Prepared Remarks
of
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before the

Antitrust Modernization Commission

U.S. Merger Enforcement Policy

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Thank you for the opportunity to appear before this distinguished Commission. As most of you know, for the last 30 years, I have practiced antitrust and trade regulation law here in Washington, D.C. Like others on this morning's panel, my experience includes both public service and private sector practice. From 1975-80, and again from 1995-1999, I held a variety of positions at the Federal Trade Commission. At other points, including today, I have been affiliated with the law firm of Arnold & Porter.

You have asked us to address an important and fairly framed question: whether current merger enforcement policy in the U.S. ensures competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets.

While no system, including ours, is perfect, I think the basic answer is yes. Recent U.S. merger enforcement largely does the job Congress intended for it to do. Over the last two decades or so merger review has become more predictable, better grounded in mainstream economics and less susceptible to political fluctuations. It has become a model for other jurisdictions around the world. The system is substantively

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sound. But there are opportunities to do better. We can and should make merger review more accurate, transparent and efficient.

Why and How Merger Analysis in Recent Years Has Improved

Others have written and spoken at length on how merger enforcement has changed for the better. It is a view I share. Today's approach to merger enforcement largely dates to the adoption of the 1982 Merger Guidelines. They provided an improved analytical framework for Section 7 enforcement.[1] Those Guidelines, as revised in 1984, in 1992 (by two of my co-panelists) and again in 1997 (by, among others, AMC Commissioner Valentine) gradually changed merger enforcement in major ways. They moved enforcement away from the unpredictable and sometimes overly aggressive stance enforcers and the courts had taken over the prior three decades[2] towards a wide variety of mergers – horizontal, vertical and conglomerate. The Guidelines articulated better than ever before the circumstances in which mergers would be investigated and possibly challenged. By identifying up front the issues central to effective merger enforcement, they provided both agency staff and practitioners with the questions that needed to be asked and answered in every transaction. The Guidelines framed the debate; they created a common agenda, a shared vocabulary focusing discussions on the key issues: market definition, concentration, competitive effects, likelihood of entry and efficiencies. The result has been a more constructive and focused merger review process. The exercise of prosecutorial discretion is more informed. Cases are better investigated and better litigated.

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[1] U.S. Department of Justice, Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,102 (June 14, 1982).

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

When I returned to the FTC in the mid 1990s, I saw firsthand how much better the agencies had become at the underlying analytics. The 1992 revisions to the Merger Guidelines were especially helpful.[3] They imposed upon the enforcers, as Professor Kauper is fond of saying, the discipline of telling a credible story about how a particular transaction likely would or would not harm competition.[4] Enforcement decisions had moved from the theoretical ("could entry potentially defeat the exercise of market power") to the more practical ("are market conditions such that timely, likely and sufficient entry will prevent the exercise of market power"). The "story of harm" requirement in the 1992 Guidelines caused the difficult but necessary prediction as to whether a particular deal may "substantially lessen competition" to be based less on theory and more on hard facts and data.

The result was that in the late 1990s the Commission challenged – successfully – a number of potentially problematic deals. But the Commission also stayed its hand where it was not confident that a merger would alter the market for the worse. Boeing's acquisition of McDonnell Douglas, combining two of the three producers of large commercial aircraft, is but one example of enforcement restraint. Despite the numbers, the Commission simply was not persuaded that the transaction would reduce competition.[5]

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[3] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, available at http://www.usdoj.gov/atr/public/guidelines/hmg.htm.

[4] Thomas E. Kauper, Antitrust in 1992: The Year of the Storyteller, 61 Antitrust L.J. 347 (1993).

[5] Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek and Christine A. Varney, In the Matter of The Boeing Company/McDonnell Douglas Corp., File No. 971-0051 (1997).

