

**Seventh United Nations Conference to review the UN Set on
Competition Policy**

Geneva, 6-10 July 2015

Roundtable on:
***International Cooperation on Merger cases as a tool
for effective enforcement of competition***

**Contribution
By
United States of America**

The views expressed are those of the author and do not necessarily reflect the views of UNCTAD

In the past dozen years, the number of agencies reviewing mergers has increased dramatically.¹ Increasingly, cross-border merger transactions are investigated by more than one competition agency.² During that time frame, the U.S. antitrust agencies' (the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), collectively the "U.S. Agencies") have engaged in international case cooperation ("cooperation") involving competition agencies from an increasing number of jurisdictions,³ and cooperation has deepened between competition agencies that work together most often. This is particularly the case in merger case cooperation, the focus of this submission.⁴ We expect this trend of expanding and deepening cooperation will continue.

Through cooperation, a competition agency coordinates its domestic investigation with those of other competition agencies reviewing the merger. Cooperation can improve the effectiveness of individual agency investigations and produce compatible outcomes in the review of the same matter.⁵ Cooperation can benefit both parties and cooperating agencies. Parties benefit from more efficient reviews and a reduced risk of conflicting outcomes. Agencies enjoy these benefits and are better able to compare their own approaches and analyses with those of other jurisdictions, to learn from one another, and to engage in a process of continuous improvement and convergence.

For the U.S. Agencies, merger cooperation has worked most effectively when reviewing agencies make informal contacts early in their respective investigations. A written cooperation agreement is not necessary for the U.S. Agencies to engage in merger cooperation with other competition agencies. Early informal contact allows agencies to understand whether further

¹ While precise statistics are elusive, the growth in merger control can be understood by comparing Global Competition Review's annual compilations of MERGER CONTROL: THE INTERNATIONAL REGULATION OF MERGERS AND JOINT VENTURES. The compilations, while under inclusive, list 45 jurisdictions with merger control in 2003 and 77 in 2015.

² See e.g., OECD Competition Committee, "International Enforcement Co-operation: Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation," 2013, at 66, available at <http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf> (hereinafter, OECD-ICN Cooperation Survey Report).

³ See e.g., "FTC Fiscal Year 2014 Performance Report and Annual Performance Plan for Fiscal Years 2015 and 2016," at 99, available at <https://www.ftc.gov/system/files/documents/reports/1-fy-2015-2016-performance-plan-fy-2014-performance-report/pprfy15-16.pdf>, "FTC 2009 Performance and Accountability Report," at 14, available at https://www.ftc.gov/sites/default/files/documents/reports_annual/performance-and-accountability-report/2009parreport.pdf, and DOJ International Program Update, Spring 2015, available at <http://www.justice.gov/atr/division-update/2015/international-program-update>.

⁴ See e.g., OECD-ICN Cooperation Survey Report at 9, 66, 158 (showing a 35% increase in the number of merger investigations involving some international cooperation between 2007 and 2012 and finding that, of 55 competition agencies, 21 had experience with merger cooperation, and 46 agencies expected to see more cooperation in merger and non-merger matters in the future); UNCTAD, "UNCTAD Perspective on Competition Law and Policy," 2013, at 34, available at http://unctad.org/en/PublicationsLibrary/ditcclpmisc2013d2_en.pdf.

⁵ Compatible outcomes are not necessarily identical outcomes, but rest on consistent analysis even if that analysis produces different results under different market conditions. In a case in which the same merger affects jurisdictions with differing market structures (such as where a merger reduces the number of competitors from eight to seven in one jurisdiction but from two to one in another), it is possible that two jurisdictions will conduct entirely consistent analyses, conclude that the competitive effects in their own countries will differ, and reach different conclusions on the competitive impact of the transaction within their jurisdictions.

cooperation is warranted. Such contacts are limited to public and non-confidential information. When it is in both reviewing agencies' and merging parties' interests to have more in-depth cooperation, parties may choose to provide agencies with waivers of confidentiality to enable cooperation based on the parties' confidential information.

This paper will: (1) examine the evolution of merger cooperation from the U.S. perspective; (2) discuss best practices for effective merger cooperation identified by agencies and international organizations, including the International Competition Network ("ICN"), the Organisation for Economic Co-operation and Development ("OECD"), and the United Nations Conference on Trade and Development ("UNCTAD"); (3) describe the U.S. Agencies' experiences working with newer competition agencies; and (4) provide some examples of successful merger cooperation involving U.S. Agencies and sister competition agencies.

