Chapter 2

MULTIJURISDICTIONAL MERGERS: FACILITATING SUBSTANTIVE CONVERGENCE AND MINIMIZING CONFLICT

Issues raised by the proliferation of merger control laws are at the cutting edge of economic globalization. The marked increase in the number of jurisdictions that have adopted merger review regimes makes it increasingly likely that international mergers and acquisitions will be reviewed by multiple competition authorities. The substantive standards contained in the competition laws and regulations of nations differ, reflecting divergent policy goals. Such differences, especially when coupled with the significant extraterritorial reach of many merger control laws, present challenges both for the merging parties and for reviewing antitrust authorities.

For the merging parties, these challenges may include heightened uncertainty regarding the ultimate legality of the proposed transaction; the necessity for interacting and negotiating with multiple reviewing authorities; the possibility of inconsistent and perhaps conflicting rulings; and the potential for overly burdensome remedies. These challenges increase transaction costs for merging parties and, in the worst-case scenario, may result in the abandonment of procompetitive transactions.

The challenges that antitrust authorities confront in the multijurisdictional merger review arena are equally significant. Antitrust enforcers are reviewing transactions where more and more firm assets and production facilities, as well as documents and witnesses, may be located outside the borders of the reviewing jurisdictions. As a result, an antitrust authority might create international friction by imposing remedies with extraterritorial effects, or the remedies imposed by one reviewing jurisdiction might prevent another jurisdiction from obtaining the relief it seeks. Further, merger reviews frequently require antitrust enforcers to cooperate to obtain information and arrive at consistent outcomes and compatible remedies around the world. When divergence occurs, it is the agencies that must often explain and at times attempt to reconcile their differences. Clashes also may lead to trade wars.

Although much attention has been focused on the potential for divergent outcomes when proposed transactions are reviewed by multiple agencies, multijurisdictional merger review for the most part has resulted in consistent outcomes and compatible remedies. The possibility of divergent outcomes will remain, however, as long as underlying substantive differences in merger control laws exist and multiple agencies continue to review a single transaction.

The Advisory Committee is of the view that these challenges may best be addressed by facilitating, where possible, substantive harmonization and convergence of substantive standards and approaches to merger review. Complete harmonization and convergence will be achieved only in the long run, if ever. This, however, should not deter policymakers and their publics from taking steps where possible to support and facilitate efforts at harmonization and convergence both in the short and medium term. To this end, the Advisory Committee considers herein a variety of steps to achieve this goal.[1] The unifying theme of these recommendations is that cooperation among antitrust enforcement authorities is not only desirable but necessary if the challenges in this arena are to be addressed effectively.

The Advisory Committee further believes that if undertaken, the proposed reforms also may have the beneficial effect of reducing the incidence of nationalistic actions by competition authorities around the world. For example, transactions reviewed in one jurisdiction may have the potential to generate net positive effects in that country and net negative spillovers elsewhere. It is customary practice and therefore to be expected in the short and medium term that enforcement authorities will focus primarily on the effects that each transaction will generate within their own jurisdiction. Over time, as the level of harmonization and convergence increases, however, the Advisory Committee considers that there may be circumstances when it may be appropriate (or necessary) for enforcement authorities to cooperate in accounting for the global effects of a proposed transaction.

The United States by virtue of its extensive history of cooperation can and should continue to forge even closer ties with other competition authorities around the world. Indeed, perhaps one of the most important ways the United States can stimulate global convergences lies in refining and expanding its network of international cooperation agreements, and this chapter offers a perspective on how such cooperation might deepen over time.

More specifically, this chapter examines the challenges presented by multijurisdictional merger review and identifies concrete ways in which the United States and other jurisdictions may begin to address these challenges constructively. This chapter first explores in greater detail the trends that collectively have generated the challenges that corporations and antitrust authorities frequently encounter in the multijurisdictional merger arena. It also explores the underlying substantive differences among antitrust merger control laws and the implications of these differences for multijurisdictional merger review. The chapter then considers steps likely to minimize conflicts and to promote a degree of convergence among nations. These include facilitating greater transparency, developing disciplines for the review of transactions with significant transnational or spillover effects, enhancing cross-border cooperation through the

[1] The Advisory Committee uses the word harmonization to signify a process that relieves tensions between and among the laws and policies of different nations by bringing the laws and policies into a state of greater compatibility. Harmonization can be achieved in many ways. This report advocates soft harmonization (that is, not mandatory) and recommends steps that jurisdictions can take to facilitate the adoption and implementation of common goals. Thus, when this Report recommends harmonization, the Advisory Committee is recommending measures designed to bring law and procedures into closer identity, i.e., convergence.

development of a framework for cooperation and the exchange of confidential business information, and developing work-sharing arrangements.

In Chapter 3 the Advisory Committee examines those problematic features within merger review systems that increase uncertainty about individual transactions and give rise to unnecessary transaction costs through the notification and review procedures implemented by various jurisdictions. As described in detail there, the Advisory Committee believes that these costs can most profitably be addressed by advocating targeted reform in individual merger regimes through the promotion of best practices. Broadly speaking, these best practices seek to ensure that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction, and to further ensure that each jurisdiction refrains from imposing unnecessary burdens on those transactions during the course of the merger review process.

INTERNATIONALIZATION OF ANTITRUST MERGER CONTROL LAW

Since World War II significant effort has been spent on developing and implementing international trade agreements designed to lower governmentally imposed barriers to trade and investment. These efforts along with the unilateral actions of governments to open their markets have produced many areas of success. During this same period, transportation costs have decreased significantly, and technological developments have made possible the nearly instantaneous sharing of information and data throughout the world. Together, these developments have facilitated the flow of goods and services among nations, thereby increasing the linkages among national economies.

Globalization and the Merger Wave

As barriers to trade and investment have been reduced, companies have responded by expanding their business operations into other countries. One of the preferred mechanisms for international expansion has been through mergers, acquisitions, and joint ventures.[2] Although many factors have been identified as drivers of merger activity, perhaps one of the most important is the ease with which mergers enable companies to expand into new geographic markets.[3] As one economist testified at ICPAC hearings,

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[2] *See* Submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, "Rationalizing International Pre-Merger Review," ICPAC Hearings (Nov. 4, 1998), at 2-3 [hereinafter Byowitz and Gotts Submission]. Cross-border deals accounted for a quarter of the mergers in 1998. Securities Data Company.

[3] Significant effort has been expended to identify the driving forces behind mergers and acquisitions. In 1959, for example, the National Bureau of Economic Research released a study on U.S. merger movements from 1895 through 1956. This study concluded that the primary drivers of merger activity are two related factors: a strong capital market and a strong economy. Interestingly, the study concluded that technological innovation was not a primary factor in the merger waves that occurred during the period under examination. Expert testimony at ICPAC hearings indicates that the primary forces that motivate mergers remain the same today. "Simply put, while there will be mergers even in bad times, especially where economic pressure forces people to sell, by and large merger *waves* are associated with periods when financial markets and the economy are booming." Submission by Ali E. Wambold, Managing Director, Lazard Frères &

"[c]omplementary geographic coverage can be very important, especially in international mergers. It can be less expensive to expand into a new market by simply buying someone who is there, someone who knows what's going on on the ground rather than having to do those investments yourself."[4]

Moreover, as national markets evolve into a global marketplace, more and more companies are deciding that they must become bigger to compete effectively. The Antitrust Division observed that "[o]ne way companies are growing, be they large vertical or horizontal conglomerates, or small single-industry businesses, is through strategic mergers. Companies of all stripes are seeking to grow and enhance owner or shareholder value through combination with other concerns where there is some relationship between or among the goods and/or services created."[5]

The United States is currently in the midst of the fifth merger wave that has occurred during the last 100 years.[6] In 1999 global merger and acquisition activity was at an all-time high, with over $3.4 trillion in mergers announced worldwide. This volume renders small by comparison the previous year, itself a record year with approximately $2.5 trillion in merger activity.[7] The increase in merger activity also is reflected in the total value for domestic mergers. In the United States, approximately $1.7 trillion worth

Co., LLC, ICPAC Hearings (Nov. 3, 1998), at 2-3 [hereinafter Wambold Submission]. Another expert testifying at ICPAC hearings suggested that the overall business and economic drivers of merger activity can be divided into three broad categories: macroeconomic factors in the environment, the condition of financial markets, and sectoral changes occurring in particular industry areas. Testimony of Steven B. Wolitzer, Managing Director, Lehman Brothers, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 7-8.

[4] Testimony of Dr. James A. Langenfeld, Principal, Law and Economics Consulting Group, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 27. Similarly, in rapidly evolving technology markets where timeliness is critical, firms may purchase product markets to enhance or leapfrog into the next generation products.

[5] Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 18, 26; *see also* Transcript of Testimony of Senator Orrin Hatch at the Senate Judiciary Committee Hearing on the effects of corporate mergers and consolidations (June 16, 1998) (observing that many of the recent mergers are undertaken in response to the strategic imperatives of the globalized economy in an effort to increase market share). An interim report by a White House group looking at the recent merger wave found that the current wave of mergers has not produced an unhealthy concentration of power (the report was not made public). The White House merger working group recommends no major changes in antitrust law. Ronald G. Shafer, *Washington Wire,* WALL ST. J., May 21, 1999, at A1. The FTC also held hearings on October 12 and December 13, 1995, to identify and examine the need for changes in antitrust to deal with global competition and high technology and innovation. According to the FTC Staff Report, the hearings confirmed that the core aspects of antitrust law continue to serve the United States well, and that vigorous competition in domestic markets aids success in today's global marketplace. A REPORT BY FEDERAL TRADE COMMISSION STAFF, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (May 1996).

[6] The first merger wave during this period occurred during the 1890s, another in the 1920s, a third in the 1960s, and a fourth during the early and mid-1980s. *See* DEVRA L. GOLBE AND LAWRENCE J. WHITE, *Catch A Wave: The Time Series Behavior of Mergers, in* THE REVIEW OF ECONOMICS AND STATISTICS 493 (1993).

[7] Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A hits $3.4 trillion as Europe takes off and telecom soars,* INVESTMENT DEALER'S DIGEST, Jan. 17, 2000 *citing* Thomson Financial Securities Data.

of U.S. deals were announced in 1999, a slight increase from the $1.6 trillion announced the year before. As the total value of transactions grew in the United States, however, the number of deals actually declined to 10,892 compared with 12,279 in 1998. By contrast, the value of European transactions announced in 1999 more than doubled that of the prior year to $1.2 trillion spread over 12,062 transactions.[8] This merger wave has encompassed virtually every industry from financial services, to telecommunications, to defense.[9]

As the number of total mergers has increased, so too has the number of antitrust notifications filed with the U.S. antitrust authorities under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act or HSR) which established a premerger notification and review system in the United States.[10] In the early 1990s, fewer than 2,000 transactions were notified to the U.S. antitrust authorities each year. During fiscal year 1999 the U.S. antitrust authorities received notifications for 4,679 transactions (Annex 2-A).[11]

The number of mergers reviewed in the United States with international implications likewise has increased significantly during the last few years. Robert Pitofsky, Chairman of the Federal Trade Commission (FTC), recently noted that when he served on the Commission during the Carter administration in the late 1970s, it reviewed only one transaction with an international dimension.[12] By contrast, from 1987 to 1997, merger filings in the United States involving a foreign acquiring person or foreign acquired entity ranged from 15.5 percent to 51 percent a year, and requests for additional information and documentary material (colloquially referred to as a second request) issued by either the

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8 *Id.* Some question whether the current surge in merger activity will continue and suggest a downturn may already have begun. Wambold Submission, at 4-5 (observing that even if the U.S. economy retreats, merger activity in Europe may remain relatively strong in the short term).

9 Notable deals announced in 1999 include Olivetti SpA/Telecom Italia SpA ($35 billion); Vodafone Airtouch plc/Mannesmann AG ($140 billion); Sprint Corp./MCI Woldcom Inc. ($114 billion). Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A hits $3.4 trillion as Europe takes off and telecom soars*, INVESTMENT DEALER'S DIGEST, Jan. 17, 2000. In 1998, notable deals included Travelers Group/Citicorp ($73 billion); Norwest/Wells Fargo ($34 billion); NationsBank/BankAmerica ($62 billion); WorldCom/MCI ($44 billion); SBC Communications/Ameritech ($63 billion); and Lockheed-Martin/Northrop Grumman ($11.6 billion). Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 7, 18.

10 15 U.S.C. §18a.

11 U.S. DOJ Premerger Office; FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A. Fiscal year 1999 filings reflect a slight decrease from fiscal year 1998 when 4,728 transactions were notified.

12 Mergers and Acquisitions: ABA Section Examines Consequences of Proliferation of Premerger Notification, 75 Antitrust & Trade Reg. Rep. (BNA) 163 (Aug. 6, 1998)(reporting Chairman Pitofsky's remarks at the American Bar Association's Section of Antitrust Law annual meeting).

Department of Justice, Antitrust Division (DOJ) or the FTC ranged from 13 percent to 46 percent.[13] Although in 1999 the total number of transactions notified to the U.S. antitrust authorities declined slightly from the prior year, notified transactions involving a foreign acquiring person or foreign acquired entity increased. During fiscal year 1999, 849, or roughly one-fifth of the notifications that the U.S. antitrust authorities received under the HSR Act involved a foreign acquiring person or foreign acquired entity (compared with 736 the prior year). Preliminary investigations were opened in 111 matters resulting in 21 second requests and ultimately five enforcement actions (Annex 2-B).[14]

The DOJ recently began tracking the number of investigations of transactions with an international aspect, a broader measure than merely examining whether a foreign acquiring person or foreign acquired entity is involved in a transaction. A transaction is considered to have an international aspect if it may involve possible adverse impact on U.S. domestic or foreign competition *and* if it meets at least one of the following criteria:

- one or more involved parties is not a U.S. citizen or U.S. business;
- one or more involved parties is not located in the United States;
- potentially relevant information is located outside the United States;
- conduct potentially illegal under U.S. law occurred outside the United States; or
- substantive foreign government consultation or coordination is undertaken in connection with the matter.[15]

In recent years, transactions with an international aspect have made up a nontrivial percentage of all transactions in which the U.S. antitrust authorities have issued second requests. Of the 68 second requests issued by the DOJ in 1999, 18 involved transactions with international aspects.[16] During the first nine months of fiscal year 1999, the FTC issued 38 second requests of which 21 involved formal

[13] Robert Pitofsky, Chairman, U.S. Federal Trade Commission, The Effect of Global Trade on United States Competition Law and Enforcement Policies, Remarks before Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy, at 4 (Oct. 15, 1999). Second requests are issued when the agencies choose to conduct a full investigation of a transaction's likely effect on competition.

