



DEPARTMENT OF JUSTICE

International Cooperation: Preparing for the Future

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Let me start today with a few thoughts on the Horizontal Merger Guidelines and the remarkable efforts we, the Federal Trade Commission, the competition bar, and other stakeholders made to update them. A year ago at this event, I announced public workshops to explore whether and how the Guidelines should be updated in light of changes in economic learning, case law, and agency practice since the last major Guidelines revision in 1992.¹ The workshops, as well as the public comments we received about the Guidelines, confirmed the gaps between the Guidelines and actual agency practice in the eighteen years since the issuance of the 1992 Guidelines.² Accordingly, the Department of Justice and the FTC resolved to issue revised Guidelines that better reflect how we assess a merger's competitive effects.

The revised Guidelines that we issued last month provide transparency into the agencies' current enforcement analysis in mergers. The revised Guidelines contain no surprises. They set forth concepts and considerations that have been central to our merger review for some time.

The fact that agency practice had evolved reflects the reality that we adjust and refine our approach to merger review to incorporate advances in economic learning and changes in business realities. To cite one example, the typical data specifications in a

¹ Christine A. Varney, *Merger Guidelines Workshops* (Sept. 22, 2009), available at <http://www.justice.gov/atr/public/speeches/250238.htm>.

² Christine A. Varney, *An Update on the Review of the Horizontal Merger Guidelines* (Jan. 26, 2010), available at <http://www.justice.gov/atr/public/speeches/254577.htm>

Department request for additional information call for the production of information that businesses simply did not possess almost twenty years ago when the Guidelines were last revised. As technological developments have changed the way firms do business, the agencies have adjusted their practices. Similarly, as our economic understanding of mergers and their competitive effects evolves, so too should agency practice. Every prior iteration of the Guidelines has noted that they are subject to change in light of these realities. The 2010 Guidelines are no different.

The revised Guidelines incorporate much of the Commentary on the Horizontal Merger Guidelines that the agencies issued in 2006, including a significant softening of the emphasis in the 1992 Guidelines on the sequential nature of merger review. The new Guidelines now accurately explain that the sequencing of a merger investigation is very often tailored to the circumstances of a given review.

The revised Guidelines also describe a number of economic considerations that have been central to merger investigations for many years. For instance, it is common for the agencies to issue requests for additional information asking for documents and data reflecting margins, diversion ratios, pricing information, and bidding histories. Indeed, evaluating those kinds of evidence is typically the crucial focus of the 60-plus economists serving at the Division in our Economic Analysis Group.

The enhanced transparency provided in the Guidelines will be beneficial to the many different groups that consult them. For instance, business executives and their lawyers considering potential transactions will be able to make more accurate predictions about likely enforcement decisions and plan business decisions accordingly. Similarly, I

hope the Guidelines will be a valuable resource for courts in understanding the views of the two government agencies charged with enforcing our nation's merger laws.

Now, let's turn to the future. As is often said, we live in a multi-polar competition world with roughly 120 agencies enforcing competition laws. Agencies around the world not only prosecute cartel activity but also conduct investigations of merger transactions and unilateral conduct. As my special advisor for international matters, Rachel Brandenburger, has said, in this day and age, no one jurisdiction has a monopoly on good ideas.³ This multitude of agencies and investigations creates both great opportunities and great challenges for us in the future. International cooperation for the next decade and beyond must both take account of, and adapt to, these developments.

Against this backdrop, I would like to discuss some of my international priorities, including a few ideas on where I believe global competition policy should be headed. I don't have all the answers. Indeed, one of my objectives today is to solicit your help in spurring an international dialogue among competition enforcers, business, consumers, practitioners, academics, and others on a course for the future. What will the challenges be and what can we do now to anticipate and prepare for them? How can we best enhance cooperation among competition agencies? In what ways should our cooperation policies and strategies change? And, equally important, what strategies and policies have worked well in the past but need fine-tuning to remain effective for the future?

³ Rachel Brandenburger, *Transatlantic Antitrust: Past and Present* (May 21, 2010), available at <http://www.justice.gov/atr/public/speeches/260273.htm>.

