



# DEPARTMENT OF JUSTICE

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## INTERNATIONAL ANTITRUST IN THE BUSH ADMINISTRATION

Address by

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Good morning ladies and gentlemen. It is a great pleasure to be here with you today and to be on the same panel with my colleagues Alex Schaub, Fernando Sanchez Ugarte, and Konrad von Finckenstein. My special thanks go to you, Konrad, for inviting me to talk about my perspectives on the future direction of international antitrust enforcement, which in many ways are similar to the views you expressed last May in Vancouver. I am particularly pleased to be discussing my views on this important subject here in Canada because the U.S. and Canada have been working together on antitrust matters longer than anyone else.

Before turning to the future of international antitrust, I want to first reflect on how far we have come in the past decade. The close bilateral cooperation on investigations that we take for granted now is almost entirely the result of progress we have made in only the past ten years. I would like to concentrate this morning on two of our most successful collaborations — our cooperation with Canada on anti-cartel enforcement and our cooperation with the European Commission on merger enforcement. By focusing on Canada and the E.U. this morning, I do not in any way mean to downplay the very effective cooperative relationships that we have developed with a number of other competition authorities, including Germany, Japan, and, most recently, Mexico. However, the relationships with Canada and the E.U. that I am about to describe are among the most successful and can serve as useful models.

### **United States-Canada**

Let me begin by describing our great relationship with our friends to the North. Although Canada and the U.S. have been dealing with one another on antitrust matters since the 1940s, the

close and cooperative relationship that the U.S. and Canadian antitrust authorities enjoy today occurred largely as a result of Canada's adoption in 1986 of a new Competition Act. For the past dozen or so years, we have successfully moved away from the limited conflict-avoidance approach of the early days and towards a more constructive relationship aimed at supporting each other's common antitrust enforcement objectives.

These efforts were advanced considerably in 1990 when the U.S.-Canada Mutual Legal Assistance Treaty entered into effect. Mutual Legal Assistance Treaties — “MLATs” — are agreements that provide generally for assistance in criminal law enforcement, including obtaining evidence and sharing information. Because both the U.S. and Canada prosecute hardcore cartels as criminal offenses, my good friend and then-Assistant Attorney General, Jim Rill, and Howard Wetston, then-Director of Investigations and Research at the Canadian Competition Bureau, recognized that the MLAT presented an opportunity to bring antitrust cooperation to a new level. They began a serious dialogue on how the two agencies could utilize the MLAT to prosecute cartels involving both nations and then put their ideas into action.

It is a simple fact that in this day and age, cartels often cross national borders. Members of the cartel are based in different countries, meetings frequently take place in more than one country, witnesses may be scattered around the world, and documentary evidence of criminal antitrust activity may be located in multiple jurisdictions. Accordingly, effective prosecution of an international cartel requires the ability to gather evidence located in several different countries. Because the U.S. and Canada have similar views on the criminality of cartel behavior, and now, an effective mechanism for coordinating investigations, both countries have become more effective in attacking conspiracies that straddle the border.

The U.S. and Canada have cooperated in a wide range of criminal investigations, including the plastic dinnerware, graphite electrodes, and vitamins investigations which resulted in U.S. fines exceeding US\$1.3 billion and commensurate Canadian fines of more than CDN\$115 million. Our cooperation has included simultaneously executed search warrants, as well as searches by one authority on behalf of the other. In many of these investigations, we and our Canadian counterparts would have found it far more difficult, if not impossible, to conclude our investigations successfully without the other's assistance. I think it is safe to say that both nations, and especially the consumers of both countries, have benefitted enormously from our efforts.

As an aside, our current antitrust cooperation agreement with Canada still does not permit us to share confidential information to the full extent that would be permitted if we were to enter an agreement of the type contemplated under our International Antitrust Enforcement Assistance Act (IAEAA), which allows the U.S. and foreign antitrust agencies to provide mutual legal assistance to one another and to share certain types of confidential information. However, we are very encouraged that Canada has now proposed amending its law to authorize these types of arrangements in civil matters and look forward to the prospect of deepening our current cooperative relationship with an IAEAA-type agreement in the near future.

### **United States-European Union**

At just about the same time our relationship with Canada entered into a new phase with the MLAT's entry into force, the U.S. and the E.U. began to explore developing a deeper cooperative relationship in the area of antitrust. Our relationship with the E.U. celebrates an

important milestone early next week — the tenth anniversary of the signing of the first antitrust cooperation agreement between the U.S. and E.U.

The U.S.-E.U. 1991 cooperation agreement was a European initiative, first proposed by Sir Leon Brittan, in a meeting with former Assistant Attorney General Jim Rill. The U.S. agreed from the beginning that an agreement was called for because it was clear that the growth of European antitrust enforcement — particularly after the EC Merger Regulation went into effect in 1990 — inevitably would mean that we would examine many of the same merger transactions and non-merger conduct.

