Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition

Session on International Issues

Prepared Remarks of

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I. Introduction

This roundtable focuses on the approaches of several jurisdictions to dominant firm conduct and invites discussion on the ramifications of various approaches for trans-border commerce. With the increasing volume of international trade and the growing number of multinational corporations, the actions of an agency in one jurisdiction increasingly has consequences across the world.

Different enforcement agencies' analytical approaches coupled with increased regulatory complexity have clouded the ability of firms operating in global markets to plan business strategies with confidence that an antitrust challenge will be avoided. The resulting uncertainty can lead to excessive reticence to implement aggressive, efficient, and often procompetitive activities, and can damage consumer welfare.

The complexity inherent in the analysis of single-firm conduct simultaneously endorses the need for caution and challenges the steady approach to convergence that has been in large measure achieved, for example, in the area of horizontal mergers.[1]

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[1] Detailed analysis of various approaches and recommendations have been covered in earlier roundtables and are beyond the scope of this paper.

Nevertheless, there is a need for enhanced certainty and, ideally, at least, a framework for convergence in enforcement with regard to dominant firm behavior. At a minimum, traditional and other mechanisms could be employed to establish safe harbors for unilateral conduct. This approach would enable firms to plan procompetitive business strategy with confidence and promote consumer welfare. In the more complex and unsettled areas outside the safe harbors, agencies should focus on principles of certainty and transparency. Institutional mechanisms already exist to promote these ends, and parallel informal cooperation channels can augment them.

II. Key Issues in The Application of Competition Policy to Unilateral Conduct of International Dimensions

A. Caution in Enforcement Is Warranted

Even within a single jurisdiction, antitrust enforcement against single-firm conduct presents a significant analytical challenge. Enforcement activity that prohibits single-firm conduct has been inconsistent in application even within individual jurisdictions. It has created ambiguous results, leading, in some cases, to enforcement that can be seen, *ex post facto*, as unwarranted. The challenge and risk of over-enforcement in any single jurisdiction is exacerbated by the multiplicity of agencies throughout the world that are undertaking to address this conduct.

It is generally acknowledged that antitrust policy and enforcement against unilateral conduct requires extreme caution. Complaints about unilateral conduct often originate from competitors that seek competition agencies' assistance in eliminating competitors or, more often, in easing competitive, frequently efficiency-promoting, pressures, rather than preserving competition in the market as a whole. As courts and enforcers continuously point out, antitrust policy is in fact intended for the protection of competition, rather than of individual competitors.[2] However, especially when described by competitors, the actual effect of unilateral

[2] The notion that antitrust laws were enacted for the protection of competition, not competitors has been embraced in numerous U.S. Court cases, including *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 n.14 (1984); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*,

conduct is often clouded. Conduct that is in fact procompetitive and beneficial to consumers risks attack. Excessive enforcement threatens to chill and even prohibit procompetitive conduct. As recently noted by the Business and Industry Advisory Committee to the OECD (BIAC),[3] the implications of misapplying the provisions on abusive conduct by dominant firms, in particular by finding dominance where there is none, are anything but trivial. By restricting or forcing firms to alter the way they license their intellectual property rights, distribute their products, price their products, or engage in other procompetitive activities, enforcers could discourage companies from undertaking welfare-enhancing activities and, more importantly, from undertaking innovative activities in the first place.

The consequences of false-positive errors are more serious in innovation markets, where over enforcement may decrease the incentive to develop new products and technologies with a concomitant reduction in consumer welfare due to the non-introduction of valuable goods and technologies for which there is consumer demand. Moreover, the nature of intellectual property is such that curtailment of incentives by one jurisdiction can adversely affect consumer welfare across many borders.

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370 U.S. 294, 320 (1962); *Tennessean Truckstop, Inc. v. NTS,* Inc., 875 F.2d 86, 88 (6th Cir. 1989); *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 817 (2nd Cir. 1979); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 298 (7th Cir. 1974); *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 352 F.3d 367, 372 (9th Cir. 2003); *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819, 824 (10th Cir. 1987); *SmithKline Beecham Corp. v. Apotex Corp.*, 383 F. Supp. 2d 686, 696 (E.D. Pa. 2004); *Ansell, Inc. v. Schmid Laboratories, Inc.*, 757 F. Supp. 467, 479 (D.N. J. 1991); and *Yangtze Optical Fibre v. Ganda, LLC*, 2006 U.S. Dist. LEXIS 38510, 2006-1 Trade Cas. (CCH) ¶ 75,322 (D.R. I. 2006).

