



Session IV

DG COMP's practice in case cooperation with foreign enforcement authorities

EU-China Competition Week

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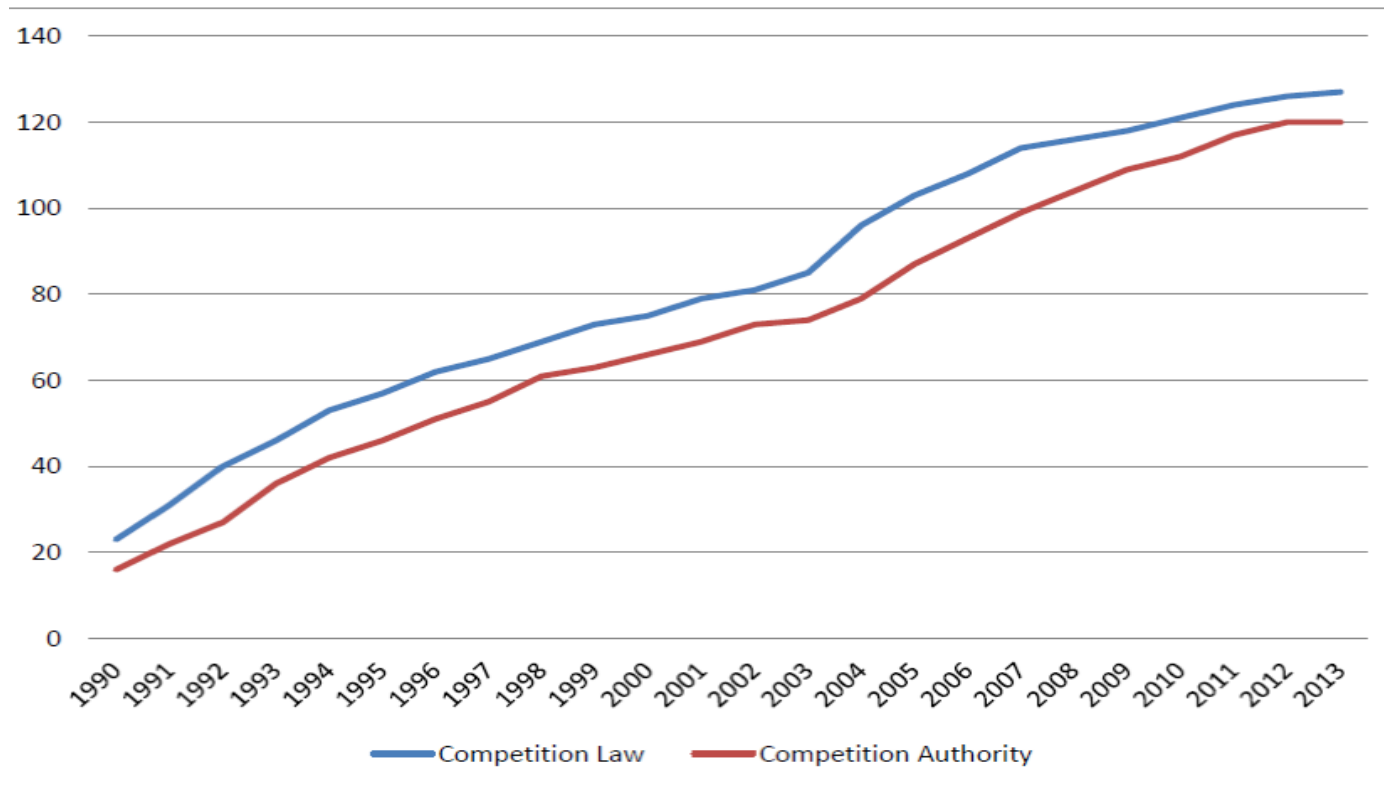
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Why international cooperation?

