



DEPARTMENT OF JUSTICE

Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels

MAKAN DELRAHIM
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Introduction

Ladies and gentlemen, colleagues and friends, I am delighted to be here today.

I would like to focus my remarks today on the close working relationship between the United States Department of Justice's Antitrust Division and the European Union's Directorate General for Competition. Not only do we cooperate on cases almost daily, but we also increasingly are in close communication about emerging policy issues. I make these remarks recognizing the important differences between us, but also affirming how far we have come since I was a Deputy Assistant Attorney General at the Antitrust Division in the early 2000s.

Two decades ago this speech would have been surprising. Back in 2001, Bill Kolasky, then Deputy Assistant Attorney General for International, delivered a speech entitled "Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels." This was shortly after DG Competition's decision to block the merger of GE and Honeywell, which the U.S. Antitrust Division had decided to clear with minimal conditions. As many of you probably know, both GE and Honeywell manufactured airplane engines, but the Antitrust Division had determined that there was no direct overlap, because GE's business focused on jet engines for large commercial aircraft, while Honeywell's focused on engines for small regional jets, avionics, and nonavionics systems such as landing gear and auxiliary power units. DG Competition decided to block the merger based on concerns that it would strengthen GE's market power for large jet engines, and that it would enable Honeywell to gain a dominant position in the small engine, avionics, and nonavionics markets. Needless to say, these were concerns that the Antitrust Division did not share. These divergent outcomes in the GE-Honeywell merger led to a difficult point in transatlantic antitrust relations. There was a general malaise in the relationship, and the feeling persisted for some time.

Much has changed since then. DG Competition appointed its first chief economist, we have had increased cooperation, and our mutual understanding has increased, even as we may disagree at times. Today, DG Competition is one of the Antitrust Division's most important partners, and our cooperation is vital to successful antitrust enforcement in this ever-increasing global economy.

There is an old classic by the Rolling Stones that says "there've been good times, there've been bad times" but "there's gotta be trust in this world or it won't get very far." As European Commissioner Margrethe Vestager said in a recent TED talk, "trust may be the most important thing we have" for "without trust, everything we do becomes harder."¹ One of the great things about our relationship with DG Competition is that we have worked together so closely for so long that we trust each other, even when we disagree. For that reason, I have titled my remarks "Good Times, Bad Times, Trust Will Take Us Far."

Background

Jean Monnet, one of the so-called founding fathers of the European Union, stated that throughout his life, he had one objective: "make people work together to show them that beyond their

¹ Remarks of Commissioner Margrethe Vestager at TED Talk (September 20, 2017), *available at* https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-can-build-trust-our-societies_en.

differences and over their borders they have a common interest.”² That is what the Antitrust Division and DG Competition have been doing together for years. The relationship between us goes back decades, long before we entered into a formal cooperation agreement in 1991. Our ultimate goals are similar: protecting consumers and competition during an era of rapid technological change. Consumers on both sides of the Atlantic Ocean have reaped the benefit of greater cooperation and convergence in how we review mergers, challenge anticompetitive conduct, disrupt cartels, and pursue remedies. As Director-General of DG Competition Johannes Laitenberger said recently, this is a vital *acquis* that we cannot underestimate. Indeed, we have reached the point at which we are working together in some form or another almost all the time.

Investment in our Relationship

In recent years, the Division has made a concerted effort to invest in our relationship with DG Competition, on multiple levels. At the formal level, we have continued our regular annual bilateral meetings with DG Competition, achieving real results. For example, in 2011, on the 20th anniversary of the first United States-European Union cooperation agreement, we released updated best practices for coordinating our merger reviews.³ These formal agreements crystalize our cooperation practices. To help us avoid divergent outcomes when we are investigating the same transaction, these best practices place great weight on coordination among our agencies at key stages of our investigations, including when we consider potential remedies.⁴

We routinely cooperate at the informal level as well. Through case cooperation and frequent policy discussions, our career staff have developed strong relationships with our counterparts in Brussels. Assistant Attorneys General and Commissioners for Competition may come and go, but lasting bonds formed at the staff level between our International Section and the International Relations Unit of DG Competition are vital to ensuring that the culture of cooperation continues. In 2011, we launched our Visiting International Enforcer Program to provide an opportunity to host visiting enforcers, including several managers from DG Competition. These visiting international enforcers have the opportunity to meet leaders and staff from throughout the Division, participate in policy and case-related meetings, and become immersed in casework. This program has allowed our EC friends to better understand how we do things on our side of the Atlantic.

