

March 8, 2018

TO: ICN Steering Group

FROM: ICN Training on Demand Project, Agency Effectiveness Working Group

SUBJECT: Approval of Work Product, ICN Training on Demand

The ICN Training on Demand Project has two new modules in production to add to the project's curriculum of training products aimed at newer competition agencies. We recommend that the Steering Group approve them with the work product for the 2018 Annual Conference based on the accompanying materials.

- **Introduction to International Cooperation.** This module, produced by Liz Kraus from the Federal Trade Commission with significant input from co-presenters Marcus Bezzi (ACCC), Jeanne Pratt (CCB) and Michiel Denkers (ACM), introduces the concepts and mechanics of international cooperation. It aims to provide a general introduction to cooperation, based on existing ICN materials, with new case handlers and newer agencies as the target audiences.

In addition to the co-presenters, Tembi Bonakele (CompComm S.A.), Rose Webb (Hong Kong), Carolina Garayzar (COFECE), and Melanie Aitken (Bennett Jones) each contribute clips describing the cooperation process from his/her perspective. Filming is underway, with completion timed to take advantage of the ICN website update. A detailed outline/script is attached as Appendix I.

- **Merger Remedies.** Co-produced by the CCB and Omar Wakil (Tories), James Musgrove (McMillan), and Melanie Aitken (Bennett Jones) with input from veteran ITOD producers Terry Calvani and Hiram Andrews (Freshfields, Bruckhaus, Deringer), this module will make extensive use of the ICN 2016 Mergers Remedies Guide and then walk viewers through the development of a remedy using a hypothetical scenario developed by the MWG for the recent Mexico City merger workshop.

The outline of the module is included as Appendix II. It is anticipated that the full script will be completed by the third week of March, and filming will take place in April.

ITOD is producing two additional modules for which Steering Group approval would be premature at this time. The first is on assessing public interest factors, which will be produced by the South African Competition Commission with input from John Fingleton and Eleanor Fox. The second is an introduction to unilateral conduct, which will be based on the Framework approved at the 2017 annual meeting, and will be produced by Prof. Harry First of New York University and Timothy Longman of USDOJ. Steering Group approval for these modules will be sought at a future date.

APPENDIX I: Introduction to International Cooperation Module

International Cooperation Module

This module aims to provide a general introduction to cooperation, with new staffers and young agencies as the target audiences. We anticipate that this module will be complemented by separate merger (maybe including UC) and cartel modules that would walk through the steps of cooperation in that context.

I. Introduction

Format: Individual presentation

Liz Kraus to kick off with brief introduction to cooperation, identifying:

- This module as an introductory module on the basics of cooperation. Complementary modules will address how cooperation plays out in the merger (and unilateral conduct) and cartel contexts.
- What cooperation is (cooperation can take different forms (policy, enforcement)). The module focuses on enforcement cooperation, concerning matters when two or more agencies are investigating the same enforcement matter.
- Timely in that cooperation is increasingly important and common today. Some reasons for this seem intuitive: increased globalization has led to transactions or conduct with effects in multiple jurisdictions; more agencies are enforcing competition laws; and the desire for consistent outcomes; but also improved opportunities for building relations among agencies (multilateral and regional organizations) and improved means of communication.
- Enforcement cooperation is voluntary (in an agency's complete discretion), and flexible. It develops as needed, on a case-by-case basis -- from keeping one another informed of investigational status to detailed discussions.
 - o Even within a matter, cooperation may be differentiated, *e.g.*, depending on the nature of the competitive impact and intensity of the investigation in each jurisdiction.
- The nature of cooperation will differ for cases involving issues treated criminally in certain jurisdictions, *e.g.*, given discovery rules.
- This module focuses on how to get started and common features of cooperation across mergers, unilateral conduct and cartels, from identifying opportunities for cooperation, to initial contacts between agencies, to the types of information that may be discussed/exchanged as part of ongoing cooperation and the role for waivers of confidentiality.
 - Liz also will note that the module is based on ICN materials, supplemented by OECD work and the experience of our expert participants, who she will introduce.

