

WHAT IS TRUMP ANTITRUST?

COMPETITION POLICY UNDER A NEW U.S. ADMINISTRATION

Interview with Randolph W. Tritell

Randolph W. Tritell (Director, Office of International Affairs, Federal Trade Commission) has been interviewed by **Concurrences** in anticipation of the 5th edition of the joint conference co-organized by Concurrences Review and George Washington University Law School, to be held in Washington DC on September 11, 2017. He will participate in the panel "The new Administration - U.S. global antitrust enforcement going forward".

With a new Administration in place for over six months but with more appointments to come, what changes have you seen, and what changes can we expect, in international antitrust policy?

That's a natural question and of course consistent with the theme of our upcoming conference but I am afraid my answer will be rather boring. Let me first make clear that the views I express are solely my own and not attributable to the FTC or its Commissioners. Before I get directly to your question, I want to dispel any misconceptions about the state of the agency. Although we have only two of our five Commissioners and they are from different political parties, the Commission is functioning smoothly and has been quite productive. Unlike some other agencies, we have no quorum issue, and Acting Chairman Ohlhausen and Commissioner McSweeney have an excellent working relationship. This is reflected in the agency's output – for example, the Commission has acted on well over 100 matters, including major merger and conduct cases, continued our vigorous competition advocacy, and held our first workshop pursuant to the Acting Chairman's Economic Liberty Task Force. Turning to the international area, I have perceived no change in the Commission's strong support for our international antitrust program, on which there has been a longstanding bipartisan consensus. That extends to our bilateral engagement with partner agencies around the world, our deep involvement in multilateral competition fora, and our extensive technical assistance program for young agencies. We continue to work for convergence toward competition enforcement and policy grounded in principles of consumer welfare and sound economic analysis. This does not surprise me, as our engagement and policies promote competition enforcement that is good for American

consumers, good for U.S. businesses, and good for the American economy. I therefore expect our work to continue along the same trajectory for the foreseeable future.

You mentioned the FTC's bilateral engagement and its work in multilateral competition organizations. Can you be more specific about your priorities and what accomplishments we might expect to see?

Bilaterally, we prioritize cooperation on cross-border investigations so we can work with other agencies to maximize the relevant information available to decision-makers, seek analytical coherence, and avoid incompatible outcomes. I expect our cooperation to continue to broaden and deepen, and hold out some hope that we will be able to conclude one or more "second generation" agreements, such as we now have with Australia, that enable us to share confidential information and provide investigative assistance to the other party. Multilaterally, we play leadership roles in the ICN, the OECD Competition Committee, UNCTAD, and other competition bodies. The FTC co-chairs the ICN's merger working group, where we plan to work on new best practices in the areas of process and analysis. Having co-led, with DG COMP, the ICN's project that culminated in consensus guidance on procedural fairness, we will now focus on implementation of its good principles of transparency and engagement, which will fit nicely into our new responsibility of co-chairing, with the Portuguese competition authority, the ICN's implementation body.

You have painted a rather rosy and optimistic picture of the international competition landscape. While we can probably all agree that there have been significant accomplishments, there are also some serious concerns, including in the areas of due process, and substantively where convergence is not yet a reality. What are your thoughts about steps the FTC and other competition agencies can take to address these concerns?

Let me first pick up on the premise of your question, regarding accomplishments – I will get to the concerns but I think it is well worth recognizing the significant progress in the identification and adoption of good practices, which has taken place against a backdrop of rapid spread of competition enforcement, especially in developing countries with little background in market economies much less in competition law and economics. But you are right about the concerns and I can assure you that the concerns, and the need to address them, are shared by the FTC and many other agencies. I have alluded to the efforts underway in the ICN to implement the guidance on transparency, engagement, and confidentiality and to broaden and deepen the recommended practices on merger analysis and on merger notification and review procedures. In addition, the ICN's unilateral conduct working group will continue its focus on the analysis of vertical restraints. The OECD continues to foster high-level discussion, often enriched by outside experts, of front-burner and emerging issues, such as in the session it recently held on whether the use of algorithms raises particular competition concerns. In addition, the FTC and DOJ raise issues such as due process, industrial policy, and the proper role of antitrust in relation to intellectual property when we meet privately with our counterparts and through our technical assistance program. I believe the recent FTC-

DOJ Antitrust Guidelines for International Enforcement and Cooperation will also help promote good practice, for example with regard to the appropriate territorial scope of remedial measures. When appropriate, we also work with our colleagues in other U.S. agencies in to address these issues bilaterally, such as in U.S.-China dialogues and in the negotiation of competition provisions of free trade agreements. Progress in these areas is necessarily incremental and not without setbacks, but I believe the U.S. agencies are well-positioned to continue to play a lead role in advancing international convergence toward sound competition enforcement policies.