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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 multi-jurisdiction merger reviews over the past two decades,¹ 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. We discuss cross-border merger review, addressing guiding principles and efforts at convergence, and then describe our approaches to cooperation and coordination during the three main phases of a merger review: the notification, the investigation, and the development of effective remedies to alleviate anticompetitive concerns raised in individual transactions.

2. Merger review in the United States

2. The principal statute governing mergers and acquisitions in the U.S. is Section 7 of the Clayton Act, which prohibits such transactions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”² The U.S. antitrust agencies enforce Section 7, and benefit from the pre-merger notification requirements of the Hart-Scott-Rodino Act (“HSR Act”),³ which provides for mandatory pre-merger notification with a waiting period for certain transactions above thresholds relating to the size of the transaction (and, in some instances, the size of the parties).⁴ These thresholds capture the majority of transactions likely to have an impact on a relevant market in the U.S. A filing fee set at levels depending on the size of the transaction is payable upon notification. The U.S. agencies can also challenge under Section 7 transactions that are not subject to the HSR Act’s notification and waiting

¹ On the growing trend of transnational mergers and acquisitions see Joseph Wilson, *GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS* (Kluwer Law International 2003), pp. 30-32.

² 15 U.S.C. § 18. Mergers may also be challenged under the Sherman Act as unreasonable restraints of trade or as monopolization or attempts to monopolize (15 U.S.C. §§ 1, 2), but such challenges are rare.

³ Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. *See also* 16 C.F.R. §§ 801, 802, and 803.

⁴ Notification thresholds are adjusted annually to reflect changes in the Gross National Product. In addition, certain types of transactions are exempt from filing requirements, such as acquisitions of certain real property or assets located outside the U.S. that generated sales in or into the U.S. falling below certain dollar thresholds. *See* 16 C.F.R. Parts 802.2, and 802.50.

period requirements.⁵ There are no special rules for cross-border transactions, although jurisdiction is dependent on effects within the territory of the United States.

3. As noted below, the U.S. has a number of bilateral antitrust cooperation agreements that have been used in merger cases, but is not a member of any regional competition organization. The U.S. agencies have been actively involved in merger-related work of both the ICN and OECD, and merger review procedures in the U.S. are consistent with the recommendations of these organizations. Non-competition considerations and political intervention do not play a role in merger review in the U.S.

3. Cross-border merger review: Guiding Principles

4. The goal of any merger review program is to identify mergers that may harm competition in the reviewing jurisdiction, and prevent them from going through in that harmful format. We have found that the vast majority of mergers reviewed by the U.S. antitrust agencies do not harm competition: approximately 95 percent of transactions notified to the U.S. agencies have not resulted in further investigation.⁶ For transactions requiring more in-depth investigation, the agencies have developed policies and procedures to identify and remedy competitive issues as quickly as possible,⁷ and have shared their experience with other antitrust enforcement agencies, new and old.

5. Now that over 100 jurisdictions have merger laws, it is particularly important that agencies seek to ensure that their processes do not create conflicts or impose inconsistent demands for parties that are before more than one agency. As Assistant AG Varney noted recently, “In today’s world, competition agencies can no longer cooperate on investigations with only one or two other jurisdictions and call it a day.”⁸ In addition, learning from the experience of others in handling similar issues can, in some cases, help to identify best practices.

6. Through our technical cooperation work, the U.S. agencies have had the opportunity to send our attorneys and economists to work side-by-side with our counterparts in many agencies in Central and

⁵ The notification thresholds are based primarily on the size of firm and the size of transaction. Accordingly, smaller mergers, which may pose competitive problems in smaller markets, are often not reviewed before they occur. The agencies, however, also may challenge consummated mergers, and will challenge them if they suspect that a transaction has harmed or is likely to harm competition. Since challenging consummated mergers requires undoing a completed deal, it poses particular difficulties with regard to remedies and coordination with other nations’ enforcers.

⁶ Such experience is consistent with that of other OECD members. See OECD, Analysis and Discussion of Selected Responses to the Questionnaire on Harmonisation of Merger Control Procedures (DAFFE/COMP/WP3(2002)14) (January 10, 2003).

