



Practical Aspects of International Cooperation  
in Merger Cases:

Alignment of Proceedings

ICN MWG Teleseminar, October 17, 2013

# Agenda

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- **Tatsuro Kuchinomachi**, Japan Fair Trade Commission
- **José Alexandre Buaiz Neto**, Pinheiro Neto Advogados, Brazil
- **Gian Luca Zampa**, Freshfields, Italy



# PRACTICAL ASPECTS OF INTERNATIONAL COOPERATION IN MERGER CASES: ALIGNMENT OF PROCEEDINGS

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ICN MWG Int'l Cooperation Teleseminar  
17 October 2013

Disclaimer: The views expressed herein are my own, and do not necessarily reflect those of the Competition Bureau

# OUTLINE OF ISSUES

1. How do we find out if another agency is reviewing a merger?
2. How and when do we make initial contact?
3. Form and frequency of contact thereafter
4. Practical obstacles/limitations to cooperation
5. Role of the Parties in facilitating cooperation

# CONTEXT: COMPETITION BUREAU STATS

- ☉ In an average year:
  - 210 merger filings - 40 designated “complex” (20%)
  - 8-10 involve international cooperation (4-5%)
    - ☉ 95% involve US agencies
    - ☉ 25% involve European Commission
    - ☉ 10% involve other agencies ACCC, UK OFT, etc.
    - ☉ 1-2 result in a remedy (< 1%)
- ☉ Over past 4 years, approximately 17 cases have resulted in remedies :
  - 9 involved international cooperation (53%):
    - ☉ 6 involved a Consent Agreement in Canada
    - ☉ 3 relied solely on remedies reached outside Canada
  - 8 were domestic cases that did not involve int’l cooperation (47%)

**Key Takeaway:** International cooperation occurs in a small proportion of total cases, but in a relatively high proportion of complex cases, and cases that require remedies.

Issue 1: How do we find out if another agency is reviewing the same merger?

# 1. Notification Form Requirement (mandatory)

- “3.1 List of foreign authorities which have been notified of the proposed transaction by the parties and the date of notification for each”
- Example response:
  - ⌘ Norwegian Competition Authority – Pending
  - ⌘ Turkish Competition Authority – April 3
  - ⌘ UK OFT – March 31
  - ⌘ US FTC – February 17

# 2. Parties often tell us (voluntarily)

- e.g., before making a filing, or in cases not requiring a filing

### 3. Often find out from Public Info:

- ⌘ **M&A press:** “GCR understands the deal will be notified with authorities in Europe, the US and potentially other jurisdictions worldwide because of the companies’ global client base.” – GCR story on Omnicom/Publicis merger
- ⌘ **Securities Filings:** “The Company's proposed merger with Live Nation is subject to antitrust/competition regulatory review in the United States and four other countries...The other jurisdictions where the transaction is under regulatory review are Canada, the United Kingdom, Norway, and Turkey.” – Ticketmaster SEC filing
- ⌘ **Agency websites:** Some agencies post info about active investigations on their website (e.g., UK OFT, EC)



## 4. International Notifications

- Bilateral Agreements/Cooperation instruments often contain notification provisions
  - ⌚ A less common, more formal mechanism
  - ⌚ Typically arises when another agency is planning to conduct interviews/seek info from a Canadian company
- In the merger context, we are often already aware of the matter before the international notification is received

5. If all else fails, we ask the parties!

**Key Takeaway:** We use a variety of sources to find out if another agency is reviewing the same merger

Issue 2: How and when do we make initial contact?

