DEPARTMENT OF JUSTICE

The Trans-Atlantic Antitrust Dialogue: What Do You Know?

Remarks by

J. Bruce McDonald
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented to the
British Institute of International Comparative Law
Sixth Annual Trans-Atlantic Antitrust Dialogue

July 6, 2006
London

I'm pleased to be here in London, perhaps the city closest to the geographic midpoint of the trans-Atlantic dialogue, California to Lithuania. Thanks to BIICL and Philip Marsden for the invitation to make these remarks, which I have entitled, "The Trans-Atlantic Dialogue: What Do You Know?"

The trans-Atlantic dialogue is revealing. At gatherings like these, the way we discuss how antitrust should view various types of conduct reveals what we know, what we know we know, and what we know we don't know about the competitive consequences of particular conduct. At gatherings like these, when we talk about price fixing cartels, we talk confidently about the enforcement actions we mercilessly have taken and will take again. At gatherings like these, when we discuss unilateral conduct, abuse of a dominant position, monopolization, we talk about what we don't know and the various government-sponsored gatherings to further discuss what we don't know.

For my part of the trans-Atlantic dialogue today, I'd like to talk about what DOJ has been doing in the context of what we all know and what we don't know. What do we know about cartels, mergers, monopolies, and government regulation?

Cartels

What do we know about cartels? With confidence, we all know cartels are bad business. Price fixing, bid rigging, and output restriction agreements almost always are harmful and have no plausible efficiency justification. Therefore antitrust authorities generally regard cartel behavior as, in words of the U.S. system, per se illegal, hard core violations, the "supreme evil of antitrust."

In the U.S., we are especially confident that cartels are harmful, and over the years we have tested the resistance of these scoundrels to the powers of persuasion, shame, and punishment. Over the years, we have ratcheted up the criminal legal consequences of hard core antitrust violations, collecting hundreds of millions of dollars in fines and throwing otherwise respectable, white collar wrongdoers into prison. Measuring the success of this aggressive approach is not scientific. We are sure cartel activity within the U.S. has declined. We observe that firms in some cartels compete in the U.S. while conspiring elsewhere.

I suspect that the EC, imposing increased fines, sees similar trends. Today there is little debate: counterparts in most jurisdictions see cartels as economically dangerous and also put cartel enforcement high on their priority lists.

In the U.S., we are confident enough in the wrongfulness of cartels and the importance of criminal punishment to counter them that, in appropriate cases, we will seek indictment, even extradition, of foreign nationals so that they may be tried in U.S. courts and, if convicted, serve time in U.S. prison. This is not a pleasant duty, but justified for cartel conspirators in cross-border markets and decreasingly controversial even among nations whose citizens have seen those prisons.

Elsewhere in the world, there is a growing confidence that cartels victimize businesses and consumers and cannot be tolerated. Today in Europe, for example, more enforcement decisions involve cartel activity than other type of competitive wrongdoing. Ireland's Competition Authority has pursued and won criminal convictions for price fixing. France has imposed antitrust prison sentences. Lithuania has its cartel cases imposed many millions of euros in fines. Beyond the trans-Atlantic, the Australian government has introduced legislation to increase cartel fines and announced its intention to introduce criminal penalties. The shared commitment to fighting those cartels has led to improved cooperation among antitrust enforcers. Authorities in the U.S., EC, and other jurisdictions regularly coordinate dawn raids and other searches, recently in the investigation of anticompetitive practices in the air cargo industry. We have frequent discussions on best practices in criminal enforcement, resulting for example in the U.S. and EC today having similar leniency programs. These are important benefits of the trans-Atlantic antitrust dialogue.

Mergers

What do we know about mergers? We know that most mergers are good. Mergers and acquisitions often generate procompetitive benefits: cost savings, lower prices, increased innovation, more consumer choice. The vast majority of transactions reported to antitrust enforcement agencies each year are either competitively neutral or affirmatively beneficial. However, anticompetitive transactions – those that substantially lessen competition or tend to create a monopoly – harm markets and consumers. So one of our jobs is to predict the future competitive effects of proposed mergers, to separate the sheep from the goats. Mergers unlikely to lessen competition should be released through the competition agency gate and allowed to proceed with as little burden and delay as possible. Mergers likely to substantially lessen competition should be blocked, or otherwise have their competitive harm remedied, which for the U.S. DOJ generally requires challenge in federal court.

