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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

| TYPE OF INFORMATION | CONDITIONS FOR SHARING |
|---|---|
| Publicly available information | Usually no restrictions |
| Non-confidential agency information that is not publicly available | Can be shared if assurances of confidentiality exist |
| Confidential information from parties (including merger notifications, leniency applications) | May be shared with waivers of confidentiality by submitting party (or without under “second generation” agreements) |

Non-confidential, Non-public Information

- 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.

Non-Public Information Sharing in Practice

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

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

* 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!

