

THE NEW EUROPEAN ANTITRUST REGIME:
IMPLICATIONS FOR MULTINATIONALS

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APPEARANCES

JAMES F. RILL, Moderator—James Rill is Co-chair of Howrey Simon Arnold & White's Antitrust Practice Group. One of America's foremost antitrust attorneys, Mr. Rill has served as Assistant Attorney General in charge of the U.S. Department of Justice's Antitrust Division, and as chairman of the ABA's Section of Antitrust Law. During his tenure as Assistant Attorney General, he negotiated the U.S.-European Union Antitrust Cooperation Agreement of 1991 and issued the first joint DOJ and FTC Horizontal Merger Guidelines in 1992. He was responsible for initiating the largest number of merger challenges in over a decade, including challenges to major bank mergers and airline asset transactions.

MARIO MONTI—Mario Monti is the member of the European Commission in charge of Competition, a position he has held since September 1999. In the previous Commission (1995-1999) he was in charge of the Single Market, Financial Services, and Tax Policy. From 1989 to 1994 he served as Rector of Milan's Bocconi University, and was appointed President in 1994. At Bocconi he was professor of Economics and Director of the Institute of Economics.

TIMOTHY J. MURIS—Timothy J. Muris is a George Mason University Foundation Professor of Law at the George Mason University School of Law. Professor Muris served as Chairman of the FTC from June 2001 to August 2004. He held three previous positions at the Agency; Assistant Director of the Planning Office (1974-1976), Director of the Bureau of Consumer Protection (1981-1983), and Director of the Bureau of Competition (1983-1985).

JAMES C. MILLER, III—Jim Miller leads the CapAnalysis Group and participates in its various research programs. He is the author or co-author of several CapAnalysis studies and has served as an expert witness in several cases. Dr. Miller's government service included being Director of the Office of Management and Budget and Chairman of the Federal Trade Commission.

PROCEEDINGS

MR. RILL: While the panelists are getting situated, I'm really delighted that Mario Monti is our star on this panel. Mario, you have been introduced three times already today, in absentia, and I can only add to the laudatory and well-deserved comments that were made, particularly by Debbie Majoras and Hew Pate, who not only raised you to a pedestal, which you deserve, but who also probably stole your speech.

At any rate, the plan for this panel is to have Mario Monti make a presentation, followed by comments not necessarily on the presentation, but comments that Tim Muris and Jim Miller choose to make.

I would only add to the many comments that have been made about Mario Monti earlier today that Commissioner Monti, in my own personal experience, has been a DG Competition Commissioner without peer, and it's been my privilege to work with four Commissioners both in and out of office over the years. Mario, we look to you for your judgment, your balance, your ability to "roll with the punches," as we say in the United States, and for your decisive action. As I need remind no one present today, Commissioner Monti has taken positive action without complaint to accomplish such feats as the horizontal merger green paper, the horizontal merger regulation, the horizontal merger guidelines, the technology transfer block exemption, convergence with the United States, the working groups with the U.S., and these things have not always been done under easy circumstances.

As of the 1st of November, Commissioner Monti will be returning to private life. He has been a giant figure as Commissioner for Competition and it's going to be a little bit lonely without him.

Following Mario, in order, will be Tim Muris, a long-time friend. You all know him well. Tim recently departed the Chair of the Federal Trade Commission to return to George Mason and associate with O'Melveny & Myers. With great respect to Debbie, Tim is going to be a tough act to follow. It's funny what people are remembered for. We in the United States probably are getting a lot fewer phone calls around dinner time thanks to Tim Muris. As a result, a great many in the U.S. admire Tim's work, even those who likely never have heard of the Federal Trade Commission. But that's certainly not to overshadow the long list of accomplishments that Tim has had as Chairman of the FTC.

In fact, Tim has had four career turns at the FTC. His second visit to the FTC was occasioned by our third participant, James C. Miller, III, who was Chairman of the Federal Trade Commission in the first part of the Reagan administration and then Director of the Office of Management and Budget in the second part of the Reagan administration. Currently, he is the

Chairman of the Howrey affiliate, CapAnalysis, and, with Jeff Eisenach, one of the organizers of this very excellent program.

Jim's mark at the FTC will be long remembered because he took over the FTC at a time when the Federal Trade Commission was in some jeopardy, even for its existence. The oil cases were foundering, the cereal cases were ill advised, but Congress' attention was focused on the funeral director's rule, because every congressional district has a funeral director.

Jim brought a relatively young lawyer by the name of Tim Muris into the Bureau of Consumer Protection, and the two of them, the Jim and Tim team, turned consumer protection into a viable, powerful, effective, and rational enforcement mechanism. The two worked to rid the FTC of questionable deceptive practice protocols, perhaps best exemplified by the "Red Fox Fur" case. For those of you too young to remember, this was a case where the prior Commission ruled "Red Fox Fur" jeans to be deceptive advertising, as the jeans were not made of red fox fur.

