



# **DEPARTMENT OF JUSTICE**

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## **The Many Facets of International Cooperation at the Antitrust Division**

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**Remarks as Prepared for  
International Bar Association  
Midyear Conference**

**Madrid, Spain**

**June 15, 2012**

## **I. Introduction**

It is a great honor to be invited to speak to you this morning, and I am deeply grateful for the opportunity.

In talking with you this morning about “The Many Facets of International Cooperation at the Antitrust Division,” I would like to focus on what we, at the Antitrust Division, have been seeking to do internationally over the past three years; why we have sought to intensify the international facets of our work; and how this fits with what is occurring around the world.

The original impetus for many of the early international antitrust initiatives, whether as far back as the Havana Convention in 1948<sup>1</sup> or the establishment of the International Competition Network (ICN) in 2001,<sup>2</sup> was, of course, seeking convergence, whether hard or soft convergence, to a “standard” norm, whether substantive or procedural. Convergence and cooperation often go hand in hand, although, as I will explain this morning, there can be very effective cooperation without there necessarily also being convergence. But what both cooperation and convergence require is good – real – communication.

Real communication, I will suggest this morning, lies at the heart of meaningful international cooperation. Communication between competition agencies is, increasingly, taking place in real time, across many different time zones.

Real communication can be challenging, and not only because of different time zones. It needs to be a multi-faceted endeavor involving both actions and words. In the

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<sup>1</sup> *United Nations Conference on Trade and Employment, Final Act and Related Documents* (Apr. 1948), available at [http://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/havana_e.pdf).

<sup>2</sup> *Memorandum on the Establishment and Operation of the International Competition Network* (Oct. 25, 2001), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf>.

area of international cooperation, it involves dialogue conducted in an open way, acknowledgment of the legal, cultural and economic differences of other jurisdictions, and a willingness to listen to what other people are actually saying as opposed to maybe what you want them to be saying. It may also involve the ability to agree – respectfully – to disagree. It involves building current relationships and making new ones, and incorporating those relationships into the enforcement work we do on a daily basis. It takes time and effort, but it is time and effort well-spent. The results of real communication among competition authorities around the world – a deeper sense of trust, and open and meaningful dialogue – benefit all of us: the competition agencies; the parties who appear before us; and the consumers we serve.

Today, I want to describe for you what international cooperation means from a practical perspective. I want to provide you with examples of how intensified international cooperation, what we increasingly refer to as “real-time” cooperation, has helped the Antitrust Division in its enforcement efforts and enriched our multilateral and bilateral relationships. Acting Assistant Attorney General Joe Wayland has been explicit that he places importance on the international dimension of the Antitrust Division’s mission and that it will continue to be a high priority under his leadership. Accordingly, “international” is part of our strategic and our day to day thinking at the Antitrust Division, and I hope it is part of yours as well.

## **II. Guiding Principles for International Cooperation**

One of our key objectives at the Antitrust Division is to intensify our cooperative relationships and interactions with competition agencies around the world, and to do so

not just with our long-time colleagues, but also with newer competition agencies.<sup>3</sup> We encourage Antitrust Division staff constantly to be, “mindful of the international implications of our [enforcement] actions right from the very start of an investigation through to the remedial phase.”<sup>4</sup>

In this context we have sought to articulate a new international lexicon of seven guiding principles for international cooperation with competition agencies around the world. Three of these principles were first articulated 12 years ago by the International Competition Policy Advisory Committee (ICPAC)<sup>5</sup>:

- Increased *transparency* and accountability of government actions;
- Expanded and deeper *cooperation* between U.S. and overseas competition enforcement authorities; and
- Greater *convergence* of competition regimes.

To these principles, we have added four more:

- *Mindfulness* of other jurisdictions’ interests;
- *Respect* for other jurisdictions’ legal, political and economic cultures;
- *Trust* in each other’s actions; and

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<sup>3</sup> 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>; Sharis A. Pozen, *Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers* (Apr. 23, 2012), available at <http://www.justice.gov/atr/public/speeches/282515.pdf>; Rachel Brandenburger, *Intensification of International Cooperation: The Antitrust Division’s Recent Efforts* (Feb. 17, 2012), available at <http://www.justice.gov/atr/public/speeches/281609.pdf>.

<sup>4</sup> Rachel Brandenburger, *International Competition Policy and Practice: New Perspectives?* (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>; Rachel Brandenburger & Randy Tritell, *Global Antitrust Policies: How Wide is the Gap?*, Concurrences No 1-2012, available at <http://www.justice.gov/atr/public/articles/282930.pdf>; see also, e.g., Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm>.

<sup>5</sup> International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* (Feb. 2000), available at <http://www.justice.gov/atr/icpac/finalreport.html>.

- Ongoing *dialogue* on all aspects of international competition policy and enforcement.<sup>6</sup>

While none of these guiding principles is completely new to international competition enforcement, we believe that, in view of the globalization of competition law and enforcement and the vastly increased number of competition agencies around the world, it will be increasingly important to place a high priority on each of these guiding principles in the future, and perhaps none more so than dialogue or real communication.

### **III. Globalization and Developments in International Cooperation**

International competition law and enforcement do not, of course, exist in a vacuum. They reflect the increasingly connected and globalized world in which we all live. Anyone who walks down an average city street in Europe, North America, China, Japan or elsewhere today and counts the number of people talking into or typing on their smart phones cannot deny one indisputable fact of modern life – we all communicate a great deal more often and with a greater number of people than ever before.

