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COMPETITION COMMITTEE**

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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by the Delegation of the United States --

This note is submitted by the delegation of the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by the United States --

1. This paper responds to the Chairman's invitation for written submissions on the topic of promoting compliance with competition law. The Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("Division") (collectively "the agencies") are pleased to provide our perspective on this important issue. The paper addresses the topic in three parts. The first part offers various agency enforcement perspectives on the topic. The second part looks into the role private antitrust enforcement plays in promoting compliance. Finally, the third part provides agency perspectives on antitrust compliance programs. The agencies note that the agencies are not best placed to answer some of questions suggested in the invitation for submissions. Private companies are in a better position to explain what factors determine their decision to comply or not comply with competition laws.

1. Promoting better compliance: Agency perspectives

1.1 Transparency of the agency process & clear guidance

1.1.1 Transparency of enforcement actions

2. The agencies complement their enforcement actions by providing detailed guidance to consumers, the business community, and the private antitrust bar that counsels it. Robust transparency promotes compliance because it informs antitrust enforcement's stakeholders of the boundaries between legitimate conduct and conduct that runs afoul of the antitrust laws.

3. The agencies provide the public with substantial information about all aspects of antitrust (policy, enforcement, history, statutes, agency operations) through their public websites.¹ In our legal system, administrative litigation at the FTC and litigation in federal court by both agencies result in written judicial and agency opinions that form a body of legal precedent that can guide private compliance with the antitrust laws. The agencies similarly make this jurisprudence available through our websites.²

4. Parties in most of our cases settle matters instead of litigating. Settlements generally do not result in a substantive judicial opinion. Nevertheless, they form an important body of precedent with broad influence in the private antitrust bar, the business community, and consumers at large. In accordance with the Tunney Act,³ when the Division files its complaint and proposed consent decree in federal court, it also files a competitive impact statement and invites comment from interested parties. Before the FTC accepts a consent order, it follows a similar practice, inviting public comment by issuing a draft complaint, a press

¹ See, for example, the FTC Competition Policy Guidance gateway page *available at* <http://www.ftc.gov/bc/guidance.shtm>; relevant documents on the Antitrust Division webpage at <http://www.justice.gov/atr/public/index.html>.

² See <http://www.ftc.gov/bc/caselist/index.shtml>; <http://www.justice.gov/atr/cases/index.html#page=page-1>.

³ Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(f).

release, and a notice to aid public comment that explains the actions it is planning to take.⁴ These materials help the public to understand the reasons for our concern and how the remedy will work, and invite the public to express their views about the terms of the settlement. These materials also explain the agency's analysis in the particular area of the law more generally. When a settled case raises novel issues, the Federal Trade Commissioners often issue public statements explaining the bases for their decisions, providing further guidance.

5. In addition, there are instances in which the FTC or the Division issues a closing statement to explain a decision to abstain from an enforcement action. These statements are important not only to make the agencies' decisions transparent to the public, but also to make them accessible to other agencies that face similar issues, as well as the antitrust community at large.

1.1.2. Transparency in non-enforcement activities

6. Our educational efforts are not limited to enforcement actions. The agencies also hold workshops and public hearings on important or novel competition issues, and issue Advisory Opinions and Business Review Letters on specific antitrust conduct. Our workshops and hearings solicit input from interested parties as part of the process of formulating public policy, but they also serve an educational role, alerting the business community and consumers that particular issues are of interest to us. The agencies periodically issue formal guidelines, which the agencies have found to assist in these educational efforts. The agencies also conduct competition advocacy, with frequent filings before regulatory and legislative bodies, both federal and sub-federal.

7. The FTC has an advisory opinion process, which allows private parties to request a review of particular, novel competition questions and obtain the FTC's opinion about any competitive questions that may be raised. Advisory opinions may also be issued by staff and are non-binding on the agency, but nonetheless provide valuable guidance in situations where novel competition issues arise.⁵ Similarly, under the Division's business review procedure, an organization may submit a proposed action to the Division and receive a statement as to whether the Division would likely challenge the action under the antitrust laws.⁶

8. Finally, the agencies' leaders regularly speak publicly to provide further clarity on their enforcement agenda to the antitrust bar, the business community, and the public; many speeches are available on the agencies' websites.

9. These educational efforts can have valuable, indirect deterrent effects. One of the ways the agencies generate new civil cases, beyond the premerger reporting laws, is through complaints by customers, suppliers, and competitors. Accordingly, as the agencies increase the general awareness of how antitrust laws apply in the U.S. economy, the business community becomes more educated in the basics of competition law and is aware of the opportunity to bring competition problems to the agencies. The more

⁴ See Rule 2.34 of the FTC Rules of Practice, *available at* <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b7afccdbff50301d4053192eb44c484b&rgn=div6&view=text&node=16:1.0.1.1.3.3&idno=16>.

