



COMMISSION OF THE EUROPEAN COMMUNITIES

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**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**

1 January 2002 to 31 December 2002

1. UNITED STATES

1.1. Introduction

On 23.09.1991 the Commission concluded an Agreement with the Government of the United States of America regarding the application of their competition laws¹ (the "1991 Agreement"), the aim of which is to promote co-operation between the competition authorities. By a joint decision of the Council and the Commission on 10.04.1995² the Agreement was approved and declared applicable from the date it was signed by the Commission.

On 04.06.1998 another agreement, which strengthens the positive comity provisions of the 1991 Agreement, entered into force³ (the "1998 Agreement"), after having been approved by a joint decision of the Council and the Commission of 29.05.1998.

On 08.10.1996 the Commission adopted the first report on the application of the 1991 Agreement for the period of 10.04.1995 to 30.06.1996⁴. The second report completes the 1996 calendar year, covering the period of 01.07.1996 to 31.12.1996⁵. The third report covers the whole calendar year 1997⁶, the fourth the year 1998⁷, the fifth the year 1999⁸, the sixth the year 2000⁹, and the seventh for the year 2001¹⁰. The current report concerns the calendar year from the 01.01.2002 to 31.12.2002. This report should be read in conjunction with the first report which sets out in detail the benefits, but also the limitations of this kind of co-operation.

In summary, the 1991 Agreement provides for:

- notification of cases being handled by the competition authorities of one Party, to the extent that these cases concern the important interests of the other Party (Article II), and exchange of information on general matters relating to the implementation of the competition rules (Article III);
- co-operation and co-ordination of the actions of both Parties' competition authorities (Article IV);
- a "traditional comity" procedure by virtue of which each Party undertakes to take into account the important interests of the other Party when it takes measures to enforce its competition rules (Article VI);

¹ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (OJ L 95, 27.4.1995, pp. 47 and 50)

² See OJ L 95, 27.4.1995, pp.45 and 46.

³ Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173, 18.6.1998, pp. 26–31.

⁴ Com(96) 479 final, see XXVIth Report on Competition Policy, pp. 299-311.

⁵ Com(97) 346 final, see XXVIth Report on Competition Policy, pp. 312-318.

⁶ Com(98) 510 final, see XXVIIth Report on Competition Policy, pp. 317-327.

⁷ Com(1999) 439 final, see XXVIIIth Report on Competition Policy, pp. 313-328.

⁸ Com(2000) 618 final, see XXIXth Report on Competition Policy, pp. 319-332.

⁹ Com(2001)45 final, see XXXth Report on Competition Policy, pp. 291-307.

¹⁰ Com(2002)505 final.

- a "positive comity" procedure by virtue of which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting Party (Article V).

In addition, the 1991 Agreement makes it clear that none of its provisions may be interpreted in a manner which is inconsistent with legislation in force in the European Union and the United States of America (Article IX). In particular, the competition authorities remain bound by their internal rules regarding the protection of the confidentiality of information gathered by them during their respective investigations (Article VIII).

The 1998 Agreement clarifies both the mechanics of the positive comity co-operation instrument, and the circumstances in which it can be availed of. In particular, it describes the conditions under which the requesting Party should normally suspend its own enforcement actions and make a referral.

1.2. EU/US cooperation during 2002

During 2002, the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). Contact between Commission officials and their counterparts at the two US agencies was frequent and intense. These contacts range from detailed case-related discussions to more general, sometimes theoretical, competition policy-related matters. Case related contacts usually take the form of regular telephone calls, e-mails, exchanges of documents, and other contacts between the case teams. High-level meetings and contacts also occur with reasonable frequency. The cooperation continues to be of considerable mutual benefit to both sides, in terms of enhancing the respective enforcement activity, avoiding unnecessary conflicts or inconsistencies between those enforcement activities, and in terms of better understanding each other's competition policy regimes.

1.2.1. Merger cases

In line with the overall economic climate the number of transnational mergers decreased in the year 2002. Nevertheless, the year 2002 saw a continued good cooperation in those transactions notified to both the Commission and the US antitrust agencies. With regard to the investigation of these proposed mergers, staff-level contacts between DG Competition's Merger Task Force, on the one hand, and the US DoJ and FTC, on the other, take place on a very frequent basis. Cooperation is most effective where the parties involved agree to permit the EU and US authorities to share the information they provide by means of a waiver which now frequently occurs.

