DEPARTMENT OF JUSTICE

TIME FOR A GLOBAL COMPETITION INITIATIVE?

By:

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Ten years ago, just after the Merger Control Regulation was adopted, the US Justice Department and Federal Trade Commission sat down with the European Commission to negotiate our first antitrust cooperation agreement. The timing wasn't coincidental. Both sides saw that we would have to work more closely together than we ever had in the past, as very large multinational mergers would come under review not only in the United States, but in Brussels too.

But I doubt that our predecessors or other observers ten years ago predicted either of the two most striking merger control developments of the recent past: first, the proliferation of merger laws around the world, so that today merging companies have to take account of merger laws in more than sixty jurisdictions; and second, the depth and regularity of the cooperation in these cases between the antitrust authorities in Washington and Brussels.

These developments are taking place in an economic environment that is changing at a breathtaking pace. After being directly involved in these issues for more than five years now -- years where the growth of globalization has been exponential and the internationalization of antitrust enforcement concomitantly great -- I have reached certain conclusions that I would like to set before you today:

The rate of economic internationalization will increase in the years ahead and increase dramatically -- beyond what most people are predicting and beyond what many people will be comfortable with. As a harbinger of things to come, one need only look at two quite recent European-centered transactions with significant global import: Vodaphone's purchase of Mannesmann and Vivendi's bid for Seagrams. The number of transnational mergers and acquisitions, in short, will accelerate rapidly, with major Asian companies soon beginning to conclude -- as many American and European powerhouse companies already seem to believe -- that, in many industries they need a global footprint to compete in the global market.

This in turn will mean several things relevant to antitrust enforcement. To begin with, I think it is clear that the trend away from sectoral regulation in favor of generalized antitrust enforcement will grow and that, in the not-very-distant-future, we will see very little of the former -- telecommunications, airlines, energy and other industries are all in regulatory decline. This of course puts increased burdens on antitrust enforcement, something I learned through direct experience in recent years in the US as we experienced the effects of the 1996 Telecom Deregulation Act: some of our most difficult and controversial decisions involved mergers in the wake of this statute, from Bell Atlantic/Nynex to ATT/Media One to WorldCom/MCI and then WorldCom/Sprint.

Second, and here is where I want to focus my comments today, the burdens on international cooperation and coordination among various national antitrust authorities will likewise increase. It follows as the night the day: as markets become more global, the number of countries having a legitimate enforcement interest in a particular merger will increase as well. This creates a whole host of problems -- substantively and procedurally -- about simultaneous review and the implications of one competition authority's actions for the actions of other authorities. If, for example, we block a global merger in the US, that is very likely to kill the deal worldwide, no matter what other agencies think of its pro- or anti-competitive effects, which may, in fact, be different in different counties. Similiarly, the mere proliferation of agencies looking at the same transaction can have unintended side-effects, possibly interfering with mergers that are efficient, for example.

Anticipating these problems, the Attorney General of the United States and I decided to appoint an independent advisory committee -- the International Competition Policy Advisory Committee (ICPAC) -- to give us the benefit of some careful thoughtful deliberations and analysis. We were fortunate to be able

to enlist an extraordinary group of twelve members to serve on the committee, co-chaired by Jim Rill, a former Antitrust Division head, and Paula Stern, former chairman of the US International Trade Commission. Merit Janow of Columbia University served as Executive Director. The Committee was formed in November 1997 and delivered its report to the Attorney General and to me in February of this year. As those of you who have read the report know, it is an exceptionally thorough and thoughtful product.

The Committee spent a lot of its time looking at merger issues, and in particular at the implications of the growth of multijurisdictional merger review. Some of the Committee's recommendations were directed outside the US, particularly at newer merger regimes. These recommendations go to issues of transparency, nondiscrimination, the need for reporting requirements keyed to the risk of anticompetitive harm, and the adoption of consumer-driven merger policy. These are sound recommendations, and they're crucial if we're eventually going to bring more coherence to the antitrust review of international mergers.

Other ICPAC merger recommendations support expanded cooperation among antitrust authorities in examining mergers – something with which, needless to say, I agree – and, in the longer run, the development of "work sharing" arrangements to reduce the number of separate reviews of the same transaction. I don't know whether work sharing is ultimately the answer to the merger review proliferation problem, but it's one of the alternatives that's worth a hard look. The fact is that it already is happening, in a limited way in appropriate cases. The Halliburton-Dresser merger is a good example. There, at the outset of our investigation the companies committed themselves to a divestiture in one market where it was clear there was a competition issue, while the investigation proceeded in connection with other markets. The EU, which had its own investigation of the deal, decided to rely on the companies' divestiture

commitment to us, instead of launching its own investigation in that market, and directed its efforts to other aspects of the merger that raised antitrust questions on the European side. Whether you call this "work sharing," or "positive comity," or whatever term you use, a crucial point is that it worked, and saved time and resources for the companies and for the competition authorities, because we were operating with closely aligned policies and with a basically similar analytical framework – a degree of convergence about whose importance I'll say more shortly.

We have already started putting some of the Committee's recommendations about US merger procedures into practice. Consistent with the ICPAC recommendations, as well as concerns that had been expressed by our Congress and in the business community, we and the FTC put in place this April new internal review procedures to make sure that our "second requests," while tailored to make sure we get the information we need to deal with competition concerns, don't impose undue burdens on the merging firms. I have also supported, consistent with the ICPAC recommendations, proposals to raise our merger reporting thresholds which have stayed the same for many years despite the changing value of the dollar. These are sensible changes, and ICPAC's recommendations helped focus discussion on the need for them.

