

Profile: FTC's Brill emerges as key player in national, international regulation

Jurisdiction : USA

10 Jun 14 | 14:14 ET

Author: Mike Swift

IN BRIEF

Julie Brill still spends much of her time in a small town in central Vermont, where until recently she was perhaps best known for her play on the local women's tennis team. But as she marks her fourth year on the US Federal Trade Commission, this small-town Democrat has become a key regulator on not just a national, but also on an international, stage.

Julie Brill still spends much of her time in a small town in central Vermont, where until recently she was perhaps best known for her play on the local women's tennis team. But as she marks her fourth year on the US Federal Trade Commission, this small-town Democrat has become a key regulator on not just a national, but also on an international, stage.

The FTC's senior Democrat along with Chairwoman Edith Ramirez, Brill is widely seen as the commission's most important voice on Internet privacy and data security issues. She recently appeared on "60 Minutes" to discuss the data-broker industry currently being scrutinized by the FTC (see [here](#)). Over the course of repeated trips to meet with European regulators, Brill has bolstered the credibility of US Internet privacy regulation in the eyes of European regulators.

Brill was back to Brussels, seat of the European Union, last week to speak at a meeting organized by the European Data Protection Supervisor. Her missionary role is a particularly critical one at a time when bulk data collection by US intelligence agencies has undermined European trust in US Internet companies and the US government, and when important multi-national agreements such as the US-EU "Safe Harbor" cross-border data transfer agreement have come under threat (see [here](#)).

"She really is now seen as a global player. She is well respected on both sides of the Atlantic," Richard Thomas, Information Commissioner for the United Kingdom from 2002 to 2009, said of Brill following a global privacy summit in Washington, D.C. in March where Brill received the top international leadership award for 2014. "She absolutely understands that there really can't be a falling out, as there sometimes has been symbolically, between North America and Europe."

Brill, 55, is also an experienced and well-respected, though not completely

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

uncontroversial, antitrust regulator. As a regulator, Brill cut her antitrust teeth on community-focused cases in the early 1990s in Vermont, one of the smallest US states, involving trash haulers, supermarket chains and the dairy industry.

Brill still travels home to spend most weekends with her husband and the one of her two sons who remains at home in Randolph, Vermont, population 4,778. Since she arrived in Washington in 2009, she has also helped harmonize the enforcement efforts of the two US antitrust enforcement agencies, which are often perceived to be jealous rivals, the FTC and the US Department of Justice.

“When Julie was nominated and confirmed, from the beginning she made it clear she wanted to have an open line of communication,” said Sharis Pozen, the former acting assistant attorney general for the DOJ’s antitrust division. Pozen joined the Justice Department as chief of staff at about the same time Brill was appointed to the FTC, and credits her for helping the two agencies work better together.

Brill is seen by many as being generally more willing to support antitrust enforcement actions or divestitures than her Republican colleagues, and sometimes her fellow Democrats, and she wrote the commission’s opinion blocking ProMedica’s purchase of St. Luke’s Hospital in Toledo, Ohio. The US Court of Appeals for the Sixth Circuit agreed in April that the merger was anticompetitive and should be unraveled, calling Brill’s analysis “comprehensive, carefully reasoned and supported by the substantial evidence in the record” (see [here](#)).

Brill built a national profile while working for the attorney general of Vermont for 17 years, coordinating the efforts of a diverse array of political players on issues including multi-state litigation against the tobacco industry, consumer protection pharmaceutical litigation and Internet privacy. At the National Association of Attorneys General, the association of state attorneys general, Brill became co-chair of the Privacy Working Group in 2004.

Brill also knows the inside of a courtroom. She served as the co-lead litigator in a multistate lawsuit against RJ Reynolds over its claims for “reduced risk” cigarettes, which went to trial in Vermont in 2008 and 2009.

JB Kelly recruited Brill in early 2009 to work under North Carolina Attorney General Roy Cooper as senior deputy attorney general partly because of her ability to navigate multiple jurisdictions and to understand the diverse and different needs of many different players.

“In North Carolina, much like Vermont, we’re not New York. We’re not Illinois. You can’t do every case yourself; you have to be willing and able to work with other states and work through the needs of other states,” said Kelly, now a partner in Dickstein Shapiro’s state attorneys general practice. “She has a

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

unique capacity to be challenged by, to be interested in, and to be looking for good ideas when there are multiple jurisdictions involved – not rejecting one idea, but being open to what other jurisdictions are doing, what might work.”

Brill agrees that the experience of working in the nation’s smallest state capital – Montpelier, Vermont – and having to find common ground with regulators with different political views from much larger states is a skill she applies to trying to harmonize the privacy regimes of the United States and Europe.

“Vermont is a very small state, and it has a particular place on the spectrum among states,” Brill said in an interview. “When I was one of the leading players in the management of the state tobacco litigation, when I was one of the people organizing the pharmaceutical litigation and leading the privacy working group, I did have to work with folks from all over the country who have very different perspectives, whose perspectives I had to understand, and figure out how to achieve a common goal that satisfied as many folks as possible, and still get us to a place where we were moving the ball forward.”

