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Rachel BRANDENBURGER  
& Randy TRITELL,  
Global antitrust policies:  
How wide is the gap?

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**Rachel BRANDENBURGER**

rachel.brandenburger@usdoj.gov

| *Special advisor, International, Department of Justice*

**Randy TRITELL**

rtritell@ftc.gov

| *Director, International affairs, Federal Trade Commission*

# Interview

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**Rachel BRANDENBURGER**  
rachel.brandenburger@usdoj.gov

*Special advisor, International,  
Department of Justice*

**2010-Present**

Special advisor, International,  
U.S. Department of justice,  
antitrust division

**1988-2009**

Partner, Freshfields Bruckhaus  
Deringer LLP; working in the  
firm's antitrust, competition  
and trade group in London and  
(from 1996 onwards) also Brussels

**Randy TRITELL**  
rtritell@ftc.gov

*Director, International affairs,  
Federal Trade Commission*

**2007-Present**

Director, Office of international  
affairs, Federal Trade Commission

**1998-2007**

Assistant director for international  
antitrust, Federal Trade Commission

**1992-1998**

Partner in charge of opening  
and managing the Brussels office  
of Weil, Gotshal & Manges LLP

**1986-1992**

Associate, trade regulation  
department, Weil, Gotshal  
& Manges LLP, New York

**1978-1986**

Staff attorney, assistant to the  
director, attorney advisor to  
commissioner Calvani, and  
executive assistant to the chairman,  
Federal Trade Commission

## Rachel BRANDENBURGER & Randy TRITELL, Global antitrust policies: How wide is the gap?

**What is your view of the current state, and future, of convergence between U.S. and Europe on antitrust policy and approaches? To take one example, there has been a recent outbreak of new – and similar – horizontal merger guidelines on both sides of the Atlantic. Is this merely coincidence or indicative of international convergence at work?**

**R. B.** I would like to start by saying it is a great pleasure to share this panel with such distinguished colleagues and to be here to discuss the current state, and the future, of global antitrust policies; I thank *Concurrances* very much for this opportunity.

I can say, without reservation, that the U.S.-EU relationship is an ongoing success story in terms of both competition policy and enforcement. The two U.S. antitrust agencies (the U.S. Department of Justice and the Federal Trade Commission) and the European Commission have largely consistent enforcement policies, directed at the common goal of promoting consumer welfare. The Department of Justice (“DOJ”) is deeply committed to cooperating closely with the European Commission on enforcement matters and also to discussing and exchanging views on policy matters. That commitment has also been demonstrated by the efforts of the Federal Trade Commission (“FTC”) and by the European Commission. Our relationship involves frequent collaboration on investigations and discussion about policy issues. The collaboration and discussion occur at all levels within our institutions and across the full range of our work – not only mergers but also conduct and cartel investigations. In the case of DOJ – where I can speak with personal experience – it is not an exaggeration to say that contacts with the European Commission occur on an almost daily basis.

Our comprehensive interaction with the European Commission began with the 1991 Cooperation Agreement between the DOJ, FTC, and the Commission. It was spurred by the recognition that the agencies increasingly would investigate the same matters, especially following the adoption of the European Merger Control Regulation. I am delighted to say that next month (in October 2011), the DOJ and FTC will join our colleagues in Brussels in celebrating the 20<sup>th</sup> anniversary of the Cooperation Agreement, as a special part of our customary annual bilateral consultations. Over the past year, DOJ, FTC and the European Commission have been discussing both the coordination of U.S. and EU merger review investigations and unilateral conduct issues. The merger discussions resulted in updated Best Practices on Cooperation in Merger Investigations. See <http://www.justice.gov/atr/public/international/docs/276276.pdf>.

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Turning to the specific example of horizontal merger guidelines that you referred to, as I am sure you are aware, a number of jurisdictions have recently revised, or are reviewing, their merger guidelines. The DOJ and FTC did so last year, as also did the UK and France. Canada and Germany are going through a similar process

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*Text is based on a panel discussion with Rachel Brandenburger, Randy Tritell, and Ewoud Sakkers, that was held on 6 September 2011 moderated by Mark Gidley. Partner, White and Case, Washington DC, New York. The answers of Ewoud Sakkers, Head of Unit, DG COMP, could not have been reproduced.*

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now. Prior to last year, the last significant revision of the U.S. Horizontal Merger Guidelines took place 19 years ago in 1982. The European Commission's horizontal merger guidelines are, of course, newer – they were adopted in 2004.

