

THE HARMONIZATION OF COMPETITION LAWS WORLDWIDE

REMARKS

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I. The Case for Harmonization

We have experienced nothing short of an explosion in competition law enactment and enforcement over the last several years. Today, more than eighty countries have competition laws, with the majority of these enacting competition legislation for the first time in the 1990s.¹ With these new laws come new, or in some cases renewed, enforcement efforts against commercial behavior viewed as posing threats to the competitive process. Even in jurisdictions that have developed a tradition of competition law enforcement, like the European

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¹ ABA Section of Antitrust Law, *Competition Laws Outside the United States*, at 13, ch.1 (2001) (hereinafter ABA Competition Laws Compilation); Int'l Competition Pol'y Advisory Comm. to the Attorney General and Assistant Attorney General for Antitrust, *Final Report*, available at <http://www.usdoj.gov:80/atr/icpac/finalreport.htm> [hereinafter I.C.P.A.C. Report].

Community and the United States, the influence of competition law in everyday commercial decision-making has increased dramatically. While it is difficult to assert with any certainty that enforcement efforts in these jurisdictions have increased in volume – they likely have, simply by virtue of the dramatic increase in notifiable merger activity over the last several years – it is easy to assert with confidence that enforcement efforts in these jurisdictions have increased in prominence. Who can ignore the collection of more than \$1.1 billion in competition law fines collected by the Antitrust Division of the U.S. Department of Justice in 1999, more than \$800 million of which came from a single enforcement matter (the prosecution of an international price-fixing conspiracy among vitamin suppliers)?²

We can attribute this growth to a number of forces. First is the globalization of trade and economic activity, including transnational mergers and acquisitions. Second is the overwhelming embrace of free market principles by formerly centralized economies in the 1990s. Third is the influence of multinational organizations like the European Union, the International Monetary Fund, the United Nations, and the World Bank that universally advocate the adoption and enforcement of competition law rules. Finally, as is the case across many fields of interest today, advances in communication and media now make competition law dialogue not just commonplace, but practically instantaneous. The Microsoft case in Washington D.C., for example, is discussed and debated throughout the world and across borders on a daily basis, thanks in part to the Internet. All of these forces will likely be as prevalent tomorrow as they are today. So we can expect this trend to continue for the foreseeable future.

The dramatic increase in interest regarding antitrust matters across such a wide range of cultures and legal traditions raises the concern that, assuming substantially similar market facts, commercial practices or transactions that are considered lawful under the competition laws in one jurisdiction will be treated as unlawful in another. This concern is a reasonable one. After all, if we accept that (i) competition law is predicated on the belief that the free interplay of market forces is the best way to organize productive activity so as to maximize social welfare, and (ii) the economic principles that govern this free interplay of market forces, i.e., the laws of supply and demand, are universal, then it seems reasonable to expect that the principles that govern the maintenance of this free interplay should also be universal and thus yield the same results in similar conditions.

² U.S. Department of Justice Antitrust Division Annual Report FY 1999 at 8 (2000), available at <http://www.usdoj.gov/atr/public/4523.htm>. See also, ICPAC Report, *supra* n. 1, Annex 4-A. See also Gary R. Spratling, Address at the American Conference Institute 7th National Conference on Foreign Corrupt Practices Act (Dec. 9, 1999), available at <http://www.usdoj.gov:80/atr/public/speeches/3981.pdf> (“However, in the last three fiscal years, the Division has obtained over \$1.5 billion in criminal fines - including over \$1.1 billion in FY 1999, which ended September 30.”); Belinda A. Barnett, Address to the Atitrust Law Section of the State Bar of Georgia (Nov. 30, 2000), available at <http://www.usdoj.gov:80/atr/public/speeches/7086.pdf>.

The fact of the matter is that we do get different results in different jurisdictions for like behavior. Compare, for example, the rules governing joint purchasing in Germany with the rules applied in the United States or the European Union;³ or consider the treatment of recommended resale prices. While most jurisdictions appear to recognize that recommendations alone are not unlawful, at least one new enforcement agency in a country with a formerly centralized economy has asserted informally that, while it accepts the majority view and regards resale price recommendations as lawful, it believes as an enforcement matter that where a bona fide resale price recommendation is in fact followed by a distributor, the practice is regarded as unlawful price fixing.⁴

Differences in presumptions triggered by market share also contribute heavily towards divergent outcomes in the assessment of like behavior. There are several jurisdictions that have adopted a presumption of market power, or "dominance," where a firm's market share is as low as thirty percent. The Czech Republic and Lithuania, for example, have expressly adopted a presumption of dominance at thirty and forty percent, respectively, while several other European jurisdictions have adopted the same presumption threshold as a rough rule-of-thumb.⁵ These presumptions based on market share contribute to what is generally perceived as a wide disparity between the competition law treatment of single firm conduct in European jurisdictions and the United States.⁶

³ Compare German Federal Cartel Office Annual Report 1989/1990 at 73 (asserting Federal Cartel Office objection to furniture retailers purchasing pool negotiating supply terms under Article 15 of Act Against Restraints of Trade), with National Sulphuric Acid Association, Commission Notice of September 22, 1998 (1998 O.J. 293/3), and Commission Decision of June 9, 1989 (1989 O.J. 190/23-24), and *Cartrade, Inc. v. Ford Dealers Adver. Ass'n*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972).

