

Enforcement Cooperation in Unilateral Conduct

November 7, 2012

Presented by

ICN Unilateral Conduct Working Group

Moderator - James F. Rill

James F. Rill is actively engaged in the representation of firms involved in merger and unilateral conduct activities before U.S. and foreign antitrust agencies.

Mr. Rill has served as Assistant Attorney General in charge of the U.S. Department of Justice's Antitrust Division and also as Chairman of the ABA's Section of Antitrust Law. During his tenure as Assistant Attorney General, he negotiated the U.S.-European Union Antitrust Cooperation Agreement of 1991 and issued the first joint FTC and DOJ Horizontal Merger Guidelines in 1992.

In 1997, Mr. Rill was appointed by Attorney General Janet Reno and Assistant Attorney General Joel Klein as Co-Chair of the Justice Department's International Competition Policy Advisory Committee, with a mandate to recommend future international antitrust policy initiatives. The recommendations in the Committee's report, issued February 2000, are being pursued in the U.S. and overseas. Foremost among these recommendations was the proposal to create a global competition forum that would serve as a mechanism for government competition authorities throughout the world to meet and confer on antitrust issues. This recommendation was background for what became the International Competition Network.



Una Johannsdottir

Una is a case officer at the Swedish Competition Authority. Furthermore Una is the General Contact Point (GCP) for the European Competition Network (ECN) at the Authority, meaning that all incoming and outgoing inquiries within the ECN go through her. Una holds a B.A. in law and a Master of laws from the University of Iceland and completed an LL.M in European and competition law at Stockholm University.





International
Competition
Network

European and Nordic Enforcement Cooperation in unilateral conduct cases

Una Johannsdottir
Case Officer/General Contact Point ECN
Swedish Competition Authority (SCA)

Overview

- **European Competition Network** – Assistance in investigations
- **Nordic Cooperation**
- Enforcement cooperation in unilateral conduct cases – example: **Astra Zeneca case**
- Case study: **The NOMX case**
- Final thoughts (*advantages of enforcement cooperation, challenges and obstacles that remain*)



ECN - European Competition Network

- 27 National Competition Authorities (NCAs) and the European Commission
- Council Regulation 1/2003
 - ✓ Information about cases and case-allocation (Article 11)
 - ✓ Exchange of information (Article 12)
 - ✓ Assistance in carrying out investigations or other fact-finding measures(Article 22)
- Unique Cooperation!

Assistance in investigations (Article 22)

- Inspections on behalf of the Commission or another competition authority
- Other fact-finding measures, e.g.
 - Request for information
 - Interviews
- Assisting NCA applies own rules of procedure and own powers of investigation
- No legal obligations – “best efforts”

Nordic Cooperation

- Close cooperation between the Nordic competition authorities
 - ✓ Annual Nordic meetings
 - ✓ Different active working groups
 - ✓ The Nordic Cartel Network
 - ✓ Joint Nordic Reports
- Agreement on the exchange of confidential competition-related information between the authorities of Denmark, Iceland, Norway and Sweden
- Denmark, Finland and Sweden also members of the European Competition Network

Enforcement cooperation in unilateral conduct cases

- ECN members frequently assist one another in carrying out inspections or requesting information in cases of unilateral conduct
- Example: **Astra Zeneca case**
 - Parallel investigations by Commission (101&102 in several MSs) & Netherlands (102 in NL)
 - Simultaneous inspections
 - In Netherlands - NMa
 - In the UK – EC, OFT & NMa
 - In Sweden – EC, SCA & NMa
- The European Commission applied EU law, while the national competition authorities applied their national laws.

