



DEPARTMENT OF JUSTICE

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Remarks at the
Bundeskartellamt Ceremony
Celebrating Fifty Years of the German Competition Act

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Today we celebrate the 50th anniversary of the entry into force of German's Act Against Restraints of Competition (ARC). I am greatly honored that Dr. Heitzer and the Bundeskartellamt (BKA) invited me to Bonn to join your celebration. In my time today, I want to look first to the past by providing an American perspective on the significance of the BKA's contribution to global competition policy during the half-century of its work. Then I will turn toward some of the future challenges we will face together, in particular one of the most difficult and contentious areas of modern antitrust – the rules governing single-firm conduct by firms that are “dominant” or possess what we would call “monopoly power.” In this area I will offer some thoughts on how safe harbors can help business to conform to and understand the rules, provide guidance to enforcement authorities, and minimize the risk of costly errors that may chill the vigorous competition and the spirited innovation that are of most long-term benefit to consumers.

Most of you are well aware that Germany's robust tradition of antitrust enforcement began much earlier than 50 years ago. The Weimar Republic's Regulation Against Abuse of Economic Power Positions in 1923 was “the first general legislation in Europe aimed specifically at protecting the competitive process.”¹ Three decades later, the German federal parliament enacted the ARC after many years of debate, building upon the de-cartelization and de-concentration laws introduced in Germany by the U.S. authorities in 1947. The year 1958 is a major milestone in the history of antitrust, with the adoption of the ARC in Germany and the signing of the Treaty of Rome establishing the European Community, with its famous articles 85 and 86 (since renumbered as 81 and 82). Both legal regimes became effective on January 1, 1958.

Dr. Franz Böhm, a prominent German thinker and champion of the ARC, once observed

¹Organization for Economic Cooperation and Development, Germany: The Role of Competition in Regulatory Reform, page 8 (2004), *at* <http://www.oecd.org/dataoecd/40/49/33841373.pdf>.

that “a free market economy resembles a monarchy in that the consumer is the king.”² In substance, this sentiment closely mirrors the U.S. commitment to consumer welfare as the foundation of a free market.

With the adoption of the ARC, the newly-established BKA instantly became the preeminent model of an independent, court-like expert administrative body. The BKA’s first President, Dr. Eberhard Günther, held his post for eighteen years -- an extraordinarily long tenure -- and set the BKA on a firm foundation. One of the great strengths of the German antitrust regime has been that the BKA is insulated from political considerations. Any ministerial overruling of its decisions on non-competition grounds is open and transparent, clearly exposing the trade-off between competition and other policies for healthy debate. This has surely been an important confidence-building measure for German consumers and businesses alike.

From an early date, the German authorities have been reliable partners in cooperation with the U.S. Department of Justice, to our mutual benefit. Our first bilateral antitrust agreement dedicated to enforcement cooperation was signed with Germany, in 1976. Especially in the field of anti-cartel enforcement, we have had a long and productive relationship involving legal assistance, extending well over a decade. After years of negotiation, a Mutual Legal Assistance Treaty (MLAT) with Germany has now been signed; when ratified by our respective federal legislatures, it will be the first of the United States’ 50-plus MLATs to apply to administrative cartel investigations, giving the BKA reciprocity in seeking U.S. Government assistance in cartel cases.

Germany has also played a leading role in the development of European Community competition law as a source of highly-qualified enforcement officials, having provided the first

²American Bar Association Section of Antitrust Law, Competition Laws Outside the United States (2001) Germany-page 9.

Commissioner responsible for competition policy (Dr. Hans von der Groeben) and a stellar series of Directors-General for Competition (including Drs. Manfred Caspari, Claus Ehlermann, and Alexander Schaub). And last, but not least, while we in the U.S. often think that we invented premerger notification, in fact the German merger notification regime was established in 1973, three years before our Hart-Scott-Rodino Act, and 16 years before the EC's Merger Control Regulation.

