

The Federal Trade Commission's International Antitrust Program

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The Federal Trade Commission’s international antitrust program aims to (i) support the FTC’s competition enforcement program by assisting with international aspects of investigations and litigation, (ii) promote cooperation with competition agencies in other jurisdictions, and (iii) promote convergence of international antitrust policies toward best practice.¹ This paper presents the background and organization of the international antitrust program of the FTC’s Office of International Affairs, and describes our main activities to further the program’s goals internally, through bilateral relations, and in multilateral fora.²

I. Background and Organization of the Office of International Affairs

The Office of International Affairs was established on January 2, 2007. The Office brings together the functions and personnel formerly in the International Antitrust Division of the Bureau of Competition, the Division of International Consumer Protection of the Bureau of Consumer Protection, and International Technical Assistance Office of the Office of the General Counsel. Its Director reports directly to the Chairman, and works closely with all of the FTC’s component organizations. The Office has four Deputy Directors, responsible for international antitrust, consumer protection, technical assistance and special projects.

The Office’s antitrust predecessor, the International Antitrust Division, was created in the Bureau of Competition in 1982 to investigate and prosecute cases with an international dimension – for example, cases involving a foreign party, evidence located abroad, or remedial action in another jurisdiction. As commerce became more international, an increasing number of the FTC’s antitrust investigations had an international component. As a result, in 1990, the investigation and litigation functions were moved to the operating divisions, and the International Antitrust Division provided support on international issues. The Office continues to serve that function, and also represents the agency in bilateral relationships with other competition agencies and leads the FTC’s international antitrust policy initiatives in multilateral fora. The Office handles similar functions with respect to foreign consumer protection agencies and policy issues.

The Office is managed by a Director, Randolph W. Tritell, with overall responsibility for the Office, and a Deputy Director for International Antitrust, Elizabeth Kraus, who oversees the Office’s antitrust work. The Office has seven other antitrust attorneys, with the indicated primary portfolios:

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¹ Most of the Office’s antitrust policy and technical assistance work is conducted in tandem with the Foreign Commerce Section of the Department of Justice’s Antitrust Division.

² For further information, see the Office’s antitrust webpage at <http://www.ftc.gov/oia/competition.shtm>.

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Competition technical assistance issues are under the purview of James Hamill, Deputy Director for International Technical Assistance, whose group also includes Timothy Hughes, Nicholas Franczyk, and Russell Damtoft.

II. Resource within FTC

The Office of International Affairs is an internal resource that supports the Bureau of Competition on international issues that arise in their investigations and litigation. We work with staff on issues such as personal and subject matter jurisdiction, service of process, and obtaining evidence abroad, and assist our case teams in understanding foreign laws and procedures and how they intersect with FTC and other US laws and procedures. The Office also notifies foreign governments and agencies of FTC enforcement activities pursuant to international agreements.

III. Bilateral Relationships

Building and maintaining strong bilateral relationships with foreign competition agencies is a critical element of the FTC's enforcement program. Given the many important FTC cases involving foreign parties, foreign-located evidence, or parallel review with other agencies, effective cooperation with other agencies is a necessity.

The US antitrust agencies cooperate with foreign competition agencies through formal and informal agreements and arrangements, although cooperation also takes place in their absence. The United States has bilateral cooperation agreements with eight jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); and Mexico (2000).³ One important informal mechanism is the Recommendation of the Organization for Economic Cooperation and Development ("OECD") on international competition cooperation.⁴ The OECD Recommendation and bilateral agreements generally provide for notification of enforcement matters implicating the other party's interests, investigative assistance through sharing non-confidential information, traditional and positive comity, and consultation to address

³ <http://www.ftc.gov/oia/agreements.shtm>.

⁴ Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130).

disputes. While the earlier agreements were motivated primarily by a desire to reduce and manage conflicts arising from extraterritorial enforcement of antitrust laws, more recent agreements seek mainly to enhance enforcement cooperation. In addition to providing a legal framework for cooperation, the agreements have been catalysts to facilitate closer working relationships.

The United States has entered into enhanced positive comity agreements with the EC (1998) and Canada (2004) that include, *inter alia*, a presumption of deference to the other jurisdiction to take the lead on antitrust enforcement in certain circumstances.⁵ These agreements have yet to be invoked (although there have been some examples of “informal” positive comity).

