REDUCING GOVERNMENTAL IMPEDIMENTS TO CAPITAL MOBILITY

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How to Make Competition Law and Policy Play a Greater Role
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I am very pleased to have the opportunity to appear before you this morning. One of the issues on which ASEAN and its members have been working coincides with an interest that I have had for several years – namely, how to achieve the potential benefits of widespread competition law enforcement, while at the same time minimizing the harm that sometimes flows from the transnational effects of inconsistent or overextended enforcement practices.

In an article that I published last year before entering government service and while still a member of the private sector, I wrote:

> As international markets confront the jurisdictional reach of national competition authorities, the exercise of sovereign powers will spill across national borders. A decision by enforcement authorities in Country A may affect not only their own citizens, but also citizens in Country B. The respective effects are not necessarily the same. They may even be fundamentally inconsistent. As more competition regimes are adopted, implemented, and funded around the globe, and as more authorities assert extraterritorial application of their respective laws, the problem will likely increase.[1]

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[*] These views are those of the author and do not necessarily represent the position of the Federal Trade Commission or of any individual Commissioner.

[1] William Blumenthal, *The Challenge of Sovereignty and the Mechanisms of Convergence*, 72 ANTITRUST L.J. 267, 267 (2004).

This concern was neither novel nor isolated. In a speech delivered in 2001, Tim Muris, then serving as Chairman of the agency at which I now work, expressed similar views:

> The spread of antitrust enforcement regimes has paralleled the increasing globalization of business activity over the past decade. Most countries in which multinational firms do business have a competition law and an enforcement agency.
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> Businesses face different competitive conditions in the various countries in which they operate. Some of these differences arise from different legal and regulatory regimes that affect investment, employment, and taxation. Others arise from the market, such as distribution methods and their related costs, language, and customer tastes and preferences. As much as businesses strive for cost savings through, for example, the standardization of products and their distribution, to succeed they must accommodate the differences arising in those markets in which they participate.
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> Just as competition conditions vary from country to country, so too do competition regimes. In many cases, the U.S. antitrust agencies work with foreign antitrust agencies whose laws – and, in some cases, enforcement goals – differ from ours. How enforcers manage those differences influences whether they achieve their enforcement goals; it also influences whether companies get caught in a multi-jurisdictional tug-of-war.[2]

My objective today is to build on these earlier discussions, with a particular focus on some relationships among competition policy, government-imposed restraints, capital flows, and incentives for investment and development. I will begin with the familiar issue of competition advocacy directed against traditional governmental restraints. I will then turn to restraints that are sometimes imposed by competition authorities themselves, with special attention paid to missteps in the areas of dominance, essential facilities, and merger process. As you will see, the missteps I have in mind are ones that tend to discourage investment and capital formation. Looking more closely at the merger process, I want to highlight some remedial measures that have been advanced by the world's competition law community through the work of the International Competition Network. Finally, in closing, I would like to offer some thoughts on the role that ASEAN and ACFC might play in the future as vehicles for useful regional cooperation.

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[2] Timothy J. Muris, Chairman, Federal Trade Commission, *Merger Enforcement in a World of Multiple Arbiters*, Remarks before Brookings Institution Roundtable on Trade and Investment Policy (Dec. 21, 2001), available at http://www.ftc.gov/speeches/muris/brookings.pdf.

I. Competition Advocacy and Governmental Restraints

A. Enforcement Activity Addressing Governmental Restraints

As competition authorities, we have long recognized the potential adverse effects of misplaced or excessive governmental intervention. That recognition takes various forms.

Many enforcement agencies conduct an active program of competition advocacy, through which we alert legislatures and regulatory bodies to particular statutes and rules that would tend to reduce competition. In comparison to private conduct,

> public restraints are far more effective and efficient at restraining competition. Unlike private restraints, there is no need to maintain backroom secrecy or to incur the costs of conducting a covert cartel. Public restraints can be open and notorious. Public restraints are also a more efficient means of solving the entry problem. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides for only a limited number of licenses. Perhaps the clearest advantage of public restraints is that they frequently include a built-in cartel enforcement mechanism. While cheating often besets private cartels, public cartels suffer from no such defect. Cheaters, once identified, can be sanctioned through government processes.[3]

It is now commonplace for competition authorities to express caution over the anticompetitive consequences that often flow from regulatory capture and rent-seeking.[4] Thus, in the United States we have conducted competition advocacy to address governmental restraints that reduce competition in a wide range of industries and services – physicians, lawyers, funeral homes, and other professional licensing; advertising claims; sale of wine or real estate using electronic commerce; transportation; and many more.[5]

A second form relates to the policies of many jurisdictions with respect to state aid. The most widely recognized example is in the European Union, where the Treaty of Rome prohibits Member States from interfering with commerce among themselves.