The NOMX case

- NasdaqOMX (NOMX) is an American company that operates stock exchanges in the Nordic and Baltic countries
- Suspicion of exclusionary practices on the market for trade in securities
 - The possibility for a competing trading venue (Burgundy) to localize server capacity next to NOMX customer servers in a data center (owned by Verizon) to be able to reduce latency time.
 - SCA suspects that NOMX has put pressure on Verizon to refuse Burgundy access to the data center

The NOMX Case: Request for written information

- The market for trade in securities is highly complex and NOMXs customers are widely spread in Europe
- Request for information necessary for determining the relevant market, assessing the impact of the suspected infringement and determining the theory of harm
- The SCA sought assistance from several ECN members and Nordic competition authorities in sending out a questionnaire to NOMX customers regarding trading in securities
 - On basis of Article 22(1) of Regulation 1/2003
 - Through the Nordic cooperation
- The enforcement cooperation proved to be essential for the investigation in the NOMX case
 - Important to gather information from companies located outside of Sweden

Final Thoughts

- Advantages of formalized enforcement cooperation
 - Reaching across borders in competition law enforcement
 - Can be essential when investigating companies that operate internationally
- Challenges and obstacles that remain
 - No legal obligation
 - Differences in national rules (*legal possibilities, formal requirements etc.*)
- Possible future convergence?



International
Competition
Network

Thank you

Una.johannsdottir@kkv.se

Joshua B. Gray

- Harvard University, AB
- Columbia Law School, JD 1996
- Law Clerk, U.S. Court of Appeals for the Second Circuit 1996-97
- Attorney-Advisor to FTC Chairman 1997-99
- Private Practice, New York, 2000-12
- FTC Office of International Affairs, present



A U.S. FTC Perspective on Cooperation in Unilateral Conduct Investigations

Joshua B. Gray
US Federal Trade Commission OIA

(Views expressed are personal, not those of the agency or its
Commissioners.)

FTC Conduct Cases

- Within FTC Bureau of Competition, two groups handle conduct cases
 - Healthcare Group
 - Anticompetitive Practices Group
- Limited resources for non-merger antitrust enforcement affects case selection
 - Consumer harm
 - Influence and improve the development of our law
 - Relationship to private litigation

FTC Conduct Cases

- Healthcare Group typically works on matters in local or national markets
 - Hospitals, health insurance, physicians
 - Food and Drug Administration regulations often produce national markets
 - Bilateral case cooperation, less common
- Often, confer and consult other agencies on shared policy issues, e.g. Pay-for-Delay

FTC Conduct Cases

- FTC Anticompetitive Practices Group (ACP)
 - ACP sees more opportunities for bilateral case cooperation
 - Cooperation is highly valued
- Types of cases investigated by ACP
 - Anticompetitive agreements and invitations to collude
 - Abuse of standard setting or regulatory processes
 - Technology investigations, e.g. Intel

FTC UC Cooperation

- When possible, cooperation in UC cases is common
 - In past year, FTC has actively cooperated in 4 UC investigations
 - Preferably, cooperation begins as early as possible and continues through the remedy stage
- Opportunities for UC cooperation affected by
 - Fewer conduct cases with cross-border implications
 - Different timetables

FTC UC Cooperation

- Obstacles to cooperation similar to other types of cases
 - Confidentiality restrictions absent waivers
 - Differences in definition and scope of legal privileges
 - Threat of private litigation may heighten parties' concern about exposure to civil discovery
- Any differences in substantive legal standards rarely impede cooperation during UC investigations

FTC UC Cooperation

- Our experience suggests value of cooperation lies in
 - Coordination of timing of investigations
 - Common understanding of relevant facts and economic principles
 - Compatible remedies
- Similar to the benefits of cooperation in merger investigations

FTC UC Cooperation

- What types of cooperation have been successful in UC cases?
 - In parallel open investigations, without waivers from parties
 - Discuss policy objectives, market definition, and general theories of liability and harm
 - Exchange general information about markets from public sources
 - Compare views about appropriate remedies

FTC UC Cooperation

- What types of cooperation have been successful in UC cases?
 - In parallel open investigations, with waivers from parties
 - Discuss documents, witness testimony, evidence of anticompetitive effects, and expert economic analysis
 - Close collaboration in crafting remedies

