

Twenty Years of Transatlantic Antitrust Cooperation: the Past and the Future

**Rachel Brandenburger, Special Advisor, International
Antitrust Division, US Department of Justice**

A mere 18 months passed between then-Competition Commissioner Sir Leon Brittan's first public reference to "the desirability of a treaty or less formal agreement" to deal with "the possibility of conflicts of jurisdiction"¹ and the signing of the US-EC bilateral antitrust cooperation agreement on September 23, 1991. It is not surprising that the negotiators, including then-Assistant Attorney General Jim Rill, were able to produce the text – which became the model for many subsequent US antitrust cooperation agreements – in a relatively short time, by the standards of international negotiations. This was clearly an idea whose time had come. Indeed, as then-Acting Attorney General Bill Barr noted upon signing, "the increasing integration of [the US and EU] economies and the emergence of an international business environment make cooperation between [the US and EU] governments in the area of antitrust enforcement absolutely essential."² The EU's Merger Regulation had come into effect in 1990, the US and EU economies were becoming increasingly integrated through trade and investment, and the two US antitrust agencies, the US Department of Justice ("DOJ") and the Federal Trade

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¹ Press Release, European Commission, "Need to Consider EC-US Agreement on Competition Policy": Extracts from Speech by Sir Leon Brittan to EC Chamber of Commerce (Mar. 26, 1990), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/90/241&format=HTML&aged=1&language=EN&guiLanguage=en>

² Press Release, U.S. Dep't of Justice, U.S. and Commission of European Communities Sign Antitrust Cooperation Agreement (Sept. 23, 1991) (on file with U.S. Dep't of Justice).

Commission (“FTC”), and the European Commission (“EC”) were the most prominent actors in global competition law and policy.

The stated purpose of the agreement was “to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.”³ It was a forward-looking agreement based on mutual interest. It committed both the US antitrust agencies and the EC to “render assistance”⁴ to each other’s enforcement activities, and provided explicitly that, “in any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.”⁵ The agreement provided for “positive” comity, allowing the US antitrust agencies or the EC to request that the other initiate appropriate enforcement activities under its own laws when the requesting party’s important interests were affected.⁶ Finally, the agreement committed each party, at all stages of its enforcement activities, to take into account the important interests of the other party, with a list of factors to consider in balancing these interests.⁷

As we now know, the 1991 Agreement ushered in an era of mutual respect, trust, expanded communication, and agreement as to common objectives and perspectives. This path-breaking agreement was not universally understood, however, or even welcomed, at the time. A *Wall Street Journal* editorial the day after the signing noted as “remarkable” the “extent to which it is being interpreted as an alliance against the Japanese.”⁸ Antitrust practitioners were more concerned about lack of substantive convergence between the US antitrust agencies and the EC,

³ Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, Art. I, § 1, *available at* <http://www.justice.gov/atr/public/international/docs/0525.htm>.

⁴ *Id.* at Art. IV, § 1.

⁵ *Id.* at Art. IV, § 3.

⁶ *Id.* at Art. V.

⁷ *Id.* at Art. VI, § 3(a)-(f).

⁸ Editorial, *Antitrust Analgesic*, WALL ST. J., Sept. 25, 1991, at A10.

and feared the consequences of unchecked exchanges of confidential business information. The *Financial Times* cited competition experts who feared that “companies might face greater difficulty in winning approval because of the increased exchange of information by competition authorities”⁹ – despite the fact that the agreement did not provide for the exchange of confidential information.

