Federal Trade Commission

THE EVOLUTION OF INTERNATIONAL COMPETITION POLICY:

A FEDERAL TRADE COMMISSION PERSPECTIVE

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The views expressed are those of the Commissioner and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Thank you and good morning. It is a pleasure to be here for the nineteenth annual institute on international antitrust law and policy. I have been asked to speak this morning about international antitrust policy from the perspective of the Federal Trade Commission.

Competition policy is evolving in the United States and worldwide. It is spreading as more countries adopt competition laws, and an appreciation of its importance to the development of trade and free market economies is increasing. Not surprisingly, as the internationalization of trade continues, interest in the convergence of competition policy also has grown.

International commerce and competition may be impeded by the application of different and perhaps conflicting antitrust laws and policies, and the costs of multinational compliance may be high. Convergence of international antitrust law would go far to reducing these costs. Cooperation and general agreement on important competition issues will do much to make competition policy more effective and predictable. Essential to international antitrust cooperation and convergence is a mutual understanding of our antitrust similarities and differences.

Our understanding of other antitrust systems grows through discussions and exchanges with other antitrust agencies and through forums such as this Institute. Attorneys who regularly practice in different venues can illuminate and instruct us both about the problems they encounter and about things that work in smoothing the way for international transactions that are competitively neutral or procompetitive. Every opportunity to exchange views about the similarities and differences in antitrust philosophies around the world is an opportunity to take another incremental step toward a harmonious international approach to competition policy. I use the word "harmonious" here in its general sense, not as a term of art.

The interconnections among competition authorities reflect the international arena in which competition takes place. The first thing I plan to do today is to bring you up to date on the Commission's activities with the antitrust agencies of other countries. Next, I will discuss two substantive issues that have arisen at the Commission in connection with our analysis of international and domestic transactions. It has become clear that what we might once have described as purely domestic law enforcement also has international implications. It is here, too, with the incorporation of the economic learning that shapes competition analysis, that we can advance the competition goals on which we agree. Finally, I will offer a few modest remarks on what is to come. As is customary, my remarks today are my own views and do not necessarily reflect those of the Commission or of any other commissioner.

Let me begin by describing some of our technical assistance activities in Central and Eastern Europe, where governments have

been making the transition from controlled to market economies.[1] You will be hearing more on this topic tomorrow from Dr. Fornalczyk of the Polish Antimonopoly Office. Enormous political, social, philosophical and economic changes have been occurring in Central and Eastern Europe, including, of course, the movement from state-owned and controlled monopolies to entrepreneurialism, competition and a free market economy.

The Commission and the Justice Department have been able to participate in this process by sending technical advisers to work with their foreign counterparts by offering technical assistance and advice in structuring competition agencies, drafting competition laws and investigating and analyzing cases. The role of the technical advisers is not to prescribe a particular organizational, legal or analytical model but rather to explain our own experience and help explore alternative ways in which the competition goals of the host country might be achieved. The technical assistance programs, which are funded by a grant from the United States Agency for International Development, include long and short term projects, domestic internships and an annual conference.

Long term technical assistance projects consist of two-person teams of Commission and Justice Department lawyers and economists who spend approximately six months in the host country. The exchange program is beginning its second year in the Czech and Slovak Federal Republic and in Poland. Under a different funding grant, a team of advisers traveled to Hungary this fall for a four-month stay.

We also have participated in a number of short term projects, usually one or two weeks in duration, in connection with plans for restructuring particular sectors of the economy. Our staff have been invited to consult with foreign authorities concerning the telecommunications, energy, automotive and agriculture industries, to name a few. Other short term projects include the planning and presentation of seminars. Recent seminars have addressed vertical restraints analysis, market definition, enforcement issues and investigation techniques. The staff of the Commission and the Department of Justice have analyzed and submitted joint comments on drafts of competition laws from Central and Eastern European countries.

We have sponsored internships in the United States, which usually last six weeks. Interns from Poland, Hungary and both the former Federal Office for Economic Competition and the Slovak

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[1] Chairman Steiger spoke about these activities in this forum last year. Address by Janet D. Steiger, Chairman, Federal Trade Commission, Before Fordham Corporate Law Institute, New York City, Oct. 24, 1991.

