COOPERATION IN MULTIJURISDICTIONAL MERGER FILLINGS – THE ECA NOTICE MECHANISM*

*Rita Prates & Ricardo Bayão Horta***

Abstract *Cooperation among Competition Authorities in multijurisdictional filings should always be a factor to take into consideration. The ECA Notice is a mechanism through which European Competition Authorities cooperate with each other when reviewing transnational merger transactions. Although active for almost 20 years, the ECA Notice cooperation mechanism is hardly well-known among stakeholders, in particular merging parties. Nevertheless, the ECA Notice cooperation mechanism has proven to be an extremely useful tool in promoting consistency and avoiding conflicting assessments and final decisional outcomes in EU national merger control. This, however, is not short of challenges. This article intends to provide a brief insight on how cooperation in multijurisdictional filings of merger transaction works in practice, the principles it is based on, and its benefits and challenges to both National Competition Authorities and merging parties.*

Key-words Merger Control; Multijurisdictional filings; Cooperation by National Competition Authorities and European Commission; Referral mechanisms; ECA Notice mechanism (JEL Classification: K; K2 Regulation and Business Law; K21 Antitrust Law)

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** Rita and Ricardo are both Legal Advisers at the Merger Control Department of the Autoridade da Concorrência (AdC), the Portuguese Competition Authority. The opinions expressed in this article are personal and do not necessarily reflect the views of Autoridade da Concorrência.

1. INTRODUCTION

Cooperation and coordination amongst National Competition Authorities on merger proceedings can enhance the efficiency and effectiveness on the review process, help achieve consistent and non-conflicting outcomes, and reduce transaction costs as well as administrative burdens.

In 2001, this need to foster increased consistency and convergence within the European Union's jurisdictions in merger proceedings led the National Competition Authorities of each of the European Union Member States, together with the European Commission, the EEA EFTA States and the EFTA Surveillance Authority (all together hereinafter referred as the "ECA members" or "NCA"), to start a cooperating platform with the main focus on mergers subject to be reviewed by more than one NCA – known as "multi-jurisdictional filings".

Through this arrangement, the ECA members agreed upon a set of Principles and Best Practices' documents, based on which cooperation would be put in place through a system of sharing/exchange of information in cases involving multijurisdictional filings. The *ECA Notice* – a simple form whereby the first notified NCA transmits to its sister NCAs the basic information on the merger transaction – was introduced.

Along with the creation of the cooperation platform, and in order to better ensure consistency, convergence and cooperation involving such multijurisdictional filings, the ECA members decided to formalise and institutionalise the creation of the Merger Working Group (hereinafter the "MWG") within the European Competition Network.

Established in Brussels in 2010, the MWG's mandate is to identify areas of possible improvements regarding issues arising in relation to mergers with cross-border impact, and to explore possible solutions, focusing on what is feasible within the existing national legal frameworks, and drawing from the practices and experience of NCAs.

With this in mind, the ECA members issued guidelines that deepened the convergence and benefits of cooperation when reviewing merger transactions: individual NCAs would work with each other when reviewing the same merger transaction, thus aiming to achieve a consistent and coherent assessment and outcome, while at the same time reducing transaction costs and the administrative burden.

By doing so, the ECA members devised a cooperation system, the ultimate goal of which parallels that of the *one-stop-shop* principle: the review of the merger is entrusted to a single-entity, which would ensure the consistency

and coherence of the assessment throughout the EEA, and a final decisional outcome compatible with the principles of creating a common market *vs.* a review of the merger entrusted to individual NCAs who, by cooperating with each other, will ensure consistency and coherence between each of its autonomous assessments, and a final decisional outcome compatible with the principles of creating a common market.

2. LEGAL FRAMEWORK & THE NEED TO COOPERATE

Contrary to Regulation 1/2003[1], Regulation 139/2004 (the "EU Merger Regulation")[2] only very lightly addresses issues of cooperation; and when it does, it is to determine jurisdiction in multijurisdictional filings, rather than how to best conduct it.

