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I am Daniel Cooperman, Senior Vice President, General Counsel and Secretary of Oracle Corporation. I appreciate the opportunity to address the Commission on some of the aspects of antitrust law and law enforcement that we view as particularly important to software companies and others in the new economy. For us, physical facilities and assets are far less important than intellectual property; we deal primarily in bits rather than bricks. I would like to focus on the practicalities of antitrust enforcement as they affect transactions by new economy companies of this kind. In line with the questions posed by the Commission, I also will briefly address some issues in the application of substantive antitrust law to new economy situations.

I would emphasize above all that time is precious in the new economy. In our industries, competition develops with extraordinary speed. New entrants can quickly gain footholds and significantly displace incumbents. In addition, product design decisions in the software industry occur on an accelerated schedule. As a result, some of the Commission's concerns, such as developments in the relationship between patent law and antitrust, are somewhat less important to our business than they are for the biotechnology and pharmaceutical industries. In those fields, the cycle of innovation may be 7 to 10 years as an invention works its way from animal and human trials and other regulatory processes to commercial shipment. In the software industry, however, the cycle of innovation is closer to seven to ten *months*. Many advances in the software field become obsolete—or at least thoroughly superseded—before enough time passes for a patent to issue or for it to be enforced.

Here, even more than in other industries, a procompetitive merger transaction that is delayed may be derailed altogether. Whether delay results from procedural overload or duplication, or from the sincere regulatory pursuit of an aggressive but unverifiable theory of competition, the additional time spent in the regulatory process may be the largest and most important transactions cost of all—and the one that thwarts the most potentially procompetitive transactions. Product design decisions occur on short cycles in the software industry. When a transaction is held up for many months, product design decisions—and thus, to a substantial extent, innovation in the merging companies—may be frozen to a significant extent because the companies cannot predict which resources from each company will be at their disposal when the product ultimately reaches market.

While this general concern with the pace of regulatory investigations has many hidden costs, our principal specific concern pertains to the fragmentation of antitrust enforcement among dozens of different sovereign states around the world. Because the nature of their business does not depend on significant physical facilities, new economy companies often conduct operations in a large number of jurisdictions. The wide divergence in rules, procedures and standards produces a multiplicity of traps for the wary and unwary alike, while increasing transactions costs and deal risk sufficiently to deter procompetitive alliances and consolidations. We suggest closer international coordination to produce streamlined premerger filings, a coordinated investigation protocol, and dispositions that occur within a single, agreed-upon, limited time.

As the Commission has recognized, the advent of the new economy has prompted new perspectives on a variety of new substantive issues in antitrust law. We do not believe that, for the most part, the fact-specific analysis of competitive markets and situations should change radically. But it is important to keep the analysis tethered to the actual—and sometimes counterintuitive—facts of the evolving new economy, and not dependent on speculative projections about what products might and might not develop, or when. Thus, we believe that the enforcement agencies, here and throughout the world, should avoid relying on nebulous concepts such as "innovation markets." In addition, agencies analyzing market structure and concentration in the merger and acquisition context also should avoid the temptation to formulate and apply bright-line rules except in the very clearest cases. The speed and unpredictability of innovation in new economy markets undercuts many of the assumptions about current and future market structure that may be more valid when applied to markets for physical commodities. For example, almost always lingering at the periphery of any significant new economy market is the specter of disruptive technologies that can make the strongest static market position irrelevant. Related to this phenomenon is the rapid commoditization of markets that formerly produced high profit margins, forcing companies to move up and down the product stack in order to deliver a set of innovations that can produce a profit. Similarly, network economies may make the free distribution of some products a necessary step in the development of a market for other, profitable products—particularly when there is a dominant incumbent in one or more complementary markets. And perhaps most important are the most current market-wide responses to a new brand of network effects—one that depends on the cooperative development of standards and the use of open-source (and usually free) products.

