

WSGR ALERT

NOVEMBER 2011

EUROPEAN UNION AND UNITED STATES ANTITRUST AUTHORITIES UPDATE *BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS*

The Competition Directorate-General of the European Commission (DG Competition) and the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the United States have jointly issued revised *Best Practices on Cooperation in Merger Investigations*. The revised *Best Practices* builds upon the experience gained by the agencies in merger investigations since the first *Best Practices* statement was issued in 2002—and responds to criticism from the business community, which was in need of clear recommendations on how to navigate the processes in these two very different regimes. In particular, the update expands the guidance to cover remedies and settlements. It also makes recommendations on how merging parties can assist the agencies in their review of a merger that has effects in the U.S. and the EU.

Framework for Interagency Cooperation

Communication and Coordination between the Reviewing Agencies

To be clear, not all transactions require coordination. The revised *Best Practices* deals with those transactions that raise competition issues in both jurisdictions. When a transaction raises such issues, the revised *Best Practices* encourages early and prompt communications between the EU and U.S. competition authorities. Interagency communication regarding the transaction is even encouraged during the EU pre-notification phase (i.e., when the deal has been initially communicated to DG Competition but before the Form CO has been accepted), thereby taking into account the

front-loaded nature of the EU's merger control system.

Where a transaction appears to present significant competition issues in both jurisdictions, the revised *Best Practices* recommends that the authorities establish a "tentative timetable" for interagency consultations, particularly at key stages of the investigation, namely:

- before the relevant U.S. agency either closes an investigation without taking action or issues a second request;
- no later than three weeks following the initiation of a Phase I investigation in the EU (i.e., upon receipt of the answers to the market test questionnaires when the European Commission starts forming its views on a concentration);
- before the European Commission opens a Phase II investigation or clears the merger without initiating a Phase II investigation;
- before the European Commission closes a Phase II investigation without issuing a Statement of Objections or before DG Competition anticipates issuing its Statement of Objections;
- before the relevant DOJ section/FTC division makes its case recommendation to senior leadership;
- at the commencement of remedies negotiations with the merging parties; and
- prior to a reviewing agency's final decision to seek to prohibit a merger.

The agencies' ability to coordinate their review of a merger is primarily dictated by the dates on which the merger notifications are filed, which is (in the EU, subject to receiving the European Commission's blessing upon closure of the pre-notification discussions) largely in the hands of the merging parties. The agencies want to avoid a situation where a jurisdiction has completed or almost completed their investigation before the other jurisdiction has received notification of the merger or acquisition. Therefore, the revised *Best Practices* has expanded the section on timing to include guidance for the merging parties to facilitate interagency coordination, as discussed below.

Collection and Evaluation of Evidence

The revised *Best Practices* encourages the agencies to share as much information as they can as early in the investigation as possible, subject to their local confidentiality rules. DG Competition and the reviewing U.S. antitrust agency may—to the extent permitted by their statutory non-disclosure obligations regarding the parties' confidential information and other applicable rules—share information or coordinate discovery requests that each may issue to the merging parties and third parties. The agencies also are encouraged to provide the parties with the opportunity to jointly present, or to have interviews with and to submit documents concurrently to both reviewing agencies.

Continued on page 2...

European Union and United States Antitrust Authorities Update Best Practices . . .

Continued from page 1...

Remedies and Settlements

Where the merging parties provide the agencies with sufficient time to coordinate, the revised *Best Practices* recommends that the reviewing agencies—when appropriate and consistent with confidentiality and non-disclosure obligations—share draft remedy proposals and hold joint discussions with the merging parties, prospective buyers, and trustees. Such cooperation may result in a single proposal for a remedial package addressing the concerns of both agencies.

Guidelines for Merging Parties

Significantly, unlike the 2002 *Best Practices*, the revised *Best Practices* provides a set of recommendations for merging parties whose transaction is subject to review in both the European Union and the United States.

Information about the Merger or Acquisition

The revised *Best Practices* encourages the merging parties to consult DG Competition and the relevant U.S. antitrust agency as soon as practicable, and to be prepared to provide the following general information about the transaction prior to formal notification:

- The names and activities of the merging parties
- The geographic areas in which they conduct business
- The sector or sectors involved (short description for both jurisdictions)
- The names of other jurisdictions in which they have made or intend to make a filing
- The actual or anticipated date for the filing in each jurisdiction
- Any issues relevant to the timing of the merger

Coordination and Timing of Filings

The revised *Best Practices* urges the merging parties to file concurrently with both jurisdictions. However, the coordination and timing of filings are more complex than the rather straightforward recommendation to file concurrently seems to indicate: The EU and U.S. regimes differ greatly with regard to timing, but also with regard to the likelihood of cases going into an in-depth review. In Europe, few cases go into Phase II, and competition concerns are usually remedied in Phase I. This is facilitated by the front-loaded European process and the practice of often lengthy pre-notification contacts between the parties and DG Competition. Conversely, in the back-loaded U.S. regime, second requests are more frequent and the timing is often difficult to predict in advance. As a result, the pros and cons of coordinated filings should be carefully considered in light of the special features of each case.

