Competition and Deregulation Roundtable #1

Remarks of Assistant Attorney General Makan Delrahim

Wednesday, March 14, 2018

Good morning. I am Makan Delrahim, Assistant Attorney General for the Antitrust Division. Welcome to the Great Hall of the Department of Justice. Today, we are pleased to launch the Division's series of roundtables on competition and deregulation.

I am starting out by asking for leniency from my friends at the FTC. I hear they come down pretty hard on deceptive claims in advertising, and I see that our first so-called "round"-table discussion is being held at an unmistakably "square" table.

I am joined at the table by several attorneys from the Antitrust Division here at DOJ. Seated to my left are Douglas Rathbun, Attorney Advisor, and Bob Potter, Section Chief for Competition Policy and Advocacy, and to my right are Rene Augustine, Senior Counsel in the Front Office, and Daniel Haar, Assistant Section Chief for Competition Policy and Advocacy.

I would like to thank our panelists and their organizations for their participation on the panels. It is an honor to see so many great thinkers in the areas of antitrust, competition and regulation here today. Let me also thank everyone who has made a written submission.

Today's roundtable will focus on antitrust exemptions and immunities. The next roundtable, to be held on April 26th, will examine antitrust consent decrees. The third roundtable, on May 31st, will assess the consumer costs of anticompetitive regulations. I invite everyone in attendance today to join us for the entire series of roundtables, because I anticipate a very productive discussion of these important topics.

If you take a moment to look at the cast aluminum statue of Lady Justice behind me in this room, do you notice something unique about her as compared with most representations of Lady Justice? She has no blindfold. This reminds us that today, we should keep our eyes open and remain vigilant in continuing to assess the appropriate application of our nation's antitrust laws.

In the antitrust world, we are fortunate to have durable laws along with a great body of legal precedent. Over the years, we have seen advancements in our economic analysis as applied to antitrust cases. We also have an ever-changing landscape in business and innovation. Today, we are here to evaluate circumstances when our antitrust laws should, or should not, be applied.

Free market competition is, of course, fundamental to the success of the American economy. As Justice Thurgood Marshall said, "Antitrust laws…are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] The enforcement of antitrust law is, at its core, intended to ensure competition in the marketplace to promote consumer welfare.

Not long ago I saw a news story about a pet boa constrictor that escaped from its cage. The neighbors were terrorized by the roving yet elusive boa constrictor, whose exact whereabouts were unknown. This scenario reminded me a bit of where we find ourselves today. When regulation replaces antitrust enforcement, the regulations – and regulators -- become stealthy and disruptive forces that can interfere with the competitive marketplace.

[1] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

And, like a boa constrictor, they can slowly, and painfully, squeeze competition from the free market. I will stop short of pointing out that boa constrictors, in the end, swallow their prey whole!

With this in mind, it is my view that we should proceed with heavy skepticism whenever we see regulation replacing vigorous enforcement of the antitrust laws. Sound competitive analysis, not special treatment for particular industries or entities, should take precedence. Much as private restraints on competition can be harmful to consumers, *government* limitations on competition are equally harmful to consumers.

This series of roundtables will allow us to explore the relationship between competition and regulation, and its implications for antitrust enforcement policy. These conversations will help the Department pursue effective and appropriate competition policy and identify related regulatory burdens on the American economy. Without a doubt, early and appropriate enforcement of antitrust laws should protect the competitive process and minimize the need for regulatory intervention.

Today, we will discuss restraints in the form of exemptions and immunities from our antitrust laws, given to certain sectors of industry.

When I served on the Antitrust Modernization Commission back in 2007, we concluded that "[a]s a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition. When the beneficiaries of an exemption likely

appreciate reduced market pressures, consumers … and the U.S. economy generally bear the harm."[2]

When an industry is given an antitrust exemption or immunity, competition is replaced by government regulation. This notion, despite an accumulation of exemptions and immunities in the law over the years, goes back many decades. One of my legal heroes, the great Justice Jackson, who previously served as the Assistant Attorney General of the Antitrust Division here at the Justice Department, had this insight over eighty years ago: "Every step to weaken antitrust laws or to suspend them in any field, or to permit price fixing, is a certain, even if unknowing, step to government control." [3]

In the first discussion session, we will examine the impact of express statutory exemptions from the antitrust laws. We will explore how segments of the economy with express exemptions may be unique, review justifications for those exemptions, and determine whether they are, and continue to be, warranted. We will also evaluate whether such exemptions harm consumer welfare.

In the second session, we will look at how implied immunities and exemptions have affected antitrust enforcement. We will examine the appropriate roles of the courts in creating immunities from antitrust laws. We will discuss whether the "implied repeal" doctrine in *Credit Suisse*[4] helps or hampers competition.

---

[2] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 334-35 (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[3] Robert H. Jackson, Should the Antitrust Laws Be Revised?, 71 U.S. L. Rev. 575, 577 (1937), available at https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-laws-be-revised/.

[4] *Credit Suisse v. Billing*, 551 U.S. 264 (2007).

And finally, we will examine whether the state action doctrine in its current form strikes the appropriate balance between state sovereignty and the federal policy favoring competition in interstate commerce. We will assess policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. We will also query whether the dormant Commerce Clause can or should provide a meaningful limit on states' ability to reduce competition involving interstate commerce.

And now for the logistics. I will ask each of our panelists to provide a brief opening statement immediately after I introduce them. At the conclusion of the opening statements, we will begin with our series of three 30 minute discussion sessions. After the first session, we will have a ten minute break. The next two sessions will be followed by a brief wrap-up.

Now, let me turn to the panelists. Thank you once again for your willingness to participate today and to share your views on these important issues. We appreciate your time and your views.