1. The Evolution of International Case Cooperation

In large part, case cooperation began out of necessity, as a way to minimize friction caused by the application of competition law to international commerce. In the 1940s, the U.S. Courts applied competition laws to conduct taking place outside the United States if the conduct had a direct and intended effect in the United States.⁶ This application led to certain international tensions, particularly when the conduct challenged as illegal under competition law was considered lawful or was even encouraged by another country's government.⁷ As an increasing number of jurisdictions began to apply their competition laws in this manner, concerns increased, including at a political level. Different suggestions, including resolution through trade instruments,⁸ were voiced, though practical case cooperation among competition agencies proved capable of helping to alleviate these concerns and shape the future of the international competition law system.

1.1. Cooperation among competition agencies

Competition agencies recognized that they had a common interest in cooperating, especially in merger cases affecting multiple jurisdictions. On their own initiative, agencies began to cooperate with one another bilaterally.

⁶ See e.g., *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (holding that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."). More information about the extraterritorial application of antitrust law and the evolution of international case cooperation in antitrust can be found in Molly Askin and Randolph Tritell, "International Antitrust Cooperation: Expanding the Circle," 2014, available at <https://www.ftc.gov/system/files/attachments/key-speeches-presentations/141024expandcircle-askin-tritell.pdf>; and John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 *Cornell Int'l L.J.* 55 (2010).

⁷ As a leading British judge noted in *In re Westinghouse Elec. Corp. Uranium Contract Litig.* [1978] A.C. 547, 617 (H.L.), "It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."

⁸ The World Trade Organization (WTO) began discussing competition issues in the Uruguay Round of negotiations in the 1980s, and discussions intensified under the Doha round. While some jurisdictions supported inclusion of competition disciplines into the WTO, some developed and developing countries questioned the wisdom of doing so. In the end, the WTO General Council removed competition law from the agenda for the Doha Round of meetings in 2004.

They also worked multilaterally and bilaterally to develop cooperation guidance. Cooperation among agencies was first put on the international agenda in 1967, when the OECD published its first Recommendation regarding competition agency cooperation in antitrust investigations.⁹ This Recommendation created a mechanism for competition agencies to consult one another when investigations involve issues that could have effects in other jurisdictions.

As agencies began to cooperate on individual investigations, they learned about one another's procedures, analytical methods, and approaches to understanding competitive effects. Discussions between and among competition agency staff addressed differences in the applicable laws in each jurisdiction, how differences affected the analysis of competitive effects, and how remedies could be structured to ensure compatibility. This served both to allow agencies to resolve cases in a way that avoided conflict, and to develop a shared understanding of competition enforcement, which has, in many instances, resulted in the long-term convergence of policies and practices of cooperating agencies.

As a pattern of cooperation emerged, the U.S. Agencies entered into several bilateral written agreements and arrangements with non-U.S. competition agencies. These documents memorialized a shared commitment to further cooperative relationships and served as catalysts for increased cooperation.¹⁰

Merger cooperation became increasingly common between the U.S. Agencies and other competition agencies that reviewed mergers in the 1990s and 2000s. While the vast majority of cooperation resulted in cases with compatible outcomes, there were a few notable and well-publicized exceptions, including *Institut Merieux* (1990),¹¹ *Boeing/McDonnell Douglas* (1997),¹²

⁹ See e.g., OECD, "Competition law enforcement," in *International Regulatory Co-operation: Case Studies*, Vol. 1, Chemicals, Consumer Products, Tax and Competition, OECD Publishing, 2013, at 77, available at <http://dx.doi.org/10.1787/9789264200487-6-en>.

