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Competition Policy and International Competitiveness from a U.S. Federal Trade Commission Perspective: The Case of Merger Enforcement

Alden F. Abbott
Associate Director for Policy and Coordination
United States Federal Trade Commission

I. Introduction

Konnichiwa. Good afternoon. I am delighted to be here today. I have been asked to provide a United States Federal Trade Commission ("FTC") perspective on competition policy and international competitiveness. This is an extremely broad topic. Thus, to make it manageable, I will focus primarily on American merger enforcement, which has evolved substantially in recent decades and which involves increasingly frequent interactions between American and foreign antitrust officials. Before turning to mergers, however, I will first briefly address criminal enforcement and regulatory reform – both of which are also vital to a competition policy that promotes international competitiveness. The views I express are my own, and do not necessarily reflect those of the Federal Trade Commission ("FTC") or any Commissioner.

II. Criminal Antitrust Enforcement

Criminal enforcement directed at hard core cartel activity (typically price fixing or bid rigging carried out in secret) is the responsibility of the U.S. Department of Justice's Antitrust Division. Such enforcement has loomed ever more significant in recent years, with greater fines and jail sentences obtained, and prosecutions of international price fixing cartels rising in prominence.[1] The Government's increased success in ferreting out and prosecuting cartels has been associated with a toughening of criminal sanctions[2] -- and with the introduction of amnesty from criminal prosecution for the first cartel member that reveals the scheme to the Justice Department.[3] This is no coincidence – these changes in sanctions policy

[1] For a good overview of criminal enforcement penalties, see *The Modern Leniency Program After Ten Years*, Remarks by James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, Presented to the American Section of Antitrust Law Annual Meeting, *available at* http://www.usdoj.gov/atr/public/speeches/201477.htm.

[2] The most recent law strengthening criminal sanctions came into force in June 2004. This law's provisions are summarized by the U.S. Antitrust Division at http://www.usdoj.gov/atr/public/press_releases/2004/204319.htm.

[3] *See* Griffin, note 1 *supra*, for a discussion of the success of the U.S. amnesty program, which has been emulated by many foreign antitrust authorities.

have aided monitoring and prosecution by raising incentives for revealing cartel conduct.[4]

This is all to the good, because hard core cartel activity not only raises prices to consumers and reduces allocative efficiency, it also undermines the competitive vigor of cartel-afflicted industries. Cartel members focus on cooperating to divide up a limited market, rather than competing to obtain market share by introducing new and improved products and processes.[5] Yet it is precisely such efforts to innovate, thwarted by cartels, that would allow a nation's firms to remain internationally competitive by responding creatively to shifting customer tastes around the world. In short, tough laws directed at cartel conduct promote international competitiveness while benefiting consumers. Thus I for one believe that the JFTC is to be applauded for proposing to raise antitrust surcharges.

III. Regulatory Reform

Now let me turn briefly to regulatory policy. Excessive, heavy-handed regulation, which encourages firms to follow detailed rules and reject competitive innovations, diminishes the competitive vigor and "creative destruction" that are keys to international competitiveness.[6] Regulatory reform complements antitrust enforcement and promotes international competitiveness by eliminating unnecessary constraints on the ability of firms to compete vigorously on the merits.[7] Traditional justifications for strict

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[4] For an analysis of these and other antitrust enforcement tools, see *Private Participation in the Enforcement of Public Competition Laws*, Remarks by William E. Kovacic, General Counsel, Federal Trade Commission, before the British Institute of International and Comparative Law Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust Dialogue, London, United Kingdom, May 15, 2003, *available at* http://www.ftc.gov/speeches/other/030514biicl.htm. The raising of criminal fines and jail exposure would be expected to deter future cartel conduct, and to raise the incentive of cartel members to seek amnesty.

[5] Such efforts to innovate would destabilize a cartel consensus and therefore would be avoided by firms that sought to preserve the cartel's existence.

[6] Thus excessive regulation and cartel conduct, though different in kind, share one key feature – they both curtail competitive initiative and the innovation it engenders.

