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**Modalities and Procedures for International
Cooperation in Competition Cases Involving
more than one Country**

**Contribution
by
United States**

The views expressed are those of the author and do not necessarily reflect the
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I. Introduction

1. International cooperation has been the subject of detailed surveys conducted in tandem by the OECD Competition Committee and the International Competition Network.¹ These surveys were inaugurated in July of 2012 and their results were announced earlier this year. Ultimately, 57 responses were received from 55 jurisdictions; 46 of those responses were from OECD Members or Observers, 11 were not. The U.S. Federal Trade Commission (“FTC”) and Department of Justice Antitrust Division (“DOJ”) (together, “U.S. Agencies”) responded to the survey. They also submitted two papers on cooperation issues to the OECD last year, one on the general topic of cooperation, and one on cooperation in criminal matters,² and hosted the ICN Roundtable on Enforcement Cooperation. This note will include a summary of the OECD and ICN work as well as summarize the experience of the U.S. Agencies, particularly as concerns enforcement cooperation.

2. The U.S. Agencies believe that cooperation between and among national competition authorities is an important way to make enforcement efforts more efficient, consistent and thorough, especially now that many investigations involve international aspects.

II. Objectives of Cooperation

3. Globalization has increased the prevalence of investigations by the U.S. Antitrust Agencies that involve multinational companies and markets. At the same time, the number of competition agencies around the world has increased exponentially, from approximately 20 in 1990 to roughly 130 today. In the merger context, an increasing number of jurisdictions require pre-merger notification and mandate waiting periods, and interagency cooperation could reduce delays and conflicting results.

¹ See “OECD Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation”, available at <http://www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm>; and “ICN report on OECD/ICN questionnaire on international enforcement Cooperation”, available at http://icnwarsaw2013.org/docs/icn_04-05-13_icn_report.pdf.

² See “Discussion on International Cooperation,” submitted to Working Party NO. 3 of the Competition Committee, June 12, 2012, available at: http://www.ftc.gov/bc/international/docs/062012International_coop_U%20S.pdf and “Improving International Cooperation in Cartel Investigations,” submitted to the Global Forum on Competition, January 31, 2012, available at: <http://www.justice.gov/atr/public/international/286282.pdf>.

4. International cooperation plays a critical role in the U.S. Agencies' antitrust enforcement. The U.S. Agencies are committed to facilitating cooperative relationships with non-U.S. enforcement agencies and promoting cooperation with jurisdictions around the world on both investigations and policy matters, whether related to mergers, unilateral conduct, or cartel matters.³

5. The U.S. Agencies pursue international cooperation because it furthers their enforcement interests. The U.S. Agencies' objectives include improving the effectiveness of individual agency investigations, promoting consistent case outcomes, and, where appropriate, coordinated remedies. Such cooperation may also contribute to substantive and procedural convergence, which can build trust and encourage further cooperation.

6. The U.S. Agencies' bilateral relationships and participation in multilateral organizations further policy development, cooperation, and may facilitate convergence. To further bilateral relationships, the U.S. Agencies have provided international technical assistance on competition law and policy matters to governments and competition authorities in developing and transition economies since 1991. Through technical assistance programs, the U.S. Agencies provide comprehensive assistance that fosters trust and continuing relationships between agencies, which has contributed and should continue to contribute to effective case cooperation. While non-enforcement cooperation is important, the remainder of this paper refers primarily to enforcement cooperation.

III. The Findings of the OECD/ICN Reports: Cooperate more often

7. At present, most active cooperation takes place between established authorities in OECD countries. The OECD report on the recent OECD/ICN survey shows that about half of the respondents reported having some experience with cooperation, while the other half reported no experience, outside of regional experience. Of those agencies reporting experience with cooperation, just seven (all from OECD Member jurisdictions) reported frequent or regular cooperation. This suggests that there is room for increased cooperation among agencies, especially non-OECD members. A number of obstacles to cooperation were raised in the survey, such as legal limitations, resource constraints, differing legal standards, and mutual lack of experience. Nonetheless, 84 % of respondents identified cooperation as a policy priority.

8. The short additional survey report circulated by the ICN showed particular support for cooperation in cartel investigations, with similar levels of support for cooperation in merger matters. There was less need seen for cooperation in abuse of dominance inquiries.

³ Hard core cartels are within the jurisdiction of the DOJ. References to criminal cartel investigations and enforcement in the U.S. Agencies' responses refer only to the DOJ.

9. The OECD report included tables that showed the statistical distribution of responses, the nature of the objectives pursued, the types of legal bases available to agencies, levels of experience with cooperation in different types of matter, a ranking of limitations and constraints on cooperation, and OECD priorities for future work.

