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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
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INTERNATIONAL CO-OPERATION IN TRANSNATIONAL MERGERS

-- United States --

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United States

1. It is timely and appropriate for the OECD Competition Law and Policy Committee (CLP) to take stock of international cooperation in transnational mergers. Almost ten years ago, in November 1991, the CLP mandated a study, conducted by Professors Richard Whish and Diane Wood, of multi-jurisdiction merger review. The report was published at about the same time as the 1990s merger wave gathered force.[1]

potentially conflicting remedies. For example, in *Ciba-Geigy/Sandoz*, both the European Commission and the FTC sought remedies that involved Sandoz's production of Methoprene; coordination was necessary to avoid placing Sandoz under conflicting obligations.

5. There are many transnational mergers that require little, if any, communication or cooperation

useful information that the agencies can share,[8] and the authorities have successfully cooperated in the absence of confidentiality waivers.

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

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

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

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

Conclusion

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

NOTES

1 OECD, Merger Cases in the Real World: A Study of Merger Control Procedures, Paris, 1994.

2 DAFFE/CLP/WP3(2001)5, 27 Apr 2001.

3 Revised Recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, C(95)130/FINAL (27-28 July 1995), *available at:* http://www.oecd.fr/daf/clp/Recommendations/REC8COM.HTM.

4 Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <http://www.usdoj.gov/atr/public/international/docs/ec.htmt>, at Art. II.3.(a)(i).

5 U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, *available at:* http://www.ftc.gov/bc/docs/horizmer.htm.

6 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9 Dec. 1997; *available at:* http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

7 *See, e.g.*, Robert D. Stoner, "Convergence of U.S. and E.U. Merger Enforcement," Economists Ink, Economists Incorporated, Spring/Summer 2000, at 1; and William J. Kolasky, Jr. and Leon B. Greenfield, "Merger review in the EU and US: substantive convergence and procedural dissonance," Global Competition Rev., Oct./Nov. 1998, at 22.

8 *See, e.g.*