
The Antitrust Division's International Program



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Both former Assistant Attorney General Christine Varney and Acting Assistant Attorney General Sharis Pozen have made the international dimension of competition policy and enforcement among the top priorities for the Antitrust Division. The continuing role of Rachel Brandenburger as Special Advisor, International has added a new dimension to the Antitrust Division's international work. The Antitrust Division's international program carries forward the work of developing strong cooperative relationships among competition agencies.¹

Case Cooperation

Cooperation is fundamentally important to competition enforcement in today's globalized world. It is increasingly common for many agencies to investigate the same matter. The decisions of one agency can impact consumers elsewhere. The Antitrust Division works closely with its counterparts in other jurisdictions on a wide range of cartel, merger and civil non-merger enforcement matters that affect U.S. consumers.

In fiscal year 2010, the Division worked on almost 40 civil investigations with an international dimension, most of which involved cooperation with competition agencies in other jurisdictions. Similarly, during 2011, we cooperated on merger reviews – often pursuant to waivers from the parties – with competition agencies in Australia, Brazil, Canada, Colombia, the European Union, Germany, Japan, Mexico, South Africa, the United Kingdom, and

¹ For more information about the Antitrust Division's international program, see the international page on the Division's website at <http://www.justice.gov/atr/public/international/>.

elsewhere. The Division also cooperated with other competition agencies around the world on dozens of criminal matters and in the civil non-merger arena as well. For example, in the Division's ongoing investigation of price-fixing in the air transportation industry, we have cooperated with enforcement agencies on five continents.

One of the main goals of the Division's international program is to further integrate the consideration of international issues into the day-to-day work of the Division with respect to its investigations. We are working hard to establish "pick-up-the-phone" relationships with an increasing number of agencies around the world, which have an interest in investigating a merger, possible anticompetitive unilateral conduct, or cartel activity along with us.

For example, earlier this year, the Division worked closely with the German Federal Cartel Office on the acquisition of certain patents and patent applications from Novell Inc. by CPTN Holdings (a holding company owned by Microsoft Inc., Oracle Corp., Apple Inc. and EMC Corp.). This was the first merger enforcement cooperation the Division had had with Germany in 20 years. Aided by waivers from the parties, the agencies discussed information on, and assessments of, likely competitive effects and coordinated on potential revisions to the parties' agreements. The two agencies announced their respective decisions on the same day.²

² Press Release, U.S. Dep't of Justice, *CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns* (April 20, 2011) available at http://www.justice.gov/atr/public/press_releases/2011/270086.htm; Press Release, German Bundeskartellamt, *Budeskartellamt clears CPTN joint venture for acquisition of Novell patents* (April 20, 2011) available at http://www.bundeskartellamt.de/wEnglisch/News/press/2011_04_20.php.

Other recent highlights include the Division's complaint and consent decree involving Unilever and Alberto-Culver Co., requiring those firms to divest two hair care brands in order to proceed with Unilever's acquisition of Alberto-Culver.³ The product markets and competitive issues involved in that investigation varied between the different jurisdictions affected by the merger. Nevertheless, we sought to discuss the merger with our counterparts in Mexico, South Africa, and the United Kingdom, and aided by waivers from the parties, were able to enter into dialogue with each other as we conducted our respective investigations and crafted remedies appropriate to our respective jurisdictions.

Strengthening Bilateral Relationships

Building on existing bilateral relationships and creating new ones are key to our vision of cooperative competition enforcement for the future. The Division works actively with its many counterparts around the world in order to bring greater cooperation to the international aspects of competition policy and enforcement. Division officials are in frequent contact with their counterparts exchanging "know how" on particular issues in specific sectors, both where the Division has expertise to offer and where the Division can learn from the experiences of others.

Enhancing bilateral relationships is a high priority for the Division's international program. We wish not only to maintain the already strong and

³ Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures in Unilever's Acquisition of Alberto-Culver Company* (May 6, 2011) available at http://www.justice.gov/atr/public/press_releases/2011/270854.htm; Press Release, UK Office of Fair Trading, *Unilever/Alberto Culver merger: OFT accepts divestment undertakings* (June 16, 2011) available at <http://www.of.gov.uk/news-and-updates/press/2011/66-11>.

extensive relationships we have developed, over many years, with established competition authorities, but also to foster relationships in jurisdictions with newer regimes.

China

Our cooperative relationship with the [Chinese antimonopoly agencies] has steadily strengthened. This memorandum of understanding is a reflection of that relationship, and, by establishing a framework for enhanced cooperation among our agencies, the MOU also allows us to move to the next chapter in our collaboration on competition law and policy matters.

- Assistant Attorney General Christine Varney

During the last several years, the Division and the Federal Trade Commission's cooperative relationship with China's three antimonopoly enforcement agencies has steadily strengthened, as China has developed its antimonopoly enforcement regime. Together with the Federal Trade Commission, we have hosted frequent meetings and training workshops, both in China and the U.S. We have discussed substantive antitrust analysis and effective investigative techniques, commented on draft implementing rules and guidelines, and engaged in many less formal exchanges.

