



# **ICN Roundtable on Enforcement Cooperation**

## **Roundtable Report & Questionnaire Response Summary**

**March 29, 2011  
Washington, DC**

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## **1. Introduction**

The ICN held a Roundtable on Enforcement Cooperation on March 29, 2011 in Washington, DC to deepen the discussion of enforcement cooperation within the network. The roundtable, co-hosted by the U.S. Federal Trade Commission and Department of Justice, was the first ICN program to specifically address international enforcement cooperation across competition enforcement areas (cartel, merger, and unilateral conduct).

The roundtable provided all participants with an interactive forum in which they could share experience in small agency-only groups and with non-governmental advisors. 60 competition enforcers from over 35 jurisdictions and 15 non-governmental advisors participated in the roundtable. They discussed, *inter alia*, cooperation tools and the types of cases in which they are used, confidentiality and privilege considerations, as well as effective approaches and impediments to cooperation. The format of the day-long roundtable consisted of a series of panels, each followed by a “table talk” session that addressed issues raised by the panel in small group discussions. Following these table talk sessions, each group reported on its discussion, offering individual perspectives, suggestions for improvement to cooperation, and questions to the larger group. The complete agenda for the roundtable is attached to this report (Annex I).

The opening session set the stage with introductory remarks by the conference hosts and an address by John Fingleton (Chair, ICN Steering Group). The first session tackled cooperation and information sharing in anti-cartel enforcement. The second addressed cooperation in merger and unilateral conduct matters. In the third session, which provided views from the private sector, non-governmental advisors joined agency officials. The fourth session solicited feedback from all participants on the use of ICN work product and other international tools on enforcement cooperation and thoughts for possible future work that might be taken up in the ICN in this area.

In preparation for the roundtable, a brief questionnaire was circulated among ICN members. Nineteen agencies, representing a broad spectrum of experience and geographic diversity, responded. A short paper aggregating and summarizing the responses also is attached to this report (Annex II).

This report summarizes key points raised at the roundtable.

## **2. International Enforcement Cooperation – Setting the Stage**

*Speakers:* Jon Leibowitz - Chairman, U.S. Federal Trade Commission  
Rachel Brandenburger - Special Advisor, International, U.S. Department of Justice  
John Fingleton - Chief Executive Officer, UK Office of Fair Trading

In his introductory remarks, **Jon Leibowitz** stressed the importance of greater communication, interaction, and cooperation between competition agencies on enforcement matters. He noted that enforcement cooperation can lead to greater similarity in the analysis applied by cooperating agencies, both as a result of the information they may obtain from one another and the discussion of their respective approaches, and can help to ensure compatible outcomes. Leibowitz encouraged further ICN efforts to minimize barriers to enforcement cooperation and to continue to work together more effectively and efficiently.

In her remarks, **Rachel Brandenburger** emphasized that all agencies can learn from one another and should be mindful of the impact of their actions and approaches outside their own jurisdictions. She explained that informal cooperation, *i.e.* the sharing of non-confidential information,<sup>1</sup> can be useful, as well as formal cooperation, through the use of party waivers. She stressed the need for agencies to focus more on day-to-day cooperation on individual matters. She stated that establishing “pick-up-the phone” relationships with each other and working together closely on individual investigations are probably the best ways for ICN members to build mutual trust and respect over time, and to bridge existing differences. Brandenburger encouraged the ICN to continue to foster intensified enforcement cooperation as part of its mission.

In his opening address, **John Fingleton** encouraged all participants to discuss their experiences with international cooperation openly, including the practical obstacles they have faced, and what can be done at an international level, through the ICN as well as OECD and UNCTAD, to further support such cooperation. To initiate the discussions, Fingleton touched on three issues.

First, he briefly recapped experience with international competition enforcement to date, observing that the growth of formal cooperation agreements has undershot expectations over the past two decades. Noting the limits of such cooperation agreements, Fingleton acknowledged that on a less formal case-by-case basis there has been some notable success in international cooperation in the fields of mergers and cartels.

