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Andrew Heimert
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Antitrust Modernization Commission
1120 G Street NW (Suite 810)
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3 February 2006

Dear Mr Heimert,

Submission by the UK Government to the AMC: Observations attached

The work of the Antitrust Modernization Commission (AMC) has been of interest to Her Majesty's Government of the United Kingdom and Northern Ireland for some time, including its invitation for public comments.

The UK Government is responding to that invitation with a set of 'Observations', which are attached. These may be of interest ahead of the AMC's Hearing on the "International Antitrust Issues", to be held on 15 February, 2006.

The UK Embassy will send a representative to attend this public Hearing, especially the statements of the Witnesses. In the light of this Hearing, the UK Government may wish to pursue further contact with the AMC.

Thank you in advance for your consideration,

Yours sincerely

Phil Budden

**Dr Phil Budden
First Secretary
Regulatory Affairs**

**OBSERVATIONS BY HER MAJESTY’S GOVERNMENT OF
THE UNITED KINGDOM AND NORTHERN IRELAND (“the
UK Government”) TO THE ANTITRUST MODERNIZATION
COMMISSION ESTABLISHED BY THE US CONGRESS
 (“the Modernization Commission”).**

1. The Modernization Commission has invited the UK Government to make observations to it in relation to the Commission’s mission. The UK Government is pleased to respond to this invitation because it believes that cooperation and coordination between our respective governments is important in the competition law area. However, in the spirit of comity, we shall generally refrain from endorsing or opposing any particular reforms to US laws or procedures that the Modernization Commission may consider or recommend to the US Congress. Rather, we submit the following general observations in order to assist the Modernization Commission in considering possible ways of strengthening cooperation and mutual understanding in the effective enforcement of the respective competition laws in the USA and the UK¹.

Mutual interests

2. The UK Government believes that effectively enforced laws that penalise, and thereby deter, anti-competitive collusion among businesses and exclusionary conduct by monopolists play an important part in developing efficient and competitive open market economies.

3. As international trade increases and markets develop, we have a strong mutuality of interest with the USA in the development, and enforcement of complementary competition laws in our respective countries.

4. It is therefore important that the authorities and courts in the USA, UK, EU and EU Member States develop arrangements for effective cooperation in enforcing our respective competition laws and to minimise conflicts in their application.

5. We encourage the Modernization Commission to consider this set of issues from two perspectives.

¹ These observations are not made on behalf of the European Union (EU), but we note that they are made by the UK, an EU Member State, which has substantially harmonized its competition law rules with those of the EU in the Competition Act 1998. Thus the same policy and practical issues often arise under both UK and EU law.

I. Convergence

6. We believe that it is generally useful for governments and legislatures to study the rules and experiences of other jurisdictions using competition law as an important instrument of public policy and, whenever appropriate, to adopt complementary (rather than divergent) rules and practices. It appears to us that the greater the similarity of legal norms and procedures, the easier it will be to co-operate on their application and less likely it is that jurisdictional conflicts will arise, and the easier it will be to resolve them if they do.

7. There has been a steady trend in recent years towards convergence in our respective laws and practices in the competition law area by drawing on each other's experience in operating such laws. In the UK we have introduced new prohibitions on anti-competitive agreements and exclusionary conduct based on those in EU law, which are similar to those in US law². We have drawn on US experience in introducing new arrangements to assist private parties bringing financial claims for breaches of these prohibitions³. We have also introduced criminal sanctions for individuals participating in hard core-cartels⁴. Leniency policies drawing on the experience of the US Department of Justice have been introduced in the EU, UK⁵ and many other EU Member States and these policies have already led to the uncovering of significant cartels in the EU. The arrangements for enforcement of the prohibitions in EU law by the courts, competent authorities of the Member States and the European Commission have been greatly strengthened, giving the prohibition on anti-competitive agreements direct application, and remodelled to focus on enforcement of hard-core cartels, as part of the so-called "modernization program"⁶. Merger control in the UK has been focussed on a "substantial lessening of competition" test drawing on US experience⁷ and the EU has revised the competition test in the EC Merger regulation⁸.

8. We expect the process of reforming aspects of competition law in the UK and EU to continue:

- The European Commission is currently reviewing a number of transport block exemptions. These grant certain sectors, exemptions under Article 81 (3) of the EC Treaty and are similar to US antitrust immunities. The European Commission is proposing that the block exemption that currently applies in relation to liner shipping should be revoked, and significant changes to the block exemption relating to international air travel, changes that the UK would welcome. Both these have parallels in US anti-trust immunities. We would encourage the

² See Chapter 1 and 2 of the Competition Act 1998.