Written with the benefit of hindsight, this article will examine each of these long-forgotten concerns, and explain why they have been displaced by the obvious success of the agreement’s collaborative purpose.¹⁰

The Treatment of Confidential Information

The agreement has not led – as initially feared – to a flurry of ill-considered data dumps of confidential business information. Instead, the agreement has facilitated continuing and frequent contacts between DOJ and EC officials, both formal and informal, at both leadership and staff levels. These personal contacts were critical to the formation of deeper ties based on mutual understanding, trust, and confidence. In 1991, the EC had only recently acquired jurisdiction over mergers, but it immediately became apparent that many of those transactions would be reviewed on both sides of the Atlantic, and cooperation in the review of transatlantic mergers began to flourish. Although the agreement does not provide for the exchange of confidential information, it did not take long for many merging parties, and increasingly also third parties, to realize that facilitating cooperation between the reviewing agencies in fact would lead to more efficient and effective investigations, and give greater assurance that the outcomes

⁹ George Graham, *U.S. and E.C. Sign Anti-Trust Accord*, FIN. TIMES, Sept. 24, 1991, at 3.

¹⁰ Although the agreement is between the EC and the two US competition agencies, the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), this article focuses on the relationship between the EC and the DOJ.

would be consistent. This, in turn, has encouraged the widespread use of waivers by the merging parties of their confidentiality protections, a practice that today is commonplace.¹¹

Substantive Convergence

The initial concern over lack of substantive convergence has also proven to be misplaced. In fact, the agreement has contributed to a significant narrowing of differences in the agencies' analytical methods and outlooks. There is now broad agreement between DOJ and EC officials on the objective of benefitting consumers and protecting competition, not competitors. The agencies in Washington and Brussels ground their decisions on common bodies of economic learning, relying on expert in-house economists. The effects-based approach rules the agencies' enforcement efforts.

The increasingly convergent approach by DOJ and the EC to core principles of antitrust analysis has reduced the risk of divergent analyses and outcomes in individual cases. For merger review, there is agreement on many of the fundamentals. Indeed, there is little practical difference in DOJ's statutory standard of review and that of the EC; and the horizontal merger guidelines issued (or re-issued) by the US¹² and EU¹³ agencies in the last few years, in both cases after consultation with one another, are broadly equivalent. DOJ and the EC have also achieved substantial convergence in anti-cartel enforcement. Cartels are recognized as particularly pernicious in both jurisdictions, and both have strong anti-cartel laws, vigorous enforcement, and effective leniency programs. With many applicants approaching Washington and Brussels simultaneously, DOJ and the EC have successfully coordinated many cartel

¹¹ Not all merging parties support this cooperative approach. Some attempt to whip-saw the agencies and to leverage one jurisdiction's investigation against another's. That is their choice, but the agencies are aware of these tactics, which can complicate and extend agency review.

¹² U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (rev. ed. 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

¹³ European Commission, Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (rev. ed. 2004), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF>.

investigations. Although there has perhaps been less convergence in the approach of DOJ and the EC to unilateral conduct, there have been cooperative working groups in this area over the years, and ongoing dialogue.

As DOJ and the EC have converged in their respective approaches to antitrust enforcement, they also have worked together in framing their relationships with the burgeoning global competition community. DOJ, FTC, and the EC helped to launch the International Competition Network in 2001,¹⁴ and have coordinated their technical cooperation as they build critical relationships with new agencies responsible for promoting competition around the world. Promotion of cooperation between DOJ and the EC, a goal and outgrowth of the 1991 Agreement, has contributed to global cooperation, with significant benefits to international trade and commerce.

A Shared Commitment to Cooperation

The 1991 Agreement and the benefits of the cooperative relationship it embodies are predicated on a serious commitment and investment of resources in the transatlantic relationship, through both frequent contacts at the staff level and periodic regular meetings at the most senior level. Indeed, DOJ and the EC engage in everything from daily “pick up the phone” conversations to senior-level videoconferences on important policy issues, to respectful debates over the appropriate remedies in complex mergers. More recently, as Acting Assistant Attorney General Sharis Pozen announced, DOJ has initiated an internship program to involve enforcers from its sister agencies – starting with DG Comp – in its enforcement activity, consistent with appropriate security and confidentiality constraints. This sustained commitment to building ties

¹⁴ Press Release, U.S. Dep’t of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), available at http://www.justice.gov/atr/public/press_releases/2001/9400.htm.

and mutual understanding is essential to the deep cooperation that was the goal of the 1991 Agreement.