At any rate, those are our panelists and it gives me enormous pleasure to turn the microphone over to Commissioner Mario Monti.

MR. MONTI: I don't know, Jim, whether it is true that I don't need an introduction. It certainly was true that I badly needed an introduction to competition policy only a few years ago and that no other single person provided me with the same amount, quality, and perspective as to how to go about competition policy in the transatlantic relationship as Jim Rill did. So, my debt to you, Jim, is really enormous.

I'm greatly honored to have been invited to take part in this concluding panel together with three monumental figures of U.S. antitrust enforcement. I'm really grateful that the George Mason Law Review has decided to devote the whole symposium to the new European antitrust regime. When I first came to Washington as Competition Commissioner at the beginning of 2000, I frankly would not have imagined that four years later there would be in place such a thing as a new European antitrust regime or that a highly distinguished American university would have devoted a symposium to it, and I would never have imagined how much all of these developments would have been inspired, stimulated, accompanied, and improved thanks to the cooperation with our DOJ and FTC colleagues. But I must say in particular that at times which were not exactly at the high point of the diagram of the bilateral cooperation, Tim Muris was extremely helpful and constructive in helping us to move ahead.

Now, a lot has been said today, including by my colleagues at DG Competition, on the new European antitrust regime. I will add a few sparse reflections in my own perspective at the conclusion of these, I must say, fascinating five years. Of course, we all know that the least contested and, after all, most fundamental area of competition enforcement is the fight

against cartels. There the Commission has, I believe, tried to do its job rather forcefully. Looking only at hard-core cartels, the Commission has imposed over the last five years fines for \$3.7 billion Euro, compared to less than \$1 billion in the five years before that, and less than \$300 million in the 25 years before that.

Since September '99, we have issued infringement decisions in thirty cases. We have targeted some 145 companies, covering cartels in a variety of industries and of various geographic scopes. In the last five years, as compared to the five previous years, we have gone from an average of four decisions per year to around ten per year.

The Revised Leniency Program of 2002 has resulted in a tremendous influx in applications. The revision of the Leniency Program is just one line of work in which we owe so much to inspiration from the U.S., just as we owe to the cooperation with the U.S. and others the increasing effectiveness in the international fight against cartels. On this point, I would not dwell any more.

Besides this added effort in the crucial, historic, venerable, and every-day more and more important area of antitrust enforcement, which is the fight against cartels, we have tried in effect to put together a new architecture for competition enforcement. We have eliminated the costly and unnecessary system of antitrust notifications. We have given national authorities power to enforce European competition law and created the European competition network, which Kris Dekeyser has already described. And we have changed, with some initial difficulty, the structure of DG Competition so that instead of cartels, mergers, and other antitrust cases being dealt within separate directorates, we now have sector-specific directorates with responsibility for all antitrust cartel and merger cases within their areas. This ensures that sector expertise is used to inform all of our work and also ensures greater flexibility in the allocation of staff to cases.

We have increased our reliance on solid economic analysis (again, drawing upon the U.S. approach) and you have the living testimony to this effort in the person of Lars-Hendrik Röller, here today.

Alongside these internal structure reforms, we have made an effort to introduce stringent priority setting, trying to single out those behaviors which are likely to bring about more harm to consumers, and are thus likely to have a more sizable anti-competitive impact on the European single market. Beyond procedural reforms, we have issued, as Jim Rill recalled, block exemptions and guidance in a number of general areas. .

Of course, the activity of any competition authority seen from the broader public takes the name of individual cases, not of architecture reforms. Concerning cartels, cases are rather well known. Then we have had a smaller number of highly visible and contentious cases. The contentious

but vitally important decision on Microsoft lays down, I am convinced, an important precedent for the future. During the U.S. proceedings, Microsoft famously argued that they should be able to include a ham sandwich or orange juice with Windows if they so wanted. We hear much less of that rhetoric today and, indeed, Microsoft's conduct during the settlement discussions was exemplary. Nevertheless, I did believe, and I continue to believe, that a legal precedent had to be established. Competitors and consumers had to know the boundaries to Microsoft's discretion, the legal limits that constrained Microsoft's ability to move into any market it wants.

Similarly, the decision against the German postal operator, Deutsche Post, laid down important rules for those companies that benefit from state monopolies, but also pursue other competitive markets. A firm line was drawn, setting down guidance on cross-subsidization and pricing, which will bring clarity to many sectors of the economy and not just postal services.

Both of these cases were controversial. Important cases tend to be so, but not always. The battle to create a single European market continued perhaps nowhere more obviously than in the car sector. The Commission's most popular publication year after year is actually a comparative analysis of car prices throughout the European Union member states. And year after year it demonstrates that although the market is becoming increasingly integrated, there still is some distance to travel before we can claim to have a genuine single market. In addition to a block exemption regulation for the car distribution sector, the Commission also pressed forward with a number of individual cases such as that against Opel Netherlands, in which the ever-hopeful car manufacturers continually sought to impose barriers to parallel trading between the member states.

