RECENT DEVELOPMENTS IN THE MERGER REVIEW PROCESS IN THE UNITED STATES AND THE INTERNATIONAL COMPETITION NETWORK

Remarks before the International Bar Association and Japanese Federation of Bar Associations

Conference on International Competition Enforcement
Tokyo, Japan
April 20, 2005

William Blumenthal
General Counsel
Federal Trade Commission
Washington, D.C.

I am pleased to be here in Tokyo this afternoon to appear before this conference of the International Bar Association and the Nichibenren (Japanese Federation of Bar Associations). I welcome the opportunity to appear as a United States representative.

As is our standard practice, I need to clarify that the views I will be expressing are my own and do not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. I can report, however, that I was on the phone with Washington this morning – last evening in local Washington time – and that my colleagues were delighted by the news of the then-impending, now-realized passage of the amendments to the Antimonopoly Law. We extend our congratulations to the Japan Fair Trade Commission on the passage of legislation on which they have been working for a long time. We extend our appreciation to the Nichibenren for its support of the legislation, which will benefit both Japan and the world community. And we extend our continued willingness to offer whatever assistance we can provide as Japan moves forward with the details of implementing the amendments over the next two years.

Let me turn to the topic I was asked to address this afternoon, Recent Developments in the Merger Review Process in the United States and the International Competition Network.

THE ICN AS STARTING POINT

I will begin with the ICN as a starting point for our discussion. "ICN and Harmonisation" is the topic for the next panel this afternoon, so I don't want to dwell on those

issues at too much length. But recent merger developments in the US – and, I would submit, in Europe, Japan, and elsewhere – have to be understood in the context of the convergence efforts that were launched in October 2001 through the ICN and of the related, longer-standing coordination efforts at the OECD. The US has been devoting substantial resources to the work of the ICN. We believe that scope of the effort has been justified, and we believe the effort is bearing fruit.

The ICN conducts its activities through several working groups, which address various issues in the broad field of competition law and policy. Because this panel is focused on merger control, though, I will limit my remarks here to ICN's merger-related activities. We have been devoting resources to all three of ICN's working subgroups in the merger field – Notification and Procedures, Analytical Framework, and Investigative Techniques. All of the subgroups have made important contributions, and we are especially proud of the Recommended Practices for Merger Notification Procedures that have emerged from the Notification and Procedures subgroup. The Recommended Practices that have been adopted by ICN to date address eleven topics:

(1) sufficient nexus between the transaction's effects and the reviewing jurisdiction,
(2) clear and objective notification thresholds,
(3) flexibility in the timing of merger notification,
(4) merger review periods,
(5) requirements for initial notification,
(6) conduct of merger investigations,
(7) procedural fairness,
(8) transparency,
(9) confidentiality,
(10) interagency coordination, and
(11) periodic review of merger control provisions.

Two additional topics will be taken up at the ICN's next annual conference, to be held in Bonn, Germany in early June – (12) remedies and (13) agency powers.

Many of the Recommended Practices can be traced back to work undertaken during the late 1990s by the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD. That work effort came full circle last year, when the OECD adopted a Merger Recommendation with elements that are substantially similar to many of the ICN Recommended Practices. We are mindful of the tremendous assistance that the private sector has provided through the work of the ICC and BIAC, through a parallel work effort under the auspices of the IBA, through earlier participation in the International Competition Policy Advisory Committee in the United States, and through recent and ongoing participation in ICN's working groups. Several members of the Japanese bar have been involved in those efforts, and we hope that the Nichibenren and other private sector groups in Japan will become increasingly active in the global efforts to achieve convergence on economically well-founded principles in the competition field.

Throughout the world we are seeing jurisdictions that have taken steps to bring their merger review systems into conformity with the ICN Recommended Practices or that have begun the process of doing so. We are aware of 27 jurisdictions outside the United States that have made or proposed changes that would bring their merger regimes into closer conformity with the ICN's Recommended Practices. An additional eight ICN members are considering making changes to bring their laws into closer compliance, including three jurisdictions that do not currently have merger regimes. This is out of an ICN membership of 88 member agencies from 78 jurisdictions.

Last year, at the ICN Annual Conference in Seoul, 22% of ICN member jurisdictions with merger laws indicated that they had made or were planning changes that would bring their regimes into greater conformity. As of today, 46% of member jurisdictions with merger laws have made or have proposed changes, and an additional 8% are planning to make changes.

