

## US-EU Merger Working Group

### BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS

Recognizing the 20<sup>th</sup> anniversary of the Agreement between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, and

Celebrating two decades of cooperation between the Competition Directorate-General of the European Commission and the United States federal antitrust agencies, the Federal Trade Commission and the Antitrust Division of the Department of Justice, that continues to benefit consumers and firms in both jurisdictions,

The three agencies reaffirm their strong commitment to this mutually beneficial cooperative relationship. In order to enhance their relationship, the three agencies have today adopted the following revised Best Practices on Merger Cooperation in cases where a U.S. agency and the Competition Directorate-General of the European Commission are reviewing the same merger.

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This document provides an advisory framework for interagency cooperation by setting forth best practices that the United States federal antitrust agencies (the US Department of Justice (“DOJ”) and the US Federal Trade Commission (“FTC”), hereinafter the “US agencies”) and the Competition Directorate-General of the European Commission (hereinafter “DG Competition”) will seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they review the same merger.<sup>1</sup> This document also acknowledges the substantial contribution that merging parties can make in facilitating cooperation among reviewing agencies in the merger review process.

Cooperation between the US agencies and DG Competition is based primarily upon the 1991 US-EU Agreement on the application of their competition laws. The purpose of that Agreement is “to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”<sup>2</sup>

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<sup>1</sup> These Best Practices apply to mergers that are subject to the EU Merger Regulation, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004), and to § 7 of the Clayton Act, 15 U.S.C. § 18, regardless of whether the merger is subject to the Hart Scott Rodino Act, 15 U.S.C. § 18a.

<sup>2</sup> Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) 13, 504, and OJ L95 (27 Apr. 1995) *corrected at* OJ L131/38 (15 June 1995), art. I.1, *available at*: [http://www.ftc.gov/bc/international/docs/agree\\_eurocomm.pdf](http://www.ftc.gov/bc/international/docs/agree_eurocomm.pdf); <http://www.justice.gov/atr/public/international/docs/0525.htm>; and <http://ec.europa.eu/competition/international/legislation/usa01.pdf>.

This document revises the best practices agreed between DG Competition and the US agencies in 2002<sup>3</sup> and builds on the experience gained in a significant number of cases since 2002. This restatement of best practices sets 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 practice. The US agencies and DG Competition reserve their full discretion in the implementation of these best practices, and nothing in this document is intended to modify or create any enforceable rights.

## **I. Objectives**

1. In today's global economy, many mergers involving international businesses are likely to be subject to review in both the European Union ("EU") and the United States ("US"), as well as in other jurisdictions. When the US agencies<sup>4</sup> and DG Competition are reviewing the same merger, both have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.
2. Cooperation between DG Competition and the US agencies is beneficial not only for the agencies, but also for merging parties and third parties, as it increases the efficiency of the respective investigations, reduces the burden on merging parties and third parties, and increases the overall transparency of the merger review process.
3. Given legal constraints in both jurisdictions, effective coordination between the US agencies and DG Competition depends to a considerable extent on the cooperation and goodwill of the merging parties, and of third parties. Agency cooperation is most effective when the merging parties and third parties allow the agencies to share information, the disclosure of which is subject to confidentiality restrictions. In addition, cooperation is more effective when the investigation timetables of DG Competition and the US agencies allow the investigative staffs of each agency to engage with one another and with the merging parties and third parties on substantive issues at key stages of their respective investigations. The reviewing agencies, working together and with the merging parties, can seek to align their timetables accordingly. At the same time, the US agencies and DG Competition recognize that whether to facilitate such cooperation is within the discretion of the merging parties. Accordingly, while a party's choice not to follow some or all of these best practices may complicate cooperation between the agencies, that decision will not of itself prejudice the conduct or outcome of the agencies' investigations.
4. An increasing number of mergers reviewed by DG Competition and the US agencies also are subject to review by other competition authorities around the world. The merging parties are encouraged to inform the US agencies and DG Competition of the competition authorities in other jurisdictions that are reviewing or are expected to review the same merger, and DG

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<sup>3</sup> US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, *available at* [http://ec.europa.eu/competition/international/bilateral/eu\\_us.pdf](http://ec.europa.eu/competition/international/bilateral/eu_us.pdf); <http://www.justice.gov/atr/public/international/docs/200405.htm>; and <http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm>.