This is true among competition agencies as well. Indeed, the number of competition agencies around the world has increased exponentially, from 20 or so in 1990 to roughly 130 today. The proliferation of competition regimes – and agencies – is attributable to a number of political and economic changes around the world.<sup>7</sup> They have

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<sup>6</sup> See 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, *Challenges and Opportunities in International Competition Policy*, (Nov. 9, 2010), available at <http://www.justice.gov/atr/public/speeches/272860.pdf>; Rachel Brandenburger, *International Competition Policy and Practice: New Perspectives?*, (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>.

<sup>7</sup> By way of illustration, although the United States' two largest trading partners remain the EU and Canada, China and Mexico currently vie for third place. China has become the world's leading exporter, a major change from just over 10 years ago, when China was "merely" the sixth largest exporter. Also, between 2000 and 2011, U.S. trade in goods with Brazil increased by nearly 150%, U.S. trade in goods with Africa more than doubled, and U.S. trade in goods with India more than tripled.

resulted in the globalization of competition law and enforcement, where the BRICS nations (Brazil, Russia, India, China and South Africa) and others now have significant involvement.

It is not only the amount and extent of communication between competition agencies that is proliferating: the instruments that facilitate that communication are also changing and increasing.

### ***Bilateral Relationships***

Bilateral relationships are an important facet of international cooperation. The Antitrust Division's bilateral arrangements take multiple forms, ranging from mutual legal assistance treaties (MLATs), which have the force of law, to cooperation agreements, to memoranda of understanding (MOUs). We also have agreed to best practices and guidance documents with some agencies.

The United States is party to approximately 70 MLATs, which are treaties of general application under which the United States and another country agree to assist one another in criminal law enforcement matters, generally, though not always, including antitrust matters.<sup>8</sup> The specific provisions of the treaties vary, but they generally provide for such assistance as the conduct of searches, taking of witness testimony, and service of documents by one jurisdiction in aid of the other.

In addition, the United States, or, in some cases, the Antitrust Division and the Federal Trade Commission (FTC), is a party to "soft" bilateral antitrust cooperation agreements with Australia, Brazil, Canada, Chile, the European Union, Germany, Israel,

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<sup>8</sup> The MLAT with Germany is unique in that it also provides for U.S. assistance to Germany in administrative cartel matters – a product itself of long-term U.S.-German cooperation. The United States also is a party to an antitrust-specific mutual legal assistance agreement with Australia, an agreement authorized by domestic legislation. *See* International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 et seq.

Japan and Mexico. The Antitrust Division and the FTC have also recently entered into MOUs with the competition authorities of China and Russia, and we are in the process of finalizing an MOU with the Indian competition authorities.<sup>9</sup> These arrangements set out frameworks for bilateral cooperation.

Bilateral cooperation can also be facilitated by best practices agreed between competition agencies. For example, the Antitrust Division, the FTC and the European Commission's (EC's) Directorate General for Competition (DG Comp) have followed a set of Best Practices on Cooperation in Merger Investigations since 2002.<sup>10</sup> Last October, following a year of dialogue among the three agencies and review of our merger cooperation experience since the best practices were adopted in 2002, the best practices were revised and reissued. The revised best practices provide an up-to-date advisory framework for interagency cooperation when one of the U.S. antitrust agencies and DG Comp review the same merger.<sup>11</sup> Our best practices provide guidance to firms about how to work with the agencies to coordinate and facilitate the reviews of their proposed transactions; recognize the globalization of competition enforcement and that transactions reviewed by authorities in the United States and Europe may also be subject to antitrust review in other countries; and place greater emphasis on coordination among the U.S. agencies and DG Comp at key stages of their investigations, including the final stage when agencies consider potential remedies to preserve competition.

The revised best practices illustrate the importance of international cooperation. They seek to promote fully-informed decision-making by facilitating the exchange of

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<sup>9</sup> See <http://www.justice.gov/atr/public/international/int-arrangements.html>.

<sup>10</sup> Available at <http://www.justice.gov/atr/public/international/docs/200405.htm>.

<sup>11</sup> Available at <http://www.justice.gov/atr/public/international/docs/276276.pdf>.

information between the agencies; minimize the risk of divergent outcomes; enhance the efficiency of investigations; reduce burdens on merging parties and third parties; and increase the overall transparency of the merger review process.

Less well known, perhaps, than our revised merger best practices with DG Comp is the joint guidance on case cooperation that the Antitrust Division, the FTC and the Chinese Ministry of Commerce (MOFCOM) issued in November 2011.<sup>12</sup> The guidance provides a framework for interagency cooperation when MOFCOM and one of the U.S. antitrust agencies are reviewing the same merger. The guidance recognizes that case cooperation between the investigating agencies may help improve the efficiency of their investigations, and thereby maintain competition in their jurisdictions. In particular, the guidance provides that, when MOFCOM and the relevant U.S. antitrust agency each finds it appropriate and consistent with confidentiality obligations under their respective laws, they may decide to exchange information regarding a merger they both are investigating, such as the timing of their respective investigations and technical aspects of cases, for example, definition of relevant market(s), evaluation of competitive effects, theories of competitive harm, economic analysis, and remedies.<sup>13</sup>

The Antitrust Division nurtures each and every one of our bilateral relationships. Some of them are long-standing. For instance, last month in Tokyo, the Antitrust Division, including Acting Assistant Attorney General Joe Wayland, Deputy Assistant Attorney General Scott Hammond and I, and representatives from the FTC held our 32<sup>nd</sup> annual bilateral with the Japanese Fair Trade Commission. Other relationships, such as those with the Chinese and the Indian competition authorities, are much newer. We value

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<sup>12</sup> Available at <http://www.justice.gov/atr/public/international/docs/277772.pdf>.