The new U.S. Horizontal Merger Guidelines seek to close the gaps that had developed between the previous guidelines and actual agency practice. The revisions take into account legal and economic developments since the last revision. Thus, they provide important transparency for businesses, consumers, the antitrust bar, scholars and courts about the agencies' current enforcement analysis in mergers. And, importantly also, they level the playing field between those lawyers who practice "inside the beltway" and the rest of the legal community.

As to convergence, and in acknowledgement of today's multi-polar world, the DOJ and FTC sought the views of the broader competition community around the world for this revision of our guidance. Indeed, we benefited from the input of senior officials of four non-U.S. agencies who travelled to the U.S. to participate in the public workshops during the consultation process, and we and FTC also had informal discussions with other agencies around the world. As my DOJ colleague Joe Matelis and I have explained in a recent article we wrote for *Antitrust* magazine comparing the new U.S. Horizontal Merger Guidelines with a number of other jurisdictions' merger guidelines, there is a great deal of similarity in horizontal merger analysis around the world.

**R. T.** I would first like to thank Concurrences and White & Case for providing me with the opportunity to participate in this program. It is valuable for government officials to have platforms such as this to explain our policies and report on developments, and even more important that we can answer questions and get feedback from those affected by our policies. I am particularly honored to share the podium with such distinguished colleagues and good friends from the US and the EC. Let me also note that, as usual, my remarks reflect my own views and not necessarily those of the Federal Trade Commission or its Commissioners.

Increasing substantive and procedural convergence between the US and the EU has been a high priority for the Federal Trade Commission for many years, across several administrations. In my over thirteen years dealing with international antitrust policy at the FTC, I have witnessed enormous progress toward that goal. Looking back and comparing US and EU approaches, I think you would find that they have moved closer together in almost every area of substantive competition law, including the analysis of horizontal mergers, non-horizontal mergers, competitor collaborations, vertical restraints, and single firm conduct. Following the transatlantic rifts in the *Boeing / McDonnell Douglas* and *GE / Honeywell* matters, some commentators expressed concern about endemic conflicts between our merger review regimes. Putting aside that, even then, these cases were rarities among a large multitude of parallel reviews that concluded with compatible results, the US and EU have not had a single conflicting outcome of a merger review in over a decade. Although I cannot promise that we will never again reach different results, there is a very strong

track record evidencing analytical convergence. In addition, our procedures, while different in some areas as a result of our statutory frameworks, have been adapted to interoperate quite smoothly in most cases.

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**“Increasing substantive and procedural convergence between the US and EU has been a high priority for the Federal Trade Commission for many years, across several administrations.” (R. T.)**

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This state of affairs is by no means a result of coincidence or good fortune. Rather, it is the product of a concentrated effort driven by agency leaders and embraced by our staffs to work together to achieve consistent results. Following *GE / Honeywell*, the agencies redoubled their efforts to increase convergence, including through working groups on both substantive and procedural aspects of merger review. One output was a set of US-EC Best Practices on Cooperation in Merger Investigations. Last year, the FTC, DOJ, and the EC convened a working group to review the best practices in light of a decade of experience and, in October 2011, issued an updated version. See <http://www.ftc.gov/os/2011/10/111014eumerger.pdf>. Similarly, we consulted both publicly and informally with DG COMP's lawyers and economists, as well as colleagues from many other agencies, in developing the 2010 horizontal merger guidelines. We also are working with our DG COMP colleagues to examine and compare our approaches to standards for determining dominance and for evaluating conduct by dominant firms.

Although some substantive and procedural differences remain, for example in the analysis of some dominant firm conduct, they result largely from statutes and court decisions, and we are committed to minimizing their impact. Based on the recent record, I expect that remaining differences in US and EC competition policies will continue to diminish.

**For the past decade, multilateral efforts within the OECD and the International Competition Network have promoted the convergence of procedural and substantive rules among agencies as a response to some of the challenges of globalization. What is your view of the status and future of convergence efforts?**

**R. B.** I agree that, in the past decade, a huge amount of work has gone into multilateral convergence efforts around sound competition policy within organizations such as the OECD and the ICN. This has been a very positive step. The Antitrust Division is actively engaged in the work of both organizations. Several Assistant Attorneys General have served as the Chair of the OECD Competition Committee's working party on enforcement and cooperation. In the ICN, the Division is a member of the Steering Group and has co-chaired the Merger Working Group for the past ten years, overseeing the development of many consensus-based work products on important merger enforcement issues.

