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OECD SUBMISSION ON OBSTACLES AND CONSTRAINTS TO COOPERATION

1. Introduction

1. In its response to the OECD/ICN questionnaire, DG Competition has identified a number of constraints and obstacles to cooperation with agencies of third countries. Some of these are rooted in the legislative framework in which competition agencies are operating; others are of a more practical nature. This submission summarizes the most important of these obstacles and constraints and makes some suggestions as to how OECD and ICN could organize future work on these obstacles and constraints.

2. In recent years, DG Competition has witnessed a significant increase in international cooperation in antitrust and merger investigations:

   • there is an increase in the number of cases in which DG Competition cooperates with third country agencies; and

   • there is an increase in the number of jurisdictions with which DG Competition cooperates shown in a far greater degree of geographical diversification.

3. On the whole, DG Competition assesses this cooperation with other agencies as positive and as bringing significant benefits.

4. At the same time, cooperation is not without cost for the agencies involved. When making a cost benefit analysis both sides need to be convinced that the investment in cooperation is justified by the benefits to its side (benefits can be defined quite broadly as more efficient investigation e.g. coordination of dawn raids, access to information, greater coherence in outcomes, more effective enforcement). It is not necessary to achieve this balance in each individual cooperation case. However, there should be some overall balance in the cooperation relationship between two cooperating agencies in the short to medium term.

2. Legal ability to cooperate

5. In assessing constraints on obstacles to inter-agency case cooperation, it is important to distinguish between cooperation involving the exchange of confidential information and cooperation that does not involve such exchanges.

6. As regards cooperation that does not involve the exchange of confidential information the EU regulatory framework does not impose major constraints on DG Competition's ability to cooperate with agencies of third countries.

7. The EU has a large number of instruments containing provisions on cooperation with third countries. These are either dedicated competition cooperation agreements as well as cooperation provisions in Free Trade Agreements and Association Agreements or Memoranda of Understanding (MoU).

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1 This submission focuses on cooperation with agencies of "third countries", i.e. it does not cover cooperation with agencies of EU Member States within the European Competition Network.
However, none of the agreements in force provides a legal basis allowing DG Competition to exchange confidential information in the absence of confidentiality waivers by the provider of the information.

8. DG Competition can engage in cooperation with agencies of other jurisdictions even in the absence of a bilateral agreement between the EU and the third country concerned. Nevertheless, such agreements provide a framework facilitating dialogue and cooperation. Their main benefit is that they put case related cooperation and the policy dialogue into a structured framework and thereby contribute to a more efficient competition law enforcement.

9. However, in DG Competition’s experience other competition authorities can sometimes be reluctant to engage in cooperation in the absence of some explicit provisions in a bilateral agreement or MoU expressly permitting cooperation on cases. This may constitute an obstacle to effective cooperation.

10. Moreover, cooperation is sometimes limited by provisions contained in national laws requiring competition authorities to seek permission from other government bodies in order to engage in cooperation activities with competition authorities of third countries.

11. In this respect a review of the 1995 Recommendation might be useful to encourage national legislators to remove such obstacles to cooperation.

3. **Legal obstacles to the exchange of confidential information**

12. In DG Competition's experience, case cooperation can be very useful even if there is no possibility to exchange confidential information. At the same time, it is clear that the lack of ability to exchange confidential information can, in many cases, severely limit the effectiveness and efficiency of the cooperation with other agencies. DG Competition (as most other agencies) faces considerable constraints on its ability to exchange confidential information, most of which are of a legal nature

a) **Legal obstacles to the disclosure of information**

13. On the EU side, Article 28 of Regulation 1/2003 provides that information collected by the European Commission may only be used for the purpose for which it was acquired, that is the application of Article 101 and 102 TFEU by the European Commission. Article 17 of Regulation 139/2004 provides for the same principle in the context of merger control. This means in practice that no information obtained through the formal investigative process can be shared with the other authority without the specific consent ("waivers") of the company that provided the information.

14. Provisions on professional secrecy serve a legitimate purpose as they create the necessary framework for companies to provide sometimes sensitive information to competition authorities. Only if companies know that the information they provide is protected they will be willing to make information available. However, the right balance between professional secrecy and the need for effective enforcement has to be found. To overcome a possible constraint on cooperation, DG Competition tries to obtain confidentiality waivers in cases in which cooperation with other agencies is envisaged. Whereas in merger investigations cases, the parties concerned are normally granting such waivers, they are less inclined to do so in most antitrust investigations. This is one of the reasons why the EU is negotiating so-called "second generation cooperation agreements" with a number of other jurisdictions (i.e. Switzerland and Canada). These second generation agreements would provide a legal basis allowing the competition authorities of the Parties to exchange confidential information gathered in the course of their investigations under a number of strict conditions.