⁴ This type of contradiction between theory and practice is not uncommon, and indeed can reasonably be expected, in jurisdictions that have little or no experience with market economics and/or competition law enforcement.

⁵ Protection of Economic Competition Act, Act No. 63/1991 (Czech Republic), Article 9(2) ("A dominant position on the market is that of a competitor who, over a period of a calendar year, supplies the relevant market with at least thirty percent of its supplies of identical, comparable or interchangeable products"); Republic of Lithuania Law on Competition, Article 3, Para. 6 (23 March 1999, No. VII-1099) ("Unless proved otherwise, the undertaking with the market share of not less than forty percent shall be considered to have a dominant position in the relevant market.") (official translation). See Nicholas Levy, *The Control of Concentrations Between Undertaking*, COMP. L. OF THE EUR. COMM., Ch. 8, at p. 8-148 (2000) (citing *Akzo v. Commission*, Case C-62/86 1991 E.C.R. I-3359, paras. 59-61; *Kimberly-Clark/Scott*, Case IV/M.623 Commission decision of January 16, 1996 (1996 O.J. L183/1), para. 119; *Rewe/Meinl*, Commission decision of February 3, 1999 (1999 O.J. L274/1), para. 28(bb)).

⁶ Compare *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share"), *cert. denied*, 116 S.Ct. 1288 (1996), with *United Brands*, 1976 O.J. L95/1 (1976), 1 C.M.L.R. D28, paras. 76-82, *on appeal*, Case 27/76, [1978] E.C.R. 207, paras. 125-29 (Commission found, and European Court of Justice confirmed, abuse of

For companies that operate in more than one country (and how many these days do not, or at least do not aspire to?), different outcomes to the same question are confusing, raise risk, and provoke uncertainty. Most competition laws provide for a wide range of remedies where a violation is found, including fines of up to ten percent of total revenues, and injunctive relief that includes divestiture.⁷ Accordingly, where there is uncertainty regarding legal risk for the same conduct across jurisdictions, coupled with the potential for extremely harsh consequences, a firm may very well decide to forego transactions or business strategies that in fact are competitively neutral or even procompetitive. This predicament makes for less economic activity that is otherwise desirable.

Leaving aside for a moment the potential impact of substantive competition law divergence, another concern is the increasingly onerous burden of mandatory merger notification and review across two or more jurisdictions. More than eighty jurisdictions have some form of mandatory merger notification requirement, and this number is increasing.⁸ This burden includes managing wide disparities on four different issues: (i) whether a transaction is reportable, (ii) if so, when must the filing be made, (iii) what must the filing contain, and (iv) when will review be completed and a decision rendered, that is, when can the parties proceed with their transaction with a reasonable amount of certainty that it will not be challenged post-transaction.

While there are some similarities in the types of thresholds used to determine whether a filing is required, rarely do the tests coincide, and in all too many instances the tests do not usefully distinguish between transactions that are likely to raise competitive effects and those that will not. Many jurisdictions simply use various formulations of size-of-person (measured by revenues) and/or size-of-transaction thresholds. Others use a market share threshold, but rarely is notifiability linked to the existence of an actual overlap in business activity between the transaction parties.⁹ That leaves a transaction party no choice but

dominant position with market share between forty-one and forty-five percent of market Commission had defined as relevant); *see also* ABA Competition Law Compilation, *supra* n. 1, at V-47.

⁷*See, e.g.*, Council Regulation No. 17 implementing Article 85 and 86 [now 81 and 82] of the Treaty of Rome, Art. 15, 1962 O.J. 13/204; Antitrust Act (Spain), Law No. 16/89, of July 17, 1989, Art. 10; Federal Economic Competition Law (Mexico) D.O., 24 de Diciembre 1992, Art. 36-37.

⁸ ABA Competition Laws Compilation, *supra* note 1, at 1-14; *see also* J. WILLIAM ROWLEY & DONALD I. BAKER, *INTERNATIONAL MERGERS – THE ANTITRUST PROCESS*, at 1-1 (2d ed. 2000) [Hereinafter Rowley & Baker].

⁹ Most jurisdictions rely solely on thresholds based on some measure of individual or combined revenues or asset value either in the relevant jurisdiction or worldwide. *See, e.g.*, Law on Competition (Alb.), No. 8044 (Dec. 7, 1995), Art. 4; E.C. Merger Regulation Article 1(2), Council Regulation 4064/89/EEC on the control of concentrations between undertakings, 1989 O.J. L395/1, amended by Council Regulation 1310/97/E.C., 1997 O.J. L180/1 [hereinafter E.C.M.R.]; Act LVII of 1996 on Unfair Trade Practices and the Restraint of Competition (Hung.), Art. 24; Competition and Fair Trading Act (It.), Law

to assess notifiability for every jurisdiction in which it does business, regardless of the magnitude of that business or whether the counter-party does business in the same jurisdiction.