The fact that cases in such clear cut areas of competition law are still necessary shows that there is always more that can be done. And I don't expect DG Competition to sit on its laurels after I leave. Indeed, I am sure that my successor, Neelie Kroes, will arrive equipped with a list of priorities where she wants action. The next steps are, of course, for her to determine, but I would like to modestly set out some thoughts as to the antitrust challenges ahead.

First, we need to continue the reforms that have already been put in place, ensuring a more focused, effective, and proactive enforcement of the antitrust rules. This may well mean handling fewer cases, handling them more quickly, and prosecuting them more rigorously. Although fines have increased significantly in the last decade, I'm still not convinced that they are high enough to act as a serious deterrent to anti-competitive activity.

Second, we need a greater focus on government restrictions on competition, and here I must say every time I met with Tim we reinforced each

other's faith in the overriding importance of this sensitive chapter of a competition authority's job. All too often we find governments regulating sectors of the economy in a way which, had it been done by the companies themselves, would have been a breach to the competition rules. We have recently done quite a bit of work in the area of the liberal professions, finding there an area full of restrictive practices imposed either by government or by industry self regulation. Indeed, the very name "liberal professions" is somewhat ironic here.

Third, we need to change the culture of competition enforcement so that competition authorities are not the primary agencies (indeed, often the only agencies) to apply the competition rules. Private enforcement of anti-trust is largely non-existent in Europe and we have started to identify the explanations for that. Private enforcement clearly brings with it some risks, but these are far outweighed by the potential benefits. Obviously this is another area in which we look to the U.S.

Finally, we need to be ready to have recourse to competition inspired regulation when the competition rules themselves appear to be inadequate. This is a model which is working extremely well in the communications sector and deserves wider consideration in other sectors of the economy characterized by pervasive long-term competition problems.

Being in charge of cartel enforcement leads almost inevitably to a fair wind and good headlines. I think it would be reasonable to say that being in charge of merger control, at least in the EU over the last five years, has led to somewhat more turbulent winds. Mistakes were made leading to some well-known defeats before the Court of First Instance. Though I have high hopes of reversing one of those defeats before the European Court of Justice in the next few months, the rule is the law. In a hearing before the European Parliament my successor, Ms. Kroes, said that in her life she had learned more from her failures than her successes. I can only agree (I mean, concerning my failures, not hers).

Since the defeats before the court, we have appointed a Chief Competition Economist to advise on all cases, not just mergers (we had some idea of going down that way; you are not entirely a son of Luxembourg, Professor Röller). We have put in place a more flexible system for allocating staff to cases which should allow us to cope better with the next merger wave.

We have introduced a system of peer review, in which all important cases (again, not just mergers) are examined meticulously by experts drawn from all the different parts of DG Competition. In short, although the court setbacks were disappointing and did not go entirely unnoticed by the press, we have emerged with a stronger and more effective merger control system than before.

This is helped, of course, by the reform of the merger regulation, which came into force in May of this year. I believe Laurent Petit has dwelled upon this and I've seen some rather amusing charts, by the way, concerning one particular non-merger whose name now escapes me.

In addition to numerous improvements to the procedure, we have moved from a test, as you know, of whether a merger creates or strengthens dominance, to a test of whether the merger poses a significant impediment to effective competition. This change should ensure that all anti-competitive mergers are caught and should bring EU and U.S. approaches to merger control closer together. In fact, it's clear that we are seeing the development of a worldwide system of merger control with all major jurisdictions enacting merger laws and increasingly cooperating effectively in their application.

And just as with antitrust, it's not only the procedure reforms that are significant. There have been a number of cases important as to their substance. The Volvo prohibition, for example, confirmed a clear policy against the creation of national champions. I should say more precisely, not against the creation of national champions, but against tilting the competition rules in order to asymmetrically favor the creation of national champions.

And, although I was bitterly criticized in my approach against the national champions in this respect by several European politicians, I entirely stand by it. If a company believes it needs to grow to compete on the world stage, then so be it. But if in the end that implies, taking account of all the possible remedies, a right to dominate the domestic market, we cannot agree; such a price would be too high for consumers. By the way, we are trying to bring the advocacy a step further. I've recently argued, of all places, in front of the French Senate in Paris, that we have nothing against national champions as long as they come to birth in full compliance with the competition policy of the European Union. I pointed out that this includes not only merger control, but also state aid control.

And I went out of my way to put myself in the place of a French citizen. I argued that if I were a citizen of a country whose government pleads in favor of the creation of national champions, I would be cautious in being excited by that in my capacity as a worker, in my capacity as a shareholder, and in my capacity as a consumer. At any rate, it's a matter for national choice whether through words and through deeds the creation of national champions (or pan-European champions for that matter) is encouraged, but it is our role, of course, to see to it that this does not happen by infringing competition rules.

