



DEPARTMENT OF JUSTICE

ANTITRUST IN A TRANSATLANTIC CONTEXT – FROM THE CICADA’S PERSPECTIVE

Address by

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Good morning ladies and gentlemen. It is a privilege to participate in what is fast becoming a tradition in Brussels: last year, Chairman Tim Muris of the Federal Trade Commission spoke at this event, and in 2002, my predecessor, Charles James, spoke here. Many thanks to Commissioner Mario Monti, Ambassador Rockwell Schnabel, and the private sector sponsors who have made this event possible.

Introduction

It seems strange as an American who lives in Washington to have been in Europe for the past few days. I feel fortunate, on the one hand, to have seen the attention over here to the events of D-Day from a perspective I could not have gotten in America. On the other hand, being here to see the news of President Reagan's passing feels like being caught out of town when there has been a death in the family. In any event, I think these events serve as reminders, both that – as President Bush once put it – America will never be on the sidelines when liberty hangs in the balance, and that America owes much to, and will never forget, its deep connections to its oldest friends.

This weekend's events also give those of us whose responsibility is competition law a chance to remind ourselves of, and perhaps be grateful for, the fact that our decisions are not ones of life and death. So, in the spirit of transatlantic dialogue – which is about helping each side of the Atlantic to offer the other some insight into its current events and concerns – I want to turn for a moment to a much lighter topic that has been occupying a great deal of the attention of those of us who live in Washington. I refer not to the very serious issues confronting us in the field of international affairs, nor to our upcoming political season, but rather to the emergence of the 17-year cicada.

Every 17 years, certain pockets of the United States – most definitely including Washington, DC and the surrounding suburbs – are subject to a great invasion. The invaders are billions of black, two-inch long winged insects with big, bulging, bright-red eyes. These periodic cicadas, technically known as "Brood X" to entomologists, lay dormant underground, sucking on tree roots, for 17 long years before digging their way in unison to the surface of the soil to emerge from small holes. Fortunately, they do not sting or bite. Once above ground, they molt, leaving billions of empty skeleton husks clinging to walls, trees, roofs, plants, and literally any other available surface. They then begin their brief active life of flying and mating, at the end of which the females lay eggs in trees, the larvae fall to the ground and burrow in, and the 17-year cycle begins anew.

Each cicada has special organs called tymbals that make a loud clicking sound, which is then amplified by the insect's eardrums. (The tymbals work something like the signaling clickers that American paratroopers used during the Normandy invasion 60 years ago yesterday.) Because of the cicada's density – up to 3.5 million per hectare – the noise can be deafening. The sound is often compared to that of a giant alien spaceship from a 1950's science fiction movie. In many areas it is impossible to hold a conversation out of doors. The Baltimore Sun newspaper did a decibel-meter survey this past week that found levels in excess of 90 – a violation of local noise ordinances. Under our American litigation system, perhaps this means someone will file a lawsuit against the cicadas.

I mention the cicadas because they are one of those events of nature that connects us all, whatever our interests or station in life. School children chase them, collect them, and dare each other to eat them. Reuters last week ran a photo of President Bush being buzzed by a cicada as he

walked up the steps to Air Force One. Some local restaurants are even serving sauteed or deep fried cicadas. By July, these billions of bugs will all be gone, and won't be seen again until 2021. This leaves us all to marvel at a massive population of creatures that sleep underground for 17 years (apparently a prime number cycle helps prevent predators from adapting to the pattern) and then awake in unison for a frenzy of flying and chirping.

This also leaves us to ponder where we will be in 17 years when the cicadas come back. And that seemed to me to provide a useful framework for a discussion this morning of antitrust in a transatlantic context. Rather than simply review the current crop of cases that constantly come and go, I want to discuss developments that I think are likely to be of enduring importance 17 years from now. This approach works even better in light of the fact that one of my chief purposes here today is to acknowledge the impressive and important record of achievements that have come under Mario Monti's tenure as Europe's Commissioner for Competition, which is scheduled to conclude just a few months from now. The cicadas suggested to me a striking thing that distinguishes Commissioner Monti from most of us who have had the privilege to serve as competition enforcers. That is how many of his accomplishments are likely to have lasting importance 17 years from now, long after our current controversies have faded from memory .

