DEPARTMENT OF JUSTICE

ANTITRUST GOING GLOBAL IN THE 21ST CENTURY

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Good Morning. It is a pleasure to be here this morning and, particularly, to be in Cleveland, the city where I spent most of my years in private practice before moving to Washington in early 2001. I thank the Federal Bar Association and the American Corporation Counsel Association for giving me the opportunity to share with you the Antitrust Division's perspective on some significant global antitrust issues and efforts.

"Globalization" has become one of those words that has been used so much in the past decade that its use any more tends to elicit little more than yawns (except from traveling anti-globalization demonstrators who travel to Seattle, Washington, D.C., or wherever to protest outside of World Bank and IMF meetings). That we are experiencing globalization is such "a given" that it might seem that there is little left to discuss. Notwithstanding the seeming saturation of our vocabulary with the term, globalization continues to lead to significant developments in many facets of the law and the way we practice it, and antitrust plainly is among those facets.

There are now nearly 100 national and regional antitrust regimes in the world, with roughly 65 requiring some form of premerger notification.   While this is a positive development, at least in part resulting from our sustained efforts to encourage other countries to adopt and enforce antitrust laws, the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm some of the very competitive values that antitrust is meant to protect. In addition, as the number of antitrust regimes increases, the chances that there will be policy and enforcement divergences among enforcers also increases. As the nations of the world adopt and implement their own antitrust laws, we need to continue exercising leadership to prevent antitrust enforcement from being misused as a tool of industrial policy or protectionism, and thereby jeopardizing the strong public and political support for sound and vigorous antitrust enforcement, and to promote convergence around sound principles and practices.

The International Competition Network

Last October, we, along with the FTC, were among the lead jurisdictions to launch the International Competition Network ("ICN"), a global network of competition authorities focused exclusively on competition. The ICN has two goals: (1) to provide support for new competition agencies both in enforcing their laws and in building a strong competition culture in their countries, and (2) to promote greater convergence among these authorities by working together and with interested parties in the private sector to develop guiding principles and "best practices" to be endorsed and then implemented voluntarily. The ICN now includes 65 jurisdictions on six continents, representing over 70 percent of the world's GDP.

The ICN exists as a "virtual" network through which agency heads commission and guide the efforts of working groups focused on specific competition law issues. The working groups themselves are directed by government personnel, who receive input from a broad range of sources, including international organizations, academics, industry groups and leaders, and private practitioners. The working groups' recommendations will be considered by the ICN members, but implemented, if at all, through separate governmental initiatives. The ICN itself will not be a forum for reaching binding international agreements.

At the first annual ICN conference held a few weeks ago in Naples, Italy, I had the privilege of standing in for Assistant Attorney General, Charles James (who was unable to attend), to represent the Department of Justice and, together with the Federal Trade Commission, the United States. Nearly 60 antitrust agencies from around the world participated by sending at least one representative, including (in addition to the "usual suspects" from the United States, Canada, Europe, and Australia) representatives from nations such as Armenia, Croatia, the Czech Republic, Hungary, Korea, Latvia, Tunisia, and Zambia, many of their trips funded by nations with more robust budgets. At the conference, FTC Chairman Tim Muris enthusiastically declared, "We're winning!" As he went on the explain:

> Competition advocates have won many victories over the last few decades. We have largely won the intellectual debate: Economists and legal scholars around the globe now recognize the benefits of competition to consumers and to the economy as a whole. We are winning the legal debate: Courts now recognize the importance of efficiency and robust price competition in evaluating mergers and business conduct. Lastly, and perhaps most critically, we are starting to win the policy debate: From airlines to electricity to telecommunications, industry after industry has been privatized or liberalized. Legislators more frequently are turning to competition policy, rather than to more burdensome forms of regulation, to create a well-functioning marketplace.[1]

But, lest it be mistaken, Chairman Muris' victory cry signals not an ending point, but a starting point, that is the beginning of an enormous amount of effort that must be undertaken.

