THE NEW, IMPROVED BEST PRACTICES GUIDELINES FOR US/EC MERGER ENFORCEMENT COORDINATION

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On October 14, 2011, the Federal Trade Commission ("FTC"), the Department of Justice ("DOJ") (together "U.S. agencies"), and the European Commission's ("EC") Directorate General for Competition ("DG Competition") issued revised Best Practices on Cooperation in Merger Investigations ("revised Best Practices").[2] This revision is an elaboration on the Best Practices the authorities issued in October 2002 ("Best Practices").[3] Like the original, the revised version describes how the EC and the U.S. agencies work together in concurrent merger reviews pursuant to the 1991 EC/U.S. Cooperation Agreement ("1991 Agreement" or "Agreement").[4]

The original Best Practices reflected the experience the authorities gained during the first decade of their cooperation under the 1991 Agreement. Changes in law and practice since 2002, and another decade of experience in coordinating merger reviews, necessitated updating the Best Practices.[5] The main purposes for

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[2] FTC Press Release, United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews, Oct. 14, 2011, *available at* http://www.ftc.gov/opa/2011/10/eumerger.shtm.

[3] U.S.-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (2002), *available at* http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf.

[4] Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) 13, 504, and OJ L95 (27 Apr. 1995), *corrected at* OJ L131/38 (15 June 1995), *available at* http://www.ftc.gov/bc/international/docs/agree_eurocomm.pdf.

[5] At the U.S.-EC annual consultations in July 2010, the U.S.-EU Merger Working Group ("Group") was tasked with studying current practices and recommending whether to revise the Best Practices. Following a detailed review of the merger review procedures that included a series of video-conferences, the Group determined that revision was warranted, and drafted the Best Practices that were adopted at this year's annual U.S.-EC competition consultations.

issuing the revised Best Practices are (1) for the agencies to be transparent about their cooperation – including when and what they communicate with one another and their aim at compatible outcomes – and (2) to suggest how merging parties and third parties can facilitate coordination and resolution of those reviews. Despite 20 years of practice, the authorities still observe that some companies and their counsel appear surprised at the extent of communication and cooperation between the U.S. agencies and DG Competition and that they are sometimes less coordinated than the authorities in their approaches to the analysis and resolution of a case. Moreover, the authorities have continued to collaborate increasingly with other competition authorities pursuant to either multilateral guidelines and principles,[6] or through bilateral cooperation agreements,[7] a development that needed attention.

This article will present a brief historical overview of U.S./EC enforcement cooperation, analyze the main elements of the revised Best Practices, and provide guidance on how merging parties and third parties can facilitate coordination and resolution of their merger reviews.

1. History of U.S./EC Enforcement Cooperation

The U.S./EC antitrust enforcement cooperation is a success story in the transatlantic economic relationship. The basis of this success is the 1991

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[6] *See* OECD Revised Recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, C(95)130/FINAL, July 27-28, 1995, *available at* http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False; *see also* principles of interagency coordination in Section X of the ICN Recommended Practices for Merger Notification Procedures, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

[7] In addition to the 1991 Agreement, the United States has entered into bilateral competition cooperation agreements with Australia, Brazil, Canada, Chile, Germany, Israel, Japan, and Mexico. The U.S. has also entered into Memoranda of Understanding ("MOUs") with China and Russia. For a compilation of bilateral agreements to which the U.S. is a party, *see* http://www.ftc.gov/oia/agreements.shtm. The EC has entered into bilateral cooperation agreements with Canada, Japan, and Korea, as well as MOUs with Brazil and Russia. For a compilation of bilateral agreements to which the EC is a party, *see* http://ec.europa.eu/competition/international/bilateral/.

