

Regulatory Harmonization:

21st Century Challenges for Competition and Antitrust in the Transatlantic Area

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Globalization poses new challenges to antitrust enforcement.

Although the United States has long taken an expansive view of the ability of its antitrust laws to reach beyond our borders, until recently antitrust enforcement was a largely domestic exercise. The rapid increase in trade and foreign investment, while surely increasing consumer welfare, also multiplies the opportunities for anticompetitive conduct with cross-border effects. Yet while we now live in global economy, we do not live in a global state. This means that there are necessarily limits on the ability of national antitrust enforcers to address and remedy practices that might adversely affect their nationals. This

paper will discuss some of the means that antitrust enforcement officials have developed, and others that have been proposed, to adapt national antitrust policy to globalization, focusing in particular on the US-EU relationship.

Background

Several global trends have come together to prompt new approaches to international antitrust issues. One is the rapid increase in global trade, stimulated by, among other things, the progressive reduction in trade barriers resulting in part from international and regional trade agreements, easing of barriers to foreign direct investment, improvements in transportation and communications and, as you are discussing elsewhere in this conference, convergence of technical and other industrial standards. In the decade ending in 1997,

exports as a percentage of U.S. gross domestic product grew from 7.2% to 13.5%, while imports increased from 10% to 15.4%. These remarkable increases do not even consider foreign direct investment, which was \$350 billion in the United States in 1996 alone. The US-EU trade and investment relationship is the largest in the world, with two-way trade flow and foreign investment each exceeding \$500 million in 1998. US-EU bilateral trade constitutes over 7% of total world trade, and we have by far the world's most important bilateral investment relationship.

Another important trend, at once a cause and a result of the increase in global competition, has been the surge in merger and acquisition activity. At the FTC, we see that in the form of a tripling of mergers reported under our pre-merger notification program; we now receive over 4,500 such notifications per year, a level three times that of

1991. Whereas most mergers once raised only domestic issues, now one-half of the mergers that prompt substantial further investigation have a significant foreign dimension, such as a foreign-based party, important evidence located abroad, or a foreign asset involved in a remedy. Thus, in the past year, out of the twenty-eight merger cases in which the FTC took enforcement action, we notified foreign governments in thirteen of these cases and conducted substantive discussions with foreign authorities in six of them.

We have also witnessed over the past decade the opening of markets in formerly closed or state-dominated economies around the world. Faced with new competition from abroad, firms have sometimes turned to anticompetitive practices to safeguard their formerly protected markets. This can take the effect of closed distribution systems, import cartels, anticompetitive mergers, abuses of a dominant

position, or outright price fixing and territorial allocation. A look at the Department of Justice's recent enforcement against international cartels illustrates the breadth and depth of one aspect of this problem. In the past two years, the Antitrust Division has obtained fines in criminal antitrust cases totaling over \$1.5 billion – many multiples of the total of all criminal antitrust fines since the Sherman Act was passed in 1890. Approximately one-half of the defendants in the Division's criminal cases were based abroad, and well over 90% of these fines were imposed in connection with international cartel activity. Today, the Antitrust Division has over thirty-five sitting grand juries investigating suspected international cartels, representing over one-third of all of its criminal grand juries.

Another noteworthy trend is the proliferation of national and regional competition regimes. Many countries going through the

market liberalization process, recognizing the importance to an open economy of competition policy, have enacted an antitrust law. Today, over eighty countries have an antitrust law, approximately fifty of these with merger control provisions. Most of these laws are less than a decade old; another approximately twenty countries are considering draft antitrust legislation. Hence, mergers and other conduct by businesses operating internationally are often subject to the antitrust jurisdiction of numerous countries. This raises concerns both on the part of regulators, who seek the ability to address anticompetitive practices that affect their consumers, and firms that seek to avoid the burdens of multiple, overlapping, and potentially inconsistent antitrust regulation.