See also, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986) for the related notion that it is "inimical to [the antitrust] laws to award damages for losses stemming from continued competition" (quoting *Brunswick Corp.*, 429 U.S. at 488).

For a reflection of this notion by competition enforcers, *see, e.g.*, Neelie Kroes, *Preliminary Thoughts on Policy Review of Article 82*, Address Before the Fordham Corporate Law Institute (Sept. 23, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=PDF&aged=1&language=EN&guiLanguage=en at 3 ("[m]y own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected").

[3] BIAC, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Working Party No. 3 on Cooperation and Enforcement, Roundtable Discussion on Proof of Dominance/Monopoly Power, ¶ I-3 (June 7, 2006).

The dangers of over enforcement intensify with the proliferation of antitrust regimes across the world. Even apart from the problems noted by former Assistant Attorney General R. Hewitt Pate and former Deputy Assistant Attorney General Makan Delrahim,[4] the very multiplicity of enforcement overlaid on single-firm conduct can impede procompetitive conduct, if for no other reason than by undermining certainty as to the proper approach to its conduct. Thus, in cases involving global markets and technology markets, there is little doubt that any jurisdiction seeking to curtail single-firm conduct risks impacting the welfare of consumers in other countries and should proceed with extreme caution.

B. Illegal Conduct is Difficult to Identify

Much of the procompetitive conduct by a firm excludes rivals from some share of the market, just as superior efficiency inherently forecloses competitors.[5] The challenge is to identify which exclusions result from harm to the competitive process and which are a legitimate result of more efficient production or other business acumen. This problem is difficult with respect to unilateral conduct, which, unlike collusive price or output restriction among competitors, does not necessarily harm consumers or the competitive process.

As a result of this complexity, the analysis of unilateral conduct is a fact-driven endeavor. Even within a single antitrust jurisdiction, it is often not easy to predict or even determine whether specific conduct will be found to violate antitrust laws, and the challenge is far greater at the international level. This very complexity and necessarily case-specific analysis makes substantive convergence of analysis among jurisdictions especially difficult. What can be

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[4] *See*, R. Hewitt Pate, *Current Issues in International Antitrust Enforcement*, Address Before the Fordham Corporate Law Institute (Oct. 7, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206479.pdf at 11 ("A global antitrust system in which each agency simply lines up to take its whack at the piñata is not a model that is going to serve us, or the market, very well."); and Makan Delrahim, *Facing The Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies The U.S. and E.U.*, Address Before the ABA Administrative Law Section Fall Meeting (Oct. 22, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206429.pdf at 3 ("[w]hen half of the world's antitrust agencies are only ten years young or less, and there is still much discrepancy between agencies on antitrust enforcement principles, we believe that a forced path to uniformity would result in enforcement at the level of the lowest common denominator").

[5] *See also*, ROBERT H. BORK, THE ANTITRUST PARADOX 137 (1993).

achieved, nevertheless, is greater certainty about enforcement methodology and some base-line agreement in the fundamental approach. Progress toward this goal can be achieved through the development of consensus safe harbors and greatly enhanced transparency where safe harbors or other avenues of convergence cannot yet be realized.

III. In the Absence of Across-the-Board Convergence, Agencies Should Strive for Consensus on Baseline Safe Harbors

Adoption of safe harbors would contribute substantially to certainty and remove, to some extent, the unwarranted frustration of procompetitive conduct. This approach would also spare businesses the enormous expense of being forced to defend single-firm conduct where there is little likelihood that such conduct could result in harm to consumers.[6] The inquiry should therefore concentrate first and foremost on the firm's ability to maintain or enhance monopoly power because only where such ability is demonstrated may "abusive" effects take place.

