DEPARTMENT OF JUSTICE

GLOBAL COMPETITION: PROSPECTS FOR CONVERGENCE AND COOPERATION

Remarks by

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Thank you, Tad. This is, in a sense, my valedictory, so I hope I do not go on too long. Tad asked me to extend my prepared remarks to focus more on the prospects for international convergence and cooperation. In response, I would say that the prospects are very good. Let me explain why.

Looking back

I'd like to spend just a moment reflecting on how far we have come before I turn to where we go from here. I began at the Division just one week after 9/11. My very first trip was to Ottawa at the end of that week to speak at the annual meeting of the Canadian Bar Association. En route I flew over the remains of the World Trade Center, and when I arrived I was deeply moved by the outpouring of support from our Canadian friends, demonstrated most visibly by the thousands of floral wreaths they had placed before the U.S. embassy. It was that experience that prompted me to say at the outset of my remarks the next morning that as we talk about our differences over matters like GE/Honeywell, we need to remember that much more unites us than divides us.

My second trip was to Paris for the OECD, where I had my famous (or should I say infamous) first encounter with Commissioner Monti, an encounter that somehow made it onto page one of the Financial Times. The brouhaha over GE/Honeywell obscured something much more important that took place in Paris that week — the inaugural meeting of the OECD Global Forum on Competition, to which OECD invited some 20 developing countries to join the 30 OECD members for a serious substantive discussion of competition policy and institutions. It also obscured something else equally important — a meeting of fifteen competition agencies from around the world at which we reached agreement on the basic framework for a new International Competition Network. It was these two developments, coupled with a very healthy

debate over the use of portfolio effects as a theory for challenging non-horizontal mergers, that prompted me at the end of the week to comment that, like Dean Acheson after World War II, I felt I had just had the privilege to have been present at the creation.

Since then, we have made more progress toward building a sound institutional framework for promoting cooperation and convergence among competition authorities worldwide than any of us expected last fall. We have the ICN up and running, with more than 75 members worldwide. We had a very successful initial annual conference in Naples, and we have made concrete progress in developing guiding principles and recommended best practices for multinational merger notification, thereby helping to reduce unnecessary transactions costs on efficient mergers. Next year, ICN will turn increased attention to assisting new competition authorities in designing effective competition regimes, what we call "capacity building."

We have also improved our working relationship with the EU, and have made substantial progress toward greater convergence and cooperation at the bilateral level. Our merger working group has had detailed discussions of our approaches to conglomerate mergers and to efficiencies, and has produced a set of best practices for coordinating our merger reviews. These best practices largely institutionalize existing best practices, making them more transparent so they can be more widely used. But they also contain two important innovations. The first is that we will provide parties an opportunity to meet with both the FTC or DOJ and the European Commission Merger Task Force jointly prior to initial notification to set a schedule for the investigation and identify issues. The second is that we will have high-level consultations between senior decision-makers from the very outset of a Phase II investigation.

Separately, both the European Commission and the European courts have taken important steps toward responding to many of the concerns about the European merger review process that we have heard from our business community. The Court of First Instance has reversed the Commission in three cases, in two of which the appeals were decided within one year under the new fast track procedure. These decisions go a long way toward dispelling concerns about a lack of effective judicial review of Commission merger decisions.

Commissioner Monti has responded by announcing that he is putting his new Director General of Competition, Phillip Lowe, in charge of the merger review process. Phillip, who served previously as head of the Merger Task Force, is fully qualified to, and I'm sure will, exercise the kind of hands-on, senior-level review over case determinations that the heads of our competition agencies here in the U.S. do. Commissioner Monti has also announced that he plans to hire a new chief economist, to head an independent economics unit, which will bring more rigorous economic analysis to the Commission's decision-making. This is a critical step. The creation of an effective and independent economics unit is, as Oliver Williamson reminded us at our Twentieth Anniversary Merger Guidelines celebration last June,[2] one of Don Turner's lasting legacies to the Division.

