ICN Merger Working Group Interim Report on the Status of the International Merger Enforcement Cooperation Project

1. INTRODUCTION

One of the core tasks in the ICN's mission statement is "*to facilitate effective international cooperation to the benefit of member agencies.*" In 2012, the ICN Steering Group (SG) initiated an ICN-wide international cooperate on project[1] to address this topic across enforcement areas and deepen the discussion of enforcement cooperation within the network, although the topic of enforcement cooperation had been addressed in various projects at working group level[2].

Interconnection and globalization of the world's economies are now key features of economies and business relations. These features continue to impact agency enforcement, consumers, and economies worldwide, especially considering the growing number of jurisdictions adopting merger review control regimes. Interconnection and globalization of the world economy have translated into more, larger and often more complex mergers affecting multiple jurisdictions. The increase in the number of jurisdictions with merger review control means that international enforcement cooperation practiced mainly on a bilateral basis and by only few jurisdictions or group of jurisdictions faces growing challenges. The ICN MWG's agency membership has increased each year, rising to a total of 65 in 2014 from 21 in 2006.

This is why the ICN SG and, at the same time, the Competition Committee of the Organization for Economic Cooperation and Development (OECD) began to study enforcement cooperation. Under the leadership of the ICN Steering Group and the Competition Committee, the ICN and the OECD carried out a joint survey to gauge the successes and weaknesses of current cooperation frameworks, and to seek members' view on possible future work. The results of this survey were reported by the OECD and ICN in 2013, in two separate but closely complementary documents[3].

The ICN report identified the ICN's important role as a "*platform for interaction*" and identifies the ICN's achievements "*in building relationships, facilitating the transfer of knowledge between agencies, and beginning to move the competition enforcement community from a patchwork of agencies towards greater convergence and cooperation*". In its conclusions, the ICN Report states, "*markets and economies are becoming increasingly internationalized, and the international competition enforcement community will need to keep pace*". The ICN MWG can build on its strengths and help member agencies keep pace by developing additional work related to cooperation

[1] See the Mandate for the International Enforcement Cooperation Project. See also ICN Roundtable on Enforcement Cooperation, March 2011, http://www.internationalcompetitionnetwork.org/news-and-events/cooprt.aspx (including a questionnaire and discussion of cooperation in merger matters).
[2] See ICN's international cooperation-related work.
[3] See the OECD Competition Committee, Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation ("OECD report") and ICN Report on OECD/ICN Questionnaire on International Enforcement Cooperation ("ICN report"). In order to avoid duplication with the work of the ICN, the OECD decided to launch a single questionnaire that would support the needs of both the OECD's long-term project and the ICN SG project on International Enforcement Co-operation. Some ICN members are not part of the OECD.

on mergers in particular. The Report noted that a majority of the 57 agencies that completed the survey supported "*new recommended practices or other guidance on cooperation*".

The OECD report highlighted that agencies are increasingly co-operating when reviewing multi-jurisdictional mergers: between 2007 and 2012, there has been an approximate increase of 35% in merger review cases where agencies have co-operated internationally. Merger review is the enforcement area in which international cooperation is more frequent. Moreover, although international cooperation may appear to occur in a small proportion of total merger cases, cases that require remedies for clearance are often subject to cooperation between reviewing agencies.

The MWG has been one of the primary platforms for the discussion and production of cooperation-related work within the ICN for over a decade. For example, in 2004, the first cooperation-related ICN work product was adopted – the recommended practice on "*Interagency Coordination*" (see Section 2 below). In the years since, the MWG has been active in promoting and facilitating cooperation by producing other work products, including the Waivers of Confidentiality in Merger Investigations Report, with a model waiver, and the Framework for Merger Review Co-operation. In its work plan for 2013-2016, the MWG has undertaken a project on international cooperation in merger cases with the objective of developing guidance - in the form of guidelines, recommended practices, or other work product - on cooperation between agencies reviewing the same merger.

The ultimate aim of such guidance is to build upon existing work products, the findings of the OECD and ICN reports, and the practical experiences of the ICN MWG members and Non-Governmental Advisers ("NGAs") to establish an guidance work product that can be used for interagency cooperation by laying down a set of recommendations, which agencies may seek to apply when reviewing a merger which is also subject to review in another jurisdiction.

This work product would assist agencies in their pursuit of more efficient and effective cooperation in merger review. In helping to avoid unnecessary duplication of costs and efforts and, to the extent possible, inconsistent outcomes, the guidance work product is also envisaged to result in benefits for parties involved in the merger review processes, particularly for the merging parties.

Since 2012, the ICN MWG has undertaken a number of activities with a view to working towards this ultimate goal of having a guidance work product. Notably it has:

- engaged in a stock-taking exercise whereby it reviewed existing ICN work products related to merger enforcement cooperation (see Appendix 1);
- organised a Teleseminar Series to collect merger cooperation experiences from a cross-section of agencies and NGAs;
- organized discussions of the topic at various ICN events (the 2012 workshop in Colombia and the 2013 Annual Conference in Poland); and,
- established a Framework for Merger Review Cooperation (the "Merger Review Cooperation Framework") to serve as an important tool to facilitate inter-agency contacts, through which

members of the Framework are provided with agency liaison officer contact details, updated periodically, of all participating agencies[4].

Through these activities, the MWG has promoted efficient and effective inter-agency cooperation. This year in particular, the MWG focused on sharing experiences and lessons learnt from agencies and NGAs related to enforcement cooperation , which will be used in the coming year to inform the ICN MWG's drafting of the a guidance work product.

This Interim Report compiles the main take-aways and conclusions from these activities, particularly those transpiring from the Experience Sharing Teleseminar Series. This Interim Report seeks to serve as a resource for the drafting of the guidance work product.

