ICN Merger Working Group

Practical Guide to International Enforcement Cooperation in Mergers

I. GENERAL FRAMEWORK

1. This Practical Guide to International Enforcement Cooperation in Mergers elaborates on recommended practices and principles of merger review cooperation contained in ICN work products, particularly the Merger Notification and Review Procedures Recommended Practice on Interagency Coordination.[1] In doing so, this Practical Guide draws on the experiences of ICN MWG member agencies and non-governmental advisers.[2]

II. OBJECTIVES

2. This Practical Guide seeks to address the ICN MWG members' calls for practical guidance on merger review cooperation (hereafter "cooperation") in the context of increased multijurisdictional mergers and multilateral cooperation.[3]

3. This Practical Guide is intended to serve, to the extent consistent with applicable laws and agencies' respective enforcement responsibilities, as: (i) a voluntary and flexible framework for interagency cooperation in merger investigations; (ii) practical guidance for agencies seeking to engage in such cooperation[4]; and (iii) practical guidance for merging parties and third parties seeking to facilitate cooperation. In particular, the Practical Guide provides guidance to agencies on how cooperation in individual cases can be structured and which tools[5] can be used while recognising the need to allow for agency flexibility to determine the extent of cooperation (both

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[1] See in particular: Recommended Practices for Merger Notification and Review Procedures (Recommended Practice X on Interagency Coordination) [http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf]; Guiding Principles for Merger Notification and Review (point 6) [http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf]; Merger Remedies Project Report for the fourth ICN annual conference (part 3 and appendix G) [http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf]; ICN Investigative Techniques Handbook for Merger Review (chapter 2 and chapter 5) [http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf]; Waivers of Confidentiality in Merger Investigations [http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf]; and ICN Merger Working Group Interim Report on the Status of the International Merger Enforcement Cooperation Project [http://www.icnmarrakech2014.ma/pdf/ICN_MWG_Interim_Report.pdf].

[2] These experiences were, in particular, shared during ICN annual conferences, ICN MWG workshops and the 2013-2014 ICN MWG international cooperation experience-sharing teleseminar series. The main takeaways from this teleseminar series are contained in the ICN Merger Working Group Interim Report on the Status of the International Merger Enforcement Cooperation Project. For further information see: http://www.internationalcompetitionnetwork.org/uploads/library/doc941.pdf; http://www.internationalcompetitionnetwork.org/uploads/library/doc943.pdf; and http://www.internationalcompetitionnetwork.org/uploads/library/doc940.pdf. This Practical Guide is intended to be updated periodically to reflect further experience gained in the field of merger review cooperation.

[3] See in particular: Mandate for the International Enforcement Cooperation Project [http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf], the ICN Report on OECD/ICN Questionnaire on International Enforcement Cooperation [http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf] and the OECD Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation [http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf].

[4] Throughout this Practical Guide, "agencies" refers to competition agencies that have chosen to cooperate with one or more international counterparts during their review of the same merger.

[5] For example, timing alignment, waivers of confidentiality and coordinated or joint investigative efforts.

in terms of the agencies involved in that cooperation as well as the intensity of cooperation between those agencies).

III. OVERARCHING PRINCIPLES

4. Cooperation may be beneficial for agencies as well as merging parties and third parties[6] as it can:

   (i) help to promote consistent outcomes[7];

   (ii) increase investigative efficiency by reducing unnecessary duplication of work, delays and burdens for parties and agencies;

   (iii) reduce gaps in information available to agencies and lead to more informed agency decision making and enhanced analytical robustness;

   (iv) help to promote convergence, both in the analysis of specific cases as well as more generally, in relation to principles applicable to all mergers; and

   (v) increase familiarity between agencies and mutual understanding of their merger review processes, which in turn may help foster trust and aid future cooperation.

5. Cooperation in merger review is voluntary. While agencies are generally encouraged to cooperate in the review of mergers that may raise competitive issues of common concern in their jurisdictions, agencies have full discretion to decide whether to cooperate. Cooperation does not limit an agency's ability to make enforcement decisions independently.