That certainly has been the case, especially, as anticipated, in the merger area. Virtually any large transaction involving international businesses is likely to be subject to review in both the U.S. and under the European Merger Regulation. And in cases in which the U.S. and E.U. are reviewing the same transaction, both jurisdictions consider themselves to have a large stake in reaching non-conflicting outcomes, whenever possible.

By notifying, consulting, and coordinating under our cooperation agreement, we have managed to avoid inconsistent results in the vast majority of cases. Indeed, the close collaboration on facts, analysis and remedies between the Antitrust Division and the European Commission in the *Sprint/MCI*, *Alcoa/Reynolds*, *MCI/WorldCom*, and *Dresser/Halliburton* investigations stand out as cases in point. And, although we reached different conclusions in *GE/Honeywell*, which I will discuss more in a moment, it is essential to put *GE/Honeywell* in the context of the many other cases that were resolved without any conflict whatsoever.

While it is important to recognize that U.S.-E.U. cooperation is not limited to mergers, it is mergers where cooperation between the U.S. and E.U. has become most developed and

effective. And it is the merger program that perhaps provides the best indication of what we can accomplish both with respect to U.S.-E.U. relations in other areas of antitrust enforcement and with respect to relations between other national enforcement agencies.

### **Cooperation and Convergence**

One product of bilateral cooperation has been a fair amount of substantive convergence. With respect to bilateral cooperation on individual cases, I would not be the first to observe that, despite certain differences in our respective antitrust laws, we have tended to reach the same set of conclusions on a matter when we become fully engaged with one another on the analysis and are working from a common set of facts. The importance of reaching consistent outcomes is obvious. Besides imposing substantial costs on the merging firms involved, divergent outcomes undermine the public's confidence in the work we do and risk politicizing antitrust — both of which can have adverse effects on sound and predictable antitrust enforcement.

But bilateral cooperation on individual investigations can only go so far, as demonstrated recently by *GE/Honeywell*, where the Antitrust Division cleared the merger (subject to certain divestitures) but the E.U. blocked it. The U.S. and the E.U. reached inconsistent decisions despite a tremendous amount of coordination between the two antitrust agencies over several months. In fact, it is hard for me to imagine how we could have coordinated more. We held extensive meetings between the investigative staffs of both competition authorities in both Washington and Brussels. The European Commission staff had access to our economic expert. There were a series of substantive discussions between our Director of Merger Enforcement and Alex Schaub. Debbie Herman, my Deputy Assistant Attorney General for Litigation, met

personally with the Commission's decision-makers to discuss the case, and, once confirmed by the Senate, I had a number of telephone consultations. Moreover, both jurisdictions were analyzing identical product and geographic markets and largely had access to the same facts.

The different results in *GE/Honeywell*, therefore, were not attributable to failings on the part of the two agencies to coordinate on the facts and analysis. Rather, they flowed from a substantive difference between the two agencies on the proper scope of antitrust enforcement. The Antitrust Division concluded that the merged firm would have offered better products and services at more attractive prices than either company could offer on its own, which, in our view, is the essence of competition. The Commission, on the other hand, focused on how the merger would affect competitors, essentially concluding that the efficiencies and lower prices that would flow from the transaction were ultimately anticompetitive. It is essential that we not minimize the significance of this difference. In our view, the so-called "portfolio effects" analysis employed by the E.C. is antithetical to the goals of antitrust law enforcement. This is the type of analytical difference that may not be readily resolvable by consultations on individual cases alone. That should not, however, stop us from recognizing the many areas in which we do agree, trying to cooperate even more, and attempting to achieve greater procedural and substantive convergence.

Indeed, a strong bilateral relationship can go beyond coordinating on particular cases and can instead lead to substantive convergence. For instance, now that most antitrust laws prohibit cartel activity, a number of jurisdictions, seeing the U.S.'s enforcement successes, have begun to recognize that a properly conceived leniency policy is a necessary law-enforcement tool for combating cartels effectively. In that regard, last year, Canada brought its policies closer to those

of the U.S. by permitting automatic leniency in certain circumstances. Similarly, the E.C. has in recent weeks proposed to revise its leniency program to guarantee complete immunity from fines where certain conditions are met. All three jurisdictions now recognize the importance of a system that encourages the disclosure of cartels.

Bilateral efforts at convergence, as well as cooperation on individual cases, will, of course, always be a critical component of effective international antitrust enforcement, but, going forward, they will not be enough. The rapid globalization of business means that antitrust enforcement cannot remain simply a concern of a handful of highly developed economies. To achieve truly global convergence and cooperation, multilateral efforts must supplement the existing bilateral ties.

