



# DEPARTMENT OF JUSTICE

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## GLOBAL ANTITRUST ENFORCEMENT

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## **I. Introduction**

Good morning. I am pleased to be here today to talk with you about the globalization of antitrust enforcement. I observe at the outset that we now take as a given that the economy is global, and most antitrust practitioners are keenly aware of the proliferation of antitrust enforcement agencies around the world. It should come as no surprise to those of you gathered here today that the globalization of both the economy and antitrust enforcement has imposed additional burdens on market participants and increased the need for cooperation and comity among antitrust enforcement agencies. Certainly anyone who has shepherded merging parties through the merger process in multiple jurisdictions appreciates this fact. Indeed, your presence here today suggests that you recognize the importance of these developments and want to be involved in the dialogue about how best to address the issues raised by the globalization of antitrust enforcement.

In my time here with you this morning, I want to focus on what globalization of the economy and antitrust enforcement means for anti-cartel enforcement, merger enforcement, and enforcement involving unilateral conduct.

## **II. Anti-Cartel Enforcement**

Let me begin with some good news: the world is less safe for cartels. Cartels remain "the supreme evil of antitrust,"<sup>1</sup> and antitrust enforcement authorities around the world are united in a commitment to pursue hard core anticompetitive conduct (that is, horizontal agreements among competitors not to compete such as price fixing, bid rigging and market allocation) that we know to be the most pernicious. Accordingly, many jurisdictions punish such conduct with significant fines and, in the case of the United States and soon a number of other jurisdictions, with jail time. The Organisation for Economic Cooperation and Development (OECD) has recommended that governments consider imposing criminal sanctions against individuals to enhance deterrence and creating incentives to cooperate through leniency programs.<sup>2</sup> Recent developments in Australia, Japan, Israel and Ireland are prime examples of the global trend toward greater individual accountability.

Here in the United States, prosecuting cartel offenses—and deterring the formation of cartels and the activities of cartelists—continues to be our highest

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<sup>1</sup>*Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

<sup>2</sup>OECD Competition Committee, *Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation* (December 15, 2005), available at <http://www.oecd.org/dataoecd/58/1/35863307.pdf>.

priority. International cartel investigations account for almost half of our ongoing grand jury investigations. The subjects and targets of our international investigations have been located in roughly twenty-five different countries on six continents. Our investigations have uncovered meetings of international cartels in well over a hundred cities in more than thirty-five countries, including most of Europe and Asia. More than ninety percent of the \$1.9 billion in criminal fines imposed in Antitrust Division cases during the past five years has been in connection with the prosecution of international cartel activity.

Because of the international nature of many cartels—a typical international cartel consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia and throughout the world—enforcement takes on a global dimension. A shared commitment to fighting international cartels has led to the establishment of cooperative relationships among antitrust enforcement agencies around the world. One result of this coordination in global antitrust enforcement has been an enhanced ability to detect, investigate, prosecute and punish cartel offenses in this country. I will mention several ways in which this benefit is being achieved.

**First**, with more antitrust enforcement agencies on the beat, cartels run a greater risk of detection. Having antitrust enforcement agencies in multiple jurisdictions focused on criminal enforcement has led to greater success globally in the detection of cartels. A key factor has been the adoption of and convergence in leniency programs. The Antitrust Division's leniency program continues to be our greatest source of cartel evidence. The Antitrust Division has had great success combining vigorous criminal prosecution with our leniency program in order to increase the likelihood of cartel detection and prosecution.

The extraordinary success of the Antitrust Division's leniency program has generated widespread interest around the world, and our leniency program has served as a model for similar programs that have been adopted by other antitrust enforcement agencies. We have advised a number of foreign governments in drafting and implementing effective leniency programs in their own jurisdictions. Countries such as Japan, Australia, Brazil, Canada, Germany, Ireland, South Korea and the United Kingdom have announced new or revised leniency programs, and still other countries are in the process of doing the same. The convergence in leniency programs has made it easier and more attractive for companies to simultaneously seek and obtain amnesty in the United States, Europe, Canada and other jurisdictions.

