



DEPARTMENT OF JUSTICE

FACING THE CHALLENGE OF GLOBALIZATION: COORDINATION AND COOPERATION BETWEEN ANTITRUST ENFORCEMENT AGENCIES THE U.S. AND E.U.

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I. Introduction

Good afternoon. It is a pleasure to be here with you today to discuss the coordination of antitrust law and policy between the United States and Europe. I always enjoy meeting with groups of lawyers like yourselves, who are not necessarily antitrust specialists, because I find that you often bring fresh ideas and insights to some of the issues that arise in this area. So, I am very much looking forward to our discussion following my prepared remarks.

It has, of course, become widely recognized that we now live in a global economy. For international corporations, that is the accepted reality of doing business. As a result of this globalization, individual transactions or specific business practices are often subject to scrutiny under the antitrust laws of many different jurisdictions. Competitively driven companies, however, enabled by the spread of free market principles, have shown a remarkable ability to adapt to different cultures and different legal frameworks.

Although we live in a global economy, we do not live in a global state. The incentives for law enforcement agencies around the globe to find ways to coordinate with their foreign counterparts are not always as clear. The challenge of both enforcing national laws with respect to conduct that has international effects and interacting with other foreign agencies trying to do the same is a challenge faced by all governmental agencies that investigate economic conduct. It has therefore become important for antitrust agencies reviewing conduct that reaches across national borders to cooperate with their counterparts abroad. Ill-conceived antitrust enforcement and the assertion of overlapping antitrust responsibilities by multiple jurisdictions has the potential to harm the very competitive values that antitrust is meant to protect.

Of course, these challenges are not unique to antitrust enforcement. Government agencies that enforce tax laws and securities laws, to name two examples, have faced these challenges as well. In fact, antitrust has arrived relatively late to the discussion of the international implications of law enforcement and methods to coordinate with foreign colleagues. Just fifteen years ago, there was little need for antitrust agencies to consider international implications – relatively few jurisdictions had antitrust laws on the books, and fewer still showed any commitment to enforce them. With the wider acceptance of free market principles in developing and transition economies, we have seen an explosion in the number of jurisdictions adopting and enforcing antitrust laws. Today there are roughly 100 jurisdictions with antitrust laws.

II. Theories of International Antitrust Coordination

If you review the growing academic literature about the coordination, convergence, and potential harmonization of antitrust laws, you will soon discover several different theories about the optimal structure of the international antitrust system and several different models of how agencies should coordinate their investigations in a world where business conduct has effects in many countries. These theories borrow from other disciplines, most notably political theory, and look to other areas of law for comparison and insight.

The first and perhaps most abstract vision of an international antitrust framework is the view that agencies should converge toward centralized international regulation. The most commonly-cited end points for such a process are either a modified World Trade Organization empowered to review and address international antitrust cases or a standalone global antitrust body. The focus of this perspective is uniformity of results and harmonization of law. Under

this theory, the model for agency coordination is ultimately to cede decisionmaking authority on cases or specific enforcement policies with multilateral effects to a global body. There is no need for me to spend much time describing this vision, as it is just that – a vision, and some would say, a hallucination. Almost no one in the US, and very few people elsewhere, believe that this is the time for a global antitrust authority within the WTO or elsewhere. When half of the world’s antitrust agencies are only ten years young or less, and there is still much discrepancy between agencies on antitrust enforcement principles, we believe that a forced path to uniformity would result in enforcement at the level of the lowest common denominator.¹

A second theory of international antitrust cooperation is a more limited multilateral approach under which only *policy* cooperation – not specific case coordination – is elevated to a multilateral context. Specific case enforcement would remain at the national or regional level, perhaps augmented by voluntary bilateral coordination. We see this kind of cooperation in entities such as the Organization for Economic Cooperation and Development (OECD) and International Competition Network (ICN), that serve as fora for the multilateral discussion of discrete competition policy issues. OECD and ICN work serves to compare differing approaches, often with an eye towards identifying recommended practices that work best. Such work is intended as guidance for members to consider and implement as desired in their own enforcement policies and techniques. This model does not require uniformity or a centralized

¹ I recognize that this model may have a parallel in the structure and operation of the European Union, whereby antitrust investigations that have wide effects are handled in Brussels, while Member states pursue more localized cases. However, the advanced state of economic integration and similarly developed legal principles in the EU is unique in the world, and so is able to support a system whereby national authorities defer to a centralized antitrust body, unlike the widely divergent approaches we currently see in the world antitrust community as a whole.

dispute settlement mechanism, and therefore does not, like the other theories, approach specific investigation coordination in a particular way. Rather, the voluntary participation of antitrust enforcers in forums such as OECD and ICN offer guidance on effective cooperation and coordination with the opportunity for convergence of different approaches should members choose to do so.

