DEPARTMENT OF JUSTICE

OUR PROGRESS TOWARDS INTERNATIONAL CONVERGENCE

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I. The Importance of Convergence in a Global Economy

As my predecessor in the Antitrust Division, Assistant Attorney General Joel Klein, noted more than a decade ago: "In today's global economy, no aspect of antitrust enforcement and antitrust policy is more important than its international dimension."[1] At that time, nearly 80 countries had adopted antitrust laws, actualizing their commitment to the competitive process and to the prevention of anticompetitive practices that harm consumers. However, as the International Competition Policy Advisory Committee ("ICPAC") concluded in its Final Report issued in February 2000, "the emergence of competition policy regimes has not meant a uniformity of substantive rules or institutional approaches around the world."[2]

Among ICPAC's recommendations were 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. On October 25, 2001, antitrust officials from 14 jurisdictions launched the International Competition Network ("ICN"), the first international body devoted exclusively to

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

[2] 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 33 (February 2000) ("ICPAC Final Report"), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm.

international antitrust enforcement.[3] The tradition of fellowship among antitrust authorities continues at the ICN, and I am very much looking forward to working with John Fingleton of the United Kingdom's Office of Fair Trading, and the other members of the Steering Group, in the coming years.

In the past decade, we have seen firms continue to extend their operations across borders and reach more consumers around the world than ever before, driven by the need for competitiveness on a global scale and powered by technological development. In this context of a global economy, divergence in substantive rules and procedural approaches poses significant difficulties for members of the business community. These firms seek greater transparency and expediency in enforcement processes,[4] as well as the assurance that their business practices or transactions – often subject to review in multiple jurisdictions – will be evaluated under consistent standards.

With every discussion of convergence, the obvious and thorny limitations we face must be raised: the antitrust laws and enforcement policies of jurisdictions inevitably diverge due to differences in legal systems, some of which are foundational, and others not. Despite these limitations, we have made significant progress over the last decade in the merger review context, which I will discuss today. The merger context is just one of the areas that reflects the great potential for our continued collaboration on international antitrust issues. I believe we will be

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[3] *See* History of the International Competition Network, *available at* http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/history.

[4] *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.

able to make further progress in other substantive and procedural areas, such as the standards governing single-firm conduct, and more generally, the types of antitrust remedies.

II. Successful Efforts Towards Greater Convergence: Merger Review

Merger review is an area that reflects the value of our collective efforts towards greater convergence. When ICPAC evaluated the state of multi-jurisdictional merger review in the late 1990s, it concluded that the spread of merger control laws had the potential to create significant benefits for consumers. In particular, the committee observed that merger review regimes with advance-notification requirements would give antitrust agencies the ability to identify and remedy competitive issues in merger transactions.[5] However, the committee also recognized the potential difficulties that would likely accompany a marked increase in the number of international mergers and acquisitions reviewed by multiple jurisdictions. Of particular concern were additional delays, increased transaction costs, and divergent outcomes presenting conflicts in compliance.[6]

In the years since ICPAC considered these issues and the ICN was established as a forum for dialogue and developing best practices, substantial progress has been made as a result of focused collaboration by numerous antitrust agencies towards "rationalizing" merger review. Together, we have developed more tools to identify when a merger is likely to have harmful effects. This progress resulted from efforts by antitrust agencies to (1) develop domestic merger guidelines, (2) actively participate and collaborate with other agencies in international bodies focused on establishing recommended best practices, (3) seek out opportunities to share insights

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5 *See* ICPAC Final Report, *supra* note 2, at 88-89.

6 *Id.* at 52, 90-94.

on approaches with other antitrust agencies, either in the context of specific investigations or more generally, and (4) revisit and improve merger review practices over time.

First, to promote greater clarity and transparency in their merger review and enforcement policies, antitrust agencies have developed merger guidelines setting forth important substantive considerations and explaining agency practices in the review of mergers and acquisitions. The Department of Justice issued the original merger guidelines more than 40 years ago. In 1992, we partnered with our sister agency, the Federal Trade Commission, to issue a set of joint guidelines, and in 1997, the agencies issued a revision of the section dealing with efficiencies. We have recently begun the process of reviewing our merger guidelines with the Federal Trade Commission.[7] Similarly, the European Commission undertook a comprehensive review of its merger review practices and remedies, and subsequently issued both a set of guidelines regarding horizontal mergers in 2004 and a Merger Remedies Study in 2005.[8] The United Kingdom's Competition Commission and Office of Fair Trading have also jointly published draft merger guidelines for public comment.[9] The development of domestic guidelines provides the

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[7] Press Release, *Federal Trade Commission and Department of Justice to Hold Merger Workshops Concerning Horizontal Merger Guidelines* (September 22, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/250236.htm; *see also* Horizontal Merger Guidelines: Questions for Public Comment, *available at* http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf.