<sup>13</sup> *Id.*

all of them, and we strive to build the open and respectful relationships that make for meaningful communication with our counterparts around the world.

### ***Multilateral Organizations & Regional Networks***

Another basic facet of international cooperation is the communication that takes place between competition agencies in a variety of multilateral organizations where competition agencies meet, in person or virtually, to share their ideas and experiences and to work together to discuss and build consensus on competition law, practice and enforcement. The Antitrust Division supports these efforts and takes a leadership role in various multilateral organizations.

### ***Multilateral Organizations***

By way of illustration, and because I have just come from meetings of both these organizations in Paris earlier this week, I will focus my remarks today on the Organization for Economic Cooperation and Development (OECD) and ICN, although the Antitrust Division also participates in other multilateral organizations, including the United Nations Conference on Trade and Development (UNCTAD)<sup>14</sup> and the Asia Pacific Economic Cooperation (APEC).<sup>15</sup>

*OECD* – Organization for Economic Cooperation and Development. The Competition Committee of OECD has existed in one form or another for more than 50 years. This organization, which currently consists of 34 developed countries and its

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<sup>14</sup> Geneva-based UNCTAD has nearly 200 jurisdictions as members. In the 1970s, UNCTAD was the forum for lengthy negotiations (in which the Antitrust Division played a leading role), that led to the United Nations General Assembly's adoption of the Set of Principles of Rules, a non-binding multilateral code of conduct for the prevention of private anticompetitive behavior. The Set of Multilaterally Agreed Principles and Rules for Control of Restrictive Business Practices, *available at* <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>.

<sup>15</sup> APEC is a significant contributor to multilateral competition work. APEC is an organization of 21 member economies in the Asia-Pacific region, including the United States. It was established in 1989 to facilitate economic growth, cooperation, trade, and investment in the regions; its Competition Policy and Law Group (CPLG) was created in 1996.

many observers, and ad hoc observers, (including all of the BRICS nations), discusses and formulates consensus views on a wide range of public policy issues, including competition. The OECD recently has expanded its membership to include Chile, Estonia, Israel and Slovenia, so that more countries contribute to and benefit from the OECD's competition work. OECD also hosts an annual Global Forum on Competition aimed primarily at the concerns of developing countries, at which close to 100 competition agencies participated in February 2012.

The Antitrust Division has chaired the OECD Competition Committee's Working Party 3 on Enforcement and Cooperation for many years and is an active participant in the OECD's meetings in Paris. Recent topics discussed among the OECD's members have ranged widely, including competition in hospital services, unilateral disclosure of information, competition and commodity price volatility, cooperation in anti-cartel enforcement, antitrust in the digital economy and transparency and procedural fairness. The proceedings of the three roundtables on transparency and procedural fairness, including summaries of the discussions and an introduction by then-Acting Assistant Attorney General Sharis Pozen, were published this spring as a special OECD publication.<sup>16</sup> This booklet will serve as a useful baseline for discussion as the global procedural fairness conversation moves forward in various fora around the world.<sup>17</sup>

The Competition Committee has recently adopted a two-year work plan in relation to its forthcoming work. Priority topics will be the assessment of agency

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<sup>16</sup> Procedural Fairness and Transparency – 2012 (Apr. 30, 2012), *available at* [http://www.oecd.org/document/20/0,3746,en\\_2649\\_37463\\_50235668\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/20/0,3746,en_2649_37463_50235668_1_1_1_37463,00.html).

<sup>17</sup> Transparency and procedural fairness issues have also been addressed in other multilateral settings. The ICN Recommended Practices on Merger Notification and Procedural include many practices that deal with transparency and procedural fairness concerns, the competition policy working group of the APEC recently held a roundtable on these issues, and the draft Competition Policy chapter of the proposed Trans-Pacific Partnership Free Trade Agreement, which currently involves nine Pacific Rim jurisdictions, contains numerous transparency and procedural fairness-related provisions.

performance and, very relevant to my talk today, international cooperation. Earlier this week in Paris, Competition Committee members started the international cooperation project with a discussion of a stocktaking of previous work in this area and a proposed survey of the existing cooperation landscape, including our cooperation tools. The Antitrust Division intends to continue to be an active participant in this work.

*ICN* – The International Competition Network is a working collaboration of more than 120 competition agencies devoted to dialogue and cooperation on common competition law and policy issues. It was launched in 2001, in part, as a result of the Department of Justice’s International Competition Policy Advisory Committee (or ICPAC), an independent panel of legal, economic and business experts brought together by then-Assistant Attorney General Joel Klein to address the global antitrust challenges of the 21st Century.

