Round Table on: Informal Cooperation among Competition Agencies on Specific Cases

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Informal Cooperation: a Private Sector Perspective

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Informal Cooperation and Private Parties

• Where you stand often depends on where you sit
  • Merging parties
  • Cartel/abuse of dominant defendant
  • Complainants, other third parties

• Regardless...
  • It’s all about incentives/consequences and trust
  • Informal international cooperation is gaining traction as experience (public and private) develops
Informal Cooperation

- **Non-confidential information**
  - Agencies engage in direct agency-to-agency exchanges of non-confidential information without any recourse to the parties.
  - A good example – the merger control context, informal sharing often involving:
    - public information; analysis; market definition; economic theories of harm; empirical evidence needed to test theories; remedies; procedure/timing.
    - See the UNCTAD Secretariat Note “Informal Cooperation Among Agencies in Specific Cases” and “US-EU Best Practices on Cooperation in Merger Investigations”.

- **Confidential information**
  - But to get deeper and more detailed information which can facilitate better cooperation, disclosure **waivers** from private parties are often needed.
  - The OECD/ICN 2013 Report found that waivers were **the most frequently cited** assistance tool used by agencies with experience in cooperation.
Incentives for Private Parties to Grant Waivers

- Private parties may be amenable to a waiver request where it makes sense for that case as there are many incentives and benefits, as waivers can:
  - Save us time, money, avoid duplication on data/info supply;
  - Help us to get everyone on the same page/same terms;
  - Help us tell our global story in a coordinated/efficient manner;
  - Sometimes allow a “lead” agency to help the others which can focus and expedite an investigation;
  - Help us coordinate procedure/remedies where necessary;
  - Ultimately help facilitate convergence in approach and consistency in decision-making.
Disincentives for Private Parties to Grant Waivers

• But where private parties and their counsel may be hesitant is where we are unsure as to:
  • The position of the country in question with regard to the handling of our information by the enforcement agency:
    • Can it be used for other enforcement proceedings? Other agencies?
    • Can it be accessed by third parties?
  • The country’s confidentiality protections and treatment of legal privilege;
  • The country’s track record with regard to leaks of confidential information;
  • The relevancy of the information that may be requested.

• Also, cartel cases are special:
  • Criminal liability
  • Relevancy and sensitivity of information
  • Some agency reluctance too...
  • Leniency/immunity applicants
5 Tips for Creating a Waiver-Friendly Environment

- Agencies, in particular the large number without limited international cooperation experience, can build an “environment” of trust for the granting waivers by:
  1. Clarifying their protection rules/policies by issuing public statements or waiver guidelines.
  2. Producing or following existing model/template waivers, such as the ICN, EC and US model waivers for merger investigations, and the recently published ICN cartel waiver model.
    - See the “Informal Cooperation Resource” document created for this session
  3. Making public the agency’s strong record of maintaining confidentiality.
  4. Engaging in waiver “advocacy” - explaining to the local private bar and business community the incentives and benefits of waivers, as well as clarifying the agency’s policies on confidentiality and use.
  5. Generate a track record first in mergers cases.

- If your agency can take these steps, it will help private parties to engage seriously in discussing and granting waivers with you.
A Word of Encouragement to New/Emerging Agencies on International Cooperation

• OECD/ICN 2013 Report on International Cooperation
  • The Report indicates that international cooperation is a **still emerging and developing area**.
  • Of those agencies experienced in international cooperation, the Report found cooperation to be increasing, expanding and positive.
  • The attitude toward cooperation regionally/ internationally is more positive and constructive than ever before.
  • The survey found that merger control was the **most productive area** for cooperation and waivers are a key tool to informal cooperation.
So, Now is a Good Time to Engage...

- For the many agencies that have not been involved in international cooperation (young and experienced) the message is: you haven’t missed the boat and you are not behind with regard to cooperation.

- So, it is a good time to engage on the subject and benefit from it:
  - Interest is high - as shown by the 2013 OECD/ICN Report and the heightened attention to the subject at UNCTAD, OECD, ICN and bi-laterally between agencies.
  - It is being developed and you can be a part at the start.
Thanks!

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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.