And DG Competition has reciprocated our efforts. During the past few years, the EC has hosted three of our senior career managers. Patty Brink, our Director of Civil Enforcement, spent two weeks at DG Competition in 2013, and described her experience as “extraordinary.”⁵ As she pointed out, “these kinds of exchanges make later cooperation easier because, in antitrust, as well

² Jean Monnet, *Mémoires*, 273 (1978) (“*Faire travailler les hommes ensemble, leur montrer qu’au-delà de leurs divergences ou par-dessus les frontières, ils ont un intérêt commun.*”).

³ Press Release, U.S. Dept. of Justice, *United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews* (Oct. 14, 2011), available at <https://www.justice.gov/opa/pr/united-states-and-european-union-antitrust-agencies-issue-revised-best-practices-coordinating>.

⁴ See *U.S.-E.U. Merger Working Group: Best Practices on Cooperation in Merger Investigations* (Oct. 14, 2011), available at <https://www.justice.gov/atr/public/international/docs/276276.pdf>; see also *FAQs on the U.S.-E.U. Merger Working Group’s Best Practices on Cooperation in Merger Investigations* (Oct. 14, 2011), available at <https://www.justice.gov/atr/public/international/docs/276279.pdf>.

⁵ Patricia Brink, *International Cooperation at the Antitrust Division: A View from the Trenches* (Apr. 19, 2013), available at <https://www.justice.gov/atr/speech/international-cooperation-antitrust-division-view-trenches>.

as in many other fields, relationships matter.” This face-to-face interaction helps build trust and understanding, both of which are key to successful cooperation.

Expanding our Commitment to Case Cooperation

Our commitment to case cooperation cannot be understated; indeed, it has expanded dramatically since I last served at the Antitrust Division in the early 2000s. Two decades ago, the differences in our respective approaches—as exemplified by the GE-Honeywell matter—posed challenges for cooperation. But in the nearly 20 years since, the differences between us have narrowed considerably, particularly on the merger front. And the Division has made various structural changes to capitalize on this trend.

Most recently, we have established Front Office contacts for international case cooperation. Our counterparts, including those at DG Competition, have told us how much they appreciate having a Division manager who oversees at a high level the full range of case cooperation. We have also expanded our recently-renamed International Section, adding additional attorneys with international experience from inside and outside the Division. And, of course, I have recruited Professor Roger Alford as my International Deputy from Notre Dame Law School, so that the Division can benefit from his significant international law expertise and years of scholarship in Europe.

Within our case handling sections, we have made new investments to instill the importance of case cooperation in our hard-working attorneys, and to ensure that they are fully equipped to engage with their international counterparts. We have frequent staff training programs on international developments and best practices for international case cooperation. I also have established an International Cooperation Working Group that includes representatives from each of our civil sections to ensure that we closely monitor and coordinate all international outreach and engagement, and that all of our learning is shared across the Division.

In January 2017, the Division, together with the Federal Trade Commission, released revised Antitrust Guidelines for International Enforcement and Cooperation, which now include an extensive section on case cooperation.⁶ These revised guidelines reflect a sea change in international enforcement and cooperation since the first international guidelines were issued two decades ago, particularly with respect to investigations that involve collaboration with our international counterparts.

Increased Frequency, Depth, and Scope of Cooperation

This work has paid dividends. We engage with DG Competition on almost every matter where we are both investigating. And even when differences in markets result in only one agency

⁶ Press Release, U.S. Dept. of Justice, *Justice Department and Federal Trade Commission Announce Updated International Antitrust Guidelines* (Jan. 13, 2017), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-updated-international-antitrust>; U.S. Dept. of Justice and Fed. Trade Comm’n, *Antitrust Guidelines for International Enforcement and Cooperation* (Jan. 13, 2017), available at <https://www.justice.gov/atr/internationalguidelines/download>

investigating, we likewise share relevant information to help that agency reach the best possible market-based outcome.

