MERGER CASES IN THE REAL WORLD
A STUDY OF MERGER CONTROL PROCEDURES
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CONTROL PROCEDURES

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
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Foreword

The report, Merger Cases in the Real World - A Study of Merger Control Procedures, which analyses, through nine illustrative case studies, problems raised by multijurisdictional review of mergers was prepared by Prof. Richard Whish, University of London, and Prof. Diane Wood, formerly of the University of Chicago. Seven recommendations are drawn by the consultants to improve international co-operation and convergence in the area of merger control procedures.

This report is published under the responsibility of the Secretary-General.
### Abbreviations and Definitions

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<tr>
<td>ABA 1991</td>
<td>American Bar Association Special Committee on International Antitrust</td>
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<td>ARC</td>
<td>Advance Ruling Certificate (Canada)</td>
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<td>Bellamy and Roth</td>
<td>International Report by Bellamy and Roth on the Extraterritorial Application of Competition Law to International Mergers and Acquisitions, August 1992</td>
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<td>BKartA</td>
<td>Bundeskartellamt (Germany)</td>
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<td>Bureau</td>
<td>Bureau of Competition Policy (Canada)</td>
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<td>CA 1986</td>
<td>Competition Act 1986 (Canada)</td>
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<td>DGFT</td>
<td>Director General of Fair Trading (UK)</td>
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<td>DGIV</td>
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<td>Director</td>
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<td>DOJ</td>
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<td>DTI</td>
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<td>French Ministry</td>
<td>Ministère de l’Économie, des Finances et du Budget</td>
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<td>French Ordinance</td>
<td>Ordinance No. 86-1242 of 1 December 1986</td>
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<td>MMC</td>
<td>Monopolies and Mergers Commission (UK)</td>
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<td>MTF</td>
<td>Mergers Task Force (EC)</td>
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<td>1986 OECD Recommendation</td>
<td>OECD Recommendation concerning Co-operation on Restrictive Business Practices</td>
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<td>OFT</td>
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<td>Protocol</td>
<td>Protocol for Coordinating Federal-State Merger Probes (US)</td>
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<td>Tribunal</td>
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<td>US/EC Agreement</td>
<td>Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws of 24 September 1991</td>
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Preface by the Committee
on Competition Law and Policy

The report, *Merger Cases in the Real World - A Study of Merger Control Procedures*, has been prepared for the Committee by Prof. Richard Whish, University of London and Prof. Diane Wood, formerly of the University of Chicago, in response to a mandate agreed by the Committee on Competition Law and Policy in November 1991. The terms of reference laid down by the Committee were:

"i) to review procedures employed by the Member countries with respect to the pre-merger review and regulatory approval of mergers and other concentrations;

ii) to identify areas of procedural difference that impede cooperation among Member countries and add unnecessary regulatory costs to firms or enforcement agencies in the merger process;

iii) to identify areas of procedural convergence and cooperation consistent with regulatory goals of individual Member countries."

The study consists essentially of nine case studies in which two or more different national authorities reviewed a single transaction. These cases were chosen to be illustrative of the problems raised by multi-jurisdictional review of mergers and were conducted by means of interviews with the parties to the transactions, their legal advisers as well as the competition agencies involved. For reasons of confidentiality, the information on the cases is restricted to facts that were publicly available or that the parties were free to make public. In addition, interviews were conducted with experienced international lawyers and with representatives of the business community to gather their views on the subject of the study.

The consultants make a total of seven recommendations designed to improve international cooperation and convergence in the area of merger control procedures.
The report also contains seven appendices, one of which - Appendix 6 - was prepared by the Secretariat. It contains a summary of existing procedures for merger control in force in OECD countries.

The Committee would like to acknowledge the financial contributions made by Canada, the United States and the European Commission to the carrying out of the study.

In order to encourage debate about these issues the CLP Committee recommends that the study should be derestricted by the Secretary-General, on the understanding that the views contained in the study represent those of the authors only and do not necessarily reflect those of the OECD or of its Member Governments. The Committee intends to give further consideration to these recommendations.
Chapter I

Introduction

A. Justification for study

Competition enforcement agencies and the business community alike have been aware for many years of the regulatory problems created by transnational mergers, acquisitions, and joint ventures (hereinafter referred to collectively as mergers unless the context requires otherwise). In brief, those problems arise because a single international merger frequently falls within the jurisdictional and substantive scope of more than one State’s law (including, for these purposes, the law of the European Economic Community and potentially other regional laws). From the point of view of regulatory authorities, this can have undesirable consequences, due to factors such as disagreements over the proper scope of jurisdiction, frustration in efforts to collect information located within another State, different opinions about the proper remedy, and, perhaps most importantly, policy differences about the appropriate regulatory response. From the point of view of the business community, the consequences can be equally undesirable: the multiplicity of jurisdictions leads to greater uncertainty over the legality of an arrangement, simply because more than one approval is formally or practically necessary; it may lead to conflicting resolutions, where one authority approves and another blocks the same deal, often forcing the business enterprises to respond to the most restrictive regime; and, to a certain extent, it may lead to wasteful duplication of effort.

The OECD has been actively involved in efforts to address these problems for many years. In 1979, it adopted a Council Recommendation Concerning Co-Operation Between Member Countries on Restrictive Business Practices Affecting International Trade, calling for notifications, exchanges of information, consultations, and co-ordination of action whenever conflicts in enforcement action were possible. The 1979 Recommendation was revised in 1986. The 1986 Recommendation has had considerable success in encouraging Member Countries to make regular notifications to one another when appropriate. Furthermore, it
has strengthened the role of the OECD as a forum for discussion of matters of common interest in the area of merger control.

Notwithstanding the helpful effects of the 1986 Recommendation, the increasing level of trans-border mergers, coupled with the adoption of merger legislation by more and more States, has kept this problem at the forefront of concern. Respected private organisations as well as prominent government officials have called attention to the problems of multiple jurisdiction review in recent years. For example, in an August 1992 report prepared by C.W. Bellamy and P.M. Roth for the International League for Competition Law (ILIDC), a draft resolution calls for the harmonization of the forms and documents required for notification of mergers and acquisition according to a common model form with a view to greater efficiency of procedures and a reduction in transaction costs, and for various measures that would improve the co-ordination of enforcement procedures among the different national and regional authorities\(^1\). Similarly, the Special Committee on International Antitrust of the Section of Antitrust Law of the American Bar Association recommended, \textit{inter alia}, greater procedural harmonization for merger enforcement and more effective interagency co-operation mechanisms\(^2\).

Government officials such as Sir Leon Brittan, the former European Commissioner for Competition, Dr. Wolfgang Kartte, the former Director of the German Federal Cartel Office (BKarT), and James Rill, the former Assistant Attorney General for Antitrust in the United States, have all proposed various mechanisms for the increasing harmonization of antitrust procedures. The Government of Japan recognised the value in this approach in its first and second annual Structural Impediments Initiative Reports. Whatever the merit of various particular proposals or actions individual States have taken, it is plain that the issue of cross-border mergers has commanded the highest level of attention in many States. It was against this background that the OECD’s Committee on Competition Law and Policy, through its Working Party No. 3 on International Co-operation, decided to undertake a new kind of study on international merger enforcement. Rather than assuming either the existence or the magnitude of the types of problems outlined above, this study was to take a more empirical approach, to discover what the companies involved in these mergers were actually experiencing, and to see how effectively the co-operation process was working.

B. Scope of study

The Terms of Reference adopted by Working Party No. 3 identified three principal goals for the study:

\(i\) to review procedures employed by the Member countries with respect to the pre-merger review and regulatory approval of mergers and other concentrations;
ii) to identify areas of procedural difference that impede co-operation among Member countries and add unnecessary regulatory costs to firms or enforcement agencies in the merger process;

iii) to identify potential areas of procedural convergence and co-operation consistent with regulatory goals of individual Member countries.

Each of these goals was to be pursued through the study of particular cases in which two or more different authorities reviewed a single transaction. The Working Party initially identified eight cases for study, and later added a ninth. It engaged consultants for the purpose of developing a detailed account of the enforcement process in each case, both from the point of view of the parties and their attorneys, and from the point of view of the participating agencies. With the help of the concrete accounts of the nine cases, the consultants were to draw conclusions and make recommendations about the course of future process convergence and co-ordination among competition authorities.

The consultants were engaged in mid-July 1992 and were given the Terms of Reference attached to this Report as Appendix 3. They submitted an Interim Report which was considered by the Working Party at its meeting of 1 December 1992. After hearing the discussion and receiving instructions from the Working Party, the consultants have prepared this Final Report.

C. Methodology

The Terms of Reference, as modified at the meeting on 1 December 1992 identified the following nine cases for study:

Westinghouse Electric/Asea Brown Boveri joint venture
Société Parisienne d’Entreprises et de Participations/Square D acquisition
Matsushita/MCA acquisition
TNT/Canada Post et al. joint venture
Renault/Volvo joint venture
Fiat/Ford New Holland joint venture
Hoechst/Celanese acquisition
Coats Viyella/Tootal acquisition
Gillette/Wilkinson acquisition

It is important to note several things about this list of cases. First, it does not purport to be a scientific sampling of trans-border mergers over any particular period of time. It is merely an illustrative list of cases which, for a variety of reasons, it was feasible to study in this manner. Second, for reasons of business confidentiality as well as legal limitations on each enforcement authority, the
information collected was necessarily restricted to facts that were publicly available or that the relevant party was free to make public. Third, almost all represent closed transactions, some several years old, for which subsequent changes in procedure might have made a difference. Finally, a natural consequence of such a short list of cases is the omission from the study of a consideration of process convergence from the standpoint of many of the OECD Member Countries, which were not involved in these particular transactions.

On the other hand, there is remarkable variety in the nine transactions presented here. Some were friendly, some hostile; some involved standardized products, some specialised ones; some involved a great number of authorities, some just two. Thus, even bearing in mind the fact that this is not a scientific study, the list proved to be a good collection of illustrative examples.

In order to address some of the inevitable shortcomings of any selection of a small number of cases, the consultants supplemented their case-study work in two ways. First, they met with experienced international competition lawyers who offered additional insights based on their own practical experience in other matters. Second, they met with representatives of the business community and company officials from organisations not represented on the list, to gather their comments and reactions to the subject of the study. While in the end these sources could only add to the anecdotal evidence collected, it was revealing to see the extent to which a common pattern emerged, and where it did so (or did not do so).

D. Summary of findings and recommendations

i) Findings

a) Improved procedural co-operation in certain areas would be of significant benefit to the enforcement authorities. The most promising areas include (a) co-ordination of timetables, (b) a co-operative approach to remedy to the greatest extent possible under all relevant national or regional laws, and (c) the ability generally to discuss issues such as relevant market or method of analysis.

b) Procedural co-operation in other areas would not materially assist agencies. An indiscriminate or comprehensive exchange of investigative files would contain information of questionable relevance for the recipient agency and would impose an undue time burden on the sending agency. More targeted exchanges of information could be useful, if they were possible under the relevant confidentiality regime.

c) The business community would reap certain benefits from greater process convergence and inter-agency co-operation. Those benefits could include (a) more common timetables for review, (b) more
effective application of comity principles, especially on the issue of remedy, (c) for companies making standardized products, the reduction of duplicate or overlapping information requests, (d) improved transparency, to the extent that convergence and co-operation result in public documents such as the agreements and memoranda of understanding that already exist. In general, the smaller the transaction, the greater the potential benefits from greater co-ordination and process convergence, since there is a large fixed-cost element to each authority’s review process.

d) There are inherent limits on the benefits to businesses and their lawyers as long as substantive regimes remain different. However, improved co-operation will help the natural evolution toward a common understanding of competition law issues. As, and to the extent that, convergence of substantive standards occurs, the business community will benefit.

ii) Recommendations

Chapter IV makes some specific recommendations:

Recommendation 1  Increased general co-operation, in areas that could be specified in a protocol to the 1986 OECD Recommendation indicating the permissible types of co-operation for particular cases and otherwise expanding on the 1986 Recommendation, is desirable; encouragement might also be given to negotiation of further bilateral and multilateral agreements of the type described in Appendix 7 of this Report.

Recommendation 2  In some cases the idea of waiver by the parties of their confidentiality rights may be beneficial and could be encouraged.

Recommendation 3  Greater clarity is required as to the information that is to be regarded by agencies as confidential and that which is not.

Recommendation 4  Parties notifying a merger to a particular agency should be required, at the time of doing so, to indicate whether they have also notified any other agency; there could also be a requirement to provide information of any subsequent notification.

Recommendation 5  Information already in the public domain should be more efficiently distributed.
Recommendation 6  
Develop one or two model filing forms, which would request common information in a single format and use different country annexes as appropriate.

Recommendation 7  
Significant benefits would flow to the private sector from aligning notification requirements, although the achievement of these benefits would in many instances require legislative changes.
Chapter II

Case Studies

A. Westinghouse Electric - Asea Brown Boveri

1. Facts

a) Parties

Westinghouse Electric Corporation, 11 Stanwix Street, 6 Gateway Center, Pittsburgh, PA 15222, USA.

Westinghouse Canada Inc., 120 King Street West, Hamilton, Ontario L8P 3K2, Canada.

Transeлектричес Технологии Инку. (changed to Westinghouse Canada).

ABB Asea Brown Boveri Ltd., CH-8050 Zurich, Switzerland.

Asea Brown Boveri, Inc., 2975 Westchester Ave., Purchase, NY 10577, USA.

Asea Brown Boveri Inc., 10300 Henri-Bourassa Blvd. West, St. Laurent, Quebec H4S 1N6, Canada.

ABB Atom AG, Sweden.

b) Nature of the transaction

Westinghouse Electric and Asea Brown Boveri (ABB) entered into a number of joint ventures. Certain joint ventures were reviewed by Canada and the United States, on the one hand, and others by Germany, on the other.
i) Germany

German authorities were notified of the formulation of a new company, in the joint venture form, called ABB Westinghouse Nuclear Services, seated in the Netherlands. Both the cartel provisions and the merger provisions of the German Law Against Restraint of Competition were involved. ABB had 51 per cent and Westinghouse 49 per cent in the venture. The company was to hold shares of subsidiaries in Germany, Belgium, Switzerland, and Spain, which would themselves also need to be created. The venture would handle all of the nuclear service businesses, for both pressurized and boiling water systems, but not for high temperature systems. These would be brought first into the four subsidiaries, or into the holding company. The parent companies would withdraw from the business on the general European market and do this business through the joint venture. With respect to the rest of the world, nothing would change as between the parents.

Westinghouse had attempted to enter the German market with its nuclear services business, but this was difficult because of authorisation problems. Westinghouse, prior to the joint venture, was a relatively unimportant presence in Germany. There were large entry barriers for foreign companies, and Westinghouse was in danger of losing even its existing small part of the German market. ABB was already in Germany, and thus the ABB link allowed Westinghouse to increase its German presence. The difficulty of entering the German market is related largely to the reduction in the construction of new nuclear plants.

ii) United States

In the United States, two partnership joint ventures had been proposed between ABB and Westinghouse. The first would combine the United States electric power transmission and distribution businesses of ABB and Westinghouse, including their power transformer and converter transformer businesses, in a new joint venture company that would be 55 per cent owned by Westinghouse and 45 per cent owned by ABB. The other joint venture would combine the United States electric power generation equipment businesses of ABB and Westinghouse, including their steam turbine generator equipment and steam turbine generator service businesses, in a new joint venture company that would also be 55 per cent owned by Westinghouse and 45 per cent owned by ABB. The US lawyers were not aware of any German involvement, suggesting further that these were separate joint ventures.
iii) Canada

The transaction at issue in Canada was the same as the one at issue in the United States.

c) Regulatory authorities involved

i) Germany: Bundeskartellamt (BKartA)

ii) US Department of Justice

The merger was also notified to the Committee on Foreign Investment in the United States, known as CFIUS, pursuant to the Exon-Florio statute, but the President decided not to intervene.)

iii) Canadian Bureau of Competition Policy

iv) Not involved: Switzerland, Sweden. (ABB Asea Brown Boveri Ltd. is a Swiss- and Swedish-owned corporation.)

d) Relevant product market

i) Germany

The market included nuclear services, such as operations, inspections, repairs, maintenance, up-dating; various reactor techniques, including boiling water and pressurized water, and services for nuclear power plants with light water reactors in Europe. It excluded breeders, construction, development, as well as production and supplying for new plants. There was an advantage to offering services for both techniques (boiling water and pressurized water), because other firms in the market could do so, in particular, Siemens, which was the dominant firm in Germany. In addition, there were nine more suppliers serving the German market.

ii) United States

The complaint, stipulation, final judgment, and competitive impact statement filed in United States v Westinghouse Electric Corp. et al., Civ. Action No. 89-Civ-1032, S.D.N.Y., contain the following information about the product markets of concern to the US regulators. The complaint alleged that the sale of power transformers constituted a line of commerce and a relevant product market, into which successful entry was difficult because of the cost and time required to develop the necessary technology, to construct physical facilities, to assemble the necessary personnel, and to become a qualified source for domestic buyers (electric utilities). It also alleged that the manufacture of converter transformers
involved a distinct technology, and was thus a separate product market. Converter transformers are used in transmitting electricity over long distance transmission lines, and are used to connect synchronous transmission lines. In addition, the complaint alleged a reduction in competition in the market for steam turbine generator equipment, which faced entry barriers similar to those of transformers. Finally (and incidently closest to the market described by the German authorities), the complaint alleged that the sale of steam turbine generator service, for the repair of equipment involving the replacement or retrofitting of major components, or equipment modernisation efforts aimed at efficiency enhancements or life extensions, was affected by the joint ventures. Given this last market, it is difficult to conclude definitively that this was not the same case as the one reviewed by the BKartA; however, it is plainly true that neither side was aware of the other’s involvement or interest. By contrast, the US and Canadian authorities knew of one another’s reviews.

iii) Canada

The Director of Investigation and Research, in a press release announcing his decision to file an application before the Competition Tribunal for a remedial order, identified two particular product markets of concern. The first was for very large electric power transformers with a power rating greater than 400 MVA, for which ABB and Westinghouse were the only two manufacturers in Canada. The second was for large transformers rated between 40 MVA and 400 MVA, for which ABB, Westinghouse, and Federal Pioneer were the only manufacturers. In the reasons for the Consent Order dated 15 June 1989, furnished by the Competition Tribunal in the case, the Tribunal explained further that the products at issue are transformers primarily used by the utility companies to convert low voltage electricity produced by a generating unit to higher voltages that are more efficiently carried over transmission lines and to reduce the voltage at the other end in order to deliver electricity safely to the end users. The rating of a transformer is determinative of its use; for any specific application a customer would normally be unable to substitute a transformer with different specifications. Like the Director, the Tribunal broke the product market down into two groups, one covering the very large transformers, and the other the large transformers\(^3\).

e) Relevant geographic market

i) Germany

Germany was the principal geographic area considered, although there is an indication that Europe was also considered. Framatome, French company, was ahead of Siemens on a European-wide basis, and its ability to participate in the market was pertinent.
ii) United States

The materials filed in the Westinghouse Electric proceedings noted above allege only a United States market. In our interviews, there was some discussion about a North American market, but there is no indication that the US authorities took this broader view.

iii) Canada

The relevant geographic market was Canada. The remedy contained in the Consent Order, however, took into account the existence of the North American market for supplies into Canada, in a manner described more fully in g) below.

f) Issues of concern to each agency

In Canada and the United States, the concern was with the high concentrations in the product markets defined above that would be created by the joint venture. In Germany, the joint venture was reviewed under the mandatory provisions of the German law. However, in the end it appeared that it would help to create new competition in the nuclear services market, taking into account the structure of the German market.

g) Conclusion of proceedings

i) Germany

A note in the BKitA file indicates that the deal was never completed. Another duty to notify (post merger) would have been triggered at the time of completion. In any event, as noted as above, the BKitA was of the view that there were no substantive problems for the German market.

ii) United States

The Department of Justice filed a formal complaint against the joint ventures on 14 February 1989. On the same day, it filed a stipulation signed by all parties consenting to the entry of a final judgment in the action, and it filed the final judgment and the Competitive Impact Statement required by US law. The agreed judgment provided that (1) Westinghouse and ABB were enjoined for a period of 10 years from any combination that would join their steam turbine generator or steam turbine generator service businesses without the prior written approval of the Assistant Attorney General for the Antitrust Division; (2) ABB would divest certain transformer assets located in Wisconsin; (3) Westinghouse would sell or licence certain converter transformer and smoothing reactor
technology; and (4) Westinghouse agreed to amend its 1986 asset purchase agreement with General Electric Co., in such a way that General Electric would be able to resume the manufacture and sale of power transformers and to use intellectual property relating to power transformers. This judgment became final after the 60-day statutory waiting period provided in the Antitrust Procedures and Penalties Act, 15 USC §§ 16(b)-(h). [See 1989-1 Tr. Cas. (CCH) 68,607 (S.D.N.Y., 9 May 1989).]

iii) Canada

On 13 February 1989, the Director announced that he had concluded that the proposed acquisition by ABB of the electric power transmission and distribution business of Westinghouse Canada would likely result in a substantial lessening of competition in the market for large power transformers in Canada. On 25 April 1989, he filed an application with the Competition Tribunal for a consent order under s. 105 of the Competition Act. The Tribunal issued the requested order on 15 June 1989. Pursuant to the order, ABB was required to divest certain assets if and only if it was unable to obtain certain specified tariff remissions. With respect to certain products, the tariff remissions were to apply on an MFN (most favoured nation) basis; with respect to others, the obligation covered only imports originating in the United States. In addition, ABB provided a letter of undertaking to the Tribunal promising not to institute any dumping actions for a period of five years. Because the tariff remissions were obtained, the back-up remedy of divestiture was not needed. (See generally Director of Investigation and Research 1989 Ann. Rep. p. 15; 1990 Ann. Rep. pp. 17, 52; and 1991 Ann. Rep. p. 9.)

2. Process of investigation: Agencies’ perspective

a) Methods used to collect information

i) Germany

The joint venture for nuclear services was subject to mandatory premerger notification under German law. On 7 November 1989, the BKartA received the notification. The transaction was cleared within one month, without a major investigation.

ii) United States

Because these transactions were structured as partnerships, they did not fall within the HSR pre-merger notification requirements. Thus, the US Department of Justice used its powers under the Antitrust Civil Process Act, 15 USC § 1312, which provides that the Assistant Attorney General for the
Antitrust Division may issue Civil Investigative Demands ("CID")s to investigate possible violations. The provisions governing confidentiality of information are quite similar under the CID statute to those under HSR.

### iii) Canada

The transaction was notified to the Canadian authorities pursuant to Part IX of the Competition Act. Once a notification is made, the transaction may not be closed before the expiration of seven to 21 days (depending on whether a short-term or a long-form procedure is used). In this case, as noted above, the Director brought a proceeding before the Competition Tribunal for a remedial order.

### b) Actual inter-agency co-operation, if any

With respect to OECD-based notifications between Germany, on the one hand, and the United States and/or Canada, on the other, it appears that nothing was done. The BKartA considered that there were no significant problems on the German market, and thus that it was not likely to take any action affecting other countries’ interests. The parties did not offer any information that indicated foreign reviews. On the other side, neither the United States nor Canada was aware of any German interest.

With respect to the US - Canadian transaction, there was some formal contact. The Director of Operations in the Antitrust Division communicated with his Canadian counterpart, and there was some contact with the Chief of the investigating office (New York Field Office). Due to confidentiality restrictions, the agencies were not able to share with us the full content of these discussions.

The co-operation that occurred between the United States and Canada appears to have been limited to simple exchanges of information about the timing of proceedings, and the agencies had some knowledge of each other’s areas of substantive concern. The fact that the United States had to proceed by means of CID’s created timing problems, since the time limits imposed by HSR do not apply in a CID case. Thus, the overall process may have been somewhat longer than it would otherwise have been. Agency officials expressed the view that to the extent that unpredictability of timing creates costs for the parties and difficulty in co-ordination for the agencies, some improvements are at least imaginable. In addition, if in a particular case the best remedy involved divestiture of assets in another country, the benefits of co-operation would be plain.

No one indicated any need to seek information in Switzerland, the home of ABB’s parent. The Swiss Cartel Commission reported that it did not investigate the transaction. There is no evidence that the parties acted affirmatively to facilitate inter-agency contacts.
The fact that the transaction identified by the Working Party turned out, at best, to involve joint ventures with significantly different impacts in North America and Germany, and at worst, to involve completely separate deals, suggests that the degree of detail involved in inter-agency notifications may not be sufficient. A standard form for OECD notifications under the 1986 recommendation may help alleviate this type of problem.

3. **Process of investigation: Parties’ perspective**

   i) Did the parties know of inter-agency co-operation? Insufficient information.

   ii) Did they inform agencies? No, and these parties expressed the opinion that it is unrealistic to expect lawyers, who are serving as their clients’ advocates, to inform other agencies in all cases. As long as different substantive standards apply, and different agencies are primarily concerned only with their own national (or EC) markets, they believed that information sharing is not likely to help the parties’ position. To the contrary, it is likely to reduce the effectiveness of their advocacy. (We heard a wide spectrum of views on this question, ranging from this extreme to the opposite.)

4. **Costs**

   i) Germany

   The BKartA normally uses one staff person for its cases, and it indicated that this practice was followed here. The fee for companies varies according to the amount of work required, travel necessary, size of staff, the value (economic importance) of the project, and the turnover of the company. Objections to the fee level are possible, but in practice do not occur. See section 80 of the German Act Against Restraints of Competition. In some cases, the staff person might visit plants, observe production, or the like; in many everything can be done by telephone or correspondence from Berlin. Since this was a simple case, it apparently did not require expensive investigation techniques.

   ii) The United States

   Given the complexity of the product markets involved, the DOJ officials indicated that the costs of review were considerable: five attorneys, a paralegal, and four economists, were all required to review a great number of documents. Although there is no concrete information on the question of costs that might have been saved with greater co-ordination, it is interesting to note that the Canadian remedy relied on competition from US based products that would be
exported to Canada. Had the US remedy interfered in any way with these assumptions, clear problems from a lack of co-ordination could have arisen.

iii) Canada

The comment above on the interrelationship between the Canadian market and the US market applies here with equal force.

5. Strategies

The parties to the US-Canadian transaction indicated that multiple review was not a significant factor in this case from a strategic standpoint. They indicated that this was a transaction in which the legal costs were relatively low compared with the overall value of the deal, and thus the elimination of some cost would not have affected strategy materially.

B. Société Parisienne d’entreprises (Groupe Schneider)/Square D

1. Facts

a) Parties

SPEP (Groupe Schneider), 4 rue de Longchamp, 75116 Paris, France: major French manufacturer of electrical devices. Schneider had various subsidiaries including those in Germany (Merlin Gerin GmbH, Wickmann Energietechnik GmbH, Sarel GmbH, and Deutsche Télémécanique Electrique GmbH) and in Italy (Nuova Magrini Galileo Spa, Nuova Magrini Meridionale Spa, Vanossi Sud Spa and Télémécanique Spa).

Télémécanique, and Merlin Gerin. Télémécanique operated in both Europe and the United States. Merlin-Gerin, in the electrical distribution device market, had acquired the Canadian company Federal Pioneer Ltd., a major electrical distribution company in Canada. Merlin-Gerin wanted to sell electrical equipment in the United States, but had not done so to any significant degree prior to this transaction. Federal Pioneer (FPL) had no US market share, in part because of differences in standards.

Square D Co., 1415 S. Roselle Rd., Palatine, Illinois 60067, USA: manufacturer of circuit breakers and other electrical distribution products. Square D had subsidiaries in Germany (Square D Company, Deutschland GmbH and Ircon GmbH), and in Italy (Square D Italia Spa).

SQD Acquisition Co.

Federal Pioneer Ltd./La Cie Federal Pioneer Ltée (Canada)

Télémécanique Canada Ltd./Télémécanique Canada Ltée
b) Nature of the transaction

Although the parties ultimately came to a satisfactory agreement pursuant to which Groupe Schneider acquired the stock of Square D, it was basically a hostile take-over. Square D announced on 19 February 1991, that Schneider had proposed acquiring it for US$78 per share. (See The New York Times, 16 April 1991, late ed., sec. D, p. 1, col. 3.) On 28 February 1991, the Square D board of directors unanimously rejected the Schneider bid and revealed that it had filed an antitrust suit in the United States. In that private antitrust action, Square D alleged that Schneider had entered the North American market through acquisitions of a Canadian company and a Mexican company, and that it had already attempted unsuccessfully to acquire an American company, suggesting thereby that this was a horizontal combination that should be stopped. Schneider responded by making a hostile offer for Square D on 4 March. Square D continued to resist the offer, and on 28 March the federal court denied Schneider’s motion to dismiss the antitrust claims. [See Square D Co. v. Schneider S.A., 760 F. Supp. 362 (S.D.N.Y. 1991)]. On 15 April Schneider announced that 78.1 per cent of Square D’s shares had been tendered. On Sunday, 12 May 1991, Schneider agreed to raise its tender offer to US$88 per share, for a total value of US$2.23 billion. (See Chicago Tribune, 14 May 1991, Business Sec., p. 1). At that point, Square D dropped its opposition to the transaction.

c) Regulatory authorities involved

i) Canadian Bureau of Competition Policy

ii) United Kingdom Office of Fair Trading

iii) Irish Competition Authority

iv) Italian Competition Authority

v) US Department of Justice

vi) German Federal Cartel Office

Note: This transaction fell below the European Commission Merger Regulation thresholds.
d) Relevant product market

i) Canada

According to the news release of 17 September 1991, from the Bureau, the two relevant product markets were comprised of industrial control products and electrical distribution products, such as panel boards, circuit breakers, and related equipment. The release noted further that "while the individual products within these product groupings are application specific, they are generally sold as part of a system. . . . Due to the application specific nature of the products and the degree of regulatory control over their use, . . . consumers would not switch to other products in response to a significant non-transitory price increase."

ii) United Kingdom

Two markets were involved: (1) industrial controls, including motor starters, control units, limit switchers, and pressure and water controls, and (2) electrical distribution equipment, including molded case circuit breakers, certain panel boards, and switch gear.

iii) Ireland

No specific information available.

iv) Italy

Electricity distribution apparatus, industrial process control apparatus, non-break power units, and electrical engineering products.

v) United States

The US DOJ was concerned with a number of product markets in two large categories of products. The first category was industrial controls, and the second was electrical distribution equipment.

vi) Germany

The BKartA examined the German product markets for (1) electrical distribution equipment, (2) industrial controls, and (3) emergency current equipment.
e) Relevant geographic market

i) Canada

The relevant geographic market was found to be Canada. (See 1992 Annual Report of the Director for Investigation and Research at 10.) From the point of view of possible suppliers to Canada, the North American market was considered. In addition, the Background paper attached to the Director's news release of 17 September 1991, notes that "a significant amount of the available evidence collected indicated that the relevant geographic market was North America," due to factors such as the progressive removal of tariffs under the Canada-United States Free Trade Agreement, the on-going process of the harmonization of standards and electrical codes, and the rationalisation of North American production.

ii) United Kingdom

The OFT appears to have focused on the four or five firms serving the United Kingdom and thus presumably used the United Kingdom as the relevant geographic market.

iii) Ireland

No specific information available; presumably the focus was on Ireland as a whole.

iv) Italy

The Italian market. However, the Italian Anti-trust Authority mentioned in its opinion that there are many competitors including international corporations, and that market entry was easy, indicating again an awareness of supply-side flexibility.

v) United States

With respect to the market for industrial controls, the United States found that the geographic market was domestic (United States only); there was a horizontal overlap with Télémécanique. With respect to electrical distribution equipment, an issue existed as to whether the market was limited to the United States or was larger, including at least Canada and perhaps more. If the market included Canada (or more), the horizontal overlap covered Square D and Merlin Gerin, which owned Federal Pioneer. If the market was limited to the United States, the focus of the investigation was whether Schneider, through Merlin Gerin and Federal Pioneer, was an actual potential entrant or a toehold competitor.
in the sale of electrical distribution products in the United States. The principal issue requiring some kind of international co-operation (or at least awareness) related to the electrical distribution (ED) equipment markets. Federal Pioneer was the largest ED company in Canada, and Square D was one of the two others.

*vi) Germany*

The German market.

*f) Issues of concern to each agency*

*i) Canada*

With respect to industrial controls, the evidence indicated that the combined market shares of the parties in Canada did not exceed the threshold levels established in the Merger Enforcement Guidelines. For electrical distribution (ED) equipment, in contrast, the combined shares were significant, and this was therefore the focus of the investigation. Schneider already owned Federal Pioneer, a Canadian competitor of Square D in the manufacture and sale of ED products, and Merlin Gerin. The Director commenced a formal inquiry under s. 10 of the Competition Act on 18 April 1991. On 29 May 1991, he announced that Schneider and certain of its affiliates had provided undertakings to hold separate their Canadian operations from those of Square D until 13 September 1991, or earlier if the Director concluded they were no longer needed. Schneider also promised that it would not take actions in the United States towards completing the acquisition prior to that time. Ultimately, the Director did not challenge the acquisition before the Tribunal, in part because of strong remaining competition in Canada from firms such as Westinghouse Canada and Siemens Electric, and in part because of the likely entry into Canada of General Electric, which is one of the largest suppliers of ED equipment in the United States.

*ii) United Kingdom*

The element of state involvement in Groupe Schneider may have been of some interest to the UK authorities, as this was the period when the Lilley doctrine was being advanced.

*iii) Ireland*

No information available.
iv) Italy

The Italian authorities focused their attention on the products for which the combined market shares were quite high, such as electrical distribution equipment (15 per cent), non-break power units (17 per cent), electrical engineering products (25 per cent), and terminal distribution (15 per cent). In the end, however, they concluded that competition from other sources and the lack of entry barriers alleviated any concerns that might have arisen under the Italian law, and decided not to commence investigations pursuant to s. 16(4) of the Act. (See Ruling no. 70 of 24 April 1991, Ref. C74, Schneider v. Square D Corporation).

v) United States

The United States focused on the potential adverse competitive effects in the markets for different types of industrial controls and ED equipment. It was able to complete its inquiry in the industrial controls markets without regard to the potential effect of the transaction on the production and sale of industrial controls in other countries. The United States was able to obtain sufficient information from the parties and other domestic sources to review the transaction and analyse its potential effect in the industrial controls markets. The transaction’s effect on the electrical distribution equipment markets was the principal area for which foreign-based information, especially information in Canada, would have been useful. Questions existed about the interchangeability and potential interchangeability of devices manufactured for the United States with those manufactured for Canada; about the height of the entry barriers for this type of equipment; about the impact and pace of efforts to develop common operating standards for ED equipment in the two countries; and about the breadth of the geographic market (i.e. United States, North America, or broader).

vi) Germany

The BKartA examined the three German product markets identified above. It found that the parties participating in the merger had only insignificant market shares and a number of competitors, and thus that the transaction did not give rise to competitive concerns. The transaction was cleared on 5 May 1991.

g) Conclusion of proceedings

With respect to the different authorities involved, see the discussion in part f) above. Square D’s decision to accept Schneider’s sweetened offer brought to an end all the private litigation and private efforts to obtain review of the transaction. The agency proceedings operated on different timetables: the US DOJ cleared the transaction immediately before the deal was finally concluded. The New York
Times reported that "Mr. Pineau-Valencienne [Schneider's chairman and chief executive] and his investment bankers at Lazard Freres & Company said a ruling by the Justice Department on Friday [10 May] was crucial in completing the deal". (New York Times, Monday 13 May 1991, Sec. D, p. 1, col. 6.) As noted above, by this time both Germany and Italy had cleared the transaction, but the Canadian proceeding was still pending. It is unclear how far along the review process was in the United Kingdom and in Ireland.

2. **Process of investigation: the agencies' perspective**

   a) **Methods used to collect information**

   In the United States, this case proceeded under the normal HSR timetable, and second requests were issued. In Canada, as mentioned above, the Director obtained undertakings from the acquiring party to assure the necessary time for complete review. The review process in the other jurisdictions appears to have been less time-consuming.

   b) **Actual inter-agency co-operation**

   Inter-agency co-operation took place in this case, particularly between the United States and Canada. The US officials recalled direct contact with their Canadian counterparts, co-ordinated and approved through the DOJ Antitrust Division's Foreign Commerce Section. The Foreign Commerce Section handles notifications under arrangements such as the 1986 OECD recommendation and the Memorandum of Understanding between Canada and the United States. In addition, the target firm was actively informing all agencies about one another's work. The DOJ, for example, was told by one of the target's lawyers that the Canadians were reviewing the case. It is not known how the offeror was responding to these proceedings. The target felt certain, however, that there were some inter-agency discussions inspired by its filings and notifications.

