



# **DEPARTMENT OF JUSTICE**

---

## **CHALLENGES AND OPPORTUNITIES IN INTERNATIONAL COMPETITION POLICY**

**Rachel Brandenburger  
Special Advisor, International  
Antitrust Division  
U.S. Department of Justice**

**Remarks as Prepared for The Law Society's European Group**

**London, United Kingdom**

**November 9, 2010**

## **I. Introduction**

Ten years ago I had the honor to be the Chair of this Group; this evening, it is a great pleasure and a privilege to be back here as a speaker.

My topic this evening is the challenges and opportunities in international competition policy. There certainly are many of both in today's global economy and multi-polar world.

As Greg Olsen has explained, since the beginning of the year, I have been working at the Antitrust Division of the U.S. Department of Justice. More specifically, I am serving as the Special Advisor on international matters to the Assistant Attorney General for Antitrust, Christine Varney.

My appointment demonstrates the high priority that AAG Varney places on the international aspects of competition law enforcement, as well as her recognition of the increasing significance that international relationships and fora will play in the future. I could not agree more. Indeed, in very broad terms, my overarching goal, together with AAG Varney, is to more fully integrate the consideration of international issues into the day-to-day, practical work of the Antitrust Division, as well as in its policy work.<sup>1</sup>

To give you an idea of what this means in practice, last week I attended a highly successful merger enforcement workshop sponsored by the International Competition Network (ICN). The U.S. Department of Justice and the Irish Competition Authority are the co-chairs of the ICN's Merger Working Group. The workshop was hosted by the Italian Competition Authority in Rome and attended by over 100 delegates from more than 45 competition agencies

---

<sup>1</sup> For more details, see U.S. Dep't of Justice, Antitrust Div., *The Antitrust Division's International Program* (Oct. 2010), available at <http://www.justice.gov/atr/public/international/program.pdf>.

from around the world, as well as non-governmental advisors from the legal, business, and academic communities.

Prior to the ICN merger workshop, I went with AAG Varney to the Competition Committee meetings of the Organisation for Economic Cooperation and Development (OECD) in Paris. The Competition Committee's working party on enforcement and cooperation, which is chaired by AAG Varney, devoted a day to the important new topic of the interface between arbitration and competition law. Other highlights of the OECD meetings included roundtables on emission permit trading and auctions, horizontal agreements and competition advocacy work relating to environmental matters, as well as information exchanges among competitors. The Antitrust Division (and the U.S. Federal Trade Commission) participated actively in these discussions, which were intended to provide a competition perspective to a broader OECD project on the timely issue of green growth.

In these and other fora, the Antitrust Division works actively with its many counterparts around the world to bring about improved inter-agency cooperation and greater dialogue and convergence in thinking about competition rules and policies.

We also hold bilateral meetings with our counterparts. This year, we have had fruitful bilateral meetings with the Japanese Fair Trade Commission and the European Commission in Washington D.C., and we have also had the privilege of hosting agency counterparts from Brazil, Canada, China, India, Mexico and elsewhere.

China and India are important focuses of our work, and the Antitrust Division participates in the Administration's initiatives in these and other respects.

As my primary duty is to advise AAG Varney directly on the international dimensions of *all* aspects of the Antitrust Division's work, a significant amount of my time is spent working closely with the Division's investigative staffs in Washington, D.C. (where I am based) coordinating the frequent interactions with our non-U.S. counterparts during the course of our investigations.

Our aim is to intensify the Antitrust Division's cooperative relationships with other competition agencies and to encourage our staffs to be mindful of the international implications of our actions right from the very start of an investigation through to the remedial phase. We need to approach our work in this way because the challenges presented by today's global economy and multi-polar world demand it.

Let me return to my main topic this evening – the challenges and opportunities presented by today's world of many competition agencies operating in a globalized world.

At the outset, I wish to emphasize that neither I nor, as AAG Varney has made a point of emphasizing,<sup>2</sup> the Antitrust Division has all the answers. I also fully recognize that I am not the first person to observe that we will face challenges in a world of many enforcers. But what I can tell you, based on my own experience in private practice and my recent work with the Antitrust Division, is that multiple competition agencies increasingly *are* reviewing the same transaction and conduct, and cooperation *is* taking place among more agencies than ever before. This world of multiple enforcers is no longer theoretical; it is real.

