



DEPARTMENT OF JUSTICE

COORDINATED REMEDIES: CONVERGENCE, COOPERATION, AND THE ROLE OF TRANSPARENCY

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Globalization has reshaped the face of modern business and modern markets, and the agencies charged with policing those markets for anticompetitive conduct face new challenges as a result. In many of this century's most important industries, the players are bigger, faster, and more interconnected than ever before – accelerating the pace of innovation and expanding the geographical scope in which they bring their innovative products and services to market. These changes require competition agencies around the world to adapt in countless ways, so as to encourage the important welfare gains that these forces can create while, at the same time, remaining vigilant for any anticompetitive harm that may arise. In particular, we at the antitrust agencies all face the challenge of working better *together* as the scale, speed, and global reach of business complicate the jurisdictional boundaries within which we work. It was over a decade ago that my predecessor, Joel Klein, remarked: “In today’s global economy, no aspect of antitrust enforcement and antitrust policy is more important than its international dimension.”¹ The intervening decade has proven his prescience.

Thus, since my appointment last year as Assistant Attorney General for Antitrust, I have spoken on a number of occasions, both in the U.S. and in Europe, about the importance of efforts to bring greater *convergence* to international antitrust enforcement.² *Convergence* can take many forms, including the substantive principles of competition law, the remedies that can be sought, and the procedures used in investigations and merger evaluations – an important topic that OECD Working Party 3 is discussing this week. Greater convergence is itself driven by greater

¹ Joel Klein, Assistant Attorney General, Remarks Regarding the International Competition Policy and Advisory Committee, at 1 (Nov. 27, 1997), *available at* <http://www.usdoj.gov/atr/icpac/1294.pdf>.

² 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 (Sept. 24, 2009), *available at* <http://www.justice.gov/atr/public/speeches/250264.pdf>; Christine A. Varney, Assistant Attorney General, Striving for the Optimal Balance in Antitrust Enforcement: Single-Firm Conduct, Antitrust Remedies, and Procedural Fairness (Oct. 8, 2009), *available at* <http://www.justice.gov/atr/public/speeches/250814.pdf>.

cooperation between the competition agencies – in particular, through their interaction with each other in the course of their investigations, but also through bilateral agreements, technical assistance meetings, and international bodies like ICN and OECD.

I have also spoken on a number of occasions about the importance of *transparency*,³ a key aspect of procedural fairness. This includes openness with the parties about the nature of the proceedings and the theories of harm that an agency is investigating, and willingness to listen and engage with the parties throughout that process. An aspect of transparency that I have emphasized previously is transparency of agency decision-making, and I would like to say something more about that today. Indeed, what I hope to do today is bring the themes of convergence, cooperation, and transparency together by first discussing some ways in which international agencies can improve their coordination of antitrust remedies and then discussing the role that transparency can play in creating cooperation and convergence in the selection of appropriate antitrust remedies.

Addressing Remedies with Our Eyes Open

Devising effective remedies for anticompetitive mergers and conduct is a critical element of successful antitrust enforcement.⁴ Even the best-constructed cases or investigations will fail to fulfill their objectives if we do not fashion appropriate and effective remedies. The globalization of economies and businesses that is the hallmark of our current world can complicate the remedial process, however. Substantial divergence in remedial approaches among different competition agencies risks undermining one or more jurisdictions' enforcement

³ Varney, *Striving for Optimal Balance*, *supra* note 2, at 20-22; Varney, *Our Progress Towards International Convergence*, *supra* note 2, at 2-5; Christine A. Varney, Assistant Attorney General, *Procedural Fairness*, Remarks as Prepared for the 13th Annual Competition Conference of the International Bar Association (Sept. 12, 2009), *available at* <http://www.justice.gov/atr/public/speeches/249974.pdf>.

