

United States: Federal Trade Commission



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In 2015, the Federal Trade Commission (FTC) celebrated 100 years of operations. As the agency enters its second century, it continues to apply a full range of tools to ensure that markets work to the benefit of consumers. This includes robust competition law enforcement to address anti-competitive business practices,¹ advocacy and studies that enhance its expertise to promote competition and protect consumers, and work with sister competition agencies in the Americas and around the world to ensure a globally interoperative approach to competition law and policy. In this chapter, we highlight some of the FTC's recent competition activities, as well as our international cooperation efforts.

Enforcement

The FTC prioritises enforcement efforts in areas of the economy where it can have the greatest impact, and this includes health care. For example, following the Supreme Court's 2013 opinion in *FTC v Actavis*,² the FTC continued enforcement actions against branded pharmaceutical manufacturers who pay generic firms to stay out of the market through private litigation settlements. In 2015, the FTC and Cephalon reached an agreement to settle an antitrust case charging Cephalon, Inc, with illegally blocking generic competition to its blockbuster sleep disorder drug, Provigil.³ The settlement ensures that Teva Pharmaceutical Industries, Ltd, which acquired Cephalon in 2012, will make a total of US\$1.2 billion available to compensate purchasers, including drug wholesalers, pharmacies and insurers, who overpaid because of Cephalon's conduct.⁴ In another key case involving conduct in the pharmaceutical sector, the FTC reached a consent order with Cardinal Health requiring that the company relinquish US\$26.8 million of the ill-gotten gains it obtained by monopolising the markets for low-energy radiopharmaceuticals in 25 cities.⁵ While disgorgement of wrongfully earned profits is not a typical remedy in competition cases, in appropriate cases, the Commission may seek monetary relief.

In appellate litigation, the Supreme Court agreed with the FTC's position in *North Carolina State Board of Dental Examiners v FTC*, holding that a state board comprised mostly of private market participants must be actively supervised by state authorities in order to qualify for immunity from the federal antitrust laws.⁶ The Court held that even when an association of market participants has been given some regulatory powers by the state, its members may not collude to exclude new entrants or engage in other anti-competitive actions unless the activity is actively supervised by neutral parties. This decision is particularly important because occupational licensing requirements set by boards govern a substantial and growing segment of the US economy,⁷ and incumbents can potentially use that power to keep new forms of competition out of the market if not actively supervised by the state government.

The FTC achieved a significant victory with the Ninth Circuit Court of Appeals' decision that the acquisition of Idaho's largest independent physician practice group by the state's dominant health-care system violated the antitrust laws by reducing competition

among adult primary care physicians in Nampa, Idaho.⁸ The Court found that the FTC had met its prima facie legal burden of demonstrating that the merger created an appreciable danger of causing higher prices in the affected market through evidence of the merged firm's extremely high concentration levels combined with its ability to negotiate higher reimbursement rates with insurers.⁹ The Court dismissed the defendants' efficiency arguments, finding that the district court did not err in finding that St Luke's failed to prove that efficiencies resulting from the merger could not have been achieved in other ways.¹⁰

The FTC also obtained an important ruling from a federal court of appeals upholding an FTC decision in a monopolisation case. In *McWane, Inc, v FTC*,¹¹ the Eleventh Circuit Court of Appeals upheld the FTC's ruling that a monopolist's exclusive dealing practices violated the antitrust laws because they prevented potential market entrants from becoming meaningful competitors in the market for domestic pipe fittings sold to municipalities and others. Other recent conduct enforcement actions challenged provisions in trade association codes that prevented competition among association members¹² and an allegedly illegal invitation-to-collude between two resellers of internet barcodes.¹³

On the merger front, in June 2015, a Federal District Court judge granted an order to temporarily block the proposed merger between Sysco Corporation and US Foods to preserve competition in the national market and in 32 local markets for broadline food service distribution services,¹⁴ after which Sysco announced it was abandoning the transaction.¹⁵ As this chapter was written, the FTC's challenge to the proposed merger between Steris Corporation and Synergy Health was pending before another federal court. In it, the FTC alleged that the transaction would eliminate likely future competition between Steris's gamma sterilisation facilities and Synergy's planned x-ray sterilisation facilities in the United States.¹⁶