⁷ Any person filing a merger for review by the U.S. antitrust agencies may request “early termination”, i.e. that the waiting period be terminated before the statutory period expires. See <http://www.ftc.gov/bc/earlyterm/2008/11/index.shtml>. Statistics show that most filers now request early termination of the waiting period. 84% of mergers filed in the U.S. in 2009 were subject to early termination requests, which were granted in 69% of these cases – see the 2009 Hart-Scott-Rodino Annual Report available at <http://www.ftc.gov/os/2010/10/101001hsrreport.pdf> at p. 5; see also the same report at p. 16 (“[a]lways cognizant of the program’s impact and effectiveness, the enforcement agencies continue to seek ways to speed up the review process”).

⁸ Christine A. Varney, Assistant Attorney Gen., U.S. Dep’t of Justice, *International Cooperation: Preparing for the Future*, remarks at the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010).

Eastern Europe, South and Central America, Africa, and Asia over the past two decades.⁹ 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 competition policy and enforcement, particularly the OECD and the ICN, the United Nations Conference on Trade and Development (UNCTAD) and regional organizations such as the Asia-Pacific Economic Cooperation (APEC). The United States antitrust agencies participate in each of these fora. Recently, the U.S. Federal Trade Commission, together with competition agencies from Mexico, Chile and Panama, led the founding of the Inter-American Competition Alliance to foster enforcement cooperation in the Americas.¹⁰ The Alliance plans to cover merger practice in a future conference call, and both U.S. agencies have actively participated in previous calls.

8. Sharing merger review experience among competition agencies has led to the development and publication of international best practices in this area. These include the OECD Council Recommendation on antitrust enforcement cooperation ("OECD Cooperation Recommendation"),¹¹ the OECD 2005 Council Recommendation on Merger Review,¹² the ICN's Guiding Principles and Recommended Practices on Merger Notification and Review Procedures,¹³ and the ICN's Recommended Practices on Merger Analysis.¹⁴ Exchange of views and experience, bilaterally and through multilateral organizations, also has allowed the U.S. agencies to help sister competition agencies to work with other institutions, such as the legislature, regulators, courts and other government bodies, to build a "culture of competition" in their jurisdictions.¹⁵ Antitrust agencies can also benefit from undertaking competition advocacy within their

⁹ See, then FTC Chairman, Deborah Platt Majoras, *Looking Forward: Merger and Other Policy Initiatives at the FTC*, Remarks at the ABA Antitrust Section Fall Forum (November 18, 2004) *available at* <http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf> ("with antitrust regimes continuing to spread around the globe, the FTC will continue to devote significant resources to assisting new agencies as they strive to formulate and implement sound competition policy").

¹⁰ See <http://www.cfc.gob.mx/index.php/CONTENIDOS/acerca-de-nosotros.html>.

¹¹ Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, *available at* http://www.justice.gov/atr/public/international/docs/council_recs.htm. The Recommendation was first adopted in 1967, and has been revised several times since.

¹² *Available at* <http://www.oecd.org/dataoecd/3/41/40537528.pdf>. The Department of Justice chairs the OECD Working Group that drafted this recommendation.

¹³ *Available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

¹⁴ *Available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>. The U.S. agencies led the efforts to create both sets of recommended practices; the Department of Justice co-chaired the Merger Working Group and the Federal Trade Commission chaired the Notification and Procedures Sub-Group.

¹⁵ See, for example, Promoting a Culture of Competition, Remarks by then-FTC Chairman, Deborah Platt Majoras, Before the Chinese Academy of Social Sciences (April 2006) *available at* <http://www.ftc.gov/speeches/majoras/060410chinacompetitionadvocacy.pdf>.

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, and/or provide investigative assistance. This type of cooperation enables the agencies to identify issues of common interest, share their competitive analyses, and seek to avoid inconsistent outcomes. There have been few cases of "conflict" between decisions of one of the U.S. antitrust agencies and the decision of a non-U.S. agency reviewing the same merger (*e.g.*, *Boeing/McDonnell Douglas*; *GE/Honeywell*; *Sun/Oracle*); those rare instances of conflict have led to increased efforts at mutual understanding, consultation, and cooperation. For example, in 2001, following *GE/Honeywell*, the European Commission and the U.S. agencies formed a bilateral working group that concentrated its efforts on several aspects of merger analysis including efficiencies and vertical and conglomerate effects.

¹⁶ See OECD Secretariat Note, Competition Advocacy: Challenges for Developing Countries, *available at* <http://www.oecd.org/dataoecd/52/42/32033710.pdf>; the 2009 ICN Report on "Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy," *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc362.pdf> (that reflects advocacy experience of both old and new competition agencies); and the ICN Toolkit for Effective Advocacy, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc361.html>.

