

PaRR Special Report

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DoJ prioritizing individual accountability, cartel investigations

The Department of Justice (DoJ) prioritizes pursuing individual accountability for corporate wrongdoing and investigating conspiracies at both the local and international levels, according to an agency official.

“Companies commit offenses through individuals,” and the DoJ is taking seriously the Yates Memo initiative to hold individuals responsible, said Marvin Price, director of criminal enforcement at the DoJ.

Price was speaking on a panel titled “Assessing Risk and Settlement Strategies in Global Price Fixing Cartels” during the morning session on 16 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

In the last three years, the DoJ has held 51 companies and 77 individuals responsible for corporate wrongdoing, Price said.

When prosecuting individuals, the agency aims for jail time, he said. Prison terms act as a deterrent, while monetary fines are secondary, he added.

Another top priority for the DoJ is investigating large cartels and local conspiracies. “People don’t understand how much work we do on smaller matters,” Price said.

The agency filed new charges on 15 June in its long-running auto parts probe, and the DoJ has numerous local conspiracies under investigation, he said.

Price also offered advice to companies that seek leniency by self-reporting cartel activity.

The DoJ expects leniency applicants to conduct a thorough internal investigation, provide details and relevant facts to the agency, produce documents related to any foreign involvement in the wrongdoing, translate all relevant documents, and bring foreign witnesses to the US, he said.

by Ryan Lynch in Chicago

EC official says different standards between jurisdictions strengthen cartel deterrence

- There is no ‘single ideal system’
- Lack of universal judicial consensus on cartels results in different enforcement
- Complementary legal standards better serve global deterrence

A senior European Commission (EC) official said there is “no ideal system” for anti-cartel enforcement, but well-coordinated interagency cooperation makes for the best deterrence.

“There is no single ideal system. I do not think there is a kind of evolution that will lead us all to having the same system,” said Marisa Tierno Centella, deputy head of the cartels unit of the EC’s Directorate General for Competition.

She added that there is plenty of scope for simplifying the complexities that arise between systems, but said that “a natural selection of the features that work in enforcement” is at play and this amounts to a “convergence of best practices.”

Centella was the featured speaker on the topic of cartel enforcement in the EU during the morning session on 16 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

She explained that legal enforcement choices depend on the culture of a given jurisdiction, and that there is, for instance, no universal judicial consensus as to whether a cartel is actually a crime or an egregious civil infringement.

Centella noted that the EU and the US have different standards and sometimes have different scopes in investigations, adding that there are “concrete complementarities in having two robust models of cartel enforcement coexisting in the global scene.”

“We pay increasing attention when we know that companies are dealing with several agencies at the same time around the world, not to coordinate completely, but to mitigate the distortions in the sentence, to try to avoid conflicting timing,” Centella said. She added that agencies also try to avoid making incompatible demands on companies.

In her role as a regulator, Centella drafted the settlements and leniency notice legislative packages. She also participated in the internal discussions and drafting of the legislative package on damages claims by victims of antitrust violations.

Centella said that the difference in standards between the EU and the US better serves deterrence. “What would be the advantage of convicting the same individual twice for the same cartel, and then having to determine how to share the prison term. You cannot simply impose more years to a prison



sentence for a cartel here and there. But you can impose different fines because you are capturing different commerce,” she said.

She noted that most enforcement agencies the EC works with on cartels “have developed the reflexes to reach out to the others in order to coordinate the first investigative steps” —and that the EC cooperates productively with the US Department of Justice (DoJ) in areas where there are common interests.

“Because we are different and compatible, our actions are not redundant, even when we look at the same international cartels,” Centella said.

by Peter Geier in Chicago

IP guidelines should be based on experience, DOJ official says

- DOJ official wary of ‘a lot of guidelines’ by agencies without enforcement experience
- ‘Devil in the details’ regarding how anticipated Chinese IP guidelines will be applied—economist
- Canada uses other countries’ experiences to help interpret its Competition Act—regulator

A senior US Department of Justice (DoJ) official for intellectual property (IP) said that she is concerned when she sees competition agencies in countries with little IP enforcement experience issue guidelines in that area.

