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BY E-MAIL AND COURIER

Mr. William E. Kovacic
Chairman
United States Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington DC 20580

Dear Mr. Kovacic:

FTC at 100: Into Our Second Century - Ottawa Meeting September 18, 2008

INTRODUCTION

I am writing further to our recent meeting with you and members of your staff in Ottawa as part of your consultation process. During that meeting, you were kind enough to invite us to supplement our discussions at that meeting with any written comments we might wish to forward to you for your consideration. Accordingly, I am writing to take you up on this offer.

For completeness, these comments include not only the points I made during the meeting but also include some additional thoughts relating to other subjects which arose for discussion at the meeting.

Before beginning this, I wish to express my appreciation to you and your staff for including me in this consultation process. I found the experience to be both stimulating and enlightening. I hope that you and your staff found it to be similarly useful.

I am counsel to the firm of Osler, Hoskin & Harcourt LLP, practising in its Toronto office. For many years, my practice has been restricted to areas of competition law and, to a lesser extent, foreign investment. I have never had an extensive involvement in regard to consumer protection laws (although I am an interested observer in that field).

I wish to congratulate the Federal Trade Commission ("FTC") on several things:

First, for nearing the completion of its first 100 years and, in particular, closing out the century with such an exemplary record of leadership in the antirust field. Although we have had competition laws on our books in Canada for almost 120 years, our effective history in this field is much shorter, dating from the introduction of the *Competition Act*

in 1986. Your agency has set a fine example to us in Canada and other countries who do not have the lengthy experience in this field that you do.

Secondly, I applaud the FTC's initiative in undertaking this self-examination of its effectiveness with a view to further improving how it executes its mission. Whatever comes of this initiative, it will undoubtedly be valuable to have done this.

Thirdly, I appreciate your reaching out to solicit input on this subject from the international competition law community, including a number of Canadian competition law practitioners. At the same time, it does seem a bit strange for us to be offering advice to the FTC, which, to my way of thinking, is, together with the United States Department of Justice ("DOJ"), the "gold standard" in antitrust. However, as you undoubtedly noticed from our presence at and participation in the meeting last week, we were not so humbled by your reputation and stature in the field to pass on this opportunity to provide our views.

EFFECTIVENESS OF THE FTC

To be honest, I am not entirely sure what are the most appropriate criteria and techniques for assessing the effectiveness of a competition or antitrust agency such as the FTC. Obviously, such things as transparency, independence from political influence, making decisions which are informed by enlightened economic thinking, having a credible enforcement policy and being seen to be fair and predictable are all important elements. Whether those are the relevant or appropriate criteria, I hesitate to say. However, what I would prefer to do in this regard is to comment upon what I think the FTC does very well. I also propose, but to a much more limited degree, to comment upon some reservations I have about the U.S. antitrust system in general. Also, by way of a general caveat, I should mention that I do not pretend to be very expert about FTC operations or procedures in detail and, in particular, I am not well qualified to make very specific comments upon its consumer protection mandate.

Having said that, I would list the following *positives*:

(a) The FTC does a very good job, I think, in connection with its management of the merger notification/review process, in identifying, for more extended review, a very limited number out of the total cases it sees while giving clearance within 30 days or less to the 97% or more (based on 2007 results) of the remaining merger cases, thereby demonstrating not only great efficiency in accomplishing this feat but also considerable restraint in limiting itself to cases of real significance;

(b) Its decision-making process always seems to be well-informed by economics, a reflection no doubt of the fact that the Commission has a large, well-qualified staff of experienced economists;

(c) The FTC appears to have successfully combined its functions of investigation and enforcement with those which relate to its separate role of administrative adjudication, without giving rise to perceptions of unfairness or bias. That is a model which we in Canada have looked at seriously as a possible alternative to the system we have here in the civil law area;

(d) The FTC is the clear international leader in the field of international consumer protection, taking the initiative to institutionalize international efforts to detect, deter, prevent and punish international consumer fraud;

(e) The FTC appears to have been very successful in interpreting and enforcing a very broadly-worded statute (the *FTC Act*) and the other antitrust laws over which it has enforcement authority on a principled basis and in so doing has responsibly toned down enforcement of legislation, such as the *Robinson-Patman Act*, which is no longer supported by modern economic learning;

(f) The FTC has been an independent voice of reason when public and congressional reaction against the major oil companies in regard to gasoline pricing has been rising to a fevered pitch;