A. Though Incomplete and Arguably Flawed as a Comprehensive Tool, Structural Analysis Can Provide a Basis for Safe Harbor Analysis

Antitrust monopoly power, or dominance, which is a crucial element in any unilateral conduct case, is not measured in a vacuum. Rather, it is evaluated within the context of a carefully defined product and geographical market. While it is generally recognized that market definition is a not entirely satisfactory proxy step toward the evaluation of market power, the exercise can nonetheless provide a critical check on antitrust enforcement in unilateral conduct cases. Antitrust enforcers and practitioners recognize that market definition is a daunting task, which involves unavoidable approximations and proxies for competition analysis. Hence, the U.S. Supreme Court has acknowledged that there is "some artificiality" in any boundaries, and that "such fuzziness" is inherent in bounding any market.[7]

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[6] *See*, USCIB, Statement of the United States Council for International Business, Submission to the Directorate-General for Competition on the Application of Article 82 of the Treaty to Exclusionary Abuses (Mar. 30, 2006), *available at* http://www.uscib.org/docs/Final_USCIB_Article82.pdf at 16.

[7] *See, United States v. Philadelphia Natl. Bank*, 374 U.S. 321, 360 n.37 (1963); *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974); and 2A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 530d (2nd ed. 1998-2006).

Nonetheless, market structure, including market share, remains informative as to the potential for a firm to exercise unilateral market power, at least in the short term. Although a large market share is insufficient, of itself, to establish dominance, dominance will rarely be inferred on the basis of conduct alone, without reference to market structure.

1. Different National Standards in Defining Dominance

The theoretical definition or identification of market dominance differs markedly across national boundaries. The differences have been widely recognized and described, and a detailed exposition is beyond the scope of this session. Nevertheless, a few different approaches demonstrate the divergent antitrust policy terrain.

- The U.S. defines monopoly power as "the power to control prices or exclude competition" in a relevant market.[8]
- The European Commission (EC) views single dominance as a scenario in which an undertaking "has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[9]
- The Japanese Antimonopoly Act prohibits "private monopolization" by which a market player excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in a particular field of trade.[10] The Act also prohibits "unfair trade practices" defined as

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[8] *United States v. E. I. Du Pont de Nemours & Co*., 351 U.S. 377, 391 (1956); *United States v. Grinnell Corp*., 384 U.S. 563, 571 (1966). *See also*, *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2nd Cir. 1999) (defining monopoly power as "the ability to price substantially above the competitive level and to persist in doing so for a significant period without erosion by new entry or expansion"). Thus, the *AD/SAT* decision suggests the correct view that the "or" in the *Du Pont* decision should be read as "and." *Cf.* Gregory J. Werden, *Identifying Single-Firm Exclusionary Conduct: From Vague Concepts to Administrable Rules*, Address Before the Fordham Corporate Law Institute (Sept. 15, 2006) at 4 n.18 (hereinafter "Werden Fordham paper").

[9] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Dec. 2005), ¶ 28, *available at* http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf, (citing Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, 1979 E.C.R. 461, ¶ 39).

[10] Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947, rev. 2005) § 3, *available at* http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf (hereinafter AMA). Significant jurisprudence has developed around the Act, such as *Hokkaido Shimbun* (Consent decision issued on Feb. 28, 2000) and *the Intel Kabushiki Kaisha Ltd*. (Recommendation decision issued on Apr. 13, 2005), to name two recent examples.

conduct which tends to impede competition but which falls short of the "substantial restraint of competition" criterion of Private Monopolization. Whether a firm is influential or not is one determining factor in that analysis.[11]

- In Mexico, Article 13 of the Federal Law of Economic Competition defines the criterion as whether the party can "unilaterally set the prices or restrict the supply in the relevant market without the competitive agents being able to act or to potentially counteract that power."[12]
- In Canada, the dominance element set out in Section 79 of the Competition Act focuses on whether "one or more persons substantially or completely control[s], throughout Canada or any area thereof, a class or species of business."[13]

In addition to the analytical divergence among the various antitrust jurisdictions, there are substantial differences in the market share criteria agencies use to determine whether a firm reaches a threshold of dominance.

Most jurisdictions no longer accept static market share as sole proxy for monopoly power.[14] Instead, there is a growing consensus among competition agencies that market share is merely the starting point for defining or establishing dominance.[15] In recent years, the

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[11] AMA, *id.*, § 19.

[12] Federal Law of Economic Competition (1993), Art. 13, *available at* http://sp.cfc.gob.mx:8080/cfc01/Documentos/ing/Legislation/Federal%20Law/Index.htm (hereinafter FLEC). For an application of this standard, *see, e.g.*, Files AD-41-97 and RA-36-2001 *Teléfonos de México, SA de CV* (Telmex) which focused on Telmex's capacity to unilaterally set prices.