⁴ Although there is also a case to be made in relation to criminal remedies for hard-core cartelization, criminal remedies raise different concerns and so I will be discussing only civil remedies today.

powers as well complicating, or even frustrating, a firm's good faith efforts to comply with the ordered relief. We, the competition agencies around the globe, thus have an increasingly challenging course to navigate as we each seek to fulfill our respective obligations. On the one hand, we must each seek fulsome remedies sufficient to fulfill our foundational obligation to protect our own consumers; on the other, we should seek to avoid remedies that would have serious effects in other jurisdictions and on their agencies' independent enforcement efforts. We need to strive for those most elusive of remedies: neither too narrow so as to fail to cover all the competitive concerns, nor too broad so as to interfere with other jurisdictions.

Of course, such counsels of perfection are easier to aspire to than they are to achieve. Each agency has its own legal mandates and constraints on what it can do, must do, and must not do, and those legal obligations are, of course, paramount. We also have different approaches, analytical tools, and antitrust philosophies among the various agencies around the world, and those differences create problems of both translation and interpretation that can be hard to overcome. At the same time, it can be a tall order to devise a remedy confined to one jurisdiction for a product market that spans the globe, and the prevalence of such markets makes finding appropriate remedies not only more difficult but also more important. In the end, perfection may be unattainable. Yet it is not, in my view, a counsel of unattainable perfection to propose the following broad principles to help us to navigate our most difficult remedial choices together.

First, we must be attuned to the effects that our actions might have on other jurisdictions. Extraterritorial effects may or may not be avoidable, but where possible we should seek to identify and minimize them. Second, we must be attentive to what our international counterparts have already done. Divergences among our outcomes or remedial approaches on particular

matters are problematic, and avoiding them should be a high priority. Finally, we must be sensitive to what our international counterparts may yet do in the future – to the choices that they may be considering – and attempt to avoid surprising one another. Inter-agency cooperation and coordination can significantly reduce instances of divergence between us, and we can, and should, build on existing practices to advance that cause. This is true in both merger and conduct cases. Let me discuss each of these elements in turn.

1. *Being Mindful of Extraterritorial Effects*

Mindfulness about the extraterritorial effects of our remedial choices should be a relatively basic concept – as simple an idea as knowing the consequences of one’s actions. Perhaps for that reason, it is not a new idea in international antitrust. In the merger realm, the ICN has adopted Recommended Practice X.E, which provides that “[r]eviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions.”⁵ The OECD’s Council Recommendation on Merger Review contains a similar provision,⁶ and the Department of Justice (DOJ) and the Federal Trade Commission (FTC) *Antitrust Enforcement Guidelines for International Operations* state that DOJ and FTC consider international comity in enforcing the antitrust laws, “including the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected.”⁷ Our bilateral antitrust cooperation agreements contain similar provisions,⁸ and OECD

⁵ INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES, RECOMMENDED PRACTICE X.E., INTERAGENCY COORDINATION, at 31 *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL ON MERGER REVIEW (Mar. 23, 2005), *available at* [http://webdomino1.oecd.org/horizontal/oecdacts_nsf/linkto/c\(2005\)34](http://webdomino1.oecd.org/horizontal/oecdacts_nsf/linkto/c(2005)34).

⁷ UNITED STATES DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT

members have agreed to give “full and sympathetic consideration” to the “important interests” of other members.⁹

There are important practical examples of these principles as well. Take, for example, the European Commission’s dealings with Microsoft. The Commission’s recent remedy in the browser case¹⁰ – which was limited to European markets – was an important instance of mindfulness about extraterritorial effects. Indeed, this may be an area in which the United States could improve, at least in those instances where we do not believe that our statutory obligation to our own citizens requires a broader remedy. Yet whether or not we are always able to choose the remedy with the least extraterritorial effect, we nonetheless have an obligation in every case to be mindful of what those extraterritorial effects might be.

Careful consideration of these extraterritorial effects is perhaps essential if we are to identify potential divergences at the best time – that is, before they happen. We can neither seek to support the remedial schemes of our neighbors nor avoid undermining them unless we are mindful of, and seek to avoid, the inappropriate effects that our own choices may have beyond our borders.

