanisms aimed at avoiding, managing, and resolving such conflicts. These mechanisms are embodied in a multilateral instrument adopted by the members of the Organization for Economic Cooperation and Development (OECD) and a number of bilateral agreements.

III. The OECD Recommendation

In 1967, the OECD adopted a "recommendation" that its member countries cooperate with one another in the enforcement of their national competition laws. The OECD Recommendation has been modified several times, most recently in 1995. Essentially, it provides that Member countries: (1) timely notify other members when the latter's "important interests" are affected by an investigation or enforcement action; (2) share information to permit the member whose interests are affected to comment to, and consult with, the proceeding member; (3) coordinate parallel investigations where

appropriate; (4) assist one another in locating and obtaining information located in each other's territory; and, (5) consider addressing anticompetitive conduct affecting its important interests but occurring outside its territory by requesting the authorities in the country where the conduct occurs to

take action (what is called "positive comity").

IV. The bilateral cooperation agreements

Following in the spirit of the OECD Recommendation, the United States has entered into seven bilateral cooperation agreements with: Germany (1976), Australia (1982), Canada (1984 and 1995), the European Communities (1991), Israel (1999), Japan (1999), and Brazil (1999). As in the OECD Recommendation, each of these bilateral agreements includes notification provisions, which contemplate that each party will provide the other with information about planned actions which may affect the other's important interests. While the specifics vary among the five agreements, each also contains provision for consultations to resolve mutual or unilateral concerns, whether based on notified activities, or otherwise. Each agreement also articulates, in some form, the intention of both parties to cooperate in matters of antitrust enforcement, where such cooperation is feasible in both practical and legal terms. The 1991 EC/US agreement, the 1995 Canada/US agreement, and the 1999 agreements between the U.S. and Israel, Japan, and Brazil also include "positive comity" provisions calling on each party to weigh the impact of anticompetitive conduct on the other party as an additional reason in favor of challenging conduct that also violates the enforcing party's antitrust laws.

None of these agreements, however, override domestic laws that prohibit the sharing of confidential business information without the provider's consent, and all of the agreements specifically allow the requested party to take its own national interests into account in determining whether and to what extent to provide the requested cooperation.

Under U.S. law, these agreements are "executive agreements." That is, they are formal, binding international agreements that contain commitments on the exercise of discretionary authority (as, for example, in the non-application of "blocking" statutes in Article 5.2. of the Australia/US agreement). Entry into such agreements by FTC and DOJ on behalf of the U.S. Government must first be authorized by the State Department under the terms of the Case-Zablocki Act of 1972. And, because they are not treaties -- which require the consent of two-thirds of the U.S. Senate -- these agreements therefore do not override any provisions of U.S. law with which they may be inconsistent.

V. The EC-US "positive comity" agreement of 1998

The 1991 EC/US Agreement was the first bilateral agreement to incorporate the so-called "positive comity" concept under which, for example, the U.S. Government could ask the European Commission (EC) to take enforcement action against anticompetitive activity in Europe with effects in the United States. Based on experience under the 1991 EC/US agreement, the European Communities and the United States entered into a new, separate agreement in June 1998 that clarifies and elaborates on when positive comity ordinarily will be invoked and what processes will follow.

Under Article V. of the 1991 EC/US agreement, EC and U.S. antitrust authorities have considered a number of matters for possible referral under the positive comity provision. Several matters have been handled on an informal basis, but the EC is also currently handling a matter formally referred by the DOJ under the positive comity provision; this case involves allegations of anticompetitive conduct by European airlines that may prevent U.S.-based airline computer reservation systems from competing effectively in certain European countries.

The 1998 agreement has two purposes: (1) to help ensure that anticompetitive activities do not impede trade and investment flows between the parties or competition and consumer welfare within their territories; and (2) to establish cooperative procedures to achieve the most effective and efficient enforcement against anticompetitive activities that occur principally in and are directed principally toward one party's territory. The agreement provides, among other things, that, under certain

conditions, a party will normally exercise its discretion to stay its hand with respect to certain anticompetitive practices in the territory of the other party which the latter has agreed to investigate pursuant to a positive comity request. This reflects the cooperation and trust that the parties have accumulated over years of working more closely together.

VI. MLATs and other mutual assistance agreements

The Mutual Legal Assistance Treaty ("MLAT") between the U.S. and Canada permits the sharing of information obtained in criminal antitrust investigations that otherwise must be kept confidential. In order to permit such sharing in civil cases, Congress enacted the International Antitrust Assistance Act of 1994 ("IAEAA"). This legislation authorizes the FTC and DOJ to enter into bilateral antitrust mutual assistance agreements with foreign governments that will authorize the FTC and DOJ to share otherwise confidential antitrust evidence in their possession with foreign antitrust authorities (§ 2); use their respective investigative powers (subpoenae, CID's) to gather antitrust evidence for use by foreign antitrust authorities (§ 3); and, withhold from public disclosure any antitrust evidence obtained from foreign antitrust authorities (§ 8(B)).

