

DG Comp official vouches for organisations' role in convergence

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An official at the European Commission's Directorate General for Competition yesterday praised international bodies as the best way to facilitate convergence on issues such as due process. *Charles McConnell at GCR Live in Palo Alto, California*

During a panel on international convergence at yesterday's GCR Live: Intellectual Property and Antitrust conference at Stanford University's Hoover Institution, European Commission policy analyst Ekaterina Rousseva said the International Competition Network and the Organisation for Economic Co-operation and Development are important vehicles to develop ideas and best practices.

"In the European Union, we pay a lot of attention to the relationship we have with various jurisdictions," Rousseva said, adding that "soft instruments [and] soft types of relationships" are the best way to reach greater convergence.

Rousseva's remarks came during an exchange about how to deal with diverging defence rights worldwide.

Dina Kallay, the head of antitrust at Ericsson, said a harder approach would be better, noting that the World Trade Organisation's TRIPS agreement sets

international standards for intellectual property. She said it could be helpful for antitrust enforcers to use the WTO forum to align their approaches.

Kallay added that corruption is one of the major obstacles to convergence, pointing to recent dawn raids by Korea's Fair Trade Commission and Brazil's Administrative Council for Economic Defence.

Koren Wong-Ervin, the director of the Global Antitrust Institute at the George Mason University law school, said it is important to understand the problem before proposing solutions, and urged enforcers – especially in the US – to gather more evidence about countries' purported use of antitrust for industrial policy and alleged discriminatory enforcement against American companies.

“Maybe it's good faith antitrust, but bad economics,” Wong-Ervin said. “One thing is to really study the problem. I do think that there is inappropriate antitrust going on that's unfairly harming US companies and deterring incentives to innovate, but I'd like to understand [it] exactly, because I think there are different answers.”

Wong-Ervin, who has led training seminars with enforcers from around the world, said everyone wants due process – but does not necessarily agree on what the correct process looks like, since everyone also believes they have good procedures.

She said it takes “a certain amount of confidence” for enforcers to have a good process of notifying the parties of the legal reasons for their investigations, noting that there are often cultural issues at play leading enforcers to divergent conclusions on their theories of harm.

Due process concerns in other areas – including past allegations that China's National Development and Reform Commission locked US executives in rooms and threatened to take their passports – ended only when “there was high levels of government public shaming” during the Obama administration, she said.

Public exposure, studying the problem and providing more training are three ways to tackle divergent processes, Wong-Ervin concluded.

Stephen Harris, a partner at Winston & Strawn in Washington, DC, Shanghai and New York who has extensive experience in Asia, said the process often dictates the outcome and a lot of Asian enforcers – especially in China – still struggle with issues of transparency.

In China, companies often do not get to see everything in the case, sometimes including the full extent of the allegations they face, Harris noted. Asian countries – with the exception of Singapore – do not follow the practice seen

elsewhere in the world of an enforcer sitting down with the parties and talking things through, he said.

Harris said he would like to see more enforcers follow Australia's lead and incorporate the hot tubbing practice of allowing opposing parties' experts to debate in front of the decision-maker. Nobody is better at cross-examining an economist than a disagreeing economist, he said, and hot-tubbing is an effective tool to get to the truth of an issue.

Speaking from the floor, Carnegie Mellon University professor Lee Branstetter said dealing with China on issues of convergence poses a huge problem.

Branstetter said China is soon to be the world's biggest economy, and has economic objectives that are fundamentally different than some of its Asian neighbours and the rest of the world. He said the Western world – including Japan and South Korea – may have to come up with a different way to handle China.

Jamillia Ferris, a partner at Wilson Sonsini Goodrich & Rosati in Washington, DC, moderated the panel. The inaugural GCR Live IP & Antitrust California conference concluded yesterday.