Once the issue of notifiability is resolved, there is a wide disparity regarding precisely when a required notification is due. In some jurisdictions, filing is required within a certain period of time, sometimes only days, after an agreement is reached, while in others timing of filing is left to the discretion of the parties.¹⁰ As a practical matter, parties often must begin to prepare their filings even before a deal is actually reached. As to information required in a filing, some jurisdictions require a volume of information that simply is not justified for making a preliminary assessment of whether a potential competitive problem exists.¹¹ If we consider (i) that the overwhelming majority of notified transactions raise no competitive issues,¹² and (ii) the costs associated for transaction parties and public authorities alike in preparing and studying

287 (Oct. 10, 1990), § 16; Federal Law on Cartels and Other Restrictions on Competition (Switz.), Acart, Oct. 6, 1995, Article 9(1). Other jurisdictions also incorporate some form of size-of-transaction threshold. *See, e.g.*, Clayton Act §7A(a), 15 U.S.C. 18a(a), as added by Hart-Scott-Rodino Antitrust Improvements Act of 1976 §201, Pub. L. 94-435, 90 Stat. 1390, as amended, Publ. No. 106-553, 114 Stat. 2762 (Jan. 25, 2001) (U. S.) (hereinafter Hart-Scott-Rodino Act); Federal Economic Competition Law (Mex.), D.O., 24 de Diciembre 1992, Art. 20. Some jurisdictions acknowledge the importance of an overlap between the parties' activities and resulting concentration and use a market share threshold, but only as an alternative to the revenue or asset value tests. *See, e.g.*, Law No. 8884 (June 11, 1994), Art. 54, para. 3 (Braz.), Law on the Protection of Competition (Bulg.), as amended and adopted by the Grand National Assembly (May 2, 1991) (promulgated in State Gazette, No. 52 (May 8, 1998)); Competition Act (Port.), Decree-Law No. 371/93 (Oct. 29, 1993), Art. 7.

¹⁰ The European Commission and Poland, for example, require notification within seven and fourteen days, respectively, after the signing of a binding agreement. E.C.M.R., *supra* note 9, Art. 4; Act (Feb. 24, 1990) on Counteracting Monopolistic Practices and Protection of Consumer Interests (Pol.), §11(1). Given the burdens of multiple filings, the more enlightened view is to leave to the parties' discretion when to file and simply prohibit closing until the filing requirement is met. This rule is followed, for example, in the United States, Canada, and the Czech Republic. Hart-Scott-Rodino Act, 15 U.S.C. 18a(a); Canadian Competition Act, R.S.C., ch. C-34, § 123.(1); Protection of Economic Competition Act, No. 63/1991 (Czech Rep.), Art. 8a(1).

¹¹ The European Commission, Brazil, and Poland essentially require the detailed substantive analyses and the compilation of extensive information before a transaction is even agreed to by the parties in order to meet filing deadlines that expire within days after a deal is agreed. Rowley & Baker *supra* note 8, at I-6.

¹² For example, in the United States, approximately ninety-seven percent of transactions notified in 1999 under the applicable pre-merger notification statute were cleared within the initial thirty-day waiting period. I.C.P.A.C. Report, *supra* note 1. Less than five percent of transactions notified to the European Commission were challenged or subjected to a second-phase investigation. Rowley & Baker *supra* note 8, at I-6.

responsive information, massive and invasive information requirements in initial filings become manifestly inappropriate.

Finally, review periods vary across jurisdictions, leading to delays of many months to more than one year to make a decision on a transaction.¹³ Increasingly, parties need to weigh the risks of closing a global transaction without a key economy where the review process is dragging on and compromising the benefit of the bargain between the parties.

These concerns have inspired many bright minds to think and talk about a framework for harmonizing competition law worldwide.¹⁴ Proposals range from multilateral negotiation and adoption of a global competition law code enforced by a supra-national enforcement authority or dispute resolution mechanism, to doing nothing, with much room in between for compromise proposals.¹⁵ The harmonization of competition laws is an extremely difficult

¹³ Several jurisdictions follow fairly rigid deadlines for regulatory review that last as long as seven months. See, e.g., E.C.M.R., *supra* note 9, at Art. 10 (one month for first phase and four months for second phase investigation with some provisions for specified extensions); Antitrust Act (Spain), Law No. 16/89 (July 17, 1989) §§ 16-17 (seven months to decision in cases referred to Tribunal of Competition). The review periods in several other jurisdictions can be extended by requests for additional information that can result in review periods of more than one year. Finally, a number of jurisdictions do not have any enforceable deadlines and even simple transactions that raise no antitrust issue take four or five months to review. See Rowley & Baker, *supra* note 8, at VI-9.