I. International Cooperation: Historical Context

Gradually, and particularly after the collapse of communism and the fall of the Berlin Wall in 1989, competition law became more widely accepted as a key component of a successful, market-oriented economy and not merely a conflict avoidance mechanism.⁴ An uptick in the number of jurisdictions with competition laws accompanied this change in attitude. During this time, U.S. competition outreach focused on sharing expertise through technical assistance to newly emerging competition-law regimes and building effective, cooperative relationships with enforcers in a few jurisdictions.

By the late 1990s and early 2000s, many jurisdictions were ramping up enforcement, including conducting pre-merger notification reviews. The competition community began to experience some bumps in the road in this new world of an increasing number of enforcers. For example, coordinating merger filings in a growing number of jurisdictions presented challenges for the private sector.⁵ Even more controversially, the U.S. and the EC competition agencies arrived at different conclusions on two high profile

⁴ Diane P. Wood, *Cooperation and Convergence in International Antitrust: Why the Light is Still Yellow*, in RICHARD A. EPSTEIN AND MICHAEL S. GREVE, *COMPETITION LAWS IN CONFLICT* 177, 178 (2004).

⁵ *See generally* INT'L COMPETITION POL'Y ADVISORY COMM., FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 90-94 (Feb. 28, 2000), available at <http://www.justice.gov/atr/icpac/chapter3.htm> [hereinafter *ICPAC Final Report*].

mergers: *Boeing/McDonnell Douglas* and *General Electric/Honeywell*.⁶ The focus of international competition policy turned toward preventing divergences and encouraging rationalization of the merger review process.

To help grapple with these new and challenging issues, Assistant Attorney General Joel Klein created the U.S. International Competition Policy Advisory Committee (ICPAC) in 1997, an independent panel of legal, economic, and business experts. The ICPAC's report, published in 2000, recommended a global competition initiative to create a new venue where governmental officials, private firms, and nongovernmental organizations could discuss issues of competition law and policy.⁷ The International Competition Network (ICN) was established a year later.⁸ The ICPAC report's three core

⁶ See *Boeing/McDonnell Douglas*, EC Case No. IV/M.877 (July 30, 1997); The Boeing Co., et al., *Joint Statement Closing Investigation of the Proposed Merger and Separate Statement of Commissioner Mary L. Azcuenaga*, FTC File No. 971-0051 (July 1, 1997), reported at 5 Trade Reg. Rep. (CCH) ¶ 24,295; *General Electric/Honeywell*, EC Case No. COMP/M.2220 (July 3, 2001); see Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), available at http://www.justice.gov/atr/public/press_releases/2001/8510.htm.

⁷ *ICPAC Final Report* at 281-85.

⁸ See Press Release, U.S. Dep't of Justice, *U.S. and Foreign Antitrust Officials Launch International Competition Network: New International Venue Will Assist in Global Convergence on Important Antitrust Enforcement Issues* (Oct. 25, 2001), available at http://www.justice.gov/atr/public/press_releases/2001/9400.htm.

goals of cooperation, convergence and transparency became the core of many international competition efforts.⁹

In addition to the Department's work with the ICN, our bilateral relationships also have been crucial in recent years, as we have sought to enhance convergence and improve enforcement coordination with key partners on the cartel front (encouraging competition agencies around the world to achieve substantial convergence through the adoption and use of stronger investigative powers to detect and prove cartel activity, the implementation of leniency programs, and the imposition of more effective sanctions for cartel violations¹⁰) and on the civil side (where the Department has had working groups with the European Commission, Canada, and Mexico on a wide range of issues, including conglomerate mergers, merger efficiencies, and unilateral conduct). On a case-by-case basis too, cartel cooperation among competition enforcers also has increased significantly. Our merger staffs also have intensified cooperation, discussing with more sustained frequency merger reviews with their non-U.S. counterparts, particularly those in the EU and Canada.

⁹ The ICPAC report focused on the identification of initiatives to achieve three core goals: (1) expanded cooperation between U.S. and foreign competition enforcement agencies; (2) greater convergence of enforcement systems; and (3) increased transparency and accountability of government actions. *ICPAC Final Report* at 2.

¹⁰ See Int'l Competition Network, *Trends and Developments in Cartel Enforcement* (Apr. 2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf>.