The FTC's recent release of merger data covering 1996-2003[6] helps make the point that in recent years merger enforcement has not been driven solely by arid application of the Merger Guidelines. Market concentration and the market shares of the merging parties correlate with the likelihood of investigation but do not alone dictate enforcement decisions. Even though the Guidelines "presume" competition problems when the HHI exceed 1800 and concentration will increase by 100 or more points, the FTC data show that mergers receiving a second request in a market with a 2,400-2,999 post-merger HHI and an increase of 200-299 had only a 57% chance of being challenged.[7] The data show how entry, customer complaints and "hot documents" affected the Commission's enforcement decisions. The Commission brought enforcement actions in 89 of 109 concentrated markets in which the Commission also found that entry would be "difficult,"[8] but did not challenge any of the 19 mergers in which it found entry would be easy.[9] In mergers in which the FTC received strong customer complaints, the FTC challenged in 50 of 51 markets. Where the Commission did not find strong customer complaints, it enforced in less than half of the transactions.[10] Where the Commission identified "hot documents," discussing significant anticompetitive effects of the merger, the FTC moved to enforce in 18 of 20 mergers.[11] Where the Commission did not find such strong documentary evidence it enforced in

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[6] Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal Years 1996-2003, available at http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf.

[7] Id. at Table 3.1.

[8] Id. at Table 9.2.

[9] Id. at Table 9.1.

[10] Id. at Table 7.2.

[11] Id. at Table 5.2.

only 37 of 108 mergers.[12] The bottom line is that HHI numbers alone are not dispositive; enforcement decisions appropriately weigh other factors.

The Emerging Bipartisan Approach to Enforcement

The process that began in 1982 with the Merger Guidelines has given antitrust enforcement stability, a sense of gravity that previously was lacking. Compare the controversy over merger enforcement policy we saw in the late 1970s and early 1980s[13] to the relative calm that has existed for the last decade and a half. At that earlier point, the differences between politicians and enforcers regarding appropriate application of Section 7 were profound.[14] In recent years, in the midst of "vigorous policy debate" the result is "essential stability of merger policy in the United States."[15] President Clinton's FTC Chair – Bob Pitofsky – and President Bush's first appointee – Tim Muris – recently authored companion articles discussing how antitrust enforcement, particularly merger enforcement, has become less partisan and more predictable. Timothy Muris, Principles for a Successful Competition Agency, 72 U. Chi. L. Rev. 165, 168 (recognizing that his own and Pitofsky's policies "were not significantly different" and that any disagreements between the parties "are truly at the margins"). Robert Pitofsky, Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission, 72 U. Chi. L. Rev. 209, 212

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[12] Id. at Table 5.1.

[13] National Institute on Antitrust and Economics Papers, 52 Antitrust L.J. 515 *et seq.* (1983).

[14] ABA Annual Meeting Emphasizes Competitiveness, International Trade, 53 Antitrust & Trade Reg. Rep. (BNA) 311, 315 (Aug. 20, 1987) (remarks of Sen. Metzenbaum) (referring to Reagan antitrust appointees as a "garbage barge of ideologues").

[15] Commissioner Thomas B. Leary, The Essential Stability of Merger Policy in the United States, 70 Antitrust L.J. 105 (2002).

("a substantial consensus has emerged, consigning much of antitrust to a common middle ground.").

The public declarations of continuity between the Clinton Administration and the current Bush Administration have some support in the numbers. During the Clinton Administration second requests were issued in 4.7% of merger filings.[16] During the first two full years of the Bush Administration, second requests were issued in a nearly identical 4% of eligible transactions.[17] In contrast, the changeover from Democrats to Republicans in 1981 saw a dramatic reduction in merger reviews: second requests dropped by over 50% – from 10.3% to 3.9%.[18]

The observable continuity over the past fifteen years should be reassuring to parties appearing before the agencies. As a recent ABA report noted, there is consensus within the agencies and the antitrust bar that antitrust has found "a middle ground reflecting moderately aggressive enforcement, accompanied by sensitivity to efficiencies, preservation of incentives to innovate, and global competition considerations."[19]

Judicial and Scholarly Acceptance of Current Merger Enforcement Standards

Another promising trend in recent years has been the increasing acceptance by the courts of the Merger Guidelines as part of the framework for analysis. When the Guidelines were first revised in 1982 there was a gap between the enforcement standards they embodied and the analysis the courts historically had used in assessing the legality

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[16] William J. Baer, Deborah L. Feinstein, Randal M. Shaheen, Taking Stock of Recent Trends in U.S. Merger Enforcement, 18 SPG Antitrust 15, 16.

[17] Id.

[18] Id.