In addition to litigation, the FTC resolved many merger cases with consent orders, including many in the health-care sector. In 2014, the Commission accepted 13 negotiated settlements resulting in final orders requiring divestitures, and three transactions were abandoned as a result of antitrust concerns raised during the investigations. From October 2014 through May 2015, the Commission accepted for comment 11 proposed consent orders requiring divestitures and authorised administrative complaints and related preliminary injunction actions to block three proposed mergers.¹⁷ In one of these mergers, Verisk Analytics' proposed acquisition of EagleView Technology, the parties abandoned their merger plans after the Commission issued its complaint.¹⁸

Advocacy and studies

In addition to its enforcement mission, the FTC seeks to engage with regulators to encourage regulatory outcomes that are consistent with both sound competition policy and regulator's policy goals. The FTC files advocacy letters with policymakers on how best to do this and can study business practices to better understand their

potential effects on competition.¹⁹ Recent advocacy examples include FTC comments to state legislatures and other policymakers to encourage the removal of unnecessary scope-of-practice restrictions that prevent health-care professionals from being able to take full advantage of their training and expertise,²⁰ and of prohibitions on direct-to-consumer auto sales by manufacturers.²¹

In June 2015, the FTC held a workshop on the ‘sharing economy’ to better understand how technology is used to interact with consumers, and how competition and consumer protection are affected by new business models and the existing regulatory framework.²² In addition, the FTC has two studies in progress:

- a study to enhance the agency’s understanding of how patent assertion entities may affect innovation and competition;²³ and
- a study to evaluate the effectiveness of the agency’s merger remedies.²⁴

International work focusing on the Americas

Building and maintaining strong relationships with sister competition agencies has become an increasingly important element of the FTC’s enforcement programme.²⁵ Through its international antitrust programme, the FTC works with sister competition agencies to promote cooperation and convergence of international antitrust policies toward best practices. In the Americas and elsewhere, the FTC continues its work to foster cooperation and convergence through bilateral and multilateral relationships and through cooperation on individual matters. This section describes the international antitrust programme and focuses on the FTC’s work with agencies in the Americas.

Bilateral cooperation

The FTC continues to work directly with sister competition agencies to cooperate on individual cases, share experiences, and improve mutual understanding of each other’s laws, policies and practices. Such work also promotes sound approaches to competition law enforcement and policy work. Bilateral discussions frequently occur pursuant to cooperation agreements that foster increased interactions. In September 2014, the FTC and DOJ signed an antitrust cooperation agreement with Colombia’s competition authority²⁶ which complemented earlier cooperation agreements in the Americas with Brazil, Canada, Chile and Mexico.

When the FTC and a sister competition agency review a merger or conduct that raises competition concerns in one or both jurisdictions, the agencies cooperate with increasing frequency by sharing investigative information.²⁷ The frequency and depth of cooperation with experienced and newer competition agencies continues to increase. In the 2014 fiscal year, the FTC worked with sister competition agencies in 37 investigations,²⁸ including with competition agencies in Brazil, Canada and Mexico.

A recent example of case cooperation including agencies in the Americas involves the merger between two of the world’s largest auto parts suppliers: ZF Friedrichshafen AG and TRW Automotive Holdings Corp (TRW). During its investigation, the FTC cooperated with the Canadian Competition Bureau, Mexico’s Federal Economic Competition Commission and the European Union’s Directorate General for Competition.²⁹ The companies entered into a consent agreement requiring divestiture of TRW’s linkage and suspension business in North America and Europe that settled FTC charges that the merger would likely harm competition in the North American market for heavy vehicle tie rods.