Agreement,[8] which was entered into two years after the EC adopted its first Merger Regulation ("ECMR").[9] The Agreement provides a framework for international antitrust cooperation and has since served as a model for subsequent bilateral agreements. The purpose of the Agreement is to "promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws."[10] Based on the Agreement, the EC and U.S. authorities agreed to: notify each other when enforcement activities might affect their important interests; exchange information to the extent allowed by each party's laws, *i.e.*, not including confidential information; coordinate their enforcement activities when in their mutual interest; and consider comity in enforcement activities.[11] Since signing the Agreement, the U.S. agencies and DG Competition have applied their experience gained through concurrent reviews of mergers to achieve substantive convergence of enforcement policy and practice both bilaterally and multilaterally.

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[8] *See supra* note 4.

[9] Council Regulation (EEC) No 4064/89 of 21 December 1989, On the Control of Concentrations Between Undertakings, 1989 OJ (L 395) and Council Regulation 1310/97. Before the adoption of the ECMR, general competition rules in former Articles 81 and 82 of the EC Treaty were applied to mergers.

[10] 1991 Agreement, Art.I(1).

[11] *Id.*, Art. II-VI. A noteworthy example of the application of comity under the Agreement is the *Boeing/McDonnell Douglas* case in 1997. Although the EC and the FTC reached different enforcement decisions, the EC considered and met concerns the U.S. raised about the impact on U.S. national defense interests of certain potential remedies the EC was considering. *The Boeing Co.*, *et al.*, Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051, July 1, 1997, *available at* http://www.ftc.gov/opa/1997/07/boeing.shtm; *Boeing/McDonnell Douglas*, Case No IV/M.877, Commission Decision of 30 July 1997, OJ L 336/16 (8 Dec. 1997), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m877_19970730_600_en.pdf. In addition, in 1998, the U.S. and EC entered into a supplemental agreement on positive comity. *See* 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, June 4, 1998, 37 I.L.M. 1070, 1075 (1998), *available at* http://www.ftc.gov/bc/us-ec-pc.shtm.

One of the notable examples of early concurrent merger enforcement by the EC and the U.S. was the *Shell/Montedison* case,[12] a protracted procedure in which the parties first obtained a decision from the EC involving commitments, then reached a settlement with the FTC, and finally a revision of the EC commitments. FTC Chairman Robert Pitofsky asked:

> "how much easier it might have been for all concerned if the EC and US investigations could have been coordinated. Given current confidentiality constraints, that would have first required the consent of the parties. As I look at the outcome and the procedural history of this matter, it seems to me that we should be asking what would need to be done to enable "and embolden" all of us, enforcers and parties alike, to enter into such a coordinated effort."[13]

After *Shell/Montedison*, several cases over the last half-decade of the 1990s revealed an evolution in the ways that the EC and the U.S. agencies were able to coordinate their enforcement in markets affected by proposed mergers or other business conduct, particularly *Guinness/Grand Metropolitan*,[14] *ABB/Elsag Bailey,*[15] *Zeneca/Astra*,[16] *WorldCom/MCI,*[17] and *Exxon/Mobil*.[18] Instead of dealing

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[12] *MontedisonS.p.A.*, *et al.*, *reported in* 119 F.T.C. 676 (1995), *available at* http://www.ftc.gov./os/decisions/docs/vol119/FTC_VOLUME_DECISION_119_(JANUARY_-JUNE_1995)PAGES_618-723.pdf#page=59; *Shell/Montecatini*, Commission Decision 94/811/EC of 8 June 1994, Case IV/M.0269, OJ L 332/48 (22 Nov. 1994), *revised* 24 June 1996, OJ L 294/10 (19 Nov. 1996), *available at* http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code= 2_M_269.

[13] Robert Pitofsky, International Antitrust: An FTC Perspective, 1995 FORDHAM CORP. L. INST. 1, 8 (B. Hawk ed. 1996).

[14] *Guinness/GrandMetropolitan,*Case No IV/M.938, Commission Decision of 15 October 1997, 1998 OJ L 288/24, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998D0602:EN:HTML; *Guinness PLC*, *et al.,* FTC Dkt. No. C-3801, *available at* http://www.ftc.gov/os/caselist/c3801.shtm.