[8] *See* EUROPEAN COMMISSION, GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (May 2, 2004), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:NOT; EUROPEAN COMMISSION, MERGER REMEDY STUDY (October 2005), *available at* http://ec.europa.eu/competition/mergers/studies_reports/remedies_study.pdf.

[9] *See* COMPETITION COMMISSION AND OFFICE OF FAIR TRADING, MERGER ASSESSMENT GUIDELINES – CONSULTATION DOCUMENT (April 2009), *available at* http://www.oft.gov.uk/shared_oft/consultations/OFT1078con.pdf.

foundation for discussions among international antitrust agencies regarding the convergence of merger practices more globally. There can be no constructive discussion in the absence of such clarity.

Second, the work accomplished by members of the ICN and the Competition Committee of the Organisation for Economic Cooperation and Development ("OECD") has also played a critical role in addressing divergence among antitrust authorities on the merger front. Working groups and committee roundtables are some of the most fruitful opportunities for antitrust officials at the highest levels to focus on merger practices. These important venues are not only marketplaces for ideas, but also have enabled antitrust agencies to direct their discussions to pragmatic ends: the development of recommended best practices. These recommendations have addressed both substantive and procedural aspects of merger analysis. For instance, the ICN has issued recommended best practices that provide an overview of the broader framework for merger review[10] and also address key substantive concepts that unify our respective analyses, such as the consideration of competitive effects, unilateral effects, and coordinated effects.[11] Indeed, while international jurisdictions may use different wording to describe their substantive standards, the overwhelming majority focuses on whether a merger will substantially lessen competition. The ICN's recommendations thus reflect success in bridging gaps in merger

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[10] *See* INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER ANALYSIS (June 2009), *available at* http://www.internationalcompetitionnetwork.org/media/library/Cartels/Merger_WG_1.pdf; INTERNATIONAL COMPETITION NETWORK, MERGER GUIDELINES WORKBOOK, *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf.

[11] *See* Press Release, *International Competition Network Adopts Recommended Practices to Improve Merger Analysis and Presents Reports on Unilateral Conduct Issues* (June 5, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/246758.htm.

review, even though the strictures imposed by each jurisdiction's legal framework may preclude the development of international merger law.

Third, beyond our collaboration with other agencies in the context of the ICN and the OECD, we strive for other opportunities to interface with our counterparts abroad. Whether it is in the context of specific matters or in a broader context, discussions with other antitrust agencies enable us to exchange useful insights regarding our experiences in reviewing merger transactions. Through bilateral meetings and technical assistance visits, as well as more informal staff-to-staff discussions, we want to continue to share our expertise in this area, and explore approaches used by other agencies. Indeed, our staff-to-staff communications, particularly when evaluating the same transactions, are a concrete example of our efforts to "rationalize" international merger review.

Finally, greater convergence on the merger front reflects the willingness of competition agencies to revisit their practices over time to reflect new learning. After we issued the original Merger Guidelines in 1968, the Department continued to develop its thinking and issued revised guidelines with the Federal Trade Commission that elaborated on some of the important components of our analysis. We incorporated new economic learning with the goal of moving beyond mere structure to engage in a real assessment of whether a transaction may adversely affect competition. As previously noted, we have again begun the process of reviewing our merger guidelines with the Federal Trade Commission, and will be holding public workshops in the coming months to foster focused discussion regarding whether modifications are needed.[12] I believe that an openness to others' ideas and new approaches is critical to our efforts towards greater convergence.

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[12] *See supra* note 7.

III. Opportunity for Further Dialogue: Single-Firm Conduct and Antitrust Remedies

Our progress in the merger review context demonstrates that our collaboration can yield tremendous results. This success should fuel our efforts towards convergence in other areas, such as standards for single-firm conduct, and more generally, the use of antitrust remedies. I am confident that if the same focus and spirit of cooperation are directed towards these issues, greater convergence is ahead.

