



# DEPARTMENT OF JUSTICE

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## **International Antitrust Engagement: Benefits and Opportunities**

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## **I. Introduction**

Good morning. It is a pleasure to be speaking to you today at the Fifth Annual Forum on International Antitrust Issues. Thanks very much to Northwestern University School of Law for organizing and hosting this conference.

This audience knows well that as governments have adopted more market-oriented policies, there has been extraordinary growth in the passage and enforcement of competition laws. When I began practicing antitrust law in 1996, there were approximately three dozen competition agencies, many of them brand new. Today, there are roughly 130 agencies, on six continents, enforcing competition laws.

I am going to talk about some of the ways the Antitrust Division is working, often alongside our sister agency, the Federal Trade Commission (FTC), to promote multi-jurisdictional antitrust enforcement that is efficient, consistent, and sound. My comments will be particularly focused on international cooperation and our ongoing bilateral and multilateral engagement to promote international convergence around economics-based antitrust principles and procedural fairness. I will then share thoughts on how counsel can constructively contribute to these efforts, because effective and efficient multi-jurisdictional competition enforcement is in the business community's interest, too.

## **II. The Benefits of Cooperation Among International Antitrust Enforcers**

Both older and newer antitrust agencies have come to regard cooperation with their international counterparts as an important tool in ensuring effective competition enforcement. According to responses to a significant joint survey on international enforcement cooperation by the Organisation for Economic Co-operation and Development (OECD) and the International

Competition Network (ICN), antitrust agencies are increasingly looking for opportunities to cooperate with each other, particularly in the area of merger enforcement. For example, between 2007 and 2012, there was a 35% increase in the number of merger investigations involving some international cooperation.<sup>1</sup> Similarly, in the cartel context, the interaction between U.S. antitrust enforcers and their international counterparts continues to increase as more countries – including emerging economies – have come to understand the significant harm inflicted by hard core cartels, such that international cartels are likely to be pursued and prosecuted by more than one antitrust authority.<sup>2</sup>

What explains this trend towards increased cooperation in antitrust enforcement? For the antitrust agencies, the benefits of cooperation are significant. Cooperation increases the efficiency of enforcement efforts by facilitating the ability of agencies to exchange information and evidence. For example, in the merger context, while it is true that international cooperation happens in a relatively small percentage of merger matters overall, such cooperation helps antitrust agencies better understand the background facts and context underlying a transaction, particularly in complex cases requiring remedies for merger clearance or approval.<sup>3</sup> Open and candid dialogue among enforcers helps us better understand competitive dynamics worldwide, and provides opportunities to discuss theories of harm and best practices. It facilitates the

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<sup>1</sup> See Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement, *Report on the OECD/ICN Survey on International Enforcement Co-operation* at 9 (Feb. 12, 2013) (hereinafter “OECD/ICN Survey”), available at <http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3%282013%292&docLanguage=En>.

<sup>2</sup> Margaret C. Levenstein & Valerie Y. Suslow, *International Cartels*, in 2 *Issues in Competition Law and Policy* 1107, 1115-17 (ABA Section of Antitrust Law 2008).

<sup>3</sup> See OECD/ICN Survey, *supra* note 1, at 36, 46, 66.

transfer of knowledge and experience from more established agencies to newer agencies, and may help newer agencies avoid reinventing the wheel when confronting issues for the first time.

The growing incidence of effective case cooperation strengthens close ties between many enforcement agencies, at both the staff and senior manager levels. Additionally, many of our international counterparts have told us they value having “front office” to “front office” contacts. To this end, the Antitrust Division’s Director of Civil Enforcement, Patty Brink, is responsible for day-to-day international case cooperation in the civil context. Her direct, sometimes daily, contact with her international counterparts has helped keep several investigations on track to successful conclusion.<sup>4</sup>

Cooperation also offers a number of benefits for the international business community and their counsel. In civil cases, effective cooperation can reduce the risk of conflicting outcomes and help to ensure that investigations and remedies are consistent. In addition, cooperation among international enforcers can help expedite investigations and reduce some of the expense associated with multiple antitrust reviews. For example, in a number of investigations the Antitrust Division’s staff has, after careful review and extensive engagement with international counterparts, narrowed the scope of its concerns and eliminated certain theories of harm. Similarly, other agencies that cooperated with the Antitrust Division in various matters have, after careful consultation, streamlined their own investigations.