Let me a say a word about substance and a word about process in merger review.

On the substance, as my friend Carles Esteva-Mosso said here today, there is growing agreement in the worldwide antitrust community that a focus on competitive effects better predicts the outcome of a merger and leads to more sound enforcement decisions than does relying on structural presumptions, market shares, and concentration ratios. A direct analysis of effects is fact intensive and unquestionably more difficult, but this is the cost of making better predictions.

The merger analysis conducted in the U.S. and many other jurisdictions only begins with market definition and concentration. As described in the DOJ/FTC Horizontal Merger Guidelines, we move from market shares to evaluate potential adverse competitive effects, the possibility of entry that could check anticompetitive effects, assertions that the merger will make possible efficiencies that counter those effects, and evidence that without the transaction the assets to be acquired would exit the market. This general framework is familiar to you.

To update you on what the DOJ and FTC have been doing, we recently completed a jointly-prepared Commentary on the Horizontal Merger Guidelines, which elaborates on the organization and approach of our merger analysis and provides short summaries of matters the agencies have investigated as they are relevant to the elements of our analysis. We included both cases we won and lost at trial. The Commentary follows from a merger enforcement workshop we jointly held in 2004, and it is one more way to increase the transparency of our decision making. Available on our websites.

As part of the effort to improve our ability to get the competitive effects prediction right, the U.S. DOJ is giving increased attention to possible efficiencies of proposed mergers. I discussed this in some detail on the opening panel of the conference. As our Assistant Attorney General, Tom Barnett, said recently to the Financial Times, counsel do their clients a disservice if they act as though "efficiencies don't matter" when defending a merger before the government. Obviously, claimed efficiencies must satisfy the standards of our Merger Guidelines, but you will find that the DOJ is willing to give possible efficiencies a careful review and that a strong efficiencies case may be a significant factor in deciding whether your deal gets challenged.

On the process side, we must admit that a more robust, fact intensive merger review will tend to be more burdensome on both the parties and the government. And systemic burden or delay impose costs on all mergers, including those that should not be challenged or those with negative aspects that can be remedied. Therefore, it is imperative that we streamline the merger review process, without sacrificing the quality of the investigation. This is a greater challenge as electronic storage of information increases the amount of information companies have on hand when the second request arrives.

Reforms to the merger review process have been a priority for the U.S. agencies over the last few years. In 2001, the DOJ initiated changes that emphasized better use of voluntary information production during our initial 30-day waiting period, carefully tailored second requests, frequent communication between agency staffs and counsel for merging parties, and useful tools like timing agreements to give both sides confidence that they could focus on the substance without turning early to litigation preparation. These changes have reduced both the number and length of DOJ second request investigations. This year, the FTC went even further, implementing an array of internal best practices that reduce the size of second requests, limit the time period and number of persons within companies that are searched, and reduce the burden of producing electronic data. The DOJ has a second round of similar reforms on the way.

Principles like transparency, predictability, timeliness, and consistency are being given increasing importance in developed enforcement regimes. The work of the International Competition Network illustrates the broad consensus that governments should make their merger reviews "efficient, timely, and effective." The ICN has explicitly recognized the costs to merger transactions of delay in reviewing them and making enforcement decisions. ICN members also have stressed the necessity for jurisdictions reviewing the same transaction to coordinate their investigations.

The U.S. agencies and the EC continue to try to do our part to coordinate merger enforcement. For a recent example, both agencies have been considering the acquisition by Canada's Inco Limited of Falconbridge Limited, and the two jurisdictions have worked closely and productively. The DOJ found that the merger would lessen substantially competition in the worldwide high purity nickel market. DOJ has accepted as a remedy the divestiture of Falconbridge's Nikkelverk refinery in Kristiansand, Norway, to LionOre Mining International Limited, and the EC too is considering this as a possible remedy under its regime.

Thanks to the trans-Atlantic dialogue.

Unilateral Conduct

Next I ask to the question that is asked more at these gatherings than any other question, what do we know about unilateral conduct by dominant firms?

We know that the prospect of a monopoly obtained through competition improves market performance, but monopoly created or maintained through exclusionary conduct harms consumers. We know that aggressive anticompetitive behavior and vigorous competition often "look alike." We know that false positives over-deter and false negatives under-enforce. We know we don't always agree on the right approach to single firm conduct. We know this is the toughest antitrust nut we've ever had to crack.