   From the agency standpoint, follow-up does seem to have occurred. The US authorities indicated that there was some co-ordination with Canada on this case, and the Canadian authorities confirmed this. The contacts related to the timetable each side was following, and may also have involved some contacts relating to the gathering of information and the likely outcome of the case. With respect to remedy, the UK authorities and the Canadians would have apparently faced the same issue, since the facts suggest a similar difficulty with respect to the extraterritorial nature of the deal. There is no indication whether or not they consulted one another on this point.

   It is difficult to say whether there could have been closer co-operation in this case. The case officers stressed the importance of specificity about what cooperation might actually mean. Obviously no one can actually analyse the
substantive implications of a transaction for another agency, since legal standards
differ. Case officers do not have the time to collect information for their
counterparts elsewhere, and they expressed no great need to receive massive
amounts of information from abroad, which might contain redundant or irrelevant
matters. On the other hand, a more carefully focused type of co-operation was
seen as potentially useful. For example, if there had been a previous investigation
of these markets in one of the reviewing countries, it would have helped to know
what it showed. As between the United States and Canada, analysis of the
geographic market question, the effects of the Free Trade Agreement, and the
evolution of common standards, could usefully have been shared. With respect
to the agencies whose investigations were terminated early, it would have been
useful to have a system whereby notice of this fact was automatically transmitted
to other interested authorities.

3. Process of investigation: parties' perspective

Because Square D was in the position of a target company during most of
the proceedings, it obviously had an incentive to inform as many agencies as
possible of the pending transaction. In such a case, one may also assume that the
target would prefer a general injunction, rather than country-specific relief. A
country-by-country summary follows.

Canada: The lawyers in Canada worked actively to handle the multi-
jurisdictional problems that were involved. It was clear to them, and they
made it clear to the authorities, that this was a transnational case.

United Kingdom: The most detailed European proceedings took place here,
at the OFT. Remedy was likely to be a significant issue, since it appears
that the UK problems, if any, may not have been handled satisfactorily by
a remedy addressed only to the UK business. The public record shows that
the Secretary of State never made a reference to the MMC. It is impossible
to say from the outside whether this is because the potential concerns being
raised by Square D were nonmeritorious in the final analysis, or if the
restructured deal included any provisions that solved possible substantive
problems. It is doubly difficult for purposes of this report to come to a final
conclusion on this point because of Groupe Schneider's decision not to
participate in this study.

Ireland: There was a filing in Ireland, but again the authorities did not take
any formal action against the deal. It is worth noting, however, that Irish
law provides that there is a cloud on Irish title to property that passes
pursuant to an illegal merger.

Italy: The decision of the Italian Anti-trust Authority indicates that the
French parent of Schneider notified the Authority that it had made a cash
offer to purchase all of the issued equity stock with voting rights of the US
parent company of the Square D Group. Square D submitted comments to
the Authority. Finally, the Investigation and Enquiry Unit reported on the
matter on 23 April 1991. Square D co-operated to the greatest extent
possible with this proceeding.

United States: As noted above, this case was subject to HSR in the United
States, and second requests were issued. The parties thus would have
submitted whatever information the DOJ believed was necessary to evaluate
both markets (usually voluminous). Reports in the press indicated that the
law firm of Skadden, Arps, Slate, Meagher and Flom sent almost a ton of
documents to the Anti-trust commission [presumably the DOJ] on behalf of
Schneider during the course of the proceeding. (See NEXIS, Reuter Textline
AGEFI, 3 July 1991, USA: "Lawyers Heavily Involved in Schneider
Acquisition of Square D").

Germany: It appears that this proceeding was relatively uncomplicated.

i) Did the parties know of any inter-agency co-operation?

Square D was obviously aware of the multiple jurisdiction nature of the case.
However, we have no knowledge of the parties’ awareness of any
intergovernmental co-operation.

ii) Did they inform any agencies of other proceedings?

Square D did so; there is no information on Groupe Schneider.

iii) Did they go beyond simply informing?

Parties might take a number of steps in addition to a simple notification to
one agency that another has formally or informally taken cognizance of a case.
They might waive privileges to which they are entitled; they might attempt to co-
ordinate their presentations; or they might seek to ensure that remedial measures
do not conflict with one another. It would normally be the case that counsel for
one party would co-ordinate his or her presentations before the various interested
agencies, and there is no indication that matters were otherwise here.

Since this is the only hostile case in the group, one can learn both from the
facts that have been gathered and from those that are unavailable. Inter-agency
co-operation may be especially important as a source of general information when
the parties are in an adversary relationship, since the truth normally lies
somewhere between the extremes of each side’s advocacy. Square D’s filing of
the private action in the United States suggests that it was willing to use the US
antitrust laws as a means of defeating the take-over; it is logical to assume that
it would have explored similar possibilities in other affected jurisdictions. The
acquiring company might have different incentives, but it is hard to say exactly what they might be in the absence of any information from the company. In considering this issue below, we rely on our more general discussions with business groups and international companies to draw our conclusions, since Schneider chose not to participate in this project.

4. **Costs**

The sheer number of jurisdictions involved in this case must have added substantially to the costs of obtaining approval for the transaction. Given the sensitivity of cost data, our sources are second-hand. Reuters reported that Schneider paid approximately US$25 million for services relating to the takeover of Square D, of which about US$11.7 million went to Lazard, and about US$1 million for the translation of documents. (See NEXIS, Reuter Textline AGEFI, 3 July 1991, cited above.) The same story speculated that Square D spent "at least" the same amount in its efforts to fight the takeover. That figure appeared also in a story reported by *Le Figaro* on 11 May 1991, "USA: Square D’s Defence Against Takeover Costs US$25m." The Figaro story reported that Square D had hired 25 lawyers in several countries, taken out pages of newspaper advertising space, and hired the advice of Goldman Sachs (for US$10 million). If these figures are correct, then the private costs of the deal (US$50m) amounted to 2.17 per cent of the total value of the deal (US$2.3 billion). To that one would need to add the costs of each agency’s review, and estimate how much of both the private and public costs would have been avoidable if better co-ordination had been possible. It is fair to assume that the resulting figure, while perhaps not a large percentage of the overall deal value, would be quite substantial.

5. **Strategies**

It is plain to us, based on the totality of the information we have collected, that from a target’s perspective, the existence of numerous interested agencies was a potential benefit. More particularly, if more than one authority would have been justified in enjoining the entire transaction, the target had everything to gain and nothing to lose by co-operating to the greatest extent possible with all such authorities. On the other hand, it is important to recall that this transaction was eventually approved by all reviewing agencies. From the point of view of the acquiring firm, if better agency co-ordination had existed from the start, it might have been able to avoid some of the additional review that took place.
C. Matsushita/MCA

1. Facts
   a) Parties (including interested third parties)
      MCA Inc
      MCA Canada Ltd
      Matsushita Electrical Industrial Co Ltd (MEI)
      Matsushita Acquisition Corp
      Matsushita Industrial Canada Limited/Industriel Matsushita Canada Ltée
      Matsushita Electric of Canada Limited/Matsushita Electrique du Canada Limitée
      JVC Canada Inc.

   b) Nature of the transaction
      MEI acquired the whole of MCA Inc. There were no horizontal overlaps between MEI and MCA: MEI is a manufacturer of consumer electronic products and household electrical appliances as well as communication and industrial equipment, electronic components, kitchen-related products and batteries. MCA’s activities are in films and music entertainment, book publishing, retail and mail order business and theme parks.

   c) Regulatory authorities involved
      i) European Commission
         The transaction was notified by the parties under Article 4 of Regulation 4064/89 and a Decision of the European Commission was adopted on 10 January 1991 (Case IV/M037, [1992] 4 CMLR M36).

      ii) US Department of Justice

      iii) Canadian Bureau of Competition Policy

   d) Relevant product market
      i) European Commission
         The MTF looked at the consumer "software" entertainment market and at the consumer electronic hardware market.
ii) US Department of Justice
There were no competition issues in the United States.

iii) Canadian Bureau of Competition Policy
Audio, video, movie, software and hardware products.

e) Relevant geographical market
i) European Commission
The MTF did not define the geographical market. In its decision it mentioned MEI’s and MCA’s market shares in the Community as a whole and also, to some extent, market shares in particular Member States.

ii) US Department of Justice
There were no competition issues in the United States.

iii) Canadian Bureau of Competition Policy
Canada was the relevant geographic market.

f) Issues of concern to each agency
i) European Commission
The MTF was concerned at the conglomeracy aspect of the case; DGIII (Internal Market and Industrial Affairs) and DGXIII (Telecommunications, Information Industries and Innovation) had an interest in the case as well as the MTF/DGIV. The combination of MEI’s massive resources with the market position of either party might create considerable competitive advantages. As far as the consumer "software" entertainment market was concerned, the MTF considered whether the linkage of the financial resources of MEI with MCA’s activities could lead to such competitive advantages as to amount to a problem under the Merger Regulation. Its conclusion was that, as MCA’s principal competitors themselves had financially strong shareholders or parent companies, this was not a situation which raised a serious issue of compatibility with the Common Market. Examples of such links were Paramount (Gulf and Western), Warner (Time-Warner), Columbia Pictures (Sony) and Twentieth Century Fox (News Corporation).
The MTF also considered the linkage of MEI’s hardware products with MCA’s software. An anxiety was that MCA might apply a market strategy for its software products that would favour MEI’s hardware after the takeover. It considered that this was not a problem in the short term as there was at the time a sufficient supply of motion picture films and recorded music for every major technical standard or format used for broadcasting, home audio and video systems and cinemas.

Looking to the future, the MTF considered whether, as technological changes come about, the linkage between MEI and MCA could give a competitive advantage to MEI. In particular the MTF was considering the impact that the introduction of High Definition Television (HDTV) would have. Its conclusion was that there was the possibility of competing HDTV standards coming on to the market (the Japanese HiVision/Muse standard and the European MAC standard); that there are several software companies on the market which will be able to decide under which format to offer motion pictures; that only two of these producers would have a vertical linkage with a hardware producer (the other case being Sony and Columbia Pictures), and their combined market share was only 16 per cent of consumer video entertainment products in the Community. On the basis of this information the Commission concluded that the MEI/MCA linkage would not significantly impede competition.

ii) US Department of Justice

From the US DOJ’s perspective, the case was one of conglomeracy and so, by applying the 1984 Guidelines, it came to the conclusion that there was no issue.

iii) Canadian Bureau of Competition Policy

An ARC was issued (1991 Annual Report of the Director of Investigation and Research, p 31).

g) Conclusion of proceedings

i) European Commission

The merger was allowed without conditions.

ii) US Department of Justice

The merger was allowed without conditions.
iii) Canadian Bureau of Competition Policy

The file was closed as there was no issue under the Competition Act. The transaction was processed under the advance ruling certificate procedure.

2. Process of investigation: agencies' perspective
   a) Methods used to collect information
      i) European Commission
         The parties notified the concentration to the MTF on Form CO.

   b) Actual inter-agency co-operation, if any

      The MTF's view was that there was no need to contact the US DOJ on this case, as it was obvious from the 1984 Guidelines that the merger would not be challenged there.

3. Process of investigation: parties' perspective

   We have no information.

4. Costs

   We have no information.

5. Strategies

   This case did not give rise to any serious problems of multiple review, and we know of nothing to suggest that merger policy affected the transaction.

D. TNT/Canada Post

1. Facts
   a) Parties (including interested third parties)
      TNT Ltd
      Canada Post Corporation
      Deutsche Bundespost POSTDIENST
      La Poste
      PTT Post BV
Sweden Post
GD NET BV

b) Nature of the transaction

The five PTTs established GD Net BV, a Dutch company, as a vehicle for their own co-operation. A joint venture company, Express Worldwide, was established; TNT and GD Net BV each took a 50 per cent shareholding in Express Worldwide.

The principle of the transaction was the establishment of a worldwide express parcels and courier service. This was to be achieved by TNT transferring to Express Worldwide its worldwide international express delivery service, its European international express freight business and its remail activities, and by the five Post Offices transferring to Express Worldwide their individual express delivery businesses.

c) Regulatory authorities involved

i) European Commission

The transaction was notified by the parties under Article 4 of Regulation 4064/89 on 28 October 1991 and a Decision of the European Commission was adopted on 2 December 1991 (Case IV/M102).

ii) Canada

The transaction was brought to the attention of the Canadian authority, although there were no serious competition issues there. The European Commission was careful to ensure that its own proceedings did not give rise to conflict with Canada.

d) Relevant product market

The principal markets identified by the MTF were international express delivery, international express freight and remail.

As far as international express delivery was concerned, the MTF considered that this service possessed features such as a speed and reliability which enabled it to be regarded as a separate market from the normal mail service. It also considered that the international market was distinct from the domestic market, for example because of the greater number of destinations in the international market and the different operators on each market.
As far as international express freight was concerned, the MTF considered that it was not possible to draw a clear distinction between the express delivery and express freight markets on the basis of weight in that there was some overlap between them. However there were also some differences between them, not least that the freight market tended to be cheaper than the express delivery market.

The remaining market involved the cross-border letter services developed by private operators: international mail would be collected in bulk from business customers in one country, delivered as freight to another country, and then distributed there through the postal system. This could result in the international delivery of letters more cheaply and at greater speed.

e) **Relevant geographic market**

As far as all three product markets were concerned, the MTF considered that the markets were still national, for example because pick-up and delivery was still organised on a national basis and because prices and pricing schemes differed substantially for every country and marketing was different for each. However the MTF noted that as internal market legislation in the EEC begins to take effect, the national division of markets could begin to break down.

f) **Issues of concern to each agency**

i) European Commission

The MTF was not concerned about the international express freight market, as none of the five Post Offices was active in it and TNT’s market share was not significant.

The MTF was not concerned about the remail service. Although remail was a distinct market from the ordinary cross-border delivery service offered by Post Offices, there was a competitive effect between them. TNT’s position in the remailing market was minor and the MTF could not foresee that the transaction would strengthen the market position either of Express Worldwide or of the EC PTT’s involved.

The MTF was more concerned about the international express delivery market. The merger involved a combination of TNT’s strength in the international express delivery market with the national strengths of the five PTT’s. There were obvious advantages in this combination, but there was also anxiety that the transaction would result in the creation of a dominant position for Express Worldwide. For example it would become the leading operator in France and the second largest in Germany and the Netherlands, and the MTF considered whether any features of the proposed transaction required amendment to deal with this concern. The original proposal was that Express Worldwide would have
exclusive access to various postal outlets in the five countries concerned for a period of five years. In the course of the MTF’s examination, the parties agreed to limit the period to two years, and to outlets that already offered international express mail delivery services. The MFT was also concerned that Express Worldwide might sub-contract to the five Post Offices on a discriminatory basis so that third party competitors might be foreclosed: in particular the Post Offices might be able to favour Express Worldwide as a result of cross-subsidisation. To allay these fears, assurances were given by the French, Dutch, German and Swedish Post Offices. The assurances are set out in an Annex to the Commission's decision. An interesting point is that the Swedish Post Office gave this assurance on the basis that the EEA agreement would, in due course, come into force. Canada Post was not a party to these assurances.

g) Conclusion of proceedings
The merger was allowed without conditions.

2. Process of investigation: agencies’ perspective
a) Methods used to collect information
   i) European Commission

   There were extensive discussions between the parties and the MTF prior to notification. The merger was then notified on Form CO.

b) Actual inter-agency co-operation, if any
The Canadian Bureau and the MTF discussed this transaction.

3. Process of investigation: parties’ perspective
The parties to this transaction were primarily concerned with the position under EEC law. Lengthy negotiations took place with the MTF. It was a considerable advantage to the parties that the transaction was regarded as a concentrative joint venture, thereby opening up the opportunity of "one-stop merger control".

4. Costs
It would be reasonable to suppose that, as a result of the comments in 3 above, the parties benefitted in terms of costs by being subject to the EEC Merger Regulation.
5. **Strategies**

The parties to this transaction structured it so that it would fall on the concentrative rather than the co-operative side of the joint venture debate, thereby becoming subject to Regulation 4064/89 and so being (a) outside Article 85 and (b) not subject to the domestic merger laws of EC Member States. In particular the time scale of investigations under the Merger Regulation as opposed to Article 85 was attractive. A hostile third party objected to this transaction and argued before the Commission that it was a co-operative joint venture under Article 85 rather than concentrative under the Merger Regulation.

E. **Renault-Volvo**

1. **Facts**

   a) **Parties** (including interested third parties)

   Renault

   i) Régie Nationale des Usines Renault SA (Renault SA)

   ii) Renault Véhicules Industriels SA

   Volvo

   i) Aktiebolaget Volvo (AB Volvo)

   ii) Volvo Truck Corporation

   iii) Volvo Car Corporation

   iv) Volvo Canada Ltd/Volvo Canada Ltd

   v) Volvo GM Canada Heavy Truck Corporation

   Olofstrom Automation Ltd

   b) **Nature of the transaction**

   This transaction involved exchanges of participation and technical agreements between Renault and Volvo in (i) the car market and (ii) the truck, bus and coach market. The position as at 31 December 1990 is illustrated in Appendix 4. In the United States, Renault originally had a large minority interest in a truck producer, Mack. When Renault proposed to increase its ownership to 100 per cent in the summer of 1990, this triggered an investigation of the transaction generally in the United States.
i) The car market

In the car market, Renault SA acquired a 25 per cent shareholding in Volvo Car; AB Volvo acquired a 20 per cent shareholding in Renault, with the option of increasing its shareholding to 25 per cent. Profits and losses were to be shared between the parties according to their respective shareholdings. The parties would have reciprocal directorships, but the majority on the boards of management would remain in the hands of the majority owner.

ii) The truck, bus and coach market

In the truck, bus and coach market, Renault SA acquired a 45 per cent shareholding in Volvo Truck and AB Volvo acquired a 45 per cent shareholding in Renault Véhicules Industriels.

At the same time the parties entered into agreements by which they set up three joint committees; one General Policy Committee, one Joint Car Committee and one Joint Truck and Bus Committee. These committees could discuss and might decide on matters of common interest from research and development to production and purchasing, including co-operation with third party producers.

c) Regulatory authorities involved

i) European Commission

The transaction was notified by the parties under Article 4 of Regulation 4064/89 on 4 October 1990. This was the first filing under the EC Merger Regulation; a Decision of the European Commission was adopted on 7 November 1990 (Case IV/M004, [1991] 4 CMLR 297).

ii) Canadian Bureau of Competition Policy

iii) US Department of Justice

iv) Swedish Competition Authority

No formal investigation was launched in Sweden as there was no alteration of the market structure in that country. The European Community and the United States notified Sweden of their own proceedings.
d) Relevant geographic market

i) European Commission

a) Cars

No concentration: not considered.

b) Trucks, coaches and buses

The European Commission concluded (at para 11 of its decision) that it was not necessary to determine in the case of trucks whether or not the geographic market was the whole Community or whether it was still composed of several national markets, since the concentration would not create or strengthen a dominant position within Article 2(3) of the Merger Regulation on either of them. At the EEC level, their maximum market share in the truck market would be 25.9 per cent (para 12 of its decision) and at least five other major suppliers were present throughout the EEC (Mercedes, Iveco, Man, Daf and Scania). At the national level in the truck market their maximum market share would be 54.3 per cent (in France); however the other major suppliers were also established on these national markets with "not insignificant" market shares and with established distribution and service networks so that the Commission concluded that Renault/Volvo would not have the power to behave to an appreciable extent independently on the market (paras 13 and 14).

The coach market was considered to have characteristics similar to those of trucks and therefore to require no further analysis (para 16).

The bus market was considered to be divided along national lines, with strong national buying preferences which constitute a high barrier to entry for competitors from other Member States. Local specification requirements also can impede the transferability of supply (para 17). The Commission concluded that the concentration would not create or strengthen a dominant position, however, even though Renault’s share of the bus market in France was 69.7 per cent and Volvo’s share of the bus market in the United Kingdom was 64 per cent. Neither was present in the other’s national market for buses, and there were several major potential suppliers including Mercedes, Iveco, Man, Daf, Scania, Kässbohrer, Van Hool, Pegaso and Jonckheere.

ii) Canadian Bureau of Competition Policy

The geographical market was a problem in North America since there are different safety and emission standards in Canada and the United States. It is possible as a buyer to ask for joint certification, in which case the truck can be used on either side of the border. Otherwise, a vehicle can be used only in the jurisdiction whose standards it satisfies.
iii) US Department of Justice
The geographical market was the United States.

e) Relevant product market
i) European Commission
   a) Cars
      No concentration: not considered.

   b) Trucks, buses and coaches
      The European Commission looked at the markets for trucks, buses and coaches separately. The truck market is commonly divided into three sub-markets: below five tons, between five and 16 tons and above 16 tons. The Commission did not consider the segment of the market below five tons, as Volvo did not produce or sell trucks in that range. The Commission rejected the parties’ argument that trucks between five and 16 tons and trucks above 16 tons were in the same market: the technical configurations of trucks in these two groups were such that they constituted two different relevant markets.
      The MTF also looked, separately, at the bus and the coach markets, concluding that there were no grounds for intervening in either.

ii) Canadian Bureau of Competition Policy
Class 7 and 8 trucks.

iii) US DOJ
   a) Cars
      Renault had no car operations in the United States, so there was no issue there for the car market.

   b) Trucks, coaches and buses
      The US authorities were concerned about the truck market. Renault had a wholly-owned subsidiary (Mack) and Volvo also had a truck subsidiary in the United States. The DOJ was particularly concerned about the market for trucks over 33 000 pounds gross vehicle weight.
f) Issues of concern to each agency

i) European Commission

a) Cars

The parties received a comfort letter for the operation concerning the car sector stating that there were no grounds under Articles 85(1) or 86 necessitating further action on behalf of the Commission.

b) Trucks, buses and coaches

In the case of trucks, the MTF looked at the five-16 tons range and the 16 tons-plus range, both at the national and the EEC level. It concluded that there were no competition problems at either level. Even where there would be market shares after the concentration in excess of 50 per cent, the MTF’s view was that there would be effective competition from other major producers such as Mercedes, Iveco, Man, Daf and Scania. The MTF pointed out that the truck market seemed to be performing generally in a competitive way, that in France in particular prices appeared to be among the most competitive in the EEC, and that increasingly trucks were purchased by fleet buyers which were moving towards a European purchasing policy.

The MTF considered that the coach market was similar to the truck market and required no further consideration.

As for buses, even though Renault held a high market share in France and Volvo a high market share in the United Kingdom, neither was present in each other’s market and there were several major potential competitors. The fleet-buyer point also obtained here, and the Commission concluded that there were no competition problems.

ii) Canadian Bureau of Competition Policy

Competition in the market for Class 7 and 8 trucks.

iii) US Department of Justice

The DOJ received an HSR filing for the original 45 per cent interests taken in the truck businesses of the parties. At that time, it obtained an undertaking from the parties to file the equivalent of an HSR Second Request when Renault increased its stake in Mack to 100 per cent. Thus, when Renault did so in the summer of 1990, the filing was made and an investigation was opened. Renault claimed that it had increased its stake in Mack to 100 per cent to prevent it from failing; thus, the agency had to decide whether the "failing firm" defence was applicable. The DOJ inquiry focused on competition in the
market for trucks weighing over 33 000 pounds. In January 1991 it seriously considered suing to enjoin the cross-investments, and was not dissuaded by the fact that the merger had been allowed under the EC Merger Regulation in November 1990. In the end, however, it permitted the transaction to proceed. An important factor in DOJ’s decision was the perilous financial condition of Mack.

\[ g) \quad \text{Conclusion of proceedings} \]

\[ i) \quad \text{European Commission} \]

The merger was allowed without conditions.

\[ ii) \quad \text{Canadian Bureau of Competition Policy} \]


\[ iii) \quad \text{US Department of Justice} \]

The merger was allowed without conditions.

2. \textit{Process of investigation: agencies’ perspective}

\[ a) \quad \text{Methods used to collect information} \]

\[ i) \quad \text{European Commission} \]

The parties notified the concentration to the MTF on Form CO.

\[ b) \quad \text{Actual inter-agency co-operation, if any} \]

An important point in this case is that the EEC investigation began before the investigation in the United States. There was little or no co-operation between the European Community and the DOJ, largely because the process in the European Community had essentially been completed well before DOJ had sufficient basis to form a position.

An interesting point about Renault/Volvo is that there was, apparently, little discussion between the DOJ and the French Ministry; of course, as the concentration in respect of trucks, buses and coaches fell within the scope of the Merger Regulation, it followed that the case was not one that could be investigated under the French ordinance, and the merger was viewed by the French government with favour anyway. It would seem that the French Ministry was not aware that the DOJ at one time was considering taking action against the
merger. So, although DOJ notified the correct authority in terms of the 1986 Recommendation, the body most interested in this information did not receive it.

3. **Process of investigation: parties’ perspective**

   No particular comments.

4. **Costs**

   No particular comments.

5. **Strategies**

   The parties to this transaction notified it after the Merger Regulation had come into force, as a result of which it did not require notification under the merger control system of individual Member States of the European Community. There is no evidence that the possibility of multiple review affected the parties’ strategy.

F. **Fiat/Ford**

   1. **Facts**

      a) **Parties**

      Fiat SpA, 10/20 Corso Marconi, 10125 Turin, Italy. (Fiat handled most of the EC work through its in-house counsel, working in Turin.)

      Fiat Geotech SpA, Viale delle Naxioni 55, San Matteo Modena, Italy.

      Ford Motor Co., Room 1010, The American Road, Dearborn, MI 48121, USA.

      Ford New Holland Inc., 500 Diller Ave., New Holland, PA 17557, USA.

      Ford Motor Co. of Canada, Ltd./Ford du Canada Limitée.

      Ford New Holland Canada Ltd./Ford New Holland Canada Ltée.

      Hesston Corporation.

      Hesston Industries Ltd.
b) Nature of the transaction

This transaction was a friendly joint venture, which created a new entity controlled by Fiat (80 per cent), in which Ford held a 20 per cent share, and limited voting rights. The agreement was signed on 19 December 1990.

c) Regulatory authorities involved

i) European Commission

ii) US Department of Justice

iii) Canadian Bureau of Competition Policy

d) Relevant product market

i) European Community

Three distinct markets: (1) tractors, (2) combine harvesters, and (3) hay and forage machines. The biggest problem concerned combine harvesters in Italy, because a special type is used there. Fiat had a large but declining market share.

ii) United States

US authorities identified several types of hay and forage equipment as the markets in issue. One of the lawyers involved in the transaction expressed the opinion that the product market of interest in the United States (hay and forage machines) was quite different from the market of interest in Europe, because of local distribution practices and technical requirements in each area.

iii) Canada

Farm tractors, combines, bailers, mower conditioners, etc.

e) Relevant geographic market

i) European Community

The geographic market, as described by counsel, was difficult to define. On the one hand, if it was regarded as a worldwide market, problems might have arisen in the United States; in Europe, the greatest difficulties would have been presented if the market had appeared to be individual nations. Thus, the case was made that the geographic markets were European and American. In terms, perhaps, of submarkets, Italy was the principal one and the United Kingdom the
second; France and Germany were not significantly involved. On some national submarkets, particularly Italy, shares were quite high.

From the perspective of the European Community regulators, there was a significant question: should Italy be regarded as a distinct market, or as part of a broader market? On analysis it became clear that the former was the case; indeed, Italy itself might have been divided further. However, they found that it was not essential to split the country up into regions. The major players operating there worked through national distribution networks. In particular, the Federconsorzi (Fedit), the national network of farmer co-operatives, provided an extensive distribution system for Fiats with over 2,000 branches locally, which was a considerable barrier to entry. Of the competitors to Fiat, Ford NH was the most successful, with newer technology than Fiat. It was also building up its network, in northern Italy at least. The Merger Task Force informed Fiat that Italy was the geographic market about which it was most concerned, in the product market for combines.

ii) United States

The concern of the US authorities was limited to the US market. There is no indication that they regarded this as a case presenting a world geographic market in any important sense. Counsel agreed that the geographic markets (the United States and the European Community) did not overlap.

iii) Canada

The Bureau looked at a number of geographically specific markets within Canada, relying on area and soil characteristics. The issues were similar to those faced by the MTF, in that soil conditions tend to lead to regional market definitions, while climatic conditions lead to a North American market. Industry publications typically quote North American statistics. Furthermore, trade in tractors and terminal attachments has been free throughout North America since the Great Depression, and it is a highly integrated market. These facts were important from the standpoint of availability of foreign competition for each of the regional markets considered.

f) Issues of concern to each agency

i) European Community

The MTF focused on the combine market in Italy. From a procedural standpoint, a major issue was the ability of the Commission to accept undertakings during a Phase 1 inquiry. The MTF concluded that this was possible in Fiat/Ford NH, and they did so.
ii) United States

As noted above, the concern of the US DOJ lay in the consequences of the joint venture in the various types of hay and forage equipment markets they had identified.

iii) Canada

This case raised no special problems in Canada that appear on the record.

g) Conclusion of proceedings

i) European Community

Following discussions the venture was cleared by the MTF within the one-month period of the Phase 1 inquiry.

ii) United States

The DOJ agreed not to challenge the venture upon the condition that Fiat would sell its Hesston hay-making equipment division. It promptly sold Hesston to the US group Deutz-Allis.

iii) Canada

The file was closed without additional proceedings or conditions. (See 1992 Director of Investigation and Research Annual Report at 34.)

2. Process of investigation: agency’s perspective

a) Methods used to collect information

In the European Community, the necessary information would have been collected using the Form CO, and through the co-operation of the parties during the investigatory phase.

In the United States, in addition to the standard HSR procedure, information was collected by approaching the United States entities (e.g., parents, subsidiaries), to avoid the need to seek information overseas. When this method is possible, it is used to avoid unnecessary friction.
In Canada, the normal information would have been supplied in accordance with the Merger Guidelines. The record does not indicate whether this was a short form or a long form case.

b) Actual inter-agency co-operation, if any

At first glance, this does not appear to be a good case for inter-agency co-operation, because the products manufactured for each geographical area are so specialised that individualized information would be necessary no matter what. On the other hand, there are only a small number of firms worldwide who manufacture agricultural equipment, which suggests that from a longer-term competitive standpoint the various authorities would nevertheless benefit from the fullest possible understanding of one another's actions. It is also significant to note that the effects of the transaction were felt in many countries. N.H. Geotech, the resulting joint venture, is headquartered in London and incorporated in the Netherlands. It employs more than 30 000 people, principally in the United States, Italy, Belgium, France, the United Kingdom, Brazil, and Canada. Furthermore, it planned to maintain an equity participation in joint ventures in Mexico, Turkey, India, and Japan. (See NEXIS 1991 PR Newswire Association, PR Newswire, 7 May 1991, "Ford and Fiat Complete Agreement"). Over that number of countries, it is quite likely that common issues would arise even taking into account the specialised nature of the equipment.

With respect to the 1986 OECD Recommendation, the US DOJ indicated that the European Community would have received a notification from the United States through diplomatic channels. On the EC side, the MTF officials recalled no particular liaison with the United States. The Canadian officials also could recall no notifications.

It is not clear whether, or to what extent, the parties took any initiatives to inform the agencies about the multi-national nature of the transaction. On the face of it, this was probably obvious in any event. The European Community received its formal notification under the Merger Regulation on 7 January 1991; it announced on 8 February 1991, that it would not oppose the deal. Discussions with the DOJ apparently went on longer, since it was not until April 1991 that Hesston was sold, at which point the DOJ should have known about the Commission’s action. (However, there is no assurance that final dispositions are reported to other interested OECD parties, which is a matter taken up below.) The US authorities recalled that the parties informed them that the European Community was reviewing the action; the parties themselves had no firm recollection on the point. Because the markets were different and assets were located in the key reviewing countries, there was little necessity for co-operation on other matters, such as jurisdiction, the timetable for review (except that it may be noted from the parties' standpoint how the different DOJ and EC timetables affected the deal), information collection, or remedy. One official noted,
however, that if there had been a serious competitive issue in his country, an
effective remedy would have required international co-operation.

3. **Process of investigation: parties' perspective**

The parties took care to co-ordinate their submissions on both sides of the
Atlantic, to be sure that nothing would appear to be contradictory. They
expressed scepticism about the iron-clad confidentiality rules. They noted that a
second request in the United States can (and often does) require submission of the
Form CO from Europe. They were not certain what information could be shared,
or was being shared, under the EC-US Co-operation agreement.

*i*) Did the parties know of inter-agency co-operation?

Counsel indicated that the answer to this was yes, at least in general.

*ii*) Did they inform agencies?

The parties indicated that the notifications to the United States and the
European Community were simultaneous. If, then, the United States also received
its formal notice on 7 January 1991, the different methods of proceeding under
the HSR process and the Merger Regulation can be clearly seen. In the European
Community, the parties have the opportunity informally to consult with the MTF
prior to the filing of the notification, whereas in the United States (due in part to
the need to assign responsibility for each merger to either DOJ or the FTC),
nothing official begins until after the HSR filing is received.

*iii*) Did they go beyond informing?

The parties did not provide formal waivers to the enforcement agencies,
or assist the agency work in any particular way. However, the lawyers prepared
for internal use a general "global" memorandum, which was then adapted as
needed for the various reviewing jurisdictions. They expressed the opinion that
do-ordination among the lawyers themselves was absolutely essential on issues
such as the definition of the product and geographic markets. Additional co-
ordination is harder, because the commercial approach varies among authorities.
In the United States, one lawyer said that he would not describe markets as
generally as he would in Europe, since it was his perception that substantive
standards differed in the two places.

One person expressed the view that a common form would be very
useful. Yet he then compared the EC Form CO with the US second requests, and
noted that they tended to be about 80 per cent different. The conceptions behind 
the forms are not the same at the present time. Perhaps something like a questionnaire and a simplified form might help somewhat. In practice, the most significant way in which the EC system approaches the US system is in the Commission’s practice of waiving compliance with certain parts of Form CO; thus, the initial detail may come closer to the first HSR filing. His personal view was that something more like the US system would be helpful. However, he and many others quickly noted that this would be nearly impossible as long as the present time limitations found in the Merger Regulation were unchanged.

4. Costs

One lawyer estimated that in a deal valued at over US$100m, the costs of review would be somewhere between US$1 000 000 and US$2 000 000. This proportion is similar to what was reported in the press for the Square D takeover discussed above. As noted above, transaction costs in the region of 2 per cent are probably absolutely significant. The importance of the relative costs is harder to assess. Business people in general do not want to increase their costs even by 2 per cent, which can sometimes be an important marginal cost. Although specific information is hard to find, the reaction from business organisations was that the costs of obtaining approval for international mergers were quite high. Nonetheless, in a case like Fiat/Ford NH, where specific product and geographic market information would need to be collected no matter how much co-operation and process convergence existed, the opportunity for marginal cost savings is less than in a case with more standardized products.

5. Strategies

Given the worldwide character of the proposed (and eventual) joint venture’s business, the need for multiple review affected planning strategy in the obvious sense that a negative decision from one of the key authorities or a decision placing severe conditions on the deal would have called into question the wisdom of going forward. However, this is not a case like some that business representatives described, in which very large companies (who therefore fall within various reporting thresholds) want to acquire smaller entities, but the cost of multiple review operates as a deterring influence.

G. Hoechst/Celanese

1. Facts

a) Parties

American Hoechst Corporation (Del.), 1041 Route 202-206 North, Somerville, NJ, USA.
Hoechst Aktiengesellschaft, D-6230 (Main) 80, Frankfurt, Federal Republic of Germany.

Celanese Corporation (Del.), 1211 Avenue of the Americas, New York, NY, USA.

Celanese Canada Inc. (mentioned in Canadian response)
MonteRay Textiles Inc./Textiles Monterey Inc. (Canada)
Edmonton Methanol Co. (Canada)
Canadian Methanol Venture (joint venture, Canada)
Virchem Canada Inc.

b) Nature of the transaction

i) Germany

This was an acquisition by Hoechst of 100 per cent of the capital shares of Celanese Corporation. Hoechst used the subsidiary American Hoechst. This appears to be a friendly transaction. The economic aim was to improve the relatively weak market position in the United States. Press reports indicate that prior to the merger, Celanese and Hoechst had shared ownership of Ticona Polymerwerke, a German acetal manufacturing joint venture. At the same time, Celanese and Daicel Chemical Industries (Japan) had shared ownership of Polyplastics Co., a Japanese acetal manufacturing joint venture.

ii) United States

On or about 3 November 1986, Hoechst commenced a cash tender offer for up to 100 per cent of the Celanese common and preferred stock, pursuant to an agreement of merger entered into on 2 November 1986. The Celanese Board of Directors had approved Hoechst's tender offer. The purpose of the stock acquisition was to transfer to Hoechst the polyester business of Celanese.

iii) Canada

From a business standpoint, it was the same as the transaction described above for Germany and the United States. The process of investigation was somewhat unusual, as noted below under 2.
c) Regulatory authorities involved

   i) German Federal Cartel Office (BKA)

   ii) US Federal Trade Commission: an FTC complaint was issued before the transaction was completed with respect to polyester textile fibres and related substances, and a different one was issued after the transaction became final, with respect to the acetal business.

   iii) Investment Canada

   iv) Canadian Bureau of Competition Policy


d) Relevant product market

   i) Germany

   The BKA identified three product markets: the market for chemicals, the market for chemical fibres, and the market for plastic synthetic techniques. It indicated that there was very little overlap in the range of products under consideration.

