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Promoting International Convergence: Spring Training for Antitrust Professionals

I am delighted to have the opportunity to conclude this successful forum. I commend the organizers for choosing Miami as the program's locale. Miami, of course, is the crossroads for U.S. and Latin American culture and business, and the location of the original Free Trade Area of the Americas ("FTAA") negotiations. Thus, it is the ideal site for a conference aimed at promoting cross-cultural understanding of competition issues faced around the globe. (Besides that, here in the United States, Miami provides the rare warm respite in January!)

In just a few weeks, the pitchers and catchers for several Major League Baseball teams will report to spring training right here in Florida, followed later by their teammates. What is striking about early spring-training exercises is that they are heavy on fundamentals. The major leaguers will be running through the same drills, in fact, that you see little league players run through when they practice and prepare for their seasons. I always have thought that there was a great lesson for all of us who strive for the "major leagues" in those fundamental, spring-training exercises. That is, periodically, as we

[1] The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other individual Commissioner.

execute our duties and endeavor to improve, we should remember to return to first principles and make sure that we have the basics engrained in our work. The start of a new year is a good time to do that.

As many of my U.S. colleagues know, I feel strongly that antitrust enforcers must trust in markets to serve consumers and business alike. Ensuring robust competition based on free market principles is the most effective means by which to achieve consumer welfare. "Free," however, does not mean free of responsibility. We have rules for markets, put in place to prevent cheating by those cowards who fear competitive forces, and when those rules are violated, antitrust enforcers must act. That is when government intervention is both appropriate and necessary. But we must take caution not to convert a law enforcement intervention into an excuse to engage in market engineering.

While public and political support for free market principles today is, fortunately, prevalent and, on a global basis, increasing, that support may waiver when individual interests are at stake. Time and again, we witness businesses engaging in rent-seeking behavior, that is, seeking, through legislation or government agency action, to limit competition in a way that benefits their individual interests. And, frankly, we see it on the consumer side also, as individual consumers or consumer organizations argue for market tinkering outside of law enforcement. This is not solely a U.S. problem, as noted in many of the preceding panels. This morning's trade and competition panel, for example, identified a recurrent problem in antitrust enforcement: that as domestic competition agencies successfully eliminate private anticompetitive restraints, private

parties often try to achieve the same anticompetitive ends through government favors or regulation, to protect themselves from competition.

Arguments in favor of agreements, transactions, or rules that are truly anticompetitive often are cleverly disguised in terms that pit business against consumers, suggesting that the market will favor one group over the other. A recent speech by a European head of state suggests that reliance on this contrived dichotomy conflicts directly with free market principles. In requesting that his government consider purportedly pro-consumer legislation, this leader stated that, to promote economic growth and consumption, "[L]et us favor competition. Not wild competition, which destabilizes whole fields and endangers economic sectors, but rather regulated competition, to give more purchasing and economic power to consumers."[2] His statement contains a false premise: that consumers generally will be better off if competition is tamed through regulation.

U.S. antitrust enforcers often face arguments based on what I deem the false dichotomy between business and consumers: that what is good for business cannot be good for consumers, and that what is good for consumers cannot be good for business. This, of course, is nonsense. Evidence abounds that competition, above all else, benefits consumers and businesses alike. But if in the United States, where our Supreme Court aptly stated, "[t]he heart of our national economic policy long has been faith in the value

[2] Allocution de Monsieur Jacques Chirac, President of France, Jan. 4, 2005, *available at* http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2005/05VXFV.html.

of competition,"[3] we still must wrestle with such falsehoods, then such anticompetitive pressures can only be more severe in jurisdictions in which market principles are not so well-entrenched.

What can we do to reduce or eliminate the potential for these arguments based on lack of faith in competition to succeed across jurisdictions, and how can we convince the average Joe, Jacques or José that they should care?

To combat these destructive forces, we must be vigilant in our support for market processes and defense of consumer interests, and we must explain our actions to our citizens and legislators. Trust in markets and support for competition law and its proper enforcement can be learned, and we can help to build our own constituencies. We can and should continually demonstrate to consumers, businesses, legislatures, and other government officials that support for effective antitrust enforcement based on market realities and accepted economic thinking offers the best way. It ensures that consumers reap the benefits of vigorous competition -- increased availability of quality products and services at competitive prices -- and that businesses flourish from the benefits of a competitive playing field in which the players follow the rules.

