DEPARTMENT OF JUSTICE

GLOBAL COMPETITION CONVERGENCE AND COOPERATION: LOOKING BACK AND LOOKING AHEAD

Address by

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Good afternoon. It is my great pleasure to be here today and to share the podium with both old and new friends. Thank you especially Tad for giving me the opportunity to provide my perspectives on global competition convergence and cooperation and on where we should go from here.

As many of you already know, I will return to private practice at the end of this month. Naturally, my upcoming departure has caused me to reflect on the Antitrust Division's accomplishments in the international area and to think about what else remains to be done. Under Charles's leadership, we have made remarkable progress. We have put into action initiatives such as the International Competition Network that were mere paper projects only fifteen months ago. And, despite a rocky beginning as a result of the GE-Honeywell divergence, our relationship with the European Commission is now better than ever.

This afternoon, I will first review our main accomplishments in the international area. We have achieved a great deal both bilaterally and multilaterally over the past year and are presented with an extraordinary opportunity to build on our recent successes. The stage is set: never before have we been better poised to achieve meaningful antitrust convergence, and never before have so many talented practitioners and economists, antitrust agencies, and multilateral organizations been so committed to the effort. I will close my remarks with a discussion of where I believe we should focus our energies in the future so that we can take advantage of the momentum we have built over the past year and use it accomplish even more.

I. International Antitrust at the Department of Justice During the Past Year

I cannot imagine a more exhilarating time to have been Deputy Assistant Attorney General in charge of international antitrust policy. A few weeks ago, when I announced to the Division's Foreign Commerce Section that I was leaving, they reminded me of my first days at

the Division and of our endless meetings planning an international agenda — or "workplan" in the parlance of Charles's performance-based management style. They observed that if someone had predicted during those meetings that the international antitrust community would accomplish all that it has in the past year, we all probably would have dismissed that prediction out of hand as "hopelessly optimistic."

So, what has made the past year so remarkable? Action. For a number of years, people have talked about the need for increased cooperation and collaboration by antitrust agencies. But this year, the Antitrust Division — together with our colleagues at the Federal Trade Commission — took aggressive steps to turn that talk into action.

When we developed our work plan last fall, we set three priorities:

- Getting our bilateral relationship with the European Commission back on track in the wake of GE/Honeywell
- Launching the International Competition Network
- Promoting a better understanding of the American vision of sound competition policy

Happily, we managed to exceed our expectations in all three areas. This success was not due solely to our own efforts, but was in large part due to the equally strong commitment of the FTC, the European Commission, and many other national competition authorities to international convergence and cooperation. Another important factor in our success was the outstanding job our predecessors did in laying the foundations for our success. The ICN is a direct product of the work of the International Competition Policy Advisory Committee, appointed by Joel Klein. Joel, and his immediate successors Doug Melamed and John Nannes, strongly endorsed the concept of forming a new international competition network and took the initial steps toward

realizing it. Similarly, our success in rebuilding our bilateral relationship with the European Commission would not have been possible without the reservoir of good will that Joel and Bob Pitofsky, and their colleagues, had built up over the past decade.

Let me examine briefly what we have accomplished over the past year in each of our three priority areas.

A. US-EU Cooperation

The European Commission ("EC") currently stands as the most important antitrust enforcer outside our borders, and our relationship with the EC is very good because we have worked hard to make it so. Over the past decade, we have achieved a remarkable record of cooperation and convergence. Despite our different legal traditions and cultures, and despite substantial differences in the language of our governing laws, we have been able to work together to develop generally coherent and largely consistent competition policies, built on sound economic foundations and directed at a common goal: to promote consumer welfare through competition.

1. Merger Cooperation/The US-EU Merger Working Group

We have, obviously, encountered some bumps in the road, the most significant of which have occurred in the merger area. As many of you already know, I began my tenure at the Division shortly after the GE/Honeywell divergence — the first merger transaction that we cleared but the EU blocked in its entirety. Then, as now, I believed that the case was monumental in significance. It demonstrated how easily the goals of antitrust can become confused and frustrated and how large the consequences are when that happens. Then, I

believed that something positive would come out of the experience, and now I know that to be true.

