

# International Aspects of United States Merger Review Policy<sup>1</sup>

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Recent years have witnessed not only an enormous proliferation in merger activity by firms, but also an exponential increase in merger review regimes around the world. This article will describe some of the issues raised by these phenomena and discuss how antitrust enforcers in the United States are responding to the globalization of mergers and merger review.

## The Current Merger Landscape

The Federal Trade Commission and the Department of Justice are facing an unprecedented wave of merger filings. The agencies are receiving on the order of 4,500-5,000 notifications annually under the Hart-Scott-Rodino Act, approximately three times the level of a decade ago. These filings pose significant challenges to the agencies because, to a much greater extent than in the past, today's mergers are strategically driven, raising complex analytical and remedial issues. In addition, they are far more likely to implicate international issues. Of

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<sup>1</sup>This is an update of an article originally published in the newsletter of the Clayton Act Committee of the Section of Antitrust Law of the American Bar Association (2000).

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the mergers that progress to second-phase review in the U.S., approximately one-half have a significant international aspect such as a foreign-based party, the need for evidence located outside the U.S., or the involvement of a foreign asset in a remedy.

At the same time, as trade barriers fall and many economies move from substantial state ownership or control to a more market-based system, countries throughout the world have been enacting new antitrust laws at a rapid pace. There are now over ninety nations with an antitrust law, while more than another twenty are in the process of drafting and enacting such legislation. Of the current laws, nearly two-thirds were enacted within the past twelve years. Approximately seventy countries' laws contain merger review provisions, most requiring some form of pre-merger notification and pre-closing approval, with many purporting to apply to transactions among parties based outside the jurisdiction.

#### Challenges to Parties and Enforcers Raised by Cross-Border Mergers

The proliferation of merger regimes poses issues for both merging parties and antitrust enforcers. For the parties, firms once faced only with steering their transactions through the FTC or Justice Department, with perhaps an additional

notification in Canada or Europe, may now confront a gauntlet of antitrust reviews around the world. In many jurisdictions, it may be difficult to determine whether the law requires a filing, or to assess whether thresholds such as those based on local market shares are satisfied. The timing of notifications may vary, with some jurisdictions allowing filing based on a letter of intent while others insist on a definitive agreement. The information that parties must submit will likely differ among jurisdictions, and some authorities may require parties to translate some or all documents. Review periods may be inconsistent, complicating plans to close the deal. Moreover, the substantive tests and the analyses applied to reviewing the legality of the merger may vary among notified jurisdictions, creating the potential for inconsistent or conflicting remedies as a condition of approving the transaction. While U.S. antitrust officials are well aware of these problems and the resulting increase in transaction costs, being able to identify the issues does not mean that they are susceptible to ready solution.

Antitrust enforcers, too, face challenges as a result of globalization and multi-jurisdictional merger review. These issues arise from the dilemma of having to address global transactions and conduct with cross-border effects with laws that are national in scope - as Principal Deputy Attorney General Douglas Melamed

succinctly put it, we live in a global economy but not a global State.<sup>3</sup> For the agencies, effective review of cross-border mergers may depend on access to documents and information located outside the jurisdiction. Enforcers may need information in the possession of a foreign antitrust agency but that information may be protected by domestic confidentiality rules. Foreign assets may be essential to effective relief, and there may be a need to coordinate with foreign authorities to prevent incompatible remedies. Though beyond the scope of this article, globalization may also raise issues implicating the substance of the merger analysis.<sup>4</sup>

#### Proposals to Address Issues Raised by Global Mergers.

Many commentators have advanced thoughtful proposals on how to address the issues raised by multi-jurisdictional merger review. These include, for example, proposals for a supra-national body that would review global mergers, harmonization of substantive and/or procedural merger review rules, review based on principles of lead jurisdiction or “center of gravity,” consideration of welfare

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<sup>3</sup> D. Melamed, “Antitrust Enforcement in a Global Economy,” Fordham Corporate Law Institute (Oct. 1998).

<sup>4</sup>See R. Pitofsky, “The Effect of Global Trade on United States Competition Law and Enforcement Policies,” Fordham Corporate Law Institute (Oct. 1999).

effects in other nations, a common repository for merger filings, and common notification forms. While a review and critique of these proposals is beyond the scope of this article, suffice it to say that many of them would require substantial changes in national legislation, the ceding of at least some degree of national sovereignty to an extent that is not, at least at present, realistic, and/or considerable progress in the harmonization of antitrust laws and policies among many countries currently at substantially different levels of development.<sup>5</sup>

The International Competition Policy Advisory Committee (ICPAC) has recently completed its study of issues posed by multi-jurisdictional mergers and has issued a Report containing a comprehensive discussion of these issues as well as a set of policy recommendations. The Justice Department as well as the FTC will be considering the Report carefully in the coming months.<sup>6</sup>

The remainder of this article will focus on the policies that U.S. and many other antitrust enforcement agencies are now following, and are in my view likely to

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<sup>5</sup>See, e.g., R. Whish & D. Wood, "Merger Cases in the Real World: A Study of Merger Control Procedures," prepared for the OECD Committee on Competition Law and Policy (1994).

<sup>6</sup>Final Report of the International Competition Policy Advisory Committee, <http://www.usdoj.gov/atr/icpac/icpac.htm> (Feb. 2000).

follow for at least the near future, to address international issues raised by mergers.

This approach is based on voluntary cooperation by enforcers, often with the assistance of the merging parties, and soft convergence of the substantive laws and policies facilitated by such cooperation.

### Enforcement Cooperation Among Antitrust Agencies

Cooperation among antitrust enforcement agencies has become a daily fact of life in the FTC and the Antitrust Division. Although some have expressed fears of dark conspiracies among enforcers, as discussed below, cooperation is both a natural response to globalization and is in the mutual interest of enforcers and merging parties.

