REFLECTIONS ON THE EVOLUTION OF EUROPEAN COMMUNITY COMPETITION POLICY UNDER COMMISSIONER MONTI

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Good morning. I am delighted to have the opportunity to open this conference on "The New European Antitrust Regime." Many thanks to the George Mason Law Review and to Howrey Simon Arnold & White.

Fall is the season when the antitrust community turns its attention to international issues, as we approach the Fordham Conference and the October OECD meetings. For enforcers, however, there is no "off-season." Rather, the international component of our work now envelops it. The focus on so-called international issues, which has captured the attention of the business community and the bar for the past several years is, no fad. For enforcers—and not to mention for multinationals, to which this conference is directed—dealing with competition issues on a global basis is an imperative and, indeed, it has become a daily responsibility.

That, I believe, is a good thing and it was, for me, the theme of the recent meetings I attended in Brussels. Last week, Assistant Attorney General Hew Pate and I led the U.S. delegation in our annual bilateral consultations with our colleagues at the European Commission. I have had the privilege of being involved in such meetings for four years running. What was so plain to me last week was the strong and vibrant working relationship between the two jurisdictions—emphasis on "working"—even as compared to four years ago. On the surface, it might have seemed that not much could be accomplished during the discussions in a year like this, with Commissioner Monti preparing to turn over the reins to his successor and the U.S. presidential elections looming. Those musings are wrong for two reasons. First, the enforcement work in both jurisdictions is too important to slow down, even during transition times. Second, transatlantic cooperation is now woven into the enforcement fabric of both jurisdictions. It cannot simply be turned on and off.

The meeting produced no great pronouncements that would be considered "newsworthy"; good government seldom does. I was struck, though, by how much we have accomplished. We are working together—not politely listening to one another while looking to dodge the next divergence—but truly working together. Our discussions last week were candid, infor-

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* Chairman, The Federal Trade Commission. The views expressed in this speech are the author's own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

mative, and productive. In fact, that one day of meetings simply symbolizes the work that we and our staffs are doing together daily. This should be regarded as good news for the market, which benefits from cooperation between the U.S. and the EU authorities and our joint efforts to promote sound antitrust policy and enforcement.

Our meetings in Brussels were, however, tinged with sadness in one major respect. As agency-to-agency relationships are formed and developed, so, too, are personal relationships. And last week was the last time we would be holding these consultations with Commissioner Mario Monti. It has been both a professional and personal privilege for me to have worked with Commissioner Monti. In my view, the strength of the U.S.-EU relationship is, in no small measure, a testament to his leadership and vision. It is therefore a special privilege for me to be able to say a few words this morning about my colleague and friend, Commissioner Monti.

During the various panels today, you will, of course, have the opportunity to discuss Commissioner Monti's many specific accomplishments as Competition Commissioner. It would be impossible to discuss the "New European Antitrust Regime" without discussing modernization, strong cartel enforcement, merger reform, internal reform, the embrace of economic thinking, and other developments that he engineered. So, I will share some thoughts about one particular feature of Commissioner Monti's tenure—how he has risen to the challenges of his time by confronting adversity and adapting to changed circumstances in a way that leaves the Commission stronger.

Several weeks ago, we lost a law and economics pioneer when Aaron Director died at the age of 102. Aaron Director is widely believed to have been the intellectual godfather of the law and economics movement which revolutionized antitrust thinking and, eventually, practice in the United States. Although he was almost a lone voice in the woods when he wrote and taught at the University of Chicago in the 1950s, over time, his views made their way into the academy and, eventually, into the courts. Along the way, he made his mark by teaching a generation of students that included Richard Posner and Robert Bork. Aaron Director's teachings contributed enormously to the intellectual foundations for the landmark decisions, such as *GTE Sylvania* and *General Dynamics,*[1] that we hail as turning points for U.S. antitrust.

But even as the courts were reflecting the new learning, the antitrust agencies had not yet caught up. One case after another, in almost every substantive area—Section 1, Section 2, Section 7, even Section 5 of the Federal Trade Commission ("FTC") Act—failed before the federal courts.

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[1] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

In striking down the agency challenges, courts rejected not only the legal theories but also the agencies' evidence and processes. As FTC General Counsel Bill Kovacic noted in his 2002 Fordham speech, "You do not have to read too far between the lines in these decisions to see a palpable distrust of the capability and the judgment of the FTC."[2]

In the early 1980s, new leadership came to the agencies in the persons of Bill Baxter at the Department of Justice ("DOJ") and, at the FTC, the first economist Chairman, Jim Miller, who chose, as head first of the Consumer Protection Bureau and then of the Bureau of Competition, a 31-year old protégé of the law and economics movement named Timothy Muris. Under these new leaders, the agencies made sweeping changes in their enforcement policies, putting into effect the economically-based learning that had implanted itself in the courts.

