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INVESTIGATIVE POWERS IN PRACTICE – Breakout session 2 and Breakout session 3 - Contribution from the United States

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This contribution is submitted by the United States for the Breakout session 2: *Requests for Information – Limits and Effectiveness* and the Breakout session 3 *Due Process in relation to Evidence Gathering* under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Investigative Powers in Practice

Breakout Session 2: Requests for Information – Limits and Effectiveness
and
Breakout Session 3: Due Process in relation to Evidence Gathering

-- United States –

1. Requests for Information – Limits and Effectiveness

1.1. In the context of the cases you are describing, how did you determine to issue a RFI to an undertaking or a person? How did you access the information needed to draft an effective RFI? While preparing a RFI in the context of the cases you are describing, did you use information gathered in the context of a previous separate investigation? Are there any limitations to the use of information collected in the context of a previous separate investigation?

1. When voluntary requests for information are judged to be inadequate or inappropriate for the agencies' needs, Civil Investigative Demands (CIDs)[1] can be used to compel production of information and documents. CIDs may be served on any natural or juridical person, including suspected violators, potentially injured persons, witnesses, and record custodians, if there is "reason to believe" that the person may have documentary material or information relevant to a civil antitrust investigation.

2. For the Division, if there is "reason to believe" that any violation within its scope of authority has occurred, there is sufficient authority to issue a CID even in the absence of "probable cause" to believe that any particular violation has occurred. In criminal investigations, which are conducted exclusively by the Division, a grand jury has similar latitude in framing subpoenas for production of evidence and testimony. Likewise, the FTC has authority "to require by subpoena the attendance and testimony of witnesses and the production of . . . documentary evidence relating to any matter under [civil] investigation."[2]

3. At the time CIDs are drafted, agency staff often lacks information about the manner in which respondent's documents are organized, their geographic distribution, accessibility, and other factors relevant to setting a reasonable response date. Consequently, agencies generally serve CIDs with a cover letter inviting the respondent, or its counsel, to telephone an antitrust investigator identified in the letter in order to attempt to resolve any avoidable problems created by the CID. Responders to this invitation almost

[1] See Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14.

[2] 15 U.S.C. § 49.

always engage staff in a compliance negotiation, seeking to modify the scope of the request and enlarge the time for response. Recipients of FTC CIDs are required to meet and confer with staff within fourteen days after receipt of process.[3]

4. None of the statutory provisions governing the use of compulsory process limits the agency's use of submitted information to a particular matter.

1.2. Can you request information from third parties? If so, are RFIs from third parties voluntary or compulsory? In the context of the cases you are describing, has professional obligation to secrecy/confidentiality of third parties been raised as an objection to your information request?

5. The U.S. Agencies may issue compulsory process to third parties. The Agencies are always available to discuss a respondent's concerns about the scope of a particular request for information (RFI). They also seek to obtain the information that they need without imposing an undue burden on a respondent. When the Agencies issue compulsory RFIs, either in the form of a Second Request in a merger investigation or a subpoena or CID, they typically encourage the recipient to discuss the request and, indeed, recipients almost always engage the Agencies' staff in a compliance negotiation. Staff and counsel for the recipient often have extended discussions and agree to modifications and/or deferrals that ensure that the Agencies obtain the information that they need for their investigations, while minimizing – to the extent possible – the cost and burden on the recipient.[4] Typically, staff and the recipient's counsel will examine the recipient's organizational chart and come to an agreement on a set of individuals whose files must be searched for responsive documents. The number and position of the search group individuals varies depending on the nature and complexity of the investigation. The process is generally the same whether the recipient is a potential defendant or a third party; however, the Agencies recognize that third parties are differently situated than potential defendants and therefore strive to an even greater extent to minimize their burden.

6. The same U.S. federal statutes that provide authority for the Agencies to obtain information from parties and third parties in civil investigations also provide for confidential treatment of submitted information.[5] Thus, the Agencies have developed rules and policies for the treatment of information to ensure that, while they obtain

[3] 16 C.F.R. § 2.7(k).