“I’m troubled when I see presumptions of harmful conduct that do not appear to be based on experience,” said Frances Marshall, assistant chief of the legal policy section and special counsel for IP at the DoJ. She said this is something that happens “where a lot of guidelines are being issued in jurisdictions that do not have a lot of enforcement experience.”

Marshall was speaking on a panel titled Comparing IP Antitrust Guidelines and Enforcement Actions on 16 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

She noted that US IP guidelines are reflected in many other countries’ guidelines. “Most competition authorities recognize that standard antitrust analysis should apply, most jurisdictions do not presume market power in intellectual property rights, and most jurisdictions recognize that in most cases, the exercise of IP rights is pro-competitive,” Marshall said.

“In addition, many jurisdictions apply an effects-based analysis in most cases, or articulate the desire to do so,” she said. Marshall added that the US approach is to only presume that conduct is anticompetitive where experience has shown that that type of conduct almost always has anticompetitive effects.

Marshall said that when one presumes that something violates competition laws, “you really risk chilling pro-competitive activities, because firms will only engage in conduct if they are confident they can overcome that presumption, particularly when they do not know what is necessary” to do so.

She said that she is particularly concerned when she sees in guidelines “the possibility that competition law may be used as a means to regulate royalties and provide access to IP to advance industrial policy goals rather than to promote competition.”

Marshall said that China's National Development and Reform Commission (NDRC) is expected to issue draft guidelines for public comment later this year, which are said to combine the views of the country's three competition regulatory agencies.

She said that it will be interesting to see the relationship between the rules that were issued by State Administration for Industry and Commerce (SAIC) and whatever joint guidelines come out. She said that it is her understanding that under Chinese law, a rule is binding in court whereas guidelines are not.

Sheng Li, an economist at NERA Economic Consulting, acknowledged the often-reported disagreements between the three Chinese competition authorities. "Each agency's guidelines reflect how each parent entity thinks about antimonopoly law enforcement within its own jurisdiction," she said.

Li said that given China's limited enforcement experience in the IP area, it is especially important to understand the institutional jurisdictions when dealing with cases in patent law. "In the end, the devil is in the details of how these guidelines are implemented and how these agencies will balance encouraging innovation against the adoption of new technology," he said.

Canada recently issued IP guidelines but does not have a lot of enforcement activity, said Alan Gunderson, coordinator, at the Advocacy and Economic Analysis Directorate of the Canadian Competition Bureau. But the Competition Bureau is frequently asked what it would do in circumstances that have arisen elsewhere in the world, he said.

"We put out enforcement documents based on circumstances that happened in other jurisdictions and give our views as to how we would look at it under our Competition Act," Gunderson said, adding that the agency is open to revisiting our guidelines. "One of our priorities is to be transparent," he said.

by Peter Geier in Chicago

DoJ sees few ‘potential competition’ cases, official says

Relatively few mergers raise questions of ‘actual potential competition’ (APC), but the Department of Justice (DoJ) is most likely to look at those in highly concentrated industries, an agency official said.

The idea of APC involves predictions of market entry and has been applied in cases such as the Federal Trade Commission’s (FTC) unsuccessful challenge to the acquisition of Synergy by Steris. That case, which involved competing firms in the market for product sterilization, marked the first APC merger to be litigated in roughly 30 years.

Patricia Brink, director of civil enforcement in the DoJ’s Antitrust Division, said APC claims are very fact-specific and rely upon a judge making a prediction based on a range of facts. Individual data points, such as whether a company could actually attract customers, may prove critical in APC cases, she said.

Brink was speaking on a panel titled "Recent Hurdles in Global Merger Review" during the afternoon session on 16 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

Many APC cases involve the pharmaceutical industry and thus are examined by the FTC, Brink said. However, there are examples of APC matters on the DoJ side. For instance, the DoJ required a settlement in the merger of Ticketmaster and Live Nation after finding that Live Nation’s ticketing business posed a “real threat” to Ticketmaster, Brink said.