## How do we find the right contact?

### 1. We have a designated International Liaison within our International branch

- Helps us get in touch with the relevant case team by contacting assigned liaison at counterpart agency
- Then we are on our own to reach out and make introductions – sometimes we know them already!
- Benefits:
  - ⌘ Streamlines and simplifies process (24-48 hr turnaround)
  - ⌘ Useful for international team to be aware of co-operation efforts

### 2. ICN Framework for Merger Review Cooperation

- Useful for identifying contacts at agencies we are less familiar with

## When do we make initial contact?

- ☪ **SCENARIO 1:** Case does not appear to raise substantive issues and co-op not expected to be necessary or beneficial:
  - May not make contact at all
  - Or may make contact just before clearance as a check on substantive findings, and also a procedural heads-up
  
- ☪ **SCENARIO 2:** Case raises complex issues, and it appears that cooperation would be beneficial:
  - We make contact as early as possible
  - Depending on the case, it could be before filings are received, or just after they are received
  
- ☪ Introductory calls at an early stage are useful to:
  - Establish lines of communication
  - Discuss timing/procedural issues
  - Discuss potential areas of competitive overlap
  - Identify any relevant precedent cases, etc.

Issue 3: What is the form and frequency of communication after initial contact?

- ☪ Contact usually made at key stages of investigation:
  - Prior to a clearance decision
  - Prior to decision to issue a Supplementary Information Request (initiates Phase II in Canada)
  - Prior to major internal briefings or meetings with the Parties
  - Prior to remedy discussions with Parties (sometimes conducted jointly)
  - Prior to a final enforcement decision
  
- ☪ However there is typically also continuous/informal contact throughout the investigation
  - Used for team-to-team substantive updates/exchanges
  - At early stages of investigation - typically ad hoc, as necessary
  - As review advances - typically weekly/pre-scheduled
  - At final stages (remedy negotiations/enforcement decision) – daily

**Key Takeaway:** The form and frequency of contact is determined largely by the status/pace of the investigation

# AVIS-BUDGET/DOLLAR THRIFTY - CB COOPERATION WITH US FTC (2010-11)

## Approximate Timeline:

- ⌚ May 3 – Potential transaction announced
- ⌚ May 13 – US HSR Filing
- ⌚ Shortly thereafter Parties approach CB
- ⌚ CB and FTC coop already underway
- ⌚ June 14 – US Second Req.
- ⌚ End June – PMN filing Canada
- ⌚ Aug 26 – Canada SIR
- ⌚ September onwards – Phase II in both jurisdictions
  - Info sharing made possible by waivers
- ⌚ Transaction ultimately abandoned in September 2011

## Cooperation:

- ⌚ Despite earlier US filing (1.5 months), still able to align investigation timetables
  - CB able to start work before filings received, and cooperate with US FTC from very early stage
  - Phase II alignment
- ⌚ Contact made before key milestones
- ⌚ Parties able to supply certain 2<sup>nd</sup> Request docs in response to SIR
- ⌚ Weekly team-to-team calls during more advanced stages of Phase II (Wednesdays at 10am ET!)
- ⌚ Conducted joint interviews
- ⌚ Coordinated (potential) remedy discussions at later stages

Issue 4: What is the role of the Parties in facilitating international cooperation?



☪ Parties encouraged to provide confidentiality waivers when requested

- Waivers not required in Canada, but typically required by other agencies to exchange confidential info with us
- Experience is that parties almost always provide them
- However can usually discuss certain useful things such as timing, substantive approach without waivers

☪ Parties encouraged to facilitate cooperation through the timing of their filings

- Does not necessarily mean filing at the same time in each jurisdiction
- Means timing filings so that, to extent possible, agencies can cooperate meaningfully at key investigation/decision-making stages
  - ☪ Reviews conducted in parallel, rather than in serial
  - ☪ Facilitates joint info requests, work sharing, etc.
  - ☪ Can lessen burden/duplication of efforts for parties and agencies involved

Issue 5: What are some practical obstacles/limitations to cooperation?