2. EXISTING ICN WORK PRODUCTS RELATED TO INTERNATIONAL ENFORCEMENT COOPERATION AND THE NEED TO HAVE A GUIDANCE WORK PRODUCT

A number of existing ICN work products relate to international enforcement cooperation in merger review (see Appendix 1). Some of the main objectives and principles of international merger enforcement cooperation are broadly reflected in these existing work products. In particular, these work products recognise:

- the need to coordinate merger review in cases raising issues of common concern[5] particularly, but not only, as regards remedies with a view to avoid conflicting outcomes[6];
- the need to coordinate the different timing and procedures of the agencies involved[7];
- that coordination should be tailored to the particular transaction[8];
- the importance of the parties' voluntary cooperation to ensure effective coordination[9]; and,
- the need to protect confidential information in the context of information sharing[10].

However, the existing work products do not generally (with the exception of the ICN Model Waiver Form) contain practical guidance as to how to achieve these objectives. As international enforcement cooperation increases, more agencies with different legal powers, experiences, traditions, and cultures will work more closely together, gain greater familiarity with each other's practices, and present opportunities for improved cooperation.

The contemplated guidance work aims to assist agencies in their pursuit of more efficient and effective cooperation in merger review. It is not only competition agencies themselves that stand to benefit from

[4] Surveys on the use of the Merger Review Cooperation Framework were conducted in 2013 and 2014.
[5] See: Recommended Practices for Merger Notification and Procedures; Guiding Principles for Merger Review Notification; and Merger Remedies Report.
[6] See: Recommended Practices for Merger Notification and Procedures; and Merger Remedies Report.
[7] See ICN Investigative Techniques Handbook for Merger Review, Chapter 2 - Planning a Merger Investigation.
[8] See Recommended Practices for Merger Notification and Procedures.
[9] See Recommended Practices for Merger Notification and Procedures and, to a certain extent, ICN Investigative Techniques Handbook for Merger Review, reflecting the private sector's perspective.
[10] See Recommended Practices for Merger Notification and Procedures; ICN Investigative Techniques Handbook for Merger Review, reflecting the private sector's perspective; and Waivers of Confidentiality in Merger Investigations.

a more coordinated approach between agencies, but also merging parties and third parties, as enhanced enforcement cooperation may lead to more efficient outcomes, and cost and time savings. Indeed, such guidance work product will also support another main ICN MWG mission: that of reducing the time and cost of multi-jurisdictional merger reviews.

3. THE ICN MWG TELESEMINAR SERIES ON 'PRACTICAL ASPECTS OF INTERNATIONAL COOPERATION IN MERGER CASES'

During 2013-2014, the ICN MWG held a series of three experience-sharing teleseminars on merger enforcement cooperation.

The teleseminars gathered practical experiences of enforcement cooperation from many agencies (with participation of newer and older agencies and agencies from various geographic regions) and NGAs (targeting lawyers with experience in representing clients in mergers which triggered review in more than one jurisdiction).

Through the teleseminars, the ICN MWG sought to identify, with reference to actual cases: (i) the reasons behind and the objectives of cooperation in that particular case; (ii) the principles guiding that cooperation; (iii) the means employed to make that cooperation efficient and effective; (iv) the legal, procedural or other hurdles encountered in the case cooperation; (v) the ways in which these hurdles were overcome, if at all; (vi) the role of merging parties and third parties in enhancing the case cooperation or rendering it more difficult; (vii) the overall outcomes of the cooperation; (viii) the ways in which agencies will adapt their approach to case cooperation in their future cases on the basis of what they learnt in their recent case cooperation experiences; and (ix) the ways in which NGAs will seek to adapt their approach to case cooperation related issues in their future work on multi-jurisdictional mergers on the basis of what they have learnt in their recent experiences.

The following topics were addressed in the teleseminar series:

1. alignment of proceedings: communication, timing, and legal and practical obstacles to cooperation;
2. investigation - in particular, information sharing; and
3. substantive competitive assessment and remedies.

A detailed summary of each of these teleseminars is attached as Annex 2.

While each call was designed to focus on a particular topic, a number of cross-cutting issues/recurrent themes were raised by participants in each of these teleseminars. These teleseminars recognised that international cooperation entails a spectrum of possible types of interaction, from informal exchange of views based on publicly available information via phone calls to full-line cooperation[11], which may include discussions through the final stages of implementing a merger remedy. Trust between cooperating agencies contributes to successful cooperation. In this regard, the teleseminars highlighted the importance of informal cooperation and recognized the MWG's role in providing a venue – through its activities and events like teleseminars and workshops – to build trust and relationships

[11] Cooperation facilitated by waivers and in which agency staff communicate regularly.

among case handlers, which are invaluable when cooperating on cases. Furthermore, the contact information provided by members that participate in the Merger Review Cooperation Framework makes initial member-to-member contacts easier.

4. MAIN TAKE-AWAYS AND CONCLUSIONS

Based on the stock-taking and experience-sharing exercises and in line with the existing work products, the MWG has identified issues of common interest which can be used to develop guidance for competition agencies in the field of international enforcement cooperation.

Guidance work product should be useful for both experienced and newer agencies. In this context, the aim of the guidance work product provided for in the 2013-2016 ICN MWG work-plan is to build upon existing work products, the findings of the ICN and OECD Reports and the practical experiences of the ICN MWG members and NGAs.

The ultimate goal of the guidance work product is to produce recommendations on effective enforcement cooperation for competition agencies to consider within the ambit of their respective legal framework and rules.

4.1. Timing Alignment and the important role of the parties

Cooperation is most effective when the timetables of the investigations by the reviewing agencies run more or less in parallel, meaning agencies make key decisions about a review at the same time. The chance that this may occur is often tied closely to each agency's merger review investigation timetable.