Second, he discussed key findings that emerged from the questionnaire responses (See Annex II for findings). Almost all respondents indicated that they have experience with informal cooperation, such as sharing information on the status of an investigation or

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<sup>1</sup> This may include, for example, information about the status of the investigation and findings about the nature of the market and market definition.

sharing substantive theories of harm. According to Fingleton, the ICN already facilitates informal cooperation through its networking and relationship building opportunities. Nevertheless, he asked whether ICN can do more to help international enforcement cooperation at a basic level through networking and contacts. In terms of more advanced forms of formal cooperation, such as the sharing of confidential information obtained from the parties, the questionnaire responses showed that most agencies are permitted to obtain waivers to share business information, but that the experience of newer agencies with waivers has been limited to date. Likewise, younger agencies reported little or no experience with coordinating searches. Fingleton asked whether the lack of enforcement cooperation at newer agencies is due to a lack of demand or of supply and whether more should be done through ICN to encourage more coordination. The questionnaire responses identified certain common obstacles to effective formal cooperation, such as legal constraints on the exchange of confidential information. Respondents also identified the lack of systematic notification of cases opened by other competition agencies as an impediment to cooperation more generally. In addition, the responses indicated that while it is not uncommon for agencies to cooperate in mergers and cartel matters, they rely on it far less frequently in the unilateral conduct context. Fingleton called on participants to explore the reasons for this difference.

Third, Fingleton suggested that participants consider the infrastructure necessary at the national level in order to cooperate effectively at the international level, noting that it would be worthwhile for participants to think about what domestic provisions concerning information exchange they would put in place if they were able to construct their systems *de novo*. In this connection, he asked whether ICN should work towards developing a model legal provision that would make cooperation easier between agencies that had it in their laws.

### **3. Cooperation and Information Sharing in Anti-Cartel Enforcement**

*Moderator:* Scott Hammond - Deputy Assistant Attorney General, U.S. Department of Justice

*Panelists:*

Tembinkosi Bonakele – Deputy Commissioner, South African Competition Commission

Toshiyuki Nambu – Director-General, Criminal Investigation Department, Japan Fair Trade Commission

John Pecman – Senior Deputy Commissioner of Competition, Canadian Competition Bureau

Sari Suurnäki – Deputy Head of Unit, European Commission

During this session, agency participants addressed informal and formal methods for information sharing and cooperation in cartel investigations. The panel discussion touched on several issues, including investigative coordination and timing, limits to the exchange of evidence, and factors that facilitate or hinder cooperation.

Panelists first acknowledged the benefits of enforcement cooperation in cartel investigations, from resource implications to the ability to better access evidence located abroad. They then noted that the differences between criminal and civil cartel enforcement systems can raise barriers for information sharing in cartel cases. The panelists focused on the advantages of coordinating inspections and searches, highlighting that time zone differences require agency attention to ensure that evidence is not destroyed in other jurisdictions as a result of tip-offs. The panelists cited factors such as the location of the conduct, its impact, and useful documents as considerations in determining the timing of searches across jurisdictions, suggesting that the timing of searches requires agency flexibility and coordination.

Panelists underscored two important prerequisites for effective cooperation. First, agency staff should not be risk-averse to exchanging non-confidential information. Recognizing that non-confidential information can always be shared, the speakers suggested that informal cooperation can be hindered by agency staff reluctance to disclose this type of information. Overcoming this obstacle is, one of the panelists stressed, more than anything a matter of changing attitudes. Second, the panelists highlighted the importance of trust for effective cooperation. To build trust, however, they recognized that is important to develop a record of enforcement. As one of the panelists put it: *“You have to be a local enforcer before you can be an international enforcer.”* The speaker suggested that agencies look to a broader definition of cooperation, which would incorporate capacity building – promoting understanding of how global cartels operate and including cooperation on follow-on cases, to help newer agencies to develop their own capacity while building relationships between agencies.