### **III. International Cooperation in Practice**

The extent to which the Antitrust Division can cooperate effectively with antitrust enforcers on a particular civil matter will often depend in significant part on the parties’

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<sup>4</sup> Issues and questions regarding international case cooperation in civil matters should be directed to Ms. Brink. With respect to international cooperation in cartel matters, inquiries should be directed to her counterpart, Marvin Price, Director of Criminal Enforcement.

willingness to grant waivers of confidentiality to allow us to exchange information.<sup>5</sup> In merger investigations, the Hart-Scott-Rodino Act (HSR) prohibits the Antitrust Division from disclosing information obtained under the Act, including the parties' confidential business information and the fact of a merger filing.<sup>6</sup>

Even absent waivers, agencies can discuss non-confidential and publicly available information, provide general information about deadlines, and exchange general views on market conditions and theories of harm. As a practical matter, however, waivers will be valuable in nearly all complex civil investigations. Confidentiality waivers enable agencies to engage in substantive discussions, and share documents and data. Waivers also allow for close coordination of timetables and other aspects of the agencies' reviews, to the extent feasible and useful.

We and our FTC colleagues have streamlined our processes to significantly reduce the time and resources involved in negotiating waivers in civil matters.<sup>7</sup> Last September, we overhauled the two agencies' separate waiver forms and issued a joint model waiver of confidentiality for individuals and companies to use in civil matters involving concurrent review by DOJ or FTC with one or more international counterparts. This form reflects each agency's recent experiences with waivers and has a new provision addressing the treatment of privileged information. To make the model waiver more transparent and user-friendly, we also released a

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<sup>5</sup> See Patty Brink, Director of Civil Enforcement, DOJ Antitrust Division, Remarks for Institute for Consumer Antitrust Studies, *International Cooperation at the Antitrust Division: A View from the Trenches* at 7-8 (Apr. 19, 2013), available at <http://www.justice.gov/atr/public/speeches/296073.pdf>.

<sup>6</sup> See 15 U.S.C. § 18a(h); see also Antitrust Division Manual at III(D)(1)(g)(iii) (last updated Mar. 2014), available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>.

<sup>7</sup> See DOJ Press Release (Sept. 25, 2013), available at [http://www.justice.gov/atr/public/press\\_releases/2013/300932.htm](http://www.justice.gov/atr/public/press_releases/2013/300932.htm).

set of Frequently Asked Questions to explain the provisions and applicable confidentiality rules.<sup>8</sup> Since we introduced it last fall, the model waiver has been widely used and credited with improving the efficiency of our waiver processes.<sup>9</sup>

With respect to case cooperation in the criminal context, the United States has Mutual Legal Assistance Treaties (MLATs), Instruments, or Protocols with numerous countries or regional organizations that allow information to be shared with another jurisdiction's criminal law enforcement authorities. A court order or specific statutory authority is generally required to share statutorily-protected confidential information pursuant to an MLAT request. For example, a court order may be obtained under Rule 6(e) of the Federal Rules of Criminal Procedure in order to disclose, pursuant to an MLAT request, matters occurring before a grand jury.<sup>10</sup>

Let me offer a few examples of how the Antitrust Division has cooperated with its international counterparts on investigations.

I will begin with the 2012 merger between United Technologies Corporation and Goodrich Corporation, which was the largest merger in the aircraft industry's history.<sup>11</sup> In reviewing this transaction, the Antitrust Division, the European Commission (EC), and the Canadian Competition Bureau (CCB) worked closely together, including discussing potential

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<sup>8</sup> These Frequently Asked Questions are available at <http://www.justice.gov/atr/public/international/docs/300916.pdf>.

