



DEPARTMENT OF JUSTICE

STRIVING FOR THE OPTIMAL BALANCE IN ANTITRUST ENFORCEMENT: SINGLE-FIRM CONDUCT, ANTITRUST REMEDIES, AND PROCEDURAL FAIRNESS

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I. INTRODUCTION: THE LEGACY OF THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

In 1997, Attorney General Janet Reno and my predecessor in the Antitrust Division, Assistant Attorney General Joel Klein, made history in appointing the International Competition Policy Advisory Committee (“ICPAC”), a panel comprised of distinguished individuals representing broad legal, economic, and business experience and expertise, and charged with making recommendations regarding the most pressing international competition policy issues facing the United States. ICPAC’s Final Report, which became a blueprint for the Department’s international competition policy, focused on the identification of initiatives to achieve several overarching goals: (1) expanded cooperation between United States and foreign competition enforcement agencies; (2) greater convergence of systems; and (3) increased transparency and accountability of government actions.¹ ICPAC also recommended that the United States and other nations undertake a Global Competition Initiative to create a new venue where governmental officials, private firms, and nongovernmental organizations (“NGOs”) could discuss issues of competition law and policy.² On October 25, 2001, antitrust officials from 14 jurisdictions met in New York to launch the International Competition Network (“ICN”), the first international body devoted exclusively to international antitrust issues.³

¹ U.S. DEPARTMENT OF JUSTICE, FINAL REPORT OF THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND THE ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, at 1-2 (February 2000) (“ICPAC Final Report”), *available at* <http://www.usdoj.gov/atr/icpac/icpac.htm>.

² *Id.* at 29-30, 281-85.

³ The antitrust agencies that launched the ICN were from Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia. *See* History of the International Competition Network, *available at* <http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/history>.

In the years since ICPAC’s Final Report was issued, the Antitrust Division has pursued greater cooperation with our colleagues abroad. We have been active participants in the ICN and the Competition Committee of the Organisation for Economic Cooperation and Development (“OECD”), which foster an ongoing international dialogue regarding competition policy, as well as the development of a consensus regarding best practices on substantive and procedural issues. Bilateral meetings and technical assistance visits have strengthened our relationships with both experienced and newer foreign competition authorities. In recent years, the Division has also offered its expertise to newer competition agencies – for example, providing comments on proposed legislation or enforcement guidelines – as they build and expand their enforcement capabilities.

Cooperation with fellow antitrust authorities in the global network of competition agencies remains a high priority of the Division. Although well over 100 countries have adopted antitrust laws, “the emergence of competition policy regimes has not meant a uniformity of substantive rules or institutional approaches around the world.”⁴ Moreover, even within established antitrust jurisdictions, the focus and practice of antitrust law must evolve and change in response to technological developments and the expansion of global markets. This environment of continuing change raises challenges in our pursuit of two other goals of the ICPAC report: convergence in competition policy and increased transparency. I believe we can meet these challenges if we continue to pursue discussions of the core principles that drive our antitrust systems. Such basic, pragmatic conversations are essential to further progress. Today, I want to contribute to the conversation regarding two specific issues, single-firm conduct

⁴ See ICPAC Final Report, at 1-2.

standards and antitrust remedies, as well as discuss a path to greater transparency and procedural fairness in enforcement.

II. IN SEARCH OF GREATER CONVERGENCE IN GLOBAL ANTITRUST ENFORCEMENT STANDARDS

At his first press conference serving as Assistant Attorney General for Antitrust, Thurman Arnold offered the simple statement that he intended to “pursue a policy of enforcement of the anti-trust laws which will be both fair and vigorous.”⁵ As those who serve in other enforcement agencies know well, achieving this balance is as challenging as it is essential. I want to discuss two particular enforcement issues – single-firm conduct and antitrust fines – as they represent areas in which agencies around the world have struck different balances. These areas therefore present opportunities for discussions of greater convergence. We have already made great strides in substantive and procedural convergence in the merger review context,⁶ and I believe that these results demonstrate the potential for our collaboration going forward on other complex issues. I am confident that if the same focus and spirit of cooperation are directed towards single-firm conduct and antitrust fines, greater convergence can be achieved.

A. Single-Firm Conduct

We have already made strides towards convergence regarding the standards for single-firm conduct, but we need to keep working on this. The analytical approaches of U.S. agencies and the European Commission (“EC”) are more similar than ever before. Importantly, we agree with the EC that “what really matters is to protect an effective competitive process and not

⁵ *Arnold Takes Office as Anti-Trust Chief*, N.Y. TIMES, Mar. 22, 1938, at A3.