International Cooperation in General

Format: Individual presentation of the ACM's Michiel Denkers with NGA cut-in.

- Why do agencies enter into enforcement cooperation?
 - o Increases efficiency and effectiveness of an investigation.
 - May reduce resource burdens and increase investigative efficiency for parties and agencies.

- Promotes consistent outcomes
 - Can reduce gaps in information available to individual agencies thereby leading to more informed agency decision-making and enhanced analytical robustness.
 - Promotes convergence
 - Builds relations – creates opportunities for further interaction on other matters. (Cooperation increases familiarity between agencies and mutual understanding of partners’ procedural and substantive law, which in turn can help foster trust and facilitate future cooperation.)
- What types of cases are best suited for international cooperation?
- Transactions involving cross-border elements
 - Two or more jurisdictions conducting an investigation that raises competitive issues of common concern
 - Where reviews or remedies in one jurisdiction may impact another jurisdiction

[ACM will provide one or more examples of cooperation with Germany and, perhaps, Belgium.]

- Helpful cooperation occurs with regard to straightforward as well as more complex investigations.
- Complexity may impact the intensity of cooperation deemed beneficial.

NGA Melanie Aitken (through pop-up screen) will identify that parties to (or subjects of) an investigation can facilitate cooperation, discuss the factors that prompt a party to cooperate and those that might give parties pause in promoting cooperation in an individual case.

- Melanie will identify the following points:
- Parties can play an important role in facilitating cooperation between/among agencies engaged in the investigation of the same or similar conduct—be it merger, cartel or even at times in a unilateral conduct matter. (Mention a few ways in which parties can facilitate, such as aligning review timetables through coordinating filings; granting waivers to share confidential information).
 - Fair to say that, while not invariably the case, there can be significant advantages for the parties in encouraging the communication, free sharing of information and analysis, and collaboration on remedy design and implementation among agencies. For example, facilitated cooperation can, in the right cases, promote consistent analyses and outcomes, minimize delay and reduce the burden on the parties as well as the agencies.
 - That said, and while not exhaustive, I would suggest that there are 3 categories of factors that play into the decision of a party being investigated in more than one jurisdiction to take the steps within its control to facilitate cooperation among investigating agencies.
 - First, confidence in the Agency
 1. The party/party’s counsel’s experience—and corresponding level of trust—with the agency is the lead consideration as a practical matter. Particular focus is on confidentiality protections (the transparency/robustness/ demonstrated agency commitment) and transparency. (*e.g.*, Canada/US experience).

- For many agencies, their own authority to cooperate is inherent in their general enforcement authority. To cooperate with other agencies, they may require an acknowledgement that the cooperating agency will protect information received.
 - This can be achieved through bilateral agreements and MOUs, as well as multilateral arrangements. Whereas these agreements and arrangements generally are not necessary for cooperation to take place, they can facilitate cooperation.
 - As discussed later in this module, the exchange of confidential information may require a waiver of confidentiality or mutual assistance agreement.

- [Two different cut-in videos, Tembi Bonakele (South Africa) and Rose Webb (Hong Kong)] Each describe when and how their agencies developed their international cooperation efforts.
 - These responses bring out, *inter alia*, that effective cooperation is supported by mutual trust and understanding of the cooperating agency's legal frameworks and investigative processes.
 - They also identify how the agencies developed trust and understanding, *e.g.*, exchange of policies, working together in international fora, etc.

- [Cut-in video from Carolina Garayzar (COFECE)] examining how international cooperation is promoted within the agency, focusing on the role of the International Affairs Unit in facilitating cooperation, including by providing much of the same background and information identified in this module, *e.g.*, with respect to reaching out to counterparts and identifying which information can and cannot be shared without a waiver.