1. The Myriad International Rules And Procedures For Merger Clearance Discourage Procompetitive Transactions.

International merger clearance has become a critical issue for new economy companies. Because most of the assets of new economy companies are intellectual rather than tangible, they can and do become international in scope with great speed. That is especially true for companies involved in software or software-driven services, where the same product, once it has been tailored to local languages, can be distributed and sold anywhere in the world with relatively little additional expense. Likewise, software can be developed anywhere. Shipping costs are trivial, and indeed licensed products can be distributed by downloading software over the Internet. The largest expense of international expansion comes from local sales and support organizations, though many of those functions can be performed over the Internet as well.

What this means is that moderately sized companies that develop software that is reasonably popular with businesses or consumers are likely to have sales, and even sales organizations, in many parts of the world. Any new economy company of market significance likely is present (in the jurisdictional sense) in a dozen or more different countries.

As a consequence, new economy companies will encounter multijurisdictional antitrust review whenever they initiate strategic mergers and acquisitions. Setting aside the substance of any country's antitrust laws and policies, the mere fact of review by a plethora of agencies, each applying its own set of rules and procedures, creates a powerful disincentive for companies that might engage in significant transactions.

An antitrust practitioner for practical purposes may think of merger clearance in the United States and the European Union, and perhaps Japan, among the key jurisdictions for regulatory review. But though those jurisdictions' antitrust enforcers may be most likely to challenge significant transactions comprehensively, from a procedural point of view those jurisdictions are scarcely be the tip of the iceberg for a transaction with global impact.

In fact, about 60 nations have some form of merger preclearance system. That situation presents significant hurdles to any company that is trying to close a deal without violating any nation's law—especially because failing to file a required notification can result in a fine or even a divestiture or unwinding order.

Each nation has its own legal standards, of course, but the gradual and continuing convergence of the antitrust law in many countries around a similar set of economic principles has begun to pay dividends. In most instances, an applicant can analyze and address the effects of its transaction according to a common set of economic principles, even though the legal application of those principles may vary in different jurisdictions. We appreciate the efforts expended by the competition enforcement agencies and other members of the international antitrust bar to bring some common rigor to antitrust analysis.

Nonetheless, the patchwork quilt of overlapping rules and analyses may lead to conflicting results in enforcement actions. Those dangers are uncommon, but real. The differences between the approaches of the US and the EU to the proposed GE/Honeywell merger a few years ago may be the most well-known example. Conflicts of some kind are almost inevitable when dozens of jurisdictions apply their differing analyses, motivated by different concerns, to the same transaction. The transacting parties have to hope that the conflicts do not reach the core of the deal, and that one jurisdiction's cure is not another's harm.

The divergence of substantive antitrust standards is largely inevitable. Sovereign nations are unlikely to yield the right to apply their own law to transactions that affect them.

Today I would like to address a problem that, I hope, can be fixed more easily: the procedural minefield that awaits any party that engages in a merger or acquisition that implicates multiple jurisdictions around the world.

As I noted above, 60 jurisdictions have premerger notification requirements. More countries are joining the club every year. Although for a variety of reasons few if any mergers will require the parties to file separate merger notifications in all or even most of those nations, merging parties commonly need to file in a dozen or more different jurisdictions. The timing and required contents of those filings vary widely, and the character of the investigations that follow upon the parties' submissions vary widely as well. This fragmentation and the resulting confusion far exceeds the similar problems often observed as a result of the parallel antitrust jurisdiction shared by the federal government and the 50 states.

In the discussion that follows, I will refrain from naming jurisdictions. None of the difficulties I will identify is confined to a single country, or even a few countries. The disincentive to pursue transactions results first and foremost from the very lack of coordination itself, rather than any jurisdiction's particular set of requirements.

As to the timing of notification requirements, some countries require filings as soon as a week after the execution of the merger agreement. Different countries have different rules about followup information requests, so that companies must engage in a series of search and production exercises over a period that may extend to several months. In countries that permit closing before clearance, the review can extend much longer. And none of the agency time-clocks begin until the agency is satisfied that the notification is "complete," a term that may be defined in the eyes of the beholder.