One notable example is the development of the OECD and ICN recommendations on merger notification procedures and practices. Credit should go to my fellow panelist, Randy Tritell, who played a leading role in the creation of the ICN Recommended Practices. These recommendations have resulted in legislative changes in dozens of jurisdictions as they have sought to conform to the Recommended Practices.

Convergence plays an important role because it reinforces cooperation. And now that so many jurisdictions see eye-to-eye on basic approaches to competition law enforcement, the basic building blocks for international case cooperation are in place. Convergence is also important because businesses generally face lower costs of doing business globally when jurisdictions have similar approaches.

I think convergence is fundamentally about getting to similar answers on similar questions in similar cases. Facts and market structures are, of course, not always the same, and so different outcomes will continue to occur for these reasons, regardless of the degree of convergence on the underlying legal and economic theories that we achieve.

The recent *Unilever-Alberto Culver* merger that was investigated by the DOJ and in several other jurisdictions around the world illustrates this. We had excellent dialogue and close cooperation with our counterparts in the Mexico, South Africa, the UK, and elsewhere during our investigation. Differences in the products affected by the merger, the product positionings, and the market structures in the different jurisdictions produced different – though not conflicting – outcomes to our respective investigations. Thus, we and the UK Office of Fair Trading required remedies to close our respective investigations – although not the same remedies – whereas the other agencies did not.

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As to the future of convergence, I think we need to be realistic: further convergence may be easier in some respects of competition law and enforcement than others. There undoubtedly will be further work on convergence under the auspices of multilateral efforts such as the OECD and the ICN, and I anticipate convergence will remain an important ingredient of international competition policy and practice going forward. Also undoubtedly, there are now many more voices at the table than in the past to discuss competition policy and share enforcement experiences. We need to listen to, and seek to understand, these new voices. We each have our

own culture, legal regime, political structure, and economic situation that shape our views of competition policy and enforcement, and we need to understand this as we seek to move forward within the global antitrust community.

In terms of estimating the future results of convergence, I do not know where we will get to, but I am sure there will be continuing efforts to achieve further convergence in the future.

**R. T.** Multilateral competition bodies have played a major role in advancing procedural and substantive convergence. Since its founding in 2001, the ICN has explicitly sought to promote convergence of competition policies. As its membership has grown from 16 founding agencies to 123 today, that goal has become more important but also more challenging. Despite its diverse membership, the ICN has succeeded in achieving consensus on recommended practices in merger review procedures, substantive merger analysis, the criteria for dominance, and other areas. Its norms are non-binding but have nonetheless been influential in spurring changes in laws, regulations, and agency policies toward greater conformity with the ICN’s recommendations. Just recently, legislative changes in Brazil and Slovakia have brought their merger notification regimes closer to the ICN standards, in both cases citing the work of the ICN. In addition, its reports, workshops, tele-seminars, and other soft instruments have increased mutual knowledge and understanding of different competition policies. The ICN also brings together competition officials across continents and cultures in a shared enterprise, which also contributes significantly to minimizing cross-border conflicts. The ICN’s work is enriched by the close involvement of experienced advisors from the legal, economic, business, academic, and consumer communities who contribute their experience, ideas, and time to ICN projects. Entering its second decade, the ICN is well-positioned to continue its work on policy convergence and practical tools for agencies while taking on greater challenges in the area of broader competition policy. The FTC is proud of its leadership roles throughout the history of the ICN, which include serving on its steering group, co-chairing the unilateral conduct working group, leading the implementation of the merger process recommendations, and heading the ICN’s new project to develop competition training materials.

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“Despite its diverse membership, the ICN has succeeded in achieving consensus on recommended practices in merger review procedures, substantive merger analysis, the criteria for dominance, and other areas.” (R. T.)

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The OECD Competition Committee is also a key forum to promote convergence. It operates at a governmental rather than an agency level, has a limited membership of developed countries, and, unlike the ICN, which is a “virtual”

organization, benefits from a professional Secretariat that serves as a competition policy think tank. The OECD collects and disseminates learning from its Secretariat and its members through in-depth sessions on substantive issues that competition agencies are confronting, and engages with developing countries through training and an annual program with non-members. The Competition Committee is taking steps to further increase its effectiveness by focusing on longer term strategic themes, starting with international enforcement cooperation and the evaluation of competition enforcement and advocacy.