- [Presentation by the ACM's Michiel Denkers] Getting cooperation started with regard to an individual matter
 - Identify other jurisdictions conducting the same investigation
 - Through merger notification (if it is a merger review)
 - Through the parties' provision of the information (voluntarily or through leniency)
 - Public information
 - Reaching out to a relevant point of contact at the agency, *e.g.*, the International Liaison Officer
 - If not already known through bilateral relations, may rely on the ICN or OECD contact list, or find a point of contact on an agency's website
 - Identify the importance of reaching out early, including that it (i) makes joint consideration of issues possible; (ii) avoids leveraging or implicitly imposing an early decision from one agency on another; and (iii) permits discussions of remedies to avoid conflict.
 - Note that this includes during the pre-notification stage, as relevant.

- [Presentation by the ACM's Michiel Denkers on the initial discussion] Will first note the purpose of the initial discussion -- to determine whether cooperation on the matter may be worthwhile for the agencies, and prospective timing for the agency's respective reviews or next steps (dawn raids). Then expand upon these points to identify that the call may be used to assess whether and the extent to which cooperation is likely to be useful, to identify

potential areas of competitive overlap and the potential scope and depth of cooperation, and perhaps establish a tentative timetable for regular communications, if needed.

- What type of information do you try to include in your initial communication to an agency contact or liaison, and why?
 - o Help the liaison identify the correct staff person by:
 - Explaining why you are initiating contact
 - Identifying the case to discuss
 1. Reference public sources
 - Identify the issues to discuss.

- Michiel will identify that informal modes of communication are best
 - o E-mail and telephone calls
 - Identify considerations to address in advance of using these tools, language for and timing of any call, etc.

- [Presentation by the ACM's Michiel Denkers] Identify the role that parties can play at this stage.
 - o Identify other jurisdictions reviewing or expected to review the transaction.
 - o Time filings to align reviews at key decision points
 - This doesn't have to mean filing at the same time in each jurisdiction, rather the goal would be to file such that the resulting review timetables allow the reviewing agencies to cooperate at meaningful stages during their investigation and decision-making processes. Key decision-making stages, *e.g.*, for mergers, are:
 1. before deciding whether to open an in-depth investigation
 2. when discussing remedies
 3. prior to prohibiting or challenging a merger
 4. before closing an investigation
 - o Michiel also will identify that it is important to ensure that staff checks back in before closing or issuing communications or a final decision.

- Michiel Denkers will then identify factors an agency considers in determining whether to cooperate with another agency.
 - o The nature of the cooperation requested
 - o The timing of the request and whether it will allow for effective cooperation
 - o Resources

- Michiel will reiterate that the form and frequency of contact is determined on a case-by-case basis depending on the case teams' needs.
 - o The discussion can range from no further contact necessary, to check-ins at key-decision making stages, to more continuous contact throughout the investigation, to joint interviews to scheduled calls during the review and regular calls during remedy negotiations.

- [Presentation by the ACM's Michiel Denkers] Can the agencies discuss a matter even if one does not have an open investigation?

- Agencies can have very helpful discussions related to matters, even if one of the agencies does not have an open investigation. For example, one agency may have significant experience with a particular market sector, and can help the other to identify questions to explore regarding market definition, test theories of harm and analytical frameworks.
- Conclude segment with a summary of the tips identified that would be available on a slide.

III. Confidentiality and the Exchange of Information

Format: 2 individual presenters (Marcus Bezzi, ACCC, and Jeanne Pratt, CCB) accompanied by a slide set.

- [Presenter 1] Highlight that information sharing between agencies should be consistent with confidentiality obligations.
 - Identify that staff often feel a tension between protecting confidentiality and the need for information exchange between agencies. By understanding basic designations for information and the rules that apply to the classification, they can learn to cooperate effectively within the agency's confidentiality obligations.
 - Some agencies have international officers that assist staff in this regard.
- Explain the types of information that may be exchanged, and that typically, information is classified as:
 - Public information - published information or general knowledge about the industry, parties or third parties
 - Examples include
 1. Information found online
 2. Information on company websites or in newspapers
 3. Public records, such as SEC or court filings
 - Agencies may exchange this information freely.
 - Agency non-public information - information that agencies normally treat as non-public, but that the agencies are not prohibited from disclosing.
 - Depending on your law, examples may include
 1. Existence of an open investigation
 2. Information regarding agency's process (*e.g.*, timing)
 3. Agency views on economic analysis such as market definition, theory of harm, and competitive effects provided that the information does not include confidential information identifiable to a party or third party
 - Because the agencies maintain the confidentiality of this information as a matter of agency policy, before sharing, the agency with the information will typically require some sort of assurance of confidentiality from the recipient agency. This can take many forms, from bilateral agreements to multilateral arrangements, *e.g.*, the ICN Merger Framework. With such assurances in place, agencies generally can, and do, share this type of information as part of their cooperation.
 - Confidential business information - sensitive, non-public information that is protected from disclosure by law. No commonly agreed definition, but examples may include:

1. Merger filings, complaints, and voluntary submissions
 2. Parties internal documents, data or economic analysis
 3. Identities of third-party complainants and/or witnesses and their information
 4. Responses to information requests, subpoenas, or other compulsory process
 5. Party or third-party testimony
 6. Details of remedy proposals made by the parties
- Agencies generally cannot share confidential business information without the party's providing a written waiver of confidentiality or as otherwise provided by law, *e.g.*, through mutual assistance agreements (noting section of Australian Competition and Consumer Act which permits this).

Recap - In summary, there is a lot of information that you can helpfully share with your fellow investigators in other agencies. You can freely exchange public information, and often Agency non-public information, with an assurance of confidentiality from the recipient agency, generally found in bilateral and multilateral arrangements and agreements. You need to be cautious when you are dealing with confidential business information and make sure not to disclose it unless you have a waiver from the party providing the information or legal provisions or mutual assistance agreements that allow for the sharing of such information without the party's consent.

- [Presenter 2] A **waiver of confidentiality** (waiver) is a voluntary instrument provided by a party or third party that enables the two or more investigating agencies to share the party's information and to discuss the information as related to an investigation. Identify the ICN Report and Model Waiver.
- A waiver's primary use is to promote deep, informed discussion among the cooperating agencies. Thus, its utility in an individual matter will depend on the likely detail and depth of the expected cooperation.
- From the agencies' perspective, sharing such information can increase the quantity and quality of the information on which to base their decisions, leading to more informed decisions and effective coordination between the agencies. For the parties, waivers can enable each agency to benefit from the additional information and analytical insights of the other, avoid duplicative information production burdens, and promote the adoption of effective, non-conflicting remedies.
- Key features:
 - Waivers don't have to be long. A waiver identifies the terms under which a person agrees to waive statutory confidentiality protections vis-à-vis the agency that originally received the person's confidential information.
 - Waivers are limited in scope to a specific, named matter and designate the agencies that may share the waiving person's confidential information.
 - An important corollary is that confidentiality is maintained vis-à-vis other agencies, third parties, and the public
 - Waivers generally allow the cooperating authorities to share documents, statements, data, and other information, but on a case-by-case basis, as appropriate, can exclude some categories of information.

- Whether to grant a waiver is within the party's discretion, and refusal should neither prejudice the investigation nor obviate cooperation. The agencies will continue to cooperate on the basis of public and agency confidential information.
- Identify the ICN's waiver templates for both cartel and merger matters.
- **Recap** - You will not always need a waiver. There are numerous instances where you can effectively cooperate with another agency by sharing 'public' and 'agency non-public' information.
 - o If you would like to discuss a case or industry at a high level or understand the structure of an industry, another agency is likely to be able to assist by relying on information that is not confidential, and there would be no need for a waiver.
 - o A waiver of confidentiality is likely to prove helpful if cooperating with an agency that is investigating the same matter/conduct as your agencies and the case teams would like to have detailed discussions, for example on case theory, assessment of available evidence, *e.g.*, witness statements and/or detailed market data, and, on the coordination of remedies.
- An additional point - In many international competition cases, you might find that you are cooperating with multiple competition agencies – some on the basis of a waiver and some without, or 'differentiated cooperation.' In this situation, you need to carefully manage the information you share and with whom.
- Will then highlight available ICN resources on confidentiality and cooperation, mentioning the ICN report on waivers of confidentiality in merger investigations.