In relatively short order, the FTC's woeful track record in the courts showed dramatic improvement. Although not everyone in the antitrust community was immediately converted, the antitrust policies adopted during that era became the basis of the broad consensus in antitrust policy that still prevails in the United States today.

So, too, has Commissioner Monti faced criticism and adverse court decisions that laid down new and stricter standards for the decisions of the European Commission. In the well-known trilogy of *Airtours*, *Schneider/LeGrand*, and *Tetra Laval/Sidel*, the Court of First Instance reversed Commission decisions to block mergers, demanding a higher standard of evidence and proof.[3]

There are many possible reactions that an incumbent can have when facing criticism. These include denial, anger, hand-wringing, and withdrawal. They are all natural reactions, and ones we have seen from many who have faced trials in public service. Headline writers and enemies of competition policy crowed that "Super Mario" had been laid low, and even that he might be forced to resign.

But those who uttered such words badly underestimated the Commissioner. Instead of reacting defensively or defiantly, Commissioner Monti took the Court's decisions not as a setback but as an opportunity. I suspect that when the Commissioner told a reporter that the Court's rulings showed

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2 Remarks of William E. Kovacic (Oct. 31, 2002), *in* ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 414 (Juris Pub. 2003).

3 Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2585; Case T-77/02, Schneider Elec. v. Comm'n, 2002 E.C.R. II-4201; Case T-5/02, Tetra Laval v. Comm'n, 2002 E.C.R. II-4381. I should note that, newspaper headlines to the contrary, the recent reversal of the Commission's *MCI WorldCom/Sprint* decision is not relevant to this discussion because it rests on a purely technical procedural issue.

that, contrary to popular impression, there *was* effective judicial review of the Commission's decisions, his tongue was only half in cheek.

The Commission had been subject to criticism, sometimes withering, perhaps even including from some in this room, for the way it conducted merger investigations. According to the critics, the Commission's processes lacked objectivity, suffered from a lack of economic analysis, were non-transparent, and failed to incorporate the checks and balances necessary to produce sound results. In addition to procedural issues, many criticized the substantive merger test, which was enshrined in the Commission's merger regulation since its inception, for being inconsistent with the U.S. standard and for leaving a gap that deprived the Commission of the ability to deal with a class of anticompetitive mergers, including *Airtours*.

Fast forward to 2004—a strikingly short period of time since the court decisions, given the length of time necessary for reform proposals to germinate, to be vetted internally and externally, to be approved, and to be implemented. The merger review process at the Commission today reflects so many reforms that it differs significantly from the process that Commissioner Monti inherited when he began his term. Indeed, I recently heard a Brussels competition lawyer start to criticize the Commission on some point, only to stop himself and sheepishly admit that the bar had gotten what it asked for.

First, as you know, after vigorous debate, the substantive merger test has been changed in a way that should eliminate the alleged gap in the Commission's ability to address certain non-coordinated oligopoly behavior such as that at issue in *Airtours*. At the same time, the Commission issued guidelines for the analysis of horizontal mergers and for best practices, increasing the transparency of the Commission's internal process and promoting certainty to the business community.

Second, Commissioner Monti instituted the so-called devil's advocate process, whereby lawyers and economists who have not been involved in a major investigation take a fresh and critical look at the theories and evidence, and make an independent evaluation of the strengths and weaknesses of the case. My understanding is that these panels have already played a critical role in informing the decision-makers and influencing the outcomes of important matters at the Commission.

Third, the Commission has dramatically increased the importance of economists and economic analysis in the Commission's decision-making process. The hiring of Lars Hendrik Röller as a Chief Economist, and a team of economists that report to him rather than to the head of the case team, has brought a strong, independent voice to the analysis of significant mergers and other cases.

These reforms are just some of the reforms in the merger area. Non-merger antitrust enforcement was modernized by scrapping a voluntary notification scheme that had become a burden, rather than an aid, to enforcement. Modernization has also federalized enforcement in ways that we in the United States can easily recognize. The EU Member State Competition Authorities are now empowered to enforce Articles 81 and 82 of the EU Treaty, including the authority to exempt agreements—a power over which the European Commission held a monopoly. This sharing of power with the Member States recognizes that an enlarged European Union is a more diverse Union and that Member State competition authorities may be better placed than Brussels to address more local competitive problems.

There will always be critics, and that is healthy for those of us who serve in government. But, any way you slice it, to launch this ambitious reform program, which overturned longstanding ways of doing business, took vision and courage —the courage to see clearly the deficiencies in one's own organizations and propose the steps necessary to correct them. To see the reforms through to enactment and implementation took great skill and leadership. I know that the DG-COMP that Commissioner Monti leaves behind is a stronger organization than the one he inherited five years ago.