[14] U.S. DOJ Premerger Office; Letter from William J. Baer, Director, Bureau of Competition, U.S. Federal Trade Commission, to James F. Rill, Esq. and Dr. Paula Stern (June 15, 1999) (providing statistics for fiscal years 1996-1998) [hereinafter Baer June 15, 1999 Letter]. The term "enforcement action" includes matters in which the FTC or DOJ issued a proposed consent order, authorized a preliminary injunction or administrative complaint, and matters in which the parties addressed concerns raised by the agencies by using a "fix-it-first" solution or by abandoning the transaction.

[15] Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 72.

[16] U.S. DOJ Premerger Office.

notifications to foreign governments. Twelve of these second request investigations involved substantial discussions with foreign antitrust authorities.[17]

Cases involving an international aspect also account for a significant percentage of enforcement actions against proposed mergers undertaken by the U.S. antitrust authorities. Of the 46 enforcement actions taken by the DOJ in fiscal year 1999, 3 involved transactions with international aspects.[18] At the FTC, 13 of the 28 merger enforcement actions undertaken in fiscal year 1998 involved notifications to foreign governments, and of those, 6 involved substantial discussions with foreign authorities also reviewing the transaction. In addition, the FTC reports that there have been about a dozen other mergers in which discussions took place between FTC staff and reviewing enforcement authorities in other countries but for which the FTC concluded that no enforcement action was necessary.[19]

One could take an even broader view of internationalization. These numbers may underestimate the percentage of transactions that possess international implications, however, because they may not capture transactions involving U.S. firms with foreign sales or assets or purely domestic transactions that involve global markets. In 1999, for example, Chairman Pitofsky estimated that approximately 50 percent of the mergers investigated by the FTC at any given time have an impact on consumers in more than one country and "often require a remedy, or a series of remedies that are coordinated among law enforcement authorities in different countries."[20] Similarly, Assistant Attorney General Joel Klein of the Justice Department's Antitrust Division indicated in November 1998 that the percentage of *all* matters reviewed by the Antitrust Division and possessing an international aspect had grown from 2 to 3 percent in the early 1990s to almost 40 percent in 1998.[21]

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[17] Richard G. Parker, then-Senior Deputy Director, Bureau of Competition, U.S. Federal Trade Commission, Global Merger Enforcement, Remarks before the International Bar Association (Sept. 28, 1999) [hereinafter Parker Remarks (Sept. 28, 1999)]. The cooperation agreements to which the United States is a party generally require each party to notify the other whenever its competition authorities are engaged in enforcement activities which may affect "important interests of the other party." In 1998, the DOJ and FTC notified the EC of 39 mergers under the 1991 U.S.-EC Cooperation Agreement. The EC notified the U.S. agencies of 43. Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Jan. 1, 1998 to Dec. 31, 1998 (Apr. 2, 1999).

[18] U.S. DOJ Premerger Office.

[19] Parker Remarks (Sept. 28, 1999).

[20] Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Remarks at the Brussels Press Conference following the U.S.-EC annual bilateral talks (Oct. 6, 1999); *see also* Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Federal Trade Commission Merger and Competition Policy—The Way Ahead, Remarks before the American Bar Association Annual Meeting (Aug. 4, 1998)(remarking that half of all mergers reviewed at the FTC at any given time involve a foreign party, information located outside the United States, or a foreign asset that is critical to a remedy).

[21] Testimony of Joel I. Klein, Assistant Attorney General, U.S. Department of Justice, Antitrust Division, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 13.

Overview of Substantive Approaches to Merger Analysis

These trends render it increasingly likely that mergers involving firms doing business in several jurisdictions will be reviewed by multiple antitrust authorities. Of the more than 80 jurisdictions currently possessing competition laws, it is estimated that at least 60 provide for merger control (Annex 2-C). This number undoubtedly will increase as other countries implement competition laws.

Jurisdictions with antitrust merger control laws employ differing substantive standards of review. The merger laws of nations essentially span the following spectrum: laws that prohibit or control anticompetitive mergers; laws that prohibit or control mergers that create or enhance dominance; and laws that prohibit or control either anticompetitive mergers or those that create or enhance dominance unless the economic advantages of the merger to the country -- including preservation of jobs and promotion of exports -- outweigh the disadvantages.

In many merger cases the differences in substantive law are not apparent because the result of the analysis is the same. Nonetheless, the following differences are noteworthy. First, as with all of competition law, views diverge about the meaning of anticompetitive and dominance. In a number of countries, very strong presumptions arise from high market shares. For example, in the European Union (EU), 50 percent and sometimes 40 percent of a market means dominance, especially if the next largest company is far behind.[22] The United States, on the other hand, measures market power and its possible increase microeconomically, by considering the various relevant factors in the specific context. In many, if not most of the less mature competition systems, harm to competition is presumed if the merging companies are competitors and have significant market shares, and the burden shifts to the merging parties to show that the economic advantages to the nation outweigh the harm.

The definition of anticompetitive has another dimension. Many jurisdictions consider a merger anticompetitive if it significantly lessens the market opportunities of the remaining firms in the market. To the extent that consumer interests are a major concern, it is usually assumed that a merger that blocks meritorious competition by less powerful firms will harm the consumers by depriving them of options and eventually of the fruits of robust competition. This view of competition has led the European Commission (EC) to be concerned about portfolio effects, whereby the merged firm would have a full product line, buyers would find doing business with the full line firm irresistible, and these purchasers would shift share to the dominant firm, increasing its dominance.[23]

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[22] Under EU law, for example, when Boeing increased its market share from 64 percent to 70 percent by acquiring McDonnell Douglas, Boeing reasonably could be viewed as dominant and having increased its dominance. Boeing/McDonnell Douglas, EC Case No. IV/M.877, ¶ 29 (July 30, 1997).

[23] The EC applied the portfolio effects theory in two aircraft mergers, *De Havilland* and *Boeing*, noting that the merged firm in each case would have a full family of aircraft. Boeing/McDonnell Douglas, EC Case No. IV/M.877, ¶38 (July 30, 1997); Aérospatiale-Alenia/De Havilland, EC Case No. IV/M.053 (Oct. 2, 1991).

In some countries this has led to a competitor-driven merger review process. U.S. antitrust practitioners are accustomed to U.S. authorities having a healthy skepticism of the views of direct competitors, which may be motivated by obvious strategic incentives. In the United States, particularly careful attention is paid to the views of customers, who serve as the primary proxy for a transaction's effect on consumers. Merger review in the EU under the EC Merger Regulation permits third parties to submit written or oral comments if they so request and can show a "sufficient interest" in the outcome of the proposed transaction.[24] The EC considers competitors, customers, and suppliers to be sufficiently interested parties in virtually all circumstances.[25] According to recent analysis, competitors have been much more aggressive than customers and suppliers in attacking transactions under the EC Merger Regulation. In practice, the transactions involving the most voluminous records also involve the most intense competitor attacks. Some argue that this phenomenon raises public policy questions regarding the proper role of competitors as intervenors in the merger control process.[26]

The law of some other countries is even more concerned about the impact of a transaction on small- and medium-sized businesses and gives the competition authorities power to block mergers because of their damaging effect on these firms. For example, the law of South Africa does so explicitly;[27] other laws do so implicitly. Globalization has a disciplining effect on such uses of the law. Almost every country has been captivated by the ambition for competitiveness, which means that the antitrust agencies have an incentive to approve efficient mergers and not to handicap the nation's firms.

A conclusion that a merger is anticompetitive or dominant assumes a definition of the market. The U.S. antitrust enforcement agencies have a very specific blueprint for defining the market, as laid out in the

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[24] Council Regulation (EEC) No. 4064/89, O.J. L 395/1 (Dec. 30, 1989), as amended [hereinafter EC Merger Regulation].

[25] *See* BARRY E. HAWK AND HENRY L. HUSER, EUROPEAN COMMUNITY MERGER CONTROL: A PRACTITIONER'S GUIDE 309-10 (Kluwer Law Int'l 1996)[hereinafter HAWK AND HUSER]. The Commission defines an "interested" third party as one that has expressed comments following publication of the initial Official Journal notice announcing the parties' notification of the proposed concentration and "those which the Commission believes are liable to be affected" by its decision (e.g., a clearance subject to remedial commitments by the parties or modifications to their proposed concentration). *See* European Commission Twenty-Fourth Report on Competition Policy 1994, at ¶315.

[26] HAWK AND HUSER, at 309-310; Testimony of Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 106-107.

[27] Competition Act of 1998 (as amended 1999) ch. 3 §16(3).

DOJ and FTC Horizontal Merger Guidelines.[28] The EC has adopted a notice on market definition that in many ways is very similar to the market definition section of the U.S. merger guidelines.[29]

Immature market systems are often so lacking in resources that the agencies cannot conduct sophisticated economic analysis, much less gather the basic background facts necessary for them to do so. Often, in these jurisdictions, any distinct product overlap and overlapping geographic area will be accepted as the market.

Another area of difference is the extent to which national industrial policy is a defense to an anticompetitive merger. For example, some jurisdictions use their merger regimes to preserve employment, promote exports, or place domestic firms at a competitive advantage in the international arena. In these jurisdictions, there is the risk that a government could use its antitrust review process to delay or complicate clearance of a small but important piece of a large, multinational transaction to serve a nonantitrust agenda. As one commentator observed, such an agenda could include parochial commitments to keep a local plant open, to hire more local personnel in key positions, or to resolve some other political (but nonantitrust) problem.[30] In several nations such considerations are aboveboard, but for other nations the use of national industrial policy as a trump over competition concerns may not be transparent. Instead, it may be obscured under the gauzy cloak of an opinion that finds that the transaction does not have an anticompetitive effect.

Despite differences, however, there also are significant commonalities, and further convergence on substantive standards is occurring. Recent examples of convergence may be attributable to the diffusion of information, which in turn may be attributable to cooperation among antitrust authorities in different jurisdictions. One government official has stated:

> [T]here are fewer differences about what is sound competition policy and about how to assess any particular merger than would appear if you were to ask the agencies to negotiate a common code or even a common premerger notification form. When you put the questions in the abstract, you isolate differences in national style and perhaps differences in substantive policies. But when you get down to the concrete, and ask what's

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[28] U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines (April 2, 1992), *as amended* April 8, 1997, *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104. Though even application of the Guidelines can lead to widely differing results, as seen in the FTC challenges of Staples/Office Depot and Tenet Healthcare/Poplar Bluff Physicians Group Hospitals. FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Tenet Health Care Corp., 17 F. Supp. 2d 1045 (E.D. Mo. 1998), *rev'd*, 186 F.3d 1045 (8th Cir. 1999).

[29] Commission Notice on the definition of the relevant market for purposes of community competition law, O.J. C 372 (Dec. 9, 1997).

[30] James B. Kobak, Jr., and Anthony M. D'Iorio, Hughes Hubbard & Reed LLP, *The High Cost of Cross-Border Merger Reviews*, *in* THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY, VOL. III INTERNATIONAL TRADE, at 717, 721 (Gulser Meric and Susan E.W. Nichols eds., 1998) submitted by Mr. Kobak for inclusion in the Advisory Committee record [hereinafter Kobak Submission].

> really the problem with a particular merger and how do we solve it, my impression is that, in the day to day work of the agencies, there is a high degree of good will and procedural cooperation . . . and that that good will and cooperation leads to a kind of substantive agreement at least with respect to the application of competition principles to the particular case at hand. There is therefore reason to believe that more and more cooperation on specific cases will lead to some kind of de facto convergence among the different competition authorities.[31]

Perhaps the most notable steps toward convergence have occurred between the United States and the EU, presumably because of the high level of interaction and cooperation between the two jurisdictions following the implementation of a bilateral agreement regarding the application of their competition laws (1991 U.S.-EC Agreement). At ICPAC hearings, officials from the EC noted that with the exception of the Boeing/McDonnell Douglas case, virtually all other cases had come up with consistent results.[32]

Another notable example of convergence includes the EC's recent adoption of aspects of market definition analysis historically employed by the U.S. agencies. The U.S. authorities also have placed a greater emphasis on unilateral effects analysis (similar to the EU's historical emphasis on single-firm dominance), whereas, in the EU, the Courts and Commission have recently applied collective dominance to merger analysis, a shift toward a greater focus on the likelihood of coordinated effects postmerger (similar to the U.S. agencies' historical emphasis on the ability of the remaining firms either tacitly or expressly to collude post-merger).[33]

There also appears to be movement away from using antitrust laws to pursue noncompetition objectives. For example, the United Kingdom has proposed replacing its general public interest test for mergers with a competition-based test and creating an independent competition authority as the decisionmaker. The UK has published *Mergers: A Consultation Document on Proposals for Reform* to encourage public debate on these issues.[34]

Challenges Presented by Diverse Policy Goals and Approaches

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[31] Remarks by A. Douglas Melamed, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, Antitrust Division, ICPAC Committee Meeting (Sept. 11, 1998), Meeting Minutes, at 106.

[32] Testimony of Karel Van Miert, then-Competition Commissioner, European Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 51 [hereinafter Van Miert ICPAC November Hearings Testimony].

[33] Testimony of William J. Kolasky, Jr., Wilmer, Cutler & Pickering, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 129-133 (highlighting areas of EU-U.S. convergence on substantive standards and notable exceptions, including treatment of efficiencies and remedies) [hereinafter Kolasky ICPAC November Hearings Testimony].

