KEYNOTE REMARKS OF COMMISSIONER TERRELL MCSWEENY[1]
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This week's IBA conference brings together lawyers from over 130 jurisdictions. That is quite an impressive statistic – one that underscores that antitrust enforcement has truly become global. Over the last few decades, antitrust enforcement has grown to reach a similar number of jurisdictions, with agencies enforcing a variety of competition laws. Many of them – certainly over 100 – engage in some form of merger review. As this audience is well aware, this has major implications for global transactions – which will be the theme of my remarks today.

I am going to begin by discussing convergence and divergence in merger enforcement, both procedural and substantive. Then I will turn to the specific issue of ensuring viable and effective remedies in merger challenges, particularly in the United States but also across jurisdictions. Finally, I will conclude with some thoughts on analyzing high-tech mergers, including the potentially challenging areas of innovation and big data.

I. Convergence and Divergence in Merger Enforcement

A. Procedural

The need for global convergence in merger enforcement is not new. For decades the FTC has played a leading role in promoting convergence by building and maintaining strong bilateral relations with foreign competition agencies, offering training and technical support, and working in multilateral organizations.

I'm pleased to note an increased convergence on procedure due in part to these efforts. Our ability to work with colleagues to reach compatible outcomes is enhanced when, for example, agencies with suspensive regimes eliminate filing deadlines or when agencies allow flexibility in review periods. The trend towards interviews as one means of collecting information early in investigations allows us to gather and understand the same set of facts as, for example, our European counterparts who traditionally relied almost exclusively on responses to written questionnaires.

However, challenges remain. When transactions face extended review by more than a handful of jurisdictions, coordinating review and remedies can be difficult. As we gain more experience with these complex, global mergers, we are introducing new tools to address these challenges. For instance, when we conduct in-depth multijurisdictional reviews, often one agency will assume a role somewhat analogous to that of an air traffic controller, taking the lead on collecting and communicating information about timeframes and progress among all reviewing agencies.

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[1] The views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

I would be remiss to talk about procedural convergence without discussing the development and implementation of what has become the world's gold standard of best practice: the ICN Recommended Practices for Merger Notification and Review Procedures.[2] The FTC had a leading role in creating these recommendations more than a decade ago.

When the ICN was formed 15 years ago (with just 14 jurisdictions),[3] one of the biggest challenges facing the global competition community was achieving effective merger review without imposing undue costs and burdens on parties. Multijurisdictional merger notification and review was one of the ICN's first projects. The FTC led a project team of 14 agencies and more than 30 non-governmental advisors with the goal of developing best practices to help rationalize the multijurisdictional merger review process. It was a challenging task because most members' laws did not match what most members realized were good practices. Ultimately, members adopted the recommended practices by consensus – providing a valuable model for the network, which now includes as members more than 120 jurisdictions.

In the years that followed, dozens of agencies changed their procedural rules to conform towards ICN best practices. The IBA's early work on best practices in this area informed the ICN recommendations, and subsequent IBA comments on proposed laws urging conformity with ICN practices were important in achieving these results.

Our understanding of the changing landscape, and certainly ICN's role in influencing those changes, was largely anecdotal. This past spring, however, the FTC, together with our colleagues at the French competition authority, led a groundbreaking project in which 84 of the 100 ICN members with merger control regimes identified how their merger systems conform to each ICN recommended practice. They also weighed in on which practices have been most helpful, and how the ICN influenced reforms.

Broadly speaking, there is considerable convergence on procedure – with great strides in aspects such as the timing of notification, simplification of notifications for non-problematic transactions, and clarification of defined review periods. There is also positive change in local nexus criteria for merger thresholds.

Members largely view the ICN as having designed the roadmap for a well-functioning system. Still, the responses also indicated that only about 40% of the jurisdictions surveyed have notification obligations that follow the essential components of the ICN recommended practices – a threshold that requires at least two parties or the target to have material sales or assets in the jurisdiction, and where only the target's sales or assets are assessed for determining whether the threshold for the selling side is met. Twenty-two jurisdictions surveyed use subjective criteria for filing requirements, such as market shares. So survey results indicate that there is more we can and should do to promote convergence.

