

The Federal Trade Commission's International Antitrust Program

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The primary missions of the FTC's International Antitrust Division are (i) to provide effective assistance to the FTC's competition enforcement program with respect to international issues, (ii) to promote cooperation with competition agencies of other jurisdictions, and (iii) to foster convergence of international antitrust polices around the world toward best practice.¹ This paper presents the background and organization of the Division and describes our main activities to further these goals internally, in bilateral relations, and in multilateral fora.

I. Background and Organization of the International Antitrust Division

The International Antitrust Division is part of the Federal Trade Commission's Bureau of Competition. The Division was created in 1982 to investigate and prosecute cases with an international dimension – for example, cases involving a foreign party, that involved evidence located abroad, or that could involve remedial action in another jurisdiction. As commerce became more international, so did the FTC's antitrust investigations, to the point that it no longer made sense to have a separate unit responsible for cases with an international aspect. In 1990, the international function was reorganized so that the Division no longer had direct investigative or enforcement responsibilities, but rather provided assistance to the other, litigating Divisions in the Bureau of Competition. This organization remains in effect today. In addition, as described below, the Division represents the Bureau and the agency in bilateral relationships with other jurisdictions' competition agencies and handles international antitrust policy issues in various multilateral fora.

The Division consists of an Assistant Director, Randolph W. Tritell, with overall responsibility for the Division, and five attorneys with the following primary portfolios:

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ICN, OECD, competition technical assistance

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Canada, Latin America, competition technical assistance

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EC, Member States, international cooperation

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¹ Most of the Division's work is conducted in tandem with the Foreign Commerce Section of the Department of Justice's Antitrust Division.

II. Resource within FTC

International issues arise in many FTC investigations. The International Antitrust Division is an internal resource, along with our General Counsel's office, to assist with these issues. For example, the Division advises staff on when it is necessary to notify foreign governments or agencies of FTC enforcement activities pursuant to an international agreement. We also consult with staff on issues involving personal and subject matter jurisdiction, service of process, and obtaining evidence abroad as these issues arise in connection investigations and in administrative litigation. When we work with foreign agencies, Division personnel assist our investigative staff in understanding foreign laws and procedures and how they intersect with FTC and US laws and procedures.

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 agencies cooperate with foreign competition agencies in a number of ways. Formal and informal agreements and arrangements with other agencies can be particularly useful tools to facilitate effective cooperation (but are not prerequisites to cooperation). One important informal mechanism is the Recommendation of the Organization for Economic Cooperation and Development ("OECD") on international competition cooperation.² The United States has entered into 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 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 disputes. While the earlier agreements were motivated primarily by a desire to reduce and manage conflicts arising from extraterritorial enforcement of antitrust laws (primarily by the US), more recent agreements seek mainly to enhance enforcement cooperation. The agreements also have proven to be catalysts to facilitating closer working relationships between the US and foreign agencies.

The US also has entered enhanced positive comity agreements with the EC (1998) and Canada (2004) that include, among other things, a presumption of deference to the

² Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade,
<http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/DD80C6BBCF8BAF89C1256FCE00110CFD?OpenDocument>.

³ http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

other jurisdiction to handle antitrust enforcement in certain circumstances.⁴ These agreements have yet to be invoked.

In 1994, Congress passed the International Antitrust Enforcement Assistance Act, which authorizes the US to enter into mutual assistance agreements that, *inter alia*, permit agencies to share parties' confidential information and to use compulsory means to obtain evidence for the other jurisdiction's competition agency. The US has entered one such agreement, with Australia (1999).⁵