⁶ See Christine A. Varney, Assistant Attorney General, *Our Progress Towards International Convergence*, Remarks as Prepared for the 36th Annual Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy, at 3-6 (September 24, 2009), available at <http://www.usdoj.gov/atr/public/speeches/250264.htm>.

simply protect[] competitors.”⁷ Further, both jurisdictions eschew *per se* and formulaic approaches, and instead embrace effects-based analyses of single-firm conduct. In discussing the strong trend toward an effects-based approach to Article 82 enforcement in the European Union, Competition Commissioner Kroes recently stated that “instead of making assumptions – for example that rebates and product-tying and bundling are a problem – we require evidence to back such views before we will act,” and that “[s]igning up to an effects-based approach also means we are unlikely to pursue a case unless a firm’s conduct is likely to cause *consumer harm*.”⁸

Notably, the U.S. and the EC also share common views on the threshold issue of monopoly power or “dominance.” Under U.S. law, market power and monopoly power are not one and the same.⁹ The latter describes the “power to control prices or exclude competition.”¹⁰ Although in some circumstances, we may be able to infer monopoly power from a firm’s

⁷ European Commission, Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 4-5, ¶ 6 (December 3, 2008) (“EC Guidance Paper”), available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>.

⁸ Commissioner Neelie Kroes, European Commission, *Commission Enforcement Policy and the Need for a Competitive Solution to the Crisis*, Remarks before the Irish Centre for European Law, at 5 (July 17, 2009) (emphasis in original), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/348&format=HTML&age=0&language=EN&guiLanguage=en>.

⁹ See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (“Monopoly power under § 2, requires, of course, something greater than market power under §1.”).

¹⁰ See, e.g., *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956).

predominant share of the market,¹¹ we also look beyond market share and ask questions regarding the durability of the firm's market power,¹² and its ability to exclude its rivals.¹³ Similarly, in its Article 82 analyses, the EC considers a predominant share of the market to be a strong indication of dominance, but also assesses other market conditions that shed light on the durability of a firm's market power and its ability to exclude competitors.¹⁴ Some other jurisdictions have identified a particular market share as sufficient, standing alone, to establish dominance, but that is not the U.S. or EC approach, and a shared view on this important threshold issue is critical.

Moreover, under U.S. and EC law, monopoly power or dominance alone is not sufficient to constitute an antitrust violation. Although Article 82 addresses the types of potentially illegal

¹¹ Although a dominant market share is typically required to infer monopoly power, as Judge Learned Hand wrote in *United States v. Aluminum Co. of America*, U.S. courts have not identified a requisite market share. See 148 F.2d 416, 424 (2d Cir. 1945).

¹² See *AD/SA, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (defining monopoly power as the ability to “(1) price substantially above the competitive level and (2) to persist in doing so for a significant period of time without erosion or expansion.” (quoting 2A PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 501, at 90 (2d. ed. 2002)) (emphasis in original)).

¹³ See, e.g., *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 190-91 (3d Cir. 2005) (noting district court's “clear error” in finding that defendant lacked ability to exclude competitors where evidence demonstrated numerous instances in which defendant required or pressured dealers not to carry competitors' products). A firm may have the ability to exclude rivals due to its power over consumers; market power is greatest where customers find it difficult to forego using a product or service. See *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001) (en banc) (considering Microsoft's predominant market share, as well as other factors, including consumers' preference for Microsoft's dominant operating system, in finding monopoly power).

¹⁴ See EC Guidance Paper at ¶¶ 10-16; Commissioner Neelie Kroes, European Commission, *Preliminary Thoughts on Policy Review of Article 82*, Remarks at the Fordham Corporate Law Institute, at 1-2 (September 23, 2005) (discussing considerations in the assessment of dominance, including the market position of competitors, barriers to expansion and entry, and the market position of buyers).

conduct more specifically than Section 2 of the Sherman Act,¹⁵ it is a critical commonality that both jurisdictions require a showing of anticompetitive conduct. This requirement reflects a fundamental principle that serves to protect firms engaged simply in competition on the merits: size and power in and of themselves are not illegal.¹⁶

Despite these similarities, there is much room for further convergence between the U.S. and the EC, and among other jurisdictions. There still may be some level of disconnect between the U.S. and the EC in our fundamental attitudes – or underlying assumptions – about what it means to protect the competitive process and how competition law best achieves that objective. Indeed, Article 82 places a “special responsibility” on a dominant firm “not to allow its conduct to impair undistorted competition”¹⁷ – an obligation that has no true analog under U.S. law. Differences in overarching philosophies or attitudes can lead to corresponding differences on more specific issues and in particular cases. For example, there still seems to be more skepticism in Europe than in the U.S. about the generally procompetitive nature of price discounting and the importance of efficiencies.

With respect to predatory pricing, the European Court of Justice recently held that recoupment is not an essential element of a predatory pricing violation,¹⁸ whereas the United

¹⁵ Compare Article 82 of the Treaty Establishing the European Community with 15 U.S.C. § 2.