Under the EU Merger Regulation, there is a clear separation between the European Commission's jurisdiction and that of the Member States in reviewing merger transactions: if it meets the EU Merger Regulation's thresholds, the European Commission has exclusive jurisdiction; if not, the review falls with the Member States' jurisdiction (all or only some, depending on each of their respective legal framework).

There are, however, four exceptions to this rule on jurisdiction: the referral mechanisms pursuant to Articles 4(4) and 4(5), on one hand, and to Articles 9 and 22, on the other.

Articles 4(4) and 9 of the EU Merger Regulation enable the Member States' NCAs to assess and decide upon merger transactions that originally fall under the scope of the EU Merger Regulation (i.e. the merger originally falls within the European Commission's jurisdiction). On the opposite "direction", Articles 4(5) and 22 enable the European Commission to assess and decide upon merger transactions that originally fall outside the scope of the EU Merger Regulation (i.e. the merger originally falls within Member States' jurisdiction).

In terms of timing, Articles 4(4) and 4(5) may be invoked (only) by the merging parties prior to formally submitting the notification to the European Commission or the relevant NCAs as appropriate, whereas Articles 9 and 22

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25.

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1-22, in particular Articles 3(1) and 1(2) and 1(3). The Commission's exclusive jurisdiction to enforce the EU Merger Regulation derives from its Article 21.

can be invoked after the merger has been formally submitted to the European Commission or the relevant NCAs as appropriate. Contrary to Articles 4(4) and 4(5), Articles 9 and 22 can be invoked only by either the European Commission or NCA, depending on where the merger was notified.

In addition, Article 4(5) provides for two extra details that single it out from the other three provisions: first, Article 4(5) can only be triggered if the merger transaction is reviewable in three or more EEA national jurisdictions, whereas Articles 4(4), 9 and 22 only need one actor in order to be triggered; second, Article 4(5) does not allow for a partial referral, and so, no parallel investigations NCA-European Commission are possible, whereas all of the remaining three provisions allow for a part of the merger case to be assessed and decided upon in parallel by both NCAs and the European Commission.

Article 4(5), therefore, represents a clear manifestation of the one-stop-shop principle. Unlike Articles 4(4), 9 and 22, which enable the possibility of the merger being only partially referred to the concerned NCAs or to the European Commission (i.e. the European Commission assesses only that part of the merger that the referral NCAs have agreed to, whereas the NCAs that oppose the referral remain competent to review their respective parts), an opposition to a referral under Article 4(5) will preclude it *tout-court* (i.e. no partial referrals are possible).

Irrespective of their differences, Articles 4(4), 9, on one hand, and Articles 4(5) and 22 represent a transfer of jurisdiction, from the European Commission to NCAs, and from NCAs to the European Commission respectively, based on the principle that the latter would the best-placed authority to review the merger case.

Notwithstanding the EU and national legal frameworks on the assessment of merger transactions, cooperation between NCAs is almost totally based on the Principles and Best Practices' Guidelines drafted by ECA Members, initially acting solely as ECA and later as a part of the MWG.

The first set of guidelines dates from 2001 and is entitled "*The Exchange of Information Between Members on Multijurisdictional Mergers – a Procedural Guide*". Pursuant to it, NCAs adhere to a cooperation system of exchanging/sharing information in multijurisdictional filings. The *ECA Notice* – a simple form whereby the first notified NCA transmits to its sisters NCAs the basic information on the merger transaction – was introduced.

In 2005, following the adoption of the 2004 Merger Regulation, the ECA Members adopted the "*Principles on the application by National Competition Authorities within the ECA of Articles 4(5) and 22 of the EC Merger Regulation*".

Pursuant to these principles, cooperation between NCAs in what regards multijurisdictional filings took a step further from a 100 per cent NCA cooperation system to also include the dimension of cooperation in the context of a referral of an assessment from Member States to the European Commission under Articles 4(5) and 22 of the EU Merger Regulation (in the latter case, in full or only partially).