6. The need for and utility of cooperation varies from case to case depending on the facts and issues raised by a particular merger. Agencies have full discretion to determine the extent of cooperation throughout the process. There may be various reasons for differing extents of cooperation; such as differences in the impact of the merger on the jurisdictions involved as well as differences in procedural rules, the scope or the timing of investigations or agency resources.

7. Cooperation between agencies is especially beneficial in cases that raise competitive issues of common concern. These may be cases which raise *prima facie* competition concerns in global markets or in cross-border regional markets. Cooperation may also be beneficial in cases raising *prima facie* competition concerns in national markets or separate regional markets where the remedies may be overlapping or where remedies accepted by one jurisdiction may impact another jurisdiction.

8. Significant flexibility exists in the way agencies may seek to cooperate with each other. The extent of cooperation may vary from case to case, ranging from less extensive cooperation (for example, keeping each other informed on the stages of the investigation or having general discussions on substantive issues such as market definition or theory of harm) to more extensive cooperation. More extensive cooperation may involve, for example, detailed discussions on

[6] Merging parties and third parties are hereafter referred to collectively as "parties".

[7] The precise outcomes of the review of each of the different agencies in a given case are dependent on various factors, including the impact of the merger in each jurisdiction and each jurisdiction's merger review laws and procedures.

substantive issues including evidence gathered or coordination on remedy design and implementation on the basis of waivers of confidentiality ("waivers"), where applicable.

9. When, in a given case, an agency chooses to engage in cooperation with more than one agency, the extent of that agency's cooperation with the different agencies may vary. Cooperation with some agencies could involve less extensive cooperation, whilst cooperation with other agencies may be more extensive. Cooperation may, in light of the specifics of the merger under review and to the extent consistent with applicable rules, involve one agency taking on an informal coordinating role for aspects of the review, for example in relation to discussions on remedies.

10. Parties have the ability to facilitate cooperation. A party's decision not to facilitate cooperation does not prejudice an investigation. However, the more extensive types of cooperation may depend, to a considerable extent, on parties' active engagement and goodwill.[8] In instances where active engagement by parties is required to enable more extensive cooperation, it may be beneficial for agencies to explain the benefits of such cooperation and how parties may facilitate it.

11. Effective cooperation between agencies is supported by mutual trust and an understanding of each other's legal frameworks and investigative processes.[9] Agencies may find it useful to have discussions or share informational materials about their respective processes, particularly where the agencies do not cooperate frequently. Explanations of investigative practices, timetables, procedures and confidentiality rules increase transparency and mutual understanding and can therefore help make cooperation more effective. Agencies that engage in recurring cooperation may find it useful to develop their own agency-to-agency protocols for cooperation based on their experiences.[10]

Practical example 1:

Varying degrees of cooperation with different agencies regarding the same transaction

The European Commission's ("Commission") cooperation with other agencies in the Thermo Fisher Scientific/Life Technologies case[11]:

8 See for example section IV.3 of this Practical Guide on Timing Alignment.

9 To learn about merger control in ICN member jurisdictions, agencies and merging parties may consult the ICN Merger Notification and Procedures templates at: http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx. These templates provide background on the reviewing jurisdiction's merger review legal framework and procedures.

10 See Recommended Practice X on Interagency Coordination (point B, comment 2) of the Recommended Practices for Merger Notification and Review Procedures. Formal cooperation agreements or other agency-to-agency protocols are not a necessary pre-condition for agencies to cooperate. Examples of agency-to-agency protocols for cooperation include the US-EU Merger Working Group Best Practices on Cooperation in Merger investigations (as revised in 2011) (available at: http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf) and the Canada-US Merger Working Group Best Practices on Cooperation in Merger investigations (2014) (available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Canada-US-Best-Practices-en-2014-03-25.pdf/$file/Canada-US-Best-Practices-en-2014-03-25.pdf).

11 M. 6944 – Thermo Fisher Scientific/Life Technologies, European Commission Decision of 26 November 2013 (conditional clearance in phase I). Press release: http://europa.eu/rapid/press-release_IP-13-1167_en.htm.

