Keynote Remarks of FTC Chairwoman Edith Ramirez
Problems with Global Antitrust Enforcement Conference
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I am delighted to be here at the Yale School of Management and want to thank Dean Ted Snyder and Professor Fiona Scott Morton for inviting me to be part of this program.

What I heard of yesterday's discussion appeared to be in keeping with the title of this conference – a conversation centered on the *problems* with global antitrust enforcement and the uncertainty, costs, and lost efficiencies that result from differences across competition regimes. I want to strike a more hopeful note and suggest that there is a path forward and reason for cautious optimism, even in the area of single-firm conduct.

I also believe some differences across competition regimes are not only inevitable but can be beneficial. Competition policy is a work in progress, and some degree of experimentation can provide an invaluable basis for judging which rules work better than others in what is an inherently dynamic discipline.

One of my former colleagues, Bill Kovacic, has made a related observation. He has noted that when we talk about convergence, there is a tendency to speak of the need for convergence on "best practices."[1] The aim, however, should be convergence on "better practices." As he puts it, "[t]he best practice in competition policy is the relentless pursuit of better practices."[2]

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[1] William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?*, 4 COMP. L. INT'L 8, 10 (Oct. 2008).

[2] *Id.* at 17.

In other words, what U.S. antitrust enforcers and our foreign counterparts should be doing is to relentlessly pursue "better practices" in tandem, learning from each other and from our respective experiences.

With this in mind, I want to start this morning by broadly describing the global competition landscape and highlighting certain areas of commonality and difference. I will then share some thoughts about what I think competition authorities can do to achieve greater convergence in antitrust enforcement.

I. Globalization of Antitrust Enforcement

To understand the challenges of fostering greater convergence, we have to take account of the recent widespread adoption of competition regimes in countries around the globe. As recently as the 1980s, there were only two dozen or so jurisdictions with antitrust laws. By 2006, that number had grown to 102, and today, there are more than 120. The number of competition agencies is even larger; the International Competition Network ("ICN") is currently comprised of more than 130 member agencies.

These figures remind us that there are scores of relatively new competition agencies. Let me highlight a few examples.

The modern era of antitrust enforcement in Brazil began in 1994 with the establishment of the Brazilian Competition Policy System, concurrent with the country's transition to a market-based economy. In 2011, Brazil enacted major reforms to its competition laws, many inspired by recommendations of the ICN, to modernize its enforcement and policies. These reforms have resulted in a stronger, more effective regime.

India is another relative newcomer to the antitrust world. India passed a new and more economically grounded Competition Act in 2002 to replace an earlier, outdated law. But before the Act came into full force, the constitutional validity of the new enforcement agency's

composition and authority was challenged before the Indian Supreme Court, and it was not until September 2007 that the Act was amended to address these concerns, with substantive enforcement provisions coming into effect later.

And, of course, another newcomer, China, has also emerged as an important figure in the antitrust world. China's Anti-Monopoly Law (AML) is among the newest antitrust laws governing a major world economy. The AML took effect in 2008 and led to the creation of three antitrust enforcement agencies: MOFCOM, which conducts merger reviews, and two other agencies, SAIC and NDRC, that share enforcement responsibility over conduct cases.

I could go on to describe many other relatively new antitrust regimes. What I want to emphasize is that in any conversation about convergence it is crucial to recognize, first, that many of these competition regimes have emerged out of legal, political, economic, and social circumstances that are quite different from our own, and, second, that a large number of agencies are at an early stage of their development and have limited experience applying competition laws.

So, given the diversity of competition agencies and jurisdictions we have today, what can we realistically hope for – much less demand – in the way of convergence?

II. Defining Convergence

Before attempting to answer that question, it is important to unpack what we mean when we talk about "convergence."

First, there are important variations in *process* from country to country. Different jurisdictions have widely disparate adjudicative and administrative frameworks through which governmental agencies or private actors pursue the application of substantive antitrust rules. For example, private plaintiffs play a central role in supplementing governmental antitrust enforcement in the United States, but not in Europe (at least not yet). And the forums and

procedural rules used to resolve antitrust disputes look very different from jurisdiction to jurisdiction. When people talk of a need for greater convergence in international antitrust enforcement, they are typically not advocating for procedural convergence.

