AAI CONFERENCE EXAMINES KEY DEVELOPMENTS IN INTERNATIONAL ANTITRUST AND COMPETITION LAW ENFORCEMENT

On February 8, 2017, the American Antitrust Institute (AAI) held its first International Antitrust Roundtable, entitled *Critical Issues in Global Antitrust: Comity, Intellectual Property, and Due Process*. The interactive, full-day program brought together more than 50 diverse experts from business, government, academia, private practice, and the public interest community. Guest speakers, panelists and audience members discussed important legal, economic, and political developments affecting international competition policy. Key topics included (1) the extraterritoriality rules, comity principles, and cooperation practices reflected in recently revised Federal Trade Commission and Antitrust Division Antitrust Guidelines for International Enforcement and Cooperation; (2) varying international approaches to the antitrust treatment of intellectual property rights, including with respect to standard essential patents (SEPs) and non-practicing entities (NPEs); and (3) concerns over foreign jurisdictions' due process standards and pathways to reform. This report summarizes some of the highlights of the program.

Year in Review

Diana Moss, President of AAI, began the day by describing AAI's goals in the international arena and providing a brief overview of the program. Professor Stephen Calkins, Wayne State University Law School, then took the stage to deliver a slide presentation entitled *Observations on the Year in International Antitrust*. His remarks examined the indicators of divergence and convergence among U.S. and foreign competition regimes and concluded that recent developments have been mixed. On the one hand, meaningful private and criminal enforcement regimes, which historically were primarily U.S. phenomena, have been emerging around the world. Moreover, various competition authorities have expressed shared concerns about the behavior of major multinationals like Intel, Google, and Qualcomm, albeit under a variety of anticompetitive theories. Competition regimes around the world also have found common cause in concern over pay-for-delay settlements and excessive pricing practices in the pharmaceutical industry.

On the other hand, divergence is evident in the world's treatment of resale price maintenance and cartel facilitating practices. The U.S. has liberalized its treatment of these practices while other countries have cracked down. Divergence is also apparent in variations among countries' abuse of dominance standards, as well as certain countries' willingness to intervene in markets to actively promote competition without a finding of infringement, as has occurred in the UK, Netherlands, and Greece. Finally, competition authorities have diverged in their comparative embrace of privacy and big data as competition concerns, with authorities in the EU, Germany, and the Netherlands being more active.

Professor Calkins also examined the American Bar Association's recent transition report recommendations on international antitrust, including the controversial suggestion that U.S. agencies

should directly intervene in foreign proceedings to promote due process standards. Among other things, he raised questions about how America will conduct itself in foreign affairs during the Trump Administration, and what effect this might have on American credibility in the international competition community.

Antitrust and the Golden Rule: Assessing the Revisions to the FTC/DOJ International Guidelines

The first panel of the day focused on the cross-border application of antitrust and competition law. Panelists included John Briggs, Managing Partner at Axinn, Veltrop and Harkrider, LLP, Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at NYU Law School, Kristen Limarzi, the Appellate Section Chief of the Antitrust Division of the U.S. Department of Justice, and Henri Piffaut, a Fellow at Harvard's Weatherhead Center for International Affairs and former Head of Unit for Merger Control at DG Competition in the European Commission.

In introductory remarks, the panel moderator, Randy Stutz, Associate General Counsel of the AAI, explained that countries are increasingly being called upon to determine the applicability of their competition laws beyond their territorial borders. This forces the world's competition authorities into "a mutual line drawing exercise, which often has to be done using relatively clumsy instruments." The panel focused on three of those instruments, namely extraterritoriality rules, comity principles, and cooperation practices.

The discussion began with the extraterritorial reach of the Sherman Act under the Foreign Trade Antitrust Improvements Act (FTAIA). The panelists examined what conduct is reachable under the Sherman Act on grounds that it "involves import commerce" or has a "direct" effect on U.S. commerce that "gives rise to a claim" under the FTAIA's statutory language. Among other things, the panelists discussed whether the agencies' international guidelines go too far, or not far enough, in defining conduct beyond direct sales into the United States that may "involve" import commerce. They also discussed whether a domestic effect from foreign conduct should be deemed "direct" under a proximate cause standard or an immediate consequence standard, with one panelist arguing that the immediate consequence standard improperly introduces a temporal aspect to the determination rather than focusing on the closeness of the connection between the two.