---

<sup>2</sup> See, e.g., Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, Remarks as Prepared for the Institute of Competition Law New Frontiers of Antitrust Conference, at 12 (Feb. 15, 2010), *available at* <http://www.justice.gov/atr/public/speeches/255189.pdf>.

And so, now more than ever, we need to think, in very practical terms, about how best to meet the challenges and seize the opportunities presented by this new situation in which we find ourselves.

I hope that my remarks this evening will help to promote a truly global discussion about the challenges and opportunities in international competition policy – a dialogue that AAG Varney called for at Georgetown University Law School in September and again in Paris last month.<sup>3</sup>

## **II. Challenges for International Competition Policy in Today's Multi-Polar World**

Today, roughly 120 competition agencies enforce competition laws, including new agencies in China and India. All of us – competition agency officials, merging parties, subjects of conduct or cartel investigations, and their advisors – must now pay serious attention to the rules in *many* jurisdictions. We are fortunate to have made good progress in international competition policy and practice over the last decade, and to have in place many of the building blocks we will need for the future. The challenge will be adapting today's cooperation protocols to a world of multiple enforcers. In thinking about ways to meet this challenge, it is useful to reflect on how far we have come, and where we are today, in the three core areas of competition enforcement: mergers, cartels, and unilateral conduct.<sup>4</sup>

---

<sup>3</sup> Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice, *International Cooperation: Preparing for the Future*, Remarks as Prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010) available at <http://www.justice.gov/atr/public/speeches/262606.pdf>.

<sup>4</sup> See also Rachel Brandenburger, Special Advisor, International, U.S. Dep't of Justice, *International Competition Policy and Practice: New Perspectives?*, Remarks as Prepared for the Centre of European Law, King's College (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>.

### **III. Progress on Convergence, Cooperation and Transparency in Mergers, Cartels and Unilateral Conduct**

In looking at these three principal areas of competition enforcement, I think it is also helpful to consider the recommendations that were made more than a decade ago by the U.S. International Competition Policy Advisory Committee (ICPAC) – a blue-ribbon advisory committee established by the U.S. Department of Justice in 1997 to consider international competition issues.

ICPAC’s groundbreaking report recommended (1) increased *transparency* and accountability of government actions; (2) expanded and deeper *cooperation* between U.S. and overseas competition enforcement authorities; and (3) greater soft harmonization and *convergence* of systems.<sup>5</sup>

These principles of transparency, cooperation, and convergence have been the core of our international competition policy efforts over the past 10 years. And, as I will discuss in a few moments, while we might add to them and refine them, they certainly will remain important in the years to come.

#### **Merger Enforcement**

To date, we have made a great deal of progress on convergence, cooperation, and transparency in international merger enforcement.

As for *convergence*, we now have agreement on many of the fundamentals of merger review. This has been a success story. This was vividly demonstrated by the discussions at the

---

<sup>5</sup> INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, at 2 (Feb. 28, 2000) (hereinafter “ICPAC Report”), *available at* <http://www.justice.gov/atr/icpac/finalreport.htm>.

ICN Merger Workshop in Rome last week which was attended by delegates from all around the world – not only Europe and North America but also South America, Africa, Asia and Australasia. It is important not to forget though, that the application of even convergent rules can, of course, still result in differing outcomes, depending on the markets at issue in a particular case.

Turning to *transparency*, there seems to be more transparency about merger review process and analysis than in other areas of enforcement. This has been spurred in large part by initiatives of the OECD and the ICN.

There have also been some successful examples of *cooperation* in the merger arena – I will come back to these.

### **Cartel Enforcement**

Turning now to cartels and using the same convergence-cooperation-transparency paradigm.

I think many of you would agree that one of the most – if not the most – significant achievements of the global competition community over the past decade or so has been the substantial *convergence* we have witnessed in relation to the recognition of the particularly pernicious nature of cartel activity and the importance of strong anti-cartel laws and vigorous enforcement.<sup>6</sup>

---

<sup>6</sup> In 1998, the OECD Council's recommendation on cartels helped spur convergence on the great consumer harm that cartel activity inflicts, as well as the surge in international anti-cartel enforcement and cooperation that we see today. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (March 25, 1998), *available at* <http://www.oecd.org/dataoecd/39/4/2350130.pdf>.