I have always been of the firm view that we learn more from our failures than our successes and that we benefit from talking about them openly. In discussing GE/Honeywell last year at the Fordham conference, Charles James aptly quoted Oliver Wendell Holmes by saying that "sunlight is the best disinfectant." In that spirit, Charles and I have attempted to do globally what we have been doing successfully in antitrust circles in the United States now for years. That is, we issued an open invitation to the antitrust community to engage in a substantive debate on the topic of portfolio effects and other related theories of harm that we believed sacrificed competition in order to protect competitors. From our speeches to our OECD paper on portfolio effects to our appearances at Fordham and George Mason and a variety of other policy fora, we raised these issues in detail and at every turn because we feared that divergence among major antitrust enforcement agencies on issues so fundamental might undermine the growing consensus favoring competition. We also knew that the economic and policy implications of antitrust meaning one thing in one jurisdiction and something else in another were enormous.

Fortunately, several positives have emerged from the GE/Honeywell episode. The first is a strong reaffirmation by the European Commission that it shares our view that the ultimate goal of competition policy must be consumer welfare, which competition advances through lower prices, higher output and enhanced innovation. A second is the clarification by the Commission of its attitude toward efficiencies. The Commission has made it clear, just as we have, that it views merger-generated efficiencies positively and will not challenge a merger just because it

creates a more efficient firm and thereby benefits consumers, even if competitors might suffer from the increased competition.

This experience also served as the impetus for a more dynamic relationship with the EU. In particular, 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 focused on our differing policies toward so-called conglomerate mergers and developed a set of best practices for coordinating our merger reviews.

I have had the pleasure of sitting in on several of the working group's sessions, which have proceeded largely by video conference supplemented by some in-person meetings. The antitrust agencies on both sides have committed experienced and thoughtful lawyers and economists to the exercise, and the discussions proceed at an extraordinarily high level of antitrust sophistication. The group's meetings consist of principally of presentations of each other's approach on one or two focused issues that are agreed on in advance. Ultimately, each session evolves into a friendly, full and frank conversation, with an open exchange of ideas in which each side asks probing questions of the other. After every meeting, not only do we have a more complete understanding of our similarities and differences, but we also have a more refined understanding of the reasons behind our own approach. In my view, this exchange has represented the convergence process at its very best — that is, a coming together of some of the best and the brightest minds at the agencies on each side of the Atlantic to question and analyze one another's premises, assumptions and theories in order to come up with the optimal approach to difficult issues.

Thanks to the working group's hard work over the past year, we had at a policy level the best U.S./EU bilateral consultations ever in July. 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 used last summer's bilateral to put the finishing touches on the working group's best practice recommendations, which were released a week ago and are a subject to which I will now turn.

The best practices reinforce the U.S. and EU antitrust agencies' ongoing commitment to keep each other fully informed of developments throughout their respective merger investigations. In addition to recommending that investigative staffs establish schedules for communications with their EU counterparts early in their investigations, they also encourage DOJ section chiefs and Deputy Assistant Attorneys General to engage in substantive discussions with their EU counterparts at key moments of one another's investigations. In addition, because cooperation is most effective when the timetables of the reviewing agencies run more or less in parallel, the best practices invite merging parties to an early meeting with the U.S. and EU to discuss timing issues. The best practices also provide for joint interviews of parties and third-parties, where appropriate, and increased coordination with respect to remedies.

Many of the best practices memorialize and make more transparent practices that have been in place informally for quite some time or that have been used successfully in certain investigations but may not have become standard operating procedures. So, even though the U.S. and EC investigative staffs have communicated effectively with one another in many cases over the years, the best practices should help standardize "good practice." They will serve not

only to strengthen our already strong cooperation, but also will provide important guidance to all participants in the process. I also see the best practices as an important complement to the U.S. and EU agencies' internal reforms of our respective merger review procedures.

