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Section 2 Symposium: Alden Abbott on the International Perspective
May 6, 2009
Alden Abbott

Alden Abbott is Associate Director, Bureau of Competition, Federal Trade Commission. The views expressed below are solely attributable to the author. They do not necessarily represent the views of the Federal Trade Commission or of any individual Federal Trade Commissioner.

As I indicated in my prior blog entry, U.S. competition policy vis-à-vis single firm conduct ("SFC") is best viewed not in isolation, but, rather, in the context of other jurisdictions' SFC enforcement philosophies, and efforts to promote greater SFC policy convergence worldwide. Given the proliferation of competition law regimes, firms that do business in multiple jurisdictions either may have to: (1) tailor their business plans (marketing and distributional arrangements, joint ventures, pricing policies, etc.) nation-by-nation to satisfy differences in national competition laws (an approach rife with transactions costs); or (2) adopt a single set of policies that meets the competition law requirements of the "most restrictive" jurisdiction (an approach that could yield selection of a "less than optimally efficient" business plan). A further complication is caused by transactions whose effects spill across jurisdictional boundaries; a transaction that found favor in one jurisdiction may not find favor in other jurisdictions. To add to the policy complexity, as private rights of action proliferate around the globe, difficult jurisdictional questions and conflict of law issues may be posed in the future; the greater the divergence among antitrust regimes, the higher will be the costs imposed on businesses associated with (ideally) avoiding and (if necessary) ironing out such complications. Thus, even though there may be good policy justifications (associated with differences among nations in procedure, private enforcement, and other local factors) for some continued differentiation among national competition regimes – reasons that David Evans (see http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342797) and others have ably expounded upon – there is a sound basis for efforts (rooted in business efficiency and transactions cost avoidance) to promote gradual convergence and thereby avoid the greatest burdens arising from multinational disharmony in this field.

In my last blog entry, I alluded to the role of the ICN as an institution poised to promote useful "soft convergence" in different areas of competition law. While bilateral discussions are useful, and undoubtedly will remain a key component of U.S. international competition policy, the ICN is particularly well-placed to enhance understanding of the extent of the differences in individual areas of competition law – and to pave the way toward the development of a consensus around "better" if not "best" practices. Over time, this may yield gradual improvements in substantive law across jurisdictions. As the ICN is a "virtual

network," it can take note of differences in economic thinking, economic conditions, and business trends, and revise particular recommended practices accordingly.

The ICN already has accomplished more in the SFC area than even optimistic observers would have predicted a few years ago. In 2006, the ICN formed a Unilateral Conduct Working Group (UCWG) to deal with SFC issues. In its first year, the UCWG prepared and released the first of a series of planned SFC-related reports. That first report, released in 2007, drawing on agency questionnaires, focused on (1) the objectives of unilateral conduct laws, (2) the assessment of dominance and substantial market power, and (3) state-created monopolies. The report noted that most respondents identified consumer welfare, efficiency, and ensuring an effective competitive process as important (albeit not exclusive) goals. The report found significant consensus regarding the key criteria for assessing market power and dominance.

Further progress occurred in the 2007-2008 period, with the ICN's acceptance at its 2008 annual meeting of UCWG recommended practices on the assessment of dominance/substantial market power and on the analysis of state-created monopolies. Because the determination of whether substantial market power or dominance exists is a key element of a single firm conduct analysis in all jurisdictions with competition laws, the achievement of a consensus on principles that are key to making such a determination is a significant convergence milestone. Also, because state-created monopolies often play a prominent role in developing and newly industrialized countries, the acceptance of multiple UCWG recommendations aimed at curbing state-created monopoly power flowing from such institutions is a heartening development. Even if these recommendations are implemented unevenly and imperfectly for a period of years, they set neutral standards, rooted in sound economic policy, that can be looked to by reform-minded officials over time.

In March 2009, the UCWG held a well-attended workshop on assessing dominance/substantial market power and evaluating unilateral conduct. At the June 2009 ICN annual meeting in Zurich, the UCWG will present reports summarizing ICN members' policies toward tying/bundling and loyalty discounts/rebates. The UCWG will continue to work on other substantive SFC topics in future years.

In sum, the ICN may not be a perfect vehicle for improving SFC policy worldwide, but, thus far, the "hard facts" show that it has been a rather effective one in taking initial steps in the right direction. Thus, it merits the continued strong support of the competition policy community, in the United States and abroad.

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