An Interview with Robert Pitofsky

In his lecture, Professor Pitofsky discusses changes in antitrust remedies that occurred under the first Bush and the Clinton administrations. In June, *Georgetown Law* magazine asked his views on recent developments in antitrust in the United States and Europe.

An unprecedented number of mergers occurred during your term as FTC chairman, and just last year, when General Electric and Honeywell proposed what would have been the world's largest industrial merger to date, the U.S. government agreed with minor conditions but the European Union prohibited it. Why? Can you discuss this wave of mergers? And what are the differences between Europe and the United States toward antitrust?

Generally you can find from the E.U.'s statement of objections and from speeches by enforcement officials what their concerns are. The differences between U.S. and E.U. antitrust enforcement aren't night and day. I thought that the E.U. was wrong to block the G.E.-Honeywell deal, but a primary reason they stopped it is that they believe antitrust should be enforced to protect competitors, not just consumers. Sometimes Europeans enforce their antitrust laws to the disadvantage of very large conglomerates in order to protect smaller companies. In the U.S., our focus is on consumer welfare. If a deal is likely to be to consumers' advantage, we give priority to that even if a competitor might be injured.

What we in the U.S. did 30 years ago, the Europeans still do a little of: protect small business competitors for the sake of their smallness, regarding them as more entitled to protection than other, larger companies. We've moved away from some of those theories in the direction of a consumer welfare approach.

That spotlights one difference. It is important to recognize, however, that the differences between Brussels and Washington have so narrowed in the last 20 years, the convergence is so pronounced, that to discuss differences without putting them in the context of the elimination of differences is misleading. It's amazing how similar Europe and the United States are on most antitrust issues.

Are they converging more as time goes on?

Very much so.

Is Europe coming closer to our ways, or we to theirs?

A little of both. We've been enforcing antitrust laws for 110 years, they've been doing it for less than 50. In some ways they're adopting more of our approach, in others, we're learning from Europe.

An example of the latter: In merger review, Europe has shown more concern about dominant market behavior than we. In about the past 15 years, we've looked at something called "unilateral effects" in the U.S. a lot more carefully than we did, and some of that is influenced by enforcement and scholarship in Europe. The main reason in the U.S. that we might challenge a merger is when it reduces the number of firms in the market to the point that it makes it easier for them to conspire. But another reason we might be concerned, and increasingly are concerned, is because the two combining firms can then raise prices without threat of losing much of the business to somebody else.

It has to do with alternatives. If I decide as a consumer that I want to leave product A, I turn to B, C, D, or E. If my most likely fallback position is product B, and if A and B merge, A/B might be able to raise prices even though C, D and E are still in the market. That's not conspiracy; it's "unilateral effects." The Europeans were more sensitive to that before we were in the U.S.

How can you measure "unilateral effect"? Isn't that hard to detect?

Very hard. But there've been some cases in the U.S. and quite a few in Europe. The computer has made available to enforcement people a vast amount of data about who buys at what price and from whom. So, now, there are industries where you have a wealth of data you didn't have 20 years ago on alternatives that consumers are likely to move to.

Why have Europeans seen that issue ahead of us? And what is an example of Europe moving in our direction?

They started out concerned more with dominant market power than with conspiracy, and we started out focused more on collaboration. These are subtle differences.

On the other hand, they now *measure* market power almost exactly the way we do. That's quite a change. I think the U.S. has had a better fix on the issue than Europe or, for that matter Canada, Australia, or Japan. We've always looked at market power; the problem is, it's hard to measure. Does the New York Times have 20 percent of advertising or 50 percent or 90 in its "market"? That depends on who you think the competitors are. Is the Scarsdale newspaper a competitor to the New York Times? Is the Wall Street Journal? CBS News? I have said there may well be more Court of Appeals reversals of District Court opinions on the subject of measuring market power than on all the other subjects of antitrust put together. I think it's because until fairly recently, say 15 years ago, the question of how you measure it was so uncertain that no matter what the District Court said, the Court of Appeals would hear a good argument that it was wrong.

Is there a risk that some mergers, allowed by our favoring the increased economies of scale, can lead to such concentration of power that monopoly and inefficiency ensue?