[34] Mergers - A Consultation Document on Proposals For Reform, Department of Trade and Industry Publication 4308 at <http://www2.dti.gov.uk./CACP/cp/mergercon.htm>.

Diverse policy goals and approaches to merger review present the potential for divergence in analyses and results and may give rise to international friction.

Potential for Divergence in Analyses and Results

Respondents to ICPAC outreach efforts have indicated that divergent results in multijurisdictional merger review most commonly arise when only one of several reviewing jurisdictions challenges a transaction or when a remedy imposed by one authority is more demanding than the remedies imposed by other reviewing jurisdictions.[35] In such cases, the most restrictive nation prevails.

Different outcomes, however, are not necessarily inconsistent. Frequently differences are premised upon differing factual situations among the reviewing jurisdictions.[36] For example, a transaction may implicate separate markets in various jurisdictions. It is to be expected that each jurisdiction will seek the remedy necessary to prevent anticompetitive effects in its markets. Even where the markets involved are international in scope, applicable law or the effectiveness of a remedy may vary from one jurisdiction to another. Each jurisdiction's law demands that it obtain the relief necessary to correct anticompetitive problems arising in that jurisdiction and under its law. In such cases, authorities who have chosen to take no action or to impose a "lesser" remedy against a proposed transaction generally do not feel aggrieved by actions taken in other jurisdictions. Indeed, there are very few situations in which agencies or merging parties have complained about inconsistent results.[37]

Divergent results may present a conflict, however, when a party is unable to comply with the remedies imposed by two different jurisdictions.[38] Such outcomes rarely, if ever, occur. Close cooperation

[35] *See, e.g.,* Submission by American Bar Association Section of Antitrust Law, "Report on Multijurisdictional Merger Review Issues," ICPAC Hearings (May 17, 1999), at 27 [hereinafter ABA Antitrust Section Multijurisdictional Merger Review Submission]; Upjohn Co./Pharmacia, 60 Fed. Reg. 56,153 (1995), *order entered* 61 Fed. Reg. 31,120 (1996); EC Case No IV/M.631 (Sept. 28, 1995); Hoechst AG/Marion Merrell Dow, 60 Fed. Reg. 49,609 (1995), *order entered* 61 Fed. Reg. 16,794 (1996); EC Case No IV/M.587 (June 22, 1995); Baxter Int'l Inc./Immuno, FTC Dkt. No. C-3726, *reported at* 5 Trade Reg. Rep. (CCH) ¶ 24,184 (Mar. 24, 1997); EC Case No IV/M.821 (Oct. 9, 1996) (in these three cases, the United States ordered divestiture of U.S. or worldwide assets and/or imposed licensing requirements whereas the EC cleared the transactions).

[36] As Debra Valentine, General Counsel, U.S. Federal Trade Commission, remarked, sometimes two or more antitrust authorities looking at the same transaction will (and should) come to different results because the transaction will in fact have differing impacts on different markets. Debra A. Valentine, *Building A Cooperative Framework For Oversight in Mergers -- The Answer to Extraterritorial Issues in Merger Review*, 6 GEO. MASON L. REV. 525, at 527-28 (1998) [hereinafter Valentine, George Mason Remarks]; *see also* Kolasky ICPAC November Hearings Testimony, at 157.

[37] *See* ABA Antitrust Section Multijurisdictional Merger Review Submission, at 27; Panel on Conflicts and Remedies, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 123-173.

[38] From the agencies' perspective, a conflict also may arise when remedies imposed by one jurisdiction impact the remedies available to another jurisdiction. This is particularly problematic in largely global transactions where the impact

may be credited with achieving compatible results in many cases reviewed in the United States and by the EC. Government officials have observed that "even if the transaction needs to be addressed somewhat differently on both sides of the Atlantic because of differing market conditions and competitive realities, we reach solutions involving divestitures and licensing that neither conflict nor force firms to choose between complying with U.S. or EC law."[39]

It has been emphasized, however, that it is not necessary for remedies imposed by various jurisdictions to conflict for them to burden a transaction unduly. The cumulative effect of remedies imposed by several jurisdictions ultimately may outweigh the benefits the merging parties had hoped to attain, thereby forcing the parties to abandon the proposed transaction.[40] When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy. However, while any one remedy could make sense from the point of view of any particular jurisdiction, taken together, remedies from several jurisdictions may lead to what is perceived as overregulation or inefficiency. As two experts have noted:

> Large international mergers tend to be time sensitive and vulnerable to regulatory uncertainty. As a result, merging parties are reluctant to litigate, even when faced with onerous demands from antitrust enforcement agencies. Any agency of significance may therefore have the leverage to obtain remedies which have international spillover effects. Merging parties may find that they are forced to divest of businesses or license intellectual property in countries where the merger has been cleared or where no competition concerns exist.[41]

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of various remedies may differ from jurisdiction to jurisdiction.

39 *See* Valentine, George Mason Remarks, at 531.

40 *See, e.g.*, Comments of American Airlines, Inc., by Greg A. Sivinski, Senior Attorney, American Airlines, at 5 (March 15, 1999), submitted for inclusion in the Advisory Committee record.

41 A. Neil Campbell and Jeffrey P. Roode, McMillan Binch, "International Mergers: The Highest Common Denominator Effect of Cross-Border Divestitures and Licensing Remedies," Global Competition Review, Aug./Sept. 1997, submitted by Mr. Campbell for inclusion in the Advisory Committee record; *see also* Testimony of Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, ICPAC Hearings (Nov. 3, 1998), Hearings Transcript, at 142 (cautioning that the premerger review process should not be used as a way to address non-merger-related issues or to achieve noncompetition-law objectives: "You have these two companies that want to proceed to that finish line as quickly as possible. That doesn't mean that that's an opportunity to extract a toll from these companies." Gotts explains that from the parties' perspective, the fix may be so small compared to the value of an entire transaction, the parties may concede, even though it is not the merger that will have the impact or even when an agency may be seeking to extract a remedy beyond what is needed. For example, an authority may seek to improve the market from the status quo. Gotts concludes that there are other avenues to address those concerns.)

Friction Among Jurisdictions

Multijurisdictional review of mergers can precipitate international friction among nations in at least two circumstances. First, friction may arise among jurisdictions as a result of externalities (that is, competitive benefits or harm in foreign markets) that are not considered by one or more reviewing authorities. For example, a jurisdiction may clear a transaction that may increase prices in a nonreviewing jurisdiction. Conversely, a jurisdiction that blocks a transaction may also block benefits that would arise in another jurisdiction. This type of situation may occur when an international merger review is based on policies unrelated to competition. For example, a merger may be challenged on competition grounds in one or more countries and at the same time be favored in another country because of its positive impact on employment or investment and growth in the domestic economy. Friction also could occur, however, when a transaction is reviewed in both jurisdictions on competition grounds, when one nation's decision that a merger is anticompetitive and should be enjoined clashes with another nation's decision that a merger is procompetitive and should be allowed.

The second source of potential friction arises when remedies with extraterritorial effects are imposed. With increased globalization, more and more firm assets and production facilities may be located wholly outside the borders of the reviewing jurisdictions. This market development raises potential frictions when remedies are imposed in another country that may have concluded a remedy is not necessary. Most multinational mergers and joint ventures that the United States reviews involve a U.S. and a foreign firm, or, if both firms are foreign firms, at least one has production facilities in the United States. The same holds true for the EC.[42] However, the United States occasionally has reviewed and taken enforcement action against a merger of foreign firms, neither of which had production assets in the United States. In addition, the United States has ordered divestiture of foreign assets.[43] The EC also has ordered undertakings when the merging firms' only assets or only productive assets were outside of the EU.[44]

In 1990 the FTC provoked a dispute with Canada in the *Institut Merieux* case, when, without first consulting with Canadian authorities, it imposed a remedy on the proposed merger of a French firm and a Canadian firm with no production assets in the United States.[45] Today, such consultation would occur

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[42] Valentine, George Mason Remarks, at 525-26.

[43] In re Institut Merieux, 113 F.T.C. 742 (1990)(In 1990, the FTC obtained a consent agreement imposing divestiture although neither party maintained production facilities in the relevant market -- rabies vaccine -- in the United States); *see also* United States v. Baker Hughes Inc., 1990-2 Trade Cas. ¶ 69,149 (D.D.C. 1990)(consent decree ordering divestiture of U.S. and foreign assets).

[44] *See, e.g.* Boeing/McDonnell Douglas, EC Case No. IV/M.877 (July 30, 1997); Gencor/Lonrho, EC Case No. IV/M.619 (Apr. 24, 1996); Case T-102/96, Gencor v. Commission [1999] ECR 0000, [1999] 4 CMLR 971; Anglo American Corp./Lonrho, EC Case No. IV/M.754 (Apr. 23, 1997).

[45] 113 F.T.C. 742 (1990).

as a matter of course, before accepting such a settlement, with the FTC or DOJ seeking the parties' permission to share confidential business information to the extent necessary for such consultation. For example, in 1994, in a case closely coordinated between the FTC and the German Federal Cartel Office, the FTC reached a consent agreement with Oerlikon-Bührle, a Swiss firm that proposed to acquire Leybold, a German company. The FTC concluded that the merger would reduce competition in the U.S. markets for turbomolecular pumps used in manufacturing semiconductors and in the world market for compact disc metallizer machines. Both companies sold substantial amounts of their production in the United States, even though both companies' production facilities were in Europe. The FTC required divestitures in both lines of business.[46]

Boeing's acquisition of McDonnell Douglas is a prominent example of how divergent assessments can create friction. The *Boeing/McDonnell Douglas* case might have been just another of the growing number of cases in which two sets of antitrust authorities vet a merger, one clears it, while the other has concerns and negotiates relief. But, in the Boeing case, according to one Advisory Committee member, "this dull tale was not to be."[47] The United States viewed the transaction as competitively benign and did not challenge the transaction, but the EC challenged the transaction and permitted its consummation only with remedial measures.[48] Many Europeans viewed the lack of an FTC challenge as inexplicable, given that agency's aggressive enforcement posture in many other merger cases. The EC's high-profile decision to challenge the transaction was attacked by some in the United States as reflecting an industrial policy favoring a "national champion" rather than the principled application of EU competition law principles.[49]

Many Americans perceived the EC to be primarily, if not solely, concerned with the effect of the merger on Boeing's principal competitor, Airbus Industrie, and largely uninterested in the views of

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[46] In re Oerlikon-Bührle Holding *AG*, FTC Dkt No. C-3555 (Feb. 1, 1995), *reported at* 5 Trade Reg. Rep. (CCH) ¶ 23,697.

[47] Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal To Keep Politics Out of Antitrust,* Antitrust Report, at 19, Nov. 1997 [hereinafter Fox, Lessons from Boeing].

[48] The facts of Boeing's acquisition of McDonnell Douglas are well known: Both Boeing and McDonnell Douglas do business in a global market. Both have their productive assets in the United States. They have no productive assets in Europe. Airbus, the European rival to Boeing, is a European consortium and has received subsidies from three European governments. See Boeing/McDonnell Douglas, EC Case No. IV/M.877 (July 30, 1997); 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), *reported at* 5 Trade Reg. Rep. (CCH) ¶24,295.

[49] ABA Antitrust Section Multijurisdictional Merger Review Submission, at 27. Boeing found the merger review process in Europe "involved a high level of controversy relating to trade policy, perceived affects on Airbus and various other policy issues, which Boeing viewed as largely unrelated to antitrust considerations." Submission by Theodore J. Collins, Senior Vice President & General Counsel, The Boeing Company, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction, at 3 (March 19, 1999)[hereinafter Collins Submission].

customers or consumers. Airbus's role in the EC review was prominent. The company was a full participant in the EC hearings, was allowed to question Boeing witnesses, and was permitted to review Boeing's proposed remedial obligations before the EC accepted them. Counsel for Boeing characterized the remedies imposed by the EC as unusual by standards of U.S. merger theory in that many of the remedies did not relate to effects of the combination of Boeing and McDonnell Douglas, but instead appeared to be intended solely to provide benefits to Airbus.[50]

Other observers believe, however, that the EC could credibly find the merger anticompetitive by neutral application of its law. Indeed, EC law pointed to illegality. At least some friction arising from this merger may have resulted from the failure of some in the United States to recognize or accept EC merger law.[51]

The review process also seemed highly political and very public. American politicians -- all the way up to the President of the United States, who telephoned the President of the European Commission in Luxembourg -- "waged a war to save Boeing/McDonnell Douglas from the Europeans."[52] From the time the merger was announced, and long before Boeing made a European filing or provided factual information to the EC authorities, the Commissioner for Competition announced that the merger would not be approved without substantial concessions, which were outlined in press releases, interviews, and speeches. The Commissioner gave speeches in the United States condemning the transaction before review of the merger had been completed. There also was public speculation that the merger would not be approved without abrogation or renegotiation of the bilateral treaty on large aircraft subsidies.[53]

High-profile cases such as *Boeing/McDonnell Douglas* notwithstanding, consistent outcomes and compatible remedies are more the rule than the exception. The possibility of divergent outcomes will remain, however, as long as underlying substantive differences in merger control law exist and proposed transactions continue to be reviewed by multiple agencies.[54]

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[50] Benjamin S. Sharp and Thomas L. Boeder, Perkins Coie LLP, antitrust counsel for Boeing, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction, at 4,7,8 (March 30, 1999)[hereinafter Sharp and Boeder Submission].

[51] *See e.g.,* Fox, Lessons from Boeing.

[52] *Id.*

[53] Sharp and Boeder Submission, at 7.

[54] J. William Rowley, QC and A. Neil Campbell, McMillan Binch, *Multi-jurisdictional Merger Review -- Is It Time for A Common Form Filing Treaty? in* POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW; A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY, at 23 (1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter Rowley and Campbell Submission].

