DEPARTMENT OF JUSTICE

CAN THE INTERNATIONAL COMPETITION NETWORK HELP TAME THE GROWING MULTINATIONAL MERGER THICKET?

Address by

William J. Kolasky[1]
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented at the

2002 American Bar Association Annual Meeting
(Section of Antitrust Law)
Washington, DC

August 12, 2002

It is a delight to be here today with old friends like Ky, Tad, and Martha and new friends and colleagues like Margaret and Fernando. I attended my first ABA annual meeting in San Francisco in 1982 shortly after Bill Baxter released his complete rewrite of our Merger Guidelines. It is hard to believe that this year we celebrated the twentieth anniversary of those guidelines.

The world has changed unbelievably in these twenty years. Then we were just one year into the Reagan Administration, the Dow was at 675, a large part of the world was Communist, and antitrust was an alien (and often unwelcome) concept even in many countries in what we then called the Free World. In many of these countries, large sectors of the economy were either under the control of government-owned monopolies or, as in the United States, heavily regulated. And in other sectors industrial policy and tolerance of private cartels were viewed in many countries as preferable to more "disorderly" free markets.

The picture could not be more different twenty years later. Today, most of the world, including even Russia and to some extent China, have embraced free market principles. Most government-owned monopolies have been dismantled and all but a few sectors of the economy have been deregulated. And cartels have now been outlawed in nearly 100 countries. As this reflects, countries around the world are increasingly placing their faith in antitrust (or, what most of the rest of the world calls "competition") laws to assure that this movement to free markets delivers what its proponents have promised: greater economic growth, greater prosperity, and greater consumer welfare. Over this same period, as markets increasingly have been opened to foreign investment and trade, a much more tightly integrated and interdependent global economy has evolved. These changes helped create the longest lasting Bull Market in American history,

during which the Dow rose from 675 to over 11,000 points, and Americans enjoyed prosperity beyond even the most optimistic forecasts of twenty years ago.

But as great as our progress has been over these last 20 years, further progress is far from assured. As Dr. Joseph Stiglitz documents in his recent book *Globalization and Its Discontents*, globalization (and the related shift to free markets) has not always lived up to its promises. Throughout the world, there is a growing divide between the haves and the have-nots, producing a level of anger that has contributed to unfathomable acts of terror. And even in countries whose embrace of free market principles once seemed secure, we have seen that national governments can be tempted to revert to command-and-control economic policies when that growth slows, as is currently happening in Argentina. Today, faith in free markets is being further shaken by allegations of widespread corporate misgovernance and accounting and securities fraud in the United States and elsewhere. As a result, rather than being at the beginning of a great Bull Market as we were twenty years ago, today we are enduring a Bear Market, the duration of which no one can predict.

In some respects the current economic picture is reminiscent of the book *The Perfect Storm*. As a result of the convergence of acts of terrorism, the bursting of the dot-com and telcom bubbles, and revelations of corporate misgovernance and accounting fraud, merger activity has fallen to the lowest level in decades. It may seem odd, therefore, for us to be sitting here talking about the multinational merger review thicket when there are so few mergers to review. Who cares, you may say. The answer, of course, is that like the doctor in Camus's *The Plague*, the best thing we antitrust enforcers can do in this environment is to use the respite from

the merger wave to strengthen our institutions and improve our processes so that we are ready when merger activity picks up again, as it certainly will.

In that spirit, I want today to talk principally about the new International Competition Network and the important role it is playing in helping to tame the multinational merger thicket that has grown up around us as an increasing number of jurisdictions — roughly 65 at last count — have enacted merger notification regimes. I also will try to describe some of the complementary efforts being made at the national and bilateral level, as well as in other multilateral fora. Happily, there is a lot of encouraging news to report.

The International Competition Network

Few in this room would disagree with Joseph Stiglitz that competition is what makes free markets work.[2] As Dr. Stiglitz shows, a country invites disaster by privatizing state-owned monopolies and trying to create free market economies without having sound competition laws and institutions in place. Fortunately, most countries have heeded this lesson; more than 100 countries now have competition laws in one form or another. But having a law is only the beginning. Implementing the law sensibly is what really matters.

