CONFLICT, COOPERATION & CONVERGENCE IN INTERNATIONAL COMPETITION

Terry Calvani*

I left the Federal Trade Commission in September of 1990. Conflict characterized much of the interaction among national competition authorities. Cooperation was the new, but largely unrealized, objective. Convergence would have meant precious little to anyone in the antitrust enforcement community.

Now, some fourteen years later, conflict among national competition authorities is rare. Cooperation is the order of the day. Convergence is not only in everyone's lexicon, but is taking place. In a relatively short period of time the international competition community has changed significantly. As we pause to reflect on the history of the Federal Trade Commission, I would like to review these three themes and offer thoughts on what the competition community might expect fourteen years hence.[1]

I. From the Beginning to 1990.

The 1986 Leeds Castle Conference well illustrates the conflict that characterized relations among competition authorities in the late 1980's. That May a meeting to discuss competition issues between the United States and the United Kingdom was held at Leeds Castle, Kent. Although such conferences today are too numerous to list, it was an unusual

---

* Member, The Competition Authority of Ireland; Lecturer in Law, University College, Dublin. The views expressed here do not necessarily represent those of the Competition Authority or any of its other Members. I would like to thank John Fingleton, Paul Gorecki, Sarah Hill and Randolph W. Tritell for their thoughtful comments; the errors are my own.

[1] *See* address of Ass't Attorney Gen. R. H. Pate, "Antitrust in a Transatlantic Context—From the Cicada's Perspective," Antitrust in a Transatlantic Context Conf., Brussels, June 7, 2004 for a view *17 years* hence (the cicada's life-cycle).

event at the time.[2] The United Kingdom was to be represented by the senior officials of the Office of Fair Trading ("OFT") and others.[3] Then timely issues of extraterritoriality, "blocking" legislation, "claw-back" statutes,[4] and the like would probably be discussed. As the conference approached, the OFT was instructed by the Department of Trade & Industry ("DTI") to stand-down. Senior representatives of the DTI rather than the OFT would represent the United Kingdom. As the *dramatis personae* changed, we learned that the OFT was not trusted by its ministry to adequately represent U.K. interests.[5] Evidently it was feared that the OFT officials would not "stand-up" to the American trustbusters on the issues of the day. Today, this story sounds silly. The U.K. is a strong member of the international competition community, and has

[2] International competition policy was a fledgling subject. Even within the academy, it received little attention. Professors Barry Hawk at Fordham University and Eleanor Fox

a close working relationship with the U.S. authorities.[6] Times were different, and conflict was commonplace.[7]

There was little cooperation among national competition authorities. I cannot identify a single important case where there was serious multinational cooperation during my seven-year term as Commissioner.[8] But I can recall instances where there was a significant lack of cooperation—sometimes on the part of the U.S. authorities.[9]

As for convergence, I doubt that I had heard—or much less used—the term during my tenure in office. Indeed, it was not until 1990 that anyone began to take the idea very seriously. Conflict—yes; cooperation—no; convergence—not yet an idea.

II. 1990-2004

Change was in the air as I completed my term in 1990. There were major transitions associated with the demise of the Berlin Wall. The world's competition community faced important change too. I think I am safe in saying that my *international* experience at the FTC was not significantly different from that of my predecessors. My successors, on the other hand, have had a very different experience.

A. A Reduction in Conflict.

One can attribute conflict to a variety of sources. U.S. invocation of the "effects test"[10] in the exercise of extraterritorial jurisdiction was certainly important. Very vocal opposition to the "effects" test was voiced from Sydney to Ottawa to London—and places in between. Foreign governments adopted laws and other policies designed to frustrate U.S. efforts to assert extraterritorial jurisdiction. Yet extraterritoriality was a bit of a whipping boy. The U.S. continues today to invoke the "effects test" to support its extraterritorial jurisdiction, and yet conflict has been dramatically reduced. The real source of conflict was that the American faith in antitrust was not shared. The exercise of extraterritorial jurisdiction by the United States simply highlighted the difference in attitudes. Today, however, competition policy is no longer an American commodity.[11] With the emergence of transnational antitrust, opposition to American

---

[10] Discussion of extraterritoriality is beyond the scope of this article. For a summary discussion of the subject, see ABA Antitrust Section, 2 Antitrust Law Developments 115-30 (5th ed. 2002). *See also* Weintraub, *Globalization's Effect on Antitrust Law,* 34 N.E.L.Rev. 27 (1999).

