International enforcement cooperation in mergers: main principles and recent experiences

1. Introduction: Cooperation benefits, trends, challenges and tools

Over the past decades, economic activity has been subject to rapid globalisation. Since the 1950s, international trade volumes have grown on average at a higher pace than real GDP. Value chains have become global and companies increasingly operate internationally. Globalisation has brought about large economic benefits, but it also poses regulatory challenges. Competition rules are an important element in ensuring effective governance of the global marketplace. In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today.

As a result, large cross-border mergers and acquisitions between companies operating globally are reviewable by a growing number of agencies\(^1\) around the world. This proliferation of merger regimes and the related internationalisation of merger review is a positive development, as it shows that a competition culture is expanding around the world and a global level playing field is being established. It may, however, increase burdens and costs for merging parties as well as the risk of inconsistent merger review outcomes.

Effective inter-agency cooperation\(^2\) in multi-jurisdictional merger cases is part of the answer to these challenges. Cooperation facilitates consistent outcomes in individual cases and convergence in relation to merger assessment principles in general. It may also increase investigative efficiency by reducing duplication of work, delays and burdens for the merging parties, third parties and the agencies.

In a nutshell

Effective inter-agency cooperation may significantly reduce the burdens and costs for stakeholders in multi-jurisdictional mergers, as well as the risk of potential inconsistent outcomes of merger review.

Mindful of the potential benefits of cooperation, the Commission has invested significantly in achieving and enhancing cooperation with its counterparts over the years.

The 2015 ICN Merger Working Group Practical Guide to International Enforcement Cooperation in Mergers elaborates on practices, tips and tools which may be used by agencies, merging parties and third parties when they seek to cooperate effectively.

The Commission has actively engaged in bilateral and multilateral cooperation with competition authorities in many countries outside the European Union in a large number of cases, through the conclusion of numerous bilateral agreements\(^3\) and in

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\(^{1}\) For the purposes of this policy brief, the term ‘agencies’ relates to competition agencies. Furthermore, the brief does not describe the cooperation between the European Commission and EU Member States’ National Competition Agencies, only the cooperation between the European Commission and agencies in third (i.e. non-EU) countries.

\(^{2}\) The term ‘cooperation’ is used here broadly, and covers the full spectrum of possible inter-agency cooperation: from limited inter-agency exchanges of market information over the phone to more extensive cooperation such as coordination on remedy design and implementation on the basis of waivers of confidentiality.

\(^{3}\) http://ec.europa.eu/competition/international/bilateral/index.html#u;

One of these bilateral agreements is with the United States, the US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations (US-EU Best Practices), which were initially concluded between the Commission and the two US competition agencies in 2002 and updated in 2011 in order to reflect the experience gained in a significant number of cooperation cases in the meantime. More recently, on 15 October 2015, the Commission’s Directorate-General for Competition (DG COMP) and China’s Ministry of Commerce (Mofcom) signed a Practical Guidance document. The document builds on the 2004 Terms of Reference on the EU-China Competition Policy Dialogue with Mofcom and reflects the ambition of enhanced cooperation in merger cases between the Commission and Mofcom throughout the merger procedure, including remedy design. Such bilateral cooperation documents are very useful as they typically build on the experience gained in the cooperation in individual cases, can be tailor-made to set out the best ways to cooperate in the respective
international organisations such as the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN).

Whereas cooperation used to be mostly bilateral between long-standing cooperation partners, trends have shifted towards more multilateral cooperation. It is against this background that the **ICN Merger Working Group (MWG) Practical Guide to International Enforcement Cooperation** was adopted at the ICN Annual Conference in Sydney in 2015. The Practical Guide provides guidance on multilateral cooperation for agencies seeking to engage in such cooperation, as well as for merging parties and third parties seeking to facilitate cooperation.

This policy brief presents key principles of effective cooperation as set out in the Practical Guide, and explains how these principles have been applied in recent merger cases reviewed by the Commission. It demonstrates that cooperation has to happen in specific cases and that it requires constructive cooperation from the companies involved. Finally, it aims at providing advice to companies on how to facilitate effective inter-agency cooperation.

