DEPARTMENT OF JUSTICE

Antitrust and the Digital Economy: New Challenges for International Cooperation?

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I. Introduction

It is an honor to be with you, and I want to express my sincere thanks to my friend, former Prime Minister of Italy, and former EU Competition Commissioner Mario Monti, for the invitation. He is not only a pioneer in the field of competition policy, but also a courageous leader with a firm grasp of fiscal and budget policy. It is always an honor to be in his presence, and at this great institution, Bocconi University.

Tonight, I will discuss digital markets and how they impact international cooperation between the United States and the international community in the context of antitrust policy. These topics are of increasing interest these days, which is not surprising given the important impacts digital markets have on consumers across the globe and on international commerce.

Just this week, US Deputy Attorney General Rod Rosenstein delivered a speech in New York, in which he referred to a parable originally delivered by Robert Jackson, a former US Supreme Court Justice, Attorney General, and even more important to our discussion, a former Assistant Attorney General for Antitrust in the Roosevelt Administration, eighty years ago. As Justice Jackson told it, there were three stonecutters who were asked to describe their work. The first workman said simply, "I am earning a living." The second workman gave a slightly more detailed, but equally unenthusiastic, answer: "I am cutting this stone." But the third workman, with a hopeful and excited voice, said, "I am building a cathedral."

At a time when competition enforcers around the world are considering how our legal structures can best protect and promote economic liberty, Justice Jackson's parable has particular resonance. We, as competition law enforcers, should focus not just on how we enforce in any individual case, but also on the collective legacy of global free market principles we are helping to build for the new economy. Our economy is transforming with new digital technology, and it is vital that we build our cathedral on a solid foundation that continues to withstand the test of time.

As lawyers, Justice Jackson often said, "we too, whether or not we are aware of it, do more than earn livings; we do more than carry on particular cases. We are building a legal structure that will protect the altars of human liberty—the structure that will express man's faith in his worthiness and capacity to be free." When it comes to international cooperation with our most important foreign partners, one of which is, of course, the European Union, it is possible to identify certain cornerstones that form the foundation for our collaboration. One is that our

enforcement is economics-based. In both the US and the EU, antitrust enforcement is directed at protecting competition and consumers, applying a consumer welfare standard.

In both jurisdictions, we apply economic concepts to distinguish between conduct that is harmful to competition and conduct that actually reflects competition. President Monti deserves enormous credit for implementing many reforms approximately 20 years ago at the European Commission, including appointing the first Chief Economist at the Directorate for Competition. It has had a positive and lasting institutional impact.

A second cornerstone for collaboration is a deep commitment to sound procedures. Both the US and EU, as well as an increasing number of competition agencies around the world, have very firm and longstanding commitments to the rule of law. That shared commitment is evident in the procedural norms parties can expect when they come before competition enforcers in these jurisdictions, and particularly in the EU and US. Both jurisdictions prioritize transparency, non-discrimination and fair procedures, and importantly, both incorporate review of competition agency decisions by an independent judiciary. In both jurisdictions, we strive to uphold the highest procedural standards. Our mutual commitment to these principles is also evident in the shared initiatives we have undertaken to promote these ideals around the world.

In an age of rapid change, these two cornerstones ensure that as technological innovations enable us to soar to new heights, our enforcement remains grounded in sound principles. While the US and the EU may not always reach identical results, we are able to engage deeply with one another thanks to our common foundation. These commonalities will serve us well as we work together to protect and promote competition in the markets transformed by digital technology.

II. Economics-Based Enforcement in the Digital Economy

In all markets, and especially in innovative markets, we must wield the antitrust laws with thought and care, guided by economics. In a platform market characterized by network effects, for example, competition enforcers may need to take a close look to see whether competition is suffering or competitors are losing out as a result of misdeeds by an incumbent. But especially in fast-moving innovative markets, an incumbent's monopoly may be fragile, and prone to being toppled by new entrants offering something better and more exciting.

We want to encourage that dynamic competition to innovate, improve, and respond to consumer demand. To ensure that we do not undermine the very dynamic we are charged with protecting and fostering, we depend on our evidence-driven, economics-based approach.

Antitrust law is guided by the consumer welfare standard,[1] which helps to ensure that free market competition works for the benefit of consumers. This standard disciplines enforcers and courts, so that they do not condemn actions that don't pose a threat to the competitive process.[2] It also provides continuity and predictability for businesses, because it is an enduring feature of our law. It is significantly flexible, allowing it to be applied to new and cutting-edge facts.

