DEPARTMENT OF JUSTICE

COMPARATIVE MERGER CONTROL ANALYSIS: SIX GUIDING PRINCIPLES FOR ANTITRUST AGENCIES — NEW AND OLD

Address by

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Good morning. It is my great pleasure to be here today and to share the podium with both old and new friends. Thank you especially Bill Rowley for giving me the opportunity to provide my perspectives on international merger control.

Over the past decade or so, as more and more countries have embraced market principles, we have witnessed an explosive growth in the number of countries with antitrust laws and agencies. Over 90 countries now have antitrust laws, with at least 60 having some form of merger notification. Rigorous enforcement of antitrust laws is essential in preserving and extending the gains that open markets have brought to national economies and the global economy as a whole. But it is equally critical that antitrust enforcement not become a bureaucratic obstacle to efficient transactions and that antitrust enforcers not unnecessarily regulate — and thereby stifle — the competitive forces we mean to protect.

This morning, instead of belaboring the specific differences that currently exist between the various merger control regimes, I will focus on six guiding concepts that are critically important to any successful enforcement program, regardless of its maturity or the specific statutory structure under which it operates.

Protect Competition, Not Competitors

Antitrust enforcers should not be in the business of picking winners or protecting losers. We should keep in mind that preserving "competition" does not mean taking action to ensure that a market remains populated by a static number of relatively equally matched players. In the merger context, this means resisting the temptation to use the antitrust laws to make life easier for

complaining competitors by blocking efficient transactions that give the merged firm the ability to lower prices. This is not a new concept. Indeed, Thurman Arnold, who led the Antitrust Division in the United States some sixty years ago, explained that,

> "[t]he economic philosophy behind the antitrust laws is a tough philosophy. [T]hose laws recognize that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win."[1]

The mission of an antitrust authority should, therefore, be to protect competition in all of its forms and varieties because competition is the one surefire way of guaranteeing that society's resources will be put to their most efficient use — keeping costs and the resulting prices low, and encouraging firms to innovate.

Recognize The Central Role Of Efficiencies In Antitrust Analysis

The second principle is a close corollary of the first: namely, that efficiencies should play a central role in our analysis of mergers and other allegedly anticompetitive conduct. As the June 1994 OECD Interim Report on Convergence in Competition Policies states: "[T]he basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources — and thus efficient market outcomes — in free market economies."[2]

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[1]Quoted by Jack Brooks, Address at Symposium in Commemoration of the 60th Anniversary of the Establishment of the Antitrust Division, January 10, 1994, Washington, D.C. (transcript available on Westlaw at 1994 WL 13093148).

[2]Organization for Economic Co-operation and Development. Interim Report on Convergence of Competition Policies. OECD/GD (94) 64, Paris, June 1994 (on file with OECD).

In the United States, efficiencies have played a central role in antitrust analysis from the very beginning. One of the great insights of the rule of reason, as formulated by our Supreme Court in *Standard Oil*[3] nearly a century ago, was that determining the legality of conduct under the antitrust laws requires balancing its anticompetitive effects, in terms of market power, against the procompetitive effects, in terms of greater efficiency, in order to determine what the likely net effect will be on price, quality, output, innovation, and, ultimately, consumer welfare.

After a brief detour and frolic during the 1960's, we in the United States have now fully integrated efficiencies into our analysis of the likely competitive effects of mergers. We were pleased last July when Commissioner Monti signaled that the European Commission intended to do likewise, treating efficiencies as a reason for approving a merger even where those efficiencies might make it more difficult for rivals to compete.[4]

We all nevertheless still have a great deal to learn about how to factor efficiencies into our evaluation of particular mergers. As Joseph Schumpeter first taught us, productive and dynamic efficiencies are at least as important as static allocative efficiency in promoting economic growth.[5] These efficiencies are often hard to measure; placing too high a burden on the parties to quantify

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[3] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[4] See Mario Monti, The Future for Competition Policy in the European Union, Address at Merchant Taylor's Hall, London (July 9, 2001) (transcript available on European Union web site, http://europe.eu.int, under News/Press releases) ("[W]e are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition.")

[5] J.A. SCHUMPETER, CAPITALISM, SOCIALISM and DEMOCRACY (1942). *See also* Michael E. Porter, *Competition and Antitrust: Toward a Productivity-Based Approach to Evaluating Mergers and Joint Ventures*, 46 ANTITRUST BULL. 919 (2001).

these efficiencies and to show that they are merger-specific therefore risks prohibiting transactions that would be efficiency-enhancing. At the same time, it often said that more than two-thirds of all mergers fail so we should also be careful not to accept efficiencies claims on faith alone. This is why in the United States, we don't count efficiencies "if they are vague or speculative or otherwise cannot be verified by reasonable means."[6]

Base Decisions on Sound Economics and Hard Evidence

Third, we must do everything we can to prevent antitrust from becoming politicized. As an economy grows, and the stakes become ever larger, firms are naturally driven to seek protection and help from their governments. They can be expected to try to use antitrust as a weapon to be wielded against their competitors. This is a problem faced by new antitrust agencies and old — newer agencies can expect to see their legitimacy challenged, and more mature agencies are increasingly confronted by lobbyists and public relations experts seeking to influence decisions, not through arguments on the competitive merits, but through the media and otherwise.