[7] Vigorous antitrust enforcement helps ensure the success of regulatory reform by deterring firms from replacing government regulatory dictates (e.g., government-supervised tariffs) with private collusive agreements. (Previously

government regulation of industry sectors, such as vague notions of "the public interest" and concerns about constraining natural monopoly, have been exposed as wrongheaded or dated.[8] From the 1970s to the present, regulatory reform and deregulation have reshaped a wide range of American industries, such as commercial aviation, trucking, busing, "public utilities" (telecommunications, electricity, gas), and financial services.[9] These reforms have substantially enhanced American economic performance, as documented by scholarly research.[10] Studies also demonstrate that nations in general, not just the United States, benefit greatly from appropriate regulatory reform.[11]

Despite these benefits, proposals for regulatory improvements often engender the staunch opposition of beneficiaries of the inefficient status quo. Mindful of this, United States competition agencies, and, in particular, the FTC, have employed competition advocacy, bolstered by economic research reports, to press for sound regulatory reform, both at the federal and state levels.[12] Not surprisingly,

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regulated firms that avoided competition under regulation, such as former members of a truckers' rate bureau, would otherwise have an incentive to retain the non-competitive "easy life" by installing private price-restrictive arrangements that mimicked the former regulatory status quo.)

[8] For example, technological change has eroded or eliminated "natural monopoly" (markets in which it is most efficient for one firm to produce all the output) characteristics in various industry segments.

[9] The American Enterprise Institute-Brookings Institution Joint Center for Regulatory Studies carries out a wide variety of studies on the impact of regulations and regulatory reform on consumers, businesses, and government. These studies may be found at http://www.aei-brookings.org. Full deregulation is appropriate when an industry sector will perform better (in economic welfare terms) without regulatory oversight. Even when the persistence of some "natural monopoly" bottleneck or "negative externality" (e.g., pollution) suggests some role for regulation remains, the least restrictive regulatory means to achieve the desired regulatory end should be employed. Furthermore, in sectors in which a substantial degree of regulation is retained, such as environmental protection and telecommunications, efforts have been made to bring market incentives to bear on the regulatory process (e.g., "pollution rights trading" to achieve desired pollution abatement levels at minimal social cost, and government "spectrum rights auctions" to allocate portions of the electromagnetic spectrum to highest-valued uses).

[10] See Hannes Suppanz, Michael Wise, and Michael Kiley, *Product Market Competition and Economic Performance in the United States*, OECD Working Paper No. 398, 20-34 (July 15, 2004), *available at* http://www.olis.oecd.org/olis/2004doc.nsf/linkto/eco-wkp(2004)21.

[11] The OECD has carried out a variety of studies on regulatory reform in different nations. The seminal work is Sveinbjorn Blondal and Dirk Pilat, *The Economic Benefits of Regulatory Reform*, OECD Economic Studies, No. 28, 1997/I, *available at* http://www.oecd.org/dataoecd/22/21/2733617.pdf.

[12] For a description of these efforts, see *How Should Competition Policy Reform Itself? Designing the New Competition Policy*, Remarks of Todd J. Zywicki, Director, Office of Policy Planning, Federal Trade Commission, before the Competition Research Center, Fair Trade Commission of Japan, November 20, 2003, *available at* http://www.ftc.gov/speeches/other/031120zywickijapanspeech.pdf. Advocacy efforts may be directed to legislative

therefore, we applaud the efforts of other nations' competition agencies, such as the JFTC, to promote regulatory reforms through appropriate measures.[13] We also look forward to continuing to exchange ideas on competition and regulatory reform under the aegis of the U.S.-Japan Regulatory Reform and Competition Policy Initiative. In short, regulatory reform is a "win-win" policy that will enhance any nation's economic welfare and competitiveness without detracting from – indeed, enhancing – the welfare of its neighbors.