- *The Commission's investigation of the complex life sciences markets affected by the transaction was conducted in cooperation with several competition authorities worldwide, notably: the US Federal Trade Commission, the Canadian Competition Bureau, the Australian Competition and Consumer Commission, the Commerce Commission of New Zealand, the Japan Fair Trade Commission, the Fair Trade Commission of the Republic of Korea and the Ministry of Commerce of the People's Republic of China.*

- *The degree of intensity of the Commission's cooperation with these different agencies varied; ranging from less intense cooperation with some agencies to close coordination with others. While cooperation generally involved keeping each other informed on process (particularly, on expected timelines and state of play of the respective investigations) as well as comparative discussions of agency considerations and findings on substantive aspects (including theories of harm, product and geographic market definition and market dynamics), the Commission's cooperation with some of the agencies went beyond this (and involved, for example, exchange of documents which included confidential information and coordination in relation to remedy design and implementation on the basis of waivers). This dialogue helped agencies achieve a similar understanding of substantive aspects - similar concerns were identified and addressed through remedies. Cooperation on remedy design and implementation also helped avoid conflicting outcomes.*

- *This case demonstrates that agencies may opt for different degrees of cooperation in the same case. The more extensive cooperation that may take place between some agencies does not necessarily prescribe the appropriate degree of intensity of cooperation between all agencies involved in the review of the same transaction.*

IV. COMMUNICATION, TIMING ALIGNMENT AND INFORMATION SHARING

1. Initial contacts

12. During initial communications with merging parties, an agency should consider asking the merging parties to indicate which other jurisdictions are reviewing or are expected to review the transaction. Agencies may request this information in the merger notification form or may ask the merging parties directly.

13. Initial contacts between agencies can be useful to determine the timing and status of the respective reviews and the impact of the merging parties' timing of notifications on the potential for cooperation. Agencies can use the information provided in initial contacts to assess whether, and to what extent, cooperation is likely to be useful in that particular case. Initial contacts may be used to discuss the potential scope and depth of cooperation appropriate to the particular case as well as the need for and frequency of additional contacts. Agencies may also seek to agree on a tentative timetable for regular communication, taking into account the nature and timing of the merger review.

14. Agencies seeking to cooperate should initiate contact with one another as early on as possible and even prior to the merger notification, where possible in light of applicable rules. Early contact may allow agencies to better align review timetables (to allow for more meaningful

discussion among agencies at key stages of their respective investigations). Early contact may also allow for investigative efficiencies which may result from early discussion and development of theories of harm as well as from coordinated approaches to the collection and discussion of evidence.

15. Agencies may find it useful to make initial contacts through the liaison officers listed in the ICN's Framework for Merger Review Cooperation.[12] Agencies may choose to designate a specific contact person at their agency with the responsibility for coordinating cooperation in individual cases.

2. Further communication among agencies

16. Particularly in the types of cases described in paragraph 7 above, it may be helpful for agencies to communicate at regular intervals throughout their respective procedures and, in particular, at key decision-making stages. Communication at key decision-making stages may help to avoid conflicting outcomes as regards the substantive assessment and remedies.

17. Key stages when communication may be beneficial may include: (i) before deciding whether or not to open an in-depth investigation[13]; (ii) when remedies are discussed with the merging parties; (iii) prior to prohibiting or challenging a merger; and (iv) before closing an investigation.

18. Discussions between agencies regularly include investigative staff. Where beneficial, consultation as to investigative approaches, investigative tools and assessments may take place between the agencies' economists or agency leadership.

Practical example 2:

Benefits of early identification of other reviewing agencies and early contacts

The Japan Fair Trade Commission's ("JFTC") cooperation with the US Department of Justice ("US DoJ") and the Fair Trade Commission of the Republic of Korea ("KFTC") in the ASML Holdings N.V./Cymer Inc. case:[14]

- *In this case, the JFTC obtained information that the transaction had been notified to the US DoJ, KFTC and other agencies by asking the party concerned which other jurisdictions were reviewing or were expected to review the transaction. This was done whilst the case was still in pre-notification before the JFTC. The JFTC contacted the US DoJ during the JFTC's pre-notification stage and the KFTC during the JFTC's primary review. This initial contact was made by using the contact list in the ICN's Framework for Merger Review Cooperation.*

- *The JFTC exchanged information with these and other agencies on time schedules and substantive issues, such as the scope of the relevant markets. The JFTC exchanged*

[12] Members of the ICN Framework for Merger Review Cooperation ("Framework") are provided with agency liaison officer contact details, which are updated periodically. The Framework therefore serves to facilitate cooperation. For more information about the Framework, see: http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf.

