

RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES

III. Timing of Notification

A. Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (April 2018)

Comment 1: Parties should be permitted to notify transactions without undue delay. This will allow parties to make filings at the time they deem most efficient and facilitate coordination of multijurisdictional filings.

Comment 2: Competition agencies should not be required to accept filings with respect to transactions that are merely speculative, and parties may therefore reasonably be required to provide evidence that they intend to proceed with the transaction as a precondition to filing a notification. The vast majority of jurisdictions allow formal notification before a definitive agreement is signed, which provides the parties with flexibility to account for business constraints raised by the transaction.

Jurisdictions should permit filing before the parties conclude a definitive agreement, on the basis of, e.g., a letter of intent, agreement in principle, certification of good faith intention to consummate the transaction, or public announcement of the intention to make a tender offer.

Comment 3: Where formal notification is not permitted until a definitive agreement is in place, the standards for determining when a “definitive agreement” has been reached should be clearly defined so that the parties can determine when their notification will be accepted for filing. These jurisdictions should give the parties the opportunity, prior to such formal notification, to present and discuss the proposed transaction in order to facilitate timely submission and review.

Comment 4: In determining when notification will be permitted, jurisdictions may consider whether requests for confidentiality during the review period will impede the competition agency’s ability to conduct an effective investigation (as, for example, by contacting third parties) or otherwise conflict with applicable public disclosure requirements in the jurisdiction concerned. Competition agencies may condition formal acceptance of a filing upon publication of the fact of such filing or otherwise complying with the jurisdiction's public disclosure requirements.

B. Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (April 2018)

Comment 1: Jurisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction (“suspensive jurisdictions”) should not impose a

deadline upon the parties to file notification within a specified time after reaching an agreement. Parties have the incentive to file promptly after reaching an agreement since they are prohibited from closing their transaction until it has been cleared.

Comment 2: Elimination of filing deadlines facilitates coordination of multijurisdictional reviews.

C. Jurisdictions that do not prohibit closing pending review by the competition agency should nevertheless allow parties a reasonable time in which to notify the transaction following a clearly defined triggering event.

WORKING GROUP COMMENTS
Original Comments (September 2002)
Amended (April 2018)

Comment 1: Certain jurisdictions require notification of transactions but do not prohibit the parties from closing pending competition agency review (“non-suspensive jurisdictions”). Such jurisdictions have a legitimate basis for requiring a filing within a time frame that will permit the competition agency to conduct a timely review. Where notification is required within a specified period following a triggering event, such period should accord the parties a period of time to prepare the necessary submissions that is reasonable in view of the information requirements to be satisfied.

Comment 2: The triggering event for purposes of calculating the filing deadline should be clearly defined to permit the parties to determine the timing of their notification obligation. The triggering event should also be defined to avoid requiring notification of transactions that are merely speculative. To that effect, some jurisdictions may also require an express certification by the notifying party or parties of a good faith intention to consummate the notified transaction.

D. Jurisdictions should provide for the possibility of pre-notification discussions with the parties.

WORKING GROUP COMMENTS
Amended (April 2018)

Comment 1: To facilitate clearance or resolution within a reasonable time frame, jurisdictions should consider offering merging parties the opportunity to have pre-notification discussions of whether their transaction will be subject to notification and on the scope of the information to be submitted. These discussions can also help the agency and the parties prepare for any required review. They should remain confidential, except if the parties and the agency otherwise agree.