[19] ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement – 2004 at 8, available at http://www.abanet.org/antitrust/comments/2004/state_of_fed_enforc.pdf.

of mergers. Over time – and it has taken some time – both appellate and trial courts have gradually embraced the framework of the guidelines. This offers parties and the public more consistent application of the Section 7 standard than we once saw. In some cases, the courts relied upon the guidelines to enjoin a transaction.[20] In other cases, such as United States v. Baker Hughes Inc., 908 F.2d 981, 985-86 (D.C. Cir. 1990), the guidelines' entry standards were used to rebut a presumption of anticompetitive effect.[21]

The scholars seem to agree as well. Judge Posner, no shill for the enforcement agencies when it comes to assessing the quality of antitrust enforcement, recently revised his treatise "Antitrust Law" to include discussion of recent merger enforcement activities.[22] One example he discusses at length is the evidence, both documentary and economic, presented by the Federal Trade Commission in seeking to enjoin the combination of two of the three leading office supply superstores. His conclusion? That "economic analysis of mergers has come of age."[23]

This does not mean there is always consensus on a particular decision to challenge or not to challenge a particular deal. The recent Oracle/PeopleSoft merger[24]

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[20] F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (applying efficiencies analysis from Guidelines to determine whether merger-specific efficiencies could overcome presumption of anticompetitive effect with post-merger HHI of 4775 and increase of 510); F.T.C. v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 53 (D.D.C. 1998) (applying entry and efficiencies analysis called for in the Guidelines).

[21] See also F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (applying guidelines analysis to reject the F.T.C.'s coordinated effects theory); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (finding that Plaintiffs had "not proved that the post-merger level of concentration (HHI) in the product and geographic markets, properly defined, falls outside the safe harbor of the Horizontal Merger Guidelines.")

[22] Richard A. Posner, Antitrust Law (2001).

[23] Id. at 158.

[24] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

and Arch Coal challenges,[25] the District Court's decision in the Baby Food case,[26] and the FTC's earlier challenges to the Drug Wholesalers mergers[27] and to Staples/Office Depot[28] all were hard-fought battles with little agreement on the facts, theories of potential harm and the appropriate application of the Merger Guidelines. But the battles were fought within more well-defined boundaries than ever before. There was at least agreement on the questions that needed to be addressed, if not on the answers.

International Acceptance of the Substantially Lessening Competition Standard

As firms increasingly operate in a multinational environment, the merger policies of foreign competition authorities have become more important. The potential for divergence in enforcement is real. It is encouraging therefore that the analytical framework the U.S. has come to employ in merger analysis has begun to receive some acceptance in other jurisdictions. This is something of a surprise. Ten years ago no one was predicting anything approaching substantive convergence in merger enforcement.[29] But, in recent years, key jurisdictions have adopted tests that are identical or similar to the language of Section 7.[30] We are a long way from consistent application of the SLC

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[25] F.T.C. v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

[26] F.T.C. v. Heinz, 116 F. Supp. 2d 190 (D.D.C. 2000), rev'd, 246 F.3d 708 (D.C. Cir. 2001).

[27] F.T.C. v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998).

[28] F.T.C. v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[29] See Dane Holbrook, International Merger Control Convergence, 7 UCLA J. Intl. L. & Foreign Aff. 345 ("While procedural convergence is imminent, substantive convergence, because of national sovereignty and political pressures, may take some time.").

[30] European Union, Council Regulation(EC) No 139/2004 of 20 January 2004 (adopting a hybrid dominance/competition analysis); United Kingdom, Enterprise Act 2002 (adopting SLC test); Singapore, pending Competition Act legislation (adopting SLC test); Turkey, June 2005 Draft Legislation (proposing shift to SLC test); New Zealand, Commerce Act, Part III (adopting SLC test); Ireland, Competition Act of 2002 (adopting SLC test); Japan, Act Concerning Prohibition of Private Monopolization and

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standard. But it is helpful that we are increasingly using the same test. That promotes better dialogue between enforcers. It makes it easier for the U.S., in bilateral and multilateral negotiations, to urge incorporation of Merger Guidelines analytics into the enforcement efforts of other competition authorities.