2. **Overarching principles**

   i. **Voluntary nature of cooperation and flexibility**

   One of the most important principles of international merger enforcement cooperation is that it is voluntary and does not limit the agencies’ ability to take their own enforcement decisions independently.

   So there is significant flexibility in the way agencies may cooperate with each other in a specific merger case.

   In any given case, the extent of the Commission’s cooperation may vary from one agency to the other. Indeed different degrees and kinds of cooperation exist.

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5 As an ICN MWG co-chair since 2012, the Commission has taken a leading role in bringing the ICN MWG International Cooperation Project forward and in developing and promoting the implementation of the Practical Guide. During the period 2012 to date, the Commission’s ICN MWG co-chairs included the agencies of Canada, France, India and Italy.


7 Practical Guide, paragraph 5.


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In **Holcim/Lafarge**, for instance, the Commission cooperated with several agencies. Cooperation was extensive with the US Federal Trade Commission (FTC) and Canadian Competition Bureau (CCB), characterised by regular tri-party calls, discussions on market definition and theories of harm and detailed exchanges on remedy proposals on the basis of waivers. Cooperation with other agencies (such as those of Brazil, India, Serbia, Mauritius and China), whilst less extensive, was also beneficial as it enabled insight into other agencies’ timing and processes as well as discussion on substantive aspects.

### ii. Need for and utility of cooperation

The need for and utility of cooperation varies from case to case depending on the facts and issues raised by a particular merger. In some cases, only limited cooperation may be sufficient, for example consisting of initial contacts with a view to determining whether further cooperation would be useful.

Cooperation between agencies is especially beneficial in cases that raise competitive issues of common concern. This is particularly the case for mergers affecting global or cross-border regional markets. However, it may also be relevant where the geographic scope of the markets is confined to the respective jurisdictions if, for instance, competition problems in different national or regional markets are remedied through the divestiture of a global business. Dialogue between agencies in such cases, not only in the design but also in the implementation of remedies, may avoid inconsistent or conflicting obligations being imposed on the merging parties.

In **General Electric/Alstom**, the Commission cooperated closely with the US Department of Justice (DoJ). The US DoJ did not share the Commission’s main concern related to the supply of 50 Hz Heavy Duty Gas Turbines, as the US is a 60 Hz market where Alstom was basically absent. The Commission and the US DoJ did, on the other hand, identify common concerns regarding the servicing of GE’s mature gas turbines for 50 Hz and 60 Hz, where a subsidiary of Alstom was one of very few capable independent service providers. Despite the different points of focus in the two agencies’ assessments, close cooperation, in particular on the design of the remedies, led to satisfactory and mutually supportive remedy solutions for both the Commission’s more far-reaching and the US DoJ’s more limited concerns. This cooperation also extended to the approval of the buyer.


iii. Role of the merging parties

Finally, the merging parties have a key role to play in facilitating cooperation between different agencies, in particular when cooperation requires aligning the timing of the review processes or the exchange of confidential information. Indeed the early and constructive engagement of merging parties is very important to successful inter-agency cooperation.

In Novartis/GlaxoSmithKline oncology business\textsuperscript{13}, the Commission and the US FTC held regular weekly calls, exchanged documents and information supplied by the parties, organised and attended joint calls with third parties and discussed extensively the substance of the case. The parties’ collaboration and engagement was essential to enabling and ensuring the smooth conduct of that cooperation process, notably in terms of sharing confidential information during the substantive review and remedies design processes. Cooperation also took place with the CCB, Brazil’s Council for Economic Defence (CADE) and the Australian Competition and Consumer Commission (ACCC). Despite some differences in the substantive assessment, reflecting specificities in the healthcare competitive landscape in their respective jurisdictions, compatible and non-conflicting remedies were achieved. The CCB relied on the consent order issued by the US FTC and the ACCC relied on the commitments accepted by the Commission. This successful outcome is a clear indication of how the goodwill and engagement of the merging parties facilitates cooperation.