<sup>4</sup> Pursuant to Rule 803.20(b)(1) of the Code of Federal Regulations (16 C.F.R. § 803.20(b)(1)), only one US agency – either the DOJ or the FTC – reviews each pertinent transaction and, accordingly, coordinates with DG Competition regarding that transaction.

Competition and the US agencies seek to cooperate with those other authorities pursuant to the relevant OECD Recommendation,<sup>5</sup> bilateral cooperation arrangement,<sup>6</sup> and/or the principles developed by the International Competition Network for interagency cooperation.<sup>7</sup>

## II. Communication between Reviewing Agencies

5. The reviewing agencies, via liaison officers or otherwise, are to contact one another promptly upon learning of a merger that appears to require review in both the US and EU.<sup>8</sup> The nature and frequency of communication between DG Competition and the US agencies may differ depending on the characteristics of the particular case under review.
6. For example, at the start of any investigation in which it appears that substantial cooperation between the US agencies and DG Competition may be beneficial, the relevant DOJ Section Chief or FTC Assistant Director and DG Competition Unit Head (or their designees) should seek to agree on a tentative timetable for regular inter-agency consultations, which takes into account the nature and timing of the merger. While it will normally be beneficial to keep each other informed on a continuous basis and discussions may take place at any time between the reviewing agencies, consultations are likely to be particularly useful at key stages of the investigation, including: (a) before the relevant US agency either closes an investigation without taking action or issues a second request; (b) no later than three weeks after the European Commission initiates a Phase I investigation ; (c) before the European Commission opens a Phase II investigation or clears the merger without initiating a Phase II investigation; (d) before the European Commission closes a Phase II investigation without issuing a Statement of Objections or before DG Competition anticipates issuing a Statement of Objections; (e) before the relevant DOJ section/FTC division makes its case recommendation to senior leadership; (f) at the commencement of remedies negotiations with the merging parties; and (g) prior to a reviewing agency's final decision to seek to prohibit a merger.<sup>9</sup> Consultations between the senior leadership of DG Competition and their counterparts in the US agencies may also be appropriate at any time. The senior leadership

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<sup>5</sup> OECD Revised Recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, C(95)130/FINAL, July 27-28, 1995, *available at*: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False>.

<sup>6</sup> Bilateral arrangements to which the United States is a party are collected at: <http://www.ftc.gov/oia/agreements.shtm> and <http://www.justice.gov/atr/public/international/int-arrangements.html>; bilateral agreements to which the European Commission is a party are collected at: <http://ec.europa.eu/competition/international/bilateral/>

<sup>7</sup> *See*, in particular, principles of interagency coordination in Section X of the ICN Recommended Practices for Merger Notification Procedures available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

<sup>8</sup> Subject to the normal conditions for cooperation in the pre-notification phase, DG Competition may discuss with the US agencies preparatory steps in cases that are in the process of being referred to the Commission by the Member States under Article 4(5) of the Merger Regulation, in particular if the parties have granted a waiver at that stage.

<sup>9</sup> Pursuant to the terms of the Administrative Arrangements on Attendance of 1999, officials of the relevant US agency and DG Competition, as appropriate, may attend certain key events in the other's investigative process.

of the reviewing agencies should be kept informed of key milestones throughout the investigation. Consultations also may take place between the reviewing agencies' economic counterparts at appropriate points in the investigation.

7. To facilitate the communication envisaged in paragraph 6, at the start of any investigation in which it appears that substantial cooperation between DG Competition and the US agencies may be beneficial, each agency should designate a contact person responsible for, *inter alia*: setting up a schedule for communications between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating timing of the respective investigations (see Section III below); and coordinating information gathering or discovery efforts, including seeking waivers from the merging parties and from third parties.

