COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

JAMES R. ATWOOD
TEL 202.662.5298
FAX 202.778.5298
JATWOOD@COV.COM

August 12, 2005

Andrew J. Heimert, Esq.
Executive Director & General Counsel
Antitrust Modernization Commission
1120 G Street, N.W., Suite 810
Washington, D.C. 20005

Re: Public Comments

Dear Andrew:

On behalf of Bertelsmann AG, General Electric Company, Microsoft Corporation, Pfizer Inc., Royal Philips Electronics, and TimeWarner Inc., I am pleased to submit the attached comments on Topic VI(2) of the Commission's review of the antitrust laws: international cooperation.

The principal authors of these comments were Calvin S. Goldman, QC, a partner at Blake, Cassels & Graydon LLP, Toronto; Ilene Knable Gotts, a partner at Wachtell, Lipton, Rosen & Katz, New York; Professor Robert Pitofsky, Professor of Law at Georgetown University Law School and Counsel, Arnold & Porter, Washington, D.C., and myself.

Sincerely,

James R. Atwood

Attachment

August 12, 2005

COMMENTS TO THE ANTITRUST MODERNIZATION COMMISSION ON THE NEED TO ENHANCE COMITY ARRANGEMENTS WITH FOREIGN ANTITRUST AUTHORITIES (Topic VI(2))

Executive Summary

The globalization of commerce, together with the growing number of jurisdictions enforcing antitrust laws, have increased the likelihood that businesses will be confronted with inconsistent demands arising from divergent national standards of antitrust law and policy. The inefficiencies and uncertainty this creates impose significant costs on businesses, governments and society at large.

Comity -- the deference given by one agency or tribunal of one nation to an act or decision of another -- has long been recognized as a methodology for avoiding or resolving conflicts between different jurisdictions arising from divergent national approaches. To its credit, the United States has played a leading role in recent years in embedding comity principles in a network of bilateral antitrust cooperation agreements with other jurisdictions. But the promise of these agreements is not being fully realized, and the risks of future conflicts across an array of jurisdictions are steadily mounting. Hence, the U.S. antitrust enforcement authorities should explore the scope for enhanced comity mechanisms, drawing both on experiences to date in the antitrust field as well as the cooperative approaches applied in other regulatory fields.

These comments argue that the United States has a strong interest in enhancing the use of comity as a means of avoiding conflict between antitrust enforcement authorities. We make a number of specific suggestions for advancing that objective.

Comments

The Commission has invited public comment on whether there are technical or procedural steps the United States could take to facilitate further coordination with foreign antitrust enforcement authorities. 70 Fed. Reg. 28902, 28906 (May 19, 2005). We, the undersigned companies, believe that the United States can play a decisive role in promoting greater use of comity principles as a means of avoiding conflict between enforcement authorities, thereby reducing the costs imposed on business, government, and society generally by divergent national approaches to antitrust law and policy. We urge the Antitrust Modernization Commission, in its ongoing work and final report, to endorse the objective of "enhanced comity" and to encourage the relevant U.S. authorities to take concrete steps towards this objective.

The following comments assess the costs imposed by the continuing potential for conflict between antitrust authorities, describe the current and -- we believe -- underdeveloped role of comity in mitigating those costs, and make a number of specific suggestions for U.S. action in support of enhanced comity.

I. The Private and Public Costs of Divergence in Antitrust Standards

The vast growth of import and export trade worldwide, and the development of multinational companies, increases the potential that a transaction or a company's business operations or conduct will extend beyond national boundaries. At the same time, more than 100 countries have adopted antitrust laws and approximately 70 countries provide for merger pre-notification and/or review. As former Assistant Attorney General Pate noted, "this global

expansion . . . brings new challenges" and "the multitude of reviewing jurisdictions creates the risk of inconsistent results."[1]

The potential for conflict arising from divergence of antitrust standards governing both merger transactions and non-merger conduct imposes significant costs on business, among the most important of which are:

- uncertainty over the legal consequences of cross-border transactions or investments which hinders business planning and skews investment decisions by diminishing the anticipated competitive rewards of innovation;
- the inability of companies to rely on a remedy imposed by a competition authority in a context where that remedy potentially affects its operations worldwide;
- the risk of inappropriate or inconsistent substantive outcomes as a result of forum shopping by complainants seeking the jurisdiction that will impose the broadest requirements upon a competitor;
- higher transaction costs in the form of increased legal fees and other administrative burdens.