In the *Solvay/Ausimont* case, a merger in the chemicals industry, the Commission and the US Federal Trade Commission fully and intensely cooperated not only with respect to the substantive assessment of the case but also to the suitability of the remedies with contacts occurring on a more or less daily basis. In some instances, three-way (EU Commission-US FTC-merging parties) telephone conferences were conducted. The same is true for the analysis of Bayer's acquisition of Aventis Crop Science (case *Bayer/Aventis*). Again, cooperation was particularly intensive in relation to the various remedies proposed by the merging parties to address the agencies' common concerns in a multiplicity of markets. In this case, there was also three-way communication, including the Canadian Competition Bureau. Both operations were finally approved subject to undertakings. In the analysis of *P/O Princess/Carnival*, the cruise line merger, the Commission's and FTC's staff were in close

and frequent contact throughout the investigation, much of the discussion was focused on issues of market definition. The operation was approved by the Commission and not challenged by the FTC.

1.2.2. Non-merger cases

During the course of the year there was also frequent contacts in a number of non-merger cases. In the *Microsoft* case, the Commission and the US DoJ kept each other informed about the status of their respective investigations. Bilateral cooperation between the Commission and the US DoJ was particularly intensified in cartel cases: numerous contacts took place between officials of the Commission's cartel units and their counterparts at the DoJ. The exchanges of information on particular cases, within the limits of the existing provisions on confidentiality, were most frequent, but discussions also concerned policy issues. There were 15 Commission investigations for which effective co-operation took place. Most contacts were established via telephone and e-mail, but in some instances meetings were held. Many of the case related contacts took place as a result of simultaneous applications for immunity in the US and the EC. Furthermore, in a number of instances, co-ordinated enforcement actions took place in the US and the European Union, whereby the agencies tried to ensure that the time lapse between the start of the respective actions was as short as possible. General consultations took place on the application of the respective leniency policies of both agencies. Another important issue which was discussed with the Department of Justice was the discovery in US civil litigation of evidence submitted to cartel authorities. The Commission intervened in three US civil trials in order to protect written information submitted in the framework of the Commission's leniency policy vis-à-vis such "discovery". Those interventions were intended to safeguard the integrity of the Commission's leniency policy, and were not made in support of any of the parties in such civil procedures.

1.3. High-level contacts

There were numerous high-level bilateral contacts between the Commission and the relevant US authorities during the course of 2002. On 23 July 2002 Commissioner Mario Monti met in Brussels the heads of the US and antitrust agencies, Assistant Attorney General Charles James, and Chairman Timothy Muris of the Federal Trade Commission for the annual bilateral EU/US meeting.

1.4. EU/US Working Groups

The work of the joint EU/US Working Groups continued. The activities of the existing EU/US Mergers Working Group were expanded and work intensified. DG COMP agreed with the US agencies that the Working Group should consist of a number of sub-groups. One sub-group has been dealing with procedural issues and two other sub-groups with substantive issues (one with conglomerate aspects of mergers, and another with the role of efficiencies in merger control analysis). The fruitful discussion on remedies also continued.

To date, work has been completed in the sub-groups on procedural issues and on conglomerate aspects of mergers. In each of these sub-groups, a series of video-conferences was conducted, involving presentations and discussions of each other's policy approach and of the lessons learned from the review of mergers. The officials involved also made a visit to each other's agencies, in February (meetings in Brussels for the procedural sub-group) and in June (meetings in Washington for the conglomerates sub-group).

Work in the sub-group dealing with efficiencies in merger control is still in progress. The objective of the sub-group on efficiencies is to discuss the consideration to be given to efficiencies in merger control analysis. Work in the sub-group commenced in August 2002, and was ongoing at the end of 2002.

Best practices on EU/US cooperation in merger cases.

On 30 October 2002, Commissioner Monti with his US counterparts, Timothy Muris, Chairman of the U.S. Federal Trade Commission and Charles James, US Assistant Attorney-General for Antitrust issued a set of best practices on co-operation in reviewing mergers that require approval on both sides of the Atlantic, with a view to minimising the risk of divergent outcomes, and to enhancing the good relationship developed over the last decade. They result from the deliberations of the procedures sub-group of the EU-US Merger Working Group, which brought together experienced officials from the three agencies, and which had been closely studying how the effectiveness of EU-US cooperation in merger cases might be further improved.

The best practices put in place a more structured basis for co-operation in reviews of individual merger cases. The best practices recognise that cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel. Merging companies will therefore be offered the possibility of meeting at an early stage with the agencies to discuss timing issues. Companies are also encouraged to permit the agencies to exchange information which they have submitted during the course of an investigation and, where appropriate, to allow joint EU/US interviews of the companies concerned. The practices moreover designate key points in the respective EU and US merger investigations when it may be appropriate for direct contacts to occur between senior officials on both sides.