2. *Being Mindful of Other Agencies’ Choices*

The second type of mindfulness – that is, mindfulness about the decisions that other

GUIDELINES FOR INTERNATIONAL OPERATIONS (April 1995), available at <http://www.justice.gov/atr/public/guidelines/internat.htm>.

⁸ See, e.g., Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws (Sept. 23, 1991), available at <http://www.justice.gov/atr/public/international/docs/0525.htm>.

⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE (July, 27, 1995), available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130).

¹⁰ See European Commission, Web Browser Choice for European Consumers (Dec. 16, 2009), available at http://ec.europa.eu/competition/consumers/web_browsers_choice_en.html.

competition agencies have already made – is challenging but also important. Divergent results in particular matters are troubling for both businesses and enforcers. For businesses, the risk that different agencies could take different remedial actions creates uncertainty and may undermine firms’ ability to operate globally. Businesses may be unsure about the global relevance of their dealings with one agency when another agency may yet order a different set of remedies. Conversely, such instances of divergence may create incentives for firms to try to play agencies against each other. As Acting Assistant Attorney General Doug Melamed noted, divergent remedies risk not only “suboptimal antitrust enforcement, but also the international politicization of antitrust disputes.”¹¹

As I have said, I recognize that each competition agency has its own responsibility to enforce its own laws and to protect its own consumers, and so each has an independent responsibility to assess the competitive effect of the merger or conduct in question, and to seek remedies, if necessary, that satisfy its own legal obligations. Even setting aside any differences in substantive principles between different antitrust systems, there may be different market conditions and realities in different jurisdictions, and those differences may explain why we do not always end up at the same remedial end point.¹² Yet I believe divergent outcomes should occur, if they do, for well-founded reasons, and not arbitrarily or unexpectedly. Paying due attention to what our sister agencies have already done to address particular mergers or activities that we are investigating will, I believe, assist in this respect. Of course, in a world now populated by over 100 competition agencies, and where many agencies around the world may

¹¹ A. Douglas Melamed, Acting Assistant Attorney General, Promoting Sound Antitrust Enforcement in the Global Economy, Remarks Before the Fordham Corporate Law Institute (Oct. 19, 2000) *available at* <http://www.justice.gov/atr/public/speeches/6785.pdf>.

¹² *See, e.g.,* Varney, Our Progress Towards International Convergence, *supra* note 2, at 2-3.

investigate the same merger or conduct, that may be no easy task.

Thus, while we must all of course adhere to our own mandates and timing requirements, I suggest that we should keep our eyes open, in particular, for the conclusions of that agency with the greatest proportion of commerce and consumers at stake in a particular case. We should be particularly attentive to the opinion of the agency where the principal assets are located or the greatest revenue is earned, where the greatest impact will be felt, and where the thorniest enforcement issues may have already been addressed. This stems from a basic but important realization: that all antitrust enforcement agencies around the globe have an incentive to be vigilant policemen on behalf of their own customers, and that incentive is (or should be) strongest for the agency in whose jurisdiction the parties do the greatest amount of business. It should surely count for something that such an agency, after conducting a thorough investigation, decided on some form of relief or decided not to take action at all. Where we can look to the actions of such an agency, and, satisfying ourselves of our own obligations, align ourselves with that agency's remedial choices, in my view, we should.

Indeed, the international antitrust community already has substantial practical experience operating in this way. We frequently seek each other's advice on cases with international dimensions,¹³ and, in some circumstances, may be willing to accept as sufficient the remedies secured in another jurisdiction. As Canada's former Commissioner of Competition Sheridan Scott explained in a 2006 address to the American Bar Association:

¹³ See, e.g., Department of Justice, Justice Department Requires Divestitures in General Electric's Acquisition of Instrumentarium (Sept. 16, 2003) (US-EC cooperation), *available at* http://www.justice.gov/atr/public/press_releases/2003/201271.pdf; Department of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008) (US-Canada cooperation), *available at* http://www.justice.gov/atr/public/press_releases/2008/239167.pdf; Department of Justice, Justice Department Requires Thomson to Sell Financial Data and Related Assets in Order to Acquire Reuters (Feb. 19, 2008) (US-EC-Canadian cooperation), *available at* http://www.justice.gov/atr/public/press_releases/2008/230250.pdf.