³ See Section 47A Competition Act 1998.

⁴ Section 188 Enterprise Act 2002.

⁵ See Office of Fair Trading, *Leniency in Cartel Cases: A Guide to the Leniency Programs for Cartels* (2005).

⁶ See Regulation EC/1/2003.

⁷ See e.g. sections 35, 36 and 41 of the Enterprise Act 2002.

⁸ See Regulation EC/139/2004.

Modernization Commission to study carefully the rationales being offered for such changes and to make similar recommendations in respect of US immunities if it finds reasonable justification for doing so. Failure to make parallel changes in the US and the EU would be likely to generate legal uncertainty for international carriers, as they face at least the possibility of being charged under EU law for the same conduct that was immunized under US law, in relation to transatlantic traffic.

- The European Commission is looking at ways of improving the arrangements for bringing private actions in EU Member States for infringement of EU and national competition rules, and has recently published and invited comments on a Green paper and a staff working paper on this subject⁹; we encourage the Modernization Commission to help promote convergence by commenting on these papers from a US perspective.
- There is a continuing healthy dialogue between officials, legal practitioners and academic commentators on both sides of the Atlantic as to the respective merits of and need to develop aspects of our competition laws, for example as to identifying abusive behaviour by businesses with market power. The EU Commission is currently reviewing its approach to the enforcement of Article 82 of the EC Treaty (abuse of dominant position), and recently published and invited comments on a working paper on the assessment of many common forms of exclusionary conduct¹⁰ while the Modernization Commission has been holding hearings on the application of Section 2 of the Sherman Act to various types of conduct by dominant enterprises. This may offer an opportunity to bring about greater convergence between two regimes. We would encourage the Modernization Commission to review the EU papers on Article 82 before making any final recommendations of its own on Section 2 enforcement.

II. Managing interaction and minimising conflicts between overlapping jurisdictions

9. At the outset we should note that continued dialogue and cooperation between our respective enforcement authorities is essential in dealing with international cases; this is not only likely to maximise their efforts to deter uncompetitive practices and arrangements, but also to avoiding duplication of effort, and consideration to one another's sensibilities. Thus we strongly encourage the ongoing co-operation between the competition law enforcers in Washington, Brussels, London and elsewhere on the application of particular rules, the conduct of particular investigations, and policy more broadly. It is highly undesirable for such agencies to reach inconsistent factual or legal conclusions, especially where the same enterprises are being investigated for essentially the same conduct in different jurisdictions.

⁹ Papers published on 20 December 2005.

¹⁰ DG Competition discussion paper on the application of Article 82 to exclusionary abuses of 19 December 2005.

10. A variety of arrangements are now in place to promote such dialogue including the EC/US Cooperation Agreements of 1991 and 1998¹¹. In the UK we have moved to facilitate co-operation by extending the mutual legal assistance treaty between the US and UK in relation to criminal matters to anti-trust cases. Continued dialogue and cooperation is the best way of encouraging our respective authorities to cooperate effectively, thereby encouraging them to defer to each others' efforts, rather than duplicating them, and to give consideration to one another's sensibilities. We would be interested in suggestions from the Modernization Commission on ways this goal could be promoted.

11. However we also recognise that states will continue to make sovereign judgments as to the scope and terms of their respective laws. Where significant legal differences exist these are likely to generate conflicts and litigation over jurisdictional and other issues. In the competition law area, the US has over the years chosen to adopt some important substantive and procedural rules that are significantly different from the rules that other states have generally chosen to enact. This has been particularly evident in approaches to private litigation over potential competition law violations, an area where private parties are likely to pursue their own case-specific goals with no reason to consider the general interest, unlike government enforcers. Two examples suffice to make the point: (1) the US policy of mandatory treble damages in Section 4 of the Clayton Act (15 USC §15) has not been generally followed; and (2) no other legal system has adopted "opt out" class action litigation of the type authorized by Rule 23 the US Federal Rules of Civil Procedure¹². These differences in law and policy continue to encourage private plaintiffs injured in the UK and elsewhere outside the US to try to bring their cases in the US courts, whenever possible, and thereby impose on the US courts the ongoing burden of resolving comity and other jurisdictional issues.

11. There will also be cases where, although our authorities and courts may agree what behaviour or agreements should be prohibited, they will take different views on what (if any) sanctions or remedies should be imposed or awarded. This may be a particular problem where inconsistent injunctions or prohibition orders are sought or imposed.