We know the key questions, and that not all of them will be answered from this podium today. Fortunately, as we sit here some of antitrust's greatest minds are at work on the problem. The European Commission has held a hearing on its Article 82 discussion paper, and a final version is anticipated later this year. The DOJ and FTC have begun a series of hearings on single firm conduct, and the level of debate has been high. And the ICN has established a working group to tackle these issues.

To deliver more substance on this topic, let me share with you six principles we at DOJ have articulated for our own thinking about single firm conduct, as we consider it intensely throughout 2006.

First, we know individual firms with monopoly power can act anticompetitively and harm consumer welfare. We should seek to identify and prosecute such conduct.

Second, we know size alone does not demonstrate harm to competition or antitrust law violation. The proper focus of antitrust law is on anticompetitive conduct that produces durable harm to competition, not just size or market share.

Third, we know a large firm's causing injury to a competitor does not show competition has suffered. Even dominant firms may win sales with better products and services. The goal of the antitrust laws is to protect competition, not competitors.

Fourth, we know consumers and the business community benefit from clear, administrable, and objective rules that allow firms to assess the legality of a practice before acting and enable enforcers and courts to judge challenged conduct predictably and correctly. It is not acceptable for those rules simply to allow enforcers to make an ex post evaluation of business judgments that were objectively reasonable at the time. It is the duty of the competition agencies to articulate rules that can be followed by business in the real world.

Fifth, we know laws governing single firm conduct, such as our Sherman Act § 2, should be construed to avoid chilling procompetitive conduct. That is why we worry about "false positives." Every time a firm refrains from engaging in aggressive conduct because it fears an unnecessarily expansive interpretation of the antitrust laws, competition is harmed.

Sixth, we know a remedy needs to be effective and administrable by courts and agencies, without restricting competition. A remedy should be proportional and leave market participants with the procompetitive incentives. And as Professor Areeda advised, no court should impose a remedy "that it cannot explain or adequately and reasonably supervise." A remedy that harms competition is worse than no remedy at all.

You might think we talk of little else in the trans-Atlantic antitrust dialogue.

Government Regulation and Antitrust Regulation

What do we know about government regulation? What we know stems from the confident belief that competitive markets best are able to drive firms towards efficiency and consumer benefit. Antitrust doctrine reflects the principle that markets do better than government officials in rewarding practices that create economic benefit and in penalizing other practices.

Competition enforcers are suspicious of regulation, because we know that competition is distorted when governments regulate or intervene excessively. Of course, there are situations in which legislatures have determined that there are social goods to be obtained through regulation that could not be provided by an unregulated market. But we know that, in the main, free markets are the best path to economic prosperity and consumer benefit. Over the last decades, the U.S. has substantially deregulated critical industries, including transportation, telecommunications, and electricity, which has benefitted our economy. The changes have been even more dramatic in other parts of the world including many European countries.

I submit that, even in deregulated economies, it is critical that we continue to promote competition as the fundamental, guiding principle for economic policy in each of our jurisdictions and among them. This should not be a risky proposal to make before this trans-Atlantic gathering. The UK Office of Fair Trading is on record saying that government regulation can harm markets by raising entry barriers and stifling innovation, and OFT has committed to advise other parts of the government on the impact of their regulatory actions. At the EC, DG-Competition has led the way towards eliminating antitrust immunities, such as in ocean shipping and aviation, and of course Commissioner Kroes has made high priorities of battling state aids and member state restrictions on mergers. Through the ICN, we have expressed our consensus that competition is the first principle and that competition agencies should advocate regulating markets only where absolutely necessary.

For the U.S. agencies too, competition advocacy is a priority, and we pursue this in ways large and small, such as through enforcement actions, speeches, amicus briefs, press releases, guidelines, manuals, commentaries, workshops, and business review letters. I'll elaborate on a couple of these.

Amicus briefs are an important tool for convincing courts to make decisions that reflect sound competition policy, especially in a U.S. system in which the judicial branch has the responsibility to interpret the law and decide cases. In this forum it is worth mentioning the brief we filed with our Supreme Court in one particular case, *Illinois Tool Works v. Independent Ink*.[1] In this case the intermediate appeals court had held that it was constrained to infer the existence of market power from the mere existence of a patent. In the brief of the United States, you will find a footnote in which we cite to the views of other competition agencies around the world that have looked at this issue and come to the sound conclusion that this presumption does not make sense. The Supreme Court agreed with this argument and rejected the presumption. This is an example of how a developing consensus around the world can give the U.S. some help at home.