While each case turns on its own facts, which are carefully weighed and analyzed, we are more likely to formalize negotiated remedies within Canada when a matter raises Canada-specific issues, when the Canadian impact is significant, when the assets to be divested reside in Canada or when it is critical to the enforcement of the terms of the settlement. On the other hand, the Bureau may rely on remedies in formal proceedings of foreign jurisdictions when assets subject to divestiture, or conduct that must be carried out as part of a behavioral remedy, are primarily located outside of Canada. . . . When we are coordinating cross-border remedies, one of our primary objectives is to prevent conflicts that may arise when remedies are intended to address competition concerns in different jurisdictions. We will listen to the views of foreign agencies regarding particular remedies and, provided that the competition concerns in Canada are adequately addressed, we will make efforts to align ourselves.¹⁴

This is exactly the sentiment I wish to express, and whatever advance coordination is possible to promote this end is certainly to be recommended, in my view. It is not a matter of passing the buck. It is an effort to respect each others' sovereignty and to acknowledge each others' good faith efforts to secure outcomes that are best for consumers worldwide.

3. Being Mindful of Other Agencies' Options

This brings me to the third kind of mindfulness. So far, I have focused on the importance of giving thought to the global consequences of our own decisions and of taking account of the decisions that our counterparts have already taken in a particular case. Yet time does not neatly arrange itself to suit our purposes – even in the antitrust world – and the different legal timetables to which agencies around the world must work add complexity and further challenge to our efforts to get on the same page, not to mention the issue of whether, in a merger case, the parties choose to engage with all the relevant agencies at the same time. It may be the case that, in practice, one agency has to reach a decision because of its timing constraints before the others

¹⁴ Sheridan Scott, Commissioner of Competition for Canada, Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World, To Defer or Not To Defer? Is that the Question?, Speaking Notes before American Bar Association's Section of Antitrust Law Spring Meeting (March 29, 2006), available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02049.html>; see also Sheridan Scott, Address to the Federation of the Industries of São Paulo State (May 12, 2008) available at <http://www.bureaudelaconurrence.gc.ca/eic/site/cb-bc.nsf/eng/02678.html> (describing the "three Cs" of international antitrust work: "communication, co-ordination and cooperation").

can conclude their considerations on the same issue. Yet in these circumstances, too, cooperation and convergence should remain the objectives, and in my view they remain achievable. What they require is mindfulness about what other agencies may yet want to do in particular cases. Being future looking, that mindfulness can be hard to achieve, but I do not believe it impossible.

To achieve it, it is essential to have open lines of communication between the different agencies as we each consider the matters before us. Our goal, through formal and informal tools, should be to eliminate any surprises arising between us. We ought to endeavor to be as open as possible with each other about what we are thinking, and at the same time, to have our eyes open – when making our remedial choices – to what our international counterparts might think about what we are doing or the problem that we are considering when their turn comes.

This is the area where transparency and convergence come together. Transparency can take two forms in the antitrust enforcement context. On the one hand, there is the kind of transparency I have discussed before – openness with *the parties* regarding our core competitive concerns and theories of harm because, as I have said previously, “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.”¹⁵ Transparency has another important side, however: openness not only with the parties but also with *the rest of the world* about how an investigation is progressing and the evaluation that leads an agency to pursue the course that it takes (consistent, of course, with our obligations to respect confidential information and the rights of the parties to make their case to each authority). While I believe the Antitrust Division excels at the former kind of transparency, the latter is an area where we can perhaps improve.

¹⁵ Varney, *Striving for Optimal Balance*, *supra* note 2.

