Federal Trade Commission

The Three Cs: Convergence, Comity, and Coordination

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INTRODUCTION

In my remarks today, I will discuss what I call the three Cs: Convergence, Comity, and Coordination.

CONVERGENCE

Three matters – Boeing's acquisition of McDonnell Douglas, General Electric's failed acquisition of Honeywell, and Microsoft – are often cited by those who voice concern and alarm about the globalization of antitrust enforcement. These matters have played a prominent role in the debate over international antitrust enforcement. In all three matters, European authorities reached a different outcome on the merits of those transactions than the authorities in the United States. Those cases have led to calls for a solution. At one time I shared the concerns about these cases and believed that harmonization – the development of a common framework and set

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Kyle Andeer, for his invaluable assistance in preparing this paper.

of legal principles – was the answer. However, I've changed my mind. I'm not sure harmonization is achievable, and perhaps more important I don't think it is necessarily a good idea.

"Soft convergence" - a process of voluntary movement toward best practices that come through experience and can be shared and discussed – likely yields better results. The process of sharing market experiences and best (and failed) practices should contribute to greater convergence. At the same time, neither jurisdiction should expend too much effort to bring the other's views in line with its own, just for the sake of alignment. It should come as no surprise to anyone that when one brings together two groups of talented and dedicated, but independent, lawyers there may be some disagreement on the outcome. That's completely natural and in many respects quite healthy. I'm also not prepared to say that our antitrust views are superior to European views – or that yours are superior to ours. As we sometimes tell the parties to a merger, it's best to let competition between these differentiated products play itself out.

For nearly two decades, U.S. and European competition officials have met regularly to discuss substantive antitrust law. Indeed, great strides have been made in reaching common ground in such areas as horizontal mergers and cartel enforcement. Yet there are still some significant differences in practice. It is best, I think, to acknowledge those differences.

First, there is a fundamental difference in our approaches to non-horizontal mergers. At first blush that difference may not appear all that great if one was to compare the case law in the United States to the draft guidelines recently released by the European Commission. If one reads the older decisions of the Supreme Court and the lower courts in the United States, one would find support for challenging non-horizontal mergers. For example, in the past the Supreme Court has condemned vertical mergers which threaten to lessen competition in downstream or

upstream markets.[2] Indeed, forty years ago, the Supreme Court held that a conglomerate merger might conceivably be illegal.[3] Admittedly, those precedents were handed down before the Court began to discuss economic efficiency prominently in its antitrust decisions.[4]

One could also look at the enforcement guidelines still on the books in the United States. The Non-Horizontal Merger Guidelines enacted by the Department of Justice in 1984 are still valid – at least in theory.[5] Those guidelines embrace two limited theories of liability for non-horizontal mergers. First, foreclosure is recognized as a potential harm of non-horizontal mergers – albeit under very limited circumstances. Second, the guidelines also recognize the potential that a non-horizontal merger will facilitate collusion in either the "upstream" or "downstream" market. However, in practice there has been very little recent enforcement by the agencies in the non-horizontal merger area.[6] For example, the agencies have not litigated a

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[2] United States v. Brown Shoe Co., 370 U.S. 294, 323-24 (1962) ("The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition."); Ford Motor Co. v. United States, 405 U.S. 562, 570 (1972).

[3] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[4] The seminal Supreme Court decision in this regard is Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[5] Dep't of Justice, Non-Horizontal Merger Guidelines, § 4.0, 49 Fed. Reg. 26,823 (June 29, 1984), *available at* http://www.usdoj.gov/atr/public/guidelines/2614.htm.

[6] The agencies obtained a number of consent decrees in merger cases based on vertical theories in the 1990s. *See, e.g.*, In the Matter of Dominion Resources, Inc. and Consolidated Natural Gas Company, FTC Docket No. C-3901 (consent agreement November 1999), *available at* http://www.ftc.gov/opa/1999/11/dominion.htm; In the Matter of America Online, Inc. and TimeWarner Inc., FTC Docket No. C-3989 (consent agreement Dec. 2000), *available at* http://www.ftc.gov/opa/2000/12/aol.shtm; Cadence Design Sys. Inc., 124 F.T.C. 131 (1997); Time Warner Inc., 123 F.T.C. 171 (1997); Silicon Graphics, Inc., 120 F.T.C. 928 (1995); Eli Lilly & Co., 120 F.T.C. 423 (1995); United States v. MCI Communs., Inc., 1993-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994); United States v. Tele-Communs., Inc., 1994-2 Trade Cas.

merger challenge on a vertical theory in decades. Nor has either agency brought a conglomerate merger case (or even pursued a consent decree under such a theory).