Whilst recognizing that timetables may differ, cooperation was considered as particularly effective when the reviewing agencies' respective investigation timetables allow for meaningful communication at key (decision-making) stages throughout the procedure.

For more complex cases, alignment of procedures to permit meaningful discussions at key decision-making times for cooperating agencies is crucial, and it may ultimately impact the ability of cooperating agencies to discuss remedies.

The participants at these teleseminars highlighted the role of the parties in seeking to coordinate timing of the respective investigation and of the collection of information and data requested by the reviewing agencies. Therefore, there will often be appears to be benefit in seeking to involve parties in discussion on possible ways to coordinate timing of investigations, to the extent possible.

4.2. Communication between the reviewing agencies

Communication between reviewing agencies is key to achieve an efficient and smooth cooperation process when reviewing multi-jurisdictional mergers. To this purpose, it seems important to identify ways that agencies can ascertain that another agency is reviewing the same transaction (for example, by asking the parties to provide such information at the beginning of the review process). The Merger Review Cooperation Framework is one of the efforts to help the agency contact.

The experiences shared during the teleseminars highlighted the importance of open communications between agencies and between the agencies and the parties. Mutual trust and transparency between the agencies, and among the agencies and the parties, on procedural and substantive aspects of a merger proceeding, contribute to successful cooperation.

The extent, timing, and frequency of communication will vary depending on particular facts in the matter (for example, the presence or absence of a worldwide market) and complexity of the merger.

The more complex cases discussed were often characterised by frequent and regular communication between agencies, at least each time that an analytical or procedural milestone was reached. Waivers may also be necessary in such cases to permit analytical discussions. Agencies found it important to update each other on key developments in the case and those discussions proved particularly important and useful at key stages of the investigation, such as when preliminary conclusions on the competitive assessment are reached or remedies are discussed. This is of the utmost importance for cases where remedies are imposed, as there must be a clear understanding of the substantive issues to facilitate a discussion of remedies. These discussions can also be useful in case of transactions that do not raise *prima facie* cross border effects.
The teleseminars showed that sharing information between reviewing agencies can benefit both cooperating agencies and parties.

The information shared by cooperating agencies may range from publicly available information and, consistent with the agencies' confidentiality obligations and any waivers provided by the parties, to discussing analyses at various stages of an investigation, including market definition, and theories of harm, based on confidential information. Views on relevant past investigations and cases with similar theories of harm or in similar industries may also be shared, based on publicly available information.

For more complex cases, waivers of confidentiality are recognised as enabling more effective coordination between the reviewing agencies, more complete communication between the reviewing agencies and with the merging parties. Waivers may be necessary to discuss evidence that is relevant to the investigation, which contributes to more informed decision-making by cooperating agencies. In some cases, meaningful cooperation and non-conflicting outcomes (e.g., remedies) would not have been achieved without waivers[12].

Joint investigative tools (such as joint calls/meetings, joint interviews, joint request for information) proved also to be extremely useful.

4.3. Cooperation on substance and remedies

Participants recognised that efficient investigatory coordination is beneficial to reviewing agencies and parties alike. Exchanges on working theories, methods of analysis and the nature of the evidence proved very useful even when the relevant markets are national in scope. Cooperation during the

[12] In light of the discussion, it may perhaps be useful to reflect on whether the ICN work products relating to waivers should be revisited/updated.

remedies phase is most effective when agencies have been working together throughout the investigation and staff have a common understanding of the competitive effects of the transaction

Concurrent submission of documents to agencies may also contribute to efficient cooperation in earlier stages of an investigation.

Cooperation on mergers for which remedies are considered in more than one jurisdiction, or in which remedies will affect other jurisdictions, was recognised as particularly valuable both for the reviewing agencies and for the merging parties themselves. Even if the geographic market is not worldwide in scope, the remedies offered in one jurisdiction may have an effect on those offered in the other jurisdiction. Cooperation on the design and implementation of such remedies was recognised as important.

The need for avoiding, if possible, inconsistent or conflicting remedies/obligations by the merging parties was highlighted in the teleseminars. Coordination in the implementation stages of remedies was also recognised as of the essence. The role of the parties in contributing towards coordination on the timing and substance of remedy proposals being made to different agencies was flagged as important.

When it is clear that cooperating agencies are each considering remedies, it is important that agencies keep one another informed of remedy discussions with the parties and of other relevant developments with respect to remedies. Sharing of draft remedy proposals and joint discussions with the merging parties, prospective buyers, and trustees have often proved useful. Cooperation on the implementation of the remedies has led to the appointment of common trustees / monitors, or agreement on the same purchaser(s) for assets to be divested. Practical examples discussed during the teleseminars showed that it is particularly important for both the parties and reviewing agencies to communicate early and frequently to help ensure meaningful cooperate regarding remedies.

APPENDIX 1

ICN MWG Existing Work Product Related to Merger Enforcement Cooperation

A. RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES (2002)

http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf

Recommended practice Nº X (Interagency coordination)

A. Competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern.

B. Interagency coordination should be conducted in accordance with applicable laws and other legal instruments and doctrines.

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

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

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

B. GUIDING PRINCIPLES FOR MERGER NOTIFICATION AND REVIEW

http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf

6. Coordination. Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.

C. MERGER REMEDIES REPORT (2005)

http://www.internationalcompetitionnetwork.org/working-groups/current/merger/workproduct.aspx

Part 3 – Choice and Design of Remedies

General considerations
3.3 Co-operation with competition authorities in other jurisdictions is desirable where each is considering aspects of the same merger (see the Shell/BASF case (appendix D) and the General Electric/InVision case (appendix G) as examples of circumstances favouring cooperation between competition authorities). This helps to avoid inconsistency of approach in applying remedies and is

normally also in the merger parties' best interests. Such co-operation should take place early enough to be effective but should not affect each jurisdiction's assessment of competitive detriment. It should preferably be with the consent of the merging parties as otherwise restrictions on disclosure may prevent sharing of relevant
information.