3. Putting cooperation principles into practice

Merging parties can make vital contributions by facilitating initial contacts and information sharing between agencies as well as timing alignment. In this respect, careful planning and a coordinated approach in relation to filing obligations in the various jurisdictions are critical in large multi-jurisdictional transactions.

i. Initial contacts

Once the required information is received from the merging parties, initial contacts between agencies ideally start as early as possible, even if only to touch base on status and timing of a transaction\textsuperscript{14}. Here, merging parties can help by providing to the agencies sufficient information about the transaction and the filing obligations in other jurisdictions early on in the process.

ii. Information sharing

Information sharing may lead to less duplication of work and to a more informed decision-making process, which ultimately helps to avoid inconsistent outcomes. The merging parties may facilitate information sharing by giving waivers of confidentiality (waivers). Such waivers are generally beneficial in more complex cases, particularly as they facilitate evidence exchange and enable fruitful discussions on remedy design proposals and implementation issues.

Merging parties may have legitimate concerns\textsuperscript{15} in granting waivers, notably in relation to exchanges of documents. To address these, the Commission has strict measures in place to protect confidential information and is transparent about how it handles it\textsuperscript{16}. The Commission has also published a model waiver, the Commission Confidentiality Waiver\textsuperscript{17}. Apart from that, the US-EU Best Practices note that agencies will accept a stipulation in the merging parties’ waivers given to the Commission that excludes evidence qualifying for in-house counsel privilege under US law from the scope of the waiver\textsuperscript{18}.

Ultimately, however, as the Practical Guide emphasises waivers are not needed in each and every cooperation case\textsuperscript{19}, the decision as to whether to grant a waiver is at the sole discretion of the party that provided the confidential information and the refusal to grant a waiver does not prejudice the investigation\textsuperscript{20}. Indeed, types of information that can typically be discussed without waivers range from publicly available information regarding the industry/sector or the merging parties or third parties, non-confidential aspects of prior relevant investigations or decisions, or information regarding an agency’s process, to aggregate results of the market investigation without identification of the views expressed by individual customers or competitors, and agency views on issues such as market definition, theory of harm and competitive effects\textsuperscript{21}. Waivers are therefore not a must-have for cooperation to be successful, and the Commission will ask for and make use of them in a responsible manner.

iii. Timing alignment

Procedural frameworks for merger review and investigation timetables differ from one jurisdiction to another. While these differences do not render cooperation impossible, they make it more difficult, especially in the context of multilateral cooperation in multi-jurisdictional cases.

The Practical Guide recognises that merger reviews that are aligned at key-decision making stages may allow for more

\textsuperscript{13} M.7275, Commission Decision of 28 January 2015.

\textsuperscript{14} Practical Guide, paragraph 14.

\textsuperscript{15} Practical Guide, paragraph 30.

\textsuperscript{16} As the Practical Guide notes in paragraph 29, transparency about applicable rules and practices on the handling of confidential information promotes greater understanding about the process of sharing information for agencies and the merging parties and this may serve to encourage the merging parties to grant waivers.

\textsuperscript{17} Available at: http://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf


\textsuperscript{18} The scope of application of the rules on legal professional privilege in the EU and the US differs. In particular, unlike the situation in the US, legal professional privilege does not, under EU rules, extend to communications between undertakings and their in-house counsel.

\textsuperscript{19} Practical Guide, paragraph 26, 27 and 28.

\textsuperscript{20} Practical Guide, paragraph 29.

\textsuperscript{21} Practical Guide, paragraph 27.
efficient investigations, more meaningful inter-agency discussions and ultimately, more consistent outcomes in both substantive assessment and remedies22.

A main way of achieving timing alignment is through the timing of notifications. This does not necessarily mean that notifications in the various jurisdictions need to be made at the same point in time23. What matters is rather that notifications are timed in such a way that agencies can cooperate meaningfully at key decision-making stages24 of their respective investigations.