2. Cartel Enforcement/Leniency Programs

Another important area in which we have made progress toward convergence with the EU is in corporate leniency. The Antitrust Division's Corporate Leniency Program — which offers a "pass" from prosecution for companies and their employees so long as they are the first to admit involvement in a cartel and meet the program's other requirements — has been extraordinary successful in cracking cartels. Over the years, we have advised a number of foreign governments in implementing effective leniency programs in their jurisdictions. We were very pleased when the EC revised its leniency program last February to establish a more transparent and predictable policy that is similar to our own. The adoption of effective leniency programs by foreign antitrust enforcers benefits our international enforcement efforts. Firms are more likely to come forward to report violations when they can receive leniency in all (or most) of the jurisdictions where they would otherwise stand prosecution.

B. The International Competition Network

Our second priority was launching ICN as the principal platform for promoting convergence and cooperation among antitrust authorities worldwide. As most of you already know, we and the Federal Trade Commission joined with competition agencies from 13 other jurisdictions to form ICN a year ago. The concept behind ICN was that it would be a global network of competition authorities focused exclusively on competition -- "all antitrust all the time" as Charles James put it. The goal was twofold. The first was to provide support for new

competition agencies both in enforcing their laws and in building a strong competition culture in their countries. The second was 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 antitrust agencies from 63 jurisdictions on six continents, representing more than three-quarters of the world's Gross Domestic Product. Nearly all of these members attended our first annual conference in Naples, Italy in September. In addition, we brought in more than 50 representatives of the private sector to join the discussion. By all accounts, the first meeting was an extraordinary success.

Consistent with its twin goals, ICN initiated two major projects during its first year. The first one involved creating a baseline report in the area of competition advocacy. The second, which I have been leading, is the development of guiding principles and recommended practices for merger review. I would like to briefly summarize the accomplishments of the first two working groups.

1. Competition Advocacy Working Group

With respect to the first ICN initiative, Dr. Fernando Sanchez Ugarte, the head of the Mexican antitrust agency, leads a working group on competition advocacy. This working group produced a comprehensive report on the practice of competition advocacy in 50 ICN jurisdictions, an unparalleled effort that should form the basis, among other things, for recommended practices in competition advocacy. The work of this group will continue; it is a

subject that is particularly important to antitrust agencies from developing countries and countries in transition, as well as to firms that operate in those jurisdictions.

2. Merger Working Group

The ICN Merger Working Group concentrated on three distinct areas this year: merger notification and review procedures; the analytical framework for merger review; and investigative techniques for merger review. With respect to merger notification and procedures, ICN members adopted a set of guiding principles for merger review that were developed by the Merger Working Group. The guiding principles include concepts 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.[2]

The working group also developed recommended practices for merger notification and review, which were endorsed by ICN members at September's annual meeting. These recommended practices addressed three topics the member agencies and the business community believed were of the greatest urgency. The first was local jurisdictional nexus (the notion that a regulator should not assert authority over a merger unless the deal would have an impact on its country). The second was objective filing thresholds for merger notifications based on dollar of sales rather than market shares. And the third subject was the trigger for a filing of a merger

notification. Implementation of these guiding principles and recommended practices will bring more consistency to the merger review process and will undoubtedly make the process more efficient and effective, while at the same time reducing delay and the investigative burden on merging firms.

Through the efforts of the Analytical Framework and Investigative Techniques subgroups, the Merger Working Group is focused on substantive merger issues as well as procedural ones. We had a highly substantive discussion of the Analytical Framework subgroup's discussion paper on the objectives and analytical framework for merger review at our Naples conference, and expect that this subgroup's work will assist countries in designing their merger control laws and developing merger guidelines. The Investigative Techniques subgroup will hold an ICN international merger workshop for over 40 member agencies in Washington later this month. The workshop -- inspired by the excellent series of cartel conferences held over the past three years in the U.S., the UK, Canada, and Brazil — 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. Unusually for such conferences, but consistent with the character of ICN, there will be private sector participation at the conference. Lessons learned at the November workshop along with responses to a questionnaire on investigative techniques will be used to develop a manual for making merger investigations more efficient and effective.

