



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION TO THE COUNCIL AND
THE EUROPEAN PARLIAMENT**

**on the application of the
Agreement between
the European Communities and
the Government of the United States of America
regarding the application of their competition laws**

1 January 1999 to 31 December 1999

1. INTRODUCTION

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

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

On 08.10.1996 the Commission adopted the first report on the application of the 1991 Agreement for the period of 10.04.1995 to 30.06.1996⁴. The second report completes the 1996 calendar year, covering the period of 01.07.1996 to 31.12.1996⁵. The third report covers the whole calendar year 1997⁶, the fourth the year 1998⁷. The present report concerns the calendar year from the 01.01.1999 to 31.12.1999. This report should be read in conjunction with the first report which sets out in detail the benefits, but also the limitations of this kind of cooperation.

In summary, the 1991 Agreement provides for:

- notification of cases being handled by the competition authorities of one Party, to the extent that these cases concern the important interests of the other Party (Article II), and exchange of information on general matters relating to the implementation of the competition rules (Article III);
- cooperation and coordination of the actions of both Parties' competition authorities (Article IV);
- a "traditional comity" procedure by virtue of which each Party undertakes to take into account the important interests of the other Party when it takes measures to enforce its competition rules (Article VI);
- a "positive comity" procedure by virtue of which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory and which affects the important interests of the requesting Party (Article V).

¹ *Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws* (OJ L 95, 27.4.95, pp.47 and 50)

² See OJ L 95, 27.4.95, pp.45 and 46.

³ Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173, 18/06/1998, pp. 26 – 31.

⁴ Com(1996) 479 final, see XXVIth Report on Competition Policy, pp. 299-311.

⁵ Com(1997) 346 final, see XXVIth Report on Competition Policy, pp. 312-318.

⁶ Com(1998) 510 final, see XXVIIth Report on Competition Policy, pp. 317-327.

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

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

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

2. EC/US COOPERATION IN INDIVIDUAL CASES DURING 1999

During 1999, the Commission cooperated with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC) in a substantial number of cases. Beyond the specific case-related benefits arising out of this intensive cooperation for both the competition authorities and private parties involved (in terms of a more rapid and coherent management of cases on both sides of the Atlantic), the close daily contact between case teams in the Commission (DG Competition) and the US DoJ and FTC is conducive to mutual confidence building, accrued knowledge of the substantive and procedural rules in each other's jurisdictions, substantial convergence in competition analysis, and movements towards "best practices" in both substantive and procedural matters.

2.1 Merger cases

Since the adoption of the Merger Regulation, there has - nearly every year - been a steep rise in the number of operations notified to the Commission. 1999 saw a further dramatic increase over 1998. On top of the increase in the number of transactions, it is clear that an ever-greater number of these cases involves companies based in different parts of the world; the current merger wave has a truly global dimension. Indeed, 1999 has seen a further rise in the number of merger cases notified under the agreement, and a considerable intensification in co-operation between the US and the EU in the treatment of such cases.

It has become routine for case handlers to ask the notifying parties for waivers of their right for the confidentiality of the information which they provide to the authorities to be protected. Such waivers enable the agencies to exchange confidential information with one another. Frequently the main benefit of this is not so much the information which might be exchanged, but the removal of constraints which would otherwise prevent the agencies from having a free and unfettered dialogue. For example, such exchanges prevent misunderstandings which might otherwise arise. Such a co-ordinated approach can have the effect of reducing the burden on the notifying parties and on third parties.

Substantive cooperation in merger cases tends to focus on three areas: the definition of markets (the product and geographic scope of such), the assessment of the likely competitive effects of the proposed operation on that/those market/s, and the appropriateness of any remedies proposed by the parties to meet any competition concerns identified by the authorities. EU/US cooperation has been characterised by a marked progressive convergence in the thinking of the agencies on both sides of the Atlantic with regard to all three of these areas. What follows are a few examples of concrete cooperation in merger cases during 1999.

Transatlantic (in this instance, Commission/FTC) cooperation during 1999 was particularly intensive with regard to the big oil merger cases, most notably with regard to the *Exxon/Mobil* merger. Informal contacts between the FTC and the Commission started soon after the announcement of the *Exxon/Mobil* transaction (December 1998), long before the formal notification occurred in May 1999. This allowed the EU and US authorities to discuss the particular competition concerns for future oil and gas output which they feared might stem from the creation of so-called "super majors". Following notification, and having obtained waivers from the merging parties which permitted the EU and US authorities to exchange confidential information, assessment of much of the substance of the case was carried out in close co-operation between the agencies. Commission staff visited their FTC counterparts, reviewed documents at FTC premises, and there were regular telephone calls, exchanges of documents, and other contacts between the two case teams.