¹⁴ In the last year alone we have seen various comprehensive efforts to collect the views of antitrust enforcers and practitioners alike to discuss these very issues. In February 2000, the International Competition Policy Advisory Committee ("I.C.P.A.C."), which was formed in 1997 by U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein to consider a number of international competition law issues, including the globalization of antitrust and harmonization, issued its final report. I.C.P.A.C. canvassed the views of economists, lawyers, regulators and scholars that produced a rich diversity of thought on the harmonization issue. I.C.P.A.C. Report, *supra* note 1, at App. 1-B. I.C.P.A.C. proposed a new forum for global competition law discussion called the "Global Competition Initiative." *Id.* The Global Competition Initiative concept was further advanced by a number of distinguished speakers at the Tenth Anniversary Conference for the European Community Merger Task Force on September 20, 2000. See Rowley & Baker *supra* note 8, at I-12. Finally, the International Bar Association invited forty-three leading competition law thinkers and enforcers to discuss possible design and activities for the Global Competition Initiative at a conference at Ditchley Park, Oxfordshire, England, held February 2-4, 2001. See, Merit E. Janow, *Report on The Initiative for a Global Competition Forum*, available at <http://www.ibanet.org/pdf/Ditchley.pdf>.

¹⁵ In 1993, a group of twelve scholars and experts meeting in Munich proposed an International Antitrust Code enforced by a supra-national authority. I.C.P.A.C. Final Report, *supra* note 1. Several countries, including the European Union, Australia, Canada and Japan, have supported proposals to establish common competition rules and dispute resolution mechanisms within the framework of the World Trade

issue, as there is clear evidence of strong consensus on the existence of a problem but absolutely no consensus on a proper solution.¹⁶

II. Substantive Harmonization

A threshold question in considering the substantive harmonization of competition laws is what exactly are we trying to harmonize. There is no doubt that, at the end of the day, the objective is to move toward a common set of principles, if not rules, governing restrictive business behavior. But does competition law lend itself to rule-setting the same way that laws governing other social objectives do, such that formal efforts to adopt, for example, a common competition law code, represent viable means for harmonization? If not, how else might meaningful harmonization be achieved, if at all? Most students and/or practitioners of competition law internationally would likely agree that the issue of harmonization is tricky precisely because if whatever is harmonized results in the wrong set of common rules, principles, or presumptions (that is, rules that do not effectively protect the competitive process or, worse yet, actually impair the realization of efficient market outcomes), then harmonization will likely do more harm than good.

A useful starting point in answering these questions is to revisit the purpose and nature of competition law. The fundamental objective of competition

Organization. See, e.g., Karel VanMiert, Address at Vrije Universiteit Brussel (March 25, 1998) available at http://europa.eu.int/comm/competition/speeches/text/sp1998_052_en.html; see also, Testimony of Takaaki Kojima, Deputy Secretary General, Japan Fair Trade Commission, I.C.P.A.C. Hearings (Nov. 2, 1998), Hearing Transcript at 86-87; Submission of Konrad von Finckenstein, Director of Investigation and Research, Canadian Competition Bureau, I.C.P.A.C. Hearings (Nov. 2, 1998) at 4-6; Submission of Allan Fels, Chairman, Australian Competition and Consumer Commission, I.C.P.A.C. Hearings, (Nov. 2, 1998) at 6. See also, Patience Wheatcroft, *Monopolies Need Just One Regulator*, TIMES (London) (Feb. 22, 2001), available at 2001 WL 4877467. I.C.P.A.C., however, took a different view towards the harmonization of substantive competition rules. While it recommended further discussion in the context of a Global Competition Initiative, it advised against supporting formal substantive harmonization efforts at this time. I.C.P.A.C. Final Report, *supra* note 1, at 51, ch. 5. "Namely, this Advisory Committee sees efforts at developing a harmonized and comprehensive set of multilateral competition rules administered by a new supranational agency as not only unrealistic but also unwise. It is apparent that the laws of the industrialized countries have already converged to some extent, but the differences that remain are still substantial, and such differences are probably the most resistant to harmonization. Hence, there is limited likelihood of binding agreement on substantive standards except at the highest level of generality or perhaps with respect to hard-core cartels. This inability to reach convergence in approach as well as structure is even more severe where developing countries are concerned."). *Id.*

¹⁶ For a discussion of growing momentum to create inclusive forum for addressing the globalization of competition law and demands for harmonization or convergence, see *supra* note 14.

law is to maintain the free interplay of market forces.¹⁷ This objective is met by protecting the competitive process. Acting to protect the competitive process, however, is not easy where the very premise of free markets is that they operate free from intervention, legal or otherwise. Knowing when to intervene in the marketplace in the form of competition law enforcement is in fact a very difficult exercise. Free markets are fundamentally dynamic in character. Industries transform constantly, sometimes overnight, influenced by a score of factors that likewise change over time.