   Specifically, the BKA investigated the following markets: (1) vinyl acetate monomers, (2) industrial yarns or threads, and (3) certain special markets, including polyester yarns, heavy duty threads, polyamids, and rayons. Vinyl acetate monomers are an intermediate product used in the production of glues and similar substances. There was an issue concerning captive production versus production for the open market. Only Hoechst participated in this business on the German market, with one competitor, Wacker Chemie GmbH. Hoechst conducts two-way transactions, both selling to outside users and purchasing from outside suppliers; however, the facts indicated that it buys more on the outside market than it sells, which affects its reliability as a supplier. With respect to industrial threads, Hoechst is a large supplier in Germany. Nonetheless, its market share was going to increase less than 1 per cent due to the merger. In addition, there is another large German supplier with three times the market share of Hoechst. Finally, in the specialised markets, a number of competitors were present on the German market, including ICI, Rhone-Poulenc, DuPont, and Allied Chemical. In none of the product markets considered did the BKA see significant problems.

   ii) United States

   This was a somewhat unusual case in the United States, in that the FTC conducted two separate proceedings focused on different product markets, the first in 1987 involving various polyester fibre markets, and the second in 1991 involving acetal products. Specifically, the opinion of the FTC In re American
Hoechst Corporation et al, 110 F.T.C. 4 (1987) (referred to here as the 1987 proceeding or the first proceeding), identified four products: first, polyester fibres, or manufactured fibres in which the fibre-forming substance is any long-chain synthetic polymer composed of various chemicals; second, textile polyester fibres, defined as polyester fibres used in the production of textiles, including fabrics and yarns for apparel, carpeting, home furnishings, and automotive applications; third, textile polyester filament, i.e. continuous threads of polyester produced for textile applications; and fourth, polyester staple, i.e. short fibres cut from spun polyester, including fibrefill and tow. The FTC complaint focused on the manufacture, distribution, and sale of polyester staple and textile polyester filament.

The 1991 complaint (Dkt. No. 9216) focused on a variety of acetal products. Acetal itself is the crystalline engineering thermoplastic polymer resin known as acetal, polyacetal, or polyoxymethylene. The products included acetal, trioxane, and acetal to which fillers and other agents were added. The 1991 consent order essentially required Hoechst-Celanese to give Daicel and Polyplastics favourable treatment in various ways to assist them in becoming independent competitors.

e) Relevant geographic market

i) Germany

Celanese had no production plants in Germany, and the transaction therefore had little impact on Germany. The principal impact of the transaction was in the US market and other export markets.

ii) United States

The 1987 FTC decision identifies the United States as a whole as the geographic market. In the 1991 acetal consent decree, the Commission was dealing with a world geographic market.

iii) Canada

The review focused on the effect of the acquisition in Canada.

f) Issues of concern to each agency

i) Germany

The BKartA concluded that the German market for the products of
concern was hardly touched. There was little overlap, and Celanese had no production facilities in Germany.

   ii) United States

   The 1987 FTC decision alleged that the acquisition would significantly increase levels of concentration in the relevant markets, and would substantially lessen competition by eliminating actual competition between Hoechst and Celanese, and between Celanese and others, and by enhancing the possibility of collusion. The 1991 consent decree reflects a more complex case, since it focused on divisions of markets with other producers of acetal products, permissible and impermissible licensing agreements with Japanese and Taiwanese companies, cross-agency and distribution agreements on a world-wide basis, and a variety of technology development agreements that might have had the effect of limiting competition in the United States.

   iii) Canada

   The Bureau was charged with advising Investment Canada whether the acquisition would have a negative impact on competition within Canada, which is one of the factors Investment Canada is charged with considering under its own governing law. The Bureau routinely receives notice of applications under Investment Canada.

   g) Conclusion of proceedings

      i) Germany

      Clearance was given after one month.

      ii) United States

      The FTC negotiated a consent order with the parties, which pursuant to US law was placed on the public record for a 60-day comment period and then approved and entered by the Commission on 2 July 1987 (110 FTC 4). In that order, Hoechst was ordered to divest certain manufacturing assets and to permit the acquirer to take a nonexclusive license relating to current technology and know-how. One Commissioner dissented, on the ground that strong competition from foreign producers is likely to make it impossible for domestic producers (including the combined Hoechst-Celanese operation) to exercise any significant degree of market power.

      The 1991 proceeding relating to polyacetal resulted in a proposed consent decree which was issued for comment in September 1991 and formally
issued on 26 November 1991 (Dkt No. 9216). As indicated above, the relief provisions were complex, ranging from obligations not to engage in practices likely to result in divisions of markets, to obligations not to enforce certain patents against the (related) Japanese and Taiwanese competitors, to assist in capital contributions for the construction of new facilities in Japan or in the United States, non-exclusive technology licensing, etc.

iii) Canada

The Bureau raised no objection before Investment Canada.

2. Process of investigation: agencies’ perspective

a) Methods used to collect information

i) Germany

This case required notification pursuant to German law. The BKartA received the mandatory notice on 11 November 1986. On 24 November 1986, it received a notice from the US FTC pursuant to both the OECD 1986 Recommendation and the US-FRG Antitrust Co-operation Agreement. The transaction was cleared within one month, on 11 December 1986. The formal letter of clearance was sent on 18 December 1986.

ii) United States

The first proceeding took place routinely under the HSR procedure. The second proceeding was commenced by a complaint before an administrative law judge in October 1988, and thus required litigation-style investigatory methods. It was necessary for the Commission staff to file an ancillary proceeding in US District Court to obtain authorisation to take depositions, on a voluntary basis, in a number of foreign countries, including the Netherlands, Japan, Germany, and the United Kingdom.

iii) Canada

The transaction was not notifiable under the Competition Act. Thus, the Bureau’s only involvement was through its advice to Investment Canada, as noted above. All transactions above specified thresholds must be cleared with Investment Canada; thus, there was nothing unusual about the case in that respect.
b) Actual inter-agency co-operation, if any

i) Germany

The BKartA did not notify any other countries of its proceeding. It received a notification from the United States about the FTC's proceeding. The records do not reflect any notice of the second phase of the FTC proceeding. However, the BKartA had records of a letter from the FTC indicating that it was planning to issue second requests, and that some of the information sought might be located in Germany. There was no mention of information directly from the parties.

ii) United States

The staff FTC lawyers informed us that the international office was keeping in touch with foreign authorities. There is no indication of unusual steps for the fibre proceeding, which took place between February and July 1987. Cross-referencing to the BKartA records, it also appears that a formal notification related to this proceeding. Our records do not show whether the FTC issued a notice to the foreign jurisdictions relating to its efforts to take evidence in the ancillary proceeding, referred to above. The BKartA had no record of this proceeding, although they thought it possible that some other ministry or agency of the German government might have been involved. The parties informed the FTC about the German proceeding.

There is little information about further contacts between the agencies. In Germany, after the US notifications were received, no additional communication took place. Similarly, the FTC lawyer knew of no further contacts or consultations with the Germans. Because the Canadian proceedings were minimal, the same is true with respect to both German and US contacts with the Canadian authorities. Because the remedy adopted in the 1991 proceeding affected know-how and patents of Japanese firms, notification and/or consultation with Japanese authorities might have been useful. The FTC indicated that Japan was notified of the proposed consent decree in August 1991. It commented further that the Japanese interest in consultation was probably minimal, since the decree simply ensured that Daicel would be free to compete in the United States.

iii) Canada

There is no indication of any formal co-operation, since this was not even notifiable under the Competition Act.
3. *Process of investigation: parties' perspective*

   *i*) Did the parties know of inter-agency co-operation?
   
   It appears that they were not directly aware of it.

   *ii*) Did they inform the agencies?
   
   Apparently they did not voluntarily try to assist co-operation, at least at the first stage. The second stage FTC proceeding took place long after the German and Canadian aspects of the case were closed, and thus they did not perceive it as crucial.

4. *Costs*

   The costs of this proceeding were typical on the German and US sides. For typical BKartA practice, see the Westinghouse/ABB discussion. On the US side, three FTC lawyers were listed as appearing for the Commission in the 1987 proceeding. This information does not appear in the 1991 order. Normally, in addition to counsel, staff economists and other necessary experts will also participate in the case preparation. No information is available about the private costs of the proceeding.

5. *Strategies*

   There is no evidence to suggest that the existence of multiple review affected this transaction one way or the other.

**H. Coats Viyella/Tootal**

1. *Facts*

   *a*) *Parties* (including interested third parties)

   Coats Viyella plc

   Tootal Group plc

   *b*) *Nature of the transaction*

   On 12 May 1989, Coats acquired 25 per cent of the equity in Tootal. This took Coats' total holding to 29.9 per cent. An order was made by the Secretary of State precluding Coats from exercising more than 15 per cent of the voting rights in Tootal pending the outcome of the MMC's investigation. On the same day Coats and Tootal announced an agreed bid by which Coats would acquire all the issued capital of Tootal.
The agreed bid was not proceeded with following the reference of the merger to the MMC. At a later date there was a further hostile bid as a result of which there was a further review in the United Kingdom, the United States and Germany.

\[c\] Regulatory authorities involved

\[i\] UK Office of Fair Trading, Secretary of State for Trade and Industry and Monopolies and Mergers Commission

\[ii\] US Federal Trade Commission

\[iii\] European Commission

Note that this case occurred before the Merger Regulation had come into force; the Commission’s concern was therefore with the application of Article 85 and/or 86. Had the matter arisen under the Merger Regulation, the case would have been below the thresholds of the Regulation and therefore subject to domestic systems of merger control.

\[iv\] German Bundeskartellamit

\[v\] French Ministry for economic and finances

\[vi\] Irish Competition Authority

\[vii\] South Africa

Note: the application of systems of merger control in 21 jurisdictions were considered in respect of this transaction. However the basic economic analysis in this case was the same, irrespective of the jurisdiction in question. This being so, the lawyers involved did not think there was a great problem of duplication of effort.

\[d\] Relevant product market

\[i\] UK Monopolies and Mergers Commission

The MMC looked at the markets for industrial sewing thread, and for domestic thread used for dressmaking and mending. The product in each case was essentially the same albeit packaged differently and sold through different distribution channels to different end users. This segmentation by reference to end-use made it possible to identify separate markets. The MMC also considered \emph{inter alia} the markets for consumer craft, garments and household textiles but found that no public interest issues arose therein.
ii) German Bundeskartellamt

The BKartA considered that the relevant market was sewing yarn.

e) Relevant geographic market

i) UK Monopolies and Mergers Commission

The MMC did not define the geographical markets as such. In the course of its report it considered the international context of the industrial and domestic thread markets and it described the effects of the *Multi-Fibre Arrangements* made under GATT. However, its brief was to consider the impact of the merger upon the public interest in the United Kingdom, and it would appear, at least implicitly, to have taken the United Kingdom as the relevant geographical market.

ii) European Commission

There is no report of the Commission’s reasoning in this case; it is understood however that it was prepared to define the market more widely than any one Member State.

iii) Bundeskartellamt

The BKartA was concerned with the market for sewing yarn in Germany, and considered this to be the relevant geographic market.

f) Issues of concern to each agency

i) UK Monopolies and Mergers Commission

The MMC concluded that there were no competition problems in the market for industrial thread. However, in the market for domestic thread there were only three major competitors: Tootal, the market leader with 37 per cent of the market; Gütermann, a Swiss/German group with 20 per cent and Coats with 18 per cent. Coats owned by then 20 per cent of the share capital of Gütermann, had a seat on the supervisory board and a pre-emptive right over the remaining shares. In the circumstances the MMC concluded that this merger could have an adverse effect on the public interest.

ii) US Federal Trade Commission

At the time of the first transaction there were an HSR filing and a fairly in-depth internal scrutiny, and the merger was allowed. When the second
transaction occurred, about 18 months later, there was a further review. At this time the MMC's report was available and this was an extremely useful tool for the case-handlers concerned.


iii) European Commission

The transaction occurred before Regulation 4064/89 had come into force; the Commission did not oppose it under Articles 85 or 86.


iv) German Bundeskartellamt

In Germany there was a notification on 26 May 1989. Both Tootal and Coats Viyella had German affiliates. Tootal had an interest in Rhenania and Coats Viyella in MEZ and Unigarn; it also had a 20 per cent interest in Gütermann AG, but it sold this holding. The BKartA wrote to the parties on 21 June 1989 to say that there would be a full-scale investigation. The OFT was told of this on 6 July 1989. No other States were told of the German investigation. On 29 September 1989 the BKartA told the OFT that it did not intend to prohibit the merger. The BKartA had a particular difficulty in this case in that the structure of the transaction did not interface well with the German legislation because when interests are acquired through a public bid, the merger - under German law - will be completed before notification is possible and thus the pre-merger notification regulations will be formally violated. The BKartA examined whether as a result of the merger a marked dominating position would be created by an oligopoly, in which Rhenania (Coats Viyella-Tootal), Ackermann-Göggingen AG and Amann would jointly dominate the German market.


g) Conclusion of proceedings

i) UK Monopolies and Mergers Commission

The MMC concluded that, because of the possible public interest detriment in the domestic thread market, Coats should be required to dispose of its existing United Kingdom interests in domestic thread supply and sell its shares in Gütermann; in this case the proposed mergers should be permitted: see Coats Viyella plc/Tootal Group plc (Cm 833, 1989). Subsequently the SOS accepted statutory undertakings from Coats Viyella plc involving the divestments of its domestic thread business and its shareholding in Gütermann. It agreed to sell its domestic thread business to Amann and Söhne GmbH on 2 July 1990 and it disposed of its interests in the Gütermann Group on 30 April 1990.
ii) US FTC
Merger allowed.

iii) European Commission
Merger allowed.

iv) German Bundeskartellamt
The BKartA decided not to prohibit the merger on 26 September 1989 because it found that there was substantial competition between the oligopolists.

2. Process of investigation: agencies’ perspective
   a) Methods of collecting information
The FTC had the benefit of the MMC’s report, which had been published by the time of the second investigation in the United States. It also had the normal information collected pursuant to the HSR Act.

In Germany there was a notification on 26 May 1989. The BKartA wrote on 21 June 1989 to the parties to say that there would be a full-scale investigation. On 8 October 1989 the BKartA issued 35 formal requests for information and sent them to competitors.

   b) Actual inter-agency co-operation, if any
The FTC, when it conducted its second investigation, had the benefit of the MMC’s 1989 report. This was extremely useful, although the FTC still conducted its own market analysis nevertheless. The German BKartA had concluded its investigation by the time of the second FTC investigation. The FTC did not contact or consult with BKartA at that stage as it was very pressed for time.

The BKartA informed the OFT under the OECD recommendation on 6 July 1989 that it was conducting an investigation and on 29 September 1989 that it did not prohibit the merger. The BKartA informed further the European Commission of the completed merger by letter of 29 January 1989.

A minor point that arose in the UK investigation concerned a trade mark licence: this had to be considered under Article 85 of the EC Treaty and was discussed with the European Commission. There was an undertaking given on this point which DGIV approved.
3. Process of investigation: parties’ perspective

The parties to this transaction appreciated that there would be several regulatory hurdles. This was not in itself a disincentive to their proposals.

4. Costs

No evidence has been received to suggest that the costs involved in clearing these proposals were excessive or that they could have acted as a deterrent to proceedings.

5. Strategies

No evidence has been received that the parties’ business strategies were affected by regulatory hurdles.

I. Gillette/Wilkinson

1. Facts

a) Parties

i) The leveraged buy-out (LBO)

Vendor - Stora Kopparbergs Bergslags AB

Purchaser - Eemland Holdings NV (previously called Eemland Management Services BV then Swedish Match NV)

<table>
<thead>
<tr>
<th>Equity investors in Eemland</th>
<th>Votes (%)</th>
<th>Equity stake (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copenhagen Handelsbank</td>
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<td>Procuritas</td>
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<tr>
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<td>23.9</td>
</tr>
<tr>
<td>Gillette UK Limited</td>
<td>-</td>
<td>22.0</td>
</tr>
<tr>
<td>Intermediate Capital Group</td>
<td>-</td>
<td>5.2</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>
Initial lenders to Eemland:
Various senior creditors (syndicated by Morgan Guaranty)

Mezzanine creditors:

a) Copenhagen Handlesbank
b) Intermediate Capital Group
c) Morgan Guaranty
d) Lustrasilk UK Limited (Gillette subsidiary)

Stora Kopparbergs Bergslags AB

ii) The non-European acquisition
Vendor - Eemland Holdings NV
Purchaser - The Gillette Company

iii) Complainants
Warner-Lambert Company
La Société Bic S.A.

b) Nature of the transaction

The various proceedings arose out of:

i) the involvement of the Gillette Company (and other members of the Gillette group) in the financing of the purchase of Stora's consumer products division by means of a leveraged buy-out company called Eemland Holdings NV. This consumer products division included the Wilkinson Sword wet-shaving business which had manufacturing facilities in the United Kingdom, Germany, Zimbabwe and Brazil; and

ii) the purchase by the Gillette Company from Eemland of the entire Wilkinson Sword wet-shaving business outside the European Community.

The parties agreed on the two aspects of the transaction on 20 December 1989. Taken as a whole, it was a complex transaction, which is typical for a leveraged buy-out (LBO). From the standpoint of competition law, the transaction raised serious questions from the start, since Gillette competed
directly with Wilkinson Sword in the wet-shaving market of many countries. Gillette had been advised before the transaction that the competition rules of the United Kingdom, Germany, and the European Community were likely to prevent it from acquiring control of the Wilkinson Sword business in the European Community. In response to this advice, the parties carefully structured the LBO transaction so that Gillette would acquire the Wilkinson Sword trademarks and wet-shaving activities only in countries outside the European Community. Within the European Community, as noted above, Gillette furnished about one-quarter of the US$630 million that Eemland paid for Stora's consumer businesses, and it acquired about 23 per cent of the non-voting equity shares of Eemland and subordinated debentures worth about US$69 million.

Gillette told us that it would have been happy to be able to achieve this "non-EC acquisition" without having to participate in the equity and debt financing of the LBO, but this alternative was not available to it because of the circumstances in which Stora was proposing to sell its consumer products division and because of perceived financing constraints. Gillette informed us that, hoping to ensure that the transaction would not infringe relevant European competition rules, it had attempted to limit its involvement in the LBO, so that it would not have control or (more ambiguously) influence over either Eemland or the Wilkinson Sword businesses that Eemland would operate. In particular, the arrangements had been structured to take account of the Commission's decision and the findings of the European Court of Justice in the Philip Morris case (Cases 142 & 156/84 BAT and RJ Reynolds v. Commission [1987] ECR 4487). Following that model, the agreement provided that Gillette's 23 per cent equity stake in Eemland gave it no voting rights or board representation. Gillette also stated that it took care to ensure that the arrangements relating to the non-EEC acquisition would not weaken the competitive position of Eemland's Wilkinson Sword wet-shaving business in the European Community. Although Gillette and its advisers had insisted on these structural features in the LBO agreements, they realised that regulatory authorities around the world would be interested in the transaction. Interestingly, there were no legal requirements to pre-notify the transaction either to the European Commission or any other competition authorities. With respect to voluntary pre-notification, Gillette told us that it had proved impracticable to approach any agencies informally for at least two reasons: first, Stora had decided to sell its consumer products business by way of competitive auction and had not been willing to make completion of any sale conditional on consents which were not legal requirements; and second, Stora had insisted throughout the tender process that the parties maintain confidentiality.

c) Regulatory authorities involved

The transaction was investigated by the competition and regulatory authorities in the 14 jurisdictions listed below. Given that the nature of the transaction investigated was very different in the European Community countries
(where the authorities were looking at the possible effect of Gillette’s involvement in the Eemland LBO) from that investigated in other countries (where the authorities were looking at an outright acquisition of the Wilkinson Sword business by Gillette), the different investigations of the two aspects of the transaction are considered separately here.

\[ i \] The leveraged buy-out

European Commission (DGIV)

UK (OFT; MMC; DTI)

Germany (BKartA)

France (Ministère de l’Economie, des Finances, et du Budget; Conseil de la Concurrence)

Ireland (Department of Industry and Commerce; Fair Trade Commission)

Spain (Department for the Defence of Competition)

\[ ii \] The non-EC acquisition

US (DOJ)

Canada (Bureau of Competition Policy)

New Zealand (Commerce Commission)

Australia (Trade Practices Commission)

Brazil

Switzerland (Cartel Commission)

South Africa (Competition Board)

Sweden (Competition Ombudsman)

\[ d \] Relevant product market

In all jurisdictions concerned the relevant product market was consistently defined as wet-shaving razor blades or shaving products (razor blades, razors, and other razor products). Both Gillette and Wilkinson Sword manufactured these products. Their respective market shares varied from country to country, as noted below, but in every market they were leading firms.

In the jurisdictions where Eemland acquired the Wilkinson Sword business (initially the EEC and subsequently also the United States), the case revolved
around the question whether there was a "merger" or "concentration", or some other form of structural link that gave Gillette (the world’s No. 1 firm in the wet-shaving market) the ability to exercise influence over Eemland’s Wilkinson Sword wet-shaving business. Gillette appears to have conceded that if such a merger or similar link existed, competition would have been affected. It contended that no such structural link existed.

In the other jurisdictions, where Gillette itself acquired control of the Wilkinson Sword business, Gillette took one of two positions: in some instances, it claimed that the merger was outside the scope of the relevant national merger rules; in other instances, it claimed that the merger would not have impermissible effects on competition in the wet-shaving business in that country.

e) Relevant geographic market

Although each jurisdiction properly focused its inquiry into competitive consequences on its own geographical territory, and thus one could say there were a series of national markets, there is no doubt that this transaction affected product markets in which competitors compete at an international level.

The DOJ alleged that the United States as a whole was the relevant geographic market. The French decree specifically noted that the concentration had its origin outside the national territory of France, but that it affected the French market for the subject products. In Australia, the Trade Practices Commission contended that the Gillette acquisition was likely to permit Gillette to dominate the Australian market for wet shaving products, in breach of s. 50 of the Trade Practices Act.

The European Commission considered the Community as the principal geographic area, and therefore did not address the issue of individual markets of the Member States, because it considered that Gillette’s high market shares suggested "dominance" in nearly all Member States in any event. The Commission and the BKA did consider the possible effects the transaction would have in the EFTA countries and other non-EC European countries. The BKA’s principal extra-jurisdictional concerns related to the neighbouring German-speaking markets of Austria and Switzerland (and to some extent the Central European countries to the east of Germany). The Commission voiced similar concerns about the effect of the perceived geographical separation of these "neighbouring" countries on competition within the Community.

Gillette is of the opinion that the fact that the European Commission’s November 1992 Decision refers specifically to the EFTA countries, Hungary, Poland, Turkey and the former East Germany, Czechoslovakia and Yugoslavia can be attributed to the fact that, already by the time of the December 1991 oral hearing in Brussels, Gillette had informed the Commission (and other competition authorities in Europe) orally and in writing that it was prepared voluntarily to
transfer back the Wilkinson businesses in those jurisdictions as a way of settling the case. The Commission knew, therefore, that Gillette was unlikely subsequently to challenge its legal jurisdiction.

f) Issues of concern to each agency; actions taken by the authorities

i) Jurisdictions where Eemland had acquired the Wilkinson Sword business

European Commission - DGIV

Gillette informed the Commission (head of Directorate B of DGIV) of the transaction at a meeting on 21 December 1989. At that meeting Gillette indicated that it proposed to file an application for negative clearance under Articles 85 and 86 and/or an exemption under Article 85(3). Full details of the transaction were notified to the Commission under Form A/B on 23 February 1990. The Commission received complaints from Warner-Lambert and Bic in February and March 1990. The Commission sent Gillette a formal request for further information on 20 February 1990 to which Gillette responded on 20 March 1990.

Gillette informed us that it had sought, at an early stage, to reach an amicable settlement with the Commission (as it had done in the March 1990 consent decree with the US Department of Justice). It wrote to the Commission with a formal proposal on 8 June 1990. The Commission took no action at that time, perhaps in part because the UK and German national investigations were still pending.

A year later, in June 1991, the Commission issued a formal statement of objections which was followed by an oral hearing in Brussels in December 1991 and a formal Decision in November 1992.

The Commission did not contend that there was a "merger" or "concentration" in the sense of Council Regulation 4064/89, given that the case predated the implementation of the Regulation. Instead, it relied on its powers under Articles 85 and 86. The Commission expressed the concern that Gillette might be abusing its dominant position on the wet-shaving market by holding a substantial equity stake in Eemland and by becoming one of its principal creditors. It contended that, despite the precautions Gillette had taken in the LBO arrangements, Gillette had acquired the kind of influence over Eemland’s commercial policy that amounted to a change in the structure of the wet-shaving market. The Commission also contended that there would be commercial co-operation between Gillette and Eemland resulting from the geographical separation of the Wilkinson Sword trade marks between the Community and neighbouring countries, which would also restrict competition within the Community.
On 10 November 1992 the European Commission adopted a Decision under Article 86 which found that, through its involvement in the transaction, Gillette had abused its dominant position. It ordered divestiture of Gillette’s equity and debt interests in Eemland by a specific date, not made public in the Commission’s decision. Additionally, the Commission found that the agreements between Gillette and Eemland, relating to the geographical separation of the Wilkinson Sword trade mark between the Community and neighbouring countries, would have necessitated commercial co-operation between the respective owners of the Wilkinson Sword trade marks in breach of Article 85. The Decision also required Gillette to re-assign to Eemland the Wilkinson Sword businesses and trade marks in the EFTA countries, Hungary, Poland, Turkey and the former East Germany, Czechoslovakia, and Yugoslavia.

Gillette had been prepared to appeal against the Commission’s Decision to the Community’s Court of First Instance but by the time that it would have been necessary to lodge its appeal, it was already apparent that Eemland was not going to continue to own its Wilkinson Sword business. Any basis for the Commission’s concerns about the equity and shareholding links between Gillette and Eemland was removed by Eemland’s disposal on 22 March 1993 of its Wilkinson Sword business to Warner-Lambert, in connection with which Gillette re-transferred the trade marks and businesses in various non-EC jurisdictions (including those named in the Commission’s Decision). Gillette told us that it subsequently remained in touch with the Commission with a view to the Commission’s closing its file in this case.

ii) United Kingdom - OFT and other UK authorities

Gillette informed the OFT of the transaction shortly after the signing on 20 December 1989. It supplied fuller details to the OFT’s Merger Secretariat in January 1990 and to the OFT’s Restrictive Trade Practices Section in March 1990. Gillette had meetings and correspondence with the OFT over the first half of 1990. Warner-Lambert also lobbied the OFT during that period.

In June 1990 the transaction was referred by the Secretary of State for Trade and Industry to the MMC for a detailed investigation under UK merger legislation. At the same time, the Director General of Fair Trading (at the OFT) referred the case to the MMC for a detailed investigation under UK monopoly control legislation. In their two reports to the Secretary of State in December 1990 (published in March 1991) the MMC concluded, despite Gillette’s submissions to the contrary, that Gillette had the "ability materially to influence the policy" of Eemland (i.e. that there was a "merger" under UK legislation) and recommended that the Secretary of State should require Gillette to dispose of its equity and debt interests. The UK authorities did not look at the non-EC acquisition.
Gillette entered into discussions with the OFT and the DTI relating to the timing of voluntary undertakings to dispose of its interests in Eemland, although it continued to contest the MMC's conclusions. Those discussions were unsuccessful: DTI rejected Gillette's suggested undertaking to divest by June 1994, and Gillette refused to agree to an earlier date. Because Gillette took the position that the MMC had erred in law in reaching its conclusions and making its recommendations, it applied to the High Court of Justice for the judicial review of the reports.

The High Court granted Gillette leave to apply for judicial review on 24 July 1991. The Court proceedings revolved around whether or not there was a "merger" between Gillette and Eemland, and around the scope of any remedial action, including the timing of any order requiring Gillette to divest its equity and debt interests in Eemland. A High Court hearing had been scheduled for the week of 26 April 1993. In the meantime, in March 1992, the DTI had announced its intention to lay a draft divestment order before Parliament. Gillette then made formal representations to the Secretary of State, and in October 1992 it also petitioned the House of Lords under the Parliamentary hybrid instruments procedure. Pending the outcome of the judicial review, the DTI refrained from pursuing its order-making powers and the House of Lords' hybrid instruments committee was not called to consider Gillette's petition.

As stated above, the perceived competition issue was removed by Eemland's disposal on 22 March 1993 of its Wilkinson Sword business to Warner-Lambert. Gillette then proceeded to co-ordinate with the DTI with a view to the withdrawal of the various UK legal proceedings.

**iii) Germany - BKartA**

Gillette similarly informed the BKartA of the transaction on 21 December 1989. In agreement with the BKartA, the transaction was then formally notified in February 1990.

There was an extensive investigation into the effects of the Eemland LBO on competition within the German market. The BKartA also looked at the possible effect of the non-EC acquisition on the German market. It considered the objectionable part of the transaction to be Eemland's acquisition of the wet-shaving business within the European Community and the United States, concluding that Gillette's minority equity and debt interest in Eemland was sufficient to give rise to a merger for the purposes of German law. The market shares within Germany were substantial enough (61 per cent for Gillette, 28 per cent for Wilkinson) to trigger the oligopoly presumption of section 23a(2) of the German competition law. The BKartA raised certain objections to the transaction in August 1990.
With a view to settling those proceedings, Gillette stated to the BKartA that it would be prepared to sell back to Eemland the Austrian and other EFTA trademarks and distribution operations, to give up the various pre-emption rights, and to undertake not to renew any regular supply arrangements with Eemland. However, it did not prove possible to reach a settlement and on 23 July 1992 the BKartA prohibited the transaction.

Gillette appealed to the Berlin Kammergericht on 4 August 1992. Those appeal proceedings were withdrawn following Eemland’s sale of its Wilkinson Sword business to Warner-Lambert on 22 March 1993.

iv) France - Ministère de l’Economie, des Finances, et du Budget; Conseil de la Concurrence

The French Minister of State referred the matter to the Conseil de la Concurrence for investigation on 15 October 1990. The Conseil’s opinion was given on 15 October 1991. The Conseil noted that the European Commission was examining the transaction under Articles 85 and 86, and not as a "concentration" under Reg. 4064/89 (which had not yet entered into force on the date of the merger). Nevertheless, following its examination of the equity and debt interests, the Conseil concluded that the links created between Gillette and Wilkinson gave rise to a "concentration" under the French merger rules. With respect to the French market, it examined the distribution channels for the subject products, and advised the Minister to keep the Wilkinson Sword and Gillette marks separate. To this end it recommended that Eemland should appoint a third party distributor for its products in France. The Conseil’s opinion also referred to the various proceedings that were taking place outside France. With respect to competition within France, it argued that the market for shaving products had numerous barriers to entry, that costs of production were high, that it was necessary to use extensive publicity in order to promote the products, that expenditures for research and development were high, and that no new entrant had appeared in France for a period of 15 years.

The Minister issued a decree on 11 March 1992 which prohibited Gillette from influencing, directly or indirectly, the distribution of Wilkinson shaving products in France. Eemland was ordered to renounce its right to commercialise (either itself or through an intermediary) the Wilkinson products, by 1 February 1993, unless such commercialisation was done by a company guaranteed to be financially independent of Gillette and Eemland. Eemland was required to report to the competent authorities, by 1 February 1993, about the steps it had taken.

Eemland appealed to the French Courts against this decision, although it is understood that Eemland’s sale of its Wilkinson Sword business to Warner-
Lambert on 22 March 1993 will probably lead to those proceedings being withdrawn.

v) Ireland - Fair Trade Commission

Because of the thresholds involved in the acquisition of Maguire and Paterson Limited (the Irish Wilkinson Sword subsidiary acquired by Eemland), the FTC could not definitely say that the proposed transaction triggered the Mergers, Take-overs and Monopolies (Control) Acts 1978 and 1987. Gillette's non-voting shareholding of 22 per cent, with no right to Board representation, appeared to mean that there was not a merger within the scope of the Irish merger control legislation.

The FTC concluded that, since the proposed acquisition appeared to be outside the scope of its relevant jurisdiction, it had no basis for opposing the transaction. However, the FTC made a recommendation (which was adopted on 3 October 1990) that the Minister for Industry and Commerce express strong concern over the transaction to the competent authorities in the United Kingdom, Germany, and at the EC level (where the transaction was already being examined).

vi) Spain - Department for the Defence of Competition

On February 23rd, 1990 Warner-Lamber (through its Spanish subsidiary Adams S.A.) filed a complaint against Gillette for abuse of a dominant position in Spain. This complaint was not because of the acquisition of the Wilkinson Sword business in Spain by Eemland at this first stage, but because the commercial behaviour of Gillette against the productions of Adams S.A., particularly against the brand called "Schick".

On July 9th, 1990 Adams S.A. gave more details and included the fact of the acquisition, and on October 22nd the Service of Protection of Competition notified the complaint to Gillette. Gillette S.A. answered on November 16th and on December 3rd Adams S.A. sent more information.

On February 1991 the Service asked several great distributors about the commercial conditions of the relevant products and decided not to propose provisional measures.

During the next months the Service studied deeply the competition conditions in Spain in the razor blade market. After that study the Service concluded that Gillette had a dominant position but it did not abuse. The Service also concluded that Gillette and Wilkinson Sword continued to compete in the Spanish market notwithstanding the Gillette’s financial investment in Eemland and its purchase of the Wilkinson Sword business outside the EC and the USA.
The conclusions were considered enough to close the case on December 1991. This decision was not appealed.

2. Jurisdictions where Gillette had acquired the Wilkinson Sword business

i) United States - Department of Justice

On 10 January 1990, the US Department of Justice filed an action to enjoin the transaction, on the ground that it violated Section 7 of the Clayton Act, 15 USC s. 18. Gillette. Shortly after the case was filed, on or about 24 January 1990, Gillette, Eemland, and Wilkinson rescinded Gillette’s acquisition of Eemland’s wet shaving razor blade business in the United States.

Subsequently, on 26 March 1990, a proposed consent decree was filed with the district court, along with the competitive impact statement required by s. 2(b) of the Antitrust Procedures and Penalties Act, 15 USC s. 16(b)-(h). The proposed final judgment was designed to ensure that the status quo after the rescission of 24 January would be maintained, "by providing that Gillette could not, without the prior consent of the United States, reacquire the Wilkinson Sword wet shaving razor blade business in the United States or otherwise deprive Eemland of assets necessary to efficiently supply and support its wet shaving razor blade business in the United States." The proposed decree prohibited Gillette from obtaining further equity or additional debt of Eemland; from acquiring assets that Eemland had been using to produce blades for sale in the United States or the European Community; from marketing, distributing, or selling razor blades in the United States; and from acting as Eemland’s agent for the US wet shaving razor blade market. The final judgment also contained similar prohibitions directed against Eemland. Finally, the judgment addressed the more subtle problems raised by the actions due to the equity or debt relationships between the two. In this respect, it was concerned with the same kinds of risks as the European authorities were addressing.

Both Warner-Lambert and Bic expressed opposition to the consent decree, focusing primarily on the debt and equity interests that Gillette was maintaining in Eemland. However, the District Court for the District of Columbia rejected their objections, and entered its final judgment incorporating the consent decree on 25 July 1990 (Civ. Action No. 90-00530-TFH, DDC). The decree incorporated the provisions outlined above. Several parts of it related to competition abroad, including provisions prohibiting Eemland from transferring trademarks to Gillette in either the United States or Europe, and an exemption from the prohibition on acquiring Eemland production facilities or assets that related to Zimbabwe and Brazil.
ii) Canada - Bureau of Competition Policy

The Bureau commenced its examination of the acquisition in January 1990, following the receipt of complaints by several interested third parties. Since there are few manufacturing operations in Canada relating to the wet-shaving products market, the focus of the investigation was on other ways to resolve the competitive issues. Furthermore, the nature of the transaction and the relationship between the Canadian operations and those abroad complicated the task of obtaining the necessary information.