At the occasion of the bilateral meeting of 23 July 2002 both sides agreed to set up a working group on intellectual property rights issues. Work started in November 2002.

1.5. Statistical information

a) Number of cases notified by the Commission and by the US authorities

There was a total of 63 formal notifications made by the Commission during the period between 1 January 2002 and 31 December 2002. The cases are divided into merger and non-merger cases and are listed in **Annex 1**.

The Commission received a total of 44 formal notifications from the US authorities during the same period. A list of these cases is found in **Annex 2**, again broken down into merger and non-merger cases.

Merger cases made up the majority of all notifications in both directions. There were 56 merger notifications made by the Commission and 27 by the US authorities.

The figures given represent the number of cases in which one (or more) notifications took place and not the total number of individual notifications. Under Article II of the Agreement, notifications may be made at various stages of the procedure and so more than one notification may be made concerning the same case.

b) Notifications by the Commission to Member States

The text of the interpretative letter sent by the European Communities to the US as well as the Statement on Transparency made by the Commission to the Council on 10 April 1995, provides that the Commission, after notice to the US Competition authorities, will inform the Member State or Member States, whose interests are affected, of the notifications sent to it by the US antitrust authorities. Thus, when notifications are received from the US authorities, they are forwarded immediately to the relevant sections in DG Competition and at the same time copies are sent to the Member States, if any, whose interests are affected. Equally, at the same time that DG Competition makes notifications to the US authorities, copies are sent to the Member State(s) whose interests are affected.

1.6. Conclusions

2002 witnessed a further intensification of EU/US cooperation in all areas of competition law enforcement. The further increase of cooperation in 2002 with respect to the combating of global cartels is noteworthy, also the authorities on the two sides of the Atlantic are taking increasingly convergent approaches to the identification and implementation of remedies, and to post-merger remedy compliance monitoring. The Commission, DoJ and FTC also continued to maintain an ongoing dialogue on general competition policy/enforcement issues of common concern.

2. CANADA

2.1. Introduction

The EU/Canada Competition Co-operation Agreement¹¹ is designed to facilitate cooperation between the European Communities and Canada with respect to the enforcement of their respective competition rules. The agreement was signed at the EU/Canada Summit in Bonn on 17 June 1999 and entered into force at signature.

The Agreement provides for, among other things: (i) reciprocal notification of enforcement activities by either competition authority, where such activities may affect the important interests of the other party; (ii) one competition authority rendering assistance to the competition authority of the other party in its enforcement activities; (iii) coordination by the two authorities of their enforcement activities; (iv) requests by a party that the competition authority of the other party take enforcement action (positive comity); (v) one party to take into account the important interests of the other party in the course of its enforcement activities (traditional comity); and (vi) the exchange of information between the parties, subject to applicable domestic laws to protect confidential information. The report on cooperation between 17. 06.1999 and 31. 12. 2000 was published together with the sixth report on cooperation with the United States,¹² the seventh report covered the period from 01.01.2001 to 31.12.2001.¹³ The current report concerns the calendar year from 01.01.2002 to 31.12.2002.

2.2. Cooperation

An increasing number of cases is being examined by the competition authorities on both sides resulting in increased and enhanced cooperation. Contacts between the Commission and the Canadian Competition Bureau have been frequent and fruitful. Discussions have concerned both case related issues, and more general policy issues. Case related contacts usually take the form of telephone calls, e-mails, exchanges of documents, and other contacts between the case teams. Case related contacts comprised all areas of competition law enforcement. Particularly intensive contact took place in the *Bayer/Aventis* merger case, where there was also three-way communication including the US authorities. There was also some contact with respect to the *Pfizer/Pharmacia* merger case. Cooperation and coordination efforts in cartel cases continued as well.

At the occasion of two bilateral meetings of the merger and cartel units from the respective authorities policy related issues specific to their areas of enforcement were discussed. Furthermore, for the first time in 2002 a staff exchange for a period of six months was organised and an official from the Commission and one from the Competition Bureau were seconded to the other agency. Each exchange officer took

¹¹ Agreement between the European Communities and the Government of Canada regarding the application of the competition laws OJ L 175, 10.7.1999, p. 50.

¹² Com(2001)45 final, see XXXth Report on Competition Policy, pp. 291-307.

¹³ Com (2002) 505 final.

on the responsibilities of a regular case officer in the host jurisdiction involving the investigation and analysis of merger cases.