Lest any of you are nervous about this format, my plan is neither to declare that every area in which the EC and the US have moved toward convergence during Commissioner Monti's term is one of lasting positive significance, nor that in every area of divergence the EC has permanently wrecked competition law. Rather, I will take a four part approach. First, I want to discuss areas of enduring significance where I believe there has been positive movement in the direction of convergence. Second, I will mention areas that meet my "cicada" standard of

significance, where there is movement toward convergence, but only time will tell whether it is positive. Third, I will mention an area of potential divergence (yes, the one you expect), but offer a positive prediction for 17 years hence. Finally, I want to mention areas of positive movement where Europe is, in my opinion, moving ahead of the United States.

Positive Convergence

Because we at the U.S. Justice Department tend to think of our antitrust enforcement in terms of a three part hierarchy, it will not surprise you if I start with enforcement against cartels, which – as our Supreme Court recently put it in the *Trinko* case – are the “supreme evil” of antitrust. In this area, transatlantic cooperation under Commissioner Monti’s tenure has been simply spectacular. Before Commissioner Monti’s tenure, contacts between our cartel investigators were few and far between. Now, we routinely share information and coordinate investigative strategies in our international cartel investigations with the end result being coordinated, simultaneous raids on targets located in the United States and Europe.

In fact, you may have read recent newspaper accounts of our simultaneous service of subpoenas and raids on manufacturers of labelstock and magazine paper ten days ago. This cooperative spirit was demonstrated last year when the Antitrust Division and the Commission were joined by the Canadian Competition Bureau and the Japanese Fair Trade Commission in the first ever coordinated raids involving four different competition authorities. The raids, which spanned eight different countries and involved over 200 investigators, is a dynamic example of the ability and desire among competition authorities to work together against a common enemy.

Under Commissioner Monti’s leadership, the Commission has also revised its Amnesty Program. This resulted in greater convergence with the U.S. amnesty program. The current

program, much like DOJ's own amnesty policy, provides clear, transparent, and automatic guidance to firms, and has proved to be a critical weapon in the battle to wipe out harmful price-fixing activity. As expected, the EU's revised program has led to a surge in parallel amnesty applications to *both* the Commission and the Division, and has resulted in scores of convictions, hundreds of millions of dollars in fines, and, most importantly, the dismantling of numerous international cartels that preyed on business and consumers in Europe, the United States, and around the world. The Commission since 1989 has fined cartel participants nearly 4 billion, with record fines in the notorious vitamins cartel. (It is a fact I do not like to advertise that, during Commissioner Monti's tenure, the EC has surpassed the United States in terms of monetary penalties levied against cartelists.) The modernization program has provided the Commission with important new investigatory tools, and the European Competition Network provides a valuable framework for promoting cooperation and the gathering and exchange of information for anti-cartel enforcement.

All of this sets the stage for a very different atmosphere for international cartel enforcement by the time the cicadas return in 2021. We have the building blocks in place for an international network of enforcement agencies using the tools of coordination, information sharing, and amnesty programs to crack difficult cartel cases. As the United States and seven of our important trading partners emphasized in the recent *Empagran* argument in the U.S. Supreme Court, it is government enforcement that detects and disrupts cartels. Although private actions for damages may be important for deterrence, experience has not shown them to be a means of detection. There will continue to be challenges and debates in the area of cartel enforcement, including the desirability of criminal as opposed to civil sanctions and the optimal scope of

information sharing. Overall, however, there can be no question that Commissioner Monti's tenure has brought fundamental and positive improvements of lasting value.

Another area of positive convergence is merger control. In cicada terms, 17 years ago there was no Merger Control Regulation in the EU, and when the Regulation went into effect in 1990, 17 years had elapsed since the Commissioner's first proposal in 1973 for powers in this area. The major story under Commissioner Monti's leadership has been increased attention to economic analysis and theories of competitive effects. There is a new standard of review in the EU – "significant impediment to effective competition" – with a more explicit application to unilateral effects cases. The focus on economics is also evident in horizontal merger guidelines issued this year by the Commission, which tie the competition analysis firmly to consumer welfare and recognize the benefits of efficiencies. Rather than be daunted by some challenging results in the courts, Commissioner Monti has taken the opportunity to make DG-Comp a more effective enforcer in several ways.