Divergent standards also create costs for government and society generally:

- greater reluctance of business entities, faced with conflicting requirements or inconsistent remedies, to cooperate with antitrust agencies, to utilize leniency or amnesty programs, and to negotiate and agree to remedies;
- misallocation of scarce legal and administrative resources by enforcement agencies duplicating each other's work or trying to resolve conflicting approaches to the same issue;
- increased political tension that may reduce support for global trade and cooperative bilateral relations;
- economic inefficiency associated with companies' forgoing procompetitive conduct and transactions as a result of uncertainty.

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[1] R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Securing the Benefits of Global Competition," Presented at Tokyo American Center, Tokyo, Japan (Sept. 10, 2004).

II. The Current Role of Comity in International Antitrust Enforcement

Given the lack of any early prospect of full convergence on internationally-agreed antitrust standards, antitrust agencies around the world have made significant recent progress in reducing conflicts by increasing cooperation, information sharing, and networking. The concept of comity plays an important role in those efforts. As described below, however, the potential for comity to provide an effective conflict-avoidance mechanism has not been fully realized.

For over 100 years, public international law has recognized the concept of comity as a means for resolving clashes between states resulting from a decision of one state that has effects in another. Traditional comity requires no change in a jurisdiction's domestic laws; rather, it relates to the degree of deference given by a domestic agency or tribunal to an act or decision of a foreign government. As the U.S. Supreme Court stated in 1895, comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[2]

In more recent years, comity has also been invoked as a means of defusing international friction caused by the application of the antitrust laws of more than one country to the same conduct. The 1995 Recommendation of the OECD Council, *Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade*, recognized "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of cooperation in the field of anticompetitive practices." The Recommendation describes negative comity as the principle that a country should (i) notify other

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[2] *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

countries when its enforcement proceedings may have an effect on their important interests, and (ii) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.

Comity principles are also reflected in bilateral cooperation agreements in which many jurisdictions have agreed to consider limiting their enforcement activities when foreign interests are involved. The United States played a pioneering role in this regard and currently has bilateral cooperation agreements with Canada, Germany, Australia, the European Union, Brazil, Israel, Japan, and Mexico. In addition to traditional "negative comity," many of these agreements also reflect a "positive comity" principle. Positive comity permits either party to ask the other party to take appropriate actions regarding anticompetitive behavior occurring in its territory that affects the important interests of the requesting party, where that behavior violates the antitrust rules of the host party.

It is generally agreed that elements of these bilateral agreements have largely been a success. Competition authorities routinely notify each other of investigations, share information, and coordinate in conducting investigations. We submit, however, that the comity provisions of the agreements, and the more general application of traditional comity principles, have been less successful. The limited impact of comity in the antitrust field is highlighted by the continuing pursuit of inconsistent remedies by the EU and U.S. enforcement authorities in such high profile cases as the GE/Honeywell merger and the monopoly claims against Microsoft. When these two leading, long-established antitrust authorities have open disputes in such cases, other countries – often with less mature antitrust regimes – will feel little constraint in pursuing their own divergent remedies, designed perhaps to serve parochial or protectionist interests rather than the objective of maintaining an open and competitive global market. The U.S. and EU must set a

strong example by respecting the principle of comity, for otherwise companies that operate multinationally will find themselves increasingly subjected to conflicting and constraining national regulations, sometimes posing as antitrust enforcement but in fact serving very different objectives.

Our belief that comity principles can be strengthened in the field of antitrust is supported by the cooperative measures nations have adopted in other regulatory fields. By comparison to at least some other transnational settings, the comity mechanisms reflected in the OECD Council Recommendation and embodied in the various bilateral antitrust agreements appear ripe for further development. In such areas as cross-border insolvencies, international telecommunications, international air transport services, transborder shipment and disposal of hazardous wastes, and drug safety regulation, one finds examples of enhanced comity arrangements (albeit phrased in different terminology) from which the international antitrust enforcement community could potentially learn.

The recent proliferation of cooperation agreements applying comity principles to international antitrust enforcement is to be welcomed. But the magnitude of the burden imposed on business and society by conflicts between antitrust jurisdictions suggests that much more needs to be done to make comity an everyday reality. The United States has a strong interest in advancing this objective. The U.S. played a leading role in developing the bilateral cooperation agreements which have become models for other industrialized nations. Further, American corporations will be among the prime beneficiaries of the improved predictability and consistency in international antitrust enforcement which enhanced comity can bring.

