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Informal Cooperation: a Private Sector Perspective

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Informal Cooperation and Private Parties

- Where you stand often depends on where you sit
 - Merging parties
 - Cartel/abuse of dominant defendant
 - Complainants, other third parties
- Regardless...
 - It's all about incentives/consequences and trust
 - Informal international cooperation is gaining traction as experience (public and private) develops

Informal Cooperation

- **Non-confidential information**

- Agencies engage in direct agency-to-agency exchanges of non-confidential information without any recourse to the parties.
- A good example – the merger control context, informal sharing often involving:
 - public information; analysis; market definition; economic theories of harm; empirical evidence needed to test theories; remedies; procedure/timing.
 - See the UNCTAD Secretariat Note "*Informal Cooperation Among Agencies in Specific Cases*" and "*US-EU Best Practices on Cooperation in Merger Investigations*".

- **Confidential information**

- But to get deeper and more detailed information which can facilitate better cooperation, disclosure **waivers** from private parties are often needed.
- The OECD/ICN 2013 Report found that waivers were **the most frequently cited** assistance tool used by agencies with experience in cooperation.

Incentives for Private Parties to Grant Waivers

- Private parties may be amenable to a waiver request **where it makes sense for that case** as there are many incentives and benefits, as waivers can:
 - Save us time, money, avoid duplication on data/info supply;
 - Help us to get everyone on the same page/same terms;
 - Help us tell our global story in a coordinated/efficient manner;
 - Sometimes allow a “lead” agency to help the others which can focus and expedite an investigation;
 - Help us coordinate procedure/remedies where necessary;
 - Ultimately help facilitate convergence in approach and consistency in decision-making.

Disincentives for Private Parties to Grant Waivers

- But where private parties and their counsel may be **hesitant** is where we are unsure as to:
 - The position of the country in question with regard to the handling of our information by the enforcement agency:
 - Can it be used for other enforcement proceedings? Other agencies?
 - Can it be accessed by third parties?
 - The country's confidentiality protections and treatment of legal privilege;
 - The country's track record with regard to leaks of confidential information;
 - The relevancy of the information that may be requested.
- Also, cartel cases are special:
 - Criminal liability
 - Relevancy and sensitivity of information
 - Some agency reluctance too...
 - Leniency/immunity applicants

5 Tips for Creating a Waiver-Friendly Environment

- Agencies, in particular the large number without limited international cooperation experience, can build an “environment” of trust for the granting waivers by:
 1. Clarifying their protection rules/policies by issuing public statements or waiver guidelines.
 2. Producing or following existing model/template waivers, such as the ICN, EC and US model waivers for merger investigations, and the recently published ICN cartel waiver model.
 - See the “*Informal Cooperation Resource*” document created for this session
 3. Making public the agency’s strong record of maintaining confidentiality.
 4. Engaging in waiver “advocacy” - explaining to the local private bar and business community the incentives and benefits of waivers, as well as clarifying the agency’s policies on confidentiality and use.
 5. Generate a track record first in mergers cases.
- If your agency can take these steps, it will help private parties to engage seriously in discussing and granting waivers with you.

A Word of Encouragement to New/Emerging Agencies on International Cooperation

- OECD/ICN 2013 Report on International Cooperation
 - The Report indicates that international cooperation is a **still emerging and developing area**.
 - Of those agencies experienced in international cooperation, the Report found cooperation to be increasing, expanding and positive.
 - The attitude toward cooperation regionally/internationally is more positive and constructive than ever before.
 - The survey found that merger control was the **most productive area** for cooperation and waivers are a key tool to informal cooperation.

So, Now is a Good Time to Engage...

- For the many agencies that have not been involved in international cooperation (young and experienced) the message is: you **haven't** missed the boat and you are not behind with regard to cooperation.
- So, it is a good time to engage on the subject and benefit from it:
 - Interest is high - as shown by the 2013 OECD/ICN Report and the heightened attention to the subject at UNCTAD, OECD, ICN and bi-laterally between agencies.
 - It is being developed and you can be a part at the start.



Thanks!

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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