In that regard, ICN is off to a good start. The ICN initiated two major projects in the first year of its existence. First, under the leadership of Bill Kolasky, the Antitrust Division's Deputy Assistant Attorney General for International Enforcement, a Merger Working Group addressed several aspects of the difficult issues raised by multi-jurisdictional merger review, including merger notification and review procedures, the various analytical frameworks pursuant to which mergers are reviewed around the world, and investigative techniques. Roughly 65 jurisdictions have adopted merger notification regimes of some variety. Notification requirements have the

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[1]Prepared Remarks of Timothy J. Muris, "Creating a Culture of Competition: The Essential Role of Competition Advocacy," September 28, 2002 (*see* http://www.ftc.gov/speeches/ muris 020928naples.htm).

benefit of giving antitrust authorities the ability to identify, investigate, and potentially remedy problematic transactions before they close, protecting competition for the benefit of consumers. But, of course, I do not need to tell you that there are costs to merger notification — costs in determining where to notify, costs in notifying and providing information, and costs in increased uncertainty for the transaction. Given that the vast majority of transactions are either pro-competitive or competitively neutral, it is important that merger notification and review schemes not impose unnecessary costs or bureaucratic roadblocks that might deter efficient, pro-competitive mergers.

The ICN has taken an important first step in rationalizing the current thicket of multi-jurisdictional merger enforcement in a way that well-serves the competitive process worldwide. Under the leadership of a 13-nation subgroup, the participating nations in Naples adopted eight Guiding Principles For Merger Notification and Review and three Recommended Practices For Merger Notification Procedures, which the Merger Working Group had proposed. Consistent with the informal and project-oriented nature of the ICN, these principles and practices are aspirational and non-binding. Jurisdictions must now implement them through legislation, regulation, or changes in practice, as appropriate.

The eight Guiding Principles are:

1. Sovereignty. As a starting point, the members of the subgroup believed it important to recognize that "jurisdictions are sovereign with respect to the application of their own laws to mergers."

2. Transparency. In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures

involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.

3. Non-discrimination on the basis of nationality. In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.

4. Procedural fairness. Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the facts that support such concerns, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.

5. Efficient, timely, and effective review. The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame.

6. Coordination. Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.

7. Convergence. Recognizing that it will be left to each ICN member to implement change within their jurisdiction, "jurisdictions should seek convergence of merger review processes toward agreed best practices."

8. Protection of confidential information. Finally, it is both fair and in the interest of agencies and merging parties alike to maintain the confidentiality of information obtained during the course of an investigation. Accordingly, "the merger review process should provide for the protection of confidential information."[2]

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.

The three Recommended Practices are:

> (1.) Nexus to Reviewing Jurisdiction. Jurisdiction should only be asserted over those transactions that have an appropriate nexus with the jurisdiction concerned. Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification, and the nexus should be based on activity within the jurisdiction, as measured by reference to the activities of at least two parties to the transaction or of the acquired business in the local territory.

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[2] *See* http://www.internationalcompetitionnetwork.org/ICN%20NP%20Working%20 Group%20-%20Guiding%20Principles.pdf.

(2.) Notification Thresholds. Notification thresholds should be clear and understandable and should be based on objectively quantifiable criteria and information that is readily accessible to the merging parties.

(3.) Timing of Notification. Parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction. Jurisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.[3]

The Recommended Practices follow a format similar to that employed in American Law Institute documents, with a brief "black letter" Practice, followed by more extensive comments. These Practices are conceived as works in progress, and ICN members agreed to continue to refine the Practices during the coming year. The members will also develop additional Recommended Practices on several other subjects, with the intention of adopting them at the next annual conference in Mexico next summer.

The key to making both the Guiding Principles and Recommended Practices meaningful is implementation. At the Antitrust Division, as well as at the FTC, we plan to lead by example by publicizing the Principles and Practices as I am doing today and by comparing our own procedures to them. We urge the private sector, both in North America and abroad to draw the attention of foreign legislatures and opinion makers to these ICN achievements and to urge jurisdictions to take steps to implement the consensus reached in Naples. We recognize that there may be some principles and practices that some jurisdictions may not be able to implement

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[3]*See* http://www.internationalcompetitionnetwork.org/practices.pdf.

at this time. Nonetheless, 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 adapt their systems to them.