To take merger enforcement as an example, well over 60 jurisdictions around the world already engage in merger review, and this number is likely to increase. Moreover, these enforcement agencies do not review simply local matters. Rather, because markets and companies are becoming increasingly global in reach, these enforcement agencies are more and more finding themselves looking at mergers that are also being reviewed by their counterparts around the world.

Needless to say, as transactions are reviewed by ever more enforcement authorities, the substantive risks and procedural difficulties have the potential to increase dramatically. On the substantive side, absent convergence as well as cooperation, the potential for inconsistent outcomes becomes more and more real. And on the procedural side, the burdens, costs, and uncertainties associated with filing in, and dealing with, an ever larger number of jurisdictions are an understandable concern to the international business community. The mere proliferation of



agencies reviewing a transaction can have unintended side effects — for instance, discouraging or delaying an efficient transaction. These are not problems with an easy or obvious solution and certainly are not ones that can be resolved unilaterally or strictly through bilateral efforts. Moreover, the problems are not limited to the merger area, although mergers may be the most visible example.

### **Global Competition Initiative**

A number of organizations have already begun to address some of these issues on a multilateral basis. The OECD Competition Law and Policy Committee has had a critical role over the years in building consensus on a wide range of antitrust and competition policy subjects. UNCTAD's Intergovernmental Group of Experts on Competition Law, as well as the WTO Working Group on Trade and Competition Policy, have each played valuable roles as multilateral educational fora. These groups serve important functions, but their broad mandates make them unsuitable to deal adequately with the practical law enforcement issues raised by the internationalization of antitrust. What is needed is another forum, focused specifically on the substantive and procedural issues surrounding international antitrust enforcement.

To the extent that the Global Competition Initiative (GCI) can be this new and different forum, I fully support it. That is why I have devoted much time during my first few months at the Antitrust Division thinking about GCI and consulting with Mario Monti, Alex Schaub, Konrad von Finckenstein, and others about getting GCI off the ground.

My views on GCI are simple. It should be a forum for antitrust agencies from developed and developing countries to formulate and develop consensus on proposals for procedural and

substantive convergence in antitrust enforcement. Because our ultimate goal is convergence, I believe GCI's general approach to issues should be as practical and concrete as possible and that we should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement. Unlike OECD, WTO, and UNCTAD, the GCI would not deal with trade issues, or even non-antitrust issues that could reasonably be included in the rubric of "competition policy." It would be all antitrust, all the time.

I would like GCI meetings to provide a structured dialogue by focusing on only two or three projects at a time. These projects would be selected sufficiently far in advance in order to permit meaningful participation by all participants. Each project would have a work plan, which would be submitted for evaluation and approval to the GCI as a whole. These work plans would include timetables, sources of information to be consulted or developed, and desired work product. The leadership and staffing of each project would also be determined by the work plan.

The projects would be aimed at leading to non-binding general guidelines or "best practice" recommendations. Where the GCI reaches consensus on particular recommendations, it would be left to governments to implement them voluntarily, through unilateral, bilateral or multilateral arrangements, as appropriate.

In order to ensure that the GCI will play an effective role in contributing to antitrust convergence, antitrust agencies would need to commit to being represented by policy-level officials at GCI meetings to the maximum extent possible, but GCI would not be a "bricks and mortar" organization with a permanent secretariat.

A number of people — including some of you here today — have asked me about my views on the important question of the role of the private sector in GCI. Because the goal of GCI

is to promote convergence in government enforcement policies, I do not believe it would be appropriate for the private sector to be involved in the decision-making functions of GCI. I do, however, hope that the private sector will play a critical role in the work of GCI. For example, I would expect legal and economic antitrust practitioners, academics, and businesspeople to help GCI to identify projects and develop work plans. They also would be called upon to contribute papers or participate in hearings on topics. In addition, I would like to see international organizations provide appropriate input.

Getting GCI off the ground will not be easy, but I have made it a personal priority. Indeed, this is one reason why I have committed to do what I can to help launch GCI by no later than mid-2002. It is also one of the reasons behind my decision to appoint Bill Kolasky as a Deputy Attorney General devoted almost exclusively to international antitrust matters. Bill is a distinguished antitrust practitioner who is known to many of you; he will lead the Antitrust Division's participation in GCI.

## **Conclusion**

The international antitrust community has come a long way in the past decade. The products of bilateral cooperation have shown us what can be achieved when we work together. We now must begin the related but difficult task of multilateral convergence. We have a lot of hard work ahead of us, but if we can successfully turn the Global Competition Initiative concept into a reality, we can look forward to more efficient and substantively sound

antitrust enforcement that transcends national borders, to the benefit of consumers all over the world. Let us move forward with confidence and with our past achievements as a firm basis for future success.