

Proposal for Establishing the ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Enforcement

The long-term goal of the Cartel Working Group (CWG) is to actively contribute to the improvement of the anti-cartel enforcement across the whole membership by advocating improved cooperation between member agencies.

In accordance with this goal, the CWG has taken various cooperation related work such as “Cooperation between competition agencies in cartel investigations” (2007), “Charts summarizing information sharing mechanisms” (2012), “Anti-Cartel Enforcement Manual Chapter on International Cooperation and Information Sharing” (2013) as well as various sessions on cooperation at annual Cartel Workshops, etc.

However, as reports on OECD/ICN Questionnaire on International Enforcement Cooperation (2013) revealed, about half of the respondents reported that they had not yet cooperated on any investigation while many survey respondents emphasized that they seek cooperation on all cases where it would be feasible and necessary. This fact may suggest that, except for some jurisdictions that have organized regular contacts among them via bilateral agreements, etc., competition agencies do not necessarily know whom to contact when they find through media reports, etc. that competition agencies in other jurisdictions have initiated or sometimes even completed an investigation on a cartel case that may affect their markets. As a result, it may need some time and efforts to reach appropriate contact points of the competition agencies in other jurisdictions. On the other hand, even if they could reach appropriate contact points, for the competition agencies receiving a request for information from the foreign agencies that have not been in contact before, it might need some time to consider the possibility of providing information and the extent of information provided. This may be a potential obstacle for promoting cooperation.

To enhance information exchanges among competition agencies, different frameworks may be more effective depending on the type of information exchanged. For example, exchanges of confidential information are possible when there are specific information gateways stipulated by the legislation of each jurisdiction. Also, exchanges of information for simultaneous dawn raids are usually based on the multijurisdictional leniency applications and provision of waivers of confidentiality from the applicants. On the other hand, there could be

substantial needs for exchanging information to check the status of a cartel investigation abroad or to request additional information. It would be beneficial for the agencies considering the initiation of an investigation of the international cartel case within their own jurisdictions if the ICN could establish a framework that makes such exchanges of information easier.

Therefore, the JFTC would like to propose to establish the “ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Enforcement” (hereinafter “the framework”) through which the CWG could expect to foster “Pick up the phone relationship” for improved cooperation for effective cartel enforcement by supporting member agencies to gain more experiences on information exchanges mentioned above.

1. The purpose of establishing the framework

The mission of the ICN includes the formulation of proposals for procedural and substantive convergence and the facilitation of effective international cooperation. The framework reflects the mission of the ICN mentioned above.

2. Participating agencies

Framework participation is open to all ICN member agencies responsible for cartel enforcement. ICN members with experience in investigating or that expect to investigate international cartel cases, are particularly encouraged to join the framework.

3. Specific content of the cooperation

- (1) Procedure for participating in the framework

ICN members are invited to complete an information form and register liaison officer(s) (preferably, 2 officers or more). The liaison officer is typically the person who is expected to work as the initial contact point for international matters in cartel enforcement and coordinate, if necessary, with the case team of a specific case.

If the agency is not yet a member of the CWG, it is encouraged to join the CWG as well.

In addition, as the ongoing project on Anti-Cartel Template and Information Sharing Mechanisms Chart by the CWG Sub Group 2 provide basic information on anti-cartel regime of the jurisdiction and useful implication on

what kind of information each agency can provide to other agencies, participating agencies are also encouraged to create the template and the chart of their jurisdiction if possible although it is not a condition to join the framework.

(2) Category of information to be exchanged

Ordinarily, participating agencies might consider exchanging agency information on cases on the same or similar cartel conducts in which the requesting agency is interested when the investigation by the requested agency has already been initiated or even been completed and to the extent that such information can be disclosed. The competition agency receiving the request for information from another agency provides the requested information to the extent permitted under its own legislation. As a result, it would be possible that information on on-going cases is not available for disclosure even if the cases are reported in the media, etc. In the absence of waivers or information gateway, non-confidential information exchanges may still be very useful within the framework. The use of existing Anti-Cartel Templates and Information Sharing Charts are encouraged in gathering the information on anti-cartel enforcement regime and legislation on confidentiality obligation of each jurisdiction.

It may be useful if categories or examples of information that could be exchanged within this framework are presented.

(3) Request procedure

It may be useful if the common format for asking the information is created, but the use of the format is voluntary and not an obligation.

4. Merits of establishing the framework

By joining this framework, competition agencies can more easily seek information about cases of other agencies for the benefit of possible investigations of their own. Matured agencies are invited to join this framework and support investigations of younger and smaller agencies by providing information about case work and related information as long as their confidentiality obligation and resources permit. Through the use of the framework, younger and smaller agencies would be able to experience actual enforcement cooperation and may gain experience with a view to joining formal mechanisms for enforcement cooperation such as bilateral or multilateral agreements which allow exchanges of confidential information under clear conditions in the future. The framework

would complement the ongoing work of the OECD which reviews its recommendation on international cooperation for improving international enforcement cooperation and contribute to foster “Pick up the phone relationship” for effective cartel enforcement.