

## **Merger Cooperation and Information Exchange**

### **Types of Information**

When a transaction raises possible competitive issues in multiple jurisdictions, it may be beneficial for investigating agencies to consult with one another about the matter and cooperate. Cooperation enables the investigating agencies to identify issues of common interest, improve their analyses, and avoid inconsistent outcomes. Cooperation includes the exchange of investigative information, usually, though not exclusively, through oral communications.

Cooperation may be effective even without the use of waivers as useful communication between agencies can occur in the absence of waivers. While it may vary depending on the agency's applicable rules and confidentiality protections, types of information that can be discussed without waivers may include public information, such as: (i) publicly available information regarding the industry/sector, the merging parties or third parties; (ii) non-confidential aspects of prior relevant investigations or decisions; as well as "agency non-public" information. Agency non-public information is information that the cooperating agencies may not be statutorily prohibited from disclosing, but normally treat as non-public. This kind of information includes (iii) information regarding an agency's process (such as timing); and (iv) agency views on issues such as market definition, theory of harm and competitive effects.

In some matters, more in-depth discussion, including the exchange of business confidential information, would benefit the reviews, and in these instances, agencies may decide to ask the parties to consider providing waivers of confidentiality.

### **Protecting Information Exchanged**

When sharing investigative information, including agency non-public information, each cooperating agency should maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other cooperating agency and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party. Cooperating agencies should protect the information in accordance with their own respective legislation and regulations, and should not disclose any information provided in confidence by another agency without that agency's consent.

When agencies issue a press release or decision in a particular matter, often they indicate the agencies with whom they cooperated. (See, for example, [here](#) and [here](#).) Before doing so, it is good practice to check with the agencies that will be identified in the press release whether they agree to being mentioned.

### **Public Information**

Agencies can share publicly available information, such as information regarding the industry or sector, or information about the merging parties or third parties they have learned from public sources, such as investor reports or the trade press. This could include, inter alia, information about

the size of the industry or sector, trends in demand or other observations relevant to competition review, a party's sales volume, major customers or competitors.

Agencies also may share applicable legal principles and precedents from past cases, including exchanging press releases, publicly available complaints, or published decisions.

Best practice is to share links to public documents instead of actual documents to avoid questions about whether a particular document is public.

## **Agency Non-Public Information**

*Basis for Exchanging Agency Non-Public Information:* When the cooperating agencies are parties to an agreement, either bilateral or multilateral arrangements including the ICN Framework,<sup>1</sup> or, in the absence of such an agreement, cooperating agencies have reached an understanding that both agencies will maintain the information in confidence and in accordance with their laws and rules, the agencies often can exchange non-public information.

*Implications of Sharing Agency Non-Public Information:* In some jurisdictions, sharing agency non-public information, could potentially waive a protection the agency would have otherwise had if the information is considered agency work product, or lose an exemption from the jurisdiction's rules requiring agencies to turn over requested information (such as the Freedom of Information Act (FOIA) in the U.K. and U.S.). However, many jurisdictions take the position that if the two cooperating agencies have a parallel investigation (both jurisdictions are reviewing the same matter at the same time), it is likely that the protection for work product or FOIA exemption is not waived based on "common interest" in the outcome of the investigation.

### *Examples of Agency Non-Public Information:*

Agency non-public information, also known as "agency confidential" information, is information that the cooperating authorities are not statutorily prohibited from disclosing, but normally treat as non-public.

This kind of information includes (i) information regarding an agency's process (such as timing); and (ii) agency views on issues such as market definition, theory of harm and competitive effects.

#### *(i) Agency Process - Status of an investigation*

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<sup>1</sup> For multilateral arrangements, see, for example, the [ICN Framework for Merger Review Cooperation](#). See also the [OECD Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade](#), which applies to OECD [member](#) states and non-member countries that adhere to the Recommendation. In the absence of either agreement, agencies may reach an understanding that both agencies will maintain the information in confidence and in accordance with that authority's laws and rules.

- the existence or absence of an open investigation<sup>2</sup>
- the process generally to be followed in the investigation, including any applicable deadlines,<sup>3</sup> and the likely timing of decision-making
  - For example, staff may share when they expect a decision may be made as to whether to proceed to an in-depth investigation or seek compulsory process. Similarly, staff may share that such a decision has been taken.
  - Staff may share when a recommendation for a decision on the investigation is or will be shared with decision-makers.

(ii) *Agency Views and preliminary conclusions*

- How the staffs analyze the definition of the relevant markets
- Possible or actual theories of harm
- Potential competitive effects and related issues, such as entry, efficiencies, failing firm, etc.
- Economic approach, economic models, and econometric analysis, including the types of data being used by the agency
- Market feedback, including to summarize and report what third parties are saying generally (though not the identity of companies or any information that would specifically identify a third party)
- As to markets in which there are concerns, agencies may share their views about potential remedies (but not whether the parties have offered a particular remedy).

## **Business Confidential Information**

Several statutes and rules generally preclude cooperating authorities from discussing or otherwise exchanging the parties' confidential information ("business confidential information"). Business confidential information usually includes written, electronic, and recorded oral information including, but not limited to, the parties' documents, email messages, data, audio files, statements, questionnaire responses, transcripts, oral communications, testimony, and remedy proposals, that each cooperating agency's confidentiality rules prohibit from disclosure without a waiver of confidentiality from the submitting party or other arrangements that allow the information to be shared without consent.<sup>4</sup>

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<sup>2</sup> Some agencies have rules that protect the existence of a transaction or the fact of notification, but do not prohibit disclosing whether or not there is an open investigation.

<sup>3</sup> In jurisdictions that protect the existence of a transaction or the fact of notification, statutory deadlines likely may not be shared. However, staff may be permitted to speak in general terms on timing.

<sup>4</sup> The ICN model waiver is available [here](#). The ICN has information on confidentiality practices of ICN members, see [here](#). In some circumstances, the jurisdiction may have legislative provisions or the agency mutual assistance agreements that allow confidential business information to be shared without consent.

