



International
Competition
Network

Practical Aspects of International Cooperation in Merger Cases:

Investigations

ICN MWG Teleseminar, November 14, 2013

Agenda

- Dr Stanley Wong, Stanley Wong Global (moderator)
- Chris Whitcombe, Sophie Perrussel (UK Office of Fair Trading)
- Katherine Celeste (US DOJ)
- Joseph Krauss, Hogan Lovells US
- Lindiwe Khumalo, Competition Commission of South Africa
- Paulo Silveira, Brazilian Administrative Council for Economic Defence (CADE)
- José Alexandre Buiaiz Neto, Pinheiro Neto Advogados
- Jean-Yves Art, Microsoft
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Cross-agency information sharing: Ecolab/Permian Mud case study



**Chris Whitcombe and
Sophie Perrussel (OFT)**

ICN MWG Teleseminar on International
Cooperation in merger control
Investigations and information sharing
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What makes this a good candidate for cooperating?

- **Global supply chains**
- **Strong concerns raised by third parties**
- **Early contact and parties granted waiver fairly early**
- **Review**
 - OFT phase 1 merger investigation
 - DOJ in depth review
- **Clear purpose**
 - Reach consistent and robust decisions through greater understanding of the cross-cutting issues



- **Start of cooperation is not dependent on waivers**
- **Information shared:**
 - Non-confidential:
 - Theories of harm
 - Third party questions
 - Progress and timing of investigation
 - More confidential:
 - Parties' internal documents
 - Working papers
 - Remedies in US



- **Benefits:**

- Different disclosure requirements and resourcing
 - US had access to many more documents
- Confirmed part of the deal would be remedied
- Sharing timings means not wrong footed
- Sounding board
- Ensure consistency
 - This doesn't mean coming to the same decision





- **Limitations:**
 - Cannot rely on unseen evidence
 - Waiver did not cover third party responses (only anonymised discussions)
 - Important to still come to own independent view
 - Even where markets are global, merger looked at to some extent through a national lens

ICN – Merger Working Group Teleseminar on Investigations

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Information in Foreign Jurisdiction and Its Use By Requesting Agency

Restrictions on Disclosures

- Private parties have relied upon protections against disclosures of confidential information to give them comfort that highly sensitive business secrets will not be disclosed.
- Principal protections:
 - Confidentiality protections
 - Statutory restrictions
- It is important that parties see authorities abide by these restrictions in order to encourage future cooperation
 - Actual practice instills confidence

Information that Generally Can Be Shared By Foreign Jurisdiction Without Violating these Restrictions

- Information that can be shared varies by jurisdiction
 - different rules and practices
- Generally the following can be shared without waivers:
 - Publicly available information
 - Notification of the opening of an investigation
 - Process to be followed, including any applicable deadlines
 - Applicable legal standards and relevant legal and economic analysis
 - Agency generated information – analytical thinking, without disclosing confidential non-public information
 - Possible Effective remedies

Information that Can Not Be Shared By Foreign Jurisdiction Without the Parties' Consents

- Actual merger filing itself – filing form and attachments, as well as any voluntary submissions made by the merging parties
 - Example of key documents submitted in the US – Item 4c and 4d documents
- Responses to 2nd Requests, subpoenas, civil investigative demands, or other compulsory process
 - Will include ordinary course business documents that reveal important facts regarding competitive dynamics in industry
- Testimony given – sworn depositions or statements provided by merging party executives and third-party witnesses
- Economic analysis prepared by the merging parties
- Identities of third-party complainants/witnesses and the substance of the information submitted by those third-parties

General Recognition of Benefits from Sharing Information to Competition Authorities

- Sharing of information allows investigating agencies to identify issues of common interest, improve their analyses, and allow for more effective remedies
- Echoed in DOJ/FTC FAQs issued with Model Waiver, 9/25/13 and ICN Report on Waivers of Confidentiality in Merger Investigations:
 - “From the agencies’ perspective, sharing information can increase the quantity and quality of the information on which to base their decisions, leading to more informed decisions and effective coordination between the agencies, promoting convergence, minimizing the risk of conflicting outcomes, and expediting merger review.”

But there are also Potential Benefits for the Merging Parties

- Speedier review – identification of potential issues and relevant analysis
- Eliminate issues more quickly
- Facilitate a common analysis and can produce more consistent decisions
- Result in more consistent remedies
- Reduce costs for the merging parties

Waivers and Its Uses

Issues raised by Waivers Require Flexibility – Adapt to Specific Situations

- Waivers can be very effective tool, but they do raise potential issues that private parties will consider before granting such a waiver.
 - Local rules regarding confidentiality and the authorities history and effectiveness of treating information as confidential.
 - Concern that highly sensitive business information not fall into public domain or hands of competitors.
 - Issues of legal privilege – are the rules regarding privilege similar or will divergent treatment of privileged materials lead to claims of waiver of that privilege by other jurisdictions?
 - Scope of the investigation --
 - A particular merger might raise different issues, in different relevant markets, in different jurisdictions. Therefore, information presented to one authority might not be that useful to another authority that may be examining different markets.
 - The use of the information provided.
- Waivers may not be necessary in all cases



competition commission
south africa

CO-OPERATION ON MERGER INVESTIGATION

SHARING OF INFORMATION

COMPETITION COMMISSION SOUTH AFRICA

14/11/2013

Merger cooperation

- South Africa has engaged with:
 1. SADC region such as Namibia, Botswana and Swaziland mainly informally.
 2. Other agencies, e.g., EC, Brazil, ACCC – mainly used informal tools (no waivers).
- **Tools used:** formal and informal
- Waivers arranged by attorneys of the merging parties, e.g. we had a formal waiver with ACCC