2.3. Statistical information

a) Number of cases notified by the Commission and by the Canadian Competition Bureau

There was a total of 5 formal notifications made by the Commission during the period between 1 January 2002 and 31 December 2002 (**Annex 3**). The Commission received 9 formal notifications from the Canadian Competition Bureau (CCB) in 2002 with respect to 5 cases (**Annex 4**).

b) Notifications by the Commission to Member States

As foreseen in the agreement, the Commission has informed the Member State or Member States, whose interests are affected, of the notifications sent to it by the Canadian Competition Bureau. Thus, when notifications are received from the Competition Bureau, they are forwarded immediately to the relevant sections in DG Competition and at the same time copies are sent to the Member States, if any, whose interests are affected. Equally, at the same time that DG Competition makes notifications to the Competition Bureau, copies are sent to the Member State(s) whose interests are affected.

2.4. Conclusion

The Cooperation Agreement has led to a closer relationship between the Commission and the Canadian Competition Bureau, as well as to a greater understanding of each other's competition policy. An increasing number of cases are being examined by both competition authorities, and there is consequently a growing recognition of the importance of coordinating enforcement activities to the extent that this is considered mutually beneficial by both parties and of the necessity of avoiding conflicting decisions. The Commission and the Canadian Competition Bureau also continued to maintain an ongoing dialogue on general competition policy/enforcement issues of common concern.

ANNEX 1¹⁴

Notification by the European Commission to the US Authorities

01.01.2002 –31.12.2002

MERGER CASES

1	COMP.M.2609	Hewlett Packard/Compaq
2	COMP.M.2666	Berkshire Hathaway/Fruit of the Loom
3	COMP.M.2544	Masterfoods/Royal Canin
4	COMP.M.2693	ADM/ACTI
5	COMP.M.2665	Johnson Professional Holdings/Diversey Lever
6	COMP.M.2734	Sanmina/SCI Corporation/Alcatel
7	COMP.M.2720	Alcoa/Elkem
8	COMP.M.2681	Conoco/Phillips Petroleum
9	COMP.M.2672	SAS/Spanair
10	COMP.M.2726	KPN/E-Plus
11	COMP.M.2705	EnerSys/Invensys (ESB)
12	COMP.M.2706	Carnival Corporation / P&O Princess
13	COMP.M.2738	GEES/Union
14	COMP.M.2780	General Electric/ENRON Wind Turbine Business
15	COMP.M.2800	Brack Capital/Haslemere
16	COMP.M.2815	Sanmina-SCI-Hewlett Packard
17	COMP.M.2823	Bank One Corporation/Howaldtswerke-Deutsche Werft AG
18	COMP.M.2785	Publicis/Bcom3

¹⁴ Due to confidentiality requirements or to protect the secrecy of ongoing investigations, this list names only those investigations or cases which have been made public

19	COMP.M.2841	TXU-Braunschweiger Versorgungs AG
20	COMP.M.2832	General Motors/Daewoo Motors
21	COMP.M.2891	CD&R Fund VI Limited/Brake Bros. Plc.
22	COMP.M.2890	Edf/Seeboard
23	COMP.M.2860	Lehman Brothers/Haslemere
24	COMP.M.2882	TEREX/DEMAG
25	COMP.M.2920	Outokumpu Oy/Lennox International Inc.
26	COMP.M.2930	KKR/Demag Holding/Siemens Businesses
27	COMP.M.2915	DLJ Capital Funding Inc./Hamsard-Bowater
28	COMP.M.2934	Prudential Financial/Sal. Oppenheim
29	COMP.M.2901	Magna/Donnelly
30	COMP.M.2946	IBM/PwC Consulting
31	COMP.M.2874	StarCore LLC
32	COMP.M.2886	Bunge/Cereol
33	COMP.M.2781	Northrop Grumman/TRW
34	COMP.M.2928	Alcoa/Fairchild Fastener Business
35	COMP.M.2917	Wendel-KKR/Legrand
36	COMP.M.2940	TPG Advisors III/Goldman Sachs/Bain Capital Investors/ Burger King
37	COMP.M.2965	Staples Inc. / Guilbert SA
38	COMP.M.2867	UPM-Kymmene/Morgan Adhesives
39	COMP.M.2939	JCI/Bosch/VB Autobatterien JV
40	COMP.M.2968	Jabil/Philips Contract Manufacturing Services
41	COMP.M.2970	GE/ABB Structured Finance
41	COMP.M.2996	RTL/CNN/Time Warner/N-TV
42	COMP.M.2975	Aon Jauch & Hübner / Siemens / JV