The evolution of merger control in the EEA – either pursuant to national or EU legal frameworks – meant a growing awareness of the need for undertakings to comply with merger control rules. In addition, the deepening of the creation of the common market meant that NCAs received growing numbers of notifications that were also subject to review by their sister NCAs – in short, multijurisdictional filings.

Faced with the challenges that multiple fillings may pose on NCAs (risks of in-coherent assessments and conflicting outcomes) and uncertainty on merging parties, the ECA Members decided to deepen the 2002 and 2005 cooperation principles and rules. In 2011, already in the context of the MWG, the "*Best Practices on Cooperation between EU National Competition Authorities in Merger Review*" were adopted.

According to the press release:[3]

> "The Best Practices aim to foster cooperation and sharing of information between NCAs in the European Union, for mergers that do not qualify for review by the Commission itself (the one-stop-shop review) but require clearance in several Member States."
>
> (…)
>
> "The Best Practices have been adopted to alleviate the difficulties related to multiple filings. They identify the key steps at which the NCAs should cooperate and the information they may share, for instance on the timing of the review process or on remedies when necessary to avoid a merger harming customers and consumers.
>
> Cooperation on mergers that have the potential to affect competition in more than one Member State, or where remedies need to be designed in more than one Member State, would help both merging parties and NCAs by reducing the risk of divergent outcomes.

3 https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1326.

> The Best Practices were prepared by a Working Group set up in 2010 by the Commission and the NCAs. The European Economic Area's NCAs were also represented."
> (…)
> "The best practices do not envisage cooperation in all multi-jurisdictional cases. NCAs will decide on a case-by-case basis whether well targeted cooperation could enhance the review process.
> The success of cooperation will depend to a great extent on the goodwill and cooperation of the merging parties, because NCAs will in most cases depend on them for permission to exchange confidential information. Both the merging parties and NCAs have an interest in good cooperation, as it can increase the overall efficiency, transparency and effectiveness of the review process. The timing of notifications is also an important area where merging parties can facilitate co-operation between NCAs."
> (…)
> "The Best Practices are without prejudice to existing guidance on the system of re-allocating cases between the Member States and the Commission. However, the enhanced cooperation recommended in these Best Practices may also facilitate smooth case reallocation.
> The Best Practices are the result of thorough reflection following broad stakeholder consultation this spring. On that basis, the Best Practices were amended to clarify for instance the use and scope of the case information system, the voluntary nature of waivers and the timing for providing up-front information about the merger. The Best Practices make it clear that confidential information is protected under the national legislation in all Member States."

One final comment: as a document of soft-law, the Best Practices "(…) is intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is intended to create new rights or obligations which may fetter that discretion."[4]

More than reproducing soft-law instruments that represent the basis for the cooperation mechanism – the *ECA Notice* – this article should be read in conjunction with them.

4 EU Merger Working Group, 2011: §1.3.

3. COOPERATION IN PRACTICE

3.1 Procedural Issues – How it works: The *ECA Notice*

Although the object of the cooperation in multijurisdictional filings is focused on substantive issues, such as defining the market, theories of harm, or remedies, the manner in which institutional cooperation materialises is very much a procedural issue.

Naturally, the aim of cooperation is to ensure that measures adopted by different NCAs during proceedings to assess the same merger transaction, as well as the final outcome, are not in conflict with one another, or at least do not hinder the others' purpose. With this in mind, NCAs are encouraged to promote enhanced cooperation, in particular at key stages of the merger control proceedings. So how does all of this work in practice?

Procedurally, it is quite simple and straightforward. It all starts when a particular merger transaction is formally notified to an NCA in accordance with competition law. The first task for any NCA, when faced with a merger notification, is to determine whether it has, *prima-facie,*[5] the jurisdiction to assess it. Assuming the answer to this question is affirmative, the necessary elements submitted by the parties should also inform the notified NCA about whether the same merger will also be notified in other jurisdictions (at least) within the ECA network. If that is the case, the notified NCA should trigger the cooperation mechanism with other NCAs by emailing them the *ECA Notice*.

