DEPARTMENT OF JUSTICE

Remarks of Andrew C. Finch
at the 44th Annual Conference on
International Antitrust Law and Policy

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Thank you for inviting me to speak today and for your kind introduction. As I think we all recognize, this conference has become a premier event in the world of international antitrust, and I am delighted to be here. I am also honored to share a podium with Andreas Mundt, who, as chair of the International Competition Network, has made an enormous contribution to the worthy goals of that organization and to international antitrust in general.

For the past five months I have had the privilege to work with the very talented people at the Antitrust Division, who are committed to defending competition on behalf of American consumers. When I was last at the Antitrust Division, I served as counsel to Assistant Attorney General Hew Pate, but I worked very closely with the current nominee for Assistant Attorney General, Makan Delrahim, who was International, Appellate and Policy Deputy at the time.

Back then, it was clear that fulfilling our enforcement mission at DOJ required working and collaborating with other competition agencies around the world. Indeed, promoting our international efforts was one of Makan's priorities, and when he testified before the Senate this past May, he confirmed that international engagement remains one of his priorities.

Today, with over 130 antitrust enforcers worldwide, it is even more imperative that competition agencies work together on both antitrust enforcement and policy. In fact, effective enforcement that addresses anti-competitive conduct while respecting the protections of rule of law and reducing undue burden on economic growth depends on engagement and cooperation. So it is not surprising that Makan chose to highlight increased international engagement as a goal in his confirmation hearings.

Consistent with this goal, Roger Alford recently joined us as Deputy Assistant Attorney General for International. He has significant experience in international public law and a deep knowledge of trade issues, an area that has intersected with competition law in recent years. Working together with a strong Foreign Commerce team, Roger will help magnify the Division's voice in the international competition community. In fact, we have already started to engage internationally on several key issues. I will discuss a few examples of this engagement today.

Procedural Fairness and Transparency

First, we have spoken and will continue to speak forcefully about the importance of rule of law, and procedural fairness and transparency, in effective antitrust enforcement. Just a few weeks ago, Roger gave a speech in Shanghai on this issue. As Roger noted, antitrust agencies are the guardians of the strong and vigorous competition that is vital to economic prosperity, and we must be committed to the accountability, stability, procedural fairness, even-handedness, and independence that characterize rule of law if we are to succeed in our mission.

The international community has already come together to do important work regarding these issues. The International Competition Network and the Competition Committee of the OECD have both produced very useful guidance on procedural fairness in enforcement, and our bilateral engagements with China and others have led to progress in the area. But there is more that can be done. All antitrust enforcers must strive, for example, for greater transparency. Although exposing our agencies' policies and practices to scrutiny and challenge may not always be easy or comfortable, the benefits are well worth the cost. Clear guidance from antitrust agencies gives business the

incentive to invest and innovate and thus furthers economic growth. Transparent decision-making enhances trust in our authority as competition enforcers.

To reiterate what Roger said a few weeks ago in Shanghai, in a world where businesses increasingly operate across multiple jurisdictions and are subject to different antitrust enforcement regimes, transparency that increases understanding and confidence in each agency's processes and decision-making will minimize the impact of such differences. Finally, transparency, together with strong procedural fairness protections, enables us to keep to the path of fair and non-discriminatory enforcement and foster the conditions for economic growth.

Cooperation in Cartel Enforcement

We have also begun to engage regarding the need for greater international cooperation and coordination on cartel cases. The rise in multi-jurisdictional enforcement and the proliferation of leniency regimes internationally have raised the key issue of how we might make these investigations more efficient, both for the investigating agency and for the leniency applicants.

I had a chance to address this issue at the annual meeting of the International Competition Network in Porto, Portugal this past May, when I spoke on a panel organized by the ICN's Cartel Working Group. As I noted there, my experience in private practice over the past decade has made me acutely aware of the burdens that managing multiple leniency processes can impose on applicants. While some of this burden is inevitable as a result of having many different leniency regimes—virtually all of which place a premium on prompt reporting of conduct by applicants —there are still

important things agencies can do to coordinate their activities, focus their investigations, and streamline processes.