- ☪ We rarely encounter issues with language barriers, time zones, etc.
  - However, vast majority of cooperation is occurring with a small number of English-speaking agencies
  - As opportunities to cooperate with other agencies grow, these could become challenges for us going forward
  
- ☪ Largest practical limitation to cooperation tends to be unaligned timing:
  - Notification in Canada can sometimes lag notification in other jurisdictions
  - When this occurs we sometimes have to play “catch-up”, and may even lose opportunities for meaningful cooperation altogether

# UNALIGNED TIMING: A “NATURAL” ANALOGY

- ☉ **Mutualism:** interaction where both species benefit. e.g., the goby fish and the shrimp
  - Agencies can realize mutual benefits of cooperation when timing is aligned!
- ☉ **Commensalism:** interaction where one species benefits and the other is not significantly harmed or helped. e.g., egrets and buffalo
  - When one agency is ahead of the other (procedurally/substantively), cooperation may be limited/one-sided



**Key Takeaway:** Unaligned timing can limit the benefits of cooperation (for agencies, and also for the parties)

## ICN International Cooperation Resources

- ☪ ICN Report on OECD/ICN Questionnaire on International Cooperation (2012)
- ☪ ICN Framework for Merger Review Cooperation (2012)
- ☪ ICN Report on Roundtable on Enforcement Cooperation (2011)
- ☪ ICN Merger Working Group Model Confidentiality Waiver (2005)
- ☪ ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, Interagency Coordination (2004)



# The JFTC's experience -Framework for Merger Review Cooperation-

Tatsuro Kuchinomachi

Deputy Director, Japan Fair Trade Commission

October 17th, 2013

Disclaimer: This material is created on the presenter's own responsibility and does not represent any official views of the organization to which he belongs.

## Overview of my presentation

1. JFTC's experience – Recent International Merger Cases
2. Communication Tool
3. Background of the proposal on the Merger framework
4. ICN Framework for Merger Review Cooperation
5. Toward Further Improvement

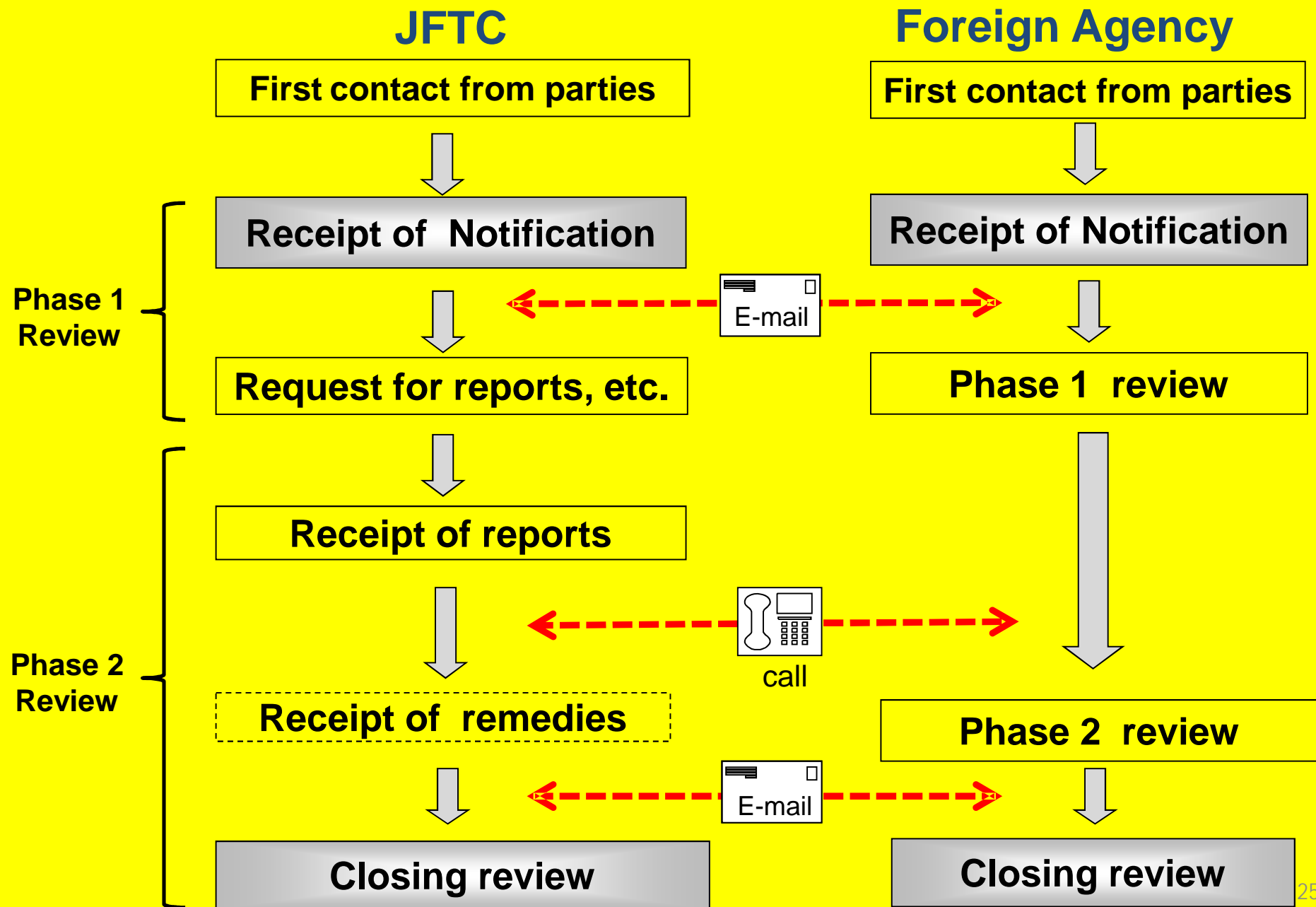
# 1. JFTC's experience – Recent International Merger Cases

