DEPARTMENT OF JUSTICE

COMPETITION AND POLITICS

Remarks by

R. HEWITT PATE
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented at the
12th International Conference on Competition
Bonn, Germany

June 6, 2005

I. Introduction

Our topic this morning is competition and politics. How do they go together? After hearing a reference to American movies in our discussion this morning, I could not get out of my mind an image from an old American television commercial for a famous candy called the Reese's Peanut Butter Cup. In this commercial, a man and a woman are walking through their house. The woman loves peanut butter and she is eating peanut butter and having a great time. The man loves chocolate and he is walking through the house with a chocolate bar. They are not watching where they're going, they crash into each other and, of course, the chocolate goes into the woman's peanut butter and there is peanut butter all over the man's chocolate. They both become angry and she says, "You got chocolate in my peanut butter," and he says, "Well, you got peanut butter on my chocolate." But then they taste what has happened and realize this is a great combination — and so is invented the famous Reese's Peanut Cup.

After thinking about this image, I have concluded that for competition and politics, this works only half way. So my theme this morning would be: keep politics out of your competition, but get competition into your politics. Now, what do I mean by "politics" here? I do not use the term pejoratively or to imply something that is in any way illegitimate. Politics is important and it is important that the public participate in it. "Politics" is a positive word in my vocabulary. But for this morning, what I mean by "politics" is decisions that are taken on a basis outside of efficiency or consumer welfare as defined by price, quality, and output. That is what I mean for this morning's purpose and so I, therefore, come to the first idea – keep politics out of your competition.

II. Keeping Politics Out of Competition

What is the proper role of a competition agency? I think that is easy to sum up: promoting competition. Competition enforcers need to remain narrowly focused. There is a danger in focusing within our discipline on anything other than efficiency and consumer choices in making our decisions. As I will discuss later, in the broader context of political decision-making process, where – I am careful to say – there are other values that need to be taken into account, antitrust agencies should be advocates for sound competition principles.

Over the past few decades, competition enforcement has become more and more about economics. Economics can be applied in different ways. President Ulf Böge, of the Bundeskartellamt, talks about this frequently. Under the German system, he would say, economics are applied at the front end and then clear legal rules are developed. In the United States, we tend to apply economics on a case-by-case basis, to analyze the economics of each individual transaction. But whichever way you are doing this, clearly the point is to use sound economic analysis to promote consumer welfare as defined by better output of improved products at a lower price. And my point is that, as competition enforcers, we had better focus on that and not focus on anything else.

There are people who would like us to take on other subjects – maybe trade policy or labor policy – and to do this as part of competition enforcement. Maybe we should consider environmental aspects, some people would tell us. Perhaps we should also consider cultural values in making competition decisions. But the inclusion of other, non-competition values is very dangerous, and we need to be very careful with it.

We also need to be careful about the temptations of populism. Many of these other issues are correctly perceived as very important by the public at large. So this temptation is particularly relevant for newer agencies because there is a need to bring the agency's activities to the public's attention and to secure public support. But if we do this on the basis of getting involved in politically charged issues by reference to populism, then there is a great danger of diluting our competition principles. We need to beware of vanity. There will always be people who come and say, "What a great job you are doing. If you just consider *my* special political interest, you will show that you are broad-minded and that you have excellent judgment." There will be no shortage of people who would like to congratulate you for making decisions based on populism or other, non-competition values. You should resist that temptation, I suggest.

As an American, it was very interesting to listen to this morning's discussion of media regulation in Germany. This is a topic that gets great attention in my country as well. I have been called before our Senate to be asked why I do not champion the idea of diversity of opinion and diversity of content on the airways. My answer is that diversity may be a by-product of what we do. If we stop a merger because it is anticompetitive economically, then there will be more companies left in the marketplace. Certainly this could have the by-product of promoting different types of programs, different types of offerings. But yet this is not a basis on which I could make a decision about a merger. I am in no better position and have no more special expertise than anyone else to figure out what group of opinions or entertainments my culture demands. In fact, because I am not an elected official, I am much less qualified to do that than some others.

When competition agencies make decisions on other grounds, we lose our bearings. That is why for some things, it may be appropriate to have a more broadly-focused regulatory structure. In our country, we have a Federal Communications Commission. It makes decisions on the basis of the "public interest," a very broad standard that may include what sort of political opinions or entertainment values are appropriate or what level of decency regulation will be required to protect children. This becomes a very transparently political debate. It is appropriate that it be debated in this way, but it is also appropriate that it not be a basis on which we try to make competition decisions.

