



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, 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 Chair, and works closely with all of the FTC’s component organizations.

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 (202-326-3051; rtritell@ftc.gov), and a Deputy Director for International Antitrust, Elizabeth Kraus (202-326-2649; ekraus@ftc.gov), who oversees the Office’s antitrust work. The Office has nine 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/policy/international/international-competition>.

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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 ten jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); and the competition enforcement agencies of Chile (2011), and Colombia (2014).³ The US antitrust agencies entered a Memorandum of Understanding with the Russian Federal Antimonopoly Service in November 2009,⁴ with

³ See <http://www.ftc.gov/policy/international/international-cooperation-agreements> for complete list.

⁴ *Id.*

the three Chinese antitrust agencies in July 2011, with the Indian competition authorities in September 2012, and with the Korea Fair Trade Commission in September 2015. The Recommendation of the Organization for Economic Cooperation and Development (“OECD”) on international competition cooperation is an important informal cooperation instrument.⁵ The OECD Recommendation and bilateral agreements generally promote practical enforcement cooperation through informal communications, underscore the importance of investigative assistance, including through the sharing of non-confidential information, and provide for confidentiality safeguards. While the early agreements were motivated primarily by a desire to reduce and manage conflicts that arose 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.⁶

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 arrangements, or often without, FTC staff cooperates with foreign agencies on individual cases and on developing competition policy. In fiscal year 2015, the FTC coordinated in 35 investigations, 30 merger, and 5 non-merger investigations. This cooperation included coordination with competition agencies from Australia, Belgium, Brazil, Canada, China, the European Union, Japan, Korea, Mexico, New Zealand, Pakistan, South Africa, Taiwan, Ukraine, 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” 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 that the FTC is investigating a particular party. Parties to merger and conduct investigations routinely waive confidentiality protections to

⁵ OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, <http://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm>.

⁶ 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. <http://www.ftc.gov/policy/international/international-cooperation-agreements>. These agreements have yet to be invoked (although there have been some examples of “informal” positive comity).

⁷ <https://www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement> (1999).

⁸ Fiscal Year 2015 Performance Report and Annual Performance Plan for Fiscal Years 2016 and 2017, at pp. 92-97, available at <https://www.ftc.gov/system/files/documents/reports/fy-2017-congressional-budget-justification/2017-cbj.pdf>. For a more complete description of the U.S. agencies’ international case cooperation, see U.S. Submission to the OECD Working Party on Co-operation and Enforcement “Discussion on International Cooperation,” June 8, 2012, http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/062012International_coop_U%20S.pdf.

facilitate cooperation. Waivers are particularly valuable to the agencies, and can benefit parties by reducing information production burdens and avoiding incompatible remedies.⁹ In 2013, the FTC and the Department of Justice's Antitrust Division issued a joint model waiver of confidentiality for individuals and companies to use in merger and civil non-merger matters involving concurrent review by the FTC or DOJ and non-U.S. competition authorities.¹⁰ The model waiver is designed to streamline the waiver process to reduce the burden on individuals and companies, as well as to reduce the agencies' time and resources involved in negotiating waivers.

Two cases from the past year underscore the depth and breadth of our cooperation. In the *Staples/Office Depot* matter, Commission staff cooperated with staff from the antitrust agencies in Australia, Canada, and the European Union. Our coordination on this matter was so close that the FTC and the Canadian Competition Bureau filed complaints to block the transaction in court on the same day.¹¹ In *GSK/Novartis*, the FTC cooperated with antitrust agencies in Australia, Canada, the European Union, New Zealand, Pakistan and the Ukraine. Throughout the investigations, staff cooperated closely with counterparts, including on the analysis of the proposed transaction and potential remedies. This coordination led to compatible approaches on a global scale, and included the FTC and the European Commission approving the same buyer of the divested oncology assets.¹² Given the number of FTC cases involving foreign parties, evidence located abroad, and parallel review with other agencies, effective cooperation with other competition agencies is critical to FTC enforcement. While most of our enforcement cooperation is in the merger context, we increasingly cooperate on non-merger enforcement matters, of which there were five during the past year. This cooperation is often aided by waivers provided by the parties.

In addition to cooperating on specific matters, the FTC works with other agencies to promote policy convergence. For example, with the DOJ, we continue our 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 of Revised Best Practices for Coordinating Merger Reviews.¹³ 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. This past year the FTC, DOJ, and the EC held a series of calls on merger remedies to promote better understanding of one another's systems, and from which we developed tools that will allow case teams to better coordinate at various stages of the merger remedies process. The FTC,

⁹ See 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 The joint model waiver and accompanying FAQ are available at <http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>.