Encouragingly, ICN survey responses clearly indicate that the ICN should take a more active role in promoting these recommended practices. We welcome this renewed energy to

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[2] *See* Int'l Competition Network, Recommended Practices for Merger Review Notification Procedures, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

[3] Int'l Competition Network, About: History, http://www.internationalcompetitionnetwork.org/about/history.aspx.

focus ICN resources on the development and spread of good practice. We see a clear consensus among agencies – as well as practitioners – that there is important work to be done, and a willingness to do it.

The FTC hopes to play a key role in this effort through leadership of the ICN's Merger Working Group – we had the good fortune to become co-chair of the group a few months ago. The group just kicked off a project to revisit the existing best practices to update them to reflect lessons learned in past 15 years. The group is also exploring areas ripe for new best practices, such as the types of transactions that should be subject to merger review. We are working with IBA colleagues as non-governmental advisors on these projects, some of whom are here today, and we look forward to learning from your experiences.

B. Substantive

The procedural convergence that has taken place has also facilitated an increasing like-mindedness in substantive merger review. Today different outcomes occur in a tiny fraction of all the merger cases the FTC reviews, and inconsistency even rarer. This is due to convergence in our similar analytical approach to merger review – firmly grounded in economics and spanning many aspects, including for example, the standard of review and the role of efficiencies. At least with our closest partners, we see convergence influenced by enforcement cooperation in parallel reviews as we learn from one another and incorporate one another's ideas into our own work. The process of understanding one another's systems is ongoing – even with counterparts with whom we work regularly.

For example, in reviewing the proposed *Staples/Office Depot* merger, the FTC worked closely with our competition enforcer colleagues in Ottawa and Brussels. When FTC staff started preparing for litigation, we had secondees from the *Staples* case teams in Canada and the European Commission join our case team to allow them a firsthand experience of how we litigate cases.

Another example is that in many recent complex, global transactions with potential vertical concerns, FTC staff worked with colleagues from other agencies to compare how we evaluate these issues, including by holding joint calls with competitors and customers.

We are also exploring the same novel market developments simultaneously and often together – affording us opportunities to benefit from collective thinking as we generate our own studies on and approaches to these developments. We can help shape one another's views early on, which can lay the foundations for convergent approaches and outcomes in the future.

While acknowledging this convergence, we also see differences. There may be subtle differences in how agencies around the globe evaluate conglomerate or vertical mergers. We have also seen new laws, as well as long-standing ones, explicitly call for consideration of non-competition factors in merger review, such as, effects on employment and local or national industries. The application of these factors has an impact on convergence internationally.

In many jurisdictions – including the United States – we see a growing call in the political discourse for public interest considerations to factor into merger review –and this has potential to disrupt existing convergence.

II. Remedies

I'd like to turn now to the topic of remedies in FTC merger review, which as I just mentioned, is a critical piece of our merger review process – and an area where competition enforcers have a mixed track record of convergence. There is generally international consensus that enforcers should seek to remedy the competitive harms arising from a combination. However, there appears to be a greater willingness in some jurisdictions to address behavioral concerns in the merger context.

Each merger case is very fact-specific, but every prayer for relief in a complaint and every consent order have the same goal: to preserve fully the existing competition in the relevant market. The inherently predictive nature of Section 7 enforcement can make this exercise difficult at times, but over the years, the Commission has learned a number of important lessons.

First, the FTC generally prefers structural relief (*i.e.*, divestiture) over behavioral or conduct-type remedies, especially in horizontal mergers. Our preference for structural remedies derives from the underlying intention of the Clayton Act – any remedy must maintain or restore competition in the market affected by the merger. Typically, this involves divestiture of an autonomous, ongoing business unit that comprises at least one party's entire business in the relevant market.

Structural remedies directly address the anticompetitive harm and remedy by creating a new or enhanced competitive player in the market. Structural remedies also entail less risk and less ongoing monitoring for the agencies and can usually be accomplished in a relatively short period of time. At times, the FTC may consider non-structural remedies, for example in vertical mergers or where a structural remedy isn't available, but this is not the norm. The FTC may also consider temporary non-structural remedies, like supply agreements, technical assistance, and licensing in order to help the divestiture buyer to get up to speed in the relevant market. This is particularly common in our pharmaceutical consents.