Differences do and will continue to persist. But, divergence between national competition agencies on major issues has been relatively infrequent. While there are notable exceptions, for example, the U.S./E.U. split on GE/Honeywell[31] and before that Boeing/McDonnell Douglas,[32] most enforcement decisions are not at odds with one another. And, to the extent that some of the divergence between the U.S. and the E.U. on those cases can be attributable to the greater weight the EU has historically given to competitor concerns, that gap may be narrowing as well. Commissioner Kroes spoke last month at Fordham and embraced the view that is fundamental to us: "it is competition, and not competitors, that is to be protected . . . I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it ultimately benefits consumers."[33]

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Maintenance of Fair Trade, interpreted by 2004 Guidelines on the Application of the Anti Monopoly Act to Reviewing Business Combination (applying SLC test); France, New Economic Regulations Act of 15 May 2001 (replacing dominance analysis with SLC standard); South Africa, Competition Act, Act No. 89 of 1998 (adopting substantially lessen or prevent competition test); and Australia, Trade Practices Act of 1974 as amended in 1992 (adopting SLC test).

[31] Case m2220 General Electric/Honeywell, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

[32] Case m877, Boeing/McDonnell Douglas, available at http://europa.eu.int/comm/competition/mergers/cases/index/m17.html#m_877.

[33] Neelie Kroes, Member of the European Commission in charge of Competition Policy, Preliminary Thoughts on Policy Review of Article 82 Speech at the Fordham University Law Institute (Sept. 23, 2005), available at

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This trend is especially important to multinational firms. It is tough enough today determining where, when and how a transaction must be notified in the roughly sixty nations with some notice requirement.[34] But it is much worse to have fundamental differences in the analytics and the outcome. That uncertainty potentially discourages otherwise pro-competitive and efficiency enhancing M & A activity. Credit here goes to the recent generations of U.S. competition enforcers for making this a priority. The time spent on substantive convergence has been considerable. It has no doubt been frustrating and challenging. But, looking at the trend line, it is time well spent.

The Continuing Validity of Structural Presumption

I am aware that there has been debate in recent years over the relationship between concentration and market performance. Some have suggested that we would be better off abandoning the very rebuttable presumption of anticompetitive effects reflected in the Philadelphia National Bank decision[35] and embodied in the Merger Guidelines.

I am not convinced the case for change has been made – especially in light of how market concentration factors into current merger enforcement. As I noted earlier, the market concentration today serves as a filter – screening out cases where the likelihood of competitive effect is low and focusing the analysis on the remainder. If the inquiry stopped there, if the agencies initiated action and the courts issued injunctions based on the concentration numbers alone, the critics might have a point.

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http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en.

[34] http://www.internationalcompetitionnetwork.org/mergercontrollaws.html.

[35] U.S. v. Philadelphia Nat'l. Bank, 374 U.S. 321 (1963).

But, as noted above, that is not how modern merger analysis works. The Guidelines and the courts require more, as they should. The net effect is that the structural presumption is hardly outcome determinative. At the agencies, concentration numbers help determine which cases will be looked at closely. In the courts, the structural presumption affects only the burden of coming forward with evidence. It does not shift the government's ultimate burden, and it does not appear to be producing over enforcement.

The FTC ALJ's recent decision to break up the Evanston hospital merger illustrates how HHIs alone do not dictate outcomes. In a lengthy opinion, the ALJ pursues dual tracks, analyzing the merger as it would have been at the time of consummation under the Guidelines while also analyzing the actual effect of the merger in the market.[36] The ALJ found that the merger was a 6-to-5 with a post-merger HHI of 2739 and increase of 384.[37] That was merely the starting point, at best entitling the government to a weak structural presumption which might be overcome by efficiencies claims or other defenses.[38] The ALJ's analysis turned on his finding that the merged entity was able to raise billing rates to its customers approximately 11-18% more than its peers in the market.[39]

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[36] In the Matter of Evanston Northwestern Healthcare Corp, ALJ Initial Decision, Oct. 20, 2005, available at http://www.ftc.gov/os/adjpro/d9315/051020initialdecision.pdf.

[37] Id. at 1.

[38] Id. at 187.

[39] Id. at 2.

