



DEPARTMENT OF JUSTICE

Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement

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Good afternoon. It is an honor to be here. I congratulate Georgetown and Dean Treanor on the 9th Annual Global Antitrust Enforcement Symposium. It has been a pleasure to work with Bill over the years, especially in 2012 when Howard Shelanski, Bill, and I organized a one-day symposium honoring Bob Pitofsky, whose contributions to this Law Center and to the antitrust field are the stuff of legend.

Bob has long recognized the importance of dialogue—indeed he has often led the conversation—among those of us who care about competition principles and antitrust enforcement. This Enforcement Symposium serves as a key forum for antitrust enforcers, academics, and practitioners from around the world—giving us an opportunity to take stock of recent developments and talk about the future direction of antitrust law and policy.

Things have changed a lot since 1995 when Bob became chairman of the Federal Trade Commission and I was privileged to join him as Director of the Bureau of Competition. Twenty years ago only two dozen or so jurisdictions had antitrust laws; only a handful included the kind of pre-merger notification rules that give enforcers the chance to stop mergers before assets are scrambled. Several jurisdictions prohibited price-fixing, but few had developed an effective cartel enforcement program.

There was talk then of the prospects for antitrust convergence. The differences in approach among those with competition laws were quite significant, both on substantive antitrust principles and process. It was uncertain, too, how many other jurisdictions would embrace competition enforcement. I recall the prevailing assumption at the time

was that enforcers were likely to make progress on procedural convergence long before they approached consensus on substantive issues.

Fast forward to the present. The landscape is quite different. Today, roughly 130 different jurisdictions have antitrust laws, with nearly 80 requiring some form of pre-merger notification. Cartel enforcement is no longer limited to a few jurisdictions. And, contrary to expectations, enforcers have had success converging toward common approaches on many substantive antitrust issues.

We first saw progress in cartel enforcement. Today there is near unanimity about the importance of fighting price fixing, bid rigging, and market allocation. Enforcers around the world recognize that this conduct undermines the very foundation of free enterprise and lacks any efficiency justification or socially redeeming value. And look at the numbers. In 2014 alone, at least 19 different jurisdictions levied criminal fines or administrative penalties against cartel conduct totaling more than \$6.5 billion.

Shared understanding of the evil cartels do has led to greater cooperation among cartel enforcers. We coordinate searches and dawn raids. We use mutual legal assistance treaties to obtain evidence from each other. And increasingly we work to extradite executives who attempt to dodge accountability for price-fixing, obstruction of justice, and fraud. This, in turn, makes the world ever smaller and more uncomfortable for cartelists, whether they trade currencies or make liquid-crystal displays. Just one impressive example: close cooperation with enforcers from Asia and Europe, combined with the incentives to self-report created by leniency programs, exposed an extensive and long-lasting series of conspiracies among auto parts manufacturers. In the U.S. alone, we

have so far charged 55 individuals and 37 companies, and secured more than \$2.6 billion in criminal fines.

Merger enforcement today also shows progress. Increasingly, pre-merger notification regimes around the world do not automatically sweep up all transactions. Enforcers are better at deciding when and how to evaluate consolidation. Most now agree to limit jurisdiction to situations where there is an appropriate nexus to the transaction. We also increasingly share the view that we should seek relief only when a transaction risks significant harm to competition. Multilateral organizations like the Organization for Economic Cooperation and Development and the International Competition Network help lead this ongoing effort. Both organizations provide forums for enforcers to share views about the important questions underlying every merger review—how to evaluate potential harm to competition and determine the affected markets—and to develop best practices on how to answer them.

We also need to recognize, commend, and encourage the bilateral cooperation that occurs on merger reviews. Antitrust Division attorneys and economists regularly consult with foreign colleagues on issues of process, timing, and substance affecting merger investigations. Our FTC colleagues do the same. In the last five years we have worked with other enforcers in 40% of our merger challenges; last year alone, we cooperated with 16 different foreign enforcers—sometimes more than one at a time—in 14 different investigations. Coordination gets enforcers to the right results more quickly and avoids inconsistent outcomes, benefitting both consumers and the merging parties.

Let me briefly cite two examples. First, over the last year we worked with colleagues from China and Korea to investigate Applied Materials' proposed merger with Tokyo Electron. We coordinated our analysis and our assessment of remedies proposed by the parties, ultimately concluding that the proposed "undertakings" would not address our concerns about the likely effect of the merger on the development of next-generation semiconductor manufacturing equipment. The companies abandoned the proposed merger earlier this year after all three agencies expressed those concerns.

Just three weeks ago the Antitrust Division and the European Commission announced separate settlements that eliminated the harm to competition caused by General Electric's proposed acquisition of Alstom SA. Coordination between the Division and the Directorate-General for Competition advanced the investigation, and it enabled each jurisdiction to remedy the threats the acquisition posed for its respective market while allowing the non-problematic aspects of the deal to go forward. In the United States, this meant that GE had to divest an Alstom subsidiary that competes to service GE turbines. In Europe, the Commission also required the merging parties to divest the most technologically advanced parts of Alstom's heavy duty gas turbine business.

We also have made progress towards consensus on ensuring transparency, procedural fairness, and even-handed application of antitrust principles. Process matters. In a global economy, competition and consumers are best served where corporations and individuals have confidence that they will be treated fairly wherever they do business.