*The Legal Bases for Cooperation.* The framework for antitrust cooperation by the U.S. enforcement agencies is set forth in an Recommendation of the Organization for Economic Cooperation and Development (“OECD”) as well as in several bilateral cooperation agreements. The OECD Recommendation, which applies to the OECD’s thirty member States, was originally adopted in 1967 and has been

amended several times, most recently in 1995.<sup>7</sup> The Recommendation provides

for, among other things:

- timely notice to other members when an enforcement proceeding affects the other member's "important interests";
- assistance in locating information in each other's territory and sharing relevant, non-confidential information;
- appropriate coordination of enforcement actions when more than one member is investigating the same conduct; and
  - "positive comity" (discussed below).

The U.S. has also entered into bilateral antitrust cooperation agreements with, to date, eight jurisdictions.<sup>8</sup> The earlier agreements, such as with Australia and the first agreements with Canada, were motivated primarily by the desire to minimize and manage conflicts that arose largely from efforts by the U.S. antitrust agencies and courts to exercise jurisdiction over parties and information outside the U.S. (such as in the uranium cartel cases of the 1970s and early 1980s). More recent agreements, while still addressing conflict avoidance and management, stem

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<sup>7</sup>Recommendation of the OECD Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (1995), [www.oecd.fr/daf/clp/rec8com.htm](http://www.oecd.fr/daf/clp/rec8com.htm).

<sup>8</sup>Australia (1982), Brazil (1999), Canada (1995), Germany (1976), European Communities (1991), Israel (1999), Japan (1999), and Mexico (2000). These can be found at [www.usdoj.gov/atr/public/international/int\\_arrangements.htm](http://www.usdoj.gov/atr/public/international/int_arrangements.htm).

principally from a mutual desire to enhance the effectiveness of antitrust enforcement in cross-border matters. Beginning with the 1991 agreement with the European Communities, the agreements include provisions similar to those in the OECD Recommendation for, among other things, notification, cooperation, coordination, positive comity, and consultation, as well as providing for traditional comity along the lines set forth in the DOJ/FTC Antitrust Guidelines for International Operations.<sup>9</sup>

In addition to providing a legal framework for cooperating, the agreements have served as a catalyst to facilitate closer working relationships between the agencies, including on merger investigations. This is illustrated most dramatically in the relationship between the staffs of the U.S. agencies and the EC's competition directorate, which are in contact on cases on literally a daily basis.

*The Nature of Cooperation in Merger Investigations.*<sup>10</sup> Domestic laws and regulations protecting the confidentiality of information submitted in merger

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<sup>9</sup>[www.usdoj.gov/atr/public/guidelines/internat.htm](http://www.usdoj.gov/atr/public/guidelines/internat.htm), § 3.2.

<sup>10</sup>For an excellent discussion of antitrust enforcement cooperation, see J. Parisi, "Enforcement Cooperation Among Antitrust Authorities," [www.ftc.gov/speeches/other/ibc99059911update.htm](http://www.ftc.gov/speeches/other/ibc99059911update.htm) (as updated, March 2000).

investigation can place a major constraint on the type and level of cooperation in which enforcement officials can engage. FTC and DOJ officials adhere scrupulously to these restrictions (an invitation by ICPAC for examples of breaches of confidential treatment produced noaffirmative response). Even given these prohibitions on disclosure of not only confidential business information but of any information submitted under the Hart-Scott-Rodino pre-merger notification procedures, FTC and DOJ staff have engaged in significant cooperation with foreign counterparts in merger investigations.

First, pursuant to the OECD Recommendation on cooperation or an applicable bilateral agreement, we notify other jurisdictions whose important interests are implicated by a U.S. investigation of a merger (and receive notification of matters affecting U.S. interests). In addition to the formal notification, which generally is made when the staff opens an investigation of the transaction, our staff will typically contact the staff of other jurisdictions whose interests are implicated at the outset of a merger review proceeding when it seems likely that the transaction will raise substantive issues in both jurisdictions. If the U.S. and a foreign agency will both review the transaction, our staffs will typically begin discussing the case early in the investigative process. At this stage, we may share public information

pertaining to the firms and markets involved in the transaction, and discuss each agency's likely timetable for review. As the investigation proceeds, it may be possible to extend the cooperation to discussing each agency's approach to the substantive issues in the case, including issues such as the relevant product and geographic markets and the likely competitive effects of the transaction.

Perhaps the most important phase of cooperation involves discussion of remedies in cases raising substantive problems in both jurisdictions. It is in the agencies' interest to ensure that the remedies that each authority is considering, for example divestiture or licensing, at a minimum do not conflict with each other. Particularly when dealing with geographic markets that encompass both jurisdictions, the agencies endeavor to consult on remedies early enough in the process so that they can arrive at solutions that address the anticompetitive aspects of the transaction in the most effective manner. For example, the FTC staff may seek to ensure that divested assets constitute a stand-alone businesses and that they are sold to a party that will serve as a viable competitor, pursuant to the findings of the Commission staff's Divestiture Study.<sup>11</sup>

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<sup>11</sup>FTC Bureau of Competition Staff, "A Study of the Commission's Divestiture Process," [www.ftc.gov/os/1999/9908/index.htm#6](http://www.ftc.gov/os/1999/9908/index.htm#6) (Aug. 1999).