[13] In jurisdictions having voluntary merger notification regimes, communication may be beneficial before deciding whether or not to investigate a merger.

[14] Japan Fair Trade Commission press release: http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.html.

information with the agencies concerned at key stages of its investigation, such as when the parties proposed remedies or before the JFTC made the final decision.

- *This case demonstrates that early identification of other jurisdictions that are reviewing or are expected to review the same transaction and early contacts with those other agencies can facilitate successful cooperation at key stages of the investigation.*

3. Timing alignment

19. Merger reviews that are aligned at key decision-making stages may allow for more efficient investigations, more meaningful discussions between agencies and ultimately more consistent outcomes. In light of existing procedural differences in different jurisdictions, effective timing alignment does not necessarily mean that the timing of notifications has to be aligned, but rather that the timing is aligned to such an extent so as to allow for meaningful communication at key decision-making stages of the investigation.

20. Merging parties exercise some influence over the timing of investigations, in particular in the choice of (i) when to file required notifications, (ii) in some instances, when to respond to information requests, or (iii) whether to request or agree to investigation timeline extensions. Accordingly, merging parties can help facilitate the alignment of key decision-making stages through the timing of their notifications, through timing their response to information requests or by requesting or agreeing to timeline extensions. In seeking to facilitate timing alignment through the timing of their notifications, merging parties should also take into account the various stages of the respective reviewing agencies' processes. Meaningful cooperation can take place even if agencies are in different phases of their respective processes, including the pre-notification phase (where applicable).

21. Agencies and merging parties should communicate about their respective timetables and, particularly in the types of cases described in paragraph 7, consider aligning timing. Agencies and merging parties could jointly discuss practical steps to achieve timing alignment through the timing of notifications, possibilities of adjusting deadlines, or other means. The specificities of the particular merger may require flexibility in developing approaches regarding the alignment of timing that are suited to the particular transaction.

22. Agencies should keep each other updated on their respective timetables for review. Where this is considered beneficial, agencies may consider using timing flexibility within their respective procedures to achieve greater alignment of key decision-making stages. For example, where an agency has discretion to adjust its timeline for decision, it may wish to use this flexibility to seek to coordinate with the timing of other agencies.[15]

23. In order to facilitate timing alignment, both merging parties and agencies should retain flexibility with regard to the timing of merger notifications in different jurisdictions. Merging parties can

[15] See Recommended Practice X on Interagency Coordination (point C, comment 4) of the Recommended Practices for Merger Notification and Review Procedures ("*A competition agency should not delay its merger decision based on reviews pending in other jurisdictions, except where continued coordination is warranted to address common substantive or remedial issues*").

maintain flexibility by avoiding provisions in their transaction agreements that require the parties to make merger notifications in some or all relevant jurisdictions within a specified period of time. Agencies can promote flexibility by not imposing deadlines for notification.[16]

24. Cooperation is possible even if notifications in the various jurisdictions are not coordinated. However, if the timing of notifications in various jurisdictions is such that a final decision in one jurisdiction is reached before notification has taken place in another jurisdiction, the possibility for certain types of cooperation may be limited. In such cases, it may still be beneficial for agencies to discuss theories of harm, factual findings and remedies and their implementation.

Practical example 3:

Successful cooperation when agency investigations are in different phases of review

Cooperation between the European Commission ("Commission")[17] and the US Department of Justice ("US DoJ")[18] in the Cisco/Tandberg case:

- *In this case, notifications were not made simultaneously. Discussions on substantive aspects of the case between the two agencies took place during the Commission's phase-I investigation, at a time when the US DoJ had already begun an extensive investigation. Cooperation in this case allowed the two agencies to achieve a common understanding of the facts of the case and a similar orientation on substance. Importantly, it also allowed the agencies to engage in close cooperation on remedy proposals.*
- *Ultimately the Commission cleared the case by way of a phase I decision with commitments. The US DoJ concluded that the transaction was not likely to be anticompetitive taking account of the evolving nature of the videoconferencing market and the commitments that Cisco made to the Commission.*
- *The successful alignment of remedy discussions was reflected by the fact that press releases on the outcomes of the case were published by the two agencies on the same day.*

4. Information sharing

25. Information sharing between agencies (whether orally or in writing) should be done in a manner consistent with their confidentiality obligations. An agency's commitment to protect the confidentiality of information that it receives from another agency during cooperation is a critical factor in the ability and willingness to share information.