On July 27, 2011, in Beijing, the Department of Justice and the Federal Trade Commission signed an historic Memorandum of Understanding on Antitrust Cooperation (MOU) with the three Chinese antimonopoly agencies – the Ministry of Commerce (MOFCOM), National Development and Reform

Commission (NDRC) and State Administration for Industry and Commerce (SAIC).⁴

The MOU signing is a first, though very important, step to an enhanced working relationship. It establishes a framework for enhanced cooperation among the two U.S. and three Chinese agencies.⁵ This framework envisions cooperation at two levels: first, a joint dialogue among the senior officials of all five agencies, and second, ongoing cooperation and communication among individual U.S. and Chinese enforcement agencies at the senior or working level. In that regard, the MOU provides for the development and implementation of work plans for cooperative activities between the two U.S. agencies and each of the three Chinese antimonopoly agencies. The MOU lists several specific avenues for cooperation, including exchanges of information and advice about competition law enforcement and policy developments; training programs, workshops and other means to enhance agency effectiveness; providing comments on proposed laws, regulations and guidelines; and cooperation on specific cases or investigations, when in the investigating agencies' common interest.

⁴ Press Release, U.S. Dep't of Justice, *Department of Justice and Federal Trade Commission Sign Antitrust Memorandum of Understanding with Chinese Antitrust Agencies* (July 27, 2011) available at http://www.justice.gov/atr/public/press_releases/2011/273306.htm.

⁵ See Christine A. Varney, *Remarks on the Occasion of the Signing of the Memorandum of Understanding on Antitrust Cooperation* (July 27, 2011) available at <http://www.justice.gov/atr/public/speeches/273347.pdf>.

European Commission

In a world of multiple competition regimes, the strength of the U.S.-E.U. relationship and the depth of cooperation between the U.S. agencies and the European Commission serve as a model for the sound enforcement of competition laws.

– Acting Assistant Attorney General Sharis Pozen

The Division, Federal Trade Commission, and the European Commission are deeply committed to cooperating closely on enforcement matters and exchanging views on policy matters. This longstanding relationship involves frequent collaboration at all levels within the agencies and across the full range of the agencies' work.

The bilateral cooperation agreement that the Department of Justice, Federal Trade Commission, and the European Commission entered into in 1991⁶ was spurred by the recognition that the agencies increasingly would investigate the same matters. On October 13, 2011, the three agencies celebrated the 20th anniversary of the agreement by hosting a high-level symposium in Brussels on U.S.-E.U. competition agency cooperation.⁷ The symposium brought together many senior officials who were responsible for the adoption of the 1991 agreement, present and former senior officials from all three agencies, and leading academic experts, practitioners and business executives from both jurisdictions. The symposium discussed the future of transatlantic cooperation in

⁶ AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE COMMISSION OF THE EUROPEAN COMMUNITIES REGARDING THE APPLICATION OF THEIR COMPETITION LAWS (1991) available at: <http://www.justice.gov/atr/public/international/docs/0525.htm>.

⁷ Press Release, U.S. Dep't of Justice, *United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews: Agencies Celebrate Best Practices for Coordinating Merger Reviews* (Oct. 14, 2011) available at http://www.justice.gov/atr/public/press_releases/2011/276308.htm; Press Release, European Comm'n, Competition: *EU and US celebrate 20 years of cooperation; agree to advance cooperation further* (Oct. 14, 2011) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1194&format=HTML&aged=0&language=EN&guiLanguage=en>.

a global economy with more than 120 competition agencies, and how U.S.-E.U. cooperation might serve as a model in the global context.

On October 14, 2011, the Division, the Federal Trade Commission and the European Commission issued an updated set of Best Practices on Cooperation in Merger Investigations that they use to coordinate their merger reviews when one U.S. antitrust agency and the European Commission are reviewing the same merger.⁸ The Best Practices, originally issued in 2002, provide an advisory framework for interagency cooperation.

The revised U.S.-E.U. best practices provide more guidance to firms about how to work with the agencies to coordinate and facilitate the reviews of their proposed transactions; recognize that transactions that the U.S. agencies and the European Commission review may also be subject to antitrust review in other countries; and place greater emphasis on coordination among the agencies at key stages of their investigations, including the final stage in which agencies consider potential remedies to preserve competition.

Chile

On March 31, 2011, the Department of Justice and the Federal Trade Commission signed an antitrust cooperation agreement with Chile's Office of the National Economic Prosecutor, the agency that enforces Chile's competition law.⁹ The antitrust agencies in the two countries have steadily improved their ties, both

⁸ US-EU Merger Working Group, BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS (2011) available at <http://www.justice.gov/atr/public/international/docs/276276.pdf>.