The *ECA Notice* is a simple form whereby the first notified ECA NCA informs all the other sister ECA NCAs that a particular merger transaction has been notified to it and that ECA NCA *x* or *y* should also expect to be notified as well; in short, the notified merger transaction is subject to a multijurisdictional filing.

The process of completing the *ECA Notice* is simple, and the level of information necessary is quite basic: what the merger consists of; who the undertakings concerned are (potentially their parent companies); what the relevant economic sector is (NACE code, if available); what the date of notification

5 *Prima-facie* because assessing jurisdiction is a three-step process: 1) are we dealing with a *merger transaction* for the purpose of competition law?; if so, 2) who has jurisdiction to assess the merger: the European Commission pursuant to Regulation 139/2004 or national competition authorities pursuant to their respective merger control legal frameworks?; if the latter, 3) whether the merger transaction triggers (any of) merger notification threshold(s)?

and provisional deadline are; who the case-handlers and contacts are; and which NCAs are expected to also be notified.

The currently used Model *ECA Notice* is as follows[6]:

MODEL ECA NOTICE

[Date]

In accordance with the decision made at lhe ECA meeting on 20 April 2001, the [NCA] provides you with the following intormation:
The [NCA] received a merger notification which might be of interest to you:

Notified merger (merging parties and type of transaction):	
Sector/Industry concerned and/or products concerned. NACE code if readily available:	
Date of notification:	
Provisional deadline:	
Case handler: **Email:** **Phone/fax:**	
Notified by the merging parties in Member States:	
ECA members informed:	

Once the *Notice* has been filed, the first notified NCA emails it to all its sisters NCAs.[7] At this stage, the main relevant aspect is that it is the responsibility of the first notified NCA to send the *ECA Notice* and trigger the cooperation mechanisms; this is important because – as will be shown – one of the main strategies to fulfil the objectives of cooperation in multijurisdictional fillings is to try to align assessment timelines as far as possible among all the notified NCAs. Therefore, if the *ECA Notice* was sent by the second or third notified NCA, any possibility of timeline alignment would be hampered.

Once all the NCAs have been informed and the NCAs relevant to where the merger is to be notified have been identified, cooperation involving

6 The ECA Notice Model here presented corresponds to an updated and in-use version of the formally adopted Model of 2001 (cfr. European Competition Authorities, 2001). This updated version has not been published.

7 NCAs should maintain an up-to-date contact-person mailing list.

multijurisdictional fillings should develop subject to the following principles: *(i)* it should be restricted to NCAs where the merger is reviewable; *(ii)* the concerned NCAs should keep each other informed about whether a referral under Article 22 of the Merger Regulation [or even under Article 4(5)] may be an issue to consider. The same should occur accordingly by the European Commission as to the possibility of a referral under Article 9 [or even under Article 4(4)]; *(iii)* the concerned NCAs should liaise with one another and keep one another informed of their progress at key stages of their respective investigations; *(iv)* the concerned NCAs should use cooperation mechanisms to reduce the administrative burden on the NCAs and on the merging parties or third-parties; *(v)* the concerned NCAs should use their best efforts to ensure that cooperation leads to coherent (or, at least, non-conflicting) and consistent decisional outcomes. We will examine each of these in turn.

One preliminary note: cooperation is not an end in itself, but a means to achieve a coherent and consistent final decisional outcome for the same merger transaction notified in multiple jurisdictions. The concerned NCAs are not legally obliged to cooperate with each other every time a multijurisdictional filing occurs. Once the *ECA Notice* has been sent, the concerned NCAs will informally determine whether even contacting each other is in the best interest of a sound investigation and a final outcome. Therefore, as cooperation principles and mechanisms are at their disposal, it will be up-to the concerned NCAs to evaluate whether, how and when they can be used.

a) Cooperation beyond the ECA Notice should remain confined to those NCAs reviewing the merger[8]

The main reason is that cooperation resulting from a multijurisdictional filing should focus on those NCAs/jurisdictions where the merger will have a direct impact.