Assessing long-term competitive effects of commercial behavior under these circumstances is not simply a matter of spotting issues and mechanically applying rules. It is not mathematics. Mathematics allows you to calculate the trajectory of an object assuming very precise, even perfect, information about variables like weight and speed. Predicting the "trajectory" or net economic effect of allegedly suspect market behavior is an entirely different matter because the information we have as to the identity of the variables at play and their respective magnitudes is almost always hopelessly imperfect.

Competition law is in effect a discipline that depends on very careful and studied analysis of a variety of moving parts in any given situation, and relies heavily on logical inferences drawn from usually less-than-perfect economic evidence. Indeed, the most difficult antitrust cases tend to be those that require a careful balancing of pro-competitive benefits against anti-competitive harm under the so-called "rule of reason" because whether there is a net anti-competitive effect going forward is simply not readily apparent and in order to make a reasoned judgment on that issue all circumstances of an alleged restrictive trade practice must be identified and considered.¹⁸

Moreover, since competition law enforcement involves intervention in a process that is otherwise supposed to operate free from intervention to produce desired efficient market outcomes, enforcement errors can be costly, thus making the quality and completeness of case-by-case analysis fundamentally important.

As in any discipline where no two cases are precisely alike and the stakes are high, experience is critical. Only a practiced hand can readily identify and assess

¹⁷ See Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (Aug. 1995), available at <http://www.usdoj.gov:80/atr/public/international/docs/uscan721.pdf>; See also *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, at 4 (1958) ("[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.").

¹⁸ See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Attempts to draw lines and cut short full market analysis in "rule of reason" cases are frequently met with a healthy dose of skepticism. See e.g., *California Dental Association v. Federal Trade Commission*, 119 S.Ct. 1604, at 1613-18 (1999).

points of departure in the competitive effects analysis of similar conduct undertaken in different industries or under subtly different market circumstances.

Another useful consideration in thinking about the questions raised above concerning harmonization is the state of competition law and practice worldwide.

First, with the exception of only a few competition law regimes, competition law and practice in most of the world is new. There is not a great deal of experience out there. Most of the more than eighty jurisdictions with competition laws today did not have a competition law ten years ago.¹⁹ Many have made great strides in a short amount of time, but the fact remains that very few jurisdictions have the breadth of experience in analyzing competitive effects that is required to productively discuss a common set of rules. Even those that do have experience generally find themselves constantly revisiting and rethinking their own rules or assumptions about competitive effects. Over one hundred years have passed since enactment of the existing competition law in the United States and we still see significant improvements made by the courts as a result of revisiting old rules.²⁰

Second, wide disparities in economic tradition make common understanding of purpose and the fundamental elements of competition law analysis extremely difficult. Former centralized economies, for example, have little experience with a free market system. Companies operating in these jurisdictions face situations where, almost overnight, regulators who were charged with setting and controlling prices have become responsible as competition law regulators for protecting the competitive process.²¹ In several economies in Latin America, for example, a history of hyperinflation and price control no doubt has made the exercise of meaningful competitive effects analysis close to impossible.²²

Finally, differences in legal traditions on fundamental issues such as the protection of property rights, enforcement of contracts, private enterprise, and regulatory intervention in the economy represent significant barriers to the adoption of common principles and standards that contribute to meaningful

¹⁹ See *supra* text accompanying note 1.

²⁰ It took eighty-seven years for the U.S. Supreme Court to get around to drawing a distinction between unlawful vertical price restraints and vertical non-price restraints and ruling that the latter be assessed under a rule of reason rather than be regarded as per se illegal. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). As recent as 1997, nearly thirty years after ruling that maximum resale price maintenance per se illegal, the U.S. Supreme Court in *State Oil Co. v. Kahn*, 552 U.S. 3 (1997), reversed its prior ruling and held that maximum resale price maintenance should in most circumstances be assessed under a rule of reason.

²¹ In at least one formerly centralized economy country (to remain unnamed), most of the bureaucracy that was the "Price Control Service" before a 1992 shift to democracy and a free market economy became the staff for the newly-minted competition authority.

²² See Duncan H. Meldrum, *Country Risk and a Quick Look at Latin America: How to Analyze Exchange Risk, Economic Policy Risk and Institutional Risk*, 34 BUS. ECON. 30 (1999).

harmonization. Moreover, in many, if not most jurisdictions with competition laws, appeals of competition law decisions are held to a very high public interest or abuse of discretion standard of review rather than a standard that tests the rigor of the underlying competition analysis (for example, a full *de novo* review of evidence and reasoning).²³

