

February 7, 2006

The Antitrust Modernization Commission  
Attn: Public Comments  
1120 G Street, NW  
Suite 810  
Washington, D.C. 20005

via e-mail: [comments@amc.gov](mailto:comments@amc.gov)

Re: Comments Regarding International Antitrust Convergence

The Association for Competitive Technology ("ACT") is pleased to respond to the Antitrust Modernization Commission's request for comment on the growing proliferation and conflicting application of antitrust laws around the world. We also offer suggestions to improve the consistency of antitrust enforcement and merger approval in the international context.

ACT is a nonprofit trade association representing nearly 3,000 businesses and professionals in the information technology ("IT") industry. ACT members include software developers, systems integrators, IT consulting and training firms and other Internet-based businesses.

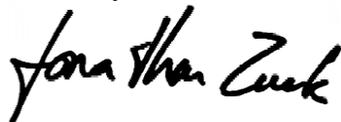
In the attached document, we describe four ways that current international antitrust trends are threatening a healthy environment for technology development:

1. Threats associated with enforcement actions against single-firm conduct
2. Threats associated with multi-jurisdictional merger reviews
3. Threats associated with emerging antitrust enforcement regimes
4. Impacts on small business

We then describe recent efforts to improve convergence within existing international mechanisms.

Finally, we offer several specific suggestions for encouraging convergence around sound economic principles. In the context of dynamic industries and market sectors, ACT is advocating steps to help national and international regulators work cooperatively and consistently to avoid conflicting antitrust rules and decrees in a global marketplace.

Sincerely,



Jonathan Zuck  
President, Association for Competitive Technology

**COMMENTS**  
**OF THE**  
**ASSOCIATION FOR COMPETITIVE TECHNOLOGY**  
**ON**  
**INTERNATIONAL ANTITRUST CONVERGENCE**  
**BEFORE THE**  
**ANTITRUST MODERNIZATION COMMISSION**

The Association for Competitive Technology (“ACT”) is pleased to submit the following views in response to the Antitrust Modernization Commission’s request for public comment on the growing proliferation of antitrust laws around the world, the potential for conflict in relation to antitrust enforcement actions and remedies, and possible solutions to this problem.

ACT is a nonprofit trade association representing nearly 3,000 businesses and professionals in the information technology (“IT”) industry. ACT members include software developers, systems integrators, IT consulting and training firms and other Internet-based businesses. While ACT’s membership includes some large multinational companies, most of its members are small and medium-sized enterprises. ACT’s members compete in a global marketplace by offering innovative products and services that are better, faster, and less expensive than yesterday’s market-leading solutions.

ACT believes that the best way to achieve a healthy technology environment is to foster free market principles that promote competition, investment and innovation. The proper development and application of antitrust laws are vital to this goal. Antitrust laws must protect competition, but at the same time not deter innovation, hobble efficient companies, or favor particular market players.

A healthy technology environment is being threatened today by a growing proliferation of antitrust laws around the world, with conflicting and frequently misguided goals, rules, enforcement processes, and remedies. Over the past 15 years, the number of jurisdictions with antitrust laws has grown from about 25 jurisdictions (few of which had serious enforcement programs), to approximately 100 today. Most if not all of these laws include prohibitions of single-firm “monopolization” or “abuse of dominance.” The antitrust laws in approximately 70 jurisdictions require the pre-notification of mergers.

As noted by the Antitrust Modernization Commission itself in its request for public comment, this proliferation of antitrust regimes has given rise to the potential for conflict between the United States and foreign jurisdictions, with respect both to the enforcement actions taken and the remedies sought.<sup>1</sup> At the end of these Comments, after discussing the issues of most concern to the IT industry, ACT presents a number of suggestions for how to encourage an improved convergence of antitrust rules and enforcement around sound economic principles.

