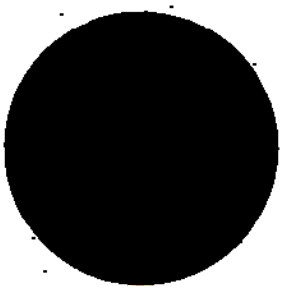

Federal Trade Commission

The Three Cs: Convergence, Comity, and Coordination

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INTRODUCTION

In my remarks today, I will discuss what I call the three Cs: Convergence, Comity, and Coordination.

CONVERGENCE

Three matters – Boeing's acquisition of McDonnell Douglas, General Electric's failed acquisition of Honeywell, and Microsoft – are often cited by those who voice concern and alarm about the globalization of antitrust enforcement. These matters have played a prominent role in the debate over international antitrust enforcement. In all three matters, European authorities reached a different outcome on the merits of those transactions than the authorities in the United States. Those cases have led to calls for a solution. At one time I shared the concerns about these cases and believed that harmonization – the development of a common framework and set

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Kyle Andeer, for his invaluable assistance in preparing this paper.

upstream markets.[2] Indeed, forty years ago, the Supreme Court held that a conglomerate merger might conceivably be illegal.[3] Admittedly, those precedents were handed down before the Court began to discuss economic efficiency prominently in its antitrust decisions.[4]

One could also look at the enforcement guidelines still on the books in the United States. The Non-Horizontal Merger Guidelines enacted by the Department of Justice in 1984 are still valid – at least in theory.[5] Those guidelines embrace two limited theories of liability for non-horizontal mergers. First, foreclosure is recognized as a potential harm of non-horizontal mergers – albeit under very limited circumstances. Second, the guidelines also recognize the potential that a non-horizontal merger will facilitate collusion in either the "upstream" or "downstream" market. However, in practice there has been very little recent enforcement by the agencies in the non-horizontal merger area.[6] For example, the agencies have not litigated a

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[2] United States v. Brown Shoe Co., 370 U.S. 294, 323-24 (1962) ("The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition."); Ford Motor Co. v. United States, 405 U.S. 562, 570 (1972).

[3] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[4] The seminal Supreme Court decision in this regard is Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[5] Dep't of Justice, Non-Horizontal Merger Guidelines, § 4.0, 49 Fed. Reg. 26,823 (June 29, 1984), *available at* http://www.usdoj.gov/atr/public/guidelines/2614.htm.

[6] The agencies obtained a number of consent decrees in merger cases based on vertical theories in the 1990s. *See, e.g.*, In the Matter of Dominion Resources, Inc. and Consolidated Natural Gas Company, FTC Docket No. C-3901 (consent agreement November 1999), *available at* http://www.ftc.gov/opa/1999/11/dominion.htm; In the Matter of America Online, Inc. and TimeWarner Inc., FTC Docket No. C-3989 (consent agreement Dec. 2000), *available at* http://www.ftc.gov/opa/2000/12/aol.shtm; Cadence Design Sys. Inc., 124 F.T.C. 131 (1997); Time Warner Inc., 123 F.T.C. 171 (1997); Silicon Graphics, Inc., 120 F.T.C. 928 (1995); Eli Lilly & Co., 120 F.T.C. 423 (1995); United States v. MCI Communs., Inc., 1993-2 Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994); United States v. Tele-Communs., Inc., 1994-2 Trade Cas.

merger challenge on a vertical theory in decades. Nor has either agency brought a conglomerate merger case (or even pursued a consent decree under such a theory).

The principal cause are the views of many American micro-economists that dominate current enforcement policy. They believe that non-horizontal mergers should rarely, if ever, be challenged because they are generally efficiency-enhancing. They would challenge only those

(CCH) ¶ 71,496 (D.D.C. 1994).

[7] United States submission to the Organization for Economic Cooperation & Development "Roundtable on Vertical Mergers" (Feb. 15, 2007), *available at* http://www.ftc.gov/bc/international/docs/07RoundtableonVerticalMergers.pdf.

[8] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 4 (1992; as amended 1997) *reprinted in* 4 Trade Reg Rep. (CCH) ¶ 13,104.

synonymous with "total societal welfare." They would consider cognizable efficiencies to include any net efficiencies that would redound to the benefit of anyone in society including shareholders, as well as consumers.

Finally, we may need to ask ourselves whether we have today too cramped a view of the anti-competitive effects that may result from a merger. A recent law review article asserts that American antitrust enforcement focuses almost exclusively on a merger's impact on price and quality whereas the inquiry in Europe is broader to include all possible detrimental effects on consumer choice.[9]

Those responsible for law enforcement in the EC seem more agnostic in their view about the role that efficiencies should play in antitrust law enforcement. Indeed, as I observed last year, the EC's draft guidelines respecting foreclosure of competitors could be read to assert that efficiencies could not justify exclusionary practices in a highly concentrated industry.[10] That thinking is also reflected in the recently released guidelines on non-horizontal mergers.[11] Those guidelines acknowledge that vertical and conglomerate mergers may create efficiencies.