¹⁰ A complete list of agreements and arrangements is available at <http://www.ftc.gov/policy/international/international-cooperation-agreements>. With the exception of a 1999 IAEEA agreement with Australia, they do not allow for the sharing confidential information without waivers from the parties. The United States has bilateral cooperation agreements with ten jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); Chile (2011), and Colombia (2014), and the Agencies entered into Memoranda of Understanding with the Russian Federal Anti-Monopoly Service (2009), the three Chinese Anti-Monopoly agencies (2011), the Ministry of Corporate Affairs (Government of India), and the Competition Commission of India (2012). Competition-related issues also may be addressed in bilateral and multilateral trade agreements. Approximately half of the free trade agreements the United States has signed (the North American Free Trade Agreement (NAFTA) and bilateral agreements with Australia, Chile, Colombia, Korea, Peru, and Singapore), include a chapter on competition policy. The chapters typically include provisions providing for cooperation between the parties in competition enforcement and policy, as well as maintaining a competition law and agency and consultation to resolve disagreements. Importantly, these provisions are not subject to dispute settlement. While these represent binding obligations between states, they do not play a significant role in governing relationships between the U.S. Agencies and sister agencies. The United States' trade agreements are available at <http://www.state.gov/e/eb/tpp/bta/fta/fta/index.htm>.

¹¹ *In re Institut Merieux*, 113 F.T.C. 742 (1990).

¹² See William E. Kovacic, "Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy," 68 *Antitrust L.J.* 805 (2001).

and General Electric/Honeywell (2001).¹³ Following these incidents, the affected agencies redoubled their efforts to strengthen cooperative relationships involving merger review.

1.2. Lessons learned from bilateral merger cooperation

Successes and the occasional stumble led the U.S. Agencies and their counterparts to evaluate and analyze how well cooperation worked in practice, and to find ways to improve the process. In 1999, between the Boeing/McDonnell Douglas and GE/Honeywell merger reviews, the U.S. Agencies and European Commission's DG Competition ("DG COMP") established a U.S.-E.C. mergers working group to take stock of the experience gained through cooperation to date and to examine where cooperation could be enhanced, with a particular focus on remedies. The U.S.-E.C. mergers working group's work led to an October 2002 document describing best practices for merger cooperation between the U.S. and E.C., which was updated in 2011.¹⁴ Certain of the lessons learned that were codified in these documents are broadly applicable and can be useful for agencies with less merger cooperation experience, including:

- The value of prompt communication among competition agencies and acknowledgement that the nature and frequency of further communications will be case-specific;
- The importance of establishing staff level points of contact to facilitate early and informal communication;
- The value of coordinating merger review timetables between cooperating agencies;
- The importance of sharing publicly available information and other information that can be shared without infringing confidentiality legislation;
- The role that the parties can play to facilitate the cooperative process, in particular concerning the coordination of the timing of investigations, and in granting waivers of confidentiality to facilitate informed discussion of theories of harm and remedies;
- The need for coordination between cooperating agencies at key stages of their investigations, including the final stage when agencies consider potential remedies to preserve competition; and
- The importance of avoiding conflicting or inconsistent remedies.¹⁵

The benefits of these practices can be seen in the numerous cases in which the U.S. Agencies and DG COMP have cooperated in reviewing since 2001, including several with complex remedial arrangements involving divestitures on both sides of the Atlantic, during which there have been

¹³ See Donna E. Patterson and Carl Shapiro, "Transatlantic Divergence in GE/Honeywell: Causes and Lessons," *Antitrust Magazine*, Fall 2001, at 18.

¹⁴ US-EU Merger Working Group, "Best Practices on Cooperation in Merger Investigations," October 2011, available at <https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/111014eumerger.pdf>.

¹⁵ *Id.* The 2011 best practice document also recognizes that an increasing number of mergers are subject to review by other competition authorities around the world.

no serious conflicts. The U.S. has also codified best practices with other jurisdictions, notably Canada, with similar results.¹⁶

To make cooperation work in practice, the U.S. Agencies also established offices to handle and foster international cooperation. Staff of those offices reach out to, and receive inquiries from, other agencies concurrently reviewing mergers.¹⁷ When agencies cooperated, their case handlers typically had early and regular telephone and e-mail contact. This has become routine practice with the competition agencies in the European Union, Canada, Australia, Germany, Japan, Mexico, and many other jurisdictions.

1.3. The work of multilateral organizations to support case cooperation

Bilateral experience and best practices have served as the basis of multilateral work on antitrust case cooperation as well. The Competition Committee of the OECD, the ICN, and UNCTAD, as well as regional organizations, help support case cooperation by developing cooperation frameworks and guidance and by providing opportunities for agency staff to build relationships. The guidance reflects some of the same elements as the bilateral best practices documents and recognizes that merger cooperation often begins with informal contacts and a discussion of publicly available information.