10. For example, the OECD report identified eight major types of objectives pursued by cooperating agencies, ranging from capacity building to facilitating investigations to efficiency and transparency. The report also noted that many respondents found prior OECD recommendations and best practices useful as general guidance in the pursuit of cooperation. The report noted that 17 respondents found current incentives for cooperation to be sufficient, 20 found them to be insufficient, and 17 had no opinion. A few respondents identified ways in which incentives could be improved, such as development of “more practical” procedures, facilitation of information sharing, and strengthening legal provisions and protections. The ICN report showed that numerous survey respondents found future work on cooperation topics, including information exchange, to be a high priority and that most had found on-going ICN work in this area to be quite useful.

11. Confidential information may be crucial to successful cooperation in many instances, but protections for the exchange of such information must be rigorous and reliable. As the OECD report stated:

Exchanges of information, and in particular of confidential information, between enforcers is a key area for improvement. Many respondents suggested that agencies should agree on a clearer legal framework for the exchange of confidential information.⁴

12. Reforms in the area of confidentiality waivers are one way to foster more valuable cooperation, but “structural solutions” are also likely needed. In general, the report does not suggest that the way forward to address this issue is the weakening of confidentiality rules. The report posits three critical questions to be answered in order to develop an effective legal framework for confidential information exchanges:

- “what type of information can be exchanged and what type of information cannot be exchanged;
- the conditions for the transmission of confidential information to another enforcement agency; and

⁴ OECD Secretariat Report, *supra* note 1, at 22.

- what use the receiving agency can make of the confidential information received.”⁵

Future OECD work to develop a model agreement on information exchange is a top priority identified by survey respondents.

13. In many cases, agencies are able to cooperate effectively without exchanging confidential information. For example, they may be able to coordinate investigations by discussing publicly available information or information that is not covered by confidentiality statutes.

IV. The United States Agencies’ Experience⁶

14. The U.S. Agencies routinely work on dozens of investigations with an international dimension, many of which involve cooperation with competition agencies in other jurisdictions. During FY 2011 alone, the FTC had almost 50 substantive contacts and cooperated on 20 merger matters (of which 12 were completed within that fiscal year) and four conduct investigations. During the same year, the DOJ cooperated with international counterparts on 17 merger reviews. The DOJ also works with many competition agencies around the world on criminal and conduct matters.

15. The U.S. Agencies cooperate with international counterparts pursuant to formal bilateral⁷ and multilateral⁸ arrangements, although enforcement cooperation also takes place in their absence. Investigational staff consider international aspects “right from the start of an investigation through to the remedial stage.”⁹ The U.S. Agencies are “working hard to establish ‘pick-up-the-phone’ relationships with the increasing number of agencies around the world that have an interest in working with us to investigate a

⁵ *Id.* at 23.

⁶ This section is abridged from the 2012 OECD submission cited in footnote 1, *supra*. Detailed citations to matters discussed herein can be found in that document.

⁷ The United States has bilateral cooperation agreements with nine jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); and Chile (2011), and the Agencies entered into Memoranda of Understanding with the Russian Federal Anti-Monopoly Service (2009), the three Chinese Anti-Monopoly agencies (2011) and India (2012). In addition, the United States is party to approximately 70 MLATs, which are treaties of general application pursuant to which the United States and another country agree to assist one another in criminal law enforcement matters. The United States is also a party to an antitrust-specific mutual legal assistance agreement with Australia, an agreement authorized by domestic legislation. See International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.*

⁸ The 1995 OECD Council Recommendation on antitrust enforcement cooperation (“OECD Cooperation Recommendation”), long a core document of international cooperation, provides general guidance for member countries to follow when an investigation or proceeding may affect another member’s important interests.

⁹ Rachel Brandenburger and Randy Tritell, Global Antitrust Policies: How Wide is the Gap?, Concurrences No 1-2012, p. 6, available at <http://www.justice.gov/atr/public/articles/282930.pdf>.

merger, possible anticompetitive unilateral conduct, or cartel activity.”¹⁰ Generally, the U.S. Agencies and their counterparts can share any information that their laws do not prohibit them from sharing, and each authority must maintain the confidentiality of information received from parties and third parties, pursuant to its own rules and governing laws. The U.S. Agencies can also share information provided to them where there has been a waiver of confidentiality by the submitter. Indeed, parties to merger investigations routinely waive statutory confidentiality protections to facilitate inter-agency cooperation, and increasingly are doing so in unilateral conduct investigations. The U.S. Agencies have found that waivers can play an important role in facilitating their investigations and contributing to consistent outcomes. Cooperation can also be informal and *ad hoc*, involving exchanges of public information and background knowledge or even exchanges of agency personnel.¹¹

A. Cooperation in Individual Matters

16. Below, we identify selected recent merger, conduct, and cartel cases in which the U.S. Agencies cooperated with international counterparts.

