DEPARTMENT OF JUSTICE

"SOUND ECONOMICS AND HARD EVIDENCE:" THE TOUCHSTONES OF SOUND MERGER REVIEW

Address by

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Before

Mergers & Acquisitions: Getting Your Deal Through in the New Antitrust Climate
Co-Sponsored by: The American Bar Association Section of Antitrust Law and
The Association of the Bar of the City of New York

New York, NY

June 14, 2002

In March, in a speech in Capetown, South Africa, I tried to articulate six principles that I argued should guide merger reviews in our increasingly global economy.[2] The six principles are:

- Protect competition, not competitors
- Recognize the central role of efficiencies
- Base decisions on sound economics and hard evidence
- Realize that our predictive capabilities are limited
- Impose no unnecessary bureaucratic roadblocks
- Be flexible and forward looking.

Today, I would like to deliver what I hope will be the first in a series of speeches designed to flesh out each of these six principles. The one I want to focus on today is the need to base our decisions on sound economics and hard evidence. As I explained in Capetown, doing so is absolutely essential if we are to maintain confidence on our decision-making and to avoid antitrust becoming politicized in the way trade policy is. When complaints are brought to us, we must test them against what Schumpeter called "the cold metal of economic theory."[3] We must also assure that our decision-making processes are transparent and fair. As senior enforcement officials, we must bring our own mature judgment to cases, and not rely uncritically on the advice of our staffs. We must do the hard work of learning the facts and understanding the theories ourselves and we must give the parties and complainants an opportunity to engage us substantively before we reach a decision. And we must have in place effective mechanisms for judicial review.

I believe that three key elements are critical in order for us to conduct merger reviews in a manner consistent with this principle. First, we need a sound analytical framework that is firmly grounded in economic science. Second, we need an infrastructure in which lawyers and economists can work together in evaluating the likely competitive effects of proposed transactions, each bringing their comparative advantage to bear in reaching a sound outcome. Third, we need strong investigative tools, fair procedures, and effective checks and balances.

Today, I will discuss each of these three elements. I will then look at two recent cases in the U.S. in what I hope will be a somewhat self-critical analysis of our own efforts to live up to this principle.

Elements of Sound Decision Making

1. A Sound Analytical Framework

The first element of sound decision making is a sound analytical framework grounded in economic science. I use the term "economic science," rather than "economic theory," to draw a distinction that I believe was first noted by George Stigler. As Stigler and others have observed, the minds of economists are extremely fertile. It is very easy to come up with theories of competitive harm. The difference between theory and science is that science requires that hypotheses be testable empirically. By economic science, I refer to those economic theories that have been tested empirically and not yet disproven. This is the case, for example, with Stigler's theory of oligopoly, which identified a number of conditions that Stigler deduced would be conducive to coordinated interaction. Subsequent empirical work, by our own Andrew Dick among others, has substantiated Stigler's intuition, giving us confidence that we can rely on it in our decisionmaking.[4]

Earlier this week in Washington, we celebrated the twentieth anniversary of Bill Baxter's 1982 merger guidelines. (Today, is the actual anniversary, but we had to be in New York today so we had celebrated a little early.) The reason the 1982 guidelines are worth celebrating is that, as Charles James said in his prepared remarks, those guidelines took "giant steps" toward basing merger policy on economic science.[5] The four biggest steps were in the areas of defining "substantial lessening of competition," market definition, entry, and competitive effects**.**

Substantial lessening of competition. As hard as it may be to believe, prior to 1982 we did not have a clear definition of what the Clayton Act meant by a "substantial lessening of competition." One of the key innovations in the 1982 guidelines was to define "lessening of competition" is purely economic terms — as a merger that is likely to "create or enhance market power or to facilitate its exercise."[6] The guidelines went on to define "market power" as "the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time."[7] By incorporating these economic concepts into our test for substantial lessening of competition, the guidelines firmly rooted merger policy in economic science.

Market definition. As Greg Werden details in the paper he drafted for our celebration, the second giant step was the adoption of the hypothetical monopolist paradigm for market definition and the creation of the SSNIP test for implementing that paradigm.[8]

Entry. The third giant step was making entry a central part of merger analysis, recognizing that even a single-firm market will perform competitively if entry is easy.[9]

Competitive effects. The fourth giant step was in defining the non-structural factors that need to be examined to determine whether a merger that increases concentration in an already concentrated market is likely to give the remaining firms in that market the ability to raise prices and restrict output. The 1982 guidelines focused primarily on the conditions that are necessary for coordinated price increases. The 1992 guidelines added a similarly robust framework for evaluating whether a merger would likely give the merged firm the ability and incentive to raise prices unilaterally.

