

X. Interagency Enforcement Cooperation

A. Competition agencies should seek to cooperate in their review of mergers that may raise competitive issues of common concern or involve remedial coordination.

WORKING GROUP COMMENTS

Original Comments (April 2004)

Amended (April 2018)

Comment 1: Interagency cooperation occurs in a number of contexts. This Recommended Practice concerns cooperation between competition agencies in the assessment of mergers under parallel review (“enforcement cooperation”). Enforcement cooperation is beneficial in the review of transactions that raise similar competition issues or remedial concerns, in particular but not exclusively in cases that raise competition concerns in cross-border or global markets. Enforcement cooperation may also be beneficial in transactions that raise different competition concerns in different jurisdictions but where remedies in one jurisdiction may impact another jurisdiction.

Comment 2: The goals of enforcement cooperation include: (1) fostering efficient merger review by reducing unnecessary duplication of work, delays, and burden for merging parties and agencies; (2) promoting effective merger enforcement, in particular by reducing gaps in information available to agencies and thereby leading to more informed agency decision making and enhanced analytical robustness; and (3) consistent, or at least non-conflicting, outcomes in the cooperating jurisdictions.

Comment 3: Convergence toward recognized best practices in merger review can help to facilitate effective enforcement cooperation, for example, through more consistent timetables and procedural rules, as well as a common understanding of the substantive assessment.

Comment 4: Enforcement cooperation is voluntary; competition agencies that are requested to cooperate in merger reviews are generally encouraged, but are not obligated, to do so. Enforcement cooperation does not limit an agency’s ability to make enforcement decisions independently, nor imply that the agency should consider competitive effects that may occur outside its jurisdiction. A competition agency should not delay its merger decision based on reviews pending in other jurisdictions unless appropriate in light of common substantive or remedial issues that require continued enforcement cooperation.

Comment 5: Enforcement cooperation increases familiarity among agency staff and understanding of one another’s merger review processes, which in turn may help foster trust and facilitate future cooperation, and greater procedural and analytical convergence.

B. Enforcement cooperation should be conducted in accordance with applicable laws and other legal instruments and doctrines.

WORKING GROUP COMMENTS

Original Comments (April 2004)

Amended (April 2018)

Comment 1: Enforcement cooperation should be conducted in accordance with applicable national laws, including rules regarding the treatment of confidential information and privileged communications, and applicable cooperation treaties and agreements.

Comment 2: Enforcement cooperation may take place pursuant to formal cooperation treaties or agreements, or informal memoranda of understanding or protocols, such as the ICN’s Framework for Merger Review Cooperation (2012) and the OECD’s Council Recommendation concerning

International Co-operation on Competition Investigations and Proceedings (2014).¹ Cooperation can also take place in the absence of a formal agreement or other written arrangement.

Comment 3: When two or more competition agencies engage in enforcement cooperation in merger reviews on a recurring basis, it may be useful for them to develop formal agreements, memoranda of understanding, or other protocols to facilitate such cooperation.

C. Enforcement cooperation should be tailored to the particular transaction under review and the needs of the competition agencies conducting the merger investigations.

WORKING GROUP COMMENTS
Original Comments (April 2004)
Amended (April 2018)

Comment 1: The scope and depth of enforcement cooperation will depend on the facts and issues raised in the transaction under review. Accordingly, enforcement cooperation should be sufficiently flexible to accommodate differences in agencies' investigations. Similarly, the degree and type of enforcement cooperation in a particular transaction may differ among cooperating agencies.

Comment 2: When a competition agency becomes aware that a merger review is likely to benefit from enforcement cooperation, that agency should contact other relevant competition agencies as soon as practicable. Agencies should consider the expected nature and scope of engagement as early as practicable during their reviews.

Comment 3: Depending on the complexity of the merger review, the applicable legal frameworks, and the potential for competitive or remedial issues of common concern, agency cooperation typically involves identifying case team liaisons; identifying and, if necessary, coordinating the timing of reviews; and engaging on analyses. Enforcement cooperation may also include coordinating information requests; conducting joint interviews of merging parties and third parties; coordinating site visits; and cooperating in remedy design and implementation.

Comment 4: When agencies decide to coordinate closely during the review of a case, it is helpful for them to communicate at regular intervals throughout their respective processes and, in particular, at key decision-making stages. This includes agencies communicating the outcome of their investigation to other cooperating agencies who may have already completed their review or who may still be investigating.

Comment 5: Cooperation involves the exchange of investigative information, usually, though not exclusively, through oral communications. It may occur based only on sharing publicly available information, as well as "agency non-public information," *i.e.* information that the agencies are not statutorily prohibited from disclosing, but normally treat as non-public, such as analyses of relevant market definition, or the timing of the investigation, and theories of harm. In closely coordinated reviews, cooperation typically involves voluntary waivers of confidentiality by the merging parties, which allows the agencies to exchange the parties' business confidential information. In some cases, agencies may also seek waivers from third parties to allow for a more fulsome discussion.

