Update on International Cooperation and Convergence

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Good morning. It is a pleasure to be here today and update you on recent developments in international cooperation and convergence.[1] As many of you may know, chief among my goals as a Commissioner is to pursue transparent, predictable, and economically sound policies at the FTC and to advocate for similar policies around the world. With that in mind, I want to discuss with you my personal vision for successful international cooperation, which I mean to include both case-specific cooperation and more general cooperation on substantive and procedural matters, and convergence, brief you on the FTC's work this year with enforcers in other jurisdictions, highlight some of the key international developments from the past year, and close with an assessment of where I see the greatest need to better harmonize the work of the world's antitrust authorities.

I. The Need for Cooperation and Convergence

A. Cooperation

Today there are more than 125 antitrust agencies enforcing the competition laws of over 100 jurisdictions. Inter-agency cooperation is critical given the increasingly multi-polar world economy and global scope of many modern transactions. This cooperation can range from

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discussions of substantive law, economic analysis, and procedural issues to sharing knowledge about a particular industry; and, of course, coordinating on specific investigations. Cooperation allows agencies to identify issues of common interest, to improve their analyses, deepen relationships at all levels of the agencies, and ideally to avoid contradictory outcomes. As enforcers, we need to remember that failure to cooperate well can have serious repercussions for the global economy. My aspiration is that the FTC and other agencies add concrete value by efficiently protecting competition and consumers and, in the process, avoid imposing an unreasonable regulatory burden that could drag on innovation and economic development.

Achieving efficient and successful international cooperation will take time and effort. I generally agree with others who have observed seven principles to foster cooperation: (1) agency transparency and accountability, (2) mindfulness of other jurisdictions' interests, (3) broader and deeper engagement by agencies across jurisdictions, (4) dialogue on all aspects of international competition and enforcement, (5) respect for different legal, cultural, and political paradigms, (6) trust in different agencies' actions, and (7) greater convergence of competition regimes.

To be clear, cooperation does not necessarily mean identical results across jurisdictions in every matter; that is simply not realistic. For instance, in 2011 and 2012 more than 11 jurisdictions, including the FTC, worked together to investigate the hard disk drive acquisitions announced by two U.S.-based buyers, Western Digital and Seagate Technology. Although these investigations ran a parallel track in most jurisdictions, they ultimately led to a very different remedy for Western Digital in China as compared to the U.S. and EC. The FTC and EC imposed a structural remedy, requiring the sale of certain disk drive manufacturing operations, whereas the Chinese imposed an additional behavioral remedy that, among other things, required that for at least two years the parties be held separate and run as independent competing entities.

Although this type of outcome is not ideal and has drawn criticism from some in the business community, I hope it will become less preval

time and resources, competition authorities continue to dedicate themselves to achieving greater convergence on substantive competition norms, procedural standards, and operational techniques which better equip them to keep up with the globalization of markets. The world's many different legal and cultural approaches to business make total harmonization unlikely – for instance, we will probably never have an EU-style "abuse of dominance" standard in the U.S. – but as more nations are integrated into the world economy, I think it is realistic to pursue "soft" convergence – that is, our enforcement regimes will communicate regularly and voluntarily develop and follow best practices linked by economic analysis, respect for intellectual property rights, and fairness and transparency to impacted persons and businesses. And, where agreement is not possible at this normative level, is it incumbent on us as enforcers to identify upfront major differences for businesses and consumers.

I trust the new agencies joining the enforcement community have the domestic will and political capital to pursu

And, to the extent non-competition issues do play a role, they should be transparent to the

Fifth, and finally, the model modern competition agency should aspire to international cooperation, ideally following the seven guiding principles on cooperation.

III. Recent FTC Initiatives

A. Multilateral Engagements and Policy Convergence

The FTC has for many years dedicated itself to advocating for greater international cooperation and convergence, helping guide the world's newer agencies to adopt the characteristics of a modern regime. And the past year has been no different. Let me highlight for you some of the FTC's major multilateral

We are also leading the ICN's "Curriculum Project." We and others around the world are creating online video training modules for use either by personnel at relatively new agencies or for new staff at all competition agencies. The first set of modules focuses on basic concepts of competition enforcement, including market definition, market power, analysis of competitive effects, leniency programs, and predatory pricing. I recently taped a segment about competition advocacy at the FTC, drawing mainly on my experience in the mid-2000s as Director of the Office of Policy Planning, and my perspective on why it has made the FTC's advocacy program successful. Our ultimate goal with the Curriculum Project is to develop a virtual education center available to agencies at every stage of development – we already have many materials up on our website that are being used for training.