In the last several years we have seen sustained engagement on these issues. The OECD Competition Committee has helped secure “a broad consensus” “on the need for, and importance of, transparency and procedural fairness in competition enforcement.”¹ Similarly, the ICN has adopted guidance that aims to promote fair and informed enforcement across all institutional frameworks.²

There is bilateral progress as well. As part of the broader U.S.-China Strategic and Economic Dialogue in June 2014, and the U.S.-China Joint Commission on Commerce and Trade in December 2014, enforcers from the United States and the People’s Republic publicly recognized that antimonopoly law enforcement should address harm to competition and should not promote individual competitors or industries. In addition, the Chinese government made detailed commitments regarding procedural fairness, transparency, and nondiscrimination in the enforcement of their now eight years-old Antimonopoly Law. We look forward to seeing these commitments bear fruit.

Dialogue among enforcers and the broader international antitrust community has led to significant progress on many issues. The achievements are real. But there are still some important topics where the conversation is less advanced. One area is how we address allegations of anticompetitive single-firm conduct.

Some observers have suggested that the comparatively slow progress towards convergence in this area is best explained by differences in statutory language, economic history, or enforcement philosophies. There is truth to that. But those differences are not

¹ OECD COMPETITION COMMITTEE, PROCEDURAL FAIRNESS AND TRANSPARENCY: KEY POINTS 5 (2012).

² INTERNATIONAL COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2015), *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

unique to single-firm conduct and are not good reasons to avoid a conversation about when single-firm conduct is problematic and when it is not. As former Assistant Attorney General Joel Klein said in 2000 when he first raised publicly the concept of an international competition network, “Ultimately, for global cooperation and coordination to work, we need to develop a common language even if we can't achieve pure convergence.”³

It is important to get this right. Under-enforcement against unilateral anticompetitive conduct creates significant risks to competition and consumer welfare. Exclusionary conduct by a monopolist can deny consumers the benefits of vigorous competition on price, quality, and service. At the same time, over-enforcement creates its own set of risks. Some types of aggressive pricing behavior, for example, may disadvantage competitors but provide significant benefits for consumers. Deterring such competition harms the competitive process and leaves consumers worse off.

We may not reach consensus on all issues relating to single-firm conduct. But I expect that we will find that there is much we can agree on. Even if differences between our laws and traditions prevent full convergence on the treatment of single-firm conduct, we should be able to reach common ground on underlying principles and approaches. It is important to have these discussions outside the context of particular enforcement actions. Doing so will help us develop a shared vocabulary and better understanding of the analytical framework best suited to distinguishing between abuse of dominance and

³ Joel Klein, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Time for a Global Competition Initiative?, Remarks as Prepared for the EC Merger Control 10th Anniversary Conference (Sept. 14, 2000), <http://www.justice.gov/atr/speech/time-global-competition-initiative>.

legitimate competitive behavior. Over time that should reduce the risk of inconsistent outcomes.

The foundations for such a dialogue have grown stronger over the last few years. Thanks to the international antitrust community's growing commitment to enforcement based on transparency and sound economic principles we have never had a better chance for productive collaboration. Our experience working collaboratively on cartels, mergers, and procedural fairness can help guide our way.

We have something to build on. There is broad consensus that market power—some call it dominance—should be at the heart of any unilateral conduct violation. And it is widely recognized that market shares are only one tool for assessing market power. At the same time, there is growing appreciation that unilateral conduct violations require specific exclusionary conduct with likely anticompetitive effects. Market power created through competition on the merits should be rewarded, not condemned. In my recent speech to the International Bar Association, I discussed how intellectual property law and antitrust law should work together, particularly in the context of single-firm assertions of patent rights.⁴ Lawful intellectual property rights should be respected because they spur incentives for innovation and reward greater business acumen. Bad behavior that inflates the value of otherwise lawful intellectual property should be subject to antitrust scrutiny, for example, when a patent holder fails to honor its voluntary promise to a standards-setting organization to license a standards-essential patent on a fair, reasonable, and non-

⁴ Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Reflections on the Role of Competition Agencies When Patents Become Essential, Remarks as Prepared for the 19th Annual International Bar Association Competition Conference (Sept. 11, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-19th-annual-international-bar>.

discriminatory basis. In those cases, antitrust enforcers can help ensure that standards-essential patents are not used to unreasonably limit competition.

There is also common understanding that the net effect of the challenged conduct should be carefully considered. Aggressive, beneficial competition and anticompetitive exclusionary conduct can look very similar. Both may involve non-cooperative behavior toward competitors. Getting enforcement right requires tools that effectively distinguish between the two.

Important differences remain and may endure for some time. Further discussions are needed on what constitutes market power (or “dominance”) and how to best measure it. So, too, we need to talk more about what makes exclusionary conduct anticompetitive. These are tough issues to tackle but these conversations should occur between enforcers, at conferences like this one, and through multilateral organizations like the OECD and ICN. Indeed, over the past several years, the ICN’s Unilateral Conduct Working Group has mapped the parameters of unilateral conduct enforcement. In the Unilateral Conduct Workbook, the ICN has already provided a useful summary of how enforcers view unilateral conduct laws generally, predatory pricing, and exclusive dealing.⁵ The Working Group’s current co-chairs—the Antitrust Division, the United Kingdom’s Competition Markets Authority, and the Turkish Competition Authority—want the conversations to continue over the next year.

⁵ INTERNATIONAL COMPETITION NETWORK, UNILATERAL CONDUCT WORKBOOK, Presented at the 11th Annual ICN Conference (2011), available at <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral/ucworkbook.aspx>.

We have come a long way in building productive relationships in the international antitrust community. The time for letting our differences stand in the way of movement toward convergence has passed. If we are to effectively advance our shared goals of protecting competition, we need to be able to talk about all the tools at our disposal. As one of the heroes of my youth, Attorney General Robert Kennedy, said shortly before he left the Justice Department, “Just because we cannot see clearly the end of the road, that is no reason for not setting out on the most essential journey.”⁶

⁶ Statement by Attorney General Robert F. Kennedy on Departure from Poland (July 2, 1964), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/07-01-1964.pdf>.