The Antitrust Division is a founding member of the ICN and serves on the steering group that guides the direction of the ICN’s work. Since April this year, the Antitrust Division co-chairs the ICN’s Cartel Working Group with the German and Japanese competition authorities.<sup>18</sup> From 2001 to 2012, the Antitrust Division was a co-chair of the Merger Working Group.

The Merger Working Group encourages best practices in merger review with the goal of increasing effective agency merger review, facilitating convergence of the law in merger analysis, and reducing the public and private costs associated with multijurisdictional merger review. Over the years, the Merger Working Group has formulated recommended practices on both merger notification and review and merger analysis, all of which were subsequently approved by the ICN membership.

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

The Cartel Working Group's mandate is "to address the challenges of anti-cartel enforcement, both domestically and internationally, across the entire range of ICN members," with a focus on battling cartels involved in price-fixing, market sharing and market allocations.<sup>19</sup>

Like OECD's Competition Committee, ICN is also undertaking a project on international enforcement cooperation.<sup>20</sup> The Antitrust Division and the Turkish Competition Authority, under the authority of the ICN Steering Group, are co-chairing this project to evaluate the ICN's work and future goals with respect to international enforcement cooperation. This is an important part of ICN's work for its second decade. It is intended to be a cross-cutting project (i.e., to facilitate work among and between the three ICN enforcement working groups rather than to be the project of any one of them) and to determine what practical guidance and other actions are appropriate or necessary for enhancing international cooperation in the future. The project was approved by the ICN membership at the ICN annual meeting in April and implementation is underway. The intention is that ICN and OECD will liaise closely to ensure their respective projects on international cooperation are complementary.

### *Regional Networks*

Regional networks are another facet of international cooperation. They provide an avenue for competition agencies to pursue closer ties with their neighbors, creating regional groupings of authorities from jurisdictions with close economic ties, similar legal cultures and significant overlaps in the matters they investigate. The Antitrust Division and the FTC are members of the Latin American Competition Forum (LACF)

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<sup>19</sup> See <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel.aspx>.

<sup>20</sup> ICN Steering Group, International Enforcement Cooperation Project (Mar. 2012) available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>.

set up in April 2003.<sup>21</sup> The forum has served as a meeting point for senior Latin American and OECD antitrust enforcers. The Antitrust Division has welcomed the opportunity provided by LACF to share its experience with its sister agencies throughout the western hemisphere, and to strengthen ties with senior officials of the member agencies.

#### **IV. Multilateral Contributions to International Cooperation**

Multilateral organizations such as OECD, ICN and others provide opportunities for both well-established and newer agencies to share their experiences in merger review, cartel investigations and conduct investigations. This dialogue has led to the development of international best practices, guiding principles and other resources in these areas, in particular, through the OECD's Competition Committee and the ICN.

The 1995 OECD council recommendation on antitrust enforcement cooperation, (OECD cooperation recommendation),<sup>22</sup> has long been a core document of international cooperation. It provides important general guidance for member countries to follow when an investigation or proceeding may affect important interests in another member country, including providing notice of the investigation or proceeding, exchanging information with other countries affected, and coordinating actions when more than one country proceeds against an anticompetitive practice. In addition, the OECD cooperation recommendation provides guidance for consultation among countries when one country's action may have an effect in another, or where the activities of an enterprise located in one country have an adverse competitive impact in another.

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<sup>21</sup> See [http://www.oecd.org/document/54/0,3746,en\\_21571361\\_49185959\\_49203318\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/54/0,3746,en_21571361_49185959_49203318_1_1_1_1.00.html).

<sup>22</sup> Available at <http://www.oecd.org/dataoecd/60/42/21570317.pdf>.

With regard to mergers specifically, both the OECD and the ICN provide guidance for international cooperation. The ICN's Guiding Principles<sup>23</sup> and recommended practices on merger notification and review procedures,<sup>24</sup> and its recommended practices on merger analysis,<sup>25</sup> advocate that competition agencies seek to coordinate their review of mergers that may raise competitive issues of common concern, with the goal of fostering efficient merger review, effective merger enforcement and consistent outcomes in the coordinating jurisdictions, as well as reduction of duplication and unnecessary burden for parties and agencies.

Both the ICN's recommended practices and the OECD's 2005 council recommendation on merger review,<sup>26</sup> which was reviewed earlier this week at OECD, encourage jurisdictions reviewing a merger to avoid inconsistencies with remedies sought in other reviewing jurisdictions, and to facilitate cooperation through national legislation as well as formal agreements, memoranda of understanding, or other protocols for coordinating merger reviews. Both also encourage merging parties to facilitate cooperation by granting waivers of confidentiality rights.

In the cartel area, the ICN Cartel Working Group has collected its member agencies' "good practices" in its comprehensive Anti-Cartel Enforcement Manual,<sup>27</sup> which practices include communicating and coordinating, where appropriate, with other relevant competition authorities early in the investigation and on a regular basis, and

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<sup>23</sup> Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>.

<sup>24</sup> Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

<sup>25</sup> Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>.

<sup>26</sup> Available at <http://www.oecd.org/dataoecd/3/41/40537528.pdf>.

<sup>27</sup> Available at <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx>.

requesting waivers of confidentiality from a leniency applicant as early as possible when two agencies have the same applicant.