¹⁶ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); see also Commissioner Kroes, *supra* note 14, at 3 (“I like aggressive competition – including by dominant companies. . . as long as it ultimately benefits consumers”); Letter from Thurman Arnold to Alfred Friendly (Aug. 9, 1961), in *VOLTAIRE AND THE COWBOY: THE CORRESPONDENCE OF THURMAN ARNOLD* 439 (Gene M. Gressley ed., 1977).

¹⁷ Case 322/81, *Nederlandsche Baden-Industrie Michelin NV v. Comm’n*, 1983 E.C.R. 3461; 1 C.M.L.R. 282 (1985); see also EC Guidance Paper, at ¶ 9.

¹⁸ Case C-202/07 P, *France Télécom v. Commission* (2009) (judgment not yet reported).

States Supreme Court observed in *Brooke Group* that, unless recoupment is feasible, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”¹⁹ Thus, the Court held that a monopolist must have “a dangerous probability . . . of recouping its investment in below-cost prices” for a plaintiff to prevail on a predatory pricing claim.²⁰

As for efficiencies, the EC’s Guidance Paper explicitly recognizes a role for efficiencies, but only when the dominant firm can “guarantee” that no net harm to consumers is likely to arise.²¹ Moreover, the dominant firm must show that the conduct at issue is “indispensable” to realization of the efficiencies, with “no less anti-competitive alternatives that are capable of producing the same efficiencies.”²² Even where efficiencies have been, or likely are to be, realized by the indispensable conduct, and they “outweigh any likely negative effects on competition and consumer welfare,” the allegedly efficient conduct in question may still be viewed as illegal under an additional, broad catch-all provision.²³ In the U.S., efficiency claims are evaluated under a different framework, and the practical difference can be substantial when the conduct at issue serves some legitimate business purpose.²⁴

¹⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

²⁰ *Id.*

²¹ EC Guidance Paper, at ¶ 29.

²² *Id.*

²³ *Id.*

²⁴ *See United States v. Microsoft Corp.*, 253 F.3d at 59 (“If the monopolist asserts a procompetitive justification— a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal— then the burden shifts back to the plaintiff to rebut that claim.”).

These are just a few examples of areas where the EC imposes more limits on single-firm conduct than Section 2 of the Sherman Act. These specific differences, as well as those in general and overarching competition philosophies, may root in differing economic histories. But such differences nevertheless raise concerns in today's interconnected global economy, particularly if they are not managed properly, because the enforcement action of just a single antitrust agency can affect consumers worldwide. As ICPAC recognized in the merger review context,²⁵ lack of unity creates significant difficulties for firms developing business strategies in a global economy. We understand – as do our colleagues at other antitrust agencies – that members of the antitrust and business communities face uncertainty in evaluating whether, and in what circumstances, certain categories of single-firm conduct will be deemed unlawful. Their concerns deserve further attention and discussion. Although these issues present highly complex legal and economic questions, I believe that substantially more progress towards convergence is possible. The important dialogue regarding further convergence is already underway,²⁶ and I intend to be an active participant as discussions continue.

B. Antitrust Remedies – Fines

Another area that warrants our further discussion is one of the toughest issues we face as antitrust enforcers – how to fashion appropriate and effective remedies and sanctions in response to particular instances of anticompetitive conduct. Of interest to many is the question of whether competition agencies should rely primarily on antitrust fines – either criminal or civil penalties –

²⁵ See *supra* note 1, at 52, 90-94.

²⁶ See, e.g., INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR DOMINANCE/SUBSTANTIAL MARKET POWER ANALYSIS (June 2008) (addressing relevant measure of dominance/monopoly power), available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf.

or instead look to a range of alternative antitrust remedies and sanctions. This issue is ripe for discussion in light of recent cases in which competition authorities around the world have imposed significant civil fines in administrative contexts.²⁷ Although our respective enforcement strategies are strongly influenced by our native legal traditions, we share a common interest in the pursuit of effective enforcement and the achievement of consistent resolutions. I believe that this shared interest makes a continuing dialogue regarding civil fines and other remedies worthwhile.

The difficulty in formulating any one remedy in a civil antitrust case is plain: U.S. antitrust laws reach a broad range of anticompetitive conduct occurring in a myriad of industries, each of which presents a different competitive landscape. Indeed, in recognition of the varied circumstances falling within the reach of antitrust laws, courts have “a wide range of discretion .