Canadian antitrust enforcers apply a similar concept to block deals in which market entry would have occurred ‘but for’ the merger, said Jeanne Pratt, senior deputy commissioner at the Canada Competition Bureau.

Pratt noted that outside of the pharmaceutical industry – which is a “prime example” of US-Canada coordination in requiring merger remedies – Canadian courts in recent years considered a relevant case in the landfill industry.

In that case, which involved Tervita’s acquisition of Complete Environmental, the Competition Tribunal sided with the Canada Competition Bureau. However, the Supreme Court of Canada later overturned the Tribunal’s ruling.

by Ryan Lynch in Chicago

ICN at 15 years old marks global enforcement advances, faces hurdles

- Organization notes agencies cooperating more than ever, finding common approaches
- ICN still challenged by different cultures, legal traditions, process rules and outcomes
- Fledging competition agency puts ICN on the front lines of enforcement

An official of the US Federal Trade Commission (FTC) said that the International Competition Network (ICN) has made great strides in advancing the enforcement of competition law around the world but still faces major challenges.

“Any conversation you have on international antitrust comes with a mix of hope and challenge,” said Paul O’Brien, counsel for international antitrust at the FTC.

O’Brien was speaking on a panel titled Update on the International Competition Network: Projects and Available Tools for In-house Counsel, at the afternoon session on 16 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

Described as “an organization by enforcers, for enforcers,” the 15-year-old ICN is comprised of 120 competition agencies and five working groups: cartels, mergers, unilateral conduct, competition advocacy and agency effectiveness, the last focused more on process and internal operations, O’Brien said.

He said that ICN is “hopeful when we hear that agencies are cooperating more than they ever have ... we are hopeful that we are beginning to hear common approaches and promoting convergence around them.”

But O’Brien added that ICN is also “challenged by different cultures, different legal traditions, by different process rules than we have in our jurisdictions. And on occasion, we are challenged by different outcomes.”

Speaking of ICN's successes, he noted that its “comprehensiveness in terms of subject matter” is matched by a “comprehensiveness in terms of purpose and target.” O’Brien highlighted two categories of the work produced by the ICN: its “recommended practices” and its staff manuals.

The recommended practices - what O’Brien referred to as “should documents” - have inspired a lot a change, he said. Their purpose is to inspire change, he said, to encourage agencies around the world to make changes to promote convergence to come closer to international norms.

O’Brien said that Brazil is “a good theme for the day” in this regard. He said that its competition agency, Conselho Administrativo de Defesa Econômica (CADE), welcomed a letter from the ICN steering group that articulated ICN’s merger recommendations. The agency used that letter to help guide the country’s legislature as it reformed its law, helping to shape the law in terms of international norms.

“That’s a great example of how the impact of ICN’s guidance works,” O’Brien said.

He said the ICNs staff manuals have been prepared for the day-to-day use of enforcers and case handlers around the world - what he termed “the dark matter of ICN - not the dark side, but the dark matter.” O’Brien added: “We know the impact is there, but we cannot measure it.”

He said that at a recent annual ICN conference, a country’s competition authority recounted the story of how it conducted its first dawn raid. “Where did they learn how to do a dawn raid?” O’Brien said. The ICN chapter on searches and raids inspired that agency’s practices, and they printed out copies that the entire team brought to the raid just in case any questions came up, he said.

“There you have ICN on the front lines of enforcement,” O’Brien said.

by Peter Geier in Chicago

EU-China cooperation growing, EC official says

Amid the need for international antitrust cooperation, the EU and China communicate more regularly and at an equal level, according to an official at the European Commission (EC).

International cooperation promotes a level playing field on a global scale, said Torben Toft, principal administrator of international relations at the EC Directorate-General for Competition. Cooperation also increases the effectiveness and efficiency of EU enforcement actions, Toft said. In roughly 70% of all cartel decisions, the EC cooperated significantly with antitrust enforcers in other jurisdictions, he noted.

