



Seventh United Nations Conference to review the UN Set on Competition Policy

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INTERNATIONAL COOPERATION IN MERGER CASES

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The Need for Cooperation: 2 Challenges

- Globalization of commerce and competition policy presents two key issues:

C COOPERATION: How to achieve consistent outcomes in mergers reviewed in multiple jurisdictions?

C CONFIDENTIALITY: How to cooperate while maintaining confidentiality obligations?

Cooperation: A Short History

- Origins of cooperation: managing conflict
- Early friction: assertion of jurisdiction over foreign anticompetitive conduct
 - Example: Uranium cartel (1978)
- Later friction over differences in analysis of competitive effects.
 - Examples: Boeing/McDonnell Douglas (1997); GE/Honeywell (2000)
- Cooperation as an important tool for preventing conflict

From Managing Conflict to Cooperation

- First step: better understand each others' practices and processes
- Cooperation becomes the norm
 - Results in better outcomes for all
 - Conflict virtually nonexistent today
- Fine tuning:
 - US/EC Merger Working Group
 - US/EC Merger Best Practices 2002 & 2011
 - US/Canada Merger Best Practices 2014

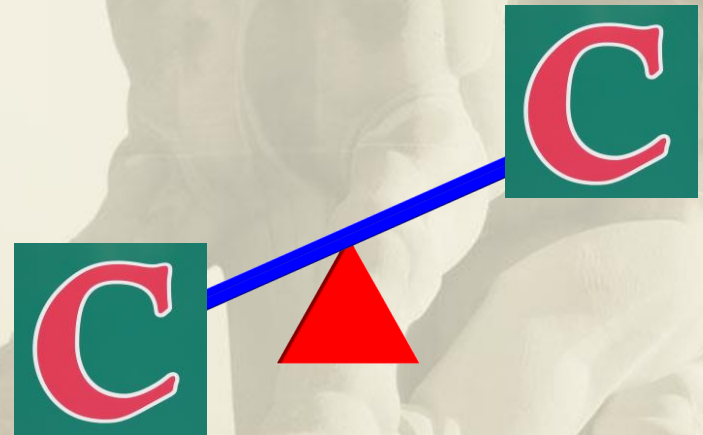
Agreements Reinforce Cooperation

- Formal cooperation agreements:
 - Articulate an existing relationship of trust,
 - Share a commitment to cooperation, and
 - Include confidentiality commitments.
- Most agreements do not:
 - Supersede confidentiality laws,
 - Provide powers not already allowed under law.
- United States or agencies:
 - Thirteen bilateral cooperation arrangements
 - Party to multilateral arrangements: OECD, ICN framework



Cooperation and confidentiality

- Effective cooperation involves exchanging information on:
 - Markets affected
 - Theories of harm
 - Anticompetitive effects
 - Possible remedies
 - Timing
- Information exchanges are subject to:
 - National confidentiality legislation
 - Internal regulations and practices
- The big challenge: balancing cooperation with confidentiality




Protecting Confidences Matters

- Confidentiality laws protect confidential commercial information and trade secrets
 - Potential to affect competitive behavior
 - Effect on capital markets
 - Protection of intellectual property
- Effective cooperation often depends on merging firms
- Firms more likely to cooperate if they are confident about confidential treatment
- Maintaining a reputation for protecting confidential information is critical to success

Three Types of Information

1. Publicly available information
 - General knowledge about markets
 - Published information
2. Information normally kept confidential, but not protected by law (“Agency Confidential”)
 - Can often be shared under assurances of confidentiality
 - E.g., timing, theories about markets and competitive effects
3. Information protected by law (“Party Confidential”)
 - Can only be shared if party waives protection
 - E.g., merger filings, third party data, proposed remedies

Sharing Public Information



Do you know if anyone has tried to enter this market?



Yes, Alpha Corporation built a new factory here last year.

Were they able to compete successfully?

Yes, I think so. I will send you a link to their annual report where they report it has done well.

Sharing Non-Public Information

We think the market includes small cars but not minivans.

Why do you think that?

Sorry, but I can't say without revealing confidences.

OK, I understand. Anyway, our market sources are telling us the same thing.



Confidentiality and Waivers

- Legal confidentiality protections usually belong to the party supplying **business information**
 - The party supplying the information may waive that protection
- But confidentiality protections of the **agency's own information** usually belong to the agency
 - The agency may choose to share that information when it is convinced that confidentiality will be maintained
- In many cases, parties waive confidentiality to facilitate cooperation
- Especially useful for coordinating remedies

Model Waivers



News & Events » Press Releases » Federal Trade Commission
 Accompanying FAQ

Federal Trade Commission Updated Model Waiver of Confidentiality in Civil Matters and Accompanying FAQ

**Updated Model Waiver is Designed to Streamline
 Resources**

FOR RELEASE

September 25, 2013

TAGS: international cooperation | Office of International
 Affairs

The Federal Trade Commission staff and the Department of Justice
 staff will be reviewing the updated model waiver of confidentiality for individuals and companies
 undergoing concurrent review by the DOJ or FTC and non-U.S. companies.

A waiver provides the terms on which an individual or company may share information with
 the agency that originally received the company's confidential information.

APPENDIX D

EUROPEAN COMMISSION
 CONFIDENTIALITY WAIVER

WAIVER

1. On behalf of Company X and Company Y, the parties agree to waive the confidentiality of information obtained from Company X and Company Y in the course of their analysis into the proposed merger transaction referred to as the "proposed transaction" into the proposed transaction.
2. A corresponding waiver has or will be provided by Company X and Company Y enabling that authority to share information during the course of its enquiry into the proposed transaction otherwise be subject to the confidentiality obligations of the European Commission.
3. Specifically Company X and Y agree to waive the confidentiality of information, supplied by Company X and Company Y, that may be shared with [competition authorities] in the course of their own internal analysis that contains information that otherwise be prevented by the confidentiality obligations of the European Commission.



WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS

I. Introduction

Pursuant to its mandate to examine procedural aspects of multijurisdictional merger review, the ICN's Notification and Procedures Subgroup has undertaken a project concerning the use of waivers of confidentiality in merger investigations.

Confidentiality waivers are related to several provisions of the ICN's Guiding Principles and Recommended Practices for merger review. The Guiding Principles provide that reviewing jurisdictions should maintain the confidentiality of information obtained in their investigations.¹ Another Guiding Principle urges jurisdictions reviewing the same transaction to "engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs."² A further, stated goal of coordination is consistent, or at least non-conflicting, outcomes.³ In furtherance of that goal, the Recommended Practices provide that "competition agencies should encourage and facilitate the parties' cooperation in the merger review process" through, *inter alia*, the use of voluntary confidentiality waivers.



Putting Cooperation into Practice

- Learning of the transaction and the reviewing agencies
 - Media, securities filings, website, parties
 - Initiating early contact
- Initial discussion(s)
 - Determining/coordinating review timetables
 - Initial thoughts on markets, potential competitive effects, possible common interests
 - Possible waivers
- Continuing Dialog
 - Regular calls over course of investigation
 - Refine views on competitive effects and their scope
 - Discussion of remedies

Three Myths about Cooperation

Popular Myths

- Lack of a formal cooperation mechanism prevents effective cooperation
- Cooperation requires an enforcement mechanism to make it work
- Cooperation takes place only among developed countries

Reality

- Effective cooperation happens every day, with and without a formal mechanism
- Cooperation requires mutual trust and strong relationships
- Cooperation takes place wherever there are enforcement interests in common

Conclusion



- “Getting to know each other” matters
- The most important instruments of cooperation are the telephone and e-mail!
- Thank you for your attention!
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