But process is important. I think it is essential. There are basic procedural norms to which all antitrust regimes should aspire, including procedural fairness and transparency to the parties and the public. Using a variety of tools and channels, we have made great progress in developing international consensus on investigative principles and practices that promote procedural fairness and effective enforcement around the globe. Much work remains, however, particularly but not only in jurisdictions that have recently established new competition authorities.

When it comes to differences in the *substance* of competition law from jurisdiction to jurisdiction, there is no question that substantive differences are far more pronounced today in the rules governing single-firm conduct than in the rules governing cartels and mergers, where competition authorities have made the greatest strides.

Competition authorities around the world now generally accept that price-fixing is undesirable because it thwarts the very nature of competition and lacks any efficiency justification or socially redeeming value.

We have also made a great deal of progress in merger enforcement. Today a merger of global dimension may require notifications in a number of jurisdictions. But, spurred by the ICN's recommended practices for merger notification and review procedures,[3] turnover thresholds and other screens for the most part ensure that only those jurisdictions with a

[3] INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2004), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

significant nexus to the transaction need to invest agency time and resources in evaluating competitive effects, and that parties need not incur the costs and burdens of notification and review in jurisdictions where such a nexus does not exist. And when multiple agencies do investigate a merger, regular communication and exchanges of information among agencies tend to reduce the likelihood of divergent analyses and outcomes.

Unilateral conduct enforcement presents many more challenges. Whereas merger timetables tend to synchronize agency review across borders, no such timetable prevents agencies from conducting independent and less coordinated review of unilateral conduct. And unlike enforcement against categorically undesirable coordinated activity such as price-fixing, unilateral conduct enforcement invariably raises fact-sensitive questions about where to draw the line between competitive and anticompetitive conduct. Such enforcement often presents complex analytical issues as to which agency learning is evolving, and reasonable and learned minds may differ, including within the United States.

Differences in how dominant firm behavior is treated under U.S. and EU antitrust law help to show why some amount of difference is inevitable, and why convergence should be viewed more as a continuous process than an end-state.

Some differences are a product of interpretation and judgment. For instance, a market share of around 40% may suffice to establish dominance in the EU, whereas shares under 50% are typically not enough even for a claim of attempted monopolization in the United States.

Sometimes the differences are baked into the relevant statutes. Article 102 of the TFEU expressly enumerates excessive pricing, as well as other "exploitative" acts, as species of abusive conduct.[4] Various other jurisdictions – including China, Germany, and South Africa – have

[4] Consolidated Version of the Treaty on the Functioning of the European Union art. 102(a), Dec. 13, 2007, 2012 O.J. (C 326) 89.

enacted similar provisions in their competition laws. We have no analogue in U.S. antitrust law. On the contrary, our courts have made clear that, generally, a seller may charge whatever the market will bear, at least as far as antitrust law is concerned.

Further, as I noted earlier, the political, economic, and cultural context in which antitrust laws are applied also matters. At the margin, in the United States, we tend to have greater faith in market forces than our international counterparts. U.S. antitrust doctrine therefore recognizes narrower circumstances in which dominant firms can be held liable for competitive abuses. In the European Union, competition law was designed to help break down trade barriers, discipline state-owned monopolies, and promote integration in postwar Europe. There may therefore be a greater inclination there to intervene in markets to address the unilateral conduct of dominant firms, with the goal of establishing a common market among the member states.

Additionally, U.S. courts may be more reluctant than their European counterparts to intervene in markets because they are more sensitive to the risk of false positives, magnified by the prospect of treble damages in private litigation, and because they are less institutionally inclined to administer ongoing behavioral remedies.[5]

Ultimately, however, the task is one of line-drawing. I think we can all agree that unilateral conduct enforcement should not penalize conduct that is shown to be procompetitive over the long run. Rather than debate broad principles in the abstract, we should therefore strive to gain a full and accurate understanding of the rationale and impact of a challenged act or practice.

[5] *See, e.g.*, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 452−55 (2009); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414−15 (2004).

While the differences I have highlighted might lead to divergent outcomes in unilateral conduct enforcement, there are also important commonalities that tend to promote more convergent enforcement. I will mention two of them.