<sup>9</sup> See Molly Askin, Anne Newton McFadden, and Koren Wong-Ervin, *Seven Months In: The U.S. Antitrust Agencies' Joint Model Waiver of Confidentiality*, in *International Antitrust Bulletin*, American Bar Association, Section of Antitrust Law 7, 7-8 (May 2014), available at [http://www.dfdl.com/images/stories/IAB\\_2014v1\\_2014-05-15.pdf](http://www.dfdl.com/images/stories/IAB_2014v1_2014-05-15.pdf).

<sup>10</sup> For additional information regarding the treatment of confidential information in criminal antitrust matters, see Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement, *Discussion on How to Define Confidential Information* at 2-7 (Oct. 29, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310us-confidentialinfo.pdf>.

<sup>11</sup> See DOJ Press Release (July 26, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/285420.htm](http://www.justice.gov/atr/public/press_releases/2012/285420.htm).

remedies and settlement terms.<sup>12</sup> This close collaboration, aided by confidentiality waivers, enabled the CCB to publicly state that it did not need to craft its own remedies, because those required by the Antitrust Division and the EC would satisfy its concerns and “sufficiently mitigate the potential anti-competitive effects” of the transaction in Canada.<sup>13</sup> Furthermore, the Antitrust Division and EC remedies imposed consistent conditions across jurisdictions.<sup>14</sup> This result also illustrates how cooperation can lead to outcomes that make compliance with remedial obligations easier for parties.<sup>15</sup>

The Antitrust Division and CCB also coordinated closely on their investigations of Louisiana-Pacific Corporation’s proposed acquisition of Ainsworth Lumber Co. Ltd., demonstrating the Best Practices on Cooperation in Merger Investigations that the agencies issued with the FTC this past March.<sup>16</sup> Both Louisiana-Pacific and Ainsworth produce and sell a manufactured wood product (oriented strand board) that is used in the construction and remodeling of homes. After the parties signed waivers, the Antitrust Division and CCB immediately began coordinating their efforts. For instance, the agencies conducted some joint witness interviews, CCB attorneys attended some of the party depositions that the Antitrust

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<sup>12</sup> For more information on the extent of cooperation in *UTC-Goodrich*, see International Competition Network Tele-seminar, *Practical Aspects of International Cooperation in Merger Cases: Assessment & Remedies* at 4-13, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc940.pdf>.

<sup>13</sup> See CCB Press Release (July 26, 2012), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

<sup>14</sup> See Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement, *Remedies in Cross-Border Merger Cases* at 5 (Oct. 29, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310merger-remediesus.pdf>.

<sup>15</sup> See Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on Promoting Compliance with Competition Law* at 6 (June 21, 2011), available at <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106complaineus.pdf>.

<sup>16</sup> A copy of these best practices is available at [http://www.justice.gov/atr/public/press\\_releases/2014/304654.pdf](http://www.justice.gov/atr/public/press_releases/2014/304654.pdf).

Division conducted (pursuant to waivers), and the agencies' attorneys and economists shared their respective thinking on theories of anti-competitive harm and analytical approaches to key issues. Last month, the parties abandoned the deal after we and the CCB expressed competitive concerns.<sup>17</sup> While the Antitrust Division and CCB successfully coordinated their efforts on this matter, each agency reached its own independent determination as to how to proceed, as in all matters in which the Antitrust Division cooperates with its foreign counterparts.