The first IAEAA agreement was reached with Australia and was published for public comment in April 1997. That agreement was signed on 26 April 1999 and has entered into force. The FTC and DOJ hope to be able to negotiate agreements with other jurisdictions as well.

VII. COOPERATION IN PRACTICE

1. What types of matters are covered - and how

The "trigger" for actions (notification, information sharing, etc.) under the OECD Recommendation and the bilateral cooperation agreements is when antitrust enforcement activity by one jurisdiction may affect "important interests" of another jurisdiction. Before addressing "important interests," a review of the types of matters covered is useful.

The bilateral cooperation agreements typically cite the parties' antitrust or competition laws to define the types of matters covered by the agreements. It is fair to say that these agreements cover just about everything that most people would agree is antitrust or competition policy. For example, the 1991 EC/US Agreement covers mergers falling under the U.S. Clayton Act and the Federal Trade Commission Act or under the EU Merger Control Regulation, horizontal and vertical agreements, and single firm behavior, whether described as abuse of a dominant position (as in EU law) or monopolization (as in U.S. law).

This should be pretty straightforward. Yet, some confusion over cooperation in merger cases arose last year, perhaps stemming from the exclusion of mergers from the 1998 EC/US Positive Comity Agreement. As explained upon the signing of the Agreement on June 4, 1998, the merger review provisions of both U.S. and EU law contain statutory deadlines for decisions that effectively preclude the suspension or deferral of investigations. This exclusion certainly does not affect the operation of the 1991 EC/US Agreement. In fact, by far, most of the cooperative efforts between the United States and the EC have involved merger cases.

While the coverage of the agreements should be clear, there is potential for misunderstanding about what constitutes "important interests" that trigger the notification, information sharing, cooperation, coordination, and consultation provisions of the cooperation instruments. In the 1991 EC/US Agreement, the parties included a number of circumstances that ordinarily trigger notification and, thereby, give each party the opportunity to determine the extent to which its important interests might be affected. That list (at Article II. 2.) covers matters that:

- are relevant to enforcement activities of the other party;

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

- involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its States or Member States;

- involve conduct believed to have been required, encouraged or approved by the other Party; or,

- involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

The OECD Recommendation adds the following circumstances that affect another Member country's important interests and, thereby, should be notified:

- where one country makes a written request for information located in the territory of another Member country; and

- when one country's enforcement activity involves remedies that would require or prohibit behavior or conduct in the territory of another Member country.

Since these are matters that "ordinarily" require notification, room is left for cooperation in matters implicating a party's important interests that may fall outside those listed in Article II.2. The Agreement's provisions concerning avoidance of conflicts (Article VI, which contains comity balancing factors) and consultation (Article VII) provide a mechanism for dealing with extraordinary interests. These interests sometimes involve concerns that are outside the realm of competition policy; for example, in 1990, the Government of Canada expressed concern over the potential impact on the supply of rabies vaccine in Canada that might result from antitrust enforcement action by the FTC in regard to Institut Merieux's acquisition of Connaught Biosciences.

Unfortunately, despite the enforcement agencies' best efforts to explain the Agreement and operations under it, some misunderstandings of the Agreement have been reported, particularly during the course of the *Boeing/McDonnell Douglas* merger case. One such misconception was the assertion that, in a merger notified to both parties, one party "goes first" while the other defers. This is clearly wrong -- just as wrong as the notion, or perception, that confidential business information is shared under the Agreement. But, before delineating what information can be shared and what cannot be shared, a step-by-step description of the process that takes place among reviewing agencies should help put information exchange into context.

B. How cooperation and coordination "works"

Having described what types of matters are covered by cooperation agreements, and before delineating in detail the information exchanged by the authorities under these agreements, a depiction of what transpires among antitrust authorities should be helpful to counselors in advising their clients on their approaches to those authorities.

During this decade relationships among competition enforcement authorities have broadened and deepened. The U.S. agencies enjoy excellent relations with competition authorities even in countries that have, in the past, strongly objected to the extraterritorial application of U.S. law and investigations. And, the more we deal with other agencies, the more we deepen the

relationships with our counterparts and broaden the institutional relationships through making the acquaintance of more and more of the investigative staff members, supervising officials, and decision makers. Of course, this has been facilitated by the merger wave which has given us ever more opportunities to work together, deepening old acquaintances and making new ones, and building trust between the agencies.

The process described is conducted and overseen by professional staff in the international departments of the agencies. These public servants are grounded in their own agency's law and practices and have acquired expertise about other systems. They have gotten to know and trust their counterparts and they serve as the diplomats who bring together the investigative staffs and help to bridge language, knowledge, and analytical gaps between the investigators. They also advise the investigative staff members of the limits of cooperation — specifically, for example, in terms of the information that can be shared in these conversations.