Discussion between staff on both sides focused most closely on the assessment of the effects that the proposed transaction was likely to have on competition in the upstream markets (exploration, development, production and sale of crude oil and natural gas). The likely impact of the merger on the market for aviation lubricants was also the subject of close discussion. Indeed, cooperation still continues with regard to the implementation of the remedies that were agreed in both jurisdictions.

There was also close cooperation between the Commission and FTC in relation to the *BP Amoco/ARCO* merger.

The Commission cooperated closely with the DoJ in the treatment of the *Allied Signal/Honeywell* merger case. The Commission's enquiry focused on a number of markets for avionics products (communication and navigation equipment, collision avoidance systems, weather radar etc.), supplied to the commercial aviation industry as well as to the space and defence industries. There were frequent (principally telephone) contacts between the relevant staff in both agencies. Initial discussions concentrated on how to define the product and geographic scope of the markets affected by the proposed transaction. In the later stages, discussion focused mainly on the appropriateness of the divestitures and commitments proposed by the parties to the two authorities; the latter discussions continued even after the merger had been cleared by the Commission, but not yet by the DoJ. Cooperation regarding divestitures proved particularly useful for the Commission, in view of the fact that most the assets to be divested were located in the United States.

Cooperation in *Allied Signal/Honeywell* was greatly facilitated by the fact that the merging parties had granted full waivers allowing for the exchange of market data and other documentation submitted to the two authorities.

The Commission also cooperated with the DoJ in the treatment of the *BT/AT&T* case. This operation was notified to the Commission under the new (in force since March 1998) Article 2 of the Merger Regulation, which extended the scope of the regulation to "full function" cooperative joint ventures. Again, contacts were frequent and mainly by telephone. Discussion focused on how to define the product/service and geographic scope of the markets affected by the proposed transaction, and on the likelihood of the joint venture being in a position to exercise power on those markets. The cooperation was particularly useful in helping to assess the likely customer impact of the operation.

2.2 Cartel cases

Cooperation between the EU and US in cartel matters has improved markedly over the past year. Contacts between the relevant sections of the Commission and the DoJ in particular have become commonplace: there has been a number of staff visits (Commission/DoJ). Cooperation has been particularly useful with regard to investigations of cartels which have produced effects on both sides of the Atlantic.

It has nonetheless to be acknowledged that effective cooperation in combatting cartels is seriously hampered by the agencies' inability to exchange confidential information. A so-called "second generation" agreement allowing such communications would greatly improve the situation in this regard; however, domestic legal constraints on the exchange of confidential information complicate the prospect of concluding such a further agreement. It is particularly noteworthy that, in many cartel cases, investigations are not conducted in parallel, but one after the other. That is, one of the authorities "goes first", because of its inability to inform the other of the details of its investigation; the other authority may only learn of the investigation when it becomes public. This hampers the authorities' ability to deal, in as efficient and timely a fashion as possible, with the threat posed by multi-national cartels.

The DoJ hosted a highly successful Anti-Cartel workshop in Washington on Sept. 30-Oct. 1 1999, from which all participants (including officials from the Commission's Competition D-G) seem to have benefited. The Workshop's panel system proved effective in focusing on particular problems/issues: leniency/immunity, investigatory techniques, and so on.

3. ADMINISTRATIVE ARRANGEMENTS ON ATTENDANCE (AAA)

The Commission adopted on March 31, 1999 a text setting forth administrative arrangements between the competition authorities of the European Communities and of the United States concerning mutual attendance at certain stages of the procedures in individual cases involving the application of their respective competition rules⁸.

These arrangements were concluded in the framework of the agreements between the European Communities and the government of the United States concerning enforcement of their competition rules, and in particular the provisions regarding coordination of enforcement activities. The arrangements will contribute to improving mutual understanding by the competition authorities of their respective procedures, as well as to enhancing coordination, cooperation and avoidance of conflicts in appropriate cases of mutual interest. Neither these administrative arrangements, nor the letters exchanged between the Commission and the US competition authorities outlining and confirming a common understanding of the said arrangements, constitute a binding international agreement.