[15] *ABB/Elsag-Bailey,* Case No COMP/M.1339, Commission Decision of 16 Dec. 1998, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m1339_en.pdf; *In the Matter of ABB AB and ABB AG,* FTC Dkt. No. C-3867, *available at* http://www.ftc.gov/os/1999/9904/abbd%26opj.htm.

[16] *Zeneca/Astra,*Case No COMP/M.1403, Commission Decision of 26 Feb. 1999, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m1403_en.pdf; *Zeneca Group plc,* FTC Dkt. No.C-3880, *available at* http://www.ftc.gov/os/1999/9906/zenecad&o.htm.

with the authorities one at a time, as in *Shell/Montedison*, merging parties recognized the benefits of coordinating their approaches to the authorities from the outset and not just at the remedy phase. The *ABB/Elsag Bailey* and *Zeneca/Astra* cases demonstrated how parties could obtain relatively quick and coordinated enforcement by the EC and the U.S. agencies even though both cases presented issues of potential competition that can be very complicated in terms of evidence gathering and evaluation.

In 1999, the EC and the U.S. agencies formed a Merger Working Group to gather the experience gained in the many jointly reviewed mergers and to examine where cooperation could be enhanced, beginning with remedies. The Group's work on remedies, guided by the FTC's 1999 study on divestitures,[19] resulted in the EC's issuance of merger remedies guidelines in 2000.[20]

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[17] *Worldcom/MCI*, Case No IV/M.1069, Commission Decision of 8 July 1998, 1999 OJ L 116/1, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m1069_19980708_600_en.pdf; DOJ Press Release, Justice Department Clears WorldCom/MCI Merger after MCI Agrees to Sell its Internet Business, July 15, 1998, *available at* http://www.usdoj.gov/atr/public/press_releases/1998/1829.htm.

[18] *Exxon/Mobil*, Case No COMP/M.1383, Commission Decision of 29 Sept. 1999, 2004 OJ L 103/1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004D0284:EN:HTML; *Exxon/Mobil*, FTC Dkt. No. C-3907, *available at* http://www.ftc.gov/os/caselist/c3907.shtm.

[19] *See* FTC Bureau of Competition, A Study of the Commission's Divestiture Process (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf.

[20] Commission Notice on remedies acceptable under Council Regulation No 4064/89 and under CommissionRegulation No 447/98, OJ 2001, C 68/3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:068:0003:0011:EN:PDF. *See also* Mario Monti, The Commission Notice on Merger Remedies - One Year After, Remarks Before the Centre d'économie industrielle, Ecole Nationale Supérieure de mines (CERNA) (Jan. 18, 2002), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/10&format=HTML&aged=0&language=EN&guiLanguage=en.

In 2001, following the conflicting U.S. and EC decisions in the proposed *GE/Honeywell* merger,[21] the Group was tasked with studying merger review procedures as well as issues that arise in vertical and conglomerate mergers, including leveraging, bundling, and tying. As to the former, the Group thoroughly examined each other's processes and their methods of cooperation and then prepared the first set of Best Practices, adopted in October 2002.[22] Reflecting on the first decade of experience of U.S./EC merger cooperation under the 1991 Agreement, the 2002 Best Practices provided an advisory framework to both enforcers and parties, as well as their counsel, in an attempt to render cooperation more effective. The 2002 Best Practices described mechanisms for synchronizing the timing of reviews by the EU and the U.S. agencies, including agreeing to parallel timetables, highlighted the importance of communication between the reviewing agencies, and called for close coordination, in particular with regard to remedy proposals. In its effort to minimize the potential for inconsistent outcomes, the document also suggested ways in which merging parties and interested third parties could facilitate coordination and resolution of their merger reviews.[23]

As to the analysis of vertical and conglomerate mergers, the Merger Working Group examined each jurisdiction's approaches to those issues as applied in actual cases. The effort not only resulted in a better understanding of the agencies' respective approaches, but also informed the EC's development of its Non-Horizontal Merger Guidelines,[24] which are broadly consistent with U.S. enforcement practices. Subsequently, the EC and the U.S. agencies have reached

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[21] *GE/Honeywell*, Case No COMP/M.2220, Commission Decision of 3 July 2001, OJ L 48/1 (18 Feb. 2004), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m2220_20010703_610_en.pdf.