- ❑ Economic Globalisation (relevant markets increasingly becoming global)
 - ❑ Legitimacy of competition enforcement:
 - ❑ Create a level playing field with fair competition on equal terms across the globe
 - ❑ Well-functioning markets fundamental to reap the full benefits of free international trade
- ❑ A world of multiple enforcers
 - ❑ Increase interoperability of rules and enforcement to:
 - ❑ Maintain and protect enforcement effectiveness
 - ❑ Avoid diverging / conflicting outcomes
 - ❑ Increase predictability, legal certainty and transparency to reduce firms' policy risk and administrative burden
- ❑ Instruments: Policy, technical, enforcement cooperation

Why international cooperation?

Global expansion of competition regimes



The EU experience

- [The European Competition Network \(ECN\)](#)
- Bilateral relations outside the EU:
 - Intensify cooperation with trusted Competition Authorities of main trading partners (dedicated agreements)
 - Build up relations with new BRICS Competition Authorities (MoUs on cooperation)
 - Promote alignment in EU Neighbourhood
- Engagement in multilateral fora ([ICN](#), [OECD](#), [UNCTAD](#), [WTO](#))

Trend: Multilateralism in cooperation

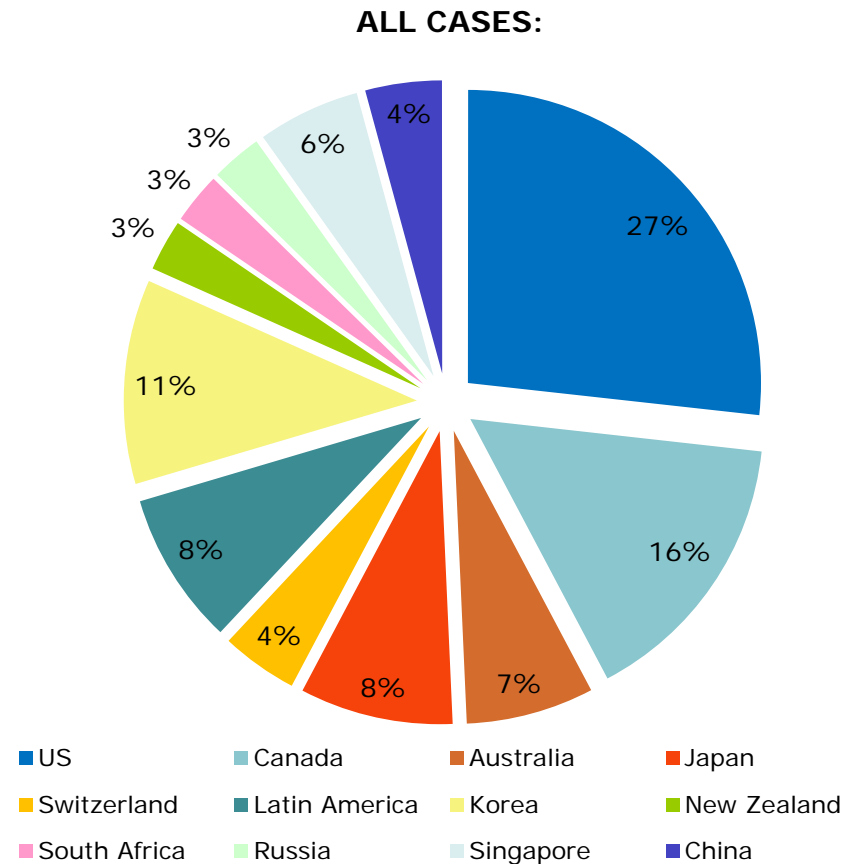
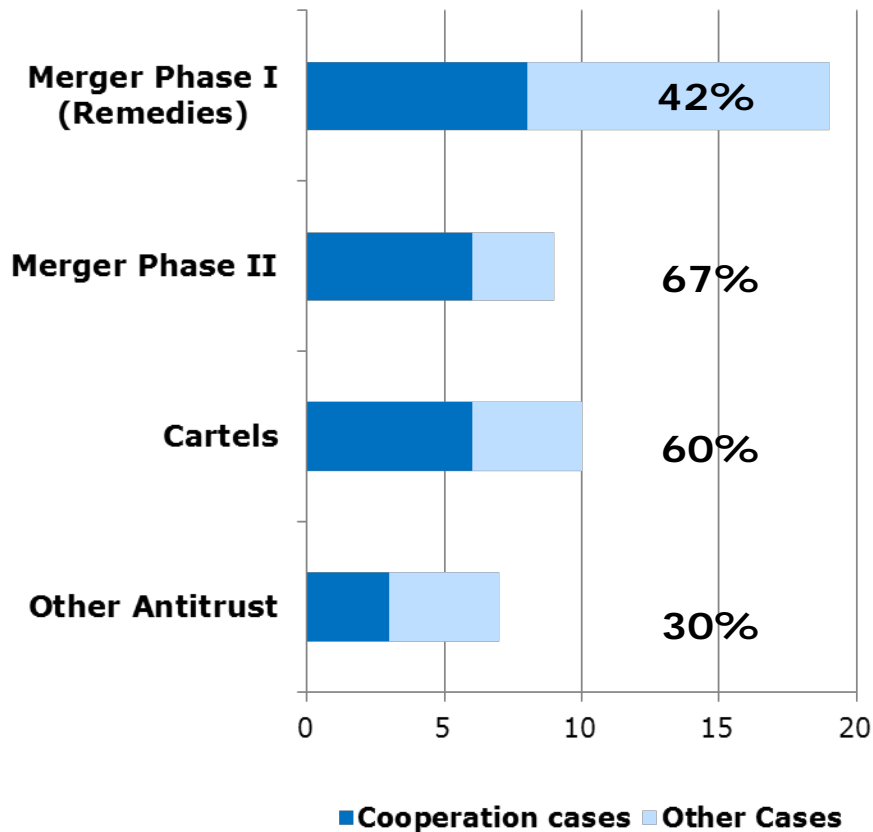
Cartels:

