US-EC cooperation in merger enforcement

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The recent clash between the European Commission and the US antitrust enforcement agencies over the high-profile GE/Honeywell merger raised public awareness about the regulatory challenges that companies face when doing business in a global environment. Some 90 jurisdictions with very different economic environments have antitrust laws, and about 20 more countries are in the process of enacting their own. While many of these regulations are inspired by the EC and US antitrust regimes, it is becoming increasingly difficult for companies to predict the way a potential merger or acquisition will be evaluated in this multi-jurisdictional context.

Introduction

The public and private concerns raised in the aftermath of the conflicting US and European decisions in GE/Honeywell are similar to those that arose in 1997, when the European Commission threatened to veto the merger between Boeing and McDonnell Douglas after the US Federal Trade Commission had cleared the deal.

Of course, the potential for regulatory obstacles from abroad runs in both directions: in Air Liquide/BOC (2000), the Federal Trade Commission insisted on remedies that went beyond those required by the EC Commission, leading to the parties' decision to abandon the deal.[1]

This article provides an overview of the nearly 12 year history of cooperation between EC and US antitrust agencies in merger enforcement. It places special emphasis on the mechanisms that have been implemented in the merger context to facilitate coordination between the agencies.

Despite the GE/Honeywell dispute, there is every reason to expect US-EC merger cooperation to stay on course in ways that, if fully understood and properly navigated, will normally benefit companies participating in deals that have to be cleared on both sides of the Atlantic.

EC-US antitrust agreements: the general framework for international cooperation

Antitrust laws remain an essential instrument of national (or at EC level, supranational) sovereignty, just as taxation or employment policies. So far, there are no global treaties imposing common antitrust standards across jurisdictions. It should not be surprising, therefore, to find occasional differences.

Indeed, what is surprising is the extent to which, despite differences in nominal standards and procedures, different jurisdictions have achieved *de facto* convergence in merger analysis.

For example, while the substantive standard of review at EC level is one of dominance, the US applies a "substantial lessening of competition" test. Merger-specific efficiencies, which are specifically recognised under the US Horizontal Merger Guidelines, have not yet been expressly acknowledged as relevant under the EC test.

While EC merger law initially focused on single-firm dominance, earlier US merger cases paid closer attention to oligopoly concerns. Yet despite these differences, in most cases US and EU antitrust authorities have achieved convergence in their analyses and outcomes and have evolved their doctrines toward a common ground.

Prior to 1991, consultations between EC and US authorities took place on an informal basis, or under the broader framework of international organisations such as the OECD. The enactment of EC Council Regulation No 4064/89 on the control of concentrations between undertakings – the Merger Regulation – was a decisive factor in spurring the two jurisdictions to negotiate a more formal framework for cooperation in the early 1990s.

Antitrust authorities on both sides of the Atlantic realised that a steady stream of large mergers inevitably would fall under scrutiny by both jurisdictions.

The 1991 US-EC antitrust agreement focuses on notification, consultation and comity principles. Under the agreement, each authority must notify the other of activities that involve a merger or acquisition in which one or more of the parties to the transaction is incorporated under the laws of the other party or one of its states (US) or Member States (EC).

Other enforcement activities as to which notification will ordinarily be provided include those that are:

(i) relevant to the enforcement activities of the other party;
(ii) involve anticompetitive activities (other than a merger or acquisition);
(iii) involve conduct that was required or encouraged by the other party; or
(iv) involve remedies that would, in significant respects, require or prohibit conduct in the other party's territory.

In practical terms, this means that the US and EC agencies normally will be aware of instances in which they are examining the same or closely related transactions.

In 1998, the EC and the US entered into a second cooperation agreement, reinforcing the "positive comity" provisions of the 1991 bilateral agreement. The basic purpose of the 1998 agreement is to establish cooperative procedures through which competition authorities can avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally and are more effectively addressed in the other jurisdiction.

Although the agreement does not contemplate either side's ceding jurisdiction over a merger to the other, there have been several cases in which the US or EC authorities have relied on the other to ensure the effectiveness of remedies within their respective territories.

A third component of EC-US cooperation is a 1999 "administrative arrangement" - an exchange of letters in which the European Commission and the US agencies agreed, subject to qualifications, to facilitate reciprocal attendance at certain stages of their respective antitrust proceedings (see Participation in the decision making process, below).

In these instances, parties under investigation must consent to representatives of the other agency being present. Satisfactory assurances regarding confidentiality and the use of information must also be in place.

Cooperation in merger cases

EC-US coordination in merger cases has gradually expanded under the framework of the 1991 EC-US Agreement. The development of a better understanding

of each other's antitrust process has increasingly led to more closely co-ordinated investigations, for instance in the recent Exxon/Mobil, AOL/Time Warner, MCI WorldCom/Sprint and AstraZeneca/Novartis cases.