Interactive Discussion between Jeanne and Marcus

- o Prompted by questions posed by Marcus, Jeanne will discuss two merger examples, one of successful international cooperation without a waiver, identifying why they proceeded without a waiver, and how the cooperation was beneficial and sufficient for the investigation, and a second in which they had successful cooperation based on a waiver.
- o Marcus will then examine differentiated cooperation in the marine hose cartel matter, including use by the UK's OFT of its statutory information sharing powers, and the extent to which the ACCC went to ensure that it protected the confidentiality of the information received (the agency seeking a confidentiality order from the court).

IV. Concluding Thoughts

Format: Individual presentation

- Liz Kraus will summarize highlights of the prior discussion and conclude with a reference to existing resources and guidance on cooperation, which will be noted on a slide, with appropriate links.

APPENDIX II: Merger Remedies

**Outline – Proposed ICN Training On Demand Module
Merger Remedies – 2018**

Based on the *Energy Drink Scenario* developed for the mergers working group

• INTRODUCTION – OVERALL MODERATOR	2-3 minutes
---	--------------------

- Introduce/remind viewers of ITOD concept
- Outline of programme
- Introduce/remind viewers of 2016 Merger Remedies Guide
- Introduce panel

• INTRODUCTORY PANEL	~10-15 minutes
-----------------------------	-----------------------

(1 enforcement agency lawyer and 1 private sector lawyer or economist)

- Introduce key concepts from 2016 Mergers Remedies Guide, including
 - Overarching Principles
 - Need for remedies
 - Tailored to harm
 - Transparency and consistency
 - Procedural Considerations
 - Timing/alignment in multijurisdictional mergers
 - Choice and Design of Remedies
 - Types of remedies: structural and non-structural considerations
 - Implementation and Monitoring of Remedies

• OVERALL MODERATOR	1 minute
----------------------------	-----------------

- Introduce initial scenario and participants

• INITIAL SCENARIO	~5-8 minutes
---------------------------	---------------------

Merging Parties Strategy Session

(2 or 3 lawyer economists and/or client rep)

- Outline the merger scenario and substantive competition law problem (with cross border and, ideally, both vertical and horizontal issues to set up a structural/non-structural discussion)
- Parties explore the plusses and minuses of various remedial approaches, and determine agreed approach to pitch remedies to the agency (perhaps a non-structural solution)

• OVERALL MODERATOR	1-2 minutes
----------------------------	-------------

- Summarize key issues from Initial Scenario and introduce Second Scenario
- Introduce participants in Second Scenario

• SECOND SCENARIO	~ 5-8 minutes
--------------------------	---------------

Enforcement Agency Strategy Session

(1 or 2 case officers/managers/ economists)

- Restate the merger’s anti-competitive concerns from agency’s perspective
- Discuss remedies suggested by merging parties, and agency’s response to the suggested remedies. Propose alternate/additional remedies
- Note cross border issues and need to liaise with foreign authorities (integrate this into the main discussion)

• OVERALL MODERATOR	1-2 minutes
----------------------------	-------------

- Summarizes key issues from Second Scenario
- Reintroduces Panel

• CONCLUDING PANEL	~5-8 minutes
---------------------------	--------------

(Same Panel as item II)

- Summarizes issues on both sides of the debate, as illustrated by the two scenarios
- Ties the arguments back into the 2016 Merger Remedies Guide
- Suggests possible approach to reconciling the views/positions from the two scenarios

• OVERALL MODERATOR	2-3 minutes
----------------------------	-------------

- Sums up the basic learnings from the session
- Thanks participants

To Do Items (Work in Progress)

- Design Merger Scenario – CCB?
- Recruit Participants - All
- Draft outline of materials (Scenarios first, then Panel Discussions, finally Moderator portion)
- Source filming expertise (Note: The two scenarios might be recorded before the Spring Meeting, with the panels and the moderator's portions recorded at the FTC recording facility during the Spring Meeting.)
- Record Scenarios
- Record Panel Discussions
- Record Moderator Intros/Summations