As noted above, the OECD Competition Committee first developed a recommendation to address cooperation in 1967. This non-binding Recommendation was updated and revised in 1973, 1979, 1986, 1995,¹⁸ and most recently in 2014, with important revisions.¹⁹ It includes provisions on coordination among competition agencies concurrently investigating the same transaction or conduct, the exchange of information (including confidential information), enhanced cooperation, and notifications of antitrust investigations in certain circumstances. Non-OECD members can use the Recommendation when considering cooperation in merger investigations.

¹⁶ The U.S. Agencies and Canada drafted best practices on cooperation in merger investigations in 2014, which reflected the long and smooth relationship in conducting merger reviews that affect two nations with many markets in common. See https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/canada-us_merger_cooperation_best_practices.pdf. The U.S. Agencies and the Chinese Ministry of Commerce (“MOFCOM”) also issued Guidance for Case Cooperation in 2011. The Guidance provides a framework for cooperation when MOFCOM and one of the U.S. Agencies review the same merger. The document recognizes that case cooperation between the investigating agencies may help improve the efficiency of their investigations, and thereby maintain competition in their jurisdictions. See <https://www.ftc.gov/news-events/press-releases/2011/11/federal-trade-commission-and-department-justice-meet-chinese>.

¹⁷ See, e.g., Randolph Tritell and Elizabeth Kraus, The Federal Trade Commission’s International Antitrust Program (May 2015), available at https://www.ftc.gov/system/files/attachments/international-competition/the_ftcs_international_antitrust_program_may_2015.pdf, and the DOJ’s International Antitrust Program, available at <http://www.justice.gov/atr/public/international/index.html>.

¹⁸ OECD, “Competition law enforcement,” in *International Regulatory Co-operation: Case Studies*, Vol. 1, Chemicals, Consumer Products, Tax and Competition, OECD Publishing, 2013, at 77-78, available at <http://dx.doi.org/10.1787/9789264200487-6-en>.

¹⁹ OECD, “Recommendation concerning International Co-operation on Competition Investigations and Proceedings” (“Recommendation”), 2014, available at <http://www.oecd.org/daf/competition/2014-rec-international-coop-competition.pdf>.

The ICN has also created work products that any agency can use to facilitate and better understand merger cooperation. The ICN was founded in 2001, with the express purpose of “facilitat[ing] effective international cooperation to the benefit of member agencies.”²⁰ The ICN now has 132 members from 119 jurisdictions. Member agencies work with one another directly to create ICN work product, including guidance, handbooks, and recommended practices.

To address merger cooperation,²¹ the ICN created a Merger Notification and Review Procedures Recommended Practice on Interagency Coordination.²² The ICN also created a non-binding voluntary Framework for Merger Review Cooperation, which provides, *inter alia*, points of contact for members to contact other agencies.²³ It is open to all ICN member agencies. In the most recent working year, the ICN’s Merger Working Group drafted the Practical Guide on International Enforcement Cooperation in Mergers by drawing on the practical cooperation experiences of ICN member agencies and private sector attorneys. It offers practical guidance for agencies seeking to engage in cooperation and for merging parties and third parties seeking to facilitate cooperation.²⁴

Together, the OECD and ICN collaborated to analyse international cooperation. In 2012 and 2013, the organizations surveyed members to better understand members’ experiences in case-related enforcement activities.²⁵ Results of this survey can help newer agencies understand other agencies’ experiences with and views on cooperation. In addition to the work of OECD and ICN, UNCTAD’s International Group of Experts provides an important forum for the discussion of cooperation,²⁶ conducts peer reviews of competition agencies, and above all, creates a forum where competition agency staffs can become more familiar with each other, which helps to breed the trust between agencies necessary to cooperation.

²⁰ ICN Mission Statement, available at <http://internationalcompetitionnetwork.org/about.aspx>.

²¹ ICN has also created guidance and other work product regarding non-merger cooperation. For a full list of ICN cooperation resources, see <http://www.internationalcompetitionnetwork.org/about/cooperationwork.aspx>.