Competition organs of UNCTAD, APEC, and other regional bodies also play an increasing role in promoting policy convergence. The FTC was instrumental in the recent launch of the Inter-American Competition Alliance, consisting of the competition agencies in our hemisphere, which holds monthly sessions (in Spanish) on enforcement issues of mutual interest. Coordinating the activities and roles of the various organizations poses challenges, especially in an era of constrained resources. Those of us who are involved in several of the organizations are aware of this issue and seek to capitalize on the relative strengths of each organization. Although they have different membership and mandates, I believe all of these bodies will contribute to continuing the trend toward greater convergence of competition policies.

**Linked to the increased level of convergence, agencies increasingly have worked together on specific cases. U.S.-Europe cooperation seems to be functioning smoothly as of late. Are there challenges remaining to effective U.S.-Europe cooperation on cases?**

**R. B.** One of our goals at the DOJ's Antitrust Division is to intensify our cooperative relationships with our international counterparts, not only with the European Commission, but also with other competition agencies around the world. We encourage Division staffs to be mindful of the international implications of our actions right from the start of an investigation through to the remedial phase. Indeed, hardly a day goes by when we are not on a video conference or telephone conference with another competition enforcer somewhere around the globe. We are working hard to establish "pick-up-the-phone" relationships with the increasing number of agencies around the world that have an interest in working with us to investigate a merger, possible anticompetitive unilateral conduct, or cartel activity.

Against that background, I should emphasize that we place great value on our longstanding cooperative relationship with our colleagues at the European Commission. We are committed to working closely on all aspects of antitrust enforcement and policy, with a particular emphasis on the day-to-day coordination of investigative efforts.

An example of effective cooperation between the Antitrust Division and the European Commission occurred in relation to the *Cisco/Tandberg* merger last year. With waivers and cooperation from the merging parties and third-party industry participants in place, the Division and the Commission were able to work closely together throughout their investigations. This cooperation included numerous

contacts between the investigative staffs, discussing one another's competitive effects analyses, and conducting joint meetings and interviews with the parties and third parties. In deciding to close its *Cisco/Tandberg* investigation, the Division took into account the commitments that the merging parties gave to the European Commission to facilitate interoperability. Our announcement that we were closing our investigation was made on the same day that the European Commission announced its clearance decision. Both (then) Assistant Attorney General Christine Varney and Vice President Almunia called this case a model of inter-agency investigation, and praised the parties for facilitating the cooperation.

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There are also recent examples of our excellent cooperation with Member States of the European Union in relation to mergers. They include, with Germany, the review of the acquisition of certain patents and patent applications from *Novell Inc. by CPTN Holdings*, and, with the UK, the investigation of the *Unilever-Alberto Culver* merger.

However, not all merging parties take such a cooperative attitude, and some seek to play agencies off against each other. That is their choice of course – but I should say that staffs at both the Antitrust Division and the European Commission are increasingly alert to this.

Close enforcement cooperation with the European Commission occurs across the full range of our actions, not just for mergers, but also in cartel and unilateral conduct investigations. There are a number of current cases in both these areas ; although I cannot, of course, name them.

As to whether there are any remaining challenges to effective antitrust cooperation between the Antitrust Division and European Commission, we have established open lines for transparent, mindful, and respectful communication between our agencies at all levels. And so I am confident that if we do face any challenges in the future, we will be able to deal with them.

**R. T.** Let me first reiterate the premise of your question, that the US and EC agencies have worked closely and smoothly on cases of mutual concern, and that cooperation, while distinct from convergence, facilitates greater convergence. While papers and conferences are useful for promoting convergence, the most effective driver is working through the facts and

legal and economic issues in real cases. At the FTC, hardly a day passes without an FTC case team cooperating with counterparts in Brussels on a pending matter. This occurs mostly in merger investigations, but increasingly in conduct cases as well. Some challenges of course remain. One is that the agencies cannot share confidential information, which includes almost everything that parties provide us, without the submitter's consent. (A US law authorizes international agreements that enable the agencies to share confidential information, but has produced only one such agreement, with Australia, that has hardly been used.) However, a substantial amount of useful cooperation is possible while respecting the confidentiality of submitted information. For example, we can generally discuss investigation timetables and our views on relevant market definition, competitive effects, and appropriate remedies. Moreover, particularly in investigations of mergers under US and EC review, parties now routinely waive their confidentiality rights. Although it may at first seem counter-intuitive that the parties would make it easier for enforcers to share their information, most parties and their counsel now see it as in their interest because a more informed dialogue between the agencies increases the likelihood of consistent analyses and, importantly, compatible remedies. Let me add that although we highly recommend waivers, whether to grant them is up to the parties and there is no adverse consequence for not doing so. When information is exchanged, the FTC takes care to avoid receiving or considering information that would be subject to the attorney-client privilege under US law.