Indeed, I recognize that, to outside observers, the Antitrust Division can seem somewhat inscrutable. We do not discuss pending investigations at all in public, and we have not regularly explained why we are willing to let a merger or conduct go unchallenged. This stems in part from our status as a prosecuting agency, and our responsibility to keep certain party information confidential until we go forward into the very public litigation process. Yet, as the Division has recognized, we can do more to explain our decision to abstain from enforcement action, especially through the issuance of closing statements. Our own guidelines on closing statements indicate that they may be appropriate,¹⁶ and both the Antitrust Modernization Commission and the ABA Antitrust Section's Presidential Transition Report recommended that we issue more such statements for the sake of increased transparency.¹⁷ The European Commission, and certain other agencies around the world, have set excellent examples in this regard, and I believe that we can learn from them. Closing statements are important not only to make our decisions transparent to the consumers whom we serve, but also to make them accessible to other agencies facing similar decisions, as well as the antitrust community at large.

Indeed, the European Commission (and also some other competition agencies) do not only issue publicly available reasoned decisions at the end of an investigation, but also issue statements of objections or similar documents during the course of an investigation. Even when those documents are not publicly available (and in some jurisdictions they are), the agency in question gives them to the parties to the investigation and to interested third parties, and they

¹⁶ See DEPARTMENT OF JUSTICE, ISSUANCE OF PUBLIC STATEMENTS UPON CLOSING OF INVESTIGATIONS (Dec. 12, 2003), *available at* <http://www.justice.gov/atr/public/guidelines/201888.htm>.

¹⁷ See ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 29 (2007) ("The agencies should issue "closing statements," when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies' merger enforcement policy.") *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm; AMERICAN BAR ASSOCIATION, ANTITRUST SECTION, PRESIDENTIAL TRANSITION REPORT 19-20 (2008) *available at* <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>.

may also attract public attention and comment. It was in such a context that we issued our much-discussed statement in Sun/Oracle, and it is in that light that it should be seen. We issued our statement because it was important for the Division to be as open as possible about the nature of our investigation and our conclusions about the merger's likely effects. Our goal was not to draw attention to potential disagreements between us and the European Commission, but to provide timely transparency and express our "hop[e] that the parties and the EC [would] reach a speedy resolution that [would] benefit[] consumers in the Commission's jurisdiction."¹⁸

If there is a takeaway from that situation, it is that there should be no surprises as between the various competition agencies around the world. To achieve that goal, we should use all the tools available to us to encourage the parties to work with the agencies in parallel, and to make clear to them that they have *nothing* to gain from trying to game the system. Early and frequent communication and cooperation between the competition agencies are also essential, and we look forward to building, with our sister agencies, upon an already rich tradition in that regard.

It was to that end that, when I became Assistant Attorney General, I asked Rachel Brandenburger to assist me as my special advisor for international matters. I am delighted that Rachel, who is here with me today, joined us at the Department of Justice last month. Her extensive experience with antitrust practice and policy in Europe and internationally will help us in our communication with the European Commission and other agencies around the world, and will enable each agency to better understand the other's thinking and actions. I believe that this will assist in improving our efforts at both cooperation and convergence, and I am very excited to have Rachel as part of the DOJ team.

¹⁸ See Department of Justice, Statement on the European Commission's Decision Regarding The Proposed Transaction Between Oracle and Sun (Nov. 9, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/251782.pdf.

To sum up, as we continue to build on the progress we have made in bringing cooperation and convergence to international antitrust, let us all endeavor to make our remedial decisions with our eyes open to their consequences beyond our shores, taking steps to minimize their extraterritorial effects; let us keep our eyes open to what our sister agencies have already done in particular cases, so that we do not unnecessarily diverge from their decisions; and let us also keep our eyes open to the decisions still facing our counterparts when simultaneous decision-making is impossible, and be willing to share and discuss the analyses we have already done. This will, I believe, foster the greatest possible cooperation and convergence in the search for effective antitrust remedies in our global era.

Finally, let me say most sincerely that what I have said, today and previously, should not be interpreted to mean that I believe America always knows best. As I have said, we are all interested in protecting our consumers, and though we may not always agree on the best course, we all should listen to, learn from, and respect the various voices in the global enforcement community. It is only in this way that effective global antitrust enforcement can become truly a reality.