26. In most jurisdictions, the consent of the merging party or third party who provided confidential information is needed to enable an agency to share that information with another agency. That

[16] See Recommended Practice III on the Timing of Notification (point B, comment 1) of the Recommended Practices for Merger Notification and Review Procedures (*"…Jurisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction should not impose a deadline upon the parties to file notification within a specified period of time after reaching an agreement…Elimination of filing deadlines will also facilitate the coordination of multi-jurisdictional filings and reviews"*).

[17] M.5669 – Cisco/Tandberg, European Commission Decision of 29 March 2010 (conditional clearance decision in phase I). Press release: http://europa.eu/rapid/press-release_IP-10-377_en.htm.

[18] US Department of Justice press release: http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

consent may be granted through a waiver[19]. For example, waivers may be needed to share certain evidence collected during the respective investigations.

27. Cooperation may be effective even without the use of waivers as useful communication between agencies can occur in the absence of waivers. While it may vary depending on the agency's applicable rules and confidentiality protections, types of information that can be discussed without waivers may include: (i) publicly available information regarding the industry/sector, the merging parties or third parties; (ii) non-confidential aspects of prior relevant investigations or decisions[20]; (iii) information regarding an agency's process (such as timing); and (iv) agency views on issues such as market definition, theory of harm and competitive effects.

28. Agencies should consider whether to request a waiver/s in a particular investigation. Waivers may enable more extensive cooperation as they allow for more informed, detailed discussions in relation to substantive assessment and possible remedies. Waivers are particularly useful for cooperation in the types of cases described in paragraph 7 above. In such cases, the provision of waivers is helpful early on in the review process. In some cases, waivers may allow for cooperation to commence while the case is still in the pre-notification phase in a jurisdiction. Waivers can also significantly facilitate close cooperation on remedy design and implementation and may therefore help to avoid inconsistent outcomes.

29. The decision as to whether to grant a waiver is at the sole discretion of the merging party or third party that provided the confidential information. Refusal to grant a waiver does not, in any way, prejudice the investigation and, as explained in paragraph 27, agencies can cooperate effectively even without the use of waivers. Transparency about applicable rules and practices on the handling of confidential information including any requirements to exchange information, any restrictions on the use of information that is shared, and the safeguards in place to maintain appropriate confidentiality protections promotes greater understanding about the process of sharing information for both agencies and parties and may serve to encourage parties to grant waivers.[21] Also, agencies can facilitate the granting of waivers by explaining why they may be beneficial and through the development and use of model waivers, such as the ICN Model Confidentiality Waiver.

30. Waivers may be drafted in such a way so as to address legitimate concerns regarding the exchange of information. For example, the merging party or third party granting the waiver could indicate in the waiver that whilst the relevant confidential information may be shared with the agency mentioned in the waiver, that information should not be shared with other third parties

[19] More information on waivers, as well as the ICN MWG Model Confidentiality Waiver, may be found at: http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf.

[20] In some cases it may be beneficial for agencies to discuss relevant past decisions involving the same sector as a transaction which is currently under review by an agency even if that transaction is not under review or expected to be reviewed by the agency with the relevant past experience.

[21] See in particular, Recommended Practice VI on the Conduct of Merger Investigations (point F, comment 3) of the Recommended Practices for Merger Notification and Review Procedures (*"Competition agencies should also establish and maintain policies pertaining to the handling of privileged materials and information in connection with exchanges of such materials and information with other competition agencies, including any exchange pursuant to a voluntary waiver. Competition agencies should promote transparency with respect to their policies and practices relating to legal privileges and related confidentiality doctrines"*).

or disclosed to the public. Similarly, a waiver may be tailored to address the concern that a document covered by privilege in one jurisdiction may not be privileged in another.