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[3] Timothy J. Muris, Chairman, Federal Trade Commission, *State Intervention/State Action – A U.S. Perspective*, Remarks before Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003), available at http://www.ftc.gov/speeches/muris/fordham031024.pdf.

[4] *See, e.g.*, Dr. Ulf Böge, *State-Imposed Restrictions of Competition and Competition Advocacy*, Remarks before Opening Session of 2004 Seoul Competition Forum (Apr. 20, 2004).

[5] *See* Deborah Platt Majoras, Chairman, Federal Trade Commission, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program*, Address before Charles River Associates Program on Current Topics in Antitrust Economics and Competition Policy (Feb. 8, 2005), available at http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf; Muris, *supra* note 3; Timothy J. Muris, Chairman, Federal Trade Commission, *Creating a Culture of Competition: The Essential Role of Competition Advocacy*, Remarks before International Competition Network Panel on Competition Advocacy and Antitrust Authorities (Sept. 28, 2002), available at http://www.ftc.gov/speeches/muris/020928naples.htm.

Article 86 of the Treaty limits the powers of the Member States to enact measures adversely affecting competition, and Article 87 authorizes the European Commission to challenge and order repayment of competition-distorting state aid.

The concern over the adverse effects of excessive regulation also finds voice in the literature arising from capacity-building activities in the developing world. Numerous books, articles, and reports now observe that investment, development, and entrepreneurial spirit can be substantially impaired by the accumulation of little rules and procedures imposed by well-meaning bureaucracies. The writings of Peruvian commentator Hernando de Soto are especially prominent in articulating this problem,[6] but are not unique.[7] Even if not motivated by rent-seeking behavior and anticompetitive objectives, overwrought requirements for licensing, permitting, bonding, and other regulatory authorization can have unintended effects that are inconsistent with a vibrant, competitive economy. A recent World Bank study warrants close reading for its identification and measurement of obstacles to critical business activities, such as starting a business, employing workers, receiving credit, protecting investors, enforcing contracts, and closing a business.[8]

All of the examples given so far – express governmental restraints on entry and pricing, state aid, and excessive bureaucratization – tend to distort investment and impede the mobility of capital. A further example that warrants special mention is governmental intervention in the operation of capital markets through anti-takeover legislation. This was a burning issue in the United States in the late 1980s and early 1990s, as numerous state legislatures considered a variety of mechanisms that would thwart hostile takeovers and entrench incumbent managements. Our federal competition agencies successfully conducted a vigorous program of competition advocacy to explain to legislators why takeovers were generally beneficial and why the proposed legislation would injure the public.[9] While this issue is now largely moot in my country, it has reappeared recently in jurisdictions that have developing securities markets or that are emerging from cultures of managerial politesse.

B. Doctor, Heal Thyself

If we are candid in developing a detailed list of governmental restraints that tend to suppress competition, we need to recognize that the rules of competition enforcement authorities themselves have at times had a counterproductive effect. We in the United

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[6] *See* THE MYSTERY OF CAPITAL (2000); THE OTHER PATH (1990).

[7] A useful first source is the web site for the Competition Policy Implementation working group of the International Competition Network, *see* http://www.internationalcompetitionnetwork.org/cbcpi.html. The ICN is described in greater detail at *infra* note 15 and accompanying text.

[8] WORLD BANK, DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH (2005).

[9] *See, e.g.*, Letter from Mark D. Kindt, Regional Director, Federal Trade Commission Cleveland Office, to Vincent J. Fumo, Senate of Pennsylvania (Feb. 23, 1990) (comments on Senate Bill 1310 to regulate hostile takeovers of companies incorporated in Pennsylvania). The FTC filed comments addressing similar legislation in more than ten states.

States have now had more than a century of experience with administering our antitrust laws, and our practices have varied widely over that period. In retrospect, it is now clear that many of our practices in the middle of the last century were ill-considered, at least to the extent that efficiency and consumer welfare are to be treated as touchstones of sound competition policy.

Without attempting to be comprehensive, one can identify numerous practices that may initially sound reasonable, but that on inspection tend to suppress competition or discourage investment or both:

- Excessive skepticism towards horizontal restraints may discourage efficiency-enhancing joint ventures;
- Prohibition of vertical non-price restraints may prevent the adoption of efficient distribution systems;
- Prohibition of exclusive contracts or long-term contracts may limit the ability of manufacturers to receive the assurance needed to finance new facilities;
- Prohibition of maximum prices at which a manufacturer, by contract, authorizes its distributors to resell product may prevent manufacturers from protecting end-use customers against price-gouging by opportunistic distributors; and
- Imposition of uniform pricing requirements in the interest of fairness may reinforce pricing rigidities.