In 1994, Congress enacted the International Antitrust Enforcement Assistance Act, which authorizes the United States to enter into mutual assistance agreements that, among other things, permit agencies to share parties’ confidential information and to use compulsory process to obtain evidence for the other jurisdiction’s competition agency. The United States has entered one such agreement, with Australia.⁶

Pursuant to these agreements, or often without an agreement, FTC staff cooperates with foreign agencies on individual cases and on developing competition policy. When the FTC and a foreign agency review a case that raises competition concerns in one or both jurisdictions, the agencies frequently exchange investigative information. This may include public information, as well as what we refer to as “agency confidential” information -- information that the agency does not routinely disclose but on which there are no statutory disclosure prohibitions; examples include staff views on market definition, competitive effects, and remedies, and the fact that the FTC is investigating a particular party. Cooperation enables the agencies to identify issues of common interest, improve our analyses, and avoid inconsistent outcomes. Parties to merger investigations routinely waive confidentiality protections to facilitate inter-agency cooperation. Waivers are particularly valuable to the agencies, and can benefit parties by reducing information production burdens and avoiding incompatible remedies.⁷ Recent cases in which the FTC has cooperated closely with foreign agencies include: *Google/DoubleClick*,⁸ *Hexion/Huntsman*,⁹ and *Pernod/V&S Vin & Sprit*.¹⁰

In addition to cooperating on specific matters, the FTC often works with other agencies to promote policy convergence on particular issues. For example, the FTC and

⁵ *Id.*

⁶ <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm> (1999).

⁷ See e.g., ICN Recommended Practice on Interagency Coordination, <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf> at §D, and ICN Model Waiver and accompanying report on Waivers, at <http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf>.

⁸ See Statement of the FTC at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf> noting that the investigation involved close coordination with foreign competition agencies, including those from Australia, Canada, and the European Union.

⁹ See FTC press release at <http://www1.ftc.gov/opa/2008/10/hexion.shtm> (noting cooperation with the EU, Canadian and Mexican agencies).

¹⁰ See FTC press release at <http://www2.ftc.gov/opa/2008/07/pernod.shtm> (noting cooperation with the EC’s DGCOMP).

DOJ have held and will continue to hold discussions with our EC counterparts on unilateral conduct policy and practice, and exchanged views on their non-horizontal merger guidelines. We also established a merger working group with the European Commission, which included task forces to address merger remedies, merger procedures, and issues arising in conglomerate mergers. Following the merger remedies project, the EC issued a Notice with many parallels to US agency policies. At the conclusion of the procedures project, the FTC, DOJ, and EC issued best practices for coordinating handling of issues that may arise in merger investigations.¹¹ The US agencies have also participated in working groups with competition agencies in Mexico, Canada, Korea, and Japan on issues including intellectual property and conduct by dominant firms.

The FTC, along with the Antitrust Division, has devoted considerable resources to working with China on its Anti-Monopoly Law and India on its new competition law and merger regulations. FTC officials have shared our experience and learning with officials in these countries who are involved in developing the law, regulations, and enforcement institutions and practices, with the aim of encouraging legal frameworks and practices that are consistent with sound competition principles and international good practice.

IV. Activities in Multilateral Competition Fora

Now that over 100 jurisdictions have a competition law and agency, it is particularly important that agencies seek to ensure that the system functions coherently. The US agencies have played a lead role in promoting convergence towards best practices in competition policy and enforcement. Given the multitude of different histories, cultures, legal systems, and levels of economic development of the jurisdictions with competition laws, it is inevitable that there will be many differences in competition laws and policies. We believe, however, that jurisdictions can benefit by learning from the experience of others in handling similar issues, including those involving institutional arrangements, procedures, and the substance of antitrust enforcement.

Several multilateral organizations facilitate dialogue and convergence toward sound competition policy and enforcement, particularly the International Competition Network (ICN) and the OECD, and also the United Nations Conference on Trade and Development (UNCTAD) and regional organizations such as the Asia-Pacific Economic Cooperation (APEC).

In October 2001, the FTC, DOJ, and 13 foreign antitrust agencies founded the ICN to provide a venue for competition agencies worldwide to work on competition issues of mutual interest. The ICN is unlike other competition fora in that: it has a broad membership – 107 agencies from 96 jurisdictions, *i.e.*, most of the world's competition agencies; it works exclusively on competition issues; it focuses on discrete projects aimed at procedural and substantive convergence through the development of consensual, non-binding recommendations and reports; it provides a significant role for non-governmental advisors from the business, legal, consumer, and academic communities, as well as experts from other international organizations; and, unlike the OECD and most international

¹¹ See <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

organizations, agency members organize and conduct the work directly rather than using a permanent, paid Secretariat.