Issues such as defining the relevant market, the transnational impact of the merger (in particular when concerned jurisdictions neighbour each other), or the mere circumstance that discussions regarding remedies in one jurisdiction will have an impact on another may surely present food-for-thought to all ECA NCAs. However, when in the presence of a merger control review, time is-of-the-essence, and it would be neither efficient nor in the best interest of the concerned NCAs or the merging parties – which are suspending

8 The exception would be a third-NCA finding at a later stage that the merger should have been notified to it and was not (a gun-jumping situation).

the implementation of the transaction until all clearances have been obtained – to remain dependent on inputs by NCAs where the merger will not have an impact.[9]

Keeping cooperation in multijurisdictional filings confined to the concerned ECA NCAs has another purpose, which should not be undermined:

b) The fact that one or more of the notifiable[10] NCAs consider referring the assessment of the merger transaction to the European Commission, pursuant to Article 22 of the Merger Regulation,[11] ***or*** *vice-versa, from the European Commission to the NCAs, pursuant to Article 9 of the EU Merger Regulation,[12] will necessarily trigger close contact between them*

First and foremost, it is necessary to evaluate whether the European Commission is the best-placed authority to assess the merger, in accordance with the legal criteria established in Article 22(1) of the EU Merger Regulation. Or, in the case of Article 9, to evaluate whether the singularities of a particular jurisdiction are relevant enough to justify a deviation from the exclusive jurisdiction of the European Commission.

Secondly, it is necessary to evaluate whether the pan-EEA impact of the merger is significant enough to justify a single-entity assessment instead of a fragmented one, even though each individual concerned NCA may actively

9 This does not preclude the possibility for a concerned NCA to contact other NCAs (concerned or either) through specific mechanisms of the European Competition Network and pose a particular query on the case. This, however, is intended to aid the concerned NCA on a particular issue by recourse to comparative law or to the addreesse's past experience, and should not, on any situation, add an extra burden on the merging parties.

10 An important note is that Article 22 allows for the European Commission to accept referrals from NCAs irrespective on whether they had the power to review the case themselves. However, the European Commission very rarely accepts referrals based on these circunstances. This rather restrictrive approach to Article 22 – in the sense they are very rare – is expected to be revisited following an announcement by the European Commission's VP Margrethe Vestager, on september 11th 2020, in which the Commission plans to start accepting referrals from NCAs of mergers that are worth reviewing at the EU level irrespective on whether they (i.e. NCAs) had the power to review the case themselves [cfr: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en (accessed in December 2020)].

11 Or, eventually, even during a pre-notification stage, pursuant to Article 4(5) of the Merger Regulation, provided *(i)* that the merging parties do not oppose to a referral in such an early stage, in particular since it would involve confidentiality wayvers *vis-a-vis* NCAs and the Commission and *(ii)* that the concerned NCAs are straightforwardly identified and made aware that that particular merger will, sooner or later, be notified to it.

12 The same rationale of footnote 13, applies accordingly in the case of Article 4(4).

cooperate towards coherent and consistent investigations and a final outcome amongst themselves.

Third, if one or more of the concerned NCAs opts to oppose to the referral, the resulting parallel investigations will lead to a scenario equivalent to that of a multijurisdictional filing. This will require investigative NCAs and the European Commission to use their best efforts not to undermine each other's investigations and final outcomes, in particular if it leads to the implementation and monitoring of remedies with a broader impact than a national scope.

This is valid irrespective of which authority assesses and decides upon the merger, and the legal basis. In the cases of parallel investigations by both NCAs and the European Commission, under Articles 4(4), 9 and 22, the need for the relevant authorities to materially align their assessments and avoid conflicting outcomes makes ongoing cooperation even more important.

However, even following an Article 4(5) referral, the exclusive jurisdiction conferred to the European Commission to assess the merger should not underrate the need for cooperation with Member States, in particular with those concerned jurisdictions where the transaction would originally have been reviewable.