Toft was speaking on a panel titled "Recent Developments Concerning China's Antimonopoly Law" during the afternoon session on 16 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

Europe and China have engaged in technical cooperation since 2004, with a standardized approach that includes regular workshops to discuss competition principles. There is also a 'summer school' for Chinese officials to learn about European competition law and a program for Chinese officials to visit with an EU competition agency for up to five months.

Toft deemed enforcement cooperation a "work in progress," because cooperating on merger reviews can involve differences in timing, language, culture and confidentiality of information.

He said it would be a good idea for China to join the International Competition Network, an international body that works toward antitrust convergence. "We would welcome that," Toft said.

by Ryan Lynch in Chicago

The US rule-of-reason: one size does not fit all

- US courts, lawyers prefer rule-of-reason to grasp actual conduct in cartel cases
- EU law considers additional objectives such as fairness, single market imperative
- Chinese courts prefer rule-of-reason; government bureaucrats impose per se

US courts have moved toward the rule-of-reason in analyzing antitrust cases, and while courts in Europe and China appreciate the value of this type of analysis, they also consider additional factors, lawyers say.

Under the rule of reason, defendants have the opportunity to offer pro-competitive justifications for their alleged anticompetitive conduct, which courts must then weigh to determine culpability. By contrast, a per se violation is conduct illegal on its face.

Mark Ryan, who chairs the antitrust practice at Mayer Brown and is a former director of litigation in the US Department of Justice (DoJ) Antitrust Division, said the trend in US courts clearly has been to focus on rule-of-reason analyses and to limit application of the per se doctrine, because courts want to get a sense “of what is really going on” in a cartel case.

Ryan was speaking on a panel titled *Contrasting Approaches to Vertical Restraints in US, EU and China*, on 17 June at the Chicago Forum on International Antitrust Issues at Northwestern Pritzker School of Law.

He said the US trend is apparent in recent trial court decisions in the Apple ebooks and American Express (AmEx) antitrust actions. The DoJ won both actions, which involved vertical restraints and were litigated under Ryan’s watch at the DoJ under the rule of reason. The Apple ebooks ruling was affirmed by the US Second Court of Appeals, and a ruling in the AmEx case, argued in December 2015, is pending.

Terry Calvani, of counsel at Freshfields Bruckhaus Deringer, a former commissioner of the US Federal Trade Commission and board member of the Irish Competition Board, said that “vertical restraints clearly is an area where there has not been complete convergence” between US and EU law. “There are areas of similarity and also areas of difference,” he said.

Calvani said that competition law in the US “is largely predicated on notions of efficiency, principally in terms of consumer welfare: that is the beginning and the end of the story these days in the US.”

In contrast, while the Europeans also ground their competition law in notions of efficiency and consumer welfare, they have other objectives which the US courts do not consider. These include fairness and the EC’s single market imperative which is a centerpiece of European competition law, Calvani said.

Chinese legal culture, while following an approach roughly similar to US and EU with regard to competition law, must answer to a hierarchical bureaucracy.

Bao Zhi, a partner at Fen Xun Partners in Shanghai and for seven years an enforcer at the Chinese Ministry of Commerce (MOFCOM), said Chinese Antimonopoly Law “focuses on three subprovisions of Article 14: price-fixing, minimum price, and other conduct determined by the authorities.” The key is the third part, which is a catch-all, Zhi said.

He said that the Ruibang v. Johnson & Johnson resale price maintenance (RPM) case shows Chinese courts' preference for a rule-of-reason approach. In that case, the first RPM private action in China, the Shanghai High People's Court ruled in favor of plaintiff Ruibang in August 2013, in a ruling that contained relatively clear argument on the adoption of the rule of reason, Zhi said.

However, per se illegality appears to be the fundamental principle of China's antimonopoly enforcers in the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC), he said.

"Although we have private litigation in China, things work according to the law provisions, especially the catch-all provision of Article 14," he said. "Thus, the government authority, the agencies, are the real creator of the law. We are similar in approach to the US and EU and follow international practice, but the real decision-maker will be the government entity."

by Peter Geier in Chicago



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