The arrangements are bilateral and reciprocal in nature. They provide for the possibility of the US competition authorities attending as observers, in appropriate cases of mutual concern, at oral hearings in competition proceedings before the European Commission; they provide, in like manner, for the possibility of the Commission attending at high level meetings (so-

⁸ Bulletin EU 3-1999, Competition (18/43).

called "pitch meetings") between the US competition authorities and the parties to enforcement proceedings involving the application of US antitrust law.

The arrangements provide that a request for attendance at a hearing or meeting may be granted in appropriate cases, subject to confirmation of satisfactory assurances or arrangements regarding confidentiality and the use of information. Attendance will be possible only with the express consent of the persons concerned by the enforcement proceedings in either jurisdiction, and the arrangements do not in any way limit the rights enjoyed by those persons.

The new administrative arrangements were invoked for the first time in December 1999, when representatives of the US FTC attended the Commission's oral hearing in the BOC/Air Liquide merger case.

4. EU/US MERGERS WORKING GROUP

At the annual bilateral meeting between the Commission (DG Competition), the FTC and the DoJ, held in Brussels on October 5 1999, it was decided to create a new EU/US Working Group whose purpose would be to enhance transatlantic cooperation in the control of "global" mergers.

It was felt that, while EU/US cooperation in merger cases is very successful, there is still scope for improvement, particularly in view of the current merger wave and the exponential increase in large-scale cross-border transactions. In the longer term, the Working Group could be further mandated to study other competition issues of common concern. For the time being, the working group has been mandated to focus on:

- (a) an in-depth study of the respective EU and US approaches to the identification and implementation of remedies (in particular divestitures), and to post-merger remedy compliance monitoring.
- (b) the scope for further convergence of analysis/methodology in merger cases being treated in both jurisdictions, particularly regarding the respective EU and US approaches towards oligopoly/collective dominance/coordinated interaction.

The working group is focusing, during a first phase, on the first topic (remedies in merger cases) and its deliberations will continue during 2000.

5. POSITIVE COMITY

The positive comity instrument provided for in Article V of the 1991 Agreement was invoked, for the first (and so far only) time by the US DoJ in 1997. The DoJ requested that the Commission investigate the Computer Reservation System (CRS) Amadeus, owned by Air France, SAS, Iberia, Lufthansa and Continental. Sabre, a CRS at the time owned by American Airlines, had complained to the US DoJ about the allegedly exclusionary behaviour of Amadeus.

In February 1999, the Commission issued a statement of objections against Air France, on the basis of a small number of the original allegations. The case is still ongoing.

6. STATISTICAL INFORMATION

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

There was a total of 70 notifications made by the Commission during the period between 1 January 1999 and 31 December 1999. The cases are divided into merger and non-merger cases and are listed in **Annex 1**.

The Commission received a total of 49 notifications from the US authorities during the same period. 23 were received from the DoJ and 26 from the FTC. A list of these cases is found in **Annex 2**, again broken down into merger and non-merger cases.

Merger cases made up the majority of all notifications in both directions. There were 59 merger notifications made by the Commission and 39 by the US authorities.

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

Table 1 sets out in figures the number of cases notified under the 1991 EC/US Agreement during the period from 1 January 1999 to 31 December 1999. *Table 2* sets out in figures the number of cases notified since 23 September 1991.

Table 1

CASES NOTIFIED

Year	No. of EC notifications	No. of US notifications	DoJ	No. of merger notifications	
		FTC			
1999	70	26	23	59 (EC)	39 (US)

Table 2

CASES NOTIFIED

Year	No. of EC Notifications	No. of US notifications FTC DoJ		No. of merger notifications
1992	26	20	20 (=40)	11 (EC) +31(US)
1993	44	22	18 (=40)	20 (EC)+20(US)
1994	29	16	19 (=35)	18 (EC)+20(US)
1995	42	14	21 (=35)	31 (EC)+18(US)
1996	48	20	18 (=38)	35 (EC)+27(US)
1997	42	12	24 (=36)	30 (EC)+20(US)
1998	52	22	24 (=46)	43 (EC)+39(US)
1999	70	26	23 (=49)	59 (EC)+39 (US)

b) *Notifications by the Commission to Member States*

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

In most instances, the US authorities also notify the Member States directly, under the OECD Recommendation⁹. During the period under review 29 cases were notified to the United Kingdom, 19 to France, 13 to Germany, 11 to the Netherlands, 7 to Sweden, 6 to Italy, 4 to Belgium, 2 each to Denmark and Finland, and 1 each to Greece, Austria and Luxembourg.

⁹ Revised recommendation of the OECD Council concerning cooperation between Member countries on anti-competitive practices affecting international trade, adopted 27/28 July 1995.