In year 2000 (the most recent for which figures are available), a total of 85 merger notifications were made by the EC Commission (59 in 1999) and 49 by the US agencies (39 in 1999).[2] In a further effort to develop a convergent framework for merger review, in 1999 the agencies formed an EC/US Mergers Working Group.

The initial focus for review was merger remedies, an area in which the EC later acknowledged that the Working Group's activities had influenced its 2000 Notice on remedies. After GE/Honeywell, the Group's agenda was expanded to address issues such as portfolio effects theories; process and timing; and the substantive standard for merger review.

It is worth noting that not all international transactions trigger extensive coordination between the US and European agencies. Coordination is, for self-evident reasons, less extensive if the transaction does not raise serious competitive concerns on both sides of the Atlantic, or if the US and EC markets are substantially different.

Where the agencies on both sides have antitrust concerns, however, even if the markets on each side of the Atlantic are different the agencies are likely to coordinate to ensure that their remedies complement or at least do not conflict with one another.

In practice, cooperation between the Antitrust Division of the Department of Justice or the Federal Trade Commission, on the US side, and the European Commission, may include any or all of the following components:

Notification between the agencies of the initiation of an investigation: under the 1991 agreement, the US authorities notify their EC counterpart when issuing a second request; when filing a complaint challenging the transaction; or before entering a consent decree. These notifications are intended to ensure that the EC's views are duly taken into account.

Conversely, the EC authorities will communicate with US agencies when notice of the transaction is published in the Official Journal, when initiating Phase II proceedings; and before making a final decision, so that the US views can be taken into consideration.

When the Commission receives a notification from the US, it will inform the EC Member States whose interests might be affected by the notified transaction.

It is important to note that these formal notifications are only the skeleton of the agencies' communications. In practice, in a matter in which there is any degree of coordination the agency staffs and, as appropriate, senior officials will be in contact regularly by phone, email or, in some instances, face-to-face.

Confidentiality issues and sharing of information: the agencies normally treat their communications with one another, and the information they receive from the other, as confidential. Moreover, the agencies are legally barred from disclosing to one another the information gathered from the notifying parties.

However, the interest of corporations in expediting merger investigations and in facilitating consistent outcomes commonly leads the parties to agree to let the agencies share the information the parties have supplied to them. These confidentiality waivers will generally be conditioned on each agency's agreeing to treat the information obtained from the other with the same degree of confidentiality as if it had been obtained directly from the parties under its own powers.

Even in cases in which companies have not waived their confidentiality rights, the agencies will discuss their assessment of the likely competitive effects of the merger or consult on information about the relevant markets to the extent they can without stepping across legal boundaries on disclosure.

Joint meetings: in cases that have involved a high degree of coordination, EC and US regulators have conducted joint meetings with the parties to the transaction and even with competitors and customers affected by the merger.

Joint meetings among the parties and the US and EC agencies are generally in addition to, rather than in place of, the individual meetings that each agency will normally conduct with the parties and their representatives.

Consultation: most of the day-to-day coordination takes place between the agencies' investigating staff and case handlers, with occasional contacts farther up the line. The greater the perceived risk of inconsistent outcomes, the more frequent the contact at more senior levels in the agencies and the farther up the chain the contacts extend.

The agencies will try to persuade one another toward convergent factual and analytical conclusions. They will seek to avoid public disagreements or conflicting outcomes that may undercut their own credibility or impose conflicting requirements on the parties.

GE/Honeywell is obviously a case in which these consultation mechanisms proved insufficient to bring together what were very different views on substantive issues. Some observers speculate that discussions between the US and EC antitrust agency heads that might, in other cases, have headed off the dispute were hampered by the timing of the case, in which key decision points fell during the interregnum

between the departure of the Clinton administration's political-level antitrust officials and the arrival of their Bush administration successors.

Participation in the decision making process: as previously indicated, the 1999 administrative arrangement encourages US and EC agencies to bring their overseas counterparts into critical stages of the merger review process, such as the EC Oral Hearings or the US "pitch meetings".

"Pitch meetings" are the meetings with the US agencies' senior decision makers at which the companies have a last opportunity to dissuade the agencies from challenging the transaction.

The administrative arrangement was invoked for the first time in 1999, with FTC officials attending the EC Commission Oral Hearing in the Air Liquide/BOC case. The following year, a Commission official attended for the first time an Antitrust Division "pitch meeting" in connection with the Division's investigation of the proposed MCI WorldCom/Sprint transaction.

Remedies: it is not uncommon for agencies to consult each other on potential remedies or to coordinate their negotiations over remedies with the notifying parties. The parties to the transaction will often promote this dialogue, in an effort to avoid inconsistent results that might impair the ability of the companies to compete in a global market, and to encourage the more permissive agency to persuade the other to loosen its demands.