Practical example 4:

Successful cooperation without the use of waivers

Cooperation in the Nestle/Pfizer Nutrition case:

1. Cooperation between the Australian Competition and Consumer Commission ("ACCC")[22] and the Competition Commission of Pakistan ("CCP")

- *Cooperation commenced between the ACCC and CCP whilst the two agencies where in different phases of their respective review of Nestle's proposed acquisition of Pfizer Nutrition: the ACCC was in its preliminary investigation stage while the CCP was already reviewing the transaction in phase II.*
- *In the absence of waivers, discussions between the ACCC and CCP were limited to non-confidential information. Cooperation was beneficial in assisting each agency's understanding of complex markets affected by the transaction, views on the theories of competitive harm, market definition issues and the potential competitive effects of the transaction.*
- *While the market structure and positions of the merging parties in Australia and Pakistan varied considerably, the ACCC and CCP were able to discuss the product market dimension and importance of brand loyalty in each respective region and general findings on the theories of harm being investigated and analytical approaches.*
- *The experience indicated that cooperation, even in the absence of waivers, can be beneficial where one agency is at a more advanced stage of reviewing a transaction and can provide general assistance to an agency that has recently commenced investigation of the transaction. Sharing non-confidential information on key high-level findings can aid the efficiency of an agency's investigation and prompt consideration of alternative analytical approaches.*

2. Cooperation between Chile's National Economic Prosecutor ("FNE") and the Former Mexican Federal Competition Commission[23] ("CFC")

- *Cooperation between these two agencies was focused on substantive assessment and started on an informal basis, without waivers. This dialogue involved exchanges of views on market definition. This contributed to a more consistent definition of the market, a better understating of the case and more informed decision-making.*

[22] Australian Competition and Consumer Commission press release: https://www.accc.gov.au/media-release/accc-to-not-oppose-acquisition-by-nestl%C3%A9-of-pfizer-nutrition.

[23] The former Mexican Federal Competition Commission also cooperated with the competition authority in Colombia.

- *At a later stage, both FNE and CFC requested and obtained waivers from the merging parties. These waivers enabled a more detailed discussion, particularly on factors taken into consideration for market definition as well as on the economic analysis and assessment of the anti-competitive effects of the merger.*

V. SUBSTANCE AND REMEDIES

1. Substance

31. Each agency's need to cooperate on substantive issues will depend on the nature of the issues being examined. Even if the geographic scope of the markets under review is different, discussion among the agencies of the substantive assessment may be helpful as similar issues may arise in the different jurisdictions.

32. A comparative discussion of agencies' investigative approaches as well as comparative discussions of the assessment of evidence can inform agencies' investigations and ultimately help to avoid conflicting outcomes. If timing is not aligned, the agency whose review process is at an earlier stage could be informed from the more advanced review conducted by another agency. Relevant past investigations and cases may also be discussed.

33. Agencies may seek to discuss investigative planning, evidence gathering methodology, and the manner through which particular substantive aspects and the theory of harm will be investigated. Agencies may choose, for example, to discuss particular questions or share drafts of questions which they plan to ask market participants. Agencies may encourage the merging parties to coordinate their substantive submissions in order to facilitate effective cooperation, avoid duplicative work and ensure that agencies are similarly informed.

34. Agencies may consider using coordinated or joint investigative tools, such as coordinated or joint requests for information or interviews and joint conference calls or meetings with parties. Agencies may also coordinate and share their analytical methods or economic models. The ability of agencies to use joint investigative tools may, in particular, depend on the nature of the issues being examined in each jurisdiction and the extent of alignment of the timing of the investigations. It may also depend on whether waivers have been granted.

35. Discussions on substantive issues arising from the merger being investigated can potentially include: market definition, market dynamics, theories of competitive harm, economic theories and empirical evidence needed to test those theories, the potential competitive effects and efficiencies of the merger as well as potential remedies.

36. To the extent permitted by confidentiality rules, agencies should seek to discuss their analyses of evidence and assessments of competitive effects, including their economic analyses. Agencies may also exchange evidence such as key party documents or testimony statements in appropriate cases, to the extent allowed by confidentiality rules and waivers.