²⁷ See, e.g., Press Release, *European Commission Antitrust Committee, Commission Welcomes CFI Ruling Upholding Commission’s Decision in Microsoft’s Abuse of Dominant Market Position* (September 17, 2007) (announcing € 497 million [\$704 million] fine), available at http://ec.europa.eu/competition/antitrust/cases/index/by_nr_75.html#i37_792; Press Release, *European Commission Imposes Fine of € 1.06 bn on Intel for Abuse of Dominance Position; Orders Intel to Cease Illegal Practices* (May 13, 2009) (announcing \$2.26 billion fine), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745>; Press Release, *European Commission fines E.ON and GDF Suez € 553 million Each for Market-Sharing in French and German Gas Markets* (July 8, 2009) (announcing \$783 million fine), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1099>; Korea Fair Trade Commission, *Correction of Hyundai Motor Co’s Interference with its Sales Agencies’ Business Activities* (July 8, 2009) (announcing fine of 852 billion won [approx. \$837 million]), available at http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=18; *Brazil hits AmBev with Highest-ever Fine*, GLOBAL COMPETITION REVIEW (July 23, 2009) (“Brazilian competition authority CADE has fined the Brazilian wing of brewer Anheuser-Busch InBev a record 353 million reais (\$184 million) for using marketing and sales practices to block entry and squeeze competitors out of the country’s beer market”), available at <http://www.globalcompetitionreview.com/news/article/18370/brazil-hits-ambev-highest-ever-fine/>; Korea Fair Trade Commission, *Corrective Measures Against Intel’s Abuse of Market Dominance* (August 8, 2009) (announcing fine of “some 26 billion won [approx. \$26.4 million] (to be determined after confirmation of affected turnover)”), available at http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=18.

. . to mold the decree to the exigencies of the particular case[.]”²⁸ As the Supreme Court noted in *International Salt Co. v. United States*:

The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do . . . When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all the untraveled roads to that end be left open and that only the worn one be closed.²⁹

The inherent complexity of the field in which we operate requires careful consideration of our enforcement objectives, the range of available remedies to meet such objectives, and the efficacy of remedies in addressing particular violations of the antitrust laws.

1. Core Antitrust Enforcement Objectives

Any discussion of antitrust remedies necessarily begins with the evaluation of the core objectives served by antitrust enforcement. Among the most important objectives of U.S. antitrust enforcement are the following: (1) the cessation of unlawful conduct;³⁰ (2) the prevention or deterrence of future unlawful acts;³¹ (3) the restitution of ill-gotten gains;³² (4) the

²⁸ See, e.g., *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461 (1940).

²⁹ 332 U.S. 392, 400 (1947).

³⁰ See 15 U.S.C. §§ 4, 25 (conferring jurisdiction on federal courts to “prevent and restrain” violations); 15 U.S.C. § 45(m) (empowering FTC to issue “cease and desist” orders).

³¹ See, e.g., Michael Kent Block, Frederick Carl Nold & Joseph Gregory Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 429-30 (1981) (discussing “use of criminal and civil sanctions” as a means to “achieve general deterrence” of antitrust violations).

³² See, e.g., *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948) (equitable relief includes “depriv[ing] defendants of the benefits of their conspiracy”), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); see also Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79 (2009) (discussing equitable remedy of disgorgement in antitrust cases).

restoration of competitive conditions in the marketplace;³³ and (5) punishment of culpable entities and individuals.³⁴ We recognize that not all of these objectives are implicated in any one case. Moreover, under the U.S. antitrust laws, some enforcement objectives can be achieved through civil and criminal enforcement by the government, and also through civil damage actions brought by private parties.³⁵

I believe that an effective enforcement framework must have enough flexibility to meet the varying objectives posed by specific cases. Indeed, there is no one perfect solution for all cases. Accordingly, the availability of several remedies, which can be used in tandem or separately, is an important aspect of a strong framework. Consistent with this notion of flexibility, the U.S. antitrust laws reflect a three-prong approach to enforcement. Each avenue

³³ See, e.g., *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (“The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition.”); *United States v. Microsoft Corp.*, 253 F.3d at 103 (“The Supreme Court has explained that a remedies decree in an antitrust case must seek to unfetter a market from anticompetitive conduct, to terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.”) (internal citations omitted).

³⁴ See Testimony of Deputy Assistant Attorney General Scott D. Hammond Before the United States Sentencing Commission Concerning Proposed 2005 Amendments to § 2R1.1 (Apr. 12, 2005) (“One of the principal congressional purposes behind increasing the Sherman Act maximum [fines] was to acknowledge and punish cartel violations”), available at <http://www.usdoj.gov/atr/public/testimony/208546.htm>.

³⁵ The Clayton Act created a private cause of action for any violation of federal antitrust laws. The statute provides that a private plaintiff “injured in his business or property by reason of anything forbidden in the antitrust laws may sue.” 15 U.S.C. § 15(a); see generally ANTITRUST MODERNIZATION COMM’N: REPORT AND RECOMMENDATIONS, at 129-150, 241-64 (April 2007) (overview of public and private enforcement of U.S. antitrust laws).

for enforcement offers a suite of remedies to be considered in addressing the multitude of concerns posed by anticompetitive conduct³⁶:

- (1) Criminal enforcement of the Sherman Act by the Department of Justice, which may give rise to criminal fines for corporations of up to the greatest of twice the gain that conspirators derive from their crime, twice the loss that conspirators cause victims, or \$100 million, and fines of up to \$1 million for individuals, and up to 10 years imprisonment³⁷;
- (2) Civil enforcement for injunctive relief and other equitable remedies by the Department of Justice of the Sherman Act and the Clayton Act, and by the Federal Trade Commission under the Clayton Act and the Federal Trade Commission Act³⁸; and
- (3) Actions by private parties³⁹ or State Attorneys General⁴⁰ under the Clayton Act for damages and injunctive relief.