Gillette never took over the running of the Wilkinson Sword business in Canada, and it gave an undertaking to the Bureau in August 1991 that it would not do so pending completion of the Bureau’s investigation. The Bureau’s investigations were still continuing when on 22 March 1993 Gillette voluntarily transferred the beneficial ownership in Wilkinson Sword’s Canadian business to Eemland’s Wilkinson Sword GmbH subsidiary (which was acquired by Warner-Lambert on the same day). The investigation in Canada is now closed.

iii) New Zealand - Commerce Commission

The proposed acquisition of the Wilkinson Sword wet shaving business in New Zealand by Gillette (New Zealand) Limited was notified to the Commerce Commission on 25 October 1990. The Commerce Commission gave its clearance of the transaction on 16 November 1990.

iv) Australia - Trade Practices Commission

On 20 December 1989, on the same day as the basic Gillette/Wilkinson/Eemland transaction was finalised, Gillette also acquired the right to appoint a new distributor of Wilkinson Sword products in Australia. Shortly thereafter, on 2 January 1990, Eemland and Gillette entered into an agreement relating to trade marks and other intellectual property rights outside of the European Community, under which Eemland assigned these rights to Gillette. Wilkinson Sword Ltd, a UK company which was then the registered owner of the Wilkinson Sword trade marks in Australia, was also a party to that agreement.

On 24 January 1990, a meeting took place between officials of the Australian Trade Practices Commission (TPC) and Gillette’s representatives, at which the TPC was first told about the transaction. At that time, Gillette voluntarily undertook to give the TPC at least two weeks’ notice of "any plans that may eventuate to finalise a proposed acquisition of the Wilkinson Sword business in Australia", and to keep the TPC fully informed about the transaction in Australia, including any step that might have trade practices implications. Gillette further agreed to seek TPC approval of any acquisition in Australia.
Gillette reiterated this undertaking on several occasions during 1990. The scope of the undertaking is reflected in a letter of 8 February 1991, which stated:

"Please note that this information is provided as a matter of courtesy only, and is not a notification pursuant to our undertaking to give the TPC 14 days’ notice of any step which might have trade practices implications. That undertaking remains."

Notwithstanding this undertaking, and regular contact between the TPC and Gillette’s representatives, certain steps did occur in Australia which later became the basis for the TPC’s action against the transaction. On 20 December 1990, the local distributor of Wilkinson Sword shaving products entered into agreements (which took effect no later then 29 January 1991) whereby the distributor’s beneficial interest in the rights to distribute Wilkinson products was held for the benefit of Gillette or its nominee. On 7 January 1991, the UK company Wilkinson Sword Ltd. assigned its interest in the Wilkinson Sword trademarks to Gillette. This assignment was later lodged with the Australian Trade Marks Office on Gillette’s behalf. On 7 March 1991, the assignment of the Wilkinson Sword trademarks to Gillette was officially registered. The effect of these arrangements was to entitle Gillette or its nominee to distribute shaving products under the Wilkinson Sword name in Australia.

On 12 June 1991, Gillette notified the TPC by letter of certain steps proposed for the Wilkinson acquisition. Gillette stated to us that its notification included the timetable, the names of the parties, and the justification for the proceeding. However, TPC records indicate that the letter did not specify which assets were to be transferred, nor the party to whom they would go. According to the information furnished by Gillette for this study, the transaction was effected by Gillette (New Zealand) Ltd., which acquired the Wilkinson Sword shaving assets in Australia. However it is unclear what assets Gillette was referring to, given the fact that the trademarks had already been acquired as of 7 March 1991. The theory of the TPC’s case has been that the acquisition of the trademarks was the step that gave Gillette effective control of the Wilkinson Sword business in Australia.

The 12 June 1991 letter also reported that Gillette (New Zealand) had appointed (or was about to appoint) the former Wilkinson Sword subsidiary company in Australia, Wilkinson Sword Group Australia Party Ltd. (which, Gillette indicated, had been taken over by its management in a management buy-out), as the distributor of Wilkinson Sword products in Australia. Gillette’s position was that Gillette and Wilkinson Sword were thus still in competition with each other, and were still independent, unrelated legal entities. This, however, was naturally a matter of dispute between Gillette and the TPC.

The TPC has noted an additional fact of great relevance for international co-operation, relating to the structure of the transaction. One can infer that Gillette was attempting to avoid the Trade Practices Act, because it referred in its
12 June letter to the acquisition of certain of the assets of the Wilkinson Sword business in Australia by one New Zealand company from another New Zealand company. Furthermore, it was Gillette’s position that the acquiring New Zealand company had never done any business in Australia.

On 22 August 1991, the TPC acknowledged Gillette’s letter of 12 June, and it indicated that it would monitor the industry to ensure that Gillette would continue to operate the Wilkinson Sword business in Australia separately from the Gillette business. On 3 October of the same year, the TPC wrote to Gillette’s representatives seeking an assurance that the arrangements for the conduct of Wilkinson Sword’s business did not contravene s. 45 of the Trade Practices Act, by being an agreement likely to bring about a substantial lessening of competition in the wet shaving market in Australia. On 16 October, it wrote again to Gillette, advising that the acquisition might fall within s. 50 of the Act. Gillette’s lawyers responded that they were not aware of any information suggesting breaches of the statute. Over the following months, Gillette’s lawyers requested information from the TPC relating to complaints made under s. 50; the TPC declined to provide this information; at the same time, the TPC was continuing its efforts to collect information from Gillette’s lawyers that would enable it to decide whether s. 50 applied. Gillette refused to provide the information.

On 27 August 1992, the TPC commenced judicial proceedings against the Gillette Company and others alleging that some of the transactions described here involved a breach of the Trade Practices Act. The TPC notes that the suit does not involve the matters of which it received notice in the 12 June 1991 letter, but only transactions concerning which Gillette gave it no prior notice.

Under the law at the time the case was instituted, which is the governing law for the proceedings, the question relates to issues of dominance on the Australian market. (Note that the new mergers test, which took effect as of 21 January 1992, refers to a substantial lessening of competition.) The TPC sought and obtained an ex-parte interim injunction against Gillette, which was granted by the Federal Court, requiring Gillette not to deal with the Australian Wilkinson Sword trademarks prior to 4.00 p.m., 2 September 1992, in order to preserve the status quo. Gillette did not object to the continuation of this injunction pending the final determination of the matter.

One of the key issues in the court proceedings is the question whether Gillette does now, or has ever, carried on business in Australia. The Gillette Company maintains that it has never done so, although wholly owned subsidiaries have had a presence there for many years. The TPC takes the opposite position, noting among other things the statement by Gillette’s lawyers that "Gillette has been marketing its broad range of products and doing business in Australia for about 60 years." It rests the case against Gillette on the proposition that Gillette carries on business in Australia, and/or it engaged in relevant conduct in Australia. Gillette portrayed the matter as a case of "extraterritorial jurisdiction."
Gillette challenged the Court's jurisdiction to hear the matter. Following a preliminary hearing of the question of jurisdiction, on 8 October 1993 the Court held that the TPC has established a prima facie case that the acquisition breached s.50 of the Act. On 1 November 1993 Gillette unsuccessfully appealed that preliminary decision and, on 19 November 1993 submitted to the jurisdiction of the Court. The matter is currently proceeding to a final hearing.

v) Brazil

In the latter part of 1990 the Brazilian authorities publicly expressed concern about the proposed acquisition of the Wilkinson Sword business (including manufacturing operations) in Brazil by Gillette. They conducted an investigation, and following a formal submission from Gillette, the transaction was approved and completed in June 1991.

vi) Switzerland - Cartel Commission

Following a complaint from Warner-Lambert in March 1991, the Swiss Cartel Commission carried out an investigation into the wet-shaving market in Switzerland. In their decision, issued on 12 February 1991, the Commission decided that Gillette's acquisition of the Wilkinson Sword business in Switzerland could not have any negative social or economic effects and there was no evidence that Gillette was trying to inflict any kind of restraint of trade. The Commission decided to take no further action.

vii) South Africa - Competition Board

The South African Competition Board wrote to Gillette early in 1990 asking for information about its acquisition of the Wilkinson Sword business. Because the Wilkinson Sword business in South Africa was, and still is, owned by a subsidiary of South African Breweries (i.e. not by Gillette or Eemland), the Board took no further action.

viii) Sweden - Office of the Competition Ombudsman

The Office conducted only a preliminary investigation into the effect of the transaction on concentration in Sweden. This investigation also covered Eemland's acquisition of the matches and lighters business, which was also part of Stora's consumer products division and was not examined in every jurisdiction. The Ombudsman concluded that the effects on the Swedish market were minimal and so no prohibition order was made.
g) Conclusion of proceedings

On 22 March 1993 Eemland sold its Wilkinson Sword business to Warner-Lambert and Gillette transferred back the Wilkinson businesses in the EFTA countries, in Poland, Hungary, Turkey, Canada and in the former East Germany, Yugoslavia and Czechoslovakia.

These developments removed all the authorities' grounds for concerns about Gillette's equity and debt interests in Eemland. In the jurisdictions where Eemland acquired the Wilkinson Sword business all proceedings have, therefore, effectively come to an end. The investigations in Spain and Ireland had already been concluded without any measures being taken against the transaction. In Germany the appeals procedure was withdrawn on 28 April 1992. In the United Kingdom and France and at the EC level, Gillette and the various authorities are in the process of withdrawing the various investigations and appeal procedures.

Of the authorities outside the European Community who investigated the transaction (i.e. Gillette's outright acquisition of the Wilkinson Sword business), the United States adopted a consent decree after the rescission of the contract for the acquisition and Gillette's acceptance of the obligations contained in the decree regarding its influence over Eemland and/or Wilkinson. The New Zealand, Brazilian, Swiss, South African and Swedish authorities imposed no conditions. The Canadian authorities closed their investigation, following the voluntary sale-back by Gillette of the Canadian business. Thus, only the Australian court proceeding is still continuing.

2. Process of investigation: agencies' perspective

a) Methods used to collect information

It is plain from the accounts received from the various investigating agencies that serious problems relating to the collection of information existed in many instances. There are indications that, among others, the authorities in Canada and Australia believed that international co-operation would have assisted them in their investigations.

b) Actual inter-agency co-operation, if any

Working Party No. 3 already has had the benefit of a number of papers on the subject of inter-agency co-operation in this case, which were submitted for a round-table discussion at the meeting of 24 October 1990. Rather than duplicate the content of those papers, or the summary of the replies prepared by the Secretariat, this report focuses more on developments since late October 1990, in light of the fact that several countries' authorities had not concluded their proceedings at the time of the round-table.
As more and more authorities completed different stages of their investigations of this transaction, agencies in other countries had the benefit of published reports analysing the transaction. For example, the MMC Report was available to the Australian Trade Practices Commission; and the French report reviews the actions taken by the United States, the United Kingdom, Germany, and the European Commission. The B KartA reported numerous contacts with authorities in other countries, and this experience appears to have been typical. The Australians in addition reported inter-agency co-operation with the New Zealand Commerce Commission, the European Commission, the Canadian Bureau of Competition Policy, the FTC in the United States, and the OFT in the United Kingdom. They noted, however, that their efforts had not been very fruitful, due to confidentiality problems.

3. Process of investigation: parties' perspective

i) Did the parties know of inter-agency co-operation?

Gillette was aware that there were informal contacts between some of the authorities within Europe. Gillette observed that DGIV had used staff from its Merger Task Force to assist in its investigations, including secondees from the B KartA and OFT who could have been expected to have personal contacts with the national competition authorities from whom they were seconded. On occasions Gillette had encouraged those contacts as it sought to reach a settlement which would be acceptable to all the authorities; this had proved difficult because of the different objectives of some of the authorities.

The Brussels lawyers for Warner-Lambert, intervener in the EC investigation, became aware of informal inter-agency co-operation by virtue of their co-ordination with counsel for Warner-Lambert in the other European jurisdictions investigating the transaction. It is thought that at one point the case workers from the B KartA flew to Brussels and held informal meetings with DGIV.

ii) Did they inform the agencies?

Although there had been no formal obligation to notify any authorities, Gillette did voluntarily inform most of the interested authorities.

Warner-Lambert filed an initial complaint with the Commission and kept constant pressure upon the European Community to investigate the transaction. It also filed complaints with many other agencies.
4. Costs

Gillette incurred extremely high costs in having to deal with the complaints and investigations in so many jurisdictions, though it was able to minimise costs by carefully managing and co-ordinating its approaches to the different agencies. Its in-house legal department played a pivotal role in this regard and external lawyers used in the principal jurisdictions worked closely with one another throughout the investigations.

Warner-Lambert indicated that the costs of the multiple reviews were enormous, although these have not been documented (and may not be documented, because of confidentiality considerations). Both direct costs, in terms of lawyers' fees, filings, and collection of information, and indirect costs, in terms of the business uncertainty caused by the long drawn-out nature of the various proceedings, contributed to the overall figure. Warner-Lambert incurred extremely high fees as an interested third party because it instructed lawyers in every jurisdiction where the transaction was investigated in detail. Warner-Lambert was an aggressive and very active participant in the investigations and submitted legal arguments as well as evidence to the regulatory authorities. Costs were minimised to the extent possible (which was not great) by discussion and information-sharing amongst Warner-Lambert's lawyers in the various jurisdictions.

Some agencies noted that it would have been significantly better if, at the time of the merger, Gillette had been required to file simultaneously in all concerned jurisdictions. Of course, since some countries do not have mandatory filing laws, and since in other countries the time at which filing is required varies, this observation related only to the ideal situation. Australia noted the problem faced by countries that looked at the transaction later on: "Gillette’s strategy of going country-by-country made it harder for a small player". Furthermore, Australia noted that the differing results in various jurisdictions were used against them, particularly the fact that the merger had been "cleared" in New Zealand. It was their perception that the companies in this case counted on the necessarily limited scope of inter-agency co-operation, due to secrecy laws. Gillette, for its part, pointed out that it had promptly and voluntarily informed all those authorities which it had considered would have shown an interest in the transaction. Gillette had no clear ideas as to why some jurisdictions had responded more quickly than others, attributing the fact partly to the differing enthusiasms of some authorities and their individual staff and partly to jurisdictional deadlines.
Chapter III

Factors Affecting Co-operation

A. Was there anything to co-operate about?

The potential for useful co-operation and process convergence varies considerably, depending upon a number of particular factors. In some cases, best illustrated by the Gillette case study, the possibilities and potential benefits are significant: the product market was essentially identical everywhere in the world; concentration levels caused concern in the majority of jurisdictions; remedial measures taken by one authority were at least potentially capable of solving the competitive problems perceived by others. Having said this, Gillette was obviously an unusual case involving a single product which is marketed globally. In other cases, such as Westinghouse/ABB, there was virtually nothing to be gained by co-operation between the US authorities and the German authorities, because the transaction itself was different. Cases such as Coats Viyella/Tootal and TNT/Canada Post fell at the end of the spectrum representing greater potential benefits, as did Westinghouse/ABB and Schneider/Square D from the standpoint of US-Canadian co-operation. Hoechst/Celanese fell somewhere in the middle.

Renault/Volvo is difficult to categorise from this standpoint, because on the one hand the nature of the products used and their geographic scope led to rather narrow areas of overlap; on the other hand, the lack of co-ordinated timing appears to have impeded the ability of the jurisdictions which followed the European Community to ensure that their own interests were protected. Fiat/Ford NH also presented few competitive overlaps, and thus did not require extensive co-operation. Finally, Matsushita/MCA appears to have raised so few substantive concerns in the reviewing jurisdictions that co-operation was not a high priority for that rather different reason.

In summary, co-operation will not be useful in some cases, for a variety of reasons. The transactions may be factually distinct, market overlaps may be
insignificant, or most reviewing authorities may be able to dispose of the matter summarily under their substantive rules. In order to maximise the benefit of any procedures that are adopted to facilitate co-operation, it is therefore useful to identify as precisely as possible the characteristics of the cases that will benefit from increased co-operation and process convergence.

B. What factors limit or define the scope of co-operation?

1. Confidentiality rules

Confidentiality rules provide the single greatest procedural obstacle to greater international co-operation. Although each agency's rules are somewhat different, stem from different sources, and give rise to different expectations, there is heavy reliance on the local regime by all parties subject to it. Ideally, agencies would be able to co-operate with one another under a carefully drafted exception to the normal confidentiality regime. Even under the present laws, however, it may be possible to increase international co-operation through the simple expedient of clarifying them. At the present, uncertainty about their scope naturally causes staff agency lawyers to err on the side of respecting confidences; this can be so even when some information may legitimately be in the public domain or may in a sense be proprietary to the agency.

There are numerous difficulties as far as confidentiality rules are concerned. From the agencies' point of view, it is extremely important to ensure that companies that are involved in mergers from time to time have confidence in the agencies. Merger control systems work most effectively when there is a high degree of co-operation between the agency and the "customers". An obvious example of this is the pre-notification phase under the EC Merger Regulation. Anxieties that confidentiality rules might be broken as part of wider international co-operation could obviously undermine this important fact of practical life.

It is useful to review several representative examples of confidentiality rules to illustrate the seriousness of the problem that they create. A brief discussion of the rules in the United States, the European Community, the United Kingdom, and Canada follows. Details for other OECD countries will be found in Appendix 6.

a) The position in the United States

Under HSR s 18(a)(h):

Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended
to prevent disclosure to either body of Congress or to any duly authorised committee or subcommittee of the Congress.

This is taken to apply to the filing of an HSR form in the first place and to the issuing of a second request. Voluntary submissions are also regarded as confidential. Some officials in the United States said they were concerned that confidentiality rules could prevent them from informing a foreign agency of an investigation they were conducting; but this was unlikely unless the proposed transaction had not been publicly disclosed and was known to the agency only by virtue of the companies' HSR filing.

The Antitrust Civil Process Act, 15 USC ss.1311-1344, under whose authority Civil Investigative Demands are issued, contains similar provisions assuring confidentiality of materials produced:

[ss. 1313(c)(3)] Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogations, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by an individual other than a duly authorised official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorised committee or subcommittee thereof.

Complementing both the HSR provision and the CID provision are several exemptions to the Freedom of Information Act (FOIA), 5 USC s. 552, which recognise that the enforcement agencies need not, and may not when statutes so provide, produce certain material pursuant to a request under FOIA. The more important exemptions include:

(b)(3) specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(7) investigatory records compiled for law enforcement purposes [under certain conditions].

Since in most instances pertinent to merger enforcement the statutory restrictions on disclosure contained in HSR and the CID law would apply, the federal agencies have taken the position that they are not entitled as a matter of
law to reveal information submitted by the parties to anyone. Thus, for example, unless the Protocol signed with the state enforcement agencies applies (discussed below), they may not even share information with the state attorneys general, despite the fact that the latter are entitled to enforce Clayton Act s. 7 as a matter of federal law. (See, for example, California v American Stores Co.\(^5\)).

\[b\) \textit{The position in the European Community}\]

EC law contains strict rules on divulging confidential information. The Commission would be unlikely to propose amendments to the implementing Regulations for Articles 85 and 86 (Council Regulation 17/62 and the relevant Regulations in the transport sector) and to the Merger Regulation, only for the purpose of modifying the confidentiality provisions. The specific rule in Regulation 4064/89 is contained in Article 17:

1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Articles 4(3),18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

It is worth pointing out that Article 17(1) of Regulation 4064/89 is actually concerned with restrictions on the \textit{use} of information; Article 17(2) is concerned with Commission officials’ obligation of professional secrecy; Article 17(3) is concerned with non-disclosure of information relating to individual firms or undertakings.

A specific problem with regard to changing the law in the European Community is that the confidentiality rules in themselves are influenced by the different standards obtaining in its Member States, so that it might be difficult to develop a new standard upon which all countries could agree.

c) \textit{The position in the United Kingdom}\]

Section 133 of the Fair Trading Act provides that:

1. Subject to subsections (2) to (4) of this section, no information with respect to any particular business which has been obtained under or by virtue of the provisions (other than Part II) of this Act \(...\) shall, so long
as that business continues to be carried on, be disclosed without the consent of the person for the time being carrying on that business.

2. The preceding subsection does not apply to any disclosure of information which is made

   a) for the purposes of facilitating the performance of any functions of the Director [the Director General of Telecommunications], [the Director General of Gas Supply], [the Civil Aviation Authority], [the Director General of Water Services], [the Director General of Electricity Supply], the Commission, the Secretary of State or any other Minister under this Act, the [Restrictive Trade Practices Act 1976] [the Estate Agents Act 1979] [the Competition Act 1980] [the Telecommunications Act 1984] [Chapter XIV of Part I of the Financial Services Act 1986] [the Airports Act 1986] [the Control of Misleading Advertisements Regulations 1988] [the Water Act 1989] [the Electricity Act 1989], [or the Broadcasting Act 1990,]8, or

   b) in pursuance of a Community obligation within the meaning of the European Communities Act 1972.

3. Subsection (1) of this section does not apply to any disclosure of information which is made for the purposes of any proceedings before the Restrictive Practices Court or of any other legal proceedings, whether civil or criminal, under this Act, the [Restrictive Trade Practices Act 1976].

4. Nothing in subsection (1) of this section shall be construed -

   a) as limiting the matters which may be included in, or made public as part of, a report of the Advisory Committee or of the Commission;

   b) as limiting the particulars which may be entered or filed in, or made public as part of, the register ...;

   c) as applying to any information which has been made public as part of such a report or as part of that register;

5. Any person who discloses any information in contravention of this section shall be guilty of an offence and shall be liable -

   a) on summary conviction, to a fine not exceeding...10,

   b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

6. In this section references to this Act shall be construed as including references to any enactment repealed by this Act.
d) The position in Canada

The Merger Enforcement Guidelines issued by the Director of Investigation and Research explain the confidentiality rules that apply to Canadian merger investigations. The key provision of the Competition Act is section 29, which provides:

1. No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration and enforcement of this Act:
   a) the identity of any person from whom information was obtained pursuant to this Act;
   b) any information obtained pursuant to section 11, 15, 16 or 114;
   c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; or
   d) any information obtained from a person requesting a certificate under section 102.

2. This section does not apply in respect of any information that has been made public.

The Guidelines explain that the Bureau will generally respect requests by merging parties that information not be sought from third parties about the likely effect of mergers that have not been made public. (Guidelines, page 56). However, such a request may lengthen the time required for an investigation. If the parties indicate that they wish to proceed more quickly, the Director will seek information from the third parties. If need be, he will also seek undertakings to ensure that the Tribunal’s powers will not be impaired, or he will seek an interim order under section 100 or an order under section 97 (applicable to transactions that have been completed). Finally, section 10(3) of the Canadian law provides that all inquiries are to be conducted in private; thus, the Director will not comment on whether a section 10 inquiry has been initiated unless the existence of the inquiry has otherwise been made public.

2. Timing and notification procedures

The differences among national timing and notification procedures limit the possibilities for effective co-operation, and at the same time underscore the need from the business community’s perspective for serious attention to this issue. Attached at the end of Appendix 6 is a chart that illustrates the present diversity of these requirements. Even using the simplifying assumption that all agencies begin their reviews at the same time (which, of course, is not the case), both the
length of the different review processes and the fact that some do not have a fixed endpoint create costs and uncertainty for companies and complicates the task of interagency co-operation.

As a practical matter, the procedural system each agency uses affects how much information it learns; at what stage of an investigation it acquires that information; in what form it receives the information (ie. documents, notes of interviews, commissioned studies, etc); and how much time the agency has in which to reach its decision. We describe below the systems in the United States, the European Community, the United Kingdom, Canada and Germany, to give some idea of the wide variation that exists among OECD Member Countries. Appendix 6 gives further details on the procedures in force in all OECD countries which have some form of merger control, even those not involved in the case studies.

a) The position in the United States

Premerger notification is required pursuant to the HSR Act, Clayton Act ss.7A, 15 USC ss. 18a, only if certain size-of-party and size-of-transaction thresholds are met. First, one party to the transaction must have net sales or total assets of US$100 million or more. If the acquired company is not a manufacturing firm, its total assets must be at least US$10 million; sales are not part of the threshold. Second, as a result of the transaction the acquiring party must hold either 15 per cent or more of the voting securities or assets of the acquired person in excess of US$15 million. Third, if the transaction would meet only the 15 per cent of voting securities or assets test, the transaction is not reportable unless, as a result of the acquisition, the acquirer would also hold assets of the acquired person valued at more than US$15 million, or voting securities conferring control of an issuer with annual net sales or total assets of more than US$25 million. As is typically the case, the HSR statutes and the FTC rules implementing it provide that the ultimate parent entity is the relevant one, and indicate how related parties must be consolidated.

Plainly, these thresholds have the effect of "catching" a great number of transactions. In the comprehensive volume edited by Rowley & Baker, the chapter on the United States (authored by Donald Baker) reports 2 747 HSR notified transactions for 1988, 2 883 for 1989, and 2 262 for 1990. (International Mergers: The Antitrust Process, at 466.) Of these, only approximately 70 to 100 per year went to the Second Request stage. Even taking into account the decrease in merger activity in the last year or so, this indicates that the filing requirements "catch" a number of cases in which no competitive problems exist.

Parties to a transaction are required to file their notification prior to finalising the deal. A fee of US$25 000 from the acquiring person must now accompany the filing. In an ordinary case, the parties must then wait for a 30-day period (or
15 days in the case of a cash tender offer) from the date of filing prior to completing the transaction. Parties who believe that their transaction poses no competitive issues may request an early termination of the waiting period, which is often granted. In more complex cases, however, a second waiting period will be triggered if the government (either the FTC or the DOJ, depending upon the outcome of the inter-agency case allocation process) issues a so-called Second Request, seeking further information about the transaction. Second Requests are often quite detailed, and require a significant amount of time for a response. Only after the parties have filed their answer to the Second Request does the second time period of 20 days (or, for cash tender offers, ten days) begin to run. Thus, it is impossible to say exactly how long the waiting period will be when a Second Request has been issued.

It is not feasible in this report to go into any detail about the operation of the HSR system. The Federal Trade Commission administers the programme, and has guides designed to explain it to the public. In addition, more detailed discussions can be found in sources such as Rowley & Baker, mentioned above.

b) The position in the European Community

Pre-merger notification is compulsory in respect of mergers that have a Community dimension under Article 4 of the Merger Regulation. The notification must be made on Form CO not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

In practice it is vital for the parties to approach the MTF in advance and to discuss the merger in question, although it is an interesting question to consider what impact this practice may have on third parties. This enables them to consider how their case should be presented and to begin work on Form CO before the time begins to run under Article 4. There are some occasions on which it has proved impossible to meet the one-week deadline, but the MTF has been prepared to allow some flexibility on this.

c) The position in the United Kingdom

There is no compulsory pre-filing in the United Kingdom, and most mergers are brought to the attention of the OFT on a voluntary basis. There are provisions in the FTA, inserted by the Companies Act 1989, for voluntary, statutory pre-notification, although these are fairly infrequently used. They are invoked if they trigger a time-frame within which the Secretary of State for Trade and Industry must decide whether or not to make a reference to the MMC.
d) The position in Canada

Like the United States and the European Community, Canada requires prenotification of certain mergers and acquisitions. Part IX of the Competition Act requires the Director to be notified when:

1. pursuant to section 109, the parties to the transaction, together with their affiliates, have assets in Canada that exceed US$400 million in aggregate value, or had gross revenues from sales in, from, or into Canada, exceeding US$400 million in aggregate value, for an appropriate period; and

2. pursuant to section 110, the size of the transaction requires notification. Section 110 identifies four types of notifiable transactions; asset acquisitions, share acquisitions, corporate amalgamations, and business combinations otherwise than through a corporation, i.e., a joint venture. For non-exempt asset acquisitions, the transaction must be notified if the aggregate value or gross annual revenue from sales in or from Canada exceeds US$35 million. For share acquisitions, the US$35 million figure is again critical: the corporation must have assets that meet this amount, and a greater than 20 per cent voting interest in a public company or a greater than 35 per cent voting interest in a private company. For amalgamations, the threshold is C$ 70 million in assets or gross annual revenue in or from Canada.

These provisions cover both direct and indirect acquisitions, which means that notification may be required in Canada even if the merging parties themselves are both foreign, or if a Canadian company is buying a foreign company or its assets. Again, it is impossible to furnish all the relevant details on the Canadian notification system in this short space. The information mentioned here is only for purposes of giving a very general idea of its scope.

Timing under the Canadian system is partly a function of the type of form the parties choose to use. Section 120 of the Act gives the parties the option of selecting the short form (section 121) or the long form (section 122). If they select the short form, they need wait only seven days to complete the transaction; however, they run the risk that the Director will seek additional information. If he notifies them before the expiration of the seven-day period that additional information is necessary, they must then furnish all of the long-form information 21 days before completing the transaction (or ten trading days, if it is a stock exchange transaction). These waiting periods run from the time that the Director considers that complete information has been submitted.

The Director has the power, pursuant to section 123, to shorten the waiting periods. In addition, section 74(1) of the Competition Act gives the Director power to issue an Advance Ruling Certificate indicating that he will not challenge a proposed merger, when he is satisfied that he would not have grounds to apply
to the Tribunal for an order. The ARC is valid for a one-year period, and obviously depends on complete disclosure by the parties of all pertinent information, and no change in circumstances.

e) The position in Germany

Pursuant to section 24(a) of the German Act Against Restraints of Competition, pre-merger notification is usually required, if:

1. one of the enterprises participating in the merger recorded a turnover of at least DM 2 000 million in the last complete business year or

2. at least two of the enterprises participating in the merger recorded individual turnovers of at least DM 1 000 million in the last complete business year and

3. certain size-of-transaction thresholds are met. Most important are acquisition of all or a substantial part of the assets of another enterprise and acquisition of at least 25 per cent of shares. Since 1990 the BKA is also entitled to control the acquisition of even smaller percentages of shares if it enables an enterprise to exercise a considerable influence on another enterprise in terms of competition.

The BKA may prohibit a merger within a period of four months from receipt of the notification only if it informs the person who has effected the notification within a period of one month from receipt of the notification that it has begun an examination of the merger project.

3. Agency structure and resources

The structure of particular agencies and the resources at their disposal may either limit or facilitate the co-operation that takes place. This factor has both a horizontal dimension, which relates to the ability of an agency in one country to contact its counterparts elsewhere, and a vertical dimension, which relates to the dissemination of information received from abroad to other persons within a single agency.

Horizontal co-operation normally operates through the respective international offices of the various competition agencies. It appears to be far less common, although certainly not unknown, for case officers directly to contact their counterparts elsewhere. In fact, in some instances such direct contacts appear to be discouraged, through measures such as making it difficult to make international telephone calls, or other subtle signals indicating that all contacts with foreign agencies must go through the international office. A serious policy question for each agency arises in this connection: whether to encourage such direct contacts, and if so, what kind of guidance to give the case officers
themselves. The most effective co-operation appears to take place when the case
officers have had some prior contact with their counterparts (as they might, for
example, if regular meetings take place, or if seminars for exchanges of views are
scheduled).

With respect to the vertical dimension, the record is mixed. In some of the
cases studied above, such as Schneider/Square D and Westinghouse/ABB, it
appeared that the international offices were following all relevant rules for
notifying other interested countries, but that the process did not filter down in
every agency to the case officers as effectively as it might have. Other agencies,
either because of their small size or because of effective internal organisation,
have had greater success.

4. Examples of existing inter-agency agreements

Despite the factors limiting co-operation, there are several bilateral or
multilateral co-operation agreements between OECD countries designed to
promote co-operation in competition law enforcement between competition
agencies. Details of these will be found in Appendix 7.
Chapter IV

Possibilities for Greater Co-operation and Convergence

A. Why co-operation?

Before turning to the recommendations below, it is useful to identify exactly why co-operation might be desirable and for whose sake it should be encouraged. The advantages that the business community might perceive will differ from those that the enforcement agencies see. In addition, although most people have a general sense that co-operation is a good idea, and it is wasteful to have duplicate and time-consuming procedures, differences of opinion exist if one assumes that substantive laws will remain unchanged, and one then attempts to identify the precise advantages of co-operation and process convergence. We therefore examine these questions from all relevant perspectives.

1. For whose sake?

Inter-agency co-operation might be undertaken for three reasons: to benefit the competition agencies in their task of enforcing their respective laws; to assist the companies involved in the transaction; or to help the private lawyers. The great majority of lawyers, however, preferred to keep control of the degree of inter-agency co-operation, rather than having it imposed by law. Some lawyers were of the view that any co-operation would inevitably be only for the benefit of regulators and not for companies or their counsel. Many indicated that they were often willing to waive rights if that would facilitate a speedier resolution. The business community basically trusts its lawyers, and thus takes a similar view; however, when the issue of cost savings from better co-ordinated procedures is raised, it expresses great interest in that aspect of the study. The enforcement agencies and their staffs see a clear benefit from certain types of co-operation, in specified kinds of cases. Normally, these benefits should translate into more efficient and effective conduct of the investigation, and thus should also benefit consumers, on whose behalf the laws are implemented. However, it is
important to specify where and how co-operation is most promising, so that desirable co-operation will not become an undesirable administrative burden.

In considering the scope for increased co-operation between regulatory agencies, it is important to review what the function of such co-operation might be, from the perspective both of the agencies and of the parties.

From the agencies’ perspective, co-operation could be considered to contribute to any of the following:

i) Avoiding the unnecessary duplication of efforts. For example if Agency A has undertaken an economic analysis of a particular market and has assembled relevant data etc., Agency B could be spared the burden of carrying out an investigation that would cover much of the same ground. An example of this occurred in *Coats Viyella/Tootal*, where the US FTC was able to make use of the UK MMC’s report in *Coats Viyella plc/Tootal Group plc*. Both *Gillette* and *Square D* provide examples of cases where this benefit would have been of great value. It is no accident that these are two of the cases reported to the largest number of jurisdictions. In *Gillette*, the benefits would have related more to a common body of information about the corporate mechanisms used and about remedy, since the product market was fairly simple for everyone to analyse. In *Square D*, however, relatively complex products were at issue, and co-operation could have helped on this point.

ii) Gathering information. Agency A may have problems in gathering information located in another jurisdiction. If it were possible for the Agency in the latter jurisdiction to gather that information, the advantage would be obvious. Some assistance from Australia *Gillette* might have helped the Trade Practices Commission know where to look for useful information on the jurisdictional question that is presently before the courts, although it seems clear that no direct information changed hands. As noted above, for many agencies reviewing the *Gillette* case, reports from their counterparts were already available to the public and certainly could have been sent without compromising confidentiality rules.

iii) Avoiding conflicts. An obvious example of conflict is the situation in which Agency A may be considering the adoption of a remedy in a particular case which could be at variance with the preferred solution of Agency B. Another typical case arises where Agency A seeks, extra-territorially, information from an undertaking situated in the territory of Agency B. Conflicts such as these have led to the adoption of blocking statutes such as the Protection of Trading Interest Act 1980 in the United Kingdom. Discussions between agencies could help to avoid this because Agency A might agree to assist Agency B or they might
agree who should take jurisdiction and deal with a particular case, taking into account such matters as comity, as set out in Article VI of the US/EEC Co-operation Agreement. They may even be able to decide on the basis of positive comity that one Agency should take the action required by another, as foreshadowed in Article IV of the Agreement.

Co-operation for this purpose would have helped in the Gillette case, particularly in areas like Australia and New Zealand where potentially conflicting solutions may be reached. Westinghouse is another example, in the sense that the Canadian remedy relied significantly on competition from the United States and other countries. In Renault/Volvo, the United States authorities were aware that a United States effort to block the transaction would have conflicted with the European clearance, but they were nonetheless prepared to take action if that had been necessary under the governing law. Earlier co-operation might have reduced the chances for this type of potential conflict. In TNT/Canada Post the European Commission was careful to ensure that its proceedings did not give rise to a conflict problem with the Canadians.

From the parties' perspective, co-operation could be considered to contribute to any of the following:

i) Reduction in cost. In considering the cost element, many of the people interviewed stressed the fact that the costs of merger review cannot be measured simply by out-of-pocket fees to lawyers and other professionals. The largest cost, by far, is in executive time and the lost productivity that a long, protracted investigation may cause. Thus, to the extent that co-operation facilitates a speedier resolution of a matter, it also reduces the overall cost of review for the companies. Furthermore, many companies were receptive to the idea of developing some common format for frequently requested information, such as the basic corporate structure and lines of business, that almost all agencies need. Some suggested that another very large cost in transnational deals is the cost of translating documents, either for submission directly to the agency (primarily in the case of the DOJ and the FTC), or for internal use in preparing submissions.

ii) Reduction in time. As the chart at the end of Appendix 6 illustrates, the time factor has two dimensions: first, how long must the companies wait for a definitive answer from one agency, and second, how long will the entire process take, including all agencies. No case better illustrates the potential for a reduction in time than Gillette, which began with the December 1989 announcement of the transaction, and which is still pending in the Australian courts. The Australian authorities initially thought in 1989 that their concerns had been addressed by actions taken in other countries, but they then found out that the off-shore solutions were inadequate for their purposes. The
parties, as well as the agencies, would benefit from the reduction in time that co-operation could foster here. (It is of course possible that the parties in a hostile case or in a questionable case would like to drag matters out as long as possible, but we do not count the temptation to abuse process as a legitimate concern.)

iii) A useful defence tactic. A target company may welcome co-operation between Agencies as this may make it more likely that one or more than one of them will choose to take action against a merger. Obviously the combined forces of several agencies may be more effective than those of individual agencies proceeding alone. An example of this occurred in *Group Schneider/Square D*. The same could be true for a complainant, as in the case of *Gillette/Wilkinson*.