The principal cause are the views of many American micro-economists that dominate current enforcement policy. They believe that non-horizontal mergers should rarely, if ever, be challenged because they are generally efficiency-enhancing. They would challenge only those mergers that are demonstrably inefficient. That thinking is reflected in the recent comment to the OECD respecting vertical merger law enforcement.[7] Unquestionably, most mergers – especially non-horizontal – are competitively benign and may in fact result in efficiencies. But theory and economic shortcuts should not trump rigorous analysis of the facts and competitive dynamics. That is, we should not ignore solid empirical evidence that shows that a proposed merger is likely to lessen competition and harm consumers.

Efficiencies play a critical role in the assessment of non-horizontal mergers. The stated goal of the enforcement regimes in both the U.S. and the EC is the same – *i.e.*, to protect and enhance consumer welfare. Our merger guidelines in the U.S. arguably view "consumer welfare" to refer to the welfare of those who buy the output of the relevant market and can be victimized by undue concentration of market power in the market. This is reflected in the guidelines' requirement that the "efficiencies" justifying a merger are those that are shared with consumers.[8] However, in the U.S. many micro-economists consider "consumer welfare" to be

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(CCH) ¶ 71,496 (D.D.C. 1994).

[7] United States submission to the Organization for Economic Cooperation & Development "Roundtable on Vertical Mergers" (Feb. 15, 2007), *available at* http://www.ftc.gov/bc/international/docs/07RoundtableonVerticalMergers.pdf.

[8] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 4 (1992; as amended 1997) *reprinted in* 4 Trade Reg Rep. (CCH) ¶ 13,104.

synonymous with "total societal welfare." They would consider cognizable efficiencies to include any net efficiencies that would redound to the benefit of anyone in society including shareholders, as well as consumers.

Finally, we may need to ask ourselves whether we have today too cramped a view of the anti-competitive effects that may result from a merger. A recent law review article asserts that American antitrust enforcement focuses almost exclusively on a merger's impact on price and quality whereas the inquiry in Europe is broader to include all possible detrimental effects on consumer choice.[9]

Those responsible for law enforcement in the EC seem more agnostic in their view about the role that efficiencies should play in antitrust law enforcement. Indeed, as I observed last year, the EC's draft guidelines respecting foreclosure of competitors could be read to assert that efficiencies could not justify exclusionary practices in a highly concentrated industry.[10] That thinking is also reflected in the recently released guidelines on non-horizontal mergers.[11] Those guidelines acknowledge that vertical and conglomerate mergers may create efficiencies. However, they also describe a host of instances in which those mergers may harm consumers, notwithstanding the potential for efficiencies.[12] These instances include theories of liability

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[9] Neil Averitt & Robert H. Lande, Using the "Consumer Choice" Approach to Antitrust Law, 74 Antitrust L.J. 175 (2007).

[10] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Reflections on the DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, at the St. Gallen International Law Forum (May 11, 2006), *available at* http://www.ftc.gove/speeches/rosch/060511RoschStGallenRemarks.pdf.

[11] European Commission, DRAFT Guidelines on the assessment of non-horizontal mergers (Feb. 13, 2007), *available at* http://ec.europa.eu/comm/competition/mergers/legislation/draft_nonhorizontal_mergers.pdf.

[12] *Id.*

whose viability are being questioned in the United States, including the facilitation of tying and bundling, for example.

A second fundamental difference between the U.S. and the EC is the way that merger challenges are evaluated and tested. In the United States, the agencies' decisions to challenge a merger are almost immediately tested in a federal district court. In those proceedings all witnesses, including experts, are subjected to searching cross-examination. Appeals from the decisions of the district courts are generally expedited so that the parties to a merger generally know where they stand within a year after the challenge.