Another nascent challenge is the possibility that data protection rules will impede the ability of the agencies to obtain and share information in transatlantic matters. Stay tuned as privacy laws are strengthened and may come into conflict with cross-border antitrust investigations and information sharing.

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**More broadly, in a globalized world with many more enforcers reviewing the same conduct or mergers, what considerations help your agency in deciding when, and with which agencies, you cooperate on cases?**

**R. B.** Years ago, agency-to-agency cooperation was occasional, and usually based on bilateral considerations. For the Antitrust Division, cooperation occurred primarily with Canada and the European Commission. Given the

changes in the world, these days cooperation can, and does, involve many different agencies around the globe. As former Assistant Attorney General Christine Varney has said, “In today’s world, competition agencies can no longer cooperate on investigations with only one or two other jurisdictions and call it a day.” Indeed, the U.S. agencies now have formal antitrust cooperation arrangements with 11 jurisdictions around the world, reflecting the increasingly diverse reality of our enforcement cooperation. See <http://www.justice.gov/atr/public/international/int-arrangements.html>.

In our last fiscal year, for example, the Antitrust Division worked on almost 40 civil investigations with an international dimension, most of which involved some level of coordination or cooperation with competition agencies in other jurisdictions. We also coordinated and collaborated on dozens of criminal matters. As the media headlines show, we work routinely with our counterparts across the world on these investigations.

In today’s world, several agencies may be investigating the same matter at the same time, and the decisions of one agency can impact consumers elsewhere, indeed worldwide. Getting to the right answer on our cases increasingly includes working with other agencies around the world that are also investigating the same matter. Sometimes the cooperation will be occasional; and sometimes it will be frequent. Sometimes the issues will be identical; and sometimes they will not. But the key to effective cooperation on each case is open and frequent dialogue.

Also, “cooperation” is a broad word in the competition context. It includes capacity building; discussing substantive competition law, economic concepts, and procedural issues; sharing general knowledge about a given industry; and working together on individual cases. All of these types of cooperation are occurring with an increasing number of agencies; and I am sure they will increasingly do so in the future.

**R. T.** FTC staff are generally ready, willing, and able to cooperate with competition agencies around the world in antitrust investigations. We operate under formal antitrust cooperation arrangements with 11 jurisdictions – government-level agreements with Australia, Brazil, Canada, the EU, Germany, Israel, Japan, and Mexico, and agency-level Memoranda of Understanding with the competition agencies of Chile, China, and Russia. See <http://ftc.gov/oia/agreements.shtm>. The FTC and DOJ hope to conclude a MOU with the Indian competition agencies very soon. In addition, an OECD Council Recommendation on antitrust enforcement cooperation provides a framework for cooperating with the 34 members of the organization. See [http://www.oecd.org/document/32/0,3746,en\\_2649\\_37463\\_44940896\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/32/0,3746,en_2649_37463_44940896_1_1_1_37463,00.html). Our agreements typically provide for notification of investigations that affect the other parties’ interests, the provision of investigative assistance, coordination of parallel investigations, traditional and positive comity, and consultation in the event of disputes. However, an agreement is not a prerequisite to cooperation, and we often cooperate with agencies with which we have no formal framework. Just give us a call!

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**How do you see your agency's cooperation with China's three antimonopoly enforcement agencies developing in the near term? For the U.S., what impact do you think that your new MOU will have on your cooperative relationship with the Chinese agencies?**

**R. B.** The DOJ and FTC have developed good cooperative relationships with the Chinese antimonopoly agencies over the last several years, as China has developed its competition enforcement regime. Together with the FTC, the DOJ has hosted frequent meetings and training workshops, both in China and the U.S., with all three Chinese antimonopoly enforcement agencies – the Ministry of Commerce (MOFCOM), National Development and Reform Commission (NDRC) and State Administration for Industry and Commerce (SAIC).

We have discussed substantive antitrust analysis and effective investigative techniques with the Chinese agencies. We have submitted numerous written comments on draft implementing rules and guidelines. And we have also engaged in many less formal exchanges.