Although she and her husband, Mark Miller, haven’t decided where they will end up after their sons are grown, Brill said she is in no hurry to move to Washington, despite the weekly commute.

“I love Washington. I love what I do; I feel honored and amazed with the issues I get to deal with every day, and the importance of what I’m doing,” Brill said. “But it’s also very nice to be able to within five or six hours be in a part of the country that is beautiful and where people are focused on lots of different things, not just politics.”

- Personality -

Brill has an ability to connect on a personal level. She has been known to offer cookies she baked to visitors to her palatial office at the FTC, overlooking Pennsylvania Avenue. But her unaffected manner can mask a tough core. At least one former boss prized Brill’s ability, when he needed to turn up the effectiveness of one sector of his staff, for “kicking ... butt.”

For the first time in the FTC’s 100-year history, four of its five commissioners are female, following the recent confirmation of Democrat Terrell McSweeney. Some antitrust lawyers on the receiving end of Brill’s questions, including admirers, describe her as “aggressive.” But like many women in public life with power, Brill is sensitive about the perception of how she applies it. She said she prefers to think of herself as “hard-charging” and “practical,” and she acknowledged “robust” exchanges when she interviews a company’s counsel or executives on antitrust or other regulatory issues.

Brill played soccer for Princeton University – she graduated magna cum laude in

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

economics, and later earned her law degree from New York University, where she first met former FTC Chairman Jon Leibowitz in the early 1980s – and she continued her athletic career playing tennis on the adult team that represents her Vermont town.

“I do like good outcomes and often good outcomes require a good fight, so maybe I do have a competitive streak,” she said.

After Leibowitz stepped down during his second term last year, Brill, Ramirez and Howard Shelanski, former director of the FTC’s Bureau of Economics, were three leading candidates interviewed by the White House to become the next chairman. Ramirez, a former business litigator from California who was in President Barack Obama’s Harvard law school class, became the first member of an ethnic minority group to become FTC chairwoman when she got the nod from Obama, at a time when the White House was taking heat for a lack of diversity in its appointments.

Unlike Ramirez, who has been a donor to Obama’s political campaigns since his US Senate campaign in Illinois in 2004 and who worked for Obama’s first presidential campaign, Brill has not been particularly involved with politics aside from some volunteer work for Democrats in local Vermont races, and for one gubernatorial campaign in 2002. At the time of her confirmation hearing in 2009, Brill had never made a political contribution of \$500 or more, and had never sought elected office at any level of government, according to documents filed with the Senate.

By all accounts, Brill and Ramirez have a good working relationship despite their competition for the FTC chair. “There is nothing wrong with a little ambition when it is tempered with being a good colleague and when you are talented – for anyone who would be chairman,” Leibowitz said. “I think Julie and Edith have a great relationship.”

Despite losing her bid for the chair, Brill’s visibility at the FTC has not waned – if anything, it’s just the opposite.

She has four times the number of Twitter followers that Ramirez has, for example – perhaps a reflection of her frequent visits to Silicon Valley, where she has mingled with startup entrepreneurs and visited big Internet companies to talk about privacy issues. Brill often appears much more comfortable and outspoken in the public spotlight than Ramirez does. But both senior Democrats are seen by many as driving the consumer protection agenda at the FTC, the function that has solidified the FTC’s position as the preeminent US privacy regulator.

Beginning under Leibowitz, the FTC has put some of the biggest US Internet social networking companies – Google, Facebook, Twitter, Path and most

recently Snapchat (see [here](#)) – under long-term privacy and data-security regulatory supervision. Under the 20-year consent orders each of those companies accepted with the FTC, each now risks fines that could reach many tens of millions of dollars if they violate those orders.

Thomas, the former UK Information Commissioner, said those agreements have given the FTC more regulatory credibility on privacy in Europe, and Brill has been the US official most responsible for making that case in Brussels.

“There is still quite a gap between European thinking and US thinking, but I think there is respect for what the FTC has done,” because of the substance of those consent orders and Brill’s “articulate” and “pragmatic” communication of them, he said in an interview with MLex.

“I think my approach – being practical, being hard-charging, being a no-nonsense person – has been one of the attributes that the Europeans have most approved about me,” Brill said. “I am an independent voice. I am clearly focused on how to improve the lives of consumers, and competition. I think that has been clear in all I’ve done and said and that has engaged the appreciation that Europeans have for me in all that I say.”

- Antitrust -

At the FTC, Brill says her record puts her squarely in the mainstream on antitrust enforcement. As she celebrated her fourth anniversary at the FTC in April, Brill tweeted her voting statistics since her 2009 confirmation: “Consumer Protection = 790 yes & 0 no votes. Antitrust = 455 yes & 3 no votes.”

