Comments of the Section of Antitrust Law
of the American Bar Association
in Response to the
Antitrust Modernization Commission's
Request for Public Comment
Regarding International Cooperation:
Are There Technical or Procedural Changes
that the United States Could Implement
to Facilitate Further Coordination
with Foreign Antitrust Authorities?

The Section of Antitrust Law ("Antitrust Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Antitrust Modernization Commission (the "Commission") in response to its request for public comment dated May 19, 2005 regarding specific questions relating to "Technical or Procedural Changes that the United States Could Implement to Facilitate Further Coordination with Foreign Antitrust Authorities" selected for study by the Commission. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Summary of Comments

The U.S. antitrust agencies have invested significant effort in promoting international antitrust cooperation generally, and in developing effective relationships with key foreign jurisdictions to coordinate enforcement efforts and work toward policy convergence. They have done remarkably well at it, within the limits of their resources and the inevitable disparities in approach and capability among the world's antitrust agencies. In general, the Antitrust Section believes the agencies should continue these important efforts.

We note, however, that little use has been made to date of the International Antitrust Enforcement Assistance Act of 1994, which authorized the U.S. agencies to enter into agreements with their foreign counterparts that allow them to share and obtain evidence for one another. An IAEAA agreement with the EU, in particular, would enable the agencies to coordinate their enforcement in ways that cannot be achieved through other mechanisms, particularly in the area of cartel enforcement.

We also recommend consideration of legislation that would authorize the agencies to accept temporary details of foreign antitrust officials with full access to case files --this is not possible under current law. Such experience will enable foreign officials to bring valuable skills back to their home agencies, and is likely to enhance convergence and coordination between the U.S. and other antitrust regimes.

Comments

I. Background

A. Statement of the Concerns

The advance of economic globalization and the proliferation of jurisdictions with antitrust laws have heightened the need for coordination among the world's antitrust authorities. Lack of coordination, at its extreme, would threaten to undermine the efficiency of business and the efficacy of antitrust policy. Businesses could be subject to unnecessary degrees of uncertainty, delay, heightened transaction costs, and overly restrictive regulation. Antitrust enforcement could be frustrated by inconsistent policies and outcomes, loss of credibility and support, and diminished cooperation from businesses and their lawyers.

Efforts to promote a single global antitrust regime in the WTO or elsewhere are unlikely in the near to medium term. The U.S. agencies have been leaders in promoting convergence and coordination through multilateral fora such as the OECD and the ICN, and bilateral cooperation through their network of "soft" antitrust cooperation agreements, enactment of the IAEAA and, in anti-cartel enforcement, innovative use of MLATs, Interpol arrangements and, recently, extradition treaties.

Nevertheless, we are far from achieving global convergence of antitrust policy or modes of analysis, or fully coordinated enforcement. Furthermore, substantial gaps remain in existing cooperation mechanisms – e.g., the absence of any mechanism for exchanging confidential information, subject to appropriate safeguards, between the US and the EU, Canada, or other jurisdictions.

B. History of U.S. Efforts at Coordination

1. Bilateral Enforcement Cooperation

Early cooperation arrangements involving the U.S., starting in the 1950s, were aimed more at alleviating conflicts over foreign objections to U.S. "extraterritoriality" than at enforcement cooperation as such; indeed, few jurisdictions other than the U.S. had substantial antitrust regimes. Arrangements between the U.S. and Canada, broadened into multilateral recommendations through the OECD, evolved into the now widely used system of notification and consultation for antitrust actions that may affect other jurisdictions' interests.

The focus on enforcement cooperation gained momentum with US-Canadian coordination in cartel investigations and US-EC coordination in merger investigations, both in the early 1990s. The 1991 US-EU antitrust cooperation agreement, which promoted enforcement cooperation to equal weight with conflict avoidance and resolution, became the model for most of the United States' subsequent cooperation agreements. Agreements along similar lines are now in place with Brazil, Canada, Israel, Japan and Mexico, and negotiations are underway with Korea, alongside earlier agreements with Australia and Germany.

