

## **Global antitrust enforcement: The authorities' reach is extended *US antitrust authorities release “model confidentiality waiver” to enable greater cross-border cooperation in merger control and antitrust investigations***

In response to the steady expansion of worldwide antitrust investigations on “civil” (i.e., non-criminal) matters – whether in the context of merger control or of investigations into cartels and anti-competitive activities – the two principal US antitrust enforcement agencies, the Federal Trade Commission (FTC) and the Department of Justice (DOJ), have recently signalled an increased willingness to disclose confidential information across borders to other antitrust and competition authorities in the world.

To facilitate more open information sharing with antitrust and competition authorities in other countries, in September 2013 the FTC and the DOJ jointly released a revised “model confidentiality waiver” for use in merger and non-merger civil antitrust investigations that involve concurrent review by US antitrust enforcers and non-US competition authorities. Accompanying guidance was also released.

When information is provided to US antitrust agencies during a civil investigation, that information is generally safeguarded from third parties by strict confidentiality statutes (information disclosed in response to a criminal investigation is subject to stricter confidentiality protections, which are not affected by the model waiver). Yet when a matter raises common competition issues in multiple jurisdictions, US investigating agencies increasingly request the ability to cooperate with their international counterparts to discuss relevant issues and to expedite the investigatory process.

The model waiver was released as a standard agreement that provides the terms by which a party under investigation partially waives the protection of US confidentiality statutes so that information may be shared with non-US competition authorities. Most significantly, the waiver includes provisions on how the agencies will treat confidential information, including privileged information.

### **Multi-jurisdictional cooperation**

Since 1990, the number of international competition authorities has multiplied from a handful to nearly 130 agencies. At the same time, there has been a substantial increase in multi-jurisdictional investigations of merger, cartel, and unilateral conduct matters. A 2013 OECD/ICN Survey on International Competition Enforcement Cooperation indicated an estimated 35 per cent increase in multi-jurisdictional cooperation in merger reviews over the last five years. In 2011, US antitrust agencies substantively cooperated with non-US competition authorities on 37 merger investigations.

Cooperation between the US and non-US authorities frequently occurs under formal bilateral and multilateral agreements. Whereas confidential information cannot be divulged in the absence of a waiver, agencies are not prohibited from discussing public information and some non-public information, including the existence of an open investigation and staff thoughts on market definition, competitive effects, and remedies. Although some cooperation may occur without a confidentiality waiver, the DoJ and the FTC consider that "a waiver enables agencies to make more informed, consistent decisions and coordinate more effectively, often expediting review."

In fact, the agencies' release of the model waiver may reflect what has become the cooperative landscape in multi-jurisdictional antitrust investigations. For example, during a recent panel discussion, Rachel Brandenburger, former Special Advisor at the FTC, described how the agency was moving toward "pick-up-the-phone" relationships with an increasing number of agencies around the world. According to the 2012 US submission on International Cooperation to the OECD, numerous significant merger investigations which occurred in 2010 and 2011 involved a confidentiality waiver.

Despite this momentum, a party under investigation should carefully consider whether to grant a waiver of confidentiality. While the US agencies have provided that entry into the waiver is optional and that the lack of a waiver will not prejudice the agencies against the party under investigation, guidance also notes that the lack of a waiver "may impact an investigation's timing and/or increase the risk of inconsistent outcomes".

## Overview of the model waiver of confidentiality

The model waiver provides that the party granting the waiver only does so with respect to the non-US competition authorities that are specifically identified. The model waiver also specifically describes how information is safeguarded in the following three situations:

- 1. When a US antitrust agency discloses confidential information to a non-US authority:** When a US agency discloses confidential information to a non-US competition authority, the non-US authority will maintain the confidentiality of the information consistent with the jurisdictional laws of the non-US authority.
- 2. When a US antitrust agency receives confidential information from a non-US agency:** The US agency will treat information received as if the US agency received it directly from the party granting the waiver and will protect this information under the provided confidentiality statutes. If the agency receives a request for disclosure under the US Freedom of Information Act, the agency will assert all applicable exemptions and will notify the party in writing if a requester files suit to obtain the confidential information.
- 3. When disclosed information is legally privileged:** US agencies will not seek privileged information from a non-US competition authority. If the US agency receives information that is privileged, the agency will treat the information as inadvertently produced. The party under investigation should identify to the non-US competition authority information that may

be subject to US legal privilege.

## **Benefits to businesses under investigation**

The waivers do not just benefit antitrust and competition enforcement agencies. There are also some benefits for entities who agree to the waiver. A frequently recurring problem in cross-border investigations has been the treatment of privileged information. The United States has an expansive view of attorney-client privilege, which protects many materials that would otherwise be subject to disclosure in jurisdictions outside of the United States. It was often the case that non-US authorities would share information protected by US legal privilege with US authorities, which created uncertainty about the preservation of privilege in the United States. Under the model waiver, however, US agencies will destroy any information received from a non-US competition authority that would be protected by US legal privilege, thereby increasing the certainty that the privilege has been preserved in the United States.

A waiver may also expedite the investigation process, as the party under investigation may avoid having the same discussions and producing the same information to multiple investigative agencies. Furthermore, a party under investigation may benefit when agencies have access to an increased quantity and quality of information, including other agencies' analytical insights. Ideally, this flow of information will result in more efficient remedies.

## **Key considerations prior to granting a waiver**

Nevertheless, a party under investigation should proceed with caution. The model waiver only outlines the US statutory safeguards for confidential information. A party under investigation must also determine whether the confidentiality protections of the non-US jurisdiction cover the information that will be provided. Waivers to non-US jurisdictions are generally provided by parties under investigation at the same time as the waivers are provided to the US agencies.

Moreover, a party under investigation should analyze the substantive law of the non-US jurisdiction. If the non-US jurisdiction has a broader scope of liability than that of the US law, it might not be to the party's benefit to waive confidentiality. Parties may also consider scope of information they must provide to the US agency. For example, if a party grants a waiver, a deposition taken by a US agency would be shared information, despite the fact that the non-US authority would not otherwise receive this information. Finally, parties should seek legal advice to determine whether the model confidentiality waiver should be modified to limit the scope of waiver or the duration of the waiver.

**This article was prepared by Eliot Turner and Layne E. Kruse of Norton Rose Fulbright's US offices.**