[4] For example, in some situations, the Agencies will use a "quick look" review for investigations, which can further minimize burdens on the parties. See Division Manual III-43 ("When staff believes that the resolution of discrete issues through the examination of limited additional information could be sufficient to satisfy the Division that the transaction is not anticompetitive, staff may arrange a 'quick look' investigation. In a 'quick look' investigation, the parties refrain from complying fully with the Second Request and instead provide limited documents and information, and staff commits to tell the parties, by a particular date, whether full compliance will be necessary."); Horizontal Merger Investigation Data, Fiscal Years 1996-2011 at 2 & n.7 (FTC Jan. 1, 2013), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf ("For example, in some cases, Commission staff may have determined very quickly that the evidence obtained could not support the market definition postulated in the second request. Second request investigations closed upon the receipt of limited, but dispositive information, are categorized as 'Quick Looks'. . . .").

5 See, e.g., 15 U.S.C. § 18a(h).

comprehensive information regarding the topic of the investigation or action, they also balance the need to protect confidential information obtained in enforcement matters against the need to provide targets of competition enforcement proceedings with the evidence forming the basis of the case against them to allow them fairly to defend themselves. During the course of an investigation, information provided by parties under investigation or by third parties is generally treated as confidential by the Agencies, both as a matter of policy and pursuant to statutory restrictions and common law privileges.[6] The Agencies are especially careful to protect the identities of any complainants. Thus, although the Agencies will often share the nature of their concerns with potential defendants, as well as their general understanding of the facts and evidence, throughout the course of their investigations they will not – and, indeed, cannot – share specific confidential information submitted by third parties.

1.3. In your jurisdiction, are non-compliance to a RFI, late submission of information or provision of misleading, incorrect or incomplete information sanctioned? If so, what has been impact of the possibility of sanction on the respondents and cases so far? How did you verify the accurateness and corroborate the information collected – did you crosscheck with information gathered in other RFIs/interviews/unannounced inspections? If so, how onerous was that exercise? If intent is a required condition to sanction provision of incorrect, incomplete or misleading information, in the cases you are describing, how did you assess the intent of the respondent?

7. Should a party not comply with a subpoena or CID, the Agencies would have to petition a federal district court for an order enforcing and requiring compliance with the subpoena or CID. For example, if the witness refuses to answer a question in the course of a deposition, the antitrust investigator conducting the examination may petition the district court for an order compelling the witness to answer. The party then would have the

[6] For investigations of notified mergers, section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits public disclosure of any information provided to DOJ or FTC pursuant to the Hart-Scott-Rodino ("HSR") Act, except "as may be relevant to any administrative or judicial action or proceeding" to which the FTC or DOJ is a party, or to Congress. Information obtained from CIDs is governed by the Antitrust Civil Process Act, 15 U.S.C. § 1313(c), (d), which provides that no material documents, interrogatory responses, or deposition transcripts received in response to a CID may be made public unless the submitter has waived confidentiality. CID material also may be used in courts, administrative bodies, or grand juries. HSR and CID materials are expressly exempted from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Information provided voluntarily to the DOJ or FTC (i.e., not under HSR or pursuant to a CID) does not receive protection under antitrust statutes; however, as a matter of policy the DOJ and FTC typically do not disclose such information without good cause. In addition, information that could disclose the identity of a confidential source is exempted from production in the event of a FOIA request for disclosure. Information provided by a confidential source in the course of a criminal investigation is also exempted from disclosure under FOIA. The Privacy Act, 5 U.S.C. § 552a(b), also provides protections for records maintained by the Agencies that contain identifying information about an individual. Common law privileges may also protect information voluntarily provided to the Agencies, such as the law enforcement or investigatory files privilege and the privilege for information given to the government on a pledge of confidentiality.

opportunity to make any objections to the subpoena or CID to the court to convince it to deny the Agency's petition for enforcement.

8. It is a criminal offense intentionally to withhold, misrepresent, conceal, destroy, alter, or falsify any documentary material, answers to written interrogatories, or oral testimony that is the subject of a CID.[7] Where there is reason to believe that a CID recipient has intentionally withheld documents or information or has in any other way attempted to evade, avoid, or obstruct compliance with a CID, initiation of a grand jury investigation is an option.

