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COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**DISCUSSION ON INTERNATIONAL CO-OPERATION**

-- United States --

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## INTERNATIONAL ENFORCEMENT COOPERATION

### 1. Introduction

1. Since 1990, the number of competition agencies worldwide has grown from a handful to nearly 130, and, concomitantly, the number of individual merger, cartel, and unilateral conduct matters investigated by more than one competition agency have increased substantially. During this period, the U.S. antitrust agencies (the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), collectively the “Agencies”) have increasingly worked with their counterpart agencies in individual investigations to promote effective enforcement cooperation among antitrust enforcers.<sup>1</sup>

2. Cooperation is a key means both of improving the effectiveness of individual agency investigations and producing consistent outcomes in similar circumstances.<sup>2</sup> Relationships, mechanisms, and tools developed to date, including in the multilateral and bilateral contexts, have done much to

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<sup>1</sup> Recent Agency speeches and articles on international enforcement cooperation include: Sharis Pozen, Acting Assistant Attorney General, Antitrust Division, Remarks at the Brookings Institution (April 23, 2012), available at: [http://www.justice.gov/atr/public/press\\_releases/2012/282517.htm](http://www.justice.gov/atr/public/press_releases/2012/282517.htm); Rachel Brandenburger and Randy Tritell, Global Antitrust Policies: How Wide is the Gap?, Concurrences No 1-2012, p. 6, available at <http://www.justice.gov/atr/public/articles/282930.pdf>; Rachel Brandenburger, Special Advisor, International, Antitrust Division, Intensification of International Cooperation: The Antitrust Division’s Recent Efforts, Address Before the American Chamber of Commerce (Feb. 17, 2012), available at <http://www.justice.gov/atr/public/speeches/281609.pdf>; Randolph Tritell and Elizabeth Kraus, The Federal Trade Commission’s International Antitrust Program, January 2012, available at <http://www.ftc.gov/bc/international/docs/ftcintantiprogram.pdf>; Christine Varney, Assistant Attorney General, Antitrust Division, Remarks on the Occasion of the Signing of the Memorandum of Understanding on Antitrust Cooperation (July 27, 2011), available at <http://www.justice.gov/atr/public/speeches/273347.pdf>; Antitrust Cooperation in the Americas: The Experience of the United States Federal Trade Commission, Randolph W. Tritell and Russel W. Damtoft, June 16, 2011, available at <http://www.ftc.gov/oia/speeches/110611AntitrustintheAmericas.pdf>; Commissioner William Kovacic, *Dominance, Duopoly, and Oligopoly: the United States and the Development of Global Competition Policy*, Global Competition Review, December 2010, available at <http://www.ftc.gov/speeches/kovacic/1012dominanceduopolyoligopoly.pdf>; Rachel Brandenburger, International Competition Policy and Practice: New Perspectives?, Address at the Centre of European Law, King’s College (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>; John Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 45 CORNELL INT’L L. J. 55, 63 (2010), available at <http://www.lawschool.cornell.edu/research/ILJ/upload/Parisi.pdf>; Christine Varney, International Cooperation: Preparing for the Future, Address at the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21 2010), available at <http://www.justice.gov/atr/public/speeches/262606.htm>; and John Parisi, Enforcement Cooperation Among Authorities, August 2010, available at <http://www.ftc.gov/oia/speeches/1008enforementantitrust.pdf>.

<sup>2</sup> While cooperation in competition enforcement may lead to convergence of standards and procedures, which in turn supports greater case cooperation, cooperation is a worthwhile objective in itself, as it helps avoid conflicting outcomes and remedies and fosters efficient investigation.

facilitate such cooperation. But more can be done, particularly as more agencies are investigating the same matters. The challenge for competition agencies in international enforcement cooperation is twofold: (1) to use the existing mechanisms effectively, recognizing the legal, cultural, political, and economic factors specific to individual jurisdictions, and (2) to give serious thought to how we want to cooperate in the coming years. The new OECD project on international enforcement cooperation, in conjunction with work in the International Competition Network (ICN) in this area,<sup>3</sup> provides an important opportunity for competition agency officials to discuss and potentially address these issues.