2. *At what stage?*

Some stages for co-operation are more important than others. Co-operation with respect to remedy appears to be the most important, followed by jurisdiction, assistance in collecting information, and timetable information. If actual exchanges of specific information were possible under confidentiality rules, and if such requests were not unduly burdensome to the agency receiving them, these could also be of assistance.

At which stage in an investigation could co-operation prove useful, and for what purpose? The regulatory bodies wish to co-operate:

i) by informing each other that an investigation has been/is to be launched;

ii) by discussing mergers at an early stage in order to crystallise the likely relevant issues and focus attention on them. This would reduce the overall burden, time and expense involved in the multiple investigation of international mergers;

iii) by deciding which agency should proceed against a particular merger. One agency could decide to renounce its own jurisdiction where it considered that another one would be likely to deal more effectively with a particular merger. Alternatively an agency might actually ask another one to take jurisdiction in a particular case where the latter could achieve results that the former could not (positive comity);

iv) by assisting each other with the gathering of relevant information;

v) by considering the possibilities for finding a suitable remedy where a transnational merger might require extraterritorial action in order to overcome problems for competition in a particular market;

vi) by considering (in conjunction with iii) above) whether conflicts can be avoided at the remedial stage. It may be, however, that one regulatory
authority might still take extraterritorial action even after consultation with another agency (see e.g. the Institut Mérieux case where there were some discussions between the United States, Canada and the European Community and where the US FTC imposed a consent order that required Mérieux (a French firm) to lease the vaccine rights of Connaught (a Canadian firm) to an FTC approved buyer for a period of 25 years, even though orders requiring specific actions overseas are notoriously difficult to enforce. See In Re Institut Mérieux\textsuperscript{11}.

3. For what purpose?

We identified the two principal purposes of co-operation as being efficiency (i.e. reduction of duplication of effort, shared expertise, etc.) and the effectiveness of law enforcement efforts. The efficiency reason does not, however, appear to be the dominant one, because individual agencies must conduct an independent examination of all the facts under their own substantive standards in any event. At this time, primary information cannot be shared because of confidentiality. The areas in which co-operative efforts appear to have been most useful, such as keeping one’s counterpart agency informed about when a dispositive order might be expected, or alerting them to a possible remedial dispute, do not consume much time and resources within the agency. Law enforcement effectiveness, while quite important, does not reach its full potential in today’s world because (again) of the confidentiality rules. In several of the cases studied here, the boundaries of the relevant geographic market were debatable, and the interchangeability of products across national markets was unclear. Agency officials expressed some unease about the potential for significantly different presentations by the parties. The parties generally denied that they would engage in this kind of gamesmanship, because it is simply too risky. However, the agency concern over at least occasional or potential abuse is a serious one.

B. Why convergence?

The possibility of convergence is distinct from the idea of co-operation.

1. Is there any tendency on the part of the parties towards convergence?

The device of the internal law firm global memorandum, which is used both as a starting point in preparing different national filing forms and to co-ordinate the advocacy in different countries, appears to be fairly widespread. This indicates that there is already some tendency towards convergence, even though Counsel then adapt to the requirements of particular systems of merger control.
2. **Cost avoidance goals**

The more similar the substantive rules and the deadlines become, the stronger the case is for process convergence to save transaction costs.

3. **Certainty of timing**

Vague deadlines are the worst enemy of transnational mergers and acquisitions, according to the parties involved in our nine cases. The second worst enemy was inconsistent deadlines. Process convergence on the issue of timing, although difficult because of constraints in legislation, would be of great practical benefit to the parties, and would normally make it easier to organise a competitively beneficial or neutral transaction.

Many of our correspondents have expressed the view that, while the idea of convergence has a special attraction, it is unrealistic at this stage given the disparity of both substantive grounds for review and procedural rules.

C. **Recommendations**

1. **Increased general co-operation plus a protocol specifying the permissible types of co-operation for particular cases, which would indicate in more detail how the 1986 OECD Recommendation should be implemented**

The protocol would go beyond agreements such as the US/EC Agreement and the memoranda of understanding that exist between nations, by defining what kinds of actions are expected of the parties. Actions could include the following (some of these actions are already taken in many countries pursuant to the 1986 OECD Recommendation): (1) notification of the initiation of a proceeding, (2) notification of the termination of a proceeding, with a description of any remedial action ordered or voluntary steps undertaken by the parties, (3) notification of the need to seek evidence in the territory of another party, (4) general description of the issues of interest to the notifying agency, such as the relevant markets affected, jurisdictional issues, remedial concerns, (5) statement of the time period within which the notifying agency either must act or is planning to act. In addition, (6) agencies could agree to require parties to tell them which other agencies have already received formal notification of a transaction, and to inform them promptly of any future notifications. We note that the Bellamy-Roth report for the International League for Competition Law recommended that the principles expounded in the report should be incorporated in an international convention.

Although it is clear that there is a certain degree of inter-agency co-operation, it may be that this not as effective as it might be because of the way in which internal responsibilities are allocated. For example, the 1986
Recommendation is observed between various agencies. However, it is not clear whether this achieves as much as it could. If the International Unit of Agency A notifies its counterpart in Agency B of an impending investigation, it is important that this should be transmitted down to the case-handler with actual responsibility for that case. We obtained the impression in more than one agency that, although there was a reasonable degree of "horizontal" contact between agencies, there was relatively little "vertical" information about this to individual case-handlers. In addition, this means that it must not be unduly difficult for them to determine whom to contact, and that they must then have the necessary facilities to contact one another. It seemed, at times, that compliance with the 1986 Recommendation was seen as little more than a symbolic act, perhaps even a chore. Agencies do not necessarily perceive the advantages to them in knowing how their counterparts in other jurisdictions are proceeding. The OECD has itself done some work on the operation of the 1986 Recommendation and it may be useful to consider what has already been done when deciding how to proceed. Consideration might also be given to the encouragement of further bilateral and multilateral co-operation agreements of the kind described in Appendix 7 of this Report as a supplement to the 1986 Recommendation.

Advantages: Although the 1986 OECD Recommendation is being implemented in the great majority of Member states that have active merger review processes, different countries interpret its scope in different ways. In part, this is a result of differences in local confidentiality rules and merger procedures; however, in part it appears to be independent of those differences. A more precise indication of what is expected of competition agencies would lead to better co-ordination among agencies and would foster greater confidence on the part of private parties, who at the present time are often not sure how much agencies are talking to each other, and what they can and cannot say.

Disadvantages: It would probably be difficult to draw up an agreed list including much beyond the lowest common denominator, i.e. simple notifications, because of the scepticism some agencies feel as to the utility of greater international co-operation, and the constraints they must observe pursuant to national (or other) confidentiality rules.

Recommendation: That action be taken to ensure that the practical benefits envisaged by the 1986 OECD Recommendation are realised in all cases.

2. Establishment of a waiver system

In the United States, under new Protocols for Co-ordinating Federal-State Merger Probes between the Antitrust Division and the State Attorneys General, and between the Federal Trade Commission and the State Attorneys General, a procedure has been devised to permit the efficiencies of using a single filing form, while at the same time fully protecting the confidentiality and reliability of
the HSR procedure (see Appendix 5). The protocol applies when all acquiring and acquired persons in the transaction submit to the Division or Commission a letter in which they agree to provide to the lead state (as designated by the National Association of Attorneys General), information submitted to the Division or Commission pursuant to either HSR or CID’s, and in which they waive the confidentiality provisions of the HSR Act, 15 USC, § 1313(c)(3), to the extent necessary to allow discussion of protected materials between the Division or Commission and the State Attorneys General. When the Division or Commission receives a letter complying with these criteria, it will provide to the lead state:

1. copies of all requests for additional information issued pursuant to the HSR Act;
2. copies of all civil investigative demands issued pursuant to the Antitrust Civil Process Act;
3. the expiration dates of all applicable waiting periods under HSR Act.

To the extent practicable and desirable, the Antitrust Division or Commission also commits itself to co-operate with the lead state in the analysis of the merger.

It should be noted that some state attorneys general would still prefer to have full compulsory powers to obtain the materials available to the federal agencies, a step which could be accomplished only by an amendment of the federal law. Furthermore, private parties are apparently wary of the new system, in part because they would prefer a federal-level "one stop shop".

Nevertheless, by leaving the key decision on confidentiality - to waive or not to waive - up to the parties, this procedure may achieve enforcement efficiencies without sacrificing the trust and reliability that must exist between agencies and their constituents. Many experienced competition lawyers said that they were always willing to waive rights not to provide filings, or to co-operate in other non-mandatory ways, if they were handling the typical friendly transaction that the parties wanted to conclude. Indeed, where time is of the essence because of the need to use outside financing commitments that will expire, the waiver option may be very attractive.

Extending this precedent to the international level would, of course, introduce additional complications. For example, the state attorneys general are normally enforcing the same law, the federal Clayton Act, as the Antitrust Division or Commission, and thus the information sought would be identical. On the international level, there is no avoiding the complications caused by substantive differences. On the other hand, particular issues are often common to different national authorities, e.g. such questions as how to define authorities and how to define the relevant market(s). Since no one would be forced to waive, it might be an interesting experiment to see how many parties could be persuaded to facilitate the review process under an international counterpart to the Protocol. It might be appropriate to offer an option, whereby one would
specifically waive with respect to designated other authorities, rather than waiving indiscriminately for all others. Note that in the Protocol the lead state handles everything. Without an international "lead agency", separate bilateral discussions would probably be unavoidable in any event.

Advantages: This would not require legislative change in most jurisdictions. Furthermore, it responds to the concern of the private sector (both business firms and counsel) relating to the ability to protect sensitive information, and the desire to approach each jurisdiction in a way that is most responsive to its law and the way the system involves the business community itself. It is also a relatively cost-less way to proceed.

Disadvantages: Experience under US Federal-State Protocols suggests that not very many parties are taking full advantage of its procedures. Thus, a waiver system might not advance matters materially beyond their present situation. Furthermore, although private parties express a desire to retain "control" over their presentation, this is not necessarily a benefit from the perspective of effective law enforcement. It may be that the system operates more successfully within a Federal structure such as the United States than between independent States.

Recommendation: Although the advantages may not be as significant as one would hope, there is no harm in trying to develop an attractive waiver system, especially if it offered benefits to waiving parties such as expedited consideration or reduced fees.

3. A commitment on the part of each Member country to draw up confidentiality guidelines under its own law, both for the use of internal agency staff and for dissemination to the public

Perhaps surprisingly, uncertainty remains about how far a country’s own confidentiality regime permits its competition agency to go in releasing information about merger cases to others. Different practices sometimes apply depending upon whether the proposed recipient is another agency of the same government, a foreign competition agency, a competition agency of a subordinate governmental entity, third parties with a clear interest in the proceeding, or the general public.

One could imagine a regime that began with each individual agency and worked outward, in the following way. First, there is a need for clearer explanations within agencies about the scope of the confidentiality rules. The potential for co-operation would be assisted materially even if the only step taken were to ensure that everyone, from case handlers to the highest officials, had a uniform understanding of the rules. This is especially important in countries in which several agencies or ministries have some responsibility for competition law enforcement, such as the United States, the United Kingdom and France. It is desirable that all officials know the answer to questions such as (in the United
States) whether the fact of a filing under HSR is confidential (plainly yes, according to both the FTC and the DOJ); to what extent can the issuance of a Second Request be revealed, when that is also confidential unless disclosed by the parties; is this problem solved by using the word "investigation" in the notifications instead of the words "HSR filing," when it is clear that the FTC and the DOJ have power to open investigations in cases that do not fall within the pre-merger notification rules? In the European Community, with its important prefiling consultative period followed by the extremely short time for review required under the Merger Regulation, is there any way to indicate that a particular transaction might be reviewed?

Second, using the facilities of the OECD. the various agencies could make it clear to one another what their respective limitations are. Many case officers might be reluctant to ask questions out of a lack of information about the possibilities; alternatively, a better understanding would spare the embarrassment of turning down an inappropriate request.

Finally, clarity in the confidentiality files would add to the transparency of the merger review process for the companies themselves. The (obvious) point was made repeatedly that companies are extremely anxious at the possibility that information about their business activities might be handed over to regulatory authorities. Naturally there is even greater anxiety at the thought that an agency in one jurisdiction would hand that information over to an agency in another one. This problem is compounded by the fact that information in the hands of a competition agency in another jurisdiction might then be handed over to other bodies in that country. In the context of the European Community, disquiet was expressed at the fact that notifications under the Merger Regulation are passed on to the authorities of each of the Member States: the Spanish Banks case may go some way to allay this anxiety.\footnote{12}

Advantages: Transparency with respect to the confidentiality rules themselves would reassure case officers that their actions were appropriate, and would relieve them of the need to err on the side of caution. By the same token, foreign agencies seeking information would know the permissible limits of such inquiries and would stay within those limits.

Disadvantages: In some jurisdictions, the rules governing confidentiality are themselves difficult to ascertain. In the European Community, for example, these rules are derived from the laws of the 12 Member States, and have been the subject of case-by-case development in the European Court of Justice. In other places, the formal rules may be relatively clear, but the ways in which they should be interpreted are not. Thus, it would be a major undertaking to draft the suggested guidelines. Furthermore, the status of the guidelines under local law is likely to vary. In some places, they would not have official weight, and in others, they might. This could lead to complications. Moreover, an effort to articulate confidentiality guidelines could lead agencies to adopt the most cautious and
restrictive approach, which might impede the flow of information more than would be required by domestic law if applied flexibly to individual cases.

Recommendation: Work within the context of the OECD to develop mutual understanding of the confidentiality restrictions governing each agency; disseminate the results of this work thoroughly within all relevant national agencies.

4. Require the parties to notify the fact of notifications to other agencies

In those jurisdictions where there is compulsory notification, or a form that must be used when making a voluntary notification, it would be possible to include a question asking the notifying parties whether they had notified the merger to any other regulatory agency. There could be a further requirement that in the event of any subsequent notifications, the parties would inform the agency in question. It would also be possible to ask companies if they had made any inquiries in any jurisdiction about the possible application of merger laws, regardless of whether there has been any formal or informal notification.

It is difficult to see any substantial objections to this idea in principle, and we did not hear of any either from the agencies or the lawyers to whom we spoke. However, in some jurisdictions (the United Kingdom) there is no prescribed form on which such a question could be asked; or there may be no legal basis for asking such a question: this is apparently the position in Germany. Japan has a compulsory notification system, but there is no provision which requires the parties concerned to inform the authority whether they have notified or will notify the regulatory agencies in other countries. In many of the cases we studied, the parties had voluntarily notified each of the agencies with which they dealt of any other notifications that had been made. It might have been helpful in Renault/Volvo if there had been greater disclosure of what regulatory action was taking place. However, at least one lawyer considered that it was not his function to make things easier for the agencies by submitting this information voluntarily.

Advantages: Without compromising confidentiality rules, this measure would ensure that all agencies know both from the parties and from their counterparts overseas of one another’s interests in a timely fashion. This could pave the way for an effective waiver system.

Disadvantages: No one with whom we spoke could think of any legitimate disadvantages.

Recommendation: Include on the relevant forms the question about notifications to other regulatory authorities, with a duty to keep the information current, or impose the obligation pursuant to other legal mechanisms.
5. More efficient dissemination of information in the public domain

A large amount of information is in the public domain and the problem of confidentiality would not, therefore, apply to it. Obvious examples are published reports of a particular agency (as in the case of the MMC’s report on *Coats Viyella plc/Tootal Group plc*), market research data, government statistics and reports. Where such information exists, more efficient dissemination of it between agencies could help to avoid unnecessary duplication of effort and would be useful in the gathering of information. There can be difficulties, however, in deciding whether information is in the public domain or whether it is covered by obligations of confidentiality. The comments above (establishing clearer guidance as to what is confidential) are therefore pertinent here as well.

Advantages: Such dissemination would help to avoid duplication of effort for the agencies, and would make it clear to private parties that agencies had access to information developed in other countries.

Disadvantages: Given the quantities of information in the public domain, this could be a burdensome responsibility. It is possible that the market will increasingly come to supply the sort of information envisaged under this Recommendation, in which case there may be no need to encourage agencies themselves to devise systems to exchange information.

Recommendation: Develop guidelines and practices for the dissemination of public information of potential relevance. Contact between agency libraries or research institutions could be a way to avoid undue burden.

6. Create one or two model filing forms, which request common information in a single format, and which use different country annexes as appropriate

An obvious possibility for procedural convergence would be the adoption of a common notification form. Various correspondents identified the current lack of such a form as a serious problem: the inconsistency of information required, the different types of form, the ways in which the information must be provided, etc. Lawyers involved in one case not within our remit expressed considerable frustration on the disparity of information required in the European Community and the United States. In particular the amount of information required at the time of a second request in the United States has received some adverse criticism.

A common form would begin with questions of interest to all competition agencies, e.g. description of the parties, information on relevant markets, information on competitive overlaps, nature of the agreement in question (i.e. joint venture, merger, acquisition, etc.), and proposed date when the transaction is to be (or was) effective. It may or not prove necessary to develop one model form for jurisdictions with a single filing and a second form for jurisdictions with
a two-step process. This issue in itself is related to the issue of time periods and decision-making (see below). It might also be necessary, to the extent that individual authorities are concerned with turnover, competitive conditions, etc., in their own countries, for the parties to append a country annex, as appropriate, with the information each authority requires under its own substantive law, following the timetable imposed in the country in question.

This idea and that of a common timetable (see below) give rise to an obvious problem: the notification form and the timetable in themselves are a reflection of the substantive criteria by reference to which mergers are judged. The problem is illustrated by comparing the substantive criteria for merger control in the United States, the European Community and the United Kingdom. The fact that the forms and the timetable are different may mean that different law firms are instructed for different jurisdictions, which inevitably involves some extra expense and can be administratively inconvenient. One lawyer argued strongly that the EC Form CO was too demanding and detailed, especially since so many mergers that fall within the Regulation prove not to raise substantial competition issues. He would favour something closer to the US system, which is more lenient on a first filing, although it requires a great deal of information when there is a second request.

There could be greater harmony in the description of the product and geographical markets on the notification form. The information required in an HSR filing is, at the moment, very different from that required under form CO. In the United States, lawyers work by reference to SIC’s, whereas lawyers operating under Form CO present the market themselves. Several lawyers said that they prepare a regulatory memorandum in respect of any particular transaction which they then adapt for the purpose of each notification; if such a memorandum exists, it would be sensible to use it for all notifications, subject to adaptations or annexes tailored to the needs of any particular jurisdiction.

Arguments in favour of harmonization of pre-merger reporting requirements have commended themselves to other commentators. The ABA 1991 recommended the harmonization of the types of information requested by the respective national enforcement agencies; it also suggested that national rules on confidentiality should be amended so as to facilitate a greater sharing of information between agencies. Similarly the Bellamy and Roth report for the International League for Competition Law recommended that the competition authorities of the individual states and the EEC should seek to harmonize their merger forms and documents. Robert Pitofsky’s testimony to the US Senate’s Committee on the Judiciary, on 18 June 1992, contained a similar idea.

Advantages: It is unclear how much time the parties waste in conforming to the variety of filing forms that exist, which is not an inevitable function of the differences in substantive law and the different focus of concern naturally expressed by each authority. However, even if the waste is not enormous,
harmonization of the way in which the same information is reported to all authorities would be a step worth taking.

Disadvantages: First, even the creation of a brief common filing form with individualized annexes might require legislative change in many Member states, and certainly would require regulatory change. Second, there is a cost-benefit issue, in that the savings to be expected from this kind of common form may be quite modest in comparison to the difficulties of bringing about the necessary changes. Third, there is a risk in any common form that filing requirements will always be harmonized upward, i.e. that the maximum amount of information any authority requires becomes the new norm. In many instances this could actually have the effect of increasing transaction costs, rather than decreasing them. Finally, not all jurisdictions have a statutory notification form of any kind at this time; introducing one would require a fundamental change.

Recommendation: For those jurisdictions which presently have required or voluntary filing forms, or instructions describing the information to be submitted, develop a common format for information that will be needed by all (description of corporate structure, nature of agreement, etc.).

7. **Harmonize the time periods within which decisions must be made, thus permitting greater harmonization of the filing forms themselves**

The single most important factor for private parties is the need for quick, certain decision-making on the part of the enforcement authorities. Although lawyers are able to work with any schedule they are given, and thus can adjust to a variety of certain deadlines (where such deadlines exist), it would be better to have fewer different deadlines, or in the ideal case, only one that applied worldwide. In one respect, this would lead to greater harmonization of filing forms: a single time period would mean harmonization between the one-stage and the two-stage systems. Substantive information would still vary among countries both because different legal standards apply and because the effects of a transaction are likely to be different in different areas of the world.

Adoption of a common timetable: One of the most striking differences in the merger control systems studied is in the time for decision. These differences are largely due to the substantive laws that each country or region is implementing, and thus cannot be easily changed. Nevertheless, it is possible to work towards a common timetable in certain classes of cases, such as friendly transactions in which the parties are willing to waive certain rights. For businesses that strongly desire a clear conclusion to the review process, and for transactions where the product markets and competitive conditions are similar in several countries, some kind of waiver-based system might address the timetable issue satisfactorily.
To the extent that agencies or legislative bodies are undertaking reviews of the operation of the competition laws relating to mergers, Member states should also take steps to bring this problem to the attention of the relevant bodies, so that long-term changes can alleviate the problem.

Adoption of a common filing form: This suggestion is also useful only to the extent that substantive law will permit change. However, it may be useful over time for jurisdictions with burdensome initial filings, such as the European Community, to consider whether some abbreviated form might be possible along the lines of the Canadian model or the US model; similarly, it would be useful for jurisdictions with burdensome second phase proceedings, such as the United States, to consider whether the techniques that the Commission uses in the prefiling stage might be useful to narrow the scope of Second Requests.

Advantages: Companies would know within a definite period of time whether their transaction was going to be allowed in whole or in part, and thus would be able to plan more effectively. Agencies would know that their counterparts in other countries were following a single time period. This could help to improve co-ordination in matters of evidence collection, definition of issues, and remedy. Further, it would be more difficult for parties to try to play one agency off against another, by strategically seeking approval in one place and then attempting to use that approval to their advantage in another.

Disadvantages: Again, the biggest disadvantage is the practical one. Harmonization of time periods would clearly require re-opening the basic legislation of many countries, a step which is widely regarded as impossible at the present time. The EC time periods, for example, are set forth in the Merger Regulation itself, and were the subject of intense negotiation in the period leading up to the regulation. The time periods in the United States are given in the Hart-Scott-Rodino legislation; the periods in Canada appear in the Competition Act. Another disadvantage would be felt by third parties and targets in hostile cases: in the brief time periods available, it is often difficult to learn enough about a transaction to know how to oppose it effectively. On the assumption that some of these transactions may actually be anticompetitive, the social loss would be greater.

Recommendation: From the standpoint of the business community, harmonization of time periods is one of the most useful steps that could be taken. It would also assist agency co-ordination in cases when the remedy ordered by an authority that finished its review earlier would prejudice the options available to one that needed more time. Thus, this harmonization should be a longer term goal for process convergence.
D. Other possibilities

During our research, we have heard of and/or considered other possibilities for avoiding conflicts and multiple review. We feel, however, that at this stage some are too modest, and others are unrealistic and over-ambitious. We are not recommending any of these ideas, but simply mentioning them for the sake of completeness.

1. The status quo

At the present time, one can observe the independent substantive development of merger laws and enforcement procedures. The procedural forms and timetables adopted in each jurisdiction are, naturally enough, adapted to serve that jurisdiction’s substantive needs. In brief, there is little in the way of process convergence, except to the extent that the parties themselves prepare a global memorandum on the common issues of market definition, competitive concerns, and remedy, and furnish the relevant parts of it to each agency. There is some inter-agency co-operation, but it is driven as much by personal contacts as by the exigencies of a particular case. Furthermore, there is considerable uncertainty among the personnel at the case officer level about the amount of co-operation that can take place: How much is confidential? How much time can be devoted to international co-ordination? How easy is it to find the right person in a foreign agency? Given substantive differences, is the effort worth it? There is always a risk, which occasionally materialises, of inter-jurisdictional conflicts over either efforts to collect information in another’s territory or the type of remedy sought. The status quo involves relatively high transaction costs to the parties, especially in cases where the product does not vary from country to country, and where international trade barriers are relatively low. Even if the lawyers generally view the costs of multiple review as acceptably low, in light of the overall value of a transaction, it is unclear at this point whether the business firms would be quick to agree.

Advantages: Leaving the status quo unchanged obviously entails the least effort, and responds most effectively to each individual country’s internal political needs.

Disadvantages: To the extent that this report identifies transaction costs stemming from the multiplicity of systems, and to the extent that the lack of co-operation hurts all systems of law enforcement, there is a clear cost to allowing the status quo to continue. Although substantive harmonization is not likely in the foreseeable future, natural evolution of merger control laws in the various OECD countries has led to systems that have many philosophical points in common. Thus, it would be difficult to say now that the procedural discrepancies are entirely driven by inconsistent systems of substantive law.
Recommendation: It is important to move beyond the status quo in the ways suggested below. As multinational transactions become more frequent, the problems associated with the status quo are likely to become more severe as well.

2. Increased general co-operation between agencies without changing practice with respect to particular cases

This possibility contemplates the regularization and extension of contacts between agencies, such as the meetings that already take place between the enforcement agency staffs of the European Commission and the US DOJ and FTC. Chapter III above gives several examples of existing inter-agency agreements. The exchange of expertise, discussions about hypothetical cases and mutual clarification of the substantive differences among member country laws can help lead to voluntary convergence of procedures. Furthermore such meetings may strengthen the case for competition and for competition law at a time when, some would say, there is a movement towards protectionism and "industrial policy" considerations in some jurisdictions. Competition agencies often have more in common with each other than with their own governments, which may be inclined to assist particular interest groups and to shy away from the pure competition considerations. The very fact of regular contacts, during which individual case-handlers become acquainted with their counterparts in other jurisdictions, makes co-operation between agencies more likely. There is a strong argument that, as systems of competition law proliferate, the encouragement and institutionalisation of such contacts become increasingly important.

If there is to be increased co-operation of this type, in which forum or under the auspices of which institution should it be organised? An obvious choice would be the OECD itself, which is well-established and has taken a close interest in competition matters over a number of years. It already has a Committee with responsibility for competition policy, and it has itself sponsored this research. The OECD consists of 24 Member countries, many of which have systems of competition law already, and it has been involved in other important issues in international antitrust.

There is however the significant fact that, recently, many states which are not OECD members have adopted competition laws. If increasing international contacts are to be encouraged, it would seem sensible to bring together agencies from all jurisdictions; this could perhaps be achieved by inviting non-member countries to send delegates on competition matters to relevant meetings of the OECD; an alternative possibility, however, would be to consider using the offices of a more broadly based organisation, or to establish a specialist and discrete World Merger Body that would take responsibility for matters of international antitrust (see further below).
Advantages: This step does not push countries faster than they are ready to move, and yet experience under existing arrangements strongly suggests that it is valuable for all participants. The formalisation of this type of meeting ensures that it will actually take place.

Disadvantages: In spite of the usefulness of the generalized inter-agency contacts, it does virtually nothing to address the private costs of multi-jurisdictional review over the foreseeable future. Furthermore, it fails to address the particular law enforcement needs that arise in specific cases. A general exhortation to agencies to extend contacts may be insufficiently focused and may in fact achieve nothing. Unless this idea is given the imprimatur of a specific recommendation, perhaps from the OECD, it may be entirely ineffective.

Recommendation: Whilst increased general co-operation between the agencies is a desirable goal, it may be insufficient, and should be considered in the context of recommendation 1 above.

3. Drafting a jurisdictional treaty that would set forth principles assigning a lead role to the country most concerned, and defining the remaining role that can be played by other countries affected

One way in which to reduce the transaction costs attributable to multiple review is to reduce the number of key reviewing agencies. Along the lines of the international tax treaties, one could envision drafting principles giving lead authority to the country in which more than two-thirds of the turnover in the competitively affected sectors took place, or allocating jurisdiction on a market-by-market, issue-by-issue basis. The practical difficulties of enforcing orders directed against concentrations if the parties are not organised within the reviewing country is well known. Thus, another potential jurisdictional principle could rely on the country or countries of the parties’ nationality.

Advantages: Oddly enough, this option actually interferes less with each nation’s domestic competition law regime, since it leaves the country free to use whichever form and whichever substantive principles it prefers once it has won jurisdiction. It also has the advantage, noted above, of providing a regime with maximum ability to enforce orders through the national mechanisms.

Disadvantages: Negotiating either bilateral treaties for the allocation of jurisdiction or a multilateral accord would be complex and time-consuming. Precedents exist even in the competition law area, in the agreement creating the European Economic Area (EEA), for example, and it is possible that the North American countries may come to something similar when the North American Free Trade Agreement (NAFTA) takes effect. Nonetheless, an agreement like this would require a high degree of substantive similarity among the signatory countries, and a high degree of trust in one another’s competition law rules,
before one could expect the national legislatures to give up such a substantial amount of domestic economic sovereignty.

4. Substantive convergence, with procedural convergence to follow

It is possible that the best way to achieve procedural convergence, and the reduction in transaction costs for the parties and agencies that can be expected from such convergence, is to allow the procedural rules to follow substantive developments. Arguably, this is the route the OECD nations have followed ever since the 1950s. For their own reasons and in their own ways, the Member states have moved much closer together in their competition laws relating to mergers. That substantive movement is what has raised the question about duplicative procedural regimes in the first place. The question is thus whether more substantive convergence is necessary before effective procedural co-ordination can take place. A full answer to that question would require a detailed analysis of each substantive regime. However, it is possible to conclude tentatively that, on the one hand, there are clear limits in the benefits of process convergence and agency co-operation imposed by substantive differences, but that, on the other hand, room for improvement exists today.

5. World merger body

A utopian possibility would be to establish a World Merger Body which would apply internationally-agreed substantive criteria to multi-national mergers and would follow the one-stop principle of the EC Merger Regulation, thereby eliminating the problems of multiple investigation and of conflict. At this stage, however, this is clearly too ambitious\textsuperscript{13}, and we do not propose to discuss the merits and demerits of the idea unless and until the OECD instruct us to consider the matter in further depth.

A possibility which may merit further reflection, however, is that of establishing a World Merger Forum in which competition agencies could meet on a regular basis to discuss competition and competition policy on a generalised, rather than a case-specific, basic.
Appendix 1

Draft Resolution

The International League for Competition Law (L.I.D.C.)

- Noting the increasing degree of state legislation concerning the control of mergers and acquisitions.
- Having regard to the interest of the community of nations in the promotion of competition and the need for effective control of mergers in order to further that objective.
- Considering that many states and the EEC and EFTA assume jurisdiction to regulate the transfer of control whether directly or indirectly of a company incorporated in or a business established in the regulating state.
- Appreciating that in an international economy such jurisdiction will involve consideration of conduct by foreign undertakings carried out outside the territory of the regulating state.
- Recognizing that such application of competition law has the potential for the infringement of the sovereignty or important interests of other states.
- In the light of the burden that is placed upon enterprises and undertakings by the multiplicity of different regimes to which an international merger or acquisition may be subject.
- Bearing in mind the principles of international law requiring each state to respect the sovereignty of other states.
- Noting the revised Recommendation of the Council of the OECD concerning Co-operation between Member Countries on Restrictive Business Practices and the bilateral Agreements and Memoranda of
Understanding concluded between the United States and Germany, the United States and Australia, the United States and Canada, Germany and France, and the United States and the Commission of the European Communities.

**Recommends:**

1. That the competition authorities of individual states and the EEC should seek to harmonize the forms and documents required for notification of mergers and acquisition according to a common model form with a view to greater efficiency of procedures and a reduction in transaction costs.

2. That where the investigation or control by one state of a merger or acquisition involves scrutiny of or interference with conduct carried out in other states, the regulating authority should consider before initiating such an investigation and before the imposition of remedies whether the merger or acquisition furthers important national interests or policies of those other states.

3. That national laws or procedures should make provision in a case where the interests of foreign states are so affected to enable the government or appropriate authority of the foreign state to make representations regarding those interests to the national authority, court or tribunal.

4. That the national authority, court or tribunal should have regard to those representations in deciding what, if any, order to make in such cases including, without limitation, orders for the production of documents or the supply of information from the foreign state.

5. That insofar as practicable the national authorities, courts or tribunals should restrict remedies regarding international mergers and acquisitions, including remedies relating to interim relief, to those elements of the transaction that are to be completed within the national territory, including in particular the transfer in control of companies incorporated in or establishments based in the national territory.

6. That all states seeking to regulate mergers and acquisitions under national law and the EEC should seek to conclude an international convention:

   a) that incorporates the principles of the above-mentioned bilateral conventions for co-operation and co-ordination;

   b) that incorporates safeguards of confidentiality, in particular precluding the regulating authority of one state from passing to
the regulating authority of another state documents or information received in confidence from undertakings and establishments save where such communication is expressly permitted by the law of the first state.

7. That UNCTAD should continue its programme of publishing and updating a compilation of the competition laws of the world and that national competition authorities should assist in that enterprise.
Appendix 2

Special Committee on International Antitrust
American Bar Association
Section of Antitrust Law
Report of 1 September 1991

"VII.  Recommendations
The Committee recommends as follows:

I.  Reporting Requirements

A.  Sovereign states should strive for greater harmonisation regarding the timing and content of their various premerger reporting requirements. In particular, the same types of information should be required in each jurisdiction.

B.  The principle of a lighter initial filing with provision for a "second request" where the agency in question decides to investigate the transaction is an attractive method of reducing the burden on reporting parties, and we encourage its adoption. Such a system is only workable where the waiting period can be suspended pending compliance, and sovereign states should be encouraged to implement legislative reform to achieve this.

C.  The quantity of information requested by an agency should not exceed what is reasonable and necessary for that agency's investigation. In particular, we encourage the EC to lighten the requirements of its form in the light of experience as soon as possible, and we encourage the US agencies to issue more narrowly focused "second requests," with less onerous document productions.
II. Conflicts in Enforcement

A. Agencies should be sensitive to the comparative interest of other states at the beginning of the consideration of a merger with a foreign element. We applaud the approach of the Department of Justice in its International Guidelines, and the exemplary list of factors it pledges itself to take into account. The Federal Trade Commission should likewise adopt, and follow, these guidelines.

B. Agencies should also consider, likewise at the beginning of review, the location of relevant assets and the effectiveness and extraterritorial impact of any remedy they may wish to impose.

C. When a merger has been notified to more than one jurisdiction, immediate consultations should take place between the agencies notified. Those that indicate a potential interest in review should consult. 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, use best efforts to avoid imposing a remedy that conflicts with the policy of the other state or states.

D. Confidentiality laws should be amended so as to allow agencies to share confidential information, subject to appropriate safeguards.

E. Sir Leon Brittan's proposal for an EC/US treaty for the coordination of merger review should be welcomed as a positive step. In order to be most effective, such a proposal should also involve Japan and Canada at the least, and (for the foreseeable future, given the high EC thresholds) the United Kingdom, France, Germany and Italy, which have major merger review systems. The 1986 OECD Recommendation set up a system of notification, consultation and cooperation which could be expanded to provide the basis for the proposed cooperation.

F. Exercise of the EC's discretion under the German clause and the "legitimate interests" provision of the Merger Regulation should take comity factors into account.

III. Private suits

A. The existence of private enforcement against mergers - especially in the United States - presents a threat to the moderation and restraint approaches advocated above. We recognize, however, that the private Section VII right of action is not likely to be
legislatively abolished, even in the limited context of mergers having important multinational effects.

B. We therefore propose that a court hearing a challenge to an international merger be instructed legislatively to apply principles of moderation and restraint before taking jurisdiction. We further propose that the multilateral agreements which we advocate also contain provision for consultation between sovereign governments where a private suit touches another sovereign state's interest, and for the court to be informed of the results of the consultations, and encouraged to follow them.

IV. State-level Enforcement

A. We applaud the present regular consultation between the National Association of Attorneys - General ("NAAG") and the FTC and DOJ, and encourage its continuation. State Attorneys General intending to prosecute a merger should inform NAAG, which should then consult with the DOJ and FTC.