## □ Cases

- Acquisition of Sanyo Electric by Panasonic  
(2009)
- Proposed joint venture for iron ore production  
between BHP Billiton and Rio Tinto  
(2010)
- Two M&As in Hard Disc Drives  
(2011)



# 1. JFTC's experience – Recent International Merger Cases



## 2. Communication Tool

### ρ Formal Channel

∅ Bilateral or multilateral Agreements (eg. FTAs or EPAs)

(OECD 1995 Recommendation)

### ρ Informal Channel

### 3. Background of the proposal on the Merger framework

ρ We have learned from experiences:

- Ø Formal and informal relationships among competition agencies are very important in merger review.
- Ø However, information exchanges are still taking place only among some mature agencies.
- Ø It seems to be difficult to cooperate with agencies who have not previously co-operated, or have no relationships of trust and understanding.



It is critical to establish some kind of framework within all ICN member including immature agencies for exchanging information on specific merger cases in a more timely and efficient way.

## 4. ICN Framework for Merger Review Cooperation

### ØParticipation in the framework

- Open to all ICN member agencies responsible for reviewing mergers
- non-binding , do not create any legally binding rights or obligations
- 51 Member agencies have joined

### ØContact list

The Name of Authority	The Name of Liaison Officers	Title	Phone Number	Fax Number	E-mail Address
Japan Fair Trade Commission	XX XXX	Director , International Affairs Division	+81 3 3581 XXXX	+81 3 3581 YYYY	<a href="mailto:XXX_XXX@jftc.go.jp">XXX_XXX@jftc.go.jp</a>
	YY YYY	Deputy Director, International Affairs Division			<a href="mailto:YYY_YYY@jftc.go.jp">YYY_YYY@jftc.go.jp</a>

## 5. Toward Further Improvement

### Ø Benefit from the Framework

- Easy to communicate with other agency at first contact
- Serve as bridge to foreign third party's contact point

### Ø Possible Improvement

- Keep the contact list updated
- Multiple contact point
- Economist contact point

# International Cooperation: Timing Alignment

ICN Teleseminar - 17 October 2013

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# Summary

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1. Incentives to align proceedings
2. Implementation: how could it work better?
3. Cases
  - GE/Avio (EU/US)
  - Saint-Gobain/Owens Corning (EU/US/Brazil)



# Incentives

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- Is cooperation always appropriate/necessary?
  - Common antitrust concerns
  - Global v. regional v. local markets
  - Coordination on remedies
  - Efficient review of the deal

## Factors - Parties

- Client incentive to close deal
- Avoid inconsistent decisions
- Limit duplication costs
- Third-party complainants
- Time pressure
- Risk of leakage (confidentiality)
- Added layer of complexity
  - additional costs and
  - additional delays
- "Race to remedies"!