Future Engagement with the Global Competition Enforcement Community

DOJ and the EC should build on the positive experience with the 1991 Agreement as we engage in the global competition enforcement world. Getting enforcement decisions right is the most important task that antitrust agencies have, and in the era of globalization, getting them right will increasingly mean getting them right together, with other agencies around the world. To achieve these goals, DOJ has suggested a new international lexicon that is premised on seven guiding principles for cooperation with other antitrust agencies around the world. These principles have been articulated in a number of public fora,¹⁵ but they bear repeating here.

The first three of these principles arise from the important work of the International Competition Policy Advisory Committee (“ICPAC”), established by then-Assistant Attorney General Joel Klein in 1997, namely: (1) increased *transparency* and accountability of government actions; (2) expanded and deeper *cooperation* between US and overseas competition enforcement authorities; and (3) greater *convergence* of competition regimes.

Although we have achieved considerable convergence in many respects, attaining further convergence between the two jurisdictions, let alone among the world’s 120-plus competition agencies – each with its own unique legal culture, enforcement regime, political structure and economic situation – may not be easy. As then-Assistant Attorney General Varney explained in September 2010, the world’s antitrust agencies are unlikely to achieve convergence on

¹⁵ See, e.g., Christine A. Varney, *International Cooperation: Preparing for the Future* (Sept. 21, 2010), available at <http://www.justice.gov/atr/public/speeches/262606.htm>; Rachel Brandenburger, *International Competition Policy and Practice: New Perspectives?* (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>.

everything, and in some areas, further successful convergence will take time.¹⁶ So, managing the areas where there has not been, and maybe will not be, convergence is likely to be the next big challenge in terms of international cooperation, particularly with respect to the increasing number of matters that draw the simultaneous attention of multiple enforcement agencies.

Convergence aside, the world's competition agencies have much to gain from discussing an issue thoroughly and thoughtfully on a bilateral or multilateral basis. Inevitably, officials involved in such discussions emerge better informed about what other agencies are doing, including what has worked well and not so well in the past, and they are better equipped to think about their own practices more critically and with greater perspective. In reality, practices that work for some jurisdictions may not always work for others. Indeed, no one jurisdiction or agency has a monopoly in good ideas.¹⁷

Along these lines, the four new guiding principles in our lexicon of international cooperation are particularly important: mindfulness, respect, trust, and dialogue. In sum, these principles require agencies to be *mindful* of the impact of their actions outside of their borders, to be *respectful* of others' ideas, and to build *trust* and an ongoing *dialogue* with counterpart competition agencies, businesses, and consumers.

The Future – Continued Strengthening of Ties

In 1991, then-Competition Commissioner Sir Leon Brittan anticipated a more far-reaching cooperation agreement. At the signing, he observed that the agreement was “only a beginning on which we will have to build”¹⁸ and that a future agreement might permit cases

¹⁶ *International Cooperation*, supra note 15.

¹⁷ Rachel Brandenburger, *Transatlantic Antitrust: Past and Present* (May 21, 2010), available at <http://www.justice.gov/atr/public/speeches/260273.htm>.

¹⁸ Transcript, United States and the Commission of European Communities, Antitrust Agreement Signing Ceremony (Sept. 23, 1991) at 6 (on file with U.S. Dep't of Justice).

where “one side should go first or take the lead.”¹⁹ In fact, DOJ and the EC have already had some cases that fit this description. In *IRI/Nielsen* in 1996, then-Assistant Attorney General Joel Klein closed the DOJ investigation into Nielsen contracting practices with international customers when the company reached an agreement with the EC alleviating any anticompetitive concerns; he stated that “we decided to let our colleagues at the Commission take the lead.”²⁰ Two years later, in announcing the settlement reached in the *Dresser/Halliburton* merger, DOJ noted the EC’s cooperative but distinct investigation, and its reliance on the divestiture commitment to DOJ in resolving competitive issues that might have arisen in the EU.²¹

A recent variant, *Cisco/Tandberg*, is an example of the excellent cooperation today between DOJ and the EC. With waivers and other cooperation from the merging parties and third-party industry participants in place, DOJ and the EC worked closely together from the opening, through fact-gathering, to the conclusion of their respective investigations. As then-Assistant Attorney General Varney noted, “This investigation was a model of international cooperation between the United States and the European Commission.”²² In deciding to close its investigation, DOJ took into account the commitments that the parties gave to the EC,²³ and closed its investigation on the same day that the EC announced its clearance decision.²⁴ EC

¹⁹ *Id.* at 12.