Regulatory Responses: Cooperation and Convergence

In a world in which business conduct is subject to multiple antitrust jurisdiction, some degree of regulatory coherence is not only desirable, but essential. The title of both this conference and this panel refers to regulatory harmonization. Harmonization is a desirable and achievable goal in many disciplines, some of which you are discussing during this conference. However, in the realm of antitrust, harmonization is not attainable in the foreseeable future, and may not even be desirable. Even between jurisdictions such as the US and the EU with well-developed antitrust regimes and substantial similarity of philosophy regarding the proper goals of competition policy, there are significant differences in procedures and substantive rules. This is a natural result of different historical experiences and cultural influences which are now reflected in differing legislative regimes. Similarly, in the North American Free Trade Agreement, there is no attempt to harmonize antitrust rules. Rather, a committee was established under

Section 15 of the Agreement under which the US, Canada, and Mexico were to study each other's antitrust systems and identify any areas in which differences in their regimes created impediments to trade within the free trade area; no significant such obstacles were found. We are now engaged in a competition negotiating group in the Free Trade of the Americas negotiations in which the thirty-four participating nations in this hemisphere are discussing how to incorporate competition principles into the free trade area slated for 2005. While this exercise is in its early stages, it appears unlikely to me that this will result in any attempt to impose harmonized antitrust rules, particularly given that most participants have no antitrust laws at this point.

This does not mean that the US and other jurisdictions including the EU simply pursue their own goals using their own tools with no regard for the activities of their counterparts in other countries.

Rather, the US and the EU, as well as other jurisdictions, are approaching the challenges of globalization through a variety of cooperative mechanisms that I will describe below. Our experience in working cooperatively in turn has led to convergence - not “hard” convergence consisting of common laws and regulations, but convergence based on shared learning and experience that slowly but steadily moves the US and our partners abroad toward common approaches to common problems.

The US and the EU and its Member States have been engaged in a cooperative exercise for many years pursuant to voluntary mechanisms adopted through the Organization for Economic Cooperation and Development. In a Recommendation first adopted in 1967, and successively amended, most recently in 1995, the US and the antitrust authorities of the OECD members agreed to a variety of cooperative

measures in antitrust enforcement including:

- notification of the other party whenever one party's enforcement activities may affect the another member's important interests;

- cooperation with another member's antitrust investigations, including sharing non-confidential investigatory information;

- coordination of parallel enforcement activities;

- comity, i.e., taking the other country's interests into account in making decisions on enforcement activities;

- positive comity, which is discussed further below; and

- consultation in the event of potential disputes arising from antitrust enforcement.

Many of the obligations in the OECD Recommendation have been incorporated into bilateral agreements the US has entered with important trading partners, including Germany (1976), Australia (1982), Canada (1984 and 1995), the European Commission (1991), Israel (1999), and just last week, Japan. These are an executive agreements rather than treaties, meaning that they are legally binding but do not overrule any conflicting domestic law. While the earlier agreements were motivated largely by a desire to minimize friction, such as that caused by the extraterritorial application of US antitrust law in cases such as the prosecution of the uranium cartel in the 1970s, the EC agreement and subsequent agreements were motivated primarily by a mutual desire to enhance cooperation in order to improve our mutual effectiveness in law enforcement.

Since the signing of the cooperation agreement with the EC, cooperation between the US and EC antitrust authorities has developed in an exemplary manner. This manifests itself both in regular high-level contacts as well as virtually daily staff contact on cases and policies of mutual interest. To use a current example, the FTC and the Commission staff have consulted and cooperated regularly and cooperated in reviewing the proposed merger of Exxon and Mobil. The Justice Department and the Commission worked together in their investigations of the MCI-WorldCom merger, resulting in a divestiture that satisfied both agencies, and they will no doubt be back in touch on the currently proposed MCI-WorldCom/Sprint transaction. During the investigation of such transactions, the agency staffs are in regular contact by telephone and e-mail, and may even sit in on hearings and meetings of the other agency. They exchange information on subjects such as market definition and the competitive effects of the merger and,