When we think of competition law as a discipline that places a heavy emphasis on the quality and completeness of the analysis of economic fact, and consider the state of competition law and practice worldwide, we can begin to reach some interesting conclusions about harmonization. First, discussions centered on the development of a common set of substantive competition rules governing commercial behavior in market economies may be putting the cart before the horse. This type of discussion is probably premature because meaningful common competition rules first require a shared understanding of the purpose of competition law and a common commitment to the discipline of properly assessing the competitive effects of commercial behavior. Without a common view on purpose and commitment to rigorous analysis of market facts, common rules will not likely yield the certainty of like outcomes in similar circumstances that we are seeking.²⁴

Second, meaningful and productive harmonization of competition laws can and will occur as a matter of course among those jurisdictions that share this understanding and commitment; this harmonization can even occur rapidly if certain conditions described below are met. The reason is simple. The laws of supply and demand are by and large universal. It follows that the proper assessment of effects of like commercial behavior across two or more free market economies should reach the same conclusion, assuming similar facts and the same degree of studied economic analysis. The simple point here is that if competition law is strictly dedicated to the maintenance of the free interplay of market forces, and nothing more, the rules that evolve through proper economic analysis of commercial behavior should naturally converge. To some degree, we

²³ Chile's competition law, for example, provides for a full appeal only in very limited circumstances that do not cover a broad range of typical antitrust remedies. (Decree Law No. 211 of 1973, Art. 19). The only recourse available in most circumstances is to appeal only for the narrow purpose of complaining that the authority had committed "grave fault or abuse" in reaching its decision. (Codigo Organico de Tribunales, Art. 545).

²⁴ Several commentators have observed that the emphasis placed on the protection of competitors by the European Commission as opposed to the United States' emphasis on consumer welfare contributes to a divergence in outcomes in the assessment of single firm conduct between the United States and the European Community, notwithstanding how closely the law on this issue in each jurisdiction (abuse of dominant position in the European Community and monopoly maintenance in the United States) appear to parallel one another. See, e.g., Fox, Eleanor M., *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U.L. REV. 1781, at 1785 (Dec. 2000); Spinks, S.O., *Exclusive Dealing, Discrimination, and Discounts Under EC Competition Law*, 67 ANTITRUST L.J. 641, at 642 (2000).

already have evidence of such convergence. For example, decisional practice in several jurisdictions recognize the principle that competition law is intended to protect the competitive process, not competitors.²⁵ Likewise, widespread adoption of the hypothetical monopolist test for defining relevant markets and improved rigor in the analysis of vertical restraints are other examples where there are traces of productive substantive convergence.²⁶ This sort of convergence is not the product of bilateral or multilateral rule-making. While it probably cannot be denied that the convergence that has occurred is in part influenced by newer antitrust regimes following the lead of more practiced regimes, it is also the product of a realization that meaningful economic analysis of competitive effects does in fact matter.

Accordingly, with the discrete exception of discussions related to merger notification and review, the harmonization discussion should focus on developing and fostering adherence to common principles of process and analysis designed to facilitate substantive convergence towards common rules, but not the adoption of the rules themselves. Harmonizing norms of process that improve the likelihood of getting the right answer should increase the success rate in effective competition law enforcement, produce better rules, and ultimately produce a harmonization that is both productive and meaningful. To this end, adherence to the following five basic guidelines for competition law analysis and process will likely do more for the substantive harmonization of competition law internationally than any other alternative.²⁷

1. *No Conflicting Social Objectives.*

The purpose of competition law is to maintain the free interplay of market forces (through competition among private enterprises) as the means of organizing productive activity in a market economy, no more and no less. Any social objective in conflict with this principle should be pursued through rules and

²⁵ See, e.g., Resolution of the Spanish Tribunal for the Defense of Competition (Dec. 1, 1995) ("the Law for the Defense of Competition does not have as an objective the defense of competitors, but is directed towards the maintenance of competition" (translation)); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws enacted for "the protection of competition, not competitors").

²⁶ See, e.g., Guidelines for the Evaluation of Economic Concentration Operations (Venez.), Gaceta Oficial de la República NI 36.819 del 11 de Noviembre de 1999, at § II.A. (adoption of hypothetical monopolist test); Regulation 2790/1999, O.J. L336/21 (European Commission vertical restraint reform regulation); see also Romano Subiotto and Filippo Amato, *Preliminary Analysis of the Commission's Reform Concerning Vertical Restraints*, 23 J. WORLD COMP. 5 (2000); see also Resolution of Superintendency for the Promotion and Protection of Free Competition (Venez.) No. SPPLC/026-98, 24 de Agosto 1998 (citing with approval pro-competitive benefits of non-price vertical restraint regarding the use of drink coolers).

²⁷ I would like to thank my colleague, Abbot B. Lipsky, Jr., for his insights regarding the guidelines that follow. These guidelines are largely derived from a series of thoughtful correspondence regarding ideal norms for sound competition law decision-making authored by Mr. Lipsky (on file with the author).

institutions distinct from those of competition law. For example, export promotion, labor protection, and wealth redistribution objectives generally conflict with this purpose and thus do not contribute to the development of rational economic principles that guide effective competition law policy and enforcement.