Cases in which SA cooperated with other agencies 2009 -2013

CASE	AGENCY	TOOL	INFO SHARED
Nestlé and Pfizer	EC ACCC	Informal Formal (waiver)	Exchange of vies on review of transaction and possible remedies.
Metropolitan and Momentum	Swaziland, Namibia	Informal Informal - MOU	SA sharing the approach taken on transaction.
DCD Dorbyl and EBH	Namibia	Informal	SA sharing the approach taken and possible remedies.
Wal-Mart and Massmart	Brazil Namibia	Informal Informal - MOU	Public interest concern specifically given issues raised by union in SA.
Kansai and Freeworld	Namibia	Informal - MOU	Sharing the possible remedies .
Clover SA and Nestle Water Division of Nestle South Africa	Namibia	Informal - MOU	SA sharing the approach on transaction.

Why do we cooperate on the control of international mergers?

- To ascertain in which jurisdictions the transaction is notified or notifiable;
- To exchange views on the approach to investigations, theories of harm, evidence and possible remedies; and
- To enhance our understanding of the nature of markets also assist others on a common approach in defining markets.

Conclusion

- **Benefits:**

1. Agencies can adopt similar approaches to market definition or theories of harm – to the extent that the market dynamics are similar.
2. It shortens the learning curve; and
3. It assists in reducing the time taken to complete the review.

Analytical assistance: non-case related cooperation



Chris Whitcombe (OFT)

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- **Multi-lateral support**
 - ICN MWG teleseminars, meetings and work product
- **Informal support mechanisms**
 - Bilateral meetings/seminars
 - Supporting each other with requests for advice and training
 - Relationship building among case teams
- **Formal programmes of experienced agencies supporting new agencies**
 - Memorandums of understanding
 - Mentoring
 - Aid agency funded



- OFT workshops at the CCP on the role of economists and economic analysis in merger control
- Idea raised between OFT and CCP at ICN's annual conference in Brazil
- Funding and support provided by the UK's Department for International Development IFUSE programme
- ICN MWG hypothetical case and economic guidance used



- **Support based on a new agency's priorities in merger analysis**



- **Scope to cover a wide range of analytical issues in mergers**



- **Time to build in-depth capability into specific areas of analysis**



- **Provides development opportunities for staff at established authorities**



- **Matching agencies together – knowing who to partner with and making that initial contact**



- **Financial costs**



- **Case team availability given case work**



- **Other priorities of both established and new agencies**



- **Promoting cooperation throughout agencies from management to case handlers**
- **Putting systems in place to support cooperation**
 - Among agencies: conferences and long-term partnerships between merger groups
 - Within agencies: international teams and mergers international liaison officers
- **MWG work product and support reduces workload for case teams**
- **Working with aid agencies and NGAs to increase funding and support**





International Mergers: Brazilian experience in the use of waivers

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Introduction

- Recent experience
 - New competition law
 - Pre-merger control
- Challenge and opportunity
 - International cooperation
- Exchange of information
 - Non-confidential information
 - Confidential information

Waivers

- Benchmarking
 - Sister agencies
 - International organizations
- Adjustments
 - National provisions
 - Language barriers
- Brazilian model of waiver
 - Bilingual (Portuguese/English)
 - Advocacy for its use

When to use waivers

- Parallel merger review
 - Assessment of related jurisdictions
 - Active: notification form or media clipping
 - Passive: sister agency
- Contact before waivers
 - Discussion of previous cases (i.e. same companies or markets)
 - General discussion of market conditions
 - General discussion of methodology used to relevant market definition
- Contact after waivers
 - Competition concerns
 - Market findings
 - Information provided by companies

Recent experience

- Three ongoing cases
- Two concluded cases
 - Syniverse/Mach
 - Munksjö/Ahlstrom
- Importance of cooperation
 - Source of information (number of competitors and clients)
 - Assets in Europe
 - Design of remedies
- Waivers

Final remarks

- Waiver as powerful instrument
 - Exchange of information
 - Timing of investigations
 - Coordination of remedies
- Positive outcomes
 - Faster review
 - Consistency of findings/remedies
 - Trust building relationship
 - Agency/agency
 - Agency/companies

International cooperation as instrument of effective enforcement



Using waivers

José Alexandre Buaiz Neto
14 November 2013

Agenda

- New competition law in Brazil
- Perspectives
- Main concerns
- Potential issues

New competition Act – effective since May 2012

- Change in merger review process.
- Waiting periods and expeditious proceedings.
- Negotiation of remedies.
- Participation of third parties in the process.

Perspectives

- Useful in complex cases involving multiple jurisdictions.
- Difficulties on aligning expectations.
- Difficulties on aligning approach.
- Waivers may be an important tool to authorities and to companies to expedite analysis of transactions and negotiation of remedies.

Main Concerns

- Confidentiality.
- Potential delays or “excessive” analysis.
- Third party interventions.
- Alignment of arguments.

Potential Issues

- Open negotiation of terms – draft model is important, but some level of flexibility should be available.
- Waiver of confidentiality – need to align different approaches to confidentiality.
- Timing – need to align timing for review and negotiations.