The best thing that both new and old antitrust enforcement regimes can do to prevent antitrust from becoming politicized is to make sure our decisions are soundly grounded in economic theory and fully supported by the empirical and factual evidence. When complaints — particularly those of competitors — are brought to us, they must be tested against what Joseph

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[6] *U.S. Dep't of Justice & Federal Trade Comm'n Horizontal Merger Guidelines*. 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992 and revised 1997).

Schumpeter called "the cold metal of economic theory." We must also ensure that our decision-making is transparent and fair. Senior enforcement officials should give merging parties and complainants an opportunity to engage them substantively before reaching a decision, and should bring their own mature judgment to cases and not rely uncritically on the advice of their staffs. And, we must have in place effective mechanisms for judicial review.

Realize That Our Predictive Capabilities Are Limited

Fourth, antitrust officials, like doctors, should take a sort of Hippocratic oath: before intervening, we should be confident that our actions will not cause harm. Antitrust authorities should be law enforcers, not industrial policy makers who try to move industries in a certain direction or dictate particular market results. Dictating industrial policy is not the proper role of an antitrust authority for a very good reason: the long-term (and, in some industries, even the short-term) predictive powers of antitrust enforcers are limited. Over the course of my twenty-five-year career as an antitrust lawyer, I continually have been amazed at how markets evolve — often in ways that even the most sophisticated of industry participants were unable to anticipate.

In the United States, we have relatively little confidence in our ability to make predictions far out into the future and have much more faith in the self-correcting nature of markets. These beliefs lead us to be skeptical of self-interested claims by rivals that a merger will lead to their ultimate demise and explain why we demand strong factual and empirical proof before we accept such claims. This is also why we intervene only when a merger is likely *substantially* to lessen competition and when we believe we can prove that to an objective decision-maker by a

preponderance of evidence.

Impose No Unnecessary Bureaucratic Roadblocks

Fifth, we must work hard to ensure that the antitrust laws do not themselves become bureaucratic roadblocks to efficient transactions. A vigorous, competitive, free-market economy produces a whole host of agreements and transactions every day. The vast majority are pro-competitive or, at worst, competitively neutral. Mergers are just one subset of the deals produced in a healthy economy, and government interference with, and delay of, the merger process should be kept to a minimum.

We enforcement authorities should therefore continually take stock of our procedures to be sure that only those mergers that raise legitimate competitive concerns are delayed and that we are stopping only those mergers that are truly anticompetitive. In recent years, the United States has been able to clear roughly 97 percent of all mergers in the first thirty days and we inspire to do even better. The Antitrust Division is examining our own internal procedures to find ways to make them work even better, and, last October we launched the Merger Review Process Initiative. The purpose of this initiative is to streamline the merger review process by encouraging and empowering Antitrust Division staff to narrow the focus of the review to critical legal, factual and economic issues as early as possible and to authorize the staff to enter into agreements with the parties under which we will agree to a procedural schedule in exchange for undertakings by the parties regarding submission of information and compliance with investigative requests.

We also just recently announced a new agreement with the U.S. Federal Trade

Commission concerning clearance procedures for merger reviews and other antitrust matters. This new agreement for the first time formally allocates primary areas of responsibility, on an industry-wide basis, between the Justice Department and the Federal Trade Commission. We believe both of these initiatives will serve to make our merger review processes more efficient and effective, while at the same time reducing delay and the investigative burden on the merging firms.

Be Flexible and Forward Looking

Finally, antitrust agencies should be as flexible and dynamic as the industries with which they deal. We must make sure that antitrust adapts to changes in technology and in the economy. In particular, we should recognize that in our new, knowledge-based economy, competition in some markets is driven more by innovation than price. New-economy industries frequently require very large and risky upfront investments that will not be made without the promise of a substantial return. They also are often characterized by large network effects and low marginal product costs. All of this means that the most efficient outcome in some markets may be for a single firm to serve the entire market for at least a period of time.

In the new economy, the costs of regulatory missteps are therefore very high. Too much government interference will frustrate innovation and discourage efficient practices to the detriment of consumers worldwide. On the other hand, a totally hands-off approach could lead to high prices and frustrate the emergence of potentially superior technologies — also to the detriment of consumers. The fact that many of the new economy industries are global in nature,

coupled with the reality that numerous enforcement agencies may now be looking at the same transactions, make it that much more important — and that much more difficult — to get it right.

International Initiatives

This is an exciting era full of new and unique challenges for antitrust. By adhering to the principles I have enunciated here, I think we can successfully meet those challenges. Speaking from the United States perspective, it is important that we continue to be engaged with our enforcement counterparts around the world. As the economy becomes increasingly global, and as more and more jurisdictions begin betting on competition and antitrust enforcement, it is all the more critical that we continue our technical assistance efforts, continue to cooperate on investigations, and continue to achieve greater convergence.

Thank you.