A third approach to antitrust agency interaction is the bilateral cooperation and coordination theory. This model for how an agency copes with the international implications of enforcement actions involves both coordination on specific parallel investigations with other agencies and cooperation on policy issues with a view towards convergence. This model is sometime cited as a prerequisite to, or early stage development of, a centralized global authority. The idea is that, as agencies cooperate over time, they converge towards common principles that might then serve as the foundation for the ultimate establishment of a broader authority. But, since a centralized enforcement authority is not an end point in the foreseeable future, I want to raise bilateral coordination as a distinct model to describe how agencies address the international implications of enforcement. Bilateral cooperation and coordination is perhaps the best description of the US-EC relationship, which I will address with specific examples a bit later.

A fourth approach is the allocation of jurisdiction over conduct with multijurisdictional effects to one agency by another agency that also has a claim of jurisdiction. This model operates on a specific case by case basis, and is not characterized by elaborate rules or agreements. Rather, basic agreements would establish factors for the delineation of jurisdiction. This approach involves deference to another agency perceived to have greater interests in the conduct.

A fifth – and perhaps default – option for the international antitrust system is for there to be no systematic format by which agencies interact. Under this model, agencies always may choose to act under what is known in antitrust as the “effects” doctrine, under which a jurisdiction is empowered to enforce its own antitrust laws whenever conduct has an anticompetitive effect within its jurisdiction, no matter where that conduct took place. This approach may also include voluntary bilateral cooperation, but it need not follow an established framework for such cooperation, as is often the case with the approach I described earlier. By focusing on the primacy of sovereignty, this model accepts that there will be diversity and does not address potential conflicts in antitrust enforcement.

III. Tools of Cooperation and Coordination

The terms “coordination” and “cooperation” do not have fixed meanings in the antitrust enforcement context. Although there is a degree of interchangeability between the two concepts, I will use the term “cooperation” to refer to situations where one agency assists another in an enforcement action and *also* to refer to policy discussions and efforts to clarify, and perhaps reach consensus on, legal theories. In contrast, I will use the term “coordination” to refer to interaction where two or three agencies work together on specific enforcement actions, where each agency is operating under its own laws. As you might imagine, the two are complementary, and our relationship with the EC is characterized by progress on both fronts.

In the past, the primary function of cooperation between agencies was to minimize the occasional conflicts that arose when one jurisdiction’s application of its antitrust laws complicated the interests of other jurisdictions. For example, conflicts about sovereignty often arose when an agency sought evidence abroad or took enforcement actions against anti-

competitive conduct that occurred outside its jurisdiction. As business practices evolved and their cross-border or, even global, effects became more prevalent, our cooperation efforts moved beyond mere conflict avoidance to encompass other goals, such as enhancing the effectiveness of mutual enforcement efforts. In addition, we are seeing that cooperation gradually fosters convergence around substantive analytical principles. Even when the laws and procedures of the cooperating jurisdictions differ, sharing information and ideas on specific matters can move one or both of the agencies toward a common approach to the case at hand, which can in turn influence and improve the agencies' general enforcement policy direction.

There is a range of tools, both formal and informal, that we use to facilitate cooperation and coordination with foreign agencies. Our ability to employ any one tool in our relationship with a foreign agency depends on a wide range of factors, including the agency's level of experience with antitrust enforcement, the agency's authority to conclude cooperation agreements, and the frequency with which we deal with the other agency.

A. Formal Cooperation Agreements

Our formal agreements include mutual legal assistance treaties for criminal matters, mutual assistance agreements under the 1994 International Antitrust Enforcement Assistance Act (IAEAA), bilateral cooperation agreements, and positive comity agreements.

