For Official Use **DAF/COMP/WP3/WD(2007)42**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **23-May-2007**

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2007)42
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Working Party No. 3 on Co-operation and Enforcement

INVENTORY ON EFFECTIVE COOPERATION PRACTICES

-- United States --

5 June 2007

To be held on 5 June at the OECD, Tour Europe, 33 Place des Corolles, 92049 Paris la Défense Cedex, starting at 10am.

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JT03227631

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INVENTORY ON EFFECTIVE COOPERATION PRACTICES

United States

1. The practices listed below reflect the experience of the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission in working with counterpart enforcement authorities under the terms of the 1995 OECD Recommendation concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade,[1] the formal bilateral cooperation agreements to which the United States is a party, and through informal cooperation arrangements.[2] The Best Practices on Cooperation in Merger Investigations, adopted by the European Commission and the U.S. agencies in October 2002,[3] identifies what both parties and agencies can do to facilitate cooperation in multi-jurisdiction investigations.

I. Timely communication among enforcers

- Informal (telephone, fax, or e-mail) inquiries and communication among potential reviewing enforcers often occurs contemporaneous with opening a merger investigation and within a reasonable time after opening a civil non-merger investigation.

- Ask subjects of investigations to identify other agencies investigating the same transaction.[4]

2. Comment: The multijurisdictional presence of many businesses and the transborder effects of their conduct and transactions remind antitrust agencies of the potential for concurrent investigations. The OECD Recommendation on Cooperation and the many bilateral cooperation agreements describe circumstances in which notification to another authority is called for. Such provisions should be viewed as signals to make early, informal (telephone, telefax, or e-mail) contact with other potentially interested agencies before such formal notification obligations arise. The agencies have seen opportunities for

1 C(95)130/Final (27-28 July 1995).

2 *See also* previous U.S. submissions related to enforcement cooperation, in particular: its submission to the June 2001 WP3 Roundtable Discussion on International Co-operation in Transnational Mergers, DAFFE/CLP/WP3/WD(2001)23; its May 2003 submission on Information Sharing in Merger Control Procedures, DAFFE/COMP/WP3/WD(2003)25; and its February 2005 submission to the Roundtable Discussion on Cross-Border Remedies in Merger Review, DAF/COMP/WP3/WD(2005)7.

3 Available at: http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm.

4 The U.S. premerger notification form requests the submitting parties to state voluntarily whether the acquisition is subject to foreign filing requirements and, if so, which jurisdictions, as recommended by the OECD's 1994 Report, Merger cases in the Real World: A Study of Merger Control Procedures, commonly known as the "Wood-Whish Report."

cooperation delayed or missed due to a failure of such early, informal contact. Given concerns over potentially conflicting enforcement actions, it is important for agencies to become aware of their enforcement counterparts' interests as early as possible.

II. Sharing of relevant information

3. Timely initial communication among enforcement agencies can help the agencies:

- identify which agencies are investigating the conduct or transaction;
- ascertain whether the reviewing agencies possess information useful to other agencies' investigations;
- determine whether the reviewing agencies have common enforcement interests;
- arrive at non-conflicting definitions of the relevant markets, assessment of potential competitive effects and, if needed, remedial measures; and
- identify any special considerations that may affect the competition agency's analysis of the matter under investigation.

4. Comment: There are three basic categories of information that may be shared under certain circumstances:

- publicly-available information. One authority may not have ready knowledge of or access to public information relevant to another agency's investigation. Examples include: the public record of prior cases involving the same parties, industry, or issues; agency studies of the affected industry or markets; and reports, including data gathered by other agencies or institutions.
- confidential agency information. This is information that agencies are not prohibited from disclosing but may, and do, ordinarily withhold from public disclosure. For the United States agencies, this includes the fact that an agency is investigating a particular transaction or conduct, and aspects of the staff's analysis of the relevant product and geographic markets, competitive effects, entry, and the need for, and nature of, potential remedies.
- confidential business information. This is information provided by parties under investigation and third parties, the disclosure of which is barred by law. It, thus, may not be shared in the absence of mechanisms, such as an international agreement (e.g., a Mutual Assistance Agreement[5]) that permits disclosure under some circumstances, or a waiver of confidentiality granted by the party submitting the information that would allow the agency to share or discuss it with another reviewing agency.

5 For example, the 1999 Agreement between the Governments of Australia and the United States.

III. Obtaining waivers of confidentiality as appropriate[6]

5. Comment: Waivers of confidentiality permit the agencies that have been granted waivers to discuss confidential documents and information, and theories or analysis based on confidential materials provided by parties and third parties. They are often used in U.S. merger investigations and are also used in some civil non-merger investigations. In criminal investigations, amnesty applicants can waive the confidentiality of their status to permit more detailed discussions with other agencies. Agencies do not seek or obtain waivers in every multi-jurisdiction investigation; in most instances, sharing non-confidential agency information will be sufficient for the agencies to determine whether the matter raises issues of common enforcement interest, the investigation of which would be facilitated by confidentiality waivers.