3. The Secretariat's recent Note on International Co-operation ([DAF/COMP/WP3\(2012\)5](#)) covers various existing instruments used in enforcement cooperation, and we will not repeat that discussion here. Accordingly, recognizing that building relationships among the agencies and promoting sound policy and practice remain critical to successful cooperation, this Submission focuses on the practice of enforcement cooperation, highlighting the Agencies' recent experience and tools developed.

## 2. U.S. Experience with International Enforcement Cooperation

### 2.1. Case cooperation generally

4. In Fiscal Years (FY) 2010 and 2011, the Agencies worked on dozens of investigations with an international dimension, most of which involved cooperation with competition agencies in other jurisdictions. During FY 2011 alone, the FTC had almost 50 substantive contacts and cooperated on 20 merger matters (of which 12 were completed within the fiscal year 2011) and four conduct investigations. Cooperation with international counterparts included extensive coordination with competition agencies from Australia, Austria, Canada, the European Union, France, Germany, Japan, Korea, Mexico, New Zealand, Russia, Spain, Turkey, and the United Kingdom.

5. The DOJ cooperated significantly on 17 merger reviews in FY 2011 with competition agencies from Australia, Brazil, Canada, Colombia, the European Union, Germany, Japan, Mexico, South Africa, the United Kingdom, and elsewhere. The DOJ also works with many competition agencies around the world on criminal matters, and on conduct matters.

6. The Agencies cooperate with non-U.S. counterparts pursuant to formal bilateral<sup>4</sup> and multilateral<sup>5</sup> arrangements, although enforcement cooperation also takes place in their absence. Investigational staff

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<sup>3</sup> Informed by an issues paper developed by the DOJ and the Turkish Competition Agency, the ICN will begin work, which DOJ will co-lead, on facilitating and enhancing enforcement cooperation among members, including the possible development of guidance on international enforcement cooperation. The paper is available at: <http://www.internationalcompetitionnetwork.org/uploads/2011-2012/international%20enforcement%20cooperation.pdf>.

<sup>4</sup> The United States has bilateral cooperation agreements with nine jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); and Chile (2011), and the Agencies entered into Memoranda of Understanding with the Russian Federal Anti-Monopoly Service (2009) and the three Chinese Anti-Monopoly agencies (2011). See <http://www.ftc.gov/oia/agreements.shtm>. In addition, the United States is party to approximately 70 MLATs, which are treaties of general application pursuant to which the United States and another country agree to assist one another in criminal law enforcement matters. The United States is also a party to an antitrust-specific mutual legal assistance agreement with Australia, an agreement authorized by domestic legislation. See International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.*

<sup>5</sup> The 1995 OECD Council Recommendation on antitrust enforcement cooperation ("OECD Cooperation Recommendation"), a core document of international cooperation, provides important general guidance for member countries to follow when an investigation or proceeding may affect another member's important interests.

consider international aspects “right from the start of an investigation through to the remedial stage.”<sup>6</sup> We are “working hard to establish ‘pick-up-the-phone’ relationships with the increasing number of agencies around the world that have an interest in working with us to investigate a merger, possible anticompetitive unilateral conduct, or cartel activity.”<sup>7</sup> Generally, the Agencies and their counterparts can share any information that their laws do not prohibit them from sharing, and each authority lawfully must maintain the confidentiality of information received from parties and third parties, pursuant to its own rules.<sup>8</sup> The Agencies can also share information provided to them where there has been a waiver of confidentiality by the submitter. Indeed, parties to merger investigations routinely waive statutory confidentiality protections to facilitate inter-agency cooperation, and increasingly are doing so in unilateral conduct investigations. The Agencies have found that waivers can play a very important role in facilitating their investigations and facilitating consistent outcomes.