Pursuant to these agreements, or sometimes without an agreement, FTC staff cooperates with foreign agencies on individual cases and on competition policy. When the FTC and a foreign agency review the same case and the case raises competition concerns in one or both jurisdictions, the agencies frequently cooperate by exchanging information. This may include public information, and also what we refer to as "agency confidential" information – *i.e.*, information that we do not routinely disclose but on which there are no statutory disclosure prohibitions (examples include the fact that the FTC is investigating, and staff views on market definition, competitive effects, and remedies). We find this cooperation very valuable in identifying issues of common interest, improving our analyses, and avoiding inconsistent outcomes. In addition, in merger investigations, parties routinely waive confidentiality protections to facilitate inter-agency cooperation; this is particularly valuable to the agencies, and can benefit parties by reducing information production burdens and avoiding incompatible remedies.⁶ Recent cases in which the FTC has cooperated closely with foreign agencies include: *Sanofi/Aventis*,⁷ *GE/InVision*,⁸ *Sony/BMG*,⁹ and *Pfizer/Pharmacia*.¹⁰ The settlement of *Sanofi/Aventis* is one example of the extent to which multijurisdictional cooperation goes beyond just competitive analysis. The case involved a complicated unraveling of third-party interests present in the United States but not in Europe as to a colorectal cancer treatment that was of concern to both the FTC and the EC. In *GE/InVision*, the FTC not only coordinated with the Bundeskartellamt on the competitive analysis, but also received

⁴ *Id.*

⁵ <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>.

⁶ See *e.g.*, ICN Recommended Practice on Interagency Coordination, <http://www.internationalcompetitionnetwork.org/mnprepractices.pdf> at §D, and forthcoming Model Waiver and accompanying report on Waivers, to be made available on the ICN's website at <http://www.internationalcompetitionnetwork.org/guidingprinciples.html>.

⁷ See *e.g.*, FTC press release at <http://www.ftc.gov/opa/2004/07/sanofiaventis.htm> and EC press release at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/545&format=HTML&aged=0&language=EN&guiLanguage=en> noting cooperation between the agencies in this matter.

⁸ See *e.g.*, FTC press release at <http://www.ftc.gov/opa/2004/09/geinvision.htm> and German Bundeskartellamt press release at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2004/2004_08_19.shtml noting cooperation between the agencies in this matter.

⁹ See *e.g.*, FTC press release at <http://www.ftc.gov/opa/2004/07/sonybmj.htm> and EC press release at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/959&format=HTML&aged=0&language=EN&guiLanguage=en> noting cooperation between the agencies in this matter.

¹⁰ See *e.g.*, Canadian Competition Bureau press release noting three-way cooperation between the Bureau, the FTC and the EC at <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02556e.html>.

advice on German labor and contract law necessary to making the divestiture remedy effective.

In addition to cooperation on specific matters, the FTC often works with other agencies to promote policy convergence on particular issues. For example, we have established a merger working group and an intellectual property working group with the European Commission. In the merger working group, we have established task forces to address projects on 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 the handling of issues that may arise in merger investigations.¹¹ The intellectual property group has discussed issues relating to patent pools and has consulted on other issues covered in the EC's recently-released Technology Transfer Agreements Block Exemption. The US agencies have also formed intellectual property working groups with the antitrust agencies of Japan, Korea, and Taiwan. The working groups operate primarily through videoconferences, with occasional in-person meetings. The FTC and other agencies also consulted on the treatment of efficiencies in merger cases in a discussion hosted by the Canadian Competition Bureau prompted by a proposed amendment to the Canadian law.

IV. Activities in Multilateral Competition Fora

Now that approximately 100 jurisdictions have a competition law and agency, it is particularly important that agencies make efforts to see that the system functions coherently. The US agencies have played a lead role in promoting dialogue in an effort to facilitate 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 dialog and convergence toward sound competition policy and enforcement, including the OECD, the International Competition Network (ICN), and regional arrangements such as APEC.

The FTC and DOJ represent the US in OECD Competition Committee. The OECD consists of thirty economically developed countries. 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. It includes committees that focus on competition issues in regulated sectors and on international cooperation and enforcement. The Competition Committee's primary goals

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

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's work sometimes culminates in non-binding, but nonetheless important Recommendations, including on antitrust enforcement cooperation and on combating hard-core cartels.¹² Just last week, the OECD adopted a Recommendation on merger review procedures.¹³ The Committee holds "roundtable" discussions (*e.g.*, on predatory foreclosure, merger remedies) and produces papers (*e.g.*, on exceptions to antitrust laws, the impact of hard core cartels). The Committee also 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, to which it invites 30–40 non-members to discuss competition issues relevant to developing countries. The business community is represented at OECD through the Business Industry Advisory Council, which submits papers and is invited to attend many of the sessions.