IV. Investigatory cooperation involving gathering of evidence

6. In merger investigations, cooperation in gathering evidence can involve joint third-party survey/information requests (MCI/WorldCom) and joint interviews of third parties (*MCI/WorldCom*, *GE/Honeywell*, *Johnson&Johnson/Guidant*, and others that are not public because the investigations were closed). Drafts of requests for documents from the parties have been shared with a cooperating agency so that its staff can see what evidence the U.S. agency considers relevant; the agencies have compared approaches to optimize data collection in each other's investigations.

7. In criminal cases, DOJ has coordinated the timing of searches/dawn raids in other jurisdictions with US searches, subpoenas, or drop-in interviews.

8. In criminal cases, DOJ has also encouraged amnesty applicants to approach the antitrust authorities of other jurisdictions.

9. In another agency's merger investigation, DOJ staff accompanied the other agency's staff to interviews of U.S. third parties, although DOJ never opened its own investigation.

V. Coordination of timing

10. For mergers, coordination of timing is critical and a central feature of the 2002 US-EU Best Practices (referred to above at note 3). The parties have significant influence on the extent to which the agencies can coordinate their review timetables through their decisions on when to file their notifications with the reviewing agencies.

11. In some merger cases, close coordination is necessary to assure a common resolution and non-conflicting remedies (for example, to avoid a situation in which one agency requires a "buyer up front" that might be deemed unacceptable by another agency following consummation).

12. In criminal cases, DOJ has discussed timing issues with other jurisdictions, particularly in relation to coordination of searches/subpoenas/dawn raids and other procedural actions.

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6 In 2005, the International Competition Network (ICN) adopted a report on waivers of confidentiality in merger cases (including model waiver forms) that describes the rationale, nature, terms, and issues related to waivers; the report is available on the ICN's website at: http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf.

VI. Cooperation in competition analysis

- In merger cases, the more complex the issues, the more frequently the case teams speak with one another to clarify and refine their respective analyses of the relevant markets, the competitive effects, and alternative remedial measures.

- In criminal cases, DOJ and foreign staffs have frequent discussions of agency policies, especially relating to amnesty and plea agreements.

- In one civil non-merger investigation involving a positive comity request, DOJ staff spent several days reviewing the evidence and discussing theories of harm with staff of the requested jurisdiction.

13. Comment: Cooperation in competition analysis has been facilitated and eased by the convergence of analytical approaches among agencies. For example, the revision of the substantive standard in the EC Merger Regulation of 2004 and the EC's Horizontal Merger Guidelines emanating therefrom have resulted in even greater convergence of analysis with the U.S. agencies under their 1992 Horizontal Merger Guidelines.

VII. Attendance at formal hearings

14. Under the 1999 US-EU Administrative Arrangement on Attendance (AAA):

- DOJ and FTC staff have attended about a dozen oral hearings in EC merger investigations;

- DOJ staff attended the EC's oral hearing in the current Microsoft case;

- EC staff under the AAA may with the parties' permission, attend civil "pitch meetings" directed at the senior policy level officials at the DOJ and FTC, but this has not yet occurred.

VIII. Devising compatible remedies

15. In merger investigations too numerous to itemize here,[7] cooperating staffs have coordinated the identification and description of assets to be divested, the timing of divestitures, the evaluation of potential purchasers of assets to be divested (in particular, to determine their ability to maintain or restore competition in the reviewing jurisdictions), and whether a "buyer up front," "fix it first," or alternate divestiture provision is needed.

16. Staffs have jointly interviewed potential buyers of divested assets.

17. In merger investigations, staffs have also discussed drafts of proposed IP licenses.

18. In the first Microsoft case (1994), DOJ and EC staffs jointly negotiated with Microsoft identical language for the DOJ consent decree and EC undertaking.

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7 Notable examples for particular examination include *Shell/Montedison* (1995), *Guinness/GrandMetropolitan* (1997), *Federal-Mogul/T&N* (1998), *ABB/Elsag/Bailey* (1998), *Exxon/Mobil* (1999), *Bayer/Aventis CropScience* (2002), *GE/Instrumentarium* (2003), *Pfizer/Pharmacia* (2003), *Sanofi/Aventis* (2004), *Linde/BOC* (2006).

19. Remedies in the current Microsoft case have been repeatedly discussed at the staff and management levels.

20. In one civil non-merger case in which DOJ relied on the remedy from another jurisdiction and closed its investigation, it reviewed and commented on the other agency's draft undertaking.

21. In criminal cases, DOJ and cooperating staffs have discussed issues relating to defendants' ability to pay fines, and methodology of fine calculation under U.S. Sentencing Guidelines.

IX. Cooperation and coordination in monitoring remedies

22. In numerous merger investigations, cooperating staffs have agreed on the hiring of a monitoring trustee and have continued to consult throughout the divestiture process, including sharing the other agency's trustee's reports on a potential purchaser.

23. In the current Microsoft case, the respective technical monitoring committees for the DOJ and EC remedies have met to compare notes on several occasions, both on their own and in the presence of DOJ and EC staff.

X. Reliance on the other jurisdiction to remedy harm to competition

24. In merger investigations, the U.S. agencies have relied on other agencies to solve a particular competition issue when the other agency was able to present a strong evidentiary record. Other agencies have relied on the U.S. agencies to ensure that necessary divestitures took place.

25. In two civil non-merger cases involving conduct occurring in the EC (*IRI/Nielsen*, *Sabre/Amadeus*), DOJ relied on the EC's remedy and made a formal positive comity request in the latter case.