Antimonopoly Office of the Czech and Slovak Federal Republic have visited the Commission and the Department, and we are expecting interns from the Czech Office for Economic Competition and additional interns from the Hungarian Office for Economic Competition.

Last March, the Commission and the Department hosted a three-day conference in Vienna for the discussion of competition issues. Representatives of Bulgaria, the Czech and Slovak Federal Republic, Hungary, Latvia, Lithuania, Poland and Romania attended. The conference began with a discussion of market definition issues and ended with a hypothetical case study. By all accounts, it was a success.

We have participated in discussions of competition and consumer protection matters with government officials in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Uruguay and Venezuela. These countries, too, have been opening their doors to increased competition. Venezuela, for example, has announced a major privatization program and recently enacted a competition law. We have received funding for a six-month program of technical assistance to Venezuela and contemplate a series of short term projects and internships. Earlier this year, the head of the new Venezuelan competition office spent three weeks at the Commission and the Department, and a second representative from Venezuela also interned in Washington. I have had the pleasure of attending meetings in Brazil, Mexico and Venezuela and can attest that the level of interest, enthusiasm and talent is impressive and exhilarating.

The governments of Taiwan and Italy have recently established agencies to administer their competition laws. We exchanged ideas and information with several officials of the new Italian agency who visited Washington last year. Earlier this fall, the Republic of China on Taiwan sent a delegation from their Fair Trade Commission to begin exploring a possible program of future cooperation with senior FTC officials.

We have regular contacts through the Australian and Japanese Embassies in Washington with the competition officials of those countries. With some countries, including Japan and Canada, the Commission and the Department of Justice conduct formal consultations on an annual or biannual basis. These consultations include, for example, discussions of proposed guidelines and policy initiatives. We also have hosted members of one another's staffs as "visiting scholars." This year, a scholar from the staff of the Japanese Fair Trade Commission visited the Commission and the Justice Department. The next round of consultations with the Japanese, to be held in Tokyo in the spring, will be the fifteenth in the series.

While en route to the most recent consultations held in Japan, Chairman Steiger visited the then-newly reorganized Korea Fair Trade Commission in Seoul. That meeting and the recent visit of the chairman of the Korean Commission and several of his fellow commissioners to Washington have led to the sharing of information concerning law enforcement initiatives and administrative policies and practices.

We have long sought to maintain relationships with the competition authorities in such countries as Australia, Britain, Canada, Germany, Japan, South Korea and New Zealand, as well as the authorities of the European Communities and the EFTA. For example, members of the Commission's staff recently participated in a symposium in Europe about merger investigations and merger analysis. Last month, representatives of the Commission and the Department of Justice met to discuss competition issues with Howard Wetston, who is on the agenda this afternoon, and his staff. We also meet regularly with the competition authorities in the European Community to discuss antitrust issues of mutual interest. We have hosted visitors from the Judicial Yuan of the Republic of China on Taiwan.

The Commission and the Justice Department have antitrust cooperation agreements with Germany,[2] Australia,[3] Canada[4] and the European Commission.[5] In general, the cooperation agreements

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[2] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices (June 23, 1976), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501.

[3] Agreement Between the Government of the United States of American and the Government of Australia Relating to Cooperation on Antitrust Matters (June 29, 1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,502.

[4] Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws (March 9, 1984), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503. The 1984 agreement with Canada was preceded by informal cooperation between the Commission and Canadian authorities and by 1959 and 1969 agreements between the Department of Justice and Canadian authorities. Id. at 21,233.

[5] Agreement Between the United States of America and the Commission of the European Communities Regarding the Application of Their Antitrust Laws (September 23, 1991), reprinted in 4 Trade Reg. Rep. ¶ 13,504.

provide for notification and consultation between the parties concerning antitrust matters and contemplate that the parties will consider the interests of the other in connection with antitrust investigations and enforcement decisions. Although the principles of comity should inform our analysis whenever the interests of another nation may be involved, the affirmative undertakings in the bilateral agreements to provide notice and to consult give shape to the process and ensure that we each have the opportunity to make our views known.

