

The Enforcer Tapes: Chicago

**Question and Answer Session, ABA Section of Antitrust Law Annual Meeting Luncheon, Chicago, IL, August 7, 2001:
Charles James, AAG for Antitrust, U.S. Department of Justice, and Timothy J. Muris, Chairman, Federal Trade Commission**

Following remarks by AAG James and Chairman Muris [available at <http://www.usdoj.gov/atr/public/speeches/8764.htm> and <http://www.ftc.gov/speeches/muris/murisaba.htm>] the Messrs. James and Muris took questions from the audience.

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Question: *At one point, the FTC was very active in exploring under Section 5 cases involving signaling and invitations to collude. Will the FTC be active in that area under your leadership?*

Chairman Muris: There currently are a few investigations that present those types of issues. Obviously you have to find the right facts.

Question: *Consumer privacy is an issue of concern to a large number of consumers. What do you see as the Commission's role and the Commission's initiatives in this area?*

Muris: I am spending approximately ten times more on privacy concerns than any other issue because I did not know much about it and the issue is of great concern to many consumers. The Commission will have a very active role, as did the Pitofsky Commission. In terms of resources, we will probably do even more as the issue evolves. I will be making a speech in Cleveland at the beginning of October where I hope to lay out our agenda. [<http://www.ftc.gov/speeches/muris/privisp1002.htm>] I think that my colleagues agree that privacy is important and a proper issue for the Commission.

Question: *What lies ahead for enforcement in terms of vertical mergers and vertical foreclosures?*

James: Obviously, horizontal merger enforcement continues to be the meat and potatoes of the antitrust world. Over the last decade, however, particularly as the technology industries have become so important, we've seen more complementary-type transactions. There certainly is a potential for problems in transactions where you have the ability to exclude or preclude, and, as Tim said, I think my new watchword is going to be "stubborn facts." When the stubborn facts indicate that there are market power issues, such as where someone through a vertical combination (i.e., through merger or other agreement) has the ability to preclude competition, I won't be shy about stepping in. Of course, the countervailing issue is always efficiencies, and we will try to strike the appropriate balance. One of the things that I'm personally troubled by is that there is no stated enforcement policy in this area, and I'm not quite sure that there is a ready solution. Moreover, the court decisions in this area are not particularly clear. Perhaps one of the things that the great think tank over at the Federal Trade Commission could do is devote some

more study to these types of issues.

Question: *With regard to “stubborn facts,” specifically, what type of stubborn facts are you talking about in the vertical area or with respect to invitations to collude? Is one of the stubborn facts going to be looking at what the effects are as opposed to the existence of market power? Where there have been anticompetitive effects, are you going to focus more on the anticompetitive effects on consumers?*

James: I think “stubborn facts” fall into all of those categories, and with respect to vertical enforcement, the effect on consumers still remains the principal issue. “More stubborn” facts speak to whether there is real foreclosure, as opposed to just mere competitive inconvenience. I don’t want us begin to develop an “inconvenient” facilities doctrine or a “desirable” facilities doctrine that guides our enforcement in the vertical area, and so I principally would be looking for real foreclosure. Where that occurs, consumer harm is likely to follow, and our enforcement in this area will be very consistent with our enforcement in the horizontal area.

Question: *Do either one of you foresee any changes in your policies, attitudes, or relationship with the FCC with regard to mergers in the media/telecom/cable area?*

James: We have one great benefit right now, which is that we have a pretty good antitrust lawyer as the head of the FCC who has a very strong respect for the role of the Antitrust Division in reviewing mergers. If the purpose of your question is to persuade us to discuss previous decisions in this area, I’m not going to fall into that trap. The Merger Guidelines are the Merger Guidelines, and it certainly will be my intention to follow them in those industries and to recognize the importance of converging technologies and the efficiency issues that such convergence brings about.

Question: *Are innovation markets a useful concept to antitrust analysis?*

Muris: They certainly can be, and the Commission’s action in the drug area was largely sensible, given the nature of drug innovation and the regulatory process.

