

Canada-U.S. Merger Working Group

BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS

The United States federal antitrust agencies (the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), jointly referred to as the “U.S. agencies”) and the Competition Bureau Canada (“CCB”) have successfully cooperated for many years on merger investigations that affect both the United States and Canada, pursuant to the longstanding bilateral agreement between the two countries.¹ This document seeks to:

- articulate the current day-to-day cooperation practices of the CCB and the U.S. agencies;
- promote cooperation and coordination between the U.S. agencies and the CCB and enhance the likelihood of consistent outcomes between the CCB and the U.S. agencies in the application of their competition laws;
- make transparent the practices that the U.S. agencies and the CCB seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they review the same merger;² and
- acknowledge the substantial contribution that merging parties can make in facilitating cooperation among reviewing agencies in the merger review process.

The CCB and the U.S. agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create or modify any enforceable rights. As the identification of best practices is an ongoing process, the U.S. agencies and the CCB will jointly continue to explore ways to further improve on these practices.

I. Objectives

1. Many mergers involving North American and/or international businesses are likely to be subject to review in both Canada and the U.S., as well as in other jurisdictions. When the U.S. agencies³ and the CCB are reviewing the same merger, both have an interest in reaching, insofar as possible, consistent analyses and outcomes.⁴

¹ Agreement between the Government of the United States and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Laws (Aug. 1995), available at: http://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/agree_canada.pdf; <http://www.justice.gov/atr/public/international/docs/0316.htm>; and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01592.html>.

² These Best Practices apply to mergers and other transactions that are subject to the Competition Act (R.S.C., 1985, c. C-34), and to Section 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 or to pre-merger notification under Part IX of the Competition Act.

³ Pursuant to Rule 803.20(b)(1) of the Code of Federal Regulations (16 C.F.R. § 803.20(b)(1)), only one U.S. agency – either the DOJ or the FTC – reviews each pertinent transaction.

⁴ A consistent outcome is not necessarily the same as an identical outcome. Different market conditions in two countries can, and frequently do, lead to different outcomes even though they are analyzed consistently

2. Cooperation between the CCB and the U.S. agencies is beneficial not only for the agencies, but also for merging parties and third parties, as it increases the efficiency of the merger review process and reduces the burden on merging parties and third parties.

3. Effective coordination between the U.S. agencies and the CCB depends to a considerable extent on the cooperation and goodwill of the merging parties and of third parties. Agency cooperation is more 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 parties take full advantage of the similar investigation timetables of the CCB and the U.S. agencies, allowing the staff 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.⁵ At the same time, the U.S. agencies and the CCB 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 in itself prejudice the conduct or outcome of the agencies' investigations.

4. Many mergers reviewed by the CCB and the U.S. agencies also are subject to review by other competition authorities around the world. The merging parties are encouraged to inform the U.S. agencies and the CCB of the competition authorities in other jurisdictions that are reviewing or are expected to review the same merger. The CCB and the U.S. agencies seek to cooperate with those other authorities pursuant to the relevant OECD Recommendation,⁶ bilateral cooperation instrument,⁷ and/or the principles and cooperation framework developed by the International Competition Network for interagency cooperation.⁸

in both countries. For example, a merger of two firms may have different outcomes when it involves two of the three firms in the involved industry in one country and two of the six in the other.

⁵ The Competition Act was amended in 2009 following recommendations from the Competition Policy Review Panel to adjust the Canadian merger review process into a two-stage regime that would more closely align procedures with those in the U.S. See, Competition Policy Review Panel, "Compete to Win - Final Report" (June 2008), available at:

http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

⁶ See <http://www.oecd.org/competition>.

⁷ Bilateral instruments to which the U.S. or the U.S. agencies is a party are collected at:

<http://www.ftc.gov/policy/international/international-cooperation-agreements> and

<http://www.justice.gov/atr/public/international/int-arrangements.html>;

bilateral instruments to which Canada, the Commissioner of Competition, or the CCB is a party are collected at:

http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00128.html.

⁸ 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> and the International Competition Network's Framework for Merger Review Cooperation, available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.

II. Communication between Reviewing Agencies

5. The reviewing U.S. agency (FTC or DOJ) and CCB ordinarily will contact one another promptly upon learning of a merger that appears to be subject to review in both the U.S. and Canada and where cooperation between the U.S. agencies and the CCB may be beneficial. The nature and frequency of communication between the CCB and the U.S. agencies may differ depending on the characteristics of the particular merger under review.

6. For example, at the start of any investigation in which it appears that substantial cooperation between the U.S. agencies and the CCB may be beneficial, the relevant staff typically seek to agree on a tentative timetable for regular inter-agency consultations, which takes into account the nature and timing of the merger. While normally it will be beneficial to keep each other continually informed 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, for example, before issuance of a second request or supplementary information request or at the commencement of remedies negotiations with the merging parties. Consultations between the senior leadership of the CCB and their counterparts in the U.S. agencies also may be appropriate at any time. Staff keep senior leadership of the reviewing agencies informed of key milestones throughout the investigation.

III. Coordination on Timing

7. Cooperation between the U.S. agencies and the CCB with respect to mergers subject to review in both jurisdictions is most effective when the reviewing agencies' respective investigation timetables allow for meaningful communication throughout the merger review processes. Recognizing the significant similarities between the U.S. and Canadian merger review investigation timetables, the merging parties can facilitate coordination by filing their pre-merger notifications concurrently in both jurisdictions. This enables the agencies to coordinate the early stages of their respective reviews. This may be particularly beneficial in mergers in which the merging parties anticipate that the agencies will likely issue a supplementary information requests and second request, as it may enable the agencies to coordinate those requests (see paragraph 10 below).