Important contributions to transparency and sound policy guidance under Commissioner Monti's watch include the notice on best practices in the conduct of merger proceedings, on divestiture commitments and trustee mandates, and on remedies acceptable under the merger control regulation. The Commissioner's decision to create a new position of Chief Competition Economist is a very important innovation. Having in place a source of independent economic assessment for policy and enforcement decisions is a major enhancement of DG-Comp's capabilities. This focus on sound, economically-grounded enforcement is reflected in other places as well, such as the new technology transfer block exemption and guidelines.

Convergence – Positive?

My next topic is one of fundamental importance – the systems by which enforcement takes place. Here again, the changes that have taken place under Commissioner Monti’s leadership are unquestionably changes of lasting significance. In broadest terms, they involve the decentralization of European antitrust enforcement. After forty years of experience with a system in which businesses had to notify their agreements to the Commission, which retained a monopoly on the granting of exemptions for those that on balance were not harmful, the EU has moved to a system where national authorities, courts, and private parties will all have their own role to play in evaluating business conduct and enforcing the same rules throughout the twenty-five member states. These changes reflect in their basic direction convergence with the current American system of enforcement. The important question is to what degree this convergence will prove to be positive – gaining for Europe the benefits of a decentralized system with more private enforcement while avoiding potential hazards.

The modernization program, which entered into effect just last month, was the culmination of a five-year process. Its decentralization of antitrust enforcement is a testament to the impressive growth of a vibrant “culture of competition” in Europe, in no small part due to Commissioner Monti’s efforts. The Commissioner has tirelessly campaigned to democratize competition policy, by making the Commission’s processes more transparent and open to citizens and effectively publicizing the work of DG-COMP in events such as the biannual European Competition Day celebrated under each presidency of the Union.

One aspect of these systemic changes has been the encouragement of private actions before national courts. The modernization regulation included provisions to promote private actions, and the Commission has undertaken a comprehensive survey of practice in the member

states. My own view is that the American focus upon private litigation and its relative absence in Europe has up to now been the single most important difference between our systems. In my experience, many Europeans have a difficult time appreciating the degree to which the availability of private litigation shapes the development of U.S. antitrust law.

Our experience has shown that private enforcement complements public enforcement as an additional deterrent to anticompetitive conduct. It allows private parties to obtain compensation for harm suffered as a result of unlawful conduct. Decentralization of antitrust decision-making likewise has many positive aspects. The establishment of our courts as the basic arbiters of development in the law and the dispersal of enforcement authority has allowed antitrust largely, though certainly not completely, to take place outside of partisan political debate and to focus more upon sound development of doctrine through legal argumentation and economic research.

I have no doubt that your recent changes will be seen 17 years from now as very significant to the course of European competition law. Whether it will be seen from that vantage point as positive, though, is not entirely guaranteed, and it will require careful attention. What I mean by that is simply that you should be careful what you ask for because you might get it. The incredible enforcement leverage generated by our own treble damages system – with its potential for burdensome litigation – requires our courts and agencies to be cautious with respect to substantive theory. In particular, this aspect of our system has much to do with our concern for objective and economically-grounded rules in the realm of unilateral conduct. With respect to merger enforcement, in our experience private litigation happily has not played a significant role. The Commission's *amicus* filings in the recent *Intel* case in our Supreme Court indicate an

appreciation that some aspects of American-style litigation, including its open discovery rules, are not without costs. Those of you in Brussels may find, as private actions grow on this side of the Atlantic, that it can be hard to craft rules that allow forceful public intervention without inviting private litigation that can complicate enforcement and chill competition.

Divergence – Long-Lasting?

Coming now to divergence, unilateral conduct remains the area of greatest separation between the general approaches of the US and the EU. At the broadest level, we in the United States might be said – in words suggested by Judge Posner at a recent Antitrust Division event – to have a more Darwinian view of the competitive process. Over here, as a DG Comp economist has put it during the same program, there is a greater emphasis on requiring that dominant firms limit themselves to “gentlemanly” competition.

Differences in this overall view of unilateral conduct are reflected in many aspects of specific application. Thresholds for finding that a firm has a “dominant position,” for example, have been lower than for the analogous finding of monopoly power in the United States. Our approaches to pricing practices, including discounting and fidelity rebates are quite different, and approaches in Europe are more likely to be characterized by *per se* rules. (This difference is clearer if we leave aside the U.S. Robinson-Patman Act.)