Comment 6: Enforcement cooperation typically involves discussions between investigative staff. Where beneficial, consultation as to investigative approaches and assessments may take place among senior officials or agency heads.

¹ The ICN and other organizations also have guidance for practical cooperation, such as the ICN's Practical Guide to International Enforcement Cooperation in Mergers (2015).

D. Competition agencies should encourage and facilitate the merging parties' support in the merger enforcement cooperation process.

WORKING GROUP COMMENTS
Original Comments (April 2004)
Amended (April 2018)

Comment 1: Merging parties' support is important for facilitating effective enforcement cooperation. Examples of such support include identifying where and when the transaction will be filed (mandatory and voluntary filings) and, as appropriate, granting voluntary confidentiality waivers. To facilitate timing alignment of merger notifications across jurisdictions, agencies should promote flexibility by eliminating filing deadlines in suspensive jurisdictions, as discussed in the Recommended Practice on Timing. To encourage the merging parties' support, competition agencies should strive to further the transparency of the enforcement cooperation process, *e.g.*, by informing parties of the benefits of enforcement cooperation and addressing concerns raised by the exchange of information pursuant to voluntary confidentiality waivers. A competition agency may wish to consider publishing a brief description of its enforcement cooperation policies and practices, including the categories of information that would likely be exchanged pursuant to a voluntary confidentiality waiver, or consider informing merging parties of the basic form of cooperation that may take place in the review of their transaction.

Comment 2: Competition agencies should seek to develop a model waiver form; the model can provide that it may be modified to suit specific circumstances. The waiver should provide the terms on which the merging party agrees to waive statutory confidentiality protections *vis-à-vis* the agency that originally received the merging party's confidential information, as well as to describe the agency's policy regarding how it will treat the information it receives from another agency pursuant to a waiver. The ICN Model Waiver Form can serve as a useful starting point.

Comment 3: Where enforcement cooperation would be facilitated by the discussion of confidential information, the competition agency should request the parties provide confidentiality waivers on a voluntary basis. The cooperating agencies should make clear that a decision not to provide a waiver will not prejudice the outcome of the investigation.

E. Reviewing agencies should seek remedies tailored to address domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.

WORKING GROUP COMMENTS
Original Comments (April 2004)
Amended (April 2018)

Comment 1: To the extent consistent with their respective law enforcement responsibilities, cooperating agencies should strive to ensure that the remedies they accept to address domestic competitive concerns do not impose inconsistent obligations on the merging parties. Remedies offered by the merging parties may not be identical in each jurisdiction, *e.g.*, because a transaction may have different competitive effects in the various jurisdictions in which it is reviewed. However, because a remedy accepted in one jurisdiction may have an impact in another jurisdiction, the competition agencies should invite the merging parties to consider coordinating the timing and substance of their remedy proposals. Where possible and appropriate, cooperating agencies should discuss remedy choice and design, such as the structure and content of the remedy, specific purchaser criteria, whether a single purchaser should be required, the viability of the assets, the duration of divestiture periods and transitional services, the use of monitors or trustees, and potential remedy implementation risks. Competition agencies should also be prepared to discuss with the merging parties any cross-border implications of remedies under consideration.

Comment 2: Enforcement cooperation on remedies may avoid unnecessary costs and burdens resulting from duplicative remedies. Subject to relevant confidentiality and nondisclosure rules, cooperating agencies should keep one another informed as early as possible of remedies under consideration to the extent that they may affect the other competition agency's review or consideration of remedies.

Comment 3: To the extent consistent with applicable legal frameworks and agency enforcement obligations, in some circumstances cooperation may result, and in many cases has resulted, in one authority closing its investigation without remedies after taking another authority's remedies into account. The benefits of this approach include conserving the agency's resources, eliminating the risk of inconsistent implementation of the remedy, and avoiding the imposition of unnecessary costs or delays on the parties. The potential drawbacks include that the deferring agency may relinquish its ability to enforce the remedy directly and the possibility that the other jurisdiction could modify or terminate the remedy.

Comment 4: Where possible, cooperating agencies should seek to coordinate administrative aspects of proposed remedies of common interest to avoid unnecessarily duplicative requirements and unnecessary costs and burdens. Such aspects might include, for example, arranging common timetables for compliance with undertakings, appointing common trustees to effectuate required divestitures, and harmonizing reporting requirements.

Comment 5: Where possible and appropriate, enforcement cooperation should also extend to substantive aspects of remedy implementation, such as the purchaser approval process for divestiture remedies.