## 2.2. Cooperation in Individual Matters

7. Below, we identify selected recent merger, conduct, and cartel cases in which the Agencies cooperated with our international counterparts. In each segment, as appropriate, we highlight a few points of interest relating to topics raised in the Secretariat’s stock-taking note.<sup>9</sup>

### 2.2.1. Cooperation in merger cases

8. From a review of the merger cooperation cases summarized below, a few issues relevant to the stock-taking paper and our discussion can be discerned, notably:

- Newer agencies increasingly are cooperating in multi-jurisdictional merger review (*e.g.*, *Western Digital/Hitachi*, *Unilever/Alberto Culver*).
- Given differing jurisdictional effects of or procedural requirements relevant to a proposed transaction, reviewing agencies may require differentiated resolutions of the matter on which they cooperated, but cooperation on such matters remains important and extensive (*e.g.*, *Deutsche Börse/NYSE*, *Intel/McAfee*).
- The Agencies have almost never employed formal positive comity; rather, they focus on informal and practical approaches to limiting duplication or inconsistency, particularly as regards possible remedies, including taking into account the remedies obtained by other agencies (*e.g.*, *Agilent/Varian*, *Cisco/Tandberg*).

## Cases

- a) Western Digital/Hitachi

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<sup>6</sup> Rachel Brandenburger and Randy Tritell, Global Antitrust Policies: How Wide is the Gap?, Concurrences No 1-2012, p. 6, available at <http://www.justice.gov/atr/public/articles/282930.pdf>.

<sup>7</sup> *Id.*.

<sup>8</sup> See *e.g.*, Contribution from the United States to the Global Forum on Competition Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies, at §4 (Feb. 3, 2011) for a description of the phases of our cooperation in merger matters, including a discussion of information sharing at §4.2.

<sup>9</sup> [DAF/COMP/WP3\(2012\)5](#) of May 23, 2012.

9. In 2011 and 2012, the FTC engaged in substantive cooperation with ten non-U.S. antitrust agencies, including newer authorities, reviewing Western Digital Corporation's ("Western Digital") proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies. The cooperating agencies included those in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordination of remedies. The parties granted waivers on a jurisdiction-by-jurisdiction basis. Throughout the review, FTC staff and staff of each of the non-U.S. authorities worked together closely, on a bilateral basis, which involved significant time and resources. Cooperation included coordinating compatible remedies that addressed competitive concerns in multiple jurisdictions. Of note, only a limited number of cooperating agencies on the matter took formal remedial action.

b) Deutsche Börse/NYSE

10. In 2011, the DOJ cooperated closely with DG Competition of the European Commission (EC) on their respective investigations of the proposed merger between Deutsche Börse and the New York Stock Exchange, with frequent contact between investigative staffs and the leadership of the agencies, aided by waivers provided by the merging parties. In December 2011, the DOJ announced that it had reached a settlement with the parties resolving concerns about the effect of the merger on equities trading in the U.S., which was the focus of its investigation. The DOJ noted that the "open dialogue between the Antitrust Division and the [EC] was very effective and allowed each agency to conduct its respective investigation while mindful of ongoing work and developments in the other jurisdiction."<sup>10</sup> On the same day, the EC said that "we have had regular and constructive dialogue with the DOJ throughout our respective procedures" and that "the markets that the DOJ is examining in its own jurisdiction, namely in the area of U.S. equities, are different to those where the commission has raised concerns, namely European financial derivatives."<sup>11</sup> In February 2012, the EC prohibited the merger.<sup>12</sup> The differing conclusions of the two agencies resulted from differences in the markets in their jurisdictions. Close cooperation was nevertheless still necessary and useful so that each agency could understand, and anticipate, the outcome of the other's investigation.

c) Unilever/Alberto Culver

11. In *Unilever/Alberto Culver*, the DOJ filed a complaint and consent decree requiring Unilever and Alberto-Culver Co. to divest two hair care brands in order to proceed with Unilever's acquisition of Alberto-Culver. The product markets and competitive issues involved in that investigation varied significantly among the different jurisdictions affected by the merger. Nevertheless, the DOJ discussed the merger with its counterparts in Mexico, South Africa, and the United Kingdom, and, aided by waivers

<sup>10</sup> Press Release, U.S. Dep't of Justice, *Justice Department Requires Deutsche Börse to Divest its Interest in Direct Edge in Order to Merger with NYSE Euronext* (Dec. 22, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/278537.htm](http://www.justice.gov/atr/public/press_releases/2011/278537.htm); Press Release, U.S. Dep't of Justice, *Justice Department Dismisses Antitrust Lawsuit against Deutsche Börse and NYSE Euronext* (Feb. 9, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280066.htm](http://www.justice.gov/atr/public/press_releases/2012/280066.htm).