Based on work of the Notification and Procedures subgroup that is to be presented in Bonn, a few notable achievements in jurisdictions other than the US are worthy of mention here. The first is Australia. After the Seoul conference, the ACCC commenced a project to prepare new Guidelines on the ACCC's Informal Merger Process based on the ICN Recommended Practices.[1] The Guidelines, circulated last year, are supported both by the Australian bar (The Law Council of Australia Trade Practices Committee) and by the business community (the Business Council of Australia). Specific changes include the standardization of the informal notification procedure (including timeframes, information requirements), new rules on communication with ACCC staff and commissioners, the option of a statement of concerns to the parties, and additional transparency as to reasons for the decision.

A second notable jurisdiction is Brazil. The agencies there have used the Recommended Practices as a benchmark of international best practice for merger review, allowing them to identify specific areas for improvement in the Brazilian regime. In order to effect change more rapidly, the agencies have begun by initiating reform in areas under their control. One of the most important changes has been clarification in the local nexus requirement for merger notification.[2] A second important change was the adoption of an informal "fast track" or "simplified procedure" review for mergers that do not raise substantive concerns. Beyond their own practices, though, the agencies are calling for legislative amendments – the agencies recently agreed on the text of a draft bill that aims to correct many of the limitations of Brazil's current merger review system. The draft proposes to abandon the current post-merger review system in favor of a pre-merger review system; to adopt clear, objective notification thresholds (based exclusively on the parties' sales in Brazil); and to adopt shorter, defined deadlines and a

[1] Graeme Samuel of the ACCC was quoted as saying: "We acknowledge our own practices must measure up to the world's best practice, as spelled out in the ICN recommendations. To that end we are in the process of developing additional guidelines that address the ICN recommendations."

[2] In January 2005, CADE issued the *ASC/Krone* decision, in which the Tribunal reinterpreted the Brazilian merger threshold rules to exclude notification of transactions involving parties that do not have turnover equal to or exceeding R$400 million in Brazil. Previously, this threshold had been interpreted as applying to the parties' worldwide sales. The former interpretation of the threshold rules required notification of a number of transactions with limited nexus to Brazil.

more streamlined process for review and decision-making. All of these proposals are aimed at conformity with the ICN Recommended Practices.

DEVELOPMENTS IN UNITED STATES MERGER PROCEDURES

Like our colleagues throughout the world, the enforcement agencies in the United States are taking steps to adopt procedural enhancements of the types urged by the ICN. Among the developments and the efforts in progress are the following:

Merger Process Task Force

In work undertaken during the period 2000-03, PricewaterhouseCoopers was commissioned by the International Bar Association, together with the American Bar Association's Antitrust Section, to survey the time and cost to the business community of merger reviews around the globe. The survey identified Brazil as the jurisdiction characterized by the longest delay, and we are cheered to see that the Brazilian competition agencies have taken that criticism to heart as they try to adopt the new, expedited process described above. We are mindful that the survey also identified the United States as the jurisdiction characterized by the most onerous cost load during the Second Phase of the merger review process for those transactions requiring a comprehensive review, and we are carefully examining the process in hopes of fashioning reforms that will enable us to reduce the burden without compromising the ability of the agency to execute its enforcement obligations.

In particular, our Chairman has established a task force to examine the merger review process and to recommend improvements. The task force is currently conducting its work. Its detailed examination embraces all steps in the merger process –

- the information requested on the Hart-Scott-Rodino notification and report form,
- the manner in which initial review is conducted during the First Phase, which in the United States typically lasts thirty days,
- the scope of information requests during the Second Phase and the requirements for parties to be deemed in compliance, and
- the content of the analysis to aid public comment.

The task force recognizes that burdens affect both the government agencies and the private sector. It also recognizes that reforms can be achieved through a variety of vehicles. The initial areas for likely reform are those within the immediate control of the agencies and the private sector, as distinct from reforms that would require legislation.

These initiatives follow on prior work. Notably, in merger review process improvements adopted in 2000, the U.S. Department of Justice provided for centralized high-level review of Second Requests prior to issuance and for early conferences with the merging parties to identify competitive issues. Similarly, in Guidelines for Merger Investigations issued in 2002, the FTC's Bureau of Competition adopted steps aimed at improving procedural fairness, such as releasing

investigational hearing transcripts to witnesses and providing for an appeals process for failed second request negotiations.