While the 1982 guidelines did not break new ground with respect to efficiencies, they were revised in 1984 to incorporate efficiencies into the competitive effects analysis, based largely on prior work done by Oliver Williamson and Don Turner.[9] With that revision, and subsequent refinements, the merger guidelines provide, we believe, a very sound analytical framework for merger review.

Today, we are pleased to see more and more jurisdictions around the world following our lead in developing merger guidelines. The U.K., which earlier this year adopted our substantial lessening of competition standard for merger reviews, is in the process of drafting merger guidelines to inform the business community of how that standard will be applied. Last week, in a major address in Brussels before the British Chamber of Commerce, Commissioner Monti announced that the European Commission is also developing what he called "market power" guidelines for use in its merger reviews.[10] (The EU already has market definition guidelines which incorporate our SSNIP test.) While it has not finally been decided, I am hopeful that the International Competition Network's merger working group will take on the task of developing model merger guidelines as part of its 2002-2003 agenda.

2. A Strong Infrastucture

Having a sound analytical framework is, of course, only the beginning. Equally important is having an institutional framework with the knowledge and expertise to apply the analytical framework to make what are often very difficult judgment calls as to the likely competitive effects of a merger.

Don Turner, who served as AAG for Antitrust from 1965 to 1968, and who was himself a Ph.D. economist and one of the leading antitrust scholars of his time, deserves the credit for beginning the process of developing a strong team of I/O economists within the Division. Turner created a new position, Special Economic Assistant, which reported directly to him, and began the tradition of recruiting distinguished academic economists to fill this position. This led in turn to the creation several years later of an Economic Policy Office, at which time the position of Special Economic Assistant was upgraded to a Director. As this office grew and became more involved in investigations, it was renamed the Economic Analysis Group and the Division's chief economist position was again upgraded, this time to the level of Deputy Assistant Attorney General.

Because I'm a big believer in the value of transparency, I thought it might be helpful to describe in more detail how our Economic Analysis Group is organized and how they interact with the Division's lawyers and senior decisionmakers over the course of an investigation.

A. EAG's Structure

EAG today has some 50 economists and a small number of financial analysts, supported by a dozen or more research assistants and interns, and other computer, administrative, and secretarial support staff, for a total of about 85 people. The ratio of economists to attorneys in the

Division's civil sections is approximately 1:6.

Structurally, EAG is composed of three sections: Economic Litigation Section, Economic Regulatory Section, and Competition Policy Section. Each section has a Chief and an Assistant Chief, both of whom are economists. In practice, however, EAG operates as one integrated section with six managers. The staff operates as a common pool, working for any or all of the managers. We have found this to be an advantageous arrangement because (1) it allows the management to more flexibly take advantage of the staff's availability and expertise when making assignments, (2) it permits each economist to work with any of the legal sections and any of the EAG managers, and therefore allows maximum flexibility to specialize or to diversify the work he or she handles.

The six EAG managers specialize somewhat by legal section and by industry, with each of the six managers sharing responsibility for the cases in two (of six) legal sections with one other EAG manager. This partial specialization allows the managers to develop useful industry expertise and to maintain close working relationships with a subset of 50-60 attorneys and their management, but still allows for variety in management assignments and flexibility in dividing up the workload between managers.

The management structure in EAG is relatively flat, with the six chiefs and assistant chiefs working closely with staff on each matter as it progresses, and reporting to the Deputy for Economics and the Economics Director of Enforcement. The Deputy for Economics is, by tradition, a visiting academic who takes a sabbatical for one to three years to work at the Division whereas the Economics Director, which was established only recently, is a career position. These two individuals sometimes split cases between them and sometimes work together on a case, but in all cases are very involved throughout the progress of each matter. The EAG managers are often in daily contact with them on active matters, and meet weekly with them to discuss resources, staffing, and the status of various cases.