²² ICN, “Recommended Practices for Merger Notification and Review Procedures,” Recommended Practice X. Interagency Coordination, available at <http://internationalcompetitionnetwork.org/uploads/library/doc588.pdf>. It is also available in French at <http://www.internationalcompetitionnetwork.org/uploads/library/doc590.pdf> and in Spanish at <http://www.internationalcompetitionnetwork.org/uploads/library/doc589.pdf>.

²³ ICN, “International Competition Network’s Framework for Merger Review Cooperation,” 2012, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

²⁴ ICN, “Practical Guide on International Enforcement Cooperation in Mergers,” 2015, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>.

²⁵ OECD/ICN Survey on International Competition Enforcement Co-operation, 2013, available at <http://www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm>.

²⁶ For a list of UNCTAD’s cooperation-related work, see Note by the UNCTAD secretariat, “International cooperation in merger cases as a tool for effective enforcement of competition law,” TD/RBP/CONF.8/4, 2015, at 3, available at http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d4_en.pdf.

2. International Case Cooperation and Information Exchanges Today

Effective cooperation depends on the ability to conduct informed discussions about mergers, their anticipated effects, and, if required, possible remedies. Consequently, it is critical to find ways to hold those discussions without infringing on confidentiality restrictions provided by competition legislation.

National laws and rules that protect confidential information from disclosure (“confidentiality protections”) serve a vital purpose, and cooperation in merger investigations should avoid undermining such protections. In most jurisdictions, confidentiality protections prohibit the misuse of sensitive commercial and financial information. Staff must understand confidentiality protections to know what they are legally permitted to share with other agencies, and how information they receive can be used. The fact that reviewing agencies understand and scrupulously observe confidentiality protections in practice gives firms confidence that their confidential information will not be misused, and greater confidence in providing relevant information to reviewing agencies. Even pursuant to these rules, agencies can still exchange a significant amount of useful information, as explained below. Such cooperation can be based on different categories of information, including publicly available information, “agency confidential” information, and, in certain circumstances, confidential information.

2.1 Publicly-available information

A considerable amount of useful cooperation can take place based on publicly available information. This type of cooperation does not require an agency to share confidential information provided by parties to an investigation. For example, agency staff often develops substantial expertise in particular industries, and they can share their understanding of how an industry operates, important market participants, technological changes under way, and other pertinent information with sister agencies.

2.2 “Agency confidential” information

In addition to cooperating on the basis of publicly available information, cooperation can be based on what the FTC and DOJ deem “agency confidential” information. This consists of information that the U.S. Agencies are not statutorily prohibited from disclosing but normally treat as non-public,²⁷ such as the existence of an investigation, staff’s analysis of the relevant product and geographic markets, the competitive effects of the transaction or conduct, the timing of the investigation, and potential remedies. The U.S. Agencies have generally been willing to share this type of information with other agencies that have given it appropriate assurances of confidentiality, either through a bilateral or multilateral arrangement, such as the OECD Council Recommendation concerning International Co-operation in Competition Investigations and Proceedings²⁸ or the ICN Framework for Merger Review Cooperation.²⁹

²⁷ See United States, “Discussion on How to Define Confidential Information,” October 2013, <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310us-confidentialinfo.pdf>.

²⁸ *Supra* at n.19.

²⁹ *Supra* at n.23.

2.3 Confidential information

In certain matters, the agencies find that the exchange of confidential information is valuable to effectively engage in in-depth cooperation, which may include jointly analyzing theories of harm and designing appropriate remedies. All information provided to U.S. Agencies pursuant to its pre-merger notification system and all information that the agencies compel production of, and, in the case of the FTC, all information provided to the agency voluntarily in lieu of compulsory process, is confidential. However, the party who provides the information is permitted to waive the protection of those laws, to allow the cooperating agencies to discuss and share a party's or third party's confidential information. In merger investigations conducted by the U.S. Agencies, parties routinely choose to waive statutory confidentiality protections to facilitate cooperation by providing the reviewing agency with written waivers of confidentiality ("waivers"). The U.S. Agencies have found that waivers can make investigations more efficient and facilitate more consistent analysis and remedies by agencies investigating the same matter. The parties usually find that it is in their interest to grant waivers, as agencies in regular and frank communication with each other are more likely to reach consistent results.