IV. Merger Policy

Mergers are a significant dynamic force in the American economy. Mergers can lower costs and otherwise benefit consumers. Among other things, mergers provide a means for inefficient firms to exit the marketplace and for productive resources to come under the control of better management. In addition, mergers can enable firms rapidly to achieve scale economies, diversify product lines and geographic reach, acquire complementary resources, and respond to tax incentives. Each of these of motives can be quite legitimate from a business standpoint – they advance such goals as enhancing shareholder value, reducing risk, and increasing competitiveness.

Mergers, however, can also be adverse to consumers' interests. Consumer interests can be

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bodies as well as to regulators.

[13] Regulatory change should be carried out within the context of a well-designed reform program in order to be fully effective. As stated in the OECD's original study of regulatory reform in Japan, "[r]egulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory reforms need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalizing network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment." DoHoon Kim and Akira Kawamoto, *Regulatory Reform in Japan: Enhancing Market Openness Through Regulatory Reform*, at 3 (1999), *available at* http://www.oecd.org/dataoecd/45/8/2506710.pdf. In July of this year, the OECD updated its study of regulatory reform in Japan. OECD Reviews of Regulatory Reform, *Japan: Progress in Implementing Regulatory Reform* (July 19, 2004) (Executive Summary), *available at* http://www.oecd.org/dataoecd/56/2/32983995.pdf. Although it noted that substantial progress had been made, the updated report stressed that commitment in the bureaucracy, public-private

adversely affected if a merger creates or enhances market power. This can occur if the merger results in a single firm with enhanced market power or results in a group of firms with increased incentives and ability to exercise market power and raise prices to consumers. The FTC and the Department of Justice enforce statutes that prohibit mergers that may substantially lessen competition. The agencies also challenge consummated mergers that turn out to be anticompetitive.

Sound merger enforcement policy is a complex and evolving endeavor. Because mergers are often motivated by legitimate and socially desirable business interests – including efficiency gains – it is incumbent on antitrust enforcement officials to take great care in performing their competitive analysis of mergers and, in so doing, use the best analytical tools available to identify as accurately as possible those mergers that are likely to be harmful to consumers. Ideally, enforcement policy should consistently prevent anticompetitive acquisitions, while allowing those mergers that do not pose a risk to consumer welfare to proceed.

This is not an easy charge to satisfy, and I must concede that, historically, our own merger enforcement record in the U.S. has not always been up to this standard. I will return to that point in a moment. First, however, since this is an international audience, let me briefly point out one additional significant, yet often overlooked, benefit of an enlightened domestic merger enforcement policy.

Specifically, an enlightened merger policy also enhances the international competitiveness of firms. I certainly need not tell a Japanese audience just how important competitive effectiveness is in international trade. Such effectiveness, in turn, is inextricably linked to the vigor of competition in home markets. In free competitive markets, a firm's long-run success is driven solely by its ability to serve consumers better than

cooperation, and multilevel coordination are required if Japan's ambitious regulatory reform agenda is to be realized.

its rivals. This is true irrespective of the division of the firm's revenues between domestic and export sales. Thus, when firms are subject to vigorous price competition in their home markets (regardless of the competition they confront in international markets), they face constant pressure to lower costs, innovate, and improve the quality of their goods and services. Such firms will be better positioned to compete effectively against foreign rivals in international commerce.

Now let me turn to a little history. Specifically, I think that an honest commentary on American merger enforcement policy must admit that, until recent decades, that policy was far from enlightened. Indeed, during the 1960s and up to the early 1970s, U.S. merger enforcement policy was badly flawed. Amendments to the United States merger review statute, Section 7 of the Clayton Act,[14] enacted in 1950, gave the federal government new tools to challenge mergers, but the amendments did not give either courts or enforcement officials wisdom. Instead, the government relied on weak empirical work being published during that time period that found a positive correlation between industrial concentration and profits. That research, which has now been largely discredited, was amplified and relied upon by the government as justification for opposing horizontal mergers even in highly fragmented markets. The courts, lacking economic sophistication or guidance, found themselves powerless to come up with a theory to oppose these government actions. Indeed, the late U.S. Supreme Court Justice, Potter Stewart, was moved to say that the only thing consistent about the merger enforcement cases of that day was that the government always won.