[13] Competition Act, R.S.C. 1985, c.19 (2nd Supp.), s.79. For a recent application of the standard, *see*, *Commissioner of Competition v. Canada Pipe Co., Ltd.*, 2005 Comp. Trib. 3.

[14] *See*, Statement by the United States Before the OECD Competition Committee, Working Party No. 3 on Co-operation and Enforcement, Roundtable Discussion on Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power, DAF/COMP/WP3/WD(2006)35 (May 29, 2006), *available at* http://www.ftc.gov/bc/international/docs/DiscussionDominance-MonopolyPowerUnitedStates.pdf; and DG Competition Discussion Paper, *supra* note 9, ¶¶ 23, 28-32 (demonstrating that market share alone is inconclusive of dominance).

[15] *See*, *e.g.*, Statement by the European Commission Before the OECD Competition Committee, Working Party No. 3 on Co-operation and Enforcement, Roundtable Discussion on Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power, DAF/COMP/WP3/WD(2006)30 (May 24, 2006), ¶32 ("[q]uantitative analysis should never determine on its own the existence of dominance but it can be very useful to lend additional credibility to a qualitative assessment").

traditional market power inquiry underlying many jurisdictions' analysis has moved away, to some extent, from historic methods of market definition and market power analysis based largely on market share data. Instead, they now consider much more searching methodologies, such as cross-elasticities, diversion ratios, cost and profitability data, and market share volatility.[16] As a result, instead of the old "market share" rule of thumb, the practical criteria employed by agencies today greatly varies among the different agencies.

At the same time, the reduced role that market share continues to play in the evaluation of dominance varies from one jurisdiction to another in at least two respects, namely, the threshold at which market shares will be considered as relevant evidence of monopoly power, and the strength of the inference that can be drawn on the basis of a market share which exceeds the threshold.

Examples of the first aspect, namely, the variance in the market share thresholds that suggest dominance, include the following.

The Canadian position states that "[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period….one must ordinarily look to indicators of market power such as market power and entry barriers. *The specific factors that need to be considered in evaluating control or market power will vary from case to case*." *Canada v. NutraSweet Co.*, [1990] 32 C.P.R. (3d), 47; [1990] C.C.T.D. No 17. (emphasis added).

For the U.S. position, *see*, *American Council of Certified Podiatric & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) ("market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share").

Under the Mexican competition rules, a high market share is insufficient for concluding that an agent possesses substantial market power. Rather, market share is just one element among many that determine market power. FLEC, *supra* note 12, Art. 13; and Code of Regulations to the Federal Law on Economic Competition, Art.12, *available at* http://www.cfc.gob.mx/DirResults.asp?txtDir=http://xeon2/cfc01/Documentos/ing/Legislation/Code%20of%20Regulations .

In Japan, in determining whether a conduct constitutes private monopolization, the AMA provides no specific criteria on the market share of a company. Rather, the existence of market power is decided comprehensively, taking various circumstances into account. *See*, Statement by Japan Before the OECD Competition Committee, Working Party No. 3 on Co-operation and Enforcement, Roundtable Discussion on Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power, DAF/COMP/WP3/WD(2006)26 (May 30, 2006), ¶14.

[16] *See*, BIAC, *supra* note 3, ¶ I-5.

- A U.S. court has found a ninety percent market share to be "enough to constitute a monopoly" but noted that "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[17]
- Canadian courts have found market shares exceeding eighty percent to be prima facie indicators of market power,[18] while market shares below fifty percent were not found to give rise to such a finding.[19]
- Under European Union law, market shares exceeding seventy percent raise a strong presumption of dominance, while market shares in the fifty to seventy percent range may in themselves raise a similar presumption under certain circumstances.[20]
- In Israel, a monopoly is statutorily defined as the vesting of more than half of the supply or purchase of goods or services within one entity.[21]
- Korean law presumes dominance where the market share is over fifty percent or the combined share of the top three competitors exceeds seventy-five percent.[22]
- Additional jurisdictions embrace different presumptions of market power above certain market share thresholds.[23]

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[17] *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2nd Cir. 1945).

[18] *Canada v. Tele-Direct Publications, Inc.* [1997] C.C.T.D. No. 8.

