

EU Merger Working Group

BEST PRACTICES ON COOPERATION BETWEEN EU NATIONAL COMPETITION AUTHORITIES IN MERGER REVIEW

1 Introduction

- 1.1 The national competition authorities of the EU who have responsibility for merger review ("NCAs") operate in compliance with different national legal systems. They believe, however, that it is desirable to cooperate in the review of some mergers which meet the requirements for notification or investigation in more than one Member State ("multi-jurisdictional mergers"), and have therefore decided jointly to publish an agreed set of Best Practices on Co-operation in Merger Review.
- 1.2 This document, which has been drawn up by the EU Merger Working Group,¹ sets out the Best Practices which the NCAs, to the extent consistent with their respective laws and enforcement priorities, aim to follow when they review the same merger transaction. It also sets out the steps that merging parties and third parties are encouraged to take in order to facilitate cooperation between NCAs. Cooperation extending beyond the existing ECA Notice system² is limited to NCAs who are reviewing the same merger transaction ("the NCAs concerned"). It is not intended that cooperation should provide a forum whereby NCAs not concerned will be involved in the review of a specific case.³
- 1.3 This document is intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is

¹ The EU Merger Working Group ("the Working Group") was established in Brussels in January 2010. It consists of representatives of the European Commission and the national competition authorities ("NCAs") of the European Union ("EU") together with observers from the NCAs of the European Economic Area ("EEA"). The objective of the Working Group is to foster increased convergence and cooperation between the EU merger jurisdictions in order to ensure effective administration and enforcement of merger control laws.

² The European Competition Authorities ("ECA") Notice system is an information system among the NCAs of the EU and EEA EFTA States ("ECAs"). An ECA Notice is a notice which is distributed to all other ECAs by the first NCA to be notified of a multi-jurisdictional merger. It sets out the names of the merging parties, the sector/industry concerned and/or products concerned, the date of the notification, the name of the case handler, and the other member states concerned. See *ECA procedures guide on the exchange of information between members on multi-jurisdictional mergers* (2001);

Available for example on

http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

³ Some cooperation may, however, be necessary in order to determine the NCAs concerned. NCAs may also wish to consult non-involved NCAs about past experiences with similar mergers both as regards the substantive assessment and remedies, and these Best Practices do not preclude such discussions. For example, it may be helpful to exchange non-confidential information when assessing the effectiveness of a remedy, e.g. if the remedy concerns facilities or assets located in another Member State that is not reviewing the merger.

intended to create new rights or obligations which may fetter that discretion.

2 Objectives of cooperation

- 2.1 Cooperation is beneficial for the NCAs concerned, for the merging parties themselves and for third parties. The Best Practices are intended to provide clarity on how cooperation among NCAs will operate in multi-jurisdictional merger cases. Where the merging parties provide full and consistent information to NCAs concerned, cooperation can reduce burdens on merging parties and third parties by facilitating, where possible, the alignment of timing and the overall efficiency, transparency, effectiveness and timeliness of the merger review processes.
- 2.2 In cases where serious concerns or difficult analytical issues arise, cooperation can be invaluable in helping to reach informed and consistent or at least non-conflicting outcomes. In such cases, cooperation will ensure that NCAs are in a better position to exchange views on, for example, possible conceptual frameworks for the assessment of the transaction and theories of competitive harm, types of empirical evidence and so on.
- 2.3 Cooperation is also beneficial both for the NCAs concerned and for the merging parties in relation to any remedial action which may be necessary. Remedies in a merger that is reviewable in more than one jurisdiction may differ across jurisdictions depending on the competition concern identified in each one; indeed, remedies may not be necessary in every jurisdiction. Nevertheless, where the merger affects a market or markets in more than one jurisdiction, a remedy accepted in one jurisdiction may have an impact in another jurisdiction (see section 3.2(iii)). Cooperation can therefore contribute to avoiding inconsistent remedies and obtaining those that are more coherent.
- 2.4 These Best Practices are intended to promote the achievement of all these ends.

