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Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures

Submission of the United States

With the increasingly globalized nature of business, antitrust enforcers today are confronted by global cartels selling across national borders, mergers of firms headquartered in different jurisdictions and operating in regional or worldwide markets, and conduct by multinational enterprises with effects in multiple countries. The US Department of Justice and Federal Trade Commission (collectively, the US agencies) believe that enforcement cooperation between national competition agencies is an important component of sound and efficient law enforcement.[1]

Cooperation: the Need for Tools and Procedures

The US agencies cooperate actively with many competition agencies in the investigation of cross-border cases. Bilateral or multilateral arrangements provide a framework for cooperation that provides guidance to agencies reaching out to other agencies, but they are not a prerequisite to, or a guarantee of, particular forms of cooperation. The US agencies (or the US Government) are parties to a number of such arrangements, among which are the (i) 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, which applies to all OECD Members and any other country that chooses to adhere to it,[2] and (ii) the ICN Frameworks for (a) Merger Cooperation[3] and for (b) exchanging non-confidential information in cartel cases,[4] to which any competition authority may subscribe. These arrangements typically do not authorize cooperative activity that would otherwise be prohibited. In the case of the US, they do not override the confidentiality requirements of US antitrust legislation and rules. Further, irrespective of any formal agreement, for every instance of cooperation, agencies carefully consider the effects of working with a foreign agency on the efficacy of the investigation, on confidentiality concerns, and on the willingness of parties (including third parties) to cooperate.

The Secretariat Note asserts that "more needs to be done in terms of the spread and coverage" of international cooperation, and proposes a range of tools and procedures. Much cooperation is possible, however, without additional tools and procedures. There is generally no barrier to agencies sharing with foreign agencies relevant publicly available information, such as background information regarding a particular industry or company, and public records, *e.g.,* court or securities filings. Many agencies, including the US agencies, have discretion to share with cooperating foreign agencies agency non-public information – information that is not

[1] The US agencies' international cooperation practice is described in the recently re-issued *Antitrust Guidelines for International Enforcement and Cooperation*, available at https://www.justice.gov/atr/internationalguidelines/download and https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.

[2] See http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

[3] See http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf.

[4] See http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf.

statutorily prohibited from disclosure, but which agencies normally treat as non-public and withhold from public disclosure. Examples of such information in U.S. antitrust agency civil investigations might include the existence of an open investigation and staff views as to the merits of a case, market definition, competitive effects, substantive theories of harm, and remedies.[5] Before exchanging agency non-public information, the Agencies will have reached an understanding that the foreign authority will maintain the information in confidence and in accordance with that authority's laws and rules. This may be through a variety of means, including through bilateral or multilateral cooperation arrangements.

To cooperate, agencies simply need to be familiar with their international counterparts and reach out and communicate. For example, both of the US agencies have offices dedicated to international work that focus on cooperation and are always available to discuss cross-border matters. Over the years, the US agencies have developed close working relationships with many other agencies, and welcome inquiries from their counterparts.[6]However, the evidence shows that agencies do not reach out as often as they might. In 2013, the ICN and OECD released the results of a joint study of international cooperation.[7] The study showed that, among other things, "outside of regional co-operation, frequent or regular experience in international co-operation appears to be concentrated among a few, more experienced agencies."

While the study did not conclusively identify the reasons why cooperation did not occur as regularly outside of a few experienced agencies, it explored possible limitations on cooperation. These included the existence of legal limits, low willingness to cooperate, different legal standards, the absence of waivers of confidentiality, lack of resources and time, lack of trust, lack of knowledge of involvement of other jurisdictions, dual criminality requirements (in the case of cartels), cooperation taking place at different stages in the procedure, and, to a much lesser extent, language and cultural differences and different time zones.[8] The study noted that further work in assessing the issues that impede effective cooperation and possible solutions are areas in need of further attention.

Cartel Cooperation

[5] While confidentiality obligations generally prohibit agencies from disclosing to foreign authorities confidential information submitted by firms or individuals, those firms or individuals may enable competition agencies to engage in more meaningful cooperation with their foreign counterparts by granting the agencies a waiver of confidentiality as to information that may be otherwise protected from disclosure.

