Seventh United Nations Conference to review the UN Set on

In the past dozen years, the number of agencies reviewing mergers has increased dramatically.[1] Increasingly, cross-border merger transactions are investigated by more than one competition agency.[2]

cooperation is warranted. Such contacts are limited to public and non-confidential information.

They also worked multilaterally and bilaterally to develop cooperation guidance. Cooperation among agencies was first put on the international agenda in 1967, when the OECD published its first Recommendation regarding competition agency cooperation in antitrust investigations.[9] This Recommendation created a mechanism for competition agencies to consult one another when investigations involve issues that could have effects in other jurisdictions.

As agencies began to cooperate on individual investigations, they learned about one another's procedures, analytical methods, and approaches to understanding competitive effects. Discussions between and among competition agency staff addressed differences in the applicable laws in each jurisdiction, how differences affected the analysis of competitive effects, and how remedies could be structured to ensure compatibility. This served both to allow agencies to resolve cases in a way that avoided conflict, and to develop a shared understanding of competition enforcement, which has, in many instances, resulted in the long-term convergence of policies and practices of cooperating agencies.

As a pattern of cooperation emerged, the U.S. Agencies entered into several bilateral written agreements and arrangements with non-U.S. competition agencies. These documents memorialized a shared commitment to further cooperative relationships and served as catalysts for increased cooperation.[10]

Merger cooperation became increasingly common between the U.S. Agencies and other competition agencies that reviewed mergers in the 1990s and 2000s. While the vast majority of cooperation resulted in cases with compatible outcomes, there were a few notable and well-publicized exceptions, including Institut Meriux (1990),[11] Boeing/McDonnell Douglas (1997),[12]

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[9] *See e.g.*, OECD, "Competition law enforcement," in International Regulatory Co-operation: Case Studies, Vol. 1, Chemicals, Consumer Products, Tax and Competition, OECD Publishing, 2013, at 77, *available at* http://dx.doi.org/10.1787/9789264200487-6-en.

[10] A complete list of agreements and arrangements is available at http://www.ftc.gov/policy/international/international-cooperation-agreements. With the exception of a 1999 IAEAA agreement with Australia, they do not allow for the sharing confidential information without waivers from the parties. The United States has bilateral cooperation agreements with ten jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); Chile (2011), and Colombia (2014), and the Agencies entered into Memoranda of Understanding with the Russian Federal Anti-Monopoly Service (2009), the three Chinese Anti-Monopoly agencies (2011), the Ministry of Corporate Affairs (Government of India), and the Competition Commission of India (2012). Competition-related issues also may be addressed in bilateral and multilateral trade agreements. Approximately half of the free trade agreements the United States has signed (the North American Free Trade Agreement (NAFTA) and bilateral agreements with Australia, Chile, Colombia, Korea, Peru, and Singapore), include a chapter on competition policy. The chapters typically include provisions providing for cooperation between the parties in competition enforcement and policy, as well as maintaining a competition law and agency and consultation to resolve disagreements. Importantly, these provisions are not subject to dispute settlement. While these represent binding obligations between states, they do not play a significant role in governing relationships between the U.S. Agencies and sister agencies. The United States' trade agreements are available at http://www.state.gov/e/eb/tpp/bta/fta/fta/index.htm.

[11] *In re Institut Merieux*, 113 F.T.C. 742 (1990).

[12] *See* William E. Kovacic, "Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy," 68 Antitrust L.J. 805 (2001).

and General Electric/Honeywell (2001).

The ICN has also created work products that any agency can use to facilitate and better understand merger cooperation. The ICN was founded in 2001, with the express purpose of "facilitat[ing]

2.3 Confidential information

In certain matters, the agencies find that the exchange of confidential information is valuable to effectively engage in in-depth cooperation, which may include jointly analyzing theories of harm and designing appropriate remedies. All information provided to U.S. Agencies pursuant to its pre-merger notification system and all information that the agencies compel production of, and, in the case of the FTC, all information provided to the agency voluntarily in lieu of compulsory process, is confidential. However, the party who provides the information is permitted to waive the protection of those laws, to allow the cooperating agencies to discuss and share a party's or third party's confidential information. In merger investigations conducted by the U.S. Agencies, parties routinely choose to waive statutory confidentiality protections to facilitate cooperation by providing the reviewing agency with written waivers of confidentiality ("waivers"). The U.S. Agencies have found that waivers can make investigations more efficient and facilitate more consistent analysis and remedies by agencies investigating the same matter. The parties usually find that it is in their interest to grant waivers, as agencies in regular and frank communication with each other are more likely to reach consistent results.

Waivers

understand each other's laws and have contacts at sister competition agencies, it is easier for staff to reach out to develop merger cooperation.

An example of a joint regional initiative that has enhanced newer agencies' ability to review mergers is the Inter-

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3.1 Examples of merger cooperation in individual matters[37]

While the majority of the U.S. Agencies' cooperation is with experienced competition agencies in developed countries, an increasing number of mergers are now being reviewed by both experienced and newer agencies. In recent years, the U.S. Agencies have cooperated with newer competition agencies in merger cases, including those in Brazil, China, Mexico, Singapore, South Africa, Turkey, Ukraine, and Venezuela. Case examples illustrate the increasing frequency and depth of cooperation with both more experienced and with newer competition agencies.

acquisition of Goodrich Corporation.[42] The Division also discussed the transaction with other agencies, including the Federal Competition Commission in Mexico and the Council for Economic Defence (CADE) in Brazil. The $18.4 billion merger was the largest in the history of the aircraft industry and involved several products. Cooperation, aided by waivers granted by the parties early in the investigation, was extensive. Calls between DOJ, DG COMP, and CCB occurred weekly, moving to almost daily and involved discussions of remedies and settlement terms. DOJ staff reviewed commitments obtained by the DG COMP to ensure that DOJ's relief would not impose conflicting remedies. The close collaboration between CCB, DOJ, and DG COMP enabled CCB to publicly state that it did not need to craft its own remedies because those achieved by the Division and the DG COMP resolved its concerns.[43] Coordination between DOJ and DG COMP went beyond the divestiture assets themselves – the agencies required the parties to coordinate all assets in the divestiture package, and also the optional supply and transition services agreements to ensure consistency. DOJ and DG COMP worked together to review and approve the acquirers of the assets required to be divested, and continued to work together on the implementation of the remedies, including coordinating on the selection of the monitor/trustee. The three agencies made announcements about the outcome of their investigations on the same day.[44]

In 2014, DOJ reviewed Continental AG's proposed acquisition of Veyance Technologies for $1.8 billion. As proposed, the acquisition would have left two dominant firms in the market for commercial vehicle air springs. The Division cooperated with the CCB, Brazil's CADE, and Mexico's Federal Competition Commission. Aided by waivers, the agencies' cooperation included frequent calls between our staff and the staffs of the other three agencies. Market conditions were similar in the U.S., Canada, and Mexico and the agencies' concerns centered on commercial vehicle air springs and barrier hose. With regard to commercial vehicle air springs, DOJ required a divestiture of a plant in Mexico and R&D, engineering and administrative assets in the U.S., as well as other tangible and intangible assets. DOJ also had concerns about barrier hose, which the parties alleviated by waiving exclusivity requirements that would have otherwise resulted in a loss of competition.[45] Mexico shared our concerns in air springs, which were resolved by the divestitures, and in barrier hose, which were resolved by the waiver of exclusivity requirements.[46] Canada took into consideration and relied upon the DOJ's remedy

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and closed its investigation.[47] Market conditions were different in Brazil: concerns related to