Appendix G- Bundeskartellamt (Bka) Case Study - General Electric / InVision 4 Theme – Preserving an effective divestiture package – international cooperation
Example of value of international cooperation between competition authorities. Early cooperation between the BundesKartellamt and the FTC ensured that a consistent approach to remedies was followed.

D. ICN INVESTIGATIVE TECHNIQUES HANDBOOK FOR MERGER REVIEW JUNE 2005

http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf

Chapter 2 - Planning a Merger Investigation

Executive Summary
(…) Tasks
If the agency chooses to coordinate with another jurisdiction that is reviewing the same transaction, the investigation team may identify deadlines facing the other jurisdiction, plans for future discussions with the other jurisdiction, and any outstanding issues with respect to coordination.

Chapter 5, A Private Sector Perspective On Tools And Techniques Used In Merger Investigations

II. Cooperation And Confidentiality In Merger Investigations

Tips For Ensuring and Maintaining Confidentiality

1) Statutory Obligations

The exchange of information between government agencies in the context of merger review should comply with all applicable national laws. If a jurisdiction does not have statutory protections for confidentiality, the enforcement agency should develop policies and procedures to protect information. Similarly, all information exchanges should be conducted in accordance with all applicable cooperation treaties/agreements.

To encourage parties both to provide agencies with confidential information and to consent to the exchange of such information between agencies, the receiving agency should undertake to protect the information in accordance with the most stringent statutory requirements applicable to either the providing or receiving agency. The adoption of a "highest common denominator" approach to the protection of confidential information will promote the willingness of parties to consent to the exchange of such information between agencies, thereby furthering the goals of inter-agency cooperation while simultaneously alleviating the concerns of businesses in this regard.

2) Developing Policies and Procedures

Business confidence in the merger review process will be enhanced if the process is clear

and transparent. Publishing a clear, concise policy that sets out practices on seeking, using and exchanging confidential information in the context of a merger review is, therefore, desirable. This policy should include any limitations on protecting the confidentiality of information imposed on the agency (e.g., freedom of information legislation); whether and how legal privileges will be respected and maintained; and the rules and protocol for dealing with requests for confidential information from third parties.

Similarly, where two or more agencies routinely exchange information in the context of the review of trans-border mergers, binding bi- or multi-lateral procedures, treatises or agreements should be implemented to address the treatment and exchange of confidential information. Finally, where two or more agencies conduct coordinated merger reviews on
a recurring basis, formal agreements or protocols for inter-agency information exchanges should be developed and made public.

E. WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS

http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf

This paper identifies and discusses issues underlying the rationale, content, and use of waivers. Several model waivers of confidentiality provided.

F. MERGER REVIEW LAWS, RELATED MATERIALS, AND TEMPLATES

http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx

To assist the Working Group in its efforts and to promote access to information on ICN members' merger review systems, the Merger Working Group has established links to merger-related materials on ICN members' websites. On these linked pages, members have posted materials that may include their current merger legislation, implementing rules and regulations, guidelines, and related materials. Members have also posted responses to a set of questions addressed to all member agencies (the "template") designed to highlight important features of their merger review systems, such as notification thresholds and review periods.

The ICN is posting the competition legislation and/or templates of members that do not currently have agency websites. The ICN vouches neither for the accuracy nor completeness of the information on any of these linked pages but has asked each member to be responsible for maintaining accurate and up-to-date information. Additional links will be posted as members make the information available.

G. THE MERGER REVIEW COOPERATION FRAMEWORK (ONGOING)

Project currently being developed by the Japan Fair Trade Commission, aiming at facilitating effective and efficient cooperation between and among ICN member agencies reviewing the same merger through the identification of agency liaisons and possible approaches for information exchange among agency case teams.

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

APPENDIX 2

The ICN MWG Teleseminar Series on 'Practical Aspects of International Cooperation in Merger Cases'

1. The objectives of the teleseminar series

During 2013-2014, the ICN MWG held a series of three experience-sharing teleseminars on merger enforcement cooperation on, respectively, the following topics: (1) alignment of proceedings: communication, timing, and legal and practical obstacles to cooperation; (2) investigation - in particular, information sharing; and (3) substantive competitive assessment and remedies.

This teleseminar series was preceded by a members call aimed at identifying and elaborating on the issues to be addressed during the teleseminar series by both agencies and NGAs in their case cooperation experiences

The objective of the teleseminars was to gather practical experiences of enforcement cooperation from a broad cross-section of agencies (with participation of newer and older agencies and agencies from various geographic regions) and NGAs (mainly lawyers with experience in representing clients in mergers which triggered review in more than one jurisdiction).

These teleseminars were used as the ICN MWG's main vehicle to gather the lessons learnt by agencies and NGAs in their case cooperation experiences.

2. Alignment of proceedings - communication and timing and legal and practical obstacles to cooperation

The teleseminar on 'Alignment of proceedings: communication and timing and legal and practical obstacles to cooperation' took place on 17 October 2013. Presentations were made by the Canadian Competition Bureau ("CCB"), the Japan Fair Trade Commission ("JFTC") and two NGAs (antitrust lawyers) from Brazil and Italy respectively. Interventions were made by the U.S. Federal Trade Commission ("US FTC") and the Italian Competition Authority. The cases forming the basis of the presentations and discussion were: *Avis Budget/Dollar Thrifty*[13] (cooperation between the CCB and the US FTC), *GE/Avio*[14] (cooperation between the European Commission and the US FTC); and *Owens Corning/Saint-Gobain Vetrotex* [15] (cooperation between Brazil's Administrative Council for Economic Defense ("CADE"), the US FTC and the European Commission). In addition, the experience of the Merger Review Cooperation Framework was presented. Slides were prepared by the various presenters.