(g) It has been innovative in its work in regard to:

(i) the conduct of merger retrospectives;

(ii) its undertaking of ex-post reviews of merger divestitures;

(iii) its publication of statements explaining its rationale for not challenging specific mergers (I think, in particular, of the Cruise Line merger);

(iv) its "Do Not Call" registry (a system which we are just now adopting in Canada);

(v) its holding individual and (together with the DOJ) joint hearings on difficult subjects in the antitrust field, including such topics as the interface between antitrust and intellectual property law and in

subsequently publishing guidance documents in those areas informed by input received during these consultations; and

(vi) its leadership in holding antitrust workshops and undertaking industry research in support of its competition advocacy efforts.

(h) The FTC has also made significant contributions towards the important work of the International Competition Network ("ICN"); and

(i) Its work in educating consumers and the public concerning things they ought to know in order to protect themselves against consumer fraud practices.

My list of *reservations* is a much shorter one and relates more to the institutional structure of the U.S. antitrust system, rather than specifically to the role played by the FTC within it.

While I expect that, as a political matter, none of the issues I am now going to comment upon are likely fixable, I feel that they are at least worthy of observation, if only to identify some "elephants in the room".

To my mind, there is a fundamental difficulty in having two national enforcement agencies exercising largely concurrent jurisdiction in the civil antitrust area. This situation is exacerbated by the existence of some 50 additional state attorneys general having their own miniature replica antitrust statutes and a proclivity to "pile on" in those cases which are already receiving attention from one or other of the two federal agencies.

While having two federal agencies either potentially or actually patrolling the same general territory would seem, on its face, to raise basic questions about the overall efficiency of such an arrangement, my greatest concern relates to the potential for inconsistency in the policy and enforcement approaches taken by the two agencies.

This has most recently been exemplified by the issuance by the DOJ earlier this month of its paper on single firm conduct under section 2 of the *Sherman Act* and in the response of your three fellow Commissioners to that statement, taking issue with many of its conclusions. These differences of view would appear to reflect a fairly major policy divergence in this area as between the two agencies. The two agencies have, of course, previously staked out somewhat different positions in regard to merger divestiture remedies and there are undoubtedly other areas where the agencies have pursued different approaches. But the discrepancy of views on this subject seems to be more significant and is therefore of greater concern.

In the merger area, the stakes are, it seems to me, raised even further to the extent that the two agencies can consume valuable time during the initial 30 day merger review process arm-wresting over which of them ought to have the responsibility for reviewing what case. I am also given to understand that it can make a significant difference to the outcome in some cases which one of the two agencies is assigned responsibility for reviewing the merger, both in terms of whether or not the merger is judged to meet the test of legality and, in cases where some remedial action is considered to be needed, in regard to what that might entail.

Because of these overlaps and uncertainty that may be caused by the possibility that either or both agencies may, in an area like abuse of dominance, claim responsibility for a particular matter or practice, the fact that they do have policy differences puts a premium on the need for the agencies to eliminate, so far as possible, those differences which can give rise to inconsistencies in enforcement approach as between the two agencies.

FTC'S ENFORCEMENT, ADVOCACY AND RESEARCH AGENDA

You also sought our views on what we thought about your Agency's enforcement, advocacy and research agenda.

Enforcement

I think the first priority in the enforcement area ought to be the *prevention* of wrongful or bad conduct. Accordingly, at the forefront of this effort, since enforcement resources are limited, should be the education of the public concerning off-limit areas, which is particularly appropriate because I understand that education is one of the FTC's original mandates. This means that prospective guidance (which the FTC does) is necessary. However, as other commentators have noted, this needs to be "meaningful" guidance. It seems to me to be counter-productive to put flags around conduct which reflects excessive caution. For example, in the Canadian *Abuse of Dominance Guidelines*, it is indicated that a "dominant party" for this purpose is one having a 35% or more market share, when in fact no case has been brought on this basis involving a party that did not have a market share in excess of 70%.

This kind of guidance should be supplemented (as you have done) by the issuance of statements on cases the Commission has decided against bringing. This sort of story-telling can explain a lot about the nuances of FTC enforcement policy. Other means of publicly communicating elements of FTC enforcement policy (all of which you already do) include speech-making, the holding of hearings and the issuance of research reports and industry studies.