³⁶ See U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER, *available at* http://www.usdoj.gov/atr/public/div_stats/211491.htm.

³⁷ See Antitrust Criminal Penalty Enforcement and Reform Act of 2004, Pub. L. 108-237, 118 Stat. 665 (June 22, 2004) (codified at 15 U.S.C. § 1) (“ACPERA”); *see also* 18 U.S.C. § 3571 (criminal fines under Section 18 of the United States Code).

³⁸ See 15 U.S.C. §§ 4, 25 (authorizing the Department of Justice to “prevent and restrain violations of [the Sherman Act]” and to “institute proceedings in equity to prevent and restrain violations [of the Clayton Act]”); 15 U.S.C. §§ 45(b), 53(b) (authorizing the Federal Trade Commission to issue “cease and desist” orders against violators, and to seek temporary restraining orders and injunctions in district courts).

Equitable remedies may include restitutionary relief, such as disgorgement. *See FTC v. Mylan Labs Inc.*, 62 F. Supp. 2d 25, 36-38 (D.D.C. 1999) (holding that FTC may pursue disgorgement in unfair competition case pursuant to 15 U.S.C. § 53(b)); ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS, at 286 (2007).

³⁹ 15 U.S.C. § 15(a) (“any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws” may “recover threefold the damages by him sustained”). There are a few instances in which treble damages may not be available, including for organizations that participate in the Antitrust Division’s corporate leniency program, which provides incentives for participants in cartel activity to provide evidence to the Division for use in criminal prosecutions and to cooperate with the Division in pursuing their civil actions. *See* ACPERA, 118 Stat. 661, 666.

Within this framework, the Antitrust Division has sought criminal antitrust fines and the imprisonment of culpable individuals following successful criminal prosecution,⁴¹ and monetary remedies upon contempt proceedings based on a violation of a consent decree entered to resolve a civil antitrust action.⁴² Putting aside monetary relief, in civil matters, the Antitrust Division explores what form of injunctive relief will bring an immediate halt to anticompetitive conduct, remedy harmful effects, and prevent future conduct in violation of the antitrust laws. As I will discuss next, I believe that this use of monetary and non-monetary remedies, as appropriate, meets our enforcement objectives and also may avoid chilling procompetitive and innovative conduct that could benefit consumers.

The United States, just as any private party injured by anticompetitive conduct, may file a damages action to assert claims that its business or property have been harmed as a result of violations of the antitrust laws. See 15 U.S.C. § 15a.

⁴⁰ Under the Sherman Act, State Attorneys General may also bring civil actions for monetary relief as *parens patriae* on behalf of citizens residing within their states. See 15 U.S.C. § 15(c).

⁴¹ See *supra* note 37.

⁴² The United States may seek penalties for contempt of a consent decree entered in resolution of an antitrust action. See 18 U.S.C. § 401 (power of courts “to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority”); *Int’l Bus. Machs. Corp. v. United States*, 493 F.2d 112, 115-17 (2d Cir. 1973) (discussing civil contempt in the context of antitrust action); see, e.g., Press Release, *Justice Department Settles Civil Contempt Claim Against Alltel Corporation – Alltel Agrees to Pay \$1.325 Million as Part of a Civil Settlement for Violating Two Court Orders* (December 3, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2009/241435.htm; Press Release, *Justice Department Settles Civil Contempt Claim Against American Airlines – American Airlines Agrees to Pay \$3 Million Civil Penalty* (August 6, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/204933.htm.

2. The Optimal Balance: A Suite of Antitrust Remedies to Address Cartel and Non-Cartel Enforcement

The Antitrust Division has sought the imposition of criminal antitrust fines and the imprisonment of culpable individuals in response to anticompetitive conduct that is always harmful to competition and consumers, clearly defined, and difficult to uncover. Hard-core cartels engage in the kind of insidiously anticompetitive conduct that implicates many of our enforcement objectives, including punishment of culpable parties.⁴³ Agreements among competitors to fix prices, allocate markets or customers, or restrict output are among the categories of conduct that present no such benefits for consumers.⁴⁴ In other words, such conduct is unambiguously harmful. Accordingly, over time, Congress has recognized the importance of providing the Antitrust Division with the enforcement tools necessary to respond to this most concerning category of antitrust violations. Since 1974, the maximum term of imprisonment for felony antitrust violations has been increased from the three-year maximum

⁴³ See Commissioner Neelie Kroes, European Commission, *Antitrust and State Aid Control: The Lessons Learned*, Remarks for the 36th Annual Fordham Conference on International Antitrust Law and Policy, at 3 (September 24, 2009) (discussing “zero tolerance approach” to cartels); Philip Lowe, Directorate General for Competition of the European Commission, *Cartels, Fines, and Due Process*, GLOBAL COMPETITION POLICY 2-3 (July 2009) (“Antitrust infringements, in particular cartels, cause enormous damage to consumers businesses, and national economies...[t]he enormous economic harm caused by cartels explains why the Commission pursues a zero tolerance policy vis a vis this type of infringement”).