There are also many examples of the sophisticated nature of *cooperation* between competition agencies in cartel enforcement these days – in, for example, the air transport sector; the liquid crystal display (LCD) industry; and, of course, the marine hose industry.<sup>7</sup>

These are not isolated occurrences of cooperation. On the contrary, the Antitrust Division is currently cooperating with – or receiving cooperation from – our competition agency counterparts and other law enforcement agencies in Europe, Asia, North America, South America, Africa and Australasia in a number of important cartel investigations. (You will realize that we do not make individual investigations public.)

*Transparency* initiatives include promoting the reporting of cartel activity through complaints and leniency applications, as well as extensive outreach efforts with the business community, the competition bar, procurement officials, public prosecutors and other government entities, as well as the public.<sup>8</sup>

### **Unilateral Conduct Enforcement**

To round out our analysis of the progress we have made to date, I would like to close with unilateral conduct – perhaps the most challenging area to tackle. The convergence-

---

<sup>7</sup> See, e.g., Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks at the 24<sup>th</sup> Annual National Institute on White Collar Crime, at 15 (Feb. 25, 2010) (outlining role of international cooperation in investigation of cartel conduct in the air transportation and marine hose industries), available at <http://www.justice.gov/atr/public/speeches/255515.pdf>; Press Release, U.S. Dep't of Justice, *Remarks Prepared for Delivery by Assistant Attorney General Thomas O. Barnett at a Press Conference Regarding LG, Sharp and Chunghwa's Agreements to Plead Guilty in LCD Price-Fixing Conspiracies* (Nov. 12, 2008), available at [http://www.justice.gov/atr/public/press\\_releases/2008/239396.pdf](http://www.justice.gov/atr/public/press_releases/2008/239396.pdf).

<sup>8</sup> See INTERNATIONAL COMPETITION NETWORK, TRENDS AND DEVELOPMENTS IN CARTEL ENFORCEMENT, at 11, 53-65 (Apr. 29, 2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf>.



cooperation-transparency story for unilateral conduct is still very much a work in progress, notwithstanding the efforts of the OECD, ICN and others.

I can perhaps explain later – if we have time – why I think this is. But, broadly, we have had fewer cases involving more than one agency investigating the same conduct at issue at the same time; firms subject to unilateral conduct investigations may be less likely to give waivers to facilitate cooperation between agencies than they are in the merger area; the laws around the world still differ to a greater extent; and the theories of harm and underlying economic theories are also still evolving to a greater extent.

#### **IV. New Challenges Present New Opportunities**

As I have said, the three core principles of convergence, cooperation and transparency identified in the ICPAC report have, I believe, served us well over the past 10 years in addressing some of the challenges we have faced.

Nevertheless, the world does not stand still, and the challenges faced by the multiple competition policymakers and enforcers around the world continue to evolve and change. These new challenges also offer new opportunities for us all to think about competition policy in different ways and to explore how the many competition agencies around the world can work most effectively with one another in the future. As useful as the principles of convergence, cooperation and transparency have been in the past – and will continue to be in the future – I believe that we also need some new ideas to meet the competition challenges ahead.

## V. Toward a Framework for the Future – Seven Principles for Effective Global Competition Enforcement

And so today, I would like to propose seven critical ingredients that I believe might guide international competition policy for the years to come:

- (1) *transparency*;
- (2) *mindfulness* of other jurisdictions' interests;
- (3) *respect* for other jurisdictions' legal, political and economic cultures;
- (4) *trust* in each other's actions;
- (5) ongoing *dialogue* on all aspects of international competition policy and enforcement;
- (6) *cooperation*; and
- (7) *convergence*.

While none of these factors is completely new to international competition policy, I believe that it will be increasingly important to place a high priority on *each* of them in the future.

### **Transparency**

One key ingredient for effective international competition policy in today's world is a familiar one – *transparency*, a core principle identified in the ICPAC report.

I begin with transparency because it is impossible for competition agencies to communicate, cooperate, respect each other, or converge effectively with one another without understanding each others' approaches.