Other Panelists focused on the standing of private parties under the FTAIA. One panelist spoke out against the Supreme Court decision in *Empagran*, arguing that the FTAIA was not meant to distinguish between public and private claims but rather only to establish jurisdiction.

Panelists also discussed the reach of the American legal system from a comity perspective. One panelist explained that many foreigners see the American system as overreaching and presumptuous. They are dumbstruck at having to defend themselves in U.S. court for foreign conduct. Another countered that the U.S. approach is becoming more common in the globalized world.

Professor Fox presented slides proposing criteria for establishing best practices for extraterritoriality rules that would hopefully lead to convergence. Another panelist was skeptical that convergence could ever succeed. Even where competition laws across jurisdictions are ostensibly similar, the panelist argued, different governments may have fundamentally different priorities and attitudes, including with respect to prioritizing risks of Type 1 and Type 2 error.

Finally, the panel discussed the role of cooperation among international enforcers as a form of "practical comity" or "practical extraterritoriality." Among other things, panelists evaluated the U.S. international guidelines approach to cooperation relative to the European approach and discussed the impact of foreign trade policy, including the Trump Administration's "America First" pronouncements, on international cooperation.

The discussion was then opened to the room. One attendee rose in defense of U.S. courts, noting that many EU citizens love the American court system because of its fairness. The panelist who had spoken previously of foreign distaste for American courts maintained that even foreign parties who like the fairness of American courts nonetheless dislike the way they exercise their powers overseas.

Another attendee raised a question as to what conduct affects "national competition interests." In a world with intermediate and component goods, many cartels can raise the prices of a country's goods without harming competition around goods sold in that country. Panelists generally agreed that the locus of competitive injury in one country does not preclude downstream anticompetitive effects in another and should not render those effects unremediable in the downstream country.

In response to questions from both attendees and the moderator, the panel also discussed the risks of over-deterrence caused by overlapping and duplicative fines and remedies, as well as the risk of under-deterrence caused by the denial of standing to private plaintiffs based on the FTAIA and the *Illinois Brick* indirect purchaser rule.

Limitations on Patent Enforcement: A Comparative International Assessment

The second panel focused on four issues in the international patent domain: injunctive relief for SEP infringement, recent cases involving allegations of SEP abuse, standards for determining fair, reasonable, and non-discriminatory (FRAND) royalties, and variances in the treatment of IP internationally. Panelists included Jorge Contreras, Associate Professor at the University of Utah College of Law, Lisa Kimmel, Senior Counsel at Crowell & Moring LLP, Daryl Lim, Associate Professor at the John Marshall Law School, and Susanne Munck, Chief Counsel for Intellectual Property and Deputy Director of the Office of Policy Planning at the Federal Trade Commission.

The panel moderator, Richard Brunell, Vice President and General Counsel of the AAI, began by leading a discussion on the availability of injunctive relief in SEP cases, which sets the stage for other SEP-abuse issues. He suggested that while there is wide consensus that SEP holders that have made a FRAND commitment may not obtain injunctions against a "willing licensee," the definition of the term—and burdens of proving it—vary, as does the legal basis for the limitation. In the United States, a SEP holder ordinarily cannot get injunctive relief as a remedy for infringement under *eBay,* may not be able to get an exclusion order from the International Trade Commission (ITC) under the "public interest" standard, and may commit an unfair method of competition by even threatening to seek injunctive relief against a willing licensee, at least in certain circumstances. In Europe, meanwhile, a panelist indicated that infringement remedies vary country-by-country, and an *eBay* or *eBay*-like standard does not apply. However, EU SEP owners may face antitrust liability for pursuing injunctions under a framework set forth in the *ZTE Huawei* case. The framework creates a safe harbor permitting SEP owners to seek injunctions where the infringer is unwilling to accept a FRAND license or make a timely response with a written offer. Injunctions are not available, however, if the putative licensee makes a timely, good-faith, written offer.

The panelists discussed the significance of whether a given jurisdiction's injunction framework treats SEP abuse as exclusionary, consistent with U.S. antitrust law, or as an exploitative abuse. They also distinguished between the question of whether alleged SEP abuse constitutes a breach of FRAND and the separate question of whether a breach of FRAND creates antitrust liability.