1. Mutual Legal Assistance Treaties – MLATs

In international cartel matters, the Division relies on the United States' mutual legal assistance treaties (MLATs) with over 50 countries. These agreements provide for comprehensive reciprocal assistance between the US and foreign governments in *criminal* matters. Specifically, this assistance often includes searches and seizures of documentary

evidence and witness interviews. The assistance obtained through MLATs has been of great value in several of our international cartel investigations.

2. Antitrust Mutual Assistance Agreements

The IAEAA governs the US agencies' ability to gather evidence on behalf of a foreign agency and to share confidential information. The IAEAA allows the Division and the Federal Trade Commission to negotiate antitrust mutual assistance agreements applicable to both criminal *and* civil matters. Under an IAEAA agreement, two countries' antitrust agencies can exchange evidence on a reciprocal basis for use in antitrust enforcement, and assist each other in obtaining evidence located in the other's country, while assuring that confidential information will be protected. IAEAA agreements require the reciprocal commitments of the foreign jurisdiction involved. Because such authority is not common under domestic confidentiality provisions, we have only concluded one such agreement to date, with Australia.

3. Positive Comity Agreements

Bilateral agreements based on "positive comity" allow antitrust enforcers in one country to request that the other country's antitrust agency investigate and take appropriate law enforcement action against anticompetitive conduct that adversely affects the interests of the requesting country and violates the laws of the country responding to the request. Such agreements outline a process under which an antitrust agency will refer cases of possible anticompetitive activities to the other authority for appropriate law enforcement action and can reduce the likelihood of duplicate enforcement actions in cases in which positive comity requests are made. Nothing in a positive comity agreement, however, prohibits the agency making the

request from bringing its own enforcement action if that agency believes that doing so is necessary to protect consumers in its country.

4. Formal US-EC Agreements

The US and EC have two formal agreements on competition matters: the 1991 Agreement between the Government of the United States of America and the European Communities Regarding the Application of their Competition Laws, and the 1998 Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws.

The 1991 agreement establishes general notification requirements when an enforcement action by an agency in one jurisdiction may affect the interests of the other country. It sets out a general duty to cooperate and render assistance in enforcement activities, subject to our internal laws, and lists factors that go into a decision of whether to coordinate with the other jurisdiction. The 1991 agreement also addresses the avoidance of conflicts in enforcement actions and contains provisions on requests for consultations between agencies. The 1998 agreement supplemented the earlier guidelines with comity provisions. The agreement identifies types of cases (though it does not apply to cartel investigations) that one party may refer to the other, and lists the obligations the antitrust authorities will undertake in handling these cases. Under the 1998 agreement, each side pledges to devote its best efforts and resources to investigate referred matters and inform the other side's antitrust authorities on the status of the cases resulting from a referral.

Due to legal constraints in the US and EU, there are limits to our ability to gather evidence for each other and share confidential information. A more comprehensive arrangement

that would allow greater evidence gathering assistance and information sharing, akin to our agreement with Australia, remains unattainable for now. The European Commission currently lacks the authority to pursue such an agreement. An IAEA-type agreement would require a change in EU law to enable the European Commission to make reciprocal cooperative commitments.

B. Informal Cooperation Arrangements

Informal arrangements that promote cooperation take many shapes. Several types of informal arrangements that we have employed include:

1. Bilateral Meetings and Working Groups

Pursuant to agreement, US and EC antitrust authorities hold annual bilateral meetings. At these meetings, our senior officials review the progress of each other's agencies and address the state of coordination between our agencies. As a result of these meetings, working groups have been commissioned to explore particular issues of substantive divergence.

The use of working groups devoted to specific policy issues is one of the most important informal cooperation tools we have. Working group sessions usually proceed by video or telephone conference and are supplemented by some in-person meetings. The antitrust agencies on both sides commit experienced lawyers and economists to the discussions. Group meetings consist of presentations of each agency's approach on one or two focused issues. The sessions are intended to create an open exchange of ideas to question and analyze one another's premises, assumptions and theories. We have used the working group format with great success to address merger review topics such as conglomerate mergers and efficiencies, and have created a working group to address intellectual property issues that arise in the antitrust context. The most notable

result from the merger working group thus far is the development of a set of best practices for coordinating our merger reviews.