[22] *See supra* note 3.

[23] *Id.*

[24] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, OJ C 265/6 (18 Oct. 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF.

consistent outcomes in several cases that raised vertical and conglomerate issues, such as *GE/Amersham*,[25] and more recently, *Google/DoubleClick*.[26]

In 2004, the EC adopted a revised Merger Regulation, in which it substituted the "dominance" test with the test focusing on whether a proposed merger will "significantly impede effective cooperation,"[27] which is essentially compatible with the Clayton Act's "substantial lessening of competition" test. The amendments also clarified that the ECMR allows efficiency claims to be taken into account in merger analysis,[28] relying significantly on the work and discussions of the Merger Working Group. The same year, the EC issued Horizontal Merger Guidelines;[29] in developing the document, DG Competition engaged in active dialogue with the U.S. agencies.[30]

2. Reasons to Revise the Best Practices on Cooperation in Merger Investigations

Among the factors that led to revision – really, an elaboration – of the Best Practices of interest to practitioners are the following:

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[25] *GE/Amersham*, Case No COMP/M.3304, Commission Decision of 21 Jan. 2004, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m3304_en.pdf. The FTC and DOJ granted early termination of the waiting period on Dec. 1, 2003, *available at* http://www.ftc.gov/bc/earlyterm/2003/12/et031201.PDF.

[26] *Google/DoubleClick*, Case No COMP/M.4731, Commission Decision of 11 March 2008, OJ C 184/10 (22 July 2008), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf; FTC Press Release, Federal Trade Commission Closes Google/DoubleClick Investigation, Dec. 20, 2007, *available at* http://www.ftc.gov/opa/2007/12/googledc.shtm. *See also* William Blumenthal, The Status of Convergence on Transatlantic Merger Policy, Remarks before the ABA Section of International Law, Brussels, Oct. 27, 2005, *available at* http://www.ftc.gov/speeches/blumenthal/051027transatlantic.pdf.

[27] ECMR, *supra* note 8, Art. 2.2-3, Recitals ¶¶ 25-26.

[28] *Id.*, Art. 2.1(b), Recital ¶ 29.

[29] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, OJ C 31/5 (5 Feb. 2004), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF.

[30] A similar dialogue took place when the U.S. agencies revised their Horizontal Merger Guidelines in 2010.

• The complexity of coordinating review timetables. The procedural differences between the EC's and the U.S. agencies' merger review regimes have become somewhat more complex since 2002. The 2004 revision of the EC Merger Regulation included changes to the calculation of decision deadlines and an allowance to "stop the clock" in Phase II; the EC also adopted Best Practices aimed at increasing and regularizing communication between DG Competition and the merging parties.[31] Moreover, there are strong incentives for both the merging parties and DG Competition to seek resolution of a case in Phase I and avoid, when possible, Phase II proceedings. That, however, can lead to longer pre-notification consultations. These are not insurmountable challenges, as the record of successful coordination demonstrates; but, they are factors that must be considered by in-house and outside counsel early in the merger planning process.

• The authorities' remedial requirements can add to procedural complexity. For example, both the EC and the U.S. agencies require "upfront buyers" as an element of an acceptable remedy in certain circumstances. While the standards the authorities apply to identify such circumstances are virtually identical, the procedures followed by the EC, on the one hand, and the U.S. agencies, on the other, to attain acceptance differ. So, while counselors can anticipate a need for an upfront buyer in a given merger case (particularly those in the pharmaceutical sector) to satisfy both the EC and the relevant U.S. agency, they should also take care to coordinate their approaches to the authorities to avoid appearing to favor one and 'cram' the other(s).[32]

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[31] DG Competition, Best Practices on the conduct of EC merger proceedings (2004), *available at* http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

[32] For example, in a couple of cases over the last few years, the merging parties presented a potential upfront buyer to the FTC, but dallied a considerable time before presenting the proposed upfront buyer to DG Competition. This inexplicable delay disabled the EC from being able to determine the suitability of the proposed purchaser as well as the necessary scope of the package of assets to be divested.