I presented an absolutely simple argument, an analogy, which was immediately understood by European politicians. I told them, "Suppose the

competition authority in Brussels was to bend the rules of merger control to favor the creation of a huge European champion. Can you imagine that that European champion would confine its ambitions and aspirations to operating on the European market? Would you expect that the Japanese or the U.S. competition agencies would deliberately close their eyes relative to their merger control system to favor the emergence of a European champion?" Of course not. That is an instance in which I have an interest to stress the big similarities, not the small dissimilarities, in our respective regimes.

I attracted some criticism for the G.E.-Honeywell case, this time from politicians on this side of the Atlantic, but, again, the risks to competitive markets in that case were high in our estimation. The case is on appeal, and I will, of course, respect the court's ultimate decision. My successor, I'm afraid, will have, at any rate, to respect the ultimate outcome of the judicial process, but I stand by the concerns expressed and I stand by my decision.

The reform of the EU merger control regime and our enforcement practices have transformed what I believe was an effective system into an even better one. There are still challenges ahead. These include the need to complete the tapestry of the reform with enforcement policy guidance and notice on mergers between non-competing firms, a revision of the remedies notice, and so on; the need to ensure consistency between the Commission's approach to Articles 81 and 82 in merger control; and the need to engage in more exposed analysis of the effectiveness of our merger control policy.

Let me, Mr. Chairman, approach the conclusion of my remarks by mention of the new constitutional treaty of the European Union, which, to me, is the most important result of the last five years. The new constitutional treaty has been agreed upon by 25 governments and hopefully will be ratified. Importantly, it does not modify the place of competition policy. If anything, the constitution enhances competition policy in the sense of objectives relative to other policies. And, lastly, I can now reveal that, say, three years ago, many friendly advocates of sound competition policy in the European Union were advising me to go much softer in the matter of state aid control. Because when a constitutional process is going on it is the member states that have the knife in their hands because it is they, and not the Commission, which subscribe to a new treaty. If you've gone with a vigorous competition policy and of all things you step up the vigorous enforcement of state aid, you can only be sure that they will take the wonderful opportunity of the revision of the constitution to trim down the power of competition policy. It was a very unpleasant trade-off to face.

The strategy that we have tried to follow has been one of continuing with business as usual in relation to the vigorous enforcement of competi-

tion policy, stepping up very, very much the advocacy exercise and lobbying or exercising the pedagogical effort vis-à-vis the members of the European Convention, then the governments, and more broadly in the public opinion so that the rules of the Treaty of Rome would not be weakened or dismantled.

And, at the same time, I must confess that although we were already embarked on the modernization exercise of decentralizing some enforcement of Articles 81 and 82, I decided to present that reform to the member states as a proof that the Commission did not have an appetite for more power across the board, but was selectively concentrating on what really needed to be done at the EU level, giving a greater role to the national competition authorities. I believe that that was a happy coincidence in time because it disposed the member states rather well when it came to finally deciding how to treat competition policy in the constitutional treaty.

So, as I said the other day to Ms. Kroes, I hand over to you a DG (and I should have stressed this much more today) a DG whose staff has through its professionalism and dedication achieved 99 percent of the improvements of modernization; a DG with a renewed architecture of competition enforcement in Europe. Above all, and most importantly despite the lack of discussion on this point, a DG whose powers to exercise competition policy for the benefit of the European economy are all intact.

Thank you very much for your attention and also for your patience.

MR. RILL: Tim?

MR. MURIS: I'm certainly pleased to be here with Commissioner Monti and Jim Rill and Jim Miller. I'll have more to say about Commissioner Monti later. First, I wanted to remark that two years ago at this time at a memorial service for Jim Liebler, I mentioned that I had three mentors in my life, each named Jim. Fortunately for me and all of us, two of them are still alive and on this panel.

Let me make a few brief points, and leave plenty of time to hear one of the other Jims and to take questions. The first point (which is obvious, but I wanted to remark on it just briefly) is that we are to some degree in a time of transition. For example, we have changes in leadership. In North America, three of the four competition agencies have new leaders. In Europe, besides the pending leadership change, the modernization effort needs to be digested. We also have the ten new competition authorities. We have the additional fact that Commissioner Monti's modernization discarded an obsolete model of antitrust enforcement. Enforcement is now shared among the Commission and the member states. The new system recognizes both the goals of the single market and uniform enforcement of competition policy within it, as well as the enormous diversity of consumers and markets that exist within the enlarged EU.

Moreover, the merger reform included both substantive and procedural elements. Commissioner Monti, for example, used his own authority, as he discussed, to address some of the problems identified by the adverse court decisions. Peer review (or the Devil's advocate panels) and the Office of Chief Economist were also welcome changes. By the way, the changes are not limited to merger control, but they apply to all of DG Comp's enforcement activities, including state aids.

Commissioner Monti has directed and overseen the construction of a modern competition enforcement structure and is to be congratulated for his efforts. His successor now has the challenge to master the operating manual, which I'm sure will be left for her, and successfully guide the new enforcement model through the challenges that it inevitably will face.