15. Another issue which may complicate the exchange of information with third country competition agencies can come from differences in national data protections systems. According to the legal framework
in the EU (Regulation (EC) 45/2001) a transfer of personal data to countries outside the EU is only lawful when there is an adequate level of personal data protection in the third country.

b) Legal issues regarding the use of information exchanged

16. A second major obstacle relates to the use that can be made of the information that is exchanged. This issue relates to the use of information exchanged under confidentiality waivers. Confidentiality waivers granted by companies normally define conditions under which the authority receiving the waiver can exchange confidential information with another authority (one of the key conditions is normally that the information exchanged under the waiver will be used only for the purpose of the investigation concerned by the authority receiving that information). However, the authority receiving information under that waiver could invoke national legislation in order to argue that it is not bound by the conditions set out in the waiver and may therefore consider that it can use the information for other purposes (or even transmit it to other authorities). For the waiver system to work, companies should be reassured that the conditions set out in the waiver document will also be respected by the receiving authority.

c) Issues linked to differences in the definition of "confidential information" and in the level of protection provided to this type of information

17. DG Competition observes that there are differences in the definition of confidential information under national law and how such information is protected. These differences as to where to draw the line between "confidential information" that cannot be shared with other agencies in absence of waivers and information that can be shared with others, even in the absence of waivers, can sometimes act as a break on discussions between case-teams on cases investigated by their agencies.

18. Lack of clarity also exists within the category of "confidential information", where many jurisdictions make further distinctions between e.g. so-called business secrets and other types of confidential information. These distinctions are important because of the different levels of protection granted to the different types of confidential information.

19. DG Competition's experience shows that an agreement on the exchange of confidential information can be reached only if there is a sufficient degree of equivalence in the way in which confidential information is defined and protected in both jurisdictions. Rules on the definition and protection of confidential information are often set in horizontal national legislation (i.e. not just in the competition law).

20. Further analytical work on definitions used in different jurisdictions and on the different rules regarding protection of such confidential information could provide a basis for OECD guidance in this area.

4. Obstacles relating to investigations of companies outside the jurisdiction of the investigating authority

21. In recent years, DG Competition has experienced a number of other difficulties, sometimes of a legal nature, undermining the effectiveness/efficiency of some of its enforcement activities in cases with an international dimension. Two specific issues are set out below.

22. A first issue is the existence of "blocking statutes" in a number of jurisdictions preventing companies that are based in these jurisdictions from participating in investigations of e.g. international merger transactions. It should be stressed that these are cases in which the companies concerned are perfectly willing to provide information to DG Competition; however, they are prevented from making such a contribution because of provisions in national legislation prohibiting them from cooperating with
authorities from other jurisdictions or imposing a number of bureaucratic procedures preventing them to make their contribution in a timely manner.

23. A second issue concerns the legal obstacles to the sending by a competition authority of information requests and the notification of decisions of competition authorities to addresses of companies in outside their jurisdiction. In a number of cases, the companies concerned and/or the authorities concerned have insisted that such information requests and/or decisions should be notified via diplomatic channels or via the competition authority of the jurisdiction in which the company concerned is located. It is clear that such alternative ways of sending information requests and decisions would/could result in serious delays and could also raise confidentiality concerns (which could lead the companies concerned to be less inclined in cooperating).

5. **Obstacles arising from different procedures and time tables**

24. Apart from the obstacles and constraints of a more legislative nature, there are also a range of issues of a more practical nature.

25. One specific obstacle can be found in the differences in timetables and procedures. Effective cooperation requires prompt contacts between agencies and regular inter-agency consultations, particularly at key stages of the investigation. While differences in investigation timetables and procedures do not make cooperation impossible they make it more difficult. These difficulties are particularly relevant in the field of merger control given the high time constrains resulting from the tight deadlines applicable to both the agencies and the merging parties. Indeed, tight deadlines require anticipation as the margin of manoeuvre to react to circumstances likely to result in conflicting outcomes is reduced.

26. Interagency cooperation in merger and antitrust cases cannot be limited to the remedies phase; it needs to be extended to the investigation and the substantive assessment. However, given legal constraints and the limited information available to each of the agencies involved in the review of a given case, the parties' cooperation is a prerequisite for such extended cooperation. Extended cooperation is not only in the interest of agencies but also of the parties, insofar as it increases the efficiency of the review and it reduces the burden imposed on them, for instance, in terms of information gathering.

27. While the need to coordinate timetables may be most pressing in merger investigations the same is also true in other competition investigations, e.g. in the area of cartels and dominance cases (where there is e.g. a need to coordinate the timing of dawn raids).

6. **Way forward**

28. The brief overview in this submission (and DG competition’s response to the ICN/OECD questionnaire) shows that there are a number of obstacles and constraints to inter-agency cooperation in competition investigations. Some of these are of a more practical nature; others are rooted in the legislative framework within which competition agencies in different jurisdictions operate.

29. Both OECD and ICN decided in parallel to launch a major project on inter-agency cooperation in competition investigations. DG Competition considers that it is important to ensure that both projects proceed in a coordinated manner and that care is taken to avoid overlap and duplication of effort. Each of these two multilateral organisations should focus its efforts in this area on issues for which they can be considered to be the "best placed" organisation.

30. Given the specific nature of the membership of OECD (an organisation of member countries), we consider that the Competition Committee could well focus on the obstacles and constraints that are more of a legislative nature (i.e. the obstacles identified under sections 2), 3) and 4) above). In particular, a number
of these obstacles and constraints could be addressed in the context of the proposed revision of the 1995 Recommendation.

31. ICN as a network of competition agencies may be better placed to address the more practical aspects of cooperation, and more in particular the questions as to how cooperation can be optimised within the existing legislative framework (i.e. the obstacles identified under section 5). In addition, ICN could consider addressing those obstacles which prevent companies from participating more actively in international cooperation.