The various enforcement agencies also pursue and conclude their investigations according to different timetables. That means that the agency from the jurisdiction where the merging parties are domiciled, or where they do most of their business, may not be the first to complete its evaluation of the substance of the transaction and to propose or initiate remedial action. For example, because of institutional timing constraints, the European Commission may issue a decision on the merits, including recommended dispositions or licenses that would address the perceived competition "issue," before the responsible United States agency has completed its review. That may not be a desirable result as a matter of policy, particularly for a merger between two companies neither headquartered nor incorporated in Europe.

Moreover, software companies may be uniquely susceptible to substantive variations between jurisdictions because software products increasingly are offered for purchase and download directly over the Internet. That mode of business makes it virtually impossible for the acquired company to refrain from doing business as a merged entity in a particular jurisdiction pending receipt of regulatory approval. Consequently, the jurisdiction with the strictest antitrust review procedures may dictate the timing and the substantive result for all other jurisdictions, a "highest common denominator" solution that may not be the most efficient, procompetitive, or economically sound.

But the hardest part is knowing where to file. The filing requirements for some countries are nearly incomprehensible even for specialists.

The economic thresholds for assertions of jurisdiction (and for the scope of the filing) often are not confined to a transaction's effects in a particular country. A filing may be required even if business within that country is entirely unaffected. Filing thresholds generally derive from one or more of three factors: (1) the size of the parties (*i.e.*, sales or "turnover"); (2) the size of the transaction; and (3) the parties' market shares. The acquiror's presence in the country may be enough to trigger a filing requirement regardless of the location or effects of the particular transactions, and whether or not the in-country activities have anything to do with the acquired company's activities. In several major nations, if the acquiror does enough business of *any* kind in the country, a filing is required so long as the acquired company does any business at all within the jurisdiction. That is, the acquiror's *unrelated* business may bring the transaction within the jurisdiction of local antitrust authorities.

Worst of all, in many countries the thresholds do not clearly distinguish between worldwide activity and activity within the relevant jurisdiction. Even where seemingly low thresholds suggest intent to focus on local effects, the enforcement agencies often take a broader view. Most countries, moreover, require consideration of the sales and assets of all affiliated companies rather than the entities involved in the transaction.

Some countries now assert jurisdiction over transactions involving companies with no direct nexus to the country, but that may affect competition within the country. Although these reviews may not be accompanied by a credible threat of enforcement if there are no in-country assets, companies that later may wish do business within such countries will find the agencies difficult to ignore altogether.

Equally obscure are the requirements covering the *types* of transactions that must be notified. Most countries' requirements cover a wide variety of economic concentrations, including the sale of assets, the creation of joint ventures, and other transactions, such as outsourcing deals, that may result in direct and indirect control over a previously independent entity.

The complexities of modern business transactions can combine with the complexities of the jurisdictional rules to produce compliance traps. This can be especially difficult for new economy companies to police. In addition, regulators in many parts of the world have very little experience with hostile acquisitions, leading to unnecessary procedural anomalies. New economy companies enjoy a fast pace both of acquisition and of expansion into new national markets. While a transaction is under review around the world, a target company may acquire another firm with business in a country in which neither firm previously did business. Particularly in a hostile deal setting, it may be practically impossible for the acquiror to identify the new country where a filing has become necessary in the course of the transaction. And that difficulty in even identifying the necessary jurisdictions is compounded by the filing requirements' variation and impenetrability. But none of this, of course, deters an overlooked regulator from imposing fines and, perhaps, delaying the consummation of a transaction.

This regulatory disarray imposes real costs on productive commerce. The combination of expense, legal risk, uncertainty, and, most important, delay produces significant transactions costs that provide a sufficient disincentive to deter procompetitive transactions on the margin. As I earlier noted, delay itself may ring a death knell on a transaction under review just as effectively as an injunction based on substantive concerns. The benefits of a transaction have to be more certain, and more durable, than they otherwise might be. Parties will turn away from transactions that raise greater procedural hurdles, just as they turn away from transactions that appear to raise substantive antitrust concerns. Deterrence because of substantive competitive concerns may benefit consumers, at least if those concerns are valid, because the deterred transactions are at least arguably anticompetitive. By contrast, deterrence of substantively procompetitive transactions based on the morass of *procedural* impediments creates a deadweight loss for consumers, and may cause significant harm to innovation.