Practical example 5:

Inter-agency joint investigations can avoid unnecessary duplication of work for parties

The Canadian Competition Bureau's ("CCB")[24] cooperation with the US Department of Justice ("US DoJ")[25] and the European Commission ("Commission")[26] in the United Technologies Corporation/Goodrich Corporation case:

- *The CCB cooperated closely with both the US DoJ and the Commission throughout all phases of their review. Staff of the three agencies discussed on many occasions their views on the theories of competitive harm, market definition issues and the potential competitive effects of the transaction on various product markets and shared documents relevant to their analysis of the competitive impact of the transaction. As the agencies determined that the relevant aviation product markets were mostly global in scope, their cooperative efforts intensified with the progress of their respective reviews.*

- *The three agencies jointly conducted a large number of interviews with market participants, which was of significant benefit to the CCB. As most of the volume of the assets and business activity involved in this transaction were outside of Canada, those joint market calls enabled the CCB to reach out to a number of third parties located outside of Canada. Without collaboration on this case, it might have proved challenging for the CCB to adequately engage with a number of those market participants once they had devoted time and resources with other competition agencies on the same matter.*

- *The CCB engaged with the US DOJ and the Commission in discussions related to remedies, including identifying assets to be divested.*

- *The three agencies announced their decisions on the same day.*

2. Remedies

37. Cooperation in remedy design increases the likelihood of non-conflicting remedies being accepted by agencies and minimises the risks of subsequent difficulties in implementation. For example, in remedies involving divestitures, cooperation increases the likelihood of consistency in the scope of the business to be divested and of interim relationships between the merging parties and the prospective purchaser(s). Similarly, cooperation on remedy implementation may lead to the appointment of common trustees/monitors and may increase the likelihood of agreeing on the same purchaser where remedies submitted to agencies provide for the divestiture of the same business.

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24 Canadian Competition Bureau press release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html.

25 US Department of Justice press release: http://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its.

26 M.6410 – UTC/Goodrich, Commission Decision of 26 July 2012 (conditional clearance decision in phase II). Press release: http://europa.eu/rapid/press-release_IP-12-858_en.htm.

38. The extent of cooperation on remedies will depend on the nature of the competitive concerns and remedies under consideration in each jurisdiction. Since a transaction may have different competitive effects in the various jurisdictions in which it is reviewed, remedies offered by the merging parties might not be identical in each jurisdiction.

39. Even in cases in which the product or geographic markets or competitive effects of the merger are not identical, remedies accepted by one jurisdiction may still have an impact on another jurisdiction. Agencies should therefore, to the extent possible, and consistent with their enforcement responsibilities, consider the impact that their remedies may have on the investigation or remedies elsewhere and strive to ensure that remedies do not impose conflicting or inconsistent obligations on the merging parties.[27]

40. The remedy process is more effective and efficient when the merging parties have facilitated cooperation throughout the investigation, for example, by helping to align timing of the substantive reviews, providing consistent information, providing waivers and coordinating remedy proposals, where appropriate. Where the overall timing of the respective agencies' investigations or other circumstances (such absence of waivers) does not allow for meaningful cooperation between agencies on the substantive assessment of the merger, it may not be possible for agencies to achieve non-conflicting or consistent outcomes in terms of remedy design and implementation.

41. Agencies should, to the extent possible, keep each other informed of remedies that they are considering and of related discussions with parties. Agencies should be prepared to discuss with the merging parties and other agencies the cross-border implications of the remedies under consideration.

42. Coordination by the merging parties of both the timing and the substance of remedy proposals (to the extent that the remedies address the same anti-competitive concerns) and purchaser proposals (for divestiture remedies) to the respective agencies: (i) promotes a common understanding by agencies of the proposed remedies; (ii) may increase the likelihood of effective cooperation and consistency regarding remedy design and implementation; (iii) may allow for joint market testing of proposed remedies; and (iv) may help to avoid unnecessary delays. In such cases it may be helpful for merging parties to keep agencies informed of remedy discussions in other jurisdictions.

43. Sharing of draft remedy proposals/settlement papers between agencies to the extent covered by waivers and allowed under applicable rules may also promote a common understanding of the proposed remedies and increase the likelihood of effective cooperation.