In addition, the BKA has consistently been a leader in the international antitrust community. For many years it has hosted the prestigious biennial Cartel Conference – one of the highlights of the international antitrust calendar – first in Berlin, then in Bonn, and most recently in Munich. A senior BKA official chaired the OECD's Competition Law and Policy Committee from 1987 to 1994, and BKA presidents have always been members of the Committee's guiding Bureau. The BKA was a founding member of the International Competition Network (ICN) in 2001, and former BKA President Dr. Ulf Böge was an outstanding ICN Steering Group Chair until his retirement last year. Today, the BKA serves as co-chair, with the U.S. Federal Trade Commission, of the ICN's Unilateral Conduct Working Group (UCWG). Co-chairing the UCWG is not an easy task, as the rules governing unilateral conduct are perhaps the most difficult area of antitrust law and policy.

This brings me to my second topic: the application of competition law to unilateral conduct. Let me start with our Supreme Court's most frequently cited recitation of the elements of a monopolization claim under our Sherman Act: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."³ Translating this general principle into operational rules and guidance for the business community has been difficult, both for U.S. courts and the U.S. antitrust agencies. In this regard I offer five broad principles to inform our enforcement policy and to guide our discussions.

³*United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

- ***Individual firms with monopoly power can act anticompetitively and harm consumer welfare***, and we should seek to identify and challenge such conduct.
- ***Mere size does not demonstrate harm to competition or a violation of the antitrust laws.***
The proper focus of antitrust law is on anticompetitive conduct and effect, not just firm size or market share.
- ***Mere injury to a particular firm does not itself show that competition has suffered.***
Indeed, a firm's inability to garner sales may indicate no more than the superiority of its competitors' products. A successful firm should not be penalized for creating a product that is preferred by consumers. Further, the loss of sales can be an important incentive to other firms to improve their efforts to offer new and better products at the lowest possible price.
- ***Consumers, the business community, and antitrust enforcers benefit from clear, administrable and objective rules*** that allow businesses to assess the legality of a practice before acting and enable enforcers and courts to judge challenged conduct predictably and correctly. This is particularly true in the context of unilateral conduct. Every time a firm is kept from engaging in aggressive conduct because it fears an unnecessarily expansive interpretation of the antitrust laws, competition is harmed.
- ***A remedy that harms competition is worse than no remedy at all.*** A remedy needs to be effective and administrable by courts and agencies without restricting competition.

In this brief summary of our overall approach to the appropriate role for antitrust in relation to single-firm conduct, I emphasize the importance of clear, administrable, and objective rules. I would like now to focus on one example of such rules: safe harbors. Antitrust enforcement agencies should consider employing safe harbors that identify conduct that will

never be the target of antitrust enforcement. (I note that, if an absolute safe harbor is not feasible, it can still be valuable to identify harbors that are unlikely to lead to enforcement actions except under “extraordinary circumstances.”) In the words of the intellectual property guidelines issued by the Department of Justice and Federal Trade Commission in 1995, safe harbors provide a “degree of certainty and thus ... encourage” innovation and competition. The conduct covered by the safe harbor may be entirely pro-competitive, or may be overwhelmingly so, such that “anticompetitive effects are so unlikely that the arrangements may be presumed not to be anticompetitive without an inquiry into particular industry circumstances.”⁴

The rationale for most safe harbors is *not* that the conduct within the safe harbor never can harm competition, but rather that the conduct poses an insufficient risk of harm to warrant further consideration in view of the administrative costs of proceeding, the potential harm from erroneous condemnation of the conduct, and the chilling effect of business uncertainty on legitimate conduct.

An antitrust regime could, for example, establish a market share below which a competitor is conclusively presumed not to possess market power (nor to be dominant), and thus may compete for business secure from any concern about an antitrust challenge to its unilateral conduct. But such a safe harbor significantly enhances legal certainty only if the market-share threshold adopted is high enough that it affords safety to competitors that had perceived a non-trivial risk of being found to possess monopoly power. Indeed, adopting a safe-harbor market share that is very low actually could increase business uncertainty by suggesting – unintentionally – an increased likelihood that competitors just outside the safe harbor will often be found to possess monopoly power.

In the United States, the vast majority of competitors in the vast majority of markets do not possess monopoly power. Courts in the United States have consistently held that a market

⁴*Antitrust Guidelines for the Licensing of Intellectual Property* at ¶4.3, available at <http://www.usdoj.gov/atr/public/guidelines/0558.htm>.

share below 50% does not support the inference of monopoly power, effectively establishing a safe harbor for firms with less than a 50% market share, and the leading treatise suggests that a share of at least 70–75% for five years is required to infer monopoly power.⁵ Modern case law also holds that “market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.”⁶ Courts in the United States require proof that entry or expansion would not effectively discipline a competitor alleged to possess monopoly power, and firms with market shares well in excess of 50% have been found not to possess monopoly power because their power over price was insufficiently durable.