### **III. Coordination on Timing**

8. Cooperation between the US agencies and DG Competition with respect to mergers subject to review by both jurisdictions is most effective when the reviewing agencies' respective investigation timetables allow for meaningful communication throughout the merger review processes, including at key decision-making stages, recognizing that there are differences between the US and EU merger review investigation timetables. To facilitate coordination, DG Competition and the US agencies should endeavor to keep one another informed of important developments related to timing throughout the course of their respective merger investigations.
9. In appropriate cases, the reviewing agencies should endeavor to coordinate the phases of their investigations, including by holding joint calls or meetings with the merging parties and the relevant US agency and DG Competition staffs to discuss timing of the respective investigations. The success of this effort depends on the active participation and cooperation of the merging parties and will be facilitated if the parties discuss timing with the reviewing agencies as soon as feasible after the parties inform the reviewing agencies of a merger that requires review by the US agencies and DG Competition. To inform these discussions, the merging parties are encouraged to provide basic information about the merger to the reviewing agencies, including:
  - The names and activities of the merging parties;
  - The geographic areas in which they conduct business;
  - The sector or sectors involved (short description for both the US and EU);
  - The names of other jurisdictions in which they have made or intend to make a filing;
  - The actual or anticipated date for the filing in each jurisdiction; and
  - Any issues relevant to the timing of the merger.

The reviewing agencies and the merging parties should be prepared to discuss ways to coordinate the timing of the US and EU investigations, to the extent possible under US and EU law respectively. Topics addressed may include the appropriate times to file and suggested timeframes for the submission of documents or other information and interviews, including in DG Competition's pre-notification phase, so as to allow cooperation before formal notification in the EU.

10. The parties' timing of their filings should allow the reviewing agencies to communicate and cooperate meaningfully at key decision-making stages of their respective investigations. In considering the timing of their filings, the parties should take into account the stages of the respective reviewing agencies' processes, and in particular, the initial phases. One option to facilitate coordination of the timing of the investigations between the reviewing agencies is parallel filings in the US and the EU; if filings in the EU and US are not made in parallel, meaningful cooperation can still be achieved if the timing of the filings allows for cooperation of the agencies at key decision-making stages of their respective investigations.
11. Merging parties also can facilitate coordination of investigations throughout the process, including when DG Competition is conducting pre-notification consultations or a Phase I investigation with or without remedies, and the US agency has already opened an investigation. Such facilitation of coordination, including the timing of filings, is particularly important in cases in which the merging parties anticipate that the US agency will issue a second request and will seek remedies, and the merging parties are seeking a Phase I clearance decision with commitments from the European Commission. After the issuance of a second request in the US and the opening of a Phase II investigation in the EU, the parties can further facilitate coordination of the investigation timetables by using the timing flexibility provided for in the respective procedures at this stage. For example, the parties can negotiate a timing agreement with the reviewing US agency based on the date on which the parties will certify compliance with the second request. In the EU, parties can request to extend the review period by up to 20 working days.
12. In any event, if the timing of the filings in the US and the EU is such that a final decision in one jurisdiction is reached before filing has taken place in the other, any possibility for meaningful cooperation between the agencies will have been excluded. As a result, the respective investigations are likely to be less efficient and effective for the reviewing agencies, the merging parties, and third parties.

#### **IV. Collection and Evaluation of Evidence**

13. In matters under review that raise issues of concern in both jurisdictions, the reviewing agencies should seek to coordinate with one another throughout the course of their investigations and to keep one another informed of their progress; such coordination may well start in DG Competition's pre-notification phase. This coordination may include sharing publicly available information and, consistent with the agencies' confidentiality obligations, discussing their respective analyses at various stages of an investigation, including market definitions, assessments of competitive effects and efficiencies, theories of competitive harm, economic theories, and empirical evidence needed to test those theories. Views on necessary remedial measures and relevant past investigations and cases also may be discussed. In addition, the reviewing agencies 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. Efficient investigatory coordination will benefit the merging parties, third parties, and the reviewing agencies. For example, in appropriate cases, the reviewing agencies might

encourage and provide opportunities for parties to organize presentations or interviews jointly with both agencies, and to allow for the concurrent submission of documents.

14. 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. Such confidentiality waivers have become routine practice in cases involving cooperation between DG Competition and the US agencies. This results in more informed decision-making and more effective coordination between the reviewing agencies, thereby helping to avoid inconsistent or conflicting analyses and outcomes, as well as expediting merger review. Accordingly, as soon as feasible after the parties inform the reviewing agencies of a merger that requires review by the US agencies and DG Competition, the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the merging parties with a view to receiving confidentiality waivers from the merging parties, normally at DG Competition's pre-notification stage.<sup>10</sup>
15. 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 request that third parties provide the same information to both reviewing agencies concurrently.