Second, up-front buyers are the norm in the United States. The European Commission calls this the "fix-it-first" process. Although I understand the EC does not commonly use up-front buyers given the fixed deadlines for merger review in the EC, it is a common practice in the United States. Requiring an up-front buyer shifts the costs of delaying the divestiture onto the respondent. When an order requires an up-front divestiture, the respondent cannot close the proposed merger until an acceptable buyer for the assets is found, the buyer conducts adequate due diligence, and the buyer submits a business plan to the FTC.

We typically require an up-front buyer if the merging parties seek to divest assets comprising less than a stand-alone, ongoing business. We do so to minimize the risk that there will not be an acceptable buyer for the more limited assets, or that the buyer of the assets will not be able to maintain competitive levels. Requiring an up-front buyer also prevents a deterioration of the assets pending the divestiture, which can cause immediate competitive harm. For those of you involved in transactions that may require a divestiture, I encourage you to involve FTC staff early in the process to make sure that any negotiated agreement with the up-front buyer includes everything that the buyer will need to hit the ground running and maintain competition in the relevant market.

Third, at times, the Commission requires respondents to divest more than just the overlapping assets that are the subject to competitive concern in order to make the divested assets attractive to potential buyers. For example, in *Zimmer/Biomet*, the merger raised competitive concerns in, among other products, bone cement used to affix implants to bones during surgery. In addition to divesting its bone cement products, Biomet also divested its U.S. assets in bone cement accessories used by surgeons to mix the bone cement ingredients and apply the cement onto implants accurately.[4] Because hospitals and GPOs frequently purchase bone cement and bone cement accessories together, it was important that the divestiture buyer offer all of the products in order to become an effective competitor. The FTC worked closely with our colleagues at the EC on that transaction, ultimately ending up with similar remedies.

Fourth, the FTC is prepared to litigate divestitures that do not adequately remedy competitive harms of a merger – we call this litigating the fix. In recent cases, such as *Sysco/US Foods* and *Staples/Office Depot*, the merging parties offered potential divestitures that the Commission rejected after careful analysis determined they were inadequate to preserve competition in the market. Accordingly, the Commission voted to litigate those matters and I'm pleased that the district courts agreed with us in both cases.[5]

Recognizing the importance of periodic study, the Commission is now fully in the midst of a remedies study that will focus on the roughly 90 orders issued from 2006 through 2012.[6] The study will evaluate both structural and non-structural relief. The current study also is designed to assess whether the orders created new competitors and achieved their remedial goals. I look forward to the results of the study, which we should expect sometime later this year.

III. "Big Data" and Innovation in Merger Review

Finally, I'd like to touch upon an issue that's generated a significant amount of attention both in the United States and abroad, particularly in Europe. There is no question that the rise of the digital economy and its transformative disruptive innovations have raised some new questions for competition enforcers, such as whether antitrust law should impose limits on the use or collection of consumer data and when enforcement versus regulation is optimal for promoting innovation.

Competition enforcers can, and I believe should, incorporate innovation effects into merger analysis. The U.S. antitrust agencies' revised 2010 Horizontal Merger Guidelines include a section that specifically addresses innovation effects.[7] In many digital markets, a traditional price-based approach to competition analysis may not show a complete picture – this can be particularly true in two-sided markets, where one side may subsidize the prices users pay on the other side.

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[4] *See* Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Zimmer Holdings, Inc. and Biomet, Inc., File No. 141-0144 (June 24, 2015) at 5, https://www.ftc.gov/system/files/documents/cases/150624zimmeranalysis.pdf.

[5] *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); *FTC v. Staples, Inc.*, Civil Action No. 15-2115, 2016 WL 2899222 (D.D.C. May 17, 2016).

[6] *See generally* Fed. Trade Comm'n, Remedy Study, https://www.ftc.gov/policy/studies/remedy-study.

[7] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 2010 HORIZONTAL MERGER GUIDELINES § 6.4.