At this point, you may be wondering whether one purpose of my cicada-based, 17-year framework is to avoid direct debate over *Microsoft* while sharing the podium with my friend Commissioner Monti. The answer to that one is largely “yes.” I have expressed our concerns about that specific case elsewhere. Our agencies continue to work under the terms of our 1991 Cooperation Agreement to avoid unnecessary conflicts between the Commission’s decision and

our consent decree. The willingness of officials of both agencies to discuss our disagreements in a cordial and professional manner at public fora both together and separately only illustrates the overall strength of our cooperative relationship.

Within my 17-year framework, I will offer some general comments on why we believe that, over time, a cautious and objective approach to unilateral conduct will be the goal on both sides of the Atlantic. There is broad agreement that we want even monopolists to compete hard by lowering prices, innovating, and making their products more attractive. The fundamental problem is that, with respect to unilateral conduct, it is extremely difficult to tell the difference between good, hard competition and anti competitive conduct. This is a difficulty that our Supreme Court in *Trinko* has now recognized as applying to unilateral conduct in general, a concern not limited to predatory pricing.

This concern has manifested itself in the United States in a much greater willingness to attack affirmative conduct by monopolists – such as tie-outs or exclusive contracts – aimed at rivals, than to intervene against business practices where distinguishing competition from predation is most difficult. Some of the same fundamental concerns our Supreme Court expressed in *Trinko* about claims based on duties to assist competitors also apply to claims of inappropriate product design. Namely, antitrust liability in these areas carries with it the risk of lessening incentives to innovate both for the incumbent and for the competing firm, and of requiring antitrust enforcers and courts to act as central planners, regulating price, quality, or quantity.

Although made in the context of rejecting my agency's earlier claim in our *Microsoft* litigation of *per se* tying liability based on product bundling, our D.C. Circuit's cautionary tale of

the tying claims brought by external disk drive makers to prevent what they called the "anticompetitive bundling" of hard drives into personal computers is one worth bearing in mind. This tying claim brings a chuckle today, but did it look so silly when it was made? My point is simply that it is hard to know how judgments of this type will look 17 years down the road.

One might ask whether there is really any EC-US divergence in *Microsoft*, since my own agency both sought the breakup of Microsoft and alleged that the company's bundling activity was *per se* illegal. But as to bundling, we have had an intervening court decision. And the breakup remedy, though drastic and ultimately rejected by the court, was advocated in part to avoid forward-looking regulatory judgments on issues like product design. It is also worth noting that we did not allege in the alternative a "rule of reason" product design case. Doing so under our standards would have required, among other things, evidence of harm to consumers, which is harder reliably to develop than information about effects on competitors.

The area of mandated licensing of intellectual property is another related one where there is the continued potential for divergence between the US and the EC. This is a point on which there was much less practical divergence in the *Microsoft* case, with much greater overlap and complementarity between the US and EC remedies on server interoperability. We imposed these aspects of our remedy as part of the settlement of our case involving affirmative anticompetitive conduct in related markets. Whether the refusal to provide access would itself support a determination of liability was not a question we were required to face. Combining the approach to claimed duties of assistance to competitors reflected in *Trinko* with precedents against unilateral licensing duties in American IP law indicates that liability for unadorned refusals to license is not part of our system. There has been much attention to this question in the wake of the

recent *IMS* decision on this side of the Atlantic, and we will watch with interest for further developments.

Under my framework of looking forward 17 years, on this subject I will simply repeat two points I have frequently made to intellectual property audiences in the United States. The first is that it cannot possibly make sense for intellectual property law to recognize as its most valued creation a patent describing an invention essential to the creation of a valuable commercial product, and for competition law to then step in and say that the owner will be required to relinquish exclusive ownership of the patent because it is essential to the creation of a valuable commercial product. On the other hand, given the significant attention to possible reforms to the patent system now under discussion in the United States, the intellectual property community must recognize that if it does not address possible areas for reform, then it should not be surprised to see competition law trying to do so, even if not very well.