Ultimately, of course, the staff must persuade the decision makers to accept the enforcement recommendations that they have made. And, at that level, too, there is fairly regular, informal communication.

A few years ago at the Fordham Corporate Law Institute in New York City, Pierre Bos, a prominent Brussels lawyer, expressed concern about communications among competition officials. Others, too, have raised questions about cooperation among enforcers and, in particular, what information is shared among the authorities. The ensuing discussion is intended to make the process more transparent. The discussion assumes a merger case that is subject to review by the U.S. authorities and involves a European-based firm.

2. ***How the agencies learn about potential cases***

Rarely do the authorities first learn of a merger through the submission of premerger notification. The merger wave of the nineties has been matched by the proliferation of media outlets — both print and electronic — that report hints of merger talks. Yet, old reliables, like the *Financial Times* and the *Wall Street Journal*, remain good sources of news about potential mergers. The agencies pay attention to these reports and may seek to substantiate them by calls to the companies or to their counselors. The agencies' staffs will also talk to one another on the basis of press reports to make sure that potential reviewing agencies are aware of such reports and can begin to determine whether they will have jurisdiction to review the transaction.

Sometimes the companies' counselors call the agencies to provide advance notice that a deal is in the works. This is a wise thing to do — certainly in contrast to the approach suggested by some counselors on the U.S. side of the Atlantic. The size of the merger wave is manifested in the growth in the number of notifications over the last few years: In fiscal year 1998, the U.S. agencies received 4,728 notifications, 28 percent more than the previous year and three times the number of filings received in 1991. Given the increasing number of merger notifications in the United States, some counselors may be tempted to advise their clients to "file and pray" that the agencies will overlook the import of that merger amidst the mass of filings. Counselors offering such advice may do so in reliance on two elements of the U.S. premerger notification regime as established under the Hart-Scott-Rodino Act and the regulations promulgated thereunder by the Federal Trade Commission:

- First, the U.S. agencies may accept premerger notification on the basis of a non-binding letter of intent. This is in contrast, for example, to Article 4.1. of the EU Merger Control Regulation which requires, *inter alia*, a formal agreement to merge as a precondition to notification. Thus, parties can file with the U.S. agencies at an early stage of their merger negotiations.

- Second, the confidentiality provisions of the H-S-R Act prevent the U.S. agencies from making public even the fact that companies have submitted a premerger notification under that Act. This is in contrast to Article 4.3. of the EU Merger Control Regulation which requires the EC to publish the fact of the notification in the Official Journal, which provides third parties with notice and an opportunity to submit their views on the proposed merger to DG-IV.

However, the U.S. premerger form and the combined experience of the U.S. agencies makes it extremely unlikely that an anticompetitive merger will slip through undetected.

Meanwhile, on the European side of the Atlantic, parties whose mergers fall within the EC's competence have learned to avail themselves of the prenotification consultations offered by DG-IV.

Increasingly, in the initial contact between the merging parties and agency staff, the agency staff will inquire whether the proposed merger must be notified to other jurisdictions and they will encourage the parties to consider coordination of those reviews, including waiving confidentiality.

3. ***Determining which agencies will review the merger***

With the proliferation of merger control in the world, especially during the last few years, determining what agencies will claim jurisdiction to review a merger has become an ever greater challenge for counselors. J. William Rowley and Donald I. Baker published the first edition of their treatise, "International Mergers: The Antitrust Process," in 1991. That edition covered the ten principal industrial jurisdictions with operating and effective antitrust merger control regimes. With the publication of their second edition in 1996, the number had grown to 29. All EU Member States, save Luxembourg, now have merger control. And, despite the 1997 amendment to the EU Merger Control Regulation (expanding the "one-stop shop" to take in certain mergers that otherwise would be notified to three or more Member States), we on the U.S. side have found ourselves cooperating and coordinating with Member State competition authorities in significant cases that fall below the "community dimension" thresholds of Article 1. of the EC Merger Control Regulation; for example, *Federal-Mogul/T&N plc* and *IMS-Health/PMSI*.

Accordingly, when the agencies learn of a possible merger through public reports, they then seek to determine which of them will actually review the merger. On the European side of the Atlantic, the questions are, whether the merger falls below the EU's thresholds, and, if so, which Member States will review it.

Although at the outset of this discussion, U.S. jurisdiction was assumed, it is important to note another distinction between the U.S. and EU merger control regimes. On the U.S. side, there are two separate threshold questions - first, whether the merger falls within U.S. subject matter jurisdiction and, second, whether the merger is subject to mandatory premerger notification under the H-S-R Act and Regulations thereunder. The scope of the premerger notification obligation is not as broad as the jurisdiction granted the agencies to review mergers under

the Clayton Act. For example, certain transactions involving foreign parties or foreign assets are exempt from the premerger notification obligations; yet, if such a transaction was likely to substantially lessen competition in the United States, the U.S. agencies might seek nevertheless to challenge it. This is in contrast to the EU Merger Control Regulation in which the EC's competence over mergers and the premerger notification obligation are co-extensive.