One could elaborate on each of these points in detail, but most are now familiar to this audience. Let me focus your attention, instead, on three other points that are also familiar, but that continue in our judgment to be a source of excessive enforcement intervention in some jurisdictions.

1. <u>Dominance and Monopolization</u>

We are mindful that enforcement authorities are not fully aligned in their views towards the appropriate analysis of conduct by dominant firms. We in the United States believe that our view on the appropriate standard has proven itself in both the marketplace of ideas and the marketplace of real-world commerce.

Section 2 of our Sherman Act[10] prohibits monopolization. The essential elements of the offense are (1) the possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of the monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Our law thus requires both the possession of monopoly power and the use of anticompetitive conduct to acquire, preserve, or expand that power.

Two key principles of United States law on monopolization should be highlighted for your consideration as you draft statutes and regulations and implement enforcement

[10] The prohibitions of the Sherman Act are included under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (“unfair methods of competition”).

policies. The first and most important principle is that United States competition law does not condemn the mere possession of monopoly power, but punishes only misuse that results in a substantial injury to competition. In our view, punishment of a firm that obtains a dominant or monopoly position by reducing price or offering new or improved products or services is contrary to the goal of promoting competition. A free market system envisions that competitors will strive for a superior position through innovation, greater efficiency, or other legitimate competitive behavior. Innovation, economic growth, and vigorous competition would be stifled if the law were to punish successful market participants who achieve a dominant or monopoly position.

A second principle is that even firms with monopoly power are permitted to compete aggressively on the merits, even if a collateral effect is the failure of their competitors. Competition is a rigorous process, and it will inevitably yield both winners and losers. If a firm is more efficient and can thereby reduce costs and expand sales at the expense of its less-efficient competitors, our competition laws are not infringed. There may be harm to competitors, but no harm to competition. Competitive conduct frequently looks like exclusionary conduct, because aggressive competition may harm less efficient firms. We do not protect less efficient businesses from legitimate, vigorous competition, even where a firm holds a dominant or monopoly position. On the other hand, our competition laws prohibit a firm with monopoly power from engaging in conduct that has no legitimate business justification other than to control prices or exclude competition, because this type of conduct injures competition.

We caution against a presumption of a dominant position based on relative market shares in the relevant market. Our experience has been that a presumption of this type can yield an erroneous conclusion. Under competition law in the United States, high market share by itself is not treated as a reliable indicator of a firm's actual control over a market in any competitive or economic sense. Actual or relative market shares are relevant, but they are only the starting points in a detailed evaluation of many factors that are pertinent to a firm's actual market power.[11]

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[11] Among the factors that must also be examined is the presence or absence of barriers to entry, examples of which include regulations, technology, or patents. An incumbent firm with a high market share will not be found to have market power under United States law if entry barriers are low, because new firms will be able to enter the market and restore competition if the incumbent raises prices to supra-competitive levels. Other factors that are relevant to the significance of market share include the pace and nature of technological change and innovation in the relevant market; market trends, such as whether the market is expanding or contracting; the existence of excess capacity in the market that can be used to increase output in the event of a price increase; patents, specialized knowledge or other assets that confer a competitive advantage on rivals in the market; and key customers whose size or attributes create an ability to resist a price increase. These and other factors determine whether a firm with a high market share can act with substantial independence from competitive market pressures. They are essential to determining the significance of market shares. Accordingly, our experience argues against the inclusion of any presumptions based on market share. In our view, legal standards should make clear that the establishment of dominance must be based on careful analysis, taking into account the range of factors that are generally considered to be determinative of market power.

In the United States, our competition law does not limit the price that a monopolist is permitted to charge – a monopolist may charge as high a price as the market will tolerate. In our view, condemnation of monopoly pricing would discourage innovation and entry by new competitors. Risky investments in innovation are undertaken because of the prospect of a large payoff from a major technological breakthrough or a popular new consumer product. To punish the monopolist from receiving the payoff would deny the expected rewards of its success and would reduce the incentive to innovate and invest.

Unless the monopolist's market is characterized by barriers to entry (as that term is used in the economic sense), high prices normally will attract firms to enter the market, especially where the new entrant can offer a lower price, a better product, or enhanced services. The new entry will restore the competitive equilibrium, tending to drive prices back toward competitive levels without the need for government interference. If artificially elevated prices do not attract new entry, it may be appropriate to inquire into the reason that market forces are failing to respond. We have found that some of the most common and effective impediments to entry are anticompetitive regulatory barriers, which in principle should be within the government's own control.

