DEPARTMENT OF JUSTICE

Can There Be a "One-World Approach" to Competition Law?

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Introduction

Thank you, Bill, for that introduction. It's wonderful to be here and to share this session with Mr. Toh Han Li, who hopefully has had a chance to relax a little after hosting a fantastic International Competition Network ("ICN") Annual Meeting in May.

Thank you as well to the organizers of this year's conference for inviting me here today. I became the head of the Antitrust Division in April of this year, succeeding my colleague, Bill Baer, who spoke here last year. One of the pleasures of my new role has been meeting with our counterparts around the world to share perspectives on competition policy. I appreciate the opportunity to do so here today at Chatham House.

Overview

Over the last two decades, competition law has been embraced across the globe. A majority of jurisdictions—about 130—now have and enforce competition laws. This globalization of competition law has vastly increased the need for dialogue—especially multilateral dialogue—among competition agencies. The ICN and the Organization for Economic Cooperation and Development ("OECD") have become critical fora for multilateral dialogue, and I am pleased to say that bilateral communication occurs daily.

Differences in jurisdictions' laws and legal systems, as well as our economic and political histories, inevitably result in divergent approaches to common competition issues. Indeed, the amount of convergence already achieved has been remarkable in view of these differences. And because the working relationships among competition agencies in different jurisdictions continue to grow closer, I confidently predict further convergence to our mutual advantage in achieving our shared goals.

Progress is being made

a. Cartels

The most conspicuous area of convergence within competition policy is hard-core cartel enforcement. Just a few decades ago, the United States could claim few allies in the battle against cartels. Indeed, we were even at odds with our close friends here in the United Kingdom. Today there is near unanimity around the world about the importance of discovering and prosecuting price fixing, bid rigging, and market allocation. International cartels are a great scourge of the people, and agencies around the world now cooperate to detect and punish them. Over the past decade, a majority of the fines levied against international cartels have been imposed outside the US.

Cartel enforcement illustrates how much can be achieved despite differences in laws, institutions, and histories. Substantial differences across jurisdictions did not prevent competition agencies from agreeing to make such enforcement a priority. Nor did these differences prevent the near-universal adoption of leniency programs, a key tool for cartel enforcement. The Antitrust Division has had great success in detecting international cartels since it revamped its Leniency Program in 1993. Since that time, qualifying companies have avoided all criminal sanctions in the US by self-reporting cartel activity.[1] This Leniency Program has revolutionized our cartel enforcement, and served as a model for jurisdictions around the world.

b. Merger review

The global antitrust community has also made progress on merger review procedures and substantive analysis. Over the past 15 years, many competition agencies' pre-merger notification

[1] *See* United States Department of Justice, Leniency Program, *available at* https://www.justice.gov/atr/leniency-program.

regimes improved thanks to the ICN's and OECD's work in this area.[2] There is now a consensus among competition agencies that they should only assert jurisdiction over a merger when their economies have an appropriate nexus to the transaction. Substantively, more jurisdictions have moved away from formalistic approaches to effects-based analysis.[3] Many jurisdictions now apply essentially the same substantive assessment of likely competitive effects from proposed mergers. These changes have facilitated cooperation on specific merger cases. Over the past few years, at any one time the Antitrust Division has worked with other enforcers in up to 25% of our merger challenges. Last year, we worked with 16 different foreign enforcers in 30 different investigations.

Areas of divergence

Of course, differences in laws, institutions, and histories do matter, and I offer a few examples:

a. Unilateral conduct

While there is much in common between how the US and most other jurisdictions approach potentially exclusionary conduct by individual firms, some of our differences are significant. Firms that would not even be at risk of violating unilateral conduct laws prohibiting exclusionary conduct in the US are subject to such laws elsewhere for the same behavior. A firm controlling half the market almost certainly is subject to such laws in Europe, and somewhat

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[2] *See* International Competition Network, Recommended Practices for Merger Notification Procedures, (2002), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf; OECD, Recommendation of the Council on Merger Review (2005), *available at* http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False.

[3] *See* e.g. International Competition Network, Recommended Practices for Merger Analysis (2008), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

smaller firms are apt to be subject to such laws as well. In the US, the threshold for intervention is higher, as some firms with market shares well in excess of 50% have been found not to possess the monopoly power necessary to trigger application of our laws.

Agencies and courts in the US have also been more reticent than our global counterparts about finding unilateral conduct to be unlawfully exclusionary. International differences are perhaps greatest with conduct related to intellectual property. No US court decision has found that a unilateral, unconditional refusal to license intellectual property was unlawful, but European courts have done so. In the US, competition agencies have a long history of acting to prevent uses of intellectual property rights in ways not authorized by intellectual property law, but competition law is not understood to circumscribe those rights themselves. DOJ has not yet found a circumstance in which a unilateral, unconditional refusal to license an intellectual property right violates our antitrust laws. By contrast, we see newer competition agencies outside Europe identifying a wide range of circumstances under which they would impose liability for such refusals to license under their competition laws. At most, liability for a unilateral, unconditional refusal to license an intellectual property right should be a rare exception to the ordinary rules of modern competition laws.

b. Criminal treatment of cartels

While there is much in common between the US and most other countries on cartel enforcement, there remains a pronounced difference with all but a few countries on individual accountability. As Deputy Assistant Attorney General for Criminal Enforcement, Brent Snyder, has said, it is "indisputable that the most effective deterrent to cartel offenses is to impose jail

sentences on the individuals who commit them."[4] Deputy Attorney General Sally Yates recently emphasized individual accountability for all corporate wrongdoing,[5] and I couldn't agree more.

