DEPARTMENT OF JUSTICE

THE BEST APPROACH TO ENFORCEMENT AGAINST SINGLE-FIRM CONDUCT: CAUTION

Remarks by

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I. Introduction

Thank you. I want to thank the ABA Antitrust Section for inviting me to be here with you today, and thanks to Paul Yde for moderating the panel. It's an honor to join with such distinguished colleagues from DG-Comp, industry, and private practice.

The title to this panel notes that the U.S. and the EU are both "contemplating new approaches" to monopolization and abuse of dominance, and it asks "Will the best one win?" I surely hope, for the sake of competition, that the answer is "yes." And I believe that it is possible to have the best approach to single-firm conduct in both places.

There is certainly a lot of hard work being done on both sides of the Atlantic. The Antitrust Division and the Federal Trade Commission are holding a series of joint public hearings designed to examine antitrust enforcement under Section 2 of our Sherman Act. The opening session was in June, with remarks by Assistant Attorney General Tom Barnett and FTC Chairman Debbie Majoras, and by Prof. Herbert Hovenkamp and Prof. Dennis Carlton (who recently joined the Division as Deputy AAG for Economics). Panels since then have addressed issues including predatory pricing, unilateral refusals to deal and tying, and just this week we had a day devoted to exclusive dealing. I expect these hearings will include additional panels on topics including bundled rebates and loyalty discounts, and that we will have some sort of wrap-up session sometime next spring. The U.S. agencies intend to issue a report summarizing what they have learned.

At the same time, the European Commission is considering proceeding with guidelines in this difficult area. DG-Comp published a Staff Discussion Paper last December on the application of Article 82 of the EC Treaty on abuse of dominance in the area of exclusionary conduct. The paper precipitated many written comments, and the Commission held a public

hearing on the discussion paper in June. My understanding is that DG-Comp is reflecting on the comments it has received, and that it is considering whether it will issue proposed guidelines and, if so, what they will say.

If you've read the Article 82 discussion paper, you know that there are some areas in which the EC's proposed approach is similar to that under U.S. law, including the focus on consumer welfare and the confirmation that unilateral practices should be condemned only if they are shown to harm competition – not just competitors – based on the application of sound economic principles. But there are a number of areas in which the EC's analysis diverges, sometimes significantly, from U.S. law. In conjunction with the FTC, the Division has been working constructively with the EC to discuss the paper and to see whether there are ways in which we can achieve greater convergence between the way the EC and U.S. antitrust enforcers view these important issues. I want to compliment DG-Comp for undertaking this ambitious project, and for the productive discussions the U.S. agencies and DG-Comp have had on this topic, including in the context of the Article 82 review, during our Section 2 hearings, and during our annual bilateral consultations.

So, to ask the second question posed for this panel, "What is this intensive re-examination of fundamental antitrust doctrine likely to produce?" I believe that both of these projects have done a lot of good already by spotlighting this topic and generating broader discussion, such as in this panel. These issues are critically important to the efficient operation of the global marketplace. Our agencies are working towards defining the boundaries between single-firm conduct that harms competition and thus should be illegal, and conduct that is pro-competitive or benign and thus should be left alone. In an increasingly globalized economy, it is

imperative that multi-jurisdictional businesses understand the appropriate line between procompetitive and anticompetitive single-firm conduct in every jurisdiction in which they operate.

Although we are unlikely to see identical policies adopted in Europe and the United States in the near term, I believe both jurisdictions would do well to recognize that agencies should approach antitrust enforcement in the area of single-firm conduct with great caution.

II. Reasons for Exercising Caution

There are, I think, three good reasons for this approach.

First, when it comes to evaluating single-firm conduct, it is hard for even the best minds to get things right. Everyone knows that hard-core cartels harm consumers. But when it comes to single-firm conduct, in the words of our Supreme Court, it is "sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects."[1]

Second, enforcement against single-firm conduct can create perverse incentives, so we'd better be sure we're right when we do go forward. Firms in the marketplace generally can choose between a strategy of competing on the merits or a strategy of seeking government intervention to slow down their competitors. If it is predictable that losers in the marketplace can become winners because enforcers and courts will compel access to a competitor's property or prohibit the competitive actions of a big firm, then competitors who cannot win on the merits will find it more desirable to seek government help rather than do the hard work of competing in the marketplace. On the other hand, for firms that do choose to compete, intervention can deter broad categories of vigorous competitive behavior. As Mark Twain put it (and I paraphrase),

"the cat that sits on a hot stove will never sit on a hot stove again, and it won't sit on a cold stove either."[2] If enforcers vigorously target (as an example) price cutting, firms may get the message that low prices result in unpleasant consequences and consumers will pay higher prices.