43	COMP.M.2922	Pfizer/Pharmacia
44	COMP.M.3007	EON/TXU Europe Group
45	COMP.M.3025	Bain Capital/Dor Chemicals/Trespaphan JV
46	COMP.M.3024	Bain Capital/Rhodia
47	COMP.M.2980	Cargill/AOP
48	COMP.M.3042	Sony/Philips/InterTrust
49	COMP.M.3045	Masco/Hansgrohe
50	COMP.M.3027	State Street Corp./Deutsche Bank Global Securities
51	COMP.M.3012	Tebodin/Lockwood Greene
52	COMP.M.2993	Carlyle/QinetiQ
53	COMP.M.3041	Credit Suisse/Safilo
54	COMP.M.3011	Timken/Torrington
55	COMP.M.3030	Eaton/Delta
56	COMP.M.2874	Jabil/Alcatel

NON – MERGER CASES

1	COMP.A.38300	PO/Pay-TV in France
2	COMP.F-1/138.153	Stichting Sanquin Boedvoorziening/ Hoffmann-LaRoche & Chiron Corporation
3	COMP.38427	PO Pay Television Film Output Agreements
4	COMP.F-1/38372	NBA/Chiron + Hoffmann-La Roche + Diagnostics Limited
5	--	Rubber Chemicals
6	COMP.36816/D3	Source/IMS
7	COMP.37055/D3	NDC/IMS – Information

ANNEX 2

Notification by the US Authorities to the European Commission

01.01.2002 –31.12.2002

MERGER CASES

1	FAG Kugelfischer AG / INA-Holdings
2	Jupiter Media Metrix, Inc. / NetRatings
3	Holm Industries / Industrie Ilpea S.p.A.
4	P&O Princess Cruises plc. / Royal Caribbean Cruises Ltd. / Carnival Corp.
5	Ralston Purina Company / Nestle S.A.
6	Danaher Corporation (« Danaher ») / Pennon Group PLC (« Pennon »)
7	The Seagram Company/Diageo Plc./Pernod ricard S.A.
8	Agora S.p.A./Ausimont S.p.A.
9	Deutsche Gelatine-Fabriken Stoess / Leiner Davis Gelatin Corp.
10	*
11	Bayer A.G./Sun Chemical Corporation/Dainippon Ink and Chemicals Inc.
12	US Steel Corp./Bethlehem Steel Corp./Wheeling-Pittsburgh Steel Corp./National Steel Corp.
13	Aggregate Industries Plc.UK/Wakefield Materials Co.US
14	Hyprotech Ltd./Aspen Technology Inc.
15	Haarman & Reimer/EQT Northern Europe Private Equity Fonds
16	ICAP Plc./BrokerTec Global L.L.C.
17	Tibco software Inc./Talarian Corp.
18	Pfizer/Pharmacia
19	Siemens/Dräger
20	ICAP Plc./BrokerTec Global L.L.C.

21	*
22	*
23	*
24	*
25	UPM-Kymmene Oyi/Bemis Corporation
26	Hitachi IBM
27	Timken/Torrington

NON-MERGER CASES

1	*
2	*
3	Elf Atochem S.A. - (MCAA)
4	*
5	Osborne/Feldman – Stamp Dealing
6	Deutsche Bank AG/Reuters America Inc./Atriax LLC
7	Carbon Cathode Block
8	*
9	Hunter Douglas Companies
10	‘MCAA’ – J.Jourdan
11	*
12	Carbon Cathode Block
13	*
14	*
15	Polyester Staple-Arteva Specialties S.a.r.l.(KoSa)
16	Carbon Brushes – Morganite Inc./The Morgan Crucible Co.Plc.
17	*

ANNEX 3¹⁵

Notification by the European Commission to the Canadian Authorities

01.01.2002 –31.12.2002

MERGER CASES

1	COMP.M 2652	Blackstone/CDPQ/DeTeks NRW
2	COMP.M. 2643	Blackstone/CDPQ/DeTeks BW
3	COMP.M.3049	Alcan/PlexPac
4	COMP.M.2901	Magna/Donnelly

NON-MERGER CASES

1	--	Rubber chemicals
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ANNEX 4

Notification by the Canadian Authorities to the European Commission

01.01.2002 –31.12.2002

MERGER CASES

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¹⁵ Due to confidentiality requirements or to protect the secrecy of ongoing investigations, this list names only those investigations or cases which have been made public

NON-MERGER CASES

1	Graphite and Carbon Products
2	Methylglucamine
3	*
4	*
5	*