[19] *Canada v. Laidlaw Waste Systems Ltd.* (1991) 40 C.P.R. 3d 289, [1992] C.C.T.D. No. 1 (Comp. Trib.).

[20] *See*, DG Competition Discussion Paper, *supra* note 9, ¶31 (citing Case 85/76, *Hoffmann-La Roche*, *supra* note 9 ¶41; Case C-62/86 *AKZO Chemie BV v. Commission* [1991] ECR I-3359, ¶60; and Case T-395/94 *Atlantic Container Line AB and others v. Commission*, [2002] ECR II-875 ¶328). *See also*, ROBERT O'DONOGHUE & A. JORGE PADILLA, THE LAW AND ECONOMICS OF ARTICLE 82 EC 113 (Hart Pub. 2006); and Werden Fordham paper, *supra* note 8 at 13-15 (discussing EU threshold).

[21] Restrictive Trade Practices Act, 5748-1988, § 26(A), *available at* http://www.antitrust.gov.il/NR/rdonlyres/9076F39E-6326-4EB3-8396-FC9191B1E4DA/0/Restrictive_Trade_Practices_Law_5748.doc.

[22] Monopoly Regulation and Fair Trade Act 1980, Art. 4.

[23] Examples include Austria (Kartellgesetz 1988), Estonia (Konkurentsisadus), Germany (Gesetz gegen Wettbewerbsbeschankungen), Latvia (Competition Law 2002), Lithuania (Law on Competition 1999), Poland (Competition Act 2000), Russia (Law on Competition 1991), and South Africa (Competition Act 1998).

The second aspect, namely, the differences in the evidentiary weight awarded to market share data, has been described by other commentators.[24] This disparity can raise significant issues for transparency as well as consistency of enforcement.

The result of this theoretical and practical divergence is a serious problem for antitrust practitioners and the enterprises they advise.[25] The absence of a single standard requires either a multitude of approaches or a default to a single standardized approach. A standardized approach has practical adverse effects. It often causes companies to "play it safe" through abiding by the most restrictive national antitrust rule all over the world. Such behavior, which is a palpable side effect of a single jurisdiction's over-enforcement, reduces consumer welfare on an international level by chilling out procompetitive conduct. As already noted, the cost of assessment and compliance has accelerated with the proliferation of agencies and the need to be familiar with diverse standards.

2. Market Share Thresholds Could Function as Safe Harbors

While it is agreed that a high market share is not an adequate indicator of monopoly power, low market shares can serve as a useful tool for, at a minimum, vitiating any finding of dominance. A realistic minimum threshold would increase the much-needed certainty for the business community. A threshold analysis of market power at an early stage can also be useful for antitrust enforcers by helping to eliminate cases where anticompetitive effects are highly unlikely, and thus save agency time and focus budget and efforts on cases that pose significant competitive threats.[26] The error should not be made, however, so as to infer that any share above the safe harbor threshold warrants a finding of dominance.

Many competition agencies already employ such a safe harbor. More specifically:

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[24] *See, e.g.*, Brian A. Facey & Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, The United States and the European Union: A Survey*, 70 ANTITRUST L.J. 513, 537-38 (2002) (suggesting that in the European Union market shares carry more evidentiary weight and create a stronger dominance presumption than in Canada).

[25] *See*, Gregory J. Werden, *Assigning Market Shares*, 70 ANTITRUST L.J. 67 (2002) (describing the difficulties in assessing market shares); and Statement by the European Commission, *supra* note 15, ¶¶ 35-40 (discussing the many practical problems posed by the process of establishing relevant antitrust markets and market shares).

[26] *See*, Frank E. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14-16 (1984).

- U.S. antitrust officials have expressed the view that they will not pursue allegations of unlawful monopolization where the market share of the subject company does not exceed fifty percent.[27]
- Under Japan's unfair trade practices rule, set out in Article 19 of its Antimonopoly Act, the acceptable thinking is that where a firm holds a low market share or is a new entrant to the market, the conduct usually would not result in reducing the competitor's business opportunities or making it difficult for them to find alternative trading partners. Whether a firm is "influential in a market" is determined, among other things, by its market share, that is, whether it holds no less than ten percent of the market or its position is among the top three in the market.[28]
- The EC has expressed the view that "undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned."[29]
- Canada's Competition Bureau has expressed the view that "[f]or the purpose of enforcing Section 79, the Bureau generally considers that a firm with a market share below 35% is not dominant."[30]

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[27] *See*, Gerald F. Massoudi, *Key Issues Regarding China's Antimonopoly Legislation*, Address Before the International Seminar on Review of Antimonopoly Law (May 19, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/217612.pdf. *See also*, Werden Fordham paper, *supra* note 8 at 12-15 (suggesting a higher threshold).

