


INTERNATIONAL ENFORCEMENT COOPERATION

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consider international aspects “right from the start of an investigation through to the remedial stage.”⁶ We are “working hard to establish ‘pick-up-the-phone’ relationships with the increasing number of agencies around the world that have an interest in working with us to investigate a merger, possible anticompetitive unilateral conduct, or cartel activity.”⁷ Generally, the Agencies and their counterparts can share any information that their laws do not prohibit them from sharing, and each authority lawfully must maintain the confidentiality of information received from parties and third parties, pursuant to its own rules.⁸ The Agencies can also share information provided to them where there has been a waiver of confidentiality by the submitter. Indeed, parties to merger investigations routinely waive statutory confidentiality protections to facilitate inter-agency cooperation, and increasingly are doing so in unilateral conduct investigations. The Agencies have found that waivers can play a very important role in facilitating their investigations and facilitating consistent outcomes.

2.2. Cooperation in Individual Matters

7. Below, we identify selected recent merger, conduct, and cartel cases in which the Agencies cooperated with our international counterparts. In each segment, as appropriate, we highlight a few points of interest relating to topics raised in the Secretariat’s stock-taking note.⁹

2.2.1. Cooperation in y</MCIDeain yooperalftee0iC /Span <</MCID 14 >>BDC 63.851 0 Td [(Coopera)Fro

9. In 2011 and 2012, the FTC engaged in substantive cooperation with ten non-U.S. antitrust agencies, including newer authorities, reviewing Western Digital Corporation's ("Western Digital") proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies. The cooperating agencies included those in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordination of remedies. The parties granted waivers on a jurisdiction-by-jurisdiction basis. Throughout the review, FTC staff and staff of each of the non-U.S. authorities worked together closely, on a bilateral basis, which involved significant time and resources. Cooperation included coordinating compatible remedies that addressed competitive concerns in multiple jurisdictions. Of note, only a limited number of cooperating agencies on the matter took formal remedial action.

b) Deutsche Börse/NYSE

10. In 2011, the DOJ cooperated closely with DG Competition of the European Commission (EC) on their respective investigations of the proposed merger between Deutsche Börse and the New York Stock Exchange, with frequent contact between investigative staffs and the leadership of the agencies, aided by waivers provided by the merging parties. In December 2011, the DOJ announced that it had reached a settlement with the parties resolving concerns about the effect of the merger on equities trading in the U.S., which was the focus of its investigation. The DOJ noted that the "open dialogue between the Antitrust Division and the [EC] was very effective and allowed each agency to conduct its respective investigation while mindful of ongoing work and developments in the other jurisdiction."¹⁰ On the same day, the EC said that "we have had regular and constructive dialogue with the DOJ throughout our respective procedures" and that "the markets that the DOJ is examining in its own jurisdiction, namely in the area of U.S. equities, are different to those where the commission has raised concerns, namely European financial derivatives."¹¹ In February 2012, the EC prohibited the merger.¹² The differing conclusions of the two agencies resulted from differences in the markets in their jurisdictions. Close cooperation was nevertheless still necessary and useful so that each agency could understand, and anticipate, the outcome of the other's investigation.

c) Unilever/Alberto Culver

11. In Unilever/Alberto Culver, the DOJ filed a complaint and consent decree requiring Unilever and Alberto-Culver Co. to divest two hair care brands in order to proceed with Unilever's acquisition of Alberto-Culver. The product markets and competitive issues involved in that investigation varied significantly among the different jurisdictions affected by the merger. Nevertheless, the DOJ discussed the merger with its counterparts in Mexico, South Africa, and the United Kingdom, and, aided by waivers

¹⁰ Press Release, U.S. Dep't of Justice, Justice Department Requires Deutsche Börse to Divest its Interest in Direct Edge in Order to Merger with NYSE Euronext (Dec. 22, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/278537.htm; Press Release, U.S. Dep't of Justice, Justice Department Dismisses Antitrust Lawsuit Against Deutsche Börse and NYSE Euronext (Oct. 9, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/280066.htm.

¹¹ "U.S. Clearing Deutsche Börse-NYSE Takeover Moves Final Approval to Europe," Bloomberg (Dec. 22, 2011).

¹² Press Release, European Commission, Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions (Jan. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/60&format=HTML&aged=0&language=EN&guiLanguage=en>.

in July 2011, which also provides for periodic high-level consultations among all five agencies as well as cooperation channels between individual agencies.²⁴

22. The Agencies have also developed other types of cooperation mechanisms. Last year, the U.S. Agencies and DG Competition updated their Best Practices on Cooperation in Merger Investigations.²⁵ The Best Practices, originally issued in 2002, were revised in light of the agencies' practical experience and provide an advisory framework for cooperation when a U.S. Agency and DG Competition review the same merger. The main purposes of issuing the revised Best Practices were (1) to be transparent about the Agencies' cooperation – including when and what they communicate with one another and their aim at compatible outcomes and (2) to suggest how merging parties and third parties can facilitate coordination and resolution of those reviews. In addition, the Best Practices address the complexity of coordinating merger review timetables between the authorities and emphasize the need for coordination among the agencies at key stages of their investigations, including the final stage when agencies consider potential remedies to preserve competition. The Best Practices also recognize that more authorities have become more engaged in the review process, requiring coordination with a larger number of agencies.²⁶

²⁴ FTC Press Release, Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding With Chinese Antitrust Agencies (July 27, 2011), available at <http://www.ftc.gov/opa/2011/07/chinamou.shtm>; Press Release, U.S. Dep't of Justice, Dep't of Justice and FTC Sign Antitrust Memorandum of Underst