Many other fora are providing opportunities for an in-depth substantive global conversation on competition policy. I have already mentioned the OECD. The WTO has also taken up the issue of competition and has begun discussing the feasibility and desirability of including competition disciplines in the WTO agreement, especially a prohibition of hard-core cartels. UNCTAD, too, has stepped up its educational efforts in this area, holding a series of regional seminars around the world. The presence of our guest from China, Wang Lei, is visible

evidence of the growing global recognition of the importance of competition law and policy in making free market economies work.

Looking ahead

So where do we go from here? As my remarks indicate, I believe we now largely have in place the institutional framework we need to promote greater cooperation and convergence among competition authorities worldwide. The final piece will be whatever emerges from WTO after the next ministerial in Cancun this fall. The question now is how we use that framework.

I would urge that the first thing we do is to try to reach agreement on the objectives of competition law and on a set of guiding principles for achieving those objectives. I was just in the Netherlands last week speaking at a seminar on convergence sponsored by the Dutch Competition Authority. At that seminar, Mike Weiss, who does the field work for peer reviews of OECD member competition authorities, gave a very thoughtful speech in which he outlined all the different flavors of competition policy we find around the world. As he explained, in Europe itself, there is considerable diversity between the Anglo-Saxon countries with their common law traditions and the continent, where corporatist and dirigiste traditions have led to very different approaches to competition law. In Asia, we see many countries where competition policy is still equated with fair trade. This results in decisions designed more to protect small competitors and maintain a fragmented market structure rather than to promote efficiency. And in many developing countries we find governments questioning the value of competition — worrying that it will expose their small local enterprises to extinction from large multinationals.

To those of you who have practiced and studied antitrust in the United States as long as I have, this will sound familiar. The picture was not too dissimilar here 25 years ago when we

lived in a world in which the Supreme Court could write, as it did in *Brown Shoe*, that Congress was willing to sacrifice efficiency to preserve small, locally-owned businesses; in which the Robinson-Patman Act was still being enforced; and in which virtually all vertical restraints were per se unlawful.

We have come a long way in the last 25 years. We have done so, I would argue, as a result of three critical steps.

- First, by reaching in agreement on the objectives of antitrust. We all now agree that the sole objective of antitrust is consumer welfare, which we express by saying that the purpose of the antitrust laws is to protect competition, not competitors. This means that we should not use the antitrust laws to outlaw efficiency-enhancing transactions, agreements and conduct even if they harm rivals.
- Second, by incorporating sound economics into our antitrust analysis. I have already mentioned the importance of having professional economists integrated into our decision-making process.
- And third, by developing a sound analytical framework for applying our antitrust laws. We need to remember that while economics helps inform our decision-making, our laws can never precisely replicate the economists' views. Unlike economics, law is an administrative system, and we need tests that are administrable even if they sometimes reach the wrong result. But because markets tend to be self-correcting, we should always tilt in favor of type II (false negative) error and should intervene only when we are confident that the conduct

in question will harm consumers.

How can we apply these experience to achieving greater convergence worldwide? I would suggest five steps. First, we need to discuss in all the fora available to us the objectives of competition policy and we need to convince, not only other competition authorities, but their constituencies of the value of sound competition policy in promoting economic growth. Misguided competition policy, designed to maintain fragmented markets or protect small business, retards growth and undermines faith in free markets. We need to agree, therefore, that the sole objective of competition policy is consumer welfare. This means, as one of our senior economists Ken Heyer put it, that "efficiency is the goal, competition is the process." I tried to begin this dialogue in a speech in the Netherlands last week, which was entitled "What Is Competition?"and is now available on our website,[3] and I plan to continue it in Japan and Korea next week.