Relying on market forces rather than enforcement will avoid imposing on competition officials the difficult, if not impossible, task of monitoring prices and evaluating whether they are "unfair" or "excessive." In the United States, we regard the setting of the "fair price" as beyond the competence and resources of competition authorities. Instead, in most sectors of the economy, we rely on market forces rather than regulation to control supra-competitive prices. For the limited sectors in which market forces necessarily will be inadequate and in which regulation is required, we place responsibility in the hands of expert sectoral commissions, rather than competition authorities.

With respect to below-cost pricing, United States courts are particularly cautious when evaluating claims that low pricing has led to the acquisition or maintenance of a monopoly. First, aggressive price-cutting, the mechanism through which competition may ultimately be excluded, is the same mechanism by which a firm stimulates competition. The exclusionary and competitive acts thus look precisely alike. Second, mistaken inferences of predatory pricing are very costly. By chilling reductions in price, they deprive consumers of the benefits that the competition laws were intended to protect. Third, below-cost pricing investigations can be very difficult and resource-intensive. The measurement of "cost" is critical and has been controversial in many countries. Fourth, the incidence of proven price predation is rare, and the strategy is unlikely to succeed. Therefore, under United States law, we treat predatory pricing as illegal only in a very specific situation – where an entity can reduce its prices below cost long enough to drive a competitor out of the market and then raise and maintain its prices high enough and for a sufficiently long period of time to recoup the lost profits from the below-cost sales. If the entity cannot recoup its losses, the below-cost sales are unlikely to injure competition, and they probably did not arise out of any intentional anticompetitive scheme.

2. Compulsory Access

As we survey jurisdictions around the globe, we have seen a recent and renewed interest in a particular form of intervention that is sometimes urged as a possible remedy for dominant firms – namely, compulsory access to their so-called "essential facilities." We in the United States have developed substantial misgivings about intervention in this form, largely because of the adverse effects that I would like to describe here.

In our view, legal provisions on refusal of access to networks, infrastructure, and other "essential facilities" often harm procompetitive behavior, innovation, and effective protection for intellectual property rights. In the United States, our competition law generally does not restrict the right of a firm, including a monopolist, to exercise its independent discretion as to the parties with whom it will deal. Even firms with market power are permitted to refuse to deal with rivals. To require otherwise would chill the firms' incentives to innovate, invest, and compete.

Consider the analysis of a compulsory access from the perspective of a potential investor. If the investor commits funds and the investment fails, it absorbs the entire loss; it does not receive any subsidy from its competitors. But if the investor commits funds and the investment succeeds, it must now share the benefits with its competitors. An asymmetrical system of this type discourages entrepreneurial risk-taking, encourages free-riding, and becomes what one of our commentators has called "an insurance policy for laggards." To assure that investment and innovation are not discouraged, competitors must be confident in advance that they will not be required to share their successful assets with competitors. And to the extent that a legal system contemplates that mandatory sharing may be required in some instances, it will be important to minimize the disincentive for innovation and investment by providing sufficient detail to enable competitors to recognize in advance when the sharing obligations will be imposed.

Compulsory access to a network or other infrastructure presents another problem – it chronically leads to disputes on the terms of access, especially price, and resolving those disputes often entails intervention by agencies or courts. Compulsory access provisions tend to anticipate some form of cost-based regulation, which is inappropriate for risky investments. If investors are allowed to recover merely their costs when they succeed, they will lose the incentive to take risks. Even if a risk premium is allowed, investment incentives will still be distorted. Regulating non-price terms of access is also complex and may undermine the efficient utilization of facilities. In practice, compelling access to a network or other infrastructure requires the creation of mechanisms that will be needed to regulate the price and non-price terms of access and to monitor compliance. As we note above in connection with the objective of setting a "fair price," we have found that mechanisms of this type are generally beyond the capabilities of competition authorities. Most commentators agree that they are generally beyond the capabilities of the courts as well.

Some courts in the United States have articulated a so-called "essential facilities doctrine" under Section 2 of the Sherman Act to define exceptional circumstances in

which a duty to assist competitors may be found. In these cases, the courts have required the facility to be truly "essential," not merely convenient for competitors wishing to free ride on the investments of successful rivals. Even when limited to narrow, exceptional circumstances, the "essential facilities doctrine" has been heavily criticized, and its continued vitality is subject to doubt. The U.S. Supreme Court made clear in last year's *Trinko* decision[12] that it has never accepted or endorsed the doctrine.

For these reasons, our view is that inclusion of compulsory access provisions in a competition law is neither advisable nor practical. To the extent that compulsory access is found to be necessary as a remedy for violations of other, more general provisions of the law, that remedy should be invoked only in the most exceptional circumstances.

3. Mergers

The third area that warrants particular attention as a source of excessive intervention – and to which I will devote the remainder of my remarks this morning – is merger control. Here our concern relates not so much to substance as to process.