First, burdens can be reduced and unnecessary duplication minimized if agencies focus investigations on harm in their own jurisdictions and tailor requests for documents and interviews with that in mind. Second, we can work to make document requests more targeted and be open to using advanced document collection tools, like predictive coding.

Third, agencies can work to coordinate, where possible, on the logistics of interviews and searches. While witnesses will still need to be interviewed separately by each agency, interviews scheduled for the same time period and the same location can bring needed efficiency to the process.

Speaking of interviews by multiple governments, some of you may be aware of the recent decision by the Second Circuit in *U.S. v. Allen*. As you may have read, in that case, the Second Circuit held that the defendants could challenge the use of a co-defendant's compelled testimony in a U.S. trial even in a situation in which the testimony at issue was compelled by foreign regulators—in this case, the United Kingdom's Financial Conduct Authority. This situation demonstrates the complexities that can arise when multiple foreign authorities are involved in investigating the same conduct, and it highlights yet another area where we stand to benefit from enhanced communication, coordination, and planning with our counterpart agencies.

In addition to interview coordination, it may be possible to increase coordination on searches. The Division has done this with other agencies in the past, and we have seen the benefits. But this is just the beginning of a conversation that will need to continue among antitrust enforcers. And we think it is important that we also open the

conversation to leniency applicants and their counsel. We should be receptive to proposals from leniency applicants on specific ways in which an investigation can be made more efficient and ways in which we might coordinate efficiently with other jurisdictions. Reducing the burdens of multi-jurisdictional investigations on leniency applicants benefits not just the applicants but the enforcers as well.

Unilateral Conduct

Cartel cooperation was not our only focus in Porto. At the same conference, the Division, as co-chair of the Unilateral Conduct Working Group, presented the results of a two-year project to produce a workbook chapter on the Analytic Framework for Evaluating Unilateral Conduct. This is a step in the challenging project of achieving international consensus on baseline principles of unilateral conduct enforcement, and we plan to use our role in that working group to continue this vital work.

The Digital Marketplace

The Division has also entered into the robust discussions, now taking place around the world, about the impact of the growing role of technology in the marketplace on competition enforcement. At the Competition Committee meetings at OECD this past June, the U.S. submissions and live roundtable gave us an opportunity to talk about what we have learned from our case experience with detecting and prosecuting illegal price-fixing agreements facilitated by algorithms.

As many of you know, we are investigating a conspiracy to fix the price of posters sold on Amazon Marketplace through the use of commercially available algorithm-based pricing software. On the Marketplace platform, a retailer sets the price for its own products, and Amazon determines the order in which to display products in response to a

customer query. The most responsive product with the lowest price typically appears first in Amazon's search results, in the most desirable spot for generating sales.

Although the members of the conspiracy programmed their algorithms differently, the algorithms were nonetheless coordinated to accomplish the conspirators' goal of matching prices. One conspirator programmed its algorithms to search for the lowest price offered by a non-conspiring competitor for a particular poster, and set a price for that poster just below its non-conspiring competitor's price. The other conspirator programmed its algorithm to match the first conspirator's price. Prior to the collusive agreement, these conspirators engaged in vigorous competition to sell posters on Amazon Marketplace. By eliminating the competition between them, they prevented their prices from dropping even further. The conspirators monitored the effectiveness of their pricing agreement by spot-checking prices, but the conspiracy was largely self-executing once the pricing algorithms were in effect.

To date, DOJ has charged two executives and an e-commerce retailer. One executive and the retailer pleaded guilty to Sherman Act violations in 2015 and 2016. Our successful investigation was enhanced by cooperation with the UK and its Competition and Markets Authority. Pursuant to the mutual legal assistance treaty between the U.S. and the UK, UK police carried out document searches on our behalf; these searches were coordinated with the CMA, which was investigating the same conduct. As a result of the successful searches, the CMA was able to obtain settlements from two e-commerce retailers.

As we shared with our fellow enforcers at OECD, our experience teaches us that the potential for algorithms to be used to facilitate price-fixing agreements does not

change the fundamental way we analyze illegal agreements, or the important competition policy considerations with respect to price setting. Specifically, U.S. antitrust laws safeguard the competitive process; they are not price-control statutes and do not provide any basis for price regulation. The focus must remain on anti-competitive behavior; to lose that focus and to give into the temptation to look only to market outcomes replaces the competitive process with regulation. It is especially important not to interfere with independent pricing decisions, which are key to securing the benefits of price competition.