#### 1. Threats Associated with Enforcement Actions Against Single-Firm Conduct

The most significant threats to a healthy technology environment stem from the tendency of many foreign antitrust authorities, in enforcing their prohibitions of “abuse of dominance” to:

- a. view the antitrust laws as intended merely to protect existing competitors (and/or foster the rise of new ones) and thus to promote a certain “competitive” market structure, without regard to consumer welfare;
- b. define relevant product markets too narrowly, and statically;
- c. require compulsory licensing of intellectual property as a remedy, in a misguided effort to bolster competitors and preserve a “competitive” market structure; and

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<sup>1</sup> The leaders of both the Senate Antitrust Subcommittee and the House Judiciary Committee have acknowledged this problem, as well. See Letter from Sens. Mike DeWine and Herb Kohl to Deborah Garza and Jonathan Yarowsky, October 1, 2004 (“With the increasing globalization of the economy, international antitrust enforcement—and the need to avoid conflicts with foreign antitrust authorities—has grown more and more important. Unfortunately, there are several prominent cases of divergence between US and foreign agencies, particularly the EU . . . . These issues deserve serious consideration by the Commission.”); Letter from Reps. James Sensenbrenner and John Conyers to Attorney General Alberto Gonzales, Nov. 9, 2005 (“The application of multiple and potentially discriminatory antitrust laws could adversely affect American businesses and consumers.”).

d. treat beneficial product integrations as illegal “tying.”

Each of these threats to technology development may be illustrated by reference to the recent European and South Korean enforcement actions against Microsoft, the maker of the world’s most popular computer operating systems. In its March 2004 decision, the European Commission held that Microsoft had infringed Article 82 of the EC Treaty by (1) refusing to disclose proprietary communications protocols and allow their use in developing and distributing work group server operating systems that would compete with Microsoft’s own products; and (2) making the purchase of the Windows operating system conditional on the inclusion of media functionality known as the Windows Media Player.<sup>2</sup>

The Commission imposed a fine of EURO 497 million on Microsoft (approximately \$610 million), the largest antitrust fine ever levied by the Commission. Of far greater concern, however, are the behavioral decrees imposed by the Commission. First, Microsoft was forced to license its communications protocols and provide related documentation to anyone with an interest in developing competing work group server operating systems (the “compulsory licensing” remedy). In addition, Microsoft was ordered to offer a full-functioning version of the Windows Operating System that did not include the Windows Media Player (the “code removal” remedy). Microsoft has sought a review of this decision in the European Court of First Instance, but its request for a stay of these remedies pending judicial review was denied.

In the meantime, by a letter dated June 1, 2005, the European Commission informed Microsoft that to comply with the Commission’s March 2004 decision, Microsoft must also permit distribution to non-licensed third parties in source code form of software developed by competitors on the basis of the disclosed Windows communications protocols unless the

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<sup>2</sup> ACT was among the trade associations that were granted leave to intervene in the administrative proceedings before the European Commission, and in the subsequent judicial proceedings to review the Commission’s decision.

protocols implemented in the software meet a new two pronged test (inventive step and novelty) akin to the test for patentability. In other words, Microsoft must disclose trade secrets without compensation and without any restrictions on their use or subsequent disclosure. More recently, on December 22, 2005, the Commission issued a formal Statement of Objections against Microsoft, charging it with failing to comply with certain asserted disclosure obligations.

On the day the European Commission issued its March 2004 decision, Assistant Attorney General Hew Pate issued a statement<sup>3</sup> criticizing it as both unnecessary and costly in light of the Final Judgment that was carefully negotiated between the US Justice Department and Microsoft, subjected to extensive judicial review, and ultimately entered by the US district court:

“The United States’ Final Judgment provides clear and effective protection for competition and consumers by preventing affirmative misconduct by Microsoft that would inhibit competition in ‘middleware’ programs such as the web browser ... and the media player that is the subject of the EC’s action today. The Final Judgment, for example, ... requires Microsoft to provide information to allow ‘interoperability’ of competitors’ software.”