Likewise, it is very important for businesses to be able to develop an understanding of the antitrust rules that apply to them generally, and – equally important – how these rules are likely to be applied to them in particular cases. This concern is amplified for global firms that are subject to many different sets of rules.

### **Mindfulness**

Once competition agencies can understand the ways in which their colleagues in other jurisdictions operate, they can begin to be *mindful* (on a day-to-day basis) of the impact of their actions and approaches outside of their own jurisdiction, and also of the effects that other agencies' actions and approaches may have within their jurisdiction.<sup>9</sup>

Mindfulness of other competition authorities' jurisdiction, practices, and traditions allows agencies to work together to minimize inconsistent or conflicting approaches. As AAG Varney has observed, “divergent outcomes should occur, if they do, for well-founded reasons, and not arbitrarily or unexpectedly.”<sup>10</sup>

Let's take the area of remedies, for example. In our multi-polar world, agencies need to remain mindful of the impact of their remedial options outside of their jurisdiction (as the European Commission, for example, was in the *Microsoft* browser case last year<sup>11</sup>). And agencies should also be mindful of the impact of remedies that other agencies have imposed or

---

<sup>9</sup> See Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 2.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> See Neelie Kroes, European Commissioner for Competition Policy, *Your Internet, Your Choice: Microsoft Web Browsers Decision*, Opening Remarks at Press Conference in Brussels (Dec. 16, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/582&format=HTML&aged=0&language=EN&guiLanguage=en>; Press Release, European Commission, *Antitrust: Commission Accepts Microsoft Commitments to Give Users Browser Choice* (Dec. 16, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941&format=HTML&aged=0&language=EN&guiLanguage=en>.

are considering in the same or similar matters (as the Antitrust Division was when it took account of the European Commission's remedy in the *Cisco/Tandberg* case earlier this year in deciding to close its own investigation).<sup>12</sup>

## **Respect**

*Respect* involves two critical components: (1) openness to the ideas of others, and (2) respect for our differences.

In terms of openness to one another's ideas, greater cooperation and convergence will *not* be possible if any of us comes to the table with the notion that our agency has all the right answers and other jurisdictions must therefore adopt our standards or processes wholesale.<sup>13</sup> In areas where we cannot yet agree, we must also learn to respect our differences. In today's – and even more, tomorrow's – multi-polar competition world, respect must include a sense of both inclusiveness and diversity.

---

<sup>12</sup> Press Release, U.S. Dep't of Justice, *Justice Department Will Not Challenge Cisco's Acquisition of Tandberg: Justice Department and European Commission Cooperate Closely to Resolve Competition Issues* (Mar. 29, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm); Press Release, European Comm'n, *Commission Clears Cisco's Proposed Acquisition of Tandberg Subject to Conditions* (Mar. 29, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>13</sup> See Varney, *International Cooperation: Preparing for the Future*, *supra* note 3, at 8-9; Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency*, *supra* note 2, at 12; Rachel Brandenburger, Special Advisor, International, U.S Dep't of Justice, *Transatlantic Antitrust: Past and Present*, Remarks as Prepared for the St. Gallen International Competition Law Forum, at 15 (May 21, 2010), available at <http://www.justice.gov/atr/public/speeches/260273.pdf> ("In today's multi-polar world, no one entity or individual, whether public, private, or academic, has a monopoly on good ideas.").

These are goals that ICN Steering Group Chair John Fingleton is focusing on as he facilitates discussion of the path for ICN's second decade.<sup>14</sup> The Antitrust Division supports these efforts.

### **Trust**

*Trust* is, of course, a fundamental element of effective cooperation. In the cartel enforcement arena, for example, trust is an essential element for agencies seeking to coordinate searches or develop coordinated investigative strategies, such as the simultaneous searches and arrests executed in the *Marine Hose* cartel investigation. Likewise, trust is a fundamental part of coordinating timing and other investigative steps in merger investigations like the *Cisco/Tandberg* merger earlier this year.

As with any relationship, trust grows over time. For the future, this will mean not only improving the ways we work with the agencies we know well and are accustomed to cooperating with, but also establishing day-to-day working relationships with an increasing number of agencies.