II. Confronting Tomorrow's Challenges: Convergence

In today's multi-polar world, however, it will not always, or maybe even often, be sufficient for competition agencies to cooperate on investigations with only one or two other jurisdictions. Increasingly, small, or even large, groups of enforcers will need to coordinate with each other. With so many players involved—each with its own unique culture, legal regime, political structure, and economic situation—achieving further substantive convergence on certain issues may be difficult. Managing the areas where we have not been, and maybe will not be, able to converge is, I believe, likely to be our next big challenge in terms of international cooperation, particularly with respect to the increasing number of matters that draw the simultaneous attention of multiple enforcement agencies.

There is an almost universal belief that convergence is important and that the substantial convergence in the past decade has been a very positive step. I wholeheartedly concur. Convergence plays a crucial role because it reinforces cooperation: now that so many jurisdictions see eye-to-eye on basic competition-law principles and the broader benefits that a sound competition regime brings to an economy, the basic building blocks for international case cooperation are firmly in place. Convergence is also important because businesses generally face lower costs of doing business globally when jurisdictions have similar approaches.

These efforts at convergence deserve a great deal of credit. They bring coherence to a potentially chaotic multijurisdictional competition system. One need only look at the ICN's recommended practices on merger procedures and substantive merger review, or

compare the newly issued U.S. Horizontal Merger Guidelines with the European Commission's own guidelines, for example, to see how far convergence has come.

However, I believe we are unlikely to achieve convergence on everything. By way of example, as pernicious as hard-core cartels are, it may be that a jurisdiction with few competitors in key sectors and a history of state monopolies will find enforcing unilateral conduct rules to be its number-one priority. Similarly, jurisdictions where supporting institutions, such as an independent judiciary, are not yet on firm ground may not be prepared to treat cartel offenses as crimes. As my friend and colleague Eleanor Fox has suggested, we also should consider that, for developing countries, "brighter-line rules might be needed, whether they tip in the direction of more or less aggressive enforcement," because "most . . . have insufficient resources to run their competition offices."¹¹ We need to be sensitive to the reality that solutions that work for some jurisdictions may not always work for others. Nor should our efforts be infused with assumptions that the most developed jurisdictions have all the right answers, or that the United States has little to learn from the experiences of others. It is these very goals—both inclusiveness and diversity—that John Fingleton, chief executive of the UK's Office of Fair Trading and

¹¹ Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 SW. J. OF L. & TRADE IN THE AMS. 101, 120 (2007).

ICN Steering Group chair, is focusing on as he facilitates a discussion of the path for ICN's second decade, and I very much support his efforts.¹²

There is a tendency to believe that an international initiative is a failure if a written agreement on a common approach is not ultimately reached. I disagree. Success can also come from competition agencies discussing an issue thoroughly and thoughtfully on a bilateral or multilateral basis. Inevitably, officials involved in such discussions emerge better informed about what other agencies are doing, including what has worked well and not so well in the past, and are better equipped to think about their own practices in the future more critically and with greater perspective.

On issues where convergence may not be readily feasible, I believe we should nonetheless strive for transparency and predictability. Whether we are talking about a particular merger under concurrent review by several jurisdictions or a substantive policy issue regarding unilateral conduct, for example, we need to know, understand, respect, and manage the similarities and differences among us. This can be facilitated, for example, by mindfulness of the potential of one jurisdiction's remedy to influence unnecessarily competition in other jurisdictions.¹³

¹² John Fingleton, *The International Competition Network: Planning for the Second Decade* (Apr. 27-29, 2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc617.pdf>.

¹³ See, e.g., Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm>.

III. International Cooperation Today

It is with these principles in mind that I have approached my role as head of the Antitrust Division. Since taking office last year, and with an appreciation of the successful history of international cooperation to date and the challenges we will face in the future, I have intensified the Division's efforts with respect to both the international dimensions of competition enforcement policy and the day-to-day consideration of international issues in the context of our investigations. As part of this, and in recognition of the increased importance of collaborative efforts among competition agencies around the world at both the investigative and remedial phases, I appointed Rachel Brandenburger as my special advisor for international matters earlier this year. Rachel's experience as a highly respected competition lawyer internationally has brought the Division enhanced understanding and valuable insights on complicated international issues. The result has been more frequent, effective, and active engagement with the Division's counterparts around the world. As I mentioned earlier, my main objective today is to spur dialogue about what international cooperation should look like for the next decade. My door is always open, and I also encourage you to contact Rachel directly with any ideas you might have.