UC Cooperation

- Parties often will execute waivers in UC matters for similar reasons they do so in other civil antitrust investigations
- Agencies may encourage parties to consent to cooperation in UC cases by using waivers to
 - Coordinate on timetables to ease burdens
 - Develop remedies that are compatible in practice

Kaarli Harry Eichhorn

- Kaarli Harry Eichhorn is Senior Counsel – European Competition Law & Government Relations at General Electric Company (GE).
- As GE's European competition counsel, Kaarli serves all GE's financial services and industrial businesses on a wide variety of competition law matters including mergers and acquisitions, distribution, R&D activities, and compliance issues. He is also a member of GE's EU Government Relations team.
- Prior to joining GE, Kaarli was a Swedish Advokat (a member of the Swedish Bar) and an attorney with Clifford Chance LLP 2001-2008, where he practised European competition law and advised on EU law and regulatory matters.
- Kaarli is vice-chair of the AmCham EU Competition Committee and chairs the AmCham EU Legal Affairs Task Force. He is a Member of the Board of the European Justice Forum (EJF). Kaarli is also a non-governmental advisor to DG Competition of the European Commission.
- In 2012, Kaarli was awarded the Global Counsel Award in the category “Competition – Individual of the Year” by the Association of Corporate Counsel and the International Law Office, after earlier having been given the European award in the same category.
- Kaarli is a regular speaker at conferences and has published numerous articles on EU law as well as a textbook on competition law. He holds a degree in law (jur.kand.) and a Master of European Law degree from Stockholm University.





International
Competition
Network

Enforcement Cooperation A Corporate View

Kaarli Harry Eichhorn
Senior Counsel, General Electric Company

- GE – an overview of our business activities and how we work with competition law compliance

Questions:

- Does the business community benefit from competition law and its expansion globally?
- Does the business community see value in international cooperation on competition policy?
- What are the benefits and challenges of cooperation in enforcement cases, including unilateral conduct cases, from a business perspective?



International
Competition
Network

GE - company overview

Oil & Gas



Energy Management



Power & Water



Healthcare



Aviation



Transportation



GE Capital



Home & Business Solutions



~\$147B Revenue

- About 300,000 employees worldwide
- Operating in more than 150 global locations

Integrity at GE

- GE's commitment to integrity is instilled in every employee as a non-negotiable expectation of behaviour. This culture is underscored by an extensive legal and compliance infrastructure with policies, processes, and training.
- Approx. 1,300 in-house lawyers globally. Reporting lines not only to business CEOs, but also to the GE General Counsel, ensuring rigor and consistency in compliance. Corporate Competition Law Team and competition experts in numerous businesses.
- Additional compliance leaders at each GE business, specialists at corporate headquarters and regional experts.
- GE legal and compliance teams work in cooperation with business leaders on a common approach comprised of three basic processes:
 - Prevention
 - Detection
 - Response



Integrity Leadership

As a GE leader, you have no greater responsibility than to shape the culture of your business— and to assure that GE's proud compliance culture is upheld. You must be personally engaged in building and maintaining an environment that meets our high standards for ethics and compliance, and confirm that the right processes— those that are described in this booklet— and the right activities always take place.

This booklet outlines your critical Integrity responsibilities as a GE leader—what you must do to assure compliance everywhere and every day in your operations.

I expect each of you to:

- Personally set the example for integrity. Employees take their cues from leaders— from what you say, and even more so, from what you do. Make sure you personally establish the right bar.
- Make the difficult choices. Nothing, including "making the numbers" or satisfying a customer, is more important than the Company's Integrity.
- Foster an open reporting environment in which every employee feels comfortable raising concerns and communicating about Integrity. If you and your employees are not communicating about Integrity, chances are that those employees do not know how to use the system, do not trust the system, or do not believe that we value Integrity. None of these scenarios is acceptable.
- Make sure you incorporate regulation into your business strategy and processes. Develop strong processes to anticipate and manage regulatory and other compliance risk. Personally establish open relationships with regulators.
- Act promptly to identify and address compliance and regulatory risks by being personally engaged. For GE leaders, the only acceptable response to red flags or issues is to ask questions, get answers, and take decisive action.
- Lead your compliance processes through compliance review boards and regular communications about compliance.
- Communicate the importance of integrity with sincerity and conviction at every appropriate opportunity and at every level in your organization.