The staff economists generally hold Ph.D.'s in some area of microeconomics, usually Industrial Organization. The size of our group allows us to have economists with a range of specializations that is crucial to handling the variety of matters we work on. Some economists specialize by industry, such as utilities, healthcare, financial markets, telecommunications, defense, and airlines. Others bring to EAG (or gain while at EAG) a specialized understanding of a particular area of theory, such as econometrics, auctions, durable goods, or vertical theories.

Our current hiring is very much focused on recruiting economists with strong empirical skills as we find that this is an area of increasing interest and one where we would like to build more strength. It is increasingly common to find that companies or trade associations or independent data collection companies are able to provide extensive data on an industry in which we have an active investigation. The Division will often commit substantial funds and/or considerable effort to purchase or obtain by compulsory process relevant data to use in our investigations. These data, and the increasingly sophisticated empirical tools that are being developed in the profession for analyzing data, create abundant opportunities to examine patterns of pricing and other strategic corporate decision variables that allow us more precisely to predict the effects of mergers or conduct. It is also increasingly common that merging companies hire economic consultants to perform sophisticated empirical analyses in defense of the transaction, which the staff must be equipped to understand, critique, evaluate, and respond to quickly.

In order to recruit and retain especially well-qualified economists, and to help keep the staff's skills current and to advance the state of knowledge in areas critical to the Division's mission, EAG maintains an active research program. We have a Director of Research who coordinates a working paper series, and one of our staffers is responsible for running a seminar program, inviting academics and others to give papers on topics of interest to EAG. EAG economists generate an average of ten working papers each year, of which approximately two-thirds are published in academic journals. We encourage research and have a competitive release time program that awards limited grants of time for research on particular topics. We find that only by making it possible for economists to do research and to publish can we attract top-notch candidates that would otherwise go into academia. Recruiting is a particular challenge for EAG because of the government ceiling on compensation, but we try to make up for this handicap by offering economists the chance to work on important applied problems, with access to information and data that are otherwise unavailable, and to have significant influence over the outcomes of investigations.

B. How EAG Integrates into the Division

In order to integrate economic analysis into the decision-making process, EAG assigns at least one economist to almost every matter that is handled in the Division. The role of economists on an investigation includes developing a framework for analyzing likely effects on competition, identifying information useful to resolving questions about the direction and magnitude of these effects, developing strategies for collecting and assembling the necessary information, interpreting the information, and communicating results effectively. In cases that reach litigation, economists must follow through to ensure that the economic analysis is communicated clearly and accurately, and that supporting evidence is developed and presented to the court effectively. Throughout the process, the economist needs to be an integral part of the investigative team that also includes lawyers, paralegals, and research assistants.

When a Hart-Scott filing is received by the Division, a copy goes to EAG, where it is assigned to one of the EAG managers, depending on the industry and/or legal section involved. The relevant EAG manager assigns an economist or team or economists who join their legal counterparts in reviewing the filing to make a determination about whether to seek authority to open a preliminary investigation.

Early in the course of an investigation, the EAG manager commissions, reviews, and provides input into an "issues-in" memorandum that lays out the facts of the transaction or conduct at issue, describes the setting, and presents candidate theories of competitive effects. The memo identifies key economic issues and proposes an investigative plan to develop the information necessary to test the theories and to evaluate the significance of possible effects. The memo is a critical opportunity to test the consistency and reasonableness of candidate theories, and to educate and focus the investigative team on the central questions of the investigation. The EAG manager works closely with the economics staff to make the most of this opportunity. The EAG manager will also participate in meetings with the legal section to discuss the analysis contained in the memo, and will work with the staff economist and the legal staff to translate the investigative plan into a Case Agenda that identifies specific tasks, assigns responsibilities, and sets deadlines.

Throughout the course of an investigation, the economics staff works closely with the staff attorneys. Economists usually participate in interviews and staff meetings, help to draft and review requests for information, help to review documents, help the attorneys to prepare declarations and take depositions, and participate in decisions about investigatory strategy and fact-finding. In addition, and importantly, the economists often conduct a separate empirical inquiry that requires specialized skills. For example, in mergers of differentiated consumer products (like bread, tissue, and shampoo), EAG has obtained scanner data on weekly prices and quantities sold in retail stores to use in estimating demand and predicting price effects from the merger. This kind of study is a sophisticated and very time-intensive project that requires the full-time skills of a highly trained and experienced econometrician. Demand estimation is done in a small minority of cases. More common types of empirical work done by EAG are (1) case studies of the effects of prior mergers or other events, (2) critical loss analyses, (3) cross-section analyses of bidding, (4) spatial modeling and estimation, (5) price-concentration studies, (6) analyses of shipment patterns, and (7) diversion studies. In addition to empirical work, EAG economists sometimes are able to study the likely effects of industry practices or consolidation by constructing formal mathematical models of industry pricing and then analyzing whether the evidence supports the assumptions necessary for harm to occur.