We must keep in mind that there are pro-competitive benefits to technological innovations in the marketplace. Algorithmic pricing can, for example, be highly competitive by facilitating rapid competitive response. The fact that price movements in response to changing competitive conditions and customer demand happen more quickly because of new technology does not change the generally pro-competitive nature of those price changes. As a result, our focus in price-fixing cases, whether or not those schemes are facilitated by algorithm-based pricing software or other technology, must remain concerted action. Whether the concerted action is effected through direct communications or a common understanding that competitors will use the same software to achieve the same result, an illegal agreement remains essential to antitrust liability for pricing conduct.

As the international community gains experience with these cases, it is important that we continue the dialogue we started at OECD. The discussions and sharing of experience, especially as we face new enforcement challenges, make us all better enforcers and lead to better competition policy.

Visiting International Enforcers

The theme of shared experience leads me to another of our initiatives at the Antitrust Division, which is our Visiting International Enforcers Program. The program provides an opportunity for staff at our counterpart agencies to come to the Division and "embed" in the offices of our litigating sections. Participants get to see first-hand how we conduct our investigations, and our litigating teams get the benefit of our visitors' unique perspectives. The most important outcome of the program has been the strengthening of "pick up the phone" relationships between our staffs. Personal relationships are key to successful cooperation, and we have seen relationships flourish as a result of this program.

The program has been so valuable to us and to our counterpart agencies that we actually receive more requests for participation than we can accommodate. We certainly plan to continue the program, however, and in the coming year, we will host visiting enforcers from Japan, Mexico, the EC, and the UK.

Technical Assistance

The Division is also continuing its commitment to help newer agencies develop strong evidence-based enforcement policies and practices. The Division is, for example, working as part of a broader U.S. government program aimed at reforming and stabilizing troubled economies. In 2017, we sent two long-term advisors to provide technical assistance to the Ukrainian Antimonopoly Committee. And since 2014, the Division has worked closely with the FTC and USAID to implement a technical assistance program to train staff at the antitrust agencies in Honduras and El Salvador. To date, eight trainings have been held, with more expected in the future.

Division staff have visited and worked with competition authorities throughout the world. This year alone, in addition to Ukraine, El Salvador, and Honduras, Division staff have traveled to Australia, Peru, Brazil, Moldova, the Philippines, and Vietnam, and additional visits are scheduled for the fall.

International Trade

Now let me turn for a moment to international trade. As you may have read, the Antitrust Division, along with the FTC, is working closely with USTR on the competition chapter of the NAFTA renegotiation. Canada, Mexico, and the U.S. kicked off the first round of negotiations to modernize NAFTA during the third week of August, and a DOJ delegation just returned from a second round of discussions in Mexico City. We look forward to working successfully with USTR and our close, long-time partners in Mexico and Canada to craft a competition chapter that affirms the basic rules of procedural fairness in competition law enforcement.

The Future of International Engagement

So, what can the international community expect from the Antitrust Division? The Division's record on international engagement reflects our on-going commitment to sound antitrust enforcement in the U.S. and around the world. We expect that these efforts will only strengthen and grow in the coming years.

We will continue our tradition of strong collaboration with other competition agencies around the globe, coordinating investigations, sharing best practices, and providing technical assistance, and we will look for new ways to engage with the ever-growing international competition enforcement community. As part of that engagement, we will continue to address important issues like the intersection of trade and competition

law, and antitrust enforcement in the digital economy, relying on the objective application of the antitrust laws. We will also be thinking hard about how best to craft remedies in an increasingly interconnected world, so that we and our foreign counterparts are all able to address harm in our respective jurisdictions consistent with the principles of comity set forth in our International Guidelines.

In all of these efforts, our guiding principle will remain the promotion of sound economic theories and evidence-based enforcement that protects consumer welfare, based on a fundamental dedication to procedural fairness and a firm commitment to non-discriminatory treatment.