HARMONIZING GLOBAL COMPETITION PRACTICES TO BENEFIT CONSUMERS, STIMULATE TRADE

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by

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More than 60 years ago, that often silent man Calvin Coolidge spoke long enough to coin a truism: "The chief business of the American people is business." Were he alive today, I am sure he would have to say "the business of America is world business." Whether we talk about one global market or a series of interdependent economies and trading blocs, the truth is that for an increasing number of firms, playing, and even winning, on the home field is no longer a guarantee of continued success and growth. Consumers in many countries are demanding and receiving imported goods to supplement or replace domestic offerings. On all continents this process is expanding and accelerating.

Many of the rules that guide and govern transnational commercial transactions are matters of trade law or policy, areas which are beyond the mandate of my commission, despite its misleading title. Our business is competition and the antitrust laws that seek to preserve and foster it. We believe that competition rather than government action is the best way to set prices and allocate resources. However, we may be forgiven a small measure of pride that the U.S. first recognized that when the invisible hand falters, the government must intervene to protect markets against the variety of distortions that private enterprise can devise. Last week, in fact, I attended a party that could only have happened in Washington: we gathered to celebrate the 100th anniversary of the passage of the Sherman Antitrust Act of 1890. It is a landmark worth noting. As

Attorney General Thornburgh reminded us, Supreme Court Justice Marshall has said "antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."

In those 100 years other nations have realized the importance of competition policies and they have passed laws, drafted rules and created regulatory bodies to implement them. There has never been an exact congruence between the antitrust laws and enforcement policies of the U.S. and our trading partners, but my theme today is the welcome news that those policies are beginning to converge. Progress has been gradual, at some times hesitant, but the pace is quickening. I will outline for you our efforts at harmonization with our traditionally important allies, such as Japan and the European Community, but I am particularly pleased to be able to report on recent discussions with a number of the new governments in Eastern Europe. The political revolutions they have achieved can only be sustained by economic transformations and we have a special responsibility, and the special privilege of assisting in the birth of newly competitive markets that will soon join the global trading system.

At the outset I would like to emphasize why an eventual harmonization of competition rules is important to all producers and all consumers, in Wisconsin, the United States and the world. Obviously trade laws are very significant, but many of the

competitive decisions and strategies of firms must sensibly be guided, if not determined, by the antitrust laws of the countries where they do business or wish to. When those laws differ, firms will face at a minimum the added costs of discovering the differences and adjusting their behavior, and may well run the added risk of penalties if their adjustments are found to be insufficient. When the laws are unwise or non-existent, the markets may be constrained or distorted in ways that impede efficient trading and production.

It is most encouraging to observe an increasing agreement among nations that the ultimate goal of competition policy must be to maximize the welfare of consumers by maintaining efficient and competitive markets. In other countries, and in the U.S. at other times, antitrust laws have been used -- and some would say abused -- to further policies that should properly be advanced by other means. However, as antitrust philosophies and substantive laws converge, producers in all countries will be able to find more predictable answers to the questions that guide their actions: In which countries is this business practice or method of distribution legal? Will this transnational acquisition be approved in all countries that might seek to exercise jurisdiction? What reports, what information will be required? How long will the review process take? As the costs and uncertainties of dealing with many disparate rules and enforcement authorities decrease, firms can get on with the

business of efficient production and distribution in a global economy. Consumers will be the ultimate beneficiaries from competitive markets where all players are subject to the same rules.

European Community

Recent discussions with officials from the European Community (EC) and its member-states suggest that in terms of philosophy and enforcement the US and the EC are following increasingly similar competition policies. An important example is their recently adopted competition policy directive that for the first time authorizes the enforcement authorities to examine mergers and joint ventures before they are consummated. In conception and scope the directive is very similar to the Hart-Scott-Rodino Act procedures followed by the FTC and the Antitrust Division of the Justice Department. The Commission in Brussels must determine whether a potential merger or joint venture that is within the scope of its jurisdiction raises serious competitive concerns. If it does, the Commission will initiate an investigation and must issue a final decision within four months.

The analytical approaches are parallel as well. The EC's "dominant power" test is similar to the "create or enhance market power" test used here. Both analyses rest on an assessment of

whether a joint venture or firm subsequent to a merger will have the ability to raise prices individually or significantly increase the chances of collusive behavior among the remaining competitive entities.

