THE STATUS OF CONVERGENCE ON TRANSATLANTIC MERGER POLICY

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Let me begin by thanking the ABA's International Section and its chair, Mike Byowitz, for arranging this morning's program. It is an honor to appear here, and I am especially grateful to be sharing the podium with Philip Lowe.

It has been a little over fourteen years since the European Commission and the US competition agencies, the FTC and the DOJ, entered into our cooperation agreement on competition policy enforcement.[1] At that time the EC and the US were engaged in disputes over bananas, beef, biotech, and Boeing; and given the new EC merger regulation, some fear was expressed that they might clash over merger policy.[2]

We seem to have moved closer on bananas.[3] The EU and the US are still engaged in disputes over beef, biotech, and Boeing – and in those fourteen years, the EC and US

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

[1] Agreement between the European Communities and the Government of the United States of America on the Application of their Competition Laws, Sept. 23, 1991, Art. I, *at* 30 INT'L LEGAL MATERIALS 1487, 1492, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504 and *available at* http://www.usdoj.gov/atr/public/international/docs/ec.htm.

[2] Such concerns were expressed by then-EC Competition Commissioner Sir Leon Brittan in his 1991 Hersch Lauterpacht Memorial Lecture at the Univ. of Cambridge Research Centre for Int'l Law, *Competition Policy and Merger Control in the Single European Market* ("With the best will in the world . . . the US and the [European] Community may well one day soon take different views of a competition case. . . [t]he problem cases may be rare now, but they will increase in number and complexity").

[3] The US and EC in April 2001 reached an understanding on bananas, *see* http://www.ustr.gov/assets/World_Regions/Europe_Mediterranean/Europe/2001_US-EU_Understing_on_Bananas/asset_upload_file251_7135.pdf?ht=bananas%20bananas. Notwithstanding this bilateral agreement, the US has continued to express concerns about the EC's banana regime, *see* "U.S. Disappointed with EU Banana Tariff Proposal" (Sept. 13, 2005) (reporting statement issued by US Trade Representative), *available at* http://www.useu.be/Categories/Bananas/Sept1305_USTR_Bananas_EU.html. A WTO arbitrator today

competition agencies have disagreed in a few matters. During the same time, however, the EC and US agencies have agreed on dozens of enforcement decisions and have taken numerous actions to bring our enforcement policies and practices into convergence.

A typical example of EC/US enforcement cooperation is provided by the reviews of Procter & Gamble's recent acquisition of The Gillette Company.[4] Those reviews reflect the extent to which the agencies apply similar standards, reach similar conclusions, and cooperate in the processing of matters. The deal was valued at $57 billion and involved a wide range of consumer non-durable products. The parties' offerings overlapped, at least in some jurisdictions, in toothbrushes and toothpaste, antiperspirants and deodorants, and shaving creams. The parties also sold other, non-overlapping products such as laundry detergents, baby care articles, and batteries. About one-half of P&G's revenues in fiscal year 2005 came from North America and about one-quarter from Western Europe.

Staffs at the FTC and the EC contacted one another soon after the deal was announced. Once each agency had the opportunity to conduct initial inquiries about the deal in our respective jurisdictions, the staffs talked with one another and shared their initial impressions, specifically concerning those markets that might be affected by the acquisition. Upon realizing that they had common concerns in markets for oral care, particularly toothbrushes, staff requested and obtained waivers of confidentiality from the parties. The waivers enabled staff to discuss the issues, and particularly the parties' submissions to the respective agencies, in more detail.

The acquisition would have given the merged firm large market shares on both sides of the Atlantic in the market for battery-powered toothbrushes. Questions were also raised about the extent to which the deal would give the merged firm anticompetitive portfolio power. Both staffs began to discuss remedies as to toothbrushes with the parties, while at the same time they spoke with retailers in their respective realms about the portfolio power issue, including what is referred to in retailing as "category management." Both EC and FTC staffs concluded that the merger would not result in anticompetitive portfolio effects on either side of the Atlantic.

Focusing their attention on battery-powered toothbrushes, the FTC and EC staffs worked with the parties on the details of a divestiture, which both agencies ultimately accepted. Without getting into the details of those discussions, it is fair to say that they included issues that have been the object of discussion in conferences like this in the past, as well as in the EC's recently released merger remedies study.

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ruled against the EC concerning its implementation of the waiver granted by the Doha Ministerial Conference as to the banana regime, *see* http://www.wto.org/english/news_e/news_e.htm.

[4] *See Procter & Gamble/Gillette*, Case No COMP/M.3732, EC Decision of July 15, 2005, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m3732_20050715_20212_en.pdf; FTC Docket No. C-4151, Complaint, Consent Agreement, Proposed Decision and Order, Analysis to Aid Public Comment, Press Release, and related materials, *available at* http://www.ftc.gov/opa/2005/09/pggillette.htm.