This is one reason I think that for agencies starting down the path of competition enforcement, anti-cartel enforcement is an excellent place to start. When we prosecute hard core cartels, we are working in the least controversial economically of all the areas where we can intervene. Preventing collusion from supplanting competition is really the fundamental thing that we do as competition agencies. John Fingleton of the Irish Competition Authority has made the point that an agency might not want to start doing this in just the way the United States does – that is, with criminal penalties. Perhaps you need to develop a culture of white-collar criminal enforcement, an anti-corruption tradition, and other things, before you pursue a criminal path, but nonetheless I think anti-cartel enforcement is a good place to start.

As the debate about whether to criminalize hard core cartel conduct indicates, there are also political choices with respect to the laws and procedures that govern competition enforcement. With respect to legal certainty and treble damages for antitrust violations, this is one area where I would say: be very careful about following an American model. With respect to abuse of dominance-type offenses, we in the U.S. have a relatively weak substantive standard

that is hesitant to intervene, but then that is backed up with an extremely powerful private litigation process enforced by treble damages. Here in the European Union, you have a somewhat stronger substantive standard, a standard that is more friendly to government intervention. On the other hand, you do not have that substantive standard leveraged by the extreme penalties and expenses of a private litigation system of the type we have in the U.S. But to go back to my Reese's Peanut Butter Cup example, I would be very concerned about putting a European-style substantive standard that allows more government intervention in Europe together with U.S.-style treble damages, discovery, and all sorts of powerful litigation tools. If you put those two together, I do not think it would taste very good in terms of economic development.

As another example of choices about how we enforce competition policy, I thought some of the comments this morning with respect to infrastructure development and sharing were extremely interesting. In the United States our broadband penetration rate, for example, is not what it could be because we operated under the Telecommunications Act of 1996[1] in a way that required forced sharing of infrastructure that requires a very high up-front capital investment. I think it is always a good question to ask whether you want to impose forced sharing obligations because of the long-term competitive consequences. This applies to infrastructure and certainly it applies to intellectual property. In the short term, there will always be a gain by seizing the intellectual property or by requiring the sharing of the already built infrastructure. But the question we have to ask is whether in the long term this produces the optimal amount of

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) codified throughout Title 47 of the United States Code (47 U.S.C.).

investment for citizens.

As you can tell, it is not my suggestion that competition is the only value that a country or a culture should promote. Sometimes in the public debate, competition will not be adopted as the primary value in a particular government decision. That is fine. But again, my point is that in our activities as competition agencies, we do not want to have a mixed focus. I think Germany has taken a very interesting approach to this issue, and because of its focus on clear rules, the German system is a very transparent system, where the Federal Cartel Office and the courts base their decisions solely on competition grounds. I may not always agree from an American perspective about how the economic analysis should be done, but nonetheless, this idea of focusing on consumer welfare and competition is very clear. But then in the German system, as I understand it, the Federal Economics Ministry with the advice of the Monopolies Commission can make a determination that the broader public interest outweighs competition concerns in a particular case.[2] This does not happen, often, but there is a transparent system in which it can happen.

If we incorporate extraneous social and political values into our decision making, we should not fool ourselves into thinking that somehow we will purify those political values with competition. I think what will happen, instead, is that our competition-based analysis will be polluted by values that, while important, just do not belong in sound competition analysis. So we should keep politics out of competition.

---

[2] *See* German Restraints of Competition Act 1958 (ARC) (amended 2004), sections 8 and 42, *available at* http://www.bundeskartellamt.de.

III. Getting Competition into Politics

The second part of my theme is that we should get competition into our politics. As competition agencies, we should not hesitate to promote the values of competition. As we have heard from several speakers today, government impediments to competition can be among the most dangerous. We need to be very active in this field. Dr. Böge made clear in his excellent speech on state-imposed restrictions at the last ICN conference at Seoul.[3] The key to injecting competition values into political decision making is effective competition advocacy. We do this in my agency in the United States. For example, we have argued that the exemption for shipping monopolies in our Shipping Act be repealed[4], and we have suggested that, in the case of scarce landing slots at airports, auctions should be used to allocate those rather than having a government regulatory bureaucracy hand them out. We have engaged in this type of competition advocacy before other governmental agencies in a variety of ways. I think it is important that antitrust agencies look for these advocacy opportunities.

Government-imposed restraints on competition are an area where competition authorities need to act. I fully agree with Commissioner Neelie Kroes on the importance of this part of the competition portfolio.[5] Competitors often are under challenge from new forms of competition,

---

[3] Dr. Ulf Boge, President of the Bundeskartellamt, State-imposed Restrictions of Competition and Competition Advocacy, speech on the occasion of the Opening Session of the Seoul Competition Forum 2004, April 20, 2004, *available at* http://www.bundeskartellamt.de/wEnglisch/download/pdf/04Seoul_e.PDF.

[4] Statement of Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Committee on the Judiciary, U.S. House of Representatives concerning H.R. 1253, The Free Market Antitrust Immunity Reform Act of 2001, Washington, D.C., June 5, 2002, *available at* http://www.usdoj.gov/atr/public/testimony/11244.htm.