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[9] Neil Averitt & Robert H. Lande, Using the "Consumer Choice" Approach to Antitrust Law, 74 Antitrust L.J. 175 (2007).

[10] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Reflections on the DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, at the St. Gallen International Law Forum (May 11, 2006), *available at* http://www.ftc.gove/speeches/rosch/060511RoschStGallenRemarks.pdf.

[11] European Commission, DRAFT Guidelines on the assessment of non-horizontal mergers (Feb. 13, 2007), *available at* http://ec.europa.eu/comm/competition/mergers/legislation/draft_nonhorizontal_mergers.pdf.

[12] *Id.*

whose viability are being questioned in the United States, including the facilitation of tying and bundling, for example.

A second fundamental difference between the U.S. and the EC is the way that merger challenges are evaluated and tested. In the United States, the agencies' decisions to challenge a merger are almost immediately tested in a federal district court. In those proceedings all witnesses, including experts, are subjected to searching cross-examination. Appeals from the decisions of the district courts are generally expedited so that the parties to a merger generally know where they stand within a year after the challenge.

The European system is different. For one thing, the EC's decisions are self-enforcing – that is a decision to challenge a transaction is not made by the courts, rather it is made by the Commission. That means that the EC does not have to present its case to an independent fact-finder prior to taking action. Nor is there the same expedited review of its decisions as there is in the United States. All this being said, the EC has implemented some important changes in recent years. Of particular note was the creation of a "devil's advocate" panel of disinterested experts that reviews the Commission's conclusions before a statement of objections issued. And the European Court of First Instance has not only provided meaningful judicial review but has tried to do so promptly. Still, there are procedural differences, and some of those differences are significant. For example, our European colleagues generally do not have the access to discovery of documents and witnesses that we do in the United States (this includes the ability to cross-examine witnesses).

COMITY

U.S. and EC antitrust law enforcement authorities don't always see eye to eye on antitrust

enforcement, either in terms of liability or in terms of remedy, although these instances have been reduced in recent years. As I mentioned earlier, the decisions in *Boeing*, *General Electric*, and *Microsoft* are the three that have garnered the most attention. There's nothing unique about these differences. Even within our national borders, differences in opinion take place. For example, it is not entirely uncommon for us to see state enforcers reach a different conclusion than federal enforcers – one needs to look no further than *Microsoft*. Nor is it entirely unprecedented to see differences between federal enforcement agencies. The FTC, for example, is no stranger to that phenomenon. Nevertheless the question remains in the international arena: what to do about the small number of cases where there is a difference of opinion on the appropriate outcome?

A proposal that has gained some recent traction – at least in the U.S. – is the adoption of enhanced principles of comity to resolve conflicts between jurisdictions. Whether those principles are termed "hard" comity or "soft" comity, they boil down to principles that are rooted in the primacy of the "interest" that one jurisdiction may have vis-a-vis the "interest" of another jurisdiction. As a theoretical matter, I think these comity proposals are sound. However, I have three concerns about the proposals.

First, insofar as it is easy to identify which jurisdiction has a predominant or primary interest in a transaction, that principle of comity may be unnecessary. As far as I can determine, in most cases that jurisdiction is *currently* being ceded the primary role in determining whether the transaction (or conduct) ought to be challenged or not.

Second, insofar as it is hard – or impossible – to identify which jurisdiction has predominant interest, I'm concerned that *no* comity principle will operate to resolve the conflict. No interested jurisdiction will be willing to cede authority or even primacy to any other

jurisdiction in those circumstances. Again, one need look no further than Microsoft. Microsoft's global success has come at a cost in this respect. One cannot say that Microsoft's operating system is vital only to the U.S. economy.

Third, there's some precedent for these concerns in the implementation of conflicts of laws principles. I recall taking a course on the conflicts of laws among nations from a very distinguished professor at Cambridge back in 1962. He said – and it has stuck with me throughout these many years – that when all was said and done each nation applied its own law when it felt it had the primary interest in dispute and deferred when it felt that it didn't. When I later got to Harvard law School and took a course on conflicts of laws among the states of the U.S., my professor said the same thing. At the end of the day that is what may happen to any principles of comity.

13

concerned about the fractured state of enforcement policy in the U.S. than I am with the rare disagreement with our friends across the pond, but the latter concern might become greater if

CONCLUSION

In concluding, I believe the agencies in both the United States and Europe do an excellent job in coordinating their merger investigations. Is there room for improvement – yes. Do I believe that we will always reach the same outcome on a part o mtla0.0008 T2kvn1uter – no. And I don't think that is necessarily a problem in need of a solution.