Consistent with a subject previously commented upon, an effort should be made to eliminate, so far as possible, any non-essential differences of enforcement approach as

between the FTC and agencies having jurisdiction over the same subject matter. The joint issuance with the DOJ of guidelines is obviously the most desirable approach in this regard.

However, guidance will not, it seems to me, engender the respect it deserves if it is not supported by enforcement actions in cases where the behaviour in question constitutes a clear violation of FTC enforcement policy. In essence, the agency cannot afford to shrink from putting its money where its mouth is.

In this connection I would note that, because enforcement resources are limited, the cases to be pursued in this regard ought to be selected by reference to their novelty (new or unsettled areas of the law), the economic importance of the area, their prospects of being successful and their potential for gaining public attention. However, I suspect that those considerations all bear on case selection undertaken by the FTC now.

I am not familiar with whether you actually do this now, but if you do not, backgrounders or case guidance might usefully be issued in regard to cases which have been settled, as well as those in which the Agency has determined not to pursue the case.

Advocacy

It seems to me very desirable to undertake advocacy functions, particularly in aid of the dismantling of unnecessary regulatory or industry barriers to competition.

Ultimately, it may be desirable for the United States to consider establishing a separate body such as the proposed Canadian Competitiveness Council which was advocated by the Canadian Competition Policy Review Panel recently in its June, 2008 Report in order to provide a more institutionalized approach to enhancing competitiveness at both the provincial (state) and federal levels.

Research

Research is necessary in connection with competition advocacy in order to make the case for reform. It would also seem to be desirable to evaluate problems which may be expected to arise from the technological transformation and/or globalization of business. The FTC has a large staff of highly trained qualified economists with a very relevant expertise to undertake such work. I do think that the holding of hearings or joint hearings are a good way to facilitate research on tough subjects which may lead to the issuance of reports and/or the issuance of guidance, as for example, in the case of competitor collaboration and the interface of antitrust and intellectual property. It also seems to me that retrospectives in regard to completed merger reviews and the effectiveness of merger remedies are particularly desirable given the fact that in real time the cases which the agencies most often concern themselves with involve prospective competition

assessments. While such "after the fact" reviews are less likely to be "perfect" due to less detailed information which is available for this purpose, it should be possible to undertake this sort of analysis on the basis of information which is reasonably available so as to inform future enforcement action in regard to similar situations.

The FTC's International Efforts

On the international side, given the expanding internationalization of business and the convergence of a multiplicity of national competition law enforcement agencies having a possible interest in reviewing the same mergers or conduct which the FTC may be looking at, I would assign the first priority to working to coordinate with interested foreign agencies in the effective international review and enforcement of these cases on a cooperative basis. This sort of collaborative activity is being achieved with good results in mergers and (although this subject is outside the FTC's purview) cartels. In many cases now, the same unilateral conduct transcends national boundaries. The need for this kind of coordinated action, it seems to me, will only increase over time with the intensified technological changes and increased globalization of business which may be expected.

Secondly, it is very much in the FTC's and, I would submit, in the national interest of the United States, for a leading force in the field of antitrust such as the FTC, to involve itself, as it has, in reaching out to other less developed countries to assist them in establishing effective and workable competition rules for application in those countries. I am aware that the FTC has lent some of its top personnel to the ICN for this purpose.

The FTC is, in my view, uniquely qualified (by its experience and recognized standing in the field) to educate those countries concerning the value of competition and international cooperation in the enforcement area and to promote respect for competition laws internationally.

I would conclude this portion of my comments by making a few remarks on the effectiveness of the FTC to date in the international area. I would preface this by saying that I think it has had a very fine record in this field generally. However, in terms of notable successes:

- The FTC has been extremely effective in leading the world in the development of workable consumer protection laws and facilitating international coordination of efforts both to prevent consumer fraud and to take appropriate enforcement action where it occurs;

- The FTC has also undertaken an important leadership role in facilitating the coordination of action between agencies, in sharing information and in holding joint meetings with other agencies, particularly in the merger area;

- More generally, the FTC sets a very high international standard and example for other countries as to how to do it right in this field; and

- The FTC has been a significant contributor to the very useful work of the ICN.

In terms of a possible area for improvement, I would reiterate my comments above which suggest that overlapping jurisdictions as between the two federal agencies and between them and the state antitrust enforcers ought either to be eliminated or, if not, a very serious effort should be made to ensure that they are on the same page in their dealings with foreign agencies in this field.

OTHER MATTERS

Two other matters came up for discussion during the course of our roundtable session on which I would like to comment.