[11] Former Assistant Attorney General Joel I. Klein put it this way:

> Until the 1990's, a not infrequent reaction of foreign governments to news that the Antitrust Division was investigating the activities of international cartels that had extracted money from U.S. consumers' and

B. Nascent Cooperation Flowers.

Cooperation is very common—so common that the subject will be treated only briefly here. In a U.S. context, it is embodied in formal instruments including "soft" cooperation agreements,[16] but also mutual legal assistance treaties[17] and the International Antitrust Enforcement Assistance Act.[18] More importantly, cooperation has become part of the everyday fabric of national competition authorities' *modi operandi.*

These developments were reflected in my own practice. Prior to coming to Ireland in 2002, it had become routine for me to sign confidentiality waivers permitting various authorities to talk among themselves and to work together when analyzing a merger. I recall providing

authorities in eight countries at premises around the world on 12 February 2003 is an excellent example of the current state of cooperation.[21]

C. The Genesis of Convergence.

Near the end of my term of office in 1990 the Bundeskartellamt hosted its semi-annual Cartel Conference in Berlin. Sir Leon Brittan (now Lord Brittan) took the occasion to suggest that the time was ripe to reconsider international antitrust convergence.[22] A moribund subject since the failure of the Havana Conference years earlier,[23] Lord Brittan initiated a discussion that became the subject of countless program sessions since. [24]

---

[21] *See* Egge, Smith & Wright, "DEW Line," The Deal (July 3, 2003).

[22] Remarks of Lord Brittan, Cartel Conference, Berlin, June 19, 1990.

[23] *See* Final Act of the U.N. Conf. On Trade & Employment, Havana Charter For an International Trade Organization (1948). The conference had sought to establish an international organization that would address issues of multilateral trade. *See generally* Bilal & Olarreaga, *Competition Policy & the WTO: Is There a Need for a Multilateral Agreement? 6* (Working Paper 98/W/02 European Inst. Pub. Admn.): "the Havana Charter…included a Restrictive Business Practices chapter…whose objective was to prevent business practices that restrain competition and adversely affect international trade. However the Havana Charter never entered into force due to the refusal by the US Congress to ratify it, probably of its fear of losing some of its sovereignty." [Citation omitted.] *See generally* American Bar Assoc. Report on the Internationalization of Competition Law Rules: Coordination & Convergence, available at http://www.abanet.org/antitrust/convreport.html.

[24] At about the same time, countries without antitrust regimes were beginning to show an interest. The OECD Competition Law & Policy Committee under the leadership of its former chairman Dr. Kurt Stockmann of the Bundeskartellamt hosted the first Global Forum meeting in Paris and invited representatives from many developing countries. A large number attended. As an outgrowth of that meeting Martin Howe of the U.K. and I, together with the representatives of other OECD countries provided assistance to Kenya in the establishment of its competition agency. On an official visit to the former Soviet Union in 1989 I met with several representatives of the Soviet government who were interested in talking about antitrust. Following my departure from the Commission, I was asked to join Commissioner Deborah Owen and others on a mission to provide technical assistance to Indonesia, which was considering the enactment of antitrust legislation. In the intervening years, there have been countless technical assistance missions, but these were among the very first.

Lord Brittan suggested the WTO as the vehicle,[25] but the idea enjoyed little real progress without the active cooperation of the United States. Such support was not forthcoming. Publicly the U.S. trumpeted the virtues of bi-lateral "soft" convergence. Former Assistant Attorney General Klein summed up the U.S. position in his "If It Ain't Broke, Don't Fix It" address to the 1999 Cartel Conference.[26] But there was another unspoken reason for the U.S. position. Unsaid was the U.S. fear that convergence would lead to "populist" antitrust divorced from economic underpinnings. Discussion of "competition" discussions within United Nations Conference on Trade & Development ("UNCTAD") did not allay the American fears.[27] It had been a long way from the likes of *Von's Grocery*[28] and *Schwinn,*[29] and there was little interest in returning. Too much was at risk.

Attorney General Janet Reno convened the International Competition Policy Advisory Committee ("ICPAC") in October of 1997 under the leadership of former Assistant Attorney General James F. Rill and former International Trade Commission Chairman Paula Stern. The Committee's Final Report highlighted the costs associated with divergent antitrust policies and

---

[25] Address by Lord Brittan, "A Framework for International Competition," Davos, Feb. 3, 1992. Indeed the issue was first seriously discussed in a WTO context. In 1993 a group of academics and competition practitioners (the so-called "Munich Group") submitted a Draft International Antitrust Code to the GATT that proposed an international competition regime under the WTO. For a discussion of this history, *see* Jones, *Come the Millennium (Round)? Competing Visions of International Antitrust Policy in the European Union & the United States* in 2001 Fordham Corp. L.Inst. 31,33 (Hawk ed. 2001).

