

US-EU Merger Working Group

BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS

This document sets forth best practices which the United States federal antitrust agencies and the Commission of the European Union will seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they simultaneously review the same merger transaction.¹ A number of these best practices already are routinely employed informally between the US and EU. With that in mind, this statement of best practices seeks to set out the conditions under which trans-Atlantic inter-agency cooperation in merger investigations should be conducted, while at the same time confirming and building upon current good practice.

Objectives

1. In today's global economy, many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.² Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives.
2. These best practices are designed to further enhance cooperation in merger review between the United States Department of Justice ("DOJ") or the U.S. Federal Trade Commission ("FTC") (hereafter referred to as the "US"),³ on the one hand, and the European Commission (hereafter referred to as the "EU"), on the other. They are intended to promote fully-informed decision-making on the part of both sides' authorities, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties, and to increase the overall transparency of the merger review processes.

¹ This document is intended to set forth an advisory framework for interagency cooperation. The agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights.

² Cooperation between the US and EU agencies is based primarily upon the 1991 US-EC Agreement on the Application of their Competition Laws, a principal purpose of which is to avoid conflict in the enforcement of their antitrust laws.

³ This document assumes that, consistent with past practice, only one US agency – either the DOJ or FTC – reviews each pertinent transaction and, accordingly, coordinates with the EU regarding that transaction.

3. Given legal constraints existing in both jurisdictions, effective inter-agency coordination between the US and the EU depends to a considerable extent on the cooperation and good will of the merging parties, and to a lesser extent on third parties. In particular, cooperation is more complete and effective when the merging parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions. In addition, coordination between the agencies is most effective when the investigation timetables of the US and the EU run more or less in parallel so that the investigative staffs of each agency can engage with one another and with the parties on substantive issues at similar points in their investigations. The agencies intend, therefore, to work cooperatively with one another and with the parties, as appropriate, to promote such timetable coordination. At the same time, the EU and US agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies' recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.

Coordination on Timing

4. Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel, recognizing there are differences between US and EU merger review processes. To that end, the agencies should endeavor to keep one another apprised of important developments related to the timing of their respective investigations throughout the course of their reviews of merger transactions subject to review by the US and the EU.
5. In appropriate cases, the reviewing agencies should offer the merging parties an opportunity to confer with the relevant EU and US staffs jointly to discuss timing issues. Such a conference will be most beneficial if held as soon as feasible after the transaction has been announced. At this conference, the agencies and parties should be prepared to discuss ways to synchronize the timing of the US and EU investigations, to the extent possible under EU and US law respectively. Topics addressed may include the appropriate times to file in the US and EU, suggested timeframes for the submission of documents or other information, and, where appropriate, the prospect of a timing agreement (in the US) and/or a waiver from the obligation to notify within seven days of the conclusion of a binding agreement (in the EU). The success of this effort depends on the active participation and cooperation of the parties, and would, in most cases, require the parties to discuss timing with the agencies before filing in either jurisdiction.

Collection and Evaluation of Evidence

6. In significant matters under review by both jurisdictions, the agencies should seek to coordinate with one another throughout the course of their investigations and keep one another apprised of their progress. This may include sharing publicly available information and, consistent with their confidentiality obligations, discussing their respective analyses at various stages of an investigation, including tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, economic theories, and the empirical evidence

needed to test those theories. Views on necessary remedial measures, and similar past investigations and cases, also may be discussed. The agencies also may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by the respective jurisdictions' laws and regulations.

7. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. This results in more informed decision-making and more effective coordination between the reviewing agencies, thereby helping to avoid divergent analyses and outcomes, as well as expediting merger review. Accordingly, as soon as feasible after the announcement of a transaction that requires review by the US and EU, the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the parties with a view to requesting the possible execution by the merging parties of confidentiality waivers, providing sample waiver letters if necessary. The reviewing agencies should, where appropriate and feasible, also encourage the merging parties to allow joint EU/US agency interviews with party executives and joint conferences with the parties.
8. Similarly, waivers of confidentiality executed by third parties enable more complete communication between the reviewing agencies and with third parties and can reduce the investigative burden imposed on third parties. Where appropriate, the reviewing agencies may, therefore, request that third parties waive confidentiality, or simply request that third parties provide the same information divulged to one reviewing agency to the other. The agencies may also encourage joint interviews and conferences with third parties, where appropriate and feasible.

Communication Between the Reviewing Agencies

9. The reviewing agencies will, via liaison officers or otherwise, contact one other upon learning of a transaction that appears to require review by both the US and EU.
10. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, each agency should designate a contact person who will be responsible for: setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables (see Section II above); and coordinating information gathering or discovery efforts, including seeking waivers from the merging parties and from third-parties.
11. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, the relevant DOJ Section Chiefs/FTC Assistant Directors and the EU Merger Task Force Unit Head (or their designees) should seek to agree on a tentative timetable for regular consultations between them on the progress of their investigations. The timetable for consultations will take into account the nature and timing of the transaction. Consultations normally should occur: (a) before the US closes its investigation without taking action; (b) before the US issues a second request; (c) no later than three weeks following the initiation of a Phase I investigation in the EU; (d) before the EU

opens a Phase II investigation or clears the merger without going to Phase II; (e) before the EU closes a Phase II investigation without issuing a Statement of Objections or approximately two weeks before the EU anticipates issuing its Statement of Objections; (f) before the relevant US DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or the FTC Bureau Director; and (g) at the commencement of remedies negotiations with the merging parties. Discussions may also take place at any other point the DOJ Chiefs/FTC Assistant Directors and the EU Unit Head find useful.

12. In some cases, consultations may be appropriate between senior competition officials for the EU (the Competition Commissioner, Director General for Competition, or Deputy Director General for Mergers, as appropriate) and their counterparts at the Antitrust Division of the Department of Justice (the Assistant Attorney General for Antitrust or the relevant DOJ Deputy Assistant Attorney General (“DAAG”), as appropriate) or the Federal Trade Commission (the Chairman, Director of the Bureau of Competition, or Deputy Director of the Bureau of Competition, as appropriate). In such cases, consultations are likely to be particularly useful: (a) shortly before or after the US issues a second request and the EU initiates a Phase II investigation; (b) approximately one week before the EU anticipates issuing its Statement of Objections; (c) approximately one week after the relevant DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOJ DAAG or FTC Bureau Director; and (d) prior to a decision by the Antitrust Division or FTC to challenge a merger or by the Competition Commissioner to recommend that the European Commission prohibit a merger. Consultations may also take place between their economic counterparts. These officials may find it useful to confer at other points in the investigation as well.
13. Pursuant to the terms of the Administrative Arrangements on Attendance of 1999, the US and EU, as appropriate, may attend certain key events in the other’s investigative process. These include (a) the EU’s Oral Hearing and (b) the merging parties’ presentations to the Assistant Attorney General or Deputy Assistant Attorney General or to the Director or Deputy Director of the Bureau of Competition at which the parties present their arguments prior to the agency’s decision whether to take enforcement action.

Remedies/Settlements

14. The reviewing agencies recognize that the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU. Nevertheless, a remedy accepted in one jurisdiction may have an impact on the other. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties. The agencies should, therefore, advise that the parties consider coordinating the timing and substance of remedy proposals being made to the EU and US agencies, so as to minimize the risk of inconsistent results or subsequent difficulties in implementation.

15. Consistent with their confidentiality and/or non-disclosure obligations, the reviewing agencies should seek to keep one another informed of remedy offers being considered and of other relevant developments with respect to remedies to the extent they may impact the other jurisdiction's review. Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the agencies should share draft remedy proposals or settlement papers, on which they may provide comments to one another, and participate in joint conferences with the parties, buyers, and trustees.