Where filings are not made in parallel, the revised *Best Practices* recognizes that there still are many opportunities for merging parties to facilitate the coordination of investigations. In some circumstances, the merging parties can utilize the regulatory procedures in one or both of the jurisdictions to ease timing constraints on agency review. For example, after the issuance of a second request in the U.S. and the opening of a Phase II investigation in the EU, the parties can (i) negotiate a timing agreement with the reviewing U.S. agency based on the date the parties will certify compliance with the U.S., and/or (ii) request that DG Competition extend the review period by up to 20 working days.

Confidentiality Waivers

Communications between DG Competition and the relevant U.S. antitrust agency are limited by the agencies' respective confidentiality and non-disclosure obligations. The revised *Best Practices* continues to strongly encourage the merging parties to

waive their confidentiality privileges with respect to interagency communications. Although confidentiality waivers are commonplace (model confidentiality waivers are available on the websites of the DOJ, FTC, and DG Competition), there are some risks associated with providing these waivers, particularly with respect to differences in the attorney-client privilege rules in the European Union and the United States.

For example, unlike the U.S. attorney-client privilege, the EU legal professional privilege does not extend to in-house counsel. A general waiver, therefore, could result in DG Competition providing information to the reviewing U.S. agency that would otherwise be protected from attorney-client privilege in the United States. Recognizing this, the revised *Best Practices* notes that DG Competition will accept a stipulation that excludes from the scope of the waiver evidence that is identified properly by the parties as qualifying for the in-house counsel privilege under U.S. law. Moreover, there are other differences in the privilege rules that the revised *Best Practices* does not consider—such as the fact that EU privilege rules extend only to counsel who are admitted to a bar in one of the Member States of the European Union—that the reviewing agencies may agree to carve out from their waivers.

Unfortunately, waiver stipulations may not adequately protect privileged communications in actions outside the purview of agency enforcement (e.g., in a private or other third-party action against the parties). Therefore, merging parties should carefully consider legal-privilege issues with outside counsel.

Remedy Proposals

The revised *Best Practices* recommends that the merging parties coordinate the timing and substance of remedy proposals to DG Competition and the reviewing U.S. antitrust agency so that the merging parties can minimize the risk of inconsistent or conflicting

Continued on page 3...

European Union and United States Antitrust Authorities Update Best Practices . . .

Continued from page 1...

remedies. Therefore, the merging parties should consider the benefits of submitting their notifications to DG Competition and the U.S. agencies concurrently or within a short time period of one another so that they have the option to submit a joint remedy proposal to both agencies.

Conclusion

The revised *Best Practices* attempts to make the case for merging parties to facilitate coordination between DG Competition and the U.S. antitrust authorities. While facilitating coordination has its benefits, there are circumstances where it may be in the interest of the merging parties to seek early clearance in one jurisdiction rather than seeking a coordinated outcome. For example, where the parties have valid reasons to expect early clearance in one jurisdiction but a more prolonged investigation in the other, they may well opt for early clearance rather than go through a protracted coordination process. The revised *Best Practices* notes that the merging parties' decision not to follow the recommendations in the document will not of itself prejudice the conduct or outcome of the agencies' review. Nevertheless, now that the EU and U.S. antitrust authorities have published their recommendations, merging parties should consult their EU and

U.S. antitrust counsel as early as possible to factor the authorities' expectations into their strategy for getting their deal through a multi-jurisdictional review.

For More Information

Wilson Sonsini Goodrich & Rosati recently strengthened its highly regarded competition law practice with the addition of an antitrust team in Brussels, members of which have held senior antitrust positions at the EU agencies and have extensive experience representing both U.S. and international clients in antitrust matters before the European Commission and other competition authorities. With this expanded expertise, the firm's global competition law practice is particularly well suited to provide representation regarding cross-border antitrust issues.

If you have any questions relating to the revisions to the *Best Practices*, or if you have a transaction that is subject to notification in the European Union and/or the United States, please feel free to contact Götz Drauz (32-02-274-5702), Michael Rosenthal (32-02-274-5701), Charles E. Biggio (212-497-7780), Scott A. Sher (202-973-8822), or another member of the firm's antitrust practice.



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on November 8, 2011. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

© 2011 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.