Waivers can be helpful at different stages of merger review. For example, when they are provided early in an investigation, they can allow cooperating agencies to engage in in-depth discussions of relevant markets, theories of harm, and supporting evidence. Such discussions between cooperating agencies can help focus investigations more quickly on key issues and competitive concerns. Waivers can also be particularly important when the parties begin to discuss remedy proposals, including divestitures. Remedial orders can be very complex, and it is important that orders allow interoperability across jurisdictions. Through discussion and mutual understanding of the terms and operation of a remedy, agencies can, to the extent possible, ensure that consistent orders will be drafted. The discussion of confidential information is helpful and may be necessary to these discussions, and waivers can prove critical in these instances.

To facilitate understanding and use of waivers, the U.S. Agencies released a model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities and an FAQ about confidentiality protections and providing waivers.³⁰ Many competition agencies around the world also use confidentiality waivers, although they are used more commonly by agencies with mature competition regimes. The ICN has also created a model waiver of confidentiality accompanying its report on Waivers of Confidentiality in Merger Investigations.³¹

3. Work with Newer Competition Agencies

Cooperation is most effective when agencies have developed a relationship of trust and an understanding of each other's competition laws and practices. This understanding is gained most effectively through contacts between competition agency staffs. As mentioned in section 1.3, international organizations, such as the ICN, OECD and UNCTAD, as well as regional groups, are important fora in which such relationships and understanding can be developed. Once staffs

³⁰ "Joint Model Waiver of Confidentiality for Use in Civil Matters Involving Non-U.S. Competition Authorities," and "FAQ," available at <http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>.

³¹ ICN, "Waivers of Confidentiality in Merger Investigations," available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

understand each other's laws and have contacts at sister competition agencies, it is easier for staff to reach out to develop merger cooperation.

An example of a joint regional initiative that has enhanced newer agencies' ability to review mergers is the Inter-American Competition Alliance,³² which was formed by Latin American competition agencies in cooperation with the U.S. Agencies. It holds monthly Spanish-language teleseminars with officials from competition agencies throughout North, Central, and South America. Each member agency proposes and selects topics to present. The programs focus on practical enforcement issues, many of which involve mergers. This experience sharing has increased the contacts among agencies. The relationships fostered by the Alliance as well as the experiences discussed during the monthly calls have helped to support and further strengthen case cooperation in the Americas.

In addition to developing relationships with newer agencies through work in international organizations, the U.S. Agencies routinely work bilaterally with newer agencies. For example, our staffs may work together to share practices related to merger review, and other aspects of competition law and policy. This often takes place during study visits and through a robust technical assistance program³³ that includes the FTC's International Fellows and Interns Program and DOJ's Visiting International Enforcers Program. These programs serve to increase mutual understanding and build relations with enforcement partners around the world. Relationships and merger review practices built and strengthened through these contacts support cooperation on individual matters. Through the FTC's staff exchange program,³⁴ staff from non-U.S. competition agencies can work as part of FTC case teams reviewing mergers or investigating anticompetitive conduct. The FTC has also taken advantage of the statutory authority³⁵ to send its merger case handlers to work as part of case teams in other countries. Similarly, as part of DOJ's program, the agency hosted three visiting enforcers in 2014,³⁶ and DOJ managers have served as visiting enforcers with the Japan Fair Trade Commission and worked with DG COMP in Brussels.

³² See "Quines somos?," <http://www.crcal.org/alianza-interamericana/quienes-somos>.

³³ The U.S. Agencies conduct a wide range of technical assistance programs, including bilateral training missions, regional workshops, international roundtables, and resident advisor placements. See, e.g., FTC Office of International Affairs, FY 2013 Technical Assistance Report, available at https://www.ftc.gov/system/files/attachments/international-technical-assistance-program/ftc_office_of_international_affairs_fy2013_technical_assistance_report_1.pdf. These activities help foreign counterparts enhance their capacity to carry out effective merger reviews and enforce other aspects of competition law. See also, "U.S. Federal Trade Commission's and Department of Justice's Experience With Technical Assistance For The Effective Application of Competition Laws," 2008, at 7, available at <http://www.ftc.gov/sites/default/files/attachments/international-assistance-program/ftcdojtechnicalassist.pdf>.

³⁴ FTC, "International Fellows Program," available at <https://www.ftc.gov/internationalfellows>.