⁵ FTC advisory opinions are available at <http://www.ftc.gov/ftc/opinions.shtm>, and its advisory opinions on healthcare scenarios are *available at* <http://www.ftc.gov/bc/healthcare/industryguide/advisory.htm>. The FTC will not render an opinion if doing so would require a factual investigation (or if the conduct is ongoing).

⁶ Copies of the Division's Business Review Letters are *available at* <http://www.justice.gov/atr/public/busreview/letters.html#page=page-1>. The Business Review process is described in the Division Manual at III-132 – III-136, *available at* <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>.

the business community knows about what the agencies do, the more effective our enforcement program will be, and the greater its deterrent effect.

1.2 *Counseling by the private bar*

10. The agencies devote considerable resources to antitrust enforcement, but our resources are limited and our mandate is broad. The U.S. economy is so large that the agencies cannot review all private economic behavior. Hence, private antitrust counseling and private antitrust lawsuits play an important role in deterring anticompetitive conduct before it occurs. Such preemptive deterrence significantly augments the agencies' antitrust enforcement.

11. Many large, sophisticated companies and trade associations regularly consult antitrust counsel before engaging in conduct and transactions that may present potential competition issues. Collectively, the antitrust bar likely reviews far more business conduct than the antitrust enforcement agencies ever see. Counselors explain to their clients the risks presented by possible conduct and transactions as accurately as possible. Accordingly, private counseling can often stop problematic conduct before it ever occurs.⁷ Agency transparency increases the value of private counseling by providing the private bar with the information attorneys need to effectively counsel their clients on the risks of problematic conduct.

1.3 *Bringing cases against both big and small violators*

12. It is both natural and appropriate to focus the agencies' limited resources on enforcement with the greatest public benefit, but the agencies enforce the law against small firms as well as large. To restrict our focus to just the largest companies that impact a substantial volume of commerce is risky, because it may lead smaller players to believe they are *de facto* immune from antitrust enforcement. The agencies therefore also pursue competition issues in small markets and against small firms, for good reason. First, the agencies do not want to establish *de facto* safe harbors for violations of the antitrust laws based on the volume of commerce. Second, in aggregate, small firms make up a substantial percentage of the total U.S. economy, so while an individual small firm may not have a great economic impact, the impact of ignoring all smaller firms would be substantial. Third, small companies can be engines of innovation and, in some markets, innovation competition is at least as important as price competition. Fourth, anticompetitive conduct by smaller firms or in smaller markets can cause serious harm to a substantial number of consumers, and the agencies will not ignore situations where clear and egregious violations result in consumer harm. Fifth, cases involving small firms can also be used to establish key principles of law and enforcement policy. Finally, it is important to the continuing vigor of our economy that all firms play by the same antitrust rules.

1.4 *A history of violations is an important variable*

13. U.S. antitrust experience shows that some industries have a history of antitrust violations. Many of these industries bear structural characteristics that are conducive to competition concerns, such as frequent, observable transactions and easy methods to detect and punish deviation from an anticompetitive agreement. This suggests that enforcers can profitably focus their efforts on industries where anticompetitive conduct has occurred. Therefore, the U.S. enforcement agencies will continue to monitor sectors that have a history of violations. This is true both for civil investigations where, for example, mergers in a sector with a history of collusive conduct will be examined closely for potential anticompetitive effects, as well as for criminal matters.

⁷ Such counseling can also ensure better compliance with the mandatory merger notification requirements of the Hart-Scott Rodino Act. 15 U.S.C. §18a.

14. This principle is recognized in the criminal context in the U.S. Sentencing Guidelines, where a history of antitrust convictions can result in a higher fine range for companies and individuals and a higher prison range for individuals.⁸ Thus, the U.S. Sentencing Commission recognizes the need to punish repeat offenders more harshly and, likewise, the Division recommends harsher penalties for repeat offenders. These increased penalties act as a deterrent. The Division also employs what it calls the “Penalty Plus” program against companies that do not report to the Division additional cartels in which the company engaged. Thus, companies should undertake a thorough internal investigation to determine whether their involvement in cartel activity extends beyond the products or services already under investigation. If a company fails to report its participation in a second antitrust offense and the conduct is later discovered, the Division will seek a sentencing enhancement. The Division will recommend a greater penalty for a company that is aware of the second offense but elects not to report it than one that fails to detect the wrongdoing as a result of an inadequate internal investigation. In assessing the amount of the penalty, the Division will, of course, distinguish between those companies that made every effort to ferret out wrongdoing in their internal investigations and those that simply turn a blind eye. In egregious “penalty plus” cases, the Division’s policy is to urge the sentencing court to consider the company’s and any culpable executive’s failure to report the conduct voluntarily as an aggravating sentencing factor. The Division will request that the court impose a term and conditions of probation for the company pursuant to U.S. Sentencing Guidelines §8D1.1 - §8D1.4, and the Division will pursue a fine or jail sentence at or above the upper end of the Guidelines range.⁹