In another recent merger review, the FTC cooperated closely with the Canadian Competition Bureau regarding the proposed

US\$25 billion merger of cement manufacturers Holcim Ltd and Lafarge SA, which raised cross-border supply issues. The parties entered into a consent agreement with the FTC that requires divestitures of specific plants and terminals in the US and Canada. The parties also entered into an agreement with Canada requiring divestitures of a larger group of Holcim assets located in Canada that Holcim and Lafarge agreed to divest to address competitive concerns raised by the Competition Bureau. FTC staff worked closely with staff from the Competition Bureau to reach compatible outcomes.³⁰

As a result of their extensive history of merger cooperation, in 2014, the US and Canadian antitrust agencies released best practices in merger investigations to make more transparent how they coordinate merger reviews that affect both countries.³¹ In addition, to further develop agency relations and understanding, the heads of the FTC, the DOJ and the Canadian and Mexican antitrust agencies hold regular ‘trilateral meetings’ to discuss current issues and cooperation. In 2015, discussions covered a wide range of topics, including: the implementation of Mexico’s new competition law; enforcement cooperation among the three countries’ antitrust agencies; approaches to innovative and disruptive technologies; regional technical assistance initiatives; and current enforcement priorities.³² The FTC also shares its competition law and policy experiences with sister competition agencies through its technical assistance programme. In 2014, the FTC conducted competition programmes in countries around the world; in the Americas, these included programmes in Brazil, Colombia, the Dominican Republic, Ecuador, El Salvador, Honduras, Guatemala and Mexico.³³ Another key part of the FTC’s technical assistance programme is a staff exchange programme, through which staff from non-US competition agencies can work as part of case teams reviewing mergers at the FTC.³⁴ The FTC has completed several exchanges with sister agencies in the Americas.

Multilateral cooperation

In addition to bilateral interactions, the FTC continues to work with sister competition agencies in the Americas and around the world through multilateral organisations, including: the International Competition Network (ICN); the Organisation for Economic Cooperation and Development (OECD); the Latin American Regional Competition Centre; the United Nations Conference on Trade and Development; and the Asia-Pacific Economic Cooperation. The FTC’s work through these organisations promotes convergence toward sound competition policy and law enforcement and helps facilitate effective cooperation on cases.

For example, the FTC participates in the OECD’s Latin American Competition Forum, which holds annual meetings focused on work in the Americas. In 2015, the FTC and other participants discussed retail markets and ex-post analysis of agency effectiveness and advocacy activities.³⁵ The FTC also works to promote less formal multilateral interactions. It helped found the Inter-American Competition Alliance, which fosters cooperation in the Americas through regular conference calls on matters of mutual interest.³⁶ The Alliance holds monthly teleseminars on which officials from competition agencies throughout North, Central and South America participate. The FTC recently presented several of its non-merger enforcement matters discussed above on these calls.

The FTC’s broader international role forms the backdrop for the FTC’s work in the Americas. In 2014 and 2015, the FTC played a lead role in the ICN’s ‘Guidance on Investigative Process’,³⁷ which discusses investigative practices, transparency and other principles

that enhance the effectiveness of agencies' decision-making and ensure the effective protection of procedural rights. The FTC contributed to revising the OECD's 'Recommendation concerning International Co-operation on Competition Investigations and Proceedings',³⁸ which fosters cooperation in both merger and non-merger matters; and to the ICN's 'Practical Guide to International Enforcement Cooperation in Mergers',³⁹ which offers guidance for agencies, merging parties and third parties about merger case cooperation. These materials are already proving useful to agencies in the region and worldwide.

Conclusion

The FTC remains committed to working with sister competition agencies in the Americas and around the world, and will continue to use the full range of its enforcement, advocacy and study tools to protect consumers and promote competition well into the next century.

The views expressed herein are those of the authors and do not necessarily reflect the views of the Federal Trade Commission or any individual Commissioner.