Third, false negatives (failures to condemn conduct that is anticompetitive) are correctible through additional experience with the market, but false positives (condemnations of conduct that is, in fact, pro-competitive) are more persistent. Because the Department of Justice must act through the courts, erroneous enforcement decisions can result in erroneous court decisions. To borrow from Judge Easterbrook, "Mistakes of law are not subject to competitive pressures. If a judge errs in saying [a contract] is a violation, there is no way private decisions can undermine the decision, as there might be a way for private competitors to undermine the contract. Once the court speaks, the contract is gone. If the prohibition was mistaken, we shall suffer the consequences indefinitely."[3]

III. What Does It Mean To Be Cautious?

These, then, are good reasons agencies should be cautious in enforcing against single-firm conduct. But as a practical matter, what does it mean to be cautious? I believe that the "best approach" to antitrust enforcement involving single-firm conduct is one that strives to reduce the false positives that, in the words of our Supreme Court, "chill the very conduct the antitrust laws

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[1] *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 458-59 (1993).

[2] Mark Twain, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 124 (1897).

[3] Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L. J. 305, 309 (1987).

are designed to protect."[4] A "best" approach will be achieved by adhering to a few critical principles (though I won't claim that this is an exhaustive list). ***First***, agencies should apply objective, verifiable standards. ***Second***, agencies should consider whether they can establish safe harbors. ***Third***, agencies should emphasize an analysis that passes judgment on challenged conduct based not on its form but on its effect in the marketplace. I will address each of these principles in turn.

A. Objective Standards

Companies, courts and juries should not be asked to rely on general, subjective standards – such as whether a given practice is "fair" or whether some other conduct might have led to a "more competitive" outcome – for determining whether conduct is legal. The United States addressed this point with regard to an instruction asking for a determination of a "fair" price in an *amicus* brief in the *Weyerhaeuser* case.[5] And as the Supreme Court has put it, Section 2 "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[6]

Instead, antitrust enforcers should strive to provide objective, verifiable standards. This will lead to decisions by enforcers, courts and juries that are predictable. Attorneys advising their clients should not have to predict what a particular enforcer or court will view as "fair" any more

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[4] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

[5] Brief for the United States as Amici Curiae Supporting Petitioner at 27, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (U.S., No. 05-381) (August 2006), *available at* http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0381.mer.ami.pdf.

[6] *Trinko*, 540 U.S. at 415-16.

than they should have to guess the length of the chancellor's foot.

One good outline of an objective standard is the Supreme Court's standard for predatory pricing claims. In *Brooke Group*, the Court held that a dominant firm's price cutting can violate Section 2 only if "the prices complained of are below an appropriate measure of [the price cutter's] costs."[7] In addition, under the Court's standard, price-cutting can be found to violate Section 2 only if the defendant "had a . . . dangerous probability . . . of recouping its investment in below-cost prices."[8] This standard permits a firm to plan its operations in light of objective pricing and recoupment tests. To be sure, the Supreme Court has not resolved what measure of cost should be used, and lower courts continue to consider the issue. Although testimony at our Section 2 hearings on predatory pricing in June suggested there is a growing consensus that the right measure is average avoidable cost, concerns were also raised as to how easily this test could be administered. But some cases can be resolved simply by looking at the likelihood of recoupment, and finding that there is no such likelihood. And the *Brooke Group* rule, even if incomplete, is better and more concrete than a rule that condemns "unfairly" or "unreasonably" low prices, since such a rule would invite entirely unpredictable enforcement.

To cite another example, the Division has argued in cases such as *Trinko* that "conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition."[9] Some commentators, including my Antitrust

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[7] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

[8] *Id.* at 224.

[9] Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, (U.S., No. 02-682) (May 2003) (emphasis in original), *available at* http://

Division colleague Greg Werden, have advocated the broader adoption of the "no economic sense" test in Section 2 analysis.[10] Other commentators advance different standards. I cannot predict at this point what standard the U.S. agencies will ultimately recommend. I believe, however, that any candidate standard must be evaluated to see whether it is objective and verifiable enough to provide meaningful guidance.