This pattern of "automatic" government victories was broken, however, by the government=s 1974 defeat in *United States v. General Dynamics Corp.*[15] In *General Dynamics* and several subsequent cases the Court emphasized that high market share numbers merely establish a rebuttable

presumption of illegality – and that the government may lose if those numbers misrepresent the actual state of the market. Those decisions demonstrated the broader need to look at the specific facts in each merger case before drawing conclusions about its likely competitive effects. Around this time, new economic research was indicating that mere "structure/performance" paradigms based on nothing more than historical market shares as proxies for competitive performance are fatally inadequate as a basis for sound merger policy. Instead, good merger analysis requires a far more sophisticated understanding of the affected markets – including, among other factors, the dynamics of those markets, the competitive positioning of each incumbent firm, the ability of firms to alter their positioning or make short- term output responses to price changes, and the likelihood that new firms can and would enter markets in which mergers might have temporarily produced an adverse price effect. Sound analysis must also be informed by the proposed merger's expected effects on overall efficiency, which in some cases may fully offset otherwise anticompetive price effects.

Importantly, although federal merger enforcement officials did not immediately change their public statements of enforcement policy in light of these developments, they were forced to reassess their thinking. A major analytical break with the past was due.

That analytical breakthrough finally came in 1982, with the Justice Department's issuance of new Horizontal Merger Guidelines (originally released by the Justice Department, subsequently joined in by the FTC). For the first time, the Guidelines laid out a multi-step approach to evaluating mergers that was grounded in detailed economic analysis. Significantly, the substantial economic content of that approach gave economists Aa seat at the table@ along with the lawyers in the evaluation of proposed enforcement actions. Today no enforcement decision is made in the United States without a careful economic analysis

[14] 15 U.S.C. § 18.

of the proposed merger, typically performed by highly skilled economists within the agencies themselves.

Although the 1982 Guidelines were revised slightly in 1984, 1992, and 1997, in light of experience and new learning, their essential approach has been retained. Today, although I make no claim that U.S. federal merger enforcement has reached perfection, it is at least anchored in modern economic analysis and employs the best tools that professional economists have to offer. Moreover, I believe it is safe to say that the current approach to merger enforcement enjoys widespread support, reflecting the substantial clarity it has brought to this important area.

To be sure, progress in applied microeconomics has not stopped; economics, like all science, always advances. Consequently, merger analysis and policy, in particular, must always be prepared to incorporate new thinking, and U.S. enforcers have attempted to do just that. Nonetheless, the refinements since 1982 in the U.S.'s approach to mergers have been largely at the margin. The core of American merger enforcement since the 1982 Guidelines has remained intact. That core, moreover, is now deeply rooted in an economically sophisticated antitrust bar and in the U.S. federal courts, with policy remaining generally consistent even as political leadership changes.[16] Thus American merger policy is unlikely to return to its hopelessly flawed, economically unsophisticated past.

With that background, let me take just a moment or two to outline the key components of the

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[15] 415 U.S. 486 (1974).

[16] Former FTC Chairman Timothy J. Muris made this point in a major policy address. See *How History Informs Practice – Understanding the Development of Modern U.S. Competition Policy*, remarks of Timothy J. Muris, Chairman, Federal Trade Commission, before American Bar Association Fall Forum, Washington, D.C., November 19, 2003, *available at* http://www.ftc.gov/speeches/muris/murisfallaba.pdf. See also Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 Antitrust L. J. 105 (2002); *The Essential Stability of Merger Policy in the United States*, Prepared Remarks of Thomas B. Leary, Commissioner, Federal Trade Commission, Delivered at Guidelines for Merger Remedies: Prospects and Principles, Joint U.S./E.U. Conference, Paris, France, Jan. 17, 2002, *available at* http://www.ftc.gov/speeches/leary/learyuseu.htm.