We have exchanged a number of notices with other agencies concerning matters under investigation. We also have consulted about national interests that might be affected by remedial provisions in orders, and we have cooperated with other agencies in specific cases. International discussions about a specific matter under investigation are limited by applicable confidentiality laws, but there often is much publicly available information that can be the basis for discussion, such as briefs previously filed in court, judicial or Commission opinions, trade journals and other public sources.

Our enforcement policy on the international front is not complicated. The basic rule is that we apply the same substantive rules to foreign firms. Principles of international comity and consultations under our antitrust cooperation agreements, however, may influence enforcement decisions. These issues, although they arise infrequently, can be enormously difficult. Considerations of comity and international cooperation may counsel that we take no action, even though anticompetitive effects in the United States appear likely.

Institut Merieux[6] may be a case in point. This was a 1990 negotiated consent order arising from the acquisition by Institut Merieux, a subsidiary of Rhone Poulenc, a French firm, of Connaught BioSciences, a Canadian firm. The complaint alleges that the acquisition would create a dominant seller in each of two product markets in the United States and would eliminate a likely potential entrant in those markets. The likelihood of anticompetitive effects in the United States seemed clear, but whether the Commission should take enforcement action was less clear.[7] Although the products of both firms were sold in the United States, neither firm had production assets or indeed any

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[6] FTC Docket C-3301 (August 23, 1990) (Commissioners Azcuenaga and Owen dissenting).

[7] See Owen & Parisi, "International Mergers and Joint Ventures: A Federal Trade Commission Perspective," 1990 Fordham Corporate Law Institute, International Mergers and Joint Ventures 1 (B. Hawk ed. 1991).

substantial assets in the United States, and no other antitrust enforcement agency challenged the transaction.

I voted not to accept the order in Institut Merieux. Apart from issues of international comity, the remedy provided in the order seemed to me highly regulatory and its likely positive effect on competition speculative at best, and our ability to enforce the order was less than certain.

Is there any difference, from our enforcement perspective, if the acquired company has a U.S. parent? This would ensure the cooperation of the selling firm in effecting a remedy. Resolving the remedial problem, however, is not the end of the inquiry. If the antitrust agency of another country is considering enforcement action, it may be appropriate for the Commission to delay or even forgo action. Inaction may be appropriate, for example, if the other agency obtains relief that is sufficient to allay our concerns about the transaction.

Our antitrust cooperation agreements obviously are important in these circumstances. We may learn that other antitrust enforcement authorities have the same concerns about the competitive effects of the transaction, or one of the agencies may be concerned that prospective remedial provisions would adversely affect their home markets. The cooperation agreements encourage us to discuss these issues early in the process and to work to accommodate other interests.

As I mentioned earlier, the subject of convergence has drawn much attention of late. Certainly a first step toward that goal is mutual understanding. When we understand our similarities, our differences and the reasons for them, we will be better able to pursue the means of achieving greater harmonization. In that spirit, I would like to discuss some of the principles that guide our merger analysis. There are two fundamental points stemming from our work in this area that I want to discuss today, the role of efficiencies and the role of concentration data in our merger analysis.

The place of efficiencies in merger analysis in the United States is, in my view, still an area that is greatly misunderstood. Efficiencies obviously promote competitiveness, a subject of major concern. The 1992 Merger Guidelines, like the 1984 Guidelines and the Commission's 1982 Statement Concerning

Horizontal Mergers that preceded them, recognize the efficiency-enhancing potential of mergers.[8]

The kinds of efficiencies we are interested in are those that reduce the cost per unit of production and cannot be achieved by the parties except through the proposed merger. Some asserted efficiencies may reduce overall costs but only by reducing output. A reduction in output, of course, may be seen as an anticompetitive effect rather than an efficiency. Similarly, reductions in personnel because of anticipated reductions in output are unlikely to be cognizable efficiencies for purposes of avoiding a challenge under Section 7.