These agreements share a common limitation: they do not allow the agencies to share confidential information. That is, they do not override provisions in U.S. or foreign law that prohibit the disclosure of confidential information obtained in the course of an investigation. This limitation is particularly significant in international cartel investigations, in which parties are less likely to authorize the agencies to share evidence than, for example, in merger investigations in which they are seeking prompt regulatory clearance.

The U.S. and Canada began to share evidence with, and obtain evidence for, one another in cartel investigations in the early 1990s under their MLAT, a mutual assistance treaty for use in criminal law enforcement generally. In 1994, Congress passed the International Antitrust Enforcement Assistance Act, which authorizes what in effect are antitrust-specific MLATs with other jurisdictions, subject to extensive safeguards to protect against the inappropriate disclosure of confidential information and to guarantee reciprocal cooperation. IAEAA agreements can also authorize the parties to use compulsory means to obtain evidence for use solely by the other jurisdiction's competition agency.

To date, the only agreement concluded under the IAEAA is the 1999 agreement with Australia. Nevertheless, the agencies have a track record of extensive cooperation and coordination with foreign antitrust authorities. In merger investigations, the U.S. has cooperated extensively with the EU, its Member States, Canada, and others. Despite rare, albeit celebrated, differences such as those in the *Boeing/McDonnell Douglas* and *GE/Honeywell* cases, most instances in which both jurisdictions have examined the same transactions have resulted in consistent outcomes. Coordination in these cases has been facilitated by the merging parties' normal willingness to waive confidentiality rights that would otherwise prevent the agencies from sharing or discussing information provided by the parties. There has also been significant bilateral cooperation on a policy level through working groups with the EC and others on mergers and intellectual property issues. These groups have produced tangible results such as the US-EC "best practices" in merger investigations and also contribute to soft convergence through increased dialogue.

The Justice Department has accumulated an impressive record of cooperation and coordination with foreign authorities in its international cartel cases. Although grand jury secrecy rules and Justice's general reluctance to disclose details of its investigations limits the information that is publicly available, Justice is widely understood to have secured the assistance of courts and antitrust and other law enforcement agencies in a number of countries to use their compulsory powers to obtain evidence for use in U.S. cartel investigations. In some instances this assistance has been carried out under MLATs; in other cases, foreign authorities have provided assistance under applicable domestic legislation even in the absence of an agreement obliging them to do so. More recently, DOJ has secured the assistance of Interpol in tracking and detaining individual targets of cartel investigations and, earlier this year, a UK court has held that a UK national may be extradited to the US in connection with an antitrust investigation.

2. Multilateral Policy Coordination

The U.S. has participated actively in multilateral antitrust fora at least since the inception of the OECD competition committee in the early 1960s. The U.S. was the leading proponent of the UNCTAD competition principles adopted in 1980 and, with the EU and others, of the

creation of the ICN. Although the U.S. initially supported binding antitrust rules in the multilateral trading system in the post-World War II Havana Charter, the U.S. eventually withdrew its support for those rules. Since then, the U.S. has actively promoted convergence toward what it views as sound antitrust principles, while remaining skeptical of the utility of binding rules and supranational dispute resolution. The most important multilateral recommendations have included a succession of OECD recommendations on notification, consultation, and cooperation, a 1998 recommendation on cooperation in cartel enforcement that helped crystallize the present global anti-cartel consensus, and the ICN's recent adoption of guiding principles and recommended practices for merger review. The ICN, originally conceived in the ICPAC Report, has become an important forum for promoting convergence and best practice among its members, which now include almost every competition agency in the world. For example, its merger recommendations have already motivated reforms in many jurisdictions.

3. Technical Assistance

The proliferation of new antitrust regimes in the wake of the collapse of Communism in the late 1980s and early 1990s created a demand for technical assistance in drafting competition laws, designing institutions, and training personnel in implementing the laws. The U.S. gave technical assistance a high priority, rooted mainly in a desire to foster the creation and the political and economic stabilization of these emerging market economies. Its assistance program draws principally on the resources of the Antitrust Division and FTC, funded primarily by AID. Other significant providers of technical assistance have included the EU and individual developed countries, the OECD, UNCTAD, and the World Bank. Technical assistance has taken a number of forms, including (i) long-term advisers on-site in foreign antitrust agencies; (ii) shorter term on-site missions; (iii) seminars and workshops that bring together personnel of a number of established and emerging agencies; and (iv) internships for personnel of emerging agencies.

