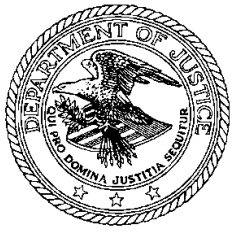

DEPARTMENT OF JUSTICE

GUIDING PRINCIPLES AND RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW

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Before the
International Competition Network
Naples, Italy

September 29, 2002

Good afternoon. I am pleased and honored to be here in Naples at this unprecedented worldwide gathering of antitrust colleagues from over 60 antitrust agencies, joined by experts from the private sector. I am particularly delighted to introduce the panel on Guiding Principles and Recommended Practices for merger notification and review. Throughout my 23 years as an antitrust lawyer in both government and private practice, I have been first and foremost a merger lawyer, and I have seen the growing benefits and costs of multijurisdictional merger enforcement from several perspectives. Participating in the creation and growth of the International Competition Network ("ICN") over the past year has been very exciting for me, because the work that the ICN has done and will do this weekend and beyond will make a unique contribution to the spread of sound merger enforcement principles and practices all over the world.

In the United States, we have been investigating mergers for over a century. Just last year we celebrated the 25th anniversary of our Hart-Scott-Rodino premerger notification statute and, this year, the 20th anniversary of the famous merger guidelines promulgated by one of my greatest predecessors, Bill Baxter. Our premerger notification requirements provide us both with essential information about proposed mergers and with the time to evaluate their potential competitive effects before the deals are closed. We have found that premerger notification assists effective antitrust enforcement by avoiding the difficulties associated with trying to restore competition by "unscrambling the eggs" after an anticompetitive transaction has been implemented and plants have been closed, employees let go, and assets consolidated. Our business community also has recognized the value of premerger notification and review. Merging parties place a premium on certainty and the knowledge that once the review period is over (and so long as they comply with the other antitrust laws in the jurisdictions in which they

operate), they can close their deal with confidence and go on with their business without substantial risk of subsequent government interference with their business.

The Multijurisdictional Merger Thicket

Recognizing the benefits of merger review for protecting competition in market economies, roughly 65 jurisdictions around the world have now enacted merger review laws and merger notification regimes in one form or another. But these benefits are accompanied by substantial costs. This is especially true when 10 or 20 or 30 jurisdictions review the same merger, and so inadvertently create what I have termed a "multijurisdictional merger thicket." In this context, business uncertainty may flow from not having common ground about how antitrust enforcers should go about conducting their merger notification and review regimes. Business costs accrue from the need to evaluate the wide variety of criteria used to trigger notification, and, then from the different ways in which filings must be made, the processes individual agencies utilize and the standards they employ, and whether there is meaningful and timely judicial review. In a world where many transactions are reviewed by many antitrust agencies, the risk of substantive conflicts (especially with respect to large transactions) increases dramatically. The burdens, costs, and delays associated with filing in and dealing with a large number of reviewing jurisdictions pose serious concerns for the international business community.

The United States antitrust agencies share many of these concerns. A vigorous, competitive, free-market economy produces thousands of business agreements and transactions every day. Over the decades, we have found that the vast majority of the transactions we have reviewed are pro-competitive or competitively neutral. And, at least in our view, it is the

purpose of antitrust agencies to identify and remedy anticompetitive transactions, *not* to require firms to justify their business judgment in some broader (and vaguer) sense. This is, after all, a characteristic that differentiates market economies from non-market economies.

Unfortunately, thus far no one has been able to devise notification thresholds that identify with precision only those transactions that raise competitive concerns. In order to provide certainty to the business community about their filing obligations, the United States and many other jurisdictions employ objective thresholds -- a practice recommended by the ICN Notification and Procedures Subgroup. While this provides reasonable certainty, premerger filings inevitably capture a whole range of business transactions that should not be unfairly burdened with costs and delays. In recent years, for example, roughly 97 percent of all mergers notified to the U.S. Department of Justice and Federal Trade Commission have been cleared by our agencies in the first 30 days. We aspire to do even better.

The risks of unnecessary, and often unintended, regulatory roadblocks are thus significant. Our obligation as antitrust enforcers should be to preserve the benefits of merger notification and review while reducing unnecessary costs associated with it. In order to achieve this goal, we should regularly review our policies and procedures to ensure that they are adequate to fulfill our mission of protecting competition but are not stifling the competitive forces we mean to protect. The fact that so many enforcement agencies may now be looking at many of the same transactions makes it that much more important -- and that much more difficult -- to get it right.

Indeed, it is miraculous -- and a testament to the good faith and good sense of antitrust enforcers around the globe -- that the situation is not even more complex. In my own view,

though, the current situation is not sustainable. We antitrust agencies will fail in our duty to the public we serve if we do not promptly begin to remedy the largely unforeseen adverse consequences of multijurisdictional merger review.

The Merger Notification and Procedures Subgroup

Against this backdrop, I ask you to consider the work of the ICN Notification and Procedures Subgroup. The Subgroup's hard work over many months in developing eight Guiding Principles and three detailed Recommended Practices is an important first step in the direction of global convergence toward sound merger practices and procedures. The Subgroup did an impressive job of bringing together 13 antitrust enforcement agencies and garnering support from jurisdictions with different legal systems, traditions and institutional arrangements to enforce their merger laws. The Subgroup's work has benefitted greatly from this diversity of experience and viewpoints.

