



The Federal Trade Commission's International Antitrust Program

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March 2013



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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, established in January 2007, 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 the 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 three Deputy Directors, who are responsible for international antitrust, consumer protection and technical assistance.

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 headed 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 eight other antitrust attorneys, with the indicated primary portfolios:

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¹ The Office often conducts its international antitrust policy work 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 includes Timothy Hughes (esp. Southeast Asia and Eastern Europe), Nicholas Franczyk (esp. India and Africa), and Russell Damtoft (esp. Latin America).

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 investigations and litigation. The Office works with staff on issues such as personal and subject matter jurisdiction, service of process, and obtaining evidence abroad, and assists 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 and works with other US agencies on issues of mutual interest.

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, evidence located abroad, or parallel review with other agencies, effective cooperation with other agencies is a necessity. Cooperation enables the agencies to identify issues of common interest, improve our analyses, and avoid inconsistent outcomes.

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 nine jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); and Chile's competition enforcement agency, the Fiscalía Nacional Económica (2011).³ The US antitrust agencies

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

entered a Memorandum of Understanding with the Russian Federal Antimonopoly Service in November 2009,⁴ with the three Chinese antitrust agencies in July 2011, and with the Indian competition authorities in September 2012. One important informal mechanism supporting our cooperation is the Recommendation of the Organization for Economic Cooperation and Development (“OECD”) on international competition cooperation.⁵ The OECD Recommendation and bilateral agreements generally provide for notification of enforcement matters that implicate the other party’s interests, investigative assistance through sharing non-confidential information, traditional and positive comity, and consultation to address disputes. While the first agreements were motivated primarily by a desire to reduce and manage conflicts that can arise from extraterritorial enforcement of antitrust laws, modern 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.⁶ 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. However, the United States has entered into only one such agreement, with Australia.⁷

Pursuant to these agreements, or often without an agreement, FTC staff cooperates with foreign agencies on individual cases and on developing competition policy. In the past year, the FTC had over 50 substantive case-related contacts with counterpart agencies around the world, cooperating on 23 merger matters and 3 conduct investigations. This cooperation included extensive coordination with competition agencies from Australia, Canada, China, the European Union, France, Germany, Japan, Korea, Mexico, New Zealand, Singapore, Turkey, and the United Kingdom.⁸

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”

⁴ <http://ftc.gov/os/2009/11/091110usrussiamou.pdf>.

⁵ Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False>.

⁶ *Id.*

⁷ <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm> (1999).

⁸ See U.S. Submission to the OECD Working Party on Co-operation and Enforcement “Discussion on International Cooperation” of June 8, 2012 available at http://www.ftc.gov/bc/international/docs/062012International%20cooperation_U%20S.pdf, for a more complete description of the U.S. agencies’ international case cooperation.

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. 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.⁹

The breadth and depth of our cooperation continues to develop. For example, as part of our review of Western Digital Corporation's recent acquisition of Viviti Technologies Ltd. (formally known as Hitachi Global Storage Technologies), the FTC cooperated with 10 non-U.S. antitrust agencies, including newer agencies from China and Singapore.¹⁰ FTC staff and the staff of each of the non-U.S. authorities worked together closely, cooperating on market definition, theories of harm, and analysis of competitive effects. Our cooperation also included coordinating compatible remedies with many of these agencies to address competitive concerns raised in our respective jurisdictions. This is the largest number of agencies with which FTC staff has cooperated on an individual matter. Other recent cases in which the FTC has cooperated closely with foreign agencies include the *Agilent/Varian*¹¹ and *Vivendi/EMI*¹² mergers and *Intel*¹³ and *Google*¹⁴ in the unilateral conduct area. Our cooperation generally has been aided by waivers provided by the parties.

In addition to cooperating on specific matters, the FTC often works with other agencies to promote policy convergence. For example, the FTC and DOJ recently established working groups with the European Commission to discuss substantive and procedural issues that arise in merger and unilateral conduct investigations. Our merger project resulted in the issuance, by the FTC, DOJ, and the European Commission, of Revised Best Practices for Coordinating Merger Reviews.¹⁵ The Best Practices provide an advisory framework for interagency cooperation when one of the US agencies and the European Commission's Competition Directorate review the same merger. The US agencies have also participated in working groups with the competition agencies of Canada, Japan, Korea, and Mexico on issues including intellectual property and conduct by dominant firms, and participated in a series of informal workshops with staff from the Canadian Competition Bureau to share merger enforcement techniques and experience.

⁹ Examples of model waivers are provided at <http://www.ftc.gov/oia/waivers/index.shtm>. See also ICN Recommended Practice on Interagency Coordination, <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> at §D, and ICN Model Waiver and accompanying report on waivers, at <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

¹⁰ See FTC press release at <http://www.ftc.gov/opa/2012/03/westerndigital.shtm>, noting cooperation with the competition agencies of Australia, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Singapore, and Turkey.