Proceeding with the discussion on the basis that the U.S. has subject matter jurisdiction and that the H-S-R Act and regulations require premerger notification, the next question is which agency, the FTC or DOJ, will review the merger. This question may not be answered by resort to statute or regulation. Instead, the determination is made through a liaison process that exists between the two agencies in which the one agency "clears" the other to investigate a particular matter. These clearance decisions are based primarily on the relative expertise one agency has with respect to the industry affected by the proposed merger or the particular parties to the merger. The agencies have endeavored to resolve this question as quickly as possible after notification, because the investigation may not proceed until they resolve clearance.

When the U.S. agencies learn about a possible merger, frequently one agency will request clearance to begin investigating it rather than wait for the parties to submit their notification. If there is no difference of opinion between the agencies, clearance can be granted and a preliminary investigation will be opened.

As soon as an investigation is opened, and the staff determines that the case may affect foreign interests -- for example, because one of the parties is foreign-based, as is assumed for purposes of this discussion -- the agency will formally notify the governments of the affected party(ies) under the OECD Recommendation or the relevant bilateral agreements. The 1991 EC/US Agreement (Article II.3.(a)(i)) provides that the U.S. agencies should notify merger cases no later than issuance of the so-called "second request." Typically, the U.S. agencies do not wait that long for two reasons: First, the fact of issuance of a second request is protected by the confidentiality provisions of the H-S-R Act, and so notification tied to that event would have the effect of disclosing it. Second, the earlier the agencies notify foreign governments, the earlier they can share information, cooperate, and, as appropriate, coordinate the U.S. investigation with those of the foreign agencies that are also reviewing the transaction.

Determining the timetable

One of the first things the investigative staffs of the reviewing agencies do upon commencing communication is to determine deadlines for decisions. This is easier for the EC and some other European authorities to determine and to communicate than it is for the U.S. agencies. For example, the EU Merger Control Regulation stipulates a timetable that locks in upon notification, and the deadlines cannot be waived. However, on the U.S. side, once the U.S. agencies issue a second request, the timetable becomes indefinite. The parties to the merger can take as much time as they want to comply with the agency's second request.

Once they do comply, the agency has twenty days in which to decide whether to seek a court injunction, blocking consummation of the merger. However, unlike EU law, the parties and the agency may agree to defer that deadline, oftentimes to allow sufficient time to reach a negotiated settlement of antitrust concerns arising out of the merger.

Determining whether affected markets overlap

Proceeding to the substance of the case, the agencies' staffs will identify the markets affected by the merger that are of concern. The staffs share their analyses which are an amalgamation of all the evidence that they have obtained in their respective investigations. As will be described in much more detail in the next section of this paper, the agencies' staffers do not share specific pieces of evidence, but rather their tentative conclusions as to the scope of the relevant product and geographic markets.

Sometimes, the scope of the market in one or both dimensions is clear and uncontroverted. But, sometimes it is not and in several cases in just the past year, the U.S. agencies and their foreign counterparts held several discussions about the scope of the relevant market, each time having refined their analyses on the basis of additional information obtained in the course of their investigations. In one such case during 1998, the separate investigatory findings of FTC and EC authorities reinforced each other's analyses and led to the mutual conclusion that the merger in question did not raise anticompetitive concern.

The issuance of the EC's market definition guidelines in 1997 confirmed the view that the U.S. and EC authorities take very similar approaches to market definition. In practice, difference over the scope of a relevant product market occurs rarely, if at all. The EC's first Report to the Council and the Parliament on the operation of the 1991 Agreement expressed a similar view, stating that

> cooperation on individual cases has shown a remarkable similarity in the analyses of the Commission and its US counterparts. There have been relatively limited divergences of view. This is, in the main, attributable to the consistency of the economic analysis of the competition authorities. . .

Delimiting the scope of the geographic market also may not be clear. Many markets remain national in geographic scope because of government regulations, including standards and licensing, such as those for pharmaceutical products. However, the enforcers are not always faced with products that are regulated to such a degree. The reduction, or outright elimination, of trade barriers along with improvements — including lower costs — in transportation of goods have led not only to increases in import-export trade; they have also broadened the perspective of antitrust enforcers in determining the geographic scope of markets, as well as in evaluating potential entry into those markets. Despite all the talk about "globalization," however, we cannot assume that because entry barriers and transport costs are low, a new foreign-based entrant will materialize and neutralize anticompetitive effects of a merger.