⁴⁴ The Antitrust Division’s criminal enforcement program has focused on the detection and prosecution of hard-core cartel activity that constitutes a *per se* violation of the antitrust laws. See generally Scott D. Hammond, Deputy Assistant Attorney General, *Recent Developments, Trends, and Milestones in The Antitrust Division’s Criminal Enforcement Program*, Remarks Presented at the 56th Annual Spring Meeting of the American Bar Association Section of Antitrust Law (March 26, 2008), available at <http://www.usdoj.gov/atr/public/speeches/232716.htm>; see also *United States v. United States Gypsum Co.*, 333 U.S. 364, 440 (1948) (describing, in general, the types of offenses prosecuted criminally, including price-fixing) (citing THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT – AN ASSESSMENT 110 (1967)).

sentence under the 1974 amendments to the Sherman Act to 10 years. Under ACPERA, the maximum criminal fine for corporations that violate the Sherman Act has been increased to \$100 million, and the maximum fine for individuals to \$1 million.⁴⁵ These developments represent an acknowledgment that hard-core cartel activity warrants the full panoply of our most powerful enforcement tools – substantial criminal fines and imprisonment.⁴⁶ Importantly, when such sanctions are employed to punish those who have engaged in hard-core cartel activity and deter future violations, there is little cause for concern that enforcement will chill pro-competitive or innovative efforts in the marketplace.

However, moving beyond hard-core cartel activity, other circumstances require a complex assessment in reaching the optimal use of antitrust remedies. A critical distinction between cartel activity and non-cartel conduct is that the latter is often subject to review under the Rule of Reason, *i.e.*, is reviewed under a reasonableness analysis. The implication of this reasonableness review is twofold. First, punishment rationales for remedies may not apply; punishment would seem most justified under circumstances where the law establishes a clearly drawn line between permissible and unlawful conduct, and parties knowingly cross the line by thwarting the competitive process. Accordingly, where the challenged conduct is not easily identifiable as violating the antitrust laws, or where the scope of resulting harmful effects is difficult to establish, remedies supported by punishment rationales, such as criminal fines and

⁴⁵ See also *supra* note 37 (alternative criminal fine statute).

⁴⁶ See Lowe, *supra* note 43, at 3 (observing that “[t]he enormous economic harm caused by cartels explains why the Commission pursues a zero tolerance policy vis a vis this type of infringement,” and noting that criminal sanctions against individuals exist at the national level).

imprisonment, are inappropriate.⁴⁷ Indeed, in such circumstances, there is a question of whether the use of significant civil fines to punish offenders may have deleterious effects on the fined parties' ability to compete on the merits, or cause ripple effects in related markets.

Second, where challenged conduct is not *per se* unlawful, we must evaluate which remedies are necessary to restore competition and deter future antitrust violations.⁴⁸ As a threshold matter, deterrence rationales are on most solid ground where parties are able to identify in advance the conduct for which enforcement may be pursued and sanctions levied. The predictability of enforcement is at the core of any deterrent mechanism. Therefore, deterrence-based remedies should be designed to send a clear message to would-be offenders regarding the scope of potential liability. In selecting from a menu of options, enforcement authorities should be wary of the risk of over-deterrence – not necessarily in the pursuit of enforcement action in the first instance – but where they choose remedies that far exceed the measures needed to clarify the bounds of the law and impress upon potential offenders that they face exposure. For instance, where parties can demonstrate that there was a lack of clarity in the key factors that would have assisted them in anticipating liability, it may be that a substantial fine is not needed to send a clear message, and a more narrowly tailored remedial solution, such as a swift and decisive injunction, would be most effective. Admittedly, many cases present close calls. However, it is important for us to be mindful of the concern that more aggressive remedial

⁴⁷ Notably, although courts are “authorized and required to decree relief effective to redress violations, whatever the adverse effect of such a decree on private interests,” they have recognized the limits of their authority to punish antitrust violators in civil proceedings. *See, e.g., E.I. du Pont de Nemours*, 366 U.S. at 326 (“Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive.”).