[6] The Secretariat Note, in para 41, mentions an instance where "exchanges of information proved difficult" between DOJ and Colombia's SIC in relation to the auto parts cartel, because "established mechanisms" for exchange were not in place. DOJ has no record of any communication with SIC on this matter. Although sharing particular evidence may not have been possible in this case, DOJ always seeks to assist other agencies, at a minimum by directing them to and explaining public information on investigations.

[7] OECD, Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation Challenges of International Co-operation in Competition Law Enforcement, http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf. See also, OECD, Challenges of International Co-operation in Competition Law Enforcement, http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf (2014).

[8] OECD/ICN Survey, supra n. 7, at 104. These reported limitations are ranked according to importance as identified by non-OECD jurisdictions.

The Secretariat Note states that cooperation is "indispensable for an effective enforcement against cartels at the global level." While anti-cartel enforcement directed at domestic cartels should be a top priority for all jurisdictions, it is not clear that "global" enforcement action is the most effective approach to eradicating international cartels. Since its revision in 1993, DOJ's leniency program has proven to be the single most effective detection and prosecution tool, especially for international cartel enforcement.

All competition enforcement (mergers, cartels, unilateral conduct) depends on scrupulous respect by competition agencies for the confidentiality of information provided to them. Without this respect, the system would break down, as competition agencies depend on parties to provide the information needed to develop cases, leniency applicants revealing secret price-fixing conspiracies, and merging parties providing their most sensitive business plans. Leniency applicants would not provide the evidence essential to successful prosecution if they were not satisfied that their information was secure. Parties will not cooperate if they do not have faith that agencies will respect the confidentiality rules.

Moreover, in the case of cartels, a system in which cross-border conspiracies are investigated by all affected jurisdictions may be counter-productive, as agencies could lose the opportunity to obtain information through covert means if a multiplicity of agencies were all investigating at the same time, with inevitable risks of leaked information.

The Secretariat Note also refers to weaknesses in the leniency programs of many jurisdictions as an obstacle to the investigation of international cartels, citing as examples the prosecution of the vitamins cartel in Japan and of the graphite electrodes cartel in Korea. The solution here, as demonstrated by both Japan and Korea, is to develop an effective leniency program that attracts applicants. DOJ has considerable experience in this area, which it shared and continues to share with many jurisdictions.[9]

How to Increase Cooperation among Competition Agencies

Recognizing that bilateral and multilateral arrangements exist to encourage cooperation among agencies, the first and most important question should be why cooperation does not take place as often as it might, especially when developing countries are involved. Seeking answers to this question logically comes before encouraging further and potentially duplicative multilateral arrangements. Without understanding the problem, it is premature to propose a solution. Possible obstacles to cooperation that might be uncovered could include, for example, unfamiliarity with potential cooperation partners or with other agencies' systems and confidentiality protections, or domestic barriers to cooperation. The OECD/ICN Study could form a good starting point for seeking to understand these issues.

While studying the issue further, we recognize that to build trust, agencies and their staffs need to develop relationships on regional and broader levels. Relationships facilitate cooperation.

[9] See *Cornerstones of an Effective Leniency Program*, ICN Workshop, Sydney Australia (November 22, 2004), available at https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program.

Trust and familiarity can be built through activities at ICN, OECD, and UNCTAD; through technical assistance and staff exchange projects; or through other mechanisms. The US agencies, for example, have frequently held telephonic or video conferences with other agencies to exchange information about their respective substantive law and processes. In the case of their closest cooperation partners, they regularly meet in person at the case handler level.

Solid working relationships usually develop, as with any new relationship, through small steps. This may begin through consultation about public matters or past experiences with particular markets or competition problems, and proceed to discussions of non-public information, possibly including the use of waivers. Good communications are essential. Relationships are likely to develop best where competition regimes are transparent and parties and cooperation partners are confident in the procedural fairness of the system, which in turn is closely related to the protection of confidential information. In the U.S. experience, foreign antitrust authorities build relationships over time and formal agreements may follow , but the reverse is not necessarily the case.