The FTC also chaired the ICN Merger Working Group's subgroup on Notification and Procedures, which developed a set of eight Guiding Principles and thirteen Recommended Practices,[3] drafted and adopted between 2002 and 2005. The Notification and Procedure Practices recommend for instance notification thresholds that are "clear" and "based on objectively quantifiable criteria."[4] They also recommend that an "appropriate nexus" to the merger exist based on "activity within that jurisdiction" in reference to the activity of at least two parties in the local territory or of the acquired business.[5]

post-merger to pre-merger review and replacing a single subjective threshold with a two-party Brazilian revenue threshold.[6] Brazil's Council for Economic Defence has been busy over the last year, issuing settlement guidelines for cartel matters and more recently confirming that it is working on new merger guidelines, possibly using competitive effects analysis similar to the FTC/DOJ 2010 Horizontal Merger Guidelines.[7] India also took steps to streamline its merger notification procedures in 2011 to contain clear nexus requirements based on the assets and turnover of the parties in India. While these changes and their implementation have been met with some concerns, and there is clearly more work to be done, I am hopeful that these moves by competition authorities in such large markets ultimately signal a trend to greater harmonization.

Several other jurisdictions also have taken steps to conform to the ICN guidelines. The Turkish Competition Authority, for example, in December 2012, adopted new notification thresholds that are both objective and have a local nexus requirement. As of February, two sets of thresholds are in place, each requiring some level of revenues in Turkey. Similarly, Namibia, Guernsey, and the Faroe Islands have either adopted or amended their competition laws in the last year to follow the ICN.

The ICN also developed Recommended Practices for Merger Analysis,[8] adopted in 2009, which appears to have prompted competition agencies to revise their horizontal merger guidelines. These guidelines focus on modern understandings of competitive effects. They note:

> An agency's merger analysis should not be a mechanical application of a legal standard based on rigid presumptions, structural criteria, or formulaic concentration numbers. An agency should apply its merger analysis reasonably and flexibly on a case-by-case basis, recognizing the broad range of possible

[6] Fiona Schaeffer and Michael Culhane Harper, "A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact On Cross-Border Transactions," Antitrust Source (Aug. 2012), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_full_source.authcheckdam.pdf.

APEC. The FTC participates in the Asia-Pacific Economic Cooperation (APEC), a 21-nation forum for regional economic issues founded in 1989. In July, the FTC became the first enforcement authority to join APEC's Cross-Border Privacy Rules System, which is a self-regulatory initiative in which businesses can adopt an enforceable code of conduct designed to protect consumer data moving between the United States and other APEC members. In November, we held a forum of domestic and international privacy experts to explore similar codes of conduct to protect consumers in cross-border commerce. Although this is normally thought of as a consumer protection issue, privacy rules can pose competition concerns. For instance, onerous rules can create barriers to entry for firms looking to move into a market. Rules agreed on by existing major competitors could cement a competitive advantage and constitute a concerted action to restrict new competition or competition from smaller players. Similarly, codifying privacy rules may stifle innovation and dampen market-based solutions to privacy, like niche search engines that promise their users not to track or retain their search queries and plug-ins that offer other privacy functions. These issues, which are hot domestically, as evidenced by the White House's involvement in developing self-regulatory privacy programs, are also relevant abroad and the FTC is at the forefront of this dialogue.

B. Bilateral Engagement and Cooperation

On a bilateral basis, the FTC works very hard to maintain direct relationships with agencies across many jurisdictions, both informally and under the auspices of a growing number of formal agreements.[11] The United States Government has formal bilateral cooperation agreements in place with nine jurisdictions, Australia, Brazil, Canada, the Chilean competition enforcement agency, the EC, Germany, Israel, Japan, and Mexico. The US antitrust agencies

[11] Fed. Trade Comm'n, International Antitrust and Consumer Protection Cooperation Agreements, http://www.ftc.gov/oia/agreements.shtm.

also have entered Memoranda of Understanding with competition authorities in Russia, China, and, most recently, India.

The FTC and the DOJ Antitrust Division signed an MOU with the Competition Commission of India, or CCI, and its parent agency, the Ministry of Corporate Affairs, this past

Whether formally, as with India, or informally, the FTC is broadly involved with other agencies around the world through case cooperation, technical assistance, placement of resident

MOFCOM, which requested comment and held a series of seminars on the new draft of its regulations.[12] MOFCOM also requested comment on a streamlined simple transactions regulation modeled after the EC's Notice on a Simplified Procedure, the Interim Regulations on Standards for Simple Cases of Concentrations of Business Operators.[13] Just recently I participated in a discussion with the head of MOFCOM on these new procedures and other issues. Although some key differences exist, these regulations appear to be moving more in line with the U.S. and EU approaches and could be an improvement, offering businesses greater procedural certainty.

