



U.S CHAMBER OF COMMERCE

Meeting with DOJ Antitrust Division Transition Team
December 22, 2008

Antitrust

The Chamber believes that businesses and the economy benefit from the certainty that comes from clear rules consistently applied—from Administration to Administration and Congress to Congress—and sees no need for radical changes that would upset the clear and consistent application of the sound antitrust laws. Significant changes in enforcement or intra-agency disagreements over the law create uncertainty and unpredictability.

We are specifically concerned with the apparent divergence in enforcement between the DOJ and FTC in certain areas, and particularly how this enhances divergence in antitrust enforcement among foreign jurisdictions. This became particularly pronounced with the recent, public dispute over the proper application of Section 2. A company's antitrust liability should not depend upon whether the DOJ or the FTC investigates the matter.

Given the proliferation in the number of antitrust jurisdictions globally, U.S. businesses are increasingly concerned about divergence internationally and the potential misuse of competition policy to promote industrial policies. This underscores the importance of the international work of the DOJ (and FTC) and demonstrates how domestic divergence only serves to undermine U.S. leadership toward greater antitrust convergence around the world.

Divergence in Enforcement of Section 2 of the Sherman Act

The Chamber believes that Section 2 should be interpreted and enforced carefully and predictably. The lack of a clear legal standard against which to judge unilateral conduct imposes significant costs on the economy by deterring pro-competitive, efficiency-enhancing conduct. We believe the recent DOJ report provides a useful reference point in the ongoing discussion of single-firm conduct in the U.S. and internationally. The FTC response to the report was disappointing, especially since we believe there is substantial agreement between both the FTC and DOJ with respect to many aspects of the DOJ report. While our significant concern was the public divergence in view, we felt the DOJ approach was closer to the mainstream consensus on single-firm policy. The report should also be thoroughly evaluated in conjunction with other contributions to the debate, such as the recently issued European Commission's Article 82 guidance. In short, in view of the intense and very timely cross-border discussion surrounding the treatment of single-firm conduct—concededly a very complex topic with a long history—the new leadership at the Antitrust Division should fully and carefully evaluate the policy options in this regard, ideally in conjunction with the new FTC leadership to reduce or eliminate the current interagency disharmony.

Improve and Speed Up Merger Clearance Process

The Chamber urges the DOJ to work with the FTC and others in the Congress and the Executive Branch (as appropriate) to develop a mechanism for quick and efficient allocation of responsibility for the review of notified transactions. In addition, the agencies should adopt a reasonably short deadline for resolving disputes.

Reduce Burden of Second Requests

Compliance with second requests typically costs millions of dollars and takes many months, and occasionally more than a year. Positive changes have been made in the past few years, but there is still room for further improvement.

Strategically Utilize Technical Assistance and Step Up Advocacy Internationally

The DOJ should further strengthen its role as an advocate for US policy in international antitrust relations: 1) Antitrust Division appointees (AAG and International Deputy AAG) should increase personal involvement in international conferences and other meetings involving counterparts from other



jurisdictions, 2) DOJ should both continue and expand working groups with leading foreign antitrust agencies, particularly in areas involving single-firm conduct, the intersection of antitrust and intellectual property, and other key areas where antitrust rules affecting competitiveness require clarification, rationalization and additional uniformity in approach, 3) DOJ should intensify joint involvement with foreign counterparts in investigations in which both agencies are involved, 4) DOJ should actively express its views regarding foreign proceedings affecting U.S. firms and interests, in accord with existing bilateral antitrust cooperation agreements, 5) DOJ should support the Antitrust Modernization Commission recommendation that calls on the Congress to provide both the budgetary authority and appropriations necessary to sustain an effective technical assistance and advocacy program.

Greater Coordination between the DOJ, FTC, Department of Commerce, and USTR

Increasingly competition policies adopted by foreign countries threaten the ability for U.S. firms to compete on equal and fair terms in those markets. The use of competition policy represents a new breed of protectionism and adversely impacts trade relationships. The U.S. business community needs a robust interagency process that delivers a well coordinated message internationally on these increasingly cross-cutting sets of issues.