<sup>11</sup> "U.S. Clearing Deutsche Börse-NYSE Takeover Moves Final Approval to Europe," Bloomberg (Dec. 22, 2011).

<sup>12</sup> Press Release, European Commission, *Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions* (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/60&format=HTML&aged=0&language=EN&guiLanguage=en>.

from the parties, was able to enter into useful dialogue throughout the investigations and to craft remedies appropriate to the respective jurisdictions.<sup>13</sup>

d) CPTN/Novell

12. In *CPTN/Novell*, the DOJ worked closely with the German Federal Cartel Office on the acquisition of certain patents and patent applications from Novell Inc. by CPTN Holdings (a holding company owned by Microsoft Inc., Oracle Corp., Apple Inc., and EMC Corp.). This was the first merger enforcement cooperation the DOJ had with Germany in 20 years. The two agencies announced their respective decisions on the same day.<sup>14</sup>

e) Intel/McAfee

13. In the *Intel/McAfee* matter, the FTC and DG Competition staff cooperated closely throughout their investigations. Although the reviewing agencies came to different conclusions, the FTC permitted the transaction to close while DG Competition only allowed it to proceed subject to conditions,<sup>15</sup> staff cooperated through regular and timely communications that continued through the end of the EC's procedure. The merging parties facilitated cooperation between the FTC and the DG Competition through the grant of waivers of confidentiality and other measures that facilitated communications and kept the investigation on parallel tracks.

f) Agilent/Varian

14. In the 2010 *Agilent/Varian* merger, involving the leading global suppliers of high-performance scientific measurement instruments, FTC staff cooperated closely with staff of the competition agencies of Australia, the EU, and Japan to coordinate their respective reviews of the merger. This cooperation, aided by waivers provided by the merging parties, resulted in coordinated remedies, with the Japan Fair Trade Commission closing its investigation after concluding that remedies the FTC and the EU obtained were sufficient to resolve any competitive concerns in Japan.<sup>16</sup>

g) Cisco/Tandberg

15. In its investigation of the *Cisco/Tandberg* merger, DOJ in 2010 took into account the commitments that the parties gave to the EC regarding interoperability in concluding that the proposed merger was not likely to be anticompetitive. DOJ and EC worked together closely on their investigations

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<sup>13</sup> Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Unilever's Acquisition of Alberto-Culver Company* (May 6, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/270854.htm](http://www.justice.gov/atr/public/press_releases/2011/270854.htm); Press Release, UK Office of Fair Trading, *Unilever/Alberto Culver merger: OFT accepts divestment undertakings* (June 16, 2011), available at <http://www.of.gov.uk/news-and-updates/press/2011/66-11>.

<sup>14</sup> Press Release, U.S. Dep't of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns* (Apr. 20, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/270086.htm](http://www.justice.gov/atr/public/press_releases/2011/270086.htm) and Press Release, German Bundeskartellamt, *Bundeskartellamt Clears CPTN Joint Venture for Acquisition of Novell Patents* (Apr. 20, 2011), available at [http://www.bundeskartellamt.de/wEnglisch/News/press/2011\\_04\\_20.php](http://www.bundeskartellamt.de/wEnglisch/News/press/2011_04_20.php).

<sup>15</sup> Commission Decision of January 21, 2010, Case COMP/M.5984 – Intel/McAfee, available at [http://ec.europa.eu/competition/mergers/cases/decisions/m5984\\_20110126\\_20212\\_1685278\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5984_20110126_20212_1685278_EN.pdf).