Second, we need to develop a set of guiding principles and an analytical framework for achieving our objectives. To begin with, we need a definition of competition that is consistent with our objectives. I proposed in the Netherlands that we define competition not in terms of rivalry, but as "the process by which market forces operate freely to assure that society's resources are employed as efficiently as possible to maximize total economic welfare."[4] Applying this definition, we should all agree that our number one priority should be stamping out hard-core cartels, which are the very antithesis of competition, and which inflict serious efficiency losses on our economies. We should also agree that since our goal is to protect competition, not competitors, we should not interfere with transactions or conduct that will be efficiency-enhancing and that will deliver better products at lower prices to consumers, even if it

means that rivals will go out of business. I have set out a number of additional guiding principles in a series of speeches around the world,[5] and I hope these will gain traction as time goes on.

Third, we need to give competition agencies the resources they need to enforce these laws consistently with these principles. One of the major forces for convergence today are our universities, both in the United States and Europe, which train many of the economists and lawyers who end up leading competition authorities in smaller economies. Another force is the technical assistance that we in North America and Europe provide to these smaller economies around the world. But these can work only if agencies have the resources to hire and retain good career civil servants.

Fourth, the US and Europe need to get their act together. Countries around the world look to the U.S. and Europe for models as to how to enforce their competition laws. To the extent our approaches diverge, that can only breed chaos and confusion. There may be sound reasons for divergence in some areas. For example, in the area of abuse of dominance, Europe has many more former state-owned monopolies, so different policies may be necessary in order to allow market forces to operate. But where we have such differences, we need to clearly articulate the reasons for them. For this reason, we need a much more open transatlantic dialogue over competition law and policy, so that we can better understand the reasons for our differences. We can then decide whether to move closer together and, if we decide to continue to pursue divergent approaches, can better explain our reasons for doing so.

Fifth, we should strive to build strong regional networks. While seeking convergence among 100 competition authorities sounds a daunting task, it becomes much less so when we

organize those authorities by region. More than thirty of these authorities are in Europe, where 25 of them will soon be members of the European Union. The current EU member country competition authorities already are making good progress toward developing a strong regional network among themselves. In North America, we have only three jurisdictions, which already have strong bilateral relationships. In other parts of the world, where competition is newer, regional networks are just beginning to form. Going forward, I would urge that we spend a large part of our cooperation/convergence efforts in building and strengthening these regional networks under the larger ICN umbrella. Countries within regions are united by common geography and often a common language and they are often at similar stages of economic development and therefore face similar competition problems. Working together, they should be able to pool resources to provide more support and assistance to one another in enforcing their laws and in building a strong competition culture in their regions.

Conclusion

I hope I've answered Tad's question. I think the prospects for greater international convergence and cooperation in the enforcement of our competition laws are very good, but that we have a lot of work before us. I hope all of you will either stay or become involved in this effort, and will work with us to achieve our ambitions.

1. Deputy Assistant Attorney General for International Enforcement, Antitrust Division, U.S. Department of Justice. These remarks reflect my personal views and not necessarily those of the Department. I want to thank Anne Purcell, Christina Akers and Gloria Jenkins for their contributions. Any mistakes are, of course, my own.

2. *See*, William, Oliver E., "The Merger Guidelines of the U.S. Department of Justice: In Perspective" Presented at the 20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine (June 10, 2002) (transcript available on U.S. Department of Justice Antitrust Division web site, www.usdoj.gov/atr/hmerger/11257.htm).

3. *See, e.g.*, William J. Kolasky, “What is Competition?,” Address at the Netherlands Ministry of Economic Affairs, (October 28, 2002) (transcript available on U.S. Department of Justice Antitrust Division web site, www.atrnet.gov).

4. *Id*.

5. *See, e.g.*, William J. Kolasky, “Comparative Merger Control Analysis: Six Guiding Principles for Antitrust Agencies — New and Old,” Address at the International Bar Association Conference on Competition Law and Policy in a Global Context, (March 18, 2002) (transcript available on U.S. Department of Justice Antitrust Division web site, www.atrnet.gov).