Making the different timetables fit in a given case may be challenging. It requires careful planning and is dependent on merging parties’ active engagement and early and continued communication between them and the agencies.

Merging parties can facilitate timing alignment by timing their notifications as explained above25. In this regard, it is also helpful if merging parties avoid provisions in their transaction agreements that require them to make merger notifications in some or all relevant jurisdictions within a specified period of time26.

Merging parties can also facilitate timing alignment all along the process through the timing of their responses to information requests or by requesting or agreeing to timeline extensions27.

Finally, there may also be some flexibility or discretion on the part of agencies when it comes to setting and adjusting deadlines or timelines for the final decision on the case28.

The ThermoFisher/Life Technologies29 case was subject to review by the Commission and eight other jurisdictions and all but one ultimately accepted remedies to eliminate concerns. The Commission cooperated with seven agencies, but more extensive cooperation including timing alignment involved only the Commission, the US FTC and the ACCC. Considering the various stages of the respective agencies’ processes, the Commission case team and the merging parties saw that the desired timing alignment could be achieved: (i) by starting inter-agency cooperation whilst the case was still in pre-notification to the Commission; and (ii) through the timing of the formal notification to the Commission. The merging parties were actively engaged in seeking to keep timing aligned throughout the review process with a view to increasing the chances of consistent outcomes and were proactive in identifying steps which could be taken to keep timing aligned when unforeseen events threatened to misalign it again. This allowed for meaningful discussions between the Commission, the US FTC and the ACCC at key decision-making stages. The case demonstrates that making the different timetables fit together requires careful planning and depends to a considerable extent on a joint effort and early and continued communication by merging parties and agencies.

iv. Substance

In complex cases, a comparative discussion of agencies’ investigative approaches, in particular on investigative planning, the approach to gathering of evidence, analytical methods and economic models, can help avoid divergent outcomes.

The merging parties can contribute to this by ensuring consistency in their substantive submissions to the various reviewing agencies.

v. Remedies

As acknowledged in the Practical Guide, inter-agency cooperation in remedy design increases the likelihood of non-conflicting remedies being accepted by agencies and minimises the risks of subsequent difficulties in their implementation30. Even in cases in which the product or geographic markets or competitive effects of the merger do not overlap across jurisdictions, remedies accepted in one jurisdiction may still have an impact on another jurisdiction31.

23 Nor does timing alignment mean that decisions in the various jurisdictions should be reached on the same day.
24 Key decision-making stages include, for example, points in time in the review process at which: (i) recommendations are made to senior leadership on case orientation; (ii) decisions are taken as to whether or not to open an in-depth investigation; (iii) remedies are discussed with the merging parties; (iv) decisions are taken as to whether to prohibit/challenge a merger; (v) decisions are taken as to whether to close an investigation.
27 For example, no later than 15 working days after the opening of an in-depth investigation by the Commission, the merging parties can request that the review period be extended by up to 20 working days, pursuant to Article 10(3) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1-22 (the Merger Regulation). Similarly, after the issuance of a second request in the US, the merging parties can negotiate a timing agreement with the reviewing US agency based on the date on which the merging parties will certify compliance with the second request (cf. US-EU Best Practices on cooperation in merger investigations (2011))).
28 For example, under EU rules (cf. Article 10(3) of the Merger Regulation), the Commission, on its own initiative but with the agreement of the notifying party, may extend the review period at any time following the initiation of an in-depth investigation. The total duration of any extension(s) pursuant to this provision cannot exceed a total of 20 working days.
The **Baxter International/Gambro** case concerned the markets for renal failure therapy which, in the EEA, were likely to be national in scope. The Commission cooperated closely with the ACCC and the Commerce Commission of New Zealand. Timing was aligned to facilitate not only discussion regarding the competitive assessment in the respective jurisdictions at key decision making stages, but also discussion on remedies at a time when these were being crafted in the different jurisdictions. The three authorities held joint calls to discuss, on the basis of confidentiality waivers, key remedy design issues. It was acknowledged that even if the transaction affected separate national/regional markets, cooperation would be beneficial given that remedies eliminating concerns in the different jurisdictions were likely to be global in scope. Ultimately, all three agencies accepted the global divestment of Baxter’s continuous renal replacement therapy business. Given the global scope of the divestment business, the three agencies continued to cooperate in the remedy implementation stage. The same trustee was appointed and the same purchaser was accepted by the three agencies.