2.1 Remedy design

44. When considering remedies, it may be helpful if agencies communicate on:

[27] See Recommended Practice X, point E of the Recommended Practices for Merger Notification and Review Procedures (*"Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavour to avoid inconsistency with remedies in other reviewing jurisdictions"*).

(i) the anticipated type of remedies (such as a divestiture);

(ii) the potential scope of remedies (such as the divestment of a standalone business as well as the scope and duration of any transitional arrangements between the merged entity and the divestment business);

(iii) other anticipated issues related to the design of remedies, such as viability of the business proposed for divestiture and/or implementation risks (such as risks relating to the identification of a suitable purchaser) and the manner in which such risks may be addressed;

(iv) anticipated processes for implementation of the remedies (such as interim obligations for the preservation of the divestment business, the need for monitors/trustees and criteria for purchasers to be considered suitable); and

(v) key timelines for implementation (such as the timeline for merging parties to propose a purchaser for the divestment business and to effect the divestiture).

45. To the extent consistent with applicable legal frameworks and agency enforcement obligations, cooperation could in some cases enable an agency to gain sufficient comfort to clear a merger subject to the parties complying with a remedy accepted by another agency. This may occur for example in circumstances where the impact of the transaction in different jurisdictions is similar and concerns are addressed globally by the remedy accepted by a particular agency.

Practical example 6:

Cooperation in the negotiation of remedies leading to efficient and effective outcomes for the agencies and the merging parties

Cooperation between the Canadian Competition Bureau ("CCB")[28] and the US Federal Trade Commission ("US FTC")[29] in the Nufarm Limited/A.H. Marks Holding Limited case:

- *Collaboration between the US FTC and CCB throughout the review was extensive. Among other things, the agencies negotiated remedies with the merging parties, and jointly contacted potential purchasers of divested assets.*
- *The CCB and the US FTC worked together to design remedies that would resolve competition concerns in Canada and in the United States. Both agencies were involved in the negotiation process that led to the formalization of the US FTC's consent decree. A unified approach to the negotiation of remedies was efficient and effective for the agencies and the merging parties.*

[28] Canadian Competition Bureau press release: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03264.html. The CCB also cooperated with competition authorities in Australia and the United Kingdom.

[29] US Federal Trade Commission press release: https://www.ftc.gov/enforcement/cases-proceedings/081-0130/nufarm-limited-matter. The FTC staff also cooperated with competition authorities in Australia and the United Kingdom.

2.2 Remedy implementation

46. Once remedies are accepted, agencies should also seek to cooperate in the remedies implementation phase, as appropriate. At this stage, agencies should seek to: (i) keep each other informed of the remedy implementation process and issues which may impact the other jurisdiction/s; and (ii) avoid conflicting outcomes in the implementation of the remedies, for example in terms of the identity of the purchaser of a global divestiture.

47. In particular, discussions may relate to proposals made by the merging parties to implement the remedies, especially those relating to the identity of monitors/trustees, hold separate managers and potential purchasers of the same divestment business. Depending on the circumstances of the case, an identical purchaser may be desirable or even necessary to remedy concerns in different jurisdictions. It is therefore beneficial for agencies to cooperate in their approval of the purchaser in such situations. Agencies may also find it beneficial to discuss whether a common trustee or monitor is appropriate or whether coordination between different trustees and monitors is needed.

Practical example 7:

Beneficial cooperation in the implementation of remedies which addressed different competition concerns in different national markets

Cooperation between the German Bundeskartellamt ("Bundeskartellamt") and the Austrian Bundeswettbewerbsbehörde in the Springer/Funke (TV programme magazines) case:

- *Even though national markets were concerned and the case raised different substantive issues in the two neighbouring countries, a close cooperation between the competition agencies was essential.*

- *The timing and sequence of the two clearance decisions with commitments and the steps in the implementation of the remedies were critical. The Bundeskartellamt could only clear the merger subject to the proposed remedies, if their implementation was sufficiently likely. Due to the complex structure of the transaction in this case, the merging parties were only in a position to avoid serious risks for the implementation of the remedies if they were able to obtain clearance in Austria ahead of the clearance decision in Germany. The competition authorities coordinated on issues of timing to ensure a successful completion of the transaction.*