The reputation of this Company is your responsibility. Thank you for your personal commitment to integrity and your personal leadership in maintaining a world-class compliance culture.

A handwritten signature in black ink, reading "Jeff Immelt".

Jeffrey R. Immelt
Chairman & Chief Executive Officer
June 2007



GE was named one of the World's Most Ethical Companies by Ethisphere in 2007, 2008, 2009, 2010, 2011 and 2012.

Competition laws in a globalised world

- In a globalised world, businesses in all countries benefit from a level playing field.
- Thoughtful competition laws inspire innovation, open up markets, encourage sustainable investment, create employment opportunities and benefit consumers.

International policy cooperation

- Need for substantive convergence:
 - to reduce the challenges raised by having > 100 jurisdictions with competition laws in an increasingly globalising economy, and
 - to facilitate enforcement cooperation and comity
- Material differences in substantive law applied to global business practices disrupts business and creates uncertainty – this is why cooperation on competition policy is essential.
- Policy cooperation on procedural rules should primarily focus on developing processes that are efficient, transparent, and allow for close engagement between the staff and the parties, but further procedural convergence can enable better agency cooperation.

Benefits and challenges of cooperation in enforcement

- Multi-jurisdictional competition law investigations (when dealing with the same conduct / same product markets) should not be capable of leading to different outcomes.
- Outcomes where mergers/conduct is prohibited by a competition agency where such merger / conduct is permissible elsewhere (and where competition conditions do not differ) are not acceptable.
- Where mergers / conduct are subject to remedies, different remedies in different jurisdictions may pose significant challenges for business and agencies alike.
- Enforcement cooperation should result in mitigation of such effects.

Cooperation in policy and enforcement - unilateral conduct

- Unilateral conduct rules are challenging – for agencies and businesses alike.
- The development towards an effects-based analysis in many jurisdictions is welcome.
- Agency cooperation especially in the unilateral conduct space – a complex area of competition law - may allow agencies to benefit from the experience and expertise of other agencies, and to ensure a consistent approach.
- Similar challenges to those found in merger control with respect to procedure:
 - In the merger context, it is difficult to cooperate on the substantive assessment and on any remedies if the agencies reviewing the merger are following different timetables and have to make decisions at a point when other agencies are not prepared to discuss substance or remedies.
 - Recent US-EU Best Practices on Cooperation in Merger Investigations addresses some of these important practical considerations

Cooperation mechanisms

- Numerous „first-generation“ bilateral cooperation agreements in place globally.
- These agreements exclude exchange of evidence. Company waivers (provider’s consent) are required for confidential information to be exchanged.
- Second-generation agreements include *inter alia* US - Australia Mutual Antitrust Enforcement Assistance Agreement and the proposal for an agreement between EU and Switzerland.

Relevant considerations for agencies and business

- Selected questions to consider when agencies consider exchanging confidential information:
 - Do both systems recognise similar procedural rights of the parties, rights of legal privilege and non self-incrimination?
 - Are the rules on confidentiality comparable, i.e. will business secrets and other confidential information enjoy similar levels of protection?
 - Are rules on protection of personal data equivalent?
 - In antitrust cases, do both enforcement systems foresee comparable sanctions?
- The decision to transmit information should remain in the discretion of the transmitting authority

Final thoughts

- If agency cooperation on procedural convergence can be improved (timing, protection of confidential information, privilege, etc.) this would facilitate enforcement cooperation.
- Enforcement cooperation is important, but is only part of a larger set of issues to deal with in a globalising economy and > 100 jurisdictions with competition laws.
- Convergence, streamlining, and alignment of timetables all facilitate effective enforcement cooperation.



International
Competition
Network

THANK YOU