**Second**, it is becoming easier to collect evidence to use in prosecuting a cartel once it is detected. The Antitrust Division regularly coordinates with antitrust enforcement agencies conducting searches across multiple

continents. One recent example is the searches of marine hose suppliers conducted in May 2007.<sup>3</sup> Eight executives from the United Kingdom, France, Italy and Japan were arrested in Houston and San Francisco and charged for their role in a conspiracy to rig bids, fix prices and allocate markets for U.S. sales of marine hose used to transport oil between tankers and storage facilities and buoys. Simultaneous with those arrests, searches were conducted by agents of the Defense Criminal Investigative Service of the Department of Defense's Office of Inspector General in the United States, and the United Kingdom's Office of Fair Trading and the European Commission executed search warrants in Europe. And in August 2007 the Antitrust Division announced plea agreements had been reached with British Airways Plc and Korean Air Lines Co. Ltd. for their roles in conspiracies to fix the prices of passenger and cargo flights.<sup>4</sup> The Antitrust Division's investigation was coordinated with the United Kingdom's Office of Fair Trading, which announced that same day that it had resolved similar charges against British Airways in its parallel investigation.<sup>5</sup> Such coordination among multiple jurisdictions will continue to be an important part of cartel investigations, and such cooperation will lead to more effective anti-cartel enforcement in the future. Moreover, while there remain some limitations, antitrust enforcement agencies can often share evidence that each of us collects either through searches or through voluntary cooperation from leniency applicants or pleading defendants.

**Third**, it is now easier to apprehend culpable individuals. With the increasingly vigorous resolve that foreign governments are taking toward punishing cartel activity and their increased willingness to assist the United States in tracking down and prosecuting cartel offenders, the safe harbors for antitrust offenders are rapidly shrinking. Not only is it more likely that an offender will be prosecuted in another country, but it also is more likely that foreign nationals who violate U.S. antitrust laws will be prosecuted in the United States. The improved cooperation with foreign law enforcement authorities already has provided the Antitrust Division with increased access to foreign-located evidence and witnesses that have proven to be instrumental in the cracking of a number of international cartels. The Antitrust Division has

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<sup>3</sup>Press Release, U.S. Department of Justice, Eight Executives Arrested On Charges Of Conspiring To Rig Bids, Fix Prices, And Allocate Markets For Sales of Marine Hose (May 2, 2007), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2007/223037.htm](http://www.usdoj.gov/atr/public/press_releases/2007/223037.htm).

<sup>4</sup>Press Release, U.S. Department of Justice, British Airways Plc. and Korean Airlines Ltd. Agree to Plead Guilty and Pay Fines Totaling \$600 Million For Fixing Prices on Passenger and Cargo Flights (August 1, 2007), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2007/224928.htm](http://www.usdoj.gov/atr/public/press_releases/2007/224928.htm). I am recused from the British Airways matter.

<sup>5</sup>Press Release, British Airways to Pay Record £121.5m Penalty in Price Fixing Investigation (August 1, 2007), *available at* <http://www.oft.gov.uk/news/press/2007/113-07>.

successfully prosecuted foreign defendants from Canada, France, Germany, Japan, South Korea, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom for engaging in cartel activity, and these individuals have served, or are currently serving, prison sentences in U.S. jails.

I note that when the Antitrust Division began prosecuting international cartels, just convincing a foreign national to submit to U.S. jurisdiction and plead guilty was a major achievement. A no-jail deal was at times necessary for the Antitrust Division to secure access to an important foreign witness or key foreign-located documents. The dramatic increase in international cooperation and our improved use of investigative tools over the last few years has caused a significant shift in the negotiating balance. The Antitrust Division now seeks jail sentences for *all* defendants, domestic and foreign.