STRATEGIES FOR FACILITATING SUBSTANTIVE CONVERGENCE AND MINIMIZING CONFLICT

The first category of reform efforts proposed by the Advisory Committee addresses the potential in the multijurisdictional review context for conflicting outcomes and inconsistent or overly burdensome remedies. These challenges can best be addressed by facilitating, where possible, substantive harmonization and convergence in merger review. Perhaps the most ambitious vision that some experts have advanced is the goal of replacing domestic merger review systems with a uniform and binding world antitrust code for premerger review, to be administered by an international merger review agency or through an international dispute resolution system. The ICPAC hearings testimony and other outreach efforts, however, recognize (as have commentators and prior studies) that agreement on specific substantive rules is unlikely in the foreseeable future.[55] The development of a substantive code, for example, has been criticized as unworkable or overly ambitious at this juncture, in large part because of the difficulties of reconciling the numerous substantive and procedural variations of disparate merger review systems.[56]

The same concerns militate against development of dispute resolution mechanisms. Some members of the business community and their antitrust counsel would welcome an international dispute resolution process that would mediate differences between the major antitrust enforcement agencies with the goal of reaching a common or compatible result.[57] The same considerations that work against a world antitrust code strongly suggest, however, that it is likewise questionable whether a formal dispute settlement process is a realistic option. Indeed, differing substantive legal standards and underlying merger policies, national sovereignty issues, and enforcement mechanisms would all present seemingly insuperable obstacles to any supranational arbitration process, even assuming that a consensus could ever be achieved as to the identity

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[55] Prof. Richard Whish and Prof. Diane Wood, MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES, at 115, prepared for the OECD Committee on Competition Law and Policy (1994); American Bar Association Antitrust Section, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST (1991), at 289-292 [hereinafter ABA ANTITRUST SECTION 1991 SPECIAL COMMITTEE REPORT]; *see also, e.g.,* Byowitz and Gotts Submission, at 12-13.

[56] Rowley and Campbell Submission, at 11; *see also* ABA Antitrust Section Multijurisdictional Merger Review Submission, at 2-3, which concurs, noting that many countries currently do not have antitrust laws, or have only weak antitrust laws, so an attempt at substantive convergence may result in the adoption of very weak rules (e.g., the "lowest common denominator"). Further, if common rules were adopted, it would be much more difficult to modify or update those rules on a multilateral basis than it would be for each country to change its own laws based on changing circumstances. Finally, differences in the legal cultures of nations also constitute obstacles to merger control convergence.

[57] Submission by Michael Sennett, Bell, Boyd & Lloyd, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Baxter International Inc./Immuno International AG transaction (April 9, 1999). Mr. Sennett suggests that the process place emphasis on the competition views of the jurisdiction with the most significant contact with the transaction and interest in the resolution of the antitrust issues.

or composition of such a body.[58] And, as a practical matter, resort to international mediation to resolve disputes in any specific case seems unrealistic given the time-sensitive nature of merger transactions.

One respondent to ICPAC's request for input summarized these points well:

> Proliferation around the world of merger notification regimes, particularly those requiring government clearance before a transaction may close, are clearly adding costs to global business. In time these may prove to be real impediments to procompetitive business arrangements. At least at the present time, however, even where jurisdictions may take a different position with respect to the merits of a transaction or a remedy, [we] do not see any usefulness in setting up a dispute resolution mechanism at the international level. Such a mechanism might well lengthen an already over-long process, and further complicate business transactions that are generally procompetitive. Much can be accomplished by individual jurisdictions improving their own techniques for investigation and their own forms for reporting of a proposed transaction.[59]

The Advisory Committee agrees that seeking a binding world antitrust code and dispute resolution system is neither achievable nor advisable. This Report considers the potential for developing a mediation mechanism as well as some general principles that might govern how international disputes might be evaluated under such a mechanism in Chapter 6. The Advisory Committee believes that, in the short to medium term, facilitating cooperation among antitrust enforcement authorities may ameliorate, at least to some extent, the potential for conflicting outcomes and inconsistent or overly burdensome remedies. Indeed, this cooperative process helps ensure in most cases that the authorities will arrive at complementary conclusions, while permitting the authorities to take into account circumstances that are unique to their own countries. Further, frequent contact among national antitrust authorities and discussion of antitrust concepts in various multilateral forums have already prompted some convergence of international antitrust laws.

Nations can take steps to facilitate, where possible, the harmonization and convergence process and further minimize transaction costs and conflicts in at least three concrete areas.

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[58] Boeing would have seriously considered any alternative dispute resolution mechanism that offered the likelihood of prompt clearance. However, Boeing acknowledges that it is difficult to envision a mechanism acceptable to the United States and Europe that would have accomplished this result with respect to the Boeing/McDonnell Douglas transaction. Collins Submission*; see also* Submission by Dr. W. Kissling, President, Oerlikon-Bührle, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Oerlikon-Bührle/Leybold transaction (March 17, 1999).

[59] Submission by Lester L. Coleman, Executive Vice President and General Counsel, Halliburton Company, in response to Advisory Committee Multijurisdictional Merger Review Merger Case Study questionnaire re the Halliburton/Dresser transaction, at 4 (March 9, 1999).

- A first step in facilitating greater substantive convergence lies in understanding more clearly the merger review principles currently employed by various jurisdictions.

- Effort also should be expended by nations on developing agreed-upon approaches of what the Advisory Committee is calling "disciplines" that nations would use to guide the review of mergers with significant transnational or spillover effects.

- To further facilitate substantive convergence and avoid or minimize divergent outcomes, it is important to encourage continued and deepened cooperation among antitrust authorities in reviewing multijurisdictional mergers. Creation of a framework to guide the cooperative process would foster this mutually beneficial cooperation between companies and competition authorities. This Advisory Committee has identified several key features of such a framework. In the U.S. context, this might entail the development of a "Protocol" with a combination of key features: a description of how the federal antitrust enforcement agencies in the United States conduct joint and coordinated merger investigations with foreign authorities; model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information by competition authorities during a merger review; and a policy statement outlining safeguards established by competition authorities to protect confidential information. Other jurisdictions could usefully develop comparable protocols.

In addition, as competition enforcement authorities have come to recognize, the transactions they review also have the potential to generate spillover effects in other jurisdictions. In the short and medium term, enforcement authorities will naturally focus primarily on the effects that each transaction will generate within their own jurisdiction. The Advisory Committee thus considers whether it would someday be appropriate for enforcement authorities to cooperate in accounting for the global effects of a proposed transaction. That is, the Advisory Committee believes that agencies should develop *work-sharing arrangements* that would permit a coordinated process whereby the review undertaken by one agency would allow for participation by representatives from the other agencies. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and building upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. An important objective is to reduce duplication in situations where the enforcement efforts of one agency may be sufficient to remedy the antitrust concerns of other jurisdictions, while preserving the right for the United States or other antitrust enforcement agencies to take their own measures, as necessary, if they believe the substantive analysis or remedies diverge from their approaches.

Facilitate Greater Transparency

A first step in facilitating greater substantive convergence lies in understanding more clearly the merger review principles, practices, and procedures currently employed by various jurisdictions. This process would highlight differences in merger control laws and could stimulate international discussion and adjustments.[60] For this reason, greater transparency in the application of each jurisdiction's merger review principles is desirable.[61] Examples of mechanisms that can be used to increase transparency are numerous. The Advisory Committee recommends that individual jurisdictions enhance transparency through the publication of guidelines and notices explaining the manner in which mergers will be analyzed; annual reports (including case examples), statements, speeches, and articles describing changes in relevant legislation, regulations and policy approaches; and case-specific decisions, releases, and press interviews. These sources could be made readily accessible by creating and maintaining websites.[62] At a multinational level, greater transparency may be achieved by surveying all jurisdictions with merger regulations and compiling an explanatory report of the principles they employ.[63]

Several jurisdictions already have undertaken efforts to improve transparency. Numerous enforcement agencies routinely publish annual reports and guidelines, and their enforcement officials regularly speak at conferences and make other public appearances. The Organization for Economic Cooperation and Development (OECD) facilitates transparency by compiling reports on the competition policies and practices of various jurisdictions. Several private enterprises also track and publish overviews of the merger reporting requirements and review principles of several jurisdictions around the world.[64]

The Advisory Committee agrees with the many witnesses at its hearing and outreach programs who have suggested that some jurisdictions need even more transparency with respect to specific enforcement decisions. It seems that transparency with respect to decisions on specific transactions lags behind transparency at the general policy level in some, if not most, jurisdictions. Indeed, except for the EC, the level of transparency in the world for decisions on specific transactions is modest to nonexistent. To initiate

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60 The dissemination of public information on general policies and case-specific decisions also tends to encourage more consistent agency decisionmaking and encourage better risk appraisal by those contemplating mergers and other transactions (and clearer advice by their professional advisors). An important consideration, however, is how specific any guidance is and how accurately it reflects what is going on. Notably, the pronouncements will tend to be less useful as counseling devices if they are either tougher or less forceful than the actual court or agency decisions. Submission by Members of the International Antitrust Law Committee of the Section of International Law and Practice, ICPAC Hearings, at 21-26 (Apr. 22, 1999) [hereinafter Members of the ABA International Antitrust Law Committee Submission].

61 Virtually all of the officials at ICPAC hearings advocated the promotion of increased transparency with respect to the merger review process. *See* ICPAC Hearings (Nov. 2, 1998), Hearings Transcript.

62 The American Bar Association provides links to the websites to more than 35 competition authorities at <http://www.abanet.org/antitrust/sites.html>. In addition, this website provides links to other competition-related sites, including the APEC Competition Policy Database and the OECD Competition Law and Policy Division.

63 A tool to facilitate this effort may lie in the creation of a Global Competition Initiative, discussed in Chapter 6.

64 For a comparison of the laws of a number of jurisdictions, *see* J. William Rowley and Donald I. Baker, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS, VOLS. I & II, 1996; Howard Adler, Jr., Lynda Martin Alegi and David A. Clanton, THE GLOBAL MERGER NOTIFICATION HANDBOOK (Cameron May Int'l Law & Policy 1999); *Getting the Deal Through: the International Regulation of Mergers and Joint Ventures*, GLOBAL COMPETITION REVIEW (2000).

a second-stage investigation, the EC must set forth reasons for the investigation, alerting the parties to the specific areas of concern. The EC also is required to make reasoned decisions on mergers, because it is both prosecutor and judge. The result is a large body of precedent to guide future parties and agency officials. In the United States, in contrast, there are few modern merger precedents. U.S. courts rarely rule on merger cases, and agency explanations of consent orders fail to provide sufficient insight into the reasons for the agency's action.[65] To their credit, the U.S. agencies have expanded analyses to aid public comment in connection with proposed consent decrees and issued detailed guidelines regarding application of the HSR rules and the standards for analyzing mergers and advisory opinions. Senior agency officials also have given more detailed substantive speeches.[66]

Written opinions, of course, may not be the answer in all situations. Staff resources, among other reasons, militate against publishing written decisions in all merger investigations. Another problem is that a system of written opinions imposes costs on those transactions that do not create competitive problems. Furthermore, while written decisions create a useful body of precedent, a requirement for a written decision can lead to a significant amount of work on issues that are peripheral to the transaction.

The dilemma between transparency and added burden is illustrated by a respondent to this Advisory Committee's merger case study questionnaire. This respondent explained that although Seagram's acquisition of PolyGram was primarily involved with the record business, Universal (a subsidiary of Seagram) and PolyGram also had some presence in music publishing and movie distribution in the United States and in Europe. In the United States, the FTC's concerns were assuaged with a short conference and reference to easily available market share data. In Europe, much more extensive filings were required before the issue was resolved.[67] Perhaps in recognition of this dilemma, the EU has issued a draft notice on a simplified procedure for processing certain transactions that would eliminate written decisions for certain transactions that do not raise competitive concerns.[68]

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65 William J. Kolasky, Jr., and William F. Adkinson, Jr., *Report Your Deal to FTC, DOJ, EC, Etc.*, LEGAL TIMES, Nov. 2, 1998, at 544, 545, submitted by Mr. Kolasky for inclusion in the Advisory Committee record.

66 Examples include a speech by Constance K. Robinson, Director of Operations, Antitrust Division, U.S. Dep't of Justice, Quantifying Unilateral Effects in Investigations and Cases, Before the George Mason Law Review Symposium (Oct. 11, 1996), on the use of analysis of next best substitutes in markets involving differentiated products as the basis not to challenge the Maybelline/L'Oreal merger; and a transaction between Interstate Bakers Corp./Continental Baking Co., two producers of white pan bread, and the Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, FTC File No. 971-0051.

67 Submission by Kenneth R. Logan, Esq., Simpson Thacher & Bartlett, on behalf of himself and Edgar Bronfman, Jr., President and Chief Executive Officer, The Seagram Co., in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Seagram/PolyGram transaction, at 4-5 (March 26, 1999).

68 Draft Commission Notice on a simplified procedure for processing certain concentrations under Council Regulation (EEC) No 4064/89.

Written decisions also present the danger of ossification -- creating a system where agencies may be overly concerned with following precedent and may therefore resist modifying their analysis even as antitrust analysis evolves or factual situations change. Finally, the agencies understandably are reluctant to acknowledge some decisions publicly. They may not want their interpretation of market-specific documentary evidence publicized, for example, or perhaps the government's theory is not backed up by sufficient witnesses.[69]

Despite these potential drawbacks, the Advisory Committee concludes that benefits can be achieved without adding undue burden by clearly articulating the rationales underlying decisions to challenge, as well as not to challenge, *significant* transactions. Significant transactions include those that set a precedent, use new doctrines, or otherwise indicate a shift in doctrine or policy. A useful model may be found in the Canadian approach. Canada has a long tradition of issuing detailed "backgrounders" when it decides not to challenge certain transactions. Backgrounders are not issued for every transaction, but only for a small number of high-profile transactions and transactions that raise novel issues. One Canadian lawyer explained that great value is placed on these backgrounders, in part because jurisprudence in the field is so limited.[70]

Develop Disciplines for Merger Review

In addition to achieving a greater understanding of the various approaches to merger analysis currently in use, the Advisory Committee recommends that nations develop what this Advisory Committee is calling "disciplines" that they could agree upon for conducting merger review of transactions with significant transnational or spillover effects. The Advisory Committee outlines several disciplines that are simple yet aspirational, and they may not be feasible to implement in many jurisdictions at this juncture. The Advisory Committee believes, however, that if disciplines are adopted, they should be set at a high standard. That is, these disciplines are designed to promote best practices under any system as opposed to creating rules that would bring about convergence to the "lowest common denominator." The disciplines set out below are intended to be illustrative and applicable to all jurisdictions with competition regimes. Other principles of law as well as disciplines can and should be developed through international discourse.[71]

1. Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities. In particular, nations should agree that competition enforcement efforts will not be targeted toward foreign firms for the purpose of protecting domestic firms or industries from competition. Further, nations should agree to refrain from using national champion policies to

[69] Members of the ABA International Antitrust Law Committee Submission, at 25.