The efficiencies also should be merger-specific. This is the point, I believe, that is most often overlooked by practitioners. Asserted efficiencies that could be achieved by less anticompetitive means, such as internal expansion, contract, a joint venture or a different acquisition, will not save an anticompetitive merger. Anticipated reductions in corporate overhead, for example, generally are credible but may not be merger-specific. A superior technology may be equally available through contract as through merger. When the efficiencies are not merger-specific, a decision to block the transaction does not also block the efficiencies, because the parties are free to seek the same efficiencies by other means.

Sometimes the Commission can craft a remedy that addresses our competitive concerns and also permits realization of the anticipated efficiencies. This may mean a partial divestiture, or the transaction may be allowed to proceed with some restrictions. For example, the Commission permitted GM and Toyota to enter into a production joint venture to make cars in the United States, but the Commission issued an order restricting competitively sensitive communications between the parties.

We depend on the parties to prove their asserted efficiencies, but for as long as I can remember, the Commission has considered possible efficiencies in making its prosecutorial decisions even if the parties do not make the argument. Our economists in particular always are alert for possible efficiencies, but all of us are attentive, since we like to believe we are economically enlightened.

To the extent that our approach to efficiencies is understood, there is little if anything left to criticize. This

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[8] 1992 Merger Guidelines § 4; see also FTC v. University Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991) ("[W]hether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition.").

is a dangerously assertive statement, I realize, and some of you may take it as a challenge if not an outright dare to prove me wrong, but that is alright if it advances the debate.

First, the question of precluding efficiencies arises only in the tiny percentage of all transactions that the government challenges. The vast majority of all transactions appear to be competitively neutral or procompetitive and will be left alone for the accomplishment of any efficiencies the parties can effect.

Second, blocking a transaction the anticipated efficiencies of which are not merger-specific does not preclude the accomplishment of those efficiencies because, by definition, they can still be achieved by other means. In all my years in government, I have never seen the Commission challenge a merger in which even a vaguely persuasive case has been made that it is likely to achieve an efficiency that could not be achieved by other means.

Now we have narrowed this down to a minute percentage of cases in which efficiencies are even an issue. Perhaps some of you still suspect that the government gives only lip service to its concern about efficiencies. My final point about efficiencies is that having observed and participated in this process for more years than I might care to admit, I know that the Commission is genuinely receptive to and concerned about merger-specific efficiencies. As I said earlier, I do not speak for the Commission, but I offer this as the personal opinion of a close and interested observer over a long period of time.

One thing we need to keep in mind in thinking about convergence is that competition laws around the world are still evolving. For example, one issue that will benefit from further study is the place of concentration data in our analysis of mergers. The 1992 Guidelines[9] identify three tiers of concentration, with a safe harbor in the bottom tier and a presumption of anticompetitive effects in the top tier.[10] The

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[9] U.S. Department of Justice & Federal Trade Commission, 1992 Merger Guidelines (April 3, 1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

[10] In the bottom tier, where the post-acquisition Herfindahl-Hirschman Index ("HHI") is below 1000 points, the Guidelines describe the market as unconcentrated and "unlikely to have anticompetitive effects." When the post-acquisition HHI is in the middle tier, between 1000 and 1800 points, the market is regarded as moderately concentrated, and an acquisition that increases the HHI by more than 100 points "potentially raise[s] significant competitive concerns," depending on other relevant

underlying principle is that as concentration increases, the likelihood of anticompetitive effects from an acquisition also increases.

The Commission in its 1988 decision in B.F. Goodrich[11] adopted a sliding scale to measure the weight accorded concentration data in the analysis of particular cases. The Commission said that in less concentrated markets, a lesser showing of other considerations affecting competition would suffice to save the merger. The court in Baker Hughes adopted a similar rule. The court said that "[t]he more compelling the prima facie case [based on market share and concentration data], the more evidence the defendant must present to rebut it successfully."[12]

Acting Assistant Attorney General Charles James has said that "concentration is merely the starting point in merger analysis. In each case, we conduct a detailed analysis of competitive effects and likely efficiencies to reach a balanced evaluation of the proposed merger."[13] Speaking the day the Guidelines were issued, former Assistant Attorney General James Rill said that the other considerations affecting the likelihood of anticompetitive effects "are of equal weight in the analysis,

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considerations. In the top tier, where the post-acquisition HHI is above 1800 points, the market is regarded as highly concentrated. An acquisition that increases the HHI by more than 50 points in the top tier also "potentially raise[s] significant competitive concerns," also depending on other relevant conditions. In the top tier, if an acquisition increases the HHI by more than 100 points, there is a "presumption" of anticompetitive effects that may be "overcome by a showing" of other considerations. 1992 Guidelines § 1.51.