The Antitrust Division's practice is to put foreign witnesses and subjects of investigation on border watches to detect their entry into the United States. In 2001, the Antitrust Division raised the stakes for fugitive defendants even further by adopting a policy of placing fugitives on a Red Notice list maintained by the International Criminal Police Organization (Interpol). A Red Notice is essentially an international wanted notice that many of Interpol's member countries recognize as the basis for a provisional arrest, with a view toward extradition. The Antitrust Division will seek to extradite any fugitive defendant apprehended through the Interpol Red Notice Watch. Thus, even if a fugitive resides in a country that would not extradite the defendant to the United States for an antitrust offense, the fugitive still runs the risk of being extradited if he or she travels outside of that home country to a third country that participates in the Red Notice list. These restrictions on a foreign national's travel to the United States are often a significant and unacceptable burden on his or her business and personal life, and have contributed to the decision of many individuals to accept responsibility for their cartel offenses, plead guilty, and negotiate plea agreements with the Antitrust Division that include prison sentences.

The development of the United Kingdom's anti-cartel policies over the last few years, including its policies toward corporate executives, offers a good example of the evolution in international anti-cartel enforcement. Formerly the United Kingdom would not assist U.S. antitrust investigations pursuant to a Mutual Legal Assistant Treaty (MLAT) request. But, over the last six years, the United Kingdom has become one of the strongest advocates in the international fight against cartels. In 2004 the Antitrust Division indicted the former chairman of Morgan Crucible Company, Ian P. Norris, for fixing prices of carbon brushes (used to transfer electrical current in automotive and transit applications) and for orchestrating a conspiracy to obstruct justice, tamper with witnesses and destroy documents. The Antitrust Division is seeking extradition of Norris, a British national, on all counts of the indictment. Norris

is appealing the rulings that have ordered his extradition.<sup>6</sup> Throughout this process we have been working cooperatively with the British government.

**Fourth**, expected penalties for cartel conduct are increasing. International cooperation has enabled the Antitrust Division to enhance the threat of prosecution on foreign nationals who commit cartel offenses in the United States. As a result we see more foreign nationals agree to plead guilty, to cooperate against other cartelists, and to serve increasingly long prison sentences. For example, in April 2007 a South Korean executive agreed to plead guilty to a single count of price fixing, pay a \$250,000 criminal fine and serve fourteen months in a U.S. prison, the longest imprisonment ever by a foreign defendant charged with price fixing in the United States.<sup>7</sup> Indeed, over the last ten years the average jail sentence for defendants prosecuted by the Antitrust Division has increased from eight months (in 1997) to more than thirty months (in 2007). And the expected penalties for engaging in cartel conduct are increasing.

**Fifth**, we are significantly enhancing the deterrence of cartel conduct. In addition to the deterrence from the increased expected penalties just discussed, antitrust enforcement agencies around the world have played a leading role in changing the business culture toward cartel activity. In the past, many countries have had no prohibition on cartels and some business people came to view price-fixing and other agreements not to compete as simply one way of doing business. Businesses on virtually every continent are increasingly aware that cartel activity is illegal and is viewed as tantamount to fraud or theft. Inculcating such awareness in the business community is one of the most effective means we have available to deter cartels from forming in the first instance.

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<sup>6</sup>*The Government of the United States of America v. Norris* (Bow St. Magis. Ct. 2005). In June 2005 a British magistrates' court found Norris extraditable to the United States on an antitrust charge. In September 2005 the British Home Secretary ordered the defendant's extradition. In January 2007 High Court of Justice dismissed appeals filed by Norris. The appeals included challenges based on the dual criminality requirement for extradition, a claim that obstruction of foreign investigators is not an extradition offense, human rights arguments, and the passage of time since the dates of the charged offenses. In June 2007 the House of Lords granted Norris leave to appeal, in part, the High Court's ruling. The appeal is scheduled to be heard in January 2008.

<sup>7</sup>See Press Release, Sixth Samsung Executive Agrees to Plead Guilty to Participating in Dram Price-Fixing Cartel (April 19, 2007), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2007/222770.htm](http://www.usdoj.gov/atr/public/press_releases/2007/222770.htm).