The OECD provides tools for agency use in cooperation in cartel investigations in the Competition Committee's 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations.<sup>28</sup>

These best practices cover the provision by one competition authority to another of information obtained from a private source, the disclosure of which would normally be prohibited under the disclosing jurisdiction's domestic laws, but which is authorized in certain circumstances by international agreement or domestic law. These best practices suggest safeguards for formal exchanges of information between enforcers, and suggest that jurisdictions should make transparent their laws regarding information exchange.

## **V. Intensified International Cooperation at the Antitrust Division**

### ***International Cooperation Generally***

“Cooperation” is a broad concept in the competition law context. It ranges from capacity-building in the form of seminars and international exchanges or visits by competition experts to and from relatively new agencies – something that the U.S. agencies have done over the past 20 years with many other agencies around the world, to our mutual advantage – to very close working relationships between and among enforcement agencies in analyzing particular competition enforcement cases.

Competition agencies repeatedly find it useful for their experts to talk to one another generally about competitive issues in particular sectors or particular investigations. Valuable cooperation of this sort often can be accomplished solely with a

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<sup>28</sup> Available at <http://www.oecd.org/dataoecd/1/33/35590548.pdf>.

discussion of public information, particularly where one agency has accumulated a great deal of experience in a sector while the other agency is dealing with an issue in that sector for the first time. This sort of cooperation enables the latter agency's experts to move up the learning curve on a particular subject in a short time. It can also be appropriate and useful for agencies to cooperate closely in a particular matter, including exchanging views about evidence, competitive concerns and possible remedies.

To give you an idea of what the work in this facet of our international cooperation endeavors consists of, let me provide you some recent examples.

First, in relation to technical assistance, we continue to participate in this important facet of international cooperation in a focused and prioritized way as our current budgetary constraints require. For example, last month, Antitrust Division staff participated in a workshop for Mexican federal judges about criminal proceedings in cartel matters and also participated in panels at an antitrust conference in Bucharest, sponsored by the Romanian Competition Council. In April, we and the FTC participated in a merger remedies workshop with MOFCOM, and both U.S. antitrust agencies are scheduled to participate in a workshop on intellectual property and antitrust with the National Development and Reform Commission (NDRC) and the State Administration for Industry & Commerce (SAIC) next week. We also have ongoing discussions with our Canadian and Brazilian colleagues on various issues as they apply their relatively new merger regimes.

Assistance can take many forms – formal workshops, videolinks and telephone calls. We discuss substantive antitrust analysis and effective investigative techniques.

We also offer comments on draft laws, rules and guidelines proposed by our counterparts around the world.

This facet of international cooperation does not move in just one direction. We have also sought, and welcome, comments from our international counterparts on our own proposals. For example, the process of revising the U.S. Horizontal Merger Guidelines in 2010 involved public workshops and multiple rounds of public comments.<sup>29</sup> As a part of this process, representatives of four non-U.S. agencies served as expert panelists during our workshops around the United States. There also were informal discussions with other agencies and experts around the world, including meetings in Europe attended by representatives of the U.S. agencies. These consultations afforded the U.S. agencies the benefit of the experiences and insights of non-U.S. jurisdictions from around the world.<sup>30</sup>

To further strengthen our relations with competition agencies outside the United States, the Antitrust Division launched the Visiting International Enforcer Program, or VIEP, last year. Through this program, one of the Antitrust Division's senior career officials spent two weeks working in the EC's DG Comp in November 2011, and the Antitrust Division hosted a DG Comp manager in Washington, D.C. in December 2011. This was the first exchange in the Antitrust Division's new Visiting International Enforcers Program, and further exchanges are planned with DG Comp, and with other

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<sup>29</sup> The U.S. agencies' request for comments, transcripts of the public workshops, draft guidelines issued for public comment, and copies of all public comments are available on the FTC's website at <http://www.ftc.gov/bc/workshops/hmg/index.shtml>. See also U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

<sup>30</sup> For further discussion, see Rachel Brandenburger & Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, 25 *Antitrust* 3 (2011), available at <http://www.justice.gov/atr/public/articles/280478.htm>.

agencies as well. This further facet of our international cooperation efforts is envisioned as “an enduring legacy and recognition of the ever-smaller world in which we live.”<sup>31</sup>

We also enjoy hosting our counterparts and learning from them. For example, the Antitrust Division was very pleased to welcome EC Vice-President Joaquín Almunia as the keynote speaker at the Antitrust Division’s Lewis Bernstein Memorial Lecture, delivered in the Great Hall of the Department of Justice in March this year. As Vice-President Almunia noted in his speech, *Competition Policy for the Post-Crisis Era*, “in today’s global economy, our strengthened cooperation can make competition policy even stronger in our respective jurisdictions.”<sup>32</sup>

### ***International Case Cooperation***

In Fiscal Years 2010 and 2011, for example, the Antitrust Division worked on dozens of investigations with an international dimension, most of which involved cooperation with competition agencies in other jurisdictions. During 2011 alone, we cooperated on merger reviews – often under waivers from parties and third parties – with many non-U.S. competition agencies, including those in Australia, Brazil, Canada, Colombia, the European Union, Germany, Japan, Mexico, South Africa and the United Kingdom. The Antitrust Division also coordinated with many competition agencies on criminal matters, and on some conduct matters, as well.