Also on the merger front, the ICN Merger Working Group is concentrating on investigative techniques for merger review -- and in November, we will host a conference in Washington for merger officials from dozens of countries, with the goal of increasing understanding and pursuing healthy convergence in the practical aspects of our various merger regimes — and the analytical framework for merger review. And, in an effort to make merger laws more transparent and accessible, the ICN is compiling each jurisdiction's merger-related laws and materials on dedicated web pages, which will be hyperlinked to the ICN website, so that the public will have ready access to this information.

With respect to the second ICN initiative, the head of the Mexican antitrust agency led a working group on competition advocacy, a subject that is particularly important to developing countries and countries in transition. This working group produced a comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unprecedented effort that should form the basis, among other things, for deriving recommended practices for competition advocacy.

ICN has already begun new projects, including a Capacity Building and Competition Policy Implementation project that will study the needs of developing countries and the technical assistance that developed nations might provide.

Cooperation with the European Union

In addition to our significant participation in ICN, our bilateral efforts in the international arena continue, particularly with the European Union. There have been limited occasions when we and the EU have disagreed on the appropriate resolution of an enforcement matter. Significantly, our divergence on the GE/Honeywell merger has served as a catalyst for making our relationship with the EU more substantive and more action-oriented than ever before. As a result, both sides agree that the relationship has been strengthened and improved. One vehicle we are using to pursue our shared goals is our U.S.-EU Merger Working Group, which we reinvigorated last September. The Working Group is examining several issues, including merger process and timing, the analysis of conglomerate mergers, and the role of efficiencies in merger analysis. Through this Working Group, we have been developing "best practices" for coordinating merger investigations subject to both U.S. and EU review, and expect to announce agreement on such practices in the near future. These best practices are designed to minimize the risk of divergent outcomes, facilitate coherence and compatibility in remedies, enhance investigative efficiency, and reduce burdens on those subject to multiple antitrust reviews.

Antitrust Division Initiatives

Lest I leave you with the mistaken impression that we believe that the U.S. merger review process is perfect, I will quickly mention two Division initiatives that we have undertaken in an effort to improve our own internal processes. First, I would like to say a few words on the procedural front and highlight our merger review process. Assistant Attorney General Charles James has made it a top priority to make our merger review process more efficient and manageable for the Division and for all parties in all industries, including the health care sector. That effort began with announcement of the Division's Merger Review Process Initiative, which established a number of methods for making the initial 15- or 30-day waiting period more productive, as well as streamlining both the Second Requests that are issued and the staff's assembling and analysis of information post-Second Request. The procedures outlined in the Merger Review Process Initiative are designed to encourage Division staff and the merging parties to more quickly identify critical legal, factual and economic issues regarding proposed mergers, facilitate more efficient and more focused investigative discovery, and provide for an effective process for the evaluation of evidence. A key component of the process is that staff are authorized and encouraged to actively tailor investigative plans and strategies according to each proposed transaction, in lieu of reliance on standardized procedures or models. While the dearth in merger activity has led to only limited experimentation with this Initiative, the early feedback, both from staff and parties, has been quite positive. We hope that parties will continue to work cooperatively with us.

Second, as an important follow-on initiative to improve our merger review procedures, the Division is now in the process of disseminating to its staff "best practices" for investigative techniques that have proven to be particularly effective in past merger investigations. We believe that this initiative will enable staff in future merger investigations to draw upon the collective experience of the Division, adopt the best investigative techniques, and continue to improve upon them.

Antitrust Principles

As we engage in efforts at convergence with other competition authorities, and as we guard against the use of antitrust laws as tools of industrial or nationalist policies, it is most important that we reaffirm our own principles of sound antitrust enforcement:

- Protect competition, not competitors.
- Recognize the central role of efficiencies in antitrust analysis.
- Base decisions on sound economics and hard evidence.
- Acknowledge the limits to our predictive capabilities, remaining flexible and forward-looking.
- Impose no unnecessary bureaucratic costs.