As I expect you are aware, on July 27, 2011, the DOJ and the FTC signed a Memorandum of Understanding on Antitrust Cooperation with China's three antimonopoly enforcement agencies – MOFCOM, NDRC and SAIC – to further enhance our cooperative relationships. It was an honor and a privilege to be a member of the U.S. delegation at the highly memorable signing ceremony in Beijing. The text of the MOU and (then) Assistant Attorney General Christine Varney's remarks at the signing are available on our website. See <http://www.justice.gov/atr/public/speeches/273347.pdf>. (By the way, I commend the newly revamped international section of our website to you. See <http://www.justice.gov/atr/public/international/index.html>.)

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**The signing of the MOU is an important first step in enhancing cooperation and joint efforts among the U.S. and Chinese enforcement agencies.” (R. B.)**

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The MOU establishes a framework for cooperation between the two U.S. antitrust agencies and the three Chinese antimonopoly enforcement agencies. This framework envisions cooperation at two levels: first, a joint dialogue among the senior competition officials of all five agencies; and second, ongoing cooperation and communication among individual U.S. and Chinese enforcement agencies at the senior or working level. In that regard, the MOU provides for the development and implementation of work plans for cooperative activities between the two U.S. agencies and each of the three Chinese enforcement agencies. The signing of the MOU is an important first step in enhancing cooperation and joint efforts among the U.S. and Chinese enforcement agencies.

The cooperative work among the U.S. and Chinese competition agencies that is contemplated by the MOU has already begun. Indeed, I am returning to China later this month, together with FTC colleagues, to speak at the second annual BRICS conference on competition law being hosted by SAIC in Beijing, and to begin our follow-up work on the MOU with MOFCOM, NDRC and SAIC.

**R. T.** The development of China's competition law regime is of great importance to the US antitrust agencies. Fortunately, we have had meaningful opportunities to be involved in its evolution. The Chinese government welcomed our views as the Anti-Monopoly Law proceeded through several stages of drafting, and we shared our experience and our learning, including through many mistaken policies, from our long history of antitrust enforcement. Since the enactment of the AML, the US agencies have continued to have the opportunity to provide views on implementing regulations, and to conduct a substantial training program that continues through the present.

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**“In our experience, cooperation agreements have been valuable not only by providing a legal framework but as a catalyst to closer staff cooperation.” (R. T.)**

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The recent Memorandum of Understanding among the two US and three Chinese enforcement agencies takes our engagement to the next level. The MOU provides for exchanges of information and advice about competition law enforcement and policy developments, training programs, the opportunity to comment on proposed laws, regulations and guidelines, and cooperation on specific cases or investigations. See <http://ftc.gov/os/2011/07/110726mou-english.pdf>. It reflects our shared commitment to continuing to build a strong cooperative relationship. In our experience, cooperation agreements have been valuable not only by providing a legal framework but as a catalyst to closer staff cooperation. This is quite important, as several mergers have already been reviewed by both the FTC and MOFCOM, and there will surely be many more. We have already derived tangible benefit from the MOU in the cooperation between the FTC and MOFCOM in a recent matter under parallel review. In addition, the FTC hosted a Chinese official for six months through our International Fellows program. We also enjoy excellent relationships with SAIC and NDRC and we look forward to expanding and deepening our relationships with all three agencies.

We are aware of some of the challenges that have been identified in the early implementation of the Chinese competition system, including the length of time to conduct merger reviews, the remedies in certain cases, and the possible consideration of objectives other than pure competition policy. We have been impressed, however, with the progress

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of the Chinese agencies, particularly given their level of resources in relation to the volume and magnitude of matters before them, and their desire to benefit from the experience of the US and other competition agencies and international organizations.

**Do transatlantic differences in available cartel sanctions – criminal and administrative systems – create challenges that inhibit cooperation in international cartel cases?**

**R. B.** The competition enforcement agencies on both sides of the Atlantic agree that cartels are pernicious; do great damage to our consumers; and deserve serious sanctions. Although the DOJ and European Commission pursue cartels through different processes and have different sanctions available, there is no disagreement on the premise that we work together closely to detect and prosecute cartels. We have an excellent record of strong working relationships with the European Commission in coordinating cartel investigations that both agencies are pursuing.

It is also worth noting that the bulk of our international cartel cases are leniency-originated. Much of the cooperation therefore occurs in the context of our leniency programs – in situations where a corporation has applied for leniency in both jurisdictions, is cooperating with both agencies, and has granted a waiver to allow the two agencies to share the information it has provided.

**R. T.** In the United States, hard core cartel conduct is prosecuted criminally by the Department of Justice, so I will defer to Rachel to respond to this and the next two questions.