Efficiency rarely if ever justifies a transaction that leads to monopoly or even duopoly. The question is, if there are five or six competitors left in a market and two merge or contract with each other or exchange patents, and that makes those two more efficient, will we block the deal. In the United States, maybe not. We might not block a deal that is right on the margin of legal behavior if powerful efficiencies are likely to be passed to consumers.

If the transaction does raise an antitrust concern, the burden of proving the efficiencies is on the private party; it's not on the govern-

ment to disprove it. And the sponsors of the merger are not going to be able to overcome the antitrust objections if they're approaching a monopoly.

But the question is a good one: Suppose that, as a result of putting a competitor out of business, it's predictable that *eventually* consumers will suffer? The burden is on the government to show that an injury to competitors would wind up injuring consumers.

Observers have suggested that, in the recent merger wave, some of the bigger ones – DaimlerChrysler, AOL Time Warner – haven't turned out as profitably as anticipated. To the extent that a merger the government allows doesn't succeed to one degree or another, that's not the government's responsibility, right? Let the participants make their own mistakes?

Exactly. It can take a decade for scholarship to catch up, but I think almost one third of the mergers in the 1980s ended up falling apart, breaking up again. Now, I don't know if that will happen with some of those completed in the 1990s, but it might.

Should decisions to challenge be reviewed after the fact?

I think that's the responsible thing to do. You shouldn't just enforce the law, you should look back and see if what you did made sense. And where the government let mergers go through because they were thought to be efficient, yes, let's go back to see if they were. I would like to have been able to do that when I was chairman, but the merger wave was so overwhelming in my years there, we didn't have the resources and opportunity to do as much post facto review as I would have liked. There were close to 4,500 mergers per year in the late 1990s, three or four times as many as just ten years previously.

In light of that, how could the commission do its job?

It was a serious challenge. In many of the years I was there, over two-thirds of our entire antitrust budget was spent only on merger review. I think our staff was efficient. They closed down investigations quickly, in part because they became better in their ability to investigate, and in part because they had to move on.

We thoroughly investigated 3 percent of the mergers announced. (We looked into all, but some you dismiss after a preliminary look.) Of the 3 percent, we challenged something approaching 2 percent. When I say "investigate," I mean heavy discovery. In almost two-thirds of the 3 percent thoroughly investigated, either the merger was abandoned, the deal restructured, or we went to court.

That's actually an interesting figure because it shows that we were careful about which cases we proceeded against. Two-thirds of the time we brought a lawsuit, and the FTC didn't lose a single merger case in the 1990s – except for a couple of hospital mergers, and I often say I don't think those should count in these statistics. They're a different breed, intensely local. Every non-hospital merger the commission challenged in court, it won.

I think that's the responsible thing to do. You shouldn't just enforce the law, you should look back and see if what you did made sense. And where the government let mergers go through because they were thought to be efficient, yes, let's go back and see if they were.

Currently, merger activity is way down and the burden of merger review is less. I think some mergers occurred where the stock of the acquiring company had become inflated, so overvalued that buyers used the stock to buy some real assets. Now, certainly the sector of the market where a lot of merger activity took place – pharmaceuticals, telecommunications – is down.

You were the first head of the Bureau of Consumer Protection. Can you talk about enforcement trends in that area now, compared to times past?

It's heavily focused toward the high tech sector, on Internet and privacy issues, identity theft. That's where the action is. I think the agency generally has the full budgetary support of Congress, which may have doubts at times about the value of some antitrust initiatives, but there were few doubts about consumer protection. Conventional deceivers are always out there – in credit fraud, in advertising – and just as the merger wave dominated the antitrust side of our resources, Internet marketing and privacy issues will dominate consumer protection. The new group at the commission has been active on that.

It's clear you're thought of as a fine teacher here at Georgetown. Given that you've served in various governmental capacities and are of counsel at Arnold and Porter, what draws you to continue teaching at Georgetown?

I always come back to teaching because it's my base, my first love. As for why Georgetown, the students are outstanding, and my colleagues are first rate in their fields and wonderful to be around.

How do you know if a class or a course is going well?

I guess the conventional answer would be whether the questions students ask are informed, and whether exams show they're getting it. I also think, as most teachers would probably say, there is a sense of alertness, interest, intellectual energy in a good class. When the dialogue is going well – the sense of byplay among students, and between them and the teacher – you just know it.