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ICN is already serving as an important force for international cooperation and convergence. It has so far brought together leaders of antitrust authorities from around the world to discuss practical issues of law enforcement. True to its name, it has provided antitrust officials with an opportunity to network, and consistent with its purpose, it has remained "all antitrust, all the time." The "virtual network" structure of ICN, and its organization around diverse working groups that consult regularly and informally throughout the year, have enabled ICN to produce concrete results far more quickly than we had imagined possible. If ICN accomplishes a fraction of what it did during its first year in existence, it will no doubt be a remarkable success.

C. Promoting a Better Understanding of Sound Competition Policy

As all of you in this audience know, we in the United States have been practicing antitrust law for over 110 years. During that period, we have made more than our share of mistakes. But from those mistakes, and with the help of several generations of economists, an antitrust enforcement regime has emerged that we believe are well designed to promote consumer welfare and economic progress. This regime is by no means perfect, and it must continue to evolve as our understanding of markets improves, but I think most of us would agree it represents a substantial improvement over what came before.

As we survey other jurisdictions around the world, especially those that have adopted competition laws only very recently, we find many of these jurisdictions making many of the very same mistakes we had. We see jurisdictions that are using the antitrust laws to protect

competitors from vigorous competition. We see other jurisdictions blocking mergers because they would make the merged firm more efficient. And we see still other jurisdictions using the antitrust laws to, in effect, regulate pricing or to require the sharing of valuable assets, including intellectual property.

We set out, therefore, in a series of speeches to try to articulate, more clearly and more comprehensively than we had in the past, what we viewed as the core principles of sound competition policy. The first, and most important, thing is that we agree on the proper objective of competition policy. Our view is that competition policy should serve one objective and one objective only: using competition to promote consumer welfare. Once we agree on this objective, we can then articulate a set of principles designed to achieve it. I have proposed seven:

- Protect competition, not competitors
- Make prosecuting hard core cartels the number one priority
- Recognize the central role of efficiencies
- Base decisions on sound economics and hard evidence
- Realize that our predictive capabilities are limited
- Minimize bureaucratic roadblocks and speed bumps
- Be flexible and forward looking

It has been gratifying to find, as I've traveled the international competition conference circuit, that the speeches in which we've tried to explain these principles have attracted a surprisingly wide readership, which is probably more of a tribute to the power of the Internet than it is to the quality of my speeches. Competition officials from countries as distant as Malaysia and Russia have come up and said that they've read my speeches and have found them useful in designing and implementing their own competition laws.

I recognize that no one size fits all, and that every jurisdiction must customize its competition laws and policies to fit its own institutions and economy. At the same time, I believe that common agreement and understanding as to a few core principles will not only promote convergence, but will reduce the risk that competition policies are misapplied to prevent the very competition they are intended to promote. I believe, therefore, that the single most important speech I've delivered was the one I gave last week in the Netherlands, in which I tried to define what we mean by competition.[3] In it, I defined "competition" as "the process by which market forces operate freely to assure that society's scarce resources are employed as efficiently as possible to maximize total economic welfare." I firmly believe that this definition of competition, coupled with the guiding principles articulated in my earlier speeches, will go a long way toward helping other jurisdictions avoid some of the mistakes we have made.

Again, I want to emphasize that while I have been the one delivering these speeches, I am by no means their sole author. While the speeches do not reflect the Division's official views, a large number of the enormously talented lawyers and economists who work at the Division have contributed significantly to researching and writing these speeches. I particularly want to acknowledge Andrew Dick, Nancy Garrison, Caldwell Harrop, John Mitnick, Anne Purcell, and Greg Werden for their contributions.