### III. Merger Review Process

Next, some mixed news: the world is more complicated for mergers. At present, more than seventy jurisdictions around the world have some form of antitrust merger review. Next year when China's Antimonopoly Law goes into effect, we will add one more jurisdiction to that list. One result of the increasing globalization of our economy is that multijurisdictional mergers are now commonplace and will face review by multiple antitrust authorities. The positive aspect of this development is that consumers in more countries around the world have the potential to benefit from merger reviews that consider whether there is harm to competition in markets that affect their local regions. This benefit comes, however, with several challenges.

**First**, most mergers do not threaten harm to competition and may bring affirmative benefits for consumers. Accordingly, in the United States we place a high priority on identifying those relatively few mergers that might threaten harm to competition as quickly as possible and closing our reviews of the others as expeditiously and as efficiently as possible.

Review by multiple antitrust enforcement authorities can impose significant burdens and costly delays on corporate transactions, as well as heavy and non-productive burdens on the resources of the reviewing agencies themselves. This recognition led the International Competition Network (ICN)<sup>8</sup> to focus much of its initial efforts on procedural aspects of the merger review process. The result of the ICN's work in this area has been a set of recommended practices that reflects international consensus on basic principles for merger notification systems. The *Recommended Practices for Merger Notification and Review Procedures* have influenced changes by member jurisdictions to bring their merger notification and review systems into greater conformity with the recommended practices.

One goal of each antitrust enforcement agency in merger review should be to cull out of the review process as quickly as possible those transactions that are not likely to harm competition within the agency's jurisdiction. An important first step is to limit merger notification requirements—whether pre-merger or post-merger—to those transactions that have an appropriate "nexus" with the jurisdiction. The ICN recommends that this can be done by requiring that at least two parties to a transaction, or at least the acquired party, have material sales or assets within the jurisdiction. I suggest that if no more than

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<sup>8</sup>The ICN was created in October 2001 by sixteen competition agencies from around the world, and now includes one hundred member antitrust enforcement agencies from nearly ninety jurisdictions. Its mission is to provide antitrust enforcement agencies with a focused network for addressing practical antitrust enforcement and policy issues of common concern, and to formulate proposals for procedural and substantive convergence on competition policy issues.

one of the parties to a transaction has assets in, or sales into, the jurisdiction, the possibility of harm to competition in that jurisdiction is remote and the burdens of a merger notification requirement are not justified.

Globally, there have been some issues that have developed on this front. For example, as I mentioned before, after thirteen years of drafting, China enacted an Antimonopoly Law on August 30 that goes into effect next year. The new law prohibits agreements that restrain competition, abuses of a dominant market position and concentrations that may have the effect of eliminating or restraining competition, as well as abuses of administrative powers to restrain competition. The law provides for a pre-merger notification system, but leaves the notification thresholds to be determined by subsequent regulation. The waiting periods appear to be generally consistent with the ICN's *Recommended Practices for Merger Notification and Review Procedures* (that is, an initial thirty-day waiting period, followed by a ninety-day waiting period if a second stage review is undertaken, with a possible sixty-day extension). The parties are free to consummate the transaction when the waiting periods have expired without a decision. The Antitrust Division has been working with the Chinese Ministry of Commerce—the agency that currently reviews mergers and acquisitions by foreign companies—to educate them on how our merger notifications and substantive reviews work in practice. In July 2007 the Antitrust Division and the Federal Trade Commission convened a merger workshop in China to train Ministry of Commerce staff on good merger review practices.

China may have grabbed most of the headlines this year, but there have been important developments in India as well. The Indian parliament has adopted amendments to India's competition law that attempt to cure some of the constitutional issues that the Indian Supreme Court identified several years ago. In the process, the amendments also change the pre-merger notification filing system from voluntary to mandatory, alter the filing thresholds for foreign firms, and impose a long, 210-day waiting period on mergers. A number of these changes pose practical issues, and through our technical assistance program we will continue to work with the Indian competition officials on substantive merger analysis and merger process, emphasizing the importance of quickly identifying and clearing transactions that are not competitively problematic.