[26] Address of Assistant Attorney General Joel Klein, Cartel Conference, Berlin, May 9, 1999. *See also* Address of Assistant Attorney General Joel Klein, "A Reality Check on Antitrust Rules in the World Trade Organization, and A Practical Way Forward on International Antitrust," OECD Conf. on Trade & Competition, Paris, June 30, 1999. Others within the U.S. enforcement community echoed these sentiments. *See, e.g.*, Address of FTC Commissioner Orson Swindle before the 8th World Business Dialogue, "Between Competition & Cooperation—Changing Business-to-Business Relations," Cologne, April 4, 2001.

[27] *See generally* Shenefield, *Coherence or Confusion: the Future of the Global Antitrust Conversation*, 49 Antitrust Bull. 385, 391 (2004).

[28] United States v. Von's Grocery Co., 384 U.S. 270 (1966). In this case the Supreme Court sustained a finding that a merger between the third and sixth largest retail grocery chains in the Los Angeles metropolitan area was illegal, where the combined share of the two chains was approximately 7.5%.

[29] United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967). In this case the Supreme Court held that most non-price vertically imposed territorial restraints were *per se* illegal. Subsequently, the Court overruled *Schwinn* in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), and applied the Rule of Reason to such cases.

the need for greater convergence.[30] The U.S. business community, with much to lose from the return to Warren Court era competition policy, seemed among the forefront calling for greater convergence. The Report also recommended “that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy."[31] Just before leaving office Assistant Attorney General Klein delivered an address, which many read to signal a change in policy had taken place.[32]

The International Competition Network was born October 25, 2001. In its short life it has accomplished much.[33] One of its initial efforts was the identification of "best practices" in the merger process.[34] The fruits of these labours are dramatic.[35] For example, the ICN Merger Working Group recognized the problem of jurisdictions that assert jurisdiction over transactions

---

[30] *See* Final Report, International Competition Policy Advisory Committee (Feb. 2000). *See also* International Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review (Sept. 28, 2002). *See generally* James, *Perspectives on the International Competition Network*, 4 ABA Internat’l Antitrust Bull. at http://abanet.org/antitrust/committees/international/fallwinter01.pdf., and Address of Commissioner Konrad von Finckenstein, Q.C., *International Antitrust Cooperation: Bilateralism or Multilateralism?*, American Bar Assoc., May 31, 2001.

There are now over one hundred competition regimes in the world today. Address of J. William Rowley, *Internationalization of Merger Review: Global Solutions Require Both Words and Actions*, CADE O Direito Da Concurrencia EM Uma Economia Globalizada, Brasilia, Nov. 28, 2002. Almost seventy have pre-merger notification procedures in place. Today there are sixty-eight jurisdictions with merger notification requirements.
a
ace. Tode co rn3-ire th1 Timpose -1.4491 TD

having little or no nexus with the state and recommended that "[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction."[36] The Group has also addressed issues of notification thresholds and timing. [37] The work of the Merger Working Group was important in the decisions of twelve jurisdictions to modify their processes[38] —including the EU's recent decision to permit a notification prior to a definitive agreement and the elimination of the requirement that notification occur within seven days following the execution of the definitive agreement.[39] This is successful convergence taking place in "real time."

The enlargement of the European Union on May 1, 2004, highlights additional convergence. As a condition to entry, the new accession states had to adopt competition regimes modeled on Articles 81 and 82 of the Treaty.[40] Whether these Member States otherwise would have opted for different competition laws cannot be said, but the adoption of laws in ten countries based on a single model is a significant step toward convergence even if a bit forced.

---

[36] *ICN* 1. Moreover, "[m]erger notification thresholds should incorporate appropriate standards of materiality as to the level of 'local nexus' required for merger notification." *Ibid.* It recommends that "determination of a transaction's nexus…should be based on activity within that jurisdiction, as measured by…the activities of at least two parties to the transaction in the local territory and/or by…the activities of the acquired business [there]." *ICN* 2. The underlying predicate for these recommendations is that "notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned." *Ibid*.