[13] The transaction was ultimately abandoned in September 2011.
[14] See European Commission, COMP/M.6844 dated 1 July 2013; US (FTC), 27 August 2013:
[15] See European Commission, COMP/M.4828 dated 26 October 2007; US FTC, 26 October 2007.

To help guide the discussion, the ICN MWG co-chairs suggested, and the call was structured to address, with reference to actual case examples:

- How does an agency learn whether another agency is reviewing the same transaction;
- How and when does an agency contact another agency reviewing the merger; and
- Alignment at key stages of review and decision.

This sub-section summarises the main points during the teleseminar.

Communication

The discussion highlighted that there are a variety of sources for an agency to discover if another agency is reviewing the same transaction. These include: (i) pre-merger notification form requirements or requests for such information made to the parties, (ii) voluntary submission of such information by the parties, (iii) information in the public domain (including, media), (iv) information provided by the other agency itself (e.g.: on the basis of bilateral agreements/cooperation arrangements) and (v) security filings.

Once an agency learns that other agencies are reviewing the same mergers, it might decide to contact them.

The presenters' experiences indicated that whether contact is made, and the degree of communication, are intrinsically linked to the nature of the case – that is, its complexity and possibly the geographic scope of the market.

Contact between agencies is often more likely to be initiated and is likely to be more intense in the more complex cases. However, even if a case does not appear to raise substantive issues in a given agency's jurisdiction, the presenters suggested that it may still prove useful to initiate contact as a 'check' on substantial issues and exchange information on procedural matters (such as the state of play in the review and the case calendar).

As regards the timing of inter-agency communication, notably in complex cases, presenters' experience suggested that initiating contact as early as possible in the proceedings has proven beneficial as it may allow more meaningful discussion going forward, at the key stages of the proceedings. The cases discussed indicate that cooperation can even take place during pre-notification.

Organising 'introductory calls' at an early stage in the respective review procedures has proven useful not only to establish the manner of conducting the case communication going forward, but also to discuss the case calendars / timing / main procedural stages and issues in the respective jurisdictions. These calls serve also to identify and discuss potential areas of competitive overlap as well as identifying any relevant precedent cases which might aid the agencies in their respective assessment.

The form and frequency of contact is determined largely by the status and pace of the investigation. The case experiences of presenters on the call clearly indicate that for the more complex cases, where cooperation is more common, pre-scheduled contact is usually made before/at the key milestones/stages of investigation, including: prior to internal decision making stages, prior to key contacts/discussions with parties; prior to decisions. However, in these more complex cases, there is typically also, more ad hoc contacts throughout the investigation. At early stages of investigation, contact is typically ad hoc, as necessary. As the review advances, there may be pre-scheduled calls

held periodically (for example, presenters mentioned that weekly calls may be held at this stage). This enables team-to-team substantive updates/exchanges. At final stages of the review process (remedy design/negotiations and enforcement decision), contacts become even more intense (with presenters mentioning daily calls in some instances). Regularly scheduled calls between agencies have therefore proven to be extremely useful in achieving effective cooperation.

A general point raised was that reciprocal openness and transparency in communication between the agencies is essential. Waivers, where required, have proven extremely valuable in enabling this openness as regards key issues in the substantive assessment and notably in the design and implementation of remedies. Therefore, parties play an important role in fostering a cooperation environment, which is conducive to effective and efficient outcomes in a particular case.

Timing alignment and legal obstacles to cooperation

Important challenges to efficient and effective cooperation are the differences of procedures and timetables in various jurisdictions. The presenters' experiences indicate that perhaps the biggest limitation to cooperation tends to be unaligned timing of reviews – with time lags between notifications in various jurisdictions. When one agency has received a notification substantially later than others, it has to 'catch-up', and may even lose opportunities for meaningful cooperation altogether. Agencies can realize mutual benefits of cooperation when timing is aligned. When one agency is ahead of the other (procedurally/substantively), cooperation may be limited/one-sided. Unaligned timing can limit the benefits of cooperation also for the parties.

Getting the different procedures and time tables of the various cooperating agencies to 'fit together' so as to permit meaningful dialogue at appropriate stages or milestones in investigations is not always a straightforward exercise. However, as the case examples discussed in the teleseminar have shown, such 'reconciliation' is possible. Merging parties can make a substantial contribution in facilitating cooperation among reviewing agencies in the merger review process.

Cooperation is more likely to be relevant in cases involving worldwide or large regional markets, as demonstrated by the *GE/Avio* case where, with the help of the parties, a timing alignment occurred between the European Commission and the FTC.[16] Parties are often in control of whether timing aligns, based on when they file notifications with various agencies. Coordination may still not always be possible due to differences in timing or local characteristics of a deal (such as in *Owens Corning/Saint-Gobain Vetrotex*, where remedies had to be tailor-made to the specificities of the Brazilian market).