Other Merger Process Steps Intended to Reduce Burden

Beyond the work of the Merger Process Task Force and its recent antecedents, the United States has undertaken other steps that are consistent with the burden-easing recommendations of the ICN's Recommended Practices:

- The US/EC Best Practices on Cooperation in Merger Investigations, issued in October 2002,
- The publication last year of a Model Second Request tailored specifically to transactions in the retail industry, and
- The updating of the HSR notification thresholds.

We are also in the process of undertaking several other projects that warrant mention:

- Updating of the HSR model Second Request, with annotations.
- Determining the most effective approaches to identifying responsive materials stored in electronic formats
- Improving the government's ability to receive and review electronic productions, and
- Developing a model letter to modify the standard Second Request instructions to permit, and provide specifications for, electronic production.

The various merger process steps are important, because the level of merger activity has increased from the trough of the early part of the decade. Last year, the enforcement agencies in the United States received 40% more merger filings compared to the previous year, with a commensurate increase in the number of mergers requiring investigation. While both the FTC and DOJ continually look to improve our processes, we would like to implement improvements before we are enveloped by a new merger wave.

Recent Improvements Aimed at Transparency

Other procedural improvements relate to the ICN Recommended Practice that treats transparency.

Additional Explanations of Merger Investigation Outcomes. The enforcement agencies have begun to offer a reasoned explanation for clearance decisions that follow a Second Phase review and that set a precedent or represent a shift in enforcement policy or practice.[3] This

[3] Key illustrations are the Commission's decision by 3-2 vote in July 2004 to close its investigation into the consummated hospital merger of Victory and St. Therese hospitals in the Waukegan, Illinois area (majority statement and dissent available at http://www.ftc.gov/opa/2004/07/waukegan.htm); the Commission's unanimous decision in June 2004 to close its investigation into the proposed merger of RJ Reynolds Tobacco Holdings, Inc. and Brown & Williamson, the United States subsidiary of British American Tobacco p.l.c. (majority statement and concurrence available at http://www.ftc.gov/opa/2004/06/batrjr.htm); and the Commission's decision by by 3-2 vote in October

differs from the practice in the European Union, which issues at least a brief statement with respect to every clearance decision. But it also differs from the prior practice in the United States, which historically offered explanations only with respect to intervention decisions. The introduction of public explanations for at least selected non-intervention decisions is novel and, we believe, in the public interest.

Increased Data on Merger Investigations and Challenges. The enforcement agencies have released reports and background data to provide the public with a clearer picture of enforcement policies and standards. In February 2004 the FTC and DOJ issued a report summarizing market concentration data sorted by market for both agencies' merger challenges over the period 1999-2003. The data, derived from 151 horizontal merger investigations, contained market share and concentration levels associated with more than 780 markets. In February 2005 the FTC released an econometric analysis of the data that showed no structural shift in enforcement patterns over the eight years covered by the study.

The Merger Guidelines Commentary Project. In February 2004 the FTC and DOJ jointly sponsored a three-day workshop aimed at assessing the efficacy of the 1992 Merger Guidelines. Workshop participants expressed a consensus that (i) the Guidelines' framework is deeply embedded in mainstream thinking on the factors to be considered in sound merger analysis and (ii) further elaboration on the application of the Guidelines would be useful. This encouraged our Chairman to seek greater transparency in the application of the Guidelines, and she established a task force of attorneys and economists to develop a commentary on the guidelines. Staff from the FTC and DOJ will work together to develop the commentary. Informed by the experience of the last twelve years, the commentary is expected to increase transparency by clarifying how the agencies apply the Guidelines in practice.

CONCLUDING REMARKS

We appreciate having had this opportunity to discuss recent developments in the merger review process in the United States, with a particular eye toward how those developments relate to the important ongoing work of the International Competition Network. Let me close by reiterating my earlier point on the value of the private sector's contribution to the ICN's projects. We are grateful for that assistance, and we hope that the Nichibenren and other private sector groups in Japan will become increasingly active in the global efforts to achieve thoughtful convergence in the competition field.

2002 to close its investigation into two proposed transactions in the cruise industry, the friendly creation of a "dual-listed company" combining Royal Caribbean Cruises, Ltd. and P&O Princess Cruises plc and the competing hostile tender offer by Carnival Corporation (Carnival) for Princess (majority statement and dissent available at http://www.ftc.gov/opa/2002/10/cruiselines.htm).