Importantly, proper observation of this principle would require that decisions regarding the disposition of competition law matters be made by knowledgeable, disinterested decision-makers based solely on competition law concerns and policy. Meaningful convergence is difficult to achieve where other interests (for example, trade or labor policies) enter the mix under the rubric of competition analysis because those interests will not be uniform across jurisdictions and the potential for uneven outcomes in like market circumstances is high. In far too many jurisdictions ultimate competition law decisions are made by persons responsible for much more than just competition policy and those decisions are subject only to a public interest standard on appeal.²⁸ This predicament considerably raises the risk that decisions are made not solely on antitrust principles, but on a variety of other considerations that easily meet the very low public interest standard.

2. *No Hard and Fast Rules.*

Substantive judgments about the legality of business conduct should not turn on the application of hard and fast rules or presumptions, but rather on complete case-by-case analysis of the long-run competitive impact of that conduct. Competition law enforcement action is a prophylactic measure intended to protect a process – competition between private enterprises – that by definition is supposed to be free from regulatory intervention.²⁹ Accordingly, intervention

²⁸ For example, the merger review procedures under the competition laws of many countries, including Spain, France and the United Kingdom, provide that ultimate decision making authority over mergers rests with a politically appointed minister or cabinet that has a far broader portfolio than competition policy and that the designated competition authority only provides a recommendation. See, e.g., Antitrust Act (Spain), Law No. 16/89 (July 17, 1989), Art. 16 (Cabinet decides, Minister of Economy plays significant recommendation role); French Ordinance No. 86-1243 (Dec. 1, 1986), § 42 (Minister of Economy and the Minister of the related economic sector decides).

²⁹ Lawrence Lindsey, a former U.S. Federal Reserve Governor and current Economic Advisor to President George W. Bush, recently observed that one of the most impressive attributes of the free market system is that it places decisions regarding marketplace behavior in the hands of those persons who have the most to lose, or win, in any given situation – those who will suffer if things go wrong; and that regulatory intervention puts decisions about market behavior in the hands of persons who do not share the same risk/reward profile. Lawrence B. Lindsey, *The 17-Year Boom*, THE WALL ST. J., Jan. 27, 2000, at A22. This observation can easily be applied to competition law enforcement. Those who agree with the purpose of competition law would most likely also agree that in the absence of strong evidence of competitive harm that the market should be allowed to operate unfettered by regulation. In other words, the default rule must be that market behavior must not be restricted without a comprehensive analysis of competitive effects and the exercise of sound judgment in consideration of all available economic facts and reasonable theoretical models about what those facts tell

in the form of prohibition or sanction should only take place after a thorough examination of all available relevant economic evidence of actual or likely competitive effects, including an assessment of the chilling effect prohibition may have against the same conduct in circumstances where such conduct would be, on balance, neutral or even pro-competitive. The application of hard and fast rules means this type of thorough examination of market effects is not happening and the risks and impact of enforcement errors are likely very high.

3. *Transparency*

Competition law review of business conduct should be an open and fair process characterized by transparency and thorough discussion and consideration of all relevant evidence and competition concerns. Enterprises subject to investigation should receive a timely notice of all claims against them and timely as well as complete access to all evidence and arguments relied upon by authorities evaluating competition law challenges to their conduct. This may seem simplistic and indeed reflects the most elemental notions of due process, but the discipline of competition law analysis in any country is advanced by a full and frank discussion of as much evidence and as many arguments as possible. Assessing competitive harm, particularly in the context of merger review, often includes drawing conclusions about what might happen in the future. Predicting future effect is always difficult even with all available evidence; but it is particularly risky in the absence of full and fair consideration of all evidence and possible outcomes.

Consistent with this principle, all decisions and the underlying considerations and evidence relied upon in reaching such decisions should be published and made readily available, subject to adequate protections for confidential proprietary information.

4. *Separation Between Prosecution and Decision-Making Responsibility.*

Authorities responsible for challenging business conduct should be completely separate from authorities responsible for deciding the outcome of a case. The combination of prosecution and judging is not generally conducive to the consistent exercise of disinterested and sound judgment. There are far too many jurisdictions that suffer this flaw, and their records on appeal, where meaningful appeal is available, tend to underscore this fundamental problem.³⁰ There are other jurisdictions that provide some measure of distance between prosecutor and decision-maker, at least as it relates to actual persons, but institutionally not enough to satisfy a standard of complete separateness.³¹

us about present and future competitive effects.

³⁰ Decision-making in many jurisdictions is made by either a person or group of persons that also initiates and conducts investigations. *See, e.g.*, Law to Promote the Exercise of Free Competition (Venez.), Official Gazette No. 34,880 (Jan. 13, 1992), Art. 29 (Superintendency has power to investigate, judge, and sanction alleged anti-competitive conduct); Federal Economic Competition Law (Mex.), D.O., 24 de Diciembre 1992, Art. 24 and 35 (same with respect to the Federal Competition Commission).