B. Safe Harbors

Now to safe harbors. Agencies should consider safe harbors identifying conduct that preferably will not ever (or second-best only under "extraordinary circumstances") be the target of antitrust enforcement. In the words of the U.S. agencies' intellectual property guidelines, safe harbors "provide some degree of certainty and thus . . . encourage" the activity in question.[11] The conduct covered by the safe harbor may be entirely pro-competitive, or may be overwhelmingly so, such that "anticompetitive effects are so unlikely that the arrangements may be presumed not to be anticompetitive without an inquiry into particular industry circumstances."[12] In the area of single-firm conduct, proposed standards for judging whether conduct amounts to an exclusionary abuse will be better if they contain safe harbors.

One potential safe harbor might be pricing above average total cost. This standard is the highest of the reasonably possible cost measures that might be used in a predatory pricing case.

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www.usdoj.gov/osg/briefs/2002/3mer/1ami/2002-0682.mer.ami.pdf.

[10] *See* Gregory J. Werden, *Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006).

[11] *Antitrust Guidelines for the Licensing of Intellectual Property* at Para. 4.3, *available at* http://www.usdoj.gov/atr/public/guidelines/0558.htm.

[12] *Id.*

Other safe harbors might include introduction of a completely new product, and actions that lower a firm's costs without affecting other firms' costs. Also, the Department of Justice has stated in speeches and elsewhere a harbor that is safe because it constitutes nothing more than the exercise of a statutorily granted right: the unilateral and unconditional refusal to license a patent.

Given that enforcement in this area is addressed to the creation or maintenance of monopoly (or "dominance" in Europe), any sound policy should incorporate a safe harbor regarding market share. If there is no monopoly or dominance, and no threat of it, there is no threat of consumer harm, and that should be the end of the inquiry. Given that many leading authorities suggest that a share of over 70% lasting for five years or more is required to justify a presumption of monopoly power,[13] and that U.S. courts have found that a market share below 50% precludes an inference of monopoly power,[14] it may make sense to adopt a market-share safe harbor of 40% or 50%.

Deciding what safe harbors should be adopted is of course a matter of some debate, in the U.S. and the EU. But I believe there can be little debate that safe harbors should be part of the best approach to single-firm conduct, in order to avoid discouraging vigorous and beneficial competition.

C. Effects-Based Analysis

Finally, agencies should employ and promote effects-based analysis as opposed to

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[13] *See* 3A P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 801a, at 319 (2d ed. 2002). *See also Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989).

[14] *See, e.g., Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) (Posner, C.J.).

formalistic rules that proscribe specific practices. This doesn't mean that every move a business makes should be subject to scrutiny. As the Supreme Court has stated, "Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote."[15] The safe harbors discussed above – including a robust market share safe harbor – will from the outset exclude much conduct from any scrutiny.

But the desirability of clear rules and objective, administrable standards should not lead us to adopt *per se* rules *against* certain forms of single-firm conduct, even when practiced by firms found to be dominant or monopolists. Rather, conduct that satisfies an objective standard and that does not fall within a recognized safe harbor should not be condemned without a showing of an adverse effect on competition. Showing harm to competitors in the marketplace should not be enough, given that every action a firm takes to make itself more attractive to consumers will, in some sense, disadvantage its competitors.

Some possible objective and administrable standards would easily clear this threshold. For example, the "no economic sense" test I discussed earlier incorporates this principle since conduct is found to be exclusionary or predatory only if it would make no economic sense for the defendant to engage in it "but for the tendency to eliminate or lessen competition." There may be other standards that similarly clear this threshold, and I will await the results of the EU's review and our own Section 2 hearings to see which candidate standards seem most promising.

IV. Conclusion

In closing, I will note again that we should approach antitrust enforcement regarding

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[15] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984).

single-firm conduct with caution. Despite our respective agencies' best efforts, antitrust is, in Judge Easterbrook's words, an "imperfect tool for the regulation of competition," in part because "we rarely know the right amount of competition there should be . . . ."[16] I believe that the principles I have described should help us reduce the risk that our own agencies' enforcement efforts will lead businesses to avoid procompetitive conduct, much like the cat who stays away from the cold stove.

Thank you for the opportunity to talk with you all today. I look forward to the remarks of my fellow panelists, and to what I'm sure will be an interesting discussion.

[16]Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L.R. 1, 39 (1984).