



DEPARTMENT OF JUSTICE

International Cooperation at the Antitrust Division: A View from the Trenches

Patricia Brink
Director of Civil Enforcement
Antitrust Division
U.S. Department of Justice

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Loyola University Chicago
School of Law

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I. Overview

Good afternoon and thank you for the opportunity to be here today. It is a pleasure to be here at Loyola Law's Institute of Consumer Antitrust Studies. One of my roles at the Division is coordinating our case teams' day-to-day interaction and cooperation with our international antitrust enforcement colleagues around the world. Our Assistant Attorney General, Bill Baer, and the Deputy Assistant Attorney General who supervises the Division's international program, Leslie Overton, have recently asked me to take on this role of working on case-related cooperation. Our international counterparts have told us that they value having a "Front Office" contact to discuss specific cases and, as Director of Civil Enforcement, I have a unique overview of all the civil matters throughout the Division. I'd like to talk to you about the Division's cooperation efforts, and in particular, those day-to-day case team interactions, or what I call, "a view from the trenches."

This topic has a growing interest among competition agencies around the world in ensuring that agencies cooperate on common investigations. This in turn has created interest among private parties involved in those investigations as to how this cooperation works. In thinking about how case cooperation has intensified over the last few years, I would compare a discussion of international cooperation today to talking about electronic discovery issues 10 years ago: we all knew that electronic discovery would have a huge impact on antitrust enforcement in the future, but we weren't quite sure what challenges and opportunities would arise. Likewise, while our efforts to work with our international colleagues have increased greatly in the last few years and will continue to be an area of focus, we cannot predict today the extent to which and the many ways in which we will

cooperate in the future. Although we don't have a crystal ball to allow us to see the future, our current efforts toward cooperation will build a strong foundation for those future efforts.

a. Why Cooperate?

First of all, I'd like to talk a bit about why the Antitrust Division and our international counterparts might want to cooperate with one another in the first place. As you all know, business today frequently operates on a transnational basis. As a result of the increasingly globalized nature of business, we at the division more and more often find ourselves reviewing mergers between companies who are based outside of the United States or who have significant business outside of the United States. Likewise, many of our investigations involve worldwide markets, where products compete throughout the globe such that any resolution of competitive issues in a given transaction could well affect the products sold into other countries.

In these situations, the same merger or conduct is likely to be subject to the review by not only the U.S. agencies, but by an increasing number of our counterpart competition authorities in other countries. Indeed, the number of competition agencies around the world has increased exponentially, from 20 or so in 1990 to roughly 130 today. An increasing number of those jurisdictions require pre-merger notification and mandate waiting periods before parties can close a transaction. So it is not surprising that in a recent Organisation for Economic Co-operation and Development (OECD) survey, 21 agencies reported international cooperation with other agencies and the number of cases for which those agencies reported cooperating with another international agencies

rose from roughly 90 in 2007 to 120 in 2011.¹ As seems to be true for all of us in our interconnected world, competition agencies no longer work in silos.

So why should the agencies cooperate? The benefits are significant: first, cooperation increases the efficiency of the overall global enforcement effort by ensuring that investigations and remedies are as consistent, predictable and efficiently- obtained as possible. Second, this increased efficiency from close cooperation reduces uncertainty and expense to firms doing business globally. Cooperation increases the effectiveness of our competition enforcement activities, allowing for better results for consumers and competition. Lastly, cooperation increases agencies' understanding of the competitive process. Exchange of ideas and analysis among competition authorities helps us all to understand competition itself and the best mechanisms for protecting it.² I should point out that international cooperation is nothing new to antitrust agencies – I was able to see the benefits of coordination firsthand a number of years ago when I worked on the enforcement of the Microsoft settlement. The U.S. and European settlements had substantial overlaps in the technology Microsoft was required to license under those settlements. Through an extensive series of meetings and calls with US and European Commission (EC) staff, we were able to ensure that the remedies as drafted and enforced did not conflict.

¹ See Organization for Economic Co-operation and Development Competition Committee, Report on the OECD/ICN Survey on International Enforcement Co-operation (Feb. 12, 2013), available at <http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3%282013%292&docLanguage=En>

² See Joseph F. Wayland, *International Cooperation at the Antitrust Division* (Sept. 14, 2012), available at <http://www.justice.gov/atr/public/speeches/286979.pdf>.

b. What is Cooperation?

All of this, of course, raises the question of what we mean by cooperation. At the division and indeed among competition agencies generally, cooperation takes many forms, and ranges from formal to informal and from broadly policy-oriented to case-specific.

The division's cooperation efforts range from discussions of high-level policy concerns to the sort of day-to-day staff-level cooperation I mentioned before.