First, competition agencies have increasingly relied on the use of economics to inform decision-making about enforcement. As we do in the United States, many agencies now have installed within their organizational structure the position of a chief economist, who leads a staff of economists working alongside the lawyers and investigators. And regardless of structure, most agencies now recognize that economic analysis is critical to realizing their stated goal of basing competition enforcement and policy on consumer welfare. Even if legal principles and doctrines relating to monopolization and dominance differ, the agencies still share a common parlance through the language of economics. While economists may reach different conclusions based on facts, and differing national goals may lead to different policy choices, basic microeconomic principles are the same everywhere.

Second, competition enforcers have given more prominence to an effects-based approach to antitrust analysis. In the United States, exclusionary conduct must be conduct that harms competition or the competitive process and thereby harms consumers. We therefore predicate liability on evidence that, without a procompetitive justification, a monopolist's conduct prevented rivals from becoming more effective competitors. Likewise, in Europe, the EC's 2009 guidance document on Article 102 enforcement signaled greater receptivity to the same types of evidence.[6]

[6] *See* Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings ¶¶ 5−6, 2009 O.J. (C 45) 7; *but see* Case T-286/09, Intel Corp. v. Comm'n, 2014 EUR-Lex No. 62009TJ0286, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009TJ0286&from=EN.

A shared vocabulary and analytical tools will help us to narrow certain differences as we develop more refined understandings of key concepts, such as what constitutes "substantial market power," which builds on the ICN's consensus-driven recommended practices providing for a multi-factor, effects-based analysis.[7]

But, realistically, we will not be able to achieve complete harmonization in substantive doctrine, nor is that even desirable. Going back to where I started, our joint aim should be convergence on "better practices." Although each jurisdiction naturally favors its own regime, we have much to learn from the experiences of others as we all work to refine our respective approaches to enforcement in light of new learning and new information.

III. A Path Forward

Given that there will likely always be differences in enforcement across jurisdictions, what can we do to move forward? Let me offer three suggestions.

First, we can champion the principle that antitrust authorities should enforce competition laws for the sake of protecting competition and promoting consumer welfare, as opposed to other political and social goals. Combining non-competition with competition goals risks producing outcomes that reduce consumer welfare and can burden and complicate the already difficult job of competition enforcers.

Second, we can strengthen the institutional mechanisms that promote interagency coordination and cooperation. For example, we should continue to promote direct, bilateral interactions between agencies in a variety of contexts, including ongoing investigations, comments on proposed rules and guidelines, workshops, and technical assistance. As

[7] INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES ON THE ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER PURSUANT TO UNILATERAL CONDUCT LAWS (2007), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf.

competition agencies grow and mature, they should find more opportunities to collaborate and exchange ideas and information.

Engagement through multilateral forums such as the ICN, where competition agencies can assemble to debate and discuss issues and topics of interest, is also crucial. Both the Federal Trade Commission and the Department of Justice have taken leadership roles in the ICN, including heading the working groups that study specific aspects of competition enforcement. The output of these working groups includes recommended practices that reflect a process of consensus building among the participating agencies.[8]

Third, we should continue to press for procedural fairness and transparency in antitrust investigations and decision-making. Even if agency outcomes differ, parties should understand the allegations under investigation and be given a fair opportunity to present their case. In addition, keeping the channels open for productive dialogue is important, even when it may require some flexibility in the process and schedule for reaching a decision. Good process, in addition to benefiting parties, is critical to ensuring that agencies obtain information necessary to reach well-informed decisions and to reinforcing the credibility and legitimacy of competition enforcers in the eyes of parties, governments, and the public. Here too there has been important work in the ICN. The FTC led a project that resulted in the issuance of guidance on investigative process, which the ICN adopted last year based on the consensus view of its 130 agency members.

[8] Examples include the previously referenced recommended practices of the Unilateral Conduct Working Group on the assessment of dominance and substantial market power, a project which the FTC co-led, and of the Merger Working Group on merger notification and review procedures, which the FTC led.

Finally, articulating the grounds for a particular enforcement outcome and the underlying decision-making process can aid the parties' and the public's understanding of the differences between antitrust regimes.

IV. Conclusion

For me, the topic of convergence in global antitrust enforcement calls to mind a metaphor attributed to former EU President Jacques Delors. He likened the integration of Europe to riding a bicycle: "Europe," he said, "is like a bicycle. You either keep pedaling or fall off."

In the area of competition policy, we should celebrate the fact that in the span of thirty-plus years, we have grown from two dozen jurisdictions with antitrust regimes to over 120. The enterprise, however, is a work in progress, and we have to keep pedaling.

Thank you.