Some have noted that, notwithstanding all of this transatlantic communication, cooperation, and coordination, the clearance for the transaction at the FTC came two months after the EC's decision. The major reason for the longer process in the US was that the proposed merger raised concerns in other markets in the United States, but not in Europe.

We often hear references to "globalization," and it may be tempting to think that products regularly are being homogenized and markets unified. Our recent experience in the field of competition policy suggests that the effects of globalization are more subtle. Many of the drivers of globalization – particularly improved means of communication and transportation and manufacturing – have actually made it easier to differentiate products to appeal to persisting differences in consumer preferences and government regulation. Cases like P&G/Gillette reflect this fact. Paragraph 17 of the EC's decision (concerning the scope of the geographic market for toothbrushes) cites several factors that led it to conclude that the scope of the geographic market was limited to national borders. In our experience, that has often been the case in the pharmaceutical industry – the products are subject to national regulation as to approval and marketing, and pharmaceutical firms find it advantageous in some circumstances to market products in some countries by licensing to third parties. This was a factor that complicated the coordination of the transatlantic settlement last year of the Sanofi/Aventis case,[5] requiring more time to sort out the third party's rights in the United States.

The conference organizers have asked me to say a few words about the analysis of portfolio power in the conglomerate merger context, with a particular focus on GE/Honeywell.[6] On that topic, my first observation is that posing the question as an instance of divergence requires us to look back to 2001 as a frame of reference. It has been four years since GE/Honeywell. In the immediate wake of that decision, the EC and the US agencies conducted thorough discussions of conglomerate theories in our Merger Working Group. In the period since 2001, we have conducted many merger investigations in common, and our respective conclusions have been consistent. Some of those cases, such as GE/Amersham[7] and P&G/Gillette, involved consideration of conglomerate theories of harm. Some other cases did not involve conglomerate issues, but did present challenging, practical analytical and remedial issues – again with consistent conclusions. We would include Sony/BMG joint venture,[8] the Sanofi/Aventis

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5 *Sanofi-Synthelabo/Aventis*, Case No COMP/M.3354, EC Decision of 26 Apr. 2004, *available (only in French) at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m3354_fr.pdf; FTC Docket No. C-4112, Decision and related materials, *available at* http://www.ftc.gov/os/caselist/0410031/0410031.htm.

6 U.S. Dep't of Justice Press Release, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm; *General Electric/*Honeywell, Case No COMP/M.2220, EC Decision of July 3, 2001, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

7 *GE/Amersham,* Case No COMP/M.3304, EC Decision of 21 Jan. 2004, ¶¶ 31-61, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m3304_en.pdf.

8 *See* FTC Press Release, FTC Closes Investigation of Joint Venture Between Bertelsmann AG and Sony Corporation of America (July 28, 2004), *available at* http://www.ftc.gov/opa/2004/07/sonybmg.htm; *Sony/BMG*, Case No COMP/M.3333, EC Decision of 19 July 2004, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m3333_20040719_590_en.pdf.

merger, and the GE/Instrumentarium merger[9] in that category. I know that these are less provocative for purposes of a program like today's, since the EC and US authorities agreed, but in our view these cases are still worth examining.

Realistically, even if we achieve near-complete policy convergence within the universe of sovereign jurisdictions, we need to recognize that there will continue to be some differences at the substantive margins of particular cases. First, just as different decision-makers in any given jurisdiction sometimes reach different conclusions when they apply applicable standards to the facts of a particular case, decision-makers in different jurisdictions may reach different conclusions as well. The FTC is a five-member body, and not all of our enforcement decisions are unanimous, even with a common set of standards applied to a common set of facts. 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. One can envision circumstances in which those different conclusions may lead to inconsistent or conflicting proposals as to remedy. Third, even with broad agreement as to framework, enforcement officials always continue to debate policy nuances – both within any given jurisdiction and across jurisdictions.

Before we turn to the question-and-answer segment of this program, let me say one quick word about non-merger communication and cooperation across the Atlantic. While our respective merger staffs talk frequently and in depth about the cases they concurrently review, discussions are also taking place about many other aspects of competition policy. The EC's initiatives concerning the regulation of licensed professions and the potential for private enforcement of competition policy, for example, have been topics for discussion and for the sharing of relevant information.

To conclude my opening remarks, I would like to reach back to the early days of the cooperative arrangement between the US and the EC – specifically, to the period from 1993 to 1995. The transatlantic realm was emerging from the recession of the early 1990s, and companies were again engaging in substantial M&A activity. Authorities in the EC and US were faced with cases that presented issues requiring cooperation and coordination of their respective enforcement efforts. Fortunately, Philip Lowe was then serving as Director of the EC's Merger Task Force, and in that capacity he helped lay the practical foundations for the communication, cooperation, and coordination that we enjoy today. That is all the more reason why I said at the outset that I was grateful for the opportunity to share this podium with him today.

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[9] *GE/Instrumentarium*, Case No COMP/M.3083, EC Decision of 2 Sept. 2003, *available at* http://europa.eu.int/comm/competition/mergers/cases/decisions/m3083_en.pdf.