There's transition elsewhere as well. Turning to Asia, India and China are confronting a basic question. To what extent will they rely on competition as the motivating force of their economies? China may be on the verge of enacting a competition law, perhaps within the next few years. What kind of law will it be and how will it be enforced? China has been relatively open to foreign investment, but some of its officials have made protectionist noises recently. There is obvious uncertainty over what the Chinese will do in competition law and the resolution has enormous potential impacts for the world's trading system.

This last point, about markets, is one that continually faces all of us. Modern competition policy at its core is based on acceptance of markets as the best method of economic success. Competition policy is a form of regulation that competes with other forms of regulation, but is much more market friendly and is often used, I think justifiably so, to justify ending regulation and replacing it with competition policy. But, even with some deregulation, we have to remain vigilant to misuse of government power and the advocacy function that Commissioner Monti mentioned will remain an important and crucial role for competition policy. Indeed, it was Commissioner Monti who, when we first launched the ICN three years ago at this time, suggested that one of the topics for discussion be competition advocacy. He thought the topic important, not just for the developed countries, but for new agencies in less developed economies.

Let me close then by paying special respect to Commissioner Monti as he prepares to pass the baton to his successor. The effectiveness of institutions is enhanced by officials who are dedicated to open markets. The European Union is fortunate to have had Mario Monti as a Commissioner for a decade. As early as the 1970's, long before such views became popular, he was a courageous advocate of open markets, deregulation, and rational market policies in Italy. At that time, only the brave would attempt to

use the name “Italy” and the phrase “rational economic policies” in the same sentence.

His persistence has benefited consumers and policy makers through his contributions to the enactment of Italy’s Competition Act of 1990. He was tireless as Internal Market Commissioner, and now as a reformer of the Commission’s competition policy. Perhaps most underappreciated in the United States was his determined fight against state aids, which he discussed briefly and which drew equally determined responses, especially from the French and the Germans.

Commissioner Monti has directed and overseen the construction of a modern competition enforcement structure and is to be congratulated. Despite our rare differences in some cases, and there were differences, he has been faithful to the purposes of the 1991 US-EC Cooperation Agreement, at whose creation Jim Rill was present. As each of us has come and gone (or is soon to go) in our leadership positions, we broadened and deepened the communication and cooperation among our agencies. I trust that our successors will continue to do the same as they face the always-existing challenges to implement consumer-oriented competition policy.

Thank you.

MR. RILL: Jim?

MR. MILLER: Well, first I want to thank George Mason University and all the people who have worked to put this together. I’d like to thank the people from CapAnalysis, in particular Jeff Eisenach; the Howrey anti-trust practice; and the Howrey marketing people. I want to thank them for all they’ve done.

Now, I’m really honored to be on this panel with Commissioner Monti, who put DG Comp on the map, who gave it a mission, who articulated its goals and objectives and restructured the organization and made it work. Anyone who can accomplish the turnaround of an agency is someone that I really admire.

I’m also honored to be on the panel with Jim Rill, who, with his leadership in international organizations, has made a real difference in harmonizing antitrust principles. .

Finally, I am honored to be on the panel with Tim Muris, whom I say without hesitation is one of the smartest people I ever met and the best Chairman the Federal Trade Commission has ever experienced.

Now, I had many new unique insights to bring today, but after listening to things all morning, I fear most of my good points have already been made. So now, everything’s down to this small sheet of paper. First a disclaimer: I’m hesitant to say much about the new European regime, because, quite frankly, I am hesitant to make recommendations to people in governments other than my own. Of course, I don’t hesitate to make recommenda-

tions to my own government, as many of you know, but I do have some hesitancy about advising other nations' governments or institutions.

But I do have five recommendations and three observations for DG Comp. (The last of my recommendations is a little controversial, so I will save it for last.)

My first recommendation is to explore your advocacy role. DG Comp is a great pulpit—a bully pulpit, as one of our presidents might have called it. You can have so much positive effect on behalf of consumers and competition by advocating pro-competitive policies, criticizing anti-competitive policies, pointing out the macroeconomic effects of bad competition policy.

Second, avoid capture by firms and industries. Tim and I experienced this, and I'm sure you did, Jim, as well. Firms would come in seeking special antitrust treatment, in hopes of getting some kind of comparative advantage. Often, their argument in favor of special treatment bore no relationship to reality. That is not to say there is never a reasonable argument in favor of special treatment, but most of the time it was a matter of people seeking special advantage and presenting rationales that could not be supported. Third, maintain transparency during the review process. I've heard some very nice things about DG Comp maintaining great openness with firms whose transactions are under review. That's a very positive thing. It reduces transaction costs and has positive advantages in terms of open government.