The parties to the merger obviously share the agencies' interest that remedies required in different jurisdictions be compatible. It should also generally be in the parties' interest for the various jurisdictions reviewing the transaction to agree on the analysis to the extent that there are common issues, for example when the geographic market is worldwide. We have found that cooperation and information sharing among agencies can lead to more informed decision-making by all authorities. Ideally, cooperation can also promote efficiency in the investigative process, avoiding unnecessarily duplicative information requests (although some witnesses at the ICPAC hearings testified that this was not consistent with their experiences). Cooperation can also, as in the case of the *MCI/WorldCom* merger, lead a U.S. agency accept a "fix-it-first" proposal based on remedies discussed in detail with the parties by the U.S. agency but ultimately enshrined in commitments made to a foreign antitrust authority, in this case the European Commission.<sup>12</sup>

These benefits from cooperation have led many firms to waive their confidentiality protections in whole or in part to facilitate information sharing by several authorities reviewing the merger. Indeed it is now almost routine for parties to grant such waivers (although, contrary to the impression of at least some witnesses

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<sup>12</sup>[www.usdoj.gov/atr/public/press\\_releases/1998/1829.htm](http://www.usdoj.gov/atr/public/press_releases/1998/1829.htm) (June 1998).

in the ICPAC hearings, the agencies do not, and should not, draw any negative inferences from a firm's decision not to grant such a waiver). Firms can, and in my view, should seriously consider, facilitating cooperation by arranging merger filings in a way that puts the U.S. and other major jurisdictions reviewing the transaction on similar schedules so they can coordinate their investigations including decisions on remedies within their respective statutory deadlines.

During the past several years, there have been numerous examples of cooperation in merger review.<sup>13</sup> It is clear that these efforts, particularly when assisted by the parties, have facilitated efficient and informed review and consistency of relief. The troubling issues that emerged in the *Boeing/McDonnell Douglas*<sup>14</sup> case, in which the analyses of the FTC and the European Commission diverged, only emphasize the need to cooperate in order, among other things, to minimize the possibility that legitimate, and inevitable, differences that may arise when different jurisdictions apply different laws turn into politically charged trade disputes.

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<sup>13</sup>For a detailed discussion of how cooperation took place in several recent FTC cases, see R. Parker, "Global Merger Enforcement," International Bar Ass'n conference, [www.ftc.gov/speeches/other/barcelona.htm](http://www.ftc.gov/speeches/other/barcelona.htm) (Sept. 1999).

<sup>14</sup>5 Trade Reg. Rpt. (CCH) ¶ 24,295 (July 1, 1977); Case No IV/M.877, OJ L 336/16 (8 Dec. 1997).

In discussing cooperation, it may also be worth noting certain mechanisms with little or no application to merger investigations. The International Antitrust Enforcement Assistance Act,<sup>15</sup> enacted in 1994, authorizes the U.S. under specified circumstances to enter into mutual assistance agreements that provide for, among other things, the exchange of confidential information (the U.S. has entered one such agreement, with Australia<sup>16</sup>). However, the Act does not apply to information provided pursuant to Hart-Scott-Rodino notification procedures (although it may be possible to obtain and share similar information through the agencies' general investigative powers). Mutual legal assistance treaties (MLATs) into which the U.S. has entered with some thirty-six countries (with fifteen more awaiting signing or ratification) provide for sharing confidential law enforcement information, but these apply to criminal conduct and thus not to merger investigations. Finally, positive comity -- under which one jurisdiction requests another to investigate and, if appropriate, remedy, anticompetitive conduct in the jurisdiction of the requested party that harms the interests of the requesting party -- will likely be of little utility in merger cases given the requesting party's statutory obligation to clear or challenge the transaction itself and the tight statutory time frames for completing

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<sup>15</sup>15 U.S.C. §§ 6201-6212 (1994), [www4.law.cornell.edu/uscode/15/ch88.html](http://www4.law.cornell.edu/uscode/15/ch88.html).

<sup>16</sup>[www.usdoj.gov/atr/public/international/docs/usaus7.htm](http://www.usdoj.gov/atr/public/international/docs/usaus7.htm).

merger investigations. For these reasons, the 1998 agreement on positive comity between the U.S. and the European Communities,<sup>17</sup> which provides among other things for a presumption of deferral to the other jurisdiction under certain circumstances, expressly excludes mergers from its coverage.

### Prospects for Convergence

It is perhaps a natural first reaction for those who have been involved with antitrust review of cross-border mergers to yearn for a day when it will no longer be necessary to have to deal with a multiplicity of laws, procedures, agencies, forms, officials, and languages (not to mention filing fees). That day, should it ever come, is alas not on the horizon. Indeed, a high level of harmonization in a rapidly changing environment may not be desirable, as it would reduce the number of “laboratories” from which we can learn the advantages and disadvantages of different systems and may risk imposing rigid standards that would be difficult to modify with changing circumstances and new learning. In the meantime, we will have to settle for modest steps in the direction of convergence, both procedural and substantive. But especially given the rapidly changing legal and economic

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<sup>17</sup>Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, [www.usdoj.gov/atr/public/international/docs/1781.htm](http://www.usdoj.gov/atr/public/international/docs/1781.htm) (June 1998).

landscape, I believe this common-law type approach is the most appropriate manner in which to move forward.

Although it is natural to at first assume that progress on procedure will be easier than on substance, the opposite may be the case -- procedural arrangements, such as notification triggers and review periods, are generally codified in statutes and regulations that are typically resistant to change. Nonetheless, the OECD's Competition Law and Policy Committee is considering whether international antitrust cooperation can be enhanced through convergence of the procedural aspects of merger review. One tangible result of this process is a framework for pre-merger notification that the OECD has published as a model for countries that are enacting or modifying notification regulations;<sup>18</sup> at least one country, Brazil, has used the framework to design its notification regime.