Horizontal Merger Guidelines. The Guidelines are broken into five key sections, with each section setting out the specific steps that the enforcement agencies undertake in their merger reviews.[17] I will elaborate on those steps in a moment. Before doing so, however, let me stress that the Guidelines' five sections are not treated as independent of one another. Indeed, the analytical framework set out by the Guidelines is intended to be an integrated framework designed to generate a confident conclusion about the likely net competitive effects of a merger, taking into account all parameters relevant to the particular merger. That process requires an analysis that ties together and gives appropriate weight to each relevant parameter based on a detailed factual evaluation. At the end of the day, the only analysis that can lead to confident conclusions is an integrated analysis.

With that said, let me outline briefly the basic steps of a merger review carried out by the enforcement agencies. Under the Guidelines' framework, the first step in the merger analysis is to identify the product and geographic markets – properly bounded – implicated by the proposed merger. Economic tools are critical to market definition under the Guidelines. Relevant product and geographic markets are defined using a "hypothetical monopolist" paradigm which relies on economic analysis.[18] Having defined relevant markets, the reviewing agency assesses whether the merger would significantly increase concentration in any of those relevant markets. In this respect, the measure of concentration takes into account not only the market shares of the merging parties and other identified competitors, but also the pre and post-merger size distribution of the market participants. Importantly, consistent with the learning from the *General Dynamics* case, the agencies attempt to measure concentration by using the most

[17] The Horizontal Merger Guidelines are set forth at http://www.ftc.gov/bc/docs/horizmer.htm.
[18] The procedures for carrying out product and geographic market definition (including special procedures to deal with price discrimination), and for identifying the firms that participate in the relevant market, are set forth in sections 1.1, 1.2, and 1.3 of the Guidelines. Any individual merger may involve one or many markets. Furthermore, for each product market identified, economic tools are applied to determine the scope of the corresponding geographic market. The geographic market may be local, regional, national, or global in scale, depending upon fact specific economic analysis.

appropriate metric. To be sure, sales are often used because they are appropriate to the task, but when sales are misleading in terms of understanding a firm's current competitive strength or forecasting its future competitive strength, the agencies will turn to other metrics, including shares of physical output, productive capacity, or access to output or capacity by dint of long- term contractual relations.

Typically, if concentration in any relevant market is not significantly increased, the merger review can stop right there. By contrast, a significant increase in market concentration does not necessarily mean that the merger is going to be anticompetitive; rather, it simply means that the agencies will carry the review to the next step, which is to assess whether the proposed merger, given changes in market concentration and other significant market characteristics, raises concerns about potential adverse competitive effects.

The third step – although again with the caveat that it is not independent of the second – is to evaluate whether entry conditions are such that were adverse competitive effects to occur, timely entry into the relevant market of a sufficient magnitude to counteract the adverse competitive effects would likely occur.

The next step – again not an analytically independent one – is to assess whether the merger would result in efficiency gains that could otherwise not reasonably be achieved and would offset adverse competitive effects. Finally, in circumstances where a party to the merger is likely to fail absent the merger, the agencies will assess the competitive impact of alternative, if any, employments of that party's resources.

Each of these steps is grounded in applied microeconomics and requires detailed factual analysis that integrates all of the relevant factors. At the end of the day, we believe that the process yields sound

assessments of the likely net competitive effects of a proposed merger. Enforcement decisions then can be made with confidence that consumer interests are being appropriately served.

As I stated, the framework of the Guidelines is now rooted in the mainstream of American antitrust policy. The American antitrust bar knows that, in representing clients to the agencies, it must be able to make its case within the Guidelines' framework. Furthermore, although the Guidelines are not themselves statutory "law,"[19] American courts also find direction in the Guidelines in deciding litigated merger cases.[20] This is important, because general acceptance of the Guidelines' framework has helped to provide overall clarity to the business community, as well as consistency, with regard to antitrust merger enforcement.

