DEPARTMENT OF JUSTICE

The Public Interest Standard and the Dangers of Discrimination

ROGER ALFORD
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for
Global Seminar Series: Dűsseldorf
Public Interest Considerations & Competition Law

Dűsseldorf, Germany

May 8, 2018

I am honored to be with you in Düsseldorf today to discuss the public interest standard and its impact on competition enforcement. I want to begin my discussion today with the broad question of the power of the state in the realm of competition law. I will then focus on the potential misuse of power in the antitrust context, particularly the risk of discrimination against foreign competition when agencies apply a broad public interest standard.

Let me start from the perspective of one's understanding of power. When you think about power, what comes to your mind? At least in the business world, one such image is the self-made entrepreneur, who built a business by capturing the imagination of millions, offering new products and services, improving our way of life, and changing the course of commerce. Another is the CEO of a multinational corporation that offers products and services that impact our lives on a daily basis.

Such titans of business wield control over a vast corporate colossus, and there is no doubt that they exert a powerful influence on society. Yet despite their dominance, they lack one crucial element: the authority of the state. As George Stigler wrote, "The state has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce."[1]

With such power comes the risk of abuse. We all know Lord Acton's famous maxim that "power tends to corrupt, and absolute power corrupts absolutely."[2] But let's put aside concerns about absolute power, and focus for a moment on the more common concern of the bounded, conditional, qualified, and yet awesome power of the state. Alexis de Tocqueville warned that power is typically abused not with great passion and sudden violence, but rather in small, complicated, and minute rules. "The sovereign power … does not break wills," de Tocqueville wrote, "but it softens them, bends them and directs them…. [I]t does not destroy … it hinders, it represses, [and] it enervates...."[3] Given the risks of abuse, we should be rightly concerned about how the state, through its agencies, projects power.

Of the agencies that exercise government authority, few have the powers of law enforcement. Speaking at the Great Hall of the U.S. Department of Justice in 1940, former Attorney General and Supreme Court Justice Robert Jackson stated that the federal prosecutors are "one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America…. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst…."[4] With the power of prosecutorial discretion, Jackson emphasized, comes the risk of prosecutorial discrimination. "If the prosecutor is obliged to choose his cases, it follows

---

[1] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4 (1971).
[2] Letter from Lord Acton to Mandell Creighton (Apr. 5, 1887), *in* LORD ACTON, ESSAYS ON FREEDOM AND POWER 329, 335 (Gertrude Himmelfarb ed., 1972).
[3] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, vol. II, Book 4, ch. 6 (1840).
[4] Robert Jackson, "The Federal Prosecutor," at 1 (Apr. 1, 1940), *available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf

that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted."[5]

How does that law enforcement power apply in the competition context? In many jurisdictions, including the United States, the state has the power of criminal prosecution for antitrust violations, which can result in serious penalties including prison sentences. Even the threat of civil antitrust enforcement often strikes fear in the hearts of the accused because it can lead to significant legal fees, loss of reputation, substantial damages, and structural remedies resulting in the breakup of businesses. And with mergers, the best laid plans of companies can be thwarted when authorities, specifically, those not subject to judicial review, conclude that a merger is anticompetitive.

Corporations who violate the antitrust laws have good reason to be nervous that they will pay the consequences for their anticompetitive behavior. When antitrust suits were filed against Standard Oil in 1905, the oil baron John D. Rockefeller went into hiding to avoid service of process, leading his biographer to describe him as the "world's richest fugitive."[6] The result of that litigation, of course, was the historic Supreme Court decision in 1911,[7] leading to the breakup of Standard Oil.

These powers are appropriate when properly employed to enforce the antitrust laws. They are designed to keep markets functioning, by avoiding pernicious corporate behavior such as cartels, price fixing, and the abuse of monopoly power. The threat of criminal and civil penalties create incentives for good behavior, and reduce the likelihood or frequency of anticompetitive conduct. And the careful and vigorous review of mergers ensures that parties structure their deals to avoid anticompetitive effects of consolidation. The proper enforcement of competition laws is unequivocally good for society, for consumers and for innovation.

But as with any other law enforcement agencies, we as competition law enforcers must be ever vigilant about exercising our power properly, using precise tools rather than blunt instruments. The current debate between the consumer welfare standard and the public interest standard is illustrative of the tendency to trade the scalpel for the sledgehammer.

