

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 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 four Deputy Directors, who are responsible for international antitrust, consumer protection, technical assistance, and special projects.

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 managed 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. OIA Deputy Director for Special Projects, Alden Abbott, is closely involved with the work of the international antitrust group. The Office has seven other antitrust attorneys, with the indicated primary portfolios:

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¹ The Office’s conducts much of its antitrust policy and technical assistance work in tandem 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. China).

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.

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 eight 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 entered a Memorandum of Understanding with the Russian Federal Antimonopoly Service in November 2009⁴ and with the three Chinese antitrust agencies in July 2011. One important informal mechanism is the Recommendation of the Organization for Economic Cooperation and Development ("OECD") on international competition cooperation.⁵ The

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

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,

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 arising 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.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 the fact that the FTC is investigating a particular party. Cooperation enables the agencies to identify issues of common interest, improve our analyses, and avoid inconsistent outcomes. 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 Cases in which the FTC has cooperated closely with

<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 In fiscal year 2011, the agency had almost 50 substantive case-related contacts with counterpart agencies around the world, including in Australia, Canada, China, the EC, Germany, Spain, France and Turkey. See <http://www.ftc.gov/opa/2011/11/par.shtm> at p. 80.

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>.

foreign agencies include *Panasonic/Sanyo*,¹⁰ *Pfizer/Wyeth*,¹¹ *Agilent/Varian*,¹² *Schering-Plough/Merck*,¹³ and *Intel/McAfee*.¹⁴

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 This document provides 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 competition agencies of Canada, Japan, Korea, and Mexico on issues including intellectual property and conduct by dominant firms.

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.

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

¹⁰ See FTC press release at <http://www.ftc.gov/opa/2009/11/sanyo.shtm>, noting cooperation with the competition agencies of Canada, the European Union, and Japan.

¹¹ See FTC press release at <http://www.ftc.gov/opa/2009/10/pfizer.shtm>, noting cooperation with the competition agencies of Australia, Canada, the European Union, Mexico, New Zealand, and South Africa.

¹² 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.

¹³ See FTC press release at <http://www.ftc.gov/opa/2009/10/merck.shtm>, noting cooperation with the competition agencies of Australia, Canada, the European Union, Israel, Mexico, and New Zealand.

¹⁴ See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/70&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁵ The Best practices are available at: <http://www.ftc.gov/opa/2011/10/eumerger.shtm>.

(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.

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 unlike other competition fora in that it: has a broad membership – 123 agencies from 108 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 using a permanent, paid 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

The FTC co-chairs, with the German Federal Cartel Office and the Swedish Competition Authority, the Unilateral Conduct Working Group, which developed Recommended Practices on the assessment of dominance/substantial market power and on the application of unilateral conduct rules to state-created monopolies.¹⁷ The Working Group held widely attended workshops on these topics at the FTC in March 2009¹⁸ and in Brussels in December 2010. The group also has been compiling data on how ICN members analyze specific types of conduct. It produced reports on predatory pricing and exclusive dealing, single product loyalty discounts and rebates, tying and bundling, and refusals to deal and margin squeeze.¹⁹ Based on these reports and the Recommended Practices, the group is drafting a Workbook on the analysis of unilateral conduct.²⁰ The Working Group also conducts web-based teleseminars on discrete issues, such as price-cost tests, excessive pricing, price discrimination, and remedies in the area of unilateral conduct, as well as unilateral conduct in specific sectors, including pharmaceuticals and energy.²¹

The FTC also leads the Merger Working Group’s work on Notification and Procedures. The Group’s projects have included developing a set of eight Guiding Principles and thirteen Recommended Practices for Merger Notification and Review. Since

¹⁶ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc757.pdf>. For a catalog of ICN work product, see <http://www.internationalcompetitionnetwork.org/uploads/library/doc667.pdf>.

¹⁷ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

¹⁸ See <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars.aspx>.

¹⁹ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>.

²⁰ The first chapter of the workbook, on Assessing Dominance/Substantial Market Power, is available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf>.

²¹ See <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/workshops-teleseminars.aspx> for recordings of the Group’s teleseminar programs.

their adoption, the Group has focused on the implementation of the Guiding Principles and Recommended Practices. 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 Group also prepared reports on merger filing fees worldwide, on practices regarding the use of confidentiality waivers in merger investigations, and on information requirements for merger notification.²²

The FTC participates in other ICN working groups and is an active member of the ICN's Steering Group. We lead a project to develop a comprehensive online curriculum of training materials on competition law and practice featuring leading competition officials, scholars, and practitioners. The first modules were the history and goals of competition policy, market definition, and market power; the group is currently developing modules on competitive effects, merger analysis, unilateral conduct analysis, leniency, and agency effectiveness. The FTC also recently hosted a one-day ICN roundtable on enforcement cooperation, with DOJ's Antitrust Division, which prompted further detailed work on cooperation by the ICN.

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 and concern.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 nonetheless important Recommendations, which the OECD has adopted, including on antitrust enforcement cooperation, combating hard-core cartels, merger review procedures, and competition assessment.²⁴ The Committee holds "roundtable" discussions and hearings - for example, over the past year, on excessive pricing, network neutrality, compliance with competition law, quantification of competitive harm, and procedural fairness. 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

²² These materials are available at <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>.

²³ 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.

²⁴ See Recommendations at http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

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 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 USTR) 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. Current agreements with a competition chapter include NAFTA and bilateral agreements with Australia, Chile, Colombia, Peru, and Singapore, as well as an agreement with Korea that is expected to enter into force shortly. 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 current Trans-Pacific Partnership.

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. In fiscal year 2011, the FTC conducted over thirty-five assistance missions, including programs in China, India, Southeast Asia, Egypt, Mexico, Central America, 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 FTC and/or DOJ 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 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, 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 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.²⁵ 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 43 lawyers, economists, and investigators from 25 jurisdictions, and will continue to expand the program. FTC attorneys and economists have also worked in competition agencies of the UK and EU 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 abroad²⁶ and welcomes input from stakeholders so that we can better serve the interests of the FTC and consumers.

²⁵ For further information on the program, see <http://www.ftc.gov/oia/safeweb.shtm>.

²⁶ 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>.