



# DEPARTMENT OF JUSTICE

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## **International Antitrust Enforcement: Progress Made; Work To Be Done**

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Good morning and thank you, Marcos. Thanks as well to Fordham for inviting me to speak and to our panelists for agreeing to participate in today's discussion. It is always great to share the dais with my predecessor and long-time friend, Christine Varney. Thank you Christine for your many years of dedicated public service at the White House, Federal Trade Commission and Department of Justice.

Vice President Almunia, you are a rock star of the competition community. When you depart the stage, you will leave quite a legacy. You and your team at DG Competition helped the European Union weather the 2008 financial crisis with a sustained commitment to competition principles; you ensured the continued success of the European Competition Network; and you established a framework for private damages actions in the EU. We at the Division thank you for your cooperation on numerous shared investigations involving mergers, cartels and exclusionary conduct. And we applaud your success in building stronger bi-lateral and multi-lateral relationships with competition enforcers around the world.

Antitrust authorities in the U.S. and EU have been able to build a close and constructive relationship because our approach to antitrust enforcement is based on common values. My friend and colleague, FTC Chairwoman Ramirez, has spoken persuasively on these issues in recent months. She and I are very much on the same page.

The U.S. and EU share the core belief that antitrust enforcement must protect and promote competition and consumer welfare. We base our respective enforcement decisions on the competitive effects and consumer benefits of the transaction or conduct being reviewed. We agree that non-competition factors, such as the pursuit of industrial or domestic policy goals, play no role in sound competition enforcement.

The U.S. and EU also agree that antitrust agencies are most effective when they follow decision-making processes that are fair, independent and transparent. Our shared commitment to process pays off. It increases the likelihood that our agencies will be positioned to obtain and consider all relevant facts and issues prior to making a decision. This, in turn, enhances the legitimacy and credibility of our enforcement decisions, and increases the parties' and public's confidence in the agency's ultimate determination.

Another value we share is the belief that antitrust laws should be vigorously enforced even during times of economic turmoil. Vice President Almunia, I recall you speaking about this shared value during your remarks at the Lewis Bernstein Memorial Lecture at the DOJ in March 2012. You encouraged countries not to relax their antitrust enforcement efforts as an expedient to weathering the 2008 financial storm.

You adhered to the "long view" of competition. So did we. Our shared vision proved to be correct. We worked together with you, the DOJ's Criminal Division and enforcement authorities in the United Kingdom to pursue conspiracies by major financial

institutions to manipulate LIBOR and EURIBOR rates. Our collective efforts exposed schemes among traders to orchestrate these important benchmark interest rates as a means of improving their individual trading positions. This conduct has no place in financial markets still recovering from the Great Recession. In the U.S., these ongoing investigations have thus far resulted in criminal charges against companies and individuals and more than \$550 million in criminal fines and penalties. Worldwide, the total criminal and regulatory fines, penalties and disgorgement obtained to date by law enforcement authorities is over \$4 billion.

Some of the Division's efforts to ensure compliance with U.S. antitrust laws during the Great Recession focused on more localized criminal misconduct. Throughout the U.S. many owners lost their homes because they could not pay their mortgages in the aftermath of the 2008 financial crisis. We investigated and prosecuted real estate investors who conspired to rig the public auctions of foreclosed homes – seeking to capitalize on the misfortune of foreclosed homeowners by suppressing the price paid at auctions for homes burdened by an underwater mortgage. Both homeowners and banks that financed their mortgages literally paid the price. This ongoing investigation has resulted in convictions against 73 individuals and 3 companies. And there is more to come.

Vice President Almunia, another point you made at the Bernstein lecture is that the international enforcement community must “work together with the common objective of

promoting open, fair and competitive international markets.”<sup>1</sup> That is a straightforward and sensible proposition. We are living in a globalized economy where the number of companies operating in multiple jurisdictions continues to rise and there is a greater likelihood that anticompetitive transactions or conduct in one jurisdiction will harm competition and consumers in other parts of the world.

The international competition community increasingly embraces that view. Progress is being made towards convergence on due process and transparency. However, more work needs to be done. We must continue to seek broad international consensus on the principle that enforcement decisions be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed. We must ensure that enforcement decisions are not used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations.

This is an easy proposition to state as a shared value. But it is challenging to implement, especially for enforcers in jurisdictions that are early in the process of moving from a planned economy to a free market system; are shifting their focus from promoting producer welfare to consumer welfare; or have state-owned and domestic corporations

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<sup>1</sup> Joaquín Almunia, Vice President, European Commission for Competition Policy, Remarks for Lewis Bernstein Memorial Lecture, *Competition Policy for the Post-Crisis Era* at 8 (Mar. 30, 2012), available at [http://europa.eu/rapid/press-release\\_SPEECH-12-249\\_en.htm..](http://europa.eu/rapid/press-release_SPEECH-12-249_en.htm..)

with considerable influence over enforcement authorities. Nonetheless, antitrust enforcers in such jurisdictions need to overcome these challenges and commit to making enforcement decisions based solely on competitive effects and consumer benefits.

Otherwise, they risk losing the trust and confidence of businesses that are looking to enter or expand in their markets, but may be reluctant to do so out of fear that the playing field is not level.