For those transactions that are subject to a notification requirement, antitrust enforcement agencies should seek to identify as quickly and as efficiently as possible those transactions that are not likely to harm competition and promptly close any investigation or terminate any waiting period. Recognizing that we should always strive to improve what we are doing here in the United States, last year the Antitrust Division amended our *2001 Merger Review Process Initiative*. In so doing, we sought to further streamline the merger investigation process to improve the efficiency of our investigations



while reducing the cost, time and burdens faced by parties to transactions that we review.

**Second**, we can improve the efficiency of multijurisdictional merger review by fostering convergence on substantive analysis. Following on the success of its efforts to develop convergence on procedural aspects of the merger review process, the ICN is now working on developing convergence on substantive merger analysis. The ICN *Merger Guidelines Workbook* is a comprehensive, practical presentation of the basic framework that many antitrust enforcement agencies use in the substantive assessment of mergers.

Building on the success of the *Merger Guidelines Workbook*, the ICN is currently focusing on three topics for initial consideration during the coming year.

- (1) ***The efficacy of an agency's legal framework for addressing anticompetitive mergers.*** This topic, which is more focused than it may sound, encompasses a jurisdiction's general merger review powers—essentially, that an effective merger law needs to enable the agency to intervene to remedy the competitive concerns arising from a particular transaction and that remedies should be limited to merger-specific harms. For example, in the United States we amended our merger law in 1950 to close jurisdictional gaps that had allowed firms to circumvent merger law based upon how transactions were structured. This legislative change helped focus our merger reviews on substance rather than form.
- (2) ***The use and role of presumptions and safe harbors or thresholds.*** Many jurisdictions use intervention thresholds or presumptions, often based on market shares, to provide a basic indication of how a merger will be evaluated. Such presumptions can be useful starting points in providing guidance, or even certainty, to firms and streamlining the process for identifying those relatively few mergers that may be harmful. This topic will require a look at how presumptions are used in the merger context, both in guidelines and in practice.
- (3) ***The analysis of entry and expansion.*** This topic will explore two areas that commonly factor into merger guidelines and that can play a decisive role in many instances.

In general, there has been great cooperation and growing consensus in both the procedure and substance of merger review globally, and we are beginning to see the benefits of antitrust convergence resulting from the work of the ICN. In trying to develop enhanced convergence on substantive merger analysis, antitrust enforcement agencies are working toward more efficient merger review and better consistency and transparency so that they can

provide better guidance to the business community, refine their own practices, and offer recommended practices to fledgling antitrust enforcement agencies.

There will always be differences in markets, local effects, procedures and laws that may lead to reasonable differences in outcomes for some transactions. I doubt we will ever completely eliminate all possible sources of potential substantive divergence. Nevertheless, the very exercise of identifying common ground and articulating the extent of analytical convergence will bolster transparency, leading to a better understanding of how our respective merger laws are enforced. By addressing the burdens of initial filings, stressing the early identification and subsequent investigation of only those mergers that raise potential anticompetitive concerns, discussing common analytical approaches, and promoting interagency coordination, we help to improve the odds that agency decision-making outcomes will not conflict. And, because of the frequency with which antitrust enforcement agencies deal with mergers, any incremental improvements to merger analysis that we take away from the project can generate significant benefits.

#### **IV. Unilateral Conduct**

Finally, some challenging news: around the world unilateral conduct continues to raise complex and difficult issues and be the subject of vigorous debate in the antitrust community today. Let me make the following observations generally about unilateral conduct.

**First**, unilateral conduct is an important part of antitrust enforcement. You hear a lot of people, me included, talking about the importance of not enforcing the antitrust laws against unilateral conduct in ways that can be more harmful than helpful. You hear that because we are coming from a history in the United States where, in hindsight, we did not fully appreciate the potential competitive benefits of many activities. Unduly restrictive standards, rather than helping consumers, can have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition.