³¹ Both the U.S. Federal Trade Commission and the European Commission, for example, rely heavily on their staffs to initiate, investigate, and essentially "prosecute" cases

5. *Independent Appellate Review.*

Judgments of a competition authority should be appealable to an independent tribunal. The standard of review should be *de novo* – the appellate tribunal should be allowed to overturn competition law decisions based on any defect in reasoning, including misinterpretation of the law, failure to evaluate all competent evidence, and the soundness of the factual and legal inferences drawn from the evidence. Appellate tribunals should not be bound by the economic reasoning of the competition authority. This sort of appellate review is an important check in ensuring that the analytical process at the decision-maker level is rigorous, fair, and complete.

I am not aware of any one jurisdiction that incorporates or satisfies all of these basic norms of competition law analysis and fair process. None of these norms, however, are controversial, and I suspect that most people interested in competition law policy would easily agree on their importance as baseline principles. The growing interest in harmonization of competition laws across borders provides an ideal opportunity to focus on the discipline of competition law analysis and improve its exercise by promoting these basic norms of fair process and studied analysis. Without them, prospects for productive and meaningful harmonization are dim.

III. A Comment on the Harmonization of Pre-merger Notification Rules

The one exception to the thesis above, that harmonization discussions should center on principles of process and not rules, relates to merger notification and review. This is one area where the rules are ripe for some degree of harmonization. Specifically, the rules to which I refer relate to the four issues discussed in the first section of this paper: (i) whether a transaction is reportable, (ii) if so, when must the filing be made, (iii) what must the filing contain, and (iv) when will review be completed and a decision rendered. As described above, nearly every jurisdiction that requires pre-merger notification and review as a condition to closing treats these four issues differently.³²

These rules, unlike substantive competition law rules, are ripe for harmonization for two reasons. First, there is a sufficient objective basis and incentive for jurisdictions to find common ground immediately. Pre-merger notification rules are designed to make sure that reviewing authorities have enough information and time to assess competitively sensitive transactions before they are completed.³³ While there may be strong disagreement on how much time and information is needed to assess competitively sensitive information, most jurisdictions can probably agree easily on criteria for identifying those transactions that are not competitively sensitive. The quicker these transactions are identified

internally.

³² See *supra* text accompanying notes 9 and 10.

³³ See, e.g., Hart-Scott-Rodino Antitrust Improvements Act of 1976, at S. Rep. No. 803, 94th Cong., 2d Sess. 215 (1976); 122 Cong. Rec. S. 8615, S. 8630 (daily ed. June 8, 1976).

and approved, the greater the time and resources that can be spent on assessing competitively sensitive transactions. This is a critical factor when you consider that in most jurisdictions the overwhelming majority of transactions captured by pre-merger notification thresholds are not competitively sensitive.³⁴

Second, there is little risk that a harmonized set of rules on this issue will reduce efficiency. Indeed, there is little doubt that the reverse is true – harmonization here will greatly reduce the burdens associated with compliance.

The existing wide disparity in rules governing merger notification and review make compliance both difficult and expensive (in terms of both time and money).

Companies with operations in more than just a few countries are forced to devote significant resources identifying and complying with different rules and requirements in different countries that are intended to accomplish the same purpose. If the procedural notification requirements were the same, compliance would be far easier and more uniform across jurisdictions.

Interestingly, the disparities in rules worldwide relating to pre-merger notification are arguably more varied than those relating to substantive competition law issues. For reasons just described, however, the prospects for harmonization are nonetheless more promising.

IV. Conclusion

Competition law is a discipline that requires rigorous analysis of economic facts. At stake is regulatory intervention in a process that by definition is supposed to operate in most circumstances free from intervention. Accordingly, the assessment process is absolutely critical. Due to its character, competition law does not lend itself easily to the adoption of hard and fast rules or presumptions. Add to this widespread inexperience across jurisdictions in competition law enforcement and wide disparities in economic and legal traditions and the case for meaningful and productive competition law harmonization through the negotiation of common rules is near hopeless.

The case for harmonization through convergence, however, is not. The growing interest in harmonization of competition laws worldwide presents an ideal opportunity to promote common principles of analysis and process that will facilitate the convergence of substantive rules across jurisdictions. The harmonization dialogue should focus on promoting strict observance of studied economic analysis of competitive effect and the application of basic norms of fair process rather than the adoption of common rules. No conflicting social objectives, no hard and fast rules, transparency, separation of prosecution and decision-making responsibility and independent and complete appellate review are five fundamental principles of analysis and process that facilitate convergence.

These principles should drive the harmonization dialogue.

I describe the prospects for harmonization through negotiation of common rules as only near hopeless rather than entirely hopeless because there is one competition law subject that offers good prospects for harmonization –

³⁴ I.C.P.A.C. Report, *supra* note 1.

procedural rules governing pre-merger notifications. The prospects are good because there is a sufficient objective basis to find common ground immediately and little risk that common rules will reduce efficiency.