These concerns often play out in matters involving intellectual property rights. The EU shares our view that antitrust laws and intellectual property laws, when properly applied and enforced, are powerful tools for increasing economic growth by encouraging innovation. When improperly applied, however, the results can hamper economic growth.

To help consumers reap the benefits of innovation, antitrust enforcers must ensure that decisions involving intellectual property rights – like other enforcement decisions – are based solely on competition factors. There may be resistance to adopting this approach in jurisdictions whose economies are shifting from being innovation takers to being innovation producers. However, enforcers in these jurisdictions should understand that in the long run it is in a jurisdiction's best interest to promote a system that rewards innovators by protecting intellectual property rights while preserving competitive markets.

In our more than a century of enforcement experience, U.S. antitrust agencies have learned several valuable lessons about how to apply antitrust laws in matters involving

intellectual property rights in ways that we believe foster innovation and competition. First, we recognize that intellectual property rights do not necessarily confer market power. Although they grant the holder the legal right to exclude others from using a specific invention or work, this exclusionary power does not automatically translate into power over a particular market. Potential or actual substitutes for the product may exist. That is why U.S. antitrust enforcers do not presume market power in matters involving intellectual property. Instead, we apply traditional antitrust principles, including those set forth in our 1995 Guidelines for the Licensing of Intellectual Property, to determine whether an intellectual property right confers market power in a particular case.

Second, owners of intellectual property rights who do achieve market power lawfully are free to participate in markets, provided that they not engage in collusive or exclusionary conduct that harms competition. As U.S. antitrust enforcement agencies have stated previously: “[I]t is well understood that exercise of monopoly power, including the charging of monopoly prices, through the exercise of a lawfully gained monopoly position will not run afoul of the antitrust laws.”<sup>2</sup> Only if enforcers find competitive harm from unlawful conduct should they conclude that a firm has committed an antitrust violation. We make this analysis on a case-by-case basis guided by sound economics, just as in any other type of antitrust investigation.

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<sup>2</sup> DOJ/FTC, *Antitrust Enforcement & Intellectual Property Rights: Promoting Innovation and Competition* 1 (2007), available at <http://www.justice.gov/atr/public/hearings/ip/222655.htm>.

Third, as in other antitrust cases, enforcement involving intellectual property rights should protect competition rather than competitors. Agencies should focus on the competitive effects of the transaction or conduct under review rather than the potential impact on particular firms, such as domestic corporations or state-owned entities. As I noted earlier, failure to adhere to this principle compromises a jurisdiction's economic growth in the long run by discouraging companies from taking the risks and making the investments necessary to invent ground-breaking products that will improve the lives of a jurisdiction's citizens. It harms the companies that the jurisdiction is seeking to protect. Shielded from the discipline of competition, these firms will become less innovative, less efficient, and less likely to succeed on a global stage.

Fourth, antitrust enforcement involving intellectual property rights should not be used to implement domestic or industrial policies. Such an approach undermines the integrity and credibility of an agency's decisions. Enforcers need to be particularly careful about imposing price controls or prohibiting so-called excessive pricing. Pricing freedom in bilateral licensing negotiations is critical for intellectual property owners. I share the concern FTC Chairwoman Ramirez expressed earlier this week with antitrust regimes that appear to be advancing industrial policy goals by "imposing liability solely based on the royalty terms that a patent owner demands for a license . . . ." U.S. antitrust law does not bar "excessive pricing" in and of itself; generally speaking, lawful monopolists may set



any price they choose. This rule applies to holders of intellectual property rights as well. In addition, regardless of the underlying theory of antitrust liability, I am concerned about antitrust regimes that appear to force adoption of a specific royalty that is not necessary to remedy the actual harm to competition. Using antitrust enforcement to reduce the price firms pay to license technology owned and developed by others is short-sighted. Any short-term gains derived from imposing what are effectively price controls will diminish incentives of existing and potential licensors to compete and innovate over the long term, depriving jurisdictions of the benefits of an innovation-based economy.

Now, you may be asking why U.S. antitrust enforcers should care about what other enforcers do within their jurisdictions. There are many reasons. Here are a few.

First, U.S. enforcers can best cooperate with their foreign counterparts on investigations when there is agreement on core analytics and procedural principles. This, in turn, allows U.S. enforcers to more effectively and efficiently address anticompetitive transactions and conduct.

Second, we are continuing to move toward an interconnected global economy. This means that U.S. companies and consumers will increasingly be subject to or affected by the enforcement approach taken by antitrust agencies in other jurisdictions.

Third, convergence on substantive and procedural principles will help U.S. and non-U.S. companies comply with competition laws in a more cost-effective manner, as

well as provide them the predictability that they need when trying to run their businesses in multiple jurisdictions.

Let me be clear, I applaud the progress that the international competition enforcement community has made in recent years with respect to convergence on important principles, including agreement on due process and transparency. But work remains. And the international enforcement community needs to continue to find common ground on core analytics as well as the principle that decisions be made based solely on competitive effects and consumer benefits. This will best promote economic growth within our respective jurisdictions by creating the level playing field necessary to encourage domestic and foreign corporations to innovate and invest.

Thank you for your time this morning. I look forward to our panel discussion.