## **V. Remedies/Settlements**

16. Cooperation will be especially valuable for both the reviewing agencies and the merging parties in mergers for which remedies need to be considered in both jurisdictions, or for which remedies offered to one agency may have effects in the other jurisdiction. For example, when a case involves markets that are global in scope or at least affect both the EU and the US, the remedies offered to the reviewing agencies may be similar or identical. Even if the geographic market is limited to only one jurisdiction, or the product markets or competitive effects of the merger are not identical in both jurisdictions, the remedies offered in one jurisdiction may be linked to, dependent on, or have an effect on, those offered in the other jurisdiction.
17. 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 or conflicting obligations on the merging parties. It is clearly in the interest of the merging parties to coordinate the timing and substance of remedy proposals being made to the US agencies and DG Competition, so as to minimize the risk of inconsistent or conflicting results or subsequent difficulties in implementation. This normally also will require coordination on the overall timing of the investigations so as to allow for meaningful cooperation between the

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<sup>10</sup> See, for a sample confidentiality waiver letter, International Competition Network, Waivers of Confidentiality in Merger Investigations, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>. For examples of the US agencies' model waivers, see <http://www.ftc.gov/oia/waivers/index.shtm> and <http://www.justice.gov/atr/public/international>. As the rules governing legal professional privilege are different in the EU and the US, in particular with regard to in-house lawyers, the agencies will accept a stipulation in parties' waivers given to DG Competition that excludes from the scope of the waiver evidence that is properly identified by the parties as and qualifies for the in-house counsel privilege under US law.

reviewing agencies on the substantive assessment of the merger before the remedial stage. If the timing of the respective filings and therefore of the investigations does not allow for such cooperation, the reviewing agencies may ultimately not be able to agree on consistent and non-conflicting remedies in relation to their respective investigations.

18. Consistent with their confidentiality and/or non-disclosure obligations and their common objective of ensuring efficient outcomes, implementation, and monitoring of remedies, the reviewing agencies should seek to keep one another informed of remedy discussions with the parties and of other relevant developments with respect to remedies, to the extent the remedies may impact the other reviewing agency's review. Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the reviewing agencies should share draft remedy proposals and participate in joint discussions with the merging parties, prospective buyers, and trustees. Practice has shown that it is particularly important for both the merging parties and reviewing agencies to communicate and coordinate early and frequently when the remedies under consideration include an up-front buyer and when DG Competition is considering a remedy in its Phase I investigation.
19. Cooperation is beneficial throughout the remedial process. Cooperating on the design of possible remedies may result in a single proposal for a remedial package to address concerns of both reviewing agencies. The remedy proposals may, for example, be similar or even identical in relation to the scope of a business to be divested, interim supply relations with the parties, or other interim safeguards. Cooperation on the implementation of the remedies may allow, in appropriate cases, the appointment of common trustees or monitors, or agreement on the same purchasers for assets to be divested in both jurisdictions. As effective cooperation at both stages will depend significantly on the timing and the content of the merging parties' proposals, the merging parties have an important role in enabling meaningful cooperation between the reviewing agencies.
20. Specific issues necessitating cooperation may arise in cases in which the European Commission and the relevant US agency agree with the merging parties on similar remedies to address common competitive concerns, but conclude that different implementation procedures are warranted. For example, the US agency may conclude that an upfront buyer of the assets to be divested is necessary, but the European Commission may conclude that the parties should be allowed to propose a purchaser after a clearance decision. In that circumstance, the US agency and DG Competition would benefit from close cooperation to seek to achieve a compatible outcome. Depending on the circumstances of the case, an identical purchaser may be desirable or even necessary, and the reviewing agencies intend to cooperate in making their determination in such a situation. It will be in the interests of the merging parties to coordinate their proposal for a purchaser with both reviewing agencies, taking into account the reviewing agencies' respective procedures and timing requirements to allow for meaningful cooperation between the reviewing agencies before either agency makes a decision, so that the risk of inconsistent or conflicting implementation is minimized.