Fourth, continue to articulate the reasoning underlying the policies that you are following. I think it's a wonderful thing when you tell why you decide to object or not to object to a merger or acquisition, not only in relatively young competition enforcement regimes, but also for those regimes benefiting from years of legal precedent. Now, as I am holding my last recommendation for the end of my remarks, I'll proceed with my three observations. First, I think modernization is going to lead to more restriction (that is, a higher threshold filter) because so many state competition authorities will have to review many things that they haven't been reviewing in the past. Dr. Depoorter presented a model this morning of this type of phenomenon. Essentially the situation is this: there is a difference between parallel and seriatim reaction. I'll use an electrical analogy. If you put resistors in parallel, you lower the resistance; if you put them in series, you add to the resistance.

Or, drawing from my days as a gentleman farmer in the beautiful Virginia countryside, say you have some cows, a fence, and three or four gates. Say you want to take the cows to pasture—the pasture surrounding the fenced area. It is a simple matter of opening the gates, any of which might be used any of the cows. But if you have to transport the cows from one

pasture to two or three adjoining pastures, they have to go through a series of gates, and it's much more difficult to do. So it is with seriatim review.

Secondly, as Tim knows and many of the economists here know, there is a bit of literature that suggests on the other hand that competition among competition agencies is a good idea. It improves them. Steel sharpens stone or steel sharpens steel, to quote another phrase. There's evidence that the FTC and the DOJ both do a better job because each one is fearful that the other will do better.

My third observation is that we ought to bear in mind that even the clearest law and the most brilliantly drawn and articulated set of policies will lead people to disagree. In other words, the rules will not be as straightforward and as black and white as we might like to see. And we need to go no further than right down the street here to the Federal Trade Commission where you have five individuals (I'm not talking these particular people; I'm just talking generically) of goodwill, very bright and very knowledgeable, who come down on different sides of many issues. So, even at the best, we're still going to have gray areas and some indeterminacy.

Now, for my final recommendation, the controversial one: It is generally perceived, as I understand from Dave Scheffman and other commentators, that not only in the United States but also in DG Comp the ultimate criterion is economic efficiency rather than equity. I know that Mr. Monti sometimes uses the phrase "fair competition," and politicians here use the phrase as well. Sometimes they mean things besides efficiency, but by and large we're talking about efficiency as the goal.

Now, experts on efficiency are economists, and the experts on advocacy are attorneys. Economists like to believe in division of labor, so my suggestion is the approach we took, as Tim will remember, at the Federal Trade Commission under President Reagan. Back then, I told the lawyers they should consider the economists as their clients, and told the economists that they should look to the attorneys as their advocates. Now, how's that for leaving on a controversial note?

Thank you.

MR. RILL: Thanks very much, Jim, and thanks to the entire panel. We've got some time to kick a few ideas around at the panel table. I would like to ask each of the panelists, starting with Mario, a question. We've seen areas of cooperation that have shown a good deal of success. The merger working group has led to significant substantive convergence in merger review, at least merger analytics. The working groups on intellectual property and antitrust have helped both sides consider fundamental issues, which, in turn, had no little influence on the revisions that were made on the technology transfer block exemption and guidelines.

For each of the panelists, what do you see as the next major area or major focus for a concentrated effort on consultation and potential convergence?

MR. MONTI: One is ongoing. The other one, in my view, should come. The one which is ongoing in a flexible way, but characterized by intensive exchanges, is a reflection certainly on the part of the European Commission on Article 82 and abuse of dominance. We are systematically working internally on how to articulate this area of enforcement more clearly and better. That has a lot of exchange in particular with the U.S. antitrust agencies.

It would be for my successor to decide what form technically this reflection will take, at any rate. It will imply, when the moment comes, a lot of public consultation. I think, as was said on several occasions, that the same degree of cooperation will be helpful in this area (monopolization or abuse of dominance) as has proved helpful in the areas that Jim Rill just mentioned, mergers and IP.

At the same time I think it's not necessarily the case that we have to aim for full convergence. In particular, Article 82 and the history of the structure of European markets is of relevance here, especially given that so many European countries are still in the process of privatization and may require an approach to the issues of abuse of dominance which may not necessarily be the same as in the U.S. economy.

The other one is more for the future and has to do with government restrictions to competition in all senses, including subsidies and state aids. I believe there should be an international movement of systematic cooperation on this issue. For instance, when I read the U.S. press and see concerns about Fannie Mae and Freddie Mac, I wonder whether the U.S. should keep in mind what was done in the recent past in Europe under state aid control to dismantle the state guarantees to the public banks in Germany.

So, Jim, Article 82, monopolization, and looking more into the future, but maybe with some short-term appetizers of mutual exploration into government restraints on competition.

MR. RILL: Tim?

MR. MURIS: Let me make a few brief comments and throw one more issue on the table. First, I agree that dominance is probably the greatest area of substantive disagreement, both within the U.S. and across national borders. The issue is further complicated in the United States by the fact that most of the action is through private cases, not through government cases. There have been prominent Section 2 cases, but unlike mergers, where private actions are not a big part of the antitrust landscape, private cases are crucial to recent monopolization developments.