In the digital context, there are many examples of products and services offered to customers for free – such as Internet search engines and social networks and booking engines. On the free side, competition often takes the form of innovation and quality improvements in products. Enforcers should, in my view, not only consider price effects on the paying sides of these platforms but also consider harms to quality and innovation competition on the free side.[8]

Moreover, in our "big data" world, there is data that anyone can obtain for a fairly nominal cost. But there is also valuable data that is proprietary and could operate as a barrier to entry. An incumbent may have a significant advantage over new entrants if it possesses a valuable database that would be difficult, costly, or time consuming for a new firm to match or replicate. In those situations, competition enforcers can, and again, I believe should, assess the competitive implications of data.

The FTC has treated data as a relevant market in one recent merger case (*Dun & Bradstreet/QED*)[9] and found it to be a barrier to entry in others based on the facts and circumstances of those cases.[10] Nevertheless, a one-size-fits-all view of data holdings is not the right approach in a world where so much data is available and so easily gathered.

Another important topic when it comes to big data is the relationship between antitrust law and privacy and data protection concerns. In general, I see antitrust enforcement and the broader policy concerns regarding privacy and data protections as two separate, but important areas of consumer protection.

Privacy is a multidimensional issue involving the collection, use, retention and securing of consumer information – and the transparency and choices offered to consumers. Of course, competition enforcement and privacy can intersect. For example, the U.S. antitrust agencies

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[8] *See, e.g.*, Statement of Commissioners Ohlhausen, Wright, and McSweeny Concerning Zillow, Inc./Trulia, Inc., File No. 141-0214 (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

[9] In *Dun & Bradstreet/Quality Education Data*, the FTC determined that data, itself, was the relevant product. The FTC found that the parties "were the only significant U.S. suppliers of [K-12] educational marketing data." Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of The Dun & Bradstreet Corporation, Dkt. No. 9342, at 1 (Sept. 10, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100910dunbradstreetanal.pdf.

[10] In *Nielsen/Arbitron*, the FTC determined that the proprietary data of Nielsen and Arbitron was a key input to offering downstream cross-platform audience measurement services. The FTC found access to television audience data with individual-level demographic information to be a significant barrier to entry in that matter. Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Nielsen Holdings N.V. and Arbitron Inc., File No. 131-0058 (Sept. 20, 2013) at 3, https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitronanalysis.pdf. In *Reed Elsevier/ChoicePoint*, the FTC treated data as an input in the market for electronic public records services for law enforcement customers. Reed Elsevier's Lexis-Nexis and ChoicePoint were the largest suppliers of public records services, with a combined 80% market share. The FTC found that the parties' combination of data and analytics were unique among electronic public records services and that other firms lacked the data an analytics to compete effectively for law enforcement customers. Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of Reed Elsevier and ChoicePoint, File No. 081-0133 (Sept. 16, 2008) at 2, https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080916reedelseviercpanal.pdf.

routinely analyze non-price considerations in merger review where there is evidence that those non-price considerations are important to competition. The FTC has yet to challenge a merger specifically based on the likelihood that it would lead to a diminution in privacy protections, but we have recognized the possibility that consumer privacy can be a non-price dimension of competition.

This is a complex issue – and one that consumer protection and competition enforcers will no doubt continue to wrestle with in the digital economy.

IV. Conclusion

This is an exciting time in the evolution of antitrust practice. Globally there are a record number of agencies developing antitrust practice in the merger context. Clearly, we all have more work to do if we are going to achieve convergence. But we have an excellent foundation in place to build on. In coming years I believe it will be critically important for the FTC to develop deeper interactions with more counterpart agencies on individual cases. We must also continue to build consensus on appropriate merger remedies in our bilateral and international work – in particular with recent and new work in the ICN, as well as domestically, for example, with our new merger remedies study.

At the multilateral level, we need to speak in more depth to the agencies that indicated they attempted reforms along the lines of ICN best practice but failed to achieve reform. These agencies can provide valuable information about the types of obstacles that remain. In parallel, the search for better practices continues; as an example, the ICN is working on drafting a new recommended practice on efficiencies. I am hopeful this work will continue a positive trajectory toward substantive convergence.

I look forward to continuing the dialogue on these issues going forward both within the United States and abroad. Thank you, and I am happy to answer any questions.