Competition Submissions

One practice which is fairly routine in Canada in connection with notifiable merger reviews is the preparation and submission to the Competition Bureau by counsel for the merging parties of a substantive competition law brief or submission on what are seen to be the principal competition law issues raised by the case and which sets forth, in the judgment of parties presenting such submissions, the rationale as to why the proposed transaction should not be considered to give rise to a substantial prevention or lessening of competition.

In my experience, the presentation of submissions, which is usually provided to the Bureau either concurrently with the filing of the merger notification document or shortly thereafter, is often quite helpful in taking off the table potential issues which, but for such submissions, might be thought by the Agency staff to constitute problems. At a minimum, I think such submissions serve to accelerate serious consideration of such issues at an earlier time in the process than might otherwise be the case.

Given the relatively abbreviated time which the Agency has to determine whether or not to initiate a second-stage review of a particular merger and the desirability of resolving as many cases as possible during the initial 30 day period, this practice would seem to be preferable to the situation which, as I understand it, is often the case in regard to U.S. merger reviews, where the parties and/or their counsel engage in a game of "hide and seek" with the reviewing agency, having in readiness white papers on possible hot button issues in the event that they are raised by the Agency, but not providing them unless it is evident that such issues are of concern to the Agency. The reticence of U.S. counsel to provide this kind of a brief or submission in advance of these issues being raised by the Agency has been explained in terms of a wariness of possibly thereby prompting

unwanted second requests that might not otherwise have been initiated had the parties themselves not brought such issues to the attention of the Agency in the first instance. In my view, there is more to be gained than lost in joining issue on any potential or possible problems in a review and it is probably not in the party's interest to "lie in the weeds" hoping that a particular potential problem will not be probed by the reviewing agency.

Advance Ruling Certificate ("ARC")

The ARC procedure, which we discussed briefly at the meeting, is, I think, unique to Canada. It enables a party to apply for clearance of a merger transaction (which is otherwise formally notifiable on a long or short form) on an informal basis whereby counsel for the parties present what it considers to be the relevant facts and makes submissions to the Agency as to why the transaction ought to be given clearance. A particular advantage of the process is that if an ARC is issued in response to such a submission or request, neither the Commissioner of Competition or the Competition Bureau may thereafter challenge the transaction. That is a situation which contrasts with the usual merger reviews under which, notwithstanding a "no action letter" may be issued by the Bureau at the conclusion of the process, the merger nevertheless legally remains open for challenge for up to three years from the time of implementation of the merger. The use of this process is also intended to obviate the need for the presentation of all of the information which is typically required in a long form review and thus allows the parties to focus the presentation on the particular pertinent facts which have a bearing on whether or not the case raises any possible need for remedial action to prevent the merger's consummation or to restructure it.

The shortcomings of this system, as it has evolved in practice in Canada, are that (i) there is no time limit on the Commissioner or the Bureau to respond to these requests (although they tend to act responsively when they receive them); (ii) if the Commissioner or the Bureau decline to issue an ARC at the conclusion of the review, the parties are then confronted with the possible need at that stage to file the more formal notification documentation and have it run through the process (in a number of cases, however, where the Bureau is satisfied with the material received but is unwilling to issue an ARC, it may nevertheless issue a no-action letter and waive the requirement for the full notification materials to be filed on the basis that it accepts, for this purpose, the information that was contained in the ARC); (iii) the Bureau, in practice, is unwilling to issue ARCs in situations where the overall combined post-merger market share would exceed 15%; and (iv) for all of these reasons, parties typically will supplement the application for an ARC with a long or short form filing in order to protect themselves against the possibility that, if the ARC request is denied, they may have to start all over again with the customary notification process.

Given the fact that the Bureau typically will only issue ARCs in circumstances where the overall combined post-merger market share does not exceed 15%, it is a fair comment that the greater level of comfort which is provided by an ARC process (by the fact that, once it is issued, the merger cannot thereafter be challenged), is somewhat academic given that ARCs are typically only available in those situations where the parties really do not require that level of assurance, given that those mergers would typically not raise serious competition law issues.

CONCLUSION

In conclusion, I would again wish to express my appreciation of the FTC's invitation to participate in this process and to express the hope that these observations may be of some assistance to you as you engage in your process of self-evaluation.

Yours very truly,

Tim Kennish

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Counsel
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c: R. Damtoft, *United States Federal Trade Commission*
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