Assessing competitive effects, identifying overlapping interests and reaching complementary remedies

Once the staffs of the reviewing authorities have completed their market analyses, they can then assess the potential competitive effects of the proposed transaction in the affected markets and whether those effects will be felt similarly in each of the reviewing jurisdictions. In a number of cases, we have found potential anticompetitive effects to be limited to one side of the Atlantic. But, experience has taught us that we can not assume that our enforcement interests will overlap only in those cases where we determine that the relevant geographic market is the world or, perhaps, transatlantic. In some cases where the relevant geographic markets are national in scope (as in the pharmaceutical industry merger cases), the market participants may be the same and the characteristics of the markets (market shares, ease of entry, etc.) may mirror each other.

In cases where the staffs find that they have overlapping concern over potential anticompetitive effects arising out of a proposed merger, they exchange ideas about remedies so as to avoid conflict and to promote a remedy - or complementary European and American remedies - that satisfy the concerns in each jurisdiction. Cases illustrating cooperation at this level include *Shell/Montedison, Guinness/GrandMetropolitan*, and, just within the last few months, *ABB/Elsag-Bailey* and *Zeneca/Astra.*

Experience has also taught us that we must be aware of each other's concerns that do not overlap, lest we seek remedial measures involving an asset that may be necessary to remedy a concern in another jurisdiction. The *Ciba-Geigy/Sandoz* merger, which the FTC and the EC (among other agencies) reviewed in 1997, provides a good example of this situation. The competition analysis in both jurisdictions examined, among other aspects, the competitive effects of the merger on supply of methoprene, the key active ingredient in animal flea control products, of which Sandoz was the only successful producer. The EC's concern over the parties' dominant position in the methoprene market was satisfied by their undertaking to grant non-exclusive licenses for its production. The FTC's concern over the effect of the merger in the North American market for flea control products was satisfied by a divestiture of Sandoz's U.S. and Canadian flea control business, accompanied by a technology transfer agreement enabling the purchaser to produce its own methoprene and a temporary supply agreement to provide methoprene to the purchaser until it achieves the necessary government approvals to begin its own production. The competitive concerns were different in Europe and North America, but could be satisfied only through access to the same ingredient. Through active coordination, the FTC and the EC were able to work out complementary remedies satisfactory to both agencies.

What types of information are exchanged

The OECD Recommendation, I.A.3., exhorts OECD Member competition authorities "to supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose." Article III of the 1991 EC/US Agreement states the Parties' agreement that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation in regulatory proceedings. Article III is limited by Article VIII which provides that, "[n]otwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information." Article VIII goes on to require maintenance of the confidentiality of information provided by, and to, each Party, stating,

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

Boiled down to the essentials, this means that EC and US authorities can share any information that their laws don't prohibit them from sharing, and each authority must maintain the confidentiality of information received from the other side.

Obviously, the antitrust authorities can share publicly-available information and information provided to them with a waiver of confidentiality that allows them to share it with the other authority. But, not all "confidential" information is barred from disclosure within the confidential relationship established under Article VIII of the 1991 EC/US Agreement. The antitrust authorities distinguish confidential agency information that can be shared with other antitrust authorities from confidential business information, the disclosure of which is specifically barred by statute absent a waiver from the submitter of the information or a Mutual Assistance Agreement under the IAEAA.

The agencies cannot - and do not - share confidential business information. This is information whose confidentiality is protected by statute. It includes most materials submitted to the agencies in an investigation. Statutory protection covers information submitted by parties and third parties in response to compulsory process or voluntarily in lieu of such process. It also covers materials submitted by merging parties under the Hart-Scott-Rodino Act -- both the initial filing and response to second request. This protection from disclosure extends far beyond a business's trade secrets or proprietary information. And, the agencies' cooperative efforts have not violated these protections.

By contrast, the agencies can - and do - share confidential agency information. This is information that the agencies are not prohibited from disclosing, but normally treat as non-public. This information also may be withheld legitimately from public disclosure under the U.S. Freedom of Information Act. It may also be similarly protected against disclosure through discovery in private litigation by qualified privileges protecting government policy deliberations and law enforcement investigation files. Examples of this kind of information include: the fact that the agencies have opened an investigation; the fact that the agencies have requested information from someone located outside U.S. territory; and how the staff analyses the case, including product and geographic market definition, assessment of competitive effects, and potential remedies.

The European Commission has drawn a similar distinction concerning the types of information that can and cannot be shared. It is contained in its Report to the Council and the European Parliament on the application of the 1991 EC/US Agreement for calendar year 1997.