The Role of Efficiencies in Merger Analysis

I appreciate that this issue is the territory of another panel and will trespass only lightly on the topic. The 1997 amendments to the Merger Guidelines[40] in my view handle efficiencies appropriately. Synergies and consolidation savings are relevant to merger analysis. But given the difficulties in predicting whether efficiencies will be realized and in accurately assessing their magnitude, they should not deflect attention from the core question: Is the combination likely to create or enhance market power? If the answer to that question is an unambiguous yes, the Guidelines suggest that efficiency claims are unlikely to save the day. But in closer cases, where the evidence of anticompetitive effects is less clear and where the efficiency claims have some basis, they ought to serve as a tie breaker. That is the sentiment underlying the efficiency section of the current Guidelines. I think it is the right one.[41]

Room for Improvement

There are ways in which our merger review process can be improved. Other panels are considering some of these topics, so I will offer only brief comments.

Transparency. Agencies enhance understanding of the process and foster better antitrust risk assessment by companies when they explain why they decided to act or not to act. Transparency matters. Critical review of agency performance and of outcomes is

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[40] Guidelines at § 4.

[41] Statement of the Federal Trade Commission, AmeriSource Health Corporation/Bergen Brunswig Corporation (Aug. 24, 2001), available at http://www.ftc.gov/os/2001/08/amerisourcestatement.pdf ("[T]he proposed transaction likely will give the merged firm sufficient scale so that it can become cost-competitive with the two leading firms and can invest in value-added services desired by customers. Furthermore, we believe that the combined firm will be able to initiate these improvements more rapidly than either could do individually, and that this timing advantage will be significant enough to constitute a cognizable merger-specific efficiency.")

not possible without access to information. Considerable progress has been made on this issue in the last 10 years and it should be continued. The agencies have joined together to make significantly more information on merger enforcement available to the public than required under the HSR act including releasing analysis of number of mergers, concentration levels and mergers challenged.[42] The release of detailed merger data in 2003 was especially helpful for both predictive and analytical purposes. The announced plans of the Antitrust Division and Bureau of Competition to jointly issue a commentary explaining more fully how the Guidelines are applied in practice will be another constructive step. Particular attention should be paid to helping the outside world better understand the economic modeling being done by the agencies.

Clearance. I appreciate that the difficulties with the current inter-agency clearance process drew the fire of an earlier panel. The existing clearance process unduly delays antitrust clearance, and confers little if any benefit on the parties, consumers or the enforcers. I helped develop and supported the short-lived 2002 FTC-DOJ accord which took the rather unremarkable step of memorializing the informal division of industries that has evolved over decades and imposing realistic deadlines for resolving disputes. It, or some variant of it, should be adopted promptly.

Second Request Reform. Change is needed here as well. The burdens created by the clearance problem are dwarfed by the staggering costs of compliance with second

[42] E.g., Horizontal Merger Investigation Data, Fiscal Years 1996-2003, available at http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf; see, e.g., Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, In the Matter of Pepsi, Inc./Quaker Oats Company, August 1, 2001; Mary T. Coleman, David W. Meyer, David T. Scheffman, Empirical Analyses of Potential Competitive Effects of a Horizontal Merger: The FTC's Cruise Ships Mergers Investigation, available at http://www.ftc.gov/be/riocruise0703.pdf.

requests. The current process results in burdensome and costly production obligations. Many of these costs are associated with producing documents and data that the agency staff do not review and have no intention of reviewing. There has to be a way to focus production obligations on the people and the information that are most relevant to merger analysis (and possible litigation) while reducing the costs and delays our current system imposes. My former FTC colleague, Mark Whitener, now Senior Counsel at General Electric Company, will present later today a thoughtful discussion of these issues. I share his views.

Concluding Remarks

My suggestions and criticisms are self-evidently at the margins. Merger enforcement is more predictable, transparent and analytically sound than ever before. No doubt some witnesses have and will argue for more fundamental changes in approach -- such as eliminating the structural presumption and giving greater weight to efficiency claims. In the absence of compelling evidence of over-enforcement, I would resist those arguments. Change in the legal standards inevitably has costs of its own. It would create a period of uncertainty over the meaning of the new standards that could take years to sort out. Moreover, a change in U.S. law is likely to have collateral consequences in foreign jurisdictions that are just beginning to emulate the analytical approach the U.S. has tried and tested over the years. In sum, I think this Commission should find that current U.S. merger enforcement is in good shape.