Lest you think me a blind devotee, I remind you that Commissioner Monti and I do not always agree. Indeed, I was right in the middle of both major decisions in which the two jurisdictions diverged during the last few years: *GE/Honeywell* and *Microsoft*. I have no doubt there will be other disagreements; good heavens, we have those within jurisdictions. Fortunately, a strong cooperative relationship does not require total agreement. And my disagreements with the Commissioner on individual matters—even matters as important as the two I mentioned—do not detract from my overall admiration for his accomplishments, and for the way in which he achieved them. Indeed, they show that it is possible to disagree in a manner that is both civilized and productive.

As you know, during the past month and a half, the FTC and DOJ have had some disappointments of their own in the U.S. courts. I am speaking, of course, of our own trilogy of district court decisions rejecting the agencies' challenges to the Arch Coal, Oracle/PeopleSoft, and Dairy Farmers of America mergers.

I can assure you that we are studying these decisions carefully and considering how we should respond. In the United States, we have, as I mentioned, been through this before. But in one sense, the current cases are more analogous to the recent experience of the EC than to the losses of the 1970s in the sense that they are based, in part, on questions of evidence and proof rather than on fundamental antitrust doctrine. In facing our current

challenges, we can undoubtedly learn from the way that Commissioner Monti handled his own setbacks.

For Europe, as for the United States, there is always much more that remains to be done. While we have had great success in achieving widespread adoption of Aaron Director's reliance on free market principles as the surest way to maximize consumer welfare, we apparently cannot take this reliance for granted. Last week, the European Parliament demonstrated that we must continue to evangelize the first principle that a free market produces robust competition and that competition best serves consumers. Apparently, some members of the Parliament—and they are not alone—buy into what I call the false dichotomy of antitrust enforcement. The false dichotomy supports the view that businesses and consumers are perpetually at war and, consequently, one cannot simultaneously stand up for the market and stand up for the consumer. According to such logic (or, shall I say, illogic) decisions by competition enforcers may be good for business or may be good for consumers, but they cannot simultaneously be good for both. Those who perpetuate the false dichotomy often seem to presume that enforcement actions are always good for consumers and bad for business, and decisions to refrain from taking enforcement actions are always good for business and bad for consumers.

At a hearing regarding the nomination of Neelie Kroes to succeed Commissioner Monti, Members of Parliament, as advertised, hammered Ms. Kroes with questions asking how she could possibly enforce Europe's competition rules if she previously has served as a director on the boards of private corporations. The tone of the questioning clearly showed that there were those who were skeptical that she could. I am afraid her questioners missed the point. I particularly appreciated one response Ms. Kroes provided: "My role is that of a referee, but do we ask a referee in football not to like the game and be interested in all its aspects? No. We demand impartiality in applying the rules but we also want our referee to know the game inside-out."[4]

The point is that strong and sound enforcement decisions steeped in market facts and accepted economic thinking benefit both consumers and businesses—whether they lead to enforcement action or no action. On the other hand, ill-supported decisions—while they may make enforcers look tough to disciples of the false dichotomy—distort markets and benefit neither consumers nor business entities. The dichotomy is overly simplistic, insulting, and unrealistic. Businesses are generally the first to call foul on what they perceive to be anticompetitive conduct and they expect the antitrust enforcers to be there. And consumers, I believe, understand that in a

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[4] Gareth Harding, *Analysis: Grilling for EU Antitrust Chief*, WASH. TIMES.COM, Sept. 28, 2004, *at* http://washingtontimes.com/upi-breaking/20040928-122058-8754r.htm.

competition, the goal is to win and that without the prospect of winning, businesses will not compete aggressively. After all, most consumers work and are part of the game themselves.

Old habits die hard. I recognize that we cannot put our faith in the free market in an envelope or e-mail and mail it to those stuck in the false dichotomy. I recall that a Brussels competition lawyer once said to me, "Debbie, when you talk about antitrust issues, it is clear that you have a passion for competition. Not everyone in Europe innately feels that same passion." Well, they do not always in the United States, either. And besides, I do not think this passion is innate; it is learned. That means that we can, through information and discussion, convince others that the dichotomy is, indeed, false and, accordingly, most unhelpful. We can do it by continuing to explain our mission and our decisions, whether we take action or decline to do so. We can do it by conducting more natural experiments and publishing those results so that we can see what really happens in markets. And we can do it by evangelizing, by rejecting the false dichotomy again and again, even when it is not politically expedient to do so, remembering the strength and courage of those who have taught us so well.

Thank you.