[70] *Id.*, at 25-26.

[71] *See* Fox, Lessons from Boeing.

protect domestic firms or industries from foreign competition. Nations should neither enforce their competition laws nor withhold enforcement of their competition laws to further the interests of a national champion.

2. As a best practice or discipline, with limited exception (such as national security), noncompetition factors should not be applied in antitrust merger review. Where the law of a reviewing jurisdiction recognizes noncompetition factors (such as preservation of jobs, promotion of exports, international comparative advantage), those factors should be applied transparently and in a manner narrowly tailored to achieve their ends. Further, where a nation's merger regime explicitly permits noncompetition factors to trump traditional competition analysis, those noncompetition factors should be applied after the competition analysis has been completed.

3. Competition agencies do not operate in a political vacuum. Still, enforcement agencies must establish their independence and "parochial" political concerns should not play a role in the merger review process.

4. Benefits may be obtained from the participation of competitors and other third parties in the merger review process. Multijurisdictional merger review, however, provides an opportunity for competitors to encourage a single jurisdiction to hold a transaction hostage and thus use (or abuse) the process to delay and sometimes to disrupt mergers that can provide procompetitive benefits to consumers. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumer interests and seek to minimize the problems that participation may cause, including the disruption of potentially efficiency-enhancing mergers.

5. When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales) lies outside its national boundaries. Traditional comity principles should play a part in the exercise of prosecutorial discretion in appropriate cases, but nations should agree that any nation has the right to enforce its antitrust laws against a transaction that threatens to adversely impact competition in its markets. At the same time, in the face of a clash of jurisdictions, remedies with extraterritorial effects should be narrowly tailored to cure the domestic problem.[72]

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[72] Advisory Committee Member Eleanor M. Fox calls attention to the problem of clashes where one nation decides that a merger is anticompetitive and should be enjoined and another nation decides that a merger is procompetitive and should be allowed. In the absence of formal protocols for resolving the clash, the more restrictive nation always prevails. This member suggests that development of rules of priority in deciding to enjoin or not to enjoin an international merger may be needed. To be entitled to exercise such right of priority, however, the privileged jurisdiction would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would be obliged to count not only the net benefits within its borders, but all of the merger's costs and benefits to competition (under whatever neutral framework for analysis it applies). *See* Eleanor M. Fox, *Extraterritoriality and Merger Law: Can All Nations Rule the*

Further, when fashioning a remedy with extraterritorial effects, the agency should take into account local practices and procedures in the foreign jurisdiction.

Continue to Enhance Cross-Border Cooperation

To facilitate further substantive convergence and to avoid or minimize divergent analyses and outcomes, it is important for the United States and other jurisdictions to encourage and further deepen cross-border cooperation in reviewing mergers. Constant contacts enable staff to understand each other's analysis, lead to convergence in approaches toward competition matters, and benefit parties insofar as the agencies are often able to arrive at complementary remedies. Indeed, one of the basic propositions of the business community, as conveyed in its testimony and statements to the Advisory Committee, is general support for greater cooperation among antitrust enforcement agencies.

The recent proliferation of international mergers, acquisitions, and joint ventures offers many useful examples that illustrate how U.S. and foreign antitrust authorities interact during parallel merger reviews. Although the Boeing/McDonnell Douglas merger is perhaps the most commonly discussed case, there are many other examples of cooperation and coordination in the multijurisdictional merger review arena, particularly between the United States and the EU. Cooperation between these two jurisdictions in individual merger cases under the 1991 U.S.-EC Agreement has most frequently consisted of discussions and information exchanges regarding the timing of respective investigations; product and geographic market analyses, including the exchange of publicly available information about the relevant markets, applicable legal principles and precedents; possible anticompetitive effects of a merger, including how the staffs analyze competitive effects and other issues, such as entry, efficiencies, and failing firms. The U.S. agencies also have participated as observers in some European Commission hearings and the EC is exploring the possibility for its officials to attend, with the consent of the parties, certain key meetings between the U.S. competition authorities and the merging parties. In transactions that appear to have an anticompetitive effect, the staffs of the U.S. agencies and the EC also have discussed possible remedies to ensure that they do not conflict.[73] The United States has cooperated in a similar manner with other reviewing jurisdictions.

Although a great deal of cooperation can take place without the consent of the parties to a transaction, there are limits on the extent to which antitrust enforcers can exchange information and employ other cooperative approaches today. The principal limits are imposed by laws protecting confidential information. The confidentiality laws applicable to documents obtained in the course of merger review

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World? Antitrust Report 2, Dec. 1999. Balancing a merger's costs and benefits is discussed in the section on the final stage of work sharing.

[73] *See* John J. Parisi, U.S. Federal Trade Commission, Enforcement Cooperation Among Antitrust Authorities, Before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law (May 19, 1999)(updated Nov. 1999) [hereinafter Parisi, IBC Address]; Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Jan. 1, 1998 to Dec. 31, 1998 (April 2, 1999).

rarely, if ever, list foreign competition law enforcers among the permitted categories of recipients of such information. These laws have a particularly significant impact on the merger review process, because much of the information used to analyze a proposed transaction comes from extremely sensitive, confidential information relating to the companies' strategies, investment plans, and marketing goals and methods. It is this information that frequently proves most useful in analyzing a proposed transaction.

To the extent that cooperation could help ease the problems associated with multijurisdictional merger review, companies are often prepared to permit the antitrust authorities to discuss and exchange statutorily protected confidential business information. In the United States, merging parties and third parties, such as competitors, may choose to remove these limitations by providing voluntary confidentiality waivers. Cooperation pursuant to a waiver of confidentiality may allow the federal antitrust enforcement agencies and their foreign counterparts to assist each other in conducting their investigations more effectively, economize on scarce resources through coordinated joint investigation, and reduce (though not eliminate) divergent and conflicting analyses and remedies. Merging parties, therefore, often accept the incremental disclosure risks that could result from granting a waiver in the hope of a speedier, more consistent, and less costly and burdensome merger review process.[74]

In many cases where waivers have been granted, the agencies have been able to cooperate effectively based on discussions alone and have not needed to exchange documents. Indeed, the Advisory Committee is informed that it is unusual for an agency to share or even discuss particular documents with another agency.[75] In some cases, the parties may opt to provide like sets of documents to each reviewing agency and waive confidentiality to permit discussion of the documents produced. Rarely, however, do the agencies transmit documents directly, and when they do, rarely are more than a handful exchanged.

In a number of these instances, the cooperating authorities were able to devise compatible remedies. In other cases, one of the reviewing authorities was able to devise a remedy that obviated the need for another interested jurisdiction to impose its own remedy. In yet other cases, one agency deferred to another, leaving the merging parties with only one reviewing authority to satisfy.[76] Outcomes like these

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74 *See* Submission by the International Chamber of Commerce, "ICC recommendation on exchange of confidential information between competition authorities in the merger context," ICPAC Hearings (Apr. 22, 1999), at 2 [hereinafter Int'l Chamber of Commerce Submission]. To date, the DOJ has obtained waivers in roughly 13 merger investigations and the FTC received waivers in approximately 11. *See* Baer June 15, 1999 Letter; Letter from Constance K. Robinson, Director of Operations & Merger Enforcement, U.S. Dep't of Justice, Antitrust Division, to James F. Rill and Dr. Paula Stern (July 14, 1999).

75 Rather, the waivers enable the agencies to discuss the quality of the evidence that supports a particular theory, a discussion that may require reference to confidential information that otherwise would be prohibited.

76 Nina L. Hachigian, then-attorney advisor to Chairman Pitofsky of the U.S. Federal Trade Commission, *An Overview: International Antitrust Enforcement*, 12 ANTITRUST 22, Fall 1997. Some foreign antitrust enforcement officials noted at the ICPAC Hearings that cooperation is producing a degree of soft harmonization and the spirit of deference. For example, in some instances the U.S. government response addresses the same competition policy concerns that foreign

can reduce the sometimes significant costs to the merging parties of satisfying different authorities. The WorldCom/MCI transaction, where the Department of Justice and the EC cooperated with each other throughout their investigations of the proposed merger, has been cited as one of the best examples of cooperation (Box 2-A).

Box 2-A. WorldCom/MCI: Example of Cooperation

In the WorldCom/MCI transaction, the Department of Justice and the EC cooperated with each other throughout their investigations. With the consent of the parties and some third parties, the agencies were able to discuss both information gathered in the investigation and possible antitrust concerns arising from the merger. Had the parties not provided the agencies with waivers that allowed this information sharing, statutory confidentiality provisions would have severely limited the agencies' ability to discuss the relevant facts.

According to DOJ staff, this cooperation between the agencies proved beneficial to the parties, the DOJ, and the EC in several respects. First, it enabled the agencies to coordinate requests for information and thus minimize the possibility of sending duplicative and conflicting requests to the parties and to third parties. Second, it allowed each agency to explore fully, with the benefits of information gathered through compulsory process, the concerns and tentative conclusions of the other throughout the investigation, thus reducing the likelihood of inconsistent conclusions at the end. Finally, cooperation between the agencies during settlement discussions, including joint meetings with the parties, helped the DOJ and EC to reach a conclusion that satisfied all concerns in the most efficient manner.

One important step in fostering this mutually beneficial cooperation between companies and competition authorities lies in instilling confidence in companies that the jurisdictions receiving confidential information can and will protect that information from disclosure.[77] Currently, there are no common international standards for international agency cooperation and on exchanging and protecting confidential information. Rather, information is shared on an ad hoc basis. The Advisory Committee worked closely with business groups, bar associations, and other antitrust practitioners, among others, to develop a framework to facilitate effective cooperation.[78]

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jurisdictions have. *See* Van Miert ICPAC November Hearings Testimony, at 126-27; Testimony of Konrad von Finckenstein, Commissioner of Competition, Competition Bureau, Canada, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 121-22 [hereinafter von Finckenstein ICPAC November Hearings Testimony].

[77] The use and management of confidential information in enforcement cooperation in the nonmerger areas is discussed in Chapter 4 of this Report.

[78] These groups included the Working Group of the Antitrust and Trade Committee of the International Bar Association, the Commission on Law and Practices Relating to Competition of the International Chamber of Commerce, and the American Bar Association Section of Antitrust Law, among others.

Some disagreement exists among these groups concerning whether confidentiality laws should be amended to permit antitrust authorities to exchange confidential business information in multijurisdictional merger review. Proponents suggest that confidentiality concerns are overstated and advocate elimination of the exemption in the International Antitrust Enforcement Assistance Act (IAEAA) that prohibits disclosure of initial filings and second-request documents submitted to the U.S. federal antitrust agencies under the HSR Act.[79] According to several government officials, reality does not support the perception that leaks occur. Enforcement agencies routinely obtain and safeguard much sensitive business information, and the agencies have self-interested reasons for doing so. A number of officials at ICPAC hearings commented that there have been no leaks of confidential information in their jurisdictions from governments, including in the pre-filing consultation phase that occurs in some jurisdictions (such as the EC and Canada). The agencies' ability to maintain business confidences helps them to obtain such confidences in the future.[80]

Others argue that confidential information should only be exchanged with the consent of the party (or parties) from whom the information was obtained.[81] Given the significant concerns that surround the sharing of confidential information it is unlikely in the short term that legislative change to permit agencies to share HSR information without the consent of the parties is feasible or desirable.

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[79] Advisory Committee Member Eleanor M. Fox believes that business overclaims "confidentiality" for its business records, and that these blanket claims obstruct efficient, enlightened interagency communication, analysis, and enforcement. She believes that merger filings should not have been excluded from the IAEAA: Of all the areas in which multiagency use of the same information to vet the same transaction can enhance understanding, enforcement, and convergence of law and remedies, mergers rank first. The IAEAA enables the U.S. antitrust authorities to enter mutual assistance agreements that permit sharing confidential business information provided the receiving jurisdiction has adequate safeguards to protect the information. *See IAEAA*, Pub. L. No. 103-438, 108 Statutory. 4597, 15 U.S.C. §§ 6200-6212, particularly § 12, which requires, among other things, that an antitrust mutual assistance agreement contain: "an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence ... and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence"; citations and descriptions (including enforcement mechanisms and penalties) of the applicable confidentiality laws in each jurisdiction; "terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only -- (i) for the purpose of administering or enforcing the foreign antitrust laws involved, or (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after -- [making various additional determinations]"; the return of the evidence at the conclusion of an investigation; and automatic notification and termination provisions if confidentiality violations occur.

[80] Parisi, IBC Address; Testimony of Dieter Wolf, President, German Federal Cartel Office, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 140-41, Van Miert ICPAC November Hearings Testimony, at 141, 157; Testimony of Allan Fels, Chairman, Australian Competition & Consumer Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 145-56; von Finckenstein ICPAC November Hearings Testimony, at 144 (government officials testifying to a record of no leaks in their jurisdictions.)

[81] Int'l Chamber of Commerce Submission, at 3; Testimony of Phillip A. Proger, Jones, Day, Reavis & Pogue, ICPAC Hearings (Apr. 22, 1999), Hearings Transcript, at 40 [hereinafter Proger ICPAC Spring Hearings Testimony].

A broad consensus exists on one fundamental point. Cooperation and the exchange of confidential information between enforcement agencies should occur within a transparent legal framework that contains appropriate safeguards to protect the privacy and fairness interests of private parties. Several business groups and bar associations that appeared before the Advisory Committee stressed a need for antitrust enforcement agencies to help businesses and their advisors better understand the international cooperative process with particular emphasis on how voluntary confidentiality waivers can benefit merging parties.