This can be accomplished in the first instance by example. Enforcement agencies must consistently make enforcement decisions based on sound economic principles,

[3] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co.* 340 U.S. 231, 248 (1951)).

whether they lead to enforcement action or not, despite pressure from those seeking exceptional treatment.

We can, however, go beyond sound enforcement to protect the market process. In the United States, the antitrust agencies couple their enforcement efforts with targeted advocacy in support of competition. In providing examples of the agencies' recent advocacy work, I turn first to our own legal profession.

Time after time, lawyers, often through local bar associations, attempt to reduce competition from non-attorney service providers through the adoption and enforcement of overly broad rules on the unauthorized practice of law. Last month, the FTC and the Department of Justice Antitrust Division ("Antitrust Division") issued a joint advocacy letter urging the Massachusetts Bar Association to reject or substantially narrow a proposed model definition of the practice of law. Like so many definitions that state bar associations have drafted, this one would prevent non-lawyers from providing certain services. Yet, there was no clear evidence that their provision of such services would harm consumers. The current definition is drafted so broadly as potentially to prevent real estate agents from explaining the consequences of failing to have home inspections completed in a timely manner and accountants from interpreting federal and state tax codes in ways that they traditionally have done.[4] In many similar cases in which we

[4] *See* Letter of Dec. 16, 2004, *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf.

have intervened, state legislatures or bar associations have revised or eliminated these kinds of restrictions,[5] and we hope that the same will occur in Massachusetts.

Also in December, the Supreme Court of Ohio decided, consistent with the amicus brief submitted to the court by the FTC, that non-lawyers appearing and practicing in a representative capacity before the state's Industrial Commission are not engaged in the unauthorized practice of law.[6] The FTC's brief argued that: (i) the prohibition was likely to result in less choice and higher prices for employers and claimants; (ii) the ban on lay providers was not likely to provide consumers with additional protections; and (iii) there was no evidence that the current practice of law, permitting lay representation before the Commission, harmed consumers.[7] The FTC brief also noted that such representation is permitted in many states and before many federal agencies.

We have advocated for competition in other industries as well. For example, the FTC commented on proposed health care legislation in California. Although the bill was intended to increase cost transparency in transactions between pharmacy benefit managers ("PBMs") and their health plan clients, provide more information to consumers and prescribers about drug substitutions, and ensure that any realized cost savings are

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[5] For example, the state bar associations of both North Carolina and Indiana eliminated or substantially reduced similar restrictions identified by the agencies following receipt of agency advocacy letters, *available at* http://www.ftc.gov/be/V020006.htm (North Carolina) and http://www.ftc.gov/os/2003/10/uplindiana.htm (Indiana).

[6] The Supreme Court of Ohio's opinion is *available at* http://www.sconet.state.oh.us/rod/newpdf/0/2004/2004-Ohio-6506.pdf.

[7] The FTC's brief is *available at* http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf. *See also* FTC Press Release, *FTC: Ohio Court Should be Guided by Public Interest When Considering Definition of 'Unauthorized Practice of Law', available at* http://www.ftc.gov/opa/2004/08/ohioupl.htm.

passed on to consumers, the FTC staff concluded that the bill actually was more likely to increase the cost of pharmaceuticals, increase health insurance premiums, and reduce the availability of insurance coverage for pharmaceuticals. California's Governor Schwarzenegger vetoed the bill, and in doing so, cited the FTC staff comments.[8]

Similarly, the FTC staff has submitted comments to the North Carolina Attorney General stating that amendments to the state's Motor Fuel Marketing Act could inflict significant potential harm to consumers by causing higher gasoline prices at the pump.[9] Under North Carolina law, it is illegal to sell gasoline below cost as a regular business practice with the intent to injure competition. Proposed amendments to the statute would have eliminated the "intent" and "business practice" requirements and would have redefined "cost" in a way that would not always reflect discounts to retailers. Because the proposal could make dealers liable for procompetitive price-cutting, the staff was concerned that it would deter aggressive competition, to the detriment of consumers. The FTC staff has filed comments on similar proposals pending in Alabama, New York, and Kansas, and an existing law in Wisconsin.