1.5 Enforcement across various sectors

15. Although the agencies monitor sectors with a history of violations, that does not mean that the agencies do so to the exclusion of other sectors. The agencies believe that refraining from a narrow focus on particular sectors of the economy advances important policy goals. In particular, the agencies want to create and maintain an expectation throughout the economy that the antitrust laws will be uniformly enforced. Just as no firm should escape antitrust scrutiny because of its size, no firm should think its exposure to the antitrust laws is lessened just because it happens to make something other than cement or vitamins, to take two examples. An explicit, sector-specific enforcement agenda derived from the agencies’ enforcement history could potentially undermine the expectation of universal enforcement. Equally important, it is crucial for competition enforcement to respond dynamically to changes in the economy and the emergence of new markets. At the same time, the agencies, while responsible for competition in the entire economy, will naturally tend to focus their resources on sectors that are most important to consumers (*e.g.*, health care, transportation, high-tech, energy, and telecommunications).

1.6 Criminal penalties for hard-core cartel violations

16. The Division has long advocated that the most effective deterrent for hard-core cartel activity, such as price fixing, bid rigging, and market allocation agreements, is significant prison sentences. Prison sentences are important in anti-cartel enforcement because companies necessarily commit cartel offenses through individual employees, and because prison is a penalty -- in contrast to fines -- that cannot be reimbursed by the corporate employer. As a corporate executive once told a former Assistant Attorney General: “[A]s long as you are only talking about money, the company can at the end of the day take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can

⁸ U.S. Sentencing Guidelines §§ 4A1.1; 5E1.2(d)(6); 8C2.5(c)(1)-(2). The 2010 Guidelines are *available at* http://www.ussc.gov/Guidelines/2010_guidelines/ToC_HTML.cfm.

⁹ Scott D. Hammond, Recent Developments, Trends, and Milestones In The Antitrust Division’s Criminal Enforcement Program, Speech before the ABA Antitrust Section’s 56th Annual Spring Meeting (March 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.htm#N_13.

do for me.”¹⁰ Executives often offer to pay higher fines in exchange for a reduction in their jail time, but they never offer to spend more time in prison in order to get a discount on their fine.

17. Prison sentences are also a deterrent to non-U.S. executives who would otherwise extend their cartel activity to the United States. In many cases, the Division has discovered cartelists who were colluding on products sold in other parts of the world and who sold the product in the United States, but who did not extend their cartel activity to U.S. sales. In some of these cases, although the U.S. market was the cartelists’ largest market, the collusion stopped at the border because of the risk of going to prison in the United States.

1.7 International cooperation among antitrust agencies can prevent compliance problems

18. Cross-border mergers are increasingly subject to simultaneous review by multiple jurisdictions. In practice, this means that cooperation and collaboration among the affected jurisdictions is beneficial to parties, the reviewing enforcement agencies, and consumers. Cooperation and collaboration help address and resolve issues of common concern in a manner that avoids inconsistent or detrimental outcomes.

19. This kind of review requires agency staffs to address any overlapping concerns in a coordinated manner. Such coordination strives to ensure that, where the competitive concerns are the same in different jurisdictions, respective remedies cover the same assets under the same terms, to avoid subjecting the parties to conflicting obligations. Therefore, for example, after obtaining waivers from the merging parties, the U.S. agencies find it useful to coordinate with sister agencies to ensure complementarity of their respective remedies in appropriate cases.¹¹

2. U.S. private litigation’s contribution to promoting better compliance

20. In a 2003 paper, FTC Commissioner William Kovacic identified five variables that affect individuals’ and firms’ decisions on whether to comply with antitrust law:¹²

- The substance of the legal command -- the specification of behavior that the law forbids or compels.
- The standards of evidence that adjudicative tribunals will apply to determine whether the plaintiff has proven a violation.
- The likelihood that transgressions of the law will be detected.
- The likelihood that observed transgressions will be prosecuted.
- The severity of sanctions that will be imposed if guilt is established.