Substantive laws, while also codified, are, as in the case of the U.S. Clayton Act and the EU Merger Control Regulation, often broad enough to allow for policy shifts without requiring legislative action. Thus, the merger analyses of the

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<sup>18</sup>Secretariat, OECD Committee on Competition Law and Policy, "Report on Notification of Transnational Mergers," [www.oecd.org/daf/clp/reports.htm](http://www.oecd.org/daf/clp/reports.htm) (Feb. 1999).

jurisdictions with which the U.S. works most closely, such as the EU and Canada, have steadily converged over the years of our cooperation, and continue to do so. For example the analytical approaches of the U.S. and EU guidelines on market definition guidelines are closely aligned. This type of soft convergence is facilitated by the frequent contacts that FTC and DOJ staff have with counterparts in other antitrust agencies both through cooperation in specific cases and through participation in competition policy fora such as the OECD. The U.S. is also committed to promoting the adoption of sound competition policy, including with respect to merger review, worldwide and advances this policy goal through participation in multilateral fora, such as the WTO Working Group on the Interaction Between Trade and Competition Policy, the Negotiating Group on Competition Policy of the Free Trade Area of the Americas, and the Asia Pacific Economic Cooperation. In addition, the U.S. antitrust agencies promote these principles through an extensive program of technical assistance provided, with funding from the Agency for International Development, to governments around the world.

Neither soft convergence nor enforcement cooperation is a panacea for the real and perceived problems arising from the proliferation of international merger review. However, both offer hope of incremental progress on the basis of actual experience

and shared learning. In the case of the U.S. and the EU, this can be illustrated by two recent steps to enhance our working relationship. In 1999 we entered into an arrangement pursuant to which members of our staff may, in appropriate cases and with the parties' consent, participate in certain stages of the others' proceeding - in the case of the EU, the Commission's hearing and, for the U.S., the parties' final meeting with senior officials prior to the agency's decision. Second, the FTC, DOJ, and the EC Competition Directorate have established a working group to identify and explore areas for further substantive convergence on merger review - the Group is looking first at our respective approaches to remedies and to the analysis of coordinated interaction / collective dominance.

I believe that these types of cooperative efforts between the U.S. and other antitrust enforcers will increase in the coming years, yielding benefits to enforcement agencies, merging parties, and ultimately consumers. In my view, these steps offer the most realistic hope in an imperfect world of promoting the most consistent and sound merger enforcement policies in the years ahead.

ABA Lunch program - November 17, 1999

Jones, Day (Joe Winterscheid)

Disclaimer

Will address “modern bilaterals”:

5: EU (1991), Canada (1995), Israel (1999), Japan (1999), Brazil (1999)

plus EC poscom agreement (1998)

A.Origins

Grew out of globalization, EC merger reg.

As much out of positive motivations (desire to work together)

than negative (avoiding conflict)

EC model - balance between the two, but now prevailing motivation is positive

## B. Summary of Main Provisions

Generally consistent

Some differences, but not important to implementation

Preamble

commitment to sound and effective enforcement; cooperation, coordination

notes that differences can arise

commitment to consider each other's important interests

### I. Purpose and Definitions

purpose - promote cooperation and coordination, minimize conflicts

definitions - anticompetitive activities - all competition enforcement;  
agencies, laws

## II. Notification

when enforcement activities may affect other party's important interests

identifies specific activities:

anticompetitive acts in other party's territory

mergers in which one party or parent is based in other territory

remedy requires or prohibits relief in other territory

advocacies that affect other's important interests

Canada: more detailed - e.g., seeking information in other territory  
except phone calls where voluntary, oral, not subject

timing - as soon as possible after aware that may affect important interests;  
in time to present views

- mergers - US - when we seek info pursuant to HSR (second request)

Canada - 7 days for info in other territory, non-merger enforcement proceedings;

Japan - tailored to specific national proceedings - e.g.,  
notify surveys that affect important interests, surcharges, warnings

### III. Exchange of Information (Cooperation)

common interest in sharing information to facilitate effective application of laws or  
promote better understanding

provide the other with any significant information about anticompetitive activities

that it believes relevant to, or may warrant, enforcement by other party

provide other party info. on request, consistent with confidentiality, other laws,

resources

#### IV. Coordination

applies where both agencies reviewing same matter or conduct

free to agree (or not) to coordinate, considering various factors (some differences)

conduct enforcement consistent with other parties' objectives to the extent possible

consider, upon request where compatible with own interests, determining whether

persons that have provided conf. info will consent to sharing with other authority

either party free to limit or terminate coordination

#### V. Positive Comity

recognize mutual interest in addressing cross-border anticompetitive practices

one party may request the other to investigate, take action; requester to cooperate

notified party considers whether to initiate or expand investigation, notify requester

notified party has full discretion to take act or not act, notifying party can take own

action (except in Japan agreement - covered elsewhere)

## VI. Avoidance of Conflicts (Comity)

take other party's interests into account in all phases of enforcement proceedings -

initiation, scope, remedies

where other party's important interests may be adversely affected, consider, inter

alia,

list of comity factors - mix of *Timberlane*, International Guidelines - some

differences

e.g., significance of effects of conduct in each territory, significance to anticompetitive activity of conduct in each jurisdiction, intent to affect other jurisdiction

## VII. Consultations

consult on any matter related to agreement

## VIII. Confidentiality

no override of national laws

no requirement to provide information if national law prohibits or incompatible with important interests of party possessing the information

each party to maintain confidentiality to fullest extent possible, and oppose to fullest extent possible disclosure to third party not authorized by provider

Japan and to some extent Canada have more detailed provisions,

e.g., on use of nonpublic information

## IX. Existing Law

nothing interpreted in a manner inconsistent with existing laws

## X. Communications

notifications direct between agencies, but enforcement actions, poscom, consultations, and termination confirmed in writing through diplomatic channels

- future - desire to move away from diplomatic channels for routine notifications

## XI. Entry Into Force, Termination, Review

in force until 60 days after notification of termination

review - EC, 24 mos.; Japan , 5 yrs.

