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Morning Session

Agenda Item 3c. Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures

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Enhancing International Cooperation: Tools and Procedures

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Overview: Making Cooperation Work Better

• What it takes to cooperate effectively
• Effective multilateral instruments
• It doesn’t happen as much as it should
• Practical obstacles to cooperation are not well understood
• Understanding the problem should inform the solution
Cooperation and Confidentiality

• Benefits of cooperation are clear, but
• How to cooperate and maintain confidentiality obligations?
  – Importance of confidentiality
  – Effective cooperation may require sharing sensitive information
• Synergies between confidentiality and effective investigations
## Sharing Sensitive Information

<table>
<thead>
<tr>
<th>TYPE OF INFORMATION</th>
<th>CONDITIONS FOR SHARING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publicly available information</td>
<td>Usually no restrictions</td>
</tr>
<tr>
<td>Non-confidential agency information that is not publicly available</td>
<td>Can be shared if assurances of confidentiality exist</td>
</tr>
<tr>
<td>Confidential information from parties (including merger notifications, leniency applications)</td>
<td>May be shared with waivers of confidentiality by submitting party (or without under “second generation” agreements)</td>
</tr>
</tbody>
</table>
Much effective cooperation involves exchanges of non-confidential, non-public information:
- Existence of investigation;
- Theories of harm;
- Markets involved; and/or
- Timing.

This is the agencies’ own information, not that of the parties, so no waiver needed.

But agencies must have assurances of confidential treatment of information shared.
We think the market includes small cars but not minivans.

Why do you think that?

From data we collected – sorry that I can’t say more about it.

OK, I understand. Anyway, our market sources are telling us the same thing.
Assurances of Confidentiality are Critical

• Multiple frameworks exist:
  – ICN Frameworks for Merger and Cartel Cooperation
    • Open to all ICN members
  – OECD Recommendation
    • OECD members and observers
    • Non-members may adhere to it
  – Bilateral cooperation agreements
  – Case-specific agreements
Making it Work

• “Pick up the phone” cooperation
• Routine cooperation between U.S. agencies and experienced counterparts
• U.S. agencies now routinely cooperate with maturing authorities
• Challenge of making it work with newer authorities
Why Doesn’t it Work Better?

• ICN and OECD conducted a survey on cooperation in 2013:
  – 52% of agencies had some experience with cooperation, but
  – Only 13% had regular experience with cooperation.

• Query: what do we need to do to make cooperation more routine for more agencies?
# Obstacles to Cooperation Surveyed

<table>
<thead>
<tr>
<th>Rank</th>
<th>Possible Obstacle (responses by non-OECD countries)</th>
<th>Importance*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Legal barriers to cooperation</td>
<td>2.0</td>
</tr>
<tr>
<td>2.</td>
<td>Low willingness to cooperate</td>
<td>1.7</td>
</tr>
<tr>
<td>3.</td>
<td>Different legal standards</td>
<td>1.6</td>
</tr>
<tr>
<td>4.</td>
<td>Absence of waiver</td>
<td>1.5</td>
</tr>
<tr>
<td>5.</td>
<td>Lack of resources/time</td>
<td>1.5</td>
</tr>
<tr>
<td>6.</td>
<td>Lack of trust</td>
<td>1.5</td>
</tr>
<tr>
<td>7.</td>
<td>Other differences or inconsistencies between legal systems</td>
<td>1.3</td>
</tr>
<tr>
<td>8.</td>
<td>Lack of knowledge of involvement</td>
<td>1.3</td>
</tr>
<tr>
<td>9.</td>
<td>Dual criminality requirement (cartels)</td>
<td>1.1</td>
</tr>
<tr>
<td>10.</td>
<td>Different stages in procedures</td>
<td>1.0</td>
</tr>
<tr>
<td>11.</td>
<td>Language/cultural differences</td>
<td>0.8</td>
</tr>
<tr>
<td>12.</td>
<td>Different time zones</td>
<td>0.3</td>
</tr>
</tbody>
</table>

* 2 = High importance; 1 = medium importance; 0 = low importance
The Challenge Today

• Understand the obstacles
  – Where are the practical barriers to cooperation?
  – How can we overcome them?

• Opportunity for UNCTAD
  – UNCTAD ties with newer agencies an asset
  – An ideal forum for studying the problem

• Solutions can be targeted to identified problems

• New frameworks may be premature
Thank you!