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Working Party No. 3 on International Co-operation

DEVELOPING COOPERATIVE RELATIONSHIPS

-- United States --

The attached document is submitted by the delegation of the United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item VI at its forthcoming meeting on 13 May 2003.

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DEVELOPING COOPERATIVE RELATIONSHIPS

1. The United States welcomes the opportunity to contribute to a discussion of developing co-operative relationships in the enforcement of competition law and policy. Through adherence to the OECD's 1995 Recommendation concerning cooperation between member countries and its participation in formal bilateral antitrust cooperation agreements with eight jurisdictions, the U.S. enforcement agencies have realized significant benefits from cooperation with other competition enforcement agencies. Accordingly, the United States is pleased to share its experience on this topic.

2. The United States recognizes that cooperation among enforcement authorities can encompass much more than information sharing in, and coordination of, investigations of specific instances of alleged anti-competitive behavior or transactions. Cooperation can take the form of technical assistance, advocacy, and non-case-specific cooperation on policy or procedural matters. This paper acknowledges the importance of such cooperation, but it will focus more on enforcement cooperation.

1. Factors that facilitate the development of co-operative relationships

3. The factors that typically have facilitated the development of co-operative relationships include: (1) investigations of matters by one jurisdiction that affect the interests of another jurisdiction; (2) conflicts between jurisdictions arising out of enforcement actions by one or more jurisdictions; and (3) establishment of new enforcement regimes.

4. Perhaps the greatest contributing factor to building cooperative relationships is the opportunity to coordinate the handling of actual enforcement cases. Examples include much of the routine communication, cooperation, and coordination that takes place today between the United States and its fellow OECD members and with those non-OECD members with whom the United States has a bilateral cooperation agreement Cooperation in the merger area was described in the United States' paper submitted for the Roundtable on International Co-operation in Transnational Mergers in 2001. Cooperation in investigations that affect the interests of others has evolved over the years, mirroring the globalization of business, trade, and investment.

5. Examples of the second factor include cases such as the uranium litigation that led to conflict between the United States and Australia and Canada. The resolution of those conflicts included memoranda of understandings in 1982 and 1984, respectively, providing for notification, information sharing, and consideration of each other's interests. Similarly, the more recent difference in approach between the United States and the European Commission over the *GE/Honeywell* merger case led to new work by the US-EC Mergers Working Group to examine thoroughly a series of issues that reflect differences in law and enforcement policy between the United States and the European Commission.

6. Examples of the third factor include the enactment of the European Union's Merger Regulation in 1989, which raised the prospect of possible conflict(s) with the United States in merger enforcement. By that time, the United States and the European Commission had already established communication at the policy level arising out of an important EC enforcement action with transatlantic implications - the *Wood Pulp* case. Enactment of the EC Merger Regulation, combined with the growth in transatlantic trade, as well as the economic conversion of central and eastern Europe following the collapse of

communism, all suggested the need to establish a framework for cooperation between the European Commission and the U.S. antitrust authorities.

7. The adoption of new competition laws and creation of authorities to enforce them, when combined with the development and growth of trade and investment, raises the possibility of review of business practices and transactions that will result in contacts with other enforcement authorities. This has been the case, for example, between the United States, on the one hand, and Mexico and Brazil, on the other. Communications between our respective agencies have grown over the past several years as more trans-national cases have raised competitive issues in those countries.

2. Instruments establishing co-operative relationships

8. As the United States experience with Australia and Canada shows, cooperation can grow out of conflict. In both of these cases, conflict in extra-territorial antitrust enforcement ultimately led to cooperation understandings that evolved into formal bilateral agreements. Furthermore, the U.S.-Canada experience informed the development of the first version of the OECD Recommendation concerning cooperation among member countries, adopted in 1967. That Recommendation has been revised over the years, most recently in 1995, to reflect the changes in business, trade, and views on competition policy. It has provided the framework for OECD members to cooperate in the absence of a formal bilateral agreement, and it has served as a model for bilateral agreements even with countries that are not OECD members.

9. Thus, much of the cooperation that occurs is in some sense inspired by the experience observed over the years under the OECD Recommendation. While not a formal, binding agreement, it provides minimum aspirational standards by which enforcement authorities can communicate and cooperate in confidence - and that is a factor of enormous importance in obtaining the cooperation of private parties.

10. The Secretariat's paper asks about experience under tri-lateral agreements. The United States is not a party to any tri-lateral agreements. It is not clear why the number of parties to an agreement has an effect on the quality of cooperation. For example, in practice, the United States agencies sometimes find themselves in tri-lateral cooperation with the European Commission and Canada, based upon the three bilateral agreements that exist among these three jurisdictions. Furthermore, the United States has had several experiences in which it has cooperated in investigations with the competition authorities of OECD members with whom the United States does not have a formal, bilateral agreement, under the terms of the OECD Recommendation. One notable example was the *Federal-Mogul/T&N* case of 1998 in which the competition authorities of the United States, France, Germany, Italy, and the United Kingdom coordinated their efforts and reached a common settlement with the parties. Cooperation under the terms of both the formal bilateral agreement with Germany and the OECD Recommendation with the others was not an issue.

3. Enforcement (case-specific) cooperation

11. Paragraph 7 of the Secretariat's paper contains an observation that is pertinent to this point. A response to the Secretariat's question of what would be required to expand cooperative relations especially at an early stage of an investigation is found in that observation - communication at an early point is one of the keys to successful cooperation and coordination. In the United States' experience, something as simple as a telephone call or an e-mail, often based upon public reports of a transaction, can lay the groundwork for effective communication and cooperation. Early communication can identify which agencies are reviewing a transaction and which ones are not. It may also encourage the agencies to consider asking the parties for a waiver.

12. The number of notifications during the past year has declined, corresponding to the general decline in the number of merger transactions world-wide.

4. Non case-specific co-operation

13. The United States is engaged in several instances of non-case co-operation. Probably the most public example is the US-EC Mergers Working Group, first established in 1999 and expanded in 2001. It has examined issues related to remedies (informing the development of the EC's Notice on Merger Remedies), procedural issues (leading to the issuance last year of the US-EC Best Practices on Cooperation in Merger Investigations), efficiencies, and conglomerate effects. .

14. To accomplish their work, the members of the Working Group are in regular telephone and e-mail contact, conduct tele- and video-conferences, and have some face-to-face meetings in both Brussels and Washington.

5. Resources required to build, maintain and expand co-operative relationships

15. Most of our cooperation with foreign enforcement authorities occurs in the course of our primary function, law enforcement. Thus, the resources required to build, maintain, and establish cooperation involve "expenditures" that would be necessary in any event to fulfill our enforcement goals but have added value as "investments" that facilitate cooperation in future cases.