Even with this widespread acceptance of the Guidelines, however, the federal antitrust agencies rightfully recognize that periodic reassessment of the Guidelines' efficacy is essential. For that reason, just this year – in February of 2004 – the FTC and the Justice Department jointly sponsored a Merger Guidelines Workshop for the specific purpose of soliciting the views of legal and economic scholars and active members of the U.S. antitrust bar on current merger policy. Questions of particular importance were whether the current version of the Guidelines continues to serve its function well, and whether modifications to the Guidelines are in order in the light of several years of real world experience working under them. The workshop permitted the FTC and the Justice Department to receive important input from many of the leading antitrust authorities in the United States. An economist from the European Commission's Directorate General of Competition also participated in the conference.

For those of you who are interested in more detail, a full transcript of the workshop is available

[19] They are guides to the exercise of agency statutory discretion in enforcing Section 7 of the Clayton Act.
[20] For example, the U.S. Circuit Court for the District of Columbia Circuit cited the Horizontal Merger Guidelines extensively in reversing a district court's denial of the FTC's request for a preliminary injunction to enjoin a merger of

on the FTC's web site.[21] You can also find there the written submissions and papers provided by the participants. It is impractical for me even to summarize here all of the technical detail covered during the three days of the workshop. One key theme, however, emerged – the overwhelming consensus of the participants was that the analytical framework set out in the Guidelines, overall, does a fine job in yielding the right policy results in individual cases.[22] Moreover, because the Guidelines are now so familiar, they serve their principal purpose – providing guidance to the business community and the antitrust bar – with great effect. This assessment, in my view, is a strong endorsement of the current thrust of enforcement policy under the Guidelines.

Before coming to a close, let me briefly address the importance of policy research and international cooperation in promoting effective antitrust policy, with particular regard to antitrust merger enforcement.

First, as you may know, Timothy Muris resigned the FTC Chairmanship just last month to return to academia. Among the important accomplishments of Chairman Muris was his active support for a "Competition Policy R&D" program within the FTC.[23] Competition policy R&D takes seriously Socrates' admonition that only the "examined life" is worth living. It uses workshops, hearings, studies, and reports to increase knowledge about competition policy and disseminate this knowledge to the wider community. Research flowing from this R&D may help enforcers focus on the potential enforcement targets that merit the greatest (or least) attention, thereby improving the quality of antitrust enforcement. The recent Merger Guidelines Workshop is an example of merger-related competition policy R&D.

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leading baby food manufacturers. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

[21] It is available at http://www.ftc.gov/bc/mergerenforce/index.html. Other information pertaining to the workshop can also be found at this site.

[22] Some participants, although supportive of the Guidelines' approach, opined that certain Guidelines provisions could benefit from specified technical improvements.

Another example is a series of Hearings on Health Care and Competition Policy in 2003, which considered, among other topics, the antitrust treatment of hospital mergers.[24] More generally, to assess the efficacy of merger enforcement, the FTC is analyzing the effectiveness of past enforcement actions, including non-enforcement decisions, and industry and firm-specific conditions relating to the potential for both procompetitive and anticompetitive effects.[25] Part of this effort is a review of consummated hospital mergers. A byproduct of that review has been the Commission's recent issuance of an antitrust complaint regarding the merger in 2000 of two Illinois hospitals.[26] That challenge is presently being litigated. I should add that our new Chairman, Deborah Majoras, strongly supports a vigorous in-house "R&D" program, which we will maintain in full force.

Cooperation among antitrust enforcers grows increasingly important as the number of transactions – and, in particularly, mergers – that affect multiple jurisdictions expands. One important vehicle for multilateral international cooperation on antitrust enforcement policy is the International Competition Network, or "ICN," which brings together antitrust enforcers and practitioners from many nations to discuss antitrust issues.[27] In my view, this effort is extremely important, because it allows enforcers of competition policy from around the world to share their individual insights and experience in a cooperative, non-confrontational setting. Ultimately, ICN-inspired adoption of "best practices" on procedural matters and improvements in substantive analysis can have nothing but a beneficial impact on the quality of competition policy throughout the world. The ICN's Merger Working Group has done particularly good

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[23] See Timothy J. Muris, *Future Development of Competition Policy*, 2003 Colum. Bus. L. Rev. at 403-404.