On the formal, more policy-oriented side, the division and our sister agency, the Federal Trade Commission (FTC), are both members of, and participate extensively in, a number of multilateral organizations. These include the Competition Committee of the OECD, the International Competition Network (ICN), the United Nations' Conference on Trade and Development (UNCTAD), and the Asia Pacific Economic Cooperation (APEC).

The division and the FTC also have a number of formal bilateral relationships with its international counterparts.³ These arrangements range from mutual legal assistance treaties (MLATs), which have the force of law, to cooperation agreements, to memoranda of understanding, to best practices and guidance documents, like our Best Practices on Cooperation in Merger Investigations followed by the division, FTC, and EC, which we first drafted 20 years ago and which we recently revised.⁴ The division, together with the FTC, also exchanges ideas with its international counterparts in formal

³ The U.S. antitrust agencies' various bilateral cooperation agreements and MOUs can be found on our website at: <http://www.justice.gov/atr/public/international/int-arrangements.html>.

⁴ US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (Oct. 14, 2011), available at <http://www.justice.gov/atr/public/international/docs/276276.pdf>. See also Press Release, U.S. Dep't of Justice, *United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews* (Oct. 14, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/276308.pdf.

workshops and seminars, and engage in technical assistance missions around the world to assist newer agencies just getting started. One example of this is joint training the division, FTC, and EC have provided the Chinese antitrust agencies over the past few years.

Other avenues for cooperation are informal exchanges between staff of various competition agencies. In 2012, I was able to spend two weeks working in the European Commission's Directorate-General for Competition (DG Comp) in Brussels. Also in 2011 and 2012, the Antitrust Division hosted two DG Comp officials and one official of the Japanese Fair Trade Commission at the division. These exchanges have been a fantastic way to get in-depth exposure to the day-to-day workings of another agency. These kinds of exchanges make later cooperation easier because, in antitrust, as well as in many other fields, relationships matter. Gaining increased familiarity with each others' procedures and legal standards, and developing personal relationships with our counterparts in other agencies, is crucial when you have to pick up the phone and discuss difficult issues.

I can attest personally to the increased familiarity and relationship building these exchanges allow. At DG Comp, I gained exposure to people throughout the entire organization. I was privileged to be able to meet with senior management, including the Director-General and Deputy Directors-General. I also got to meet the Chef de Cabinet and a Hearing Officer, whose roles in DG Comp are different than any played by division staff. I also built relationships with the staff of the merger unit where I worked day-to-day. I was able to observe personally a number of different DG Comp procedures and appreciate them first hand, including case team meetings, a merger house meeting, and a

member states advisory meeting. I was even able to participate in calls with the division's own case team on a matter where our two agencies were engaged in cooperation.

The biggest take away from my experience was learning about how the DG Comp works on a day-to-day basis, and realizing that, despite the differences in our systems, we both face similar challenges, including determining policies, prioritizing our enforcement resources, and dealing with other agencies.

My experience was extraordinary, and one we hope to be able to repeat with other division personnel in the future. In the meantime, we will continue our other, less formal interactions. Staff and managers at the division engage on a day-to-day basis in conversations with our international counterparts, whether regarding a specific industry and discussing publicly available information, or regarding particular cases, with the benefit of a waiver by the parties of the confidentiality provisions that normally protect their information from disclosure by the division. These types of day-to-day contacts are important, particularly in times of constrained resources where travel is increasingly limited.

II. Day-To-Day Cooperation

The division engages in cooperation that is not case specific through staff-to-staff informal discussions with our international counterparts. This kind of cooperation occurs frequently, can be done with exchange of purely public information, and is particularly helpful 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 kind of cooperation enables agencies to move up the learning curve on a particular subject in a

short time. We also provide verbal comments on draft laws, rules, and guidelines proposed by our counterparts around the world, and have also sought, and welcome, comments from our international counterparts on our own proposals. Indeed, when we and the FTC revised our Horizontal Merger Guidelines in 2010, we engaged in consultations with agencies and experts around the world. This kind of staff-to-staff interaction, although not tied to a particular case, not only fosters relationships and information sharing, but can also lead to increased convergence in the substantive analysis of competition issues. Indeed, we have seen great substantive convergence over the past decade, in particular with regard to the way competition agencies approach merger analysis and cartels.

In addition to these exchanges, the division also on a regular basis engages in cooperation on specific cases. Indeed, one of the first things that we consider when we open an investigation is whether there are international implications. Typically, staff will ask the parties to a transaction if they expect to file in other countries and will also review the merger agreements, which frequently list the notifications required to be filed.