where remedies such as divestiture or licensing are required, seek to coordinate them to avoid incompatibilities. This process benefits both the agencies and the merging parties. As discussed below, we generally cannot share confidential information, but parties often see it in their interest to waive their protections to allow the agencies to share such information in order to coordinate their investigations and remedies. While close cooperation is particularly evident in merger cases, where the agencies and the parties have clear incentives to reach rapid and consistent results, we have also worked together in non-merger cases, such as in the investigation of certain licensing practices by Microsoft where the Justice Department and the European Commission issued parallel orders resolving the charges. You are probably aware that there is a new Commissioner, Mario Monti, responsible for competition policy in the European Commission. Just last week I was in Brussels with FTC Chairman Pitofsky and Assistant Attorney General Klein

where we all reaffirmed our commitment to continue and deepen our cooperation.

The 1991 agreement also contained a provision for a novel mechanism that has come to be known as “positive comity.” The essence of positive comity is that one country can ask another to investigate and take action against anticompetitive conduct occurring in its jurisdiction that harms the interests of the requesting country. Two types of cases in which the US or the EU could invoke positive are: (i) party A learns of a cartel among firms in the party B that fixes prices of goods sold into both parties’ markets, injuring both of their consumers; and (ii) party A learns of anticompetitive practices by firms in party B exclude party A’s firms from the party B’s market, i.e., a denial of market access. In these cases, one option, if the US felt its interests were being harmed, would be for the FTC or DOJ to conduct an investigation

and, if the charges are borne out, to impose a remedy. However, there are often substantial practical obstacles to successfully conducting and concluding such a proceeding. For example, it may be difficult to obtain jurisdiction over the subject matter and over foreign parties. Service of process may be problematic, and the gathering of evidence may be impeded by foreign laws, including blocking statutes that make it illegal to provide evidence to foreign antitrust bodies. Even if a case could be assembled and brought, it may be impossible as a practical matter to impose enforceable remedies. Furthermore, even if all of these obstacles were overcome, bringing such a case may generate undesirable political tensions when countries that claim that the assertion of US jurisdiction infringes their sovereignty. On the other hand, the European Commission will likely have better access to evidence located in the EU, and be in a better position to prosecute the case and impose a remedy.

In 1998, the US and the EC entered into a new agreement that spelled out in greater detail the procedures to be followed in positive comity cases. In addition, it established a presumption that in certain types of cases, each party would defer to the other to investigate and bring an enforcement proceeding if the party conducting the investigation agrees to several conditions, such as that it will devote adequate resources to the case, keep the other authority informed of the status of the investigation, and seek to complete its investigation including any remedial action within a reasonable time frame. Both the 1991 and the 1998 agreements, however, explicitly provide that the requesting or deferring country does not give up its jurisdiction, and is free to institute its own proceeding at any point. In addition, because of statutory requirements for national review and tight time frames for review, the deferral presumption in the 1998 agreement does not apply to merger cases.

To date, there has been one positive comity referral, by the Justice Department in 1997 of allegations that European airlines were acting anticompetitively to exclude an American firm, SABRE, from the European market for computerized airline reservation systems. In March 1999, as a result of this referral, the European Commission initiated legal proceedings against Air France. There have also been instances of informal positive comity, i.e., where without a formal referral the US has worked with the EC or its Member States to resolve a competitive problem occurring in Europe that hurt US interests. One example is a case in which the FTC learned of a cartel in Italy that was raising prices to US consumers. Upon learning that the Italian competition authority was investigating, the US stayed its hand, and the case was resolved by enforcement action taken by the Italian authority.

Positive comity should not be oversold - it has several limitations

and will be appropriate in only a narrow class of cases. Nonetheless, in appropriate cases, it can, by ensuring that the case is handled by the authority in the best position to investigate and remedy the illegal conduct, be an effective tool for cooperation while minimizing potential friction that can arise from extraterritorial enforcement.