Question: *I wonder if either of you would like to comment on the interesting history of the hospital merger cases? It’s hard to figure out what will happen in the future.*

James: Tim, let me take a shot at that, and I would be really interested in your views. One of the interesting facts about the hospital world is that so many of these cases have actually been litigated, as distinguished from the great oral history of antitrust law in so many other markets. If you look at the body of hospital decisions, what you see is a set of decisions that, in most instances, hue very closely to the Merger Guidelines approach to market definition, which is the real cutting issue in many of these cases. It is certainly the case that the Merger Guidelines approach to market definition suggests a certain geographic dimension to hospital cases. Having worked on quite a few of them as a practitioner, I think that courts have determined the market definition issue correctly. The antitrust bar, however, may be a lot more uncomfortable with decisions that seem to take the position that there are some other issues or values—other than pure antitrust market definition—that are at play in hospital mergers, or that community decisions about how to structure health care services as reflected in affidavits from local people ought to trump antitrust analysis. As antitrust lawyers, we all ought to be very uncomfortable with those types of decisions. So, I’m comfortable applying the Merger Guidelines and letting the Merger Guidelines dictate the result. I think that the Guidelines, however, dictate a result in which very few hospital mergers are going to rise to the level of

substantial competitive problems. When they do, we'll take action.

Muris: I think it's true that very few are problematic in a statistical sense. The question is whether there are any that can be successfully challenged. I think the Commission may have some comparative advantage here.

Question: *While I realize this may be a sensitive issue, would each of you comment on the role antitrust should have with respect to the WTO?*

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—TIMOTHY J. MURIS

James: If you look back to the last round of multinational trade talks that led to the creation of the WTO, there was a little noticed chapter that had the word “competition” in it, and so it's not surprising that as people begin to talk about a new round, competition issues will at least be on the table. The extent to which competition issues are on the table, however, likely will be the subject of ongoing discussions. I think that people in the antitrust community, and the law enforcement community in general, have concerns about the potential that issues that are brought within the WTO framework might evolve into WTO disputes, and that's certainly an issue we have to be concerned about. By the same token, the WTO as a multinational organization can have some very positive proselytizing effects in terms of bringing antitrust enforcement to more jurisdictions and imposing a general non-discriminatory, non-trade-based regime of competition law in various countries throughout the world. So, as a new WTO round begins, I certainly would expect competition issues to be on the table.

Muris: I taught trade law for several years. Competition issues are becoming increasingly important in the WTO, whether competition authorities are involved or not. At some stage, and I don't know if this is the round to do it, it would be better to have competition authorities involved and competition issues addressed.

The first steps will be very minimalist ones. Over the long haul, there's a fear of antitrust being contaminated by trade. I hope the contamination runs the other way. Members of the antitrust community, whether they are Democrats or Republicans, believe in markets and they believe in open trade. Obviously, politics and other issues are involved, but I like to think that we can have a positive influence in the trade world.

Question: *One of the tribunals of the WTO has ruled that the 1916 Antidumping Act violates the treaty and thus is void, so it has, in essence, eviscerated an act of Congress. Do either of you have any comment on that ruling?*

James: As far as I am aware, the 1916 Act has never resulted in a successful private prosecution and has never been invoked by the government. So I thought it was very interesting that the Europeans and the Japanese could find this statute and bring it to the WTO's attention. But, as you're probably aware, there is a repeal that's pending, and to the extent that the 1916 Dumping Act is characterized as an international antitrust anti-discrimination statute, it probably deserves repeal. It is certainly the case that under the WTO structure, we have a prescribed remedy for that kind of conduct. Hopefully this is more an academic issue than a practical one.

Question: *Can you give some indication what's being discussed between the FTC and DOJ regarding the best business practices, and what might be done to reduce the appearance and belief that mergers are being dealt with differently at the two agencies?*

James: This initiative is the very good idea of a person who has lots of good ideas—Tim Muris. It is envisioned that we will bring together people from our respective agencies who are the most involved in merger enforcement and iden-

tify best practices in terms of how we conduct interviews, structure information requests, review documents and information, and what sorts of standards we use in assessing substantial compliance. We hope it will have the effect of making our agencies more similar in the approaches that we take. There are differences that are associated with our respective procedures and discovery tools outside of the Hart-Scott-Rodino process, and some differences are always going to occur if you have different people making decisions. But, I think Tim and I are both very committed to making our respective enforcement approaches as similar and consistent as possible.

Question: *Is there any thought being given to re-evaluating the Intellectual Property Guidelines or are you satisfied with them the way they are?*

Muris: The relationship between intellectual property and antitrust is becoming increasingly important. Former Chairman Pitofsky made a speech in February about how more and more cases are raising the intersection. [<http://www.ftc.gov/speeches/pit1.htm>] Charles and I have discussed this issue. I'm not at any stage of thought about revising the Guidelines, but clearly it will be useful for both of us to step back and think about the relationship between antitrust and intellectual property. ●