



MECHANISMS FOR COOPERATION: INFORMAL COOPERATION

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Two Key Cooperation Challenges

- Globalization of commerce and competition policy presents two key issues:
 - **CONVERGENCE:** How to ensure the benefits of commerce when there are over 120 countries with different competition laws?
 - **COOPERATION:** How to achieve consistent outcomes when a particular practice affects more than one country?

When is Cooperation Important?

1. Conduct being examined in two (or more) jurisdictions
2. Conduct investigated by one authority that may have effects in another jurisdiction
3. When remedies are considered that may have impact in other jurisdictions

1. Multi-jurisdiction investigations

- Most multi-jurisdictional cases are mergers and cartels
- Abuse of dominance:
 - Usually domestic in nature
 - Occasional cases when markets are global and one firm is dominant
- When different agencies investigate the same conduct, cooperation can be helpful to coordinate:
 - Timing
 - Market definition
 - Theories of anticompetitive harm
 - Remedies
- Separate cooperation issues exist for cartels: such as dawn raids, leniency (no FTC expertise)

2. Conduct with Cross-Border Effects

	Domestic Effects Only	Foreign Effects Only	Domestic & Foreign Effects
Domestic Conduct	<ul style="list-style-type: none"> ■ No issues ■ (Sharing of Experience) 	<ul style="list-style-type: none"> ■ Normally no jurisdiction ■ (Sharing of experience and public information) 	<ul style="list-style-type: none"> ■ Coordination ■ Communication
Foreign Conduct	<ul style="list-style-type: none"> ■ Very rare ■ (Can often act against local agents) 	<ul style="list-style-type: none"> ■ No issues 	

3. Remedies with impacts abroad

- Divestitures that take place or have effects in another country
- Conduct remedies that will affect competitive behavior abroad
- The law of unintended consequences
- Cooperation is critical when cross-border remedies are involved

The Cooperation Challenge

- Joint OECD/ICN Survey:
 - “The globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced cooperation in enforcement.”
- Just over half of responding agencies had any experience with international cooperation
- Most said cooperation was with a few, experienced agencies
- Opportunity for improvement: the best way to improve cooperation is to cooperate more

The Limits of Formal Cooperation

- United States or agencies are party to:
 - bilateral cooperation agreements with twelve jurisdictions



- OECD Recommendation
 - ICN framework for merger cooperation
- Main benefits:
 - Acknowledgement of an existing relationship
 - Shared commitment to cooperation
 - Articulating to staff that cooperation is a good thing
- Sharing of confidential information or taking enforcement action NOT covered
- Agreements do allow sharing non-confidential but non-public information (such as the existence of an investigation)

Trade Agreements Have Not Been the Answer

- Language that encourages cooperation is found in some trade agreements:
 - NAFTA
 - U.S./Singapore; U.S./Australia
 - TPP?
- Dropped from WTO Doha Round
- Issues:
 - Who administers agreement (trade or competition agencies)
 - Enforcement mechanisms (tariffs??)
 - Imbalance in capacities
- Day to day cooperation takes place between authorities under bilateral or informal mechanisms

Approaches to Informal Cooperation

1. Effective cooperation on the basis of publicly available or non-confidential information
2. Waivers of confidentiality
3. Building cooperative relationships
4. Deferral to partners in appropriate cases

1. Public and Non-Confidential Information

- While some information must be kept confidential by law, some may potentially be shared.
- In the United States:

CONFIDENTIAL


- Information obtained from firms or third parties
- Merger filings
- Proposed remedies

POTENTIALLY SHARABLE

- Existence of investigation
- Theories about harm, markets, or remedies
- Industry background

- Much can be done without using confidential information

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.



Effective Cooperation Requires



- Good will, trust, and a desire to work together
- Understanding of each others' needs and confidentiality restrictions
- The best instruments for cooperation:
 - Telephone or e-mail!



2. Waivers of Confidentiality

- In many cases, parties waive confidentiality to facilitate cooperation
 - Most frequent when parties have incentives to cooperate (such as mergers)
 - Parties decide whether to waive
 - No adverse consequences from failure to waive
- ICN mergers working group issued report with model waivers and national waivers
- U.S. agencies have a model waiver on their websites

3. Building Cooperative Relationships

- FTC relationship with many newer authorities often begins with technical assistance
 - Come to know and understand each other
 - Become comfortable picking up the phone or sending an e-mail
 - When cases in common arise, calls arranged among case handlers
- In some cases, relationships were furthered with cooperative arrangements (agreements or MOUs)
 - Formal agreements are not needed to cooperate
 - But they may “give permission” to pick up the phone
- Over time, case cooperation becomes routine
 - Firms became comfortable waiving confidentiality restrictions
 - Case handlers come to know and trust each other
 - But no confidential information is exchanged without waivers

4. Deferral in Appropriate Cases

- Can another agency solve my problem?
 - Does the transaction have the same effects in the other country as in mine?
 - Is another agency capable of imposing an effective remedy?
 - Am I confident in the other agency's ability and incentives to pursue a remedy?
 - Does my law allow me to defer action?
- Some agencies are willing to rely on remedies obtained in another jurisdictions if those remedies will adequately cure their anticompetitive concerns.
 - Some do so explicitly (Canada)
 - Others do so quietly

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 only takes place 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