

The Federal Trade Commission's International Antitrust Program

Randolph Tritell and Elizabeth Kraus*

**ABA Section of Antitrust Law Spring Meeting
Washington, DC, April 18, 2007**

* Randolph Tritell is the Director, and Elizabeth Kraus is the Deputy Director, of the Federal Trade Commission's Office of International Affairs. The views in this paper are their own and not necessarily those of the Federal Trade Commission or its Commissioners.

The Federal Trade Commission's international antitrust program aims (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 polices 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 was established on January 2, 2007. The Office 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 to the Chairman, and works closely with all of the FTC's component organizations. The Office has three Deputy Directors covering the international antitrust, consumer protection, and technical assistance functions.

The Office's antitrust predecessor, the International Antitrust Division, was created as part of 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 efforts 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 Tritell, with overall responsibility for the Office, and a Deputy Director for International Antitrust, Elizabeth Kraus, who oversees the Office's antitrust work. The Office has five other antitrust attorneys, with the indicated primary portfolios:

Russell Damtoft, Associate Director 202-326-2893 rdamtoft@ftc.gov
Canada, China, Russia, Latin America

Dina Kallay 202-326-2616 dkallay@ftc.gov
ICN, Intellectual property

John Parisi 202-326-2133 jparisi@ftc.gov
EC, EEA, Member States, International cooperation

¹ Most of the Office's antitrust work is conducted 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/bc/international/intanti.htm>.

Deirdre Shanahan 202-326-2951 dshanahan@ftc.gov
Japan, Korea, Southeast Asia, Oceania

Maria Coppola Tineo 202-326-2482 mtineo@ftc.gov
ICN, OECD, Africa, Middle East

Competition technical assistance issues are under the purview of James Hamill, Deputy Director for International Technical Assistance, whose group also includes Timothy Hughes, and Russell Damtoft.

II. Resource Within the FTC

The Office of International Affairs is an internal resource that supports the Bureau of Competition divisions on international issues that arise in their investigations and litigation. We work with staff on issues such as personal and subject matter jurisdiction, service of process, and obtaining evidence abroad, and assist 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.

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 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); and Mexico (2000).³ One important informal mechanism is the Recommendation of the Organization for Economic Cooperation and Development ("OECD") on international competition cooperation.⁴ 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, more recent 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.

³ <http://www.ftc.gov/bc/international/coopagree.htm>.

⁴ Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130).

The United States has entered into enhanced positive comity agreements with the EC (1998) and Canada (2004) that include, among other things, a presumption of deference to the other jurisdiction to take the lead on antitrust enforcement in certain circumstances.⁵ 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. The United States has entered one such agreement, with Australia.⁶

Pursuant to these agreements, or often without an agreement, FTC staff cooperates with foreign agencies on individual cases and on developing competition policy. When the FTC and a foreign agency both 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.⁷ Recent cases in which the FTC has cooperated closely with foreign agencies include: *Boston Scientific/Guidant*,⁸ *Sanofi/Aventis*,⁹ *Allergan/Inamed*,¹⁰ *Procter & Gamble/Gillette*,¹¹ *Linde/BOC*,¹² and *Pfizer/Johnson & Johnson*.¹³ The settlement of *Sanofi/Aventis* exemplifies the extent to which multijurisdictional cooperation goes beyond competitive analysis. The case involved a

⁵ *Id.*

⁶ <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm> (1999).

⁷ See e.g., ICN Recommended Practice on Interagency Coordination, <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf> at §D, and ICN Model Waiver and accompanying report on Waivers, at

<http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf>

⁸ See FTC press release at <http://www.ftc.gov/opa/2006/04/bostonscigui.htm> and EC press release at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/491>. The FTC also worked with the Canadian Competition Bureau and the Japan Fair Trade Commission on this transaction.

⁹ See 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.

¹⁰ See FTC press release at <http://www.ftc.gov/opa/2006/03/allergan.htm>; Germany’s Bundeskartellamt cleared the merger after the FTC adopted its order, satisfied with the terms of the settlement.

¹¹ See FTC press release at <http://www.ftc.gov/opa/2005/09/pggillette.htm> (noting cooperation with the EU, Canadian, and Mexican agencies).

¹² See FTC press release at <http://www.ftc.gov/opa/2006/07/lindeBOC.htm> (noting cooperation with the EC).

¹³ See FTC press release at <http://www.ftc.gov/opa/2006/12/pfizer-jj.htm>; Canadian Competition Bureau press release at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2243&lg=e>; and EC press release at <http://ec.europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1726&format=HTML&aged=0&language=EN&guiLanguage=en>.

complicated unraveling of third-party interests present in the United States, but not in Europe, involving a cancer treatment that raised issues of concern to both the FTC and the EC. The case also involved cooperation with France's financial markets regulator because the proposed acquisition was subject to France's takeover code.

In addition to cooperating on specific matters, the FTC often works with other agencies to promote policy convergence on particular issues. For example, the FTC and DOJ are engaging with DG-Competition on the EC's Discussion Paper on Article 82, and will exchange views on their draft non-horizontal merger guidelines. We also established a merger working group with the European Commission, which over time included task forces to address 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 handling of issues that may arise in merger investigations.¹⁴ The working group has operated primarily through videoconferences, with occasional in-person meetings. The US, Mexican, and Canadian agencies have formed informal working groups to discuss issues involving intellectual property and conduct by dominant firms. The US antitrust agencies also discuss issues at the intersection of intellectual property and antitrust with many of their counterparts.