## C. Significant Differences

### Canada agreement consumer protection

more specific notice provisions - 7 days notice, or as promptly as circumstances permit, to notify non-merger enforcement and seeking info (others - non-merger: far enough in advance to be taken into account; info requests: no provision - but do so under OECD Recommendation)

specific notice for info requests exception for oral, voluntary, tel. contacts)

more detailed confidentiality provisions

Japan agreements surveys - notify if affects important interests

restrictions on use of information in criminal proceedings

more detailed confidentiality provisions

## Comity factors

Brazil and Israel less detailed in some respects

Brazil technical cooperation

Israel territories

Meetings Canada - semi-annual; EC, Japan - annual; Brazil, Israel - periodically

D.EC Positive Comity agreement (1998)

elaborates on poscom provision in 1991 agreement

applies where anticompetitive conduct in one jurisdiction adversely affects interests of the other party, and conduct illegal where it is occurring

purpose is to help ensure that trade and investment flows not impeded by anticompetitive.

activities, and to establish cooperative procedures to achieve the most effective and  
efficient enforcement

definitions - doesn't apply to mergers

specifies that conduct need not be illegal in requesting country

Art. IV - deferral/suspension: may occur by agreement; also

one party normally defers or suspends in favor of the other where

a. the anticompetitive activities:

do not have a direct, substantial and reasonably foreseeable impact on consumers

in the Requesting Party's territory, or

where the anticompetitive activities do have such an impact on the Requesting Party's  
consumers, they occur principally in and are directed principally towards the other  
Party's territory

b. the adverse effects on the requesting party's interests can be and are likely to be fully and adequately investigated and remedied

parties recognize that may be appropriate to pursue separate enforcement activities where anticompetitive activities affecting both territories justify the imposition of penalties within both jurisdictions (cartels)

c. parties agree to various conditions including: devoting adequate resources, pursuing available information, keep other party advised of status, use best efforts to remedy within six months, comply with reasonable requests of the requester

Requesting party that defers or suspends free to initiate or resume own proceeding (can still coordinate)

Confidentiality - info provided to be used only for purpose of implementing agreement, but can go beyond w/consent of providing agency and, in certain cases,

source

## Experience under the Agreements

EU - close, daily working relationship built on trust and confidence

Canada - also strong relationship, contact not as frequent as with EU, at least on  
civil side

Japan, Israel, Brazil - too new

Poscom Only 1 use of formal poscom - SABRE - successful

Also informal cases - Parma Ham, Nielsen

Expectations may have been overblown

Some fine tuning necessary - e.g., 6 mo. time frame

Modest but useful procedure in limited class of cases

Cooperation example - Merger case w/EU - John

## Regulatory Harmonization:

### 21<sup>st</sup> Century Challenges for Competition and Antitrust in the Transatlantic Area

Randolph W. Tritell\*

Globalization poses new challenges to antitrust enforcement.

Although the United States has long taken an expansive view of the ability of its antitrust laws to reach beyond our borders, until recently antitrust enforcement was a largely domestic exercise. The rapid increase in trade and foreign investment, while surely increasing consumer welfare, also multiplies the opportunities for anticompetitive conduct with cross-border effects. Yet while we now live in global economy, we do not live in a global state. This means that there are necessarily limits on the ability of national antitrust enforcers to address and remedy practices that might adversely affect their nationals. This paper will discuss some of the means that

antitrust enforcement officials have developed, and others that have been proposed, to adapt national antitrust policy to globalization, focusing in particular on the US-EU relationship.

### Background

Several global trends have come together to prompt new approaches to international antitrust issues. One is the rapid increase in global trade, stimulated by, among other things, the progressive reduction in trade barriers resulting in part from international and regional trade agreements, easing of barriers to foreign direct investment, improvements in transportation and communications and, as you are discussing elsewhere in this conference, convergence of technical and other industrial standards. In the decade ending in 1997, exports as a percentage of U.S. gross domestic product grew from 7.2% to 13.5%, while imports increased from 10% to 15.4%. These remarkable increases do not even consider foreign direct investment, which

was \$350 billion in the United States in 1996 alone. The US-EU trade and investment relationship is the largest in the world, with two-way trade flow and foreign investment each exceeding \$500 billion in 1998. US-EU bilateral trade constitutes over 7% of total world trade, and we have by far the world's most important bilateral investment relationship.

Another important trend, at once a cause and a result of the increase in global competition, has been the surge in merger and acquisition activity. At the FTC, we see that in the form of a tripling of mergers reported under our pre-merger notification program; we now receive over 4,500 such notifications per year, a level three times that of 1991. Whereas most mergers once raised only domestic issues, now one-half of the mergers that prompt substantial further investigation have a significant foreign dimension, such as a foreign-based party, important evidence located abroad, or a foreign asset involved in a remedy. Thus, in the past year, out of the twenty-eight merger cases in which the FTC took enforcement action, we

notified foreign governments in thirteen of these cases and conducted substantive discussions with foreign authorities in six of them.

We have also witnessed over the past decade the opening of markets in formerly closed or state-dominated economies around the world. Faced with new competition from abroad, firms have sometimes turned to anticompetitive practices to safeguard their formerly protected markets. This can take the effect of closed distribution systems, import cartels, anticompetitive mergers, abuses of a dominant position, or outright price fixing and territorial allocation. A look at the Department of Justice's recent enforcement against international cartels illustrates the breadth and depth of one aspect of this problem. In the past two years, the Antitrust Division has obtained fines in criminal antitrust cases totaling over \$1.5 *billion* – many multiples of the total of all criminal antitrust fines since the Sherman Act was passed in 1890. Approximately one-half of the defendants in the Division's criminal cases were based abroad, and well over 90% of these

finances were imposed in connection with international cartel activity. Today, the Antitrust Division has over thirty-five sitting grand juries investigating suspected international cartels, representing over one-third of all of its criminal grand juries.