• More authorities have become more engaged in the review process. Even before the 2002 Best Practices, the EC and the U.S. agencies had coordinated reviews with additional agencies; for example, the April 2002 settlement of the *Bayer/Aventis CropScience* merger case involved closely coordinated three-way negotiations involving DG Competition, the FTC, and Canada's Competition Bureau.[33] More recently, in cases such as *Pfizer/Wyeth*,[34] *Panasonic/Sanyo*,[35] and *Agilent/Varian*,[36] DG Competition and the FTC worked closely with several other agencies to achieve resolution of those matters. With China and India joining the ranks of merger enforcers, firms and their counselors, as well as the U.S. agencies and the EC, face more challenges to cooperation and coordination of reviews.

3. The Revised Best Practices

With the reasons for revision in mind, a synopsis of the key operational sections of the revised Best Practices follows.

Communication between Reviewing Agencies: The revised set of Best Practices states that the agencies will contact one another promptly upon learning of a merger that appears to require review in both the U.S. and EU, and

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[33] *Bayer/AventisCropScience*, Case M.2547, EC decision *available at* http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_2547; FTC decision *available at* http://www.ftc.gov/os/caselist/c4049.shtm; Canadian Competition Bureau decision *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00432.html.

[34] FTC Press Release, FTC Order Prevents Anticompetitive Effects from Pfizer's Acquisition of Wyeth (Oct. 14, 2009), *available at* http://www.ftc.gov/opa/2009/10/pfizer.shtm. The FTC cooperated with the competition agencies of Australia, Canada, Mexico, New Zealand, and South Africa, as well as DG Competition, to address competitive concerns and to obtain coordinated non-conflicting remedies.

[35] FTC Press Release, FTC Order Sets Conditions on Panasonic's Acquisition of Sanyo (November 24, 2009), *available at* http://www.ftc.gov/opa/2009/11/sanyo.shtm. The reviewing U.S. authority worked with DG Competition, and the competition agencies of Canada and Japan, to resolve competitive concerns and to coordinate on the creation of a divestiture package.

[36] FTC Press Release, FTC Order Preserves Competition Threatened by Agilent's Acquisition of Varian (May 14, 2010), *available at* http://www.ftc.gov/opa/2010/05/agilent.shtm. In this matter, the FTC's cooperation with DG Competition and its counterparts in Australia and Japan resulted in creating a non-conflicting divestiture package.

recognizes that the nature and frequency of the communications may differ depending on the case.[37] The revised Best Practices identify key stages of an investigation at which discussion between the reviewing agencies is likely to be particularly useful. These key stages include: (a) before the relevant U.S. agency either closes an investigation without taking action or issues a second request; (b) no later than three weeks following the initiation of a Phase I investigation in the EU; (c) before DG Competition opens a Phase II investigation or clears the merger without initiating a Phase II investigation; (d) before DG Competition closes a Phase II investigation without issuing a Statement of Objections or before DG Competition anticipates issuing its Statement of Objections; (e) before the relevant DOJ section/FTC division makes its case recommendation to senior leadership; (f) at the commencement of remedies negotiations with the merging parties; and, (g) prior to a reviewing agency's final decision to seek to prohibit a merger.[38] The revised Best Practices also recognize that consultations between senior leadership of the reviewing agencies may be appropriate at any time during the investigation. In addition, the revised Best Practices explicitly provide for consultation between the reviewing agencies' economic counterparts.[39]

Coordination on Timing: Based on experience gained over the past decade, the revised Best Practices provide that cooperation is most effective when the reviewing agencies' respective investigation timetables allow for meaningful communication throughout the process. To facilitate coordination, the revised Best Practices call for the reviewing U.S. agency and DG Competition to keep one another informed of important developments related to timing throughout

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[37] U.S.-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (2011), at §5, *available at* http://www.ftc.gov/os/2011/10/111014eumerger.pdf. Companies should note that subject to the conditions for cooperation in the pre-notification phase, DG Competition may discuss preparatory steps with the U.S. agencies in cases that are in the process of being referred to the Commission by the Member States under Article 4(5) of the ECMR, in particular if the parties have granted a waiver of confidentiality at that stage.