II. Looking Ahead

In focusing so much attention on our top three priorities, I have not done justice to everything else that is going on in the international competition arena. The ICN is only one of several multinational fora that are working hard to promote international convergence and cooperation. The OECD, WTO, and UNCTAD have all stepped up their activities significantly,

as have a number of more regional groups, such as APEC and COMESA. In addition, our Foreign Commerce Section, working closely with USTR, is actively negotiating competition chapters in a number of trade agreements, including most importantly the proposed Free Trade Agreement of the Americas ("FTAA"). We are also working hard through our bilateral relationships with a number of competition authorities to encourage more vigorous enforcement of the antitrust laws, especially against hard-core cartels.

Indeed, there is so much going on in the international area that the real challenge for the future will be to keep properly focused. In an effort to help us do that, I'd like to offer my own proposal for how we should focus on efforts over the next year. As with last year, I would suggest that we set three main priorities:

- Continue strengthening the US/EU relationship
- Maintain our momentum in the ICN
- Promote meaningful convergence around sound competition values

Let me spend a few minutes on each of these.

A. Continuing Strengthening the US/EU Relationship

We will continue to use the highly successful US-EU Merger Working Group to build on our solid record of cooperation and convergence with the EC. The group has already begun working on efficiencies and soon will tackle the issue of competitive effects in oligopolistic markets, an exercise that nicely complements the European Commission's current efforts to develop its own merger guidelines. We have also brought the working group concept into the civil non-merger area by launching an Intellectual Property Working Group with the EC.

I also hope that the U.S. and EC antitrust authorities will take on the issue of abuse of dominance and monopolization. In my view, this is now the area of greatest divergence between competition policy in the United States and Europe. Both jurisdictions regulate single firm conduct only when the firm possesses a substantial degree of market power. In the United States, we also believe it is important that the antitrust laws allow even dominant firms to compete aggressively, but it is not clear the extent to which European competition policy shares our philosophy. Reconciling our differences in this area is critical so that our laws do not unduly interfere with the competition that we are trying to protect.

B. Maintain Our Momentum in the ICN

Over the next year, the Merger Working Group of ICN will work on additional recommended practices, with a goal of completing that work by the next annual ICN conference in Mexico in June 2003. The group will also coordinate with ICN members and other international organizations, such as OECD and UNCTAD, to encourage implementation of these guiding principles and best practices. Finally, in an effort to make merger laws more transparent and accessible, this group has asked all ICN members to summarize and 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.

The Competition Advocacy Working Group will also be busy over the next year. In order to enhance the competition advocacy efforts of its members, the group will create an on-line resource center of summaries of relevant cases and competition advocacy filings by other agencies, develop practical techniques for competition advocacy, conduct a study on competition

advocacy efforts in regulated sectors, and develop model competition advocacy provisions for consultations between competition agencies and other public authorities.

At September's meeting, we created two new working groups — capacity building and institutional framework. Over the next year, the Capacity Building Working Group will work on projects that will enable developing antitrust authorities to administer their laws effectively and develop the appropriate infrastructure and priorities for doing so. The Institutional Framework Working Group will address some important organizational issues that are critical to ICN's viability, such as how to maintain ICN's flexible and network-like character and the issue of creating a permanent steering group.

C. Promote Meaningful Convergence Around Sound Competition Values

Going forward, we still have much more to do substantively in order to promote widespread acceptance of sound competition values. We need to remind ourselves continually that convergence should not become an end in itself but must instead occur around antitrust and economic policies that best promote efficiency, economic growth and consumer welfare. Ultimately, what will we have really achieved if we require countries to have antitrust laws without a consensus on the ways in which those laws should be enforced? Where will we really be if our merger notification systems are complementary but we disagree over the meaning of competition or the objectives of antitrust law? What will we have accomplished if two antitrust agencies cooperate and regularly consult on individual enforcement matters but one agency bases its enforcement policy on the belief that protecting competition means maintaining a fragmented market while the other's policies are grounded in the precept that antitrust is about protecting competition, not competitors, even if that results in a single-firm market? In the end,

if our convergence efforts have glossed over substantive differences such as these, then we will not have solved the basic antitrust problems of our age.