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<sup>31</sup> Sharis A. Pozen, *Developments at the Antitrust Division & The 2010 Horizontal Merger Guidelines – One Year Later* (Nov. 17, 2011), available at <http://www.justice.gov/atr/public/speeches/277488.pdf>.

<sup>32</sup> Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *Competition Policy for the Post-Crisis Era* (Mar. 30, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/249&format=HTML&aged=0&language=EN&guiLanguage=en>.

The frequency and geographical scope of our international cooperation as regards cases are impressive;<sup>33</sup> but the numbers reveal only a part of the story. In many instances, our investigation-specific cooperation occurs in real time and helps to advance both our investigations and those of our colleagues' around the globe. The working relationships that this facet of our international cooperation work has established at both staff and leadership levels are instrumental in taking communication and cooperation with our counterparts to a new level. As former Acting Assistant Attorney General Sharis Pozen has noted, "all of these efforts are valuable. They . . . lead to more effective and consistent enforcement. The proof is found in many of our recent cases."<sup>34</sup>

I have spoken elsewhere<sup>35</sup> about cases on which we cooperated with non-U.S. competition agencies in the last couple of years. So, today, I am going to mention only our most recent cases in 2012.

*E-books* – In April 2012, the Antitrust Division filed a complaint in federal court that alleges that Apple and five of the largest book publishers in the United States conspired to raise retail e-book prices by ending e-book retailers' freedom to compete on price, resulting in consumers paying millions of dollars more for their e-books. When the Antitrust Division filed its complaint, we also filed a settlement that, if approved by the district court, would resolve the Antitrust Division's challenge with three of the publishers.<sup>36</sup>

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<sup>33</sup> Rachel Brandenburger, *Intensification of International Cooperation: The Antitrust Division's Recent Efforts* (Feb. 17, 2012) available at <http://www.justice.gov/atr/public/speeches/281609.pdf>.

<sup>34</sup> *Remarks as Prepared for Delivery by Acting Assistant Attorney General for the Antitrust Division Sharis A. Pozen at the Brookings Institute* (Apr. 23, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/282517.htm](http://www.justice.gov/atr/public/press_releases/2012/282517.htm).

<sup>35</sup> Rachel Brandenburger, *Intensification of International Cooperation: The Antitrust Division's Recent Efforts*, *supra* n. 33.

<sup>36</sup> Under the proposed settlement agreement Hachette, HarperCollins and Simon & Schuster will terminate their agreements with Apple and other e-books retailers and be prohibited for two years from entering into

*E-books* is a matter in which the Antitrust Division has cooperated closely with the EC in its investigation of anticompetitive conduct in the e-books industry.<sup>37</sup> Both staff and senior officials at the Antitrust Division and DG Comp were in regular contact during the pendency of this investigation. Announcing the filing of the complaint and settlement on April 11, 2012, Attorney General Eric Holder thanked “our partners at the European Commission” for their assistance in this matter.<sup>38</sup> Acting Assistant Attorney General Sharis Pozen called this matter, “a shining example of how far we have come in our cooperation efforts.”<sup>39</sup> Similarly, Vice President Almunia, in describing the “excellent level of cooperation” between our agencies, praised the “positive spirit of collaboration which, in spite of our different systems and traditions, allows us to work together” on the *e-books* matter.<sup>40</sup>

*SEPs* – The Antitrust Division has also recently engaged in international cooperation in investigations involving intellectual property (IP) and standard essential

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new agreements that constrain retailers' ability to offer discounts or other promotions to consumers to encourage the sale of the publishers' e-books. The proposed settlement agreement also will prohibit the settling parties for five years from again conspiring with or sharing competitively sensitive information with their competitors, and will impose a strong antitrust compliance program on the three companies. Also for five years, Hachette, HarperCollins and Simon & Schuster will be forbidden from agreeing to any kind of most favored nation clause (MFN) that could undermine the effectiveness of the settlement agreement

<sup>37</sup> Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-Books Prices* (Apr. 11, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/282133.htm](http://www.justice.gov/atr/public/press_releases/2012/282133.htm). “Apple and four publishers in settlement talks with European Commission,” *Financial Times* (Apr. 13, 2012), available at <http://www.ft.com/cms/s/2/2601d78e-85b4-11e1-90cd-00144feab49a.html#axzz1uals7F5r> (quoting European Commission Vice-President Joaquín Almunia, “I am happy that the very close and productive cooperation between the DOJ and the Commission has benefitted the investigations on both sides of the Atlantic.”)

<sup>38</sup> *Attorney General Eric Holder Speaks at the E-books Press Conference* (Apr. 11, 2012) available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1204111.html>.

<sup>39</sup> *Remarks As Prepared for Delivery by Acting Assistant Attorney General Sharis A. Pozen at the E-Books Press Conference* (Apr. 11, 2012) available at <http://www.justice.gov/atr/public/speeches/282147.htm>.

<sup>40</sup> Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *International Cooperation to Fight Protectionism*, remarks as prepared for the 11<sup>th</sup> Annual Conference of the International Competition Network, Rio de Janeiro (Apr. 18, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/280&type=HTML>.

patents (SEPs). The Antitrust Division investigated the acquisition by Google of Motorola Mobility Holdings Inc., the acquisitions by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (RIM) of certain Nortel Networks Corporation patents and the acquisition by Apple of certain Novell Inc. patents.<sup>41</sup> The Antitrust Division's investigations focused on the standard essential patents that Motorola and Nortel had committed to license to industry participants through their participation in standard-setting organizations (SSOs). Specifically, we examined whether the purchasing companies could use these SEPs to raise rivals' costs or otherwise foreclose competition.

