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International Law
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International Antitrust Committee: The Newsletter

SUMMER 2013

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Susana Cabrera & Mark Katz

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Message from the Committee Co-Chairs

Susana Cabrera & Mark Katz

Welcome to the Summer 2013 issue of the International Antitrust Law Committee's *Newsletter*. Thanks to all of the authors for their contributions and to our editors - particularly Mark McGowan - for pulling this issue together.

Our goal with the *Newsletter* is to provide brief articles (3-5 pages) on topics of interest to international antitrust lawyers and to keep readers informed of Committee activities. If you would like to write an article for the *Newsletter*, please contact the editors - Ethan Litwin (litwin@hugheshubbard.com), Mark McCowan (Mark.McCowan@corrs.com.au) and Marta Palacios (MPalacios@perkinscoie.com) - for further information.

Our Committee is involved in many other types of activities in addition to the *Newsletter*. You can find out more about what we do at:

<http://www.abanet.org/dch/committee.cfm?com=IC722000>.

Of note, the Committee is sponsoring two teleconference sessions on antitrust law developments in China. The first program is entitled "New Developments of Antitrust Litigation in China" and will be held on July 23, 2013. The second program is entitled "New Developments in Merger Remedies in China" and will take place on July 29, 2013. Please see the Section's home page for further details:

www.americanbar.org/groups/international_law.html

We are also now working on a special edition of the Section's International Law Newsletter that will be devoted to a consideration of global antitrust issues. We are still looking for volunteers to contribute, so please feel free to contact us if you have an idea for an article.

Finally, we also encourage you to plan to attend the Section of International Law's upcoming Fall Meeting in London, England (October 15-19, 2013). There are many programs of interest to competition law practitioners. Attending the Fall Meeting is also an excellent way to get to know your colleagues on a personal level and to become more involved in the Committee. Please watch your emails for further information on the Fall Meeting and other Committee events.

We hope that you have a wonderful summer!

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Message from the Editors

Ethan E. Litwin, Mark McCowan & Marta Palacios

Appropriately for the Summer Newsletter, our first two articles focus on the renewal that is occurring within antitrust authorities in the United Kingdom and US. First, Dave Anderson and James Marshall of Berwin Leighton Paisner overview the upcoming consolidation of the UK's current dual-regulator antitrust enforcement regime within a single regulator, the Competition & Markets Authority, and the substantive legal reforms that will accompany the structural change. Second, Alicia Batts, John Ingrassia and Courtney Devon Taylor of Proskauer Rose discuss what can be expected in terms of international agency collaboration from the new antitrust leadership at both the US Federal Trade Commission and Department of Justice.

Next, Tanya Haskins of Norton Rose Fulbright reviews the key changes proposed by new draft merger guidelines released by the Common Market for Eastern and Southern Africa ("COMESA") Competition Commission. This article provides an update on an article in our Winter 2013 newsletter which discussed the commencement of COMESA's supranational merger control regime.

Upon the criminalisation of cartel conduct in Australia in 2009, legislators also significantly expanded the scope of the existing prohibitions under Australian law - including by introducing a specific per se prohibition on bid-rigging. A recent private damages claim relating to a back-to-back private equity to trade sale of a Canadian business that occurred entirely outside of Australia represents the first test of the new cartel conduct prohibitions. Paul Schoff and Kristel Harlow of Minter Ellison Lawyers examine the implications of this ground-breaking case for the M&A community.

Finally, Lim Chong Kin and Ng Ee-Kia of Drew & Napier discuss the information requirements for merger notifications in Singapore, while Merielin Almonte offers interesting insights into competition advocacy in the Dominican Republic.

We hope you find this edition interesting and informative. The editors encourage all readers to consider contributing an article for the next edition of the Newsletter, which will be published in the Fall of 2013.

U.S. Antitrust Enforcement: New Chiefs, Same Global Focus

Alicia J. Batts, John R. Ingrassia & Courtney Devon Taylor, Proskauer Rose LLP

President Obama's second term brings new antitrust leadership at both the Federal Trade Commission (the "FTC") and the Department of Justice (the "DOJ"). While most priorities and enforcement initiatives will remain fairly consistent with first term leadership, the growing and strong need for cooperation among competition agencies worldwide is on a trajectory that likely will yield important new developments before the end of this administration. Continuing to strengthen relationships with enforcement agencies worldwide will remain a top priority for U.S. antitrust enforcers.