1. Cooperation in Specific Merger Cases

17. In 2011 and 2012, the FTC engaged in substantive cooperation with ten non-U.S. antitrust agencies, including newer authorities, reviewing Western Digital Corporation’s proposed acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies. The cooperating agencies included those in Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey. The parties granted waivers on a jurisdiction-by-jurisdiction basis. Throughout the review, FTC staff and staff of each of the non-U.S. authorities worked together closely, on a bilateral basis, which involved significant time and resources. The extent of cooperation with each agency varied, generally depending on the nature of the likely competitive effects in the jurisdictions, and ranged from discussions of timing and relevant market definition and theories of harm to coordinating compatible remedies that addressed competitive concerns in multiple jurisdictions. Of note, only a limited number of cooperating agencies on the matter took formal remedial action.

18. In the 2010 *Agilent/Varian* merger, involving the leading global suppliers of high-performance scientific measurement instruments, FTC staff cooperated closely with staff of the competition agencies of Australia, the European Union, and Japan to

¹⁰ *Id.*

¹¹ See speech, Patricia Brink, Director of Civil Enforcement, Antitrust Division, U.S. Department of Justice, “International Cooperation at the Antitrust Division: a View from the Trenches,” Chicago, April 19, 2013, available at <http://www.justice.gov/atr/public/speeches/296073.pdf>.

coordinate their respective reviews of the merger. This cooperation, aided by waivers provided by the merging parties, resulted in coordinated remedies, with the Japan Fair Trade Commission closing its investigation after concluding that remedies the FTC and the EC obtained were sufficient to resolve any competitive concerns in Japan.

19. DOJ has significant cooperation experience as well. For example, DOJ and the European Commission both investigated Google's acquisition of Motorola Mobility. The two agencies worked closely together and announced their decisions within a few hours of each other. The focus of the respective investigations was the transfer of ownership to Google of Motorola's portfolio of patents that Motorola committed to license through its participation in standard setting organizations, and how the acquisition affected the ability and incentives to follow those commitments. DOJ also had discussions about the merger with the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the Israel Antitrust Authority, and the Korea Fair Trade Commission.

20. Another example is DOJ's close cooperation with the European Commission and the Canadian Competition Bureau during its investigation of the merger of UTC and Goodrich. This cooperation led to a coordinated resolution that will preserve competition in the United States and internationally. As originally proposed, the merger would have led to competitive harm for several critical aircraft components, including generators, engines, and engine control systems. Cooperation among enforcers was—and will continue to be—essential to ensure that the complicated remedies imposed in this case are instituted in a manner that best serves consumers and competition. The business divestitures concern assets located in the United States, Canada, and the United Kingdom, and the provisions ensuring smooth transition of the divested assets will affect ongoing business relationships in multiple jurisdictions.

2. Cooperation in Conduct Investigations

21. There are fewer opportunities for agencies to cooperate in conduct investigations than in merger reviews. As noted in the report for the 2011 ICN Roundtable on Enforcement Cooperation, “[s]everal reasons for the limited opportunity to cooperate in this area were suggested, notably that: there are few unilateral conduct cases pursued in each jurisdiction; these cases often are domestic in nature; and, the timing of the various investigations into a matter is often differentiated.”¹² Over the past few years, however, the U.S. Agencies have cooperated with international counterparts on several investigations involving potentially anticompetitive unilateral conduct.

¹² See ICN Roundtable on Enforcement Cooperation, Roundtable Report, March 29, 2011, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc793.pdf> at 5-6.

22. For example, in 2010, the FTC settled charges against Intel Corp. that the company illegally stifled competition in the market for computer chips. Staff of the FTC and DG Competition exchanged views on theories of harm and methods of economic analysis during their investigations all the way up to their enforcement decisions.

23. In its recent investigation of illegal conduct in the *E-books* industry, the DOJ worked closely with DG Competition throughout the course of the investigation, with frequent contact between investigative staffs and the senior officials.

3. Cooperation in Cartel Investigations

24. In cartel investigations in particular, the DOJ engages in both formal and informal cooperation.¹³ This has included, where not restricted by confidentiality rules, the sharing of leads and background information about the relevant industry and actors, notification of initial investigative actions and the coordination of inspections and interviews.