At the 1998 Fordham Corporate Law Institute in New York, speakers from both sides of the Atlantic stated that the business community is concerned that increasing cooperation among antitrust authorities may not adequately safeguard the legitimate interests of businesses in protecting their confidential proprietary information from improper disclosure. The speakers acknowledged that this concern may be based more on perception than reality, but that the perception persists and needs to be addressed. In view of that perception, it is important to reiterate the kinds of information the agencies do not share because they cannot:

- Premerger notifications and related submissions (*e.g.*, responses to U.S. Requests for Additional Information ("Second Requests")

- Responses to investigational inquiries (*e.g.,* U.S. Subpoenae or Civil Investigative Demands), *i.e.,* hard evidence, such as parties' internal documents and the information contained therein

- The identities of third-party complainants/witnesses

The same is true for the European Commission. DG-IV cannot share Form CO or Form A/B or responses to Article 11 letters; not can it share its Statement of Objections and Article 6.1.b. decisions under the Merger Control Regulation.

By contrast, here is what can be exchanged and how it is exchanged:

- Notification, in writing, of the opening of an investigation that affects the other party's important interests

Often the written notification is preceded by telephoned notice. Then, telephone conference calls are arranged in which the following information may be exchanged:

- The process, generally, to be followed in the investigation, including any applicable deadlines

- Publicly available information about the relevant markets, applicable legal principles and precedents, and other acts relevant to the analysis (such as entry and entry barriers)

- How the staffs analyze the definition of the relevant markets, competitive effects, and other issues, such as entry, efficiencies, failing firm, etc.

- As to markets in which there are concerns, ideas are exchanged on effective remedies (divestitures, licensing, behavioral controls, fencing-in), including new issues like "buyer up-front"

Pros and Cons of waiving confidentiality rights

When more than one antitrust authority reviews a matter, the businesses involved can facilitate effective resolution of the matter by granting waivers of confidentiality concerning particular documents or information. Such a waiver does not constitute publishing the information provided on the front page of the *Financial Times*; the waiver simply allows the reviewing authorities to discuss information that the businesses have submitted to at least one of the reviewing agencies.

Before considering the pros and cons of waiver, a related matter is the willingness of parties voluntarily to provide confidential information to one authority that it has provided to another authority. For example, when the FTC learns that a proposed merger is subject to the EU's Merger Control Regulation, FTC staff now routinely ask the parties to provide a copy of their Form CO. The FTC can require production of it, of course, through a second request, where the merger is reportable, or through compulsory process. But, why not provide it if a second request could be avoided? The FTC has found the Form CO helpful in some cases in the first phase where the staff identify, and then more precisely define, the affected markets. And, without claiming a direct relationship in every instance, EC - FTC communication during the first phase has facilitated clearances in a number of cases without the need to go to second phase or to issue a second request.

That is an example of one of the "pros" in favor of waiving confidentiality in multijurisdiction reviews. Providing critical information to the reviewing authorities and waiving confidentiality for the purpose of facilitating cooperation between those authorities fosters more expeditious and complementary resolution of the matter. And that is the principal benefit of facilitating cooperation — the companies increase the possibility of avoiding inconsistent demands from two or more agencies. Both the reviewing authorities and the parties to the matter under review must be ever watchful for potential inconsistent approaches. Without information sharing and waivers of confidentiality to facilitate necessary communication, the risk of inconsistent or worse — conflicting — enforcement actions increases.

But what seems to particularly concern some businesses are the possible ramifications of sharing information with other antitrust agencies outside the context of multijurisdictional merger review. These concerns are heightened by the prospect of future confidential information sharing agreements between the United States and other jurisdictions under the IAEAA, especially if such agreements would not require prior notification to submitters that their information will be shared with the partner jurisdiction's antitrust agency under the IAEAA agreement.

The principle concerns raised by business organizations such as the International Chamber of Commerce and UNICE over information sharing include the following possible consequences: (1) leakage of the information shared to competitors or even the general public; (2) use of the information by antitrust authorities enforcing different laws with different procedures and remedies; (3) use of the information for other law enforcement purposes by other U.S. government agencies (which is forbidden by the EU's Regulation 17/62 and the Merger Control Regulation); and, (4) disclosure of the information in litigation, whether brought by the government or private parties. Companies should examine these concerns, however daunting they may appear particularly to European firms in general terms, on a case-by-case basis, balancing the likelihood of the threat they pose and the harm that could result if realized against the benefits that can be gained through sharing information with a foreign enforcement authority to resolve an antitrust compliance issue in that jurisdiction. Companies should also keep their generalized perceptions of these threats in line with reality.

As to the concern about leaks, reality does not support the perception that leaks occur. Enforcement agencies routinely obtain and safeguard much sensitive business information and the agencies have self-interested reasons for doing so. The agencies ability to maintain business confidences helps them to obtain such confidences in the future. In line with their desire to strictly maintain the confidentiality of the information they obtain, the agencies would be interested to learn -- confidentially, of course -- of demonstrable examples of leakage. As to the particular concern that shared information might find its way to state-owned competitors, the U.S. Congress acknowledged this concern and in the IAEAA imposed upon the antitrust agencies the obligation to consider whether state-owned enterprises might benefit from the sharing of information under an IAEAA agreement.