The ICN is organized into working groups and subgroups composed of agencies and non-governmental advisors. There are currently substantive working groups dealing with unilateral conduct, mergers, cartels, agency effectiveness and competition advocacy. The ICN's accomplishments are summarized in its Statement of Mission and Achievements.¹²

The FTC co-chairs, with the German Federal Cartel Office, the Unilateral Conduct Working Group, which recently developed Recommended Practices on the assessment of dominance/substantial market power and on the application of unilateral conduct rules to state-created monopolies, based on reports it issued on how its members approach these issues.¹³ The Working Group held a workshop on these topics at the FTC in March 2009 attended by over 130 participants from 35 jurisdictions.¹⁴ The group has also been compiling data on how its members analyze specific types of conduct. It produced reports on predatory pricing and exclusive dealing,¹⁵ single product loyalty discounts and rebates, and tying and bundling, and is currently studying refusals to deal and margin squeeze.

The FTC also chairs the Merger Working Group's Subgroup on Notification and Procedures. The subgroup's projects have included developing a set of eight Guiding Principles and thirteen Recommended Practices for Merger Notification and Review. Since their adoption, the subgroup has focused on the implementation of the Guiding Principles and Recommended Practices. The group held a two-day workshop, attended by almost 100 delegates from 40 jurisdictions, to promote understanding and implementation of the Principles and Practices, and it prepared a Handbook of materials and practical tools to aid implementation. The adoption by numerous ICN members of key aspects of the Recommended Practices, such as merger thresholds incorporating an appreciable nexus between the transaction and the jurisdiction and objectively quantifiable notification thresholds, is widely viewed as a major accomplishment of the ICN that has improved the merger review process for merging parties and competition agencies. The subgroup prepared a report on implementation of the Recommended Practices, as well as reports on merger filing fees worldwide, on practices regarding the use of confidentiality waivers in merger investigations, and on information requirements for merger notification.

The FTC also participates actively in other ICN working groups and is an active member of the ICN's Steering Group, with Commissioner Kovacic serving as one of the Steering Group's three Vice Chairs.

¹² See

http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMission&AchievementsStatement.pdf. For a complete list of ICN work product, see

<http://www.internationalcompetitionnetwork.org/>.

¹³ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

¹⁴ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/workshops> and transcript available at http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#Mar23_09.

¹⁵ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

The FTC and DOJ represent the US in the OECD's Competition Committee. The OECD consists of thirty economically developed countries, with participation by several non-member observers. It aims to promote coherent economic policies and economic growth. Its Competition Committee, which meets three times per year, provides a forum for senior representatives of members' competition agencies to exchange ideas and discuss policies of mutual interest and concern.¹⁶ It includes committees that focus on competition issues in regulated sectors and on international cooperation and enforcement.

The Competition Committee's primary goals are: (i) to review developments in competition laws and policies and identify best practices in competition policy and antitrust enforcement; (ii) to foster convergence among national antitrust policies; and (iii) to encourage increased cooperation among antitrust agencies. The Committee has developed non-binding, but nonetheless important Recommendations, that the OECD has adopted, including on antitrust enforcement cooperation, combating hard-core cartels, and merger review procedures.¹⁷ The Committee holds "roundtable" discussions -- for example, in June 2009, on standards for merger review, two-sided markets, and on competition, patents and innovation -- and produces papers, for example on exemptions to antitrust laws and the impact of hard-core cartels, and has developed a toolkit on competition assessment. The Committee holds competition "peer reviews," high-level examinations resulting in OECD recommendations for changes in laws and policies that often contribute significantly to promoting reform in the reviewed jurisdiction. The Competition Committee sponsors an annual Global Forum on Competition, at which members and numerous non-members discuss competition issues relevant to developing countries and young agencies. The business community is represented at OECD through the Business Industry Advisory Council, which submits papers and is invited to participate in many of the sessions.