For these NCAs who voluntarily transferred their original jurisdiction to the European Commission, issues such as theories of harm and remedies should be taken into particular consideration by the European Commission in its assessment and in its final decision, as well as in responding in the Advisory Committee (pursuant to Article 19 of the EU Merger Regulation, where applicable).

c) Concerned NCAs should liaise with one another and keep one another informed of their progress at key stages of their respective investigations

In order to fulfil this objective, the *ECA Notice* provides a minimum of information related to the case, namely the date of notification to the first concerned NCA and a provisional deadline. Upon sharing this information with other NCAs – in particular with those where the merger is reviewable – the concerned NCAs should liaise with one another in order to try to align their respective investigative timetables as much as possible.

This measure implies combined efforts by both NCAs as well as by the merging parties and is not short of challenging obstacles. First, the merging parties would have to submit the individual merger notifications to the various NCAs almost simultaneously, which may not be as simple as it seems,

as each national jurisdiction has its own legal particularities and NCAs are legally bound to enforce them.

Second, the information provided for by the merging parties will need to be as complete and clear as possible, so that concerned NCAs are made aware of the full context of the merger transaction as early as possible in the proceedings (possibly even during pre-notification contacts). Therefore, the merging parties play an important role in informing and keeping the NCAs informed of all relevant aspects concerning the merger, which can contribute to a swift and sound assessment.

Third, the competitive contexts and conditions in jurisdiction A will certainly differ from those of jurisdiction B and from those of C. Therefore, aligning investigative timetables may pose difficult challenges, as one NCA may be ready to be formally notified, while that may not be the case in another NCA.

In any case, the main focus should therefore be that the concerned NCAs keep each other informed of the key stages of their respective investigations, namely on significant changes in deadlines to issue a decision, on the likelihood of the outcome of the first phase investigation and/or the decision to open an in-depth investigation, its outcome, as well as any discussion regarding remedies.

The topic of remedies is one of the most sensitive, particularly if it occurs in the context of multijurisdictional filings. As mentioned, the competitive conditions in jurisdiction A will likely differ from those of jurisdiction B. And even though it is the same merger transaction, NCA *x* and NCA *z* may need to impose remedies, while NCA *y* need not, and the remedies to be imposed by NCA *x* may substantively differ from those to be imposed by NCA *z*.

Therefore, it is of the utmost importance that the NCAs liaise with each other on the topic of remedies as soon as the concerned NCA identifies competitive concerns and starts to discuss possible solutions with the merging parties. Keeping each other informed on the progress regarding the discussion of remedies will contribute to a coherent and consistent final outcome on the assessment of the merger, as well as to a solution whereby each jurisdiction will have safeguarded its own competitive concerns as a result of the merger.

d) Concerned NCAs should use cooperation mechanisms to reduce the administrative burden on both NCAs and on the merging parties or third parties

The topic of administrative burdens is an ever-present issue, and one that NCAs are particularly sensitive to when it comes to merger control. NCAs

fully acknowledge that the need to halt the implementation of a merger transaction – sometimes for several months – due to an *ex-ante* assessment can cause uncertainty amongst market stakeholders and, more especially, to the merging parties.

With this in mind, NCAs employ their best efforts to minimise the administrative burden during the merger procedure by: (1) obtaining – as far as possible – the necessary information and data to conduct the assessment and to produce an outcome as rigorous as possible; (2) not to burden stakeholders – both the merging parties and third parties – with unnecessary requests for information; (3) adopting, as soon as possible, a final decision on the merger transaction, thus not delaying its final outcome beyond what is strictly necessary.

Naturally, these measures are much simpler said than done, as the NCAs and the merging parties are fully aware. And this is where cooperation mechanisms can play an important role.