¹¹ See FTC press release at <http://www.ftc.gov/opa/2010/05/agilent.shtm>, noting cooperation with the competition agencies of Australia, the European Union, and Japan.

¹² See <http://www.ftc.gov/os/closings/comm/120921emifeinsteinstatement.pdf>.

¹³ See http://ftc.gov/bc/international/docs/062012International_coop_U%20S.pdf for description of cooperation in this matter and additional information on the US agencies' experience with international cooperation.

¹⁴ See <http://ftc.gov/opa/2013/01/google.shtm>.

¹⁵ See <http://www.ftc.gov/opa/2011/10/eumerger.shtm>.

The FTC, along with the Antitrust Division, has devoted considerable resources to working with China on its Anti-Monopoly Law and with India on its new competition law and merger regulations. FTC officials have shared experience and learning with officials who are involved in developing the law, regulations, and enforcement institutions and practices, with the aim of encouraging legal frameworks and practices based on sound competition principles and international good practice. We are now working with these agencies pursuant to our Memoranda of Understanding as they implement their competition laws.

IV. Activities in Multilateral Competition Fora

With competition laws and agencies in well over 100 jurisdictions, 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 differences in histories, cultures, legal systems, and levels of economic development, it is inevitable that differences in the wording and application of competition laws and policies will persist. We believe, however, that learning from the experience of others in handling similar issues, including those involving institutional arrangements, procedures, and the substance of antitrust enforcement, can promote convergence toward better practices.

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). Recently, the FTC helped found the Inter-American Alliance, which fosters enforcement cooperation in the Americas through regular conference calls on matters of mutual interest.

ICN. In October 2001, the FTC, DOJ, and 13 other antitrust agencies founded the ICN to provide a venue for competition agencies worldwide to work on competition issues of mutual interest. The ICN is unique in that it: has a broad membership – 127 agencies from 111 jurisdictions, *i.e.*, most of the world’s competition agencies; works exclusively on competition issues; focuses on discrete projects aimed at procedural and substantive convergence through the development of consensual, non-binding recommendations and reports; and provides a significant role for non-governmental advisors from the business, legal, consumer, and academic communities, as well as experts from other international organizations. Unlike the OECD and most international organizations, agency members organize and conduct the work directly rather than through a permanent Secretariat.

The ICN is organized into working groups composed of agencies and non-governmental advisors. The current substantive working groups address unilateral conduct, mergers, cartels, agency effectiveness, and competition advocacy. The ICN’s accomplishments are summarized in its Statement of Achievements.¹⁶

¹⁶ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc797.pdf>. For a catalog of ICN work product, see <http://www.internationalcompetitionnetwork.org/uploads/library/doc770.pdf>.

The FTC co-chairs the ICN's Agency Effectiveness Working Group with the Mexican and the Norwegian competition agencies. The group's mission is to identify key elements of a well-functioning competition agency and good practices for strategy and planning, operations, and enforcement tools and procedures.¹⁷ The FTC co-leads, with the European Commission, a new initiative on investigative process. The project addresses how good investigative processes and practices can contribute to enhancing the effectiveness of agencies' decision-making and ensuring effective protection of procedural rights. The project's initial work involves agency enforcement tools and transparency in enforcement, with a view to issuing ICN guidance.¹⁸ The working group has produced reports on strategic planning and project delivery for an Agency Practice Handbook, and has drafted chapters on knowledge management and human resource management. Under the working group's auspices, the FTC hosted an Agency Head Roundtable in 2012 on effective enforcement and quality decision-making.

The FTC also leads the ICN's Curriculum Project, which is developing a comprehensive online curriculum of training materials on competition law and practice, featuring multimedia presentations by leading competition officials, scholars, and practitioners. It has produced modules on the history and goals of competition policy, market definition, market power, merger investigation, competitive effects, leniency, and predatory pricing.¹⁹ The next modules will address investigation techniques, competition advocacy, special challenges of competition enforcement in developing countries, cartels, and agency effectiveness.

The FTC recently co-chaired ICN's Unilateral Conduct Working Group, which produced Recommended Practices on the assessment of dominance/substantial market power and on the application of unilateral conduct rules to state-created monopolies.²⁰ The Working Group held widely attended workshops on these topics at the FTC in March 2009,²¹ in Brussels in December 2010,²² and held its first regional workshop in July 2012 in Singapore on exclusive dealing.²³ The group also produced reports on predatory pricing and exclusive dealing, single product loyalty discounts and rebates, tying and bundling, and refusals to deal and margin squeeze.²⁴ Based on these reports and the Recommended Practices, the group is drafting a Workbook on the analysis of unilateral conduct. The FTC remains active in this work.²⁵

¹⁷ See AEWG's current work plan:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc798.pdf>.

¹⁸ See Investigative Process project discussion paper:

<http://www.internationalcompetitionnetwork.org/uploads/2011-2012/icn%20investigative%20process%20project%20consultation%20document.pdf>.