<sup>16</sup> 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>.

and, indeed, the two agencies closed their investigations on the same day.<sup>17</sup> Both then-Assistant Attorney General Christine Varney and Vice-President Almunia highlighted this investigation as a model for future cooperation and also a blueprint for how parties – both merging parties and third parties in that case – can facilitate cooperation with waivers.

### 2.2.2. Cooperation in conduct investigations

16. There are fewer opportunities for agencies to cooperate in conduct investigations than in merger reviews. In the 2011 ICN Roundtable on Enforcement Cooperation identified, “[s]everal reasons for the limited opportunity to cooperate in this area were suggested, notably that: there are few unilateral conduct cases pursued in each jurisdiction; these cases often are domestic in nature; and, the timing of the various investigations into a matter is often differentiated.”<sup>18</sup> Over the past few years, however, the Agencies have cooperated with non-U.S. counterparts on several investigations of potentially anticompetitive unilateral conduct.

17. For example, in 2010, the FTC settled charges against *Intel Corp.* that the company illegally stifled competition in the market for computer chips. Staff of the FTC and DG Competition exchanged views on theories of harm and methods of economic analysis during their investigations and leading up to their enforcement decisions.

18. In its recent investigation of illegal conduct in the *e-books* industry, the DOJ worked closely with DG Competition throughout the course of the investigation, with frequent contact between investigative staffs and the senior officials.<sup>19</sup> This is the first case in which the DOJ has cooperated so closely with a non-U.S. agency in a conduct investigation.

### 2.2.3. Cooperation in cartel investigations

19. In cartel investigations in particular, the DOJ engages in both formal and informal cooperation.<sup>20</sup> This has included, where not restricted by confidentiality rules, the sharing of leads and background

<sup>17</sup> Press Release, U.S. Dep’t of Justice, *Justice Department Will Not Challenge Cisco’s Acquisition of Tandberg* (Mar. 29, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm) and Press Release, European Commission, *Mergers: Commission Clears Cisco’s Proposed Acquisition of Tandberg Subject to Conditions* (Mar. 29, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377>.

<sup>18</sup> See ICN Roundtable on Enforcement Cooperation, Roundtable Report, March 29, 2011, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc793.pdf> at 5-6.

<sup>19</sup> Press Release, U.S. Dep’t of Justice, *Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-Books Prices* (Apr. 11, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/282133.htm](http://www.justice.gov/atr/public/press_releases/2012/282133.htm). Eric Holder, Attorney General, U.S. Dep’t of Justice, Remarks at the E-Books Press Conference (Apr. 11, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1204111.html>. Sharis Pozen, Remarks at the E-Books Press Conference (Apr. 11, 2012), available at <http://www.justice.gov/atr/public/speeches/282147.htm>. “Apple and four publishers in settlement talks with European Commission,” *Financial Times* (Apr. 13, 2012), available at <http://www.ft.com/cms/s/2/2601d78e-85b4-11e1-90cd-00144feab49a.html#axzz1uals7F5r> (quoting EC Vice-President Joaquin Almunia, “I am happy that the very close and productive cooperation between the DOJ and the Commission has benefitted the investigations on both sides of the Atlantic.”).

<sup>20</sup> Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Address at the 24<sup>th</sup> Annual National Institute on White Collar Crime (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

information about the relevant industry and actors, notification of initial investigative actions and the coordination of inspections and interviews. At the investigative stage, much of the cooperation in which the DOJ engages takes the form of formal requests for assistance pursuant to MLATs or letters rogatory. Such requests usually seek corporate documents and, less frequently, witness interviews. The DOJ has occasionally been requested to provide information in the post-investigative stage. This has involved providing copies of public court filings after a case is filed and, in some instances, providing access to non-public information that is not statutorily protected or otherwise entitled to confidential treatment. The DOJ also has cooperated with other agencies on the filing of charges.