It was for this reason that the Federal Trade Commission and we joined with competition agencies from 13 other jurisdictions around the world to create the International Competition Network. The concept behind ICN was to form a global network of competition authorities focused exclusively on competition -- "all antitrust all the time" as my boss Charles James put it. The goal was twofold. First, to provide support for new competition agencies both in enforcing their laws and in building a strong competition culture in their countries. Second, to promote

greater convergence among these authorities around sound competition principles by working together, and with stakeholders in the private sector, to develop best practice recommendations for antitrust enforcement and competition advocacy that could then be implemented voluntarily by the member agencies.

Since the ICN was formed last October, its membership has grown to include 63 jurisdictions on six continents, representing more than three-quarters of the world's Gross Domestic Product. Nearly all of these members will be attending our first annual conference in Naples, Italy at the end of next month.

Consistent with its twin goals, ICN initiated two major projects during its first year. The first one, under the leadership of Dr. Fernando Sanchez Ugarte of Mexico, is the development of best practice recommendations in the area of competition advocacy. The second, which I have been leading, is the development of best practices for merger review. This is the area I will focus on today.

Before I do, however, I would like to take a minute to respond to those who discount ICN as a nascent organization whose full membership has not even held its first meeting. A great attraction and distinguishing feature of the ICN is that it is a "virtual network," flexibly organized around geographically diverse working groups. The members of the first two working groups, on mergers and competition advocacy, have been meeting almost continuously since ICN was founded last October, sometimes in person, sometimes by video- or tele-conference, and sometimes over the Internet. Working in this manner permits frequent, informal and low-cost interactions that can produce concrete results far more quickly than the periodic formal

meetings that have characterized the work of more traditional international organizations in the past. As you will see in a moment, the merger working group has already made substantial progress in developing guiding principles and recommended practices for merger review.

The Multinational Merger Thicket[3]

Before turning to these guiding principles and recommended practices, let me spend a few minutes trying to define the scope and nature of the problem they are intended to address. At last count, roughly 65 jurisdictions have adopted merger notification regimes in one form or another. The spread of merger notification is, of course, a positive development as a general matter. Merger regimes with notification requirements give antitrust authorities the ability to identify and potentially remedy problematic transactions before they close, to the benefit of consumers and competition in their markets.

These benefits, however, do not come without cost. The first significant cost is the cost of determining in which jurisdictions a particular transaction must be notified. The second is the cost and potential delay associated with preparing and filing the required notifications and then responding to requests for additional information as multiple agencies review the transaction. The third is the uncertainty created by the potential for conflicting outcomes, a potential we saw realized last year in GE/Honeywell.

A vigorous, competitive, free-market economy produces thousands of agreements and transactions every day. The vast majority of these are pro-competitive or competitively neutral. It is important that merger review not impose unnecessary transactions costs or bureaucratic roadblocks that might deter efficient, pro-competitive mergers. Our task, therefore, is to preserve

the benefits of mandatory merger notification while reducing the costs associated with it. Over the past year, we have been working toward this objective at three distinct levels — national, bilateral, and multilateral.

Improving Our Own Merger Review Process

First, the national level. At the Antitrust Division we continue to examine our own internal procedures to find ways to make them work even better. One of Charles' first initiatives when he became AAG was to announce a merger review process reform initiative designed to improve the transparency of our decision-making and reduce the burden of our Second Requests. We have also in the last year initiated the practice of holding regular corporate counsel fora, where we get to hear directly from the private bar and in-house counsel in major companies their views of how the merger review process here and abroad is impacting their businesses and to solicit their ideas for improvements. We have held three such sessions here in the United States (two in Washington and one in New York) and three more in Brussels. We are also using the lull in the merger wave to review our policies in several important areas. We are examining our approach to evaluating and proving competitive effects (both coordinated and unilateral), to efficiencies, to vertical mergers, to remedies, and to gun-jumping. As we progress, we intend to continue sharing our thinking through speeches like the one Deborah Majoras gave on remedies in Houston in April. We invite you to give us your feedback on our merger process reform initiative, as well as your thinking about these important policy areas.