On a number of occasions (e.g. Halliburton/Dresser; WorldCom/MCI), EC-US cooperation on remedies extended to the implementation phase, with one party relying on the greater capabilities of the other for monitoring the implementation of the remedies in its territory.

GE/Honeywell

The US$43bn GE/Honeywell deal was scrutinised by both the Antitrust Division of the US Department of Justice (DoJ), and the European Commission. It was only the second instance (the first one being the MCI WorldCom/Sprint deal, which was also challenged in the US by the DoJ) in which EC authorities prohibited an all-American transaction.

There is nothing uncommon about an antitrust authority scrutinising a transaction that involves only foreign-based companies. Cases such as Ciba-Geigy/Sandoz, Glaxo/Wellcome or Guiness/GrandMetropolitan provide recent examples of US agencies reviewing mergers that, while not involving US companies, had substantial effects in the US market.

The challenges of the modern economy, where companies operate at a worldwide scale, has led to antitrust agencies having to address the potential effects in their respective markets of mergers occurring elsewhere.

Historically, it was the US that led the way in asserting "effects-based" antitrust jurisdiction, long before the doctrine found its way into the laws and policies of other countries.

In GE/Honeywell, the EC and US authorities reached different conclusions because they evaluated differently the legal and economic implications of the transaction. US authorities focused on the horizontal aspects of the merger, subsequently ordering some divestitures in the overlap areas.

The European Commission, in what has been described as a conglomerate – or portfolio – effects theory, concluded that GE would leverage its strength in the market for aircraft engines to achieve dominance in the avionics market. In the European Commission's view, GE would gain consumers through the short-term lowering of prices, the offering of bundled products and the use of attractive financing packages.

The Commission concluded that in the longer run, GE's strengths in both the engines and avionics markets would lead its competitors to exit the market. The DoJ disagreed, arguing that the likely near-term consumer benefits should not be discarded based on predictions that competitors would throw in the towel rather than respond by improving their own competitive offerings.

Increased international cooperation in the aftermath of GE/Honeywell

GE/Honeywell was a rare recent instance in which bilateral cooperation and the sharing of fundamentally compatible antitrust goals proved insufficient to bring about convergent results. The case left a wake of uncertainty in the business community, and sparked a rare public spat between US and EC antitrust officials that shook confidence in the solidity of the cooperation edifice that had been painstakingly erected over the preceding decade.

Similar, but even more intense, concerns had arisen four years earlier when the Commission threatened to block the Boeing/McDonnell Douglas merger. Instead of drawing battle lines, though, antitrust officials on both sides took the episode as notice that their efforts toward convergence and consistency were vitally important; that they would only succeed if the were attentively managed; and that the cost of failure was substantial.

After the GE/Honeywell decision antitrust officials on both sides of the Atlantic again moved to try to bridge the gap. The agenda of the US-EU merger working group was shifted to focus on the procedural and substantive issues the case had spotlighted, and the frequency and intensity of the group's efforts

were ratcheted up.

US and European officials have focused on the issues repeatedly in their public remarks and have encouraged scrutiny and debate by the business and legal communities. The Commission has gone as far as to invite discussion of whether it should entirely replace the Merger Regulation's core dominance standard with a "substantial lessening of competition" standard like that of the Clayton Act in the US.[3]

The International Competition Network (ICN), actively promoted by EC and US antitrust authorities, was launched in October 2001. The broad objectives of the ICN are to develop a stable framework under which antitrust authorities from both developed and developing countries can address issues of common interest; and to promote international convergence and cooperation, both from at a substantive and procedural perspective.

The US has taken a lead role in one of the ICN's priority areas, that of advancing sound procedural and substantive rules for merger review. The ICN's Merger Review Working Group, chaired by US Deputy Assistant Attorney General William Kolasky, will develop best practice recommendations for reviewing multi-jurisdictional mergers, with particular emphasis on the procedural framework, the analytical structure for merger review; and investigative techniques for conducting effective merger review.

Conclusion

Mergers of large companies active in both the US and Europe will almost always be subject to antitrust reviews on both continents. Cooperation between the US and EC antitrust agencies in these reviews is the rule, not the exception; and companies have to understand and take account of that cooperation in planning and structuring their dealings with the agencies.

The differences in approach reflected in the agencies divergent responses to the GE/Honeywell merger have added a new dimension to the agencies' interaction; but that interaction will continue to grow and will affect the outcome in a growing number of cases.

Notes:

1 Unlike the GE/Honeywell and Boeing/McDonnell Douglas cases, though – where US and European antitrust regulators were looking at the same worldwide market – the FTC's concerns in Air Liquide/BOC were based on competition concerns that were specific to the US market.

2 2000 Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws, COM (2002) 45 final. 1999 Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America, COM (2000) 618 final.

3 Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745/6 final.

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