Following the panel discussion, agency participants broke into small, moderated discussion groups to explore the issues introduced by the panelists.

### 1. General observation

There was a strong consensus that cooperation and information sharing is critical in cartel investigations. While many agency participants indicated that they had limited experience with enforcement cooperation in cartel cases, all recognized the importance of cooperation in the cartel context and were interested in further developing tools to facilitate such cooperation.

### 2. Factors that facilitate or hinder cooperation

Participants agreed with the panelists that institutional trust is critical to effective cooperation. While building personal relationships was regarded as important, there was consensus that institutional trust should prevail over personal trust. Participants stressed, however, that newer competition agencies face a “chicken-and-egg problem” in this regard. Less experienced agencies not only benefit from developing relations through participation in international fora (such as ICN or OECD), but also from cooperating (often with more experienced agencies) on cases. Yet cooperation requires trust, which, itself, often is obtained through enforcement coordination. One speaker highlighted that

the trust needed for effective cooperation comes after taking the risk to cooperate – it is based upon repeated interaction in real cases and understanding each other’s capacity to cooperate. It was suggested that experienced agencies cooperate and otherwise exchange experience with new agencies to build such trust. Participants also noted that demonstrating the benefits of cooperative efforts for the domestic audience is helpful, and that agencies should highlight examples of successful cooperation to domestic constituencies to underscore the relevance and importance of enforcement cooperation.

Many participants identified statutory rules on the sharing of certain types of information as limiting their enforcement cooperation, noting that national legal restrictions on the exchange of confidential information often define what is permissible cooperation. Certain participants stressed that their laws and rules do not clearly identify the types of information that can or cannot be shared, noting that their laws contain differences in the definitions of confidential information and ambiguity as regards the application of confidentiality provisions to different forms of communication (*e.g.*, telephone calls and e-mails).

Procedural differences between administrative, civil, and criminal cartel enforcement systems were also identified as factors impacting cooperation. Several administrative regime participants noted that they are limited in their ability to exchange information via formal cooperation with agencies in criminal enforcement regimes. The ability of courts in some jurisdictions to require disclosure of evidence in civil proceedings can also impact formal information sharing. Participants expressed a strong desire to find ways to address these issues. One suggestion was to make use of oral statements in leniency procedures, as a means of limiting the possibility of statements being put into evidence.

Several participants indicated that the OECD recommendation on ‘co-operation between member countries on anticompetitive practices affecting international trade’ has been a useful starting point from which to draft bilateral cooperation agreements,<sup>2</sup> and noted that, in 2005, the OECD also adopted best practices on the ‘formal exchange of information between competition authorities in hardcore cartel investigations’.<sup>3</sup> The question was raised, however, what comes first: formal cooperation under bilateral agreements or pursuant to international tools or informal cooperation without a formal framework?

Some participants also addressed the benefits of establishing or increasing regional cooperation, noting that cooperative efforts at a regional level might foster broader international cooperation efforts. One participant, from a jurisdiction that recently adopted a leniency program, cautioned that the introduction of leniency might result in the submission of a number of leniency applications concerning international cartels, and that it would be important for the agency to focus on the effects of the cartel, if any, in their own jurisdiction.

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<sup>2</sup> Available at [http://www.oecd.org/document/32/0,3746,en\\_2649\\_37463\\_44940896\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/32/0,3746,en_2649_37463_44940896_1_1_1_37463,00.html) (last revision 1995).

<sup>3</sup> Available at <http://www.oecd.org/dataoecd/1/33/35590548.pdf>.

Finally, participants underscored that, in order to cooperate, it is essential to know whether other agencies are investigating the same matter. Accordingly, it was suggested that an agency, when receiving a leniency application, should ask the parties to identify the other jurisdictions in which they have or are likely to submit a leniency application.

