

FAQs on the US-EU Merger Working Group's Best Practices on Cooperation in Merger Investigations

Objectives

1. What is the reason for updating the US-EU Best Practices on Cooperation in Merger Investigations (hereinafter referred to as “Best Practices”)?

The agencies found that an update of the Best Practices was in order to better reflect current cooperation practices between the U.S. antitrust agencies (the Federal Trade Commission and the Department of Justice) and the European Commission's DG Competition. The revised Best Practices build on the experience gained in a significant number of cases in which the agencies cooperated pursuant to the 1991 US/EU Cooperation Agreement, since the initial set of Best Practices were issued in 2002.

2. What are the objectives of the revised Best Practices and do they differ from the goals set forth in the 2002 Best Practices?

Consistent with the 2002 Best Practices, the objectives of the revised Best Practices are to: promote fully-informed decision-making; minimize the risk of divergent outcomes; enhance the efficiency of investigations; reduce burdens on merging parties and third parties; and, increase the overall transparency of the merger review process.

In addition, the revised Best Practices emphasize the role that the parties can play to facilitate the cooperative process, in particular concerning the coordination of the timing of investigations, and acknowledge the increasing frequency of cooperation with other agencies internationally. They recognize that coordination is in the parties' interest in order to avoid inconsistent or conflicting outcomes and include an expanded section focusing on improving cooperation in the design and implementation of remedies.

Communication between Reviewing Agencies

3. How do the agencies initiate cooperation during their investigative process?

The Best Practices state that the agencies will contact one another promptly upon learning of a merger that appears to require review in both the U.S. and the EU.

4. Is there a timeframe for the initiation of cooperation and a schedule for the agencies' communication?

The revised Best Practices encourage prompt initial contact, but do not set a time frame for the initiation and initial steps of cooperation. The revised Best Practices recognize that the nature and frequency of the communications may differ depending on the characteristics of the particular case, and do not provide a schedule of communications

but recommend that the cooperating agencies seek to agree on a tentative timetable for regular inter-agency consultations at the start of any investigation requiring substantial cooperation.

5. At what point of the review are consultations between the agencies beneficial?

The Best Practices provide that communication between the cooperating agencies throughout the investigation is beneficial, and identify key stages of the investigation at which discussion between the reviewing agencies is likely to be particularly useful. These key stages include: (a) before the relevant U.S. agency either closes an investigation without taking action or issues a second request; (b) no later than three weeks following the initiation of a Phase I investigation in the EU; (c) before the European Commission opens a Phase II investigation or clears the merger without initiating a Phase II investigation; (d) before the European Commission closes a Phase II investigation without issuing a Statement of Objections or before the DG Competition anticipates issuing its Statement of Objections; (e) before the relevant DOJ section/FTC division makes its case recommendation to senior leadership; (f) at the commencement of remedies negotiations with the merging parties; and, (g) prior to a reviewing agency's final decision to seek to prohibit a merger.

6. Who participates in the consultations between the reviewing agencies?

Relevant case handlers, the DOJ Section Chief or FTC Assistant Director and the DG Competition Unit Head (or their designees), and/or senior agency leadership may participate in the consultations, as appropriate. The revised Best Practices also explicitly provide for consultation between the reviewing agencies' economic counterparts.

Coordination on Timing

7. How are review timetables coordinated by the agencies?

The revised Best Practices provide that cooperation is most effective when the reviewing agencies' respective investigation timetables allow for meaningful communication throughout the process. To facilitate coordination, the revised Best Practices call for the reviewing U.S. agency and DG Competition to keep one another informed of important developments related to timing throughout their respective investigations and to coordinate phases of their investigations, including through joint calls or meetings with merging parties to discuss timing. The Best Practices recognize that the success of the agencies' efforts depends on the active participation and cooperation of the merging parties.

8. Recognizing that the merging parties can play an important role in cooperation, what guidance do the Best Practices provide to merging parties to facilitate coordination on timing of the merger review?

The Best Practices identify several ways in which the merging parties can facilitate the cooperative process. First, they suggest that the parties inform the reviewing agencies of a merger requiring review in both jurisdictions as soon as feasible, by providing basic information on the merger. The revised Best Practices then encourage merging parties to time the filing of their notifications to allow the agencies to communicate and cooperate meaningfully at key decision-making stages of their respective investigations. They recognize that even if the parties have not made their filings in the U.S. and the EU in parallel, meaningful cooperation can still be achieved as long as the timing of the filings allows for cooperation of the agencies at key decision-making points of their investigations. The revised Best Practices also illustrate how the merging parties can facilitate inter-agency coordination throughout the process, from pre-notification consultations in the EU to the use of timing agreements in the U.S.

Collection and Evaluation of Evidence

9. What kind of information can the reviewing agencies share with one another?

The agencies will share information consistent with their confidentiality obligations. This includes publicly accessible information and as appropriate their respective analyses as to market definition, competitive effects, theories of harm, and necessary remedial measures.

10. What role do waivers of confidentiality play in the merger review process?

The Best Practices note that waivers of confidentiality enable more complete communication between the reviewing agencies and with the merging parties regarding relevant evidence, leading to a more informed decision-making process and more effective coordination among reviewing agencies. The Best Practices provide that waivers of confidentiality have become routine in practice, and encourage merging and third parties to grant waivers, to benefit from these advantages and to reduce investigative burdens.

11. Recognizing that legal professional privileges differ between the U.S. and the EU, how are in-house counsel communications protections maintained once waivers of confidentiality are granted?

The Best Practices note that the agencies will accept a stipulation in parties' waivers given to DG Competition that excludes from the scope of the waiver evidence that is properly identified by the parties as and qualifies for the in-house counsel privilege under U.S. law.

Remedies/Settlements

12. How do the Best Practices address cooperation on and coordination of possible remedies?

The revised Best Practices include an expanded section on remedies and settlements that details cooperation throughout the remedial process, emphasizing that early and frequent cooperation in this phase is particularly important to avoid inconsistent or conflicting remedies, especially when remedies may include an up-front buyer and/or Phase I remedy in the EU. The revised Best Practices also underscore the critical role that the parties play in ensuring effective cooperation in this phase, including timely coordination of their remedy proposals with the reviewing agencies to allow for meaningful cooperation before either agency makes a decision. In addition to avoiding the risk of inconsistent or conflicting remedies, such meaningful cooperation in the remedial phase can result in the acceptance of common remedy proposals or even the appointment of common trustees or monitors, all of which is in both the agencies' and the parties' interest.