7. CONCLUSIONS

1999 witnessed a further intensification of EU/US cooperation in competition matters. In relation to the treatment of cross-border merger cases in particular, this cooperation has been very close and fruitful; it has facilitated a growing convergence in the respective EU and US approaches toward the assessment of the likely anticompetitive effects engendered by such operations. The authorities on the two sides of the Atlantic are also taking increasingly convergent approaches to the identification and implementation of remedies, and to post-merger remedy compliance monitoring.

The EU and US authorities have moreover further strengthened their contacts with respect to combatting global cartels during 1999, and have concluded administrative arrangements allowing for the possibility of attending key meetings with the parties in individual cases of mutual concern. The Commission, DoJ and FTC also continue to maintain an ongoing dialogue on general competition policy/enforcement issues of common concern.

ANNEX 1

NOTIFICATIONS BY THE EUROPEAN COMMISSION TO THE US AUTHORITIES 01.01.1999 - 31.12.1999

Merger cases:

- 01 Case n° IV/M.1339 - ABB/Elsag Bailey
- 02 Case n° IV/M.1388 - Total/Petrofina
- 03 Case n° IV/M.1462 - TWR/LUCASVARITY
- 04 Case n° IV/M.1381 - Imetal/English China Clays
- 05 Case n° IV/M.1376 - Cargill/Continental Grain
- 06 Case n° IV/M.1363 - DuPont/Hoechst/Herberts
- 07 Case n° IV/M.1358 - Philips/Lucent Technologies
- 08 Case n° IV/M.1391 - International Paper/Union Camp
- 09 Case n° IV/M.1466 - Eaton Corporation/Aeroquip-Vickers
- 10 Case n° IV/M.1452 - Ford/Volvo
- 11 Case n° IV/M.1403 - Astra/Zeneca
- 12 Case n° IV/M.1440 - Lucent Technologies/Ascend Communications
- 13 Case n° IV/M.1433 - Carrier Corporation/Toshiba
- 14 Case n° IV/M.1456 - Dura /Adwest
- 15 Case n° IV/M.1415 - BAT/Rothmans
- 16 Case n° IV/M.1467 - Rohm and Haas/Morton
- 17 Case n° IV/M.1493 - UTC/Sundstrand
- 18 Case n° IV/M.1518 - Lear/United Technologies
- 19 Case n° IV/M.1532 - BP Amoco/Atlantic Richfield
- 20 Case n° IV/M.1383 - Exxon/Mobil
- 21 Case n° IV/M.1512 - DuPont/Pioneer Hi-Bred International
- 22 Case n° IV/M.1560 - TI Group/Walbro
- 23 Case n° IV/M.1561 - Getronics/Wang
- 24 Case n° IV/M.1580 - CAI/Platinum
- 25 Case n° IV/M.1551 - AT&T/MediaOne
- 26 Case n° IV/M.1404 - General Electric/ALSTOM
- 27 Case n° IV/M.1612 - Walmart/ASDA
- 28 Case n° IV/M.1470 - Goodyear/Sumitomo
- 29 Case n° IV/M.1623 - Allied Signal/MTU
- 30 Case n° IV/M.1643 - IBM/Sequent
- 31 Case n° IV/M.1682 - Ashland/Superfos
- 32 Case n° IV/M.1630 - Air Liquide/BOC
- 33 Case n° IV/M.1601 - Allied Signal/Honeywell
- 34 Case n° IV/M.1618 - Bank of New York/Royal Bank of Scotland Trust Bank
- 35 Case n° IV/M.1603 - General Motors Acceptance Corporation/AAS
- 36 Case n° IV/M.1589 - Meritor/ZF Friedrichshafen
- 37 Case n° IV/M.1598 - Hicks, Muse, Tate & Furst Investment Partners/Hillsdown Holdings
- 38 Case n° IV/M.1631 - Suez Lyonnaise/Nalco
- 39 Case n° IV/M.1588 - Tyco/Raychem
- 40 Case n° IV/M.1699 - TPG Baccus/Bally
- 41 Case n° IV/M.1694 - EMC/Data General
- 42 Case n° IV/M.1653 - Buhrmann/Corporate Express