[16] Note that the US agencies (FTC and DOJ) and the European DG Competition have developed best practices that allow a high degree of co-operation in the course of the review and time alignment in the respective decisions. Press release available at http://www.ftc.gov/news-events/press-releases/2011/10/united-states-and-european-union-antitrust-agencies-issue-revised. US-EU Best Practices on Cooperation in Merger Investigations is available at http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf. On 25 March 2014, the US agencies and the CCB issued a set of "best practices" to make more transparent how they coordinate merger reviews that affect the United States and Canada. These best practices are available at: http://www.ftc.gov/news-events/press-releases/2014/03/us-canadian-antitrust-agencies-issue-best-practices-coordinating

In any event, the presenters' experiences indicated that while a situation where notification timing is aligned may be an ideal situation, fruitful cooperation is not necessarily impeded by non-aligned notifications in various jurisdictions. The CCB and US FTC experience in the *Avis-Budget/Dollar/Thrifty* case is an example: despite an earlier US filing (1.5 months), the agencies were still able to align investigation timetables. This allowed for meaningful discussion prior to important milestones in the case and laid the ground for coordinated (potential) remedy discussions at later stages.

A perfect alignment of the timing is generally not feasible in light of differences in the scope of the information required by the reviewing agencies and the procedural steps. However, it is in the interest of all stakeholders that agencies are enabled to fully cooperate at critical stages in the respective review procedures, notably also at the remedies stage.

Besides being beneficiaries of the outcomes of efficient and effective cooperation, merging parties are also key players in enabling the achievement of such results. Participants acknowledged that merging parties are in a position to facilitate alignment through the timing of their filings and are often encouraged to do so by agencies. This does not necessarily mean filing at the same time in each jurisdiction but timing filings in such a way that enables, to extent possible, agencies to cooperate meaningfully at key investigation/decision-making stages. Such timing alignment allows for review to be conducted in parallel, rather than in seriatim; it facilitates agencies to adopt joint investigative tools, engage in meaningful dialogue at key stages of the case and can have beneficial impact not only on agencies but also on parties involved as it helps lessen burdens and duplication of efforts.

Indeed, given that pre-notification, notification procedures and information requirements in the process leading to notification vary significantly between different jurisdictions; parties may have a legitimate interest not to notify at the same time in different jurisdictions. However, cooperation in crucial stages in cases, such as remedies would only be feasible if notification is done at such time so as to allow agencies to discuss at the main decision making moments in cases. Ultimately, this may translate in significant benefits for the parties themselves, who may benefit from aligned or non-conflicting outcomes as to remedies and their implementation. Meaningful exchange on design and implementation of remedies can be limited or in the worst case excluded, if timing is not aligned in such a way so as to allow for this.

The *GE/Avio* case demonstrates the important role of merging parties in aiding cooperation through timing alignment in different jurisdictions. In that case, the parties approached the European Commission and the US FTC at roughly the same time by aligning the timing of kick-off meetings and filings to both authorities were timely thought through so that calendars were closely aligned to a degree which allowed for joint investigative efforts (joint interviews, joint meetings) and discussion at key stages in the case.

Other obstacles

Mutual trust between agencies lies at the basis of effective cooperation. Establishing cooperation for the first time, if there has been no previous case cooperation or other type of cooperation, appears difficult at times. Informal or non-case related cooperation helps the building of relationships of trust between agencies.

Language barriers and different time zones may pose challenges to effective inter-agency cooperation. However, these are often not insurmountable stumbling blocks.

The Merger Review Cooperation Framework, which compiles agency liaison officer contact details and is updated periodically, is serving as an important tool to facilitate timely inter-agency communication. All ICN member agencies responsible for reviewing mergers are invited to join the Framework by submitting contact details of the appropriate liaison officers for establishing communication channels in the review of merger cases. The Framework does not create any legally binding rights or obligations for any of the participating ICN members. As of March 2014, 57 competition agencies participated in the Framework.

3. Teleseminar on 'Investigation - in particular, information sharing'

The teleseminar on 'Investigation (in particular, information sharing)' took place on 14 November 2013. Presentations were delivered by the Australian Competition and Consumer Commission ("ACCC"), the Competition Commission of South Africa ("CCSA"), Conselho Administrativo de Defesa Econômica (the Administrative Council for Economic Defense or "CADE), the UK Office of Fair Trading ("OFT"), US Department of Justice ("US DoJ"), and various NGAs (antitrust lawyers) from Brazil, the European Union and the United States. The cases forming the basis of the presentations and discussion were: *Ecolab/Permian Mud*[17] (cooperation between the OFT and the US DOJ), *Syniverse/Mach* (cooperation between CADE and the European Commission)[18], *Munksyo/Ahlstrom*[19] (cooperation between CADE and the European Commission) and *Nestlé/Pfizer*[20] (cooperation between the CCSA and the ACCC). Interventions were made by the ACCC, the CCB and the US FTC. Slides were prepared by the various presenters.

To help guide the discussion as regards communication and timing, the ICN MWG co-chairs suggested the following matters for consideration (with reference to actual case examples) by agencies participating in the teleseminar:

- Purpose, incentives and modalities of exchanging information with other agencies;
- Impediments to obtaining and using waivers;
- Joint investigative efforts for the collection and evaluation of evidence; and,
- Role of the parties in allowing information sharing.

To help guide the discussion as regards communication and timing, the ICN MWG co-chairs suggested that NGAs participating in the teleseminar share their experiences with respect to the implications and difficulties faced by parties in situations where waivers of confidentiality are requested by reviewing agencies.

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[17] See: US DOJ press release, 8 April 2013; OFT, No. ME/5696/12 5 February 2013.
[18] See: Brazil CADE, 22 May 2013; European Commission, COMP/M.6690, 29 May 2013.
[19] See: Brazil CADE, 22 May 2013 ; European Commission, Comp/M.6576 – *Munksyo/Ahlstrom*, Commission Decision dated, 24 May 2013.
[20] Australia ACCC, Reference No. 48730, 22 November 2012: http://registers.accc.gov.au/content/index.phtml/itemId/1090709; Competition Commission of South Africa, Case No: 65/LM/Jun12, 11 February 2013 (order) and 18 March 2013 (reasons): http://www.comptrib.co.za/assets/Uploads/65LMJun12-015248.pdf.