Single-Firm Conduct

We have already made strides towards convergence regarding the standards for single-firm conduct, but we need to continue making progress on that front. As a starting point, there is greater unity on the threshold issue of monopoly power or "dominance." For instance, although neither the Sherman Act nor Article 82 of the European Treaty, the European Commission's antitrust provision applicable to single-firm behavior, defines monopoly power or dominance, we have rarely diverged in our analysis on this threshold issue. Under U.S. law, market power and monopoly power are not one in the same.[13] The latter describes the "power to control prices or exclude competition."[14] Although in some circumstances, we may be able to infer monopoly power from a firm's predominant share of the market,[15] we also look beyond a substantial market

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[13] *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) ("[m]onopoly power under § 2, requires, of course, something greater than market power under §1.").

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

[15] 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), *cited in American Tobacco Co. v. United States*, 328 U.S. 781, 813-14 (1946).

share and ask questions regarding the durability of the firm's market power,[16] and its ability to exclude its rivals.[17] Similarly, in its Article 82 analyses, the European Commission considers a predominant share of the market 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.[18] Although there are certainly jurisdictions that have identified a particular market share as sufficient to establish dominance, the approaches of U.S. agencies and the European Commission reflect that we have reached a significant degree of convergence over time.

Moreover, under U.S. antitrust laws and Article 82, monopoly power or dominance alone is not sufficient to constitute an antitrust violation. Although Article 82 more specifically

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[16] *See AD/SAT 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)).

[17] *See, e.g., United States v. Dentsply*, 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*, 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).

[18] *See* EUROPEAN COMMISSION, GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS (December 3, 2008), *available at* http://ec.europa.eu/competition/antitrust/art82/guidance.pdf; 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).

addresses the types of covered conduct than Section 2 of the Sherman Act,[19] it is a critical commonality that both jurisdictions require a showing of anticompetitive conduct. This requirement reflects a fundamental principle protecting firms engaged in competition on the merits: size and power in and of themselves are not illegal.[20] As former Assistant Attorney General Thurman Arnold once commented regarding U.S. antitrust laws:

> The purpose of the antitrust laws is to ensure the freedom of business opportunity . . . They are not designed to prevent the growth of nationwide enterprises so long as that growth is the product of industrial efficiency. Even if, through greater efficiency in operation and distribution, a corporation achieved a monopoly, that in itself would not violate the Sherman Act.[21]

Beyond these important unifying principles, numerous areas of divergence remain among the laws of the U.S., European Commission, and other jurisdictions. Some divergence roots in statutory differences – such as Article 82's prohibition against "exploitative" conduct in the imposition of unfair purchase or selling prices for which there is no analog under Section 2. Other differences stem from the development of common law over time. For instance, the United States Supreme Court has applied limiting principles in the predatory pricing context, which are not reflected in other jurisdictions' statutory or case law.[22]

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

[20] *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[21] 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).

[22] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-25 (1993) (focusing on below-cost price-cutting and requiring plaintiff to establish recoupment of gains from predatory pricing). Although the plaintiff in *Brooke Group* alleged unlawful price discrimination in violation of the Robinson-Patman Act, the Court noted that "it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same

As ICPAC recognized in the merger review context,[23] the lack of unity regarding single-firm conduct standards creates significant difficulties for firms developing business strategies in a global economy. Just as my colleagues at other antitrust agencies do, we understand that members of the antitrust and business communities face uncertainty in evaluating when and whether certain categories of single-firm conduct will be deemed unlawful under antitrust laws in multiple jurisdictions. These concerns are well-founded, and deserve further attention and discussion among antitrust agencies worldwide. Although these areas present highly complex legal and economic issues, I believe further progress towards convergence is possible. The important dialogue regarding further convergence is already underway,[24] and I would like to be an active participant as the discussions continue.

Antitrust Remedies

I want to close on a final note regarding another area for further discussion – antitrust remedies. At the heart of our work as an antitrust agency is effective enforcement of the antitrust laws, of which a critical component is the ability to design remedies to address anticompetitive conduct. Designing effective antitrust remedies has become more complex than it once was. With more firms operating on a global scale, our enforcement actions increasingly have an impact beyond the borders of our respective jurisdictions. The likelihood of a broader impact

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general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." *Id*. at 221 (citations omitted).

[23] *See supra* note 2, at 52, 90-94.

[24] *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.

from domestic enforcement action requires us to carefully consider the scope and nature of remedies. Moreover, where multiple agencies pursue an enforcement action with regard to the same conduct, substantial divergence in remedial approaches 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. 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. What remedies are necessary to restore competitive conditions? What remedies are necessary to effectively prevent or deter future violations? When are punitive remedies appropriate? I look forward to more discussions with my colleagues here and abroad regarding these important questions, especially because I know that we have both shared enforcement goals and a wealth of expertise and experience to reach these goals together.

Thank you.