In my view, there are still far too many countries that doubt the value of antitrust altogether and therefore do not have a competition law. Even among those countries with an antitrust regime in place, there is substantial variation in the language and implementation of the laws. This point hit home at my first meeting of the WTO Working Group on Trade and Competition this summer. I was struck by the number of members who openly questioned whether antitrust enforcement would be of any benefit to their economies or who believed that protecting competition means making sure that local concerns have a fair chance to compete against larger rivals or that nascent, local industries are able to get off the ground. And yet, despite all this, there were members advocating a dispute-resolution based framework that would require each member to enact an antitrust law including at least anti-cartel provisions and establish an enforcement agency that abides by core principles of transparency, non-discrimination and cooperation. But having a law is only the beginning. Implementing it sensibly is what really matters. Misguided policies can cause a great deal of harm to consumer interests, chilling incentives to invest, innovate, and compete. If antitrust is improperly used as a tool of industrial policy or protectionism, the strong public and political support for sound and vigorous antitrust enforcement will be placed in jeopardy.

To promote meaningful convergence around sound competition values, we will continue to supplement our bilateral ties through active participation in multilateral organizations, such as the OECD and the WTO. Over the years, the OECD has done a great deal to foster convergence. Its members have learned from one another in roundtables on subjects such as corporate leniency

programs, fidelity rebates, and portfolio effects, and we will continue to engage in those exercises. Consistent with the Doha Ministerial Mandate, our participation in the WTO Working Group on the Interaction between Trade and Competition this year has been focused on clarifying the issues raised by a possible WTO competition agreement. Over the years, we have been told that our WTO papers — dealing with issues like technical assistance, building a culture of competition, and establishing antitrust priorities — have been of enormous help to countries that are in the process of establishing an antitrust regime.[4] We will continue our efforts in this area, which I expect will intensify as we lead up to the Cancun Ministerial next year. And finally, through speeches and otherwise, we will continue to encourage the international antitrust community to debate antitrust issues openly — something that has been instrumental to the sound development of antitrust theory and policy in the United States.

Conclusion

In our quest for meaningful convergence, we must keep in mind that there are no quick fixes. Convergence will not take place on a broad scale over one, two or even five years. Antitrust authorities must come to the exercise prepared to look at their own systems critically, not defensively. We must avoid "lowest common denominator" approaches and exercises that promote paper principles or theoretical convergence but permit everyone to do things the way they have always done them. In the end, such exercises will contribute little to sound antitrust enforcement. That is not to say that we should not be cognizant of the economic, political and legal contexts in which various antitrust agencies operate. Still, convergence cannot be all things to all people involved in the process, and some jurisdictions will need to change their laws and perhaps their entire approach.

We have come so far this year. We still have a long way to go. In a world of 100 competition authorities, achieving substantive antitrust coherence will be no easy task. But, the stage is set, and if we succeed — as I believe we will — we have only to experience more efficient and effective antitrust enforcement to the benefit of consumers and businesses worldwide.

Thank you all for an incredible year.

Endnotes

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. These proposed principles can be found on the ICN website at www.internationalcompetitionnetwork.org.

3. William J. Kolasky, "What is Competition?," Address at the Seminar on Convergence Sponsored by 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. See e.g., "The United States Experience in Antitrust Law Technical Assistance: A Ten Year Perspective," WT/WGTCP/W/185 (April 19, 2002); "Setting Priorities," WT/WGTCP/W/164 (June 26, 2001); and "Creating a Culture of Competition: Issues Involved in Establishing an Effective Antitrust Agency," WT/WGTCP/W/142 (June 9, 2000). All papers are available online at: http://docsonline.wto.org/.