Turning to the Antitrust Division's criminal antitrust enforcement program, as former Deputy Assistant Attorney General (DAAG) Scott Hammond explained last fall, the Division has cooperated extensively in recent years with the Japanese Fair Trade Commission (JFTC) on investigations and prosecutions of Japanese companies and executives accused of fixing prices for auto parts installed in U.S. cars, including seat belts, air bags and steering wheels. The JFTC has substantially assisted the Antitrust Division in its investigation, which has thus far resulted in 24 individuals and 27 companies agreeing to plead guilty and more than \$2 billion in criminal fines.<sup>18</sup> Former DAAG Hammond noted that "[w]e are grateful for [the JFTC's] assistance [in this investigation] as it has benefitted both Japanese and American businesses and consumers."<sup>19</sup>

We also engage in important international cooperation beyond the case-specific context. We have a number of bilateral cooperation agreements where the U.S. government or U.S. antitrust agencies are parties. For example, in 2011, the DOJ and the FTC entered a memorandum of understanding (MOU) with the three agencies that enforce the Chinese anti-

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<sup>17</sup> See DOJ Press Release (May 14, 2014), *available at* <http://www.justice.gov/opa/pr/2014/May/14-at-512.html>.

<sup>18</sup> See DOJ Press Release (June 5, 2014), *available at* [http://www.justice.gov/atr/public/press\\_releases/2014/306344.htm](http://www.justice.gov/atr/public/press_releases/2014/306344.htm).

<sup>19</sup> Remarks of former Deputy Assistant Attorney General of the Antitrust Division's Criminal Program, Scott D. Hammond, at Auto Parts Press Conference (Sept. 26, 2013), *available at* <http://www.justice.gov/iso/opa/atr/speeches/2013/at-speech-130926.html>.



monopoly law,<sup>20</sup> as well as an MOU with the Indian competition agencies in 2012.<sup>21</sup> We had our second annual bilateral consultation with the Chinese anti-monopoly law agencies in Beijing this past January, and planning is well underway for the third later this year in Washington. This past November, the U.S. agencies had their first official bilateral consultation with the Indian agencies.

We and the FTC have had valuable bilateral discussions with these and other counterparts about a number of issues, such as the importance of sound economics-based analysis, transparency, and procedural fairness, which are in the interest of our consumers and theirs. I can tell you that such bilateral discussions are quite candid, and where we have concerns we raise them with our international counterparts, while still respecting appropriate confidentiality regarding such enforcer-to-enforcer exchanges.

Multilateral fora play a key role, too, with respect to promoting cooperation as well as convergence. Organizations such as the ICN and the OECD's Competition Committee have for years provided the enforcement community with platforms for valuable interaction. These organizations have encouraged the development of "pick up the phone" relationships so that agencies regularly contact each other for information and support.<sup>22</sup>

These and other organizations are making important inroads to promote best practices that will encourage effective, fair, transparent and consistent antitrust review procedures throughout the international antitrust community. Such work is exemplified by various materials produced by ICN – including the Recommended Practices on Merger Notification and Procedure

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<sup>20</sup> See US-China Antitrust MOU, *available at* <http://www.justice.gov/atr/public/international/docs/273310.pdf>.

<sup>21</sup> See US-India Antitrust MOU, *available at* <http://www.justice.gov/atr/public/international/docs/287457a.pdf>.

<sup>22</sup> See International Competition Network, *ICN Report on OECD/ICN Questionnaire on International Enforcement Cooperation at 10*, *available at* <http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf>.

and newly adopted Recommended Practices for Predatory Pricing Analysis Pursuant to Unilateral Conduct Laws – as well OECD, including the 1995 Recommendation on International Co-operation, which is in the process of being updated in OECD’s Working Party 3, a group chaired by Assistant Attorney General William Baer.

#### **IV. Opportunities for Constructive International Engagement by Counsel**

I would like to now take a few minutes to offer several steps that counsel can take to help promote convergence and sound antitrust enforcement in the international context.

*Encourage your clients to help facilitate international cooperation.* Have them execute our model waiver early in the investigation. Parties benefit from signing such waivers because it allows antitrust enforcers to share information and coordinate their efforts, which, in turn, generally will result in lower regulatory costs for the parties and lead to a more efficient and timely review of their transactions. Engage openly with us about the anticipated timing of your pre-merger notification filings. In our experience, this is a more constructive approach for parties than trying to apply timing pressure on an antitrust agency by asserting that approvals are imminent in other reviewing jurisdictions. Remember, agencies do not operate in information silos; even when parties decline to provide waivers, agencies can still discuss the timing and theories of their common investigations.