Another noteworthy trend is the proliferation of national and regional competition regimes. Many countries going through the market liberalization process, recognizing the importance to an open economy of competition policy, have enacted an antitrust law. Today, over eighty countries have an antitrust law, approximately fifty of these with merger control provisions. Most of these laws are less than a decade old; another approximately twenty countries are considering draft antitrust legislation. Hence, mergers and other conduct by businesses operating internationally are often subject to the antitrust jurisdiction of numerous countries. This raises concerns both on the part of regulators, who seek the ability to address anticompetitive practices that affect their consumers, and firms that seek to

avoid the burdens of multiple, overlapping, and potentially inconsistent antitrust regulation.

### Regulatory Responses: Cooperation and Convergence

In a world in which business conduct is subject to multiple antitrust jurisdiction, some degree of regulatory coherence is not only desirable, but essential. The title of both this conference and this panel refers to regulatory harmonization. Harmonization is a desirable and achievable goal in many disciplines, some of which you are discussing during this conference.

However, in the realm of antitrust, harmonization is not attainable in the foreseeable future, and may not even be desirable. Even between jurisdictions such as the US and the EU with well-developed antitrust regimes and substantial similarity of philosophy regarding the proper goals of competition policy, there are significant differences in procedures and substantive rules. This is a natural result of different historical experiences

and cultural influences which are now reflected in differing legislative regimes. Similarly, in the North American Free Trade Agreement, there is no attempt to harmonize antitrust rules. Rather, a committee was established under Section 15 of the Agreement under which the US, Canada, and Mexico were to study each other's antitrust systems and identify any areas in which differences in their regimes created impediments to trade within the free trade area; no significant such obstacles were found. We are now engaged in a competition negotiating group in the Free Trade of the Americas negotiations in which the thirty-four participating nations in this hemisphere are discussing how to incorporate competition principles into the free trade area slated for 2005. While this exercise is in its early stages, it appears unlikely to me that this will result in any attempt to impose harmonized antitrust rules, particularly given that most participants have no antitrust laws at this point.

This does not mean that the US and other jurisdictions including the

EU simply pursue their own goals using their own tools with no regard for the activities of their counterparts in other countries. Rather, the US and the EU, as well as other jurisdictions, are approaching the challenges of globalization through a variety of cooperative mechanisms that I will describe below. Our experience in working cooperatively in turn has led to convergence - not “hard” convergence consisting of common laws and regulations, but convergence based on shared learning and experience that slowly but steadily moves the US and our partners abroad toward common approaches to common problems.

The US and the EU and its Member States have been engaged in a cooperative exercise for many years pursuant to voluntary mechanisms adopted through the Organization for Economic Cooperation and Development. In a Recommendation first adopted in 1967, and successively amended, most recently in 1995, the US and the antitrust authorities of the OECD members agreed to a variety of cooperative measures in antitrust

enforcement including:

- notification of the other party whenever one party's enforcement activities may affect the another member's important interests;
  
- cooperation with another member's antitrust investigations, including sharing non-confidential investigatory information;
  
- coordination of parallel enforcement activities;
  
- comity, i.e., taking the other country's interests into account in making decisions on enforcement activities;
  
- positive comity, which is discussed further below; and
  
- consultation in the event of potential disputes arising from antitrust

enforcement.

Many of the obligations in the OECD Recommendation have been incorporated into bilateral agreements the US has entered with important trading partners, including Germany (1976), Australia (1982), Canada (1984 and 1995), the European Commission (1991), Israel (1999), and just last week, Japan. These are executive agreements rather than treaties, meaning that they are legally binding but do not overrule any conflicting domestic law. While the earlier agreements were motivated largely by a desire to minimize friction, such as that caused by the extraterritorial application of US antitrust law in cases such as the prosecution of the uranium cartel in the 1970s, the EC agreement and subsequent agreements were motivated primarily by a mutual desire to enhance cooperation in order to improve our mutual effectiveness in law enforcement.

Since the signing of the cooperation agreement with the EC, cooperation between the US and EC antitrust authorities has developed in an

exemplary manner. This manifests itself both in regular high-level contacts as well as virtually daily staff contact on cases and policies of mutual interest. To use a current example, the FTC and the Commission staff have consulted and cooperated regularly and cooperated in reviewing the proposed merger of Exxon and Mobil. The Justice Department and the Commission worked together in their investigations of the MCI-WorldCom merger, resulting in a divestiture that satisfied both agencies, and they will no doubt be back in touch on the currently proposed MCI-WorldCom/Sprint transaction. During the investigation of such transactions, the agency staffs are in regular contact by telephone and e-mail, and may even sit in on hearings and meetings of the other agency. They exchange information on subjects such as market definition and the competitive effects of the merger and, where remedies such as divestiture or licensing are required, seek to coordinate them to avoid incompatibilities. This process benefits both the agencies and the merging parties. As discussed below, we generally cannot share confidential information, but parties often see it in their interest to

waive their protections to allow the agencies to share such information in order to coordinate their investigations and remedies. While close cooperation is particularly evident in merger cases, where the agencies and the parties have clear incentives to reach rapid and consistent results, we have also worked together in non-merger cases, such as in the investigation of certain licensing practices by Microsoft where the Justice Department and the European Commission issued parallel orders resolving the charges. You are probably aware that there is a new Commissioner, Mario Monti, responsible for competition policy in the European Commission. Just last week I was in Brussels with FTC Chairman Pitofsky and Assistant Attorney General Klein where we all reaffirmed our commitment to continue and deepen our cooperation.

