

**Intergovernmental Group of Experts on Competition Law and
Policy, Fourteenth Session**

Geneva, 8-10 July 2014

Roundtable on:
**Informal Cooperation among Competition
Agencies on Specific Cases**

**Contribution
by
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Forms of informal cooperation

Competition law cases have often an international dimension, as a consequence of increasing international trade and global supply chains¹. Moreover, the number of jurisdictions with competition law enforcement has increased from fewer than 20 in 1990 to almost 130 today.

Absent cooperation, competition law enforcement might generate substantive disagreements between different agencies and create scope for international friction and/or inconsistency.

In case of global mergers, the largest jurisdictions can block or impose conditions on the merger, with global consequences, whereas smaller jurisdictions might be unable to prevent or effectively remedy the effects of a global merger in their territory.

Similarly, global cartels and abuse of dominance cases might face parallel investigations, with some jurisdictions better placed to prosecute the behaviour. For example, when the cartel has effects in one jurisdiction, but several of the firms involved are headquartered elsewhere, enforcement might be complex and inconsistent.

While there is no generally agreed distinction between formal and informal cooperation but there is a continuum of forms of cooperation², we can consider that cooperation is informal when it does not depend on the use of legislative instruments and treaties. As a consequence, informal cooperation typically falls short of some key activities, such as the exchange of confidential information, which can only take place if a formal legal instrument expressly allows for them.

We can distinguish two main areas of informal cooperation: general cooperation and enforcement cooperation.

General informal cooperation encompasses technical assistance and capacity building projects, as well as all other forms of dialogue among the enforcers (e.g., study visits, international seminars), which increase competition know-how and set the ground for future enforcement cooperation.

Enforcement cooperation is more specific and occurs when two competition agencies exchange information with the objective of facilitating case investigations. It can either take place when an agency conducting an investigation requires case-related evidence or background information from another agency, or concern parallel investigations if both agencies are simultaneously dealing with the same conduct in different countries.

The experience of the Italian Competition Authority

The Italian Competition Authority has developed a long experience both in general and enforcement informal cooperation.

With regard to general informal cooperation, the Italian Competition Authority has developed a long experience in technical assistance, particularly in the framework of capacity building projects funded by the European Commission. Notably, it carried out eight long-term (one or two-year) Twinning Projects in Eastern Europe and North Africa and hosted several study visits. It also

¹ As highlighted by UNCTAD Secretariat in its note circulated in preparation for this Round Table and by OECD in its surveys. In recent years, more than 90% of fines against cartels by the US authorities have been international. The number of cartel cases investigated in the European Union with a participant from outside the EU, has increased more than 450% since 1990. Mergers of companies with global operations involving similar products and overlapping territories (i.e. with cross-border dimensions) have increased by about 250%-350% since 1990. (*OECD, International Co-operation in Competition Law Enforcement, Meeting Of The OECD Council At Ministerial Level, Paris, 6-7 May 2014*).

² *OECD, International Co-operation in Competition Law Enforcement, Meeting Of The OECD Council At Ministerial Level, Paris, 6-7 May 2014*, paragraph 33.

participated in projects coordinated by the European Commission addressed to China and India. Moreover, the Italian Authority is conducting a Light Twinning with the Maltese Competition Authority and has informal cooperation agreements in place with FAS Russia and the Albanian Competition Authority.

As far as enforcement cooperation is concerned, first and foremost the Italian Authority belongs to the European Competition Network (ECN), the main platform for cooperation in Europe, established among member countries of the European Union through Regulation 1/2003. The ECN provides a platform for extensive formal and informal co-operation in cartel and abuse of dominance cases, as well as discussion of general policy issues. EU agencies exchange views and foster coherent application of EU antitrust rules in horizontal working groups (e.g. leniency) and sector-specific subgroups (e.g. energy, financial services). The ECN Merger Working Group identifies issues and explores possible solutions in relation to mergers with cross-border impact.

The ECN facilitates the exchange of non-confidential information that can be helpful in conducting investigations. The Italian Authority has received and sent several requests of informal cooperation in the ECN context to explore the legal and regulatory framework or the features of certain markets in other countries.

Less frequently, the Italian Competition Authority has received requests for case-specific informal cooperation from agencies outside Europe. Sometimes the requests concern investigations that other authorities are carrying on in markets already investigated by the Italian Authority and involve discussion on issues such as the definition of the relevant markets, the theory of harm, etc. In some cases, competition agencies that were working on merger cases consulted the Italian Competition Authority to verify whether a parallel investigation was being carried out and/or to acquire information about the Italian market or sector at stake.

This kind of information exchange is a precious opportunity for the agencies to have more effective investigations and to minimise risks of divergent outcomes. Nevertheless, it should be considered that it is also costly. Providing accurate and helpful information might entail burdensome research and data collection. Therefore, agencies should limit requests for information to some crucial cases and focus on the key issues.

Moreover, enforcement cooperation is effective as long as the relevant agencies have established a network of contacts that ensures a mutual understanding. Although no confidential information can be provided absent appropriate legal instruments, the level of accuracy and responsiveness of the exchange varies dramatically according to the quality of interaction between the two agencies. Even the best designed request for information might fail to achieve its objectives if the respondent agency does not have at least a general knowledge of the legal and economic environment in which the requiring agency operates. In addition, the possibility for officers on both sides to discuss in detail the background and the national issues underlying the request enables to better frame the reply.

Finally, the engagement and the resources devoted to the response might be higher if the request comes in the context of a well-established relationship between the agencies. The incentive to provide a sound reply will be all the more elevated if there is a perception that it will be crucial for the other agency to come up with a more informed decision (effectiveness) and that the counterpart might reciprocate the favour in a future case (reciprocity).

Case-specific cooperation in parallel investigations typically takes place between very experienced agencies with regard to key cases with international implications (for example the EU DG Comp

has a well-established cooperation with the US agencies) or within regional frameworks (such as the ECN) that facilitate the flow of information both on the fact the case is reviewed by neighbouring agencies and on the merits of the case.

All these converging factors highlight the relevance of multilateral cooperation (notably in the context of international *fora* such as ICN, OECD and obviously UNCTAD), which provides an opportunity to discuss and share competition issues in light of the respective legal and economic frameworks. On top of enhancing mutual understanding, these meetings favour direct interaction among competition executives and officers that may set the foundation for bilateral and regional cooperation.

In our experience, informal cooperation has developed its full potential when it has involved an older and a younger agency. Multilateral meetings triggered initial forms of general cooperation like study visits, which in turn led to more structured capacity building projects. The increased contacts and knowledge on both sides created the appropriate environment for case-specific informal cooperation. Finally, in cases of candidate countries for EU accession where the Italian Competition Authority carried out Twinning Projects, these countries eventually joined the EU and hence their cooperation with Italy moved from informal to formal under the umbrella of the ECN network.

A further consideration is that formal and informal cooperation are complementary. We have just illustrated how informal cooperation may be a step in a process that ends up in formal cooperation. On the other hand, the ECN is a clear example of this complementarity because, rather than being a mere channel for formal communication, it also represents a precious platform for the exchange of non-confidential information, as well as for discussions aimed at promoting coherent application of EU antitrust rules in different Member States.