Former Assistant Attorney General Thurman Arnold said, more than 60 years ago, that "the economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that someone may go bankrupt. They do not contemplate a game in which everyone who plays can win."[4] Forty years later, federal Court of Appeals Judge Frank Easterbrook added: "Competition is a ruthless process . . . [T]he antitrust laws are not a balm for rivals' wounds."[5] You may recall that in the 1960's, the United States went through the Great Structural Age of antitrust law and when, from 1965 to 1975, the United States experienced a wave of conglomerate mergers, there developed considerable political concern about a "rising tide of concentration" resulting from them. There is no question that many in the United States believed

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[4]*Quoted by* Jack Brooks, Address at Symposium in Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division (Jan. 10, 1994).

[5]*Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.,* 784 F. 2d 1325, 1338 (7th Cir. 1986).

that "big is bad." In response to the concerns, the U.S. antitrust agencies challenged a number of conglomerate mergers under various theories, such as entrenchment.[6] Entrenchment theory was rooted in three primary concerns: (1) that the merger would create a financially strong company or "deep pocket" that would discourage entry by other firms, (2) that the financially strong new firm would engage in predatory conduct, and (3) that the merger would enable the firm to achieve efficiencies not available to other firms.

Significantly (and fortunately), the courts' application of entrenchment theory led legal and economics scholars to critically examine the theory, resulting in its ultimate demise in the United States. In their Antitrust Law treatise, Phillip Areeda and Donald Turner showed that to condemn conglomerate mergers because they might enable the merged firm to capture cost savings and other efficiencies, thus giving it a competitive advantage over other firms, is contrary to sound antitrust policy, because cost savings are socially desirable.[7] "Antitrust law promotes competition because it is efficient."[8] Robert Bork, in The Antitrust Paradox,[9] criticized the Supreme Court and the FTC for condemning a merger on the basis of efficiencies. Far from "frightening smaller companies into semiparalysis," Bork argued that mergers that generate efficiencies will force smaller competitors "to improve, rather than worsen, their competitive performance," which benefits consumers.[10]

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[6]*See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

[7]Phillip Areeda and Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1103c at 9 (1978).

[8] *Id.*

[9]Robert H. Bork, *The Antitrust Paradox*, at 252 (1978).

[10]*Id.* at 256-57.

Ultimately, the United States adopted greater economic rigor and a focus on consumer welfare and efficiency in antitrust analysis. In a complete rewrite of the 1968 Merger Guidelines, in 1982, the Antitrust Division under the leadership of Bill Baxter eliminated entrenchment as a basis for challenging non-horizontal mergers. Although the Supreme Court never revisited entrenchment theory or explicitly overruled cases like Procter & Gamble, its subsequent antitrust decisions make it unlikely that the Court will again apply such theories.[11]

Notwithstanding these developments in antitrust case law and policy, entrenchment and similar theories with primarily competitor-protecting rationales, such as monopoly leveraging, are quietly reemerging in advocacy, primarily for strategic reasons, even in the United States. As the economy is developing today, and as the stakes of every business investment and strategy become larger and larger, firms -- even if they may publicly decry regulation -- are driven to seek protection from governments. This is true particularly of firms in industries that previously were regulated but now turn to antitrust authorities to replace industry-specific regulators. It also is especially true for competitors in high-tech markets in the so-called "New Economy." These markets, and particularly those characterized by network efficiencies, tend to raise competitive concerns that are more vertical or complementary than horizontal. And as these market mature,

[11]*See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself..."]); *Montfort of Colorado, Inc. v. Cargill, Inc.*, 479 U.S. 104 (1986) ("[C]ompetition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'").

their potential for entry, growth, and success no longer seems limitless as it did to some in the late 1990's. In addition, the economic significance of installed base and network efficiencies has become more apparent. So, firms that only a few years ago perceived the antitrust laws as too static to be applied to rapidly moving markets and too stifling to encourage innovation are now turning to antitrust enforcers for help.