**Currently, over 50 jurisdictions have cartel leniency programs. How has the proliferation of leniency programs impacted international cartel enforcement?**

**R. B.** Leniency is an idea that originated at the Antitrust Division. It has had an enormous impact on international anti-cartel enforcement around the world. Leniency programs have proven to be the most powerful tool for uncovering cartel activity. As more jurisdictions implement effective leniency programs, more cartels are being detected, disbanded and sanctioned. Leniency also has fundamentally changed how companies respond to cartel activity that they discover internally. It has led to far greater detection rates and the production of evidence that likely would not have been obtained in the absence of a leniency program.

In the international context, leniency has now become multidimensional, with companies frequently seeking leniency simultaneously in multiple jurisdictions. And, since multiple enforcers are now often investigating the same cartel in parallel investigations, there is an opportunity for coordination of investigative steps and the sharing of information if the leniency applicant agrees to a waiver of confidentiality. This leads to more efficient investigations and also to quicker resolution of investigations.

**There has been some recent international discussion on whether anti-cartel enforcement efforts are creating the desired deterrent effect in the US and Europe, particularly in light of larger fines and questions about perceived rates of recidivism among cartel offenders. How do your agencies think about deterrence in the cartel actions you bring and sanctions you seek?**

**R. B.** At the Antitrust Division, deterrence of cartel activity means a primary focus on general deterrence, aimed at convincing executives that they should not break the law and enter into cartels, rather than specific deterrence, aimed at convincing particular companies and executives that they should not commit the same offense again. The Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences. That view is now increasingly accepted around the world, as additional jurisdictions have criminalized cartel conduct or are considering doing so.

International cartels have been detected with greater frequency over the last 20 years or so and enforcers have increasingly imposed stiffer sanctions against offenders. As regards the debate around the world on deterrence effects, particularly in light of the large fines some jurisdictions have imposed, I would offer the following observations.

Due to the secret nature of cartels, it is impossible to know the true incidence of cartels, past or present. However, in the Division's experience, increased sanctions, enhanced investigative tools, the proliferation of leniency programs, and closer cooperation among enforcers around the world have considerably strengthened anti-cartel enforcement in recent years. You cannot isolate one factor; you need to look at them together.

To summarize, the Division believes that continuing global enforcement efforts are having a cumulative impact on deterrence by increasing the perceived risk of detection and substantial punishment.

**We have discussed some of the specifics of convergence and case cooperation at the international level. More broadly, what do you see as the changes and challenges that will define the next decade of global antitrust enforcement?**

**R. B.** I think collaboration and cooperation on competition enforcement internationally will accelerate in the coming years. A decade from now, or maybe sooner, such interactions are likely to occur even more frequently and with even more agencies than they do today. I think there are several emerging factors that will drive this. Very briefly, these factors include:

*First, intensified cooperation.* I think we will see the continuation, and likely intensification, of the current collaborative approach to international competition policy and enforcement through multilateral dialogue and even stronger agency-to-agency cooperation.

*Second, more globalization.* As a result of the increased interconnection and interaction of the global economy, competition enforcement will need to be even more multidimensional than it is today.



*Third, the financial and economic crises.* The financial and economic crises continue to impact the global economy. They also have the potential to shape how competition enforcement is viewed and implemented by both governments and competition agencies.

*Fourth, pressure on enforcement resources.* Competition agencies, as part of broader government austerity plans, will need to do more with fewer resources. Cooperation, collaboration and efficiency will therefore become increasingly important.

*Fifth, the emergence of significant new players.* Future competition policy and enforcement approaches will also reflect the impact and influence of newer competition agencies in *e.g.*, China and India, and elsewhere around the world.

Looking back 10 years ago to the launch of the International Competition Network at the 2001 Fordham conference, I do not believe that we would have accurately predicted either the number of members of the ICN today (about 120 agencies) or the effect of international cooperation. Time will tell how the emerging factors I have just mentioned, and I expect others as well, will influence the development of international competition enforcement in the future. Perhaps you could be so gracious as to invite us to reconvene in a few years time to discuss how good our crystal ball gazing has been?

**R. T.** Perhaps it's because surviving as an international antitrust official requires a hefty dose of optimism, but I believe that the current trends toward broader and deeper cooperation and towards analytical convergence will continue. Nonetheless, I think that there will be significant challenges along the way, including some that at least I am unable to currently foresee. Here are five challenges that I can envision even with my limited powers of prediction and imagination.

