



**Asia-Pacific  
Economic Cooperation**

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Agenda Item: 7

## **Information Exchanges Between Antitrust Agencies: An FTC Perspective**

Purpose: Information  
Submitted by: United States



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**INFORMATION EXCHANGES BETWEEN  
ANTITRUST AGENCIES:  
AN FTC PERSPECTIVE**

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**Outline**

- Why cooperate with other agencies
- When information exchanges matter
- Balancing cooperation and confidentiality
- Successful approaches to cooperation
- Myths about enforcement cooperation
- Bilateral agreements & international organizations

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## Why cooperate with other agencies

- Ensure complementarity of remedy obligations (avoid conflicting outcomes)
- Can aid case analysis
- Can save valuable agency resources

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## When information exchanges matter

1. Conduct being examined by agencies of two (or more) economies
2. Investigations where witnesses or evidence are located in another jurisdiction
3. Remedies that may have a cross-border impact

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## Multi-jurisdictional investigations

- When different agencies investigate the same conduct, exchanges can be helpful to coordinate:
  - Timing
  - Market definition
  - Theories of anticompetitive harm
  - Remedies
- Are impacts on markets similar?
  - Sometimes agencies can rely on remedies obtained in another jurisdiction, to the extent such remedies adequately address their anticompetitive concerns.



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## Information Located Abroad

### Options can be difficult

- A voluntary document production
- A production by compulsory process through domestic affiliates
- The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (time-consuming, cumbersome)



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## Information Located Abroad

### In addition

- We can always exchange publicly-available information. That is often sufficient.
- Exchange of confidential information with sister agencies where the parties grant waivers
- Production through cooperation agreements or treaties may be possible in certain cases, e.g.,
  - Among jurisdictions with common institutions or closely shared interests (EC, Nordic Competition Authorities)
  - Under general MLAT treaties (criminal)
  - Antitrust-specific agreements – The U.S. has just one (with Australia)

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## Remedies that have cross-border effects

- Merger divestitures that take place or have effects in another economy
- Early identification of reviewing agencies is helpful
- Conduct remedies that will affect competitive behavior abroad
- The law of unintended consequences
- Cooperation is critical

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## Balancing cooperation and confidentiality

- Confidentiality laws protect:
  - Materials obtained under compulsory/voluntary process
  - Confidential commercial information
  - Trade secrets
- Firms have better incentives to cooperate voluntarily if they are confident about confidential treatment of their documents.
- Cooperation instruments do not impinge on 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 background

- You can accomplish a lot without sharing confidential information.

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## Successful Approaches to Cooperation

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

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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 also in non-merger matters
  - Parties decide whether to waive
  - No adverse consequences from failure to waive
- ICN mergers working group issued report with model waivers and national waivers.
- Model waivers available on FTC and DOJ websites.

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## 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 economies

### 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

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## Bilateral & Multilateral Instruments

The U.S. is party to

- 9 antitrust cooperation agreements
- 2 MOUs
- OECD Recommendation on Cooperation between Member economies – a 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
- Help develop mutual trust
- An effective catalyst promoting a cooperative relationship

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