I do not mean to suggest that substantive merger standards are unimportant. If they are misspecified or misapplied, they can injure consumers and economic growth. As a practical matter, though, there is an emerging consensus among major jurisdictions on the analytical framework to guide merger analysis, with a focus on consumer welfare and a recognition of the benefits of efficiencies. When that framework is properly applied, different analysts should generally reach the same results, regardless of whether a jurisdiction's substantive test is nominally framed in terms of "substantial lessening of competition" test and the alternative "creation or strengthening of a dominant position." Enforcement officials in the United States are largely pleased with the operation of our current test, "substantial lessening of competition." But we also note the conclusions reached in recent years during examinations of the differences between the two tests in international fora such as the OECD and the International Competition Network. One conclusion is that both tests are concerned with whether a merger will create or strengthen market power so as to enable the merged firm to raise prices above the competitive level either unilaterally or in coordination with other firms. Another conclusion is that for purposes of international convergence, the choice between the alternative tests is less important than having the same objectives, applying the same basic standards, and employing the same analytical framework.

Realistically, we will continue to have some differences among jurisdictions at the substantive margins. First, just as different staffers in any given jurisdiction sometimes reach different conclusions when they apply applicable standards to the facts of a particular case, different jurisdictions may reach different conclusions as well. Second, because the marketplace facts may differ in different jurisdictions, those jurisdictions may reach different conclusions about a particular case, even when they apply identical standards; and those different conclusions may lead to inconsistent or conflicting proposals as to remedy. Third, even with broad agreement as to framework, enforcement

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[12] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

officials always continue to debate policy nuances – both within any given jurisdiction and across jurisdictions. As a practical matter, however, these sources of potential substantive dispute result in frictions in only sporadic cases. While the international competition community would benefit from the development of better mechanisms for averting or resolving those frictions,[13] the need does not seem to be urgent.

By contrast, we view the problems of global merger process as pressing.

In understanding the basis for this view, we should start with some rough statistics. More than seventy jurisdictions around the globe now have some form of merger review. Most of the merger review regimes provide for extraterritorial application, and even mergers between two foreign companies are subject to local notification obligations if the parties satisfy the regime's nexus requirements. In total, the world's merger review regimes directly affect literally thousands of transactions every year.

The vast majority of those transactions do not raise competitive concerns. For even the largest and most active jurisdictions, the number of transactions that require close examination each year can be measured in only the dozens. And for those transactions that do raise concern, only a handful will require detailed review or intervention by more than one or two jurisdictions.

Of the thousands of transactions that are not problematic, many will be pro-competitive and efficiency-enhancing. At least as significantly, from the perspective of the economic system as whole, the availability of mergers as a mechanism in capital markets encourages investment by providing entrepreneurs and investors with a means for recovering their funds and potentially earning a return. As my agency wrote in a decision 25 years ago:

> Long-term competitive considerations require preservation of ease of entry, and opportunity for businessmen to take entrepreneurial risks. The other side of that coin is a largely unarticulated policy, a clear corollary to the first, which would preserve exit opportunities where significant anticompetitive results do not occur. It is essential that the owners of very small businesses with slight competitive potential have some reasonable flexibility to sell out. This set of considerations is particularly compelling where the small acquired asset is a family-owned business which has come upon uncertain and perhaps adverse business conditions. Professor Areeda summarized relevant factors that attend that situation in the following terms:
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>> "The retiring entrepreneur may lack confidence in his successors or may prefer the security of portfolio diversification. Or a firm may be impelled toward merger by the fact or fear of relative decline. The actual or prospective difficulties might be in management, research, marketing,

[13] For a discussion of some of the mechanisms that commentators have proposed, see *infra* notes 20-21 and accompanying text.

> capital, labor, or anything else that affects a firm's fortune. Sale of the company as a going business may cause minimum disruption to owners, managers, suppliers, customers, employees, and communities. To facilitate exit when it is desired may indeed facilitate entry. The likelihood of exit with minimum loss or maximum gain increases the attractiveness and reduces the risk of entering a market."[14]

As responsible enforcement officials, we should be loath to adopt practices that would jeopardize efficiencies or unnecessarily impede capital flows.

With the remainder of my time this morning, let me describe some of the steps that the world's enforcement community is taking to reduce the imposition of excessive costs and burdens on merging parties.

II. ICN'S MERGER PROCESS RECOMMENDATIONS

The issues of merger process were among the first to be addressed by the International Competition Network, the membership in which now numbers 91 competition agencies from 81 jurisdictions.[15] Upon founding the ICN in 2001, the member agencies established a Mergers Working Group to address the challenges of merger review in a multi-jurisdictional context. The Working Group's output includes a set of Recommended Practices for Merger Notification Procedures,[16] representing international best practice for the development of merger notification procedures. As their title suggests, these are not legally binding requirements, but rather recommendations for competition agencies to consider, and they have. As of April 2005, 46% of ICN members with merger laws have made or proposed changes that bring their merger regimes into closer conformity with the Recommended Practices, and an additional 8% are considering such changes. The ICN also invites non-members to rely on these materials.