Notes

- 1 The agency shares primary jurisdiction with the Department of Justice (DOJ) in enforcing the nation's antitrust laws.
- 2 *FTC v Actavis*, 133 S Ct 2223 (2013).
- 3 *FTC v Cephalon, Inc*, No. 2:08-cv-02141-MSG, (E.D. Pa.), see also FTC, News Release, 'FTC Settlement of Cephalon Pay for Delay Case Ensures \$1.2 Billion in Ill-Gotten Gains Relinquished; Refunds Will Go To Purchasers Affected By Anti-competitive Tactics: Related Private Monetary Settlements May be Credited Against FTC Fund,' 28 May 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>.
- 4 *Id.*
- 5 FTC, News Release, 'Cardinal Health Agrees to Pay \$25.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics,' 20 April 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/04/cardinal-health-agrees-pay-268-million-settle-charges-it>. Commissioners Ohlhausen and Wright voted against accepting the proposed consent agreement. See Dissenting Statement of Commissioner Ohlhausen, Cardinal Health, Inc, File No. 101-006 (17 April 2015), available at https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf; Dissenting Statement of Commissioner Wright, Cardinal Health, Inc, File No. 101-006 (17 April 2015), available at https://www.ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf.
- 6 *NC State Bd of Dental Exam'rs v FTC*, 135 S Ct 1101, 1114 (2015). The state board in this case, comprised of practicing dentists, exceeded its legal authority when it threatened non-dentist teeth whitening practitioners with legal action if the non-dentists refused to cease offering teeth whitening services.
- 7 See, eg, Morris M. Kleiner, Reforming Occupational Licensing Policies, The Hamilton Project, Discussion Paper 2015-1, at 5 (March 2015), available at www.brookings.edu/~media/research/files/papers/2015/03/11-hamilton-project-expanding-jobs/thp_kleinerdiscpaper_final.pdf.
- 8 *St Alphonsus Med Ctr-Nampa Inc v St Luke's Health Sys, Ltd*, 778 F.3d 775 (9th Cir. 2015).
- 9 *Id.*
- 10 The Ninth Circuit win in *St Luke's* follows another appellate victory in a health care provider merger challenge. In April 2014, the Sixth Circuit Court of Appeals upheld the Commission's decision blocking ProMedica Health System's acquisition of its rival, *St Luke's* hospital in Toledo, Ohio. See *ProMedica Health Sys, Inc v FTC*, 749 F.3d 559 (6th Cir 2014).
- 11 *McWane, Inc v FTC*, No. 14-11363, 2015 US App LEXIS 6111 (11th Cir 15 April 2015). *McWane's* petition for rehearing en banc is pending.
- 12 FTC, News Release, 'To Settle FTC Charges, Two Trade Associations Agree to Eliminate Rules that Restrict Competition,' 23 December 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/12/settle-ftc-charges-two-trade-associations-agree-eliminate-rules>.
- 13 FTC, News Release, 'Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude,' 21 July 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited>.
- 14 *FTC v Sysco Corporation*, No. 1:15-cv-00256 (DDC 20 February 2015). See FTC News Release, 'Statement by Federal Trade Commission Bureau of Competition Director Debbie Feinstein on the Court Ruling Granting a Preliminary Injunction in the Sysco/US Foods Matter,' 23 June 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/06/statement-federal-trade-commission-bureau-competition-director>.
- 15 See FTC, News Release, 'Statement of FTC Bureau of Competition Director Debbie Feinstein on Sysco and US Foods' Abandonment of Their Proposed Merger: Agency had Alleged that Merger would Harm Consumers and Businesses across the Country', 29 June 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/06/statement-ftc-bureau-competition-director-debbie-feinstein-sysco>.
- 16 *FTC v Steris Corporation and Synergy Health PLC*, No. 1:15-cv-01080-DAP (ND Ohio May 29, 2015).
- 17 See Cases and Proceedings, available at <https://www.ftc.gov/enforcement/cases-proceedings>.
- 18 See FTC News Release, Statement of FTC Bureau of Competition Director Deborah Feinstein on Verisk's Decision to Drop its Proposed Acquisition of EagleView Technology Corporation (17 December 2014), available at <https://www.ftc.gov/news-events/press-releases/2014/12/statement-ftc-bureau-competition-director-deborah-feinstein>.
- 19 See Edith Ramirez, 'The Relationship Between Competition, Productivity, and Economic Growth: The Case of the United States, Speech at Peru Competition Day,' 3 September 2013, available at https://www.ftc.gov/system/files/documents/public_statements/579931/140902lacfpe_ruspeech.pdf and 'Mainstreaming Competition Policy Into the Overall Economic Policy and Government Actions in Latin America and the Caribbean,' United States submission to Latin American Competition Forum, September 2014, available at https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/mainstreaming_competition_policy_us_oecd.pdf.
- 20 See FTC Staff Comment To Representative Jeanne Kirkton, Missouri House of Representatives, Regarding the Competitive Impact of Missouri House Bill 633 On Collaborative Practice Arrangements Between Physicians and Advance Practice Registered Nurses (April 2015), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2015/04/ftc-staff-comment-representative-jeanne-kirkton>.
- 21 FTC, News Release, 'FTC Staff: Missouri and New Jersey Should Repeal Their Prohibitions on Direct-to-Consumer Auto Sales by Manufacturers,' 16 May 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-staff-missouri-new-jersey-should-repeal-their-prohibitions>. See also FTC, News Release, 'FTC Staff Urges Michigan Legislature to Repeal Ban on Direct-to-Consumer Sale of Motor Vehicles by Auto Manufacturers,' 11 May 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-staff-urges-michigan-legislature-repeal-ban-direct-consumer>.