20. In the large and ongoing international *Auto Parts* cartel investigation, the DOJ has coordinated with enforcement agencies on three continents that are investigating similar conduct. In the DOJ's *Marine Hose* investigation, while eight executives from France, Italy, Japan, and the United Kingdom were arrested in the United States in May 2007 for their role in a conspiracy to fix bids, fix prices, and allocate markets for U.S. sales of marine hose used to transport oil, competition authorities in the UK (the Office of Fair Trading ("OFT")) and the EC were also executing search warrants in Europe. Three of these executives, all British nationals, entered plea agreements in the United States in December 2007, agreeing to jail sentences and fines, and were then escorted in custody back to the UK to allow them to cooperate with the OFT and serve their sentences there. The DOJ also recently worked closely with Brazil on a cartel investigation involving commercial compressors used in devices such as water coolers and vending machines, a case that affected both jurisdictions.<sup>21</sup>

### 2.3. Recent Developments -- Cooperation Tools

21. In order to facilitate cooperation and further strengthen direct relationships between the Agencies and non-U.S. counterparts, the Agencies recently entered into additional cooperative arrangements. In 2009, the Agencies entered into their first direct agency-to-agency Memorandum of Understanding, with the Russian Federal Antimonopoly Service in November 2009.<sup>22</sup> The purpose of the MOU is to promote greater cooperation and further strengthen the relationships between the U.S. Agencies and the FAS through technical cooperation and regular communication. In March 2011, the Agencies entered into an agency-to-agency agreement with Chile's competition enforcement agency, the Fiscalía Nacional Económica.<sup>23</sup> Finally, the U.S. Agencies signed an MOU with the three Chinese Anti-Monopoly agencies

<sup>21</sup> Press Release, U.S. Dep't of Justice, *Panasonic Corp. and Whirlpool Corp. Subsidiary Agree to Plead Guilty for Role in Price-Fixing Conspiracy Involving Refrigerant Compressors* (Sept. 30, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/262783.htm](http://www.justice.gov/atr/public/press_releases/2010/262783.htm); Press Release, Conselho Administrativo de Defesa Economica (Sept. 30, 2009), available at <http://www.cade.gov.br/Default.aspx?9caf7e8b65ba51d227142a065c>.

<sup>22</sup> FTC Press Release, *FTC and Department of Justice Sign Antitrust Memorandum of Understanding with Russia's Federal Antimonopoly Service* (Nov. 10, 2009), available at <http://www.ftc.gov/opa/2009/11/russiamou.shtml>; See also Memorandum of Understanding on Antitrust Cooperation (Nov. 10, 2009), available at <http://www.justice.gov/atr/public/international/251836.htm>.

<sup>23</sup> FTC Press Release, *FTC and Department of Justice Sign Antitrust Cooperation Agreement with Chile* (Mar. 31, 2011), available at <http://www.ftc.gov/opa/2011/03/chileagree.shtml>; Press Release, U.S. Dep't of Justice, *Department of Justice and FTC Sign Antitrust Cooperation Agreement with Chile* (Mar. 31, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/269211.pdf](http://www.justice.gov/atr/public/press_releases/2011/269211.pdf); See also Agreement of Antitrust Cooperation (Mar. 31, 2011), available at <http://www.justice.gov/atr/public/international/docs/269195.htm>.

in July 2011, which also provides for periodic high-level consultations among all five agencies as well as cooperation channels between individual agencies.<sup>24</sup>

22. The Agencies have also developed other types of cooperation mechanisms. Last year, the U.S. Agencies and DG Competition updated their Best Practices on Cooperation in Merger Investigations.<sup>25</sup> The Best Practices, originally issued in 2002, were revised in light of the agencies' practical experience and provide an advisory framework for cooperation when a U.S. Agency and DG Competition review the same merger. The main purposes of issuing the revised Best Practices were (1) to be transparent about the Agencies' 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. In addition, the Best Practices address the complexity of coordinating merger review timetables between the authorities and emphasize the need for coordination among the agencies at key stages of their investigations, including the final stage when agencies consider potential remedies to preserve competition. The Best Practices also recognize that more authorities have become more engaged in the review process, requiring coordination with a larger number of agencies.<sup>26</sup>