Second, in terms of government obstacles to competition, I agree that they are extraordinarily important. In some way, shape, or form (and I'm not arguing for a world antitrust code by any means) it's important for anti-trust officials to have a greater seat at the table in the WTO because more and more competition issues are resolved, or at least fought out, in the WTO.

The third issue I would put on the table, and this is more of a multilateral issue, is that the area of mergers continues to require considerable discussion. I think there's extraordinary convergence between the United States and the Europeans. The ICN (although it's obviously still in its very early stages) could be a very useful forum for discussing multilateral convergence. So I would emphasize bringing best practices and peer review to bear on the merger issue.

MR. RILL: Jim, I don't want to preempt you or even add to it, but in your recommendations you spoke of advocacy. Would you consider this, as I think both Tim and Mario do, a focal point for cooperation? And, as one of the early advocates for the attempted reduction and elimination of government restraints during your tenure as Chairman of the FTC, perhaps you can give some counsel on traps to beware of.

I have to give one personal experience. When President George H.W. Bush in his State of the Union message in 1992 announced his deregulation initiative, he was casting about; the White House staff was a bit thin in the area. So, when the White House counsel asked me, "Well, will you take over the transportation sector of deregulation?" I was quite excited, thinking this would be a wonderful and important thing to do. My experience was a bit less grand than I had anticipated. Try going into well established federal transportation agencies with the message that the time had come to substitute antitrust for federal regulation and see how far you get. It was not my most successful endeavor as Assistant Attorney General.

Jim?

MR. MILLER: I remember George Hilton, one of the great advocates of deregulation and an economist at UCLA, once saying he would never be satisfied until the ICC building were taken apart block by block, hauled off, and the ground sown with salt. Now, that hasn't happened, but along the way when the ICC was deregulated there was some advertisement in a local publication holding out rentals of the hall for purposes of ballroom dancing. And that insult is probably close to having the building torn down and it being sown with salt.

When Tim, myself, Dave Scheffman, and perhaps others in attendance were at the FTC when the so-called "interdiction program" got going full blast, we were, I think, quite successful in highlighting the adverse effects of much regulation in a lot of different ways. We took on the postal service,

as you may recall. We certainly fought the physicians who were trying to seek an exemption from FTC authority, and we were successful in that. We were successful in raising a lot of issues with local governments and state governments regarding their regulation of professionals -- back to your point about so-called liberal professions, Mr. Monti -- and I think we made some breakthroughs there. We talked to the FDA, filed pleadings with the FDA and with the FCC, seeking more competition in the case of FDA rather than bans on certain kinds of products; to label the products so the consumers would know what was in them. If you're really working hard in drug production, you're pushing at the margin, and you recognize that you might just go a little bit overboard. We had some innovations, such as suing the taxi commissions in New Orleans and Chicago. We sent Bill MacLeod up there. We were afraid he wouldn't come back because it was a highly emotional thing.

And then I think the following year, the Congress put in our appropriation a rider which forbid our using any money for filing and suing state and local governments, so, you know, you can go a little bit overboard. So, I guess I would urge that you be very careful and remember both type one and type two errors. We ventured a little bit further, but I think that rider has since been rescinded.

MR. MURIS: Well, actually, this is one of your triumphs. It passed the Senate, but you got it stopped.

But to respond to Jim Rill, even though some of the vestiges of the regulation still exist, the ICC is gone and a lot of the bad regulation is gone. I can remember when Jim Miller was budget director and we briefed President Reagan, and Jim's slogan was, "One hundred years is enough for the ICC." Then, to everyone's complete surprise, President Reagan, in response, raised the subject of "backhauls." The issue of backhauls is as follows: Certain kinds of regulations prohibited a returning truck—an empty truck—from picking up and carrying cargo back to its destination. There had been some dispute between California and Nevada, and then-Governor Reagan had to learn a lot about backhauls, and he remembered it all, 15 years later. Jim, being an expert on that issue, engaged the President in a spirited discussion on the problem.

MR. MILLER: But most importantly, the President shared my view that the problem of backhauling was one of many persuasive reasons to abolish the ICC.

MR. RILL: Yes, in those days it was a situation in many ways similar to that facing emerging economies today, with newly created antitrust agencies. They wonder how they're going to sue the state, which is the monopolist in a number of areas.

Quickly, let's talk about private enforcement. Now, an emerging issue outside the United States and one that was mentioned by Commissioner Monti, is that there's an OECD program next week that will discuss the pros, cons, and other issues involved in private enforcement. I will ask each of the panelists, starting with Tim, then going to Commissioner Monti, and Chairman Miller, what one, two, or three words of advice would you have for an institution and a nation or jurisdiction exploring the possibility of private enforcement?

MR. MURIS: Private enforcement has had lots of benefits in the United States, but it has also had enormous costs, and the key is to try to retain the benefits and reduce the costs. As just a small example, at the FTC we studied the class action system and found that it is significantly distorted. There are settlements between the plaintiffs' lawyers and the business where the plaintiffs' lawyers get money, and the consumers get virtually nothing (sometimes they get coupons that are essentially worthless). That's a system that imposes in the aggregate significant costs on the businesses that have incentives in individual cases to settle, although in the aggregate, they don't like to be sued. Very few direct benefits accrue to consumers, and indirectly the costs of consumer goods rise because the money that's paid to the plaintiffs' attorneys gets passed on.