In early March, Edith Ramirez assumed the post of Chairman of the FTC, replacing Jon Liebowitz. During her three-year tenure as an FTC Commissioner, Ramirez explained that an "important part of [her] agenda" pertained to international issues. She presented at several international conferences, including the Annual Meeting of the Ibero American Privacy Network in Mexico City in 2009 and the Latin American Competition Forum in Santo Domingo in 2012.¹ Ramirez discussed cross-border dimensions of consumer protection and the FTC's mission to build relationships with other countries, and indicated that she would "focus on some of the more challenging aspects of the cross-border flow of consumer information... [and participate] in global initiatives"² pertaining to consumer protection and antitrust enforcement. Based on the strong interest that she demonstrated in cross-border coordination on consumer protection matters as an FTC Commissioner, we expect that Ramirez will continue to augment the FTC's effort to coordinate competition enforcement with its counterparts around the world.

In January, after an eleven month confirmation process, Bill Baer was sworn in as the new Assistant Attorney General, Antitrust Division at the DOJ. Prior to assuming the position, Baer chaired Arnold & Porter's antitrust practice group. Baer, like his predecessor Christine Varney and mentor Robert Pitofsky, is likely to place high emphasis on antitrust cooperation with enforcement agencies globally, and will work to expand the number and breadth of relationships the U.S. presently has with competition enforcement agencies worldwide.

During his confirmation process, Baer vowed to focus on "both promoting coordinated outcomes and consistent enforcement in multi-jurisdictional antitrust reviews and urging commitment by enforcers worldwide to common principles of due process and transparency."³ Baer's prior government service lends credence to this assertion.⁴ While

¹ Notably, Ramirez is bilingual and, during her duties as Commissioner, presented in Spanish some of her speeches regarding international cooperation and enforcement.

² Those global initiatives included the International Consumer Protection and Enforcement Network (ICPEN), the Asia-Pacific Economic Cooperation (APEC) E-Commerce Steering Group, the Ibero-American Forum Consumer Protection Agencies (FIAGC), and the Ibero-American Data Protection Meeting. *Interview with FTC Commissioner Edith Ramirez*, FED. CIVIL ENFORCEMENT COMM. NEWSLETTER (ABA Section of Antitrust Law, Washington, D.C.), July-Aug. 2010, at 5.

³ *Nomination of William Joseph Baer, of Maryland, Nominee to be Assistant Attorney General, Antitrust Division, U.S. Department of Justice: Hearing Before the Committee on the Judiciary*, 112th Cong. 91 (2012) (response to question submitted by Sen. Durbin, Member, Senate Comm. on the Judiciary).

⁴ William J. Baer, *Int'l Antitrust Policy*, 1999 FORDHAM CORP. LAW INST. 260 (1999) (in which then-Director Baer explains that "sound domestic antitrust enforcement coupled with continued and enhanced cooperation among antitrust enforcers worldwide can go a long way toward both preventing cross-border anticompetitive harm... [T]hrough the effective use and development of existing tools, such as cooperation and coordination, with an appropriate dose of positive comity, we can confront the challenges that globalization poses to competition enforcers.")

Director of the FTC's Bureau of Competition (1995-99), Baer participated in the execution of a positive comity agreement between the United States and the European Communities,⁵ and helped facilitate bilateral antitrust agreements between the United States and countries such as Israel and Japan.⁶

Both Ramirez and Baer have already demonstrated their commitment to international cooperation. In late April, they led the U.S. delegation to the 12th Annual ICN Conference hosted by Poland's Office of Competition and Consumer Protection.⁷ Both Ramirez and Baer addressed the audience. Ramirez discussed the vital role of economic evidence in competition cases, how to present such evidence to generalist courts, and noted how "competition agencies from around the world can come together both to advance convergence toward best practices in antitrust enforcement and to strengthen the voice of competition policy as our governments confront common economic challenges."⁸ Baer moderated a panel addressing the strengths and limitations of current cooperation frameworks, remarking that "discussions and work product emerging from this meeting strengthen the ties between U.S. enforcers and our counterparts around the globe and enhance effective antitrust enforcement for the benefit of all consumers."⁹

Another leadership change is coming to the DOJ, with the recent departure of European Union competition expert Rachel Brandenburger, who served as Special Adviser for International Matters. The post, the first of its kind at the DOJ, was created by former Assistant Attorney General Christine Varney and had been held by Brandenburger since its inception.¹⁰

During Brandenburger's tenure, the DOJ, with the FTC, entered into cooperation agreements with antitrust enforcers in China (July and November 2011) and Chile (March 2011), establishing a framework for enhanced cooperation in investigations to address complex international transactions and conduct.¹¹ Brandenburger also helped facilitate the adoption of revised Best Practices on Merger Cooperation between the United States and the European Union.¹² In an interview prior to her departure, Brandenburger predicted that "collaboration and cooperation on competition enforcement internationally will accelerate in the coming years" and will be marked by increased influence of emerging competition agencies such as in China and India.¹³

5 Press Release, Federal Trade Commission, United States and European Communities Sign Agreement on "Positive Comity" in Antitrust Enforcement (June 4, 1998).