It is also important to address any domestic legal obstacles to cooperation. The Secretariat Note refers to the "lack of an international definition of confidential information" as a barrier to the exchange of confidential information. However, every legal system has its own confidentiality rules tailored to its laws, procedures, and cultural traditions. It is unrealistic to expect, for example, that criminal and civil regimes would have the same confidentiality provisions. In some systems, the legal requirements are amenable to promoting cooperation while protecting confidential information. Others are more restrictive. An understanding of how different systems interact can help agencies find ways to work together to carry out the goals of cooperation while remaining faithful to each country's legislation and regulations regarding confidentiality.

Building upon the work of the ICN/OECD project, a more searching examination of why cooperation does not take place could be a useful predicate to further work.

Specific Policy Options and Role for UNCTAD

UNCTAD can continue to play an essential role in promoting cooperation by providing a venue in which the international competition community can strengthen relationships and build the trust between members that is the foundation of successful cooperation. UNCTAD serves as a forum for sharing experience, disseminating better practices, and providing valuable technical assistance tailored to the needs of agencies. All of these activities will promote cooperation and strengthen the capacity of national and regional bodies to maintain competitive markets.

To help promote international cooperation, UNCTAD could undertake a comprehensive summary compilation of the laws, procedures, and institutional frameworks related to competition enforcement cooperation among UNCTAD members, along with a point of contact for cooperation queries. The ICN has developed useful templates for collecting information on merger and cartel enforcement, and has created a framework for exchanging non-confidential

information in cartel cases, with liaison officials identified for over 30 jurisdictions. UNCTAD could expand on these to build trust and further cooperation. Jurisdictions with less experience can look to principles contained in other countries' laws to strengthen their confidentiality practices and procedural fairness systems. UNCTAD is well positioned to contribute positively to this effort, especially with developing countries.[10]

On the other hand, the Secretariat Note refers to development of an "international intelligence network" of ongoing investigations. To the extent such a network included covert and non-public information, however, it would raise the same confidentiality issues noted above in the discussion of cartels, and could in fact deter the cooperation of leniency applicants and other essential providers of information. With respect to public information, maintaining a useful current database would be an ongoing burden on agencies, and it is not clear that it would provide any benefits beyond information already published on agency websites, journals, and on-line publications.

It is unclear whether "operationalizing" section F 4 of the Set, which covers consultations between members related to restrictive business practices, would provide significant benefit. While it may have had a theoretical benefit when the Set was drafted and few developing countries had competition legislation, section F 4 may have outlived that purpose now that almost every jurisdiction has a competition law and agencies can readily communicate with each other without an intermediary.

Experience in the OECD suggests that there is little need for and potential harm from such an elaborate negotiated framework. The OECD has had a cooperation recommendation since 1967, which included a provision that allowed members to request an OECD "conciliation" role for consultations between members. While it existed for decades, it was never used and in 2014, when the OECD revised its cooperation recommendation,[11] OECD members deleted the provision. A new agreement establishing a similar role for the UNCTAD Secretariat is likely to meet a similar fate. Further, effective cooperation requires confidential communications between the competition authorities involved. The presence of a third party, even from an international organization, could well prove to be a barrier to effective communication. In some jurisdictions, including the United States, the presence of a third party could also vitiate any legal privilege that would protect the confidentiality of those communications. In sensitive competition matters involving confidential information and/or non-public investigations, agencies seek to minimize any exposure of their activity.

[10] One of the specific proposals in the Secretariat Note, the "recognition of decisions made by authorities or courts in other jurisdictions" – could have promise for developing countries. DOJ has in the past shared certified copies of guilty pleas in criminal cases involving international cartels that have contributed to prosecutions in other jurisdictions. Under US law, DOJ cartel convictions constitute "prima facie evidence" in follow-on private damages actions against those companies and individuals convicted; under the EU's private damages directive, a final infringement decision by a national competition authority or by a review court is "irrefutably established" for purposes of private damages actions before the courts of that member state, and may be presented "as at least prima facie evidence" of an infringement in other member state courts. Directive 2014/104/EU, 26 November 2014, art. 9.

[11] See note 2, supra.

Jurisdictions not inclined or able to cooperate in the absence of a formal framework could instead consider adhering to existing mechanisms, including the OECD recommendation or the ICN Merger and Cartel frameworks.

Conclusion

The US agencies firmly support international cooperation in competition cases and applaud UNCTAD's role in promoting it. We encourage further exploration of the existing challenges to cooperation and to helping competition agencies, especially from the developing world, understand how best to take advantage of its benefits.