25. The most common form of informal cooperation in cartel investigations occurs between agencies with the same leniency applicant. When the DOJ receives a leniency application, the DOJ asks whether the applicant has also approached other jurisdictions and requests a confidentiality waiver to discuss the application and the substance of the information provided. If granted a waiver, the DOJ contacts the other jurisdiction(s) and discusses issues such as the scope of the conduct, what effects the conduct may have had in each jurisdiction, what evidence is likely to exist in each jurisdiction, future plans for investigating the matter, and investigative strategies. The DOJ regularly coordinates searches, service of subpoenas, drop-in interviews, and the timing of charges in each jurisdiction in order to avoid the premature disclosure of an investigation and the possible destruction of evidence. Even if the leniency applicant does not provide a waiver, the DOJ may still contact the other jurisdiction(s) to coordinate generally without disclosing information provided by, or the identity of, the leniency applicant.

26. At the investigative stage, much of the cooperation in which the DOJ engages takes the form of formal requests for assistance pursuant to MLATs or letters rogatory. Such requests usually seek corporate documents and, less frequently, witness interviews. The DOJ has occasionally been requested to provide information in the post-investigative stage. This has involved providing copies of public court filings after a case is filed and, in some instances, providing access to non-public information that is not statutorily protected or otherwise entitled to confidential treatment. The DOJ also has cooperated with other agencies on the filing of charges.

¹³ Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Address at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

27. In the large and ongoing international *Auto Parts* cartel investigation, the DOJ has coordinated with enforcement agencies on three continents that are investigating similar conduct. In the DOJ's *Marine Hose* investigation, while eight executives from France, Italy, Japan, and the United Kingdom were arrested in the United States in May 2007 for their role in a conspiracy to fix bids, fix prices, and allocate markets for U.S. sales of marine hose used to transport oil, competition authorities in the United Kingdom Office of Fair Trading ("OFT") and the EC were also executing search warrants in Europe. Three of these executives, all British nationals, entered plea agreements in the United States in December 2007, agreeing to jail sentences and fines, and were then escorted in custody back to the United Kingdom to allow them to cooperate with the OFT plead guilty to a cartel offense, and serve their prison sentences in that jurisdiction. The DOJ also recently worked closely with Brazil on a cartel investigation involving commercial compressors used in devices such as water coolers and vending machines, a case that affected both jurisdictions.

B. Recent Developments -- Cooperation Tools

28. In order to facilitate cooperation and further strengthen direct relationships between the U.S. Agencies and their international counterparts, in the past several years the U.S. Agencies entered into additional cooperative arrangements. In 2009, the U.S. Agencies entered into their first direct agency-to-agency Memorandum of Understanding ("MOU"), with the Russian Federal Antimonopoly Service ("FAS") in November 2009. The purpose of the MOU is to promote greater cooperation and further strengthen the relationships between the U.S. Agencies and the FAS through technical cooperation and regular communication. In March 2011, the Agencies entered into an agency-to-agency agreement with Chile's competition enforcement agency, the Fiscalía Nacional Económica. The U.S. Agencies signed an MOU with the three Chinese Anti-Monopoly agencies in July 2011, which also provides for periodic high-level consultations among all five agencies as well as cooperation channels between individual agencies. In September 2012, the U.S. Agencies entered into an MOU with the Competition Commission of India and the Ministry of Corporate Affairs, which encourages cooperation and communication in appropriate cases and periodic meetings among officials.

29. The U.S. Agencies have also developed other types of cooperation mechanisms. In 2011, the U.S. Agencies and DG Competition updated their Best Practices on Cooperation in Merger Investigations. The Best Practices, originally issued in 2002, were revised in light of the agencies' practical experience and provide an advisory framework for cooperation when a U.S. Agency and DG Competition review the same merger. The main purposes of issuing the revised Best Practices were (1) to be transparent about the agencies' cooperation – including when and what they communicate with one another and their aim at compatible outcomes and (2) to suggest how merging parties and third parties can facilitate coordination and resolution of those reviews. In addition, the Best Practices address the complexity of coordinating merger review timetables between the

authorities and emphasize the need for coordination among the agencies at key stages of their investigations, including the final stage when agencies consider potential remedies to preserve competition. The Best Practices also recognize that more authorities have become more engaged in the review process, requiring coordination with a larger number of agencies.

30. The U.S. Agencies and the Chinese Ministry of Commerce (“MOFCOM”) also issued Guidance for Case Cooperation in 2011. The Guidance provides a framework for cooperation when MOFCOM and one of the U.S. Agencies review the same merger. The document recognizes that case cooperation between the investigating agencies may help improve the efficiency of their investigations, and thereby maintain competition in their jurisdictions.

V. Conclusion

31. Much work has been accomplished by multilateral bodies and by agencies themselves on cooperation topics, but considerable work remains. Studies, surveys and recommended best practices all have the potential to be helpful. However, the best way to enhance international cooperation may simply be to do it more often, learning by experience and gaining trust and confidence.