12. The convergence of laws will never remove all scope for potential conflict, and this is particularly true where the laws are quite general in their terminology. A lot of room is left for differences in their application to particular facts. For example, there is considerable disagreement among economists as to whether certain vertical agreements should be regarded as having anti-competitive effects and as to when efficiency benefits

¹¹ *Agreement Between the Government of the U.S. and the Commission of the E.C. Regarding the Application of Their Competition Laws* (Sept. 23, 1991) (available at <http://www.usdoj.gov/atr/public/international/docs/ec.htm>) as modified by the *Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws* (June 4, 1998) (available at <http://www.usdoj.gov/atr/public/international/1781.htm>)

¹² The UK provides a single damage remedy for injured competition law victims, while also authorizing some types of "opt-in" class actions by injured victims and representative actions by recognized consumer organizations. See section 47B of the Competition Act 1998 (inserted by section 19 of the Enterprise Act 2002).

justify conduct by enterprises with market power. Likewise, there is a risk of divergence in the views to be taken on the countervailing benefits to be obtained from certain potentially anti-competitive mergers, joint ventures or licensing arrangements (e.g., whether they may encourage significant innovation or efficiencies that would not otherwise take place). In factually close cases, two different decision-makers may well reach different conclusions on the same facts. It is important that this risk be minimized internationally.

14. Different approaches to rules and remedies can have significant practical effects even for third parties and enforcement agencies that are not directly involved. For example, an enforcement agency's leniency policies may be affected by what other jurisdictions do. The Supreme Court recognised this reality in *Empagran*, when it held "that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies [in the USA] would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty".¹³

15. In this context we welcome the fact that the US has recently changed its law in response to a concern about the adequacy of amnesty applicants' incentives: Congress has eliminated the exposure of the "first in" amnesty applicant to treble damages claims and joint and several liability.¹⁴ This legislation may increase the incentives for amnesty applicants to come forward, not only in the US but in foreign jurisdictions as well; and therefore is regarded by the UK Government as a constructive step.

16. It is nevertheless important that the Modernization Commission looks for ways of reducing and managing the risk of conflicts arising from continuing legal and procedural differences. We recognise this is not an easy matter in the absence of formal treaty-based arrangements that would be binding on private parties and the courts.¹⁵

17. The UK Government continues to believe that one way to minimise disputes resulting from different laws and practices is by having regard to accepted principles of private international law. We note that these principles have been taken into account by the European Court of Justice when emphasising the relevance of the implementation of anti-competitive arrangements in the jurisdiction,¹⁶ and we have attempted to take account of them when creating prohibitions in UK law.¹⁷

¹³ *F. Hoffman LaRoche Ltd v. Empagran SA*, 124 S. Ct. 2359, 2368 (2004) (citing *amici* briefs of Germany, Canada, and the US Solicitor General).

¹⁴ See Section 213 of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, 108 P.L. 237. Under this provision, the amnesty applicant is still subject to *single damages* based on overcharges in its own sales, but is relieved of possible *treble* damage liability based on *all* conspirators' sales.

¹⁵ These exist between the Member States of the EU and EEA, which have not only harmonized much substantive law prohibiting anti-competitive behaviour and the enforcement of those prohibitions by the national authorities, but also have harmonized the rules on mutual recognition and enforcement of court judgments based on such breaches. See EU regulation 44/2001; and the papers referred to at note 9 above.

¹⁶ See "*Woodpulp*": *A Ahlstrom OY and Others v Commission* (C-89/85 etc [1988] ECR 5193, para 143.

¹⁷ See sections 2(3) of the Competition Act 1998, section 190(3) Enterprise Act 2002.

18. We also note it is important to give substantial weight to principles of comity when developing, interpreting and applying our respective legislation. We welcome the application of the principle of jurisdictional reasonableness made by the US courts in the *Empagran* decisions,¹⁸ and in particular their recognition that great deference should be given to other states in determining how best to protect customers in those states from anti-competitive conduct¹⁹. We encourage the Commission to recognize the importance of these principles of comity when making any recommendations for any reform of US law in its application to cases affecting markets in different states.

Respectfully submitted,
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¹⁸ *F. Hoffman LaRoche Ltd v. Empagran SA*, 124 S.Ct. 2359 (2004); *Empagran SA v. F. Hoffman LaRoche Ltd*, 417 F. 3rd 1267 (D.C. Cir 2005) cert.den S.Ct. (2006)

¹⁹ The confusion generated by the jurisdiction-limiting language contained in the Foreign Trade Antitrust Improvements Act of 1982, 15 USC §6a, has been considerably reduced by the US Supreme Court and the Court of Appeals for the D.C. Circuit in their *Empagran* decisions in the last two years.