[5] Neelie Kroes, Member of the European Commission, The Competition Principle as a Guideline for Legislation and State Action – the Responsibility of Politicians and the Role of

perhaps through the Internet. The first place that many competitors will go for help is to the government. A government-imposed impediment is the one type of market competition impediment that the market will never be able to correct by itself. Earlier, one of our panelists emphasized that governments have a monopoly on this type of action and when they act, there is no possibility for market self-correction. We need to be aware of competitors seeking help of this kind in our own enforcement activities. Sometimes competitors will try to get governments to act in ways that do not promote competition, but instead promote their private interest as a competitor. We must be wary of government decisions or actions that restrain competition.

Frankly, we have problems with this in the United States. We have a body of law known as the state action doctrine. If a state or local government wants to enact legislation that eliminates competition, then our federal government's competition enforcement authority is actually displaced in certain circumstances.[6] This is an area in which we and the FTC have been making a great deal of effort to try to pare back the instances in which states will act in this way, but it is a very difficult task. We file briefs in courts challenging state and local decisions that restrict competition. We send advocacy letters to state legislators who are considering adopting anticompetitive legislation. But we do not have a systematic mechanism for legislative review, nor in the United States do we have a simple way to override a state or local anticompetitive decision.

Competition Authorities, 12th International Conference on Competition Bonn, June 6, 2005, *available at* http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html.

[6] *See Parker v. Brown*, 317 U.S. 341 (1943); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

Recently, we had an example of a particularly dangerous phenomenon – anticompetitive state legislation that is being promoted in the guise of "consumer protection." In the United States, we have seen this in the real estate brokerage industry, where the Internet has brought in new forms of competition. Some brokerage firms began offering cut-price competition with a menu of individual services, where for a fee, your house could be listed on the computer real estate system. In response to this competition, large, established brokerage firms immediately began to approach many of our state legislatures to say that consumers should be served only by fully qualified professional real estate agents who offer the "full range" of services. Of course, the unstated premise is that this full range of services should be offered at the full price of a 6 percent commission. The real goal is to eliminate discount commissions. Nonetheless, we have seen many legislatures take up these requests to pass anticompetitive legislation. We have been doing competition advocacy work on this issue throughout the United States – sometimes successfully, sometimes not. But because of the state action doctrine, once anticompetitive laws are passed, we are without power to do anything about this as an enforcement matter. That is one example of why I say I am in full agreement with Dr. Boge that competition advocacy is a critical aspect of our mission to promote competition.

Where does this leave us? With this state action doctrine in the United States you might ask: "why bother? If at the end of the day you cannot override anticompetitive legislative decisions, what good are you doing?" I think the idea of accountability mentioned by one of our panelists is an important one, and one that we can serve through competition advocacy. Competition will not always be the winning value in the legislative process. That is okay; we should not become so excited about what we do for a living that we lose sight of the fact that

there are other values out there that have an appropriate place in the political process. But competition officials need to speak on behalf of competition and make clear that we are not making our decisions on the basis of extraneous factors—cultural, environmental, labor or otherwise political. Competition agencies need to tell politicians when we think competition would demand a different answer in the political process.

At the very least, focused and effective competition advocacy is important because it promotes transparency. If politicians want to tell consumers they should have something different from what the consumers would prefer in the marketplace, and if politicians also want to tell consumers that they should have to purchase that something different at a higher price than they would otherwise pay in a competitive marketplace, so be it. But we ought to be advocating competition and force politicians to admit this to consumers and be transparent about what they are doing. Promoting accountability is an important objective for every competition agency.

IV. Conclusion

With respect to the problems of globalization that have been mentioned by our panelists, I will not pretend to try to solve those. I do think that Thomas Friedman made an important point in his column in the New York Times this week.[7] Whichever economy you live in, we regulate to achieve social outcomes in a variety of ways. The challenge of globalization is one that involves opportunities being broadened beyond the developed economies where we enjoy a relatively high standard of living and can think about having these social models. The question

[7] Thomas L. Friedman, *A Race to the Top*, N.Y. Times, June 3, 2005, at A23.

that Mr. Friedman asked was how can you spend time being worried about defending a 35-hour work *week* when there are plenty of workers in India, to take his example, who by use of the Internet and other devices, would be more than happy to work a 35-hour *day* to try to increase their economic prosperity. This question confronts all of our economies and we will reach different resolutions, but the pressures from globalization should not be seen as a negative. Not only do they make our businesses more competitive when they are held up to the rigor of competition, but they also promote the possibility for greater economic welfare throughout parts of the world that have not previously enjoyed these advantages.

In short, considering these two topics of competition and politics, my conclusion is to keep politics out of your competition enforcement and get competition into your politics through effective advocacy. Thank you very much.