The Antitrust Division has been working hard to bring greater cooperation to international competition enforcement by facilitating international discussion of important issues, building bilateral and multilateral relationships, and learning how best to coordinate

investigations and remedies in a globalized age. Among these goals, the Division has placed special emphasis on encouraging procedural fairness and transparency.¹⁴ It is impossible to cooperate effectively, converge, reach non-conflicting outcomes, or manage differences effectively unless the agencies involved understand where the other agencies are coming from and how they are likely to approach a matter. It is equally important for businesses to have an understanding of the competition rules that apply to them, a concern amplified for global firms subject to many different sets of rules. When firms are well informed of an agency's rules and thinking, it allows for better quality decisions and a more efficient, effective, and fair enforcement system.

It is for this reason that I called last fall for an international dialogue on procedural fairness and transparency.¹⁵ As chair of OECD's Working Party 3, it has been a great learning experience to moderate two roundtables on this important topic. The discussions have been robust and interactive, with many of us learning good ideas from one another's

¹⁴ See, e.g., Christine A. Varney, *Procedural Fairness* (Sept. 12, 2009) (“us[ing]this opportunity to call on competition agencies, international organizations, and the antitrust community to discuss procedural fairness more broadly, focusing on the opportunity to refine procedures that parties can understand and rely on as a means of removing unnecessary uncertainty from enforcement efforts”), available at <http://www.justice.gov/atr/public/speeches/249974.htm>.

¹⁵ *Id.*

practices. I also am encouraged by the number of jurisdictions that have begun to review or propose changes to their own systems in this area.¹⁶

In the past year, I have also spoken in both the United States and Europe about the importance of bringing greater convergence to the choice of competition remedies, urging other jurisdictions to join the Division in an effort to be more mindful of the extraterritorial effects of their remedial choices and the decisions other agencies may take or have already made.¹⁷ Examples of this sensitivity include the combination of Cisco and Tandberg, where the Antitrust Division took into account the remedies secured by the European

¹⁶ See, e.g., Press Release, European Commission, Antitrust: Improved Transparency and Predictability of Proceedings (Jan. 6, 2010) (publishing for public comment best practices for antitrust proceedings, best practices for the submission of economic evidence, and guidance on the role of hearing officers), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en>; Press Release, Japan Fair Trade Commission, Submission of the Antimonopoly Act Amendment Bill to the Diet (Mar. 12, 2010) (summarizing proposed changes to the Antimonopoly Act, including development of provisions to provide recipients with an explanation of the content of an anticipated cease-and-desist order, as well as an opportunity to present opinions and offer evidence), *available at* <http://www.jftc.go.jp/e-page/pressreleases/2010/March/0312a.pdf>; Press Release, U.K. Office of Fair Trading, OFT Consults on Guidance for Handling Competition Act 1998 Investigations (Aug. 20, 2010), *available at* <http://www.offt.gov.uk/news-and-updates/press/2010/91-10>; U.K. Office of Fair Trading, Transparency: A Statement on the OFT's Approach (May 2010) (setting forth commitments to improve transparency, including regularly updating parties on case status and timescales), *available at* http://www.offt.gov.uk/shared_offt/consultations/668117/OFT1234.pdf.

¹⁷ Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), *available at* <http://www.justice.gov/atr/public/speeches/255189.htm>.

Commission in closing our investigation,¹⁸ and the EC's remedy in the Microsoft browser case.¹⁹

We are also enhancing our relationships with other competition enforcers. Over the past year, the Division, often jointly with the FTC, has had exchanges with three Chinese competition agencies on their proposed regulations and guidelines, arranged a training program for 80 Chinese judges, and participated as instructors in workshops on merger enforcement, cartels, and other topics in China. The Division also participates in the Obama Administration's initiatives in China, including the U.S.-China Strategic and Economic Dialogue and the Investment Forum. Notably, the Division and the FTC also entered into a groundbreaking Memorandum of Understanding with the Russian Federal Anti-Monopoly Service in November 2009. That understanding should serve as a springboard for future collaborative efforts with Russia. The Antitrust Division and the FTC also hosted European Commission Vice President Joaquín Almunia, Director General Alexander Italianer, and other EC officials for fruitful bilateral discussions earlier this year. We also have had the privilege of hosting agency counterparts from Canada, China, Japan, and elsewhere this year.

¹⁸ Press Release, U.S. Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg (Mar. 29, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/257173htm.

