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## **Global Forum on Competition**

### **ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES**

#### **Contribution from the United States**

-- Session I --

*This contribution is submitted by the United States under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.*

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**CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING  
AND EMERGING ECONOMIES**

**-- United States --**

**1. Introduction**

1. Recognizing the growth in the number of merger review regimes and the number of multi-jurisdiction merger reviews over the past two decades,<sup>1</sup> the United States antitrust agencies (the U.S. Federal Trade Commission and the Antitrust Division of the Department of Justice) have increasingly cooperated and coordinated with counterpart agencies reviewing the same merger, and worked with sister agencies both bilaterally and through multilateral organizations, to promote cooperation and convergence toward sound merger review policies and practices internationally. We describe below our merger review processes and approaches to cooperation, coordination and, as appropriate, convergence. Wis

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11. Below, we outline the specific measures in place for U.S. agencies to cooperate in cross-border merger review, including notification, contact with other agencies to share information and analysis, and the development of remedies, with recent examples of cooperation.

12. Once an agency opens a merger investigation,<sup>21</sup> its staff determines whether its enforcement action may affect non-U.S. interests -- for example, because one of the parties is based outside the U.S., or relevant U.S.-owned assets are located outside the U.S. Pursuant to a bilateral agreement or the OECD Recommendation, the U.S. agency will notify the relevant jurisdictions; notification can also occur where appropriate in the absence of a bilateral agreement or OECD obligation.<sup>22</sup> Historically, such notifications were formally conveyed from the U.S. government to the other government. However, given review timetables and the relations developed between the antitrust agencies, agency case teams when appropriate will contact each other informally, *e.g.* via e-mail or telephone, to determine whether they will be reviewing the transaction concurrently. Some of our arrangements, *e.g.*, the Brazil and Mexico bilateral agreements, have enhanced communication by providing for direct contacts between antitrust agencies.

13. We believe it is useful for antitrust agencies reviewing mergers with cross-border implications to ask the merging parties to identify all other reviewing jurisdictions, as recommended in the OECD's 1994 Wood-Whish report.<sup>23</sup> For example, a preliminary item on the HSR Notification and Report Form asks filers to list voluntarily any international competition authorities that have been or will be notified of the proposed transaction. Further, in instances in which FTC or DOJ decide to investigate a transaction, staffs routinely follow up with the parties to identify other reviewing agencies and consult with them to determine whether the merger raises common concerns. Early notification is useful in allowing the respective agencies time to address mutual concerns before the review process of one agency has concluded.

14. Many transnational mergers entail review of the same or similar competitive issues in more than one jurisdiction. Cooperation, including the sharing of information, permits more complete communication among agencies.<sup>3</sup> (The following information is provided for informational purposes only and does not constitute a recommendation of the OECD.)

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agency in the choice of a common divestiture or monitoring trustee and in approving the purchaser of assets divested as part of a remedy.<sup>34</sup>

20. Cross-border mergers may often require cross-border remedies in order to effectively prevent anticompetitive effects. Consequently, cooperation between competition agencies is often key in such scenarios.<sup>35</sup> We have learned this through experience. In 1990, Institut Merieux, the dominant U.S. seller of rabies vaccine, sought to acquire Connaught BioSciences, a Canadian firm. Connaught was one of two

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22. The review last year of the merger between *Ticketmaster* and *Live Nation* is another recent example of effective cooperation, this time between the Antitrust Division and the Canadian Competition Bureau. The Division coordinated closely with the Bureau at the investigative stage, and the two agencies worked closely together to obtain a remedy, announced the same day, that preserved competition across North America.<sup>38</sup> The proposed relief in *Ticketmaster/Live Nation* is both structural and behavioral. It is designed to give concert venues more choice for their ticketing needs and promote incentives for competitors to innovate and discount. In particular, Ticketmaster -- the world's largest ticketing company - - is required to divest ticketing assets. Ticketmaster must also license its ticketing software to AEG, providing AEG the opportunity and incentive to compete in primary ticketing both in its own venues and third-party venues, thereby opening the door for AEG to become a vertically-integrated competitor with incentives similar to the merged firm. In addition, Ticketmaster was required to subject itself to ten-year anti-retaliation provisions that prohibit anticompetitive bundling.

## 5. Conclusion

23. Cross-border merger review presents challenges even for antitrust agencies with well-established policies and procedures for international cooperation. The U.S. antitrust agencies will continue to work to develop strong relationships with counterpart agencies, seeking to promote and deepen cooperation with both established and younger competition agencies in the area of merger review, with the goal of promoting efficient and effective cross-border merger review. We also will continue to work to identify appropriate areas of convergence on best practices as regards the substantive review of mergers, through organizations such as the OECD. Such best practices are valuable tools for both newer and established antitrust agencies alike.