¹⁰ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 705 (Oct./Dec. 2001).

¹¹ See, e.g., Ciba-Geigy/Sandoz, materials available at <http://www.ftc.gov/os/caselist/9610055.shtm>, and discussion of this point in John Parisi, ENFORCEMENT COOPERATION AMONG ANTITRUST AUTHORITIES, p. 15, available at <http://www.ftc.gov/oia/speeches/1008enforcementantitrust.pdf>.

¹² Then General Counsel, William E. Kovacic, Private Participation in the Enforcement of Public Competition Laws, British Institution of International and Comparative Law, Third Annual conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue (May 15, 2003), available at <http://www.ftc.gov/speeches/other/030514biicl.shtm>.

21. Three of these variables appear to be enhanced by private antitrust litigation. First, when every aggrieved private party in the market can initiate an antitrust proceeding, the likelihood of observed transgressions being prosecuted grows. Second, a system of private antitrust litigation increases the likelihood of prosecution of antitrust violations, because private parties may fully internalize the benefits of their antitrust enforcement.

22. Finally, the remedies available for successful U.S. private claimants are very broad. Under Section 4 of the Clayton Act,¹³ claimants injured by violations of the antitrust laws may sue for and recover “threefold the damages...sustained.”¹⁴ Congress adopted this rule to encourage private antitrust litigation.¹⁵ A prevailing private litigant may also be entitled to equitable relief. Trebling is mandatory, as the court lacks discretion to award single damages or a multiple other than three so long as the court finds the defendant's conduct to be culpable. U.S. law also permits the prosecution of private antitrust cases on behalf of classes of injured parties, which can strengthen the position and magnify the negotiation power of the plaintiffs in private suits. Class actions can deter unlawful antitrust behavior, although concerns have arisen that they may create incentives to bring meritless class actions and do not always offer meaningful relief, given the way they have evolved.¹⁶ Overall, private antitrust litigation creates incentives that enhance antitrust compliance in the U.S.

3. Antitrust compliance programs

3.1 General antitrust compliance programs

23. The agencies do not generally impose specific requirements upon firms directing *how* they must comply with the antitrust laws. When the FTC issues orders to remedy violations, it does not generally impose specific obligations about how to comply with the orders; the firm is expected to determine how to comply on its own. At times, however, the FTC’s orders contain broad instructions about how to comply. For example, in the *Transitions Optical* matter,¹⁷ the consent order requires Transitions to designate an officer to coordinate the design of a program to educate its employees, distribute the order to employees and third parties, train employees, retain certain documents, and maintain a website link to the order. Similarly, in the *Microsoft* case, the Division’s consent decree required Microsoft to appoint a compliance officer to oversee its compliance with the decree, administer its general antitrust compliance program, distribute copies of the decree, and ensure that annual training was provided to all officers and directors on the requirements of the decree and the antitrust laws. The compliance officer was also responsible for

¹³ 15 U.S.C. §15(a).

¹⁴ *Id.*

¹⁵ See *Reiter v. Sonotone Corp.*, 442 US 340, 344 (1979) (“Congress created the treble-damages remedy of section 4 precisely for the purpose of encouraging private challenges to antitrust violations”).

¹⁶ Class actions can be an efficient mechanism for using judicial resources, providing consumer redress, deterring wrongdoing, and safeguarding the integrity of the marketplace. As consumer class actions have evolved over time, however, concerns have been raised about whether some of these actions and, in particular, some of the settlements reached in these actions truly serve consumers’ interests and deter unlawful behavior by defendants. These concerns focus on, among other things, the disproportionate influence of the class certification decision, insufficient notice to the class, consumer redress that does not really provide anything of value, and excessive attorneys’ fees that may either reduce consumer redress in meritorious cases or provide incentives for prosecution of meritless cases that can harm consumers indirectly. See more in the June 2006 U.S. Submission to the OECD Competition Committee, Working Party No. 3, Roundtable Discussion of Private Remedies, available at <http://www.ftc.gov/bc/international/docs/RdtbleOnPrivateRemediesUnitedStates.pdf>.