I believe that adherence to the proposed Guiding Principles and Recommended Practices that you will discuss this afternoon and tomorrow will make the merger review process significantly more efficient and effective for enforcers, while at the same time reducing delay and investigative burdens on merging firms in a wide range of transactions. For example, enhancing transparency with respect to the policies, practices, and procedures for merger notification and review would, among other things, reduce the cost to firms of determining whether a transaction triggers a notification threshold -- often a difficult task in today's environment, where many thresholds are imprecise and difficult to interpret. Similarly, ensuring that enforcement decisions are made within a reasonable and determinable time frame will reduce the uncertainty and delay engendered by lengthy or indefinite review periods.

I also agree with the Subgroup that we should have in place effective mechanisms for judicial review. In the U.S. system, the principal check on our enforcement powers is that we cannot prevent a transaction from being concluded unless we go to federal court to obtain an injunction. Of course, other jurisdictions with different legal systems and traditions use quite different institutional arrangements to enforce their antitrust laws. But whatever system a jurisdiction uses, I believe that meaningful and timely judicial review enforces critical discipline on the process and instills public confidence in our decisions.

Adherence to the proposed Recommended Practices also will facilitate the coordination of multijurisdictional filings and reviews. For example, permitting parties to notify proposed mergers based on a good faith intent to consummate the proposed transaction (one Recommended Practice) coupled with the elimination of filing deadlines in suspensive jurisdictions (another Recommended Practice) would enable parties to file concurrently in each notifiable jurisdiction and permit the investigations to proceed on roughly similar timetables. This not only will reduce burdens, but also enhance enforcement because it will facilitate inter-agency consultation.

Implementing the Subgroup's Proposals

One of the attractive features of the ICN is that we are *not* here this weekend to sign a grand international agreement that will bind our governments for eternity. Rather, we antitrust experts are here to discuss and, I hope, to reach consensus on Guiding Principles and Recommended Practices that we will then go home and implement as appropriate within our individual institutional frameworks. Needless to say, in an ICN encompassing 65 jurisdictions with many different legal cultures, what is good practice in one jurisdiction may not be feasible

at this time in another. Some improvements may require legislative change, while others may be implemented by rulemaking or changing informal practices and procedures. But even speeches and improvements to agency websites will go a long way towards increasing transparency. For example, public speeches by antitrust officials clarifying interpretation and application would serve to reduce a significant amount of uncertainty regarding notification obligations. And I urge you, government and private sector colleagues alike, to seize the opportunity to advance the proposed Guiding Principles and Recommended Practices in formal and informal contacts with sister agencies around the world that are not yet members of ICN (for example, during bilateral consultations and technical assistance programs).

Most of all, jurisdictions can learn from experience and lead by example. I encourage all of you to reflect critically on your own merger notification regimes and consider, in light of the proposed Guiding Principles and Recommended Practices, ways in which your agency's policies and procedures can be improved. At the Department of Justice, we continue to examine our own internal procedures to find ways to improve them. Over the past year, we have been working toward this objective at three distinct levels — national, bilateral, and multilateral.

On the national level, we recently implemented the most extensive notification reform legislation since passage of our premerger notification statute in 1976. When we looked at our enforcement record over the past 25 years, we found that we only rarely discovered competitive problems with transactions at the lower end of our filing thresholds. Moreover, there had been no adjustment of the thresholds for inflation during the entire life of our notification statute. So Congress changed our law to increase the size-of-transaction threshold from $15 million to $50 million and to eliminate the size-of-person test for larger transactions. Predictably, the number

of reportable transactions has decreased dramatically, allowing us to concentrate our enforcement resources on truly problematic mergers and acquisitions.

One of my first initiatives when I became Assistant Attorney General was to announce a Merger Review Process Initiative designed to enhance our enforcement capability, improve the transparency of our decision-making and reduce the burden of our requests for information from merging parties (commonly known as "Second Requests"). We hold corporate counsel fora in both the United States and Europe, during which we hear directly from the private sector about how the merger review process here and abroad impacts their businesses and about their ideas for improvement. The ICN Merger Working Group itself has provided valuable private sector input on these issues. We are also using the current lull in merger activity to review our policies in several important substantive and procedural areas.

At the bilateral level, it is important that the U.S. antitrust agencies continue to be closely engaged with our enforcement counterparts around the world. As the economy becomes increasingly global, and as more and more jurisdictions rely on competitive markets to serve their citizens, and thus begin active antitrust enforcement, it is all the more critical that we seek greater convergence. The Department of Justice and the Federal Trade Commission have close cooperative ties with many of the agencies represented in this room. In the context of those relationships, we continuously work to achieve harmonious and increasingly convergent approaches to common problems.

On a broader, multilateral level, the ICN provides us with a vehicle to work together to facilitate this process. We will continue to engage in an ongoing dialogue regarding the ways in which we all can improve the merger process. In the coming year, we will need to implement

the things we achieve here in Naples. And if we are true to our calling, we will identify new ways in which we can work together to enhance the efficiency and effectiveness of merger review around the world. The process we begin today will continue next year in Mexico.

Conclusion

I would be remiss in concluding my remarks if I did not acknowledge the monumental effort that has gotten us to this point. The working groups have presented us with thoughtful and insightful papers for our consideration. I also wish to acknowledge the superb leadership of Konrad von Finckenstein during this, the very first year of ICN's existence.