I will focus here on four of the key Recommended Practices – jurisdictional nexus, notification thresholds, timing of review, and requirements for initial notification. My hope is that you will give them appropriate consideration both when fashioning your own merger review regimes and when discussing modalities for regional convergence.

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[14] *Pillsbury Co.*, 93 F.T.C. 966, 1041 (1979) (quoting PHILIP AREEDA, ANTITRUST ANALYSIS ¶ 617(h), at 690 (2d ed. 1974)).

[15] *See* Dr. Ulf Böge, *Speech on the Opening of the 4th Annual ICN Conference*, at 1 (June 6, 2005), available at http://www.internationalcompetitionnetwork.org/bonn/2005speeches/openingspeech.pdf.

[16] The Recommended Practices are available on the Internet at http://www.internationalcompetitionnetwork.org/notification.html.

A. Nexus to the Reviewing Jurisdiction

The ICN's first Recommended Practice (Nexus to Reviewing Jurisdiction) provides that each jurisdiction's merger review rules should seek to screen out transactions that do not have an appreciable effect on competition within the jurisdiction. Merger control should cover only transactions that have an "appropriate nexus with the jurisdiction concerned." The rationale: Requiring notification of transactions that do not meet an appropriate standard of materiality as to the level of "local nexus" imposes unnecessary transaction costs on parties and consumes agency resources without any corresponding enforcement benefit. Accordingly, the Practice provides that notification of a transaction should not be required unless the transaction is likely to have a significant, direct, and immediate economic effect in the jurisdiction concerned.

Experience demonstrates that thresholds based on significant local sales or asset levels within the jurisdiction concerned are most suitable, and the Recommended Practice identifies these two factors as appropriate determinants of materiality. The Recommended Practice is silent as to the appropriate level at which to set such thresholds, because this will differ by jurisdiction. In the United States, for a transaction between foreign entities to be notifiable under our Hart-Scott-Rodino premerger notification filing requirement, the parties must have combined U.S. sales or assets exceeding US $116.8 million, and the acquired party must have assets or sales in or into the U.S. exceeding US $53.1 million.[17] The EU, by contrast, uses a higher primary threshold (each of at least two parties must have EU sales exceeding €250 million), in part because its system is designed to channel smaller transactions to Member States.

The question of the level at which a jurisdiction should set its thresholds will be taken up by the ICN next Spring through a workshop intended to promote greater understanding and implementation of the Recommended Practices. The workshop is still being designed, but it is currently envisioned as a two-day, interactive program intended for officials responsible for merger enforcement policy or premerger notification or both. Key aspects of the Recommended Practices, including how to set appropriate levels for thresholds that protect the public without unnecessarily burdening transactions that have only a limited relationship to the jurisdiction, will be addressed through panel discussions and hands-on breakout sessions. The workshop is likely to be held in Washington DC toward the end of March 2006.

The examples of thresholds from the U.S. and EU illustrate another key component of the ICN's jurisdictional nexus Practice: they measure nexus by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory. The Recommended Practice notes that many jurisdictions require significant local activities by each of at least two parties to the transaction before the nexus requirement is satisfied; this is viewed as an appropriate local nexus screen.

[17] The U.S. thresholds are not round numbers because the statute provides for adjustments from the original values of $100 million and $50 million to reflect currency inflation.

With respect to transactions involving only one party with appropriate nexus to the jurisdiction, the Recommended Practice observes that the risk of competitive harm is sufficiently remote that the burden associated with notification is normally not necessary. The Recommended Practice further provides that if local nexus requirements are to be based on a single party, the requirements should (i) focus on the activities of the acquired business and (ii) use thresholds that are sufficiently high to avoid notification of transactions without potential material effect on the local economy.

The Recommended Practice states that notification should not be required solely by reference to the acquiring firm's local activities – for example, by reference to a local sales or assets test that can be satisfied by the acquiring person alone. Otherwise, notification would be likely to impose unnecessary transaction costs on a large number of transactions that do not pose any risk to competition in the jurisdiction. The Recommended Practices include a narrow exception (I.C comment 4) that was crafted to address special situations in certain small economies, but the exception is unlikely to apply to ASEAN member countries.