As enforcers, we are careful not to treat consumer welfare as merely a *static* measure of effects. Instead, it is necessary to analyze both the immediate *and future* effects that a practice might create. This dynamic approach is consistent with the basic insight of economics that individuals may be willing to trade off an immediate gain for a long run benefit.[3] The entire field of modern finance, for example, rests on the notion that individuals and profit-maximizing companies have "discount rates" that roughly approximate their preference for future consumption over immediate consumption.[4]

This key insight likewise forms the basis for modern antitrust law. In fact, it is a critical feature of how enforcers and courts in the US and EU assess practices that may pose near-term harm. That is, short-term costs may not warrant condemnation because they create long-term benefits in the form of greater dynamic competition and innovation. For example, antitrust law does not punish lawful monopolists who charge above-competitive prices, because a high price provides both an incentive for the monopolist to create value as well as an incentive for rivals to compete it away.[5] Indeed, so long as entry barriers are low, new entrants may emerge to drive

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[1] *See* ROBERT BORK, THE ANTITRUST PARADOX 66 (1978) ("The Sherman Act was clearly presented and debated as a consumer welfare prescription.").

[2] *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135-36 (1998) (explaining that higher telephone rates from consumers did not flow "from a less competitive market," but from lawfully acquired market power, and that the plaintiff had to "allege and prove harm . . . to the competitive process, *i.e.*, to competition itself").

[3] *See* ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 732 -36 (Oxford Univ. Press 1995).

[4] *See* IRVING FISHER, THE THEORY OF INTEREST, AS DETERMINED BY IMPATIENCE TO SPEND INCOME AND OPPORTUNITY TO INVEST IT (1930).

[5] Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (noting that "charging of monopoly prices . . . is an important element of the free-market system").

down prices and provide additional competition—to the benefit of consumers in the long run.[6] These new entrants also can provide new sources of innovation. After all, a new entrant's incentive is not only to offer a lower price, but also to create a better product that may render the entrenched monopolist obsolete. Some call this repeating cycle "dynamic competition" because it accounts for innovation effects over time.[7]

The converse is also true. The antitrust doctrine of predatory pricing rests on the notion that a near term benefit to consumers may create a substantial long-term cost. Because future effects are, by definition, less certain, the Supreme Court has imposed a high bar on proving such a claim.[8] That is to protect against the risk of condemning as unlawful conduct that is, in fact, pro-competitive and pro-consumer.

These insights are crucial to the United States' approach to digital markets. Our evidence-based approach requires enforcement to be built on credible evidence that a practice harms competition and consumers, or in the case of merger enforcement, that it creates an unacceptable risk of doing so. Importantly, an evidence-based approach also means being open to persuasion to theories grounded in well-accepted economic principles and evidence that may show harm to competition and consumers. Where such evidence exists, it is the duty of enforcers promptly and vigorously to prosecute the antitrust laws.

All of this underscores the importance of cooperation among international enforcement agencies. As I explained earlier this year in Brussels,[9] competition enforcers share common goals: protecting competition and consumers during an era of rapid technological change. That is why the Antitrust Division has made a concerted effort to invest in its relationships with enforcers around the world, at both the leadership and staff levels.

Global enforcers nevertheless face a significant challenge in coordinating efforts with respect to digital markets. For our part, United States antitrust law rests on a bipartisan

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[6] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984) ("Monopoly is self-destructive. Monopoly prices eventually attract entry.").

[7] *See* Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 16 GEO. MASON L. REV. 1191, 1200 (2008) ("[W]hen innovation leads to dynamic efficiency improvements . . . it is a particular type of competition, and one that we should be careful not to mistake for a violation of the antitrust laws."). *See generally* J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009).

[8] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).

[9] Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Department of Justice. "Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels." (February 21, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-college-europe-brussels.

consensus that focuses on an economic-based approach to enforcement. Consistent with that approach, where there is no demonstrable harm to competition, we are reluctant to impose special duties on digital platforms. Such duties might stifle the incentives to create the very innovation that has delivered dynamic competition for the benefit of consumers.

As our respective markets are challenged by new technologies, our ongoing cooperative efforts to confront the same issues present the best path forward. The benefit of our close relationships with competition authorities around the world 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 have reached agreement on a fairly significant policy document.