The hardest issues are the ones that require global cooperation to implement. There has been extensive discussion and debate in recent years over bilateral vs. regional vs. multilateral approaches. We have had tremendous success in our efforts at bilateral coordination of merger review, especially with the EU. The examples of close and successful merger cooperation continue to accumulate. The recent decisions in both the US and the EU to challenge the WorldCom/Sprint merger, after intensive investigations in which we and the EU kept in close contact, and our staffs met several times with each other and with the companies in Washington and in Brussels, are a good example of how it ought to work.

Additional examples include the earlier WorldCom/MCI, MCI/British Telecom, and Sprint/France Telcom/Deutsche Telekom joint transactions; the Alcoa/Reynolds merger; and others. Of course, this kind of coordination can only be carried out if the companies agree to let us share the information they provide – neither our law or EU laws lets us share merger information otherwise. But companies are more and more often deciding that it's in their interests to facilitate this coordination to reduce the burden of duplicative review and the risk of inconsistent outcomes.

Nevertheless, we all realize that bilateral efforts, while absolutely essential, are not a complete answer.

Ultimately, for global cooperation and coordination to work, we need to develop a common language even if we can't achieve pure convergence: i.e., we all need to be doing microeconomic-based competition enforcement. Beyond that, we need to foster the kind of independence and credibility that the US and EU have demonstrated in their antitrust enforcement. The confidence that we're acting based on a common approach toward a common objective is what makes our bilateral relationship work. This kind of trust makes "comity" work in practice because it gives us confidence that deferring to each other doesn't mean sacrificing our own concerns. That's what made the EU's deferring to us to deal with a shared concern in Halliburton-Dresser possible. It's what made it possible for us to accept a less regulatory decree in MCI/British Telecom, where we had confidence in the performance and policies of the UK's market-oriented telecom regulator, and to tailor relief in the Sprint/FT/DT case to take account of the EU telecom liberalization directive.

But we have to broaden this "competition culture" beyond the established players. We need to expand the discussion and to coordinate and expand technical assistance to achieve a true global

commitment to developing soundly based antitrust enforcement rules and procedures. There is still a lot of work to be done without an obvious unifying forum in which to do it.

Our Advisory Committee recognized the problem and called for a Global Competition Initiative. I have been giving this considerable thought and believe that, whatever happens on antitrust at the WTO (I won't belabor my own views on the subject, which I've expressed often), we should move in the direction of a Global Competition Initiative, cautiously and on an exploratory basis, but in the end I think such a development is almost inevitable. The issues of trade and competition overlap but there are major areas where each has its own sphere. The WTO recognizes that, of course, and properly has a wide-ranging trade agenda dealing with many non-competition issues. We should do the same, in our own sphere. While those separate activities need not occur in isolation, the competition policy discourse must surely deepen.

We need to be practical, and to start slowly, but we need to begin to move forward. The OECD model of the Committee on Competition Law and Policy is a good one in many ways, and all the more so in recent years. The OECD's anti-hardcore cartel recommendation has been a tremendous success. It has helped catalyze the incredible surge in anticartel enforcement and cooperation we've seen in the last couple of years. It helped lay the groundwork for the unprecedented and hugely successful anticartel enforcement workshop we organized in Washington last fall, and for the follow-up workshops in Stockholm earlier this week and in the UK later this fall. And it has had practical impact. While it's hard to gauge the extent of the connection, I'm convinced that the recommendation, along with our own massively successful anticartel program and the now-universal recognition of the scope of the global problem, is a factor in the tremendous cooperation we've had in the last few years in international evidence gathering in these cases.

The CLP's work in other cooperation areas, in focusing on international merger and positive comity issues, has been very valuable. But the OECD's membership is too limited and it cannot reasonably be expected to expand into a truly global competition organization, although it can surely play a very useful role in supporting such an organization. The recent expansion of the OECD's membership has widened the organization's base somewhat, but ultimately it is not a global body; even the opportunity for countries to participate in the CLP as observers, let alone as members, has been limited by policies unrelated to how serious they are about antitrust. My own view is that the way to address this problem at the OECD is by rotating observer status among interested countries – but that still doesn't address the need for an antitrust forum with global scope.

As a proposed first step, it seems to me that interested jurisdictions along with the international bodies already thinking about these issues – e.g., the OECD, WTO, UNCTAD, World Bank, and others – might establish a joint working group -- first for exchanging information and views (e.g., about ongoing and planned activities, common challenges, approaches each are taking to support sound enforcement practices, areas that are most vexing, greatest opportunities for cooperation, etc.) and then for fully exploring a Global Competition Initiative along the lines laid out in the ICPAC report. In addition, these groups should develop a coordinated and expanded commitment to technical assistance for emerging competition authorities that is essential if we are to develop a global common language.

This is an exciting time for antitrust. Never has it been a more important component of the global economic machinery; never has it contributed as much and as widely to economic growth and innovation as it has in recent years; and never have we been faced with challenges for its future as complex and as important as those we face today. This conference, highlighting the extraordinary growth and maturity of

antitrust in the EU, offers us a singular opportunity to reflect on where we are and to dedicate ourselves to improving and expanding our culture of competition.