The U.S./EU Joint Merger Working Group

Second, the bilateral level. Last September, in the wake of GE/Honeywell, the European

Commission and we agreed to step up the work of our existing joint merger working group in order to promote convergence between U.S. and EU merger policy. During the past year, under the leadership of Anne Purcell, Claude Rakovsky and John Parisi, the working group has focused on developing a set of best practices for coordinating our merger reviews and on our differing policies toward so-called conglomerate mergers. Thanks to the working group's efforts just two weeks ago, we had what we believe was the best U.S./EU bilateral consultations ever. We had a highly substantive discussion of our policies toward conglomerate mergers. While we did not reach agreement on a common approach, we did succeed in identifying more clearly the issues that should be considered in evaluating such mergers. We also discussed the working group's best practices recommendations, which we expect to be able to release in the very near future. These best practices will serve not only to strengthen our already strong cooperation, but also will make our procedures for coordinating merger reviews more transparent than they have been in the past. Finally, we agreed that the merger working group would turn next to efficiencies and competitive effects in oligopolistic markets, an exercise that nicely complements the European Commission's current efforts to develop its own merger guidelines.

The ICN Merger Working Group

This brings me, finally, to the ICN Merger Working Group. This group includes representatives from roughly 20 competition authorities from many different geographic regions and differing stages of development. The working group also includes representatives from the OECD and from the legal, economic, academic and business communities in many of these jurisdictions, including the United States, Canada, and Europe. I would particularly single out Joe Winterscheid and Bill Blumenthal, who have been the private sector's real workhorses in this effort.

The ICN Merger Working Group has been concentrating on three distinct areas: merger notification and review procedures; the analytical framework for merger review; and investigative techniques for merger review. Each area has been assigned to its own subgroup. We expect to have important progress to announce in all three areas following the first annual ICN conference, in late September in Naples.

Notification and Procedures subgroup

The Merger Notification and Procedures subgroup, chaired by the FTC's Randy Tritell, has largely completed three major projects.

The first was to develop a set of guiding principles for merger notification and review. Randy's subgroup has proposed eight principles around which a merger review regime should be built:

- sovereignty;
- transparency;
- non-discrimination on the basis of nationality;
- procedural fairness;
- efficient, timely, and effective review;
- coordination;
- convergence; and
- protection of confidential information.

These proposed principles can be found on the ICN website.[4]

We believe that adherence to these guiding principles will make the merger review process more efficient and effective, while at the same time reducing delay and the investigative burden on merging firms. For example, enhancing transparency with respect to the policies, practices and procedures for merger notification and review would, among other things, reduce the cost of determining whether a transaction triggers a notification threshold -- often a difficult task in today's environment where many notification thresholds are imprecise and difficult to interpret. Similarly, ensuring decisions are made within a reasonable and determinable time frame will reduce the uncertainty and delay engendered by lengthy or indefinite review periods imposed by some jurisdictions.

Randy's second project was to develop recommended practices in the three areas that have been identified by the public and private sector representatives as the most pressing: (1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; and (3) flexibility in the timing of merger notification. Those are now complete and can also be found on the ICN website. As you will see when you visit the

website, Randy's group has used a format similar to the American Law Institute's Restatements of Law, namely, a very brief statement of the practice accompanied by commentary drafted by the subgroup. Let me review these recommended practices briefly.

Jurisdictional Nexus. These recommended practices provide that jurisdiction should be asserted only over those transactions that have a nexus with the jurisdiction concerned that meets an appropriate standard of materiality. This nexus should be based on activity within that jurisdiction as measured by reference to the activities of at least two parties to the transaction and/or of the acquired business in the local territory.

Notification Thresholds. The recommended practices provide that notification thresholds should be clear and understandable, should be based on objectively quantifiable criteria, and should be based on information that is readily accessible to the merging parties.

Timing of Notification. The recommended practices provide that parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction. They further provide that jurisdictions that prohibit closing while the competition agency reviews the transaction should not impose deadlines for notification and that jurisdictions that do not prohibit closing pending review should allow parties a reasonable time in which to file notification following a clearly defined triggering event.

We will propose that the full ICN membership endorse these principles and practices at the annual conference. We recognize that there may be some principles and practices that some jurisdictions may not be able to implement at this time. We will ask members nevertheless to

sign on to them as aspirational statements, even if their laws and regulations may not always embody them. We would consider our efforts a success if the ICN guiding principles and practices become well-accepted in the international arena, even if not all jurisdictions are able to accommodate their systems to them.

Finally, in an effort to make merger laws more transparent and accessible, Randy's group has asked all ICN members to compile their jurisdiction's merger-related laws and materials on dedicated web pages, which are being hyperlinked to the Merger Working Group page of the ICN website. Links to the webpages prepared by 13 agencies in the subgroup are already available on the ICN website. The subgroup has also developed a template to be used by ICN members on their own websites to highlight the key features of each ICN member's merger review systems, such as notification thresholds and review periods. The unique aspect of this project is that this template will be the work of the agencies themselves. These too are being linked to the ICN website, so that the public will have ready access to this information.