³⁵ US SAFE WEB Act of 2006, 15 U.S.C. §57c-1.

³⁶ See Patricia Brink, Director of Civil Enforcement, Antitrust Division, U.S. Department of Justice, "International Cooperation: A View from the Trenches," Chicago, 2013, available at <http://www.justice.gov/atr/public/speeches/296073.pdf>. Participants were from the European Commission's Directorate General of Competition, the United Kingdom's Competition and Market Authority, and the Japan Fair Trade Commission.

3.1 Examples of merger cooperation in individual matters³⁷

While the majority of the U.S. Agencies' cooperation is with experienced competition agencies in developed countries, an increasing number of mergers are now being reviewed by both experienced and newer agencies. In recent years, the U.S. Agencies have cooperated with newer competition agencies in merger cases, including those in Brazil, China, Mexico, Singapore, South Africa, Turkey, Ukraine, and Venezuela. Case examples illustrate the increasing frequency and depth of cooperation with both more experienced and with newer competition agencies.

During its investigation of the proposed merger transaction between Western Digital and Hitachi Global Storage Technologies, the FTC cooperated with competition agencies in ten countries – Australia, Canada, China, the European Union, Japan, Mexico, New Zealand, Singapore, South Korea, and Turkey.³⁸ The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions. The parties granted waivers on a jurisdiction-by-jurisdiction basis. The cooperation covered a range of topics including timing, market definition, theories of harm, and remedies. Bilateral discussions with some agencies also covered coordinating remedies to address competitive concerns in multiple jurisdictions. Not all of the investigating agencies required remedies.³⁹

During its review of Thermo Fisher Scientific's acquisition of Life Technologies in 2013 and 2014, the FTC cooperated with nine competition agencies, including those in: Australia, Canada, China, the European Union, Japan, and Korea. Reviewing staffs discussed market definition, theories of harm, and analysis of competitive effects. The FTC coordinated its consideration of remedies with many of the agencies, including with the DG COMP, and both agencies approved the same divestiture buyer on the same day.⁴⁰ The FTC has cooperated closely with non-U.S. competition agencies on other recent matters, including Medtronic-Covidien, in which FTC staff cooperated with competition agencies in Canada, China, the European Union, Japan, and Mexico.⁴¹

In 2012, the DOJ cooperated closely with the DG COMP and the Canadian Competition Bureau (CCB) on their respective investigations of United Technologies Corporation's proposed

³⁷ The U.S. Agencies also cooperate on cartel and unilateral conduct matters, but provide examples of only merger cooperation in this paper.

³⁸ Press Release, FTC, "FTC Action Preserves Competition in the Market for Desktop Hard Disk Drives Used in Personal Computers," March 5, 2012, available at <http://www.ftc.gov/news-events/press-releases/2012/03/ftc-action-preserves-competition-market-desktop-hard-disk>.

³⁹ Remedies were required by the FTC, DG COMP, China's Ministry of Commerce, the Japanese Fair Trading Commission, and the Korean Fair Trade Commission.

⁴⁰ Press Release, FTC, "FTC Puts Conditions On Thermo Fisher Scientific Inc.'s Proposed Acquisition of Life Technologies Corporation," January 31, 2014, available at <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-thermo-fisher-scientific-incs-proposed>; Press Release, European Commission, "Mergers: Commission Approves General Electric as Purchaser Of Thermo Fisher's Divestment Businesses," 31 January 2014[4], available at http://europa.eu/rapid/press-release_ip-14-97_en.htm?locale=en.

⁴¹ Press Release, FTC, "FTC Puts Conditions on Medtronic's Proposed Acquisition of Covidien," Nov. 26, 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/11/ftc-puts-conditions-medtronics-proposed-acquisition-covidien>.