**Second**, we have less consensus on unilateral conduct issues in the United States and abroad than we do in other areas of antitrust enforcement. I do not want to overstate the differences because there are many areas of consensus. To this end, the Antitrust Division and the Federal Trade Commission held a series of hearings this year with a view toward improving the state of our knowledge in this area. Globally, antitrust enforcement agencies agree that we need more dialogue and more careful thought in an area where it is often difficult to differentiate between vigorous competition and anticompetitive conduct.

Generally, there is agreement that unilateral conduct should be condemned only if it is shown to harm competition (not just competitors) based

on the application of sound economic principles. But efforts to determine clear and objective standards that will apply in all unilateral conduct matters continue to generate significant debate, and no test proposed thus far has achieved consensus support.

**Third**, in an increasingly globalized economy, antitrust authorities must be careful to consider the geographic scope of their actions. As the Antitrust Division advocated and the Supreme Court recognized in its *Empagran* decision, antitrust enforcement that reaches alleged harm outside a country's own borders "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."<sup>9</sup> It is important that antitrust enforcement agencies work cooperatively to minimize this concern.

**Fourth**, the Supreme Court's most frequently cited recitation of the elements of a Sherman Act Section 2 claim is the following: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>10</sup> Translating this general principle into operational rules and guidance for the business community is difficult. In this regard I offer five broad principles to inform our enforcement policy and to guide our discussions.

- (1) ***Individual firms with monopoly power can act anticompetitively and harm consumer welfare***, and we should seek to identify and prosecute such conduct.
- (2) ***Mere size does not demonstrate harm to competition or a violation of the antitrust laws***. The proper focus of antitrust law is on anticompetitive conduct and effect, not just size or market share.
- (3) ***Mere injury to a firm does not itself show that competition has suffered***. Indeed, a firm's inability to garner sales may indicate no more than the superiority of its competitors' products. A successful firm should not be penalized for creating a product that is preferred by consumers and is widely available at a low cost. Further, the loss of sales can be an important incentive to other firms to redouble their efforts to offer new and better products at the lowest possible price.
- (4) ***Both consumers and the business community benefit from clear, administrable and objective rules*** that both allow businesses to

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<sup>9</sup>*F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

<sup>10</sup>*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

assess the legality of a practice before acting and enable enforcers and courts to judge challenged conduct predictably and correctly. This is particularly true in the context of unilateral conduct. It is important to remember that every time a firm is kept from engaging in aggressive conduct because it fears an unnecessarily expansive interpretation of the antitrust laws, competition is harmed.

(5) ***A remedy that harms competition is worse than no remedy at all.*** A remedy needs to be effective and administrable by courts and agencies without restricting competition.

As a final consideration in this regard, firms in the marketplace generally can choose between a strategy of competing on the merits or a strategy of seeking government intervention to slow down their competitors. If it is predictable that losers in the marketplace can become winners because antitrust enforcement agencies and courts will compel access to a competitor's property or prohibit the competitive actions of a big firm, then competitors who cannot win on the merits will find it more desirable to seek government help rather than do the hard work of competing in the marketplace. On the other hand, for firms that do choose to compete, intervention can deter broad categories of vigorous competitive behavior.

## **V. Conclusion**

Given the increasingly international nature of antitrust enforcement, cooperation among antitrust enforcers and convergence in our principles and practices has become imperative. Though antitrust enforcement agencies may have some differing views and practices when it comes to addressing anticompetitive conduct, it is important that we not lose sight of our successes. In the area of anti-cartel enforcement, we are united in our commitment to detect, deter and prosecute hard core anticompetitive conduct. With respect to unilateral conduct, though we still need more dialogue and careful thought, there are significant areas of agreement among antitrust enforcers. And finally, for merger enforcement one might say that we are somewhere in between. While there remains work to be done, there has been great cooperation and growing consensus in both the substance and procedure of merger review.

Thank you for the opportunity to speak to you today.