One of the benefits of the consumer welfare standard is that it focuses the analysis. We know what to address in the analysis—benefits or harms to consumers—and competition enforcers have developed tools to do so. In contrast the public interest standard, depending how applied, can be a vague one—a blunt instrument. The broad reaches of the public interest encompass a host of factors, many of which may point one way or another on any particular transaction, especially if parties promise public interest benefits as part of their transactions.

A particularly dangerous application of the public interest standard arises when it is understood to permit discrimination in competition enforcement. Worse than just vagueness, a public interest standard used to discriminate can undermine the legitimacy of law enforcement.

The prohibition against discrimination is central to the rule of law. Various labels attach to the concept: equal protection, national and most-favored-nation treatment, impartiality, equality, and

---

[5] *Id.* at 4.
[6] RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 519-525, 554-555 (1998).
[7] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

so on. The concept is enshrined in international treaties, national constitutions, domestic laws, public mores, and our own moral compass.

In the competition context, the ICN Guiding Principles summarize the commitment as follows: "[c]ompetition agencies should conduct enforcement matters in a consistent, impartial manner, free of political interference…. Agencies should not discriminate on the basis of nationality in their enforcement."[8] The basic idea is that competition enforcers should accord a person treatment no less favorable than other persons in like circumstances.

When we think of discrimination, we tend to focus on *de jure* discrimination that is overt, obvious, and intended. Industrial policies that expressly favor domestic competitors or expressly disfavor foreign ones are perhaps the most common example of *de jure* discrimination. For example, in some countries competition agencies afford preferential treatment to competitors that are state-owned enterprises based on their special legal status.[9] In other countries, competition agencies are required to consider the effects that a merger will have on "the ability of national industries to compete in international markets."[10]

Obviously, it is rare for a competition agency to be so explicit in placing a thumb on the scale in favor of domestic competition with such a discriminatory intent and effect. Far more common is *de facto* discrimination, which is a matter of general concern. It is here that prosecutorial discretion in deciding which cases to bring is so critical. Enforcers should, in Robert Jackson's words, select cases "in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[11]

If one is not careful, the public interest standard may become a proxy for *de facto* discrimination. When antitrust laws pursue social or political goals—goals such as protecting national champions, aiding small businesses, or developing local technology expertise—the practical result may be to advantage domestic competitors over foreign ones. Any time a competition agency advocates for a broad public interest standard, we should query not only whether it is competent to address such issues, but also whether the practical result will be discrimination.

---

[8] ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement (Mar. 2018) available at http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf.

[9] See, e.g., Constitution of the People's Republic of China, art. 7 ("The state economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy."); Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening Reform (People's Republic of China) Third Plenary Session of the 18th Central Committee of the Communist Party of China, (Nov. 12, 2013) ("We must unswervingly consolidate and develop the public economy, persist in the dominant position of public ownership, give full play to the leading role of the state-owned sector, and continuously increase its vitality, controlling force, and influence.").

[10] The Competition Act, section 12(A)(3), http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf; South Africa, OECD, Public Interest Considerations in Merger Control (June 14-15, 2016), available at http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP3/WD(2016)13&docLanguage=En.

[11] Jackson, *supra* note 4, at 4.

Like other government entities, competition authorities are at risk of regulatory capture, and domestic interests will often be more powerful than foreign interests in exerting their influence. It is difficult to conceive of a greater barrier to entry than a captured agency intent on protecting a domestic incumbent. As Fred Jenny has put it, "broadly specified policy objectives can be ambiguous and as such are subject to 'capture' or 'hijack' by the politically strongest private interests…. Thus, *de jure* public interest objectives may *de facto* serve private interests."[12] Given the significant enforcement powers vested in competition agencies, it is not a satisfactory answer to say that if a prosecutor is captured, she will be prone to act with more restraint than less powerful agencies.