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 – now 88 member agencies from 78 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 consensual, non-binding recommendations; there is a significant role for non-governmental advisors from the business, legal, consumer, and academic communities, as well as experts from other international organizations such as the OECD and WTO; and, unlike the OECD and most international organizations, rather than having a permanent Secretariat, agency members directly organize and perform the work.

The ICN is organized into Working Groups and Subgroups, composed of agencies and non-governmental advisors. There are currently substantive working groups on (1) mergers, (2) cartels, (3) competition policy implementation (examining ways to increase the institutional capacity and strengthen the performance of new agencies), and (4) antitrust in regulated sectors.

The FTC chairs the Merger Working Group's Subgroup on Notification and Procedures and co-chairs the Competition Policy Implementation (CPI) Working Group's Subgroup on Technical Assistance. The Notification and Procedures (N&P) subgroup's projects have included developing a set of eight Guiding Principles and eleven Recommended Practices for Merger Notification and Review that were adopted by the ICN's membership; the ICN will consider two additional Recommended Practices on merger remedies and agency enforcement powers at its conference this June. The subgroup also will submit reports on merger filing fees worldwide, practices regarding

¹² See Recommendations at http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

¹³ See <http://www.oecd.org/dataoecd/60/20/34616718.pdf>.

the use of confidentiality waivers in merger investigations along with a model waiver form, and on implementation of the Recommended Practices. The CPI subgroup on technical assistance will report on the results of a survey project aimed at determining which models of technical assistance are most effective at the various stages of a competition agency's development, at the June annual meeting. The FTC also participates actively in other ICN working groups.

V. Trade and Competition Fora

Trade and competition policies sometimes intersect, particularly 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, with a mandate to study the interaction of these policies and assess whether any issues might merit further consideration within the WTO framework. 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 next WTO round, the US raised questions regarding the benefits of WTO competition rules, particularly if subject to dispute settlement. Ultimately, largely because of developing country opposition, the Doha Round moved forward without a competition chapter, and 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 NAFTA and bilateral agreements with Chile, Singapore, and Australia. 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 US is currently engaged in negotiations on possible competition provisions of free trade agreements with the Andean Community and Thailand. In addition, we are involved in negotiating a possible competition chapter to the Free Trade Agreement of the Americas, which would involve almost all nations of our hemisphere. The FTC participates in the US delegation that negotiating these chapters.

The OECD established a Joint Group on Trade and Competition, in which the FTC participates, to examine the interface of trade and competition policies with a view to promoting better understanding and policy coherence. After focusing in recent years on competition issues in the WTO, the Group is now emphasizing trade/competition issues affecting developing countries.

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.¹⁴ Our assistance is often funded by the US Agency for International Development and/or the U.S. Trade and Development Agency. The program began in Central and Eastern Europe in the early 1990s, and is now active in the Andean Community, Central America, Mexico, South Africa, India, and South East Asia; we recently concluded programs in Southeast Europe and Indonesia.

Many of our most successful programs involve the placement of resident FTC/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 own laws and traditions, taking into account particular issues that arise in the jurisdiction. The resident advisor program is particularly effective in that it allows 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 that are of concern to the agency. Resident advisors currently are stationed in South Africa and with the Secretary General of the ASEAN in Indonesia. In other, short-term, FTC/DOJ technical assistance programs, 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.

Conclusion

As the number of antitrust laws and agencies grow and business operates more globally, international antitrust policy will continue to face challenges. In seeking to adopt and adapt sound policies to address these issues, policy makers need input from bar and other private sector organizations. The FTC's International Antitrust Division welcomes continued constructive input from the ABA Antitrust Section, including through the opportunity to obtain direct feedback at programs such as this one.

¹⁴ The Division participates in the Commission's technical assistance team with the Office of the General Counsel's James C. Hamill, Senior Counsel for International Affairs, and Timothy T. Hughes.