1.4. In the context of the cases you are describing, have answers to RFIs produced large amounts of data, in digital or a different format? Did you need to invest in specialised IT staff/software to review that data? Did that have an impact on the costs and duration of competition investigations/inquiries? Have you had to adopt measures to narrow the scope of RFIs and/or adequately review the data provided in answers to them?

9. Parties responding to RFIs produce large quantities of data, almost exclusively in electronic format. The Division and the Commission have invested in litigation support services that are responsible for processing and loading the data received and putting it in an electronic review platform; the increasing amounts of data take additional time to load. The Division and the Commission encourage staff to negotiate modifications that limit the production of redundant or unnecessary information.

2. Due Process in Relation to Evidence Gathering

2.1. In the context of the cases you are describing, was any investigative procedure or collected evidence challenged before the courts as breaching due process rights? Was this done separately or in the context of an appeal of a final decision? On what grounds (proportionality, the scope of the evidence gathering method, to the violation of legal professional privilege, confidentiality, business secrecy or the right of not-selfincrimination, territoriality) it has been challenged? What was the outcome of such challenges? Have such challenges led to changes in how you collect evidence? Have you adopted any internal mechanisms to review use of investigative powers or taken measures to ensure transparency in evidence gathering process?

10. Successful challenges to CIDs are rare and generally have been limited to burden and relevance issues. A respondent to a CID from the FTC may not object to CID specifications by bringing an action in court without first availing itself of a potential administrative remedy.[8] For this reason, challenges usually occur prior to any decision on the merits, but can be raised again on appeal of a final decision.

[7] See 18 U.S.C. § 1505.

[8] See, e.g., General Finance Corp. v. Federal Trade Comm'n, 700 F.2d 366, 368-69 (7th Cir. 1983). The FTC's Rules of Practice describe the process for making an administrative challenge to CIDs or subpoenas. See 16 C.F.R. § 2.10 (Petitions to limit or quash Commission compulsory process).

11. Each CID must state the nature of the conduct, activity, or proposed action under investigation and the provision of law applicable to the investigation. Several cases have involved challenges to the adequacy of the description of the investigation, but courts have found the descriptions to be satisfactory; a leading case noted that "to insist upon too much specificity with regard to the requirement . . . would defeat the purpose of the [CID statute]."[9]

12. Other cases have challenged the good faith of the government's motives in issuing CIDs, and CID recipients have challenged CIDs and asked for discovery on the grounds that they were issued in response to outside political pressure or to pay off a political debt. In at least one case, discovery was granted, but in others, an affidavit from Division officials was sufficient for the court to deny discovery.[10]

13. Other cases have challenged CIDs on jurisdictional grounds. In *United States v. Time Warner, Inc*.,[11] for example, the court ordered CIDs enforced despite the recipients' claim that their conduct outside the U.S. was exempt from the antitrust laws under the Foreign Trade Antitrust Improvements Act. The court suggested that the Division need not affirmatively establish the basis for its subject matter jurisdiction in order to conduct an investigation, but rather could use CIDs to determine whether the purported antitrust exemption was applicable.

2.2. In the context of the cases you are describing, are the seized documents during an on-the-spot inspection sifted at the premises of the undertaking or the authority? If sifting can be done at the premises of the authority, is attendance of lawyers or representatives of the investigated parties to the sifting of the seized evidence required? If so, was lack of compliance with such rules a potential ground for annulment of a final decision?

14. After a seizure pursuant to a search warrant, the Division and Federal Bureau of Investigation will take the seized materials and examine them back in their government offices. Seized documents are reviewed by an independent "filter team" to remove any materials protected by attorney-client privilege before being turned over to the investigative team.

