



**Asia-Pacific
Economic Cooperation**

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Agenda Item: 6

Cross-Border Cooperation

Purpose: Information

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Cross-border Cooperation



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*The views expressed are those of the speaker and not of the Commission or any individual Commissioner

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Benefits of Cooperation

- **Direct Benefits**
 - *Seeks to ensure complementarity and practicality of remedy obligations.*
 - *Can save agency resources and expedite the process*
 - *Analysis may benefit from staff dialogue*
 - *When different agencies investigate the same merger or conduct, exchanges can help to coordinate: timing, market definition, theories of competitive harm, remedies*

- **Indirect Benefits: Cooperation promotes convergence toward best practices (note also the ICN Steering Group Project on International Enforcement Cooperation, and OECD Competition Committee International Cooperation Project.)**

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Cooperation Important for Remedies

- **When conduct remedies will affect company's behavior abroad.**
- **When merger divestitures that take place or have effects in another country.**
 - *E.g., A wants to buy B. FTC tells A wants to buy B. FTC approves on the condition that B spins off one of its product lines to an approved party . B finds C, a buyer interested in acquiring the product line. FTC approves the divestiture of the division to C. B and C must notify countries, X, Y and Z, that are all affected and must wait for approval. Because FTC staff has already conducted a lengthy investigation, it may be able to speed up X, Y and Z's investigation, especially if A, B and C have granted confidentiality waivers to FTC and B and C have granted confidentiality waivers to countries X, Y and Z.*

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Cooperation and Confidentiality Rules

- **U.S. confidentiality laws protect:**
 - *Materials obtained under compulsory or voluntary process*
 - *All pre-merger filing documents*
 - *The fact of the filing (unless parties reveal it; or early termination)*
 - *Trade secrets and confidential commercial information, Section 6(f), FTC Act.*
- **The U.S. Freedom of Information law that gives private citizens rights to certain information in government files does not extend to information submitted to the FTC in the course of an investigation. Section 21(f), FTC Act.**

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Cooperation and Confidentiality Rules

- *Cooperation MOU's or other instruments do not override rules protecting confidentiality of documents and information.*
- *However, the U.S. Congress did pass legislation, the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. Sections 6201-12 that does allow sharing of confidential information with Australia.*

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Public and Non-Confidential Information: Examples of Confidential vs. Shareable

- | | |
|--|---|
| <ul style="list-style-type: none">■ Confidential:<ul style="list-style-type: none">□ <i>Information obtained from firms or third parties</i>□ <i>Merger filings</i>□ <i>Proposed remedies</i> | <ul style="list-style-type: none">■ Shareable:<ul style="list-style-type: none">□ <i>Existence of investigation</i>□ <i>Agency theories about harm, markets, or remedies</i>□ <i>Industry studies and background</i> |
|--|---|

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Waivers of Confidentiality

- ***In many cases, parties grant waivers of confidentiality to facilitate cooperation***
 - *They are more common when parties have an incentive to cooperate (mergers); Parties make the decision*
 - *No adverse consequences from declining to waive*
- ***ICN mergers Notification 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 be time consuming to negotiate

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FTC-DOJ Model Waiver of Confidentiality

- ***On September 25, 2013, the FTC and DOJ jointly released a model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities.***
- ***The Model Waiver states that the Agencies will treat information obtained from a non-U.S. competition authority as if the FTC or DOJ “requested it directly from [the entity] and obtained it under the Confidentiality Rules” of the respective Agencies***
- ***The Agencies and the recipient non-U.S. competition authority will have a common understanding in place, e.g., through bilateral or multilateral arrangements, that the non-U.S. competition authority receiving the Confidential Information will protect its confidentiality.***
- ***A copy of the Waiver and FAQs are on the FTC’s public webpage***

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Putting Cooperation Into Practice

- *Ask the parties if they filed the same transaction elsewhere in the world, or if they are being investigated by another agency for similar conduct*
- *Follow the general antitrust media for news of parallel investigations*
- *Call or email liaisons at counterpart competition agencies to ask if their agency has a similar pending investigation*
- *Focus on jurisdictions where the proposed deal or conduct appears to have the most effects*
- *Cooperate at the staff-to-staff level*
- *Cooperation is based on public or non-confidential information, unless the parties grant waivers of confidentiality*

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Putting Cooperation into Practice

- *Learning of the transaction and the reviewing agencies*
 - *Media, securities filings, website, parties*
- *Initial discussion(s)*
 - *Determining/coordinating review timetables*
 - *Initial thoughts on markets, potential competitive effects, possible common interests*
 - *Possible waivers*
- *Continuing Dialog*
 - *Refine views on competitive effects and their scope*
 - *Discussion of Remedies*

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Benefits of Bilateral Agreements

- *Bilaterals provide a legal framework and a catalyst for cooperation*
- *Some agencies require an agreement before they can speak to another agency*
- *FTC has bilateral agreements with nine jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, Japan (1999); Mexico (2000); and Chile (2011)*
- *They allow sharing non-confidential but non-public information such as the existence of an investigation*
- *FTC has MOUs with: Russian Federation Anti-Monopoly Service (2009), the three Chinese Anti-Monopoly Agencies (2011); and the Ministry of Corporate Affairs (Government of India) and the Competition Commission of India (2012)*

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Cooperation in Trade Agreements

- *Language that encourages cooperation is found in some trade agreements:*
 - *NAFTA*
 - *U.S./Colombia agreement*
 - *Other bilateral agreements (Chile, Peru)*
- *But day to day cooperation takes place between authorities under bilateral or informal mechanisms*



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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**
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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Conclusion

- **For more information about cooperation, see the U.S. submission to the OECD, Discussion on International Cooperation available at:
http://ftc.gov/bc/international/docs/062012International_coop_U%20S.pdf.**
- **An informal mechanism supporting FTC cooperation is the Recommendation of the OECD's Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade available at:
<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False>**

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