Front office briefings by staff are held as needed during the course of an investigation to get feedback on the proposed framework for analyzing the issues presented by a case, to assess the likely level of resources that must be committed to an investigation going forward, and to allow for an evaluation of the promise and significance of an investigation compared to other matters that compete for scarce Division resources. The EAG issues-in memorandum provides one basis for discussion of these questions. The economics staff shares with the lead attorney the job of presenting the competitive effects theories and evidence, and in proposing a realistic investigative plan to develop the information necessary to test the theories. Subsequent briefings review how the theory and investigative plan have evolved as evidence is gathered and the analysis is refined. The economics staff has a critical role to play in maintaining the focus of the investigation and integrating new information into the analytical framework.

When an investigation enters the decision-making phase, the EAG team assists the legal staff in preparing its recommendation memo and usually writes a separate recommendation memorandum. Sometimes the economists and attorneys will instead author a joint memo. An EAG recommendation memo is addressed to the EAG manager and forwarded to the Economics Deputy or Director, but is also circulated to all relevant decision-makers. In other words, EAG economists formally report upwards through an independent chain of review, but in practice they are also expected to work as a team with their legal counterparts. The EAG memo includes an explanation of the competitive effects theory and supporting evidence, as well as an evaluation of the limitations of the model and methodology, the extent to which the assumptions and conclusions of the analysis are consistent with the best available evidence, the uncertainty that surrounds that evidence, and an evaluation of the parties' best arguments in defense of the transaction. The EAG memo does not attempt to duplicate the analysis set out in the legal memo, but focuses on significant questions that require economic analysis. The EAG manager may also contribute a separate memo, which identifies and explains key issues for decision makers, and reflects the judgement and perspective of the manager.

The economics staff is expected to engage with counsel and economic experts working for the parties, in order to fully understand their arguments and evidence, and to be able to provide a fair and timely appraisal to decision makers. In addition to scheduled meetings between the staff and the parties' counsel, there are often informal meetings or calls between EAG economists and the economic experts representing the parties to a transaction, especially when both are conducting empirical studies of various sorts.

The EAG manager works closely with the economics staff and interacts frequently with the legal section and the front office during the course of an investigation. Typical involvement includes reading key interview memoranda and documents, attending all meetings with legal section managers and the front office, and attending key meetings with interested parties and their economic experts. EAG memoranda circulated over the name of the staff economists almost always reflect significant review by the EAG manager, but ultimately represent the opinions and recommendations of the staff. The contributions of EAG managers to the memorandum include proposing candidate theories, testing their logical consistency and fit against the evidence, defining an investigative plan, identifying appropriate and informative empirical methodologies, and explaining the analysis clearly and accurately.

The Economics Deputy and Director are also involved at a very detailed level with all active cases under their supervision. Through reading status memos, periodic briefings, and (most often) informal discussions with the staff members and manager, these two individuals stay current on the progress of the analysis and offer feedback, suggestions, and criticisms of the substantive economic work, the gathering of evidence, the investigative strategies, the commitment of resources, and the policy and procedural implications of each case. They in turn discuss the progress of cases with their legal counterparts in the front office in both formal weekly meetings and informal discussions. In the several weeks (or more) that usually surround the front office consideration of section-level enforcement recommendations, the Deputies and Directors of Operations often have frequent and informal discussions with section managers and staff of difficult or contentious aspects of the case, which can stimulate further fact-finding or analysis in an intensive and informal process of iterating toward the fullest possible understanding of the case's substantive issues and litigation posture.

3. Strong Investigative Tools, Fair Procedures, and Effective Checks and Balances

The final element needed for sound decision-making relates to our investigative tools and procedures and to the checks and balances that limit our discretion. Sound antitrust decision-making is an incredibly fact-intensive undertaking. It therefore requires that we have the means to obtain from the parties to a transaction, as well as from their customers and competitors, detailed information about the structure and operation of the markets we are investigating. As you all know, in the United States, we have statutory authority under the Antitrust Civil Process Act to issues Civil Investigative Demands ("CIDs") compelling the production of documents, data, and witnesses.[11] Even more importantly, the Hart-Scott-Rodino Act gives us authority to issue requests for additional information and bars the parties from closing their transaction until they have substantially complied with our request.[12] This gives the parties a strong incentive to cooperate with our investigation and to produce the information we need in a timely manner.