B. Notification Thresholds

With the burgeoning number of merger notification regimes worldwide, it is critical that each jurisdiction employ notification thresholds that are clear, understandable, and based on objectively quantifiable criteria. The ICN's second Recommended Practice (Notification Thresholds) notes that the efficient operation of capital markets is best served by such bright-line tests, which are more easily administrable by both agencies and parties.

The Recommended Practice identifies assets and sales as its two examples of objectively quantifiable notification criteria. All major jurisdictions with mandatory premerger notification currently conform to the recommendation or have made significant efforts to change their systems so as to conform.

The Recommended Practice explicitly states that thresholds based on market shares are inappropriate at the notification stage because they are not objectively quantifiable. Market share thresholds are extremely difficult for both the parties and the agencies to apply. They require significant amounts of data in order to define the relevant market, determine its overall size, and calculate the percentage attributable to each competitor. Market share determinations may be appropriate at a later, more substantive stage of the merger review, but our experience and the Recommended Practice dictate that they should be avoided for purposes of merger notification thresholds.

Similarly, a threshold requirement based on the portion of the value of a transaction attributable to the jurisdiction is too subjective or arbitrary to be an appropriate notification requirement. In the context of a multi-jurisdictional transaction, the parties generally will not have made such allocations prior to the time at which they must determine where to file notification. If such allocations are eventually needed for

commercial reasons, they will require complex modeling and often tax and accounting judgments that cannot reasonably be expected at the notification stage.

C. Review Periods

With the increasingly frequent experience of numerous jurisdictions reviewing the same transaction, the ICN's fourth Recommended Practice (Review Periods) recognizes the importance of review timetables based on reasonable, yet flexible periods. The Recommended Practice reflects parallel judgments: (a) that capital markets and related business interests are better served by avoiding unnecessary delays to closing and (b) that more effective enforcement is better served by facilitating the opportunity for agencies reviewing the same transaction to coordinate their activities.

Mergers are time sensitive, and delay in clearance presents numerous commercial risks – adversely affecting the ongoing operations of the parties due to uncertainty among customers, employees, and suppliers; postponing the attainment of efficiencies that the merger will yield; and in the extreme case jeopardizing the entire transaction.

The Recommended Practice starts with recognitions that mergers may present difficult legal and economic issues and those agencies should require sufficient time to properly investigate a transaction. It continues, however, by acknowledging that the vast majority of notified transactions do not raise material competitive concerns, and it states that merger review systems should be designed to permit such transactions to proceed expeditiously.

Many jurisdictions around the globe have adopted a two-phase review system to allow non-problematic transactions to proceed expeditiously following a preliminary review. The Recommended Practice cites this approach as appropriate.

With respect to review timetables, the Recommended Practice provides specific detail: initial waiting periods should expire in six weeks or less from notification. Many jurisdictions, including the U.S., require completion of initial reviews within 30 days of notification. The Recommended Practice also provides that Phase II, or extended reviews, should be completed or capable of completion within six months or less following initial notification.

Extension of the review period beyond these targets will generally be viewed as problematic. While the Recommended Practice recognizes that a six-month waiting period may be insufficient in some instances and notes that procedures should be sufficiently flexible to allow for limited extension with the consent of notifying parties, the Practices limits the applicability of such a possible extension to narrow circumstances. Factors such as document verification and change in circumstances go beyond those recognized in the Practice.

The Recommended Practice also relies on flexibility in other areas. In particular, it provides that each jurisdiction's procedures should enable the competition agency to

grant early termination of applicable waiting periods, once the agency determines that the proposed transaction does not raise material competitive concerns.[18] This flexibility can be important to merging parties to guard against the deterioration of assets and to ensure that the merger's benefits are realized without undue delay or burden.

D. Requirements for Initial Notification

Flexibility is also important with respect to requirements for initial notification. The ICN's fourth Recommended Practice (Requirements for Initial Notification) recognizes that the duty to notify applies to transactions covering a wide range of possible competitive effects and that no single set of initial notification requirements will be optimal for all transactions. The Practice states, however, that because most transactions do not raise material competitive concerns, the initial notification should elicit the minimum amount of information necessary to initiate the merger review process by verifying that the transaction exceeds jurisdictional thresholds and determining whether the transaction raises competitive issues meriting further investigation.

The amount of information required will vary depending on the approach to notification thresholds taken by the jurisdiction. The Recommended Practice cautions jurisdictions that review a large number of transactions (due to low jurisdictional thresholds) to be particularly sensitive to disproportionate burdens arising from the breadth of their initial filing requirements. The United States, which receives between 1000 and 5000 notifications annually,[19] has a very simple notification form. Even if limited to a small number of transactions, information requirements that reach details of production costs and prices of non-overlapping products appear to go beyond the Practice's accepted scope.