Our pro-competition advocacy often falls on receptive ears in substantial part because the U.S. agencies have helped to create and sustain a consensus across political, academic, and business communities that recognizes the importance of principled antitrust enforcement in maintaining the vibrancy of our economy. We have done this by providing insight and expertise in this area (some of which results from having made

[8] *See* Governor's Veto Message for the PBM Disclosure Bill, *available at* http://www.healthlawyers.org/hlw/issues/041001/Terminator_1960_veto.pdf.

mistakes), and continuing to develop our knowledge base through policy research and development aimed at improving our understanding of markets and economic tools and assessing our own past initiatives.

Similar efforts are occurring throughout the world with increasing frequency, and it is important that agencies and their governments, as well as practitioners, share these experiences and learn from one another in an effort to build consensus on and convergence toward sound economic antitrust principles and efficient and effective procedures. Multilateral fora such as the International Competition Network ("ICN") and the Organization for Economic Cooperation and Development ("OECD") provide our agencies with a venue in which we can effectively share such experiences and promote convergence toward best practices.

The ICN is a unique organization that provides antitrust agencies from developed and developing countries with a network for addressing practical enforcement and policy issues of common concern, ultimately facilitating procedural and substantive convergence in antitrust enforcement. The ICN offers an innovative forum that helps provide agencies with the analytical and practical tools necessary to face national challenges to market principles. For example, the ICN's competition policy implementation working group is developing tools to help agencies improve their competition advocacy and enhance their stature with consumers within their own jurisdictions. I applaud the leadership of the Brazilian and Mexican agencies in this project.

[9] *See* Letter of May 19, 2003, *available at* http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf.

A key feature of the ICN is the inclusion of private-sector antitrust experts and academics in its work, which allows agencies and the private sector to understand each others' perspectives and to join forces in promoting pro-competition policies. This collaboration would seem counter-intuitive to someone who assumes that agencies charged with protecting consumers and the lawyers and economists who work for private companies do not share common goals. But, again, I submit that such a view is misguided, and I use our conference host to illustrate. As the ABA Antitrust Section demonstrates, the United States has an extremely active antitrust bar, and that bar is comprised of government officials, private firm lawyers, in-house lawyers, and academics, as well as economists, who are not formally members of the "bar," but who are so important to our work that we have made them honorary members! We litigate issues; we debate issues; we research issues; and we write about issues. This constant dialogue pushes us to improve. We will disagree on individual cases or issues, but when we return to first principles, we have widespread consensus. I firmly believe that the strong relationships that we have built between and among antitrust practitioners in the public and private sectors have contributed greatly to the robust competition culture that persists in our nation.

Substantive and procedural convergence offers additional benefits to agencies and private practitioners. For example, the ICN's merger working group's projects seek to reduce the public and private time and cost associated with multi-jurisdictional merger review. The delay and heavy resources associated with merger review have long been

bemoaned in the United States. With the proliferation of jurisdictions implementing merger review schemes, the burdens have increased as well. All jurisdictions have an obligation to seek to review mergers effectively *and* efficiently. It is the consumer and taxpayer who bear the costs.

Yesterday's panel on merger review discussed the work of the merger notification and procedures subgroup. Chaired by the FTC's Randy Tritell, this subgroup assists jurisdictions in reducing unnecessary costs while ensuring effective merger review. In particular, the subgroup has developed Recommended Practices for Merger Notification Procedures, which aim to address many of the problems identified in the earlier panel discussion by promoting rules aimed at, *e.g.*, nexus to the reviewing jurisdiction, notification thresholds based on objectively quantifiable criteria, reasonable review periods, and transparency.

Although these practices are not legally binding, they already are having a significant effect. Nearly half of ICN members with merger review laws have made or are in the process of making changes to their laws or practices that increase conformity with these Recommended Practices. Moreover, non-ICN members are relying on these practices when drafting new laws and assessing their existing merger regimes.