#### **4. Cooperation in Merger and Unilateral Conduct Matters**

*Moderator:* Dan Sjöblom - Director-General, Swedish Competition Authority

*Panelists:* Paul Collins – Senior Deputy Commissioner of Competition, Canadian Competition Bureau  
John Parisi – Counsel for European Competition Affairs, U.S. Federal Trade Commission  
Ali Haddou Ruiz – Executive Secretary, Mexican Federal Competition Commission

During this session, agency panelists discussed cooperation in merger and unilateral conduct cases. Drawing on case experience, the panel spurred the discussion by introducing several key factors that contribute to successful cooperation.

The panelists emphasized the importance of both: (i) identifying as early as possible whether an investigation involves firms, customers, competitors, suppliers, complainants or evidence located outside the jurisdiction, in order to identify other competition agencies that may have an interest in the case, and (ii) asking parties whether they are filing notifications in other jurisdictions, and, if so, to identify those jurisdictions. The panelists noted that early contact with other agencies is important in many circumstances. To illustrate this point, they noted the example of the need to coordinate promptly on merger remedies, particularly in instances in which an agency seeks an upfront buyer, given that most agencies are required to meet strict deadlines in determining whether a particular merger can proceed. With regard to remedies, the panelists also noted that early coordination may enable certain agencies to take into account or rely on the remedies negotiated by other jurisdictions to resolve anti-competitive concerns in their jurisdictions. This can help smaller, less-resourced agencies, in particular, to address potential competitive impacts on their domestic markets.

The panelists further stressed that much valuable information can be shared with other agencies without waivers of confidentiality. Generally, agency staff can discuss their thoughts on markets of interest, potential competitive concerns and theories of harm, and information that they are likely to seek from parties and third parties but cannot share information received by parties or third parties without a waiver of confidentiality. They agreed that such informal sharing is helpful not only with regard to the investigation under review, but also to promote better understanding as to how an agency's analysis is developed and to build relations between the agencies.

Additionally, the panelists observed that there is little experience in enforcement cooperation in the unilateral conduct context. Several reasons for the limited opportunity

to cooperate in this area were suggested, notably that: there are few unilateral conduct cases pursued in each jurisdiction; these cases often are domestic in nature; and, the timing of the various investigations into a matter is often differentiated. Nevertheless, the panelists emphasized that an exchange of views (*e.g.*, on theories of harm) can be useful with regard to unilateral conduct matters as a means of promoting understanding and policy convergence, as well as coordination in the individual matter.

Panelists then noted that statutory and agency rules generally are in place to protect information, and that agency staff may be reticent to cooperate with other agencies to exchange information, even when permissible. To build a culture of cooperation within the agency, the panelists underscored the importance of education and training, to clarify for staff what can and often should be done in terms of cooperation.

Following the panel discussion, agency participants broke into small moderated discussion groups to explore the issues introduced by the panelists.

### 1. General observation

There was a strong consensus among participants on the importance of cooperation in merger and unilateral conduct cases. The table discussions tended to focus on mergers. Participants confirmed that enforcement cooperation is infrequent in unilateral conduct cases, an issue that also emerged from the responses to the questionnaire and in surveys conducted by the OECD. Participants generally identified cooperation in unilateral conduct matters as more difficult, for the same reasons provided by the panelists. Discussants also, noted, however, that substantive rules on unilateral conduct vary more widely among jurisdictions in comparison to merger and cartel rules, which they believed likely to limit cooperation in the unilateral conduct context. This led some to underscore synergies between the ICN's convergence and cooperation agenda.

### 2. Factors that facilitate / hinder cooperation

Participants reiterated the need to educate agency staff to promote effective cooperation. Even though cooperation can be permissible under national laws, participants agreed that case-handlers often can be too risk-averse to contact or provide information to other agencies.