Over the past four years, we have cooperated with DG Competition on thirty merger and civil non-merger matters, including some of our most high-profile matters like Baker Hughes/Halliburton⁷, UTC/Goodrich⁸, and eBooks.⁹ In the past year alone, we cooperated on GE/Baker Hughes,¹⁰ Smiths/Morpho,¹¹ and a number of other resolved matters. And even as I speak today, we are cooperating closely in multiple ongoing cases.

Case cooperation is extensive, and despite our lack of geographic proximity, we often feel as though we are in the trenches together with our counterparts. Indeed, we are in constant contact when we cooperate on a case. Whether through daily calls or multi-day in-person discussions, we are able to share evidence, strategize on theories of harm, and coordinate remedies, while respecting each other's regions.

On the criminal front, we have cooperated on a number of significant criminal investigations. I cannot discuss the specifics of the cooperation that occurs in covert stages, but we have implemented a number of processes that ensure effective coordination, and we encourage our staff to have a "pick-up-the-phone" mentality when it comes to our friends at DG Competition. In working with leniency applicants, we also coordinate with DG Competition on deadlines and timetables for key tasks and witness interviews. Our long-ranging auto parts investigation is a prime example of cooperation among criminal enforcement agencies. Without such close cooperation in criminal enforcement, I firmly believe that our most important prosecutorial tool, our leniency program, would be much less effective in uncovering some of the most harmful cartels.

Beyond our cooperation on particular investigations, we organize quarterly calls between our cartel enforcement staffs to discuss case updates, evolving jurisprudence, policy decisions, and other topics. All of these communications contribute to strengthening this rich and valuable partnership on which we increasingly rely.

⁷ Press Release, U.S. Dept. of Justice, *Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal*, (May 1, 2016), available at <https://www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal>.

⁸ Press Release, U.S. Dept. of Justice, *Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with its Acquisition of Goodrich Corporation*, (Jul. 26, 2012), available at <https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its>.

⁹ Press Release, U.S. Dept. of Justice, *Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-book Prices*, (Apr. 11, 2012), available at <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-three-largest-book-publishers-and-continues-litigate>.

¹⁰ Press Release, U.S. Dept. of Justice, *Justice Department Requires Divestiture of General Electric Company's Water & Process Technologies Business Before Merger with Baker Hughes Incorporated*, (June 12, 2017), available at <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-general-electric-company-s-water-process-technologies>.

¹¹ Press Release, U.S. Dept. of Justice, *Justice Department Requires Divestiture of Morpho's Explosive Trace Detection Business Before Smiths Acquisition*, (Mar. 30, 2017), available at <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-morpho-s-explosive-trace-detection-business-smiths>.

Reaping the Benefits of Increased Cooperation

Our case cooperation efforts have yielded widespread benefits to the Division, parties, the business community, and, most importantly, to consumers in both of our unions. Through our cooperation, we develop greater expertise, parties enjoy greater efficiency in case management, businesses have more predictability and certainty, and consumers have more effective government and more competitive markets. As Commissioner Vestager has said, cooperation is “our secret weapon” that “makes competition work, even in a world of global business.”¹²

We may not reach the same conclusion on every merger review, but hopefully our mature relationship and close cooperation make differing conclusions less discordant. When we cooperate, consumers win. Take the \$18 billion UTC/Goodrich merger as an example. This merger was the largest in the history of the aircraft industry and would have led to competitive harm in the markets for several critical aircraft components.¹³ We closely coordinated our review with our international counterparts, and when the Division announced its settlement, DG Competition and Canada’s Competition Bureau issued statements regarding their investigations on the same day.¹⁴ Cooperation through the remedial phase of that investigation allowed us to achieve non-conflicting remedies, including divestiture of assets in the U.S., Canada, and the UK. Our cooperation continued even through the implementation of the remedy, when we and DG Competition appointed a common monitor to oversee the divestiture.

Quite often, cooperation also helps us reach the mutual determination that no remedy is necessary. A few years ago, for example, the Antitrust Division and DG Competition worked closely on an investigation into Google’s acquisition of Motorola Mobility’s patent portfolio, and reached decisions not to challenge the acquisition.¹⁵

Institutional Convergence

On an institutional level, the gap between Washington and Brussels has also narrowed over the past 20 years. Since 2003, DG Competition has had an independent Chief Economists Office,

¹² Remarks of Commissioner Margrethe Vestager at the UCL Jevons Institute Conference (June 3, 2016), available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/working-together-support-fair-competition-worldwide_en.