While there is still substantial work to be done, this is a truly exciting and successful start, and jurisdictions represented here, including the European Commission ("EC"), Brazil, and Mexico have made concrete efforts to converge their laws and

practices toward these internationally-accepted best practices. The U.S. agencies, too, have made changes to their merger enforcement procedures that conform to the Recommended Practices. For example, to increase transparency, the Commission and the Antitrust Division have established policies under which they may, on a case-by-case basis, issue statements outlining the reasons for closing certain investigations, in furtherance of increased transparency, and have issued guidelines and best practices that further this objective.[10]

Further, at the ABA's recent Fall Forum, I announced some of the Commission's related initiatives, including the creation, together with the Antitrust Division, of a commentary on our Horizontal Merger Guidelines, which we hope will further increase transparency. I also announced that I intend to focus the agency staff, as well as the private bar, on improving the merger review process. We also continue our efforts at policy research to improve our procedures further.[11] I understand that Bob Kramer, the Antitrust Division's Director of Civil Enforcement, recently outlined further merger process reform work that the Division is undertaking. And Assistant Attorney General Hew Pate and I are exploring ways for practitioners at our two agencies to interact more to share best practices.

I am honored to have been involved in the ICN since its inception, and am excited to see it develop, prosper, and begin to tackle some of the issues raised during the course

[10] *See e.g.*, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm, and the Bureau's Guidelines for Merger Investigations, *available at* http://www.ftc.gov/opa/2002/12/mergerguides.htm.
[11] These remarks are available at http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf.

of this conference. Fora such as the ICN can help to ensure that all competition agencies are aware of and, ideally, are applying best practices and promoting convergence toward sound competition policy and enforcement. Neverthless, the ICN and other multilateral fora are only part of the picture. Given differences in laws, cultures, and enforcement priorities, it is unrealistic to expect complete convergence through such organizations. Bilateral relations continue to play an important role in fostering the benefits of convegence as well as cooperation between agencies.

Much has been written about cooperation between the U.S. agencies and our main trading partners, particularly the EC, with whom we concurrently investigate many matters. The United States, however, has broadened and deepened its cooperation with many competition agencies around the world, in connection both with the review of individual cases of mutual interest and with policy development. Agency investigative staffs reviewing the same merger routinely communicate, cooperate, and coordinate. In addition, on the policy front, we hold informal dialogues on a variety of issues, ranging from workshops on vertical arrangements with the EC, to meetings on efficiencies in merger cases with the Canadian authority, to video-conferences on the intersection of intellectual property and antitrust laws with Japan and Korea. These discussions afford us a better understanding of our respective analyses and enforcement and policy objectives with a view toward promoting convergence. They also help us to minimize the potential for conflicting outcomes in individual cases of mutual interest. The agencies are committed to addressing and minimizing potential divergences, to reach compatible decisions, and recognize that we must work together to do so.

Another way that we work together with our competition colleagues is through our technical assistance program. Assistance ranges from a one-day meeting to help another agency understand a specific problem to the placement of one of our lawyers or economists in a non-U.S. agency for six months or so to share our experience in detecting, investigating, analyzing, and remedying suspected anticompetitive conduct. New staff members in our own agency learn from our more experienced hands, and this gives the same advantage to staff members in newer agencies. Technical assistance missions engender staff contacts and relations that continue well beyond an individual mission's duration, and allow for the continued exchange of ideas and learning between the relevant agencies. Staff contacts resulting from a number of such missions also have directly led to effective case cooperation between the relevant agencies.

For cooperation to be effective, however, we all must be willing to take the first step. To my agency colleagues in the audience, if you are reviewing a merger that the United States is also likely to be reviewing, call us, or send us an e-mail. Moreover, if you are considering legislative proposals to address issues with which we have some experience, let us know and we can try to help identify potential pros and cons of possible approaches before the legislation causes unintended domestic or international anticompetitive consequences. We are happy to share our experience and learning, and believe that convergence and cooperation offer the best route to ensuring sound competition enforcement globally.

Convergence toward market-based antitrust principles and efficient and effective procedures and cooperation among the world's antitrust agencies, whether promoted through multilateral fora or bilateral relations, are much more the rule than the exception. They have resulted in greater agency reliance on market principles and sound enforcement of competition law internationally, which is both good for business and consumers across the globe. There is more to be done, particularly as additional jurisdictions, such as China and India, begin to adopt antitrust rules and market reforms. We cannot rest. We must continue to work together to bolster public support for free markets and to ensure that enforcement decisions are made on the basis of sound economic principles. And to do this efficiently, like the professional baseball players who soon will descend on Florida, we must continue to return to the fundamentals and cement the first principles into our own agencies and beyond. I have enjoyed being your closer today, and I look forward to continue working with you in the coming years.