Over our more than 100 years of experience enforcing our antitrust laws, we have learned that we cannot rely on the representations of parties to a transaction or of complainants seeking to block it without thoroughly investigating the underlying factual basis for those representations. This requires that we obtain and carefully review underlying business documents, as well as that we interview third parties with a more objective view of the transaction. We often find it helpful also to question employees of the merging parties and complainants under oath to test the representations made to us.

Once we have completed our investigation, we also believe it is critical that we give the parties and complainants an opportunity to present their cases, not just to our staffs but also to senior decision-makers. In the U.S. this is done very informally. Our staff will sit down with the parties and outline for them any competitive concerns that have been identified during the course of the investigation. The parties then have an opportunity to submit white papers addressing those concerns, after which they also have an opportunity to present their arguments orally directly to the senior decision-makers. This often requires multiple meetings, first at the Deputy Assistant Attorney General level and then, finally, with the Assistant Attorney General himself. These meetings are very substantive in nature and often resemble an oral argument to a court.

Under our system, the principal check on our decision-making is that we cannot block a transaction without going to court to obtain an injunction. This means that throughout our investigation we must constantly ask ourselves whether we have sufficient evidence to persuade an independent judge, by a preponderance of the evidence, that the merger may substantially lessen competition and thereby harm consumer welfare. It means also that we know that any witnesses or other evidence we present will be subject to searching cross-examination by the lawyers for the parties to the transaction.

We respect that other jurisdictions with different legal systems and traditions may use very different institutional arrangements to enforce their competition laws. Whatever system a jurisdiction uses, however, we believe it is essential that it include these three elements: strong investigative tools, fair procedures, and effective checks and balances.

Measuring Our Success: Two Case Studies

To add flesh to the skeleton I have just presented, it may be useful to review two recent cases to show how these elements work in practice.

1. Suiza/Dean

My first case study involves the merger of Suiza Foods Corporation ("Suiza") and Dean Foods Company ("Dean"), the nation's two largest dairy processors.[13] The Department investigated and cleared this merger last year, subject to a fix-it-first divestiture of 11 processing plants in 9 states. In my view, this investigation was a model of how the Division's lawyers and economists work together to protect the public interest.

Applying the analytical framework in our merger guidelines, we identified three principal candidate product markets of concern: fluid milk processing, school milk, and soy milk. For two of these products, fluid milk and school milk, one of the key issues was the scope of the geographic markets. We recognized that this would be a particularly difficult issue, having lost a challenge to a milk merger ten years before because the court rejected our effort to define the relevant geographic market as a single metropolitan area served by dairies within a 100-mile radius.[14]

In this investigation, we determined that shipment costs and perishability limit the distance that processors can ship fluid milk profitably and are significant factors influencing customers' choices of suppliers for their fluid milk needs. In light of this information and historical shipment patterns, information obtained from customers, and other evidence, we found that dairy processors are able to price discriminate among customers or groups of customers. Accordingly, we defined geographic markets by aggregation of groups of customers within metropolitan areas. We assessed the likely critical loss of sales and concluded that customers in the metropolitan geographic markets examined would not to a sufficient degree turn to distant suppliers to defeat a small but significant price increase by all of the fluid milk processors located within and slightly beyond the area from which fluid milk was currently being supplied to each market.

We concluded that many fluid milk customers regarded Suiza and Dean as their next best substitutes to supply milk. Dairies owned by grocery stores were not a significant constraint on the pricing of Suiza and Dean. We confirmed these results through sophisticated, econometric work. Using data gathered from the parties and numerous third-party processors, we were able to model the effects of location and concentration on competition in the market.

Based on this work, we challenged the proposed merger in 22 metropolitan areas in which we concluded that the merger would be likely to result in unilateral prices increases. The merged firm's combined market shares in these markets ranged from 43 percent to 100 percent, with post-merger HHIs ranging from 2,058 to 10,000.