I'll also mention competition advocacy directed at U.S. state governments. In the U.S. system, states have sovereignty over many local matters. Appropriately in our system, under certain conditions local governments may enact laws and regulations without any concern for federal antitrust enforcement, much less for whether the federal agencies think the state's action fits our view of sound competition policy. But it's a free country, as they say, and therefore the DOJ and FTC are not shy about advocating that state and local governments recognize the economic costs of regulation and consider the competitive effects of new laws and regulations that are proposed to them.

Our recent competition advocacy to states has been especially vocal in real estate matters. Briefly, technology advances and new business models have made it possible for residential real estate brokers to offer better service using the Internet, differing packages of services to home sellers and buyers, and in some cases lower commissions. These are competitively threatening to established brokers, especially during the recent years of high demand in many localities.

---

[1] Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S.Ct. 1281 (March 1, 2006).

Some broker lobbies have responded by seeking to be regulated, illustrating that regulation can be an effective strategy to stifle competition. Brokers have asked state legislatures to mandate certain bundles of services be provided (which prevents consumers from bargaining for different bundles) and asked state regulators to limit commission discounts and rebates (which effectively limits price competition among brokers). The federal agencies have sought to educate various state legislatures about how such laws can harm consumers without bringing any benefit. And in one case DOJ resorted to litigation in a federal court, which resulted in a state regulator's abandoning pricing restrictions.

Brokerage services account for an important part of a home sale transaction. Unnecessary regulation can increase the price of those services and limit innovation. Therefore, protecting competition and consumers in real estate brokerage markets will continue to be a DOJ competition advocacy priority.

The group assembled here today has a solid commitment to competition law enforcement, and we can be proud of the contributions that the trans-Atlantic dialogue makes in mutual competition advocacy. Perhaps then it's time to break for refreshments, enjoy a little competition lawyer congratulatory back slapping, maybe share a few stories about how colleagues in the regulatory agencies just don't get it.

But before we do, let's pause to consider whether well meaning antitrust enforcement can sometimes take us into the same thicket as sectoral regulation. Antitrust regulation too can raise prices and harm consumers. This is known well by the firms that complain to government officials and courts about the conduct of their successful competitors. They know antitrust enforcement or litigation may be cheaper and more effective than resort to regulatory or political processes, certainly cheaper than competing. The sometimes inclination of enforcers or judges to save these competitors so they may compete one more day reinforces this strategy.

The goal of antitrust enforcement is to clear the way for operation of free markets. But a fundamental difficulty for enforcers and judges is the uncertainty of how best to protect a free market for the long run.

As I said about single firm conduct, more generally in antitrust enforcement we must walk the narrow path between over-deterrence and under-enforcement. And I submit the relative risk of stepping wrong one way or the other is highlighted by these corollaries. On one hand, when antitrust enforcement mistakenly permits a firm to continue to engage in anticompetitive conduct, then the welfare loss from that conduct continues in the market, but over time it is diminished. The firm's exercise of market power will attract entry and in the long run the market power will be lost. On the other hand, when antitrust enforcement mistakenly condemns a beneficial or innovative practice, the benefits may be lost for good, not only because the defendant is enjoined from continuing the practice, but because the legal precedent causes other firms to avoid that business behavior and anything that looks like it. Neither error is costless, but in general we will recover from the mistaken acquittal more quickly than the mistaken conviction.

If courts and antitrust enforcement officials were as capable of evaluating the consequences of business behavior as is the market itself, then even when the way is not clear we could advocate self-confident and aggressive challenges: "Shoot first, ask questions later." Since we are not as capable as the market, the better competition advocacy message is, "humility."

Antitrust enforcement can constitute government regulation of business that even zealous critics of government regulation can love. Where we know that business conduct will substantially harm competition and consumers, enforcement action should be quick and merciless. Where we cannot be so sure we know, we should tread more carefully. Our general agreement on these principles, that rules should be clearly articulated and that enforcement should be prudent and predictable in outcome, has been a valuable benefit of the trans-Atlantic dialogue.

Thank you.