3 Scope of application of Best Practices

- 3.1 These Best Practices address cooperation in multi-jurisdictional merger cases. While it is always useful for NCAs to provide basic case information⁴ to each other in merger cases which are notifiable in more than one Member State, further cooperation will not be necessary, or even efficient, in the case of every multi-jurisdictional merger. This is particularly the case where it is clear during the early stages of an investigation that the merger does not raise any significant competition or procedural issues in any Member State or that it does so only in one Member State, or where such issues are not decisive for the outcome of any of the different merger reviews. Close cooperation is not an end in itself: its benefits depend on the specific circumstances of each case.
- 3.2 Where multi-jurisdictional mergers raise similar or comparable issues in relation to jurisdictional or substantive questions, the NCAs

⁴ See model ECA notice (cf. Fn 2 above) as agreed in the *ECA procedures guide on the exchange of information between members on multijurisdictional mergers* (2001); available for example on http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

concerned will decide on a case-by-case basis whether cooperation may be necessary or appropriate⁵. For example:

- (i) Cooperation may assist the NCAs in forming a view as to whether a transaction qualifies for notification or investigation under merger control laws in their respective jurisdictions. It is noted that although jurisdictional rules and practices may differ across jurisdictions, cooperation may assist the NCAs in reaching an informed view.
- (ii) Cooperation may assist the NCAs in relation to mergers which may have an impact on competition in more than one Member State, when markets affected by the transaction cover more than one Member State or when a merger affects national or sub-national markets in more than one Member State, if such national or sub-national markets are the same or similar from the product standpoint.
- (iii) Cooperation may also be of value in relation to mergers where remedies need to be designed or examined in more than one Member State, such as in situations where the same remedy is designed to address competition issues in different Member States or where one remedy affects the effectiveness of a different remedy in another Member State.

3.3 These Best Practices are without prejudice to the existing guidance on the system of reattribution of cases between the Member States and the Commission (see the Commission's referral notice and ECA's Principles on the application of Art. 4(5) and 22 of Regulation 139/2004).⁶ Nevertheless, the enhanced cooperation recommended in these Best Practices may also facilitate the smooth functioning of the reattribution mechanisms set out in Regulation (EC) 139/2004. In particular, where NCAs are contemplating an Article 22 referral request, contacts between them can facilitate the referral, and, if done before notification, can also assist merging parties in forming a view whether it is appropriate for them to speed up the referral process by themselves making an Art. 4(5) referral request (see further the description of pre-notification contacts in section 5.5).

4 Role of National Competition Authorities

4.1 In all cases that relate to a merger transaction that is reviewable in more than one EU Member State, the NCAs concerned will inform the other NCAs by means of the existing ECA Notice system, which

⁵ Although the NCAs concerned will keep under review throughout the merger control process the need for cooperation, it will sometimes be possible for them to form a view in this regard at an early stage of the process, i.e. during pre-notification contacts (where such contacts take place) or following notification.

⁶ Article 4(5) provides for referral of cases from the Member States to the Commission **prior** to notification with the purpose of providing a "one-stop-shop" review. Article 22 provides for referral from the Member States to the Commission **after** notification where it is considered that the Commission is better positioned to investigate a merger. See also [Commission Notice on Case Referral in respect of concentrations](#) (OJ C 56, 05.03.2005, p. 2-23). See ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the Merger Regulation (2005). Available for example on http://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf

involves the exchange of basic non-confidential case information after a notification in such a multi-jurisdictional merger case has been received.⁷