⁹ Press Release, U.S. Dep't of Justice, *Department of Justice and Federal Trade Commission Sign Antitrust Cooperation Agreement with Chile* (Mar. 31, 2011) available at http://www.justice.gov/atr/public/press_releases/2011/269211.htm.

bilaterally and under the terms of the U.S.-Chile Free Trade Agreement. The antitrust cooperation agreement enables the U.S. and Chilean agencies to improve their law enforcement relationship. It contains provisions for antitrust enforcement cooperation and coordination, conflict avoidance and consultations with respect to enforcement actions, and technical cooperation and is subject to effective confidentiality protections.

Multilateral Dialogue

The Division is actively engaged in the competition work of the Organization for Economic Co-Operation and Development (OECD), International Competition Network (ICN), United Nations Conference on Trade and Development (UNCTAD) and several regional organizations. We believe that these organizations provide valuable venues for competition agencies around the world to participate in meaningful discussions of policy and practical experience; and we devote considerable resources and time to supporting these organizations.

In October 2011, Acting Assistant Attorney General Sharis Pozen was elected Chair of the OECD Competition Committee's working party on enforcement and cooperation (Working Party 3) in place of former Assistant Attorney General Christine Varney. Within the last year, the working party has led discussions on, inter alia, the use of economic evidence in merger analysis, remedies in merger cases, institutional and procedural aspects of the relationship between courts and agencies, and developments related to procedural fairness and transparency. The Division is also active in the ICN, including as a member

of the ICN Steering Group and co-chair of the ICN's Merger Working Group with the Irish and Italian competition authorities.

Procedural Fairness

Two years ago, former Assistant Attorney General Varney called for a global dialogue on procedural fairness issues, including an emphasis on transparency.¹⁰ Since then, procedural fairness has been an important topic for OECD's Working Party 3, a focus of the Trans-Pacific Partnership negotiations, and the topic of a roundtable discussion at the APEC's Competition Policy and Law Group.

In particular, the OECD discussions have highlighted the importance of transparency and procedural fairness for the parties involved in competition proceedings, as well as for efficient, effective and fair case management and decision making by competition authorities.¹¹

Enforcement Cooperation

With the increasing number of investigations that draw the simultaneous attention of multiple competition enforcement agencies, enforcement cooperation has also become an important and timely topic of multilateral discussions. The OECD, ICN, UNCTAD, and others have taken up the topic with

¹⁰ Christine A. Varney, *Procedural Fairness* (Sept. 12, 2009) available at <http://www.justice.gov/atr/public/speeches/249974.htm>.

¹¹ See Organization for Economic Cooperation and Development, Policy Roundtables, *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings*, 2010 available at <http://www.oecd.org/dataoecd/26/29/48825133.pdf>.

the aim of promoting stronger relationships between agencies and deepened cooperation.

In 2011, the Division, together with the Federal Trade Commission, hosted the ICN's first Roundtable on Enforcement Cooperation in Washington, aimed at exploring what makes for effective cooperation in merger, cartel and unilateral conduct cases. The Division also co-chairs a project by the ICN's Steering Group to examine the issue of enforcement cooperation within the context of the ICN's work.

International Cooperation—Preparing for the Future

The Division's interactions with enforcers around the world are premised on the guiding principles introduced by the International Competition Policy Advisory Committee (ICPAC) Final Report¹², over a decade ago. To these guiding principles of transparency, cooperation, and convergence, we have added four further principles of mindfulness, respect, trust and dialogue to provide an international lexicon suitable for the challenges and opportunities of today's international environment. These principles guide the Division's international efforts and have been articulated on behalf of the Division in a number of public fora.¹³

¹² INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST FINAL REPORT (2000) available at <http://www.justice.gov/atr/icpac/cover.pdf>.

¹³ See, for example, 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>.

These guiding principles counsel competition agencies around the world to be continually *mindful* of the impact of their actions outside of their own jurisdictions; to *respect* the ideas of others; to build *trust* between themselves and with the business community; and to encourage an ongoing *dialogue* among themselves and also with businesses, consumers, practitioners, academics, and the general public, in addition to seeking transparency, cooperation and, where feasible, convergence.

The Division continues to look for ways to deepen our interactions with our counterparts around the world. This year, the Division has launched an exchange program that will bring competition agency officials from outside the U.S. to the Division. Through this “Visiting International Enforcer Program”, mid-to-senior level staff from non-U.S. competition agencies will be invited to the Division’s Washington, DC offices for a short period of time. VIEPs – as they will be called – will be exposed to both our civil and criminal work. We also will send our staff to work with competition agencies outside the U.S. This program will build on our existing relations and take us to a new phase with those jurisdictions with which we already have a strong foundation.

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The Division’s international program aims to bring ever more effective cooperation to international antitrust enforcement through increasing case cooperation, strengthened bilateral relationships, and active participation in multilateral initiatives with our counterparts around the world. All of the initiatives summarized in this update are designed to further these objectives.

The Division has made considerable progress over the past year in achieving these objectives; yet there is still much work to be done in the future.