Beginning in October, we expect the Notification and Procedures subgroup to begin work on additional recommended practices, with a goal of completing that work by the next annual ICN conference. In addition, Randy's group will be working with the ICN members and with other international organizations, such as OECD and UNCTAD, to encourage implementation of these guiding principles and best practices. We encourage the private bar and business community to assist in this effort in their home countries.

Analytical Framework subgroup

The Analytical Framework subgroup, chaired by Dr. John Vickers, Director General of

the UK Office of Fair Trading, is developing a discussion paper and panel for the first annual ICN conference on the objectives and analytical framework for merger review. We expect that this subgroup's work will assist countries in designing and implementing their merger control laws.

While it has not yet been decided, this group may move on next year to develop a set of model merger guidelines that would assist those jurisdictions that have not yet developed their own guidelines. As many of you know, both the UK and the EU are currently in the process of developing merger guidelines, and we expect that their work could help to inform the work of John's group.

Investigative Techniques subgroup

The Investigative Techniques subgroup, chaired by Dr. Menachem Perlman, Deputy Director General and Chief Economist of the Israel Antitrust Authority, is planning an ICN international merger conference to be held in Washington in November. The conference -- inspired by the excellent series of cartel conferences held over the past three years in the U.S., the UK, and Canada -- will provide a venue for staff-level lawyers and economists from many antitrust agencies to meet and learn from one another's practical experiences in performing merger reviews, using a hypothetical case. Discussions will include the effective planning of a merger investigation, methods for gathering reliable evidence and its interpretation, the use of economists and the evaluation of economic evidence.

To gather information on the investigative techniques used in different jurisdictions, this subgroup has sent members a questionnaire on their experience using the various tools and

techniques to investigate mergers in their jurisdiction. Lessons learned at the November conference along with responses to the questionnaire will be used to develop a compendium for making merger investigations more efficient and effective. The compendium will present different practices, tools and techniques, their advantages and disadvantages in a manner that would be flexible and allow ICN members to adapt the guide to fit within their own laws, systems, and cultures.

Other Multilateral Initiatives

By focusing so much on ICN, I do not mean to slight the other international organizations that also are working hard on these issues, including the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), and the Organization for Economic Cooperation and Development (OECD). These organizations provide fine venues, each with a different focus, for promoting convergence in competition policy. In our view, the ICN, as the new kid on the block, should seek to build on what these organizations have done and are doing, and not to duplicate their work. We anticipate that the dialogue in these organizations will provide valuable input to ICN projects and we hope that they can help propagate the guiding principles and best practice recommendations that ICN develops.

Conclusion

As cross-border trade and investment grows, and as more and more jurisdictions enact antitrust laws, it becomes all the more critical that antitrust agencies impose no unnecessary bureaucratic roadblocks on the merger process and that antitrust authorities worldwide continue to achieve greater convergence. Of course, we do not expect to achieve convergence in the first year, or even the second or third years. Rather, ICN members expect to maintain a continuous, collegial, and focused dialogue and to achieve meaningful improvements in the practice of international antitrust enforcement, one step at a time, over both the short and long terms. In that way we can hopefully turn the multinational merger thicket into a well-manicured English garden.

1. Deputy Assistant Attorney General for International and Policy, Antitrust Division, U.S. Department of Justice. These remarks reflect my personal views and not necessarily those of the Department. I want to thank Ed Hand, Cynthia Lewis Lagdameo, Anne Purcell, and Randy Tritell for their contributions to this paper and, of course, my assistant, Gloria Jenkins.

2. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 74 (2002).

3. In March, in a speech in Capetown, South Africa, I identified six principles that I argued should guide merger reviews in our increasingly global economy (http://www.usdoj.gov/atr/public/speeches/10845.pdf). These six principles are: protect competition, not competitors; recognize the central role of efficiencies; base decisions on sound economics and hard evidence; realize that our predictive capabilities are limited; impose no unnecessary bureaucratic roadblocks; and be flexible and forward looking. This is the second in a series of speeches designed to flesh out each of these six principles.

4. The ICN website can be found at www.internationalcompetitionnetwork.org.