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# **Single Firm Competition Policy Convergence In A Global Environment**

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### I. INTRODUCTION

Much ink has been spilled concerning the policy split revealed by the Justice Department's September 2008 Report on Single Firm Conduct ("SFC") and the Federal Trade Commission's swift and rather critical rejoinder (issued by three of the four FTC Commissioners). (By "SFC" I refer to actions taken by a "dominant" firm or by an actual or aspiring monopolist.) Among the concerns raised is that the lack of U.S. interagency consensus on SFC enforcement standards may undermine the ability of the United States to influence the development of international norms in this area, and, in particular, to promote convergence toward desirable best practices.

These concerns, while understandable, are greatly overblown, in my opinion. As I will explain, work on SFC by leading scholars and agencies world-wide has greatly enhanced understanding of SFC practices in recent years. Moreover, DOJ's May 2009 public disavowal of DOJ's 2008 SFC Report suggests that the September 2008 FTC-DOJ contretemps is a mere "bump in the road" and will not seriously detract from enforcers' efforts to promote convergence in the SFC area. The pace and direction of convergence efforts, and the desirability of particular SFC enforcements standards, however, are questions yet to be determined.

### II. SFC POLICY IN A GLOBAL ENVIRONMENT

A bit of international context is appropriate. The Justice Department's September 2008 SFC Report and the FTC's response followed a series of Hearings on SFC jointly held by the two agencies. Those Hearings, held in 2006 and 2007, yielded a detailed record and many thoughtful contributions by leading scholars and practitioners having a range of perspectives. The Hearings were in tune with the international competition policy zeitgeist: Major competition policy agencies have been seriously studying SFC issues for a number of years.

The European Commission, following years of study, released a discussion draft on SFC in late 2005, which spawned substantial commentary by lawyers, economists, and competition agency officials from major jurisdictions—including the United States.

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Informed by that commentary, the EU undertook additional analysis and study and issued a Guidance Paper on Article 82 in December 2008.

The Canadian Competition Bureau published Enforcement Guidelines on the Abuse of Dominance in 2001, and released draft Updated Guidelines in January 2009. The draft Updates are currently open for comment.

The International Competition Network (“ICN”) (a forum of competition agencies and non-government advisors established in 2001 to promote greater international antitrust cooperation) formed an SFC Working Group in 2006. The ICN is the institution best suited to promote useful “soft convergence” in different areas of competition law. While bilateral discussions are useful, and undoubtedly will remain a key component of U.S. international competition policy, the ICN is particularly well-placed to enhance understanding of the extent of the differences in individual areas of competition law—and to pave the way toward the development of a consensus around “better” if not “best” practices. Over time, this may yield gradual improvements in substantive law across jurisdictions. As the ICN is a “virtual network,” it can take note of differences in economic thinking, economic conditions, and business trends, and revise particular recommended practices accordingly.

The ICN already has accomplished more in the SFC area than even optimistic observers would have predicted a few years ago. It already has produced various reports on the objectives of unilateral conduct laws, the assessment of dominance, state-created monopolies, and agency practices regarding predatory pricing and exclusive dealing/single branding. In addition, ICN reports regarding agencies’ treatment of tying/bundled discounting and single product loyalty discounts were adopted this June at the ICN’s Annual Meeting in Zurich, Switzerland. The ICN’s SFC work up to this time, however, has been largely descriptive in nature rather than normative. No recommendations on “best enforcement practices” in the SFC area have been made.

In short, public dialogues on SFC enforcement policy involving competition agencies are widespread, and U.S. Government involvement in such dialogues, far from being surprising, should be expected.

These international cooperative efforts are badly needed. Given the proliferation of competition law regimes, firms that do business in multiple jurisdictions either may have to: (1) tailor their business plans (marketing and distributional arrangements, joint ventures, pricing policies, etc.) nation-by-nation to satisfy differences in national competition laws (an approach rife with transactions costs); or (2) adopt a single set of policies that meets the competition law requirements of the “most restrictive” jurisdiction (an approach that could yield selection of a “less than optimally efficient” business plan). A further complication is caused by transactions whose effects spill

across jurisdictional boundaries; a transaction that found favor in one jurisdiction may not find favor in other jurisdictions.