[11] 110 F.T.C. 207, 311 (1988).

[12] United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

[13] Address by Charles A. James, Acting Assistant Attorney General, Antitrust Division, Department of Justice, Before the Joint Economic Committee Regarding Health Care Mergers in the 21st Century (June 24, 1992), at 9; see also Remarks by Janus A. Ordover, Deputy Assistant Attorney General for Economics, and Margaret E. Guerin-Calvert, Assistant Chief, Economic Regulatory Section, Antitrust Division, U.S. Department of Justice, Before the Federal Reserve Bank of Chicago, "Bank Merger Analysis and the New Merger Guidelines" (May 8, 1992), at 10 ("the new Guidelines dictate a comprehensive examination of the specific market circumstances in order to ascertain whether anticompetitive effects are likely").

regardless" of the level of and increase in concentration. In his view, "the weight accorded to concentration data does not increase with the level of post-merger concentration or the change in concentration."[14] That is the way I read the 1992 Guidelines as well, although the final clause in Section 1.51 is ambiguous and might be read to support another view.

The concentration thresholds identified in the Guidelines are largely arbitrary. No consensus exists on the critical levels of concentration in predicting the conduciveness of particular markets to adverse competitive effects. Indeed, to the best of my knowledge, the economics literature provides no support for any critical level of concentration or increase in concentration at which the ability to exercise market power is likely to occur in a particular market, much less in all markets.

In some markets with post-acquisition HHIs over 9000 points, the Commission has declined to take action, because, for example, entry appeared likely to defeat any attempt by incumbent firms to increase prices. In other, only moderately concentrated markets, the Commission has taken enforcement action, because an evaluation of other relevant considerations led to the conclusion that the exercise of market power was likely.[15]

The intriguing question is what, if any, further role concentration should play in the enforcement process beyond that of providing a starting point for the analysis. Should concentration be added back into our analysis, after we have considered other aspects of market performance, as another factor to weigh in our evaluation of likely competitive effects? When we challenge a transaction, should we forgo reliance on the sliding scale in our arguments to the courts? Where does concentration fit in our substantive law?

Enforcement guidelines inform the exercise of prosecutorial discretion; they do not constitute substantive law. Having made the decision to challenge a transaction, we properly could ignore the guidelines and urge the courts to consider any decisional law that supports us, including our own precedent and that of the D.C. Circuit on the sliding scale.

Analysis of the competitive implications of mergers is a complex and difficult task, and the temptation to find answers

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[14] Remarks by James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "60 Minutes with the Honorable James F. Rill," Before the American Bar Association's 40th Annual Antitrust Spring Meeting (April 3, 1992), at 13.

[15] E.g., B.F. Goodrich, 110 F.T.C. 207 (1988).

based on quantifiable, objective factors is immense. The sliding scale is intuitively attractive, but there are dangers in relying too heavily on concentration data in merger analysis. One risk is that reliance on levels of concentration may become a crutch. Its attractions may lead us to displace the time-consuming process of sifting through other, more probative facts or to make decisions based on relatively small differences in HHI numbers.

Merger decisions of the 1960's and 1970's have been much maligned for blocking transactions, on the basis of the numbers alone, that posed no threat to competition. Given the widespread recognition today that most mergers are competitively neutral or procompetitive, repetition of that enforcement approach is unlikely. In today's world, the result of greater reliance on numbers may be under-enforcement, particularly in moderately concentrated markets, rather than over-enforcement. Under-enforcement, of course, would be inconsistent with our mandate under Section 7 of the Clayton Act and likely to harm consumers.