In particular, Assistant Attorney General Pate criticized the Commission’s “code removal” remedy, noting that:

“Imposing antitrust liability on the basis of product enhancements and imposing ‘code removal’ remedies may produce unintended consequences. ... [It] risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is significant that the U.S. district court considered and rejected a similar remedy in the U.S. litigation.”

The European Commission’s decision also provoked concerns in Congress and in the press. The New York Times editorialized against the decision.<sup>4</sup> Representatives James Sensenbrenner and John Conyers, the Chair and Ranking Member of the House Judiciary Committee expressed concern that the “precedent established by the Commission’s actions”

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<sup>3</sup> Assistant Attorney General R. Hewitt Pate, Statement on the EC’s Decision in its Microsoft Investigation, March 24, 2004.

<sup>4</sup> Editorial, “Europe Takes on Windows,” New York Times (March 20, 2004) (“the commission is overreaching in seeking remedies that could hurt not only Microsoft, but consumers, as well.”).

could be used to “compel other American companies to disclose [their] intellectual property.”<sup>5</sup> According to press reports, Senate Majority Leader Bill Frist, Senator Richard Lugar, and ten Members of the House International Relations Committee expressed concern, as well.<sup>6</sup>

Subsequently, Assistant Attorney General Pate again expressed his “deep concern about the apparent basis of this decision and the serious potential divergence it represents,” noting that given the lengthy investigation and multiple court proceedings in the United States that led to the Final Judgment, “it is unfortunate that considerations of international comity and deference did not, in the Commission’s judgment, carry sufficient weight to avoid the significant divergence that has now occurred.”<sup>7</sup>

As noted by Assistant Attorney General Pate, the European Commission’s decision against Microsoft reflects a faulty vision of the purposes for antitrust enforcement. The Commission’s decision was motivated by an excessive desire to protect and bolster competitors, and in that way to preserve a certain “competitive” market structure, at the expense of consumer welfare. Consumers benefit when software developers enhance their products by incorporating new functionality, and they benefit from intellectual property protections that create an incentive to innovate, either to create new products or to enhance the functionality of existing products. The European Commission’s approach to “tying” analysis and its code removal remedy strike at the heart of this dynamic, and unnecessarily so, as demonstrated by the less intrusive remedies

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<sup>5</sup> Letter from Reps. James Sensenbrenner and John Conyers to Attorney General Alberto Gonzales, Nov. 9, 2005.

<sup>6</sup> See “US lawmakers join chorus of criticism of EU decision on Microsoft,” AFX Asia Focus (Mar. 26, 2004).

<sup>7</sup> “Roundtable Conference with Enforcement Officials,” Remarks by R. Hewitt Pate, Assistant Attorney General, before the American Bar Association, Section of Antitrust Law Spring Meeting, Washington, D.C., April 2, 2004, at 7. See also Statement of Sen. Bill Frist, 150 Cong. Rec. S3092-02 (March 24, 2004) (“There can be no question that the U.S. Government was entitled to take the lead in this matter—Microsoft is a U.S. company, many if not all of the complaining companies in the EU case are American, and all of the relevant design decisions took place here.”); Letter from Reps. James Sensenbrenner and John Conyers to Attorney General Alberto Gonzales, Nov. 9, 2005 (“the Commission’s actions against Microsoft further demonstrate a disregard for principles of international comity”).

that were imposed in the United States to allow OEMs and consumers to remove Microsoft applications from their desktops and add competing applications.<sup>8</sup>

The European Commission's compulsory licensing remedy threatens innovation even more broadly. ACT's members have made significant investments in the creation of software and related information technology products. This investment is made in reliance on existing intellectual property protections in the markets where they operate—including the EU. A change in the intellectual property regime—whether by statute or by a change in administrative or judicial enforcement—will necessarily cause a change in the nature and extent of such investment in the future and decrease the value of the existing and future intellectual property portfolios of ACT's members. In this particular case, the Commission's compulsory licensing remedy also threatens to make the Windows client and server operating systems less stable and secure.