¹⁷ See <http://www.ftc.gov/os/caselist/0910062/100427transopticaldo.pdf> (final order at Paragraph III).

setting up a website where complaints could be submitted and for serving as a central clearinghouse for complaints submitted by third parties, the Division, the state plaintiffs, and the committee of technical experts established by the decree to assist the Division and states in their enforcement efforts.¹⁸

24. When the FTC orders specific obligations regarding a compliance program, it nevertheless does not specify the precise details of what that program must contain, for two primary reasons. First, it is the firm's responsibility to comply with the order and to determine how best to do that; the firm is in the best position to know which employees need to be trained, how, and how often. Second, precise description of a program could have the effect of creating a kind of informal "safe harbor" for the firm; that is, if it complies with the specific obligations yet nonetheless violates the order, it might argue that it should be excused because it did precisely what the FTC's order required. Accordingly, the FTC refrains from imposing that level of detail. Nevertheless, as shown in *Transitions Optical*, it may be appropriate in some cases to give some guidance and establish minimum standards for what an order compliance program must contain.¹⁹

25. The agencies do, however, encourage the establishment of order (and decree) compliance programs by the way they view the culpability of a firm if it violates an order. A true effort to comply, including periodic training and quick intervention if an employee strays, will be viewed as "good faith," and can mitigate the amount of any civil penalty that might be sought for a violation. Conversely, failure to take steps to develop a compliance program will be considered bad faith (or at a minimum a lack of good faith) and will call for a higher penalty for an order violation.²⁰

26. In addition, the FTC works closely with firms, especially under new orders, to ensure that they begin their compliance efforts "on the right foot." New orders also require firms to submit reports showing their compliance, which allows the FTC staff to alert the firm if a problem appears in their compliance. Finally, the FTC staff will answer questions (and provide an advisory opinion if requested) if a firm is unsure how to proceed. In these various ways, the FTC remains involved in the firm's compliance efforts, subject as noted to the overall observation that it remains the firm's obligation to comply in the first instance.

3.2 *Anti-Cartel Compliance Programs*

27. The most effective anti-cartel compliance programs are the ones the Division never learns about, because they are the ones that help a company avoid violating the law in the first place. Such programs help the company avoid the consequences that flow from a violation, including federal civil and criminal penalties, private civil litigation and treble damages, state enforcement, enforcement actions in non-U.S. jurisdictions, and other penalties such as suspension and debarment, along with other harms such as loss of good will. The goal should be the creation of a culture of compliance at all levels of operation within the company. If a violation does occur, an effective compliance program increases the chances of early internal detection and thus of being the first company to self-report and qualify for leniency under the Division's leniency program. Even if the company is not the first to approach the Division with

¹⁸ See <http://www.justice.gov/atr/cases/f245100/245110.htm> (final judgment at Sections IV.C, IV.D).

¹⁹ It should go without saying that a true corporate compliance program, designed to assure compliance, is viewed quite differently from a pretextual compliance program, designed to give the appearance of sincerity without truly being effective.

²⁰ See, e.g., the FTC's recently filed \$1.3 million civil penalty settlement in *FTC v. Toys R Us*, available at <http://www.ftc.gov/os/caselist/9410040/index.shtm>. The third count alleges that Toys "R" Us failed to "adopt any specific program or procedure to assure compliance" with the FTC's original order. Toys "R" Us also allegedly failed to maintain records, as the order required.

information about the cartel, early cooperation can result in plea agreements that recommend reduced penalties under the Sentencing Guidelines.²¹

28. The U.S. Sentencing Guidelines contemplate a reduction in a corporate fine for an effective compliance program. As applied by the Division, a reduction will be available so long as there was no involvement of high-level personnel (defined broadly) in the illegal activity, and no delay in reporting the activity. Recent guideline amendments permit a limited exception for the involvement of high-level personnel, in circumstances where four criteria are met, including that (1) the compliance program “detected the offense before discovery outside the organization or before such discovery was reasonably likely;” and (2) “the organization promptly reported the offense to appropriate governmental authorities.”²² A company meeting the latter criteria may also qualify for leniency, making any fine reduction irrelevant. To date, no antitrust defendant has qualified for a sentencing reduction based on its compliance program.²³

²¹ United States Sentencing Commission, Guidelines Manual (2010), supra note 8, § 8C4.1.

²² *Id.* § 8C2.5(f)(3)(C).

²³ Further information on anti-cartel compliance programs can be found in the U.S. Sentencing Guidelines, supra note 8, § 8B2.1; Gary Spratling, former Deputy Assistant Attorney General, Antitrust Division, *Corporate Crime in America: Strengthening the “Good Citizen” Corporation, The Experience and Views of the Antitrust Division*, Remarks Presented at a National Symposium Sponsored by the U.S. Sentencing Commission (Sept. 8, 1995), available at <http://www.justice.gov/atr/public/speeches/speech1grs.htm>.