- Increased multilateralism. In 2010-2011: average of 4 agencies involved in each cooperation enforcement case
- Examples: [The Refrigeration Compressors Cartel](#) (8 non-EU-agencies) and the [Airfreight Cartel](#) (7 non-EU-agencies), [Marine Hoses Cartel](#) (US + Japan)

Mergers:

- Multiple notifications required in most transnational mergers. Agencies tend to increasingly co-operate.
- Ex.: [Thermo Fischer / Life Technologies](#) (7 non-EU-agencies)

EU cases of international cooperation:



Areas of cooperation:

Dawn raids/Inspections (18% cartel)

Obtaining waivers (>70% merger)

Characteristics of relevant market (>80% merger and 58% antitrust)

Theories of harm (>50% in antitrust and merger)

Timing of proceedings and decision (>80% in cartel and merger; 58% antitrust)

Avoidance of conflicting decisions (>50% merger)

Remedies (>50% merger)

Information exchange

Information exchange - conceptual issues ⁽¹⁾

Five broad categories of information:

1. Public available information
2. Non-public agency information
3. Non-confidential, case-related information
4. Confidential information
 - Leniency applicant information cannot generally be shared, and certainly not without a waiver
 - Exceptions exist, (i) confidentiality waivers, (ii) national legislations (so-called information gateway), (iii) regional cooperation networks and (iv) bilateral agreements
5. Decisions after publication

Information exchange - conceptual issues (2)

- When?
 - Investigation still covert
 - Investigation is publicly known
- What?
 - Basic rule: Exchange only non-confidential information
 - Exception: exchange of confidential information
 - Confidentiality Waivers, ECN, 2nd Generation Agreements
 - Balancing act: Ease information exchange / respecting protection of confidential information/ rights of defence
- How?
 - Establish trusted contact(person)
 - Contact at what level?
 - Primarily telephone calls
 - No exchange of actual documents needed

Information exchange - conceptual issues ⁽³⁾

How to establish a cooperative relationship with other competition authorities?

- Information exchange must be built on mutual trust and respect
- Enforcement record
- Is reciprocity required?