In the controversial *IMS* case,<sup>9</sup> the European Commission demonstrated its willingness to use compulsory licensing remedies. Competitors had filed complaints against IMS's refusal to license its copyrighted technology, which had become the industry standard for the provision of geographically segmented pharmaceutical sales data in Germany. The Commission made an interim order forcing IMS to license its copyrighted technology. Although the Commission's interim order was later overturned by the EU's Court of First Instance,<sup>10</sup> a series of related cases culminating in a decision by the EU's top court—the Court of Justice—left open the possibility that the Commission could impose compulsory licensing remedies in favor of competitors in the

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<sup>8</sup> See also *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1211 (D.C. Cir. 2004) (quoting with approval the district court's finding that "The weight of the evidence indicates the fragmentation of the Windows platform would be significantly harmful to Microsoft, ISVs [independent software developers] and consumers.").

<sup>9</sup> Case COMP D3/38.044 *NDC Health/IMS*: Interim measures - Commission decision of July 3, 2001.

<sup>10</sup> Case T-184/01 R *IMS Health v Commission* [2001] ECR II-3193 – Order of October 26, 2001.

appropriate “exceptional circumstances.”<sup>11</sup> In its recent discussion paper on the application of Article 82, the Commission goes even further, suggesting that there may be other circumstances in which a refusal to license may be considered an abuse of dominance.<sup>12</sup> Clearly, the possibility of such sanctions severely undermines the incentive to innovate and may cause significant consumer harm.

What is more, this compulsory licensing remedy was imposed in this case in part because the Commission defined too narrow a market for “work group servers” to begin with.<sup>13</sup> The relevant market was defined to include only servers that are priced below \$25,000 and that perform four specific, fairly basic tasks. The Commission found that Microsoft “dominated” this unrealistically narrow and static market, and then turned to compulsory licensing to give a lift to other firms who wished to compete in this space.

The Korea Fair Trade Commission (“KFTC”) rendered a decision on December 7, 2005 that was even more intrusive in challenging Microsoft’s attempts to add functionality to its Windows operating system. The KFTC held that Microsoft had abused a dominant position in South Korea by integrating media and instant messaging software into Windows. As in Europe, this proceeding was sparked by complaints by competitors. The KFTC ordered Microsoft (1) to sell in Korea a version of Windows that does not include either Windows Media Player or

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<sup>11</sup> Case C-418/01 *IMS Health*, judgment of April 29, 2004.

<sup>12</sup> Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, at: <http://www.europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>. For example, see ¶ 240 of the Discussion paper (“A refusal to license an IPR protected technology which is indispensable as a basis for follow-on innovation by competitors may be abusive even if the license is not sought to directly incorporate the technology in clearly identifiable new goods or services.”).

<sup>13</sup> The Commission generally tends to define markets narrowly. In its *Nintendo* decision (OJ 2003 L 255/33, decision of October 30, 2002), the Commission found a separate market for hand-held games consoles as opposed to static games consoles (*i.e.*, distinguishing both from each other and from PCs). The Commission further considered that there may be separate markets for the games for each type of console and even potentially for each manufacturer’s version of each console. There are numerous examples of narrow market definitions in the merger context, such as *Carnival Corporation / P&O Princess* (COMP/M.2706, decision of July 24, 2002) in which the Commission identified three separate product markets for (i) river cruises; (ii) oceanic cruises; and (iii) coastal ferry cruises.

Windows Messenger functionality; (2) to facilitate consumer downloads of third party media player and messenger products selected by the KFTC; and (3) to sell in Korea a version of its server software that does not include Windows Media Services. Microsoft has said it will appeal.

On the day this decision was announced, Deputy Assistant Attorney General Bruce McDonald released a statement<sup>14</sup> pointing out that:

“The Antitrust Division believes that Korea’s remedy goes beyond what is necessary or appropriate to protect consumers, as it requires the removal of products that consumers may prefer. The Division continues to believe that imposing ‘code removal’ remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it.”

