



**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**DAFFE/COMP/WP3/WD(2003)25  
For Official Use**

**Working Party No. 3 on International Co-operation**

**INFORMATION SHARING IN MERGER CONTROL PROCEDURES**

**-- United States --**

*The attached document is submitted by the delegation of the United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting on 13 May 2003.*

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**INFORMATION EXCHANGES IN INTERNATIONAL CO-OPERATION  
IN MERGER INVESTIGATIONS**

- b. *Have statutes that authorize the exchange of confidential information with other countries even in the absence of an international agreement or waivers by the parties to a transaction in practice been used in merger investigations to provide information to another authority? If so, how often and under which circumstances? If not, what are the reasons that exchanges of information within this framework did not (yet) take place?*

The United States has entered into only one mutual assistance agreement (with Australia) under its statute, the International Antitrust Enforcement Assistance Act of 1994, authorizing the exchange of confidential information. That statute has not been used to exchange confidential information in a merger case; in fact, that statute exempts information obtained under the U.S. premerger notification law, the Hart-Scott-Rodino Act, thereby making information sharing in merger cases pursuant to agreements under that Act more circumscribed.

- c. *Informal exchanges of information that is not considered “business confidential,” but is not public information (i.e., “agency-confidential” information) has on several occasions been described as very useful in merger investigations. Are there any legal requirements in national laws that prevent authorities from sharing “agency-confidential” information?*

“Agency-confidential” information is information that the agencies may withhold from public disclosure under the U.S. Freedom of Information Act and that the agencies are not prohibited from disclosing, but normally treat as non-public.

*What type of information typically can be exchanged and at what stage of the investigation do such exchanges typically occur?*

Included in this category of information are: the fact that the agencies have opened an investigation; the fact that the agencies have requested information from someone located outside U.S. territory; and how the investigative staff analyzes the case, including product and geographic market definition, assessment of competitive effects and potential remedies. Depending on the precise nature of the specific information to be shared, exchanges of “agency-confidential” information occur at all stages of investigations. Typically, initial conversations confirm the existence of investigations, focus on affected markets, and exchange information about definition of markets. Subsequent conversations focus on competitive effects and possible remedies. From there the conversations shift to consideration of remedies proposed by the parties.

*Would it be useful if the instances in which such information can be exchanged, and the number of agencies participating in these exchanges, increase?*

Yes.

## 2. Safeguards

3. The business community, while in principle welcoming increased co-operation in merger review

- a. *If exchanges of confidential information occur (based on treaties or waivers), are there safeguards that authorities typically apply to ensure continued protection of confidentiality, such as explicit assurances that information will be protected "downstream," requirements to return information at the end of an investigation, or others?*

Certain safeguards are provided to information shared pursuant to either a Mutual Assistance Agreement under the IAEEA or a waiver of confidentiality - such as maintaining confidentiality and return or destruction of documentary information shared. See, for example, the model waiver form appended to DAFFE/COMP/WP3(2003)3. An example of the treatment of possible "downstream" use of shared information may be found in Article VII of the US-Australia Mutual Assistance Agreement. The U.S./Japan cooperation agreement contains a provision governing "downstream" use (Art. IX.1.(a)).

- b. *Even though waivers are case-specific, are there issues that typically are addressed in a waiver? Are there any issues and concerns that typically/repeatedly are raised by the parties when negotiating waivers and that are more difficult to resolve than others? If so, what measures can be taken to address such issues and concerns?*

Issues typically addressed in a waiver can be seen in the model waiver appended to DAFTE/COMP/WP3(2003)3. Occasionally, parties inquire about the privilege issue described in response to a previous question, notification, and possible downstream use. It has been the agencies' practice to stay with the terms provided in the model form and parties have been content with that.

- c. *What are the reasons that waivers are not being obtained from the parties on a more or less regular basis? Do authorities that do not typically request parties to grant waivers consider that waivers are not useful?*



information was exchanged, and in many of them confidential information relating to case analysis or the state of the investigation (what the FTC classifies as confidential agency information) was also exchanged. In no case was confidential business information exchanged without a waiver.

For reference, we are reproducing the answer from the last questionnaire:

The two U.S. agencies notified foreign governments of about 120 mergers in the two-year period, and in 64 of them there was some additional contact with the foreign agency. In all of these 64 cases, publicly-available information was exchanged, and in many of them confidential information relating to case analysis or state of the investigation (what the FTC classifies as confidential agency information) was also exchanged. In no case was there exchange of confidential business information without a waiver. The FTC estimated that formal, blanket waivers were granted by the parties in 16 of the 40 cases in which it engaged in some level of co-