**1. Limits of soft law.** The convergence process has been primarily voluntary, with the exception of some rules that have been enacted pursuant to treaties or trade agreements or as conditions of financial assistance. Although some refer to the non-binding nature of ICN and other norms as a weakness, I see it as a strength. Bill Kovacic and Tim Muris have articulated a paradigm of soft law convergence through decentralized experimentation, identification of superior practices, and voluntary opt-in, and I think the ICN has been a successful exemplar of this process. Nonetheless, at some point, the spread of soft law may reach a limit, with some countries deciding to go in their own, different direction based on their economic or other circumstances. Although some advocate competition rules through a multilateral mechanism such as the WTO, I believe it would be unwise to implement competition policy through a code that is bound to be static and inflexible, and risks subjecting competition policy to trade and political considerations. However, that means accepting the possibility of different substantive and procedural rules and, as more transactions and business practices are subject to multijurisdictional review, the attendant risk of conflicting results.

**2. Effective and efficient investigation processes.** Competition agencies need adequate tools and procedures to conduct effective investigations, especially in cross-border matters. They need sufficiently strong legal instruments to obtain the information necessary to evaluate complex transactions and business practices. As most if not all countries' laws provide for considering only domestic competitive effects, there is potential for multiple overlapping investigations of the same firms and practices. Proposals to apply an expanded version of comity principles while safeguarding the ability of each country to protect its own consumers may merit further consideration. Similarly, proposals to rationalize multijurisdictional merger notification and reviews to reduce private and agency costs while preserving agencies' ability to conduct effective reviews may warrant further development. Finally, it is important that agencies, whatever their legal system, are able to make well-informed decisions. This entails having procedures that provide sufficient transparency and due process to ensure that the agency can receive evidence and analyses from parties that will enable them to fully evaluate the legal and economic issues in the case. The US agencies are involved in leading initiatives in multilateral organizations to consider many of these issues.

**3. Extraterritorial effects.** The decentralized, national system of competition laws can leave gaps in addressing anticompetitive effects that transcend national borders. As mentioned, I believe the drawbacks of a multinational or supranational competition system would outweigh its likely benefits. Some have suggested means by which one jurisdiction might consider and address anticompetitive effects in other jurisdictions. These proposals raise important legal and policy concerns but may merit further consideration.

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**“[I]t is important that agencies, whatever their legal system, are able to make well-informed decisions. This entails having procedures that provide sufficient transparency and due process to ensure that the agency can receive evidence and analyses from parties that will enable them to fully evaluate the legal and economic issues in the case.” (R. T.)**

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**4. Training new competition officials.** The widespread adoption of competition laws and establishment of new agencies has generated a pressing need to train new competition officials, particularly in developing countries. While new staff are typically bright, eager, and well educated, they are often unable to participate in international conferences or benefit from targeted training programs. The ICN has responded to this challenge by launching an initiative, led by the FTC, to develop a comprehensive curriculum of electronic training

materials, available without cost. The training modules feature leading academics, practitioners, and officials who provide practical guidance on competition principles and on investigative techniques. The first videos cover the goals of competition law, market definition, and market power, and the next set will cover competitive effects, leniency, fundamentals of merger analysis, fundamentals of unilateral conduct analysis, and agency effectiveness. See <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx>. The goal is to have an easily accessible library of materials that all members of the competition community can use to improve their knowledge and skills.

**5. Competing policies.** Competition policy does not, of course, exist in a vacuum. In most countries, competition enforcement benefits from substantial political independence. But, especially in times of economic stress, competition policy will face challenges from advocates of industrial policy that see competition policy as an impediment to other policy goals. This can manifest itself either in the explicit sidelining of competition policy in favor of other goals or in the incorporation into competition enforcement of other policy agendas, including in a non-transparent manner. During the recent financial crisis, some competition agency decisions were superseded by other policies and competition policy was on the defensive in some countries, but I think that competition policy generally held up well and remains a strong component of most governments' economic programs. Pressures for protectionist trade policies also pose a challenge to competition policy in a broad sense, and political pressures to favor small businesses, ensure "fairness," and achieve other social goals will likely also continue to challenge the model of consumer welfare based competition policy.

So, there is no shortage of challenging issues ahead of us! I and my colleagues at the FTC welcome feedback from all stakeholders on these issues and on all aspects of how we are doing our job. Please feel free to contact me or any of the superb staff of the Office of International Affairs with your thoughts and suggestions. ■

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