8. After the issuance of a second request in the U.S. and a supplementary information request in Canada, the parties can further facilitate coordination of the investigation timetables by using the timing flexibility provided by the respective procedures at this stage. For example, the parties can produce responses and certify compliance with the supplementary information request at the same time as they produce responses and certify compliance with the second request, and align any negotiated timing agreements. This may be particularly beneficial in mergers in which it is anticipated that remedies may be required.

IV. Collection and Evaluation of Evidence

9. In matters under review that raise issues of concern in both jurisdictions, the reviewing agencies seek to coordinate with one another throughout the course of their investigations and to keep one another informed of their progress. 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 analyses, and empirical evidence needed to test those theories. They also may discuss views on necessary remedial measures and relevant past investigations and cases. 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 jurisdiction's 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.

10. With respect to mergers involving a supplementary information request in Canada and a second request in the U.S., the agencies may, where possible, seek to coordinate those requests, whether before or after issuance, by aligning language, relevant search periods, custodians, data formats, and other aspects of the requests. The ability of the agencies to do this will depend on the nature of the issues being examined in each jurisdiction and the cooperation of the parties in aligning the timing of the agencies' investigations. In this context, however, neither agency will accept less information than it requires to conduct its review.

11. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence relevant to the investigation. While such waivers are not required by the CCB to share information with the U.S. agencies pursuant to Section 29 of the Competition Act and the CCB's confidentiality policy,⁹ the U.S. agencies must obtain waivers from the parties in order to share certain confidential information with the CCB.¹⁰ It has become routine practice for parties to grant the U.S. agencies voluntary waivers in cases involving cooperation with the CCB. This results in more informed decision-making and

⁹ See, "Information Bulletin on the Communication of Confidential Information Under the Competition Act" September 30, 2013, available at:

http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03597.html#s4_2_2.

¹⁰ In particular, the U.S. agencies are bound by the confidentiality restrictions of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(h), the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq., the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 4.9 et seq., the Antitrust Civil Process Act, and other applicable laws, regulations, and rules. Other information may be shared without a waiver pursuant to agency rules and procedures. The U.S. agencies have adopted a model waiver and frequently asked questions to facilitate waivers. See <http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust> and <http://www.justice.gov/atr/public/international/index.html>.

more effective coordination between the reviewing agencies, thereby helping to avoid inconsistent or conflicting analyses and outcomes as well as expediting the merger review process. Accordingly, after the parties inform the reviewing agencies of a merger that is subject to review by the CCB and the U.S. agencies, the staffs of the reviewing agencies will, in appropriate cases, enter into discussion with the merging parties with a view to the U.S. agency receiving confidentiality waivers from the merging parties.¹¹

12. Similarly, waivers of confidentiality executed by third parties are not required for the CCB to share third party information with the U.S. agencies. The U.S. agencies must obtain waivers from third parties before sharing certain confidential information with the CCB. Waivers from 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 to the U.S. agency.

V. Remedies/Settlements

13. 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 merger affects markets in both Canada and the U.S., the remedies offered to the reviewing agencies may be similar or identical. Even if the geographic or product markets or the 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.

14. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies strive to ensure that the remedies they accept do not impose inconsistent or conflicting obligations on the merging parties. It is in the interest of the merging parties to coordinate the timing and substance of remedy proposals being made to the U.S. agencies and the CCB, so as to minimize the risk of inconsistent or conflicting results or subsequent difficulties in implementation. This normally will also require coordination on the overall timing of the investigations so as to allow for meaningful cooperation between the reviewing agencies on the substantive assessment of the merger before the remedial stage.

15. Consistent with the reviewing agencies' confidentiality and/or non-disclosure obligations and their common objective of ensuring efficient outcomes, implementation, and monitoring of remedies, the reviewing agencies generally will, at minimum, seek to keep one another informed of remedy discussions with the parties and of other relevant developments with respect to remedies. Where appropriate and consistent with confidentiality and/or non-disclosure obligations, the reviewing agencies may share draft

¹¹ Consistent with the bilateral agreement between the U.S. and Canada, the U.S. agencies and the CCB seek to maintain the confidentiality of any information communicated to one another in confidence, and oppose, to the fullest extent possible consistent with their laws, any application by a third party for disclosure of such confidential information.

remedy proposals, and may participate in joint discussions with the merging parties, prospective buyers, and trustees.

16. Cooperation between the reviewing agencies 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. Cooperation also could lead to separate remedy proposals with similar or identical components, such as, for example, with respect 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 of assets to be divested in both jurisdictions. Depending on the circumstances of the case, an identical purchaser may be desirable or even necessary to remedy concerns in both jurisdictions, and the reviewing agencies will seek to cooperate in making their determination in such a situation. When consistent with its obligations to resolve competition issues in its own country, the reviewing agency may take into account the extent to which remedies obtained in the other fully address its concerns.

17. The merging parties serve an important facilitating role during the remedial process. By coordinating their remedial proposals with both reviewing agencies, and taking into account procedures and timing requirements in each jurisdiction, the merging parties facilitate meaningful cooperation between the reviewing agencies before either agency makes a decision, minimizing the risk of inconsistent implementation .

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