During the investigation of the *Google/Motorola Mobility* transaction, the Antitrust Division cooperated closely with the EC and had discussions with competition agencies in Australia, Canada, Israel and Korea. In connection with the investigation related to the Nortel patent assets, the Antitrust Division worked closely with the Canadian Competition Bureau.<sup>42</sup>

In analyzing the transactions, the Antitrust Division took into account the parties' public statements explaining their respective SEP licensing practices.<sup>43</sup> Ultimately, the

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<sup>41</sup> Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (Feb. 13, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280190.htm](http://www.justice.gov/atr/public/press_releases/2012/280190.htm). The Novell investigation arose from an earlier transaction investigated by the Antitrust Division, 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). In that investigation, the Antitrust Division worked closely with the German Federal Cartel Office, and the two agencies announced their respective decisions on the same day. 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* (Apr. 20, 2011) available at <http://www.justice.gov/atr/public/pressreleases/2011/270086.htm>; Press Release, German Bundeskartellamt, *Bundeskartellamt clears CPTN joint venture for acquisition of Novell patents* (Apr. 20, 2011) available at <http://www.bundeskartellamt.de/wEnglisch/News/press/20110420.php>.

<sup>42</sup> The EC did not review the Nortel patent acquisition.

<sup>43</sup> See *Microsoft's Support for Industry Standards* (Feb. 8, 2012) available at <http://www.microsoft.com/about/legal/en/us/IntellectualProperty/iplicensing/ip2.aspx>; Nov. 11, 2011 letter from Apple to the European Telecommunications Standards Institute, available at <http://www.fosspatents.com/2012/02/newly-discovered-apple-letter-to.html>. See *Letter to IEE from Google*

Antitrust Division determined that the acquisitions were unlikely to substantially lessen competition or foreclose competitors, and so closed the investigations, announcing its decision the same day as the European Commission announced its decision regarding Google/Motorola Mobility.<sup>44</sup>

*Deutsche Börse/NYSE* – The Antitrust Division also cooperated closely with the EC on our respective investigations of the proposed Deutsche Börse/NYSE merger, with frequent contact between investigative staffs and the leadership of the agencies, aided by waivers from the merging parties. Our conversations on this matter lasted for almost a year.

In December 2011, the Antitrust Division announced that we had reached a settlement with the parties resolving our concerns about the effect of the merger on equities trading in the U.S., which was the focus of our investigation, noting that the “open dialogue between the Antitrust Division and the European Commission was very effective and allowed each agency to conduct its respective investigation while mindful

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dated Feb. 8, 2012, available at:

[http://static.googleusercontent.com/external\\_content/untrusted\\_dlcp/www.google.com/en/us/press/motorola/pdf/sso-letter.pdf](http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/press/motorola/pdf/sso-letter.pdf).

<sup>44</sup> At the time the Antitrust Division closed its investigation, it noted that, “In light of the importance of this industry to consumers and the complex issues raised by the intersection of the intellectual property rights and antitrust law at issue here, as well as uncertainty as to the exercise of the acquired rights, the Antitrust Division continues to monitor the use of SEPs in the wireless device industry, particularly in the smartphone and computer tablet markets. The Antitrust Division will not hesitate to take appropriate enforcement action to stop any anticompetitive use of SEP rights.” U.S. Dep’t of Justice, Press Release, *Statement of the Department of Justice’s Antitrust Division on its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd.* (Feb. 13, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280190.htm](http://www.justice.gov/atr/public/press_releases/2012/280190.htm). Joaquín Almunia, European Commission Vice President in charge of competition policy, similarly said: “We have approved the acquisition of Motorola Mobility by Google because, upon careful examination, this transaction does not itself raise competition issues. Of course, the Commission will continue to keep a close eye on the behaviour of all market players in the sector, particularly the increasingly strategic use of patents.” European Commission, Press Release, *Mergers: Commission Approves Acquisition of Motorola Mobility by Google*, (Feb. 13, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/129>.

of ongoing work and developments in the other jurisdiction.”<sup>45</sup> On the same day, the EC said, “we have had regular and constructive dialogue with the DOJ throughout our respective procedures” and noted, “the markets that the DOJ is examining in its own jurisdiction, namely in the area of U.S. equities, are different to those where the Commission has raised concerns, namely European financial derivatives.”<sup>46</sup> In February 2012, the EC prohibited the merger.<sup>47</sup> The differing conclusions of the two agencies resulted from differences in the markets in the respective jurisdictions. But, while the outcome was different, there was no conflict. Indeed, this is an example of how it is useful for agencies to work closely together even when market conditions differ among jurisdictions, so that each agency can understand, and anticipate, the outcome of other agencies’ investigations.

