



DEPARTMENT OF JUSTICE

Onward and Upward: International Cooperation in Antitrust Enforcement

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It is wonderful to be with you here today.¹ With Seoul as our host for this conference, we are surrounded by living proof of how closely connected economies around the world have become. It is the perfect backdrop to our discussions about the present and the future of antitrust law enforcement.

Today, with more than 140 antitrust agencies—each enforcing its own jurisdiction’s specific laws—no one can afford to ignore the ways in which our enforcement efforts can overlap.

When this global network of antitrust enforcement regimes functions at its best, those who violate the antitrust laws and harm consumers by, for example, colluding on prices, will increasingly find no place to hide.

On the other hand, if the matrix of antitrust enforcement does not work, we risk impeding one another’s enforcement efforts, creating unnecessary obstacles and costs for those doing business across borders, and hindering rather than supporting innovation and economic growth.

This issue is an important one for the U.S. Department of Justice. In fact, just a few weeks ago, the Department announced a new policy encouraging prosecutors to coordinate, when possible, with other agencies, including foreign enforcement authorities, that are seeking to impose penalties for the same misconduct. This policy—which provides guidance to our attorneys but is not legally enforceable—is designed to prevent inconsistent, incompatible, or unnecessary, truly duplicative enforcement efforts.

But the policy serves a second, equally critical purpose. As our Deputy Attorney General has explained, the policy is also aimed at “enhanc[ing] relationships with our law enforcement partners in the United States and abroad.”

I’ve been talking about the Department of Justice. As many of you know, the Department’s Antitrust Division exercises federal antitrust enforcement authority in the United States, along with the Federal Trade Commission.

¹ Thanks to Kathleen Bradish, Emma Burnham and Brinkley Tappan for their assistance in preparing these remarks.

You might wonder how a change in a Presidential Administration affects antitrust enforcement at the Department of Justice. At the head of the Antitrust Division is an Assistant Attorney General, nominated by the President and confirmed by the Senate. (His deputies—of which I am one—are appointed by the Attorney General, who is himself a Presidential appointee confirmed by the Senate.) Each person to hold the position of Assistant Attorney General will, of course, have particular priorities, and I will talk today about some of the priorities of the current Antitrust AAG, Makan Delrahim.

That said, antitrust enforcement in the United States tends to remain largely consistent, for a number of reasons. One reason is that our enforcement decisions rely heavily on the careful application of economics to facts, regardless of the policies of any particular administration.

But there is a more fundamental reason: respect for the rule of law. As our Deputy Attorney General said last week, “[t]he rule of law is essential to commerce. It allows businesses to enter contracts, make investments, and project revenue with some assurance about the future. It establishes a mechanism to resolve disputes, and it provides protection from arbitrary government action.”

In short, our system is designed to be consistent over time.

Of course, the Antitrust Division under Assistant Attorney General Delrahim’s leadership is implementing a number of important new initiatives and priorities. But we are doing so in pursuit of our broader long-standing goal to create a stable environment in which businesses have the confidence to make investments for the benefit of competition and consumers.

I’m going to describe a few areas where international cooperation has made important strides, and a few areas where we believe enforcers should focus their efforts to improve cooperation. I will also identify some areas where antitrust enforcement in the United States is continuing down the familiar path, and a few examples of new initiatives and priorities.

1. Cartel Enforcement

One of the great successes of international antitrust enforcement in the past several decades has been the expanding recognition of the harm that price-fixing cartels do to consumers and to our economies.

As we continue to work with our foreign counterparts to coordinate timing of searches, gather evidence abroad through mutual legal assistance treaties, and extradite individuals who have violated antitrust laws, the ability of cartels to harm consumers shrinks even further.

In today's global economy, international cooperation is not just helpful, but necessary, to effective antitrust enforcement. The growth of the global supply chain and the rise of virtual transactions mean that cartels are increasingly operating in multiple jurisdictions. Take, for example, our recent international shipping and foreign currency exchange cases. These cartels involved conduct and commerce that crossed geographic borders, and they spurred investigations in multiple jurisdictions worldwide.

But as we look back at the successes of the Division and of our international colleagues in uncovering and punishing global cartels, we can also see opportunities for us to foster even better international cooperation.

Leniency programs are an example of this.

The Antitrust Division's corporate leniency policy has been an important part of its criminal antitrust enforcement program for 25 years. For it to continue to play this role in the next 25 years, we will have to work internationally to ensure that reporting regimes in various jurisdictions are not so complex that it becomes impossible for a company seeking leniency in multiple jurisdictions to navigate.