And the KFTC decision has proved equally controversial in Congress.<sup>15</sup> Like the European Commission decision, the KFTC decision reveals a tendency to treat beneficial product integrations as illegal “tying” and a motivation to protect competitors, rather than the interests of consumers.

## 2. Threats Associated with Multi-Jurisdictional Merger Reviews

Another significant threat to a healthy technology environment stems from the conflicting and inconsistent merger control regimes proliferating around the world. As discussed in Oracle’s earlier testimony before the Antitrust Modernization Commission,<sup>16</sup> the burdens associated with this patchwork of laws fall disproportionately on software developers and companies providing related services, particularly on smaller companies that are trying to globalize their products.

Because most of the assets of “New Economy” companies are intellectual rather than physical, such companies can and do grow quickly to become international in scope. This is

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<sup>14</sup>Deputy Assistant Attorney General J. Bruce McDonald, Statement on Korean Fair Trade Commission’s Decision in its Microsoft Case, Dec. 7, 2005.

<sup>15</sup> See Statement by Sen. Patty Murray, 151 Cong. Rec. S14303-01 (Dec. 21, 2005) (“Microsoft is being unfairly penalized by Korea, but this decision goes well beyond”).

<sup>16</sup> Testimony of Daniel Cooperman, Senior Vice President, General Counsel and Secretary, Oracle Corporation, before the Antitrust Modernization Commission (Nov. 8, 2005).

especially true for companies involved in software development and services, such as ACT's members. Once software has been tailored to local languages, it can be distributed and sold anywhere in the world with relatively little additional expense. Likewise, software can be developed anywhere. What this means is that even small and medium sized companies are likely to have some amount of sales, and thus be subject to merger control regimes, in many parts of the world.

The problem is that it is frequently difficult to determine where to file pre-merger notifications, and differing jurisdictions have differing rules concerning when to file, what information to provide, and the process to be followed in reviewing the transaction. As Oracle points out, “[t]his regulatory disarray imposes real costs on productive commerce.”<sup>17</sup> ACT joins Oracle in calling on the Antitrust Modernization Commission to spearhead procedural reform of the international merger investigation regime, particularly in the areas of filing and information gathering requirements and divergent statutory review periods.<sup>18</sup>

### 3. Threats Associated with Emerging Antitrust Enforcement Regimes

But these problems, as significant as they are, may be eclipsed in coming years by the adoption of misguided principles in new antitrust laws in emerging and transitioning economies. For example, the current draft of a new Anti-Monopoly Law in China,<sup>19</sup> now under consideration by the PRC's National Peoples' Congress, makes use of broad and vague language, raising fears of an expansive approach to defining “abuse of dominance”:

- a. Article 14 of the draft law outlaws abuses of “dominance” either by one undertaking alone or by “several undertakings as a whole.” It is difficult to predict how this novel concept could be applied. Could it be used to challenge

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> Specific suggestions for reform are outlined in Oracle's testimony, *id.*, at 7-8.

<sup>19</sup> Anti-Monopoly Law of the People's Republic of China (draft dated Sept. 14, 2005) (unofficial English translation).

legitimate standards-setting activities by IT firms, for example, if those standards are thought to exclude rivals?

- b. Once a firm or group of firms is found to be “dominant,” Article 17(v) prohibits them from “tying other products or imposing unreasonable conditions” on transactions. This could lead to challenges to beneficial product integrations similar to the ones that have taken place in Europe and South Korea.
- c. Finally, Article 56, which creates an undefined antitrust offense for “abuse” of intellectual property rights, could lead to enforcement activity that undermines such rights, and to unjustified compulsory licensing.

One must assume that legislative drafters in China and elsewhere are influenced by what they see the European Commission and other authorities doing in their respective jurisdictions. A greater effort must be made among the jurisdictions with established antitrust enforcement regimes to improve the content and the consistency of their rules governing single-firm conduct, and then to share their learning and comparatively greater experience with countries that may be developing new antitrust statutes or modernizing existing ones.