¹³ Competitive Impact Statement, *United States v. United Technologies Corp.*, No. 1:12-cv-1230 (D.D.C. filed July 26, 2012), available at <http://www.justice.gov/atr/cases/f285400/285430.pdf>; Press Release, U.S. Dep’t of Justice, *Justice Department Requires Divestitures In Order For United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation* (July 26, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/285420.pdf.

¹⁴ Press Release, European Commission, *Mergers: Commission approves acquisition of aviation equipment company Goodrich by rival United Technologies, subject to conditions* (July 26, 2012), available at http://europa.eu/rapid/press-release_IP-12-858_en.htm; Press Release, Canadian Competition Bureau, *Competition Bureau Statement Regarding United Technology Corporation’s Acquisition of Goodrich Corporation* (July 26, 2012), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

¹⁵ Press Release, U.S. Dep’t of Justice, *Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisition of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.* (Feb. 13, 2012), available at <https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations>; Press Release, European Commission, *Mergers: Commission Approves Acquisition of Motorola Mobility by Google*, (Feb. 13, 2012), available at http://europa.eu/rapid/press-release_IP-12-129_en.htm.

which is staffed today by an impressive array of Ph.D. economists who play a role similar to the Antitrust Division's Economic Analysis Group.

Furthermore, in 2004, DG Competition's current enforcement regulation came into effect, strengthening its investigatory powers and creating certain procedures similar to ours. On the cartel side, DG Competition's leniency program and settlement procedures have evolved such that they work seamlessly with our own anti-cartel efforts.

And on the private remedies front, the adoption and implementation of the Antitrust Damages Actions Directive aligns the European system more closely with our private enforcement system in the U.S.

Global Leadership

Not only have we strengthened our bilateral relationship, we also share a mutual interest in promoting sound competition policy in other jurisdictions. Together we have promoted the value of sound, economics-based competition enforcement to governments all over the globe, and today there are over 130 competition agencies helping to ensure that consumers benefit from competition.

We have long been partners in the OECD's Competition Committee, and together we helped found the International Competition Network. At the ICN and OECD, we have successfully promoted best practices and substantive convergence in antitrust enforcement. Indeed, as Commissioner Vestager has noted, "every time two or more sister agencies talk to each other on a given case, we see the importance of having procedural and substantive rules that are compatible – or at least not at odds with each other."¹⁶

The primary concern Mr. Kolasky expressed in his speech was the danger that divergence would "undermine the strong political consensus supporting vigorous antitrust enforcement." That statement remains true. Our mutual commitment to shared principles of competition law, however, has helped us avoid that danger. Today, we stand together in upholding the political consensus regarding the proper use of antitrust law, and we continue to work together to promote consumer welfare in our own jurisdictions and worldwide.

Policy and Substance

We also continue to work to narrow the differences between us on policy and substance. Mr. Kolasky's speech identified a "sharp divergence" between the EU approach and "the central tenet of US antitrust policy – that the antitrust laws protect competition, not competitors." But since those remarks, European Commissioners have again and again affirmed their commitment to the consumer welfare standard. Starting with then-Commissioner Mario Monti and continuing with Commissioners Neelie Kroes, Joaquin Almunia, and on to Commissioner Margrethe Vestager today, Commissioners have expressed their commitment to the same consumer welfare standard that guides U.S. competition enforcement. As Commissioner Vestager has stated, "we don't

¹⁶ Remarks of Margrethe Vestager at the ICN Merger Workshop (Sept 24 2015), *available at* https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/merger-review-building-global-community-practice_en.

always do things the same way. But I think our goals are very similar: We want to protect competition and consumers.”¹⁷

Respectful Dialogue Where We Diverge

This is not to say that we have overcome all of the differences between us. We still do have differences, but we talk about them regularly and respectfully, so that we can understand what motivates them.

For example, we have not yet closed the gap in the area of unilateral conduct. European competition law still imposes a “special duty” on dominant market players, while we in the U.S. do not believe any such duty exists.

With respect to unilateral conduct, we have particular concerns in digital markets. We continue to advocate for an evidence-based approach based on existing theories, which are sufficiently flexible to apply to new forms of doing business in the digital economy. Where there is no demonstrable harm to competition and consumers, we are reluctant to impose special duties on digital platforms, out of our concern that special duties might stifle the very innovation that has created dynamic competition for the benefit of consumers.