To add to the policy complexity, as private rights of action proliferate around the globe, difficult jurisdictional questions and conflict of law issues may be posed in the future; the greater the divergence among antitrust regimes, the higher will be the costs imposed on businesses associated with (ideally) avoiding and (if necessary) ironing out such complications. Thus, even though there may be good policy justifications (associated with differences among nations in procedure, private enforcement, and other local factors) for some continued differentiation among national competition regimes—reasons that David Evans<sup>2</sup> and others have ably expounded upon—there is a sound basis for efforts (rooted in business efficiency and transactions cost avoidance) to promote gradual convergence and thereby avoid the greatest burdens arising from multinational disharmony in this field.

### III. U.S. SFC POLICY OUTLOOK

The value of promoting SFC policy convergence internationally is not lost on U.S. enforcers. With the installation of new policy officials at both the Antitrust Division and the FTC, there is good reason to believe that efforts will be made to harmonize the two U.S. agencies' approach to SFC. Obstacles to achievement of an interagency meeting of the minds should not be exaggerated.

- First, new policy officials at the FTC and Justice Department may be expected to share very similar policy perspectives and a desire to get things done. Assistant Attorney General Varney's decision to withdraw the 2008 DOJ SFC Report as one of her first public acts is consistent with this interpretation.
- Second, the differences between the two agencies, as revealed in the FTC's rejoinder, centered primarily on such issues as the importance of avoiding false positives and the extent to which tests and safe harbors proposed by the Justice Department represented consensus (or at least broad-based) thinking. Differences of this sort can be reconciled by senior policy officials sharing similar enforcement philosophies, given DOJ's withdrawal of the 2008 SFC Report.
- Third, it has never been suggested that the agencies disagreed about the centrality of consumer welfare and promotion of a vigorous competitive process (or the centrality of economic analysis) in the SFC policy calculus.
- Fourth, there has been no recent effort by the agencies to advocate use of a "one size fits all" test. (Standards such as "no economic sense" or "profit sacrifice," which had been highly touted by some commentators a few years ago, are no longer advocated as universal tests by either U.S. enforcement agency.)

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<sup>2</sup> See [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1342797](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342797).

- Fifth, the use of some sort of “balancing test” as a default for situations not covered by a specific standard (such as the *Brooke Group* rule for simple single product predatory pricing) was not ruled out by either the language of DOJ’s 2008 Report or the FTC’s rejoinder. The treatment of “disproportionate balancing,” advocated by the 2008 Report but critiqued by the rejoinder, presumably can be dealt with readily, now that the 2008 DOJ Report has been withdrawn.
- Sixth, Justice Department and FTC career staff worked together closely and cooperatively over several years in planning SFC Hearings and in drafting proposed report language. Informed by the expertise they have developed in the area, career staff can be counted on to implement swiftly and effectively whatever new SFC-related guidance they may be given by new political appointees. (In addition to the SFC Hearings record, 2008 Justice Department Report, and FTC rejoinder, there are excellent FTC staff papers on various SFC issues (prepared following the SFC Hearings)).<sup>3</sup>

#### IV. CONCLUSION

I do not suggest a panglossian view of the tasks that confront the U.S. enforcement agencies as they deal with SFC policy writ large. Nevertheless, given the widely perceived importance of clarifying official views in this area, in order to promote effective U.S. Government participation in international fora and reduce uncertainty, I am optimistic about the prospects for harmonization of U.S. agency positions in the SFC domain. It remains to be determined, of course, whether this harmonization will be reflected in new agency statements, speeches by the new senior agency appointees, or some other means, such as the case-by-case working out of SFC enforcement policy.

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<sup>3</sup> See <http://www2.ftc.gov/os/sectiontwohearings/index.shtm>.