- 4.2 To facilitate cooperation, the NCAs concerned will aim to update the information contained in the ECA notice by informing the other NCAs about any decision to commence second phase proceedings/in-depth investigations, and any final decision, including a decision with remedies.
- 4.3 In cases where closer cooperation is necessary or appropriate (see paragraph 3.2 above), the NCAs, having due regard to confidentiality issues (see section 6 below), will aim to cooperate in particular in the following ways:
 - (i) The NCAs concerned will liaise with one another and keep one another apprised of their progress at key stages of their respective investigations. The key stages will vary depending on the procedural framework of each NCA concerned. The NCAs concerned will keep each other informed of the outcome of the first phase investigation, including, where relevant, the intention to open an in-depth investigation, and the outcome of the in-depth investigation. The NCAs concerned will also keep each other apprised of the launch and progress of any remedies discussions, if not conducted jointly.
 - (ii) Where it is helpful to do so, the NCAs concerned may discuss their respective jurisdictional and/or substantive analyses. Where necessary, having regard to the possible effects of the transaction on the national territories of the NCAs concerned, such discussions may relate to issues such as market definition, assessment of competitive effects, efficiencies, theories of competitive harm, and the empirical evidence needed to test those theories. NCAs concerned will also, where it is helpful to do so, exchange views on necessary remedial measures or submitted remedies.

5 Role of Merging Parties

- 5.1 Effective cooperation between NCAs requires the active assistance of the merging parties at all stages of the review process, both as regards the jurisdictional and/or substantive review and, where required, the assessment of remedies.
- 5.2 Parties to merger investigations play an important role with regard to cooperation between the NCAs concerned. They can contribute significantly to the alignment of the review proceedings in different Member States, taking into account, among other things, procedural requirements and review periods. Such alignment will be of benefit both to merging parties and to NCAs.
- 5.3 Therefore, where a transaction is expected to fulfil the requirements for notification or investigation in more than one jurisdiction, the merging parties are encouraged, unless it is clear and obvious from the

⁷ See model ECA notice as agreed in the *ECA procedures guide on the exchange of information between members on multijurisdictional mergers* (2001); Available for example on http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

outset that paragraph 3.2 above does not apply, to contact each of the NCAs concerned as soon as practicable and provide them with the following basic information:

- i. The name of each jurisdiction in which they intend to make a filing;
- ii. The date of the proposed filing in each jurisdiction;
- iii. The names and activities of the merging parties;
- iv. The geographic areas in which they carry on business;⁸
- v. The sector or sectors involved (short description and/or NACE code).

5.4 It is important to note that the provision of this information by the parties will not of itself be a trigger for cooperation among the NCAs concerned. That will depend rather upon whether the case is one where cooperation is necessary or appropriate, as set out in paragraph 3.2 of these Best Practices. However, it will assist the NCAs concerned to decide at an early stage whether there might be a need for cooperation in the particular case.

5.5 Depending on the circumstances of the case it may be possible to provide much of this information at the pre-notification stage. For this purpose, and where it is permitted by law, it may be helpful for merging parties and the NCAs concerned to organize pre-notification contacts as early as possible. Such contacts can assist the parties and the NCAs concerned to align as far as possible the timing of parallel proceedings and can, ultimately, contribute to the reduction of the overall burden that falls on merging parties in the course of a multijurisdictional merger. It may at times, where circumstances permit, be useful for the merging parties and the NCAs concerned to engage in joint pre-notification contacts.

5.6 Merging parties have a crucial role in helping NCAs to ensure that remedies in different Member States do not lead to inconsistent or untenable results. As already stated above, remedies in a merger that is reviewable in more than one Member State may differ across Member States depending on the competition concern identified in each one; indeed, remedies may not be necessary in every Member State. Nevertheless, a remedy accepted in one Member State may have an impact on the effectiveness of remedies targeted at competition problems in another Member State. It is therefore clearly in the interest of the merging parties to coordinate the timing and substance of remedy proposals to the NCAs concerned, so as to ensure coherent remedies and to avoid inconsistent remedies. In certain cases, where circumstances permit, it might be appropriate for merging parties and the reviewing NCAs to engage in joint discussions on proposed remedies.

6 Confidential information

6.1 It will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger. Therefore, while a certain degree of cooperation is feasible through the exchange of non-confidential information, waivers of confidentiality

⁸ The phrase "carry on business" does not include a situation where an undertaking is merely registered in a particular place.

executed by merging parties can enable more effective communication between the NCAs concerned regarding evidence that is relevant to the investigation.