15. Attendance of lawyers or representatives of the investigated parties is not required during the actual search at the corporate premises, and so the presence (or lack thereof) of a corporate representative is not grounds upon which to suppress evidence obtained pursuant to the warrant. An inventory of property seized must be prepared by one of the searching officers in the presence of another officer and, if present, a corporate representative. If either is not present, the inventory must be prepared in the presence of at least one other credible person. The executing officer must give a copy of the search warrant and a receipt for the property seized to a corporate representative or leave a copy of each at the place of the search.[12] In addition, in some cases, a corporate representative may provide assistance to the executing officers during the execution of the search, such as guiding officers to certain

[9] Gold Bond, 221 F.Supp. at 397; see Division Manual, III-73.

[10] See Division Manual, III-74-75.

[11] United States v. Time Warner Inc., No. MISC.A. 94-338, 1997 WL 118413 (D.D.C. Jan. 22, 1997).

[12] Fed. R. Crim. P. 41(f)(1)(B)-(C).

portions of the business or answering questions pertinent to the search. Corporate representatives obviously will not be allowed to interfere with the search.

16. Failure to let the lawyers accompany the officers as they are executing the search is not a ground for overturning any final decision, although evidence obtained following a search may be suppressed on other grounds, such as failure to meet the probable cause standard for obtaining the search warrant.

2.3. Disclosure of evidence to investigated parties is a crucial issue in terms of ensuring right of defence. In the context of the cases where you gathered very large amount of information or digital data, how did you manage the evidence disclosure processes? Did you disclose all the information on the file or only the exculpatory evidence? How did you ensure that all relevant evidence was made available to the parties and that they are given sufficient times to prepare their defence? Was the lawfulness of the practices you adopted challenged in court as breaching due-process rights?

17. If the Division or Commission initiates an enforcement proceeding in a federal district court, defendants are entitled under constitutional law and federal procedural rules to extensive discovery of the evidence that the Agency has gathered for its case. Discovery in civil litigation in cases brought by the Agencies is governed by the same standard rules for discovery in civil litigation that apply in any private litigation.[13] Those rules require the government (indeed all parties to a litigated matter) to provide, for example, documents, as well as the names of individuals, that it may use to support its claims, and entitle defendants to request relevant documents from the government, to depose the government's witnesses, and to obtain substantial information about the government's expert testimony, if any.

18. In federal criminal prosecutions, the defendant's discovery rights are governed primarily by the Federal Rules of Criminal Procedure,[14] supplemented by statute.[15] These rules originate from a number of important Supreme Court decisions, which imposed affirmative discovery obligations on the government.[16] Under these rules, the Antitrust Division is required to disclose, for example, any documents, tangible objects, or other item in its possession, custody or control if the item is material to preparing the defense, or the government intends to use the item in its case-in-chief at trial, or the item was obtained from or belongs to the defendant. It must also disclose reports of examinations and tests in its possession, custody, or control if the item is material to preparing the defense or the

[13] See Fed. R. Civ. P. 26-37. Moreover, the FTC revised its Rules of Practice for Adjudicative Proceedings to substantially comport with the Federal Rules of Civil Procedure. See 73 Fed. Reg. 58832 (Oct. 7, 2008).

[14] See Fed. R. Crim. P. 16(a).

[15] Jencks Act, 18 U.S.C. §3500.

[16] See Giglio v. U.S., 405 U.S. 150 (1972) (requiring that prosecution must disclose any deal with a witness that might call the witness's credibility into question); Brady v. Maryland, 373 U.S. 83 (1963) (requiring prosecution to disclose any material which is potentially exculpatory, including evidence that would mitigate the sentence, or that might impeach the credibility of a prosecution witness); Jencks v. U.S., 353 U.S. 657 (1957) (requiring prosecution to produce any witness statement in its possession that relates to the subject of the witness' testimony, if that witness is testifying against the defendant).

government intends to use it in its case-in-chief. In addition, the government must produce the prior statements of a government witness after the witness testifies on direct examination.[17] Additional information regarding discovery in criminal proceedings is available at the website of the Department of Justice.[18]

19. The presence of large amounts of data, usually in digital format, poses all of the problems mentioned in previous answers, but the Division has been able to meet its discovery obligations using the techniques described above.

[17] See Fed. R. Crim. P. 26.2, which implements the Jencks Act, supra note 15.

[18] See memorandum, Discovery Policy, available at https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/can_discovery_policy.pdf.