⁴⁸ *See supra* notes 31 and 33.

schemes might chill competition on the merits, along with pro-competitive benefits and innovation that may ultimately benefit consumers.⁴⁹

Given these concerns regarding the reliance on significant fines as a one-step solution for antitrust violations, I applaud those competition agencies that are developing remedial schemes that feature more than one option. A praiseworthy example is the EC's recent invitation to Microsoft to propose creative solutions on Microsoft Internet Explorer and interoperability.⁵⁰

To be clear, even where criminal prosecution is not appropriate – and therefore criminal fines and imprisonment are not sought – our other enforcement objectives remain a high priority and may lead us to seek other effective relief. For example, where the Antitrust Division pursues civil enforcement and evaluates which forms of injunctive relief are necessary to resolve its competitive concerns, it may also consider whether other equitable remedies are warranted to ensure that those who violate the antitrust laws do not benefit from the fruits of their unlawful acts. Part of this evaluation will be to take into account any pending private damage actions that may serve a similar objective, in order to assess whether duplicative remedies would result.⁵¹

The interaction of government and private party enforcement is an issue I look forward to

⁴⁹ See Gregory Werden, *Remedies for Exclusionary Conduct Should Protect and Preserve Competition*, 76 ANTITRUST L.J. 65, 70 (2009) (noting the challenge of crafting a remedy that serves “as an effective deterrent to a repetition of unlawful conduct and yet [does] not stand as a barrier to healthy growth on a competitive basis.”) (citing *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944)).

⁵⁰ Press Release, *European Commission Welcomes New Microsoft Proposals on Microsoft Internet Explorer and Interoperability* (July 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/352>.

⁵¹ See Elhauge, *supra* note 32, at 86 (discussing concerns regarding duplicative recovery, and noting potential solutions). The issue of duplicative recovery is also presented where multiple competition agencies seek enforcement action against the same parties for similar conduct.

discussing with our colleagues here and abroad, as I believe other competition agencies are developing valuable proposals regarding the optimal balance to be struck.⁵²

3. Looking Forward Towards Greater Convergence in Antitrust Remedies

As is evident from this discussion, I firmly believe that a certain amount of flexibility is needed to craft effective resolutions. The availability of a suite of enforcement tools and remedies is one way that such flexibility can be built into an antitrust enforcement framework. As no one remedy fits every case, I would urge other competition authorities to consider whether the optimal balance can be achieved through the use of a broad array of remedies, including those sought by competition agencies, as well as in private civil actions.

Reaching greater convergence with regard to antitrust remedies will be crucial as the global economy grows and evolves. With more firms based in more countries operating on a global scale – and not just North American, European, and Japanese companies – antitrust enforcement actions increasingly have an impact beyond the borders of our respective jurisdictions. There is now a firm international consensus that antitrust enforcement agencies are right to worry about the impact of anticompetitive behavior on their markets, even when that behavior originates outside of their jurisdiction’s borders. But the possibility of broad (and perhaps unintended) international impacts from “domestic” antitrust enforcement remedies in non-cartel cases requires us to consider carefully the scope and nature of such remedies,

⁵² For example, our colleagues at the EC have commenced a broad discussion of the policy choices and measures that would help give victims of antitrust violations the access to competition law in order to redress harm they have suffered. See EUROPEAN COMMISSION, WHITE PAPER ON COMPENSATING CONSUMER AND BUSINESS VICTIMS OF BREACHES OF THE COMPETITION RULES (April 3, 2008), *available at* <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

particularly where they threaten to impact complex networks of intellectual property and innovation in global markets.

Furthermore, where multiple agencies pursue civil enforcement action with regard to the same conduct, substantial divergence in injunctive relief risks inconsistent results that may undermine one or more jurisdictions' enforcement, and may also frustrate a firm's good faith efforts to comply with ordered relief. Thankfully, we have not encountered many instances of such conflict thus far, and some jurisdictions are apparently aware of these concerns and have sought to (or are seeking to) craft antitrust remedies so that they only affect conduct within the jurisdiction's oversight.⁵³ However, as the global economy draws our respective spheres of enforcement closer together, more work in this area will be needed. Posing basic questions regarding our views of the rationales for antitrust enforcement may be a useful starting point, as any discussion of convergence must begin with an understanding of common purposes. I believe that many of us agree on these basic principles, but may differ on which remedies most effectively accomplish our purposes.

However, as has been the case with the development of U.S. antitrust laws, change is not possible overnight; fashioning antitrust remedies in complex industries requires time and careful consideration by legislators, antitrust authorities, and other interested parties. In the short term, where antitrust agencies determine that significant civil fines are their best available remedy to

⁵³ For instance, as discussed *supra* note 50, the EC has engaged Microsoft in discussions regarding Internet Explorer interoperability (Case No. COMP/C-3/39.530). Microsoft has proposed a remedy that would be implemented within the European Economic Area ("EEA"). See Press Release, *Commission Market Tests Microsoft's Proposal to Ensure Consumer Choice of Web Browsers; Welcomes Further Improvements in Field of Interoperability* (October 7, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/439&format=HTML&aged=0&language=EN&guiLanguage=en>.

address competitive concerns, I believe that greater transparency regarding the basis for such fines will increase the effectiveness of the remedy for deterrence purposes, and also serve to decrease the likelihood that procompetitive conduct will be chilled. As I will discuss in closing today, it remains a priority of the Antitrust Division to find ways to achieve a higher level of transparency in our investigative and prosecutorial processes.