Procedural Legal Safeguards

- Definition of confidential information/business secrets (narrow vs broad scope)
- Rules for collecting/seizing information (incl. Legal Professional Privilege)
- Use of shared information (intelligence and/or as evidence)?
- No self-incrimination
- Civil vs criminal law

EU's legal basis for sharing information

[Basic procedural Regulation \(1/2003\)](#)

- Article 11: Cooperation DG Comp + Member States
- Article 12: European Competition Network (ECN)
- Article 15: Member States National Courts
- Article 27: Parties' access to the file
- Article 28: Protection of professional secrecy
- [Procedural Regulation \(773/2004\) Chapter VI](#)

[Bilateral agreements](#)

- First generation (US, Japan, Korea, Canada)
- Second generation (Switzerland, (Canada))

Confidentiality waivers

Securing waivers from leniency applicants to facilitate discussions between authorities

- EU: Voluntary if company gives waivers
- Commission asks for confidentiality waivers:
 - when immunity is applied for
 - when markers are applied for
- EU respects field of use limitations in waivers
- Waivers are therefore not the answer to everything:
 - Terms may differ between jurisdictions
 - Different immunity and cooperating parties

Waiver wording (1)

- [*Name of the applicant*] agrees to a waiver of the confidentiality rules of [*Agency A*] to [orally] discuss the submission made by [*name of the applicant*] to [*Agency A*] with [*Agency B*] regarding its investigation of [number of file/short description of market/industry].
- [For AGENCIES WHERE EXCHANGE OF DOCUMENTS IS PROHIBITED – For the avoidance of doubt, this waiver excludes the transmission by [*Agency A*] of any hard copy or electronic version of documents or submissions made by [*name of applicant*] including any quotations or extracts of them].

Waiver wording (2)

- [Agency A] shall make [Agency B] fully aware of the confidentiality of the information disclosed by virtue of this waiver. [Agency A] shall treat information received from [Agency B] in accordance with its own applicable confidentiality rules.
- The present waiver does not alter [Agency A] obligation to protect the confidentiality of information submitted by the applicant with respect to parties other than [Agency B] in accordance with the applicable legislation.

Information sharing: Conclusions (1)

- To be of real use in a "live" investigation, the shared information must be pertinent and *timely*. Potential risk that complicated procedures make information sharing cumbersome and slow.
- Strict safeguards must be put in place to allow safe transfer of case-related evidence between agencies.
- Avoid negative "spill-over effects": If firms *perceive* a *risk* of confidential information being shared inappropriately with other jurisdictions, firms will be less forthcoming when providing information.
- "Incidents" will seriously undermine the credibility of an enforcer (in particular when it comes to leniency).

Information sharing: Conclusions (2)

You can discuss and achieve a lot without exchanging confidential information, e.g. market functioning and definitions, theory of harm, remedy design, avoid diverging outcomes.

Challenges:

- How to simplify and streamline cooperation procedures while providing adequate procedural safeguards?
- How to ensure to that the right information is shared at the right moment (despite heterogeneous legal frameworks and procedures)?
- How to safeguard the protection of confidential information, business secrets and personal data?

Coordination of investigations (incl. dawn raids)

Coordination of investigations

Is there a case for coordination?

- Prioritization of investigations
- Investigative tools to be used?
- Compatibility of enforcement regimes
- Centre of gravity of infringement

Benefits of coordination - increased impact

Factors:

- Time zones
- Particular developments in cartel
- Forensic IT + sealing of premises
- Access to evidence/witnesses

Discussions about analysis of the case?

- Market functioning
- Relevant market
- Theory of harm
- Remedies
- Timing of decision making

Better cooperation: Tips and issues

- Building trust between enforcers' staff
- Start contacts between enforcers early
- Timing of procedures: juggle role of the parties and flexibility by enforcers
- Strive for simultaneous leniency/immunity application
- Parties granting of confidentiality waivers: enforcers must guarantee protection of business secrets
- Level of convergence and transparency in the investigative procedures & substantive assessment

Further information

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