Develop a Framework for Cooperation and the Exchange of Confidential Business Information

The Advisory Committee begins with the premise that a framework for cooperation must adequately balance the concerns of the enforcement agencies with those of business. Enforcement authorities are concerned that a framework for cooperation might entail additional burdens on agency staff, delays in the process, and prejudice to the investigation, while firms want assurances that agencies will be accountable for safeguarding confidential material from disclosure; for providing due process, including notice that information is being transferred to a foreign governmental authority; and for ensuring transparency in the processes involved. Keeping in mind this need for balance, the Advisory Committee recommends the creation of a framework for cooperation. The Advisory Committee has identified several key features of such a framework. In the U.S. context, this might entail the development of a "Protocol" with the following key features: a description of the way in which the federal antitrust enforcement agencies typically will conduct joint and coordinated merger investigations with antitrust authorities in other jurisdictions; a range of model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information by competition authorities during merger reviews; and a model policy statement outlining safeguards established by competition authorities to protect confidential information. Other jurisdictions could usefully develop comparable protocols. Another aspect of cooperation that should be emphasized in the future is the exchange of staff between antitrust authorities, thereby permitting the cross-fertilization of competition law approaches.

Protocol for Cooperation in Merger Investigations

Given the extensive and well-developed cooperation that has taken place in recent years, the Protocol could reduce to writing the approach that the DOJ and FTC staff have been using. The Protocol should describe the cooperative process in transactions where waivers have been granted and those where they have not. Successful instances of cooperation could then be emulated in future cases whenever the legal and factual situations indicate that such cooperation would be useful. Agencies' experience in cooperation should help to identify where the process tends to break down and areas of possible improvements.

A useful model may be the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General. This protocol sets forth a general framework for the conduct of joint federal and state investigations with the goals of maximizing cooperation between enforcement agencies and minimizing the burden on private parties. The first section lists specific steps for maintaining the confidential status of the shared information. The second section details the procedures under which the FTC and DOJ will provide state attorneys general with certain types of sensitive information. Guidelines for conducting a joint investigation are detailed in the third section, and the fourth section emphasizes the importance of close collaboration on the settlement process. The final section of this protocol addresses how the agencies should coordinate the release of information to the news media.[82]

Model Waivers of Confidentiality

While waivers have been used successfully in many recent mergers and occasionally in other cases, the current practice is ad hoc. The Advisory Committee recommends that to provide the most consistency and transparency, agencies should develop standardized (but not inflexible) and transparent templates for waivers.

Attached is a range of models that contemplate limited as well as broad waivers of confidentiality (Annex 2-D). The first model encompasses a waiver of confidentiality protections covering discussions between U.S. enforcement authorities and reviewing authorities in other jurisdictions that also are investigating the proposed transaction. This waiver would permit discussions that would otherwise be foreclosed by the confidentiality rules of the participating jurisdictions, but does not encompass the exchange of documents.

The second model waiver contemplates that the parties would provide a discrete set of documents to the reviewing agencies and would waive confidentiality to permit discussion of those documents and the information contained therein.[83] This approach would perhaps be most useful during the initial review period or at the remedies phase to facilitate settlement. Alternatively, this waiver could be used to permit discussion with respect to certain products or issues -- such as market definition, barriers to entry, or remedies. For example, in Chapter 3, the Advisory Committee recommends that for transactions that raise potential antitrust concerns, agencies should encourage merging parties voluntarily to provide additional information at the initial filing stage to enable the notified jurisdiction to resolve any potential antitrust issues or to conduct a focused second-stage inquiry. Merging parties using this second model waiver could

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[82] Protocol For Joint Federal/State Merger Investigations (Mar. 11, 1998), *reprinted at*, 6 Trade Reg. Rep. (CCH) ¶13,420.

[83] Bar associations and business groups that appeared before the Advisory Committee agreed that information exchanged should be limited to the necessary minimum. Some groups favored limited or restricted waivers, which would require the competition authorities to specify the documents or types of documents reasonably necessary to address important issues in an investigation that can be exchanged. Others suggested particularizing the specific issues that the agencies have identified as warranting exchanges in order to expedite and coordinate their merger reviews rather than focusing on particular documents. This second waiver attempts to provide for both options. *See* Int'l Chamber of Commerce Submission, at 4-5; Submission by a Working Group of the Antitrust and Trade Committee of the International Bar Association, "Waivers of Confidentiality to Facilitate Exchanges of Confidential Information Between Competition Law Enforcement Agencies During International Merger Reviews," at 1 (Sept. 17, 1999) [hereinafter IBA Working Group Sept. 17, 1999 Submission].

provide this information to notified jurisdictions where the transaction may raise concerns and waive confidentiality to permit discussion generally or with respect to those documents in particular.[84]

The third model waiver is the broadest and is modeled on a number of waivers used in recent multijurisdictional mergers. Under this waiver, merging parties would authorize the reviewing authorities in various jurisdictions to discuss and exchange documents, graphics, and the internal analyses of those enforcement authorities, all of which otherwise would be foreclosed by the confidentiality rules of their respective jurisdictions. Recognizing the differences among jurisdictions regarding legal privilege (particulary the differences between the United States and the EU in their treatment of in-house counsel advice), this waiver excludes materials asserted to be privileged, including correspondence sent to and from in-house counsel and legal advice given by in-house counsel. This waiver is designed so that the merging parties do not waive their rights to assert applicable privileges pertaining to such materials, including the attorney work product or attorney-client privileges.

The model waivers are drafted so that each party could submit a single waiver to the reviewing authorities. Each model contemplates that the reviewing agencies will continue to protect the confidentiality of the information in accordance with their normal practices and confidentiality rules. The waivers do not purport to make commitments on behalf of another agency or impose an obligation on one jurisdiction to act as the "guarantor" of another jurisdiction regarding the protection of confidential information.

Policy Statement

Each antitrust enforcement authority also should issue a short written policy statement to increase transparency and build private sector confidence regarding the safeguards established to protect confidential information and the manner in which the authority intends to operate. This step is particularly important in many jurisdictions around the world where confidentiality safeguards are less developed or are not transparent.

At the request of the Advisory Committee, the Working Group of the Antitrust and Trade Committee of the International Bar Association prepared a recommended framework for policy statements. A model policy statement based on this submission is attached as Annex 2-E.[85] As elaborated in the

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[84] As discussed in Chapter 3, the development of a model voluntary submission list at the international level by organizations such as the OECD would facilitate the submission of common underlying data to each jurisdiction and further enhance the cooperative process. *See also* Testimony of Simon J. Evenett, The Brookings Institution; Department of Economics, Rutgers University, ICPAC Hearings (May 17, 1999), Hearings Transcript, at 80-81.

[85] IBA Working Group Sept. 17, 1999 Submission. Another useful model may be found in the U.S. Department of Justice Antitrust Division Manual where the Antitrust Division has published model letters articulating the DOJ's treatment of confidential information received in response to civil investigative demands and voluntary requests for information. *See* U.S. Dep't of Justice, Antitrust Division Manual, (Feb. 1998 3rd Ed.), at III-13; *see also* models provided by the FTC in Chapter 15 of its Operating Manual.

attached model, these policy statements should define the term "confidential information" and include a summary of relevant confidentiality laws and rules, with full descriptions of any material gaps or exceptions (including discovery rules and freedom of information laws) and the manner in which any discretionary provisions are interpreted and applied. The statement also should set out any significant policies or practices related to information exchanges with other agencies, and it should state the agency's practice regarding destroying documents at the end of the investigation. The policy statement should be updated when material changes are made in the way confidentiality protections are interpreted and applied or as other policies or practices are developed.

Of particular importance is the principle that waivers of confidentiality should be truly voluntary. The policy statement should explicitly confirm that no negative inference will be drawn from a party's decision not to grant a waiver.[86] A number of hearing participants and other outreach respondents raised the concern that enforcement agencies seemingly believe that there are no legitimate grounds for refusing a request to cooperate. Some practitioners have indicated that some jurisdictions respond to initial refusals (or expressed unwillingness) to waive by asking what the merging parties have to hide.[87] This attitude of some enforcement officials ignores the fact that there may be legitimate reasons to seriously consider not waiving confidentiality.

Several participants at ICPAC hearings suggested, for example, that the benefits to private parties arising from information sharing and other forms of cooperation often will not be substantial or assured, and may be outweighed by a variety of perceived disadvantages.[88] These potential disadvantages include

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86 Outreach respondents note that while this principle is easy to state (and should be included in the policy statements), enforcement officials have innumerable opportunities to use their discretion as leverage in an investigation. *See, e.g.*, Exchanges of Confidential Information Between Antitrust Enforcement Agencies Submission by a Working Group of the Antitrust and Trade Committee of the International Bar Ass'n, ICPAC Hearings (Apr. 22, 1999), at 13-14 [hereinafter IBA Working Group Apr. 22, 1999 Submission].

87 ABA Antitrust Section Multijurisdictional Merger Review Submission, at 25; Submission by John Ratliff, Wilmer, Cutler & Pickering, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Boeing/McDonnell Douglas transaction (April 2, 1999), at 7 ("It is very difficult to resist [the request for copies of filings to another authority] without raising the suspicion that a party has something to hide.")

88 The extent to which the merging parties and the reviewing authorities will benefit from cooperation during the review of a particular transaction will depend on market dynamics and other factors specific to each individual transaction and investigation. Antitrust counsel suggest that the benefits of information sharing and cross-border collaboration seem clear when a proposed transaction involves two parties that compete directly in one or more global markets, because similar and overlapping issues will need to be addressed in every jurisdiction. In contrast, the benefits of cross-border cooperation in the review of a proposed merger may be more modest where few jurisdictions are affected, relevant geographic markets are local rather than international, market structure and competitive conditions vary greatly within such markets, and competition concerns arising in any country would most naturally be remedied by divestitures of one of the merging parties' local subsidiaries. Rowley and Campbell Submission, at 30. One submission questioned how frequently situations arise in which there is a realistic prospect of inconsistent remedies that could be avoided by closer coordination through waivers. According to the respondent, most cases involve different production assets serving

exposure to additional legal risks, particularly when substantive laws are different and there are significant potential sanctions or private rights of action in the jurisdiction to which information is disclosed; differences in investigation timetables, which may inhibit the realization of time and cost savings; the overburdening of competition authorities with so much information that investigations would be slowed down rather than hastened; and possible misinterpretations when one authority reviews information that has been prepared to address issues under a different legal regime.[89] Government officials suggest that companies examine these concerns on a case-by-case basis, however daunting they may appear in general terms, balancing the potential harm that could result against the potential benefits from sharing information with a foreign enforcement authority.[90]

The idea behind the model waivers is that they would not impose on an agency any obligations beyond acting in accordance with its normal practices and confidentiality rules (as described in the policy statement). Representatives of the business community and private bar that appeared before the Advisory Committee strongly believe, however, that exchanged information should only be used for purposes of domestic merger reviews and that there should be no "downstream" disclosure of confidential information to other governmental agencies or private parties.[91] In most jurisdictions, discovery rules in private

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different geographic areas, so that relief will be jurisdiction specific. It was suggested in such cases that the agencies have yet to make the case for cooperation and voluntary waivers to avoid inconsistent results. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 26-27. As the statement implies, however, there also are situations in which production assets located in one jurisdiction serve a broader region. In such cases, jurisdiction-specific remedies may not be feasible.

89 IBA Working Group Apr. 22, 1999 Submission, at 6. As an example, the ABA Antitrust Section offers the hypothetical case of a substantial aerospace merger investigated by the European Commission and one of the U.S. antitrust enforcement agencies. Europe has aerospace companies that have received a great deal of state aid over the years from countries such as France, Germany, and the United Kingdom. Under EC rules, a copy of the file must go to the antitrust authorities in each and every EU member state. American companies involved in such an investigation might be unwilling to waive confidentiality for fear that some of their sensitive information will end up in the hands of the companies that receive state aid. The concern exists because the U.S. authorities usually demand production (through the second-request process) of a great deal of highly sensitive business information, whereas the EC and member states frequently conduct their investigations with far less documentary material. According to the ABA Antitrust Section, it does not necessarily matter if the fear of improper disclosure is well founded. The perception and the harm that could come with the disclosure may be enough to justify not waiving. The ABA Antitrust Section points to other situations where refusing to waive might make sense. Assume that one of the reviewing jurisdictions appears to have already made up its mind to oppose the deal, while the other seems to have an open mind. The merging parties might want to keep the undecided agency from being influenced by the opposing agency. The ABA recognizes that in some circumstances the judgment on waiver might go the other way. It may be that the undecided agency might be able to convince the one that seems not to have an open mind. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 25-26.

90 *See* Parisi, IBC Address.

91 For example, no opportunity for other government departments or entities (including state enterprises which may be competitors), subfederal agencies (*e.g.* U.S. state attorneys general, EU member state agencies, etc.) or third parties to obtain the exchanged information. IBA Working Group April 22, 1999 Submission, at 9; Int'l Chamber of Commerce

litigation, freedom-of-information laws, and other gaps or exceptions in statutory confidentiality protections prevent antitrust enforcement authorities from providing such complete assurances.[92] These groups contend that removing these gaps and exceptions in the protection of confidential information exchanged between antitrust enforcement agencies would give the business community greater confidence and promote the use of waivers.

One suggested approach advocated by these groups to removing these exceptions calls for amendments to legislation in the United States and abroad. This approach would require explicit statutory confirmation that all received information would be subject to strict statutory confidentiality protections and that freedom-of-information laws and discovery rules could not be used to compel disclosure; some jurisdictions also would have to override broad waiver-of-privilege doctrines.[93] Another approach, adopted by the IAEAA, contemplates that a recipient agency will respect any conditions on the use of confidential information which are imposed by the disclosing agency.[94] Proposals for an international treaty that would provide similar safeguards also have been advanced. Most recently, a proposal by J. William Rowley and A. Neil Campbell would leave existing domestic merger review regimes intact, while committing signatories to an "overlay" of procedural rules and information-sharing protocols for cross-border mergers that would override domestic laws and stipulate that confidential information would not be used for other purposes or disclosed.[95]

Submission, at 4.