#### 4. Impacts on Small Business

These and other misguided and conflicting antitrust rules impose incalculable costs on small and medium sized businesses. To illustrate, it is useful to recall Professor Stan J. Liebowitz’s study of how the European Commission’s Media Player code removal decree could impose costs on software developers.<sup>20</sup>

As recognized by Professor Liebowitz, unlike third-party media players, the media functionality in Windows is not a standalone application. Instead, that functionality is exposed to other software developers through application programming interfaces (“APIs”). Calling upon the media functionality already present in Windows makes it faster and easier for third-party developers to create media-enabled applications. One example is a helpdesk application that

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<sup>20</sup> Stan J. Liebowitz, “If it ain’t Broken ... The Misguided ‘Remedy’ for Media Players” (October 2003). Professor Liebowitz is a Professor of Economics in the Management School of the University of Texas at Dallas. His study was submitted by ACT to the European Commission on October 23, 2003, as part of ACT’s intervention in the Commission’s investigation of Microsoft.

calls on Windows Media APIs to play instructional videos during an online customer help session.

Software developers must decide which media functionality to rely upon when developing a media-enabled application. To most software developers, knowing that they can call upon media functionality that is present in every copy of Windows provides them with what Professor Liebowitz describes as a “safety net.” But removing this safety net is costly. With a forced removal of the Media Player functionality, there would no longer be a baseline of media functionality in all copies of Windows. Software developers who have relied upon the presence of this functionality in Windows would be forced to re-code, re-test, re-distribute and support their applications for the new version of Windows based on varying assumptions about what media player has been installed. The practical effect of fragmenting Windows and eliminating the ability to rely on a common set of APIs is to force software developers to support at least two or three third-party media players just to maintain their current market reach—and without compensation in the form of greater sales revenues.

Professor Liebowitz estimated that the Commission’s code removal remedy imposes unnecessary development costs on European software developers ranging from approximately EURO 5.4 billion to EURO 11.7 billion over three years. If this remedy were to become a precedent for other middleware, the costs would be higher still. An alternative remedy that would allow OEMs and consumers to remove the Microsoft Media Player from the desktop without removing the code from the operating system would avoid these extra development costs by preserving the safety net for developers who, if they so choose, can rely on the presence of this default media functionality.<sup>21</sup>

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<sup>21</sup> *Id.* at ii.

## 5. Recent Efforts Toward Convergence within Existing Mechanisms

The Department of Justice and the Federal Trade Commission have devoted substantial resources for many years to fostering cooperation, convergence and consistency in antitrust enforcement efforts and in remedies.<sup>22</sup> The United States has entered into formal bilateral antitrust cooperation agreements with eight jurisdictions, for example, and a number of Mutual Legal Assistance Treaties. The United States also cooperates informally with members of the Organization for Economic Cooperation and Development (OECD) pursuant to the OECD's Recommendation on international competition cooperation.<sup>23</sup>

Many of these agreements call on participating governments to recognize the principle of traditional comity," i.e., the principle that a country should notify other countries when its enforcement proceedings may have an effect on their important interests, and give full and sympathetic consideration to possible ways to pursue its enforcement needs without harming those interests. Many of these agreements also call upon participants to recognize so-called "positive comity," i.e., a principle under which either party may ask the other to take appropriate actions in relation to anticompetitive conduct within its territory that is affecting the important interests of the requesting party. It is generally agreed that elements of these bilateral agreements have been a success.<sup>24</sup>

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<sup>22</sup> Good recent summaries of the US enforcement agencies' efforts to promote international antitrust cooperation and convergence may be found in "The Federal Trade Commission's International Antitrust Program," Remarks of Randolph Tritel and Elizabeth Kraus before the ABA Section of Antitrust Law Spring Meeting, Washington, D.C. (April 1, 2005); "The Reality of International Antitrust Convergence," Remarks by Makan Delrahim, Deputy Assistant Attorney General, before the American Bar Association, Section of Antitrust Law Spring Meeting (March 30, 2005); "Facing the Challenge of Globalization: Coordination and Cooperation Between Antitrust Enforcement Agencies in the U.S. and E.U.," Remarks by Makan Delrahim, Deputy Assistant Attorney General, before the ABA Administrative Law Section Fall Meeting, Washington, D.C. (October 22, 2004).