- 6.2 For that reason, the merging parties are encouraged to be proactive and to provide waivers of confidentiality to all NCAs concerned, including, where appropriate, at the pre-notification phase. The merging parties are encouraged to use the ICN model waiver provided in the Annex to these Best Practices.
- 6.3 For the same reasons, where appropriate, third parties are also encouraged to provide waivers of confidentiality to all NCAs concerned. Third parties are also encouraged to use the ICN model waiver provided in the Annex to these Best Practices.
- 6.4 NCAs are fully aware that it lies within the discretion of the merging or third parties whether to provide a waiver. The scope of the waiver to be provided may be adapted to the specific circumstances of the case, but is essential that the waiver should fulfil the purpose of allowing for an effective information exchange between the NCAs concerned.
- 6.5 Where a waiver has been provided the NCAs concerned will share the information covered by the waiver without further notice to the parties. NCAs will discuss with each other, prior to any exchange of confidential information as provided for in Sections 4 and 5, how it may best be protected. Confidential information and business secrets are protected under national law in all Member States.
- 6.6 Confidential information exchanged on the basis of a waiver will not be used for any purpose other than the review of the relevant merger, unless the national law provides otherwise (see paragraph 6.5).

APPENDIX A

ICN Model Waiver Form

[DATE]

[CONTACT NAME AT AGENCY A]
[ADDRESS]

Re: [CASE REFERENCE]

Dear -----:

On behalf of COMPANY A, I confirm that COMPANY A, subject to the conditions and limitations set forth herein, agrees to waive the confidentiality restrictions under [RELEVANT STATUTORY OR REGULATORY AUTHORITY] and other applicable laws and rules (collectively the “Confidentiality Obligations”) that prevent AGENCY X from disclosing to FOREIGN AGENCY Y confidential information obtained from COMPANY A in connection with its proposed transaction with COMPANY B. Specifically, COMPANY A agrees that AGENCY X staff may share with FOREIGN AGENCY Y [any of COMPANY A’s documents, statements, data and information, as well as AGENCY A’s own internal analyses that contain or refer to COMPANY A’s materials that would otherwise be foreclosed by the confidentiality Obligations].¹⁸

This waiver is granted only with respect to disclosures to FOREIGN AGENCY Y and only on the condition that FOREIGN AGENCY Y will treat as confidential information it obtains from AGENCY X in accordance with the terms of the attached letter from [CONTACT NAME] of FOREIGN AGENCY Y.¹⁹ This agreement does not constitute a waiver by COMPANY A of its rights under the Confidentiality Obligations with respect to the protection afforded to COMPANY A

¹⁸ NOTE: This model language is intended for those situations where a waiver with respect to any and all documents and information provided to Agency X is contemplated. There may be instances where such a broad waiver is not desired. In those cases, the parties may opt for a waiver limited in scope, such as to allow the agencies to discuss potential remedies that each is considering and the reasons for such remedies, or to discuss specific limited issues such as product market definition or barriers to entry. Parties and agency staff should consider the scope of the waiver that is desired to assist them in their investigation so as to not unnecessarily burden parties or other competition agencies.

¹⁹ NOTE: “Foreign Agency Y” should provide a letter describing the confidentiality protections provided by that country. (In some cases, the parties and Agency X staff may be satisfied if that letter is directed to that contact person by representatives of the parties, with a written confirmation that Foreign Agency Y agrees to the terms of that letter.) Attached to this model form at Appendix [D] are sample confidentiality letters.

against the direct or indirect disclosures of information to any third-party other than FOREIGN AGENCY Y.

COMPANY A submits this waiver under the condition and understanding that, with respect to information that AGENCY X obtains from COMPANY A and provides to the FOREIGN AGENCY Y pursuant to this waiver, AGENCY X should continue to protect the confidentiality of such information with respect to other outside parties in accordance with the Confidentiality Obligations.

A copy of this letter is being sent to [CONTACT PERSON AT FOREIGN AGENCY Y].

Sincerely,

[ATTORNEY FOR COMPANY A]

cc: [CONTACT FOR FOREIGN AGENCY Y]