As to the concern that the information shared might be shared with and used by antitrust authorities enforcing laws with different standards or thresholds of violation, this is an argument which taken to its extreme would militate against cooperation between antitrust authorities to the extent there are any differences between their systems. The fact that conduct legitimate in one jurisdiction may not be in another should not bar cooperation. Antitrust exemption or immunization by one jurisdiction does not extend beyond that jurisdiction's boundaries. In some cases, cooperation will be needed so that the parties can avoid actual conflict between the enforcement activities of different jurisdictions and, particularly, the liabilities or obligations the parties undertake as a consequence of those enforcement actions.

Moreover, communication and cooperation among authorities contributes to convergence in our respective analyses, which is ultimately good for all law-abiding companies. That their respective lawgivers require the antitrust agencies to apply different thresholds or tests to those analyses should not bar them from communicating and cooperating.

As to the concern over information shared with U.S. antitrust authorities being further shared with other U.S. Federal or State government agencies for other law enforcement purposes, companies must evaluate this generalized concern in a given case based upon an assessment of whether the information that might be shared with U.S. antitrust authorities constitutes evidence of the violation of other U.S. laws. If it does, the company must try to determine the extent of the liability and weigh that against the benefits to be gained through cooperation with the antitrust authorities.

Finally, as to the concern over information, shared between antitrust agencies, being disclosed in private cases, existing confidentiality rules, including governmental privileges, while qualified, have enabled the agencies to protect confidential business information from discovery and disclosure in private litigation in most cases.

As a practical matter, companies subject to multijurisdictional antitrust review increase the likelihood of obtaining compatible results if they make all relevant information available to the reviewing authorities and waive confidentiality for the limited purpose of expeditiously resolving the antitrust concerns under review. Generalized concerns about potential disclosure must be analyzed in the context of the particular case at hand to determine whether the threat of disclosure is realistic and that disclosure would indeed result in harm that would outweigh the benefits of sharing with the enforcement agencies in the first place.

How to effectively participate in the process

This section offers some suggestions to make the process of antitrust compliance reviews go more smoothly. Companies should assume that the reviewing agencies will cooperate to the fullest extent permitted by law, with or without the parties' consent. The parties can choose to further this cooperation by waiving confidentiality which in most instances will prove beneficial.

The agencies' belief in the benefits of cooperation is based on experience with companies and their counselors who take a one-agency-at-a-time approach and duplicate their efforts in reaching separate

settlements with the reviewing authorities which did not differ in real substance. At the 1998 Fordham Corporate Law Institute in New York, Barry Hawk questioned how cooperation can lower transaction costs. Others, in other settings, have asked whether cooperation can slow down the process. Cooperation can lower transaction costs and can speed up the process by eliminating duplication of effort, particularly in those cases where both European and U.S. authorities seek the same remedy at the bottom line -- cases like *Shell/Montedison* and *Guinness/GrandMetropolitan* come immediately to mind.

This section contains some suggestions based upon the handling of many cases over the past decade. The first part provides some observations that are particularly aimed at merger cases, while the second focuses on the effective presentation of complaints, particularly in matters that might lend themselves to handling through a "positive comity" request.

1. General suggestions

First, take care not to magnify the procedural differences between the reviewing jurisdictions, particularly as to the timing of decisions, through the timing of notifications. Parties to mergers notifiable to both U.S. and EC authorities can facilitate cooperation by filing with the U.S. agencies first on the basis of a letter of intent (which is not the practice in the EC) and begin pre-notification consultations with the EC. The longer parties delay notifying the U.S. agencies after notifying the EC -- which starts the unstoppable clock -- the more difficult they render coordination of the EC and U.S. investigations. They won't keep the agencies from communicating and otherwise cooperating to the extent permitted and practical; but, it puts the U.S. agencies at an informational disadvantage at the outset and, because of the decision deadlines under EC law, the parties will be naturally inclined to devote their energies to seeking a satisfactory resolution in the EC before turning to deal with the U.S. authorities.

Second, in cases where different law firms represent the same company in Brussels and Washington, the client deserves as much cooperation and coordination between its lawyers as between the reviewing authorities. The client needs its legal team to cooperate in order to get the job done in each reviewing capital. The agencies have witnessed numerous cases in which FTC staff and DG-IV staff seemed to know more about the status of each other's investigations than did the lawyers for the companies - unless they were inexplicably playing dumb which also does not help. Finally, no one should think that he can cut a deal with one jurisdiction that limits the ability of another reviewing jurisdiction to fulfill its enforcement responsibilities. Again, it behooves everyone involved in the processes to be aware of overlapping interests — particularly in an asset, the disposition of which may be necessary to satisfy the enforcement interests of two or more jurisdictions.