Agencies and courts can also articulate safe harbors for particular categories of conduct. They could, for example, establish that a competitor, even a monopolist, engages in lawful competition on the merits (i) when it prices aggressively but does not price below some measure of cost, (ii) when it makes investments that reduce its own costs, (iii) when it introduces a new product, or (iv) when it does nothing more than exercise unilaterally and unconditionally its right to refuse to license an intellectual property right.

A good example of a safe harbor for specific conduct is the one created 15 years ago by our Supreme Court that distinguishes unlawful predatory pricing from aggressive price-cutting. In *Brooke Group v. Brown & Williamson Tobacco Corp.*⁷, the Court held that a successful antitrust challenge to price-cutting requires proof “that the prices complained of are below an appropriate measure of the rival’s costs” and that the alleged predator had “a dangerous probability ... of recouping its investment in below cost prices.” The Court expressly recognized that its standard might permit some price-cutting that theoretically could harm consumers.

⁵3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶801a, at 319 (2d ed. 2002).

⁶*American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999).

⁷509 U.S. 209 (1993).

Specifically, the Court observed that above-cost pricing could sometimes be used to “induce or reestablish supracompetitive pricing,” and implicitly acknowledged that, even absent recoupment, below-cost pricing could allow a predator to establish short-term market power by injuring and driving out its rivals (until new competitors enter the market and drive the market price back down).

Notwithstanding those possibilities, the Court concluded that those categories of anticompetitive price-cutting were “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.” As the Court explained, a broader standard would run the risk of imposing liability in cases involving pro-competitive price-cutting, and “the costs of [such] an erroneous finding of liability are high,” because such errors (or “false positives”) would “chill the very conduct the antitrust laws are designed to protect.” And the risk that such “false positives” will occur under a broader standard is substantial, the Court explained, because “[t]he mechanism by which a firm engages in predatory pricing--lowering prices--is the same mechanism by which a firm stimulates competition.”

Whatever measure is adopted for the safe harbor, it must be an objective one. As Justice Breyer explained in an appellate decision before he joined the Supreme Court, antitrust rules “must be clear enough for lawyers to explain them to clients” and “must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.”⁸ If the line between lawful aggressive pricing and unlawful predatory pricing were to turn on a subjective *ex post* assessment of the price (*i.e.*, is it too low or unfairly low), large firms competing for sales would rationally err on the side of caution, pull their competitive punches, and price less aggressively. An amorphous and subjective standard would discourage the competitive enthusiasm that the antitrust laws seek to promote and chill the very conduct the antitrust laws are designed to protect.

⁸*Town of Concord*, 915 F.2d at 22.

Turning back to the occasion for our celebration today, I emphasize that overall we have much in common. The BKA has long pursued anti-cartel enforcement, has become a firm proponent of serious economic analysis, and continues to expand the role and number of its economists.

The U.S. and German agencies face many common antitrust challenges today, and we must continue to work closely together in the future. International cartels disrupt the efficient working of our economies, and we need to expand our cooperation even further, coordinating our leniency programs and ensuring that our criminal and administrative approaches work together to achieve maximum deterrence. The role of private antitrust enforcement seems likely to grow in Germany, and the European Union as a whole, and European courts thus will have to address some of the procedural, jurisdictional and comity issues that have already arisen in U.S. courts.

Competition in newly deregulated sectors, with problematic claims for network access and misplaced demands for national champions and increased state ownership, should be addressed in ways that preserve competition, reward innovation, and promote consumer welfare. While the U.S. and German antitrust agencies have some doctrinal differences to sort out, with our 30-year history of cooperation and good will we can, and surely will, bridge those differences and continue to converge on the best policies in our bilateral relationship and in the many multilateral settings where we work together so closely. We owe nothing less to our respective consumers.

In closing, consumers have every reason to look forward with confidence to another 50 years of healthy economic performance in a German economy where competitive markets are capably defended by the BKA. Thank you.