The 1991 agreement also contained a provision for a novel mechanism that has come to be known as “positive comity.” The essence of positive comity is that one country can ask another to investigate and take

action against anticompetitive conduct occurring in its jurisdiction that harms the interests of the requesting country. Two types of cases in which the US or the EU could invoke positive are: (i) party A learns of a cartel among firms in the party B that fixes prices of goods sold into both parties' markets, injuring both of their consumers; and (ii) party A learns of anticompetitive practices by firms in party B exclude party A's firms from the party B's market, i.e., a denial of market access. In these cases, one option, if the US felt its interests were being harmed, would be for the FTC or DOJ to conduct an investigation and, if the charges are borne out, to impose a remedy. However, there are often substantial practical obstacles to successfully conducting and concluding such a proceeding. For example, it may be difficult to obtain jurisdiction over the subject matter and over foreign parties. Service of process may be problematic, and the gathering of evidence may be impeded by foreign laws, including blocking statutes that make it illegal to provide evidence to foreign antitrust bodies. Even if a case could be assembled and brought, it may be impossible as a practical matter

to impose enforceable remedies. Furthermore, even if all of these obstacles were overcome, bringing such a case may generate undesirable political tensions when countries that claim that the assertion of US jurisdiction infringes their sovereignty. On the other hand, the European Commission will likely have better access to evidence located in the EU, and be in a better position to prosecute the case and impose a remedy.

In 1998, the US and the EC entered into a new agreement that spelled out in greater detail the procedures to be followed in positive comity cases. In addition, it established a presumption that in certain types of cases, each party would defer to the other to investigate and bring an enforcement proceeding if the party conducting the investigation agrees to several conditions, such as that it will devote adequate resources to the case, keep the other authority informed of the status of the investigation, and seek to complete its investigation including any remedial action within a reasonable time frame. Both the 1991 and the 1998 agreements, however, explicitly

provide that the requesting or deferring country does not give up its jurisdiction, and is free to institute its own proceeding at any point. In addition, because of statutory requirements for national review and tight time frames for review, the deferral presumption in the 1998 agreement does not apply to merger cases.

To date, there has been one positive comity referral, by the Justice Department in 1997 of allegations that European airlines were acting anticompetitively to exclude an American firm, SABRE, from the European market for computerized airline reservation systems. In March 1999, as a result of this referral, the European Commission initiated legal proceedings against Air France. There have also been instances of informal positive comity, i.e., where without a formal referral the US has worked with the EC or its Member States to resolve a competitive problem occurring in Europe that hurt US interests. One example is a case in which the FTC learned of a cartel in Italy that was raising prices to US consumers. Upon learning that

the Italian competition authority was investigating, the US stayed its hand, and the case was resolved by enforcement action taken by the Italian authority.

Positive comity should not be oversold - it has several limitations and will be appropriate in only a narrow class of cases. Nonetheless, in appropriate cases, it can, by ensuring that the case is handled by the authority in the best position to investigate and remedy the illegal conduct, be an effective tool for cooperation while minimizing potential friction that can arise from extraterritorial enforcement.

One important limitation of both the 1991 and 1998 agreements with the EC is that they do not allow for the exchange of confidential information obtained during the investigation. Although in some cases, particularly mergers, the parties waive their confidentiality rights to allow the agencies to work together, including to fashion compatible remedies, in most other

cases we are limited to exchanging public and other non-sensitive information. One exception is in the criminal area, where the US can sometimes obtain investigatory assistance, including confidential information, pursuant to Mutual Legal Assistance Treaties, or MLATs, that provide generally for cooperation in criminal law enforcement.

In 1994, however, Congress enacted the International Antitrust Enforcement Assistance Act, or IAEEA. The Act authorizes the US to enter into mutual assistance agreements with countries with reciprocal legislation that, among other things, allows for the exchange of confidential information and authorizes each party to obtain information, including through compulsory means, exclusively for the other party. Earlier this year, the US entered into its first such agreement with Australia. We hope at some point to be able to deepen our cooperation with the EC by entering into such an agreement with the European Commission. This is unlikely in the immediate term due to concerns by some Member States about sharing

confidential information with the US, particularly given that there is not even such a mechanism between the EC and the Member States or among Member State enforcement authorities. However, we are hopeful that these barriers will be overcome so that we can proceed with a so-called second generation agreement with the EC.

Although bilateral cooperation is the most important feature of the US-EC antitrust relationship, a significant amount of convergence has taken place and continues to evolve between our two systems. As I mentioned, although there is substantial congruence of views on the proper role of antitrust between the US and the EC, there are meaningful differences, both substantive and procedural, between our systems. For example, the EC takes a stricter attitude toward certain vertical restraints than we do in the US. This is based on their overriding concern with the integration of fifteen formerly separate economies into a single market. The EC uses a somewhat different standard for evaluating the legality of mergers as well as for

judging the conduct of firms in a dominant market position. Procedurally, the EC has relied on a system of prior notification and clearance or exemption of agreements whereas we do not, and their merger reporting system applies to far fewer transactions, requires more up-front documentation than ours, and has a fixed end-point for the review. These statutory differences are unlikely to disappear in the near term.

However, as we have worked more closely together over the years, there have been meaningful steps toward convergence. This is most apparent in our analytical approaches to most antitrust issues. On the overwhelming majority of cases that we simultaneously review, we reach the same conclusions on things like market definition, competitive effects, and appropriate remedies. During the past several years, our agencies have issued decisions and guidelines in areas such as market definition, vertical restraints, abuse of dominance, and merger analysis that bear a great resemblance to the policies of our trans-Atlantic counterparts. There is little

doubt that this process of soft convergence will continue, if not accelerate, in the coming years. For example, in our meetings in Brussels last week, we agreed to establish a new working group with officials from the FTC, DOJ, and the European Commission to study issues relating to cross-border mergers with a view to looking for further areas of convergence.