Proposals for streamlining international merger review. We call upon the Commission and the federal enforcement authorities to spearhead procedural reform of the international merger investigation regime, presumably through a treaty or other international agreement among the 60 or so nations that afford preclearance review to mergers. We do not believe that further substantive coordination between the various agencies is necessary or desirable, or even likely; we suspect that most sovereign nations will jealously guard their independence as to which deals to challenge, how, and why. We do believe, however, that the *filing*, *information-gathering*, and *statutory review periods* for merger investigations could be substantially coordinated to reduce the transactions costs for merging parties while diminishing the risk of fines for inadvertently missed, untimely, or incomplete data submissions. The accomplishments of the International Competition Network working groups on best practices provide a valuable first step for this undertaking.

We believe that the situation calls for more than guiding principles. Rather, there should be a common international investigative protocol for antitrust review of mergers and acquisitions. That protocol should have several components.

First, there should be a standard form for information requests, with a single set of filing dates. Companies should be able to file one set of information to which all interested jurisdictions have access, on one schedule for initial and followup submissions. That is, there should be one beginning to the process, and one omnibus set of documents produced, rather than a series of different selections of documents produced at different times. This would parallel the more successful examples of coordination between our state and federal governments, which can arrange to work from a single unified production of evidence.

Second, the antitrust enforcement agency of the domicile of the acquiring company should be the primary investigating agency. Other countries would channel additional information requests through the primary investigating agency to reduce duplication in requests. That would permit companies to provide a smaller number of more comprehensive requests and responses—reducing the risk of inadvertent noncompliance without reducing the volume and quality of relevant information.

Third, the investigations of the various antitrust authorities should take place concurrently. Although the information submissions would be common, the various agencies around the world of course would exercise their sovereignty to retain their own approaches to competition law and remedies. That is, the common information would feed into a multiplicity of merger review processes. But all the agencies would be pursuing their investigations at the same time and on the same schedule.

Fourth, the primary investigating agency should complete its investigation and any resulting enforcement activity first, before any other agency could move beyond the investigative, fact-gathering stage. Only upon completion of the primary jurisdiction's enforcement process would other agencies have the opportunity, within a strictly limited time frame, to bring additional enforcement actions for additional relief. The agencies in the non-primary states accordingly could focus on regional and local issues that were less likely to be adequately addressed by the primary agency.

These modest efforts at procedural streamlining could significantly reduce the transactions costs attending multijurisdictional mergers by new economy and other companies. Most important, the *procedural* aspect of merger review would become less *ad hoc*, more efficient, and more predictable, with far fewer traps for the unwary.

2. Reflections on the application of antitrust principles to dynamic industries in the new economy.

I also would like to address how antitrust law should take into account other features of dynamic, innovation-driven industries in the new economy.

Antitrust authorities should restrict the use of the "innovation market" concept to avoid impeding transactions based on speculation about future research and development in fast-moving, often-disrupted markets. In the last several years the United States enforcement agencies have developed analyses of what they call “innovation markets.” Rather than embracing current products, as standard antitrust analysis would, the analysis of innovation markets attempts to predict the direction in which research in an area is likely to go, how that research will manifest itself in marketable products, and what effects those potential new products will have on current and future competition.

We strongly urge the agencies to use a soft touch when analyzing innovation markets in the new economy. By necessity, any analysis of innovation markets is based largely on speculative judgments about whether and how research will pan out, and how consumers will react to product innovations that have not yet been developed. The natural tendency is to indulge in some form of straight-line projection from the status of current research and any current related product markets.

It is a risky and unreliable undertaking, however, to predict what products will be developed, and how consumers will react, even two years into the future. The wisest pundits and the sharpest economists by and large have had little success in predicting how industries shake out in the face of new, often underappreciated, yet disruptive technologies. Examples of these are the Internet, open source software, and the on-demand business model of furnishing software to customers as a service rather than as a product.