Only three dissenting votes in four years is also indicative of the fact that the FTC typically operates by consensus, and that Brill has been on the majority side during her four years on the commission. Most recently, Republican commissioners Maureen Ohlhausen and Joshua Wright have disagreed with Brill’s and Ramirez’s use of Section 5 of the FTC Act to sanction Google and Motorola Mobility’s use of standard-essential patents in 2013, while Wright also dissented on the use of Section 5 to sanction Apple in January for not having tight enough controls on mobile app purchases by children.

In her antitrust dissents, Brill has often pushed for stronger enforcement, and some in the antitrust bar feel Brill is pushing the FTC too far in that direction. In April 2012, Brill issued the sole dissent opposing the FTC’s clearance of Express Scripts’ proposed \$29 billion purchase of rival pharmacy benefit manager Medco. In the majority statement, the agency’s three other commissioners said that while the merger between two of the nation’s three largest PBMs would increase industry concentration, the tie-up was unlikely to result in anticompetitive effects.

www.mlex.com
MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

www.mlex.com

MLex customer services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong

Brill disagreed, calling the merger a “game changer” for the industry.

“I have reason to believe that this merger is, in fact, a merger to duopoly with few efficiencies in a market with high entry barriers – something no court has ever approved,” she wrote (see [here](#)). “The legal presumption against this merger is overwhelming and is not, in my view, sufficiently rebutted by evidence regarding competitive effects or entry.”

Brill, along with then-chairman Leibowitz, supported a consent order that would have prohibited the merged firms from engaging in some exclusionary conduct, but were unable to convince a third commissioner to join with that approach.

That combination cropped up again in the agency’s 2013 conclusion to the Google case, when Brill and Leibowitz alone said there was sufficient evidence that the search engine’s online advertising policies were anticompetitive.

The FTC ultimately allowed Google to offer an “enforceable letter” with commitments to change its practices. Brill and Leibowitz justified that form of resolution by pointing to a 2002 case involving Pillsbury (see [here](#)).

Other antitrust lawyers who spoke publicly to MLex said they don’t see Brill driving the FTC toward being a too-aggressive antitrust regulator, however.

“She has a pro-enforcement bent, there is no doubt about that,” said Matt Reilly, a former assistant director of the FTC’s Bureau of Competition, who worked under Brill at the FTC and is now a partner with Simpson Thacher & Bartlett.

“She can definitely be aggressive, but I’ve always thought she gives everyone a fair shot. I think she’s incredibly fair, very thoughtful – aggressive, yeah – but not to the point of being at all that, ‘We are going to decide it this way, without the facts and analysis,’ ” Reilly said.

George L. Paul, an antitrust lawyer with White & Case who has brought antitrust cases to Brill in Vermont as well as at the FTC, says she has often pushed his clients hard. But he disagrees with complaints about Brill that he’s heard from some antitrust attorneys that she too often takes a consumer point of view.

Brill has “a healthy skepticism about many of the arguments parties advance about why they feel a merger won’t cause anticompetitive effects, but that skepticism is not coming from the consumer perspective. It’s coming from her views on how Section 7 of the Clayton Act should be applied,” Paul said.

Indeed, Brill is willing to take an extremely nuanced view when separating the consumer protection principles that govern privacy issues from the antitrust laws that govern mergers and anticompetitive behavior.

One such question is whether privacy, given that consumer data has become a key asset for companies in the digital economy, could ever be a factor in an antitrust merger review, as some privacy advocates urged in Facebook's recent \$19 billion acquisition of WhatsApp.

It was an issue that Brill returned to while speaking in Brussels this week, where she said that "even though we are not there yet," that privacy issues around personal data could play a role in how agencies in the US and Europe analyze future mergers (see [here](#)).

Brill elaborated on her privacy views in an extended written explanation provided to MLex (see [here](#)).

– With reporting by Leah Nylén and Jeff Bliss in Washington.

Linked Case File(s)

[Antitrust investigation - FTC - Google](#)

[ProMedica - St. Luke's Hospital \(Ohio\)](#)

Subjects : Antitrust, Mergers & Acquisitions, Privacy, Profile, Regulation

Industries : Digital Advertising, Information Technology, Internet, Media, Mobile

Web, Search, Social Media, Telecom

Regulators / Courts : FTC

Jurisdiction : USA

www.mlex.com
MLex customer
services
customerservices@mlex.com

MLex London
141 Moorgate
London EC2M 6TX
United Kingdom

MLex Brussels
Rue de la Loi 67
1040 Brussels
Belgium

MLex Washington
1776 I (Eye) St. NW
Suite 260
20006 Washington, D.C.
USA

MLex New York
535 Fifth Avenue, 4th
Floor
10017 New York
USA

MLex San Francisco
32 7th Street
CA 94103
USA

MLex Hong Kong
Level 43 - AIA Tower
183 Electric Road
North Point
Hong Kong