<sup>23</sup> OECD, Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, C(95)130/final.

<sup>24</sup> Antitrust enforcement agencies now routinely notify each other of investigations, share information during investigative phases, and either confer regarding or jointly negotiate remedies. Positive comity has been employed less frequently, but with some success. The US Department of Justice formally referred to the European

Pursuant to these agreements, or sometimes without any agreement, the Department of Justice and Federal Trade Commission staffs cooperate with foreign agencies on individual cases and on competition policy development generally. The US agencies have formed working groups with foreign agencies, for example, to promote policy convergence on particular issues. The US agencies have established a merger working group with the EC to study such issues as merger remedies, merger procedures and conglomerate mergers. The US agencies have formed intellectual property working groups with the European Commission and with antitrust agencies in Japan, Korea and Taiwan to discuss such issues as patent pools and standards setting. The US participates actively in studies, conferences and other programs of the OECD and the International Competition Network (ICN), which serve as fora for the multilateral discussion of competition policy issues.

Another important tool to promote international cooperation and convergence is technical assistance to developing countries and those that are undergoing transitions to market economies and establishing new competition regimes. This assistance is often funded by the US Agency for International Development and/or the US Trade and Development Agency. Initially, this program focused on countries in Central and Eastern Europe, but it is now active in Central and South America, Mexico, South Africa, India, and South East Asia. DOJ and FTC have performed over 350 missions to assist scores of countries, both in the form of short-term trips and longer-term advisory missions of three months or more.

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Commission an investigation into anticompetitive conduct in the computer reservations systems industry in Europe, for example, with positive result.

## 6. Suggestions for Encouraging Convergence Around Sound Economic Principles

While these existing channels and instruments for promoting convergence around sound economic principles have achieved much success, the United States must expand them, give them greater priority, and devote more resources to them, if the increasing burdens associated with proliferating antitrust regimes are to be managed successfully:

a. As noted above, ACT joins Oracle in calling on the Antitrust Modernization Commission to spearhead procedural reform in the process for multinational merger reviews, particularly in the areas of filing and information gathering requirements and divergent statutory review periods.

b. As recommended by a group of multinational companies including Bertelsmann AG,<sup>25</sup> the Antitrust Modernization Commission should endorse the objective of “enhanced comity,” including such elements as an agreement among jurisdictions either to defer to one another in relation to remedies, or to fashion remedies on a joint basis, and encourage the US agencies to explore mechanisms for advancing this objective with other key antitrust jurisdictions. While existing bilateral agreements and the existing applications of comity principles have certainly been useful, they have limitations, as illustrated by the inconsistent remedies imposed by the EU and US enforcement authorities in the Microsoft matter. The EU, Korea and US should set a coherent and unified example for other developed and developing countries by expanding their cooperation relationship and making it more consistently successful.

c. The US enforcement agencies should be encouraged to participate more actively in enforcement activities of their foreign counterparts even when the US agencies are not

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<sup>25</sup> See “Comments to the Antitrust Modernization Commission on the Need to Enhance Comity Arrangements with Foreign Antitrust Authorities,” submitted by James Atwood on behalf of Bertelsmann AG, General Electric Co., Microsoft Corp., Pfizer, Inc., Royal Philips Electronics and Time Warner Inc. (August 12, 2005).