We also had concerns that the merger would have lessened competition in school milk. School milk is fluid milk that is manufactured, distributed and sold to schools, usually in half pint containers, pursuant to contracts with one or more school districts. School milk is a relevant product market; and the sale of school milk to each school district is a relevant market. School districts have been subject to bid rigging, price fixing, and customer and territorial allocations over many years in many parts of the country. Suiza and Dean competed directly against one another in numerous relevant school milk markets throughout the areas of concern. For many of these markets, Suiza and Dean were the only two, or were two of only three bidders or potential bidders.

The merger-to-monopoly in many of these markets would have allowed the post-merger firm to raise prices and reduce service. Similarly, the proposed acquisition substantially increased the likelihood of a unilateral price increase in the markets where it would have reduced the bidders from three to two. Each firm bidding to supply school milk to a school district recognizes that its probability of winning with a given bid depends on the bids made by each of its rivals. In the three-bidder markets, each firm had to predict, in the face of uncertainty, what value its *two* rivals might place on winning the school milk contract. Following the proposed transactions, however, each firm would have had only *one* rival to worry about submitting a lower bid than itself. The elimination of a single rival, in markets that are already so highly concentrated, increases substantially the likelihood that the two remaining competitors will bid higher. Finally, the proposed acquisition also substantially increased the likelihood of coordinated interaction among bidders in the markets, including tacit or explicit collusion, where it would have reduced the bidders from three to two.

We also had to consider whether the parties' proposed divestitures to the buyer of their choice, NDH, cured our competitive concerns. Our concern was that a pre-existing strategic alliance between Suiza and Dairy Farmers of America ("DFA"), the leading supplier of raw milk, undercut the effectiveness of a divestiture to NDH, which would be 50% owned by DFA. Our concern arose because fluid milk markets have factors that make them conducive to coordination. Historically, despite these factors, Suiza and Dean did not appear to have coordinated in the fluid milk markets we were examining because of two factors. Suiza and Dean's knowledge of each other's costs was weakened because of their different approaches to the procurement of raw milk. Dean procured significant amounts through independent producers; while Suiza procured principally through its preferred supplier, DFA, which is a dairy cooperative. Additionally, Suiza and Dean had no unique means of punishment (other than vigorous price competition) and no apparent means of side payments. Substitution of NDH for Dean in the relevant markets weakened these two factors. Procurement of raw milk from independent cooperatives would have ended. And, the supply relationship between Suiza and DFA created mutual opportunities for punishment and side payments, as well as facilitating communication between Suiza and NDH.

Ultimately, the parties addressed our concerns over a divestiture to NDH by modifying the aspects of the Suiza-DFA strategic alliance. In those markets in which we ultimately forced divestitures, the parties agreed to eliminate a "most favored nations" clause, reduce the termination notice requirement in their contracts from one year to sixty days, and exempt Suiza's dairies in those areas from a promissory noted and liquidated damages provisions that cemented DFA's preferred supplier relationship.

The final market of concern was refrigerated soy milk. There, we ultimately decided against a challenge because this was a very new market that was growing rapidly and in which there had been significant recent entry. While the merger would have given the combined firm a nationwide market share of nearly 90%, we concluded that there simply was not enough evidence that the merged firm would be able profitably to raise price to merit a challenge, even in the absence of any claimed efficiencies.

Throughout this investigation, a large team of lawyers and economists worked closely together in developing and analyzing the facts. At its peak, we had over 8 economists and 13 lawyers working on the matter. In its final months, the parties had regular interaction with the front office, including several meetings with the legal and economic deputies on a variety of issues and two meetings with the AAG.

2. Comdisco/Sungard

My second case study is the unsuccessful challenge we filed in October 2001 against the proposed acquisition by SunGard Data Systems of Comdisco's computer disaster recovery services business.[15] SunGard and Comdisco are two of only three large providers of shared hotsite computer disaster recovery services. The companies' combined share of the shared hotsite services market is approximately 70%.

The Court declined to enjoin the transaction, finding that we had failed to prove that shared hotsite services were a relevant product market. While acknowledging that the Division had presented dozens of customer declarations stating that they had no economically viable alternative disaster recovery solution, the Court concluded that the Division failed to show that its declarants were representative of the parties' approximately 7,500 shared hotsite services customers. Thus, the Court concluded that it could not determine whether a small but significant nontransitory increase in price would cause a substantial number of the parties' customers to switch to alternative disaster recovery solutions — in particular, internal and "quick-ship" disaster recovery solutions.