[37] Specifically it recommends that parties "should be permitted to notify proposed transactions upon certification of a good faith intent to consummate the proposed transaction." *ICN* 4. In this regard the Recommendations note that jurisdictions vary a great deal as to when parties may file, and that convergence would be efficient. It is recommended that jurisdictions "that prohibit closing while the competition agency reviews the transaction or for a specified period following notification should not impose deadlines for pre-merger notification." *ICN* 5.

[38] Kraus & Coppola, *supra* note 33. Sixteen jurisdictions in 2003, representing 25% of ICN jurisdictions with merger review, "have revised their merger laws or submitted legislative changes to their governments aimed at increasing conformity with the Recommended Practices." *Supra* at 7. More recently, the Slovak Republic has amended its merger regulation to exclude a market share test for notification.

[39] *See* Proposed Council Regulation on control of concentrations between undertakings (Dec. 12, 2002). Ireland, too, has modified its process in response to ICN recommendations.

[40] *See* Jacob, *EEA & Eastern European Agreements with the European Community*, 1993 Proceedings of the Fordham Corporate Law Institute: International Antitrust Law & Policy 403, 426 (Hawk ed.).

Informal convergence is also taking place. Merger regulation within the European Union is much more akin to that within the North America today than it was a few years ago. The revised Merger Regulation[41] reflects this convergence.[42] The new standard of review reflects a better understanding of unilateral effects and the role of economic analysis is more prominent today.[43] New merger guidelines, which recognize the role of efficiencies and speak of consumer welfare, more closely look very similar to those of the United States.[44] Indeed, the abandonment of the notification regime is another example of soft convergence.[45]

D. Postscript: 1990-2004—The Larger Environment.

So where are we now? Conflict—rare; cooperation—the order of the day; convergence—in center stage.

These developments should be appreciated within a larger geopolitical transformation taking place at the same time. Throughout most of my term as Commissioner the world was

ought be attributed to these larger forces, competition policy undoubtedly found more fertile ground from which to develop.

III. Where Do We Go from Here?

Former Chairman Timothy J. Muris has observed that there are three phases in the process of convergence: (1) decentralized experimentation, (2) consensus building, and (3) adoption of agreed upon best practices by individual jurisdictions.[46] Experimentation has occurred. While consensus has not been fully achieved, great strides have been accomplished. We now appear to be in his third and final phase.[47] Should Chairman Muris have added a fourth: international enforcement?

The grand question is whether we will see the emergence of an international competition enforcement regime as some have advocated. Lord Brittan and Commissioner Monti have endorsed some, albeit as yet ill-defined, regime within the WTO.[48] Although these sentiments have not found fertile ground in the United States,[49] the idea is not without American supporters.[50] Professor Eleanor Fox has stated that "[t]here is a need for an international economic order in which at least some players are charged with responsibility to enhance the welfare of the entire community."[51]

---

[46] Muris, note 7, *supra* at 2.

[47] It might be more correct to say that we are in both the second and third stages.

[48] *See* note 25, *supra*, and accompanying text on Lord Brittan's position. *See* Address by Commissioner Mario Monti, "A Global Competition Policy," European Competition Day, Copenhagen, Sept. 9, 2002, for his views.

[49] *See, e.g.,* ABA Antitrust Section, Comments & Recommendations before the U.S. Trade Representative on Competition Elements of the DOHA Declaration (200_). *Cf.* Marsden, *infra* note 53.

[50] *See, e.g.,* F. Scherer, Competition Policies in an Integrated World Economy (1994).

[51] *Fox* 120. Recognizing the need for an international remedy, Professor Fox nonetheless does not embrace a Havana Charter type solution. Rather she favours the adoption of an "over-arching principle [that] will rationalize and link the nearly one hundred national/regional competition systems of the world." This would include a requirement that WTO members adopt measures to prohibit hard-core cartels and to meet standards for transparency, non-discrimination, and procedural fairness. *See* Fox, *International Antitrust & the Doha Dome,* 43 Va. J.Intl'l L. 911 (2003).

Former Assistant Attorney General John Shenefield presents the alternatives:

> Should there be a convergence upon a single global antitrust law, enforced by a single supranational antitrust enforcement authority; should we instead be content with 100-polus different antitrust laws, each with a slightly different approach; or is there in fact a third way, blending the efficiencies of some degree of harmonization of competition laws with the benefits of retaining different approaches suited to different economies and different cultures?[52]

Which will it be?