¹¹ <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-staples-inc-office-depot-inc>.

¹² FTC press release at <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition>, noting cooperation with the competition agencies of Australia, Canada and the European Union on the core transaction.

¹³ <http://www.ftc.gov/news-events/press-releases/2011/10/united-states-and-european-union-antitrust-agencies-issue-revised>.

Department of Justice, and Competition Bureau Canada issued a set of “best practices” to make more transparent how they cooperate and coordinate merger reviews that affect the United States and Canada.¹⁴ 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 participates in a series of informal workshops with staff from the Canadian Competition Bureau to share merger enforcement techniques and experience.

The FTC, along with the Antitrust Division, has devoted considerable resources to working with the Chinese antimonopoly agencies and the Competition Commission of India. We share 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.¹⁵ The FTC and DOJ meet regularly with the three Chinese anti-monopoly enforcement agencies to discuss substantive and procedural issues and to enhance our cooperative relationship. For example, the FTC and DOJ are engaging with Chinese antimonopoly officials on the development of guidelines on application of the Anti-Monopoly Law to intellectual property. We also work through the United States government’s interagency processes to ensure that competition-related issues that arise in connection with China’s Anti-Monopoly Law that implicate broader U.S. policy interests are addressed in a coordinated and effective manner. Over the past year, this work resulted in competition outcomes in the Strategic & Economic Dialogue aimed at ensuring that China implements its competition law transparently and non-discriminatorily,¹⁶ and in the U.S.-China Joint Commission on Commerce and Trade, focused on independence in decision making, confidentiality, and coherence of AML and intellectual property rules.¹⁷

IV. Activities in Multilateral Competition Fora

With competition laws and agencies in approximately 130 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.

¹⁴ <http://www.ftc.gov/news-events/press-releases/2014/03/us-canadian-antitrust-agencies-issue-best-practices-coordinating>.

¹⁵ *E.g.*, Edith Ramirez, Procedural Fairness, the Use of Non-Competition Factors in Competition Analysis, and the Application of Antitrust Law to Intellectual Property Rights, ABA Section of Antitrust Law Antitrust in Asia: China, Beijing, China (May 22, 2014), http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

¹⁶ The joint U.S.-China fact sheet on the economic track of the 2015 U.S.-China Strategic and Economic Dialogue is available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0092.aspx>.

¹⁷ The U.S.-China joint fact sheet on the 26th U.S.-China Joint Commission on Commerce and Trade is available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/December/US-China-Joint-Fact-Sheet-26th-JCCT>.

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). 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 – 132 agencies from 120 jurisdictions, *i.e.*, almost all 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, economic, consumer, and academic communities, as well as experts from other international organizations. Unlike most international organizations, agency members organize and conduct the work directly rather than through a permanent Secretariat.

The ICN is organized into working groups comprised of agencies and non-governmental advisors. The current substantive working groups address agency effectiveness, cartels, competition advocacy, mergers, and unilateral conduct.¹⁸

The FTC co-chairs the ICN’s Agency Effectiveness Working Group (with the Finnish and Indian 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.¹⁹ The FTC co-leads, with the European Commission, a project 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 group developed ICN Guidance on Investigative Process²⁰ that the ICN adopted in April 2015. The guidance addresses the availability and use of effective agency investigative tools, transparency, engagement with the parties during an investigation, and the protection of confidential information. This is the most comprehensive agency-led effort to date to provide guidance on investigative principles and practices that promote procedural fairness and effective enforcement. Following the ICN’s adoption of the Guidance, the FTC has worked to promote its implementation, including through our technical assistance initiatives and the development of a multi-pronged training initiative in APEC. The working group also has produced chapters on strategic planning, effective project delivery, knowledge management, and human resources management for an Agency Practice Manual.

¹⁸ For a summary of ICN’s workproduct, see <http://www.internationalcompetitionnetwork.org/uploads/library/doc1029.pdf>. For a catalog of ICN work product, see <http://www.internationalcompetitionnetwork.org/uploads/library/doc1042.pdf>.

¹⁹ AEWG’s current work plan: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1037.pdf>.