Therefore, it is important for all involved, once it is recognized that remedial measures are necessary in more than one reviewing jurisdiction, to develop complementary approaches that do not pit enforcement authorities in a "tug-of-war" over assets, the divestiture of which may be necessary to remedy the competitive concerns arising out of the merger. In *Ciba-Geigy/Sandoz*, the FTC and EC both required remedies that involved methoprene; fortunately, the agencies were able to reach separate, but complementary, agreements with the parties which fulfilled the different remedial needs on both sides of the Atlantic.

And, where such remedial undertakings are necessary, do not expect the enforcement agencies to accept hand-me-downs for divestiture. Recently in a merger case, the parties offered to divest a grab-bag full of the parties' less-desirable assets. The more the agencies looked at the proffered assets the stronger their determination grew to hold out for a package that would enable a qualified divestee to operate competitively and restore competition to the affected market.

Finally, trying the case in public is of little utility. The U.S. agencies normally keep mum during the course of an investigation - even where the press reports on it. And, FTC Commissioners are constrained by judicial decisions limiting their utterances during the pendency of an action, lest their decision be tainted with

prejudice. Suffice it to say that trying to use the press as a separate front for advocacy of your case is a diversion from the necessary task of dealing effectively with the enforcement agency on the merits of the case. The same can be said for "politicizing" the matter by appeals to parliamentarians or officials of other government agencies.

2. "Positive comity"

Experience shows that positive comity may be applied effectively in certain types of cases and that most of the factors that can limit effective cooperation between enforcement agencies (*e.g.,* limits on sharing confidential information) may similarly limit the effective application of positive comity. That reality should not discourage agencies from considering the positive comity option in appropriate cases; but, it should keep expectations realistic.

Where a firm on one side of the Atlantic is harmed by anticompetitive behavior on the other side of the Atlantic, a logical first step for that firm and its counselors to take is to contact the competition authority on their own side of the Atlantic. In preparation for that contact, the firm and its counselors should do some homework, because when the antitrust agencies are approached by a party complaining that it is being harmed by anticompetitive activity occurring in a foreign country, here are some of the questions that the agency must deal with in determining whether the case is potentially appropriate for a positive comity referral: (Assume a U.S. firm complaining about anticompetitive conduct in Europe, but the situation can be turned around by substituting a European firm complaining of harm due to anticompetitive conduct in the United States.)

1. Do the U.S. agencies have jurisdiction to reach the actors and remedy the conduct? That is, does the anticompetitive activity (*i.e.*, conduct that violates the Sherman, Clayton, or FTC Acts) have a direct, substantial, and reasonably foreseeable effect on U.S. commerce? (Or, in the reverse situation, is the conduct implemented in the European Union) And, assuming subject matter jurisdiction exists, are the actors subject to personal jurisdiction in the United States?

2. Whether the U.S. agencies have jurisdiction or not, do comity factors suggest pursuing or referring the case?

> a. FOREIGN LAW VIOLATION: Does the activity complained of violate the law where it takes place? (Some inquiry and examination will be necessary here. Consultation with the foreign agency will be helpful to make a threshold determination whether the facts as alleged suggest a violation and, thereby, a basis for a positive comity referral.)
>
> > i) EXEMPTIONS: Does the activity complained of fall within a statutory exemption (*e.g.,* export cartel or other exempted arrangement or sector-specific exemption)?
> >
> > ii) THRESHOLDS: Does the conduct complained of fall below or outside specific jurisdictional thresholds of the foreign law; *e.g.*, do the facts suggests that the matter falls below a country's *de minimis* threshold.
>
> b. Assuming that the anticompetitive activity appears to violate the law of the place where it occurs, what other factors are considered in determining whether to make a positive comity referral?
>
> > i) PRESUMPTION: In the US-EC context, does the case fall within one of the two categories of cases that are "normally" (*i.e.*, presumptively) referred?
> >
> > ii) Overriding domestic enforcement interest: Is there some interest (such as criminal

penalties for *per se* conduct) that argues for a parallel investigation rather than a referral?

c. Where is the best evidence of violation located and in whose possession?

These are some of the issues the agencies must consider to determine whether a complaint might be referred appropriately as a positive comity request. A complaining party can assist its cause by doing its homework on these issues. That will facilitate more effective communication with the agency on the other side of the Atlantic and help both sides determine which is the more appropriate agency to 'go first' if an investigation appears warranted. And, the authorities on both sides will need to consult before a decision is made whether or not to make a positive comity referral, given the reciprocal commitments contained in the EC/US positive comity agreement.

IV. CONCLUDING COMMENTS

Just as some refer to the "globalization" of business activity, it is just as appropriate to recognize the globalization of antitrust enforcement. Foreign trade and foreign direct investment have grown in recent years in parallel with the establishment of antitrust enforcement in some places and its intensification in others. Communication and cooperation among enforcement agencies has grown as well. Despite some differences on the margins, the basic competition policies enforced by most countries are compatible and result in complementary decisions. Business concerns can increase the chances of achieving their legitimate aims more expeditiously if they facilitate cooperation among antitrust enforcers.