When a firm or individual applies for leniency simultaneously across multiple jurisdictions, our international cooperation efforts must consciously try to preserve the applicant's incentives to cooperate. That includes taking steps to ensure that jurisdictions can effectively proceed with

their investigations and prosecutions in a way that does not undermine the common goal of our leniency programs.

We value the dialogue on criminal process with our counterparts abroad and have taken steps to expand that discussion.

Just last month, enforcers from three different continents joined us at the Division as part of a public roundtable on corporate antitrust compliance, representing a range of views and experiences in encouraging effective corporate compliance programs.

In light of the discussions and feedback from the roundtable, we are re-evaluating our policy regarding corporate compliance efforts. That includes carefully examining our policy regarding pre-existing corporate compliance efforts, and what role they should have in our decision making.

I'll now say a few words about another criminal enforcement priority for the Division. Under AAG Delrahim's leadership, the Division has been actively pursuing criminal investigations into naked agreements between employers not to recruit or hire each other's employees.

These agreements, which we often refer to as "no poach" agreements, are simply another form of the per se illegal agreements the Division routinely prosecutes criminally. They eliminate competition in the same irredeemable way as agreements to fix prices or allocate customers. Just like consumers, workers are entitled to a competitive market.

Of course, that does not mean that the Division will bring criminal charges against agreements between competitors that are ancillary to joint ventures or other legitimate collaborations. Those have been, and will continue to be, analyzed under the rule of reason, consistent with the civil doctrine of ancillary restraints. That is also true for a vertical agreement between an employee and an employer that seeks to protect the employer's trade secrets by prohibiting the employee from taking a job with a competitor. But none of that should be new or surprising to antitrust lawyers familiar with U.S. antitrust law.

2. Merger Review

Some of the Division's most significant case cooperation has been and continues to be in merger investigations. The Division has worked cooperatively in this area with enforcers from almost every corner of the globe in recent years. Within the past four years alone, the Antitrust Division has cooperated with 21 foreign agencies through 58 different merger investigations.

A notable example includes the highly successful cooperation with our colleagues here in Korea in the merger investigation of Applied Materials Inc. and Tokyo Electron that concluded in 2015. In that case, the Division's cooperation with the KFTC was important to our evaluation of the proposed remedy, which the Division ultimately concluded was not sufficient to address the competitive harm resulting from the proposed merger.

As the number of jurisdictions active in merger review has grown in recent years, the need for cooperation on merger investigations has grown alongside it. This cooperation benefits not only the agencies but also the parties to the transaction. A primary goal of the Division's international merger cooperation has been to avoid subjecting parties to potentially conflicting or otherwise incompatible remedies, and to reduce as far as possible any inefficiencies in fashioning remedies to address potential anti-competitive effects of a merger.

The work that's been done bilaterally and in multilateral settings like the International Competition Network to encourage international cooperation on merger remedies is a particular success story. On a practical level, the Division has agreements with some of its most important international partners on best practices in merger cooperation. We have also made progress on reaching international consensus on the principles behind effective and efficient remedies.

The Antitrust Division has consistently focused on several core principles in our process for implementing merger remedies through consent decrees. First, our procedure ensures that the process of reaching a remedy is transparent. On the front end, an open exchange with parties is necessary to identifying and resolving important issues as quickly as possible. On the back end, public transparency about the terms of a remedy and why it will address the competitive harm is essential.

Second, as the Division emphasized time and again, the remedy must be tailored to address the harm alleged and ensure its efficacy. This minimizes the risk that the remedy will adversely affect the anticipated efficiencies of the merger and other costs the remedy imposes on the parties, while also helping ensure that the remedy addresses competitive harms that result from the transaction rather than other considerations.

Finally, the Division is working to ensure that its remedies are not overly regulatory in nature. As AAG Delrahim explained in one of his first speeches after his arrival at the Division, remedies that require ongoing government oversight on what should be a free market are “fundamentally regulatory,” and, at their core, they are contrary to the role of antitrust enforcement in “building a less regulated economy in which innovation and business can thrive, and ultimately the [...] consumer can benefit.”²

A commitment to these principles has led AAG Delrahim to emphasize the use of structural remedies instead of behavioral remedies, reflecting the core insight that our job at the Antitrust Division is law enforcement, not regulation. As he explained, “[b]ehavioral remedies often require companies to make daily decisions contrary to their profit-maximizing incentives, and they demand ongoing monitoring and enforcement to do that effectively. It is the wolf of regulation dressed in the sheep’s clothing of a behavioral decree. And like most regulation, it can be overly intrusive and unduly burdensome for both businesses and government.”