²⁰ <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

The FTC also founded and leads the ICN's Training on Demand (formerly, 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 a wide variety of competition topics, including this year on agency effectiveness and prioritization principles, state restraints, cartel inspections and dawn raids, advice for new and young competition agencies and economic analysis.²¹

The FTC previously co-chaired the ICN's Unilateral Conduct Working Group (2006-2011) and chaired the Merger Notification and Procedures Subgroup (2001-2006). Under the FTC's leadership, the Unilateral Conduct Working Group produced Recommended Practices on the assessment of dominance/substantial market power and on the application of unilateral conduct rules to state-created monopolies²² and the Merger Working Group subgroup 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 work for greater implementation of these recommendations. The FTC participates in these and other ICN working groups, and is an active member of the ICN's Steering Group, which sets the ICN's strategic direction. Beginning in May 2016, we will co-chair the Merger Working Group.

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 non-member observers. It aims to promote sound economic policies and economic growth. Its Competition Committee provides a forum for senior representatives of members' competition agencies to exchange ideas and discuss policies of mutual interest.²³ 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 important Recommendations, including on antitrust enforcement cooperation, combating hard-core cartels, merger review procedures, competition assessment, and international

²¹ <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>. The materials are available in interactive, downloadable, and YouTube formats. Available modules include: the history and goals of competition policy, characteristics of effective agencies, market definition, market power, competition policy in developing countries, planning and conducting investigations, merger investigations and interviewing techniques, competitive effects, competition advocacy, an introduction to cartels, leniency, exclusive dealing, predatory pricing, and several shorter modules on discrete topics.

²² <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral.aspx>.

²³ Information on the OECD's competition policy work is available at <http://www.oecd.org/competition/>.

cooperation.²⁴ The Committee holds “roundtable” discussions to which the FTC contributes to United States submissions - for example, recently, on “most-favored-nation” clauses, disruptive innovation, and competition enforcement in oligopolistic markets.²⁵ It also developed multi-year projects on international cooperation and on evaluating the impact of competition enforcement actions. The FTC has played a lead role in these projects, notably as a key drafter of the revised OECD Recommendation concerning International Cooperation on Competition Investigations and Proceeding.²⁶ 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 also holds 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, including in trade agreements. The FTC co-chaired with the Office of the United States Trade Representative the US delegation to the WTO Working Group on the Interaction between Trade and Competition Policy. 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 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 plays an active role in US delegations that negotiate competition chapters in proposed free trade agreements, including the recently-concluded Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, and to work with other US government agencies to respond to issues at the intersection of trade and antitrust law and policy.

²⁴ Recommendations are available at

http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

²⁵ Electronic versions of U.S. submissions to Committee roundtables are available at

<http://www.ftc.gov/policy/reports/us-submissions-oecd-other-international-competition-fora>.

²⁶ The Recommendation is available at <http://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm>.

VI. Technical Assistance

The FTC and the DOJ Antitrust Division provide technical assistance to countries undergoing transition to market economies and establishing new competition regimes (the FTC also conducts a consumer protection technical assistance program). The program began in Central and Eastern Europe in the early 1990s and has expanded around the world.

In the past year, the FTC continued its robust program of international competition technical assistance, conducting 30 short-term missions to 22 jurisdictions, including Brazil, China, Colombia, COMESA, the Dominican Republic, India, Indonesia, Mexico, Pakistan, the Philippines, Romania, South Africa, Ukraine, and Vietnam. Experienced antitrust lawyers and economists provided training in investigational skills by using hypothetical cases to conduct simulated investigations involving issues that developing agencies typically encounter. For example, our training missions in India focused on investigations involving complex high-tech sectors, which included both judicial and agency training programs on issues at the intersection of IP and antitrust.

Many of our most successful programs also involve placing 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. Over the past year, we have worked with USAID and competition authorities in Mexico, Central America and the Ukraine to place resident advisors in their agencies. We continue to assess where to concentrate our efforts and whether they have been successful. As part of this process, in February 2015 the FTC hosted a roundtable discussion for representatives from 13 U.S. agencies to exchange views on the provision of effective technical assistance and further opportunities to learn best practices from one another, and recently held a similar program with private sector representatives.

The US SAFE WEB Act, enacted in 2006 and 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, allowing 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.²⁷ 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 85 international lawyers, economists, investigators, and technical experts from 33 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.

²⁷ For further information on the program, see <http://www.ftc.gov/oia/safeweb.shtm>.

Conclusion

The FTC's international antitrust policy will continue to face challenges as antitrust enforcement and cross-border business operations increase.²⁸ The FTC's Office of International Affairs continually seeks to evaluate and improve its operations based on best practices at home and abroad²⁹ and welcomes input from stakeholders so that we can better advance the FTC's missions and the interests of consumers.

²⁸ *E.g.*, Edith Ramirez, Keynote Address at the 7th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center, (Sept. 25, 2013), http://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf.

²⁹ 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 <http://www.ftc.gov/ftc/workshops/ftc100/index.shtm>.