- 43 Case n° IV/M.1711 - Tyco/Siemens
- 44 Case n° IV/M.1689 - Nestlé/Pillsbury/Haägen Dazs US
- 45 Case n° IV/M.1711 - Tyco/Siemens
- 46 Case n° IV/M.1723 - Illinois Tool Works/Premark
- 47 Case n° IV/M.1538 - Dupont/Sabancı
- 48 Case n° IV/M.1768 - Schoyen/Goldman Sachs/Swebus
- 49 Case n° COMP/M.1765 - KKR Associates/Siemens Nixdorf Retail and Banking Systems
- 50 Case n° COMP/JV.27 - Microsoft/Liberty Media/Telewest
- 51 Case n° COMP /M.1775 - Ingersoll-Rand/Dresser-Rand/Ingersoll-Dresser Pump
- 52 Case n° COMP /M.1693 - Alcoa/Reynolds
- 53 Case n° COMP /M.1763 - Solutia/Viking Resins
- 54 Case n° COMP /M.1671 - Dow Chemical/Union Carbide
- 55 Case n° COMP /M.1784 - Delphi Automotive Systems/Lucas Diesel
- 56 Case n° COMP /M.1767 - AT&T/IBM/INTESA
- 57 Case n° COMP /M.1683 - The Coca-Cola Company/Kar-Tess Group (Hellenic Bottling)
- 58 Case n° COMP /M.1636 - MMS/DASA/ASTRIUM
- 59 Case n° COMP /M.1817 - Bellsouth/Vodafone (E-Plus)

Non-merger cases¹⁰:

- 01 See footnote
- 02 Case n° IV/36488 – Sabre/Amadeus
- 03 See footnote
- 04 Case n° IV/37506 – DVD
- 05 See footnote
- 06 See footnote
- 07 See footnote
- 08 Case n° IV/36880 - BT/VeriSign
- 09 Case n° IV/37612 - Techjet Aerofoils Limited
- 10 See footnote
- 11 See footnote

¹⁰ Due to confidentiality requirements or to protect the secrecy of ongoing investigations, this list names only those investigations or cases which have been made public.

ANNEX 2

NOTIFICATIONS BY US AUTHORITIES TO THE EUROPEAN COMMISSION 01.01.1999 - 31.12.1999

Merger cases¹¹

- 01 Exxon/Mobil
- 02 GNK/Interlake
- 03 Barnes & Noble/Bertelsmann (JV)
- 04 T&N PLC/Federal/Mogul Corp
- 05 Cobe/Sorin
- 06 Signature/AMR Combs
- 07 Imetal/English China Clays PLC
- 08 Micrion/FEI
- 09 BOC Group/Air Products & Chemicals
- 10 Hoechst/Rhone Poulenc/Aventis
- 11 Astra/Zeneca
- 12 Steag/AGA
- 13 Lockheed Martin/Comsat
- 14 British Aerospace/GEC-Marconi
- 15 Tomkins/ACD Tridon
- 16 Intergraph/Carl Zeiss (JV)
- 17 KvaernerPulping/Ahlstrom
- 18 Albright&Wilson/Rhodia
- 19 Alstom/ABB HV (JV)
- 20 PrecisionCastpartsCorp./Wyman-Gordon
- 21 See footnote
- 22 Global IndustrialTechnologies/RHI
- 23 IrvingMaterials/Lehigh Portland Cement
- 24 Fiat/Case
- 25 Alcan Aluminium Pechiney/Alusuisse Lonza Group
- 26 Allied Waste Industries/Vivendi/Superior Services
- 27 Signal/Vertex
- 28 VNU/Nielsen Media Research
- 29 Union Carbide/Dow Chemical
- 30 Nalco Chemical Company/Suez Lyonnaise des Eaux
- 31 See footnote
- 32 Reckitt & Coleman, plc/Benckiser/NRV
- 33 Hannaford Bros Co/Delhaize Freres
- 34 See footnote
- 35 BP Amoco/ARCO
- 36 See footnote
- 37 VEBA/Lyondell
- 38 See footnote
- 39 Rohm and Haas/Morton

¹¹ Due to confidentiality requirements or to protect the secrecy of ongoing investigations, this list names only those investigations or cases which have been made public.

Non-merger cases¹²

- 01** Gyma/Cambrex/Profarmaco/Mylan
- 02** See footnote
- 03** **Criminal investigation: Public Real Estate Foreclosure Auctions in Brooklyn**
- 04** See footnote
- 05** See footnote
- 06** See footnote
- 07** See footnote
- 08** **Criminal investigation: Graphite Electrodes**
- 09** **Criminal investigation: Sorbates**
- 10** **Criminal investigation: Vitamins**

¹² Due to confidentiality requirements or to protect the secrecy of ongoing investigations, this list names only those investigations or cases which have been made public.