V. Discovery Abroad

A. A foreign state should not object to discovery requests by an agency for evidence in its territory if such request (i) has been duly notified to that state, (ii) relates to an investigation which does not represent an unreasonable exercise of extraterritorial jurisdiction and (iii) relates to evidence reasonably necessary to the investigation which cannot adequately be obtained in the territory of the requesting agency.

B. The interagency consultations advocated above should be used for the purpose of harmonisation and cooperation in questions of discovery.

C. Failing such consultations, talks should be pursued with a view to bilateral or multilateral agreements to allow for the taking of evidence abroad with the active cooperation of a foreign state under appropriate safeguards."
Appendix 3

Case Studies of International Mergers
Terms of Reference

Under this contract, two consultants will analyze in detail a number of recent mergers which have been investigated by two or more national or supranational competition authorities in OECD Member countries.

Content of the case studies

1. A short introduction to the facts of each case.

2. An identification of the actual cooperation which occurred between the competition agencies examining the same case. Further, an identification of the potential for increased cooperation. This will include for each merger an examination of:

   - the issues presented in each of the several jurisdictions, including the product and geographic markets affected;
   - the extent to which those issues overlapped;
   - the kinds of information sought in each jurisdiction;
   - the methods used to collect the information;
   - the actual cooperation which occurred, beginning with when and how an agency learned that another agency was involved;
   - whether the enforcement agencies believe they could have been helped by increased co-operation, including co-operation prior to filing, and the reasons for that belief;
   - whether the consultant believes that increased co-operation could have been helpful, and the reasons for that belief;
- the limits placed on co-operation at each stage of the review process by:
  - confidentiality and use of information restrictions;
  - time restraints;
  - the scope and application of current confidentiality and use of information restrictions.

3. An examination of the costs of the current merger review procedures. This would include for each merger:
  - the approximate costs to the parties from multiple reviews, including both delay and expense;
  - the costs to the agencies involved in the reviews, particularly manpower resources devoted to the reviews and travel (numbers of trips);
  - how and how much costs could have been reduced by increased harmonisation of procedures or information sought or other co-operation among the competition authorities involved.

4. An overall assessment of the ways, if any, companies’ merger strategies were shaped by the prospect of multiple reviews.

5. An overall assessment of whether and how increased co-operation would advance law enforcement objectives.

Cases to be studied

The Working Party has created a short list of cases for study. These cases are:

Westinghouse Electric - Asea Brown Boveri;
Société Parisienne d’Entreprises(Schneider)/Square D;
Matsushita/MCA;
TNT/Canada Post;
Renault-Volvo;
Fiat/Ford;
Hoechst/Celanese;
Coats Viyella/Tootal;
Gillette/Wilkinson.
Selection of cases

An in-depth study of the cases will be made following final selection, to be done in consultation with the OECD Secretariat and the merger study Steering Group. To prepare for this final selection, the consultants will make an initial survey of the above cases, focusing on competition agency staff, in order to identify the issues in each case, the location of corporate officers and counsel, and make an initial assessment of the suitability of the case for further study within the time and budgetary constraints of the project.

Interviews

The consultants will obtain their material for each case study by interviewing:

- staff assigned to review the merger in each competition office undertaking a review of the matter,
- officers of each of the merging parties, and
- counsel for each of the merging parties.

Division of labor

Each consultant will prepare half of the case studies, including all interviews with private parties and government officials. The consultants are expected to work closely together, including exchanging drafts as they are prepared, and in coordination with the Secretariat to ensure consistency across the case studies. Each consultant should attend the other’s interviews. The consultants will be jointly responsible for the final product.

Timing

The case studies would be begun promptly and completed in time for them to be discussed at the Working Party’s next meeting, to be held on either 30 November or 1 December 1992. This will require drafts of the case studies to be circulated to the Secretariat and the Steering Group in mid-September 1992 and final texts submitted no later than 15 October 1992. (Final texts should be submitted on both hard copy and diskette, preferably in WordPerfect.)
Cross participation between RENAULT and VOLVO
(as of 31 December 1991)

RENault

8.24%
20%

AB VOLVO

25%

VOLVO CAR

45%

VOLVO TRUCK

45%

RENAULT INDUSTRIAL VEHICLES

Parent company + cars

Trucks, coaches and buses

Parent company

Cars

Trucks, coaches and buses

Renault share holding in Volvo
Volvo share holding in Renault
Appendix 5

Protocol for Coordinating
Federal-State Merger Probes

PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS
BETWEEN THE ANTITRUST DIVISION AND STATE ATTORNEYS
GENERAL

Some mergers and acquisitions may become subject to parallel investigations by the Antitrust Division of the US Department of Justice and one or more State Attorneys General. In such cases, parties to the merger may find it desirable to facilitate coordination between state and federal antitrust enforcers reviewing the transaction. This protocol describes the procedures under which the Antitrust Division will, upon the request of the merging parties, provide certain otherwise confidential information to State Attorneys General in order to facilitate investigative coordination.

Procedures

This protocol shall apply, upon the request of the merging parties, where all acquiring and acquired persons in the transaction submit a letter to the Division that:

1. agrees to provide to the lead state, as designated under the National Association of Attorneys General Voluntary Premerger Disclosure Compact, all information submitted to the Antitrust Division pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the HSR Act") or pursuant to Civil Investigative Demands, and

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2. waives the confidentiality provisions of the HSR Act, 15 USC § 18a(h), and the Antitrust Civil Process Act, 15 USC § 1313(c)(3), to the extent necessary to allow discussion of protected materials between the Antitrust Division and State Attorneys General.

Where the foregoing requirements have been satisfied, the Antitrust Division will provide to the lead state:

1. copies of all requests for additional information issued pursuant to the HSR Act;

2. copies of all civil investigative demands issued pursuant to the Antitrust Civil Process Act;

3. the expiration dates of all applicable waiting periods under HSR Act;

To the extent practicable and desirable in the circumstances of a particular case, the Antitrust Division will cooperate with the lead state in analyzing the merger.
1. *Michigan National Corporation*, Farmington Hills, Michigan: to engage *de novo* in providing data processing services to financial and banking institutions, pursuant to § 225.25 (b)(7) of the Board’s Regulation Y, through the acquisition of a to-be-formed wholly owned subsidiary. Acquico, Inc., Dallas, Texas, which will acquire all of the assets and assume certain liabilities of BancA Corporation, Dallas, Texas.


Jennifer J. Johnson

*Associate Secretary of the Board*

[TR Doc. 92-12001 Filed S-21-92: 8.43]

BILLING CODE 8210-01-F

Jay H. Lustig: Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has applied under the Charge in Bank Control Act [12 USC 1817 (j)] and § 225.41 of the Board’s Regulation Y (12 CFR 223.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph seven of the Act [12 USC 1817 (j)(7)].
The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than 11 June 1992.

A. Federal Reserve Bank of Dallas
(W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222.


Board of Governors of the Federal Reserve System, 18 May 1992

Jennifer J. Johnson.
Associate Secretary of the Board

(FR Doc. 92-11999 Filed S-21-92: 8.45)

BILLING CODE 8210-01-10
FEDERAL TRADE COMMISSION

Program for Federal-State Co-operation in Merger Enforcement

AGENCY: Federal Trade Commission

ACTION: Notice of implementation of program for federal-state co-operation in merger enforcement.

SUMMARY: The Commission is implementing a program to facilitate federal-state co-operation in merger enforcement. Under the program, the Commission will exchange with state antitrust enforcement authorities certain information and analysis developed in investigations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, provided that the parties who submit filings under the Act consent to a limited waiver of the statute’s confidentiality protections.


FOR FURTHER INFORMATION CONTACT:
Geoffrey M. Green. Assistant to the Director, Bureau of Competition, (202) 326 2641.

SUPPLEMENTARY INFORMATION: In the Federal Register of 6 March 1992, 57 FR 8127, the Commission announced that it was considering a program for Federal State Co-operation in merger enforcement and solicited public comment. Two comments were received, one supporting the proposal and one raising several concerns. The Commission is now implementing the program with minor clarifications.

As explained previously, the program will complement the National Association of Attorneys General Voluntary Pre-Merger Disclosure Compact ("Compact"). The Compact applies when a proposed merger, acquisition, or other transaction is subject to reporting requirements under section 7A of the Clayton
Act, 15 USC 18a as added by title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1978 ("HSR Act"). The HSR Act requires that the parties to most significant acquisitions of voting securities or assets notify the Commission (and the Department of Justice) in advance, and delay consummation of the transaction until certain waiting periods specified in the Act have elapsed.

Under the Compact, participating states agree that they will not serve demands for information during the HSR waiting period and prior to instituting a judicial proceeding to enjoin a proposed transaction, if the parties to the proposed transaction ("submitters") provide specified information to the liaison state defined by the Compact.

The information specified includes copies of (1) the submitters’ HSR filings: (2) second requests for additional information issued pursuant to section 7A (e)(1) of the HSR Act, 15 USC 18A(e)(1), or other requests directed to submitters by Federal antitrust enforcement authorities; and (3) on request by a participating state, materials provided by submitters in response to such further Federal requests.

Under the Commission program, the Commission will provide certain additional information to participants in the Compact who submit a certification of confidentiality to the General Counsel of the Commission ("General Counsel"). A model certification follows at appendix I. The information will be provided, however, only if all of the submitters choose (1) to provide a copy of their HSR filings to the liaison state under the Compact (the Commission will not provide a copy of HSR filings to any state), and (2) to provide the Assistant Director for Premerger Notification in the Bureau of Competition with letters waiving confidentiality protections under Federal law, insofar as those protections constrain disclosures by the Commission to members of the Compact. A model letter follows at appendix II.

If waivers are received from the submitters, the Commission will thereafter respond to requests for assistance from the participating liaison state. Specifically, under this program, Commission staff will provide the liaison State with the following information.

First, staff will provide copies of second requests, and copies of third party subpoenas with the identities of the subpoena recipients redacted. [If redaction of identities is insufficient to protect confidential information about subpoena recipients, individual specifications may be deleted or entire subpoenas may be withheld].

Second, staff will identify the expiration dates of HSR waiting periods.

Third, staff will provide limited assistance in analyzing the merger. However, staff will not disclose specific recommendations made or to be made to agency decisionmakers, and will limit disclosures as necessary to protect confidential information, including information supplied by third parties.
The program contains several safeguards to protect the confidentiality of this limited information that the Commission will provide to states. First, a state that obtains information under the program can share such information only with other states that have completed a confidentiality certification. The General Counsel’s office will maintain a list of participating states, and will provide the list to each participating state.

Second, a participating state must advise the Commission’s General Counsel if it receives a discovery request or public access request for information obtained under the program. Further, the state must assert vigorously any privilege or exemption claimed by the General Counsel, or assist the General Counsel in intervening in a proceeding to assert the exemption or privilege. In no event may the state take any action or make any statement that will compromise the Commission’s claim of confidentiality.

In deciding to implement this program, the Commission has considered the two concerns raised by Mr. Robert O’Connell of Murray Hill, New Jersey. First, Mr. O’Connell expressed concern that the program would permit disclosure of filings from all the submitters in a transaction even if only one of the submitters had waived confidentiality protections. As the description above clarifies the Commission will share information under the program only when all the submitters consent.

Second, Mr. O’Connell urged the Commission to require an indemnification agreement from states participating in the program, so that submitters will have effective recourse if information that is provided to the states is improperly disclosed. The Commission declines to pursue this proposal. As the Federal Register notice proposing the program explains, the Commission will not provide the HSR filings themselves to states. The purpose of the confidentiality protections accorded under the Commission program is to protect only "the limited information that the Commission would itself provide to states." The model waiver letter in appendix II therefore makes explicit that the Commission program does not provide for disclosure of HSR filings by the Commission, but that these filings will be released to participating states by the submitters pursuant to the Compact, and will be provided only with such confidentiality protections as are accorded by the Compact and its members.14

As to the limited confidential information to be disclosed by the Commission (and not previously disclosed to the states by the parties) the certification of confidentiality from the states provides adequate protection. The Commission routinely shares sensitive information with states pursuant to confidentiality agreements that have no indemnification provision. See 15 CFR 4.11(c). Congress has deemed "a certification *** that *** information will be maintained in confidence and will be used only for official law enforcement purposes" as adequate protection for the Commission to share trade secrets and confidential commercial information with state law enforcement agencies. 15 USC 46(f): see
also 15 USC 57b-2(b)(6) (providing for sharing of protected information received under compulsory process in an investigation). Since Congress did not require an indemnification agreement as a prerequisite for sharing sensitive information obtained under the FTC Act, and since the Commission’s own experience indicates that a certification of confidentiality provides adequate protection for information shared with states, it is not necessary or appropriate to obtain an indemnification agreement to share HSR information pursuant to a waiver.

Appendix I - Model Certification for States

To: General Counsel, Federal Trade Commission, Washington, DC 20380.


On behalf of the Attorney General of __________ (name of jurisdiction), I certify that the __________ (name of jurisdiction) will maintain the confidentiality of all information and analysis (hereafter "information") obtained directly from the Commission under the captioned program, as well as all information obtained indirectly from the Commission through another state participating in the program. All information obtained under the program will be used only for official law enforcement purposes.

If any such information is subject to a discovery request in litigation or an access (name of jurisdiction) will advise the General Counsel of the Federal Trade Commission ("General Counsel") of the request, and will claimed by the General Counsel or assist the federal proceeding to protect the information taken, or any statement be made, that will compromise the Commission’s claim of confidentiality.

I understand that information obtained pursuant to this certification may be shared with other state Attorney General offices only if they have filed a certification with the General Counsel.

Signed __________

Position __________

Telephone __________
Appendix II - Model Waiver for Submitters

TO: Assistant Director for Premerger Notification, Bureau of Competition, Federal Trade Commission, Washington DC 20580

With respect to (the proposed acquisition of X Corp. by Y. Corp.) the undersigned attorney or corporate officer, acting on behalf of (indicate entity), hereby waives confidentiality protections under the Federal Trade Commission Act, 15 USC 41 et seq., the Hart-Scott-Rodino Act, 15 USC 18a(h), and the Federal Trade Commission’s Rules of Practice, 16 CFR 4.9 et seq., insofar as these protections in any way limit discussions about [identity of transaction] between the Federal Trade Commission and members of the NAAG Voluntary Pre-merger Disclosure Compact ("Compact").

I understand that the Commission will not provide the states with copies of filings by (indicate entity) under the Hart-Scott-Rodino Act. Rather, these materials will be provided to the states by (indicate entity) pursuant to the Compact, and will be provided only with such confidentiality protections as are accorded by the Compact and its members.

Signed _________
Position _________
Telephone _________

End of Appendix II

(Authority: 15 USC § 46)

By direction of the Commission

Donald S. Clark
Secretary

(FR Doc. 92-12073 Filed 5-21-92: 8.45)

BILLING CODE 8730-01-11
The National Center for Prevention Services (NCPS) of the Centers for Disease Control (CDC) will convene a meeting of federal, state and local public health officials, as well as representatives from the public and private sector, who are involved in the organization and implementation of immunization activities.

Name: Twenty-Sixth National Immunization Conference

Times and Dates:
Registration, 13.00-17.00, 31 May 1992
and 8.00-12.00 and 13.30-16.00 1 June 1992.
8.00-18.30, 1-2 June 1992
8.00-17.00, 3 June 1992
8.00-17.15, 4 June 1992
WASHINGTON, DC -- The Department of Justice today announced a new procedure under which the Antitrust Division and state antitrust enforcement agencies can coordinate the collection of information in investigating mergers when the parties voluntarily agree to waive confidentiality requirements.

In many instances, the Antitrust Division and one or more state governments simultaneously investigate a single merger transaction, which can result in duplicative, overlapping and sometimes inconsistent requests for information that can increase considerably the costs of compliance and impede coordination. At the same time, the inability of federal and state enforcers to discuss the merits of the proposed transactions based upon commonly collected information can lead to divergent enforcement conclusions.

The procedure announced today will permit the merging parties, at their initiative, to facilitate coordinated state and federal investigations.
To implement the procedure, the merging parties must give the Department a letter agreeing to provide to state enforcement agencies all information provided to the Department and waiving applicable confidentiality provisions to the extent necessary to allow discussions between the Department and state enforcement agencies of otherwise protected information.

After receiving the necessary letters, the Department will provide the designated lead state copies of all information requested in the matter, and the expiration dates for all applicable waiting periods. To the extent practicable and desirable, the Department will cooperate with the lead state in analyzing the merger. Any such co-operation will be limited to avoid waiver of deliberative process, work product, or other privileges of either the Department or the state enforcement agencies.

James F. Rill, Assistant Attorney General in charge of the Antitrust Division, said, "The new coordination procedure, which is based on favorable practical experiences in a number of past parallel federal and state investigations, can, in appropriate cases, provide substantial benefits to merging parties, as well as to federal and state antitrust enforcement authorities."
PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE ANTITRUST DIVISION AND STATE ATTORNEYS GENERAL

Some mergers and acquisitions may become subject to parallel investigations by the Antitrust Division of the US Department of Justice and one or more State Attorneys General. In such cases, parties to the merger may find it desirable to facilitate coordination between state and federal antitrust enforcers reviewing the transaction. This protocol describes the procedures under which the Antitrust Division will, upon the request of the merging parties, provide certain otherwise confidential information to State Attorneys General in order to facilitate investigative coordination.

Procedures

This protocol shall apply, upon the request of the merging parties, where all acquiring and acquired persons in the transaction submit a letter to the Division that:

1. agrees to provide to the lead state, as designated under the National Association of Attorneys General Voluntary Premerger Disclosure Compact, all information submitted to the Antitrust Division pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the HSR Act") or pursuant to Civil Investigative Demands; and

2. waives the confidentiality provisions of the HSR Act, 15 USC § 18a(h), and the Antitrust Civil Process Act, 15 USC § 1313(c)(3), to the extent necessary to allow discussions of protected materials between the Antitrust Division and State Attorneys General.

Where the foregoing requirements have been satisfied, the Antitrust Division will provide to the lead state:

1. copies of all requests for additional information issued pursuant to the HSR Act;
2. copies of all civil investigative demands issued pursuant to the Antitrust Civil Process Act;

3. the expiration dates of all applicable waiting periods under the HSR Act.

To the extent practicable and desirable in the circumstances of a particular case, the Antitrust Division will cooperate with the lead state in analyzing the merger.
Appendix 6

Description and Analysis of Procedures for the Control of Mergers in OECD Countries and in the EEC

Appendix 6 contains an Introductory Overview and Description and Analysis of Procedures for the control of mergers in force in OECD countries and in the European Communities. It covers 18 countries and the EC which have some form of merger control. For ten countries -- Australia, Canada, France, Germany, Ireland, Italy, Japan, Spain, United Kingdom and United States -- as well as for the EEC, the sources for the information were mainly: "International Mergers: the Antitrust Process", General editors: J. William Rowley and Donald I. Baker, London, Sweet and Maxwell 1991 and the Report of the Special Committee on International Antitrust of the American Bar Association of 1 September 1991. For the remaining eight countries -- Austria, Belgium, Greece, New Zealand, Norway, Portugal, Sweden and Switzerland. The sources were recent annual reports to the CLP Committee and other submissions to the Secretariat.

I. Introductory Overview

Introduction

This appendix analyses laws, regulations and guidelines under competition law relating to pure mergers, acquisitions of assets, acquisitions of shares, whether minority or majority, joint ventures and other forms of exercising control. It does not cover stock exchange rules and regulations governing mergers and takeovers nor procedures under foreign investment laws for the review of certain
transactions. The analysis is limited to procedures for notification, authorisation, investigation and prosecution of mergers and does not deal therefore in depth with the substantive provisions of the different laws, i.e. the standards or tests laid down for determining whether a merger is pro-or anti-competitive, against or in the public interest.

Brief overview of similarities and differences in procedures

As Section II shows country by country, the merger control systems of OECD countries and the EEC display a wide variety of procedural rules and practices. Notification systems of one kind or another exist in almost all OECD countries with merger control (see Table at end of Section II). There are compulsory pre-merger requirements for certain mergers in 9 Member countries - Belgium, Canada, Germany, Greece, Ireland, Italy, Japan, Sweden, the United States - and in the EEC, statutory voluntary schemes in France, New Zealand, Spain and the United Kingdom, and an informal notification scheme in the United Kingdom. In Australia, notification is only incidental: it occurs because the party seeks guidance or authorisation, not for the sake of notification itself. Notification is also compulsory for certain mergers after they have taken place in Austria, Germany and Greece.

The thresholds for notifications also vary considerably. All countries with notification schemes except Japan and New Zealand specify some specific market share and/or size of assets or sales criteria below which notification is not required or advisable. Belgium requires both a 20 per cent market share and combined annual turnover of above 1 billion Belgian francs. France, Greece, Spain, the United Kingdom and the EEC have both as alternatives, though the market share and absolute size criteria vary. France, Spain and the UK have 25 per cent of the market as a measure. Greece has two different measures - 30 per cent for the pre-merger notification requirement and 10 per cent for the post-merger requirement. Austria has a post-merger requirement of 5 per cent of the domestic market. In the United States, transactions are subject to premerger notification requirements if two statutory tests are satisfied: both parties must be covered under the "size of person" test and the acquisition must be covered under the "size of transaction" test. The remaining countries and the EEC rely on size of assets, sales or turnover to determine the mergers subject to notification. Thus in Sweden, the combined annual turnover must exceed SKr4 billion. Canada, Germany and Italy rely on a variety of size measures for both the acquiring and acquired companies.

There would appear to be fewer differences in the timing of the merger review process, all countries and the EC recognizing the importance of reaching a decision quickly on whether to allow, challenge or prohibit a particular merger. Thus the average time for an initial decision on a merger notification is about one month. This is true of Belgium, Germany, Ireland, Italy, Japan, Spain, Sweden,
the US and the EC. Canada requires seven or 21 days, depending on the form of notification used; New Zealand ten working days, the United Kingdom 20 working days for pre-notified mergers, while France and Greece require two months. Extensions however are possible in certain situations.

If further information is requested for purposes of an investigation, a second phase of more in depth analysis is opened. Under this phase a reference is made in some countries to some other body for an opinion on the merger. The time periods vary from country to country before a final decision is taken by the merger control authorities. The usual time is about three months. In Germany and the EC, it is four months; in France and the United Kingdom there is a maximum of six months although in the UK cases are given a three-month deadline as a matter of course. The United States appears to have the shortest period of 20 days (ten days in the case of a cash tender offer) after the parties comply with second request for information. In New Zealand, the time limit for extended investigations is 60 working days. Italy lays down 45 days; Greece has two months. In Sweden, the Competition Authority has a further three months after taking an initial decision to block a merger to bring the case before the Stockholm City Court. All these periods are however flexible except in the EEC and may often be extended with the agreement of the parties or due to the complexity of the case. Most countries’ laws have these periods starting only when adequate information about the transaction has been obtained from the parties.

If appeals are lodged against decisions of the authorities, there are again various time-limits to be observed in appeals to the courts. It is difficult to give fixed periods since these depend on the nature of the court procedures in the different countries. A case which exhausts all the legal appeal possibilities might take several years, but such cases appear to be very rare.

Significant differences are present in the information required under the notification systems. As might be expected the mandatory notification systems appear to require the most information. Canada, Japan, Sweden, the United Kingdom (pre-notified mergers only), the United States and the EC all require the parties to the merger to fill in a special notification form which requests various amounts of detail about the transaction as well as financial information about the firms (in the case of the United Kingdom, this procedure is voluntary). Canada and the United States minimize the quantity of information by having a simplified procedure in the first instance. Thus, under the short-form notification in Canada and the notification form of the United States, the amount of information requested is limited. In Canada also, if an advance ruling certificate is obtained from the Director, this exempts the transaction from notification. Other countries do not require a form to be filled in, but under the statutory rules for merger control have the power to request information required in the assessment of the merger. The EC notification form appears to be the most extensive (though the Commission can and does in many cases waive the need to provide some of this
information), as it requires full details not only of each of the parties and their affiliates but information on all relevant product and geographical markets, including market shares, turnover, prices, exports, imports as well as an economic assessment of the impact of the merger on consumers and technical progress. The time-limit for submitting such information is also very short -- one week after the conclusion of the merger agreement or announcement of public bid.

A feature that appears to be common to all jurisdictions is the possibility for the parties to a merger to negotiate a settlement with the authorities if it appears from the initial examination that the merger raises competitive concerns. The "fix-it-first" technique under which the authorities and parties will attempt to resolve anticompetitive features of a proposed transaction usually through restructuring may take many different legal forms. These range from informal or formal guidance or clearance in the premerger stage, undertakings given by the firms at various stages and consent decrees or orders designed to resolve issues.

Confidentiality of information required under notification schemes or of information acquired in the course of investigations is normally assured under all jurisdictions by statutory rules preventing its disclosure to third parties. This is the case also for countries with Freedom of Information legislation such as Canada and the United States where there is an exemption for information obtained under the pre-merger notification system. There is also provision under the legislation of all countries for published reports to exclude certain data of a confidential nature requested by the submitting parties. Such information may be kept in special confidential files not open to the public. Confidentiality considerations may be an obstacle however under the informal guidance procedures in force in some countries if the parties request confidentiality of information that may be needed to be revealed in consultations with other parties that might be affected.

Turning to the different bodies responsible for merger control, one can distinguish a number of differences and similarities in the process as between countries. In OECD countries as a whole, there are at least two, sometimes three or more institutions involved in the process, with varying mixtures of administrative adjudication and resort to the ordinary courts. The emphasis in merger control as opposed to control of other forms of anticompetitive behaviour appears squarely to be on an administrative approach, subject only to ultimate appeal to the courts. This emphasis results from the inherently case-by-case approach to merger control so that a considerable proportion of enforcement resources within the different agencies is devoted to merger enforcement. While the predominant role in merger enforcement is given to the competition authority responsible for all anticompetitive behaviour, several countries have recourse to independent agencies to carry out the detailed assessment and to give advisory opinions, which may or may not be accepted by the government. This is the case in Belgium, France, Greece, Italy, Spain and the United Kingdom. In these countries therefore the final power of decision lies with the Minister responsible.
The ordinary courts are rarely required to intervene. Canada, Germany, Japan, New Zealand and the Commission of the European Communities have more unified systems under which it is the principal competition authority which undertakes the investigation internally by means of hearings and decision-making procedures. The courts may be required in these jurisdictions to approve settlements reached or to hear appeals. In Canada, a specialized Tribunal, the Competition Tribunal, hears contested and consent application of the Director. The courts can only be accessed for appeals of Competition Tribunal decisions. No appeal to, or override, is given to Ministers or Parliament. In the United States, it is the federal courts that may ultimately determine whether a transaction should be enjoined because of the likely anti-competitive effects.

Another area of considerable difference in merger enforcement is the availability and scope of fines and penalties for non-compliance. Most of these differences are related to the varying procedures used. Countries with mandatory pre-merger notification systems have all adopted fines and other penalties including dissolution if the notification requirements are not met. The United States and the EC have a substantial range of fines. In the United States there is a civil penalty of up to $10 000 for each day the person fails to comply with the pre-notification or waiting requirements, while in the EC, the Commission may impose fines of from ECU 1 000 to 50 000 for intentional or negligent failure to notify and may impose additional penalty payments of up to ECU 25 000 per day for each day an enterprise fails to supply information. In the United States, courts may also order compliance and grant other equitable relief. Obviously, countries which have voluntary systems or no notification schemes do not have these penalties but do have sanctions in the event that information requested for purposes of examining a merger is not supplied subsequently. Another range of penalties applies to failure to observe statutory waiting periods and finally fines, imprisonment, divestiture and dissolution may be imposed for failure to comply with the final decision to block the merger. Some or all of these latter penalties apply to all countries with merger control and are laid down in the relevant legislation.
II. Description and Analysis of Procedures for the Control of Mergers in OECD Countries and in the EEC

A. Pre-merger notification and reporting and waiting periods

Australia

There is no statutory pre-merger notification scheme in Australia but informal pre-notification may occur if the merging parties seek guidance on the operation of the Trade Practices Act 1974 (the Act) or if the parties seek authorisation from the Trade Practices Commission for a merger or acquisition which might otherwise breach the Act (the Act is breached if there is a substantial lessening of competition as a result of an acquisition). The Trade Practices Commission may grant authorisation if it is satisfied in all the circumstances that the proposed acquisition would result or be likely to result in such a benefit to the public that the acquisition should be allowed to take place. There is no set threshold at which parties will seek guidance or authorisation.

If an authorisation is sought for a merger, the merging parties are required to wait up to 45 days for the decision of the Trade Practices Commission, although if additional information is requested the period may be extended for the period during which the request is outstanding. If no decision is made within that time, authorisation is deemed to be granted. If the TPC decision is not to allow the merger, the parties have 21 days following the decision to lodge an appeal with the Trade Practices Tribunal. The Tribunal, in turn, must make a determination within 60 days (unless the matter is particularly complex or other special circumstances arise in which case no time limit applies).

Belgium

Under the Protection of Competition Act 1991, all mergers where the enterprises involved have a combined turnover of more than BF 1 billion and where they control more than 20 per cent of the relevant market are subject to compulsory prior notification within one week of the conclusion of the agreement,
the publication of the takeover bid or the acquisition of a controlling interest in
the target enterprise.

The Competition Council has one month to decide whether to allow the
merger, during which time the enterprises may only take merger-related measures
which will not render the merger irreversible and which do not have a lasting
impact on market structure. If the Council thinks that the merger raises issues as
to its admissibility, it may decide to initiate a further enquiry by the Competition
Service. The Council must then take a decision as to the acceptability of the
merger within 75 days of initiating the second enquiry, failing which the merger
is considered acceptable.

Canada

Pre-notification is obligatory for transactions which exceed certain
thresholds. These transactions (called "Notifiable Transactions") concern four
types of merger - share acquisitions, asset acquisitions, amalgamations and
incorporated combinations. Parties, together with their affiliates, must have total
assets or total sales in, from, or into, Canada of over C$ 400 million. Second, the
value of the target company’s assets or gross revenues from sales in or from
Canada must be C$ 35 million. For amalgamations, notification is required where
the value of assets in Canada or annual gross revenue from sales in or from
Canada of the continuing corporation exceeds C$ 70 million. Notification is
required for a proposed acquisition of "voting shares" of a corporation, where the
corporation has assets in Canada, or gross annual revenues from sales in or from
Canada, that exceed C$ 35 million and where, as a result of the acquisition, the
acquirer will have a greater than 20 per cent voting interest in a public company
or a greater than 35 per cent voting interest in a private company.

There are however general exemptions from pre-notification for:

a) transactions between affiliates;

b) joint ventures falling within section 112 of the Competition Act;
   and

c) transactions which have received an Advance Ruling Certificate from
   the Director of Investigation and Research.

Notifying parties may choose one of two notification forms - the short form
or the long form. For the short form, there is a waiting period of seven days.
For the long form the waiting period is 21 days. However if the short form is
used the Director can insist on a long form notification if the transaction appears
to raise substantial competition issues. In this case the 21-day waiting period is
restarted. In practice, it appears that in complex transactions a longer waiting
period is voluntarily agreed. If the acquisition is to be carried out through the
facilities of a Canadian stock exchange, the waiting period is ten trading days.
The parties to a merger may also ask the Director to issue an Advance Ruling Certificate (ARC) on their proposal which gives an assurance to them that a proposed merger will not be referred to the Tribunal if the merger proceeds as proposed within one year of the issuance of the ARC. No specific form is needed in requesting an ARC but it is evidently in the parties’ interests to provide all relevant information to enable the Director to take a considered decision. There are no time limits for the issuance of ARCs which may take from a few days to several weeks.

France

Section 40 of the 1986 Ordinance provides for a voluntary merger notification system to the Minister of Economic Affairs at any time up to three months after the completion of the merger. Notification triggers a six-month period after which the transaction may not be opposed. If, however, there is no response to notification within two months or no referral by the Minister to the Competition Council within the same period, the transaction is deemed approved.

Section 38 of the same Ordinance sets out the size thresholds below which mergers are not subject to control. Specifically, the total domestic sales or purchases or the parties in France or in a substantial part thereof must exceed FF 7 billion and two or more parties must each have domestic sales or purchases of FF 2 billion or more or, alternatively, the merger must bring about a combined market share of 25 per cent or more of the relevant market.

Germany

There is both a compulsory pre-merger and post-merger notification system in Germany if certain thresholds are met. Pre-merger notification concerns mergers involving an enterprise with annual sales of DM 2 billion or more, or involving two enterprises each having annual sales of at least DM 1 billion. Post-merger notification must be made (within approximately three months after it has been realised) if the participating enterprises have combined annual sales of at least DM 500 million. The merger definition essentially covers acquisitions of shares (25 or 50 per cent or the majority of shares whether with or without voting rights), assets (all or a substantial part of another enterprise), certain agreements with another enterprise or any other combination of enterprises as a result of which one or several enterprises are able directly or indirectly to exercise a controlling influence on another enterprise.

For pre-merger notifications, the Federal Cartel Office has one month after receipt of the complete notification to inform the parties whether it intends to investigate the merger and a further three months to issue a prohibition order. The transaction must not be consummated until this period has expired or until
clearance has been given. Extensions may be agreed between the parties and the Federal Cartel Office.

In the case of post-merger notifications, the Federal Cartel Office has one year to prohibit the merger.

Parties who wish to appeal against a FCO prohibition order have one month from the date in which the order was served to submit a complaint to the Berlin Court of Appeal. It usually takes about a year for the Court proceedings to be completed and, if a further appeal is made to the Federal Supreme Court, about another year.

Finally, parties which decide not to seek review of a prohibition order in the courts or which have lost their appeal in the courts may apply for special permission to the Federal Minister of the Economy. The time-period for submitting an application to the Minister is one month from whatever stage the administrative/judicial proceedings were terminated. Having requested an opinion from the Monopolies Commission, the Minister of Economics decides on an application within four months.

**Greece**

All concentrations must be notified to the Competition Authority within one month of their realization if the share of the market obtained as a result of the concentration is greater than 10 per cent of the aggregate turnover within the national market or a substantial part of it or if the aggregate turnover of all the firms involved in the merger is greater than 10 million ECU.

In addition, the government is empowered to designate certain sectors for which prior control may be exercised. In these sectors, concentrations which involve firms with at least 30 per cent of the aggregate turnover of the national market or where the aggregate turnover of the firms involved in a merger amounts to at least 65 million ECU must be notified before their realization. The Minister has two months from the date of notification being duly made to decide whether to ban the merger.

**Ireland**

There is a compulsory pre-merger notification for mergers where the value of the assets of each of two or more undertakings is at least Ir£ 10 million or has sales of at least Ir£ 20 million. All mergers involving a newspaper or newspapers, however, must be notified. Upon notification, the Minister has one month to request further information and a total of three months from the date of the notification or from the receipt of the additional information to reach a decision.
The Minister must "as soon as practicable" inform the parties that he intends to take no action or, within 30 days after notification, refer the matter to the Competition Authority. If a referral is made, the Minister must give the Authority not less than 30 days to report.

If a reference is made, the parties must not proceed with their merger until the Minister takes his decision or until the three-month period has elapsed.

There are no statutory provisions authorizing an extension of this period.

The Minister must publish the Authority’s report within two months of it being provided by the Authority, with due regard for commercial confidentiality.

**Italy**

Mergers where the aggregate sales in Italy of all enterprises concerned exceed L 500 billion or where the target company’s sales exceed L 50 billion have to be notified to the Italian Competition Authority, which has 30 days after notification to initiate proceedings. If the Authority opens proceedings, the case has to be decided within 45 further days. This may be extended by a further 30 days if parties fail to supply requested information.

The parties to the merger are not obliged to await the decision of the Authority before completing the merger unless the Authority imposes a delay.

**Japan**

All mergers, regardless of size, must be notified to the Fair Trade Commission as well as all acquisitions of the whole or a substantial part of a business or fixed assets used for a business in Japan, the leasing or management of the whole or substantial part of a business in Japan or a contract providing for a joint profit and loss account. There is a reporting obligation for parties who acquired or hold stock of a Japanese company or companies. Every Japanese company whose business is other than financial and whose total assets exceed Y 2 billion or every foreign company whose business is other than financial shall submit a report on its stock held as of the end of every business year to the Fair Trade Commission within three months therefrom. The stockholders other than companies shall report with 30 days as from the date when they have come to hold stock in excess of 10 per cent of the total outstanding stock in companies which compete with one another in the Japanese market.

There is a 30-day waiting period after notification during which the merger may not be completed. This may be shortened or extended to a maximum of 60 further days with the consent of the parties.
There is a simplified notification form for transactions where each company has assets of less than Y 5 billion or where the purpose is to change the legal nature of the companies or to change the value of the stock.