II. Concerns

A. Are There Significant Gaps in the Agencies' Ability to Cooperate and Coordinate Appropriately with Foreign Antitrust Authorities?

1. IAEAA-type cooperation

In 1994, Justice and FTC sought and obtained legislative authority to enter into more robust agreements to assist in gathering and to share antitrust evidence with foreign authorities, subject to strict confidentiality and national interest safeguards. Little use has been made of this authority; only one IAEAA agreement has been concluded, and it is understood to have been used infrequently.

The extent to which the absence of a wider network of IAEAA agreements has hampered enforcement is not clear. Justice's extensive and successful use of other instruments, including MLATs, extradition treaties, and informal law enforcement assistance mechanisms, combined with its effective leniency program, may largely have obviated the need for IAEAA agreements

in cartel investigations. Nevertheless, there remains no mechanism for sharing cartel evidence with the EU, the single most important enforcement jurisdiction outside the United States.

The Section has little information from which to evaluate the extent to which non-merger civil enforcement has been disadvantaged by the absence of IAEAA-type cooperation with foreign authorities. It appears that only a small proportion of non-merger civil matters involve more than one jurisdiction, notwithstanding such exceptional instances as the cases and inquiries relating to Microsoft that have arisen in a number of jurisdictions.

2. Extension of the Network of "Soft" Agreements

Today, approximately one hundred jurisdictions have antitrust laws; yet the U.S. has cooperation agreements with only eight of them – although these eight account for a disproportionate share of enforcement activity and cooperation opportunities. Does this unduly curtail the U.S. agencies' ability to cooperate with the remaining jurisdictions? The OECD cooperation recommendation provides a framework for cooperation among its 30 member jurisdictions without bilateral agreements, and much cooperation takes place under that umbrella – e.g., between the U.S. and UK agencies. In any event, these "soft" agreements simply identify a framework for cooperation, but do not in any way add to or modify the agencies' ability to provide or receive assistance or share information with the other parties to these agreements (although some jurisdictions have expressed a need for, or believe it would be beneficial to have, a formal instrument). Nothing prevents the agencies from cooperating or coordinating with jurisdictions with which they have no agreement, as the need or occasion arises, and such cooperation does occur with some frequency.

B. Are Current Multilateral Efforts to Achieve Convergence and Coordination of Policies Sufficient?

The recent WTO decision not to negotiate competition rules in the present round of global trade negotiations concluded, at least for the time being, an extended debate over the need for global antitrust rules. The OECD continues to be a valuable forum for promoting cooperation and convergence among its developed country members, and increasingly with newer competition agencies which participate in the OECD's annual Global Forum on Competition. Similar activities continue in APEC and other regional fora.

Over the past few years, longstanding multilateral antitrust bodies have been supplemented by the International Competition Network. The ICN is unique among multilateral antitrust fora in several respects. First, unlike the WTO, OECD, and UNCTAD, the ICN is an organization of antitrust agencies rather than of governments. Second, the ICN has institutionalized and made use of private sector advice to an unprecedented extent. Third, it has no formal structure or permanent secretariat, and is operated exclusively by officials of its member agencies. The ICN how includes almost all of the world's competition agencies and has accomplished a great deal, particularly in regard to merger review, but it remains to be seen whether its momentum will be sustained.

C. Are Current U.S. Technical Assistance Efforts Sufficient and Most Effectively Deployed?

The U.S. agencies have maintained an active technical assistance program under which they have assisted the competition authorities of more than 35 countries on five continents. Nonetheless, the proliferation of antitrust regimes has without doubt outpaced the resources of the U.S. and other governments and multilateral organizations to provide the kind of sustained and intensive technical assistance that has proven most effective in bringing nascent agencies up to speed. The issue is not just one of available funds. Effective technical assistance calls for personnel with the most experience, analytical ability, and communication skills – in short, the same people the agencies need to carry out their own enforcement missions. The problem is especially acute because experience suggests that long-term, on-site advisors provide the most valuable assistance to developing agencies – precisely the sort of involvement that is most costly in human resources.