In any given year, the division works on dozens of investigations with an international dimension, most of which involve cooperation with competition agencies in other jurisdictions. The extent of cooperation on a particular case or investigation depends on parties' willingness to allow the agencies to exchange information. The Hart-Scott-Rodino (HSR) Act, which governs the US agencies' merger review, prohibits the agencies from disclosing information obtained under the act, which includes not only the parties' confidential business information provided in a filing or in response to a

document request, but also the very fact of filing a notification.⁵ Therefore, in order to enable agencies to have meaningful cooperation, parties can provide the agencies with a waiver of the HSR restrictions. These waivers allow the agencies to share documents, statements, data and information, as well as the agencies' own internal analyses that contain or refer to the parties' materials that would otherwise be foreclosed by the HSR Act. These letters do not waive the parties' rights to protection of confidential information against the direct or indirect disclosure of information to any third party. Even if parties are unwilling to provide a waiver, the division can still share important information, including the status of our investigations, without disclosing whether a filing has been made, and the substantive theories of harm we are investigating. The waivers allow the agencies to coordinate on the timing of our review or decisions, the timing of interviews or document demands and on remedies sought.

We have found that when parties provide waivers early in the investigation and then following through by providing agencies with copies of filings, white papers, etc. submitted to other reviewing agencies, the parties facilitate effective and efficient investigations to the benefit of the agencies and the parties. While waivers were relatively infrequently given even five years ago, Ilene Gotts, a prominent antitrust attorney in private practice who is involved in many international cases, recently called waivers between the U.S. agencies, the EC and Canada "now routine."

I'd like to now give you a few examples of recent cases you may be familiar with in which the division engaged in international cooperation.

Ebooks – In April of 2012, the division filed a lawsuit against Apple and five of the largest book publishers in the United States, alleging that they had conspired to

⁵ Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h). See also *Antitrust Division Manual* at III.D.1.g.iii.

increase the prices consumers pay for e-books.⁶ As of today, all of the five publishers have agreed to settle with the division.⁷ We are continuing to litigate against Apple. Throughout the e-books investigation, we cooperated closely with the European Commission. The Acting Assistant Attorney General at the time of filing, Sharis A. Pozen, said, “This investigation is a shining example of how far we have come in our cooperation efforts.”⁸

Google/Motorola Mobility – Another recent example of successful international cooperation is the Google/Motorola Mobility merger. This transaction involved Google’s acquisition of Motorola’s patent portfolio, including patents that Motorola had committed to license through its participation in certain standard-setting organizations. We cooperated closely with the EC on this matter, and both jurisdictions announced decisions on the same day.⁹ Both agencies decided not to challenge the acquisition of the ownership rights, and both agencies also decided to note the reservation of their ability to

⁶ See 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-Book Prices* (April 11, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-at-457.html>; see also Final Judgment, *United States v. Apple, Inc., et al.*, No. 1:12-cv-02826 (S.D.N.Y. filed Sept. 6, 2012), available at <http://ia601206.us.archive.org/6/items/gov.uscourts.nysd.394628/gov.uscourts.nysd.394628.113.0.pdf.uscourts.nysd.394628.113.0.pdf>.

⁷ Id. See also Press Release, U.S. Dep’t of Justice, *Justice Department Reaches Settlement with MacMillan in E-Books Case* (Feb. 8, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/292578.pdf; Press Release, U.S. Dep’t of Justice, *Justice Department Reaches Settlement with Penguin Group (USA) Inc. in E-Books Case* (Dec. 18, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/290409.pdf.

⁸ Press Release, U.S. Dep’t of Justice, *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>

⁹ See 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) [hereinafter U.S. Google Statement], available at http://www.justice.gov/atr/public/press_releases/2012/280190.pdf; Press Release, European Commission, *Mergers: Commission Approves Acquisition of Motorola Mobility by Google* (Feb. 13, 2012) [hereinafter EC Google Statement], available at http://europa.eu/rapid/press-release_IP-12-858_en.htm.

challenge the future exercise of those rights.¹⁰ In addition to our close cooperation with the EC, we also discussed the acquisition with the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the Israel Antitrust Authority and the Korean Fair Trade Commission during our investigation.

Cisco/Tandberg – The division also cooperated closely with the EC in our review of Cisco Systems Inc.’s acquisition of Tandberg ASA and combination of the two companies’ videoconferencing business. The division and the EC’s investigations were aided by waivers and cooperation from the merging parties and industry participants, and we worked closely from the beginning, through fact-gathering, to the conclusion of our investigations. In deciding to close our investigation, the division took into account the commitments the parties gave the EC.¹¹ We closed our investigation the same day the EC announced its clearance decision.¹²

UTC Goodrich –In June of 2012, the division filed a complaint and consent decree resolving our concerns in the \$18.4 billion merger of UTC and Goodrich, the largest merger in the history of the aircraft industry. As originally proposed, the merger would have led to competitive harm in several critical aircraft components, including generators, engines and engine control systems. The division, the EC, and the Canadian Competition Bureau cooperated closely throughout the course of our respective investigations with frequent contact among the agencies. In addition, the division had

¹⁰ See U.S. Google Statement (Division’s conclusion as to Google/Motorola Mobility “limited to the transfer of ownership rights and not the exercise of those transferred rights”); EC Google Statement (“Today’s decision is without prejudice to potential antitrust problems related to the use of standard essential patents in the market in general.”).