2. Best Practices

In October 2002, the US agencies and the EC issued “procedural best practices” that were designed to reinforce the agencies’ mutual commitment to keep each other fully informed of developments throughout merger investigations. The best practices recommend that investigative staffs establish schedules for communications with their counterparts, and they encourage agency officials to engage in substantive discussions with their counterparts at key moments in each other’s investigations. The best practices also provide for joint interviews of parties and third-parties where appropriate and for increased coordination with respect to remedies. Many of the best practices memorialize practices that have been used informally in the past. They serve not only to strengthen our already strong cooperation, but also to help provide useful guidance to all participants in the merger review process.

IV. Examples of Cooperation and Coordination in Specific Cases

The US and EU antitrust agencies coordinate their activities in certain specific cases in order to promote more efficient and effective antitrust enforcement. This coordination often goes hand in hand with increased cooperation on policy issues that serves to make our mutual enforcement efforts more effective.

A. Cooperation and Coordination in Anti-cartel Enforcement

Nowhere is the issue of international coordination more crucial to our enforcement mission than in the area of hard core cartels – that is, price fixing, market allocation, and bid rigging. Hard core cartels are the most egregious violations we pursue, and in the US, such

conduct is punishable as a crime, with heavy fines for the companies and significant jail time for corporate officials involved in the conspiracy. The growing worldwide consensus that international cartels harm consumers and damage economies has led many governments to enact or strengthen anti-cartel laws and to provide investigative assistance to other governments in specific investigations. With strong international consensus on the importance of vigorous enforcement against hard core cartels, the motivation for coordination in anti-cartel enforcement is not a fear of conflict, but a desire to improve our mutual enforcement efforts in a common fight to wipe out harmful cartels. Our own ability to detect and prosecute international cartel activity has been enhanced significantly by the changing attitudes abroad with respect to anti-cartel enforcement.

In the past 15 years, we have seen an increased focus on and commitment to the battle against cartels in Europe. In the EC, we now have an important partner in the fight against international cartels. We routinely share non-protected information and coordinate investigative strategies with the EC in order to maximize the success of each other's investigations. EC member states have executed search warrants and obtained testimony and other evidence at our request. The end result of our efforts is often coordinated, simultaneous raids, service of subpoenas, and drop-in interviews of targets located in the United States and Europe. A good example of just how smooth and effective our coordination has become occurred in February 2003, when the antitrust enforcement officials of the United States, the European Commission, Canada, and Japan coordinated surprise inspections, interviews, and other investigative activity in a cartel investigation relating to heat stabilizers and impact modifiers. Without highly

effective working relationships among all of those jurisdictions, coordinated action on such a large scale would not have been possible.

One notable area of progress in the convergence of enforcement policies is corporate leniency. The Division's corporate leniency program – by which the first conspiring firm to report cartel activity to the Division and meet certain requirements can avoid prosecution – has played a substantial role in cracking the majority of the international cartels that the Division has prosecuted. The remarkable success of this program has generated widespread interest around the world, with many foreign governments following our lead by developing effective leniency policies of their own. The Division consulted with the EC prior to its adoption of a revised leniency policy in February 2002. The increased transparency and predictability of this new policy resulted in greater convergence with the US program and increased the incentives for seeking leniency at the EC. The Commission's revised program has led to a surge in parallel amnesty applications to both the Commission and the Division.

B. Cooperation and Coordination in Merger Enforcement

Our cooperation and coordination in merger enforcement efforts with the EC is motivated by our desire to improve our enforcement and by the hope of avoiding divergent outcomes and conflict. Divergent outcomes not only impose unnecessary burdens on firms, but they also threaten to sacrifice the ideal, namely economic efficiency, that our antitrust laws seek to promote.

Perhaps no case has drawn more attention to the efforts at coordination than the proposed merger of General Electric and Honeywell – the first merger transaction that the Antitrust Division cleared but the EC blocked in its entirety. After reviewing the \$42 billion merger, the

Antitrust Division cleared the merger, while requiring divestiture to address competitive concerns in two markets. The EC, analyzing identical product and geographic markets and having access to the same facts, blocked the transaction. The agencies reached inconsistent decisions even after a great deal of coordination over the course of several months, including frequent phone calls, meetings in Washington and Brussels, and extensive discussions about the evidence and theories of harm. The inconsistent decisions were not a result of a failure of coordination, but rather the result of an apparent substantive difference over the scope of antitrust enforcement.