V. Trade and Competition Fora

The FTC works on issues at the intersection of trade and competition policies, for example as they arise in the context of trade agreements. In 1996, trade ministers established within the WTO a Working Group on the Interaction between Trade and Competition Policy. The Group's mandate was to study the interaction of these policies and assess whether to incorporate competition disciplines into the WTO. Given the WTO's broad membership, the working group played an important educative role, to which the US contributed, including by submitting papers on many issues. The FTC co-chaired (with USTR) the US delegation to the Working Group. While the EC and some other members supported initiating negotiations of a competition chapter in the Doha WTO round, the US questioned the benefits of WTO competition rules, particularly if they would be subject to dispute settlement. Ultimately, the proposed competition chapter was dropped, largely because of developing country opposition. The Working Group is no longer in session.

Competition policy also arises in the context of negotiating some bilateral and regional free trade agreements. Current agreements with a competition chapter include

¹⁶ Information on the OECD's competition-policy work is available at http://www.oecd.org/topic/0,3373,en_2649_37463_1_1_1_1_37463,00.html.

¹⁷ See Recommendations at http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

NAFTA and bilateral agreements with Chile, Singapore, and Australia, as well as the proposed agreements with Korea, Colombia, and Peru (a larger number of such agreements do not contain a competition chapter). The chapters typically include provisions on maintaining a competition law and agency, cooperation between the parties, and consultation to resolve disagreements; these provisions are not subject to dispute settlement. The agreements also include disciplines that are subject to dispute settlement on certain state enterprises and designated monopolies. The FTC plays an active role in U.S. delegations that negotiate competition chapters in free trade agreements.

VI. Technical Assistance

The FTC and the DOJ Antitrust Division provide competition technical assistance to countries undergoing transition to market economies and establishing new competition regimes. Beginning in 2008 the FTC has been able to self-fund much of our assistance program, and also continues to benefit from funding provided by other government agencies, particularly the US Agency for International Development (USAID). The program began in Central and Eastern Europe in the early 1990s, and has expanded around the world – recent activity has included programs in China, India, Southeast Asia, Egypt, Mexico, Peru, Central America, and South Africa.

Many of our most successful programs involve the placement of resident FTC and/or DOJ advisors with developing competition agencies on a long-term basis (typically 3-6 months). The resident advisor program allows our experts to provide on-the-job training in the context of the recipient agency's own cases. The advisor helps to develop the investigative and analytical skills of the agency staff, and introduces staff to available tools to improve the agency's effectiveness in requesting and assessing remedies within the context of the country's laws, traditions, and economic circumstances. The resident advisor program is particularly effective in allowing the advisor to have contact with a range of the recipient agency's staff, and affords our experts the opportunity to provide immediate training on issues of concern to the agency. We also provide assistance through short-term programs, in which experienced antitrust lawyers and economists provide training in investigational skills by using hypothetical exercises (like those used by the National Institute of Trial Advocacy) to conduct simulated investigations involving issues that developing agencies typically encounter. The FTC currently has resident advisor programs in South Africa and Peru.

A 2006 statute, the US SAFE WEB Act, enables the FTC to host foreign competition (and consumer protection) agency officials and, in appropriate circumstances, provide them with access to non-public materials, thus enabling them to gain valuable experience by working with case teams. Pursuant to this authority, the Office of International Affairs established an International Fellows and Interns Program under which foreign officials spend up to six months at the FTC learning how the FTC legal and economic staff conduct their work.¹⁸ When the Fellows return to their home agencies they can share what they have learned with their colleagues, apply their experience in their work for their home agencies, and help to improve cross-border cooperation through the relationships they have developed. The FTC has hosted 16 lawyers and economists 13 jurisdictions, and will continue to expand

¹⁸ For further information on the program, see <http://www.ftc.gov/oia/safeweb.shtm>.

the program. The FTC has also sent attorneys and economists to the UK and EU competition agencies and is expanding the staff exchange program.

Conclusion

As the number of antitrust laws and agencies grows and business operates more globally, international antitrust policy will continue to face challenges. The FTC's Office of International Affairs will continue to work with other agencies to promote sound competition policy and enforcement worldwide through cooperation and convergence toward international best practice.

The Office also seeks to evaluate and improve its operations based on best practices at home and abroad. OIA was an active participant in the FTC's "FTC at 100" self-assessment program,¹⁹ conducting sessions with members of the antitrust community around the world to obtain feedback on our work and learn from others. We look forward to incorporating the learning from this project into our work in order to better serve the interests of the FTC and consumers.

¹⁹ See <http://www.ftc.gov/ftc/workshops/ftc100/index.shtm>.