While it may be tempting to impose a behavioral remedy to address certain aspects of a transaction, even if the transaction would not strictly violate our antitrust law, that’s a fundamentally flawed approach. Where we conclude that a merger is anticompetitive, we should strive to impose an effective and complete solution.

Of course, as we carry out our efforts to design and implement effective structural remedies, we will continue to work with our foreign colleagues as we have in the past, with the goal of obtaining consistent remedies for the benefit of consumers in all affected jurisdictions.

² Makan Delrahim, Assistant Attorney General for Antitrust, “Antitrust and Deregulation” (November 16, 2017), available at <https://www.justice.gov/opa/speech/file/1012086/download>.

3. Intellectual Property

The lessons we've learned from international cooperation on merger remedies have another potential application—one that deserves more attention than it has received to date: remedies in conduct cases involving intellectual property.

As was the case with the global mergers that spurred the development of international merger review cooperation over the past few decades, antitrust enforcement regarding intellectual property can have clear multijurisdictional implications. IP licensing activities often cross international borders, and remedies imposed by one jurisdiction can, either on their face or as a practical matter, profoundly affect how IP rights can be exercised in other jurisdictions.

International coordination is no less essential here than in the merger context.

U.S. views regarding antitrust enforcement in matters involving IP rights have been very consistent over time. As we have made clear, intellectual property law bestows on IP owners certain rights to exclude others that help the owners profit from the use of their property. We have also been clear that antitrust law should not impose liability upon a firm for a unilateral, unconditional refusal to license, because doing so may undermine incentives for investment and innovation.³

While these principles have long been reflected in our guidance, a priority of ours is to consider how these principles can be reconciled with enforcement by other jurisdictions that affects—or even limits—the exercise of U.S. IP rights. As our International Deputy, Roger Alford, noted when he spoke in Korea a few months ago, potential conflicts arising from remedies involving IP rights give rise to comity concerns that need to be considered before a remedy is imposed.

Our own International Antitrust Enforcement Guidelines contemplate exactly this. An inquiry into the potential comity concerns should be part of the Division's decision to impose a remedy that may affect a foreign jurisdiction's articulated policy interests, just as we would

³ U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, Section 2.1 (2017), available at <https://www.justice.gov/atr/IPguidelines/download>.

expect it to be part of a foreign enforcer's decision that may have a similar effect in the United States.

Foreign jurisdictions are entitled to enforce their laws, even if they are different from ours. But where comity concerns arise, as they likely will if a remedy imposed by a foreign enforcer affects U.S. IP rights, we invite and encourage the enforcers to engage with us so that they understand our policy concerns, and so we can understand the contours of the remedies they seek.

There is also a key role for private parties involved in helping us address these matters. In a world with 140 jurisdictions enforcing competition laws, we are not aware of every enforcement action that might affect a U.S. policy interest. Parties can assist us by providing information about potential conflicts at the time the conflict is first identified.

For our part we will continue to make clear the United States' interest in protecting intellectual property through speeches such as this and through international organizations such as the ICN and OECD. As some of you may know, AAG Delrahim has already delivered several speeches articulating the Division's interests in promoting innovation, particularly in the context of technical standard setting.

Article I of the U.S. Constitution, written in 1787, expressly recognizes the importance of intellectual property. It empowers Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The Division wants to ensure that the grant of a U.S. patent accomplishes what the framers of our Constitution intended, which was to incentivize ingenuity and entrepreneurship.

Where foreign competition enforcement affects those incentives, U.S. interests may be implicated. In those cases, we want to engage with our international counterparts, and we invite them to contact us as well. As our respective economies become increasingly interconnected, especially as a result of cross-border IP licensing, we view those conversations with our foreign counterparts as a priority.

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In the almost two decades since I first came to Seoul on behalf of the Antitrust Division, there has been not only an exponential growth in antitrust enforcement around the world, but a corresponding growth in international cooperation among competition authorities to ensure sound and effective enforcement.

Nonetheless, there remain areas of concern in which we need to broaden our cooperation. In fact, tomorrow at the Council on Foreign Relations in Washington D.C., AAG Delrahim will discuss fresh thinking on ways to promote convergence on procedural norms in global antitrust enforcement. I encourage all of you to look for that speech tomorrow when it becomes available online.

We at the Department of Justice are committed to supporting initiatives that will foster international cooperation, encourage sound antitrust enforcement, and of course, protect and promote robust competition.