We are also interested in hearing about your clients’ experiences generally on substance and process with antitrust enforcers in other jurisdictions, whether positive, negative, or neutral.<sup>23</sup> Hearing a perspective from the ground helps inform us as to potentially worthwhile

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<sup>23</sup> Experiences in other jurisdictions and views on how the Antitrust Division can promote a culture of cooperation internationally should be addressed to Edward Hand, Chief of the Foreign Commerce Section, or Lynda Marshall, Assistant Chief of the Foreign Commerce Section.

subjects for future technical exchanges or bilateral consultations with our international counterparts, and may provide insight as to the impact of our prior cooperation efforts.

The Antitrust Division wants to learn about the bar and business community's experiences working with us, too. For example, tell us what you think of our model waiver, the transparency of our engagement, and share concerns or suggestions about coordinating the timing of review of multi-jurisdictional investigations.<sup>24</sup>

***Promote international norms through your advocacy and volunteer efforts.*** I encourage counsel to keep in mind that one way to promote sound antitrust enforcement internationally is for counsel to make credible arguments founded on economics principles, whether that advocacy is on behalf of a party in favor of a merger or a competitor opposed to the transaction. Such efforts help send a consistent message, particularly to newer agencies, about the types of sound analysis that are respected in the international antitrust community.

There are also volunteer opportunities. For example, the input we routinely receive from U.S. non-government advisors significantly enhances the quality of ICN work product, and the Antitrust Division encourages U.S. practitioners to consider serving in that capacity.<sup>25</sup> Also consider serving as part of the faculty for training programs provided to judges, enforcers, or practitioners in other jurisdictions.

***Emphasize the importance of compliance.*** Albert Einstein is credited with saying: "Intellectuals solve problems; geniuses prevent them." Given that we live in a global economy where companies are increasingly operating and competing in multiple countries, it is critical that companies have in place robust internal antitrust compliance programs that provide their employees with the guidance and resources necessary to ensure that they comply with all

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<sup>24</sup> Comments on the DOJ-FTC Model Waiver of Confidentiality should be addressed to Patty Brink.

<sup>25</sup> Those interested in becoming involved in ICN should contact Edward Hand.

applicable competition laws when performing their duties. An effective compliance program can help a company avoid violating the antitrust laws. By helping to prevent such violations, internal compliance programs can also help protect companies and their executives from the range of consequences that can flow from antitrust violations, including federal criminal and civil penalties, prison sentences, private lawsuits, treble damages, and enforcement actions in jurisdictions outside the United States.<sup>26</sup> In-house attorneys, like many of you here today, can play an active and important role in developing and implementing their company's internal antitrust compliance programs, and ensuring that they reflect the current laws of the countries in which their companies operate and compete.

## **V. Conclusion**

We live and work in a global economy where antitrust problems often cross borders. As a consequence, the Antitrust Division's ability to accomplish its mission of protecting competition and consumers requires it to forge strong and cooperative relationships with its international counterparts. The Antitrust Division continues to strengthen its bonds with long-time enforcement partners and to forge new ties with antitrust authorities in emerging markets. Such cooperation and regular engagement with our international counterparts benefits not only the enforcement community, but also the international business community that is increasingly subject to the laws and regulations of a growing number of antitrust enforcement regimes.

The Antitrust Division, working together with the FTC, has made significant strides to make engaging in international cooperation easier and more efficient, as evidenced by our recent development of a joint model waiver. In the months and years ahead, we will continue to look

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<sup>26</sup> See Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, *Promoting Compliance with Competition Law* at 196-98 (Aug. 30, 2012), available at <http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf>.

for ways to further streamline and improve our processes, as well as to constructively engage bilaterally and multilaterally with our international counterparts. We welcome the input and views of the business community and bar.

Thank you very much for your time this morning. I am happy to answer questions.