Although the United States is active promoting convergence in the working groups of the

treatment of mergers, while less homogeneous than cartels, is very similar.[55] There are non-trivial differences in the treatment of vertical restraints, but nothing of great moment.[56] Only in the area of single firm behaviour are the differences more dramatic.[57]

Intent is not important.[63]

The evolution of U.S. antitrust law from an intent/rules based system to one grounded in industrial organization economics took a generation.[73] But there was nothing particularly American about that development as the dismal science does not respect flags nor frontiers. Seeds sowed within the academy by Aaron Director and others sprouted and took hold.[74] While economics has come late to European competition enforcement, it has come. Over time it will have the same effect.[75]

B. Who gets the efficiencies?

One area of increasing convergence is the recognition of efficiencies in competition analysis—particularly in the area of mergers and joint ventures. Yet, this may pose a hidden opportunity for conflict. A contemporary Irish case serves as an example.[76] In that matter the parties argued that the Competition Authority ought not challenge a proposed joint venture because efficiencies outweighed any competitive losses associated with the proposal. Irish competition law, like Article 81 of the Treaty, requires efficiency pass-though to the benefit of

[72] Critics of the European Union's treatment of "portfolio effects" in merger cases should remember that it was the United States Supreme Court that affirmed the decision of the Federal Trade Commission using a similar analysis in FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967), and that the U.S. had been plowing the antitrust furrows for 77 years at the time of that decision.

[73] R. Posner, Antitrust Law vii-ix (2d ed. 2001).

[74] *See generally* Posner, *The Chicago School of Antitrust Analysis*, 127 U.Penn. L.Rev. 925 (1979).

[75] It is persuasively argued that the U.S. was a more fertile ground than Europe by virtue of the greater interaction between government ad1 Tm0.001kcd1 Tm11 c1 0 0 lh.9(s)8.2(t 0 (,)5.5(b4.6925 01(m)6.2(e)24rch4s) 4,i.8 Tm0.00o)-7.3(.)]TJET72(

consumers.[77]

Modernisation is the devolution of some antitrust competence to Member States. [82] Some of the cases that previously were handled by Brussels

their colleagues at the Antitrust Division and the Federal Trade Commission in Washington sadly do not have. These two features will not eliminate conflict, but they can—if implemented properly—minimize the opportunities to diverge.[87] Nonetheless, devolution of what was a centralized power to twenty-five jurisdictions will present challenges.

C. American federalism: Poster child for bad policy?[88]

The virtues of convergence are not universally accepted. The decentralization of competition enforcement within the United States, while subject to criticism from many quarters, shows no sign of rationalization.

U.S. lawyers have not been bashful about criticizing the costs associated with the internationalization of merger enforcement.[89] Non-U.S. lawyers, however, quickly point out that their American colleagues have little right to complain. As one European lawyer recently observed:

> The American process is daft! U.S. lawyers complain about having to notify an American transaction in Romania, but force me to vet a deal between two European

---

of entities poses a challenge; n

companies before antitrust regulators not only in Washington, but also in state offices in Santa Fe, Des Moines, Albany, Tallahassee, Austin, Portland, Seattle and Sacramento.

This problem is not limited to mergers as anyone familiar with the government's prosecution of Microsoft[90] can attest.[91] This is mad![92] The virtues of convergence have seemingly escaped notice in America.

The problem is exacerbated by virtue of the different analytical modes brought to bear by the states.[93] Criticism has ranged from the OECD internationally[94] to ICPAC domestically.[95]

---

[90] *See* United States v. Microsoft Corp., 231 F. Supp. 2d 144, 150-51 (D.D.C. 2002), for a procedural history of the case.

[91] *See, e.g.*, Hahn, & Layne-Farrar, *Federalism in Antitrust*, 26 Harv. J.L.& Pub. Pol. 877, 892-905 (2003), for a discussion of the state role in the Microsoft Case. Rifts and discontinuities exist throughout the case law. For example, the federal authorities take the view that cooperative advertising predicated on the dealer using the recommended retail price (or no price at all) does not violate the proscription against minimum resale price maintenance. *See, e.g.*, *In re* Advertising Checking Bureau, 93 F.T.C. 4 (1979); *see also* Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs-Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057, at 41,722 (FTC May 21, 1987). This view seems consistent with the modern case law. *See, e.g.*, *In re* Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979). The states attorneys general, or at least spokesmen for their antitrust task force, take another view. *See, e.g.*, remarks *of* former New York deputy attorney general Pamela Jones Harbour, ALI-ABA Antitrust Issue in Product Distribution, Orlando, Jan. 21, 1999; remarks of former Maryland assistant attorney general Michael Brockmeyer, ALI-ABA Antitrust Issue in Product Distribution, March 4, 1993.