conducting parallel investigations. This would be an expansion of the currently accepted concept of positive comity. US agencies could participate in enforcement activities in foreign jurisdictions by filing amicus briefs, or by providing other formal or informal advice to foreign enforcement agencies in particular cases. It is noteworthy that Representatives James Sensenbrenner and John Conyers, Chair and Ranking Member of the House Judiciary Committee, urged the Department of Justice to intervene in court proceedings in Europe to review the European Commission's decision against Microsoft.<sup>26</sup> An effort should be made generally to facilitate more frequent and successful use of positive comity mechanisms.

d. Intellectual property rights are of vital importance in encouraging beneficial innovation, and enforcement agencies must use care in applying antitrust law to the exercise of such rights to avoid undermining the incentives for such innovation. The US enforcement agencies should thus elevate the priority for and expand the resources they are devoting to the working groups on intellectual property that they have established with the European Commission and antitrust enforcement authorities in Japan, Korea and Taiwan, and expand this concept to additional jurisdictions, including the PRC. Among the issues that should be taken up at the working group level are the issues of when a refusal to license intellectual property should constitute an "abuse of dominance" and the circumstances under which compulsory licensing may be an appropriate antitrust remedy.

e. The United States should expand the scope of and their participation in international organizations such as the OECD and the ICN, to further worthwhile projects designed to facilitate convergence. In particular, the United States should encourage the ICN to set up a formal Working Group on the rules that should govern single-firm conduct.

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<sup>26</sup> Letter from Reps. James Sensenbrenner and John Conyers to Attorney General Alberto Gonzales, Nov. 9, 2005 ("we urge the Department of Justice to intervene directly with the CFI ....").

f. The US agencies should provide extensive comment, perhaps both publicly and privately, on the “discussion paper” released by the European Commission on December 19, 2005 on the Commission’s application of Article 82 to “exclusionary abuses.” Most significantly, the US agencies should urge the Commission to (1) limit the circumstances under which Article 82 may be considered violated by a refusal to license intellectual property rights, including trade secrets; (2) adopt a more realistic, more dynamic approach to market definition in high technology industries; and (3) require findings of actual consumer harm as a prerequisite to intervention in cases of single-firm conduct. The US Congress should facilitate this project by ensuring that there is adequate budget authority for it.

g. The President should appoint an Executive Branch interagency committee to coordinate the US government’s response to the development of new antitrust enforcement regimes in large/high-growth economies. This committee should be chaired by the heads of the Antitrust Division and the Federal Trade Commission, but include appropriate personnel from the Departments of State and Commerce and the US Trade Representative. This committee should monitor the development of new antitrust regimes, assess risks to US business interests, prioritize issues, and marshal and coordinate US support and guidance for foreign governments. This committee would be the focus for expressions of concern by US business interests, and should report periodically to Congress.<sup>27</sup> This is particularly important given the clear and strong stance taken by the US to support intellectual property protection as a foundation for a healthy technology environment. Interagency coordination on the development of foreign

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<sup>27</sup> This proposal is similar to one Senator Patty Murray made to US Trade Representative Rob Portman in the wake of the KFTC decision against Microsoft, see Letter from Sen. Patty Murray to Rob Portman, Dec. 12, 2005, 151 Cong. Rec. S14303-01 (Dec. 21, 2005) (“I would therefore urge you to work with others in the Administration—including at the White House and the Departments of Justice, State, and Commerce—to develop and implement mechanisms for addressing these issues in a more coherent and effective fashion.”).

antitrust regimes is critical to ensure that such regimes develop in a way that is supportive of and that does not undermine intellectual property protection.

h. The US agencies should convene an advisory committee, modeled after the successful International Competitive Policy Advisory Committee in 2000, to study the effectiveness of current technical assistance programs, and recommend changes. This advisory committee should (1) review programs sponsored by other countries, as well as by the US; (2) review the work of international organizations such as the OECD and ICN; and (3) review the adequacy of US funding levels and how funding is deployed within the US. The US must approach this issue holistically and in cooperation with other developed countries to ensure that available resources are allocated efficiently and effectively and to pursue other important initiatives – such as the protection of intellectual property. The US Congress should provide budget support for this committee and for any enhanced funding levels that are recommended.