The European system is different. For one thing, the EC's decisions are self-enforcing – that is a decision to challenge a transaction is not made by the courts, rather it is made by the Commission. That means that the EC does not have to present its case to an independent fact-finder prior to taking action. Nor is there the same expedited review of its decisions as there is in the United States. All this being said, the EC has implemented some important changes in recent years. Of particular note was the creation of a "devil's advocate" panel of disinterested experts that reviews the Commission's conclusions before a statement of objections issued. And the European Court of First Instance has not only provided meaningful judicial review but has tried to do so promptly. Still, there are procedural differences, and some of those differences are significant. For example, our European colleagues generally do not have the access to discovery of documents and witnesses that we do in the United States (this includes the ability to cross-examine witnesses).

COMITY

U.S. and EC antitrust law enforcement authorities don't always see eye to eye on antitrust

enforcement, either in terms of liability or in terms of remedy, although these instances have been reduced in recent years. As I mentioned earlier, the decisions in *Boeing*, *General Electric*, and *Microsoft* are the three that have garnered the most attention. There's nothing unique about these differences. Even within our national borders, differences in opinion take place. For example, it is not entirely uncommon for us to see state enforcers reach a different conclusion than federal enforcers – one needs to look no further than *Microsoft*. Nor is it entirely unprecedented to see differences between federal enforcement agencies. The FTC, for example, is no stranger to that phenomenon. Nevertheless the question remains in the international arena: what to do about the small number of cases where there is a difference of opinion on the appropriate outcome?

A proposal that has gained some recent traction – at least in the U.S. – is the adoption of enhanced principles of comity to resolve conflicts between jurisdictions. Whether those principles are termed "hard" comity or "soft" comity, they boil down to principles that are rooted in the primacy of the "interest" that one jurisdiction may have vis-a-vis the "interest" of another jurisdiction. As a theoretical matter, I think these comity proposals are sound. However, I have three concerns about the proposals.

First, insofar as it is easy to identify which jurisdiction has a predominant or primary interest in a transaction, that principle of comity may be unnecessary. As far as I can determine, in most cases that jurisdiction is *currently* being ceded the primary role in determining whether the transaction (or conduct) ought to be challenged or not.

Second, insofar as it is hard – or impossible – to identify which jurisdiction has predominant interest, I'm concerned that *no* comity principle will operate to resolve the conflict. No interested jurisdiction will be willing to cede authority or even primacy to any other

jurisdiction in those circumstances. Again, one need look no further than Microsoft. Microsoft's global success has come at a cost in this respect. One cannot say that Microsoft's operating system is vital only to the U.S. economy.

Third, there's some precedent for these concerns in the implementation of conflicts of laws principles. I recall taking a course on the conflicts of laws among nations from a very distinguished professor at Cambridge back in 1962. He said – and it has stuck with me throughout these many years – that when all was said and done each nation applied its own law when it felt it had the primary interest in dispute and deferred when it felt that it didn't. When I later got to Harvard law School and took a course on conflicts of laws among the states of the U.S., my professor said the same thing. At the end of the day that is what may happen to any principles of comity.

COORDINATION

In the end, despite our substantive and procedural differences, and despite inevitable differences of opinion, there are only a few examples where those differences have resulted in different outcomes. In large part, I have to believe that's a credit to the remarkable coordination and cooperation between the jurisdictions. Staff from both agencies routinely meet with their European counterparts to discuss cases of mutual interests. Indeed, I'm not aware of any case where that kind of communication or coordination hasn't occurred.

Similarly, the heads of the agencies do their level best to coordinate their final decisions in these cases. I've had only one first-hand experience – the *Oracle* case when I was on the "dark side" representing Oracle. In that case, the EC immediately stood down after Judge Walker rejected the challenge to Oracle's attempt to acquire PeopleSoft and the Department of Justice announced that it would not appeal that decision. I have to believe that decision was the

consequence of coordination between the two regimes.

What could threaten this happy state of affairs? Three things come immediately to my mind. First, I don't think it's helpful for us publicly to criticize each other's decisions and policies. Mutual respect is important to our relationship. As I mentioned earlier, the EC has recently issued draft guidelines on vertical and conglomerate mergers. We may have some differences of view and some helpful comments, but I do not think we have all the answers. The law in the U.S. on these issues is largely underdeveloped in my opinion. While I have a healthy respect for the opinions of the micro-economists I cannot say that they (or we) have a "monopoly" (pardon the pun) on the proper analysis of these kinds of mergers. I've seen enough change in economic analysis – from pre-Chicago School to Chicago School to post-Chicago School to post-post Chicago School thinking – in the forty plus years I've been practicing antitrust law to know that economic thinking will continue to evolve. The trans-Atlantic cooperation that currently exists is quite strong, but I fear dialog that becomes arrogant or shrill.