Since 1890, US antitrust law has had criminal penalties for both corporations and individuals, and enforcement of antitrust law was entrusted to the agency that enforces other federal criminal laws. As far as I know, no other country entrusted competition enforcement to a general law enforcement agency, and few have provided for prosecution of individuals. That is possible now in the UK and Ireland, but not in many other jurisdictions. We will continue to encourage greater efforts in other countries to make individual accountability a reality.

c. Transparency and procedural fairness

Increasingly, the spotlight has been focused, not so much on divergence on the substance of competition law, but rather on the procedures used in applying competition law. Competition agencies agree that transparency and procedural fairness are important, but differences in laws and institutions have led to pronounced differences across jurisdictions in the way we do our work.

The success of a competition agency should be gauged not only by its output, but also by the confidence placed in it both by the public it serves and by those subject to its powers. Transparency and procedural fairness contribute to confidence in competition law and its enforcement, especially on the part of those subject to it. Generally speaking, companies will do more business in countries that instill confidence in the institutions affecting the business environment, including of course, competition law enforcement. A competition agency also

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[4] *See* Brent Snyder, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Individual Accountability for Antitrust Crimes, Remarks as Prepared for the Yale School of Management Global Antitrust Enforcement Conference (Feb. 19, 2016), *available at* https://www.justice.gov/opa/file/826721/download.

[5] *See* Sally Q. Yates, Deputy Att'y Gen., Dep't of Justice, New Policy on Individual Liability in Matters of Corporate Wrongdoing, Remarks at New York University School of Law (Sept. 10, 2015), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

should communicate with the public whose interest it is charged with protecting. In doing so, it can earn their trust that it is acting in their best interests. In some cases, it can be important to explain why competition law does not provide an appropriate remedy for perceived harms.

Different competition agencies may find different ways to communicate their policies to a general audience. Some of the ways that we communicate are: 1) business review letters explaining why we plan to challenge or plan not to challenge proposed conduct, 2) Competitive Impact Statements that explain why we challenged particular conduct and why a proposed settlement adequately addresses the problem, and 3) enforcement guidelines, often issued jointly with the Federal Trade Commission, on particular types of conduct.

Competition law should largely be self-enforcing. But it can be self-enforcing only to the extent that those subject to it understand what is permitted and what is not.

Leading the way forward

Where do we go from here? I believe that future convergence will be driven by: (1) bilateral cooperation, and (2) multilateral organizations, such as the ICN and OECD. This, I know, is not an earth-shattering pronouncement.

a. Bilateral cooperation

Cooperation, and establishing a pattern of regular cross-border consultation at the policy and staff levels, subtly promotes convergence. The more any people exchange views, the more they find some common ground and the more often they come to a common view on policies. Every day at the Department of Justice we are in dialogue with our global counterparts about a specific case, policy matter, or technical assistance. I have no doubt that this is promoting agreement on cases and narrowing policy differences.

Since 1976, we have entered into 15 cooperation agreements with other countries. [6] These agreements formalize a system of notification and consultation when either enforcer is investigating a transaction or conduct with ramifications for the other.

Just last month, I participated in a trilateral meeting in Toronto with our close friends in the Canadian and Mexican competition agencies, where we discussed matters such as recent developments, effective agency litigation, disruptive innovation, and cooperation between the agencies, including technical assistance. These frank discussions on a wide range of topics were made possible through a web of cooperation agreements including our own agreements with Canada (1995) and Mexico (1999).

The number of cooperation agreements continues to grow. Last September, the DOJ and FTC signed a joint Memorandum of Understanding with the Korean Fair Trade Commission to encourage cooperation and facilitate communication on antitrust enforcement. And just last month I signed an MOU among the Peruvian competition agency (INDECOPI), the FTC, and the DOJ.

None of these cooperation agreements give any of the enforcers involved any powers that they didn't already have. But they are valuable nonetheless: cooperation agreements motivate enforcers to start thinking about cooperating with each other more regularly. These agreements also signal to our respective staffs that we're encouraging them to shares ideas, theories, and best practices with each other. Last but not least, these agreements put companies on notice that we talk to each other, and not to try to play us off against each other, or omit or misrepresent facts before a partner jurisdiction. Cooperation also helps us understand other enforcers better, and

[6] *See* Antitrust Div., Dep't of Justice, Antitrust Cooperation Agreements, *available at* https://www.justice.gov/atr/antitrust-cooperation-agreements.

how they come to decisions the way they do. And this better prepares us for working together the next time.

b. Multilateral organizations

Future convergence will also be driven by multi-jurisdictional organizations like OECD and ICN through multilateral consensus building. I detailed earlier some of the important matters on which these agencies promote convergence.

Multilateral organization such as the OECD and the ICN play a crucial role in facilitating discussion and consensus. The ICN now spans 120 jurisdictions and brings together nearly every competition agency in the world. It, therefore, offers a unique platform to engage the vast majority of the global competition community in one setting.

And I do want to assure you convergence is a two way street. We, in the United States, do learn from our interactions. For instance, we learn more about what differences we really have. What may seem like a major policy difference can turn out to be just a different understanding of what particular words mean. Moreover, we think through the issues in our cases more clearly when we exchange views, both on the particular matters and in general, with other competition agencies.

The optimal amount of standardization

How much convergence is the right amount? I don't know. One size does not fit all, certainly not in process, and perhaps not always on substance. We do not expect any country to copy all our laws and institutions, and we don't suggest it. At the same time, we certainly are not resigned to a lowest common denominator approach.

Convergence should not be seen as a goal in itself. Our focus should always first be on articulating, practicing, and protecting fair, effective, and sound competition policy, using transparent process and informed by continued learning and experience.

Thank you. I look forward to our discussion to follow.