The ambush of the Internet is well-documented and well-remembered. Few market participants or others foresaw how quickly the Internet would change the face of commerce as well as technology—and fewer still understood the *way* in which the changes would take place, to the chagrin of millions of dot-com investors. Every few years, it seems, an additional major change takes place. Software is increasingly downloaded rather than packaged; in a practice that would have seemed absurd ten or even five years ago, many firms now charge extra for a disc containing the software they sell.

Open source software provides another example of a major yet unforeseen development that has altered how very lucrative markets operate. A good portion of the world beyond our borders operates on open source operating systems and applications. Even within the United States, a growing proportion of businesses use open source software for mission-critical applications. For example, Sun Microsystems, maker of Solaris, a premier operating system for PC workstations, recently transformed its intellectual property into an open source operating system. The business strategy is to spread the free operating system as a means of encouraging consumers to the use paid, Solaris-specific, software applications and support that Sun provides. This commercial aspect of the open source phenomenon is largely a new variation on the long-established strategy of giving away a product to create an installed base with sufficient network effects either to serve as a platform for additional, paid products or to blunt a competitive threat.

On-demand technologies have provided a disruptive *business model* that was little foreseen before a handful of software companies hit on a way to use the Web to deliver software to users only when and to the extent the customer needs to use it. While downloading a full software application represented a major advance in efficiency over packaged software, on-demand software takes the concept a step further, harnessing a wider range of software power without consuming more of the buyer's economic or computing resources. More important, on demand software brings customer switching costs down to nearly zero.

The point is that straight-line projections that speculate about products years in the future are likely to overlook some critical but unforeseen changes in the marketplace. Those changes could make one or both of the merging parties' products far less or far more popular in the market than projections might indicate. Although the innovation market concept may have some place in antitrust law, as a general rule effects on innovation markets should provide a basis for antitrust intervention only when monopoly effects are at issue. This may come about because (1) the only two firms pursuing a relatively broad line of research propose to merge, so that the merger is effectively a merger to monopoly in a field that is likely to defy timely and effective entry, or (2) an entrenched monopolist is using acquisition or anticompetitive acts to protect its monopoly by suppressing a potential challenge that currently manifests itself only in research and development.

Antitrust analysis of new economy issues should not rely on static models and traditional suspicions of collaboration in a highly dynamic industry. Antitrust analysis that accords substantial and even potentially dispositive weight to such measures as static market share does not fit markets in which competition develops and shifts with exceptional speed. As I noted above, most people have been wrong about technology market outcomes. Few predicted the commercial significance of the Internet, or open source software, or on-demand software services, yet they are all here and significant.

Static market shares are less important in this context. Competitors can shift positions overnight after a change in underlying technologies gives one an unforeseen advantage over the others. Dominant shares are often fleeting—at least in the absence of active anticompetitive conduct. And consolidation is critical to the innovative development of the most sophisticated software products. The new economy remains in an early, productive cycle of consolidation. In light of the rapid pace of disruptive change, and the benefits of consolidation that helps customers obtain complete and integrated products, the enforcement agencies should exercise extreme caution in deciding whether to intervene in new economy mergers.

Likewise, the enforcement agencies should continue to forbear from intruding on collaborations between competitors that are directed at the development of open standards. Open standards are one of the primary engines of competition in the new economy, as they promote interaction between software products, reducing switching costs and permitting customers to take advantage of the latest fruits of competition with the least cost and disruption to the customers' businesses. The agencies should continue to be mindful of efforts by participants in standard-setting bodies to game the process in order to exploit concealed intellectual property rights—that is, to transform an open standard into a proprietary one. With that rare exception to the normal functioning of the standard-setting process, however, the collaborative creation of open standards promotes rather than restricts competition. The agencies should continue to recognize the significant procompetitive benefits of this activity.

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In closing, I note that antitrust law aims at preserving the innovation and efficiency provided by competition in the marketplace. Antitrust enforcement itself should strive to be as efficient and nimble as the companies it regulates.