The discussion then proceeded to more complicated leveraging theories of SEP abuse, as reflected in a spate of recent challenges to Qualcomm's licensing practices around the world. In Korea and the United States, Qualcomm stands accused of mutually reinforcing leveraging behavior that insulates both its patent-based CDMA cellular technology monopoly and its chipset monopoly. The panelists distinguished between allegations rooted in Section 2 monopolization concerns and those rooted in FRAND abuse and excessive royalties, with one panelist arguing that it can be hard to make the leap to a competition law violation when the allegations are rooted in FRAND abuse. Another panelist emphasized that what makes the case interesting is that the refusal to license on FRAND terms is tied into the leveraging of chip sales, which can turn an implementer's relationship with Qualcomm into an existential question. The panelists also debated whether Qualcomm's refusal to license patents would be protected under *Trinko* and whether FRAND commitments include such an obligation.

Turning to the issue of methodologies for determining FRAND royalties, one panelist noted that judges appear to have been led astray in considering the pseudo-contractual nature of the reasonableness requirement under a FRAND obligation relative to the patent law requirement that damages be measured as a "reasonable" royalty. This can lead to wildly different valuations of the same patents because of the nature in which one-on-one disputes arise in litigation. The panelist discussed the comparative drawbacks of this "bottom-up" approach taken in court relative to a hypothetical "top-down" approach, where the value of the FRAND-encumbered patent might be deduced by dividing from a total value of all patents that read on a given product. Other panelists were less sanguine about a top-down approach for practical reasons, including how to deal with pre-existing, privately negotiated licenses in this context, particularly since this is the dominant means of valuation and only a very small proportion of total licensing royalties are disputed. The panel also discussed interpleader, seeking declaratory judgments, and private arbitration as possible solutions to some of the impracticalities of a top-down approach, but these solutions were acknowledged to be imperfect.

The panel also discussed recent revisions to the U.S. IP guidelines in comparison with IP guidelines adopted in Korea, Canada, Japan and China. Among other things, the panel discussed the U.S. guidelines' omission of specific conduct involving SEPs and NPEs, which other countries' guidelines address directly. One panelist noted that the U.S. approach is encapsulated not just by guidelines, but by written decisions in enforcement actions that have evolved over time, as well as still other guidance like that found in the FTC's recent PAE report. Considered in totality, the panelist argued, the U.S. approach provides ample guidance on specific conduct.

During audience Q&A, attendees voiced opinions on the Qualcomm cases and theories of harm, and the question was raised whether certain Asian jurisdictions may be less sensitive to IP rights. While panelists agreed that the United States tends to be more sensitive to IP rights than most of the world, one panelist pointed out that there are countries that are more sensitive than the United States and that the differences between all of those countries is somewhat exaggerated. Another panelist noted that different countries probably *should* have different patent rules, and rules that work well for one country could lead to misappropriation and similar abuses in others.

Luncheon Keynote Address

The luncheon keynote address was delivered by Eduardo Pérez Motta of Agon Consulting, who is the former Chairman of the Mexican Federal Competition Commission and former Chair of the International Competition Network. The address focused on the shifting political atmosphere on trade and the failure of trade advocates to adequately explain its benefits to voters. Pérez Motta maintained that foreign trade is one of the most important sources of competition and wealth in the world, but its benefits have gone disproportionately to the wealthy, with inequality increasing over time.

As a result of this dynamic, populist anti-globalization movements have upset elections in multiple countries and are poised to gain more influence. This trend suggests that defenders of competitive markets have failed to do their jobs in two important ways. First, they have failed to prevent markets from achieving subpar results. If enforcers had not failed to prevent aggressive rent seeking, for example, then less of the concern for our current state of wealth inequality would be directed at global markets. Second, defenders of competitive markets have failed to articulate the benefits of global trade and the ways that it helps solve social problems.

Attendees asked Pérez Motta about the net effect of globalism, including with respect to immigration and refugee policy. Pérez Motta defended global trade and touted the benefits of competitive markets that lead to improved economic circumstances.

Global Due Process Standards: Where Are We, and Where Are We Heading?