6 Press Release, Federal Trade Commission, United States and Israel Sign Bilateral Antitrust Agreement (Mar. 15, 1999); Press Release, Federal Trade Commission, United States and Japan Sign Bilateral Antitrust Agreement (Oct. 7, 1999).

7 The ICN includes 126 agencies from 111 jurisdictions around the world. Created in 2001, both the FTC and DOJ are original member agencies. Press Release, Federal Trade Commission, International Competition Network Advances Convergence Through Initiatives on Enforcement Cooperation and Investigative Process (Apr. 26, 2013), available at <http://www.ftc.gov/opa/2013/04/icn1.shtm>.

8 *Id.*

9 *Id.*

10 Melissa Lipman, *DOJ Int'l Antitrust Adviser Leaves Big Shoes to Fill*, LAW 360, Mar. 13, 2013, <http://www.law360.com/articles/423409/print?section=competition>.

11 Memorandum of Understanding on Antitrust and Antimonopoly Cooperation (2011), available at <http://www.justice.gov/atr/public/international/docs/273310a.pdf>; Guidance for Case Cooperation between the Ministry of Commerce and the Dep't of Justice and Fed. Trade Comm. (Nov. 2011), available at <http://www.justice.gov/atr/public/international/docs/277772.pdf>; Agreement on Antitrust Cooperation (Mar. 2011), available at <http://www.justice.gov/atr/public/international/docs/277772.pdf>.

12 The Best Practices address communication between reviewing agencies, coordination on timing, collection and evaluation of evidence, and remedies/settlement in cases in which a merger is being reviewed by both a U.S. agency and the European Commission. US-EU Working Group: Best Practices on Cooperation in Merger Investigations (2011), available at <http://www.justice.gov/atr/public/international/doc/276276.pdf>

13 Rachel Brandenburger & Randy Tritell, *Global Antitrust Policies: How Wide Is the Gap?*, 1-2012 CONCURRENCES COMPETITION L.J. 9-10 (2012).

It is not yet clear whether AAG Baer will keep the Special Adviser position, and if so, who will replace Brandenburger. Prior to Brandenburger, the Antitrust Division traditionally tasked a Deputy Assistant Attorney General with the responsibility of bolstering international cooperation efforts. Indeed, at present, Deputy Assistant Attorney General Leslie Overton supervises the DOJ's international program. Overton has been a Deputy Assistant Attorney General since 2011, and immediately prior to that served as a Special Adviser at the DOJ. Overton is also a former partner at Jones Day. Patricia Brink, the DOJ's Director of Civil Enforcement, now coordinates the agency's day-to-day interaction with antitrust agencies around the world.¹⁴ Brink is a DOJ veteran, and has been the Director of Civil Enforcement since the position's inception in 2011. In a recent talk before the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law, Brink outlined how "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," "increased efficiency from close cooperation reduces uncertainty and expense to firms doing business globally," and "cooperation increases agencies' understanding of the competitive process" through the exchange of ideas and analysis.¹⁵ Brink concluded her remarks by noting the importance of coordinated enforcement efforts in many of the DOJ's recent significant matters.

As a practical imperative, and for the U.S. agencies to retain their leadership role among competition enforcers, coordination efforts can and must continue, and the relationships between agencies must continue to deepen. Still, the picture ten years on is likely to look very different than it does today, and U.S. antitrust agencies will share center stage with competition agencies that now are only first emerging and finding their way.

For legal advisers, the movement towards more coordinated investigations hastens the need for coordinated representation as well. A jurisdiction-by-jurisdiction approach that does not consider broader implications can lead to undesirable outcomes. Whether through a global firm or through a network of local counsel, managing global cartel or merger investigations requires a high degree of coordination on substance, strategy, and defenses that support the matter as a whole.

¹⁴ Patricia Brink, *Int'l Cooperation at the Antitrust Division: A View from the Trenches* (Apr. 2013), available at <http://www.justice.gov/atr/public/speeches/296073.pdf>.

¹⁵ *Id.*