



# INTERNATIONAL COOPERATION IN CIVIL INVESTIGATIONS

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**Effective Compliance Tools for Cross-Border Regulation**  
**October 15, 2012**

# Outline

- Exponential growth in antitrust enforcement around the world
- Benefits to the parties from agencies' cooperation
- When information exchanges matter
- Cooperation and confidentiality rules
- Myths about enforcement cooperation
- Bilateral agreements & international organizations

# Benefits to Parties from Cooperation

## Direct Benefits

- No need to produce documents multiple times (saves costs and time)
- Ensure complementarity of remedy obligations
- Can save agency resources and expedite the process (especially in non-merger cases)
- Analysis, especially by younger agencies, may benefit from such a dialogue

# Benefits to Parties from Cooperation

## Indirect Benefits

Cooperation promotes convergence towards best practices (note also the ICN SG Project on International Enforcement Cooperation)

# Multi-jurisdictional investigations

- When different agencies investigate the same merger or conduct, exchanges can be helpful to coordinate:
  - Timing
  - Market definition
  - Theories of competitive harm
  - Remedies





# Remedies that have cross-border effects

- Merger divestitures that take place or have effects in another country (can only divest a unit to one buyer)
- Early identification of reviewing agencies is helpful
- Conduct remedies that will affect competitive behavior abroad

# Cooperation and confidentiality rules

- Confidentiality laws protect:
  - Materials obtained under compulsory/voluntary process
  - In the U.S., all pre-merger filing documents and the fact of the HSR filing (unless parties revealed it; or ET)
  - Trade secrets and confidential commercial information  
§ 6(f) FTC Act
  - Trade secrets
- Information submitted to the FTC in an investigation, is exempt from disclosure under FOIA § 21(f) of the FTC Act.

# Cooperation and confidentiality rules

- Confidential treatment of parties' documents is crucial
- Cooperation instruments do not override on confidentiality rules



# Successful Approaches to Cooperation

1. Effective cooperation on the basis of publicly available or non-confidential information
2. Parties grant waivers of confidentiality
3. Building cooperative relationships and professional networks through liaison officers

# Public and Non-Confidential Information

- Some information must be kept confidential by law, but some may potentially be shared.
- In the United States:

## CONFIDENTIAL

- Information obtained from firms or third parties
- Merger filings
- Proposed remedies

## POTENTIALLY SHAREABLE

- Existence of investigation
- Agency theories about harm, markets, or remedies
- Industry studies and background

- **A lot can be accomplished without sharing confidential information**

# Waivers of Confidentiality

- In many cases, parties grant waivers of confidentiality to facilitate cooperation
  - More frequent when parties have incentives to cooperate (mergers), but not only
  - Parties decide whether to waive
  - No adverse consequences from failure to waive

# Waivers of Confidentiality (cont'd)

- ICN mergers Notifications and Procedures working group issued report with model waivers (FTC, DOJ, EC) and model waiver request text, available at:

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

- Modifications to the model language can raise difficulties and delays
  - Time consuming to negotiate
  - Revisions that “roadmap” the agency’s case
  - Certain things an agency can’t commit to

# Three Myths about Cooperation

## Popular Myths

- Lack of a formal cooperation mechanism prevents effective cooperation
- Cooperation requires a formal mechanism to make it work
- Cooperation only takes place among developed countries

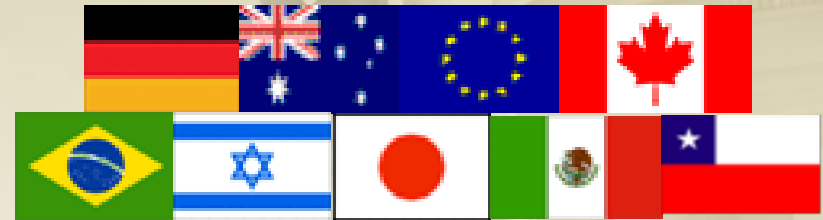
## Reality

- Effective cooperation happens every day, with and without a formal mechanism
- Cooperation requires mutual trust and strong relationships
- Cooperation takes place whenever common enforcement interests call for it

# Bilateral & Multilateral Instruments

The U.S. is party to

- 9 antitrust cooperation agreements



- 3 MOUs



- OECD Recommendation on Cooperation between Member Countries – framework for cooperation with 34 jurisdictions





# The benefits of bilateral agreements

- Provide a legal framework for cooperating
- For some agencies an agreement is a pre-requisite for speaking with other agencies
- An effective catalyst promoting a cooperative relationship

# Practicalities of Merger Cooperation

- 1. Identifying mergers with cross-border implications and the reviewing agencies as soon as possible.** E.g. parties or third parties identify voluntarily, sometimes on the pre-merger notification forms; media; contacting counterpart agency liaison officers; formal notifications under cooperation agreements
- 2. Seek the parties' cooperation.** In identifying other reviewing jurisdictions, and suggesting timing of filings in manner that maximizes opportunity for inter-agency coordination

# Practicalities of Merger Cooperation (cont'd)

- 3. Identify the affected product and geographic markets.**  
Staff may find it helpful to share their respective analyses, and learn from one another's prior expertise in an industry
- 4. Identify common enforcement interests,** so that cooperative efforts can be focused on overlapping enforcement interests
- 5. Seek waivers of confidentiality from the parties, as needed**

# Practicalities of Merger Cooperation (cont'd)

- 6. Share substantive analyses.** Usually done orally, over the phone. FTC staff can often share its competitive analysis without a waiver, as long as it does not include any information supplied by the parties or third parties
- 7. Identify and, to the extent permitted, share relevant evidence **if helpful****
- 8. Identify potential remedies, and coordinate the timeline.** In merger cases, the remedy is typically a divestiture. It is rare for settlement agreements to be reached simultaneously, but coordination is nonetheless extremely helpful