There are no doubt some of you who, hearing this blissful description, are no doubt thinking, “but what about the *Boeing/McDonnell Douglas* case?” Indeed, that was a situation in which we reached different conclusions and where our differences could have escalated into a trade war. I can only say that this was the proverbial exception that proves the rule. In that matter, there actually was close cooperation between the FTC and the Commission that narrowed differences in our analysis. In addition, the Commission deferred to the US government’s request not to seek to intervene in the defense aspect of the transaction. Regarding the market for civil aircraft, this may be the unusual case where, in addition to dealing with

a politically very sensitive product, the differences in legal standards may have dictated different results. Thus, the EU test of strengthening a dominant position may have proven more strict than the US test of substantial lessening of competition, and the EU is generally less tolerant of the type of exclusive agreements that its order ultimately condemned in this case. But such differences are to be expected from time to time; indeed there are often differences among the five Federal Trade Commissioners, not to mention the nine Supreme Court Justices, in antitrust cases, so why not between antitrust bodies in different countries? Yet there have been differences in other cases, in which one jurisdiction or the other found more of a competitive problem, and such cases are regularly dealt with without fanfare or acrimony. The US-EC relationship is strong enough to respect and handle such differences. Moreover, cases such as *Boeing* only serve to re-emphasize the importance of cooperation to avoid having competition issues resolved in trade or political fora.

## ABA International Section Lunch Program

February 28, 2001, Washington, D.C.

### I Background

#### II Globalization

#### II Merger wave

- approx. 5000 filings last year (but down now due to economy, thresholds)

- high proportion of mergers with an international dimension

#### II Proliferation of antitrust laws, merger control

- ~ 90 laws, 70 with merger control (compared to ~ 20 in 1990)

- many more draft laws, conditionality

## II Issues Raised

A Fundamental dilemma - global economy but not global state

II Ability to reach anticompetitive mergers occurring outside jurisdiction

- jurisdictional issues

- practical issues in obtaining evidence

II Limitations on cooperation - confidentiality, differences among systems

II Coherence of laws - procedural and substantive

V. Avoidance / minimization of conflicts

VI. Technical assistance

VII. Minimizing burdens on business

- determining whether filing is necessary
- different forms, information requirements, possibly requiring

translation

- different timing of filing and review
- different substantive standards
- possibility of conflicting remedies

### III Current Approaches

II Based on voluntary cooperation among agencies

II Legal framework for cooperation

- OECD Recommendation

- Bilateral agreements - 8 US agreements, many others in place

and in progress

II Increasingly conducted with full cooperation of parties

II How cooperation works

- types of information - public, confidential / HSR, agency

confidential

- cooperation without waivers
- public info., process, market definition, competitive effects,

remedies

- strict adherence to confidentiality rules
- cooperation with waivers
- limited nature of information exchange
- benefits to parties

## II Mechanisms with little or no applicability to mergers

1. Positive comity

- limited, if any, application to mergers - timing,

sovereignty

- enhanced agreement with EC inapplicable

2. IAEAA

- inapplicable to HSR

- possibility of obtaining and sharing materials re-obtained

by process

3. MLATs - just criminal

## II Informal Deference

- Boeing - defense aspects

- *MCI/WorldCom* - no DOJ decree; *Dresser/Halliburton* - no

EC undertaking

- probably goes on frequently in smaller jurisdictions

## II Future Directions

### II Utopian solutions

- supranational authority

- harmonized rules - procedural and/or substantive

## II WTO rules

- current proposals have little relevance to mergers
- in any event, poor solution, premature
- US doesn't see need for every country to have comp. law /

merger control

- small economies, open economies

## II Various constructive alternative proposals

- common notification form, but UK/French/German form a

failure

- center of gravity, but EC wouldn't take a pass on, e.g., *Boeing*

case

- central repository / opt-in

## II ICPAC Recommendations

- many geared to U.S. domestic issues

- notification thresholds that screen out mergers that are

unlikely to generate anticompetitive effects

- appreciable nexus requirement

- periodic indexing or review of thresholds

- objectively based thresholds (i.e., not market share)
- ability to review transactions below notification thresholds
- two-stage review
  - first stage no more than one month
  - early termination authority
  - harmonization and more flexibility of rules on event

triggering notification

- more certainty in time-frame for second-stage review
- initial filing should require minimum amount to determine

whether there is a competitive problem

- short-form / long-form option, with additional information

optional

- brief oral or written summary of concerns justifying

second-stage investigation

- after-the-fact audit of merger challenges

- soft procedural harmonization through the OECD

## II OECD

- ongoing review of multi-jurisdictional merger issues, with

input from BIAC

- framework notification form - use by Brazil

- looking at possible next areas - possibly nexus to jurisdiction;

also data bank

## II Global Competition Initiative

- ICPAC recommendation

- endorsement by Joel at Sept. 2000 EC merger conference,

Doug at Fordham

- support by EU, IBA, ABA Antitrust Section

- Ditchley Park conference

## II Continuation of ongoing efforts

- broadening and deepening of bilateral cooperation

- convergence through working together, learning

- US/EC Working Group - Remedies - EC Notice; on to

oligopolies

- narrowing of differences in approaches to analyses,

remedies

- provision of technical assistance to countries with new

regimes

## V Conclusion

A. The day may come when comprehensive solutions through

international standards may be appropriate but, in the foreseeable future, the best hope appears to lie in incremental progress based on voluntary efforts, cooperation, shared learning, and real-world experience.

**II We are most interested in input from users of the system - firms and their lawyers, and welcome any suggestions.**