**New Zealand**

Since 1 January 1991 New Zealand has had a voluntary premerger notification scheme (replacing a mandatory scheme). There are no quantitative criteria based on market share, assets or turnover.

There are two different approval procedures. Under the shorter procedure the Commerce Commission can clear a proposal if it concludes that the merger will not be anticompetitive. Under the longer procedure the Commission can authorize a proposal if there are efficiency gains or other public benefits that outweigh the anticompetitive detriment. The Commission may hold a conference on an application.

The time limits under the procedures are ten and 60 working days respectively. However, there can be an extension if agreed to by the Commission and the applicant. If no decision is issued by the Commission within the statutory or the agreed extended time limit, the application is deemed to be declined. The Commission’s policy in relation to the fast-track procedure is to agree to an extension only if it is close to making a decision. In other circumstances the Commission will encourage the applicant to submit the longer form application.

The Commission’s decisions may be appealed to the High Court by the parties to the proposed acquisition or any other person who participated in a conference. Most High Court decisions are made within six months of the appeal being lodged. Decisions of the High Court can be appealed to the Court of Appeal. An acquisition which has not been cleared or authorized may be challenged in the High Court by the Commission or any other person. Any challenge under this procedure is likely to be lengthy. Decisions can be appealed to the Court of Appeal and then to the Privy Council.

**Portugal**

Under Section 7, Concentrations of Undertakings, (Decree Law No. 371/93 of 29 October, on protection and promotion of competition), all mergers where the enterprises involved have a combined turnover of at least ESC. 30 000 million or where they control at least 30 per cent of the relevant market are subject to compulsory prior notification to the Directorate General for Competition and Prices.

Section 31 provides that after the receipt of the notification, the Directorate General for Competition and Prices has forty days to conclude the proceedings and pass the process to the Minister of Trade. During that time the Directorate
General may decide to obtain further information which will suspend the above-mentioned period.

Section 32 provides that, after the receipt of the notification, the Minister of Trade has fifty days to decide whether to allow the merger, during which time he may decide to refer it to the Competition Council for its opinion if he has serious doubts about the negative effects of the merger on competition. In this event, under Section 33 the Competition Council has thirty days to elaborate its opinion and the Minister under Section 4 has 15 days to allow or prohibit the merger.

The parties must not proceed with their merger until the Minister takes his decision.

**Spain**

There is no compulsory system of pre-merger notification but under Section 15(1) of the Competition Act 1989 voluntary notification may be made to the Competition Service by one or more of the companies involved either before the merger takes place or up to three months after its completion. The Act covers acquisitions of 25 per cent or more of the national market, or a substantial portion of it, for a certain product or service or if total sales of the participating enterprises have exceeded 20 billion pesetas in the previous accounting year.

If voluntary notification is made to the Competition Service, the Minister for Economics and Finance has one month to decide whether to refer the merger to the Court, which has a total of three months after notification to deliver its opinion on whether the transaction is likely to hinder the maintenance of effective competition in the market-place (section 15). Silence is taken to mean that the merger has been authorized. The Court sends its opinion to the Ministry for Economics and Finance which submit it to the Government. The Government has three months to decide:

- **a)** not to proceed against the merger; or
- **b)** to approve it subject to conditions; or
- **c)** to prohibit it.

There is no obligation for the merging parties to refrain from proceeding with their merger if they decide to notify but they are liable to divestiture in the event of the Government finding the merger to be anti-competitive.

**Sweden**

Article 37 of the new Competition Act 1993 states that an acquisition of undertakings (merger) must be notified to the Competition Authority if the parties to the merger have an aggregate turnover in excess of Skr 4 billion. Notification
can be made by any one of the parties, buyer or seller. Steps to prevent the merger may be taken if it is liable to have significant adverse effects in the long term.

When the Competition Authority has received a notification with all the necessary information it has one month to decide whether it shall pursue the matter with an in-depth investigation. Should this be the case, i.e. the merger can be expected to create or strengthen a dominant position, the Authority has another three months to gather the necessary material and to bring the case before the Stockholm City Court in order to have the merger declared void according to article 34 of the Competition Act. While the case is pending the parties to the merger may not take any action towards completion of the merger.

United Kingdom

Under the Fair Trading Act 1973, the Secretary of State for Trade and Industry (the Secretary of State) has the discretionary power to refer certain mergers (known as "qualifying mergers") to the Monopolies and Mergers Commission (MMC) for an investigation of their effect on the public interest. If the MMC find that the merger may be expected to operate against the public interest, the Secretary of State is empowered, if he accepts their findings, to prohibit the merger or to impose conditions intended to remove the adverse effect on the public interest. Since 1990 the Secretary of State has been able to accept undertakings from the parties to a merger to divest themselves of certain of the assets involved, as an alternative to a reference to the MMC.

The Director General of Fair Trading (DGFT) is required to advise the Secretary of State whether a merger should be referred to the MMC; whether undertakings could be accepted in lieu of reference; and, in a case referred to the MMC, on their findings. A "qualifying merger" is, briefly, one where two or more enterprises cease to be distinct. This includes share acquisitions which confer the ability to materially influence a company's policy, as well as outright changes in ownership or control, or where arrangements are in progress or in contemplation which would lead to that result and at least one enterprise is carried on in the UK or under the control of a UK body corporate and either the assets being taken over exceed £30 million or the merging enterprises together supply or consume at least 25 per cent of similar goods or services in the UK or a substantial part of it.

There is no obligation to notify the UK authorities of a merger, either before or after completion. However, the Secretary of State can refer a qualifying merger to the MMC at any time up to six months after its completion became known. In consequence, parties to mergers likely to qualify frequently inform the DGFT, voluntarily, before completion. In certain circumstances fees are payable, on a sliding scale related to company size, by the party taking a controlling
interest. It is also open to parties to potential mergers, not yet public, to seek, through the DGFT, "confidential guidance" from the Secretary of State as to whether a merger would be likely to be referred if it went ahead. This is an informal, non-binding, process which does not replace the statutory procedures and no fee is charged.

Since 1990 it has been open to parties to publicly-announced proposed mergers to "pre-notify" them to the DGFT. This involves submitting full information about the proposal in a standard form, and payment of a fee in advance. The power to refer a pre-notified merger lapses after 20 working days from the date of the notification, although this may be extended by up to 25 days.

The Secretary of State makes public his decision whether to refer a qualifying merger to the MMC. He also customarily indicates whether or not his decision was in accordance with the DGFT’s advice, and, if a reference is made, gives brief reasons for the decision. The MMC’s reports are also published, with provision for commercially confidential information to be omitted. If the Secretary of State decides to accept undertakings in lieu of reference, the DGFT’s advice is published, together with the undertakings concerned. Except where already noted, there are no set time-limits for decisions on references in merger cases and no fees are payable. In practice, in most cases decisions on references to the MMC are taken within four to six weeks. The MMC are required to deliver their report on a merger reference within six months or such other time as the Secretary of State may specify (usually three months).

**United States**

Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, a proposed acquisition of voting securities or assets cannot be consummated unless advance notification is provided and the prescribed waiting periods are observed if either party is engaged in activity affecting interstate or foreign commerce of the United States and if certain size thresholds are met: one party has total assets or net annual sales of $100 million or more; and the other party has total assets or net annual sales of $10 million or more; and if, as a result of the proposed transaction, the acquiring party will hold more than $15 million worth of assets or voting securities of the acquired party. Under some circumstances, an acquisition of voting securities worth $15 million or less will be reportable if the buyer is acquiring 50 per cent or more than the issuer’s voting securities.

All acquisitions that meet these notification thresholds are subject to the Hart-Scott-Rodino requirements of premerger notification and observation of the waiting period, unless exempted by the status or rules promulgated thereunder.

In some instances, a transaction may not be reportable even if the size of person and the size of transaction tests have been satisfied. The Hart-Scott-Rodino Act and the implementing rules set forth a number of
exemptions for particular transactions or classes of transaction; these include:

a) where less than 10 per cent of the outstanding voting securities of the issuer are acquired and the acquisition is solely for the purpose of investment;

b) where the buyer's percentage share of the seller's outstanding voting securities is not increased;

c) certain acquisitions by banks and thrift institutions that require approval of another federal agency through merger and holding company purchase;

d) acquisitions of bonds, mortgages and other non-voting securities;

e) where the buyer already controls the seller;

f) acquisitions by governments, including agencies and political subdivisions;

g) acquisitions specifically exempted from the antitrust laws by federal statute or;

h) acquisitions of goods and realty in the ordinary course of business;

i) certain acquisitions of assets located outside the United States, certain acquisitions of voting securities of a foreign issuer, and certain acquisitions by foreign persons based on the nexus with United States commerce; and

j) certain investment acquisitions by banks, trust companies, investment companies, and insurance companies.

As regards the waiting period following notification, there is a 30-day waiting period (15 days for cash tender offers) before the acquisition may take place. This waiting period may be extended by the DOJ or FTC if either issues a request for additional information and documentary material (commonly known as a "second request"). The issuance of a second request extends the waiting period until 20 days after the parties substantially comply with the request (or for ten days after the acquiring person complies, in the case of a cash tender offer).

**EEC**

Under Regulation 4064/89, concentrations with a Community dimension must be notified to the Commission on a prescribed form not more than one week after the conclusion of the agreement or the announcement of the public bid or the acquisition of a controlling interest, whichever is the earliest. Under Article 1(2), a concentration has a Community dimension where:
a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million; and

b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. For banks, other financial institutions and insurance companies, special rules for the calculation of thresholds are prescribed.

The merger notified to the Commission must not be put into effect until three weeks after notification. However if the Commission finds that the notification is incomplete, it will require the information which should have been provided to be supplied within a period fixed by it and the time limits will then begin to run only after receipt of the missing information.

The Commission is required to take a decision on the notified concentration within one month following receipt of the notification or of additional information requested. The period may be increased to six weeks if a Member State informs the Commission that the proposed concentration would be likely to lead to or strengthen a dominant position in a distinct market in a Member State, in which case the Commission must decide whether to deal with the case itself or to refer it to that Member State with a view to the application of its national competition law.

If the Commission decides to initiate proceedings regarding the concentration, the final decision must be taken within not more than four months from the date when proceedings are initiated.

B. Nature of information sought under notification systems and confidentiality considerations

Australia

Under the procedure for authorisation, the parties seeking authorisation must complete the appropriate Form F. The Trade Practices Commission will reach a decision on the basis of the following types of information:

a) details of the parties, their subsidiaries and affiliates;

b) the merger proposal (including the price, date and manner in which the merger is to be consummated and any collateral arrangements associated with the merger);

c) details of the products and services marketed by the parties and the relative importance to each of the parties of those products and services;
d) an analysis on both geographical and functional levels of the markets which each of the parties serve by State and Territory and on a federal level, including information concerning the relative market shares of each of the participants in each of the markets identified;

e) barriers to entry (including information concerning the likely cost and any impediments to market entry or expansion by new or existing competitors, whether from within Australia or overseas, and also information concerning the extent to which market entry or expansion is precluded by agreements or arrangements between the parties, their suppliers or customers);

f) details of the major suppliers to the applicant and the target and their major customers;

g) details of the public benefits expected to result from the merger.

The authorisation process in Australia is designed to subject the application to public scrutiny and documents related to it are therefore publicly registered. However, the Trade Practices Act enables confidentiality to be preserved in that a person making an application may request that certain information be excluded from the public register. The Trade Practices Commission has the discretion to exclude material. If it refuses to exclude certain material, it is then for the person concerned to either withdraw it or agree to it being put on the public record.

Belgium

Section 12 (3) of the Competition Act makes provision for the government to lay down the conditions for notification of concentrations falling within the scope of the Act. These rules are largely based on those adopted by the Commission of the European Communities pursuant to Council Regulation (EEC) No. 4064/89 of 21 December 1989 and, especially, to the form CO. The law expressly provides for the protection of any confidential information that the file may contain. The use and disclosure of documents or information received in accordance with the provisions of the Protection of Competition Act 1991 for purposes other than the enforcement of this Act shall be punishable by fines or imprisonment.

Canada

Under the short form information filing, the parties must describe the transaction, their business, the objectives intended to be achieved by the transaction, and quantify their lines of business, including lists of principal suppliers and customers and sales and purchases to and from them, financial information for the previous two years, information filed with a securities commission and copies of all relevant documents relating to the transaction.
The long form notification must include in addition: a description of the business and lines of business of certain affiliates; description of the principal categories of products manufactured, supplied to or purchased from each major customer or supplier; disclosure of holdings of more than 20 per cent of the voting shares of other Canadian enterprises; copies of all reports and data prepared to assist directors; and a summary description of any significant changes in the business involved in the transaction which have been agreed.

A number of provisions in the Competition Act have been introduced to mitigate some of the filing burdens for reasons of confidentiality, lack of knowledge or irrelevance.

As regards the guarantee of confidentiality, provision has been made in the Act for the protection of information submitted to the Director. Under section 29, all persons involved in the enforcement of the Act are prohibited from communicating any information obtained in the course of their duties. The law enforcement exemption provisions of the Access to Information Act (Canada) apply to evidence gathered in merger proceedings.

France

Under section 28 of the Competition Act 1986, parties wishing to notify must submit the following information to the Minister of the Economy in relation to the proposed or realized merger:

a) a copy of the instrument or draft instrument subject to notification and a memorandum on the expected consequences of such operation;

b) a list of the managers and main shareholders or associates of the companies party to the instrument or who figure in the relevant scheme;

c) the annual accounts for the past three financial years for the companies concerned and indication of their respective market shares;

d) a memorandum on the main concentration actions carried out by such companies over the past three years, if applicable;

e) the list of the subsidiaries and, if applicable, the levels of capital interests, and a list of the companies which are economically related to them with regard to the action.

As regards confidentiality, section 23 of the Competition Act enables the President of the Competition Council to refuse to disclose documents involving business or trade secrets unless disclosure is necessary for the proceedings or for the parties to exercise their rights. Disclosure by any parties to proceedings is equally forbidden subject to penalties under the French Penal Code.
Germany

Although there are no official forms for notification of mergers, section 23(5) of the Act against Restraints of Competition requires the following information for each of the enterprises involved in the merger:

a) the firm name or other designation, and the place of establishment or the seat;

b) the type of business conducted;

c) the market shares, including the basis for their determination or estimation, where they reach at least 20 per cent, for all participating enterprises together, within the territory of application or a substantial part thereof of this Act, and the total sales revenues; instead of sales revenues, total assets shall be stated for banks and building loan savings banks, and premium revenue in case of insurance enterprises;

d) in case of an acquisition of shares in another enterprise, the amount of the shares acquired and the total participation held.

In addition, the Federal Cartel Office may request each participating enterprise to provide information regarding market shares, including the basis for their determination or estimation, as well as regarding total sales revenues with regard to a particular type of goods or commercial services realized by the enterprise during the last business year preceding the merger (Section 23(6). Information may also be requested on affiliated enterprises.

Confidentiality of information submitted in merger notifications, whether before or after merger, is assured. Confidential information is kept in a separate confidential file. Any third parties intervening in merger proceedings therefore have access only to non-confidential information.

Greece

Section 4a of the Competition Act as amended in 1991 provides that the Minister of Commerce, after obtaining the opinion of the Competition Committee, will determine the content of the notifications.

Ireland

A note has been issued which sets out, in general terms, the information required by the Minister in order to examine a notification. This includes:

a) details of each of the enterprises to be involved in the proposal;

b) details of the proposed transaction;

c) estimated market shares and details of any further acquisitions planned;
d) reasons for the proposal;

e) details of any changes planned in the operation of any of the enterprises as a result of the proposal;

f) details of any other agreement being entered into in conjunction with the proposal;

g) where non-Irish enterprises are involved:

   i) details of any legal sanctions or clearances necessary in other jurisdictions,

   ii) details of any investigations or prosecutions by other national authorities in relation to competition matters.

Information obtained under the legislation by the Competition Authority may not be disclosed except that this does not apply to:

a) a communication made by a member of the Authority in the execution of his functions; or

b) the disclosure of information in a report of the Authority or for the purpose of legal proceedings under the Act or pursuant to a court order for the purposes of court proceedings.

The report of the Authority into an investigation of a merger proposal which has been referred to it must be published by the Minister, with due regard to commercial confidentiality. The report must be published within 2 months.

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**Italy**

The Competition Act 1990 does not contain any provisions as to the required content of the pre-merger notification scheme. However, a special number of the Authority’s Official Bulletin - published in 1991 - indicates which information firms should provide. It must be completed jointly on behalf of all parties or by the acquirer or bidder in the case of an acquisition or public bid. The following information is required:

a) details of the parties to the merger;

b) a brief description of the nature of the merger;

c) full details of the premerger structure of ownership and control;

d) details of personal and financial links between each party concerned and other undertakings active on the same markets;

e) data on each of the relevant product markets affected by the merger;

f) information on the general conditions in each of the affected markets;
g) a description of the expected effects of the mergers on consumers and technical progress.

**Japan**

The following details must be reported on the ordinary pre-merger notification form under section 15(2) of the Anti-Monopoly Act. As mentioned earlier there are two notification forms, one for mergers and one for acquisitions of business. Substantially the same information is required on each form, including:

a) a description of the transaction;

b) details of the firms involved;

c) nature of the goods and services produced;

d) market share data above certain levels;

e) reasons for the merger or acquisition of business;

f) company name and market share of main competitors.

Section 39 of the Anti-Monopoly Act provides that officials are prohibited from disclosing company secrets to third parties.

**New Zealand**

Parties wishing to request clearance or authorisation for their transaction must fill in the appropriate form. The form required for clearance is identical to that used for authorisation but parties may choose to answer fewer questions if they consider that the merger will not, or will not be likely to, acquire or strengthen a dominant position in any market. Both forms require the submission of information, in particular identifying the parties and their relationships, details of the transaction, the business activities of each participant, the markets affected and constraints on market power by actual and potential competition. Firms seeking authorisation rather than clearance are required to give more detailed information on actual and potential market constraints and conditions of expansion and entry in each of the affected markets.

If they so wish, parties may request a confidentiality order concerning the acquisition as a whole or for specific information contained in the application for clearance or authorisation, stating the period of time for which confidentiality is requested and the reasons for requesting confidentiality.

Under section 100 of the Commerce Act the Commission may make orders prohibiting the disclosure of information provided to it for up to 20 working days from the date on which the Commission makes a final determination. Information
not subject to a section 100 order is subject to the Official Information Act 1982. The general principle of this Act is that information should be disclosed unless there are good reasons to withhold it. Where information is withheld an appeal can be made to the Ombudsman’s office, which is empowered to investigate and review decisions.

**Portugal**

Section 30 (3) of the Protection of Competition Act requires the following information:

- **a)** identification of the individuals or collective participants in the merger operation;
- **b)** the nature and legal form of the merger;
- **c)** the types of goods and services produced;
- **d)** a list of the enterprises which have interdependent or subordinate links with the participants resulting from the rights or powers set out in paragraph b) of no. 1 of article 8;
- **e)** the market shares that will result from the merger and details of how those shares were calculated;
- **f)** turnover in Portugal of the participating enterprises and of those referred to in no. 1 of article 8, referring to the last financial year;
- **g)** annual reports of the participating enterprises relative to the past three financial years;
- **h)** main competitors;
- **i)** main clients and suppliers;
- **j)** information, if necessary, which notifiers consider relevant to fulfilling the conditions for a positive economic balance or if the international competitiveness of the undertakings involved is significantly increased (Section ten).

**Spain**

Section 15 of the Competition Act 1989 states that the form and content of notifications will be determined in regulations in such a manner as to guarantee the confidentiality of filing or where relevant, of the part of such notification which should be kept confidential.
Section 15, second paragraph, states that when notifying the parties must supply information necessary to appreciate the nature and effects of the merger and, in particular:

a) the identification of the transaction;
b) the accounts of the enterprises and their market shares;
c) the method and evolution of the transaction;
d) the final economic and legal situation.

The format and the content of the notification have been developed in the Real Decreto 1080/92.

Section 53 of the Act provides that the Competition Service and Court may order at any stage of proceedings or on their own initiative or at the request of a party to the proceedings, that information or documents they consider confidential be kept secret and that a separate record be kept for them.

**Sweden**

The Competition Authority has issued a form for merger notifications concerning the information required to assess a proposed merger. The information corresponds to that which the EC demands in Form CO.

Confidential information is protected by the provisions of the Secrecy Act of 1980. In general this means that the publishing of information which may be damaging to any of the parties is prohibited. Parties in a case may however have access to the information they need to protect their own rights if it can be done without seriously damaging the interests that were to be protected in the first place.

**United Kingdom**

If the option of voluntary notification is exercised, merging firms must fill in a premerger notification form which requires in particular details of the transaction, financial information about the merging companies, the timing of the merger, the reasons for it, expected benefits, description of the main products and services supplied by each enterprise, the market share if 25 per cent or more, horizontal effects of the merger, including details of substitute products, competitors, customers and suppliers, and vertical links between companies.

As regards other proposals and confidential guidance, there is no prescribed form for notification but it is usual for the following information to be supplied by the parties:
a) most recent annual reports and accounts;

b) details of the nature, history and organisation of parties;

c) details of value of assets being taken over;

d) data or market shares in overlapping markets:

e) principal benefits expected from the merger and absence of public interest detriments.

The OFT will normally consult third parties. Information is disclosed to them only to the extent necessary for OFT’s consideration of the case.

In the case of the confidential guidance procedure, merger proposals are kept confidential until they are made public and no one except other government departments is consulted about the proposals while they are not public.

The Monopolies and Mergers Commission may also exclude confidential matters from their report where publication might harm individuals or firms. The Secretary of State has a duty to excise material from an MMC report if

a) publication would be against the public interest, or

b) publication would seriously and prejudicially affect private or commercial interests, unless publication would be in the public interest.

United States

The initial premerger notification form requires the following information:

a) a description of the transaction and its parties, including the worldwide group corporate structure of each party and significant minority shareholdings;

b) information on US product or service lines of business of the parties;

c) Sales information by the Bureau of the Census’ Standard Industrial Classification (SIC) code and identification of SIC codes in which both parties currently derive income;

d) whether there have been any prior acquisitions in the areas of horizontal overlap;

e) whether there exist any vendor-vendee relationships between the parties;

f) financial reports and data and copies of certain documents filed with the US Securities and Exchange Commission;

g) the merger agreement or letter of intent and other contracts between the parties;

h) certain planning documents that pertain to the proposed transaction; and
in the case of joint ventures, information about the proposed structure, business and financing of the joint venture.

Most importantly, Item 4(c) of the form requests production of all documents prepared by or for an officer or director for the purpose of analyzing the acquisition for various aspects of competition.

A second request for information may be made which requires much more extensive information from the merging parties. Generally, a second request will solicit information on particular products in an attempt to assist the investigative staff in examining a variety of legal and economic questions. A typical second request will include interrogatory-type questions as well as a request for the production of documents.

Information under the Hart-Scott-Rodino Act received by the enforcement agencies in the initial filing and in response to a second request is exempt from disclosure under the Freedom of Information Act and therefore cannot be obtained by a third party. No such information may be made public. (There are exceptions for administrative or judicial proceedings and disclosures to duly authorized Congressional committees.)

European Communities

A special form CO must be used to notify mergers in one of the official languages of the Community. It must be completed jointly on behalf of all parties or by the acquirer or bidder in the case of an acquisition or public bid. The following information is required:

a) details of the notifying party, the parties to the merger, an address for service in Brussels, and the details of representatives;

b) a brief description of the nature of the merger, its legal form, the economic sectors involved, and the economic and financial details of the merger, including the parties’ turnover for the last three financial years worldwide, Community-wide and broken down by Member State, profits before tax, number of employees, etc.;

c) full details of the premerger structure of ownership and control, the parent, subsidiary and sister companies;

d) details of personal and financial links between each party concerned and other undertakings active on the same markets;

e) data on each of the relevant product markets affected by the merger for the last three financial years broken down by Member State and other relevant geographical markets, values of markets, market shares, turnover, prices, value, imports, exports, and the most important aspects of business strategy;
information on the general conditions in each of the affected markets, including barriers to entry, vertical integration of the parties, research and development, distribution and service systems, the competitive environment, co-operative agreements, trade associations, and the worldwide context of the merger; and

g) a description of the expected effects of the mergers on consumers and technical progress.

In addition, this information must be accompanied by the most recent annual accounts of all the parties, final or most recent drafts of the merger document, any other reports or studies prepared for the purpose of the merger. The financial information must be expressed in ECU. Twenty copies of the Form and 15 copies of all supporting documents must be provided.

Under the Merger Control Regulation, the Commission, the authorities of the member States and their respective officials are bound by rules of professional secrecy with respect to information obtained through the application of the regulation. Furthermore, information obtained as a result of the exercise of investigatory powers shall not be used for any purpose other than that for which it was obtained. When making publications relative to the concentration the Commission must respect the legitimate interest of the parties in the protection of their business secrets.

C. Remedies available - negotiated and imposed - to deal with anticompetitive effects of mergers

In the countries surveyed in this section, a variety of remedies are available to deal with mergers found to be harmful whether the merger has been notified before or after it has taken place. The most common remedies available are "fix-it-first" restructuring, behavioural remedies and the use of undertakings.

Australia

Various penalties and remedies can be sought from the Federal Court. The Trade Practices Act provides penalties of up to A$ 10 000 000 for a corporation and A$ 500 000 for an individual where a merger contravenes the merger provision. The Court may also order divestiture of the shares or assets acquired or declare the acquisition void. In appropriate cases the court may accept an undertaking to divest shares or assets other than those the immediate subject of the contravention. The Trade Practices Commission or Minister may seek an injunction from the Court.

Parties are able to seek guidance from the Commission as to how it will regard a particular acquisition and the Commission may accept enforceable
undertakings concerning divestiture. Individuals and corporations may not seek injunctions but may bring an action for damages, divestiture or ancillary orders.

**Belgium**

According to the Protection of Competition Act 1991, the only mergers authorised are those that do not have the effect of leading to or strengthening a dominant position which significantly hinders effective competition on the relevant Belgian market. Other mergers may nevertheless be allowed by the Competition Council under certain conditions laid down by law (if they improve production or distribution, promote technical progress, etc.). When the Council decides that a merger is not acceptable, it orders, with a view to reestablishing effective competition, the breakup of the enterprises or assets involved in the merger, the relinquishing of joint control or any other appropriate measure. The law punishes failure to comply with the Council’s decisions with fines and penalties.

**Canada**

Since the 1986 Competition Act, merger proposals which take care of competition concerns pre-closing have been the preferred solution rather than post-closing restructuring. Where post-closing restructuring is proposed, it is usual for these proposals to be made subject to undertakings.

The Director may also apply to the Competition Tribunal for resolution of a merger either on a consent or contested basis. In the case of consent orders, the Tribunal may make an order (for restructuring or any other remedy), without hearing the evidence usual in a contested application, in any matter where the Director and the parties have reached agreement. Applications by the Director in contested proceedings are generally pursued in those cases where alternative case resolution instruments do not provide an appropriate remedy to the Director’s competition concerns.

**France**

Under Section 42 of the 1986 Ordinance, the ministers concerned may, following an opinion of the Competition Council, require the enterprises involved, by order stating their reasons for the measure and within a specified time, either not to proceed with their proposed concentration or to return to the situation prevailing before its realization, or to modify or complete the transaction or to take any other action to ensure or to re-establish adequate competition.
**Germany**

The Federal Cartel Office may take the following action in the event of competition concerns arising after investigating a notified merger:

a) in the case of compulsory or voluntary pre-merger notification: prohibit the merger project;

b) in the case of consummated merger: prohibit the merger and order divestiture after a prohibition order has become final; or

c) in the case of a merger project: accept undertakings by the parties involved aimed at restructuring the merger in some way so as to avoid market dominance or to ensure improved competitive conditions that outweigh the negative effects of market dominance in another market than in the one in which market domination would be created or strengthened.

Under c) therefore, such undertakings may consist of the voluntary divestiture of an enterprise or activity, reduction in the acquisition of stock to a level below the statutory thresholds or abandonment of the acquisition. This solution must be reached during the four-month period allowed for consideration of merger proposals.

Undertakings can only relate to structural remedies and not to remedies which imply a permanent regulation of the market behaviour of the merging parties.

**Ireland**

A number of remedies are available to the Minister after considering a report by the Competition Authority. The usual remedy is an order made by the Minister to prohibit the merger either absolutely or unless certain conditions are met which are specified. Divestiture of part of a business may be one of the conditions specified. Also conditional approval may be given subject to certain conditions being fulfilled as to future behaviour. Most frequently the Minister may decide to do nothing so that the merger is free to go ahead upon expiry of the three-month decision period.

**Japan**

While there is no official procedure for negotiated solutions to merger proposals, in most major merger cases the Japanese Fair Trade Commission consults with the parties in an informal manner before the mandatory pre-merger notification is made. If after notification a merger is found to be illegal, the usual practice is for the FTC to issue a recommendation order to the parties to refrain from the transaction or to take the necessary corrective measures. If the parties
accept this recommendation, a recommendation/decision is issued. If the recommendation is not accepted by the parties, the FTC will initiate an adjudicative hearing. If the parties state how they intend to eliminate the illegal aspects of the transaction, the FTC may then issue a consent decision. Divestiture of certain assets or facilities may be a condition for such a consent decision. Otherwise, the FTC will issue a hearing decision order to the parties to refrain from the transaction or to take the necessary corrective measures. In addition, the FTC can initiate an adjudicative hearing without issuing a recommendation.

**New Zealand**

Under the 1986 Commerce Act, the Commerce Commission is empowered to accept structural undertakings as a solution to merger proposals but behavioural remedies are not allowed. Because of the existence of the voluntary premerger notification system, most of the available remedies are aimed at providing strong incentives to acquirers to prenotify mergers that raise serious competition issues. Remedies obtainable from the High Court are:

1. pecuniary penalties of up to NZ$ 5 million for bodies corporate and NZ$ 500 000 for other persons for implementing a merger that has not been approved by the Commission and is found by the High Court to be anticompetitive;
2. injunctive relief;
3. actions for damages; and
4. divestiture of assets or shares.

Remedies a), b) and d) are available to the Commission and remedy c) is available to private litigants.

**Portugal**

Under Section 34, a prohibition shall be presented in the form of a joint dispatch from the Minister of Trade and the Minister responsible for the economic activities affected by the concentration, where the notified merger is found to create or strengthen a dominant position in ways that are likely to prevent, distort or restrict competition. Nevertheless such mergers may be authorized if they fulfil the conditions for a positive economic balance or if the international competitiveness of the undertakings involved is significantly increased (Section 10). Under Section 34 (3) all transactions made by the parties to implement a merger subject to a prohibition order are void.
Spain

Having regard to the opinion of the Court, the Government issues an order not to oppose the merger, to grant conditional approval or to prohibit it or, if the merger has taken place, to order dissolution. Companies may be fined up to a maximum of 10 per cent of turnover for failure to comply with the decision.

United Kingdom

There are two types of procedure possible as alternatives to the making of a reference or an order by the Secretary of State. At the time of a merger reference, the parties may give statutory undertakings as an alternative to an MMC reference. Secondly, following investigation by the MMC, the Secretary of State may accept undertakings rather than making an order.

Prior to a reference, the statutory undertaking must provide for division or divestiture of part of the undertaking and it is the responsibility of the Director General of Fair Trading to monitor the undertaking subsequently to see that it is being observed or to determine whether circumstances change which might justify amending the undertaking.

After receipt of an MMC report, the Secretary of State may request the Director General of Fair Trading to consult with the parties with a view to obtaining an undertaking to remedy the adverse effects. Undertakings or an order may provide for a proposed merger to be stopped; require the parties to dispose of shareholdings or interests in shares, or limit the exercise of voting powers in respect of those shares; provide for the break-up of a company or group by the sale of assets or a subsidiary; or control the conduct of the merged company by, for example, prohibiting discrimination or regulating the company’s prices or charges. The Director General is responsible for monitoring compliance with both undertakings and orders and keeping them under review and recommending changes as appropriate.

United States

Negotiated solutions are the preferred means of addressing anticompetitive concerns raised by a proposed transaction. The decree or order may require divestiture of lines of businesses that are the basis for the anticompetitive concern and/or non-structural remedies. In the case of FTC orders, there is provision for prior notification and approval of future acquisitions within the markets that present the anticompetitive problems in the transaction that is the subject of the order. A proposed FTC consent order must be accepted by a majority vote of the Commission and placed on the public record for a notice and comment period before it can be made final by the Commission. In the case of the Department of Justice, a proposed settlement must be approved by the Assistant Attorney
General for Antitrust and also placed on the public record for a notice and comment period before it will be entered by a federal district court pursuant to the provisions of the Antitrust Procedures and Penalties Act, 15 USC § 16(b)-(h).

The proposed consent decree (DOJ) and a competitive impact statement must be filed with the court and published in the Federal Register at least 60 days before it becomes final. A 60 day period is also provided for FTC consent orders for the submission of comments on the proposed order once the order is published in the Federal Register.

**European Communities**

The Commission may declare a merger compatible with the common market on the basis of conditions intended to ensure that undertakings comply with commitments given by them to modify the notified merger. In addition under the Merger Regulation [article 7(4)] the Commission may, on application, grant a derogation from the suspension provisions.

**D. Institutions involved in the merger review process**

The merger control systems in OECD countries display a wide variety of institutions involved in investigating mergers. It is noteworthy that many countries have established separate agencies to provide advisory opinions on certain mergers considered to raise concerns under the legislation. Others continue to use the judicial approach employed in relation to other forms of restraints on competition and still others provide for the decisions of the control authorities to be overridden on broad public-interest grounds. Without discussing the different substantive criteria for evaluating mergers, which is beyond the scope of this paper, the following paragraphs set out the main features of the institutional mechanisms used in countries with some form of merger control.

**Australia**

In Australia, the Trade Practices Commission is the independent statutory authority which seeks to prevent mergers that substantially lessen competition in a market. The Commission may undertake investigations and it may request parties proposing a possibly illegal merger to modify the transaction or to give formal undertakings as to divestiture. Court action is the last resort: the Commission may begin proceedings in the Federal Court to obtain pecuniary penalties, injunction or divestiture. The Commission has substantial investigation powers that permit it to require persons to produce documents or to give testimony (refusal is subject to penalties imposed by the Court). Private parties may also enforce the Act through the Courts.
The Trade Practices Commission (and, on appeal, the Trade Practices Tribunal) has the power under the Trade Practices Act 1974 to grant immunity from court action for a merger that could otherwise be in breach of the Act. The Commission cannot initiate the process -- the parties must apply to the Commission. The applicants must satisfy the Commission that the conduct results in a benefit to the public such that it should be allowed to occur. Parties have the right to seek review of Commission authorisation decisions by the Trade Practices Tribunal which can either uphold, vary or set aside the Commission’s original decision. A party dissatisfied with the Tribunal’s decision may appeal to the Federal Court only on questions of law, not of fact.

Austria

The Cartel Court is the main body for the enforcement of the Act. It has the task of receiving notifications of mergers and keeping a register of them. The Cartel Court is assisted by a Joint Committee for Cartel Affairs. Appeals against the decisions of the Cartel Court lie to the Supreme Cartel Court in the Austrian Supreme Court of Justice.

Belgium

The Competition Service of the Ministry for Economic Affairs is responsible for receiving merger notifications, investigating them and preparing a reasoned report for submission to the Competition Council. The Service therefore has substantial investigative powers. The Competition Council is empowered to decide that the merger is allowable subject to any conditions it deems appropriate or that it shall not be proceeded with and, in the latter case, order any remedies necessary to establish effective competition on the market. The Council may also impose fines of no more than 10 per cent of the turnover of each of the enterprises and a penalty of a maximum of BF 250 000 per day on each of the enterprises concerned when they do not comply with the Council’s orders. The Council may also impose fines ranging from BF 20 000 to 1 000 000 on enterprises which undertake a merger without filing the prior notification required by law. Appeals against the Council’s decisions may be lodged with the Brussels Appeal Court.

Canada

The Director of Investigation and Research has the responsibility for enforcement of the mergers legislation with the support of the Bureau of Competition Policy. The Mergers Branch of the Bureau has delegated responsibilities for administering the merger provisions, including the mergers that have to be pre-notified as well as dealing with advisory opinions and advance
ruling certificates. The Director may commence an inquiry on his own initiative or if directed to do so by the Minister of Consumer and Corporate Affairs or if an application by six Canadian residents is made pursuant to section nine of the Competition Act. Once an inquiry has commenced, the Director can apply for authorisation from a court to search for and seize records, to conduct oral examinations and to exercise the other investigative powers provided for by the Act.