During the table discussions, the issue of waivers was discussed in detail. Many participants highlighted that it is more difficult to obtain waivers from parties in unilateral conduct cases, believing that parties' incentives to be forthcoming in this context were limited in comparison to the merger context. Participants also felt that the ICN should better promote the ICN Model Confidentiality Waiver,<sup>4</sup> given that some agencies do not use waivers and that some do not have a waiver model (*i.e.*, they rely on waivers produced by the parties). Some also expressed the view that bilateral cooperation agreements can provide some comfort to parties considering whether to grant waivers

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<sup>4</sup> Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

because these agreements often re-affirm each jurisdiction's confidentiality commitments.

Participants also addressed the issue of timing, and the importance of aligning key phases of investigations. They underscored that early contact with other agencies reviewing the same transaction facilitated more consistent timing of review, and that it was important to identify other agencies reviewing or likely to review the same transaction or conduct, as early as possible. In this light, some participants noted that pre-notification discussions with the parties may facilitate this process. Participants also stressed the importance of having a contact point in each jurisdiction, and felt that the creation of a list of cooperation liaisons for all ICN agencies would be helpful.

In addition, participants suggested that they found cooperating on remedies to be challenging, given that a remedy for one jurisdiction may not necessarily be an adequate solution for another. Participants reiterated the importance of establishing early contact with other agencies to attempt to develop remedies that are consistent, noting that it also can be helpful to discuss joint remedial packages and common trustees in appropriate cases.

In conclusion, and as in the cartel context, participants agreed that confidentiality protections and institutional trust are keys to successful cooperation. Likewise, the human element to effective cooperation again was mentioned – that relationships should be built between competition agencies, both at the senior and at the case handler levels.

## **5. Views from the Private Sector**

*Moderator:* Roxann Henry – Dewey & LeBoeuf, United States

*Panelists:* Andrea Appella – News Corp, United Kingdom  
Ilene Knable Gotts – Wachtell Lipton Rosen & Katz, United States  
James Musgrove – McMillan LLP, Canada  
Anmadeu Ribeiro – Mattos Filho Advogados, Brazil  
Hoil Yoon – Yoon & Yang LLC, Korea

This panel addressed cooperation from the private practitioners' perspective, including the factors they consider in determining whether and how to facilitate cooperation among agencies and covering confidentiality concerns, timing coordination, and negotiating remedies in multiple jurisdictions.

Panelists emphasized the benefits of enforcement cooperation between competition agencies, underscoring that cooperation often results in efficiency, speed, and more sound analysis to the benefit of the agencies, the private sector and consumers.

Panelists highlighted that confidentiality concerns are a significant consideration for parties in determining whether to cooperate. They noted that, in part, this is an issue of law, and whether sufficient protections for such information exist, but also noted that this

is an issue of transparency. The NGA participants emphasized the need for competition agencies to establish clear guidance as to the scope and content of their confidentiality protections. Panelists also recognized a “softer” concern that if waivers of confidentiality are granted, the information provided might end up being used in follow-on court litigation by third parties, particularly in the cartel context.

Panelists also encouraged agencies to cooperate more on remedies.

Following the panel discussion, non-governmental advisors joined agency officials in smaller, moderated discussion groups, to identify factors that contribute to successful cooperation in competition enforcement matters.

### 1. General observation

Non-governmental advisor participants stressed the need for the private bar to know of and understand the rules and safeguards in place for the protection of confidential information.

### 2. Factors that facilitate / hinder cooperation

Participants discussed the issue of confidentiality concerns in detail, with non-governmental advisors emphasizing the need for transparent and strong policies concerning the protection of confidential information. As an example, non-governmental advisors noted that a lack of understanding about how its information will be used and protected can cause firms to be less willing to consider leniency applications. To increase transparency, participants suggested that information about statutory confidentiality protections should be readily available on the website of the competition agencies and/or collected on the ICN’s website.

This discussion also identified steps that agencies and parties might take when considering the impact of follow-on litigation and the parties’ incentives to cooperate with an investigation, *e.g.*, reliance on oral statements and physical limitations on third-party access to information or restricting access to confidential information to agency offices where only note taking would be permitted.