While we have always needed and appreciated receiving assistance on the facts from customers, competitors, and other third parties, we have to test the facts and analyze them according to the antitrust laws and sound economic principles. And, amid arguments made by competitors today are clear remnants of entrenchment and like theories. We believe this is a potentially dangerous development. The balancing act for antitrust policy is to protect the competitive process without seeking to regulate market outcomes, and certainly without punishing success. We challenge horizontal mergers because they eliminate a competitor and may thereby enable the merged firm to restrict output and raise price. Similarly, we challenge vertical mergers that eliminate a key input, supplier, or customer where doing so may unreasonably foreclose competition. We do not protect competitors from mergers that will make the merged firm more efficient, even if they fear they may as a result be forced from the market, because competition is a means to an end, and not an end in itself. As former Treasury Secretary Larry Summers reminded us at last year's ABA Antitrust Section Spring Meeting: "The goal is efficiency, not competition. The ultimate goal is that there be efficiency."[12] Production and transactional efficiencies benefit consumers by lowering the costs of goods and services or by

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[12]Lawrence H. Summers, *Competition Policy in the New Economy*, 69 Antitrust L.J. 353, 358 (2001).

increasing their value. Allocative efficiencies benefit consumers by moving the allocation of scarce resources toward a situation where no rearrangement of those assets would enhance welfare.

Recognizing that efficiency is the ultimate goal should make us very cautious about adopting a merger policy that sacrifices obvious efficiencies in the name of preserving less efficient competitors. At a minimum, before applying such a policy, we should make certain that we have a high degree of confidence that the trade-off we are making will ultimately benefit consumers. We are humble about our ability to make these judgments, which would necessarily involve predictions far out into the future. We have more confidence in the self-correcting nature of markets. This confidence is especially great when the markets are populated by strong rivals and strong buyers, who will usually find ways to protect themselves from an aspiring monopolist. Our strong belief in markets and our humility in our own predictive abilities lead us to be skeptical of claims by rivals that a merger will lead to their ultimate demise and to demand strong empirical proof before we will accept such claims.

Whether or not you consider certain theories, like entrenchment, portfolio effects, or monopoly leveraging, to be bad may depend on where you sit, i.e., whether you are a complaining competitor or the object of a competitor complaint. But I submit that acting according to the sound principles discussed above — rather than any one-shot, help-me-today theories sponsored by concerned competitors — is not only best good for consumers, but also benefits all firms in the long run. Court decisions and law enforcement decisions for which a firm successfully lobbies today are precedential, and any laws affecting competition that are passed by Congress are permanent, at least for some period of time. Consequently, no new law or precedent for which a firm successfully lobbies will be directed at just that firm's competitor just one time. Eventually, the tables will turn and firms that once lobbied for an action may be looking down the barrel of it.

Compliance

Given my audience here today, I will say a few words on compliance. In this environment in which allegations of corporate fraud by officers of once respected and successful corporations have rocked the global business world, I have little doubt that your Legal Departments are heavily focused on compliance issues and programs. Do not leave out antitrust compliance! That would be a poor business decision. Do not forget that the largest fine to date in Department of Justice history was levied in an antitrust case — $500 million paid by Roche Ltd. of Switzerland for its participation in the vitamins cartel.

Over the last five years, the Antitrust Division has collected $2 billion in fines and secured jail terms of more than one year for 20 executives, with the maximum sentence being for 10 years. Among the prosecutions were 16 major multinational cartels, together affecting over $55 billion in commerce. But despite the publicity these cases have generated, our criminal staff lawyers tell us that even large companies rarely have effective antitrust compliance programs. Yet, the need for effective programs has never been greater. You need a program that will, first and foremost, prevent violations and, if and when it fails, that will detect violations as soon as possible. To be effective, the program needs the commitment of the company's officers to a culture that respects competition and will not tolerate law-breakers. And, this culture and the compliance program to protect the culture must be instituted worldwide. With 100 and counting competition authorities out there, there are no safe havens. The United States is no longer the only jurisdiction to be concerned about.