¹⁷ See Wilson, *supra* note 1, p. 52.

¹⁸ See *e.g.* the FTC 2009 PERFORMANCE AND ACCOUNTABILITY REPORT, *available at* <http://www.ftc.gov/opp/gpra/2009parreport.pdf>, p. 14, demonstrating that during the years 2007-2009, the FTC cooperated with non-U.S. competition authorities in 61, 79, and 87 cases, respectively. The DOJ has a similar record of cooperation.

¹⁹ The agreements are *available at* <http://www.ftc.gov/oia/agreements.shtm> and http://www.justice.gov/atr/public/international/int_arrangements.htm. Under U.S. law, these agreements are "executive agreements," which are formal, binding international agreements.

²⁰ *Available at* <http://www.ftc.gov/os/2009/11/091110usrussiamou.pdf>. To date, the agreements have been between the governments of the U.S. and these respective countries, while the Memorandum was signed between the U.S. antitrust agencies and the Russian antitrust agency.

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.

4.1 Making contact: The beginning of cooperation

12. 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.

4.2 Cooperation during investigations

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 the reviewing agencies and the coordination of their respective investigations, with the aim of improving the analysis and achieving consistent results, where appropriate. Agencies routinely share non-confidential information, such as public information, and what is referred to as "agency confidential" information -- information that the agency does not routinely disclose publicly but as to which there are no statutory disclosure prohibitions. Examples of "agency confidential" information include general staff views on market definition, competitive effects, and remedies. This type of consultation can entail frequent contact between U.S. staff and their international counterparts and helps to identify common areas of concern.²⁴ Pursuant to the pertinent bilateral agreement or OECD

²¹ To avoid internal conflict or duplication, only one U.S. agency investigates a particular antitrust matter under an informal "clearance process" whereby the other agency defers to the relative expertise of the investigating agency in the affected markets.

²² Over the years, the United States has provided notice of antitrust actions to dozens of jurisdictions.

²³ Richard Whish & Diane Wood, *MERGER CASES IN THE REAL WORLD – A STUDY OF MERGER CONTROL PROCEDURES* (OECD, 1994) available at www.oecd.org/dataoecd/4/40/31587583.pdf

²⁴ The United States and the EU antitrust agencies have established a specific set of Best Practices on Cooperation in Merger Investigations (available at <http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtml>) to govern the frequent simultaneous review of the same transaction. In keeping with the 1991 US-EC bilateral agreement, these best practices are designed to further enhance cooperation in merger review and to avoid conflicts in the enforcement of our respective competition laws. They are also intended to

Recommendation, the information is shared on the condition that the recipients maintain the information in confidence. The U.S. agencies often seek information located outside the U.S. from parties involved in cross-border mergers; parties often provide such information on a voluntary basis, in an effort to expedite the process of reviewing the merger.

15. **Waivers.** U.S. law generally prohibits the agencies from sharing confidential business information obtained during a merger investigation unless the submitter voluntarily waives its confidentiality rights.²⁵ The parties to a proposed merger (as well as third parties) can facilitate consistent resolution of parallel investigations by granting reviewing agencies limited waivers of confidentiality regarding particular documents or information.²⁶ A waiver allows the authorities to discuss information that has been submitted to one of the reviewing agencies,²⁷ and could also permit joint interviews, which saves time for both the reviewing agencies and business personnel, but would not permit wider disclosure to third parties or the public. The sharing of confidential business information pursuant to a waiver facilitates the identification of competitive concerns in each reviewing jurisdiction and thus reduces the risk of inconsistent outcomes. Parties are encouraged to voluntarily waive the protection of confidentiality restrictions to allow agencies to share confidential information with each other²⁸ (recognizing that this is up to the parties to decide).

16. In some cases, cross-border cooperation among competition agencies has led a U.S. agency to close its investigation in light of remedial action taken elsewhere. For example, in the *Cisco/Tandberg* acquisition, reviews by the U.S. Department of Justice and the European Commission (EC) were aided by waivers from the parties and industry participants. As a result, the agencies shared information and assessments of likely competitive effects and potential remedies in the worldwide videoconferencing market. The DOJ concluded that the transaction was not likely to be anticompetitive in light of

enhance the efficiency of the agencies' respective investigations, reduce burdens on merging parties, and increase the overall transparency of the merger review process.