III. CONCLUSION: TOWARDS GREATER TRANSPARENCY AND PROCEDURAL FAIRNESS

I want to conclude today with a brief discussion of the importance of transparency and procedural fairness in our enforcement actions. In my view, attention to transparency and fairness ensures that we never lose our focus on pursuing enforcement that is consistent with the principles of due process, which are deeply ingrained in the United States legal system. Indeed, our Constitution mandates that government may not deprive “any person of life, liberty, or property, without due process of law.”⁵⁴ Although the process that is due in a particular circumstance depends on many considerations, the overarching principles are clear: “An elementary and fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁵⁵ Beyond the fundamental requirement of due process under U.S. law, however, I believe that maintaining an open and frequent dialogue with parties under investigation not only helps ensure fairness in our process, but also facilitates more effective enforcement.

⁵⁴ See U.S. CONST. amends. V, XIV.

⁵⁵ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Antitrust Division continues to make efforts towards greater transparency in its investigatory and prosecutorial processes.⁵⁶ Of course, as a law enforcement entity, we face some limitations on our ability to share information with parties during the course of our investigations.⁵⁷ However, I believe that frank exchanges with parties – where practical – allow antitrust enforcers to conduct investigations more efficiently by focusing on the real issues in dispute. For instance, the Antitrust Division typically engages in detailed negotiations regarding the scope of electronic discovery and the timetable for the completion of document productions at the outset of an investigation.⁵⁸ With a clearer understanding of a party’s organizational structure, personnel, and information management systems, we are often routinely able to negotiate document productions that are substantially less burdensome on parties than they would otherwise be.

In addition to enhanced procedural clarity, we also strive for openness regarding our core competitive concerns and theories of harm. It is of no benefit for parties to be surprised by the scope of our concerns and therefore unable to engage in a meaningful dialogue in response. We invite parties to submit briefing, also known as white papers, addressing crucial elements of a case from the parties’ perspective. Parties typically request, and are often granted, meetings with Division leadership before enforcement decisions are made. All of these steps are taken in

⁵⁶ See Christine A. Varney, Assistant Attorney General, *Procedural Fairness*, Remarks as Prepared for the 13th Annual Competition Conference of the International Bar Association at 5-12 (September 12, 2009), *available at* <http://www.usdoj.gov/atr/public/speeches/249974.htm>.

⁵⁷ For instance, the Antitrust Civil Process Act (“ACPA”) sets forth the limitations on disclosure of materials obtained in response to a civil investigative demand (“CID”) issued by the Department of Justice. See 15 U.S.C. §§ 1313(c)-(d), and related regulations, 28 C.F.R. §§ 49.1 - 49.4.

⁵⁸ See Christine A. Varney, Assistant Attorney General, *Procedural Fairness*, *supra* note 56, at 6-7.

furtherance of our view that the Division makes better enforcement decisions when we expose our thinking to informed criticism before we take action.

Once the Antitrust Division decides to bring an action, a different set of procedures are implicated. Our civil actions are tried, in public, before federal judges who serve as neutral arbiters over our claims and the defenses of the parties.⁵⁹ Those neutral courts weigh the Antitrust Division's evidence against the parties' evidence in forming their own, independent conclusions. Our federal trial judges themselves are also accountable for their decisions, which must be explained publicly and are subject to further review through our appellate courts. The accumulated learning of those court decisions fills out the specifics of our antitrust laws: ours is a common-law system where the law evolves over time through decisions applying law to specific facts. Although other legal systems may not have the same origins in judicial review, due process protections in enforcement proceedings can be developed through several means.

It is my hope that these remarks regarding the Antitrust Division's enforcement program provide examples for consideration and further discussion by other antitrust enforcers striving for greater transparency and procedural fairness, and to enhance the effectiveness of their investigations. Of course, different legal traditions may well entail other processes that ensure due process for the parties. As we have in the past, we will continue to seek out opportunities for new learning regarding enforcement frameworks built from different legal foundations. I do not

⁵⁹ As Federal Trade Commissioner William Kovacic has noted, "[t]he judiciary's role in deciding antitrust disputes provides . . . examples of equilibrating tendencies at work." William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, Remarks for the British Institution of International and Comparative Law Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue (May 15, 2003), available at <http://www.ftc.gov/speeches/other/030514biicl.shtm>.

doubt that in sharing our ideas with each other, we will all be one step closer to Thurman Arnold's ideal: "[E]nforcement of the anti-trust laws which will be both fair and vigorous."

Thank you.