(a) Remedy design

Cooperation in remedy design increases the likelihood of consistency in the scope or parameters of remedies accepted by different agencies. The remedy design process is more effective and efficient when merging parties have facilitated cooperation throughout the investigation, particularly through timing alignment and/or waivers of confidentiality. Besides helping agencies to achieve a common understanding of competition concerns to be remedied, these cooperation tools may also help to enable coordinated approaches at the remedy design stage.

The **UTC/Goodrich** case was characterised by extensive cooperation between the Commission and the US DoJ. Timing alignment and confidentiality waivers allowed not only for synergies for the agencies and the parties resulting from joint investigative efforts, but also coordination on remedy design, including the exchange of remedy proposals received from the parties and detailed discussions (involving the sharing of confidential information) on the design of remedies suitable to remedying the competition concerns. The agencies discussed the scope of divestment remedies, including the details and the duration of transitional arrangements between the merged entity and the divestment business, as well as key timelines for implementation of the remedies. Non-conflicting remedies were achieved as a result of this extensive cooperation. Cooperation continued in the remedy implementation stage.

32 M.6851 - Commission Decision of 22 July 2013
33 Practical Guide, paragraph 40.
34 M.6410 - Commission Decision of 26 July 2012

(b) Remedy implementation

Continued inter-agency cooperation throughout the implementation phase of accepted remedies may lead to consistent and more cost-efficient outcomes for the merging parties. For example, it may lead to the appointment of common trustees or monitors and, in the case of remedies involving the divestiture of the same business, increase the likelihood of agencies agreeing on the same purchaser.

In the case of divestiture commitments, the Practical Guide recognises the benefits of cooperation regarding the approval of the purchasers. An identical purchaser may be desirable or even necessary to remedy concerns in different jurisdictions.

Inter-agency discussion regarding trustees, for example, on whether a common trustee or monitor is appropriate or whether coordination between different trustees and monitors is needed, may also be beneficial for the merging parties.

The **GSK/Novartis vaccines business (excl. influenza)/Novartis Consumer Health Business)** case is a case in point. Cooperation between the Commission and the ACCC also covered remedy implementation issues and on that basis, the ACCC accepted an arrangement whereby the monitoring trustee approved by the Commission would send its periodic reports (including a specific section relating to Australia) to the ACCC.

Cooperation may also involve discussions between agencies on possible approaches to address *ad hoc* issues which may arise in remedy implementation. Examples may include issues relating to transitional arrangements in place between the merged entity and the purchaser in the case of a divestiture, or the execution of behavioural commitments in cases in which, in light of the particular circumstances, these have been deemed acceptable.

4. Conclusion

Multi-jurisdictional mergers, with their potential risk of increased costs, burdens and divergent outcomes for the merging parties, have become a frequent reality.

The need for and utility of cooperation is very case-specific and can take different forms. The Commission’s experience indicates that inter-agency cooperation in complex mergers, throughout the review process and also in the remedy design and implementation phases, may reduce these burdens and risks and promote consistent outcomes. The cases described above attest to the potential benefits of cooperation.

Mindful of these benefits, the Commission has invested significantly in seeking to achieve and enhance cooperation with its counterparts over the years, and continues to do so. The ICN MWG Practical Guide to International Enforcement Cooperation in Mergers describes and illustrates principles and practices which underlie effective cooperation. In so doing, the Practical Guide serves as a useful source of reference, not only for reviewing agencies, but also for the merging parties to multi-jurisdictional mergers.

35 Practical Guide, paragraphs 37 and 46.
36 Practical Guide, paragraph 47.