## Factors - Agencies

- Cross-authority cooperation
- Avoid inconsistent decisions
- Make sure all aspects are covered
- Cost of cooperation
- Added layer of complexity



# Incentives

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- Is cooperation always appropriate/necessary?
  - Role of the parties – confidentiality waivers (renvoi)
  - Number of agencies involved
  - Level of experiences of agencies involved
  - Reciprocal trust is key!
  - Reciprocal openness and clarity from the outset
  - Need to know the rules of engagement in advance!

# Implementation: how could it work better?

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- **When to approach the authorities**
  - Pre-notification
- **Organization of counsel to address multiple jurisdictions**
- **Benefits of cooperation**
  - Better, speedier assessment
  - Improve efficiency in information gathering (reduce duplication)
  - Avoid conflicting outcomes and remedies
- **Confidentiality issues**
- **Potential opposition(s) by third parties**
- **Potential non-technical issues (political, economic)**

# Implementation: how could it work better?

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- Pre-notification is essential for alignment (flexibility)
- Transparent approach by the parties from the outset - necessity
- Implementation
  - joint request for information
  - joint "state of play" meetings"
  - joint interviews/expert witness statements
  - But the devil is in the details!
    - reference period
    - scope
    - market definition
- Procedural alignment is pre-condition for substantive alignment but not per se sufficient

# Cases – an international perspective

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## *GE/Avio – EU and US/FTC*

- Pre-notification
  - Party initiated alignment – clear decision to urge full cooperation
  - Global markets, global players, global complainants, common potential issues and... a certain “uncooperative” history in the background
- Full cross-transparency by the parties (same materials to both agencies)
- Joint meetings
- Joint interviews
- Request of information not fully coordinated
- Remedies – what happened?

### *Some ex post thoughts*

- Focus on procedural alignment v. substantial alignment



# GE/Avio cont'd – an example of timing alignment

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## EU COMMISSION

- 10 Jan: kick-off meeting
- 12 Feb: Submission 1<sup>st</sup> Draft Form CO
- 15 Feb : Joint state of play call
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- 21 Feb : First RFI
- 1 Mar : Meeting at EC
- 6 March: Second RFI
- 13 March: Third RFI
- 20 March: Fourth RFI
- 17 April: Meeting at EC
- 23 April – Fifth RFI

## FTC

- 18 Jan: kick-off meeting
- 30 Jan: First RFI
- 12 Feb: Submission Draft CO Form,
- 15 Feb: Joint state of play call
- 18 Feb: Second RFI
- 1 Mar: FTC joined EC meeting
- 12 March: Third RFI
- 22 March: Fourth RFI
- 17 April: FTC joined the meeting at EC
- 23 April: Fifth RFI



# GE/Avio cont'd – an example of timing alignment

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## EU COMMISSION

- 25 Apr : EC Financial RFI answer submitted
- 2 May: Final Draft CO Submitted for green-light
- 13 May : Formal Form CO Submitted
- 15 May: Joint remedies discussion

**2 July 2013 – conditional clearance**

## FTC

- 25 Apr : EC Financial RFI answer submitted also to FTC
- 6-7 May: HSR filing submitted
- 15 May: Joint remedies discussion
- 6-10 June: HSR Pull & Re-file
- 10 July: Second request
- 19 July: FTC voted to publish consent order



## Cases – a local perspective

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### *Saint-Gobain/Owens Corning – Brazil and EU and US*

- Difficulty on global perspective of the case
- Market assessment and local concerns
- Timing alignment difficult due to negotiations with the EC and with US
- Remedies – local remedies imposed due to the peculiarities of the Brazilian case.

#### **Some *ex post* thoughts**

- Coordination may not always be possible due to local characteristics of a deal.

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# Thank you!

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