[24] The Commission and the Justice Department have issued a report that discusses those hearings and policy conclusions presented by the various topics they covered. See *Improving Health Care: A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice* (July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[25] See *A Positive Agenda for Consumers: The FTC Year in Review* 22 (April 2003), *available at* http://www.ftc.gov/reports/aba/gpra2003.pdf.

[26] See *FTC Challenges Hospital Merger that Allegedly Led to Anticompetitive Price Increases* (February 10, 2004), *available at* http://www.ftc.gov/opa/2004/02/enh.htm.

[27] A description of the goals and activities of the International Competition Network may be found at its website,

work, through its subgroups on Merger Notification and Procedures (chaired by Randolph Tritell of the FTC),[28] on the Analytical Framework for Merger Review,[29] and on Investigative Techniques for Conducting Effective Merger Review.

Finally, let me turn to fruitful bilateral cooperation between American and Japanese antitrust enforcers. I applaud the JFTC's recent efforts to improve the transparency, efficiency, and effectiveness of merger review. Related to that initiative, the JFTC is also to be praised for its issuance of revised merger guidelines on May 31, 2004. I had an opportunity to review an early draft of those guidelines, and I can say without reservation that they represent a highly impressive step along the path of improved merger analysis. Notable helpful features of the guidelines are the inclusion of unilateral and coordinated effects analysis and the use of the HHI measure of concentration.[30] We will continue to coordinate with the JFTC in future reviews of proposed mergers notified in both our jurisdictions. Such coordination may afford us the opportunity to discuss the applicability of our respective nations' merger guidelines to the transactions at hand. We will welcome these opportunities to cooperate with our Japanese colleagues as we strive jointly to enhance the quality and effectiveness of merger review and enforcement.

V. Conclusion

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http://www.internationalcompetit ionnetwork.org.

[28] The Merger Notification and Procedures Subgroup has developed eight Guiding Principles and eleven Recommended Practices for merger notification and review, which the ICN has adopted at its annual conferences. See http://www.internationalcompetitionnetwork.org/2004_2005_mergernpsworkplan.pdf.

[29] The Analytical Framework Subgroup carried out and published a useful comparative analysis of major jurisdictions' merger guidelines. See *ICN Merger Working Group: Analytical Framework Subgroup: Project on Merger Guidelines, Report for the Third Annual Conference in Seoul* (April 2004), *available at* http://www.internationalcompetitionnetwork.org/seoul/analysisofmerger.html.

[30] The HHI, formally known as the Herfindahl-Hirschman Index, is calculated by summing the squares of the market shares of all of the participants in a market. The HHI reflects both the distribution of the market shares of the largest firms (giving proportionately more weight to firms with larger shares) and the composition of the market outside the largest firms. The U.S. Horizontal Merger Guidelines (see section 1.5) employ the HHI.

In sum, I submit it is no coincidence that the American adoption of regulatory reform, a strong anti-cartel program, and an economically-attuned efficiency-based merger policy have coincided with a period of rapid economic growth, dynamic innovation, and increased prosperity for American consumers over the past two decades. In other words, enlightened antitrust policy enhances competitiveness while bestowing substantial benefits on consumers. Moreover, scholarly studies of other nations' economic programs, sponsored by highly respected research organizations such as the OECD, support the premise that a vigorous and enlightened competition policy, which includes regulatory reform, is key to national economic strength. In short, there is no contradiction between a nation's pursuit of international competitiveness and its development of a strong, sound, pro-consumer competition program – in fact, those two interests are perfectly aligned. Accordingly, we applaud the efforts of JFTC and the Japanese Government to further strengthen their competition policy regime and we look forward to continued fruitful interchanges between the competition policy officials of our two nations.

Domo arigato gozaimashita. Thank you very much. It has been an honor to speak to you today.