²⁵ In the United States, absent a waiver, most of the information submitted by the merging parties or third parties during an antitrust investigation cannot be disclosed, including the HSR forms and materials responsive to a request for additional information. This practice comports with the confidentiality provisions of the OECD Cooperation Recommendation and ICN Guiding Principles and Recommended Practices on Merger Notification, *supra* notes 11 and 13. See art. 10 of the OECD Recommendation and art. IV.F of the ICN Guiding Principles and Recommended Practices. Disclosure of confidential business information also may be expressly permitted by an Antitrust Mutual Assistance Agreement under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-6212. This law allows the United States government to enter into agreements with other governments that enable its antitrust agencies to share otherwise confidential antitrust evidence (although not HSR material) with non-U.S. antitrust authorities, to use their investigative powers to collect evidence for use by the non-U.S. authority, and to withhold from public disclosure any antitrust evidence obtained from the other authority. The United States currently has only one such agreement, with Australia, which has been used rarely.

²⁶ The ICN report, *Waivers of Confidentiality in Merger Investigations*, contains several model waivers, available at www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf. The U.S. agencies have also developed model waivers for parties to a proposed merger and for third parties involved with transactions. See <http://www.ftc.gov/oia/waivers/index.shtm> and <http://www.justice.gov/atr/public/international/206543.htm>.

²⁷ These materials are protected from disclosure by law and the penalties for unlawful disclosure are severe. See 15 U.S.C. § 50.

²⁸ See Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm> ("we should use all the tools available to us to encourage the parties to work with the agencies in parallel, and to make clear to them that they have *nothing* to gain from trying to game the system").

commitments made by Cisco to the EC facilitating interoperability between its products and those of other companies. Taking account of Cisco's commitments to the EC, along with market factors such as the evolving nature of the videoconferencing market, led the DOJ to close its investigation.²⁹

4.3 *Fashioning effective merger remedies*

17. Under U.S. merger law, the antitrust enforcement agencies may seek to remedy the likely anticompetitive effects of a proposed merger by requesting a federal court order blocking the merger.³⁰ In practice, because many transactions have aspects that do not raise competitive concerns, the parties often negotiate a divestiture of less than all the transaction assets, to allow the non-problematic portions of the transaction to proceed. This approach has become routine, and is in line with the general principle that merger remedies should be tailored to resolve the competitive problems created by the merger but should not block the parts of the transaction that are unlikely to substantially reduce competition.³¹

18. Frequently, mergers that threaten competitive harm can be modified in ways that avoid the threatened harm yet preserve the procompetitive or competitively neutral aspects of the transaction. Indeed, it has been the case for many years that settlements occur in the vast majority of merger matters where the U.S. antitrust enforcement agencies find threatened harm to competition. The majority of these settlements involve structural remedies -- which typically involve the sale of physical assets by the merging firms -- although in appropriate circumstances the U.S. antitrust enforcement agencies obtain behavioral remedies -- which limit the merged firm's postmerger business conduct. In all cases, the agencies seek to fashion effective relief that "fixes" the particular harm that would likely occur from the merger. The purpose of a merger remedy is to preserve (in the case of a proposed merger) or restore (in the case of a consummated merger) competition in the market, not to enhance it.

19. With regard to transnational mergers, the timing and procedures for negotiating merger remedies typically differ among the reviewing jurisdictions.³² As a result, cooperation and communication among reviewing agencies help to avoid inconsistent obligations and manage different timetables for decision, e.g., with regard to divestiture packages or upfront buyers.³³ As with all merger remedies, the agencies are careful in transnational mergers to monitor the remedies imposed on the parties and ensure that they are properly implemented. Cooperation and coordination with other reviewing jurisdictions extends to this phase of the merger process as well; for example, the agencies may coordinate with another reviewing

²⁹ See March 29, 2010 press release, *available at* http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

³⁰ Of course, a permanent injunction from a federal court is not available if the merger has already occurred. In such cases, divestiture may be ordered.

³¹ See ICN Recommended Practices on Merger Notification and Review Procedures, *supra* note 13, Art. XI.A, comment 2.