Exchange of information

According to all participants, sharing of information allows agencies to identify issues of common interest, improve their analyses, and allow for more effective remedies. Indeed, sharing information can increase the quantity and quality of the information on which agencies base their decisions, leading to more informed decisions and effective inter-agency, promoting convergence, minimizing the risk of conflicting outcomes, and expediting merger review.

Besides the potential benefits of information sharing for agencies, there are also important potential benefits for merging parties themselves. In particular, information sharing may allow for a quicker identification of potential issues and elimination of issues (therefore potentially speedier review), facilitate a common analysis and more consistent decisions and remedies in the different jurisdictions and therefore may lead to an overall reduction of costs for the merging parties.

Waivers

The experiences shared during the teleseminar showed that the start of cooperation amongst agencies is not dependent on the granting of waivers.

The discussion indicated that while waivers are not always essential for case cooperation *per se* to take place (particularly for cooperation which normally takes place in less complex cases), more intense degrees of cooperation (usually more desirable to help avoid conflicting outcomes in the more complex cases) is facilitated by the use of waivers.

For cases requiring less substantial cooperation, waivers may not be needed at all. Without waivers, agencies can still engage in discussion on market definition and theories of harm and share non-confidential information, certain questions which they have drawn up for the purposes of their market investigation, and information their respective progress and timing of the investigation. Therefore, even without waivers agencies may engage in discussion which may still aid in the analysis of the case – such as discussion of previous cases (involving the same companies or markets); general discussion of market conditions; and general discussion of methodology used to relevant market definition. Therefore, flexibility as the types of cases in which waivers are truly warranted is necessary.

Information that can be shared without waivers varies by jurisdiction (as there are different rules and practices). However, generally the following can be shared without waivers: publicly available information; notification of the opening of an investigation; processes to be followed, including any applicable deadlines; applicable legal standards and relevant legal and economic analysis; agency generated information – analytical thinking, without disclosing confidential non-public information; theoretical possible effective remedies.

For more complex cases, waivers have proven beneficial for a deep substantive cooperation which allows for consistency of analysis and non-conflicting outcomes regarding remedies. The ability to engage in meaningful discussion on the substance is intrinsically linked with waivers. It appears that unless there is waiver, agencies cannot cooperate as intensively and deeply as they would do otherwise (in particular, at the remedies stage).

The discussion indicated that in complex cases the sharing of information and documentation on the basis of waivers is standard practice in the more experienced jurisdictions.

Sharing of confidential information (for example, parties' internal documents, agency working papers containing confidential information and information on remedies) with other agencies generally requires waivers. Without waivers, agencies cannot generally share important information, such as: submissions made by the merging parties; internal documents; parties' testimonies; economic analysis prepared by the parties; identities of third-party complainants/witnesses and the substance of the information submitted by those third-parties.

Waivers from third parties, not only from the parties themselves have proven useful. This avoids having to engage in only anonymised discussions and allows for exchange of evidence (as agencies cannot rely on unseen evidence).

Participants referred to the model ICN waiver form and encouraged its use.

The granting of waivers depends on trust which companies have in relation to the agencies involved. Companies have a legitimate concern that inter-agency exchanges of confidential information are protected. There is concern that highly sensitive business information may fall into the public domain or hands of competitors. It is important that parties see that authorities are abiding by confidentiality protections and statutory restrictions on use of information in order for future cooperation with agencies to be encouraged. More importantly, some concern exists as to use by the receiving jurisdiction of documents shared by another agency on the basis of a waiver of confidentiality. There is concern that a document which may be covered by legal privilege in one jurisdiction may not be considered privileged in another. Waivers may therefore be tailored or limited in such a way so as to make sure that privileged documents cannot be exchanged.

Joint investigative tools

The teleseminar participants indicated that some, more complex cases may benefit from the use of joint investigative tools.

The discussion suggested that joint investigative efforts by agencies for the purposes of collecting and evaluating evidence (such as discussing and sharing question prepared for collecting evidence for third parties; the sharing of testimony of the parties; setting up of joint teleconferences with the parties or third parties), may be a useful technique in avoiding the duplication of efforts and costs for agencies and stakeholders and enable a more focused investigation and assessment. Interveners stressed that joint investigative tools can be a time and money saver and the more processes can be put in place to make them practical and effective, the more merging parties will have the appropriate incentives.

As the discussion in the first teleseminar on alignment of proceedings showed, the use of joint investigative tools is often facilitated through the alignment of proceedings, an exercise in which the role of the parties cannot be overemphasized.

4. Teleseminar on 'Substantive assessment and remedies'

The teleseminar on 'Substantive assessment and remedies' took place on 16 January 2014. Presentations were made by the Competition Commission of Pakistan ("CCP"), the National Economic Prosecutor’s Office ("FNE") of Chile, the Mexican Federal Commission for Economic Competition ("CFCE") and the US Department of Justice ("US DoJ"). Interventions were made by the ACCC, the CCB, the European Commission (DG COMP), as well as by a number of NGAs (antitrust lawyers) from Brazil, the European Union and the United States. The cases forming the basis of the

presentations and discussion were: *UTC/Goodrich*[21] (cooperation between the CCB, the European Commission, the US DoJ) and *Nestlé/Pfizer*[22] (cooperation between Pakistan, Mexico and Chile – CCP, CFCE and FNE). Slides were prepared by the various presenters.

Substantive assessment

To help guide the discussion on remedies, the ICN MWG co-chairs suggested the following matters for consideration (with reference to actual case examples) by agencies participating in the teleseminar:

- Benefits in sharing the substantive assessment of the case, including theories of harm and types of evidence, even when the case is related to different geographic markets;
- Limitations and constraints in discussing the substantive assessment with other reviewing agencies.