- 22 FTC, News Release, 'FTC To Examine Competition, Consumer Protection, and Economic Issues Raised by the Sharing Economy at June Workshop: Public Workshop Will Explore Range of Issues Relating to Fast-Emerging Internet and Mobile Peer-to-Peer Business Platforms,' 17 April 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/04/ftc-examine-competition-consumer-protection-economic-issues>.
- 23 FTC, News Release, 'FTC Announces Second Federal Register Notice with Revised Proposed Information Requests for Its Patent Assertion Entity Study; OMB Clearance Requested, 13 May 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-announces-second-federal-register-notice-revised-proposed>.
- 24 FTC, News Release, 'FTC Proposes to Study Merger Remedies,' 9 January 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.
- 25 See Randolph Tritell and Elizabeth Kraus, The Federal Trade Commission's International Antitrust Program, May 2015, available at https://www.ftc.gov/system/files/attachments/international-competition/the_ftcs_international_antitrust_program_may_2015.pdf. The FTC often conducts its international antitrust policy work with the Foreign Commerce Section of the Department of Justice's Antitrust Division.
- 26 FTC, News Release, 'Federal Trade Commission and Department of Justice Sign Antitrust Cooperation Agreement with Colombia,' 16 September 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/09/federal-trade-commission-department-justice-sign-antitrust>.
- 27 Investigative information may include public information, as well as what we call 'agency confidential' information. 'Agency confidential' information is information that the agency does not routinely disclose but on which there are no statutory disclosure prohibitions – for example, staff views on market definition, competitive effects, and remedies, and that the FTC is investigating a particular party. Parties to merger and, increasingly, conduct investigations routinely waive confidentiality protections to facilitate cooperation. For more about waivers of confidentiality, see <https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>.
- 28 Thirty one were merger and six were non-merger investigations.
- 29 FTC, News Release, 'FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen AG and TRW Automotive Holdings Corp.,' 5 May 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf>.
- 30 See FTC, News Release, 'FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger Divestitures Preserve Competition in 14 US Markets for Cement,' 4 May 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets>.
- 31 FTC, News Release, 'US and Canadian Antitrust Agencies Issue Best Practices for Coordinating Merger Reviews,' 25 March 2014, available at <https://www.ftc.gov/news-events/press-releases/2014/03/us-canadian-antitrust-agencies-issue-best-practices-coordinating>.
- 32 FTC, News Release, 'Officials From the US, Canada and Mexico Participate in Trilateral Meeting in Mexico City to Discuss Antitrust Enforcement,' 21 May 2015, available at <https://www.ftc.gov/news-events/press-releases/2015/05/officials-us-canada-mexico-participate-trilateral-meeting-mexico>.
- 33 See <https://www.ftc.gov/policy/international/international-technical-assistance-program>.
- 34 See FTC, 'International Fellows Program,' available at <https://www.ftc.gov/internationalfellows>.
- 35 See www.oecd.org/competition/latinamerica/.
- 36 See 'Quines somos?', www.crcal.org/alianza-interamericana/quienes-somos.
- 37 Available at www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.
- 38 Available at www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm.
- 39 Available at www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf.

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