Although the divergent outcomes on the GE-Honeywell transaction certainly grabbed international headlines, the reality is that—despite certain differences in our laws—the US agencies and the EC tend to reach the same conclusions on matters where we are engaged with one another on the analysis and work from a common set of facts. Indeed, another recent GE merger produced more typical results and demonstrates how effective our coordination efforts have become. In 2003, General Electric announced its purchase of Instrumentarium. The Division concluded that the transaction would substantially lessen competition in the sale of monitors used for patients requiring critical care and mobile C-arms used for basic surgical and vascular procedures. The settlement we reached with GE required the company to divest two Instrumentarium businesses – Spacelabs and the Ziehm C-arm business. The Commission arrived at a similar decision with respect to patient monitors in Europe and had already reached a settlement with GE that required divestiture of Instrumentarium’s Spacelabs patient monitor subsidiary.

The Division and the Commission had conducted largely parallel investigations of the GE-Instrumentarium transaction that included extensive discussions. These discussions covered timing of the reviews and key substantive questions, including the appropriate market definitions. We made a clear effort to draft our decrees so as not to create inconsistent obligations. For instance, we used the same definition of “assets” as used by the EC and crafted complementary common trustee provisions. We coordinated extensively with our European colleagues during the course of our investigations and in reaching our respective settlements. We also continued to consult during the divestiture process, as both entities evaluated the proposed purchaser of the Spacelabs business to ensure that competition would be maintained in their respective jurisdictions. Both agencies approved the proposed divestiture.

The GE-Instrumentarium transaction is a good example of a situation in which the US-EC Best Practices for mergers were put to good use, and it is an example of an outcome that is far more common than the result in GE/Honeywell. While the extent of coordination in a particular case depends on the willingness of the merging parties to waive confidentiality restrictions that may otherwise prohibit the exchange of certain information, we have reached the point that *any* major merger investigation (even those not involving GE) that raises common concerns between the US and the EC will involve a great deal of coordination, beginning very early in the investigation, and carrying through to its conclusion.

V. Policy Convergence Through Coordination

Cooperation and coordination between the US agencies and the EC in antitrust enforcement has also sparked progress in convergence on substantive policy issues. Under Commissioner Mario Monti’s leadership, the European Commission has accomplished laudable

reforms in response to changes in the European and global economies, advances in economic understanding, and increased sharing of enforcement experience with the US and others. Earlier this year, the EC adopted amendments to its Merger Control Regulation that include a delineation of responsibility for merger review between Brussels and the Member States, with the Commission to review mergers likely to have a significant impact on more than one member state. The amendments also add some flexibility to the strict deadlines for the Commission's investigation and merger notification. These changes will facilitate further coordination by softening some of the procedural differences between US and EC merger review.

The EC also amended its substantive standard for merger review in the direction of convergence, broadening the "creation or strengthening of a dominant position" language to encompass mergers which "significantly impede effective competition," and adopted horizontal merger enforcement guidelines that incorporate concepts, such as the role of efficiencies, that mirror the guidelines used by US agencies. The Commission has also created a new Chief Economist position and continues to invigorate its use of economic analysis in its approach to antitrust enforcement. We believe that one of the important driving forces behind these changes has been the important exchange of ideas that has occurred by virtue of the cooperation and coordination between the US and EU on merger enforcement.

VI. Conclusion

In many ways, US-EC cooperation and coordination is a good model for how an effective bilateral antitrust relationship should work. Coordination and cooperation take place on a daily basis on transatlantic matters. Despite different legal traditions, and despite substantial differences in the language of our laws, we have been able to work together to arrive at largely

consistent antitrust policies. Through both cooperation and coordination on particular cases and convergence on substantive principles, we have strengthened enforcement on both sides of the Atlantic. Countries around the world look to the US and European Union – the two largest economies – as models for enforcing their antitrust laws, so it is important that we continue to make joint efforts to refine and improve our enforcement techniques.