<sup>24</sup> FTC Press Release, Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding With Chinese Antitrust Agencies (July 27, 2011), available at <http://www.ftc.gov/opa/2011/07/chinamou.shtm>; Press Release, U.S. Dep't of Justice, *Dep't of Justice and FTC Sign Antitrust Memorandum of Understanding with Chinese Antitrust Agencies* (July 27, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/273306.pdf](http://www.justice.gov/atr/public/press_releases/2011/273306.pdf). See also Christine Varney, Ass't Att'y Gen., Antitrust Division, Remarks on the Occasion of the Signing of the Memorandum of Understanding on Antitrust Cooperation (July 27, 2011), available at <http://www.justice.gov/atr/public/speeches/273347.pdf>; Memorandum of Understanding on Antitrust and Antimonopoly Cooperation (July 27, 2011), available at <http://www.justice.gov/atr/public/international/docs/273310.pdf>.

<sup>25</sup> US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (2011), available at <http://www.ftc.gov/os/2011/10/111014eumerger.pdf>.

<sup>26</sup> For example, in recent cases such as *Pfizer/Wyeth* and *Panasonic/Sanyo*, the FTC and DG Competition worked closely with several other authorities, including such as agencies from Australia, Canada, Japan, Mexico, New Zealand, and South Africa, to achieve resolution of those matters. See 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>, and 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>. During its investigation into Google's proposed acquisition of Motorola Mobility Holdings Inc. ("MMI"), the acquisitions by Apple Inc., Microsoft Corp. and Research in Motion Ltd. ("RIM") of certain Nortel Networks Corporation patents, and the acquisition by Apple of certain Novell Inc. patents,<sup>26</sup> the DOJ cooperated closely with DG Competition on the Google/MMI transaction. The agencies announced their decisions within hours of one another. The DOJ also had discussions with competition agencies in Australia, Canada, Israel, and Korea. In connection with the investigation related to the Nortel patent assets, the DOJ worked closely with the Canadian Competition Bureau. See Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (Feb. 13, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280190.htm](http://www.justice.gov/atr/public/press_releases/2012/280190.htm), and Press Release, European Commission, *Mergers: Commission Approves Acquisition of Motorola Mobility by Google*, (Feb. 13, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/129>.

23. The U.S. Agencies and the Chinese Ministry of Commerce (“MOFCOM”) also issued Guidance for Case Cooperation in 2011.<sup>27</sup> The Guidance provides a framework for cooperation when MOFCOM and one of the U.S. Agencies review the same merger. The document recognizes that case cooperation between the investigating agencies may help improve the efficiency of their investigations, and thereby maintain competition in their jurisdictions.

### **3. Looking Ahead**

24. International enforcement cooperation is increasingly important as many competition agencies conduct an increasing number of simultaneous merger reviews and cartel and conduct investigations. For the future, OECD member agencies should look to incorporate new ways of thinking and new, or to date unexplored, ways of working together to facilitate cooperation. This includes thinking creatively to learn from others’ experience, including from cooperation experience in other disciplines. For example, the FTC’s experience in consumer protection enforcement cooperation may prove useful for comparative review and experience sharing.

25. Members may wish to examine how we want to cooperate in the coming years and how to get there. Part of this examination would include a better understanding of limitations on cooperation to investigations and cooperation, from the issues highlighted in the Secretariat’s Note, including limitations on the exchange of confidential information, the impact of certain privacy regimes on competition investigations and cooperation, and what, if anything our cooperation and tools might do to minimize the impact of these impediments.

26. As we go forward, we would be well served to recognize that parties to investigations and third parties can play an important role in facilitating efficient agency cooperation. Although, as discussed above, interagency competition enforcement cooperation can occur in any event, agency cooperation on individual cases is enhanced when parties grant waivers that allow the exchange of confidential information among investigating agencies. As part of our examination, members could productively address how to improve party perceptions of the overall benefits of international cooperation in competition enforcement, and allay their concerns about the treatment of their confidential information, which would benefit agencies, parties, and consumers.

27. The OECD enforcement cooperation project is an important vehicle to promote this exchange of experience and to discuss ways and opportunities to work more effectively with one another in the future. We look forward to these discussions.

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<sup>27</sup> Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases, November 29, 2011, available at <http://www.ftc.gov/os/2011/11/111129mofcom.pdf>.