Building trust between competition agencies and the business community is also important as regards the treatment of confidential information, for example. By the same token, in order to achieve an effective global competition system, competition agencies need to have confidence that parties are not seeking to game the multi-jurisdictional system or play one agency off or against another.

---

<sup>14</sup> See John Fingleton, ICN Steering Group Chair, *The International Competition Network: Planning for the Second Decade*, Ninth Annual ICN Conference in Istanbul, Turkey (April 27, 2010) available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc617.pdf>.

## **Dialogue**

Ensuring an ongoing *dialogue* will similarly be essential for effective international competition policy in our multi-polar world. This dialogue should occur not just among competition agencies, but also with the business community, consumers, practitioners, academics and the public as well. Each “stakeholder” can provide important insights and different perspectives on what is, and what is not, working well in the international world of competition law enforcement.

Dialogue also includes a willingness of competition agencies to revisit their own policies and practices over time to reflect new learning and the experiences of others.

In the end, ensuring an ongoing, deep, and meaningful dialogue may be one of the most important things we can do in those areas where we have not yet converged or where convergence may not be achieved.

## **Cooperation**

*Cooperation* will, of course, continue to be critical. For the future, I think we will need to focus even more than we already do on the ways that we cooperate with one another in our day-to-day work on individual matters – because, as I have said, managing multi-jurisdictional competition issues with an increasing number of agencies around the world will become a more frequent issue, and because getting our cases right is what really matters at the end of day.

The future also offers us the opportunity to dust off some “old” ideas and consider them in a new light. For instance, in re-reading the ICPAC report, I was struck by the fact that a

multi-jurisdictional merger recommendation in which we have not made much progress is the area of “work sharing” it recommends.<sup>15</sup>

While we have seen progress on the joint negotiation of remedies in individual transactions (most recently in *Ticketmaster/Live Nation*, where the Antitrust Division and the Canadian Competition Bureau worked together to impose the same remedy for the U.S. and Canada),<sup>16</sup> the other forms of work sharing envisioned in the ICPAC report (*e.g.* limiting the number of jurisdictions conducting second-stage reviews or identifying one jurisdiction to coordinate a merger investigation) have not yet been deeply explored.

### **Convergence**

Last though certainly not least, *convergence* will remain an important ingredient of international competition policy in the future.

Attaining convergence among such a large number of competition agencies, each with its own unique legal culture, enforcement regime, political structure and economic situation, frankly is not always easy. And we also need to recognize that it may be unrealistic to expect convergence on everything.

Given these limits, I believe that we may need to refine our thinking on convergence. For example, AAG Varney recently has suggested that we may need to “untangle” the processes and

---

<sup>15</sup> See ICPAC Report, *supra* note 5, at 4, 7-9.

<sup>16</sup> Press Release, U.S. Dep’t of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.* (Jan. 25, 2010), available at [http://www.justice.gov/atr/public/press\\_releases/2010/254540.pdf](http://www.justice.gov/atr/public/press_releases/2010/254540.pdf); Press Release, Canadian Competition Bureau, *Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition* (Jan. 25, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html>.

procedures competition agencies employ in investigations from the substantive legal and economic theories they apply, and focus on the latter – given the uncertainties of achieving further uniformity of processes and procedures across the world’s many legal traditions.<sup>17</sup>

## **VI. Conclusion**

To conclude, the core principles of *convergence*, *cooperation* and *transparency* that have so successfully guided our international efforts up until now will continue to be important in the years to come. To meet the challenges of the future, however, I suggest looking at these core principles in a new light – and complementing them with the related goals of *mindfulness*, *respect*, *trust* and *dialogue*.

Today’s challenges are not precisely the same as those we faced a decade ago. But these new challenges offer us new opportunities to think about our work in different ways and explore how the many competition agencies around the world can work most effectively with one another in the future. These challenges and opportunities result from the tremendous success of the competition ideal across a great many countries with varied economies and traditions.

I certainly do not claim to have all of the answers. But I sincerely hope that my remarks this evening will contribute to an ongoing, productive dialogue on the best way forward for us all.

Thank you very much for your attention.

---

<sup>17</sup> Varney, *International Cooperation: Preparing for the Future*, *supra* note 3, at 15.