[38] *Id.*, at §6.

[39] *Id.*

their respective investigations and to coordinate phases of their investigations, including through joint calls or meetings with merging parties to discuss timing.[40] The revised Best Practices encourage merging parties to make parallel filings in the U.S. and EU, or to time the filing of their notifications to allow the reviewing agencies to communicate and cooperate meaningfully at key decision-making stages of their investigations.[41] The document also illustrates how the merging parties can facilitate inter-agency coordination, including by entering into timing agreements with the U.S. agencies. In addition, the revised Best Practices encourage merging parties to provide certain basic information about their proposed merger as soon as feasible, including identifying other jurisdictions in which they will notify the merger, the anticipated dates on which they plan to file in each jurisdiction, and any issues relevant to the timing of the merger.[42]

Collection and Evaluation of Evidence: The revised Best Practices confirm that, consistent with confidentiality obligations, the reviewing agencies will share what information they can, including their respective analyses of market definition, competitive effects, theories of harm, and remedies. In addition, the reviewing agencies may discuss and coordinate information and discovery requests to the merging parties and third parties.[43] The document also notes that waivers of confidentiality enable more complete communication between the reviewing agencies, leading to more informed decision-making and more effective coordination. The revised Best Practices acknowledge that waivers have become routine in practice, and encourage merging parties and third parties to grant waivers, to benefit from these advantages and to expedite the merger review process.[44] In addition, recognizing that legal professional

[40] *Id.*, at §§8-9.

[41] *Id.*, at §§8-10.

[42] *Id.,* at §9.

[43] *Id.*, at §13.

[44] *Id.*, at §14. *See also*ICN Report on Waivers of Confidentiality in Merger Investigations, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf.

privileges differ between the U.S. and EU, the revised Best Practices provide that the agencies will accept a stipulation in parties' waivers given to DG Competition that excludes from the scope of the waiver evidence that is properly identified by the parties as, and qualifies for, the in-house attorney-client privilege under U.S. law.

Remedies/Settlements: The revised Best Practices include an expanded section on remedies and settlements that details cooperation throughout the remedial process.[45] The revised Best Practices emphasize that early and frequent cooperation in the remedial phase is particularly important to avoid inconsistent or conflicting remedies, especially when remedies may include an upfront buyer and/or when DG Competition is considering a remedy in its Phase I investigation.[46] The revised Best Practices also underscore the parties' critical role in this phase, including timely coordination of their remedy proposals with the reviewing agencies to allow for meaningful cooperation before either agency makes a decision. In addition to avoiding the risk of inconsistent or conflicting remedies, such meaningful cooperation in this phase can result in the acceptance of common remedy proposals or even the appointment of common trustees or monitors, all of which is in both the agencies' and the parties' interest.[47]

4. Conclusion

As the history of the U.S./EC enforcement cooperation shows, every merger review is different. Moreover, the rules and procedures followed by the EC and the U.S. agencies differ in a number of significant ways. The EC and the U.S. agencies have tried to better understand their respective systems and find ways to make them better interoperate. Making them truly "user friendly" may be a stretch; but, providing more information to parties and their counsel about the review process and presenting ways to facilitate cooperation hopefully will make

[45] *See id.*, Section V.

[46] *Id.*, at §18.

[47] *Id.*, at §19.

all parties thoughtfully consider the relationship of the timing of the respective procedures in their communications with the reviewing agencies, and will result in a merger review with less investigative burdens for the parties. The extent to which the EC and the U.S. authorities can engage in substantive cooperation in their merger enforcement activities largely depends on whether the affected parties are willing to waive confidentiality to permit information sharing, and more generally, whether they are willing to cooperate with the reviewing agencies. While it is their privilege to be uncooperative, experience from the agencies' perspective is that cooperation is a best practice that well serves the parties.