

Merger Working Group

DRAFT/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 are notified to or investigated in more than one Member State, and have therefore decided jointly to publish an agreed set of Best Practices on Cooperation 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. It is intended to provide a non-binding reference framework for cooperation between NCAs. The NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is intended to create rights or obligations which may fetter that discretion.

2 Scope of application of Best Practices

- 2.1 These Best Practices are intended to provide clarity to merging parties and others on how cooperation among NCAs will operate in merger cases that meet the requirements for notification or investigation in more than one Member State ("multijurisdictional cases"). While it is always useful for the NCAs to provide basic case information² 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 multijurisdictional 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

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 See model European Competition Authorities („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://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_procedures_guide_post_Athens.pdf.

issues in any Member State, or where such issues are not decisive for the outcome of any of the different merger reviews.

- 2.2 Where multijurisdictional mergers raise similar or comparable issues in relation to jurisdictional or substantive questions, the NCAs concerned will decide on a case-by-case basis and will keep under review throughout the merger control process whether cooperation may be necessary or appropriate. 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 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.
 - (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 or where remedies in one Member State may have cross-border effects.
- 2.3 These Best Practices are without prejudice to the existing guidance with regard to 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 139/2004.³
- 2.4 Nevertheless, the enhanced cooperation recommended in these Best Practices may also facilitate the smooth functioning of these 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 in the pre-notification phase, 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.

3 Objectives of cooperation

- 3.1 Cooperation is beneficial for the NCAs concerned, for the merging parties themselves and for third parties. Where the merging parties

³ 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) and ECA principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation (2005). Available for example on http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/EC_A_Principles.pdf.

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 and effectiveness of the merger review processes.

- 3.2 In cases where serious concerns or difficult analytical issues do arise, cooperation can be invaluable in helping to reach informed and consistent or at least non-conflicting outcomes. In such cases, it will ensure that NCAs are in a better position to exchange views on, for example, possible counterfactuals and theories of harm, types of empirical evidence and so on.
- 3.3 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, a remedy accepted in one jurisdiction may have an impact on another jurisdiction. Cooperation can therefore contribute to obtaining coherent remedies and to avoiding inconsistent remedies.
- 3.4 These Best Practices are intended to promote the achievement of all these ends.

4 Role of National Competition Authorities

- 4.1 To facilitate cooperation, NCAs involved in the same multijurisdictional merger will aim, where appropriate, to keep each other informed of important developments related to the timing of their respective investigations, including notification, any decision to commence second phase proceedings, remedies, and any final decision.
- 4.2 In cases where closer cooperation is necessary or appropriate (see paragraphs 2.2 and 2.4 above), the NCAs concerned may liaise with one another and keep one another apprised of their progress at key stages of their respective investigations.
- 4.3 In particular, where it is helpful to do so, the NCAs concerned may discuss their respective jurisdictional and/or substantive analyses at key stages of the investigation. Where necessary, having regard to the possible effects of the transaction on the national territories of the NCAs concerned, such discussions may relate to market definition, assessment of competitive effects, efficiencies, theories of competitive harm, and the empirical evidence needed to test those theories. Views on necessary remedial measures or submitted remedies may also be discussed.

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 can contribute to cooperation between the NCAs concerned by allowing, as far as possible, for the alignment of the review proceedings in different Member States, taking into account, among other things, procedural requirements and review periods. Therefore, where a transaction is expected to fulfil the requirements for notification or investigation in more than one jurisdiction, the merging parties are encouraged to contact each of the NCAs concerned as soon as practicable and provide them with the following 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 are active;
 - v. The sector or sectors involved (short description and NACE code).
- 5.3 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 paragraphs 2.2 and 2.4 of these Best Practices. The information provided by the parties will simply assist the NCAs concerned at an early stage to decide whether there might be a need for cooperation in the particular case.
- 5.4 Depending on the circumstances of the case it may be possible to provide much of this information at the pre-notification stage. This will assist the parties and the NCAs concerned to align as far as possible the timing of parallel proceedings. For this purpose, and where it is permitted by their national law, it may be helpful for merging parties and the NCAs concerned to organize pre-notification contacts as early as possible.
- 5.5 Merging parties have an important role in ensuring that remedy proposals 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 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 other Member States. 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 minimize the risk of inconsistent results.
- 5.6 It will often be helpful for the NCAs concerned to be able to exchange and discuss confidential information when reviewing the same merger. While a certain degree of cooperation is feasible through the exchange of non-confidential information, waivers of confidentiality executed by merging parties can enable more effective communication between the

NCA's concerned regarding evidence that is relevant to the investigation.⁴

- 5.7 For that reason, the merging parties are encouraged to be proactive and to provide waivers of confidentiality to all NCAs where the merger is reviewable, 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
- 5.8 For the same reasons, where appropriate, third parties are also encouraged to provide waivers of confidentiality. Third parties are also encouraged to use the ICN model waiver provided in the Annex to these Best Practices

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⁴ For the avoidance of doubt, NCAs are not proposing to move to a system of joint investigation but rather to an environment of increased cooperation and alignment of proceedings in order to achieve the objectives set out in paragraphs 3.1 to 3.3 of this document.