¹⁹ Press Release, European Commission, Antitrust: Commission Welcomes Microsoft's Roll-Out of Web Browser Choice (Mar. 2, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/216&format=HTML&aged=0&language=EN> (announcing remedy respecting Microsoft products sold in the European Economic Area).

IV. International Cooperation for the Next Decade

These initiatives are designed to put us on a firm footing for international cooperation in the future. There is still much work to be done, and the Antitrust Division on its own does not have all the answers. So, I would like to close today where I started—by turning back to you. What direction should international cooperation take in the future? On what issues is there still room to converge in the near term? What issues should the global competition policy community be discussing? How can we at the competition agencies do our jobs better, and are there practices being employed by other jurisdictions that work particularly well and thus should be imported into the United States? What are the strengths of the U.S. antitrust regime and how should those be preserved? What stumbling blocks are you encountering in this still relatively new world of multiple enforcers? I am interested in your ideas.

Let me conclude by pulling together my initial thoughts on these issues. First, while I applaud the convergence efforts to date, I believe we have to determine what convergence will mean as we look to the future. As I noted earlier, I do not believe convergence means a wholesale adoption of U.S. antitrust standards or processes or of any other competition regime's standards and processes. I do believe international cooperation means being mindful of other competition authorities' jurisdiction, practices, and

traditions.²⁰ Indeed, I think we may need a somewhat different lexicon for international cooperation as we look to its future.

I think we need to untangle the processes and procedures international competition authorities employ in their investigations from the substantive legal and economic theories they apply, and focus on the latter. I think we should focus on substantive analysis because I am less certain of the degree to which further uniformity of processes and procedures can be achieved, given the differing legal proceedings and traditions employed by the numerous competition regimes around the world. That is why I have focused on broad principles of procedural fairness and due process when discussing process issues. I believe further discussion of these issues can be a highly productive use of our collective energies as an international community as we look to the future.

Second, I believe a high degree of convergence has already occurred in certain areas of competition thinking, while other areas, no matter our efforts, seem less readily susceptible to convergence.²¹ To take some examples, price-fixing and market allocations, which are per se Sherman Act violations, are condemned by all competition authorities

²⁰ Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.pdf>.

²¹ See generally John Fingleton, *Competition Agencies and Global Markets: The Challenges Ahead* 12 (June 5, 2009), available at http://www.ofc.gov.uk/shared_ofc/speeches/2009/spe0909paper.pdf; John Fingleton, *The International Competition Network: Planning for the Second Decade* (Apr. 27-29, 2010), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc617.pdf>.

worldwide. Clearly, convergence has occurred on this substantive area. Merger analysis is another area where a significant degree of convergence has occurred among most competition authorities. For horizontal mergers, the same theories of harm—coordinated and unilateral effects—are used by most competition authorities worldwide. However, the application of these theories may vary, not least because the market and industry structures and dynamics may differ by country or region.

By contrast, there is less convergence in relation to the substantive analysis of unilateral conduct. In the United States, for example, firms with significant market power are not condemned for such without evidence that such market power was obtained through illegal means, or without evidence that the firm has used its market power to harm competition through exclusive arrangements or other types of agreements that do not have overriding procompetitive justifications. Other jurisdictions have taken a somewhat different approach, and differences remain among jurisdictions on some of the fundamental attitudes and underlying assumptions in this area and what it means to protect the competitive process. Those divergent approaches reflect, in part, different economic histories and traditions.²²

Third, and very importantly, I believe, in those areas where convergence may not be easily attainable, we must above all focus our efforts on deep and meaningful dialogue

²² Neelie Kroes, *Antitrust and State Aid Control—The Lessons Learned* 3 (Sept. 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en>.

and continued cooperation on the basic principles that the competition community already has accepted, including the distinction between competition policy and trade and other policies. Through such efforts, we will gain a greater understanding of other traditions, thinking, and analyses. We should do this with realistic expectations—not that significantly more convergence necessarily can be achieved in the near term, but that, with these efforts, businesses will be able to assess realistically their legal risks and effectively plan and innovate without the disruption that unfounded allegations of competitive wrongdoing can cause.

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Just over a decade ago, AAG Klein raised similar issues. The world, however, is a different place today than it was ten years ago, and we need to adapt and change to be able to continue to make effective progress in international cooperation in the years ahead.