This is not to suggest that all consideration of public interest factors is necessarily discriminatory or inappropriate. It is not. But while broad public interest standards may not necessarily result in discrimination, such a standard is more susceptible to misuse that results in discrimination. The OECD Secretariat succinctly summarized this problem: "Public interest goals are generally broad and thus difficult to interpret and apply in an objective, transparent, and consistent manner. Their inclusion therefore creates risks of legal uncertainty and unpredictability in the enforcement of competition law."[13] When competition laws are enforced in a subjective, opaque, and inconsistent manner, the result allows for *de facto* discrimination against foreign competition. And when an agency favors one competitor over another, this creates a market distortion in which a less efficient competitor prevails in the market because there is a thumb on the scale. This harms not only the foreign competitor, but also domestic consumers who would benefit from higher quality, lower prices, greater innovation, and more product selection.

The consumer welfare standard is designed to promote and protect efficiencies, thereby avoiding any preference between competitors. It is agnostic as to which provider of goods or services enhances the welfare of the consumer. By maintaining a singular focus on what is best for the consumer, we lay aside competing interests that sow the seeds for mischief. By eschewing a broad public interest standard and embracing a traditional consumer welfare one that focuses on core competition concerns, we promote the likelihood of non-discriminatory enforcement of the competition laws.

Let me conclude with a few thoughts on how this concern fits within the larger mosaic of competition enforcement. Of course, discrimination is only one of a larger set of norms that are essential to promoting procedural fairness. Many elements inform fundamental due process, including transparency, proper notice, independence, opportunity to defend, timely resolution, access to counsel, respect for privilege, and judicial review. We at the Department of Justice are committed to promoting these standards around the world. That is why Assistant Attorney General

[12] Frédéric Jenny, *Competition Agencies: Independence and Advocacy*, *in* THE GLOBAL LIMITS IN COMPETITION LAW 158, 163 (Ioannis Lianos and Daniel Sokol, eds. 2012).
[13] Background Paper by the Secretariat, OECD, Public Interest Considerations in Merger Control (June 14-15, 2016), available at available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En.

Makan Delrahim has made procedural convergence relating to fundamental due process a core objective of his tenure at the Antitrust Division and of this Administration.[14]

In this area, there are hopeful signs on the horizon. There is a growing awareness in the international network of competition agencies that due process provides a fundamental protection against abuse. For example, in Delhi in March 2018, the ICN adopted nine Principles for Procedural Fairness in Competition Agency Enforcement.[15] Those guidelines are only the latest of many similar initiatives to promote due process. In recent years, we have seen various best practices adopted at the ICN[16] and OECD,[17] as well as similar commitments embedded in competition chapters of free trade agreements.[18]

We welcome these developments, while also recognizing their limitations. Neither the soft-law guidance of the ICN and OECD, nor the hard-law commitments in free trade agreements are sufficient for the current competition landscape. The former are broad and thin, while the latter are narrow and deep. We should aspire to promote genuine procedural convergence that is both broad and deep: broad in the number of agencies that adhere to fundamental procedural norms; deep in the sense of meaningful commitments to the competition community.

Until that hope is realized, we can in the meantime celebrate how far we have come in the effort to promote the sound enforcement of competition laws. Around the world, including in the United States, conversations are taking place about the proper goals of competition law, and the fundamental due process norms that apply to competition enforcement. We welcome this dialogue, and have confidence that these conversations will lead us towards a future in which competition enforcement will respectfully converge towards a common understanding of recognizing and affording fundamental due process, including against the potential misuse of competition laws to favor domestic over foreign competitors.

Thank you.

---

[14] Makan Delrahim, "The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement," (Apr. 10, 2018), https://www.justice.gov/opa/speech/file/1050956/download; Makan Delrahim, "International Antitrust Policy: Economic Liberty and the Rule of Law" (Oct. 27, 2017), https://www.justice.gov/opa/speech/file/1007231/download.

[15] ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement (Mar. 2018) available at http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf; International Competition Network Adopts Guiding Principles for Procedural Fairness and New Recommendations for Merger Review, (Mar. 23, 2018) available at https://www.justice.gov/opa/pr/international-competition-network-adopts-guiding-principles-procedural-fairness-and-new.

[16] ICN Guidance on Investigative Process (2015), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

[17] OECD, Key Points – Procedural Fairness and Transparency (2012), available at http://www.oecd.org/daf/competition/mergers/50235955.pdf.

[18] *See, e.g.*, Korea-U.S. Fair Trade Agreement, Chapter 16, available at https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.