acquisition of Goodrich Corporation.⁴² The Division also discussed the transaction with other agencies, including the Federal Competition Commission in Mexico and the Council for Economic Defence (CADE) in Brazil. The \$18.4 billion merger was the largest in the history of the aircraft industry and involved several products. Cooperation, aided by waivers granted by the parties early in the investigation, was extensive. Calls between DOJ, DG COMP, and CCB occurred weekly, moving to almost daily and involved discussions of remedies and settlement terms. DOJ staff reviewed commitments obtained by the DG COMP to ensure that DOJ's relief would not impose conflicting remedies. The close collaboration between CCB, DOJ, and DG COMP enabled CCB to publicly state that it did not need to craft its own remedies because those achieved by the Division and the DG COMP resolved its concerns.⁴³ Coordination between DOJ and DG COMP went beyond the divestiture assets themselves – the agencies required the parties to coordinate all assets in the divestiture package, and also the optional supply and transition services agreements to ensure consistency. DOJ and DG COMP worked together to review and approve the acquirers of the assets required to be divested, and continued to work together on the implementation of the remedies, including coordinating on the selection of the monitor/trustee. The three agencies made announcements about the outcome of their investigations on the same day.⁴⁴

In 2014, DOJ reviewed Continental AG's proposed acquisition of Veyance Technologies for \$1.8 billion. As proposed, the acquisition would have left two dominant firms in the market for commercial vehicle air springs. The Division cooperated with the CCB, Brazil's CADE, and Mexico's Federal Competition Commission. Aided by waivers, the agencies' cooperation included frequent calls between our staff and the staffs of the other three agencies. Market conditions were similar in the U.S., Canada, and Mexico and the agencies' concerns centered on commercial vehicle air springs and barrier hose. With regard to commercial vehicle air springs, DOJ required a divestiture of a plant in Mexico and R&D, engineering and administrative assets in the U.S., as well as other tangible and intangible assets. DOJ also had concerns about barrier hose, which the parties alleviated by waiving exclusivity requirements that would have otherwise resulted in a loss of competition.⁴⁵ Mexico shared our concerns in air springs, which were resolved by the divestitures, and in barrier hose, which were resolved by the waiver of exclusivity requirements.⁴⁶ Canada took into consideration and relied upon the DOJ's remedy

⁴² Press Release, U.S. Dep't of Justice, "Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with its Acquisition of Goodrich Corporation," July 26, 2012, *available at* http://www.justice.gov/atr/public/press_releases/2012/285420.htm.

⁴³ Press Release, CCB, "Competition Bureau Statement Regarding United Technology Corporation's Acquisition of Goodrich Corporation," July 26, 2012, *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

⁴⁴ *Supra* at n. 42, 43; Press Release, European Commission, "Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions," July 26, 2012, *available at* http://europa.eu/rapid/press-release_IP-12-858_en.htm.

⁴⁵ Press Release, U.S. Dep't of Justice, "Justice Department Requires Divestiture of Commercial Air Springs Business in Connection with Continental AG Acquisition of Veyance Technologies, Inc.," Dec. 11, 2014, *available at* http://www.justice.gov/atr/public/press_releases/2014/310440.htm.

⁴⁶ Press Release, COFECE, "COFECE Grants Conditional Approval of the Continental Veyance Merger," Dec. 21, 2014, *available at* https://www.cofece.mx/cofeca/ingles/images/ingles/press_release/COFECE-029-2014.pdf

and closed its investigation.⁴⁷ Market conditions were different in Brazil: concerns related to commercial vehicle air springs, where the remedy required mirrored that achieved in the U.S., and also steel cord conveyer belts, with regard to which Brazil required the sale of a plant in Brazil.⁴⁸

4. Looking Ahead

International case cooperation will continue to be important as the number of agencies concurrently reviewing the same merger transactions increases. Multilateral and bilateral relationships, experience sharing, and the work already developed by international organizations and agencies with more extensive cooperation experience can serve as important resources for newer agencies as they begin to cooperate in merger and non-merger investigations.

In the coming years, competition agencies may wish to continue to examine the most beneficial ways to cooperate. Part of this examination may include a better understanding of any limitations on cooperation and tools for overcoming them, *e.g.*, how agencies can cooperate given confidentiality protections and limits on the exchange of confidential information.

The U.S. Agencies look forward to working with others, including through multilateral fora, to ensure effective cooperation the international competition community further develops informal and practical approaches to cooperation.

⁴⁷ Press Release, CCB, “Competition Bureau Statement Regarding the Acquisition by Continental of Veyance,” Dec. 11, 2014, *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03861.html>.

⁴⁸ Press Release, CADE, “Veyance Acquisition by Continental is Approved by CADE,” Jan. 29, 2015, *available at* <http://www.cade.gov.br/Default.aspx?2114e236cf45db27f34112223012>.