The final panel of the day centered on concerns about procedural due process protections afforded by many of the world's competition enforcement regimes, and the progress that some countries have made. Panelists included Maurits Dolmans, a Partner in the Brussels office of Clearly Gottlieb Steen & Hamilton LLP, Dina Kallay, Director of Competition and Intellectual Property at Ericsson, Elizabeth Kraus, Deputy Director for International Affairs at the Federal Trade Commission, and Greg Slater, Vice President and General Counsel at Intel.

The moderator, Don Baker, a Founding Partner at Baker & Miller PLLC, set the stage by explaining the high stakes of global litigation where companies litigating in multiple jurisdictions have more to lose from under-developed due process protections in any single regime. The panel kicked off with a slide presentation by Maurits Dolmans and a discussion of the due process challenges associated with civil law inquisitorial systems as compared to common law adversarial systems, including the risk of confirmation bias in inquisitorial systems where the fact-finder is also the decision-maker.

Panelists also discussed problems with transparency. Some jurisdictions' enforcers, for example, keep separate formal and informal case files, with parties being deprived of access to the latter despite its containing relevant evidence. One panelist relayed an anecdote about learning of exculpatory evidence possessed by foreign enforcers only through discovery in the United States.

Even when rules exist to protect a party's right to access relevant information, the rules may not go far enough. Panelists noted, for example, that while European Commission procedures require a record of every meeting, the 'record' may include only the fact that the meeting occurred without any accounting of its contents. One panelist emphasized, however, that nuance is called for. Defendants don't necessarily have a claim to all information that is collected; what is essential is that

they have access to all of the information that will be used against them for purposes of making rebuttal arguments.

Another concern raised was the right to effective assistance of counsel. In particular, some countries do not recognize attorney-client privilege protections for communications with in-house counsel. In the context of overlapping multinational proceedings, this can lead to anomalous results whereby a document that is otherwise privileged and inadmissible in the United States is entered into evidence because the same document was seized in a different country.

Panelists also discussed risks associated with enforcers' overly friendly treatment of third-party complainants. In one example, a panelist pointed out that a foreign agency used the same outside counsel as a complainant; in another, the agency allowed complainant's counsel to participate directly in interrogation proceedings and hearings, where they may be exposed to confidential business information. In one country, a competition authority even gave office space to a complainant's lawyers.

Another concern is that Commissioners are sometimes asked to make decisions without ever attending hearings in person. Panelists noted that, even if there are systems in place to ensure that the Commissioner will get a fair report of the proceedings, the Commissioner's absence nonetheless could have a dampening effect on a party's arguments, particularly where witnesses cannot be cross-examined in front of the Commissioner.

Panelists discussed several ways to improve due process protections in inquisitorial systems, such as having a dedicated "devil's advocate" in proceedings, using peer review panels, strengthening the role of the hearing officer, and ensuring rigorous judicial review. Trade agreement provisions, like those contained in the U.S.-Korea agreement, can also be a useful tool. Some foreign jurisdictions (e.g., Korea and Taiwan) have been persuaded by respondents to provide certain rights because it strengthens the agency's ultimate decision. It was noted that strong judicial review in the EU and Korea has forced the competition authorities to improve their processes. One panelist suggested that Korea scored better than the EU on procedural protections in some respects.

The moderator also raised the ABA Transition Report's recommendation that U.S. agencies intervene in foreign proceedings to advocate for due process protections. One panelists noted that this form of public lecturing could backfire, as the effect of U.S. criticism may be to lead authorities elsewhere to "rally around the flag." Also there are questions of legal standing, depending on the nature of the intervention. Another panelist opined that bilateral cooperation through trade agreements or multilateral cooperation through organizations like the ICN are likely to be far more effective. And frank, informal discussion in the context of agency cooperation may be most effective of all. Public confrontation was largely unhelpful in past cases like Microsoft, GE-Honeywell, and others.

During audience Q&A, attendees asked about the rise in invocations of public policy considerations that have traditionally been considered beyond the scope of competition law. Panelists acknowledged that agencies are struggling with issues of political visibility and are being pressured to take industrial policy into consideration instead of focusing solely on competition. One panelist said that the recent Brexit decision means that this practice may increase in Europe. Another panelist expressed concern that America could begin doing so under the Trump Administration.