But the benefit of our close relationship with DG Competition is that we can and do talk about these differences, making progress along the way. For example, in the ICN’s Unilateral Conduct Working Group, we spent significant time working together to develop an Analytical Framework for Unilateral Conduct. Even though we have different views on how dominant players should be treated, we nevertheless reached agreement on a fairly significant policy document.

In the intellectual property area, we each have licensing guidelines; DG Competition’s guidelines were revised in 2014; ours just last year. Both sets of guidelines highlight the benefits of robust IP protection, the importance of innovation incentives, and the risk that certain hardcore conduct poses to competition.

Intellectual property rights and innovation are topics I have cared about for a long time.¹⁸ Intellectual property rights are enshrined in the U.S. Constitution, and I believe that strong protection of these rights drives innovation incentives, which in turn drive a successful economy.

A deep-seated concern for protecting incentives to innovate underlies many of the changes in U.S. antitrust law over the past several decades, and it is no coincidence that we have enjoyed a period of staggering innovation over that time. But in an ever-evolving marketplace, success is not a

¹⁷ Remarks of Margrethe Vestager, Competition Enforcement in the EU and US (September 19, 2016), *available at* https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-enforcement-eu-and-us_en.

¹⁸ Remarks of Assistant Attorney General Makan Delrahim at the USC Gould School of Law (November 10, 2017), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center>; Remarks of Deputy Assistant Attorney General Makan Delrahim at the 2004 Shanghai International Forum (November 10, 2004), *available at* <https://www.justice.gov/atr/speech/contemporary-issues-intersection-intellectual-property-and-antitrust>.

static outcome. We must continue to think critically about how best to calibrate our enforcement decisions to promote competition and innovation.

As you may know from what I have said publicly, a particular concern of mine is how we use antitrust enforcement in the context of standard setting. In particular, I worry that we have strayed too far in the direction of accommodating the concerns of technology licensees who participate in standard setting bodies, very likely at the risk of undermining incentives for the creation of new and innovative technologies. We continue to better our understanding of this important field.

The dueling interests of innovators and implementers always are in tension, but the tension is best resolved through free market competition and bargaining. And that bargaining process works best when standard setting bodies respect the intellectual property rights of technology innovators, including the very important right to exclude. To the extent a patent holder violates its commitments to a standard setting organization, remedies under contract law, rather than antitrust remedies, are more appropriate to address licensees' concerns.

I am aware that there may be some distance between my position and that of some of my European counterparts. If that is the case, however, we can look to our long history of effective and productive collaboration for guidance about how to proceed. I will make every effort to work with our counterparts at DG Competition to narrow any gap between Brussels and Washington in this area. We must maintain our close dialogue on the cutting-edge issues—innovation, intellectual property rights, and digital markets—that will occupy much of our time in the future. Innovators and consumers in both of our unions deserve nothing less.

Conclusion

To conclude, I would like to quote from one of the great figures in American history, former U.S. Attorney General and Senator Robert F. Kennedy. Senator Kennedy visited South Africa in 1966, at a time when both the U.S. and South Africa were experiencing heightened racial tensions. As he toured South Africa, he expressed hope that both countries could transform themselves into more just societies. Speaking at the University of Cape Town, Senator Kennedy said: “Few will have the greatness to bend history itself, but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation.”

Although Senator Kennedy delivered his remarks in a very different context, his words resonate with all of us who work each day to promote the best ideals of our respective justice systems. In my first speech as Assistant Attorney General, I committed to international engagement, because I believe that engagement is key to promoting competition around the world.¹⁹ In particular, I hope to promote fundamental norms of non-discrimination, transparency, and sound international antitrust enforcement as a hallmark of my tenure at the DOJ. I am supported in this mission by all of my hardworking colleagues in the Antitrust Division, and I know that together with our partners at DG Competition, we can shape this generation of enforcement.

¹⁹ Remarks of Assistant Attorney General Makan Delrahim at New York University School of Law (October 27, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law>.

It is remarkable how far we have come, and I look forward to the future challenges we will take on together. Thanks to our shared commitment to innovate, cooperate and deliberate, today we can say that the trust between Washington and Brussels will, no doubt, take us far.