²⁰ Press Release, U.S. Dep’t of Justice, Justice Department Closes Investigation into the Way AC Nielsen Co. Contracts its Services for Tracking Retail Sales (Dec. 3, 1996), *available at* http://www.justice.gov/atr/public/press_releases/1996/1031.htm.

²¹ Press Release, U.S. Dep’t of Justice, Halliburton Co. Agrees to Sell Part of its Worldwide Oil Field Services Business and its Drilling Fluids Business in Order to Proceed with Dresser Industries Merger (Sept. 29, 1998), *available at* http://www.justice.gov/atr/public/press_releases/1998/1963.htm.

²² Press Release, U.S. Dep’t of Justice, Justice Department Will Not Challenge Cisco’s Acquisition of Tandberg (Mar. 29, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

²³ *Id.*

²⁴ Press Release, European Commission, Mergers: Commission Clears Cisco’s Proposed Acquisition of Tandberg, Subject to Conditions (Mar. 29, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377>.

Vice-President Joaquin Almunia announced that he was “satisfied with the overall review process that was carried out in close co-operation with” the DOJ²⁵

Eleven years ago, the ICPAC report suggested other areas of deeper coordination that DOJ and the EC might consider exploring as next steps in their cooperative relationship. In certain cases, the agencies already employed some of the suggestions, such as joint party interviews, jointly designed questionnaires, and joint remedy negotiations.²⁶ As suggested by ICPAC, future work-sharing could involve agencies working together to reduce duplication by limiting the number of jurisdictions conducting second-stage reviews or by identifying one jurisdiction to coordinate a particular merger investigation.

In order to maintain a strong relationship and to ensure it continues to grow and develop, agencies, at times, must reflect and improve upon their practices. In this vein, DOJ, FTC, and the EC have recently revised the US-EC Best Practices on Cooperation in Merger Investigations.²⁷ The Best Practices were originally issued in 2002. Recent revisions update them to account for experience with the dozens of successful cooperative merger review efforts since then. The 2011 Best Practices reiterate the enormous value of continuing and open communication between agencies reviewing the same merger, and their common interest, along with the parties themselves, in resolving cases efficiently with effective remedies that work together to preserve competition in both jurisdictions.

²⁵ *Id.*

²⁶ A good example of this is the acquisition by Reuters Group of Thompson Corporation. See Press Release, European Commission, Mergers: Commission Clears Acquisition of Reuters by Thompson Subject to Conditions (Feb. 19, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/260>, (“The Commission’s investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case by the US Department of Justice. The process involved close co-operation between the two authorities, including exchanges of views on analytical methods and of detailed information, plus joint meetings and negotiations with the parties.”)

²⁷ See Press Release, U.S. Dep’t of Justice, United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews (Oct. 14, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/276308.htm (attaching 2011 revised Best Practices).

DOJ and the EC could not have achieved this mature relationship and the deep cooperation it entails without the mutual commitment to invest in the relationship and make it work over the long term. The great leaders of the antitrust community 20 years ago, whose wisdom and foresight led to the groundbreaking cooperation agreement among DOJ, FTC, and the EC, could not have conceived how extensively and enthusiastically the commitment to cooperation in competition enforcement would be adopted around the world.

With over 120 competition regimes in the world today, it is more important than ever that DOJ and the EC continue to invest in and build their mature relationship. The task is perhaps more complex than it was 20 years ago, but together the agencies will rise to these challenges.