While a relatively "high" market share resulting from a merger or joint venture creates a presumption of market power in the U.S. and dominant power in the EC, both regimes look at a number of other factors as well, such as foreign competition and entry barriers, although the significance of each is not necessarily identical in the two regimes. For example, the Commission's May 1989 report, "Horizontal Mergers and Competition Policy in the European Community," commented that "foreign competition is not a perfect substitute for domestic competition in that import flows are subject to extra uncertainties that do not affect domestic production." Under our analysis, we would not assume that conclusion, but would look at the particular facts before us.

On what I might refer to as the procedural side, there is already a significant degree of coordination among the world's competition authorities. The U.S. has negotiated formal, bilateral antitrust cooperation agreements with a number of countries and the 1986 OECD Recommendation on Notification and Cooperation is observed by the members of that organization. In a recent speech Sir Leon Brittan, the European competition czar,

proposed a formal antitrust treaty between the E.C. and the U.S. that would deal with consultations, exchanges of information, some degree of cooperative enforcement and perhaps a method of deciding which party will exercise jurisdiction when both have grounds to assert it. I believe the idea has much to recommend it and I will propose that this matter be on the top of the agenda for our annual consultation with the Community later this year. Achieving agreement on such a broad charter for cooperation will not be easy, but businesses and consumers on both sides of the Atlantic will benefit greatly if we are able to do so. For example, similar reporting requirements for mergers, as suggested above, are likely to reduce the cost of merging firms complying with antitrust laws and speed the evaluation process. These cost and time savings will benefit consumers. When there is no competitive problem, consumers should receive lower cost products sooner. When a merger would increase prices to consumers, it is more likely to be blocked.

Eastern Europe

Turning to Eastern Europe, Assistant Attorney General for Antitrust James Rill and I have recently returned from a two week trip to Czechoslovakia, Hungary, and Poland.

As you are aware, in each of these countries, prior Communist governments granted legal monopolies to what ultimately

became large, state-owned firms, each sheltered from domestic and international competition. Prices and outputs of these firms were bureaucratically determined by central authorities. Sad to say, the consequences were both predictable and disastrous. Managers had little incentive to improve quality or efficiency. Price controls inevitably suppressed the vital information about consumer preferences that competitive markets transmit quickly to entrepreneurs and business managers.

The new governments now face a daunting challenge: to create economies that can satisfy the needs of their people and compete successfully in world markets. For most of them, privatization of state-owned enterprises and the decontrol of prices are seen as central to the overall goal of promoting free markets. Of course, privatization without competition will create only private monopolies and the officials we met are sensitive to the need to establish entities able to compete and rules to guarantee that they do so.

I turn now to some specific perceptions of Poland, Hungary, and Czechoslovakia regarding competition policy.

In Warsaw, our delegation visited Polish government officials, including the President of the newly created Antimonopoly Commission, Dr. Anna Fornalczyk. We reviewed

Poland's "shock therapy" economic program, launched in January, and discussed in detail their newly enacted Antimonopoly Law.

The Polish Parliament is currently debating how best to privatize state enterprises. The absence of generally accepted accounting procedures and market prices for capital assets makes any meaningful economic valuation of the firms extremely difficult. Since Poland lacks private banks and domestic capital markets to finance the acquisition of the state monopolies by Polish citizens, many Poles fear that rapid privatization may allow foreign investors to "buy the country at fire sale prices." Proposals to allow employees to purchase at minimal prices up to 20 percent of newly created stock may allay some of these fears, but may at the same time discourage foreign investors who do not wish to share ownership or the responsibility for management decisions.

According to Polish officials, only 8 percent of firms account for 45 percent of output. They realize that many of the large firms must be broken up into smaller, potentially competitive entities, and foreign competition must be introduced. However, they are unsure how best to disassemble these monopolies. For example, one suggestion was that the state oil monopoly be broken up into a series of successive monopolies -- one refinery company, one distribution company, and one gasoline retailer -- rather than into several competing firms at each

level. Such a proposal would run the risk of adding monopoly price onto monopoly price, perhaps resulting in a higher price than a single integrated monopolist would charge.