### ***Waivers***

Before I move to international cooperation in cartel investigations, I would like to take a minute to address the important role of waivers in our civil investigations. In many of the cases with international facets that the Antitrust Division investigates, parties provide us with waivers of confidentiality to facilitate our interactions with non-U.S. competition agencies also investigating the same matters. But not all parties have

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<sup>45</sup> Press Release, U.S. Dep’t of Justice, *Justice Department Requires Deutsche Börse to Divest its Interest in Direct Edge in Order to Merger with NYSE Euronext* (Dec. 22, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/278537.htm](http://www.justice.gov/atr/public/press_releases/2011/278537.htm); Press Release, U.S. Dep’t of Justice, *Justice Department Dismisses Antitrust Lawsuit against Deutsche Börse and NYSE Euronext* (Feb. 9, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280066.htm](http://www.justice.gov/atr/public/press_releases/2012/280066.htm).

<sup>46</sup> “U.S. Clearing Deutsche Börse-NYSE Takeover Moves Final Approval to Europe,” Bloomberg, Dec. 22, 2011.

<sup>47</sup> Press Release, European Commission, *Commission blocks proposed merger between Deutsche Börse and NYSE Euronext* (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/94>; Press Release, European Commission, *Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions* (Feb. 1, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/60&format=HTML&aged=0&language=EN&guiLanguage=en>.

supported our cooperative approach and some parties have even tried to leverage one agency's investigation against another's, as former Acting Assistant Attorney General Pozen has put it.<sup>48</sup> At the end of the day, that is the parties' choice. But providing the investigating agencies with waivers early in the investigation and then following through by providing them with copies of filings, white papers, etc. submitted to other agencies, facilitates effective and efficient investigations to the benefit of all concerned.

There is no getting away from the fact that cooperation between competition agencies is now a day to day occurrence, and parties are well advised to take that into account in their dealings with agencies around the world.

### ***International Cooperation Concerning Cartels***

The past two decades have seen a tremendous evolution in anti-cartel antitrust enforcement around the world, and in particular, growth in effective leniency programs. In 1990, only one jurisdiction, the United States, had a leniency program for cartel participants. Today, there are more than 50 jurisdictions with leniency programs, many of them very effective.

As Deputy Assistant Attorney General for Criminal Enforcement Scott Hammond has noted, "leniency programs have led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in Australia, Brazil, Canada, the European Union, Japan, Korea, Poland, the United Kingdom, the United States and other jurisdictions."<sup>49</sup>

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<sup>48</sup> Sharis A. Pozen, *Developments at the Antitrust Division & The 2010 Horizontal Merger Guidelines – One Year Later* (Nov. 17, 2011), available at <http://www.justice.gov/atr/public/speeches/277488.pdf>.

<sup>49</sup> Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades* (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

In addition to the growth of jurisdictions offering a “carrot” (leniency programs) to aid in detecting cartel behavior, more jurisdictions are also employing a “stick” (severe sanctions) to aid in cartel deterrence. The United States, Canada, the European Union and other jurisdictions have increased potential fines over the past two decades and large fines have been imposed against cartel participants. Further, numerous jurisdictions recently have adopted or are considering legislation that will criminalize cartel offenses, including Australia, Chile, the Czech Republic, Greece, Mexico, the Netherlands, New Zealand, Russia, South Africa and the United Kingdom.<sup>50</sup>

The Antitrust Division’s focus on intensified international cooperation can also be seen in the way in which we handle criminal matters. Consideration of a cartel’s potential impact outside the United States and thinking about possible cooperation on these aspects of the investigation is standard practice at the beginning of an international criminal investigation within the Antitrust Division. For example, in the large and ongoing international cartel investigation in auto parts, the Antitrust Division has coordinated with enforcement agencies on three continents that are investigating similar conduct. The Antitrust Division already has obtained total fines of nearly \$750 million in connection with this investigation, surpassing the total amount in criminal fines obtained by the Antitrust Division for all of fiscal year 2011.<sup>51</sup> In addition, the Antitrust Division obtained plea agreements from auto parts company executives who agreed to plead guilty

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<sup>50</sup> For further discussion of these developments, see DAAG Scott Hammond’s *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, *id.*

<sup>51</sup> *Remarks as Prepared for Delivery by Acting Assistant Attorney General Sharis A. Pozen at the Briefing on Department’s Enforcement Action in Auto Parts Industry* (Jan. 30, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/279740.htm](http://www.justice.gov/atr/public/press_releases/2012/279740.htm); Press Release, U.S. Dep’t of Justice, *Yazaki Corp., DENSO Corp., and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies* (Jan. 30, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/279734.htm](http://www.justice.gov/atr/public/press_releases/2012/279734.htm).

and serve prison time in the United States, ranging from 15 months to two years. The two-year sentences would be the longest term of imprisonment imposed on a non-U.S. national voluntarily submitting to U.S. jurisdiction for a Sherman Act antitrust violation. We have cooperated with our antitrust enforcement colleagues in Japan, the European Union and Canada on this matter.<sup>52</sup>

## **VI. Conclusion**

To conclude, international cooperation among competition agencies around the world is on an increasing trajectory. It is no coincidence, for example, that both the OECD and ICN have put international cooperation at the core of their strategic plans and work for the immediate future. It is also for that reason that our international endeavors at the Antitrust Division are becoming ever more multi-faceted. Whether at a policy level or in the course of an investigation, we at the Antitrust Division take into account every day the many international facets of the work we undertake.

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<sup>52</sup> *Id.*