

House Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing (6/29/2017) on “Recent Trends in International Antitrust Enforcement”

Questions submitted for the Record from Subcommittee
Chairman Marino for Deborah Garza, Partner, Covington & Burling LLP

Question 1:

Most of the members are probably familiar with a few headline grabbing cases in which foreign antitrust agencies have seemingly acted out of hand. How systemic of a problem is this?

Response:

The key is that these highly impactful, high-profile matters are systemic to the jurisdictions in which they occur. They reflect a systemic disregard by those jurisdictions of accepted norms of due process and/or a tendency to promote national champions or use competition law to reduce patent royalty payments by their manufacturers to U.S. innovators, for example. The issue of state-owned and state-supported enterprises is also systemic. ICPEG’s recommendations are designed to address the failure of post-hoc and ad-hoc U.S. government responses to eliminate the repeated instances of these headline cases. There is a concern that these cases will become increasingly common over time if not addressed effectively now.

Question 2:

How would you evaluate the progress of international organizations to date to promote the adoption of best procedural and substantive competition law standards? How can U.S. antitrust agencies better support such standards?

Response:

Procedural fairness has been discussed in international organizations like the OECD and ICN with the support and urging of the U.S. antitrust agencies. However, neither of those two organizations has yet issued a set of comprehensive best practices. The ICN’s best practices guidance stops at the investigation stage, and the OECD has not issued best practices.

ICPEG identified several ways the U.S. antitrust enforcement agencies could promote the adoption of sound procedural and substantive competition law standards worldwide.

1. The U.S. antitrust agencies could prioritize efforts to solidify consensus on a substantive competition law standard dedicated to the protection of a vigorous competitive process, free from artificial impediments. (ICPEG Rec. 7)

2. The U.S. antitrust agencies, along with USTR and the State Department, could consider the feasibility and value of urging the World Trade Organization to expand member government assessments by the Trade Policy Review Body to cover national competition policy, both procedural and substantive. (ICPEG Rec. 8)

3. The U.S. antitrust agencies could encourage the OECD to establish a mechanism by which one member could request peer review of the practices of another member without the second member's consent. (ICPEG Rec. 9)

4. The U.S. antitrust agencies could encourage the OECD to establish a mechanism to peer review the practices of non-members (like Russia or China). Such peer reviews would focus on specific issues, such as the unreasonably broad imposition of global competition remedies or failure to provide an adequate ability to contest competition law allegations. (ICPEG Rec. 9)

5. The U.S. antitrust agencies could urge the OECD (and/or other multinational bodies) to adopt a code enumerating transparent, impartial and accurate enforcement procedures. (ICPEG Rec. 10)

6. The U.S. antitrust agencies should promote transparent, impartial and accurate enforcement procedures as a topic for consideration by all ICN working groups. (ICPEG Rec. 10)

7. The U.S. antitrust agencies could ask the ICN to make the evaluation of procedural soundness and transparency a special project and key "ICN Second Decade" initiative. (ICPEG Rec. 10)

8. The U.S. antitrust agencies could request that other entities (for example, the World Bank) study the economic benefits of enhanced due process and transparency. (ICPEG Rec. 10)

9. The U.S. antitrust agencies could support the establishment of an ICN working group to focus on anticompetitive harm caused by state-owned entities and state-supported (but not owned) entities. (ICPEG Rec. 11)

10. The U.S. antitrust agencies should consider including due process consultation provisions in antitrust cooperation agreements with other jurisdictions. (ICPEG Rec. 12)

11. To minimize unnecessary jurisdictional conflicts, the U.S. antitrust agencies could promote the application of agreements under which nations would cooperate and take account of legitimate interests of other nations affected by a competition investigation. (ICPEG Rec. 12)

12. The U.S. antitrust agencies could promote the further development of such comity principles by the OECD and ICN. (ICPEG Rec. 12)

Question 3:

The ABA Presidential Transition Report recommends the restoration of the International Deputy Assistant Attorney General to better coordinate with other agencies in this area. Based on your experience with the DOJ, do you agree and do you think more is needed to achieve better cooperation?

Response:

I understand that Roger P. Alford has been named as the Antitrust Division's Deputy AAG for International Affairs. I agree with the ABA Antitrust Section's recommendation that the Antitrust Division should substantially re-commit itself to leading international antitrust policy and enforcement efforts. There is a perception that the Federal Trade Commission has instead led the charge on behalf of the U.S. antitrust agencies. While the FTC's work in this area is highly commendable, however, the FTC is an independent administrative agency. In my opinion, it is extremely important that the full weight of the U.S. Justice Department support these efforts.