III. Proposed Steps Towards Enhanced Comity

We believe that comity principles can and should be applied at each stage of the work of antitrust authorities dealing with transactions or other business conduct with cross-border implications, from initiation of a merger review or investigation through creation and enforcement of potential remedies for competition law compliance. To this end, we would like to see the United States reactivate the debate over comity with other key antitrust jurisdictions. We commend the following ideas as options for consideration in this respect:

- *Revise existing cooperation agreements to recognize explicitly the importance of facilitating global trade, investment, and consumer welfare.* The United States' various bilateral cooperation agreements recognize that effective enforcement of antitrust laws is important to the efficient operation of markets and to economic welfare. The agreements do not acknowledge, however, that trade, investment, and welfare can be impeded by divergent government competition policies and inconsistent antitrust remedies. The existing agreements could be amended to make this point explicitly and to call for this cost to be taken into account as an important feature of comity analysis.

- *Draw upon the application of comity in other regulatory and transnational settings.* As indicated above, comity has been embraced and used widely in other regulatory and administrative settings. The U.S. antitrust authorities could review those examples to develop "best practices" and tools that, with the cooperation of counterpart authorities in other countries, might be adapted for antitrust policy.

- *Agree to a presumptive deferral of a remedy where the deferring party's interest is slight relative to that of the other party.* The U.S. could agree with its trading partners that when a competition authority in a jurisdiction with a more substantial nexus to the transaction or conduct at issue orders a remedy, there will be a strong presumption that the other jurisdiction's competition authority will defer to its counterpart.

- *Agree to seek to avoid inconsistent remedies.* Recognizing that particular harm may ensue if companies are subjected to inconsistent or conflicting remedies in different parts of the world, the U.S. could agree with its trading partners that, to the extent consistent with their respective antitrust laws, neither party will impose remedies inconsistent with those imposed by the other. A variation would be for the U.S. and its partners to agree that when investigating a transaction or conduct previously examined by the other party's antitrust authority, an antitrust authority should not impose divergent remedies without prior consultation with its counterpart.

- *Agree to fashion remedies on a joint basis*. If a competent authority is unwilling to defer completely based on comity principles, then there still might be an opportunity to formalize an alternative procedure in which, at a minimum, the antitrust authorities jointly fashion an appropriate remedy. The parallel investigations by the U.S. and EU of General Electric's purchase of Instrumentarium in 2003 provide a good example of the principle involved. In that case, the U.S. and EU antitrust authorities made a clear effort when drafting their respective decrees not to create inconsistent obligations, for example by using common definitions, drafting complementary common trustee provisions, and consulting during the divestiture process.

- *Consultation at request of affected entities.* The U.S. could agree with trading partners that they will consult with each other at the request of commercial entities that make a credible prima facie showing that they are potentially subject to divergent or inconsistent rules or remedies that may impair their efficient operations in the global marketplace.

- *Benchmarking reviews in instances where both jurisdictions impose remedies.* In any instance where the U.S. and foreign antitrust authorities are unable to reach agreement on the appropriate treatment of a merger or other business conduct under investigation, at a minimum they should agree to conduct ongoing benchmarking reviews of the matter and of the impact of the parties' divergent decrees. The purpose of the reviews would be for the authorities to exchange information and views, with an eye toward ensuring that future remedies will be consistent across borders.

Each of these features could be applied to the United States' antitrust enforcement relationship with each of the countries with which the U.S. has a bilateral cooperation agreement. Given the significance of transatlantic trade and investment flows, the importance of the EU and U.S. setting an example for other nations with less developed antitrust regimes, and the fact that an EU/U.S. institutional framework already exists in which these comity proposals could be discussed, we see particular value in the United States' working closely with the European Union to enhance comity. The EU and the U.S. have been leaders in shaping antitrust policy and instrumental in putting it on the global agenda. Through their Initiative to Enhance Transatlantic Economic Integration and Growth, both jurisdictions are aggressively promoting EU-U.S. regulatory cooperation. Antitrust policy offers a timely area for increased regulatory cooperation, under either that framework or otherwise. An "Enhanced Comity" initiative would

provide a carefully targeted, practical, and forward-leaning undertaking likely to yield tangible benefits for business, consumers, and regulatory authorities in a realistic timeframe.

Submitted by:

Bertelsmann AG

General Electric Company

Microsoft Corporation

Pfizer Inc.

Royal Philips Electronics

TimeWarner Inc.

Contact:

James R. Atwood
Covington & Burling
1201 Pennsylvania Ave. N.W.
Washington, D.C. 2004-2401
(202) 662-5298
fax: (202) 778-5298
jatwood@cov.com