To conclude these comments on the conduct of dominant firms, clearly we have continued potential for divergence. But the *Microsoft* debate has the potential to obscure as well as reveal what is important in this area. Like cicadas, celebrated (or notorious) monopolists have a habit of surfacing every 17 years or so. Such firms generate strong feelings, not to mention outsized attention from the media and other groups. It can be difficult to generate neutral principles of law that will allow enforcers to deal with these monopolists as aggressively as they might like without creating doctrines whose application to the general run of cases would create unwanted effects.

I should also acknowledge our understanding that many economies with which the EC must be concerned are different from ours, and that competition law in these areas must be much

more directed to opening previously state-controlled monopoly markets. But if different rules are required for different situations, perhaps that should be explicitly acknowledged, for rules supporting intervention aggressive enough to uproot state monopolies are hardly suited to enterprises that have grown through their own efforts. My guess is that, over the long run, for all the challenges they pose, the occasional exceptional cases will stop neither the constructive use of antitrust law to move planned economies toward competition, nor the progression toward more objective and administrable standards for single-firm antitrust enforcement in mature competitive systems.

Positive Divergence

Ironically, *Microsoft* can provide a segue to the final category in my review of the transatlantic competition relationship – areas where the EU is diverging from the United States in ways we on the other side of the Atlantic might do well to emulate. Some have suggested in hindsight that perhaps we at DOJ could have done more to coordinate with our EC colleagues at the time of our own settlement. But in fairness that was not so realistic a possibility during a time when we were working around the clock to conclude negotiations that involved numerous of our States. In the U.S., States independently enforce both their own and federal antitrust laws in parallel with the national agencies. We will be watching closely to see how the EU implements its new system of allocating cases. Under the modernization regulation, the Commission retains the power to open its own proceedings, thereby removing a case from the jurisdiction of the member states. We can perhaps learn a valuable lesson or two from our European counterparts as they work to create a complementary, and not conflicting, enforcement regime, which is particularly important in cases with effects across many borders.

We tend to forget that, in 1962, when the Council adopted the first EC antitrust procedures, only one member state – Germany – even had an antitrust agency. Today fully-functioning agencies from twenty-five EU member states participate in the European Competition Network, another innovation of Commissioner Monti’s that was established in 2002. The Commission took great pains in preparing for enlargement to develop strong and cooperative relationships with the new member states, with the result that today effective national authorities throughout the EU take decisions, produce new thinking about the issues, and influence Brussels and each other in the process. Both in those efforts, and with respect to formal mechanisms to address the proper allocation of decisionmaking responsibility, Commissioner Monti’s efforts have put the EC at the forefront of policy development.

Another area of systemic focus in which the US has a good deal to learn from our European colleagues involves intervening against government restraints on competition. Just last October, the Commissioner was kind enough to educate us on this topic when he delivered the Lewis Bernstein Memorial Lecture at the Department of Justice. The Commission has not been shy in applying the EU competition rules to state enterprises and state monopolies in a way that has broadly contributed to liberalization and more competitive markets in Europe. Another element relating to federalism in the overall framework of the European Treaty is the rule that prohibits states from taking actions that result in the violation of the competition articles. Commissioner Monti has recently opened a broad review of this area in relation to member state policies and regulations affecting the liberal professions. In the U.S., we continue to wrestle with similar issues under our “state action” doctrine as it applies to regulation at the state level. In

doing so, we can benefit from the European experience in reconciling legitimate regulatory objectives with the benefits of healthy competition.

Conclusion

Commissioner Monti's broad vision has guided the European Union through a period of extraordinary developments encompassing major modernization of many of the basic antitrust rules and procedures, decentralization of enforcement and increased collaboration with invigorated member state authorities, the creation of a European Competition Network welcoming ten new member states, the realignment of enforcement priorities with renewed emphasis on sound economic principles, and increased collaboration and convergence with antitrust authorities around the globe. In each of these areas, Commissioner Monti's leadership has contributed to raising the stature of competition policy and promoting a culture of competition. As you can see, I say that not as someone who agrees with every decision, but as one who has great respect for his overall accomplishments in promoting competition.

To finish with my 17-year cicada theme: My prediction is that in 2021, when the cicadas reemerge in Washington, it will be easy to look back and see the enduring significance of Mario Monti's tenure as Competition Commissioner in the context of a positive, strong, and mature transatlantic antitrust enforcement relationship. Thank you.