[92] One gap in the United States, for example, is the power of Congress to obtain information in the possession of the DOJ or FTC. *See* IBA Working Group Sept. 17, 1999 Submission, at 2 n.3.

[93] The discovery exposure can arise in two ways: "third party" discovery of an agency that has information in its possession that may be relevant to a private competition law action; or "indirect" discovery of an opposing litigant by cross-reference to information which may have been provided to an enforcement agency (such as, "provide copies of any documents which party A submitted to Agency Y that may have been exchanged with Agency Z."). To be fully effective in protecting information exchanged between competition law enforcement agencies, these groups argue, it would be necessary for an amendment to close off both the third party and indirect discovery channels. *See* IBA Working Group Sept. 17, 1999 Submission, at 2 n.4; *see also* Proger Spring Hearings Testimony, at 52-53.

[94] IAEAA §8(a)(1)(B).

[95] Rowley and Campbell Submission. Parties to transactions that trigger a notification obligation in two or more signatory jurisdictions could elect to proceed under the treaty. As a prerequisite, merging parties would be required to waive confidentiality and provide signatory jurisdictions with a list in the initial filing of all the jurisdictions in which premerger notification has been made. Each reviewing jurisdiction would have the ability (although not the obligation) to disclose confidential information to other signatories and would be required to keep other agencies and the merging parties informed about the progress of its review either periodically or when events, such as a change in the status of the investigation warranted, or some combination of the two. A jurisdiction could not transmit the information to other federal or state government agencies or third parties without the express written consent of the party that provided the information, and third parties would be precluded by law from using freedom-of-information requests, discovery procedures, or other means to acquire confidential information transmitted or received by any agencies in a signatory jurisdiction. The treaty proposal also provides incentives by attempting to reduce transaction costs with a common filing

These strong safeguards would go a long way to foster business confidence and thereby encourage the use of waivers and perhaps pave the way for the statutory authority to exchange confidential information without the need to obtain a waiver of confidentiality. At this juncture, however, the Advisory Committee believes that these measures are not needed to facilitate cooperation. Provided that the exchange of confidential business information is limited to those jurisdictions with safeguards equal to or greater than the protection provided in the jurisdiction disclosing the information, the Advisory Committee believes that interests of business and enforcement agencies will be adequately balanced with the development of a protocol that spells out how agencies will cooperate to conduct joint and coordinated merger investigations and the adoption of model waivers coupled with a policy statement outlining safeguards established in the reviewing jurisdiction to protect confidential information.[96]

Over the longer term, particulary in the event cooperation takes on more of a documentary sharing dimension, further consideration of these statutory changes or a treaty among jurisdictions may be advisable.[97] In the meantime, to instill further confidence, the Advisory Committee recommends that each agency using waivers of confidentiality affirm its intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions that may apply), and to provide such notice as is practicable before disclosing to a third party any confidential business information obtained pursuant to a waiver. The policy statement should explain how concepts such as using best efforts to resist disclosure to third parties are implemented on a domestic basis. This step would better enable merging parties and their advisors to consider whether, in the unique circumstances of their transaction, a waiver advances the mutual interests of the merging parties and antitrust enforcers or potentially subjects them to incremental disclosure risks or further liability.

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form, two-stage prenotification and uniform time limits. The Advisory Committee addresses ways to reduce transaction costs in Chapter 3 of this Report.

96 As reflected in testimony and submissions made to the Advisory Committee, there are many jurisdictions where private parties and their advisors might not have confidence in the existing legal or practical levels of confidentiality protections. These hearings participants suggest that United States pursue bilateral agreements with a small number of jurisdictions with which there are high volumes of cross-border cases, an established history of cooperation (such as Canada, the EC, and some member states), and an established record of protecting confidential business information. Additional jurisdictions could be added if they comply with the conditions similar to those contained in the IAEAA. *See* IBA Working Group April 22, 1999 Submission, at 2-3. One hearing participant suggested that guidelines would be easier to formulate and implement and because guidelines are less formal than a binding agreement, they would allow for regular public standard setting and eventual refinement based on experience. Submission by Calvin S. Goldman, Q.C., Davies, Ward & Beck, "Multijurisdictional Merger Review: Information Sharing and Procedural Harmonization," ICPAC Hearings, at 4 (Nov. 3, 1998).

97 However, as an initial matter, the Advisory Committee questions the advisability of limiting the use of information obtained pursuant to a waiver to the merger investigation. This would prevent the use of information to commence or further a cartel investigation. Indeed, no such limitation is placed in the use of HSR materials. Rather, merger documents may be used by the Department of Justice for a legitimate law enforcement purpose.

Notice of Information Exchange

Jurisdictions also should consider adopting a policy commitment to provide notice to the parties -- either before or after the fact -- when they share documents of that party with another jurisdiction.[98] The Advisory Committee can well understand why an enforcement agency would be unwilling to agree to a blanket commitment to provide notice. Doing so may jeopardize an investigation. However, when an agency has the authority to exchange information and when adverse enforcement consequences are not present, then notice to the parties seems reasonable and proper.

This suggested approach does sometimes occur in the United States. The agencies may find it impractical to require advance notice on each individual document that is shared. Furthermore, they may be concerned about revealing their selection of key documents (which may constitute attorney work product) outside the scope of discovery. Rather, parties that have concerns with respect to the sharing of certain documents could identify beforehand those documents or categories of documents that the agencies could share without advance notice, although in certain cases this may limit the benefits that potentially could be realized through the cooperative process.

Develop Work-Sharing Arrangements

The Advisory Committee views the creation of a nearly seamless multijurisdictional merger review system as the ultimate goal of all of these efforts toward expanded cooperation and coordination. A seamless system of international merger review is the best way to cut back transaction costs, preserve scarce prosecutorial resources, subject potentially anticompetitive transactions to thorough review, minimize parochial actions, and account fully for global competitive effects. The Advisory Committee recommends work-sharing arrangements among jurisdictions as the appropriate next step in developing this nearly seamless system. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and each step built upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. The Advisory Committee thus looks at two areas in which work sharing might successfully operate: in the remedy stage and in the review stage.

Work Sharing in the Remedy Stage

To obtain the full benefits that cross-border cooperation can provide, it is important to focus on cooperation and coordination in the negotiation of remedies. Because coordination during the remedies phase already has been successfully employed in several cases, this phase may offer the best opportunity for starting a work-sharing arrangement. The Advisory Committee believes that successful instances of cooperation and coordination at the remedies phase should be emulated in future cases whenever the legal

[98] A number of groups highlighted the importance of notice and the need for companies to be given the opportunity to explain any transmitted information that could be misinterpreted. *See, e.g.*, Int'l Chamber of Commerce Submission, at 3.

and factual situations indicate that such coordination and cooperation will be useful. The coordination of remedies is particularly important when remedies could affect conduct in more than one jurisdiction or the feasibility of remedies being considered by other jurisdictions. The goal at the remedies phase should lie both in avoiding conflicting remedies as well as avoiding a mix of remedies that may overly burden an otherwise competitively benign or efficiency-enhancing transaction.

There are several approaches to coordinating remedies. One lies in *joint negotiation.* Under this approach, each interested jurisdiction would identify its concerns regarding the likely anticompetitive effects of the proposed transaction. The enforcement authorities of the reviewing jurisdictions then jointly would consider the remedies required to address their concerns regarding the anticompetitive effects of the proposed transaction and jointly would negotiate those remedies with the merging parties. Each jurisdiction would implement its own consent decree that incorporates the jointly negotiated remedies.[99] Such an approach would require the parties to cooperate by coordinating the timing of the filings in the relevant jurisdictions and agreeing to negotiate jointly.[100] A waiver to permit cooperation among the reviewing jurisdictions also would be necessary. The parties could send a "remedy package" to each jurisdiction and provide a waiver that permits discussion of those documents and related issues.

In some cases it may be feasible to have only *one jurisdiction negotiate remedies with the merging parties that will address the concerns of both that jurisdiction and other interested jurisdictions*. In other words, the reviewing jurisdictions would identify the remedies necessary to address their competitive concerns, and the jurisdiction best positioned to negotiate and obtain the desired remedies would do so. An approach of this kind, for example, was successfully employed by the United States and the EU in the Halliburton/Dresser transaction. There, rather than negotiating separate undertakings with the merging parties, the EC relied on the provisions of a U.S. consent decree to satisfy its concerns regarding a perceived global problem in drilling fluids.[101]

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99 *ABB/Elsag Bailey* and *Astra*/Zeneca are two cases during 1999 that illustrate how effective this approach can be when the parties agree to cooperate. ABB/Elsag Bailey, EC Case No. IV/M.1339 (Dec. 16, 1998); In re ABB AB and ABB AG, FTC Dkt. No. C-3867 (Apr. 22, 1999), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,552; Astra/Zeneca, EC Case No. IV/M.1403 (Feb. 26, 1999); In re Zeneca Group plc, FTC Dkt. No. C-3880 (June 10, 1999), *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,581.

100 In some cases, coordinating settlement negotiations or divestitures when the two investigations are not on the same timetables may be difficult. To address this, some have suggested harmonizing triggering events and review periods. See discussion in Chapter 3 of this Report. However, others suggest that procedural differences are not an insurmountable stumbling block. For example, parties to mergers notifiable to both the United States and EC can facilitate cooperation by filing first in the United States on a letter of intent (which they cannot do in the EC) and beginning prenotification consultation with the EC. *See* Parisi, IBC Address.

101 *See* Van Miert ICPAC November Hearings Testimony, at 52; *see also* von Finckenstein ICPAC November Hearings Testimony, at 121-122 (observing that when the case requires a remedy that can be effected in the United States, Canada may be able to "piggyback" on a U.S. remedy and have it apply to Canada too; alternatively a parallel consent order may be require in Canada, but often the main negotiation can be done in the United States. "And thanks to this cooperation, very often the United States can address implicitly Canadian concerns so that the resulting order can serve on both sides

To some extent this approach also was employed in the Federal Mogul/T&N merger.[102] There, the FTC coordinated review efforts closely with the enforcement agencies in France, Germany, Italy, and the United Kingdom. The German Federal Cartel Office was concerned that the merger threatened competition in dry bearings. Although it appears that the FTC itself was not concerned about anticompetitive effects in dry bearings (this product market was not identified in the complaint as a line of commerce that would sustain a substantial lessening of competition if the merger were permitted), the FTC included in its consent agreement a provision for divesting dry bearings units to satisfy the German concerns and to allow Federal Mogul to avoid entering a separate divestiture proceeding in Germany.

Considering *ultra vires* issues that may be raised, however, this latter approach may be workable only when the remedy exacted by a jurisdiction does not go beyond what is necessary to satisfy that jurisdiction's concerns.[103] If there are distinct national markets, for example, one jurisdiction may not be able to rely on remedies obtained by another. Under such circumstances, it is understandable that each of two or more of the reviewing jurisdictions involved will have to impose its own remedy. For these reasons, this approach may be most useful, for example, when the proposed transaction involves a global relevant market or where the production assets, intellectual property, or research and development facilities located in one jurisdiction serve a broader region.[104]

Although work sharing is not necessarily appropriate in every case, the Advisory Committee believes that significant benefits could be obtained if these cooperative approaches at the remedies phase were employed more frequently. The Advisory Committee recognizes that initially these approaches may be feasible only with a limited number of jurisdictions, depending upon the relationship between the reviewing jurisdictions, the extent to which substantive convergence among the merger regimes of the reviewing jurisdictions has occurred, the extent to which one reviewing jurisdiction is legally capable of

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of the border. To the extent the case is the other way around, we can do the same thing. But the economic reality dictates that most of these cases create the biggest problems in the United States rather than in Canada.").

[102] See Submission by Mark W. Friend and Antonio F. Bavasso, Allen & Overy, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Federal-Mogul/T&N transaction (April 14, 1999). The transaction was notified in six jurisdictions: Belgium, France, Germany, Italy, the UK, and the United States. There was no competitive issue in Belgium and thus the Belgian authorities unconditionally cleared the transaction one month after receiving notice. For this reason, there was no coordination with the Belgian Authority. In many respects, Federal-Mogul/T&N was a ground-breaking case in international cooperation. However, Mr. Friend and Mr. Bavasso contend that the protracted and sometimes seemingly circular nature of the proceedings suggests that there is still considerable scope for improvement.

[103] In other words, if Jurisdiction A fears an anticompetitive impact in Product Market X but predicts no problem in Product Market Y, while Jurisdiction B is concerned about anticompetitive effects in Product Markets X and Y, could Jurisdiction A lawfully negotiate a remedy with the merging parties that addresses both Product Markets X and Y?

[104] Even when a market is worldwide, however, a transaction may have a somewhat different impact in different jurisdictions.

obtaining remedies for other jurisdictions, the types of relevant markets implicated, and the scope and nature of remedies required.

Work Sharing in the Review Stage

In appropriate cases, it may be beneficial to limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. Where the concerns of one country are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for the first country to refrain from independent investigation. For example, the merging parties might have enormous sales in one country but few sales in, say Bulgaria or Lithuania, and trade barriers may be low enough to prevent a price rise in those countries even if there would be no effect elsewhere.[105]

To minimize the number of agencies that proceed to second-stage review, cross-border consultation would need to be established before the expiration of the initial review period. To facilitate this cooperation, a broad waiver would be required from the parties at the initial filing stage. A key question to consider is whether the agencies are in a position to identify the issues that would enable other interested jurisdictions to determine whether the second-stage review of the proceeding agency would further explore issues about which those jurisdictions also had concerns.[106] The issues may not be sufficiently developed at this stage, however, and the agencies may lack sufficient time and resources.