III. The Value of Procedural Norms

I'll turn now to procedural norms, a second cornerstone of our approach, which also plays an important role in our efforts to promote competition in the digital age. When I use the term "procedural norms," I am referring to concepts such as transparency, non-discrimination, fair procedures and judicial review.

It is pursuant to these principles that we afford parties the opportunity to meet first with our staff and then with our senior officials at particular points in an investigation, that we furnish them with information at established points in litigation discovery, and that we and the parties are subject to specific rules of procedure and evidence during the course of litigation.

Many may think of these concepts as largely process-oriented, and, of course, they are. There is an inextricable link between process and substance, however. The procedural norms that govern our process are integral to getting us to the right substantive outcome – the one that will protect competition and promote innovation. Pursuant to our principles of transparency and fair procedures, we engage deeply with parties throughout the course of an investigation. That engagement gives the parties the opportunity to test our theories and our evidence, and to present arguments that may challenge our initial conclusions. In turn, our theories are better refined. This process of engagement can be time-consuming, and sometimes contentious, but I have yet to see a matter in which it did not yield a better and more thoughtful substantive result.

Outside the context of any particular investigation, procedural norms are important to creating a climate in which firms can depend on fixed enforcement principles. At the Justice Department, we always strive for consistency and predictability of our laws.

Where there is a stable and well-understood framework, firms have the confidence to invest, the incentive to innovate, and the will to compete hard for their share of the market. I was again reminded by DAG Rosenstein this week of a joke often told by a great Supreme Court justice. Justice Antonin Scalia, the first Italian-American justice on our highest court, liked to say that one of Emperor Nero's worst practices was to post his edicts high on a column so that they would be harder to read and easier to transgress. With all due respect to the Roman Empire, of course, I submit that this is not an ideal approach to law enforcement. To ensure that businesses can enter contracts, make investments, and plan for the future, we must provide a stable and predictable environment that is free of arbitrary government action and characterized by transparent and fair procedures.

IV. The Responsibility of Antitrust Enforcers in a Global Economy

Taking into account these cornerstone principles, what are the implications for antitrust enforcement and policy in the global marketplace? The Antitrust Division, like other competition agencies around the world, will not shrink from well-grounded and appropriate antitrust actions against foreign competitors operating in U.S. markets, and we expect our counterparts around the world to police their markets with equal vigilance.

I am concerned, however, of any perceptions by the public that antitrust actions are used or, more appropriately termed, "misused," in an effort to protect a so-called "domestic champion." If this did occur, these actions not only would harm valid business activities, but also domestic consumers. In international trade discussions, we have long recognized that regulatory protectionism may be a common form of non-tariff barrier that goes counter to efficiency-enhancing free and fair trade. Some economists have observed that existing trade commitments can "tempt political officials to employ regulatory protectionism due to constraints on their ability to use other preferred protectionist instruments."[10] Such potential regulatory

[10] Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 6 (1999).

protectionism would wrongly aim to protect local competitors, often at the cost of local consumers.

Discrimination through regulatory protectionism in competition enforcement may be *de jure.* That is, the preference is on its face discriminatory. It may also be *de facto*. That is, as applied it has a discriminatory impact on foreign competitors. In the antitrust context, I don't believe there is any *de jure* discrimination. I am more concerned, however, about any perception of *de facto* discrimination, in which competition authorities employ standards that have the practical result of advantaging domestic over foreign competitors.

I don't want to suggest that any has occurred yet, but we must be vigilant to prevent even its temptations. To avoid the risk that antitrust laws are enforced in an improper manner, each antitrust enforcement agency should redouble its commitment to the core purpose of competition law: that antitrust law favors competition regardless of whether the source of that competition is foreign or domestic. The international network of competition agencies has had significant success in fostering this approach, but we must remain focused on continued progress, especially with new, inexperienced agencies.

We are in an exciting period of technological progress, and thanks to the rapid pace of innovation and commercialization of new products and services, we all enjoy benefits that many of us could not have imagined even two decades ago. Naturally, with these benefits come challenges, particularly for those of us charged with ensuring that our markets remain competitive.

As we confront these challenges together, I have faith that our bedrock principles—economics-based enforcement and a commitment to sound procedures—provide an unshakeable foundation on which to build. I am optimistic that with our strong relationships and great leaders in the field of competition policy, such as Prime Minister Monti, as keepers of the free markets and protectors of competition, we will grow stronger from these challenges.

Thank you again for this invitation.