As mentioned above, the first task for any NCA, when faced with a merger notification, is to determine whether it has jurisdiction to assess it. On most occasions, determining jurisdiction is relatively straightforward, but sometimes it may not be so; issues such as the nature of the transaction ("is it a merger for the purposes of competition law?"), can sometimes pose challenging questions that must be answered without ambiguity before the assessment per se even begins. In addition, questions as to the parties' activities, as to the relevant market (e.g. transportation costs and import-exports influencing the geographical dimension of the market), or as to items necessary to conduct the assessment may not be as simple as it appears due to insufficient data or a complete absence of data.

Cooperation between concerned NCAs may help clear many of these questions and challenges, simply by exchanging views on the subject or by sharing relevant information from one NCA to another. This latter solution can be particularly useful to NCAs who have difficulty in gathering information on a certain stakeholder located in another jurisdiction. If the merging parties or third parties show reluctance/difficulty in providing such information, the relevant NCA can only access it through the local NCA, which can only be done through close institutional cooperation.

One important aspect regarding the exchanging/sharing of information among concerned NCAs is that, unless the merging parties or third parties waive confidentiality, it should be confined to non-confidential information. This limitation can cause serious constrains on the effectiveness of

the cooperation mechanisms for obvious – although, quite often, legitimate – reasons, as on many occasions the level of exchangeable non-confidential information is either clearly insufficient or unable to provide a clear and intelligible perspective on what the NCA seeks to know.

In order to cope with such a limitation, the merging parties or third parties should feel encouraged to provide a waiver of confidentiality broad enough to meet all of the NCAs' needs to obtain the necessary information and data to assess the merger and to produce an adequate outcome.[13]

The merging parties or third parties may be reluctant to waive the confidential nature of their information to all NCAs, in particular as they then lose control over how the exchange takes place. However, what the merging parties should also consider in their reluctance to waive confidentiality is that, by allowing for the exchange/sharing of confidential information, and as long as NCAs confine the information strictly for the purposes of assessing that particular merger transaction, they are effectively helping to reduce the administrative burden that NCAs and the merging parties themselves (as well as third parties) have to bear. In fact, unless easily accessible through NCAs pursuant to waivers, the requesting NCA will have no alternative but to request it directly from the merging parties and third parties, which often implies the suspension of the term of the decision.

This option puts pressure on the requesting NCA because it will have to *(i)* determine what information it needs; *(ii)* produce a clear official request addressed to the merging and/or third-parties; *(iii)* wait for complete responses; *(iv)* analyse all the information and determine whether it suffices and, if necessary, renew the requests for new information or the completion of the previous ones.

On the part of the parties, they will have to understand what is being asked by the NCA (the scope of the request), duly organise the information and provide it to the NCA within the indicated timeframe and hope that the NCA considers it satisfactory.

All these steps on "both sides" are time and resource-consuming and almost certainly will delay the conclusion of the assessment and the adoption of a final decision. Confidentiality waivers for the exchange/sharing of information between concerned NCAs could represent, in sum, a major factor in

13 Although different waivers may vary, the format proposed by the ICN model waiver is recommended (https://ec.europa.eu/competition/ecn/icn_waiver_model_form_en.rtf).

reducing the administrative burden on both the NCAs and on the merging parties, as well as a way of speeding proceedings.

e) Concerned NCAs should use their best efforts to ensure that cooperation leads to coherent (or, at least, non-conflicting) and consistent decisional outcomes

This fifth principle represents the ultimate goal of cooperation in multijurisdictional filings and takes from all of the previous principles, in the sense that only if a coherent, pro-active and effective cooperation is put in place by all concerned NCAs will the risk of conflicting decisional outcomes be reduced or even eliminated.

Close and regular contact between fully informed officials from every concerned NCA, particularly at relevant key stages of the proceedings, cooperating on procedural (including whether a referral to the European Commission should be considered and why) as well as on substantive aspects (especially if remedies are a likely option) of the assessment will most likely reduce to a minimum the risk of inconsistent final outcomes.