Another issue discussed was the coordination of timing of investigations. Private sector participants identified the challenge in complying with information requests within the time frames provided by different jurisdictions, and suggested that it would be desirable to align timetables, to the extent possible so as to minimize costs of the investigations on both agencies and parties.

The non-governmental advisors highlighted the importance of cooperation on remedies among different jurisdictions in matters with international impact, but observed a “falling off of cooperation,” particularly in the cartel context, at the final stages of investigation (*i.e.*, the remedial stage) vis-à-vis cooperation at the opening of the investigation.

## **6. Experiences with Existing Tools for Cooperation and Future Work**

*Moderator:* John Fingleton - Chief Executive Officer, UK Office of Fair Trading

*Speakers:* Kjell Jostein Sunnevåg – Senior Advisor, Norwegian Competition Authority  
 Thomas Hoelzl – Case Administrator, Austrian Federal Competition Authority  
 Antonio Capobianco – Senior Competition Expert, OECD

Through moderated audience discussion, this concluding session solicited feedback from members and non-governmental advisors on their use of ICN cooperation-related work product and other international tools. Participants broadly recognized the potential synergies between the work of the OECD and the ICN on cooperation issues. The session also included a discussion of relevant ICN Second Decade project takeaways and focused on possible future ICN work on cooperation.

Three speakers kicked off this session by providing short interventions on existing international tools: the regional Nordic Cooperation Network (NCN),<sup>5</sup> the Central European Competition Initiative (CECI) merger database,<sup>6</sup> and the OECD Recommendation on ‘co-operation between member countries on anticompetitive practices affecting international trade’.<sup>7</sup>

- Kjell Jostein Sunnevåg briefly introduced the main features of the regional cooperation that takes place within the NCN, highlighting that NCN members notify one another of relevant cases, and that the cooperation agreement allows members to exchange both non-confidential and confidential information (on the satisfaction of certain conditions). He also explained that annual meetings are held between *e.g.*, agency heads, cartel groups, and the Chief Economists of the participating competition agencies and that the NCN monitors advocacy and cooperation projects. Taken together, Sunnevåg stressed that these initiatives substantially lower the thresholds for effective enforcement cooperation between the NCN members.
- Thomas Hoelzl described the CECI, noting that the participating competition agencies notify one another that they are reviewing a merger and share basic information on their merger investigations (*e.g.* the name of the parties, sector, and investigative status). He underscored that while it is too early to draw substantial conclusions on CECI’s effectiveness, it appears to facilitate informal contact with respect to the exchange of theories of harm and information on potential remedies in individual matters as well as the exchange of best practices more generally.

<sup>5</sup> The NCN includes the competition agencies from Denmark, Iceland, Norway, and Sweden.

<sup>6</sup> The CECI includes the competition agencies from Austria, Czech Republic, Hungary, Poland, Slovakia, and Slovenia. The CECI was founded in 2003, Austria joined the CECI in 2009.

<sup>7</sup> Available at [http://www.oecd.org/document/32/0,3746,en\\_2649\\_37463\\_44940896\\_1\\_1\\_1\\_37463.00.html](http://www.oecd.org/document/32/0,3746,en_2649_37463_44940896_1_1_1_37463.00.html) (last revision 1995).

- Antonio Capobianco discussed the experience with the use of OECD's enforcement cooperation-related recommendations, observing that, particularly in the area of cartels and unilateral conduct, many competition agencies have made use of the recommendations.