One important limitation of both the 1991 and 1998 agreements with the EC is that they do not allow for the exchange of confidential information obtained during the investigation. Although in some cases, particularly mergers, the parties waive their confidentiality rights to allow the agencies to work together, including to fashion compatible remedies, in most other cases we are limited to exchanging public and other non-sensitive information. One exception is in the criminal area, where the US can sometimes obtain investigatory assistance, including confidential information, pursuant to Mutual Legal Assistance Treaties,

or MLATs, that provide generally for cooperation in criminal law enforcement.

In 1994, however, Congress enacted the International Antitrust Enforcement Assistance Act, or IAEEA. The Act authorizes the US to enter into mutual assistance agreements with countries with reciprocal legislation that, among other things, allows for the exchange of confidential information and authorizes each party to obtain information, including through compulsory means, exclusively for the other party. Earlier this year, the US entered into its first such agreement with Australia. We hope at some point to be able to deepen our cooperation with the EC by entering into such an agreement with the European Commission. This is unlikely in the immediate term due to concerns by some Member States about sharing confidential information with the US, particularly given that there is not even such a

mechanism between the EC and the Member States or among Member State enforcement authorities. However, we are hopeful that these barriers will be overcome so that we can proceed with a so-called second generation agreement with the EC.

Although bilateral cooperation is the most important feature of the US-EC antitrust relationship, a significant amount of convergence has taken place and continues to evolve between our two systems. As I mentioned, although there is substantial congruence of views on the proper role of antitrust between the US and the EC, there are meaningful differences, both substantive and procedural, between our systems. For example, the EC takes a stricter attitude toward certain vertical restraints than we do in the US. This is based on their overriding concern with the integration of fifteen formerly separate economies into a single market. The EC uses a somewhat different

standard for evaluating the legality of mergers as well as for judging the conduct of firms in a dominant market position. Procedurally, the EC has relied on a system of prior notification and clearance or exemption of agreements whereas we do not, and their merger reporting system applies to far fewer transactions, requires more up-front documentation than ours, and has a fixed end-point for the review. These statutory differences are unlikely to disappear in the near term.

However, as we have worked more closely together over the years, there have been meaningful steps toward convergence. This is most apparent in our analytical approaches to most antitrust issues. On the overwhelming majority of cases that we simultaneously review, we reach the same conclusions on things like market definition, competitive effects, and appropriate remedies. During the past several years, our agencies have issued decisions and guidelines in areas such as market

definition, vertical restraints, abuse of dominance, and merger analysis that bear a great resemblance to the policies of our trans-Atlantic counterparts. There is little doubt that this process of soft convergence will continue, if not accelerate, in the coming years. For example, in our meetings in Brussels last week, we agreed to establish a new working group with officials from the FTC, DOJ, and the European Commission to study issues relating to cross-border mergers with a view to looking for further areas of convergence.

There are no doubt some of you who, hearing this blissful description, are no doubt thinking, “but what about the *Boeing/McDonnell Douglas case?*” Indeed, that was a situation in which we reached different conclusions and where our differences could have escalated into a trade war. I can only say that this was the proverbial exception that proves the rule. In that matter, there actually was close

cooperation between the FTC and the Commission that narrowed differences in our analysis. In addition, the Commission deferred to the US government's request not to seek to intervene in the defense aspect of the transaction. Regarding the market for civil aircraft, this may be the unusual case where, in addition to dealing with a politically very sensitive product, the differences in legal standards may have dictated different results. Thus, the EU test of strengthening a dominant position may have proven more strict than the US test of substantial lessening of competition, and the EU is generally less tolerant of the type of exclusive agreements that its order ultimately condemned in this case. But such differences are to be expected from time to time; indeed there are often differences among the five Federal Trade Commissioners, not to mention the nine Supreme Court Justices, in antitrust cases, so why not between antitrust bodies in different countries? Yet there have been differences in other cases, in which one jurisdiction or the other found

more of a competitive problem, and such cases are regularly dealt with without fanfare or acrimony. The US-EC relationship is strong enough to respect and handle such differences. Moreover, cases such as *Boeing* only serve to re-emphasize the importance of cooperation to avoid having competition issues resolved in trade or political fora.