In addition, such an arrangement may not be feasible in the current environment where the length of review periods are often statutorily mandated. The United States, the EU, and others operate under statutory deadlines when investigating mergers. A defined review period could preclude a jurisdiction from being able to negotiate its own remedies if it felt that the proceeding jurisdiction had not adequately addressed its concerns. At that point, the deadlines that prevent firms from consummating the merger may have passed and the firms' assets will be scrambled. Thus, jurisdictions may not be willing to rely on the review of another jurisdiction if they perceive a risk that consumers and important interests may not be adequately protected.[107] A sufficient level of convergence may therefore be necessary before this work sharing can be feasible in more than a handful of cases. In the meantime, this approach may be useful in

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[105] *See* Byowitz and Gotts Submission, at 14-17 (suggesting that those jurisdictions in which the impact is likely to be *de minimis* and the concerns are likely to be addressed by another jurisdiction should defer from independently investigating the transaction and await the decision of the reviewing jurisdiction).

[106] Commentators have suggested that when an agency opens a full or second-stage investigation, it should provide the merging parties and the other interested agencies with a brief statement of issues outlining the legal, economic, and factual matters on which its second-stage review would focus. *See* Rowley and Campbell Submission, at 38.

[107] For these reasons, positive comity provisions in the cooperation agreements to which the United States is a party do not apply to mergers or acquisitions.

situations in which there is no available remedy to the reviewing jurisdiction or there is a sufficient level of confidence in the reviewing jurisdiction.[108]

One way to safeguard against the possibility that the proceeding agency may reach a different result on the merits or a remedy different from the one the other jurisdictions might have reached, while at the same time gaining efficiency in the process and other potential benefits is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction could coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions.

Under this advanced work-sharing arrangement, *the coordinating agency would* perform a centralized information gathering function following initial notification by the merging parties to all reviewing agencies. The coordinating agency would then assess the competitive effects of the proposed transaction in all relevant product and geographic markets. Each interested jurisdiction would be invited to submit comments to the coordinating jurisdiction regarding its particular concerns.[109] The assessment of the coordinating agency would be binding on the coordinating agency but could either serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the recommendation) or be binding on those jurisdictions as well. This approach may prove useful in cases involving global markets. Its utility may be diminished, however, where relevant geographic markets are local rather than supranational and where market structure and competitive conditions vary greatly within such markets.

Work sharing logically could begin between the United States and the EU because of their record of cross-border cooperation and the amount of transatlantic merger activity that has its main impact in the United States and Europe. Further, working toward a common position with the EC should be a priority.[110] The Advisory Committee supports the initiative to form a working group with respect to

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108 The ABA Special Committee in 1991 suggested a similar approach, endorsing application of a jurisdictional rule of reason approach or balancing of interests test for deciding whether to take enforcement action that affects a foreign party. The special committee suggested that the enforcement agency should ask which jurisdiction is appropriately equipped to fashion a remedy if one is felt to be required. The special committee recommended that when more than one jurisdiction has been notified of a merger, immediate consultation among those agencies should take place. A frank discussion of the relative interests involved and the location of assets ought to persuade all but the truly interested jurisdictions to defer. The remaining jurisdictions, if more than one, should consult throughout the course of the review to minimize conflicting or duplicative requirements on the parties; and at the end of the process use best efforts to avoid imposing a remedy that conflicts with the policy of the other state(s). ABA ANTITRUST SECTION 1991 SPECIAL COMMITTEE REPORT, at 181-188.

109 *See, e.g.,* A. Neil Campbell and Michael J. Trebilcock, *International Merger Review: Problems of Multi-Jurisdictional Conflict, in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 129 (Erhard Kantzenbach et al. eds. 1993).

110 The reasons why this step is important include the following: The EU is a source of both consolidation and proliferation of merger regimes. Several member states interpret domestic law consistent with EU law, and nonmember

multijurisdictional mergers, an idea that came out of the annual bilateral discussions with the EC in October 1999.[111]

Potential for Advanced Work Sharing

The Advisory Committee also considered whether, an even higher level of work sharing might be possible after more procedural and substantive convergence among merger review regimes has occurred. At this advanced level of work sharing, the coordinating agency would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger's costs and benefits to competition, not only the net effects within its borders. This approach arguably is superior to an approach in which each jurisdiction analyzes the effects of a proposed transaction within its own borders and ignores the harms or the benefits that the transaction may generate elsewhere.[112] Multimarket assessment would position the coordinating jurisdiction to account for what had previously been viewed as externalities, thereby enabling it to assess the net effects of the proposed transaction (under a neutral welfare standard) on a global scale. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.

In the United States, the Supreme Court's decision in *United States v. Philadelphia National Bank* ostensibly prohibits federal courts from balancing competitive effects in different product or geographic markets to determine whether a merger is lawful.[113] A footnote in the 1997 Revised Department of Justice and Federal Trade Commission Horizontal Merger Guidelines indicates that the federal antitrust agencies now may be willing to use their prosecutorial discretion to engage in multimarket balancing, albeit under highly circumscribed conditions.[114]

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states often have looked to all aspects of EU competition policy, including merger regulation, as an attractive model for their own economies. Finding common ground with the EU thus holds the greatest promise of facilitating convergence among jurisdictions. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 32-33.

[111] The working group is expected to consider lessons learned from cooperation with the EU over the last several years and cover a range of issues such as timing, mechanisms to facilitate information sharing, and the exchange of views with respect to enforcement theories and remedies. *See* "EU/US: Officials to Meet in Merger Control Group," EUROPEAN REPORT, Oct. 9, 1999 (reporting on remarks made by Assistant Attorney General Joel Klein and FTC Chairman Robert Pitofsky at the Brussels Press Conference following the U.S.-EC annual bilateral talks.

[112] *See* Christine Chambers Wilson, *Markets in the Balance: Efficiencies Analysis of Mergers Should Consider Multiple Markets*, LEGAL TIMES, Oct. 25, 1999, at 34.

[113] 374 U.S. 331 (1963).

[114] U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines §4 n.36 (April 2, 1992), *as amended* April 8, 1997, *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104. The 1997 Revised Horizontal Merger Guidelines acknowledge U.S. law's hostility to offset defenses, but note in a footnote that an agency "in its prosecutorial discretion

This advanced level of work sharing is a distant vision. At present, the Advisory Committee believes that while no agency should be obligated to take into consideration competitive harm or benefits that may be achieved outside the reviewing jurisdiction, competition authorities should consider that the transactions they review also have the potential to generate spillover effects in other jurisdictions. As the level of convergence in antitrust enforcement increases, however, agencies should consider the appropriateness of analyzing the benefits and anticompetitive effects of a proposed transaction on a global scale.

SUMMARY OF RECOMMENDATIONS

Facilitate Greater Transparency

1. Greater transparency in the application of each jurisdiction's merger review principles, practices, and procedures could be enhanced by the publication of guidelines and notices explaining the manner in which mergers will be analyzed, annual reports (including case examples), statements, speeches, and articles describing changes in relevant legislation, regulations and policy approaches, as well as case-specific decisions, releases, and press interviews.

2. At a multinational level, greater transparency may be achieved by conducting a survey and compiling an explanatory report of all jurisdictions with merger regulations to identify the principles they employ.

3. Each jurisdiction also should facilitate greater transparency by articulating clearly their rationales for challenging or refraining from challenging *significant* transactions (that is, decisions that set a precedent or otherwise indicate a shift in doctrine or policy).

Develop Disciplines for Merger Review

1. Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities.

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will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate" anticompetitive effects. Chairman Pitofsky observed that "[t]o date, none of the parties advocating a transaction has argued that overseas efficiencies are so compelling and so intertwined with consolidation in a domestic market that we should tolerate a significant anticompetitive effect at home. If that argument were advanced, we would consider it but our approach would be skeptical." Robert Pitofsky, Chairman, U.S. Federal Trade Commission, The Effect of Global Trade on United States Competition Law and Enforcement Policies, Remarks before Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy, at 17-18 (Oct. 15, 1999).

2. As a best practice or discipline, with limited exception (such as national security), noncompetition factors should not be applied in antitrust merger review. If a jurisdiction's law recognizes noncompetition factors (such as preservation of jobs, promotion of exports, international comparative advantage), such factors should be applied transparently and in a manner narrowly tailored to achieve their ends. Further, if a jurisdiction's merger regime explicitly permits noncompetition factors to trump traditional competition analysis, those noncompetition factors should be applied after the competition analysis has been completed.

3. Competition agencies do not operate in a political vacuum, enforcement agencies must still establish their independence, and "parochial" political concerns should not play a role in the merger review process.

4. Nations should recognize that the interests of competitors to the merging parties are not necessarily aligned with consumers' interests. Accordingly, authorities should minimize the problems that may arise in competitor-driven processes, including the disruption of potentially procompetitive mergers.

5. When a transaction has a significant anticompetitive effect on the local economy in any given jurisdiction, the local antitrust authority has a legitimate interest in reviewing the transaction and imposing a remedy notwithstanding the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales) lies outside its national boundaries. At the same time, in the face of a clash, remedies with extraterritorial effects should be tailored to cure the domestic problem. Further, when fashioning a remedy with extraterritorial effects, the agency should be informed by foreign legal and other local practices.

Continue to Enhance Cross-Border Cooperation

1. Cooperation among reviewing authorities can be enhanced if all jurisdictions establish a transparent legal framework for cooperation that contains appropriate safeguards to protect the privacy and fairness interests of private parties. In the U.S. context, a framework for cooperation might entail the development of a "Protocol" with a combination of key features: a description of how the federal antitrust enforcement agencies in the United States conduct cross-border coordinated merger investigations; model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information between competition authorities during a merger review; and a policy statement outlining safeguards established in a reviewing jurisdiction to protect confidential information. Other jurisdictions could usefully develop comparable protocols.

2. Agencies using confidentiality waivers should affirm in the policy statement the agency's intention to refuse to disclose information except to the extent it is legally required to do so, to use best

efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions that may apply), and to provide such notice as is practicable prior to disclosure to a third party of any confidential business information obtained pursuant to a waiver. The policy statement also should explain how concepts such as using best efforts to resist disclosure to third parties are implemented in the jurisdiction.

3. Jurisdictions also should consider adopting a policy to provide notice -- either before or after the fact -- with respect to documents shared with another jurisdiction. The Advisory Committee can well understand why an enforcement agency would be unwilling to agree to a blanket commitment to provide notice. However, when an agency has the authority to exchange information and adverse enforcement consequences are not present, then notice to the parties seems reasonable and proper. Alternatively, parties could provide select documents directly to other reviewing jurisdictions and waive confidentiality with respect to those documents or identify beforehand which documents or categories of documents may and may not be shared, although in certain cases this may limit the benefits that potentially could be realized through the cooperative process.

Develop Work-Sharing Arrangements

1. The most integrated approach the Advisory Committee envisions is work sharing, where the enforcement efforts of one agency may be sufficient to remedy the antitrust concerns of other jurisdictions. Work sharing may be accomplished in incremental steps with each step reflecting a different degree of cooperation and building upon successful approaches to cooperation and coordination that enforcement authorities have already implemented. An important objective is to reduce burdensome duplication, while preserving the right for the United States and other agencies to take their own measures, as necessary, if they believe the substantive analysis or remedies diverge from preferred approaches.

2. In a first step, each jurisdiction conducts its own review of the proposed transaction and participates in the formulation, if not the negotiation and implementation, of remedies. Such cooperation and coordination at the remedies phase has been successfully employed in a number of cases and the Advisory Committee believes that these approaches should be emulated in future cases whenever the legal and factual situations indicate that such coordination and cooperation will be useful.

3. In appropriate cases, it may be feasible to take cooperation to the next level and limit the number of jurisdictions conducting independent second-stage reviews of a proposed transaction. For example, where the concerns of Country A are likely to be the same as and subsumed by the concerns of a more distinctly affected investigating jurisdiction, it may be appropriate for Country A to refrain from independent investigation. At present, such an arrangement may not always be feasible in an environment with statutorily mandated review periods if the agency could lose the

right to review the transaction at all. This approach likely would preclude a jurisdiction from being able to negotiate its own remedies if it felt that the proceeding jurisdiction did not adequately address its concerns or imposed a remedy that diverged from a preferred approach. Hence such impediments would have to be resolved if this degree of cooperation were to occur in more than a handful of cases. In the meantime, this approach may be useful in situations in which there is no available remedy to the reviewing jurisdiction or there is a sufficient level of confidence in the reviewing jurisdiction.

4. One way to safeguard against the possibility that the reviewing jurisdiction will reach a conclusion different from one another agency might have reached is to ensure sufficient participation in the process by the other jurisdictions. One jurisdiction would coordinate the investigation of a proposed transaction, take into account the views of each interested jurisdiction, and recommend remedies to address the concerns of all interested jurisdictions. The assessment of the coordinating agency would be binding on the coordinating agency but either could serve as a recommendation to other interested jurisdictions (with a presumption in favor of accepting the coordinating jurisdiction's recommendation) or could be binding on those jurisdictions as well.

5. The Advisory Committee considered whether, given a sufficient amount of substantive and procedural convergence among merger review regimes, an even higher level of work sharing might be feasible someday. At this advanced level of work sharing, the coordinating agency would be required to accept the mantle of *parens patriae* for world competition. Accordingly, it would endeavor to evaluate procompetitive and anticompetitive effects of a proposed transaction on a global scale, taking into account all of the merger’s costs and benefits to competition, not only the net effects within its borders. Multimarket assessment would position the coordinating jurisdiction to account for what had previously been viewed as externalities, thereby enabling it to assess the net effects of the proposed transaction (under a neutral welfare standard) on a global scale. The coordinating jurisdiction could then design remedies to address the concerns of all interested jurisdictions.

   This advanced level of work sharing is a distant vision. At present, it is the view of this Advisory Committee that while no agency should be obligated to take into consideration competitive harm or benefits that may be achieved outside the reviewing jurisdiction, competition authorities should consider that the transactions they review also have the potential to generate spillover effects in other jurisdictions. As the level of convergence in antitrust enforcement increases, however, agencies should consider the appropriateness of analyzing the benefits and anticompetitive effects of a proposed transaction on a global scale.