The Division continues to believe that the court's decision, in addition to placing too high a burden on the Division to quantify precisely how many of the parties' customers lacked viable alternative solutions, improperly failed to recognize that, even if the acquisition would not harm some of the parties' customers, the transaction left the combined company well-positioned to price discriminate against its many shared hotsite services customers that are unable to switch economically to other solutions. As a result of the close technical collaboration between the parties and their customers, the parties had access to the information required to determine whether a customer could use economically an alternative disaster recovery solution. Indeed, the Court specifically found in a footnote that the defendants were "typically aware of those clients that could switch to an alternative solution."[16] This should have been sufficient, under the merger guidelines, to define a relevant market limited to those customers under the section of our guidelines dealing with the definition of markets under conditions of price discrimination.[17]

Despite our disagreement with the outcome, this case illustrates how quickly we can both review and litigate a proposed merger. Because Comdisco was in bankruptcy, the investigation proceeded on a very fast track. The parties' initial filing was in August and we reached a decision to challenge the merger before the end of October. The Department and the parties agreed to consolidate the hearing on our motion for a preliminary injunction with the trial on the merits. The entire proceeding, including discovery, was completed in just three weeks, culminating in a 2-day hearing and a final decision just 5 days later. While this is exceptionally quick even by our standards, most of our merger challenges are litigated to a final decision on the merits in three to four months.

Conclusion

To return to my principal theme, sound merger review requires that our enforcement decisions be based sound economics and hard evidence. I've tried to lay out today what I believe are the three main elements needed to achieve this objective: a sound analytical framework grounded in economic science; a strong infrastructure in which economists and lawyers work together but bring their independent judgments to bear; and, finally, strong investigative tools, fair procedures, and effective checks and balances.

We have worked very hard in the United States over the last 100 years to put these elements in place. Through the International Competition Network, we are now working with other competition authorities around the world, especially those created in just the last few years, to help them do likewise. This is a large undertaking, but is one that we are certain is worth the effort.

1. Deputy Assistant Attorney General for International and Policy Matters, Antitrust Division, U.S. Department of Justice. These remarks reflect the authors personal views and not necessarily those of the Division. The author thanks Elizabeth Reardon and George Rozanski for drafting the section of this paper describing the organization and role of the Economic Analysis Group, Mark Botti and Scott Sacks for drafting the descriptions of the Suiza and Sungard cases, and Christina Akers and Gloria Jenkins for their assistance in finalizing the paper. Any mistakes found in this speech are, of course, my own.

2. William J. Kolasky, Address before the International Bar Association, Conference on Competition Law and Policy in a Global Context (Mar. 18, 2002).

3. J.A. Schumpeter, Capitalism, Socialism and Democracy (1942).

4. William J. Kolasky, Address before the ABA Section of Antitrust Law Spring Meeting (Apr. 24, 2002).

5. Charles A. James, Address before the United States Department of Justice Antitrust Division, on the occasion of the 20th Anniversary of the 1982 Merger Guidelines (Jun. 10, 2002).

6. U.S. Dep't. of Justice, Merger Guidelines (1982) §1, reprinted in 4 TRADE REG. REP. (CCH) ¶ 13, 102.

7. *Id.*

8. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm* (Jun. 4, 2002). Greg's paper and those of the other contributors are available on the Antitrust Division website at http://www.usdoj.gov/atr/hmerger.htm#papers.

9. William J. Kolasky and Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers* (2002).

10. Mario Monti, Address before the Conference on Reform of European Merger Control (June 4, 2002).

11. Antitrust Civil Process Act, 15 U.S.§§ 1312, as Amended.

12. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, tit. II, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a (1994)).

13. Department of Justice, *Justice Department Requires Suiza Foods and Dean Foods to Divest 11 Dairy Processing Plants*, press release Dec. 18, 2001.

14. U.S. v. Country Lakes Foods, Inc., 754 F. Supp. 669 (D. Minn. 1990).

15. U.S. v. SunGard Data Systems, Inc., 172 F. Supp.2d 172 (D.D.C. 2001).

16. *Id*. at 190 n. 21.

17. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.12, reprinted in 4 TRADE REG. REP. (CCH) ¶ 13,104 (1992, rev'd 1997).