



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of International Affairs

June 10, 2011

Duncan Lawson
Department for Business Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
London
SW1H 0ET

Re: Consultation concerning the United Kingdom's competition regime

Dear Mr. Lawson:

The staff of the United States Federal Trade Commission (FTC)¹ appreciates the opportunity to comment in response to the Government's consultation paper, "A Competition Regime for Growth: A Consultation on Options for Reform." Our comment focuses on Chapter 12 of the consultation paper, regarding the overseas gateway provisions. In particular, we suggest that the law be amended to allow information sharing with qualified foreign authorities in merger investigations as well as those involving anticompetitive conduct.

The FTC enforces U.S. competition and consumer protection laws. It often cooperates with the Office of Fair Trading (OFT) and the Competition Commission (CC) in matters of concurrent jurisdiction and other matters of mutual interest. We and our UK counterparts have learned how to work together effectively despite differences in our respective statutes and procedures. We believe, however, that current UK law is too restrictive with regard to overseas information sharing, and that changing the law to facilitate the ability of the UK agencies to cooperate more extensively with foreign enforcement authorities such as the FTC would benefit our agencies, our economies, and ultimately our consumers.

The widespread adoption of merger control regimes in Europe and elsewhere and the frequency of mergers with competitive effects in numerous jurisdictions have led to more communication and cooperation among competition enforcement agencies. This has enabled agencies to enhance the coordination of their investigations, which has led to more consistent analyses and a reduction of the risk of conflicting outcomes.

¹ The views expressed are those of the FTC staff and do not necessarily reflect those of the Federal Trade Commission or its Commissioners.

Since 1967, the OECD has recommended that its members cooperate with each other in competition matters. Modern cooperation agreements such as that entered by the European Communities and the United States in 1991 have fostered effective cooperation among reviewing authorities. The U.S. agencies frequently communicate and cooperate with the OFT and the CC under the OECD Recommendation. The OECD Recommendation and bilateral agreements such as the EC-US Agreement are limited, however, by domestic statutes that do not permit the sharing of confidential information. Recognizing the limits this places on effective bi- and multi-lateral cooperation, a number of jurisdictions have enacted laws to facilitate sharing confidential information. Australia did so in 1992 and the United States in 1994, and they subsequently entered into a Mutual Assistance Agreement that permits them to share confidential information. The European Union's adoption of Regulation 1/2003 to modernize its enforcement structure authorizes information sharing among members of the European Competition Network. Even before adoption of Regulation 1, the UK's Competition Act of 1998 authorized its competition authorities to share certain confidential information in matters other than merger investigations.

With but a handful of exceptions, competition authorities have cooperated effectively to avoid enforcement conflict. Merger cases may involve global markets or individual national markets that pose similar competitive concerns. Designing remedies to address competitive concerns in cross-border transactions may require tailoring remedies in one jurisdiction to avoid creating problems in other jurisdictions. To reach compatible decisions, enforcers need to communicate on the basis of the best information available, which often consists of information provided by the parties and is subject to confidentiality constraints.

The competition authorities of the United States, the European Union, and numerous other jurisdictions have concurrently reviewed and cleared or conditioned dozens of mergers, in many instances with the cooperation of the merging parties. Merging firms increasingly recognize the value of cooperation among reviewing agencies and facilitate cooperation by waiving confidentiality protections. However, this is not always the case; for example, parties to a recent transaction that the FTC and the UK authorities reviewed were unwilling to waive or otherwise facilitate cooperation. Removal of the barrier to information sharing in merger cases would facilitate more efficient and effective review by the agencies. Exchange of confidential information is always subject to strict confidentiality commitments by the recipient agency, and the agencies have strong records of ensuring that confidentiality is maintained.

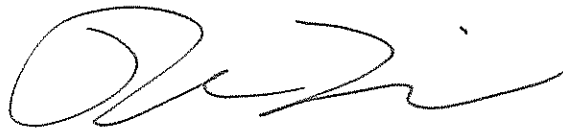
We also suggest that the Government consider relaxing the prohibition contained in Section 243, ¶ 10(b), of the Enterprise Act 2002 to allow use of evidence obtained for other law enforcement purposes ("downstream use"). Specifically, we recommend amending the law to give the UK competition agency discretion to consider and approve requests from foreign agencies to make downstream use of evidence provided by the agency. A disclosure system could be based on a list of overseas public authorities to which information could be disclosed on a discretionary basis in appropriate cases without protracted analysis. Criteria for inclusion on such a list could include that the agency has investigative or enforcement authority, a bona fide legal basis for keeping information confidential, and the ability and willingness to render reciprocal (but not necessarily same in kind) assistance. These factors are contained in the U.S.

SAFE WEB Act of 2006, which authorizes the FTC to share enforcement information in consumer protection matters with foreign law enforcement authorities. These criteria could be applied equally to competition and consumer protection enforcement. Indeed, the FTC's experience sharing information pursuant to these criteria, including with the OFT, has been positive -- it has improved the quantity and quality of evidence against common targets and helped to spur reciprocal information sharing from other jurisdictions.

We reiterate our appreciation for the opportunity to offer suggestions in the Government's consultation on reforming the UK competition regime. We have enjoyed excellent working relations with both the OFT and CC and look forward to continued and improved effective UK-FTC enforcement cooperation.

We would be pleased to respond to any questions this comment may prompt and we look forward to further developments in the consultation.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Tritell', with a large, stylized initial 'R'.

Randolph W. Tritell
Director
Office of International Affairs