¹¹ Press Release, U.S. Dep’t of Justice, *Justice Department Will Not Challenge Cisco’s Acquisition of Tandberg*, (Mar. 29, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

¹² Id. See also Press Release, European Commission, *Mergers: Commission Clears Cisco’s Proposed Acquisition of Tandberg, Subject to Conditions*, (Mar. 29, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377>.

discussions with other competition agencies, including the Federal Competition Commission in Mexico and the Administrative Council for Economic Defense in Brazil. This close cooperation resulted in a coordinated resolution that will preserve competition in the United States and elsewhere.

This is a very complicated industry, and the transaction had potential impacts in many countries. Our cooperation enabled us to achieve the non-conflicting remedy of divestitures of assets located in the United States, Canada and the United Kingdom.¹³ That cooperation was necessary to ensure that the conditions imposed were consistent across jurisdictions and did not impose conflicting obligations on the merged entity. The same day the United States announced its resolution and consent decree, the European Commission and the Canadian Competition Bureau issued statements regarding their investigations.¹⁴

Cooperation in this matter occurred in each phase, from the beginning of the investigation through to the remedial phase. In the investigation phase, we along with the EC sought, and were granted by the parties, waivers of confidentiality that allowed us to coordinate closely from the very early stages of the investigation. We engaged in regularly scheduled conferences with both the EC and the Canadian Competition Bureau. These calls started out as weekly calls, but moved to almost daily as we proceeded with

¹³ Competitive Impact Statement, *United States v. United Technologies Corp.*, No. 1:12-cv-1230 (D.D.C. filed July 26, 2012), available at <http://www.justice.gov/atr/cases/f285400/285430.pdf>; Press Release, U.S. Dep't of Justice, *Justice Department Requires Divestitures In Order For United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation* (July 26, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/285420.pdf.

¹⁴ Press Release, European Commission, *Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions* (July 26, 2012), available at http://europa.eu/rapid/press-release_IP-12-858_en.htm ; Press Release, Canadian Competition Bureau, *Competition Bureau Statement Regarding United Technology Corporation's Acquisition of Goodrich Corporation* (July 26, 2012), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

the investigation. We also engaged in joint meetings by video conference with the parties in the time leading up to our respective decisions on the matter. Staff also presented briefings on the status of our investigation to visiting EC representatives.

When our respective investigations moved into the decision phase, we worked hard to synchronize the outcomes of our respective investigations. Reviewing UTC's commitments made to the EC helped our staff be confident that the relief we would achieve was not inconsistent and did not impose conflicting obligations on the merged entity. We also required the parties to coordinate all of the divestiture packages and optional supply/transition services agreements to ensure consistency. All of this work culminated in simultaneous announcements by the division and the EC that we had reached settlement in the matter.¹⁵ Joaquín Almunia, European Commission Vice President in charge of competition policy, stated, "In this case concerning a major transaction affecting markets on both sides of the Atlantic, we worked in close and very effective cooperation with the U.S. and Canadian competition authorities."¹⁶

In addition, in an announcement that it was closing its investigation, the Canadian Competition Bureau felt comfortable closing its investigation without seeking separate relief because the relief achieved by the division and the EC mitigated the potential anticompetitive effects in Canada of the merger.¹⁷

Since the announcement of our settlements, we have worked closely with the European Commission to cooperate in the implantation of our two remedies.

¹⁵ Id.

¹⁶ European Commission Press Release, *supra* n. 14.

¹⁷ Canadian Competition Bureau Press Release, *supra* n. 14.

III. Conclusion

In sum, as transactions and conduct are increasingly international in nature, the importance of cooperation is ever more important. When I visited the EC last summer, I was struck by how attorneys and economists from so many different countries were able to work together. I sat in a merger unit in DG Comp – my office was between a woman from Ireland and a man from Spain. Down the hall were people from Denmark, Germany, Portugal and Sweden. I was always impressed by how well they worked together, given their different cultural backgrounds, histories and languages. They told me that they work very hard to develop strong working relationships and to have good communications. The same is true for international competition agencies. Cooperation builds on relationships and communication help agencies get to the right answer, together, and to ensure consistency for parties to our investigations. This coordination and communication was key to the division's successes in the *E-books*, *Google/Motorola* and *UTC/Goodrich* matters and are important priorities in the division's future work.