³² There are also some procedural differences between the FTC and the Antitrust Division, although both agencies enforce the same legal standard and are governed by the same timing constraints under the HSR Act. For a fuller discussion of the processes of each agency, see Naomi Licker and Jeanine Balbach, "Best Practices for Remedies in Multinational Mergers," *Competition Law International*, vol. 6 No. 2 (September, 2010), pp. 22-28.

³³ See e.g., *Schering-Plough/Akzo (Organon)*, FTC complaint, analysis and decision *available at* <http://www.ftc.gov/os/caselist/0710132/index.shtml>. For other examples of case cooperation see then FTC Chairman Timothy Muris, *Merger Enforcement in a World of Multiple Arbiters*, Remarks before the Brookings Institution (December 21, 2001), pp. 12-13 *available at* <http://www.ftc.gov/speeches/muris/brookings.pdf>.

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.³⁵ 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 potential entrants into the market. Failing to consult or coordinate with Canadian counterparts, the FTC staff negotiated a consent order that required Institut Merieux to lease Connaught's Canadian-based rabies vaccine business to an FTC-approved buyer for 25 years. Had the agencies coordinated, the FTC staff would have learned that the remedy was problematic for the Canadian authorities. The Canadian government protested that the remedial order would reduce availability of rabies vaccine in Canada. In response, the FTC modified its order to require Canadian government approval of the lessee.³⁶ This case serves as an example of the importance of coordinating with international counterparts, as antitrust remedies may have unintended harmful consequences in other jurisdictions.

21. Inter-agency cooperation in the *Panasonic/Sanyo* merger presents a case in point. This merger between two Japanese companies was reviewed by several competition authorities, and close cooperation among the EC, the Japan Fair Trade Commission ("JFTC"), Canada, and the FTC was made possible through bilateral agreements and waivers from the parties to allow the sharing of confidential information. The FTC staff identified competitive concerns in the worldwide market for portable nickel metal hydride (NiMH) batteries, which led to an FTC consent order requiring divestiture of Sanyo's NiMH manufacturing facility in Japan. The EC identified competitive concerns in two additional battery markets, leading to the divestiture of an additional production facility for these batteries. One of these markets was also of concern to the JFTC, which subsequently cleared the merger based on the undertakings with the FTC and the EC.³⁷

³⁴ See, for example, *U.S. v. General Electric Co. and Instrumentarium OYJ*, available at <http://www.justice.gov/atr/cases/general.htm>; *In re BASF SE*, available at <http://www.ftc.gov/os/caselist/0810265/index.shtm>; and *In Re Agilent Technologies*, available at <http://www.ftc.gov/os/caselist/0910135/index.shtm>.

³⁵ See Christine A. Varney, *International Cooperation: Preparing for the Future* (September 21, 2010), available at <http://www.justice.gov/atr/public/speeches/262606.htm>; Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm>; Rachel Brandenburger, *Transatlantic Antitrust: Past and Present* (May 21, 2010), available at <http://www.justice.gov/atr/public/speeches/260273.htm>.

³⁶ See *In re Institut Merieux*, Docket C-3301, Order Vacating Order to Show Cause, 116 F.T.C. 849, available at [http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_\(JANUARY_-_DECEMBER_1993\)PAGES_740-863.pdf#page=110](http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_(JANUARY_-_DECEMBER_1993)PAGES_740-863.pdf#page=110) and *Modifying Order* available at [http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_\(JANUARY_-_JUNE_1994\)PAGES_419_-514.pdf#page=55](http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_(JANUARY_-_JUNE_1994)PAGES_419_-514.pdf#page=55). Ultimately, no lessee could be found and the FTC set aside the remedial order.

³⁷ The FTC's press release, available at <http://www.ftc.gov/opa/2009/11/sanyo.shtm>, noted the FTC's cooperation with counterpart agencies in Japan, Canada and the EU. The U.S. agencies also actively coordinate with sister agencies to ensure complementarity of their respective remedies, for example to avoid conflicting remedies with respect to the same asset. See, e.g., *Ciba-Geigy/Sandoz*, materials available at <http://www.ftc.gov/os/caselist/9610055.shtm>, and discussion of this point in John Parisi, ENFORCEMENT COOPERATION AMONG ANTITRUST AUTHORITIES, p. 15, available at <http://www.ftc.gov/oia/speeches/1008enforementantitrust.pdf>.

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.

³⁸ U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.* (Jan. 25, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/254540.pdf; Press Release, Canadian Competition Bureau, *Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition* (Jan. 25, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html>.