To foster entrepreneurial culture and provide a means of breaking up some state monopolies, the Polish Parliament enacted a competition law on February 24, 1990, modeled after similar laws in Western European countries and the United States. We discussed various aspects of the new statute and its implementation, highlighting the areas that we felt were useful and warning about potential abuses likely to arise in other areas.

Subsequent to these discussions, the Poles made specific requests for technical assistance and training on competition policy matters. We will be sending several experts to Warsaw later this summer and initiate a personnel exchange program.

Our delegation also met with the President of the Hungarian Price Office, Mr. Ferenc Vissi, and other officials in Budapest.

The Hungarian economy, too, is still dominated by state monopolies, although there seem to be more small businesses and existing joint ventures with Western firms in Hungary than in Poland. Hungarian government officials believe that the implementation of a competition policy would help forestall

monopolistic abuses after privatization. However, they expressed concern over the fast pace of the transformation to a market economy occurring in Poland, and expressed a preference for a more gradual approach. The sale by the prior Communist government of a hotel chain to foreign investors, at what was perceived to be a very low price, seems to have temporarily slowed the pace of privatization in Hungary. Nevertheless, government officials insisted that they would privatize during the next five years up to 80 percent of the firms now currently state-owned.

The Hungarians have drafted a competition law, based loosely on the West German statute. Their parliament will debate the draft later this year and passage is expected with minor amendments. We discussed the draft competition law extensively and expressed our view that it may do too much to protect individual competitors rather than the competitive process. In some respects the analytic approach in the draft is different from U.S. law. It appears to make many business restrictions contained in contracts between buyers and sellers (what we call vertical non-price restraints) per se illegal, while horizontal restraints such as price-fixing and boycotts, are judged under a rule of reason. In the U.S. most vertical restraints are analyzed under the rule of reason and price-fixing is illegal per se. In such a different climate, foreign franchises that may be efficient could be discouraged from locating in Hungary.

Furthermore, the draft law makes "price gouging" illegal and officials may control prices if they do not like the results that the market produces. We observed that there are dangers in perpetuating government control of prices, rather than letting the market and competition policy constrain prices. Such actions could discourage investment in Hungary by foreign firms.

In Prague, we met with President Vaclav Havel and his economic advisors, discussing Czechoslovakia's plans to develop and implement a competition law as part of its overall plan to move toward a market economy. We discussed competition in the context of privatization and the restructuring of state enterprises. The Czechs and the Slovaks are well aware that privatization will have much less effect if private incentives are stilted. Our further assistance was requested, and we plan to provide assistance as the Czechoslovak Federal Price Board is transformed into a competition law enforcement agency.

Change -- and at least the possible convergence of competition policies -- is not confined to Europe.

For many years Japan has had substantive antitrust laws that parallel our own, but there have been accusations that enforcement has not been as vigorous as it has been in this country. Japanese competition policy is now a major issue in the

on-going Structural Impediment Initiative talks between our two governments.

Press reports indicate that the Japanese government plans to strengthen enforcement activities in a number of ways. They will establish a advisory panel to determine how much to increase the penalties for price-fixing. The Japan Fair Trade Commission has increased its staffing levels by a significant number and it will establish a permanent body to work with the Justice Ministry and Public Prosecutor to promote more effective controls on anticompetitive practices. The JFTC may also be authorized to provide Courts with the results of their investigations so private parties will have a better chance to bring and win cases against companies that violate the Anti-Monopoly law. We will discuss all these matters during our annual consultations with the JFTC later this year.

It is certainly too soon to know how great an effect these promised changes will have. A common complaint of American firms seeking to do business in Japan is that their efforts are often thwarted by anticompetitive practices that would not be tolerated in this country. To the extent the JFTC and the Japanese government follow through, foreign firms can expect to have a better chance to compete.

Conclusion

While the developments I have discussed today are encouraging, there is always more to be done. We are constantly looking for ways to increase the level of cooperation and coordination among enforcement authorities, from informal consultations to new bilateral agreements. As national and supranational legislatures consider new or revised competition laws, I believe we are right to hope that their provisions and enforcement standards will move closer to our own. It is heartening that many countries are asking us to share the lessons we have learned in the past 100 years. I would not have believed a short year ago, for example, that the antitrust agencies would be asked for expert staff comment on an antitrust law for the Soviet Union. As we enter the second century of antitrust policy, we may not have achieved perfect harmony, but at least we are all starting to sing a similar tune.

Thank you.