John Fingleton then opened the floor for a discussion of possible future work within the ICN, noting that many ICN members consider promoting international cooperation on enforcement matters to be one of the ICN's main goals. Participants then suggested ideas for possible future work on cooperation in the ICN, providing the following ideas for consideration.<sup>8</sup>

1. Creation of a contact list of cooperation liaisons, which is to be updated regularly.
2. Use of the ICN blog to provide cooperation tips, and highlight relevant cooperation experiences.
3. Have substantive working groups hold webinars or teleseminars on case cooperation examples and techniques.
4. Help promote cooperation opportunities between and among members on enforcement matters affecting multiple jurisdictions.
5. Develop advocacy materials on the value of cooperation for use by agencies, both to better advocate with their legislators for the necessary tools and authority for effective cooperation and to promote greater use of waivers in individual matters to firms.
6. Develop new and update existing ICN cooperation enforcement guidance, *e.g.* as part of investigation checklists and handbooks in the merger, cartel and unilateral conduct working groups.

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<sup>8</sup> Due to the nature of the roundtable, there was no consensus-building around formal conclusions or future work product commitments, and thus some of these concepts may reflect the opinions or contributions of only one or two individuals.

## ICN Roundtable on Enforcement Cooperation Questionnaire Response Summary

Nineteen agencies representing a broad spectrum of experience and geographic diversity<sup>9</sup> responded to a brief questionnaire circulated in anticipation of the ICN roundtable. This paper aggregates and summarizes the information provided.

### A. Case cooperation

The questionnaire asked agencies to identify the ways in which they cooperate with agencies from other jurisdictions on enforcement matters. Eighteen agencies responded to this question.

In summary, almost all respondents have experience with informal cooperation: (i) informal contacts with another agency; (ii) sharing information regarding the status of the investigation; and, (iii) sharing of substantive theories of harm. With regard to more formal cooperation, most agencies are permitted to obtain waivers in order to share business information. Most agencies also coordinate on the timing of review/decision and remedies. However, newer agencies identified limited experience in using more formal cooperation tools to date. Moreover, agencies identified greater use of cooperation tools in the cartel and merger areas, in comparison to unilateral conduct. In addition, member agencies of the European Competition Network (ECN) and the Nordic Cooperation Network (NCN) have confidentiality agreements in place that allow for the exchange of information without waivers; for the ECN this is limited to cartel and unilateral conduct cases. A majority of respondents, primarily experienced agencies, have experience with coordination of dawn raids/searches in cartel investigations. Most respondents have little or no experience with coordination of other aspects of investigations (*e.g.*, joint interviews).

Factors	Cartel	Merger	Unilateral conduct
Informal contact with another agency	17	18	16
Sharing information regarding the status of your agency's investigation with another agency	14	14	13
Sharing the substantive theories of violation and harm your agency is investigating with another agency	14	14	13
Obtaining appropriate waivers and sharing business	11	13	7

<sup>9</sup> Respondent agencies were: Belgian Competition Authority – Directorate General; Tribunal de Defensa de la Libre Competencia (Chile); European Commission; Irish Competition Authority; Japan Fair Trade Commission; Monopolies and Price Commission of Kenya; Korea Fair Trade Commission; Mexican Federal Competition Commission; Norwegian Competition Authority; Competition Commission of Pakistan; Commission Nationale de la Concurrence du Senegal; Competition Commission of Singapore; Swedish Competition Authority; South African Competition Commission; Swiss Competition Commission; Taiwan Fair Trade Commission; the Office of Fair Trading (United Kingdom); United States Federal Trade Commission; and, the United States Department of Justice - Antitrust Division.

information and documents with another agency			
Coordinating with another agency on the timing of review and decision	10	10	9
Coordinating with another agency on dawn raids/searches	11	2	6
Coordinating other aspects of investigations (e.g. joint interviews)	4	3	3
Remedy coordination	5	10	5

Respondents then summarized the frequency of their cooperation with an agency from another jurisdiction (defined as having at least one substantive contact) in the three substantive areas of mergers, cartels and unilateral conduct. On average they identified the frequency of their cooperation as: moderate to frequent in the merger context, followed by moderate to seldom in the cartel context and seldom to never in the unilateral conduct context.