To enable the agency to accomplish its mission without imposing unnecessary burdens on merging parties, the Recommended Practice provides that jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification and/or with respect to additional requirements during the initial phase of review. Some countries, such as the US, have a simple, abbreviated initial notification form, but may request additional information during the initial review period to determine whether the transaction presents materials concerns. Other jurisdictions, such as the EU, require more extensive initial notification requirements, but afford agency staff the discretion to waive information requirements that are not sufficiently relevant to the agency's disposition of the transaction. Still other countries, such as Canada, provide parties with an option of long and short form notifications, with long forms filed only in cases giving rise to

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[18] In the United States, for example, roughly two-thirds of transactions receive early termination of the waiting period. *See* Federal Trade Commission & U.S. Department of Justice, *Twenty-Sixth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976* app. A (Sept. 7, 2004). Early termination is often granted in as little as two weeks.

[19] *See id.* The largest number was 4,926 in US fiscal year 2000. The notification thresholds were raised substantially the following year, and the number of notifications therefore has been reduced.

competition concerns. Flexibility of this type has proven to be valuable in averting significant burdens both for parties (with respect to the time and cost of compiling such information for transactions that do not raise competitive concerns) and for enforcers (with respect to the need to devote resources sorting through information unnecessarily compelled from the parties).

CONCLUDING REMARKS

At the beginning of my remarks this morning, I referred to an article I published last year on the potential for inconsistency and burden in a world where many competition authorities apply their sovereign powers on an extraterritorial basis. Surveying the literature, the article identified four approaches that commentators have advanced as a possible remedy:[20]

> (1) Reliance on major systems, an approach under which the enforcers with the greatest experience and resources would act unilaterally, but their actions would have the collateral benefit of protecting less developed jurisdictions;
>
> (2) Voluntary cooperation between competition authorities on a bilateral or regional basis;
>
> (3) Creation of a supranational enforcement agency or the adoption of supranational law or both; and
>
> (4) Multilateral agreement on competition.

Each approach presents significant challenges,[21] and it is not clear that any of them offers the promise of a comprehensive solution.

The ICN merger recommendations provide an example of a weak form of the fourth approach – not multilateral agreement as such, but multilateral acknowledgement of de facto voluntary standards. Even with that limitation, though, the merger recommendations are beginning to have a significant beneficial effect on enforcement practices.

ASEAN or ACFC with further development could offer the prospect of serving as a vehicle for the second approach, voluntary regional cooperation. This would be a large step towards fulfilling a model that another enforcement official sketched out three years ago, when he proposed:

> we should strive to build strong regional networks. While seeking convergence among 100 competition authorities sounds a daunting task, it becomes much less so when we organize those authorities by region. . . . Going forward, I would

[20] *See supra* note 1, at 273-76.
[21] *Id.*

> urge that we spend a large part of our cooperation/convergence efforts in building and strengthening these regional networks under the larger ICN umbrella. Countries within regions are united by common geography and often a common language and they are often at similar stages of economic development and therefore face similar competition problems. Working together, they should be able to pool resources to provide more support and assistance to one another in enforcing their laws and in building a strong competition culture in their region.[22]

An approach of regional cooperation is subject to certain important limitations.[23] In conjunction with other approaches, though, it offers promise for facilitating cooperation and convergence. Not coincidentally, it is also consistent with the Terms of Reference adopted for ACFC last October in Jakarta.[24]

We are grateful for the opportunities to appear here today and, more generally, to have worked with the ASEAN Secretariat and members over the past twenty months. We are confident that ASEAN and ACFC will play an important role in the development of competition policy in the region in the years ahead.

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[22] William J. Kolasky, Deputy Ass't Attorney General, U.S. Department of Justice, *Global Competition: Prospects for Convergence and Cooperation*, Remarks before ABA Fall Forum (Nov. 7, 2002), available at http://www.usdoj.gov/atr/public/speeches/200446.htm.

[23] *See* Blumenthal, *supra* note 1, at 275 ("First, with only a handful of exceptions . . . , governments generally enter into bilateral agreements only with other governments of a similar level of economic development. It therefore is rare to find bilateral agreements that span developed and developing countries. Second, bilateral and regional agreements generally provide for cooperation only when the parties have a mutual interest, and that condition is often unsatisfied. Third, neither bilateral nor regional agreements adequately address anticompetitive practices that are broadly transnational.").

[24] Regional convergence would be a first step in aligning competition law enforcement in the region with the ultimate goal of the ASEAN Economic Community (AEC) to "establish ASEAN as single market and production base . . . and to make the ASEAN region a more dynamic and stronger segment of the global supply chain. ASEAN's strategy shall consist of the integration of its Member Countries and enhancing the region's economic competitiveness." ASEAN Annual Report 2003-2004, at 16, available at http://www.aseansec.org/ar04.htm.