If the Director and parties fail to agree on a solution to a merger matter the Director has the discretion to apply to the Competition Tribunal for a variety of orders such as dissolution, asset or share disposal or, with the consent of the person against whom the order is directed and the Director, any other measure in the case of a completed merger. In the case of a proposed merger, the Tribunal may prohibit the transaction, permit it to be completed subject to conditions or, with the consent of the person against whom the order is directed and the Director, order any other action.

**France**

The main enforcement authority for merger control is the Directorate General for Competition (DGC) which receives voluntary notifications and decides whether to investigate particular mergers. The initial investigation is carried out within the DGC, which may refer it to the Competition Council for its advice if it is considered to raise competitive concerns and if certain market share and size thresholds are met (see Section II.A. above). The Competition Council which is an independent agency is required to report back to the Minister as to whether the merger or proposed merger would make a significant contribution to economic progress to compensate for the restraint of competition. The Minister may make an order "based on the opinion of the Competition Council" but is not bound to accept its recommendations. The Minister for the Economy and Finance together with any other Minister responsible for the sector in question may jointly issue an order to block the merger or to take any other action designed to restore competition. An appeal lies to the administrative courts against decisions of the Minister in concentration cases. The parties have two months following publication of the Minister’s decision to lodge an appeal.

**Germany**

The Federal Cartel Office (FCO) - an independent government agency - is the main enforcement authority for merger control. It is both investigator and adjudicator whose decisions are subject to judicial review by the Court of Appeal of Berlin and the Federal Supreme Court, if applicable. Special permission may be sought from the Minister of the Economy by the parties to a merger which has been prohibited by the FCO. In such cases, the Monopolies Commission has to
give its opinion on the merger before the Minister decides on the request. The FCO receives notifications required under the Act and carries out its investigations within the time periods laid down (four months for proposed mergers and one year for post-merger notifications). The FCO has extensive powers of investigation including powers to obtain information from third parties and to impose fines to enforce compliance with a request for information. Hearings both formal and informal, in the sense that the participating parties may present their views, are an important part of the procedure.

If requested by a party to the merger, a formal hearing under section 53(1) must be held which is chaired by the Head of Division in charge of the case. Such hearings are not open to the public. Before issuing a prohibition order the FCO submits a "statement of objections" to the participating parties containing the facts and reasoning for the envisaged prohibition. The participating parties may then comment on the statement and submit further material. Alternatively, the parties may submit undertakings.

An administrative fee is levied on the merging parties after termination of a case, the amount depending on the complexity of the case and the resources required to deal with it. The normal maximum is DM 100 000 but this may be increased to DM 200 000. For most merger control proceedings the normal fee was in the range of DM 8 000 to 20 000 until February 1990, when the fees were roughly doubled.

**Greece**

The two main enforcement authorities are the Competition Service of the Ministry of Commerce and the Competition Committee, but the final power of decision lies with the Minister of Commerce. The decisions of the Competition Committee and the Minister may be appealed to the Athens Administrative Court of Appeal within 20 days of the notification of the decision.

Parties to mergers falling within the scope of the Act must notify their transactions to the Ministry. Such notification has suspensive effect for two months, which may be extended by a decision of the Minister.

The Competition Committee has an advisory role in all mergers which the Minister intends to prohibit.

**Ireland**

There are two authorities involved in the merger control process - the Minister for Industry and Commerce and the Competition Authority. Notifications of mergers must be made to the Minister as described in section II.A. above, who may decide to refer it to the Competition Authority for investigation. The Authority is required to decide whether the merger would be
likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good according to competition and other criteria laid down in the Act. The Authority's interpretation, which has never been tested, is slightly different. Its view is that it has to decide whether the merger would be likely to prevent or restrict competition or restrain trade in any goods or services and therefore offend against the common good. It must also give a view on the effect on the common good in respect of a number of other criteria. There is no general common good test.

After receiving the Authority's report, the Minister is under no obligation to accept the Authority's recommendations. If he does decide to prohibit the merger, conditionally or unconditionally, an order must be laid before Parliament. Either House of Parliament may pass a resolution annulling the order within 21 sitting days.

There is also the possibility for an enterprise referred to in the order to lodge an appeal on a point of law to the High Court within one month of the order coming into effect. Following the first merger investigation by the Authority under the Competition Act the Minister made an Order prohibiting the takeover of the Tribune Group newspapers by the Independent newspaper group. An appeal has been lodged in the High Court against this Order.

**Italy**

The Competition Authority is the main authority responsible for merger control in the sectors covered by the Competition Act. It receives notifications, decides whether to undertake an examination and informs the enterprises and the Minister of its conclusions within the prescribed time-limits. It also has the power to order the suspension of the merger until the examination is completed or, in the case of a take-over bid which has been notified, the bid itself may be completed subject to the acquirer not exercising his voting rights until it has been cleared. If the concentration has already taken place, the Authority may require measures to be taken in order to restore conditions of effective competition and remove any effects that distort it.

The Authority may impose fines on enterprises which fail to comply with the notification requirements or which contravene a prohibition or any measure such as divestiture ordered by the Authority. The fine may range from a minimum of one per cent of turnover to a maximum of ten per cent of the turnover of the enterprises which are the subject of the merger.

Appeals against the decisions of the Competition Authority lie to the regional administrative Court of Latium and to the Court of Appeal for the region.
Japan

The Fair Trade Commission, an independent agency administratively attached to the Prime Minister’s Office, is the sole enforcement authority for merger control with wide powers of investigation and adjudication. It receives notifications required to be submitted under the Antimonopoly Act, may organise formal hearing procedures (though these have rarely been used), makes orders in the form of recommendation, consent or hearing decisions, including provisions for dissolution or divestiture.

Appeals against the FTC decisions must be filed with the Tokyo High Court with 30 days of the decision becoming effective. Findings of fact are not reviewed by the Tokyo High Court, only the reasonableness of the decision or illegal procedure employed.

The FTC is empowered to fine enterprises up to a maximum of two million yen for failure to notify a merger or acquisition.

New Zealand

The Commerce Commission has been the main merger enforcement authority since 1986. The Commerce Commission receives the voluntary notifications, decides whether to clear any merger which does not result in the acquisition or strengthening of a dominant market position or authorises it if it is satisfied that there are countervailing public benefits. The Commission may accept structural undertakings on the part of the merging firms but is not empowered to accept behavioural undertakings. The Commission may also seek from the High Court injunctions to prevent the implementation or completion of a merger, pecuniary penalties to be imposed on parties to anticompetitive mergers and seek divestiture of assets or shares to partially or fully reverse anticompetitive mergers. The Commerce Commission’s decisions are open to challenge in the courts.

Norway

There are two authorities involved in merger control in Norway since its introduction in 1988 - the Price Directorate and the Price Council. Mergers may be prohibited if they lead to or reinforce a major restraint on competition and are harmful to the public interest. There is neither a notification system for mergers nor thresholds for the examination but the Price Directorate may investigate any merger that comes to its attention which may raise problems. It may also negotiate a settlement with the parties to remove any anticompetitive effects found to exist. If the parties do not agree the case can be brought before the Price Council which may order divestiture or any other remedy to counteract restraints resulting from the merger. There is a time-limit of one year after the merger agreement has come into effect for the Price Council to take action against it.
The above description of the Norwegian system in the field of merger control is based upon the present legislation, the Price Act of 1953 as amended in 1988. The Norwegian Parliament passed on 9 June 1993 the new Competition Act, which is expected to enter into force from 1 January 1994. The Act will replace the Price Act of 1953. From the entry into force of the new Act, the merger control system will be subject to some changes. The new competition authority, Konkurranstilsynet, which will replace the Price Directorate, will be authorized to make decisions in merger cases. The decisions will be appealable to the Ministry of Government Administration. The Price Council, which has the authority pursuant to the present Act, will be abolished. Another major change will be that the time limit to intervene will be reduced from one year to six months. When there are special grounds for it the limit will be one year compared to two years under the present Act.

**Portugal**

The Minister of Trade and the Competition Directorate have the main responsibility for the enforcement of the merger legislation with the support of the Competition Council. However, under Section 34(2), where the merger concerns an economic sector other than trade, the prohibition order must be issued jointly by the Minister responsible for the economic sector in question. Prohibition orders and authorisation subject to conditions and obligations are subject to judicial review by the Administrative Supreme Court under Section 35.

**Spain**

The Service for the Protection of Competition, which is an administrative agency within the Ministry of Economy and Finance, and the Court for the Protection of Competition also attached to the same Ministry but with total independence in the exercise of its functions, are the two authorities responsible for merger control under the 1989 Competition Act.

The Service is the investigative body responsible for receiving the voluntary notifications that may be submitted by merging enterprises and for obtaining necessary documents in other cases, with powers to compel the production of documents. The Minister for Economics and Finance decides whether to bring the proposed merger before the Court.

The Court is required to consider a number of factors in reaching its decision on the admissibility of a merger, including any contribution towards improving production or marketing systems, promoting technical or economic progress, the international competitiveness of national industry or the interests of consumers or users and whether such contribution is sufficient to outweigh any restrictive effects on competition (section 16).


_Sweden_

The merger control procedure involves the Competition Authority, the Stockholm City Court and the Market Court. Initial examination of a merger is undertaken by the Competition Authority which may decide to carry out an in-depth investigation and to apply to the Stockholm City Court for a declaration that the merger is void. If the City Court’s decision is appealed against, the Market Court has three months, from the date that the time to appeal is expired, to make a decision.

The Competition Act states that the Competition Authority may order undertakings or any other to supply information or documents or order anyone, who can be expected to give information on a matter to appear for questioning at a time and a place decided by the Authority.

_Switzerland_

Section 30 of the Federal Swiss Act on Cartels and Similar Organisations of 20 December 1985 provides that the Cartels Commission, as the competent authority, may undertake an inquiry if a merger has the effect of creating or strengthening a position which has a determining influence on the market or if there are in addition indications of harmful economic or social consequences. Under the Act, a merger is defined as the integration into a holding company or the acquisition of shares which enable the acquirer to exercise a determining influence within a group. There is no requirement to notify mergers in the Act nor have any clear criteria been laid down for enterprises to assess the situation.

The Cartels Commission Secretariat regularly undertakes preliminary inquiries to determine whether the conditions for opening a formal inquiry are satisfied. If the Commission finds after completing such an inquiry that there are harmful economic or social consequences, it may initially recommend to the parties involved to refrain from their harmful behaviour. The Commission, as well as most authorities on the subject, consider that a recommendation may also be made to the parties to refrain from future mergers. If the parties concerned refuse to accept the recommendations, the Federal Department of Public Economics may decide to take the necessary measures by order.

_United Kingdom_

There are three main authorities involved in the enforcement of merger control - the Secretary of State, the Director General of Fair Trading (Heading the Office of Fair Trading) (OFT) and the Monopolies and Mergers Commission (MMC). As mentioned in section 1 above, the OFT has the predominant role in regulating the voluntary notification scheme and the various procedures for clearance and confidential guidance on mergers. When a merger is considered to
be a likely candidate for reference, the Mergers Secretariat will convene a Mergers Panel in reaching a decision on whether to advise the Secretary of State to make a merger reference. A Mergers Panel may also be called by any member of the Panel, though this happens rarely. The Mergers Panel is usually composed of competition policy officials from the OFT and the DTI, and representatives or other Government departments or divisions of DTI with an interest in the sector concerned. After consultation the DGFT will then submit his advice to the Secretary of State for his decision. There have been very few occasions when the advice has not been followed.

The MMC is a statutory body whose chairman and members are appointed by the Secretary of State for Trade and Industry. Members, who number between 30 and 50, have a wide range of experience in various fields and include businessmen, members of the professions, trade union officials and academics but they are appointed for their experience, not to represent these sectors. A group of up to six members is set up for each investigation; the minimum number for a group is three.

The MMC have no power to initiate their own investigations and may only act on a merger reference from the Secretary of State. Following a reference the MMC are required to consider: a) whether there is a merger situation qualifying for investigation; b) if so, whether it operates or may be expected to operate against the public interest; and c) what action should be taken to remedy or prevent those adverse effects. The MMC may, if they think fit, include in their report recommendations as to such action.

The main parties to a merger are asked to make written submissions and members of the appointed group and the Commission’s staff may visit them. Submissions are also invited from other parties, such as suppliers, customers or competitors, who may wish to offer views on the merger. The main parties to the merger, as well as some of the third parties are invited (separately) to a hearing at which the main issues raised by the merger are discussed. All hearings are in private and although transcripts are sent to the parties they are not published.

The Fair Trading Act 1973 requires the MMC when considering the public interest to take into account all matters which appear in the particular circumstances to be relevant although competition is usually the major issue. The Act specifies that a merger investigation must be completed in six months although the MMC can request from the Secretary of State one extension of up to three months. Investigations are, however, usually completed well within the six-month limit: in recent years three to four months has been usual.

When the MMC have completed their report it is submitted to the Secretary of State and the MMC’s role is completed. If the MMC have found that the merger does not operate, or may be expected not to operate against the public interest, the Secretary of State has no power under the Act to overrule the conclusion. If the MMC have found that the merger has, or would have, an
adverse effect on the public interest, he must take into account any recommendations which the MMC have included in their report; he also takes advice from the Director General of Fair Trading. He is not bound to accept the MMC’s recommendation but usually does so.

Under the Companies Act 1989, companies are required to pay fees for merger investigations. In cases which are pre-notified under the statutory procedure (paragraph 54 above), the fee is payable on notification. In other cases (whether the merger is completed or not), the fee is payable on the announcement of the Secretary of State’s decision either to refer the merger to the MMC or to allow the merger to proceed without a reference. The fees vary from £5 000 to £15 000 according to the size of the acquisition.

United States

There are three enforcement authorities in the merger process - the Department of Justice, Federal Trade Commission and the State attorneys general. Most investigations and challenges to mergers are conducted by the Department of Justice and the Federal Trade Commission. The federal district courts and the courts of appeal as well as the Supreme Court also have an important role to play in the process.

The DOJ and FTC receive the statutory pre-merger notifications which have to be made to both federal agencies. They consult and agree on which agency will investigate any particular transaction before the expiration of the initial phase of the waiting period. In order to block a merger the agency conducting the investigation must obtain an injunction from a federal court before the waiting period expires in the case of mergers which have to be notified. In addition to the initial filing and second request mechanism provided by the Hart-Scott-Rodino Act, both the Department of Justice and the FTC have extensive investigative powers and discovery tools to obtain information from the parties and non-parties, which they are authorized to use in connection with any civil antitrust investigative proceeding. Both enforcement agencies first seek discovery on a voluntary basis in appropriate cases. The Department of Justice can also make use of civil investigative demands to require the production of documents, answers to interrogatories, or oral testimony. In the case of the FTC, voluntary discovery tools include investigational hearings, third-party data request letters, personal or telephone interviews, and affidavits. Where voluntary discovery cannot be achieved or is otherwise inappropriate, and in the case of foreign discovery, where personal jurisdiction can be obtained, subpoenas for documents and testimony are used.
Mergers which have not resulted in a consent decree and which the DOJ wishes to challenge must be brought before the district courts, usually with a request for a preliminary injunction to block the merger pending the decision of the court.

If the losing party in a merger case wishes to appeal a district court’s decision, it must do so within 60 days of entry of the judgment. Further review may be available in the US Supreme Court in some circumstances. Since 1975, the Supreme Court has not reviewed any government merger cases.

Parties to an FTC adjudicative proceeding may firstly appeal the Administrative Law Judge’s initial decision to the Commission and, within 60 days of the Commission’s final order, to the appropriate federal court of appeals. There is also a discretionary appeal to the Supreme Court.

**EEC**

Since the entry into force of the Merger Control Regulation in September 1990, the Commission of the European Communities is, but for exceptional situations, the sole authority for the control of mergers falling within the thresholds laid down in the Regulation for mergers having a Community dimension. Before the Regulation, the Commission had the power to enforce Articles 85 and 86 against anticompetitive mergers and theoretically the Commission still have very limited powers derived from the Treaty in relation to some mergers not falling within the thresholds.

The Community has many powers to investigate, prosecute and impose sanctions on those mergers considered anticompetitive, subject to an advisory role for the Advisory Committee on concentrations and to consultations with national authorities. Its decisions are subject to judicial review by the Court of Justice of the European Communities.

For the purpose of enforcing the Regulation, a special task force has been created within the Competition Directorate to determine whether a particular merger is compatible or not with the common market depending on whether it creates or strengthens a dominant position as a result of which effective competitive would be significantly impeded. In reaching its decision, the Commission is required to consider:

- **a)** the market position of the undertakings concerned and their economic power;
- **b)** the alternatives available to suppliers and users;
- **c)** their access to supplies or markets;
- **d)** any legal or other barriers to entry;
- **e)** supply and demand trends for the relevant goods or services;
\( f \) the interests of the intermediate and ultimate consumers; and

\( g \) the development of technical and economic progress, provided that it is to consumers advantage and does not form an obstacle to competition.

Once notification is made, the Commission has one month to decide whether to initiate proceedings concerning the merger or to issue a decision declaring the concentration compatible with the Common Market. Notification requires the parties to suspend their merger until it has been notified and three weeks have elapsed. Suspension may be continued if the Commission decide to initiate proceedings concerning the merger. The Commission’s final decision as to compatibility must be taken no later than four months from the initiation of proceedings.

The Commission has wide powers to request information from parties, examine books and business records, obtain copies of the same, ask for oral explanations and enter premises, backed up by fines and periodic penalty payments for non-compliance. The Commission must also, before issuing a final decision, organise hearings for the parties directly involved as well as for third parties.

Actions before the Court of First Instance must be brought within two months of the publication of the Commission’s decision or its notification to the parties on one of four grounds: a) lack of authority; b) infringement of an essential procedural requirement; c) infringement of the Treaty and any legislation made pursuant to it; and d) misuse of powers. The judgement of the Court of First Instance may be appealed to the Court of Justice on points of law.

Under Article 172 of the EEC Treaty, the Court of Justice has unlimited jurisdiction to review decisions where the Commission has fixed a fine or periodic penalty payment.
### Summary of merger notification and review requirements

<table>
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<th>Country</th>
<th>System of notification</th>
<th>Notification thresholds</th>
<th>Time limit for initial decision</th>
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<th>Criteria for decision</th>
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<th>Risks of failure to notify</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Voluntary</td>
<td>Post merger notification where enterprises have combined share of at least 5 per cent of domestic market</td>
<td>Up to 45 days for decision by Trade Practices Commission (extended if additional information requested). Parties have 21 days following TPC decisions to appeal. Appeal must be heard by Tribunal within 60 days (unless complex case or special circumstances)</td>
<td>Substantial lessening of competition in a market</td>
<td>Discretionary</td>
<td>Post-closing divestiture</td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>Compulsory</td>
<td>Combined annual turnover of more than 1 billion francs and more than 20 per cent of relevant market</td>
<td>Not applicable</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>Compulsory</td>
<td>Combined assets/sales in, from or into Canada of C$ 400 million; target assets value or sales in/from Canada of C$ 35 million.</td>
<td>1 month</td>
<td>75 days after the decision to begin the second phase</td>
<td>Acquisition or strengthening of a dominant position and public interest criteria</td>
<td>Assured</td>
<td>Fines from 20 000 to 1 million Belgian francs</td>
</tr>
<tr>
<td>Canada</td>
<td>Compulsory</td>
<td></td>
<td>7 days (short form) 21 days (long form: 10 days for a tender offer)</td>
<td>Competition</td>
<td>Assured</td>
<td>Fine, imprisonment, divestiture</td>
<td></td>
</tr>
</tbody>
</table>
### Summary of merger notification and review requirements (cont’d)

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<tr>
<td>France</td>
<td>Voluntary</td>
<td>Combined market share of 25 per cent or combined sales in France of FF 7 billion and each of two or more parties has sales in France of FF 2 billion.</td>
<td>2 months</td>
<td>6 months</td>
<td>Economic and social balance</td>
<td>Assured</td>
<td>Post-closing divestiture</td>
</tr>
<tr>
<td>Germany</td>
<td>Compulsory</td>
<td>Pre-merger: worldwide sales of DM 2 billion of any party; or DM 1 billion worldwide sales by each of two or more parties (also post-merger if worldwide combined sales of DM 500 million)</td>
<td>1 month (for merger proposals only)</td>
<td>4 months (1 year for post-merger notification)</td>
<td>Competition (in case of prohibition by the FCO, exemption by the Minister of Economics on general economic policy grounds possible)</td>
<td>Generally assured</td>
<td>Fine, invalidity of transaction</td>
</tr>
<tr>
<td>Greece</td>
<td>Compulsory</td>
<td>Prenotification for horizontal mergers in sectors to be designated for enterprises with combined market share of 30 per cent or aggregate turnover of at least ECU 65 million [post-merger notification for mergers having more than 10 per cent market share or more than ECU 10 million aggregate turnover]</td>
<td>2 months (may be extended)</td>
<td></td>
<td>Competition related</td>
<td>Assured</td>
<td>Fine of up to 15 per cent of aggregate turnover for failure to prenotify. Up to 3 per cent for failure to post-notify</td>
</tr>
<tr>
<td>Ireland</td>
<td>Compulsory</td>
<td>Each of two or more parties has assets worth £10 million or sales of £10 million.</td>
<td>1 month</td>
<td>3 months</td>
<td>Competition and common good</td>
<td>Assured</td>
<td>Fine, invalidity of transaction</td>
</tr>
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<tr>
<td>Italy</td>
<td>Compulsory</td>
<td>Aggregate sales in Italy of L 500 billion or target company sales exceed L 50 billion</td>
<td>30 days</td>
<td>45 days after reference (can be extended)</td>
<td>Competition</td>
<td>Fine, post-closing divestiture</td>
<td>Assured</td>
</tr>
<tr>
<td>Japan</td>
<td>Compulsory</td>
<td>True mergers or acquisitions of the whole or a substantial part of an ongoing business in Japan</td>
<td>30 days</td>
<td>90 days</td>
<td>Competition</td>
<td>Fine, post-closing divestiture</td>
<td>Assured</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Voluntary</td>
<td>Nil</td>
<td>10 working days</td>
<td>60 working days</td>
<td>Competition related</td>
<td>Assured</td>
<td>Assured</td>
</tr>
<tr>
<td>Portugal</td>
<td>Compulsory</td>
<td>Mergers where enterprises have combined turnover of at least €30,000 million or where they control at least 30% of the relevant market</td>
<td>50 days</td>
<td>50 days which can be added 30 + 15 days</td>
<td>Competition related</td>
<td>Fine, post-closing divestiture</td>
<td>Assured</td>
</tr>
<tr>
<td>Spain</td>
<td>Voluntary</td>
<td>Combined market share in Spain of 25% per cent or combined sales in Spain of €20 billion</td>
<td>1 month</td>
<td>6 months after Competition related</td>
<td>Assured</td>
<td>Assured</td>
<td>Assured</td>
</tr>
<tr>
<td>Sweden</td>
<td>Compulsory</td>
<td>Aggregate turnover in excess of SKr 4 billion</td>
<td>1 month</td>
<td>Further 3 months to bring case before Stockholm City Court</td>
<td>Competition and deterrent to public interest</td>
<td>Assured</td>
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</tr>
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</table>
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<td>UK</td>
<td>Voluntary</td>
<td>Assets acquired worth £30 million or combined 25 per cent market share in UK</td>
<td>20 working days (may be extended up to 45)</td>
<td>Fixed for each case (max. 6 months)</td>
<td>Public interest</td>
<td>Generally but qualified by some exceptions</td>
<td>Post-closing divestiture</td>
</tr>
<tr>
<td>US</td>
<td>Compulsory</td>
<td>One party has world-wide sales or total assets of $100 million and other has $10 million of sales or total assets, and acquiror will hold securities and assets worth in excess of $15 million or representing 15 per cent of outstanding voting securities or assets as a result of the acquisition</td>
<td>30 days</td>
<td>20 days after compliance with Second Request</td>
<td>Competition</td>
<td>Assured</td>
<td>Periodic penalty payments, post-closing divestiture or other equitable remedies</td>
</tr>
<tr>
<td>EC</td>
<td>Compulsory</td>
<td>Combined sales world-wide of ECU 5 billion and sales of ECU 250 million in EC for each of at least two parties unless each of them achieves more than 2/3 of its EC turnover within one and the same Member State</td>
<td>1 month</td>
<td>4 months</td>
<td>Competition related</td>
<td>Assured</td>
<td>Fine, periodic penalty payments, divestiture</td>
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**Sources:** Adapted from *American Bar Association Section on Antitrust Law*, Report by the Special Committee on International Antitrust 1991, pp. 209-210 and OECD, Annual Reports on Competition Policy, various years.
Appendix 7

Existing Bi- and Multilateral Agreements

There are several bi-lateral or multi-lateral agreements already in existence which are intended to foster co-operation between competition agencies. These include the following:

a) Australia - New Zealand

Australia and New Zealand established in 1990 a framework for trans-Tasman co-operation for monopolization cases, which covers evidentiary, procedural, and enforcement matters, in the Australia - New Zealand Closer Economic Relations Trade Agreement of 1 January 1983. In addition, there is a Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Harmonisation of Business Law, dated 1 July 1988, which provides more broadly for the harmonisation of business law between the two countries. The MOU specifically refers to competition law as one area for continued harmonisation efforts [paragraph 5(b)], and also refers to "mutual assistance between regulatory agencies in the administration and enforcement of business law" [paragraph 5(g)]. Paragraph 7 calls for consultations "when either Government considers that a difference between their respective business laws or regulatory practices gives rise to an impediment to trade."

b) Australia - United States

The Agreement between the Government of the United States of America and the Government of Australia Relating to Co-operation in Antitrust Matters entered into force on 29 June 1981. Like the agreement between the United States and Germany discussed below, this agreement was negotiated in the spirit of the 1967 OECD Recommendation Concerning Co-operation between Member

The bilateral agreement with Australia committed the parties to assist one another in antitrust investigations, to the extent possible under each party’s domestic law, to assist in gathering information within the other party’s jurisdiction, and to respect confidentiality requests. It placed great emphasis on conflict avoidance and conflict resolution, because of tensions over the proper extent of extraterritorial jurisdiction. The bilateral had three primary goals, which appear to have been achieved in operation: to manage or avoid conflict in enforcement; to cooperate to the extent that domestic law allows; and to gain greater understanding of one another’s system through regularized consultation procedures.

c) Canada - Mexico - United States

The North American Free Trade Agreement (NAFTA) includes provisions relating to competition law. Chapter 15, on Competition Policy, Monopolies and State Enterprises, recognizes the centrality of competition policy for a free trade area. Article 1501 provides:

1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.

2. Each Party recognizes the importance of co-operation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

3. No Party may have recourse to dispute settlement under this Agreement for any matter regarding this Article.

Perhaps in lieu of generalized dispute settlement, Chapter 15, Article 1504 establishes a Working Group on Trade and Competition, which is charged with reporting and making recommendations to the Parties within five years on whatever further work it believes is appropriate, on relevant issues concerning the
relationship between competition laws and policies and trade in the NAFTA area.

On 24 December 1992, Mexico adopted its new Federal Law of Economic Competition, which will enter into force 180 days after its publication in the Diario Oficial de la Federacion. Chapter III of the law addresses concentrations, and requires the Federal Competition Commission to challenge and penalize concentrations whose purpose or effect is to diminish, impair, or impede competition and free market participation with respect to goods or services that are the same, similar, or substantially related. Certain concentrations must be notified to the Commission prior to their finalization.

d) Canada - United States

Over the years, Canada and the United States have entered into a number of bilateral agreements designed to prevent conflict over antitrust enforcement, and to varying degrees to facilitate co-operation. The earliest such agreement reduced to relatively formal terms may be the Joint Statement Concerning Co-operation in Antitrust Matters issued by the Canadian Department of Justice and the US Attorney General, dated 3 November 1959. The Joint Statement arose entirely out of the need to resolve differences over US assertions of extraterritorial jurisdiction. In 1984, the United States and Canada entered into the currently effective Memorandum of Understanding as to Notification, Consultation and Co-operation with respect to the Application of National Antitrust Laws. The broader scope of the latter agreement is plain from its title. Finally, the Mutual Legal Assistance Treaty (MLAT) between Canada and the United States provides for law enforcement assistance in criminal matters. There is some question whether it can also be applied to noncriminal situations. Also relevant to criminal enforcement assistance is the Extradition Treaty between Canada and the United States.

e) EC - United States

The US/EC Co-operation Agreement was signed on 23 September 1991. The main provisions of the Agreement are as follows:

-- Article II provides that each party will notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other party. Article II(3) contains special provisions on the timing of notifications in the case of mergers.

-- Article III deals with the exchange of information and is worth setting out in full:

"1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by
them of economic conditions and theories relevant to their competition authorities’ enforcement activities and interventions or participation of the kind described in Article II(5).

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party’s competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Article VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party’s competition authorities".

-- Article IV provides for co-operation and coordination in enforcement activities, to the extent compatible with the assisting Party’s laws and important interests. This Article means that one agency will assist another with the latter’s own enforcement activities.

-- Article V provides that one Party may request the other to initiate enforcement activities to deal with anti-competitive behaviour in the former’s territory: this is known as "positive comity". For example the MTF in Brussels might ask the US DOJ to investigate arrangements at a US "hub" airport which might be excluding EC air carriers.

-- Article VI requires the parties to avoid conflicts in enforcement activities, and lays down certain criteria that should be taken into account when an agency is deciding whether to proceed. These criteria reflect the comity principles in Timberlane Lumber Co v Bank of America: it would be useful now to describe these criteria as a reflection of "negative comity" i.e. prosecutorial or jurisdictional restraint, in contradiction to the concept of "positive comity" set out in Article V. Article VI is a significant recognition of the comity principle developed in the US over the last two decades.

-- Article VII requires the parties to the agreement to consult one another in relation to matters dealt with in it.
Article VIII contains an important provision, which is worth setting out in full:

"1. Notwithstanding any other provision of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information."

Article IX is also important:

"Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or member states."

The agreement is terminable on 60 day’s notice by either party.

It is interesting to consider the way in which the lawyers and officials with whom we have spoken regard the US/EC Agreement. A number of practicing lawyers regard the Agreement as irrelevant: it does not affect the law (in particular because of Article VIII). More cynically, some lawyers think that Agencies obviously do talk to one another anyway, so that the Agreement does not alter current practice at all.

On the other hand, there are those who consider that the Agreement is important as it institutionalizes co-operation between the US and the EC and that this in itself makes it more likely that such co-operation will take place. It is clear and not surprising that there is more co-operation within the EEC than between it and third countries; Regulation 4064/89 requires close and constant liaison between the Commission and the Member States (see (a) above). In recent years there have been many examples of institutional contacts between the competition agencies of Member States and the Commission. Equally there are limits to the co-operation that is permitted within the EEC, arising for example from the rules on confidentiality and from the ECJ’s judgment restricting the use of information divulged by the Commission to a Member State in the Spanish Banking case16: the EC Commission must be careful not
to be seen to be divulging information to the US which it is not permitted to give to the Member States of the EC, or the use of which is restricted when in the hands of Member States.

f) European Economic Area

The EEA Agreement contains interesting provisions on co-operation between the EC Commission and the EFTA Surveillance Authority. Under the Agreement, Articles 85 and 86 of the EC Treaty will be extended to the EFTA countries: they are reproduced as Articles 53 and 54 of the Agreement. Article 55 provides that the EC Commission and the EFTA Surveillance Authority shall ensure the application of Articles 53 and 54. They shall do so "in co-operation with the competent national authorities in the respective territory and in co-operation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules."

Article 56 deals with the attribution of jurisdiction as between the two authorities, based on criteria such as the turnover of the undertakings under investigation. Mergers are dealt with in Article 58. Protocol 23 deals in detail with co-operation between the authorities. By Article 1 they are to cooperate in the handling of individual cases under Articles 53 and 54; they must notify each other of the notifications and complaints they receive (Article 2); consult (Article 3); send each other any comfort letters they send (Article 2); invite each other to be represented at hearings (Article 4); be present at meetings of the Advisory Committee (Article 6); request documents and make observations (Article 7); and afford administrative assistance (Article 8). Protocol 24 deals specifically with co-operation in respect of concentrations, which will almost always fall within the jurisdiction of the EC Commission. These provisions of the Agreement will entail a particularly close collaboration between the EEC and EFTA states, of which there are 19 altogether.

g) Germany - United States


h) Germany - France

There is a bilateral agreement between the Government of the Federal Republic of Germany and the Government of the French Republic concerning Co-

i) Intra-EC Co-operation

Article 5 of the Treaty enshrines the principle of sincere co-operation between Member States and the institutions of the EEC. Article 5 imposes an obligation of loyal co-operation upon the Member States, but also mutual duties on Community institutions themselves (J.J. Zwarteld and others\textsuperscript{17}). This principle is reflected in Article 19 of the Merger Regulation itself. Article 19(2) of the Regulation requires the Commission to carry out its procedures "in close and constant liaison with competent authorities of the Member States". Article 19(3) provides that an Advisory Committee on concentrations shall be consulted before significant decisions are adopted under the Regulation; Article 19(4) provides that representatives of the authorities of Member States shall sit on this Committee. Article 19 contains further provisions on the procedures of the Advisory Committee, including that its opinions may be published.

There is clearly much more contact between competition agencies in the Member States and the Commission in Brussels than was formerly the case. The Merger Regulation, and Article 19 in particular, are a cause of this, although closer contacts in other areas can also be discerned. For example the UK MMC has contacted DGIV in the course of various of its monopoly investigations.
Notes

1. The Draft Resolution is attached as Appendix 1 to this Report.

2. The Special Committee’s recommendations are attached as Appendix 2 to this Report.


4. Statement of Policy by the Secretary of State for Trade and Industry. On 26 July 1990, in a written reply to a Parliamentary Question, the Secretary of State for Trade and Industry said:

   "In deciding whether to refer merger situations to the Monopolies and Mergers Commission, I shall in future pay particularly close attention to the degree of state control, if any, of the acquiring company. One of the Government’s fundamental policy objectives has been to allow market forces to determine the most efficient allocation of resources in the interests of industry, commerce and the consumer. We have taken many important steps towards this objective over the last decade including an extensive programme of privatisation, deregulation and the vigorous application of competition policy. This objective could be undermined by nationalisation by the back door. State-controlled companies are not subject to the same disciplines as those in the private sector. They tend to have the assurance of Government backing for their business activities and consequently they do not compete on even terms with private sector companies which operate under the threat of financial failure. Their managements may be motivated to make non-commercial decisions. They may not deploy resources efficiently; and an increase in the resources they manage may well reduce competitive forces. It is important that the MMC should have the chance to consider in detail mergers involving state-controlled companies."
All bids by state-controlled companies, whether United Kingdom or foreign, will be treated evenhandedly. I shall, of course, continue to exercise my discretion in deciding whether to refer any particular case to the MMC, after receiving advice from the Director General of Fair Trading. But among the factors to which I shall give particularly close attention will be the degree of state control, if any, of the acquiring company. The MMC will, of course, continue to weigh up each case on its merit. Referring a merger to the MMC does not prejudice whether it may be expected to operate against the public interest."


7. Repealed by the RTPA 1976, s 44, Sch 6.

8. Words in Sub-s (2)(a) added or substituted by the Telecommunications Act 1984, s 109(1), Sch 4, para 57(3), the RTPA 1976, s 44, Sch 5, the Estate Agents Act 1979, s 10(4)(a), the Competition Act 1980, s 19(4)(c), the Gas Act 1986, s 67(1), Sch 7, para 15(3), the Airports Act 1986, s 83(1), Sch 4, para 3, the Financial Services Act 1986, s 182, Sch 13, para 1, the Control of Misleading Advertisements Regulations 1988, SI 1988/915, the Water Act 1989, s 190(1), Sch 25, para 45(3), the Electricity Act 1989, s 112(1), Sch 16(1), (4) and the Broadcasting Act 1990, s 203(1), Sch 20, para 20.


10. The maximum fine under Sub-s (5) is now the prescribed sum under the Magistrates’ Courts Act 1980, s 32(2), ie £2 000.


12. Case C-67/91 Dirrecion General de Defensa de la Competencia v AEB and Others judgment of 16.7.92, not yet reported.


14. Under the Compact, members "agree to keep confidential the H.S.R. filing [and] not to make any portion of such filing public except as may be relevant to instituting a judicial action to enjoin the merger or file comments with regard to the merger with federal enforcement agencies".
15. 549 F.2d 597 (1976).

16. Case C-67/91 *Dirrecion General de Defensa de la Competencia v AEB and Others* judgment of 16.7.92, not yet reported.

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MERGER CASES IN THE REAL WORLD
A STUDY OF MERGER CONTROL PROCEDURES

Using illustrative case studies, this report reviews regulatory problems raised by multijurisdictional review of transnational mergers. It draws conclusions and makes recommendations to improve international co-operation in merger control.