Finally with regard to the number of agencies with which they cooperated, respondents indicated that on average they cooperate with one to three additional agencies. Certain respondents indicated that their cooperation in merger cases falls within the one to three additional agency range, but that cartel cooperation may involve additional agencies. Most respondents did not provide information on this issue for unilateral conduct cases, often noting their limited experience.

## **B. Authority**

As a general matter, respondents identified that they are subject to the same legal rules for cooperation across the merger, cartel and unilateral conduct areas. Half of the respondents also noted that they can enter into bilateral cooperation agreements, and most of these agencies noted that they have done so. Respondents also cited relevant regional arrangements, particularly members of the ECN (who noted the limitation of these arrangements to cartel and unilateral conduct cases) and the NCN.

## **C. Process**

Respondents identified a variety of means by which they learn about potential opportunities to cooperate with agencies from other jurisdictions. They generally acknowledged that they learn of such opportunities in an *ad hoc*, case-by-case, manner through:

- Informal inquiries, on own initiative (12 respondents)
- Leniency application (8 respondents)
- Conferences or other bilateral or international meetings (5 respondents)
- Media coverage of investigations by foreign agencies (4 respondents)

A notable exception concerns members of the ECN and the European Competition Authorities (ECA) forum, which have formalized information sharing systems notifying members of the opening of cases.

Almost half of the respondents indicated that their merger notification form requests the parties to confirm whether the transaction has, or will be, notified to other competition agencies. In most cases, this information is considered a voluntary request. Five agencies do not request this information as part of their notification form; yet, they and several other respondents specified that they generally will request this information from the parties during the course of the review process.

Respondents confirm that the decision to contact another agency or to accept a foreign agency's request for cooperation depends on the facts and circumstances of the case. They identified several factors that they consider when evaluating the potential for cooperation: direct benefits (*e.g.*, the relevance of the information that can be obtained) (10 respondents); the potential effect of the practice or transaction on the other jurisdictions/common interests (6 respondents); time and resource implications (4 respondents); experience and capacity of the foreign agency (4 respondents); whether the case involves confidential information (2 respondents); past interactions (2 respondents); and, complexity of the case (1 respondent).

With regard to timing of contact, respondents identified a notable difference between merger and cartel cases in comparison to unilateral conduct cases. A majority of respondents indicated that contact in merger and cartel cases is made at the earliest stage of the investigative process (11 respondents), while respondents generally identified that contact is made at a later stage in unilateral conducts cases.

#### **D. Waivers**

Almost all respondents indicated that they are permitted to rely on waivers of confidentiality from parties and third parties to use the party's confidential information in discussions with staff from other agencies. In almost all instances, but for cases falling within the ECN and NCN contexts, waivers are required in order to share such confidential material. Five respondents noted that they systematically require waivers from leniency applicants in cartel matters.

Most of the newer agency respondents report limited experience with waivers. Four respondents experienced minor difficulties in obtaining waivers from (third) parties. Two of these respondents noted that, occasionally, it is challenging to obtain waivers from the parties in unilateral conduct or cartel cases (where there is no leniency application), but did not elaborate on the reason for this difference.

**E. Additional tools**

Although the responses indicated that there is little available written guidance on cooperation to date, seven respondents indicated that they have or are drafting (internal) guidance on case enforcement cooperation.

**F. Obstacles**

Respondents identified certain common obstacles to effective cooperation. In particular, the majority of respondents identified legal obstacles to formal cooperation regarding the exchange of confidential information in the absence of waivers or cooperation agreements (13 respondents). However, four of these respondents noted that the informal exchange of non-confidential information often is sufficient to foster effective cooperation. Other obstacles mentioned included: lack of resources (3 respondents); trust issues stemming from the political climate and lack of cooperation among jurisdictions within the region (2 respondents); vested national interests (1 respondent); lack of concurrent review timetables in merger investigations (1 respondent); and linguistic concerns (1 respondent).