Thus, I would certainly avoid some of the significant problems that we've had with class actions if one is going to have a private system of antitrust enforcement.

MR. RILL: Just a quick follow-on to that, one of the early class actions that I was involved in while at Collier was the chicken industry antitrust litigation. Howrey was also involved in that. The case was ultimately settled with lawyers getting a great deal of money and consumers getting chips which they could trade for chickens that were being sold by the broiler manufacturers. This, of course, became known as the chicken—well, I won't finish the phrase—settlement.

MR. MONTI: Well, in the case of Europe, private enforcement deserves the treatment of an infant industry given its virtual non-existence. What the Commission has done has been first of all to recognize that the pre-modernization system, the system prevailing under Regulation 17 of 1962, in fact did not allow the courts to be fully on the map concerning enforcement of EC competition law. Therefore, one of the aims of the reform now called "modernization" has been to put the courts in the position to fully apply Articles 81 and 82 without any longer the restriction deriving from the Commission's monopoly on Article 81, Paragraph 3. Now, that obstacle is removed.

The Commission has also commissioned a study (which is just out or will be out very soon) to reconstruct a map of all the other obstacles to pri-

vate enforcement. Many of them have to do with the lack of harmonization of procedural laws in the different member states.

Finally, there is also a problem of training. We must train judges, and train consumers and consumer advocates to be able to use the system once the system is in place. But we have a long, long way to go, and I think we should not allow this difficult march to be deflected because the system elsewhere may have met some excesses.

MR. RILL: Jim, you had a comment on private enforcement?

MR. MILLER: I was just going to say you need to make the rules clear and I would suggest consideration of the English rule of “loser pays.” Also, I was going to suggest maybe not to have treble damages, but to go for a lower multiple, like double damages. But on the other hand, you need to have a big incentive for private litigation to develop and to flourish.

On the training of the judges, I was just smiling because yesterday Jeff, Susan, and I met with the staff of the Modernization Commission (some of my colleagues at Howrey are probably going to just get upset about this). One of the suggestions I had for the Commission was to survey judges as to their economic literacy. That is to say, how much economics do U.S. federal judges really know? We feel like it would be useful for them to know more economics, and not just for antitrust cases, but for other kinds of cases as well.

I ran into Steve Cannon, who was here. Steve, who is a member of the Commission, said, “I don’t think we’re going to touch that, Jim.”

MR. RILL: Steve’s always had good political judgment.

MR. MONTI: Having acknowledged enormous debts of the EU towards the U.S., including antitrust, I cannot hide that we are enormously proud, after having put in place our modernization, that the Commission in the U.S. is called the Modernization Commission.

MR. MILLER: There you go.

MR. RILL: Let me offer each of the panelists just right down the line, Tim, Jim, and Mario, an opportunity for a couple of minutes of closing remarks.

MR. MURIS: I don’t know if I’ll take that long, but a great title of an otherwise completely forgettable book by Lawrence White is, “No Final Victories”. And I think in this world that we live in, that’s good to remember. I mean that success will take constant work. We’ve come a long way intellectually and practically in a market-oriented system where antitrust law has a prominent role, but the rent seekers, as Jim Miller was saying, would like to change that. Fortunately, I think that the people who are running the agencies now and those who will be in the near future are extremely well qualified and will continue the fight, as Phil Gramm once said, of doing the Lord’s work in the Devil’s city.

MR. MILLER: I want to just say again thank you everyone for this conference and thank you for inviting me to participate.

I just want to place the discussion in perspective, and I think my colleagues here would echo this point. We need to sit back and think how far we have come in terms of improvement, not only in antitrust law but also on the regulatory side. We're making better decisions today than we were making twenty years ago, thirty years ago, certainly fifty years ago.

I ran into Justice Stephen Breyer yesterday at the Justice Department for a reception, and he was talking about how extraordinarily important the reforms that gathered steam in the 1970's and were brought to fruition in the late 70's and early 80's, were in changing the dynamic for our economy. And I think antitrust enforcement has improved just as well. I hear what Tim's saying and I think that's absolutely right. We'll have conferences 20 years from now talking about ways to improve things, but sometimes we ought to just pat ourselves on the back for having done so well over the past several decades.

MR. RILL: Mario, you have the last word.

MR. MONTI: Yes, which is a deeply subjective one. This panel is the very last event in Washington of my five years as Competition Commissioner and I could not have hoped for a more pleasant event. So, thank you very, very much.

MR. RILL: I think that's all. There's nothing left to say after Mario's final comment. As I said, Mario it's been a hell of a ride. Thank you very much, and thanks to the organizers of this conference. Thank you all very much.