I believe, however, that it is appropriate for our respective enforcement officials to offer candid "behind the scenes" comments to each other on proposed guidelines as well as enforcement matters. Such interchanges, carried out in an atmosphere of mutual respect, may raise vital questions that enhance the quality of the receiving party's antitrust analysis – even when the critiques do not change the outcome of a particular matter. (European as well as American competition agencies are well aware that the courts will closely scrutinize their decisions, and thus should welcome tough questions as they prepare their cases.) Asking hard questions – something antitrust lawyers and economists are well equipped to do – should contribute to the fruitful revision and improvement of antitrust doctrine over time, on both sides of the Atlantic.

Second, I'm concerned about the proliferation of public antitrust authorities within our respective jurisdictions. In the U.S., since the Supreme Court decided the *ARC America* case two decades ago, we've had in effect nearly fifty merger enforcement regimes – one at the federal level (because the Department of Justice and the FTC do not both prosecute the same case) and multiple state attorneys general.[13] Although there's generally been good cooperation between state and federal authorities, there have been several instances when states have chosen to challenge a merger or other conduct after the federal agency passed.[14]

The same potential for mischief exists in the EC. After the reforms that were implemented on May 1, 2004, both the European Commission and the national authorities apply Articles 81 and 82 (which encompasses merger regulation).[15] I understand and respect the historical, cultural and political imperatives that drove that reform. However, our experience in the United States with competing federal and state antitrust authorities demonstrates that cooperation and coordination can be difficult. It appears that the European Commission and the member states have worked closely together to ensure that their outcomes on specific matters are consistent – likely a result of efforts like the European Competition Network. Frankly, I'm more

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[13] California v. ARC America Corp., 490 U.S. 93 (1989).

[14] California v. Sutter Health Sys., 84 F.Supp.2d 1057 (N.D. Cal. 2001). The merger of Federated Department Stores and May Stores is another recent example. The FTC did not challenge that transaction, however Attorneys General of California, Maryland, Massachusetts, New York, and Pennsylvania required store divestitures. *See* Statement of the Commission re: Federated Department Stores, Inc./The May Department Stores, Co. FTC File No. 051-0111 (Aug. 2005) *available at* http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf; Department Store Chain to Divest Three New York Stores as Part of Acquisition (Aug. 2005) *available at* http://www.oag.state.ny.us/press/2005/aug/aug30b_05.html.

[15] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT

concerned about the fractured state of enforcement policy in the U.S. than I am with the rare disagreement with our friends across the pond, but the latter concern might become greater if antitrust law enforcement became too fractured in Europe.

Third, but perhaps most important, in the U.S. we allow private parties to challenge mergers. I believe that's a mistake. In the past, I represented parties to mergers that were challenged by private parties (and their attorneys). One of those cases was settled for a very large sum of money because the merging parties were anxious to close the deal. Another was dismissed by the court as a frivolous challenge, and that decision was upheld by the Ninth Circuit Court of Appeals, but the time it took to conclude the litigation threatened the transaction. I tried the third challenge for three weeks in federal district court. We finally won, but the victory was bittersweet because the challenge was frivolous. Indeed, it ended up being less a challenge to the transaction than a challenge to the Department of Justice for not blocking the transaction.

Now the EC is considering going down the same path as the United States – it's considering allowing private parties to bring antitrust actions apparently because it hopes that will reinforce the efforts of EC and member State enforcement authorities to enforce the competition laws. I suggest most respectfully that this is one instance in which something can be learned from the U.S. We got it wrong. In Washington and elsewhere, efforts are now being made to reign in private actions. And nowhere is that more important than in the merger area. It's important in the U.S. that merging parties be able to look to one law enforcement authority for direction. Where the merger implicates both U.S. and EC merger regimes, it's important that those parties be able to count on the coordination between EC and U.S. authorities that currently exists.

CONCLUSION

In concluding, I believe the agencies in both the United States and Europe do an excellent job in coordinating their merger investigations. Is there room for improvement – yes. Do I believe that we will always reach the same outcome on a particular matter – no. And I don't think that is necessarily a problem in need of a solution.