Although we have made progress in our understanding of concentration and market structure, this is an area in which important questions remain. Antitrust analysis historically has benefited from new ways of looking at familiar patterns, fresh insights and new economic learning. The new Guidelines themselves are one example of continuing efforts to refine our analysis. No doubt this growth and refinement will continue in the 1990's and improve as the cross-fertilization of ideas becomes increasingly international.

Given the evolving state of competition policy around the world, it may take some time to achieve harmonization. Still, important similarities already exist. In our discussions with other agencies, we have seen a broad consensus on the basic principles of competition and an increasing interest in implementing those principles. We also have seen a high degree of congruency in the modes of analysis, in particular, in the efforts to integrate economic principles at every level. Merger analysis in both North America and Europe, for example, will include consideration of product and geographic market definition, measurement of market share and concentration data, conditions of entry and competitive effects.

The recent settlement in the Nestle/Perrier matter, announced by the E.C. last summer,[16] seems to suggest another broad area of consensus in the analysis of mergers: that the acquisition of either collusive or unilateral market power is a matter of enforcement concern. Before the Nestle decision was announced, there was speculation whether the E.C. merger control

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[16] Commission of the European Communities, Press Release, July 22, 1992.

regulation would reach collective as well as single firm dominance.[17] The E.C. concluded that if the Nestle acquisition had been allowed to go forward as proposed, two firms would have dominated the French bottled water market, with the joint ability to raise prices. The Financial Times called the Nestle settlement a "landmark development" that sets "an important long-term precedent."[18]

In the United States, we are accustomed to thinking about mergers in terms of the possibility of collusion, and the Merger Enforcement Guidelines of Canada, our major trading partner, recognize the possibility of either unilateral or interdependent exercise of market power.[19] The Nestle-Perrier case seems to focus on many of the same concerns. To the extent this is true, it may be a step toward convergence of competition policies. These similarities do not mean that we will necessarily reach the same conclusions. Other aspects of merger enforcement and competition policy differ from country to country, and, of course, different countries will be concerned about effects in different markets.

We can approach congruity of competition policy on three different levels, textual, procedural and analytical. At the first level, the letter of the laws rarely is identical. There are some important differences, but to the extent that the laws are informed by the same economic principles of competition and the same modes of analysis, these differences become less important.

Second, procedures often are different under different antitrust regimes. These differences may be costly for those who must comply with more than one law. It is worthwhile to examine these differences, the costs that they may impose and the feasibility of changes that may make them less costly.

Third is the analytical approach to antitrust issues. It is in this important area that a consensus appears to be evolving. Some jurisdictions may address additional considerations in making competition decisions, such as the protection of jobs or

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[17] See Lever, "Substantive Review Under the EEC Merger Regulation: A Private Perspective," 1990 Fordham Corporate Law Inst., International Mergers and Joint Ventures 503, 533-44 (B. Hawke ed. 1991).

[18] Financial Times, July 23, 1992.

[19] Merger Enforcement Guidelines Under Canada's Competition Act Adopted by the Director of Investigation and Research ¶ 2.1 (April 17, 1991), reprinted in Special Supplement, 60 Antitrust Trade Reg. Rep. (BNA) No. 1513 (April 25, 1991).

the need to integrate markets. But in analyzing the competitive impact of conduct and transactions, a familiar language and approach is becoming evident.

Progress toward formal convergence among antitrust systems may be sporadic and possibly slow, because of differences unrelated to competition analysis, such as differences among our political systems and our legal systems. Because of the importance of competition issues and antitrust enforcement to international commerce and competitiveness, we should try to be open to new ways of doing things that are consistent with the basic goal of maintaining competition. In the meantime, the easiest and perhaps the strongest basis on which to build common ground may lie in our discussions or debates concerning the analytical approach to antitrust issues. Progress toward convergence in analysis is likely to proceed on the merits of the ideas, unimpeded by other differences that may separate us. The increased understanding and cooperation among enforcement agencies that we now see are incremental but important steps toward this goal.