[28] *See*, Statement by Japan, *supra* note 15.

[29] *See*, DG Competition Discussion Paper, *supra* note 9, ¶31 (citing Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation), 2004 O.J. (L 24) 1, Rec. 32 which reads, "Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles 81 and 82 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it.")

[30] *See*, Canada Competition Bureau, *Report on the Chatham Gasoline Market* (Dec. 29, 1999), *available at* http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1610&lg=e. *See also*, Canada Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (July 2001) at 15, *available at* http://strategis.ic.gc.ca/pics/ct/aod.pdf. ("The Bureau considers that a market share of less than 35 percent will normally not give rise to concerns that a firm has engaged, or is engaging in, a practice of anti-competitive acts that is preventing or lessening competition substantially in a market.").

Selection of the appropriate structural level for safe-harbor treatment will undoubtedly require further dialog. The trend is toward higher thresholds, approaching the standard applied in the U.S. Certainly, a threshold as low as ten or twenty percent will provide little comfort in today's economic climate, especially if applied through a snap-shot lens. Effective, useful, safe harbors must take account of realistic, modern market considerations and not be unduly low out of excessive caution.

B. Safe Harbors Should be Established for Specific Conduct

Consideration should be accorded not only to the development of structural safe harbors but to conduct-based safe harbors as well. Some conduct is so patently procompetitive that it should be categorically declared legitimate, even if undertaken by a dominant firm. One obvious case of such conduct is vigorous price competition. Since the lowering of prices generally benefits consumers, such practice should never be considered as predation as long as the set price remains above some identified cost-based threshold.[31] The chilling effect of any other approach is significant and counter-productive to the goal of competition enforcement.

Consumer welfare could also be promoted through appropriate safe harbors applicable to some non-price conduct. The following conduct patterns have been proposed as candidates in this context:

- New product introduction;
- Improved product quality;
- Cost-reducing innovation;
- Energetic market penetration; and
- Successful research and development.[32]

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[31] *See*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved.")).

[32] *See*, 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c (2nd Ed. 1998-2006). *See also*, Werden, *supra* note 25 (discussing types of conduct that could be considered presumably lawful); and Werden Fordham Paper, *supra* note 8 at 15-18.

IV. Transparency is Essential in Today's Multinational Business Climate

The need for certainty underscores the essential requirement of transparency for multinational businesses. The decision of one agency can and does affect the behavior of business entities in other parts of the world. Businesses need certainty upon which they can plan their strategy and behavior.[33]

Where consensus safe harbors are achievable, transparency is essential. An agency's failure to fully explain, and indeed justify, an enforcement action can be viewed as selective enforcement, reflecting the potential for political, national or commercial bias. Enforcement activity must possess every indicia of due process, even-handedness and non-discrimination. The agency decision must be fully explained and should be subject to appropriate judicial review. Investigative tools should be in-line with typical procedures and should not place undue burdens on the firm being investigated. Ultimately, each agency should recognize that its investigation will impact the many firms that try to discern the policy implications of the investigation, not just the firm that is the subject of the investigation. Transparency is, therefore, a fundamental requirement of enforcement of improper single-firm conduct.

A. Institutions and Mechanisms are Available to Promote Transparency

1. Robust Informal Cooperation

In the event that certain conduct does not meet the criteria for safe harbors, evaluation of that conduct should then be subject to a fact-driven analysis, predicated on sound economic principles. Since there are multiple criteria for the analysis, and the possible combination of cases' factual circumstances are virtually infinite, the results of any individual factual analysis become very hard to predict *ex ante*.

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[33] *See also*, Laurence Popofsky's testimony in front of the Antitrust Modernization Commission's September 29, 2005 hearing on "Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts" where he stated, "From a practitioner's point of view, we need *rules*. Not economic theory, but rules – something akin to the per se rule under Section 1." Transcript of Public Hearing at 12, Antitrust Modernization Commission (Sept. 29, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/050929_Exclus_Conduct_Transcript_reform.pdf (emphasis added).