The U.S. agencies cannot host foreign antitrust officials for long-term internships in which the foreign officials participate directly in the agencies' enforcement activities. Internships of this kind can equip foreign officials with valuable and hard-to-obtain skills that they bring back to their home agencies and teach to their colleagues on their return. Under present U.S. law, however, Justice and FTC are precluded from giving foreign antitrust officials access to confidential information obtained in the course of their investigations, without which the foreign officials cannot fully participate in the agencies' work. Pending legislation aimed at enhancing the FTC's international consumer protection tools would, if enacted, lift this restriction at the FTC on the antitrust as well as the consumer protection side, but would not apply to DOJ.

III. What Changes, If Any, Are Called For?

A. Enforcement Cooperation and Coordination

The IAEAA struck a reasonable balance between the interests in fostering cooperation on the one hand, and protecting confidential information and national interests on the other. There is no present reason to believe, and Justice and FTC have not suggested, that the failure to date to extend the network of IAEAA agreements beyond the Australian agreement results from shortcomings in the Act. More likely, it reflects some combination of (i) Justice's ability to capitalize more readily on alternative mechanisms in its cartel enforcement activities, (ii) the relative infrequency of needs for formal assistance or non-waiver information sharing in the course of civil non-merger enforcement activities, (iii) the IAEAA's limited application in merger investigations and the common practice of parties' waiving confidentiality to allow inter-agency cooperation in these investigations, (iv) reluctance or legal inability of some foreign jurisdictions to provide information that could be used in U.S. criminal prosecutions, (v) issues involving some foreign jurisdictions' restriction of use of shared information for non-antitrust purposes; and (vi) concerns over whether potential IAEAA partners can meet the Act's stringent, but appropriate, confidentiality requirements. We do not recommend seeking any change in the IAEAA at present.

However, the absence of an IAEAA agreement or comparable arrangement with the EU is a striking gap in the U.S.'s international cooperation arrangements. To be sure, reluctance on the EU's part before it developed arrangements for information-sharing with its own Member States was probably the principal reason, but senior EU officials have said that they would like to explore a "second generation" agreement with the U.S., and this goal was incorporated into the recent US-EU Summit Declaration. We recommend that the Commission encourage Justice and the FTC to give priority to negotiating and concluding such an agreement, as well as to consider whether to pursue such agreements with Canada and other appropriate jurisdictions.

B. Multilateral Policy Harmonization

The OECD and the ICN have proven to be valuable fora for the development and promulgation of "best practices" and sound analytical approaches to antitrust enforcement. We recommend that the Commission encourage Justice and FTC to continue their active participation in and support of these organizations. In particular we encourage giving priority to maintaining momentum and continuing progress in the ICN.

C. Technical Assistance

Sustained technical assistance from the U.S. and other countries and multilateral organizations is crucial if the scores of fledging antitrust agencies that have formed in the past fifteen years are to contribute to economic efficiency rather than stifle it through ineffective or misguided regulatory approaches. We recommend that the Commission encourage the continued funding of these efforts at an adequate level (including authority to spend their own funds for this purpose rather than relying wholly on AID or other external grants), while recognizing that the finite availability of highly qualified agency personnel imposes a limit on the level of assistance the agencies can provide irrespective of funding levels.

We also recommend consideration of legislation that would authorize the agencies to integrate foreign antitrust officials into their work as interns, with full access to case files. We do not propose that Justice or FTC do so indiscriminately -- they will necessarily be mindful of the need to protect confidentiality, maintain the confidence of the business and legal communities, and the efficiency of their own operations. Nevertheless, we believe the present prohibition is unnecessary and counterproductive.

Conclusion

The Section of Antitrust Law appreciates the opportunity to present these comments and stands ready to discuss or amplify them for the Commission if the Commission would find it helpful.