The FTC, along with the Antitrust Division, has devoted substantial resources to working with China on its draft Anti-Monopoly Law. FTC officials have shared our experience and learning with officials in China involved in developing the law, with the aim of encouraging a legal framework consistent with sound competition principles and international good practice. FTC Chairman Majoras and several FTC officials traveled to Asia in April 2006 to meet with the leadership of competition and consumer protection agencies in China, Japan, and Korea.

IV. Activities in Multilateral Competition Fora

Now that over 100 jurisdictions have a competition law and agency, it is particularly important that experienced agencies endeavor 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 the multitude of histories, cultures, legal systems, and levels of economic development of the jurisdictions with competition laws, it is inevitable that there will be many differences among their 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 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).

¹⁴ See <http://www.usdoj.gov/atr/public/international/docs/200405.htm>.

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 – 99 agencies from 87 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; it provides a significant role for non-governmental advisors from the business, legal, consumer, and academic communities, as well as experts from other international organizations; and, unlike the OECD and most international organizations, agency members organize and conduct the work directly rather than using a permanent Secretariat.

The ICN is organized into working groups and subgroups composed of agencies and non-governmental advisors. There are currently substantive working groups dealing with unilateral conduct, mergers, cartels, and competition policy implementation (examining ways to increase the institutional capacity and strengthen the performance of new agencies). The ICN’s accomplishments are described in its Statement of Mission and Achievements.¹⁵

The FTC co-chairs, with the German Federal Cartel Office, the recently-established Unilateral Conduct Working Group, and co-chairs its subgroup on objectives of unilateral conduct laws and enforcement with the Mexico’s Federal Competition Commission.¹⁶ The FTC also chairs the Merger Working Group’s subgroup on Notification and Procedures, and co-chairs the Competition Policy Implementation Working Group’s subgroup on Technical Assistance. The Notification and Procedures subgroup developed a set of eight Guiding Principles and thirteen Recommended Practices for Merger Notification and Review, and prepared reports on merger filing fees worldwide, and practices regarding the use of confidentiality waivers in merger investigations along with a model waiver form. Its current work focuses on the implementation of the Guiding Principles and Recommended Practices, and preparing a report on how jurisdictions define covered merger transactions. In 2006, the subgroup held a workshop, attended by almost 100 delegates from 35 jurisdictions, to promote understanding and implementation of the Principles and Practices, and prepared a Handbook of materials and practical tools to aid implementation. The Technical Assistance subgroup is working on assessing which models of technical assistance are most effective at the various stages of a competition agency’s development.¹⁷ The FTC serves on the ICN’s steering group, and participates actively in other ICN working groups.

The FTC and DOJ represent the US in the OECD’s Competition Committee. The OECD consists of thirty economically developed countries, with the participation of non-

¹⁵ See

http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMission&AchievementsStatement.pdf.

¹⁶ See <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct>

¹⁷ See

http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/assessing_technical_assistance.pdf,

http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/EvenettTAEffectivenessPaper041006.pdf and

http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/Nicholson_Final_ICN_report.pdf.

member observers. 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 working groups that focus on competition issues in regulated sectors and on international cooperation and enforcement.

The Competition Committee's primary goals 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 has developed non-binding, but nonetheless important, Recommendations, that the OECD has adopted, including on antitrust enforcement cooperation, combating hard-core cartels, and merger review procedures.¹⁸ The Committee holds "roundtable" discussions on topics of mutual interest -- for example, in February 2007, on competition and energy security, analysis of vertical mergers, techniques to combat cartels, and competition in the real estate industry -- and produces papers, for example on exemptions to antitrust laws and the impact of hard-core cartels. 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 sponsors an annual Global Forum on Competition, at which members and non-members discuss competition issues relevant to developing countries. At the October 2007 Global Forum, the FTC will play a lead role on a program on the interface between competition and consumer protection issues. 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.

V. Trade and Competition Fora

The FTC works on issues at the intersection between trade and competition policies, for example as they arise in the context of proposed 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 the United States delegation to the Working Group with the Office of the United States Trade Representative. While the European Union and some other members supported initiating negotiations of a competition chapter in the current WTO round, the US questioned the benefits of WTO competition rules, particularly if they would be subject to dispute settlement. Ultimately, the Doha Round moved forward without a competition chapter, largely because of 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 (FTAs). Current United States FTAs with a competition

¹⁸ The Recommendations are at http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463.00.html.

chapter include the North American Free Trade Agreement, and bilateral agreements with Chile, Singapore, Australia, Colombia, and Peru (a larger number of agreements do not contain a competition chapter). The chapters typically include provisions, not subject to dispute settlement, on maintaining a competition law and agency, cooperation between the parties, and consultation to resolve disagreements. The agreements also include disciplines that are subject to dispute settlement on certain state enterprises and designated monopolies. The FTC currently participates in US delegations that are negotiating a possible competition chapter in potential FTAs with Korea and Malaysia.

VI. Technical Assistance

The FTC and the Antitrust Division provide competition technical assistance to countries undergoing transition to market economies and establishing new competition regimes. Our assistance is most often funded by the US Agency for International Development. The program began in Central and Eastern Europe in the early 1990s, and is now active in Southeast Asia, Russia, India, Egypt, South Africa, and Central America; we recently concluded programs in the Andean Community, Mexico, and Southeast Europe.

Many of our most successful programs involve the placement of long-term resident FTC and/or DOJ advisors with developing country competition agencies. 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 laws, traditions, and economic circumstances. The resident advisor program is particularly effective in allowing 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 of primary concern to the agency. Due to budgetary constraints, most of our current assistance is provided through short-term programs, in which 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. The FTC's Office of International Affairs will continue to work with other agencies to promote sound competition policy and enforcement worldwide through cooperation and convergence toward international best practice.