Remedies

To help guide the discussion as regards remedies, the ICN MWG co-chairs suggested the following matters for consideration (with reference to actual case examples) by agencies participating in the teleseminar:

- Purpose of discussion in relation to remedies (e.g., design and/or implementation of remedies, possible alignment of remedies)
- Timing, content and forms of cooperation in the implementation stage of the remedies; and,
- Limitations or constraints on cooperation in the design and implementation of remedies.

To help guide the discussion as regards remedies, the ICN MWG co-chairs suggested that NGAs participating in the teleseminar share their views on the benefits generated for the parties by agencies cooperation on substantive review, remedies design and implementation.

Substantive assessment

The teleseminar indicated that, in more complex cases, it is often important to incentivize companies to start discussions on substantive issues with the reviewing agencies at the same time (and to provide the appropriate waivers). This facilitates cooperation between agencies and, for example, avoids the possibility that one agency is significantly behind others in its review process.

The exchange of relevant documents (such as pre-merger filings), information and data may be useful in some cases. In one specific case mentioned during the teleseminar, such an exchange revealed that agencies were provided with conflicting information.

Regular inter-agency discussions of theories of harm/competitive issues are highly recommended, even at an early stage. Such discussions may take place even in the pre-notification stage of cases in those jurisdictions which provide for such a pre-notification stage. Exchanges on theoretical

[21] See: European Commission, COMP/M.6410 - UTC/Goodrich, Commission Decision dated 26 July 2012; US DOJ, 26 July 2012; Canada Competition Bureau (statement) , 26 July 2012.

[22] Pakistan (CCP), 9 October 2012; Mexico (CFCE),15 April 2013; Chile Competition Tribunal ("TDLC"), 18 April 2013.

approaches, methods of analysis and general views proved very useful in a high number of cases, and not only in cases involving worldwide or regional/cross-border markets but also in those cases involving national markets.

These discussions are particularly useful when the geographic scope of the market being assessed by the respective agencies is the same; these discussions help to anticipate issues which, if dealt only at a later stage, may impede a smooth process. That is, they aid in reaching non-conflicting outcomes. A number of practical examples (such as *Nestlé/Pfizer*) also demonstrate that even when markets are national in scope (or regional in scope), inter-agency exchanges on substantive issues are instrumental in helping the respective agencies in conducting their investigation (e.g.: aiding in market definition, developing theory of harm, assessing that theory of harm). In particular, even where the market is regional or national in scope, cooperation as regards the design and implementation of remedies (e.g.: approval of purchaser) may prove crucial to avoid inconsistent outcomes (e.g.: where the remedy involves divestiture of a global business that addresses competition problems identified in different national markets or geographic regions).

As in the previous two teleseminars, the importance of joint investigative tools (in more complex cases) was stressed, in particular holding joint calls with parties and third parties (even if it is recognized that this is not always easy to organize, especially when the relevant agencies sit in different time zones). It was recognized that such joint calls save time, avoid duplication of efforts and facilitate inter-agency discussions on substance.

In *UTC/Goodrich*, an intense cooperation, in particular between the European Commission, the DOJ and the CCB, helped to ensure a close alignment of both substantive points and timing. All three authorities issued their decisions on the same day.

Remedies

The teleseminar showed that cooperation can go beyond the substantive assessment and continue in relation to the design and implementation of remedies, and this helps to ensure non-conflicting remedies. Cooperation regarding remedies has proven important, even if it is not always possible for the authorities to adopt the same outcome.

In this respect, the practical experience indicates that starting cooperation on remedies as early as possible is beneficial. That is, it is helpful to start a remedy discussion once it is clear that remedies are needed or on submission of remedies to one agency.

All presenters and interveners emphasized the importance of aligning the remedy design and implementation, including the review of proposed buyers. As indicated in the previous teleseminars, the calls stressed that parties play a major role in ensuring that timing/procedures are aligned in such as way so as to ensure that discussion between agencies is possible at this key, remedy stage.

At the remedy design and implementation phases, frequent inter-agency discussions are recommended as well as exchanges of draft commitments and decree. Cooperation can cover all aspects of the remedy process, such as the actual content of the remedy, the duration of divestiture periods and transitional services.

As regards the divestiture process, there may be some merit in a joint approval of hold separate managers and/or proposed monitoring trustees. Discussion of proposed divestiture buyers, including review of documents, may also be useful.

The teleseminar illustrated the benefit for both the companies and the agencies in cooperating at the remedy stage. In *UTC/Goodrich*, while the DOJ and the Commission accepted remedies, the CCB issued a no action letter as the remedies imposed by the two other authorities fully addressed the CCB's competition concerns in Canada. The US and EU remedies were largely identical in terms of substance, and the two authorities closely aligned their commitment texts. A common monitoring trustee was used, and coordination also helped to approve the same purchasers.

These findings apply not only to cases involving worldwide or cross-border markets. Such cooperation may also prove important in cases involving national markets where dialogue with other agencies reviewing the same transaction may help inform the competitive assessment of the case and where remedies imposed in relation to concerns on a national market may have important impact in the implementation of remedies in relation to the same transaction imposed in another jurisdiction. In *Nestlé/Pfizer*, for instance, discussions held between the Chilean and Mexican agencies was key to the design of remedies as the production site/manufacturing unit to be divested was located in Mexico but this divestment solved the competition concerns in both jurisdictions. It is worth noting that the divested business of Latin America was sold to the same firm in Australia and South Africa. Exchanges with the ACCC were key to the remedies package accepted by Pakistan.