



**Asia-Pacific
Economic Cooperation**

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Agenda Item: 7

International Enforcement Cooperation in Civil Antitrust Investigations

Purpose: Information
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**INTERNATIONAL ENFORCEMENT
COOPERATION IN CIVIL ANTITRUST
INVESTIGATIONS**

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Outline

- Civil antitrust investigations
- Benefits from agencies' cooperation
- When information exchanges matter
- Cooperation and confidentiality rules
- Waivers of confidentiality
- Cooperation – “How to”

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Outline (cont'd)

- Myths about enforcement cooperation
- U.S. bilateral agreements & international organizations

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Civil Antitrust Investigations

- The FTC's competition enforcement mission involves civil enforcement in merger and conduct investigations (unilateral conduct and concerted practices)
- The U.S. DOJ has sole jurisdiction over criminal antitrust enforcement
- This presentation focuses on cooperation in civil investigations

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Benefits from Cooperation

Direct Benefits

- Seeks to ensure complementarity and practicality 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

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Benefits from Cooperation

Indirect Benefits

Cooperation promotes convergence towards best practices (note also the ICN Steering Group Project on International Enforcement Cooperation, and OECD Competition Committee International Cooperation Project)

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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



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When Information Exchanges Matter

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)
- Conduct remedies that will affect a company's behavior abroad
- Cooperation can also be helpful in cases that are ultimately closed

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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
- Information submitted to the FTC in an investigation, is exempt from disclosure under FOIA § 21(f) of the FTC Act

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Cooperation and confidentiality rules

- Confidential treatment of parties' documents is crucial
- Cooperation instruments do not override confidentiality rules
- However, 2nd generation cooperation agreements, such as the U.S.-Australia Mutual Antitrust Enforcement Agreement do override confidentiality rules

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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**

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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 declining to waive

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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>

- A model waiver saves work for agency and parties
- 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 cannot commit to

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Cooperation – “How to”

- Ask the parties whether they filed the same transaction elsewhere in the world, or whether they are being investigated by another agency for similar conduct
- Follow the general and antitrust media for news of parallel investigations
- Call or email liaisons at counterpart competition agencies, to ask whether their agency has a similar pending investigation; professional networks are helpful

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Cooperation – “How to”

- Focus on jurisdictions where the proposed deal or conduct appears to have the most effects
- Staff-to-staff cooperation
- Effective cooperation on the basis of publicly available or non-confidential information
- Parties grant waivers of confidentiality

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Myths about Cooperation

Popular Myths

- Lack of a formal cooperation mechanism prevents effective cooperation
- Cooperation only takes place among developed countries

Reality

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

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U.S. Bilateral & Multilateral Instruments

- 9 Antitrust Cooperation Agreements



- 3 MoUs



- 1 Mutual Antitrust Enforcement Agreement



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



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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

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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

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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**

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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

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