In addition, the Common Market for Eastern and Southern Africa, or COMESA, which has a new Competition Commission, or CCC, has been making strides to implement new competition guidelines more in line with prevailing international models, although their most recent efforts have been met with many concerns. COMESA is the largest common market in Africa and includes nineteen countries in southern and eastern Africa, from Libya and Egypt in the north to Zimbabwe in the south. In terms of merger review, the CCC already requires notification of transactions implicating two or more member states. This year, it put out for comment several draft guidelines, including for Merger Assessment, Market Definition, Horizontal and Vertical Business Practices, and Abuse of Dominant Position.[14] The COMESA

[12] See Press Release, MOFCOM, MOFCOM Held Special Press Conference on "Anti-monopoly Work Progress in 2012" (Jan. 5, 2013) [hereinafter MOFCOM Press Release], available at http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.shtml.

[13] See David Tring, MOFCOM Speeds Up Simple Mergers (May/June 2013), available at http://www.chinalawandpractice.com/Article/3201576/MOFCOM-speeds-up-simple-mergers.html.

[14] See COMESA, Draft Guidelines for Merger Assessment (April 2013), available at http://www.comesacompetition.org/images/Documents/draft%20merger%20assessment%20guidelines.pdf; COMESA, Draft Guidelines for Market Definition (April 2013), available at http://www.comesacompetition.org/images/Documents/draft%20market%20definition%20guideline.pdf; COMESA, Draft Guidelines for the Application of Section 16 and 19 of the COMESA Competition Regulations (2004) to Horizontal and Vertical Business Practices (April 2013), available at http://www.comesacompetition.org/images/Documents/draft%20guideline%20on%20the%20application%20of%20article%2016%20and%2019.pdf; COMESA, Draft Guidelines for the Application of Article of the COMESA Competition Regulations (2004) to Prohibiting Abuses of Dominant Position (April 2013), available at

commentary notes that in formulating the guidelines the Commission consulted extensively with developed competition systems internationally. In addition, some of the notification provisions in the Merger Assessment guidelines are similar to those of the ICN recommended practices in that they include regional nexus criteria and a quantifiable filing threshold, although that threshold is currently set at zero to account for the different levels of economic development of COMESA member states. This threshold is to be revised to a reasonable level after a period of testing on the market.[15] There is much work still ahead and I hope to see additional progress by COMESA.

IV. Areas of Focus Going Forward

I think our efforts both on a multilateral and bilateral basis are bearing fruit. We are harmonizing the thinking of enforcers around well-established substantive and procedural norms and are working together with dozens of agencies to handle specific cases in tandem. This valuable work improves the predictability, transparency and economic efficiency of enforcement and should remain a top priority for the agency. Going forward, I see two key areas of additional focus.

We should continue to advocate for less reliance on non-competition factors in the analysis of mergers, acquisitions, and other issues sounding in antitrust. This practice, which tends to occur at newer competition regimes, di

fall to the politicians. Although antitrust enforcers bear allegiance to their nation, we are living in an era of global business and our application of economically-sound competition policies must reflect that.

In addition, the world's leading competition authorities need to bear in mind their influence with the many new competition regimes out there and of the different cultures those agencies represent. The possibility for misinterpretation is high when one nation's actions are viewed through the lens of another culture. I believe we at the FTC can do a better job of carefully explaining our decisions for a global audience.

For example, earlier this year the Commission decided it was a competition law violation for Google to seek injunctive relief against willing licensees allegedly infringing its standard essential patents. The provisional order requires Google to cease and desist from seeking injunctive relief and provided a procedure for it to follow in licensing its standard essential patents. I dissented from this decision on several grounds, including that I believed it undercut a patent owner's right to exclude others from using his invention – a core intellectual property right – and that it did not clearly explain why Google was now being forced to license its patents.

Some months later I was in China attending a conference and meeting with officials at MOFCOM. At the conference, I watched as a presenter gave a spirited and well-received talk about the essential facilities doctrine in the United States. After arguing, incorrectly in my

should be compulsory licensing (presumably on favorable terms) because that would be the best way to facilitate competition among the licensees. This sort of misinterpretation is troubling because it undercuts the value of intellectual property rights and gives our counterparts abroad the misperception that we support wide applicati