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

Contribution from the United States

-- Session I --

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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 multijurisdiction merger reviews over the past two decades, 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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Eastern Europe, South and Central America, Africa, and Asia over the past two decades. The U.S. agencies also host visitors from other agencies that wish to learn about U.S. antitrust experience or to study particular sectors or enforcement methods. Similarly, through the FTC's International Fellows program, officials and staff of many sister agencies have worked with FTC case teams for three to six month periods to experience first-hand how FTC competition investigations are structured, conducted and managed. The focus of the FTC and DOJ technical cooperation programs is on the development of sound competition policy principles and institutions, recognizing that no single model is suitable for all circumstances, given different legal, cultural, and economic contexts.

7. Multilateral organizations such as the OECD and the International Competition Network (ICN) have provided further opportunities for older and newer agencies to share their experiences with each other to the benefit of all. Several multilateral organizations facilitate dialogue and convergence toward sound

own governments to help legislators understand the benefits of efficiency and consumer-welfare focused merger review. The need for such advocacy may be more pronounced in jurisdictions with relatively new competition regimes, and in which the importance of competition is not yet enshrined in the social and legal culture, though similar challenges are faced by all enforcement agencies.¹⁶

4. U.S. cooperation with other Competition Agencies on merger review

- 9. U.S. law does not provide for consideration of a merger's competitive effects that do not affect U.S. commerce. However, as mergers reviewed by the U.S. agencies increasingly involve non-U.S. parties, U.S. parties with assets located abroad, relevant evidence located abroad, and/or parallel review in other jurisdictions, 17 the United States antitrust agencies often work with their international counterparts to investigate and remedy potentially anticompetitive mergers. 18 The U.S. antitrust agencies cooperate with other competition agencies through formal and informal agreements and arrangements, although cooperation also takes place in the absence of such agreements. The United States has bilateral antitrust cooperation agreements with eight jurisdictions: Australia, Brazil, Canada, the European Union, Germany, Israel, Japan, and Mexico. 19 In addition, the United States antitrust agencies recently signed a Memorandum of Understanding with the Russian Federal Anti-monopoly Service. 20 The agreements all involve cooperation on significant competition policy and enforcement developments in the respective jurisdictions, and therefore are also applicable to cross-border mergers.
- 10. Under these formal agreements, as well as through informal cooperation under the auspices of the OECD Cooperation Recommendation, the United States agencies may notify other nations of their enforcement actions that implicate other nations' important interests, coordinate parallel investigations,

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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.
- Once an agency opens a merger investigation,²¹ 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.²² 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.²³ 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 amo.3 (te).0 agation,t (l)2.4 (reyn)2.4 (r(coae).0 a .0021 Tt19.4 (o)2.4)12.Tatl mohi u in 648 (m)1.2





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

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. 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 f (al) \$\phi\$ \$\frac{1}{2}\text{Abmn31r4ross}\$ ht w)\$ i3n31ene lear 0 Td[(t73na)10.8 (k)8.29(eTlt12.F)eTltp ka49c6 Tw TTJ02o29a49c6 T9

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.³⁸ 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.

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