However, as previously mentioned, cooperation is not an end in itself, but a means to achieve a coherent and consistent final decisional outcome for the same merger transaction notified in multiple jurisdictions. Concerned NCAs are not legally obliged to cooperate with each other every time a multijurisdictional filing occurs. Therefore, as cooperation principles and mechanisms are available, it will be up to the concerned NCAs to evaluate if and when they can be of use.

4. BENEFITS & CHALLENGES OF COOPERATION

4.1 Benefits triggered by the *ECA Notice*

Cooperation among Competition Authorities in multijurisdictional filings should always be a factor to consider.

The *ECA Notice* mechanism has been in place for almost 20 years, and it is fair to say that during that time it has been demonstrated to be a most valuable tool in multiple dimensions.

First, it is known for its practicability and informal use, with very little or no bureaucracy attached.

Second, the *ECA Notice* is deemed beneficial for the NCAs concerned, for the merging parties themselves and for third parties, as it namely reduces the administrative burden.

Third, it enables a very important exchange of information between NCAs, thus actively contributing to a coherent assessment of the merger case throughout the various jurisdictions and reducing the risk of conflicting decisional outcomes, in particular in the case of remedies.

Fourth, it also promotes the sharing of know-how in a particular sector by one NCA with other NCAs, as well as the exchange and discussion of different approaches to the case, thus contributing to a more enriched and informed assessment.

Fifth, it represents an extremely useful tool for NCAs to detect gun-jumping infringements, since it allows them to cross-check whether a specific merger notified in another jurisdiction should also have been notified to its own.

One can also say that the cooperation system triggered by the *ECA Notice* also benefits the internal market. Most particularly, by contributing to a coherent decisional outcome by all the concerned NCAs, it automatically contributes to a coherent application of merger control throughout the EEA, even though in individual national dimensions.

4.2 Challenges

As stated at the beginning of this article, the option to cooperate with one another is a prerogative conferred on NCAs. Even in the case of Articles 9 and 22, no Competition Authority – including the European Commission – is obliged to trigger the referral mechanism, or even adhere to it.

In addition, as a document of soft law, the Best Practices "(…) are intended to provide a non-binding reference for cooperation between NCAs. NCAs reserve their full discretion in the implementation of these Best Practices and nothing in this document is intended to create new rights or obligations which may fetter that discretion."[14]

Therefore, the first challenge is to advocate with NCAs the benefits of cooperating in multijurisdictional filings. Cooperation only delivers if it is used to the fullest by those who can benefit from it.

However, even if the Competition Authorities do cooperate with each other when multijurisdictional filings occur, the second challenge lies with how best to align the cooperation mechanisms, starting with what follows from the *ECA Notice*.

14 EU Merger Working Group, 2011: §1.3.

As seen above, aligning different timelines at key-stages of the procedure can be as important as it is difficult, given the specifics of each of the individual assessments and legal frameworks.

As merger proceedings can progress at different paces in different jurisdictions, due to differences in legal deadlines or merging parties notifying at different times in different jurisdictions, the issue of timing alignment is a challenge to the proper functioning of this system.

With this in mind, it will be up to NCAs to develop ongoing and regular contacts (equivalent to state-of-play contacts between the NCAs and the merging parties).

A third challenge relates to access to information from stakeholders – first and foremost, the merging parties, but also third parties – and to the (im) possibility of sharing confidential information amongst concerned NCAs. The difficulties related to obtaining a confidential waiver from the parties apply here in full.

5. CONCLUSION

Cooperation amongst Competition Authorities in multijurisdictional filings should always be a factor to consider.

The *ECA Notice* mechanism has proven to be an extremely useful tool in promoting consistency and avoiding conflicting assessments and final decisional outcomes in EU national merger control. This, however, is not short of challenges.

The *ECA Notice* is a simple instrument that, over the years, has allowed informal cooperation between NCAs in merger control proceedings. Although not perfect, it has proven to be mostly a successful tool and probably the key to its success is its simplicity. We hope that NCAs keep on using it and that merging parties contribute with waivers on confidentiality, information and time alignment in notifications for its intended purpose – cooperation and coordination.

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