Competition agencies should employ all available mechanisms for addressing the problems of divergence through informal cooperation mechanisms. Just as enforcement transparency is essential for multinational business planning, transparency is also useful for antitrust agencies, allowing agencies to benefit from aggregate wisdom and experience accumulated around the world.

2. Formal Cooperation Mechanisms

a) Case-by-Case Cooperation

Antitrust agencies have made considerable progress in cooperation in specific cases and investigations. This process can be expanded and assisted by cooperation from parties through waivers of confidentiality and similar undertakings. Some understanding by each agency of another's enforcement perspective and enhanced, continuing dialog should contribute to consistency and, it is hoped, results more consistent with consumer welfare. Business can facilitate this cooperation through various means, including the provision of appropriate waivers of confidentiality.

b) OECD Roundtable Discussions

The Organization for Economic Co-operation and Development (OECD) roundtable discussions are a highly useful tool for exchanging views and facilitating convergence. Recognizing the importance of international cooperation on anticompetitive practices which bear a direct effect on international trade, the OECD Council adopted in 1995 a recommendation aimed at promoting cooperation between Member Countries on anticompetitive practices.[34] Under OECD auspices, the decade that followed has seen significant practical contributions that were developed as part of the coordination and cooperation by competition agencies of OECD Member Countries together with business along with competition agencies. The participation of

[34] Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/FINAL (Sept. 1995), *available at* http://www.oecd.org/dataoecd/60/42/21570317.pdf.

business in OECD roundtable discussions has been commended by the OECD Secretariat and national authorities as adding substantial value to the debates.

One example of such practical contribution is the OECD Council's recommendation on merger review of 2005 which seeks to promote international coordination and cooperation in the area of merger law.[35] This recommendation is part of an ongoing broad effort in the merger area that has brought about a number of additional significant contributions.[36] The hard core cartel area is another area which has greatly benefited from the OECD's activism on international convergence.[37]

The OECD also conducts the Global Forum on Competition, which brings together high-level competition officials from seventy competition agencies around the world. With broad participation by both OECD members and non-members, the program provides an excellent opportunity for direct dialogue between national competition agencies. Such dialogue is highly beneficial for debating complex competition issues and ultimately increasing international convergence. National agency papers in connection with these OECD programs increasingly provide improved transparency. Further depth to these papers would be helpful. A continued focus by the OECD on unilateral conduct will also benefit convergence and inter-agency cooperation.

c) The International Competition Network (ICN)

The ICN announced at its 2006 annual conference that it is establishing a new Unilateral Conduct Working Group, to be headed by Germany's Bundeskartellamt and the U.S. Federal

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[35] Recommendation of the Council on Merger Review, C(2005)34 (Mar. 23, 2005), *available at* http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34.

[36] *See, e.g.*, Guiding Principles For Merger Notification and Review Procedures, *available at* http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm; and Recommended Practices for Merger Notification and Review Procedures, *available at* http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

[37] *See*, Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations, *available at* http://www.oecd.org/dataoecd/1/33/35590548.pdf.

Trade Commission.[38] The proposed mandate of the group acknowledges the inconsistency in the way national agencies apply unilateral conduct policy. Hence, its immediate objective is to "launch a dialogue, share experience, and exchange views on general principles and methodological issues regarding dominance/market power and abusive practices."[39] The new working group already has a work plan approved by the ICN Steering Group and work is underway. This active new working group promises to be highly beneficial in spearheading the efforts to promote international cooperation and convergence on these issues.

V. Conclusion

Businesses need as much certainty as possible in order to thrive. Divergence among different national antitrust jurisdictions imposes a great deal of uncertainty in today's global economy. Therefore, gradual convergence and immediate transparency are highly desirable for business entities, and, in turn, benefit consumers. These remarks suggest some areas whereby realization of these goals may be enhanced.

[38] *See*, Discussion Paper, *available at* http://www.internationalcompetitionnetwork.org/capetown2006/UCWGDiscussionPaper.pdf and Draft Mandate, *available at* http://www.internationalcompetitionnetwork.org/capetown2006/UnilateralConductWorkingGroupDraftMandate.pdf .

[39] Draft Mandate, *id*. at 1.