¹⁹ See <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>.

²⁰ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

²¹ See <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars.aspx>.

²² See <http://internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars/2010.aspx>.

²³ See <http://internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars/2012.aspx>.

²⁴ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

²⁵ The first chapter of the workbook, on Assessing Dominance/Substantial Market Power, is available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf>.

The FTC also led the Merger Working Group's subgroup on Notification and Procedures, which developed a set of eight Guiding Principles and thirteen Recommended Practices for Merger Notification and Review. The adoption by numerous ICN members of key aspects of the Recommended Practices, such as merger thresholds that incorporate 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 FTC continues to lead the group's work to assess and promote implementation of the Recommended Practices.

The FTC participates in other ICN working groups and is an active member of the ICN's Steering Group, which sets the ICN's strategic direction. In 2011, the FTC, with DOJ's Antitrust Division, hosted an ICN roundtable on enforcement cooperation, which resulted in further work on cooperation by the ICN.

OECD. The FTC and DOJ represent the United States in the OECD's Competition Committee. The OECD consists of thirty-four economically developed countries, with participation by several non-member observers. It aims to promote sound 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.²⁶ It includes working parties that focus on competition issues in regulated sectors and on international cooperation and enforcement.

The Competition Committee's primary goals are to: (i) review developments in competition laws and policies and identify best practices in competition policy and antitrust enforcement; (ii) foster convergence among national antitrust policies; and (iii) encourage increased cooperation among antitrust agencies. The Committee has developed non-binding, but nonetheless important, Recommendations adopted by the OECD, including on antitrust enforcement cooperation, combating hard-core cartels, merger review procedures, and competition assessment.²⁷ The Committee holds "roundtable" discussions and hearings to which the FTC contributes to United States submissions - for example, over the past year, on vertical restraints in online sales markets, market definition, efficiency claims, competition in health care services, competition and behavioral economics.²⁸ It also has launched multi-year projects on international cooperation and on impact evaluation. 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

²⁶ 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.

²⁷ See Recommendations at http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

²⁸ Electronic versions of U.S. submissions to Committee roundtables are available at <http://www.ftc.gov/bc/international/ussubs.shtm>.

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 the Office of the United States Trade Representative) 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 based on 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. Approximately half of the FTAs the United States has entered contain a competition chapter, including NAFTA and bilateral agreements with Australia, Chile, Colombia, Korea, Peru, and Singapore. 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 continues to play an active role in US delegations that negotiate competition chapters in proposed free trade agreements, including the current Trans-Pacific Partnership. We will play a similar role in the upcoming US-EU Free Trade Agreement negotiations.

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 (the FTC also conducts a consumer protection assistance program). The program began in Central and Eastern Europe in the early 1990s, and has expanded around the world. The FTC continued its robust program of international competition and consumer protection technical assistance in the past year, conducting 38 missions in 19 countries including, among others, China, Colombia, Costa Rica, India, Morocco, Russia, and South Africa. Originally funded by the US Agency for International Development, the program is now funded by the FTC and several other government sources including USAID.

Many of our most successful programs involve the placement of resident advisors with young competition agencies for several months. This allows our experts to provide on-the-job training in the context of the recipient agency's current 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 in the context of the country's laws, traditions, and economic circumstances. The resident advisor program is particularly effective in allowing the advisor to work with a range of the recipient agency's staff. The FTC has recently sent resident advisors to Colombia, South Africa, and Vietnam. We also conduct short-term programs, in which experienced antitrust lawyers and economists provide training in investigational skills by using hypothetical cases to conduct simulated investigations involving issues that developing agencies typically encounter.

The US SAFE WEB Act, enacted in 2006 and recently renewed through 2020, enables the FTC to host foreign competition and consumer protection agency officials and, in appropriate circumstances, provide them with access to non-public materials, enabling them to gain valuable experience by working with FTC 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's legal and economic staff conduct their work.²⁹ When the Fellows return to their home agencies they can apply their experience in their work for their home agencies, share their learning with colleagues, and help to improve cross-border cooperation through the relationships they have developed. The FTC has hosted 59 lawyers, economists, and investigators from 28 jurisdictions, and will continue to expand the program. FTC attorneys and economists have also worked in the competition agencies of Canada, the EU, Mexico and the UK as part of a staff exchange program.

Conclusion

The FTC's international antitrust policy will continue to face challenges as antitrust enforcement and cross-border business operations increase. The FTC's Office of International Affairs continually seeks to evaluate and improve its operations based on best practices at home and abroad³⁰ and welcomes input from stakeholders so that we can better serve the interests of the FTC and consumers.

²⁹ For further information on the program, see <http://www.ftc.gov/oia/safeweb.shtm>.

³⁰ For example, OIA participated in the "FTC at 100" self-assessment program, conducting sessions with members of the antitrust community around the world to obtain feedback on our work and learn from others. See <http://www.ftc.gov/ftc/workshops/ftc100/index.shtm>.