[92] "The costs associated with this system have been well documented." O'Connor, *supra*, *citing* Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 Antitrust 29 (Summer 2001), and Burns, *Is the Illinois Brick Wall Crumbling?*, 15 Antitrust 34 (Summer 2001); *cf.* Lande, *When Should State Challenge Mergers: A Proposed Federal Balance*, 35 N.Y.L.Schl. L.Rev. 1047, 1063-66 (1990).

[93] States implement their la

Judge Richard Posner and others have observed that the different modes of analysis may be a function of the state attorney generals' political constituencies.[96] The issue is important because the states effectively trump national policy since the parties—absent litigation—will be bound by the most interventionist enforcement entity's assessment.[97] The U.S., far from having a sensible antitrust regime, leaves much to be desired.[98]

> Overlapping responsibilities for merger review in the United States also warrant consideration…. A decision by the DOJ or the FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it

What is to be done? Judge Richard Posner has suggested that states antitrust enforcement rights be limited,[99] but acknowledges that legislation is necessary to accomplish this.[100] Absent support by the state attorneys general community,[101] any reform proposal would be dead on arrival in Congress. Clearly the situation within the U.S. undercuts its ability to call for more rational approaches abroad.[102] One of the biggest challenges to American competition policy is to find a solution for this problem.

Can state interests be persuaded to support reform? Other federal systems seem able to administer a rational allocation of jurisdiction. In Germany the Bundeskartellamt is responsible for national enforcement while the lander are responsible for "intra-state" cases. Unlike the U.S. states attorneys general, the Länder have no right to broader enforcement. But federal preemption in the United States, while theoretically possible, seems politically unlikely given the

---

federal authorities elected not to prosecute, it is not self-evident that federal enforcement is (or was) less than optimal. The fact that some defendants settle state litigation does not establish that the litigation is meritorious. Even if it were, Type II error will always characterize efficient enforcement regimes. The question should be whether the enforcement level is optimal, not whether Type II error is completely absent. The same point ought to be made with reference to O'Connor's argument that more case law aids in case law development. The more appropriate question is whether there is insufficient litigation to generate an optimal level of case law. Again, there is no evidence to support the view that more is necessarily better. But, as O'Connor concedes, there *is* evidence that state enforcement imposes real cost.

[99] R. Posner, *supra* note 73, at 281. He argues that they generally "'free ride' on federal enforcement [and] are excessively influenced by interest groups that may represent a potential antitrust defendant's competitors." R. Posner, *supra, citing* Comment, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Laws of Merger*, 48 Emory L.J. 337 (1999). He continues: "This is a particular concern when the defendant is located in one state and one of its competitors is another and that competitor, who is pressing his state's attorney general to bring suit, is a major political force in that state." *Ibid. See also* Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940-41 (2001).

Others have taken similar positions. *See, e.g.,* Bell, *States Should Stay Out of National Mergers,* 3 Antitrust 37 (Spring 1989) and Interview of Timothy J. Muris, Advisors to Presidential Candidates Differ on Most Aspects of Enforcement, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1382, at 448 (Sept. 15, 1998). Recently one commentator has called on the Antitrust Modernization Commission to create a national competition policy by preempting state antitrust laws. *See* Ewing, "Will the New Antitrust Modernization Commission Have the Courage to Tackle Real S

political clout of the state attorneys general. The Australian federal system is quite similar to that of the United States, in that the states there, like those in the U.S. and unlike Germany, have “interstate” jurisdiction. There, however, the states have ceded their antitrust jurisdiction to the federal government in return for certain veto rights over federal antitrust policy.[103]

Although differences characterize the world's competition regimes, there is more in common than there are differences. Convergence is taking place.

Since I would not have accurately predicted today's international competition environment in 1990, I hesitate to prognosticate today. Nonetheless, it seems safe to say that consensus will continue to develop—particularly as economics becomes more important in the analyses of national and regional competition authorities. Convergence, using the "best-practices" model of the International Competition Network, will likely continue to flourish.

The late Dr. Wolfgang Karrte, former President of the Bundeskartellamt, used to refer to the international enforcement community assembled for Cartel Conferences in Berlin as his "competition family."[107] While a bit of an overstatement at the time, it is likely to become much more of a reality in the coming years.[108]

[107] *See* Address of Bundeskartellamt President Ulf Böge, Bonn, May 18, 2003.

[108] Whether the family will shows signs of becoming dysfunctional remains to be seen. And like real families, *ní h-aithne go h-aontíos.*