



DEPARTMENT OF JUSTICE

COOPERATIVE ANTITRUST ENFORCEMENT

Address by

ANNE K. BINGAMAN
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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One of the great honors and pleasures of this job is to be able to address this distinguished gathering each year and highlight the accomplishments of the Antitrust Division. I find it difficult to believe a full year already has passed since I last spoke to you. On the other hand, when I consider what the Division has accomplished in that time, I marvel at the achievements of our dedicated professionals. From vigorous criminal enforcement of the antitrust laws to wide-ranging civil enforcement to providing an unprecedented amount of guidance to the business community -- these past twelve months have been wonderfully productive. We have compiled a thorough discussion of the Division's recent activities, which will be available at the back of the room at the end of this program.

The theme that I would like to stress today is teamwork. The Antitrust Division long has been known for the collaborative nature of its work. Integrated teams of attorneys and economists work together to enforce the antitrust laws. More recently, we have added a substantial number of highly talented paralegals to that team, multiplying the effectiveness of the other professionals.

We also have sought to expand the team still further, by looking at the whole undertaking of antitrust enforcement as an exercise in cooperation and coordination. Thus, a major focus of this past year has been to increase and deepen our interaction with our colleagues at the Federal Trade Commission (FTC), in the offices of the State Attorneys General and in antitrust enforcement agencies around the world.

Sometimes, teams are carried along by one outstanding player. I am reminded of the night that basketball great Elgin Baylor scored 71 points. Afterwards, his teammate,

Rodney Hundley, slapped him on the back and exclaimed, "What a night, buddy -- 73 points between the two of us!"

Well, there is no Elgin Baylor in antitrust enforcement. Effective antitrust enforcement in this age of increasing economic interdependence and limited enforcement resources demands more than ever before the solid teamwork and balanced contribution among enforcement agencies at all levels -- state, federal and international.

Cooperative antitrust enforcement maximizes consistency in the law for companies that are subject to the jurisdiction of several enforcement entities -- a consistency that reduces uncertainty, facilitates effective business planning and eases compliance burdens on business. It also maximizes the effective use of public resources.

That is why we have dedicated ourselves to furthering cooperation with our teammates in other antitrust enforcement agencies. We long have had a process -- recently improved in a number of respects that I will discuss presently -- for allocating between the Division and the FTC the responsibility for reviewing particular mergers. We also clear civil nonmerger investigations to each other to ensure that we do not duplicate each other's efforts. These mechanisms only make sense -- the resources available for effective antitrust enforcement are too precious to waste them in doing twice that which can be done once. The same principle applies to our interaction with state and foreign enforcement agencies. We are making great progress in working together in order to reduce the extent that one agency needs to spend time and money going over ground already covered by another agency, and I want to describe that progress in some detail today.

COOPERATION WITH THE FTC

I would like first to review four extremely important projects on which the FTC and the Division worked together closely and which we completed in the past year.

Last September, the two agencies released a substantially revised and expanded version of the Statements of Antitrust Enforcement Policy in the Health Care Area that originally were released in September 1993. The Statements now provide an unprecedentedly detailed level of guidance with respect to nine key areas in the rapidly changing health care market. These areas range from mergers among hospitals to providers' participation in exchanges of price and cost information to physician network joint ventures.

The two agencies also committed to providing expedited, 90-day business reviews for the health care industry. These two joint initiatives -- the Statements of Policy and the expedited business reviews -- illustrate two fundamental principles that undergird our common approach to antitrust enforcement: Competition and the competitive process receive the most protection when the two agencies speak with one voice and when businesses can determine in advance the agencies' concerns and enforcement intentions. The importance of guidance is especially acute in rapidly changing industries such as health care.

These principles of speaking with one voice and providing guidance underlie two other joint efforts that we announced this week with pride -- Guidelines on the Licensing of Intellectual Property and Guidelines on International Operations. Attorneys and economists from both agencies spent countless hours drafting these Guidelines before they were released in draft form last fall. They continued their hard work to craft the final versions to take into account to the greatest extent possible the many valuable comments we

received from the business community, the bar and other interested parties in response to the draft versions. The result of these extraordinary efforts is two more documents in which the agencies speak with one voice in providing guidance in areas that will be critical to American prosperity in the next century.

The practice of the FTC and the Division joining together to provide guidance to business has now become a tradition. We can trace the origins of that tradition to the publication in 1992 of the Joint Horizontal Merger Guidelines. My predecessor as Assistant Attorney General, Jim Rill, deserves much credit for that pioneering effort in interagency coordination.

And much credit goes as well to Janet Steiger, who as chair of the FTC has provided outstanding leadership, not just in the area of interagency cooperation, but in all aspects of the FTC's activities. The cause of competition has been lucky indeed to have such an effective champion at the helm of the Commission. Her vitality and enthusiasm in support of effective antitrust enforcement have made an enormous contribution to the Nation's economic well-being. I am proud to count her as a true friend and tireless and fearless colleague in antitrust enforcement.

The final joint effort of our two agencies that I would like to mention is the package of improvements to our premerger review program that we announced two weeks ago. For those of you who have not yet obtained the written version of those improvements, we will have copies of those in the back of the room as well.

These improvements will expedite the premerger review process from start to finish. They cover every aspect of the Hart-Scott-Rodino reporting process, from the question of what

transactions need to be reported in the first place to ways of identifying issues and analysis that can facilitate the early termination of review whenever warranted. Our goal is to reduce compliance burdens on business and facilitate procompetitive or competitively neutral mergers, while vigorously protecting competitive markets through effective merger enforcement. This package of improvements is a great step toward accomplishing that goal.

COOPERATION WITH STATE ATTORNEYS GENERAL

Turning to our relationship with State Attorneys General, just two days ago, I had the opportunity to meet with the Attorney General of Indiana, Pamela Carter, about health care issues. We had a wonderful meeting, and our discussions strengthened my profound belief that effective antitrust enforcement benefits tremendously from active involvement of the State AGs in enforcing state antitrust laws. I also believe that the key to getting the most out of active state involvement is to have an open, interactive relationship between the federal antitrust agencies and the states.

To enhance our interaction with the states, we recruited Milton Marquis in June of last year from the Virginia Attorney General's office to join the Antitrust Division as Senior Counsel with responsibility for state liaison. The impressive record of achievement in federal-state interaction that I am about to discuss is a direct result of Milton's outstanding contributions.

A wonderfully constructive project that we and the FTC have worked closely on has been a series of Common Ground Conferences at which officials of the two federal agencies gather with officials from State AG offices and discuss, quite simply, the "common ground" of antitrust enforcement. These conferences originally were an FTC initiative. After being held for several years in Chicago in conjunction with the AGs

of midwestern states, the program now has been expanded both geographically and to include the field offices and senior staff from the Antitrust Division, as well as the FTC and State AG's offices in each region. We held one in New Orleans last month, attended by representatives from eleven states in the south and southwest. The next one will be in May in San Francisco and will involve officials from a large number of western states.

The conferences give us a useful opportunity to compare notes on a number of substantive areas with state enforcement officials. To give you an idea of the topics covered, last December's conference in Chicago included discussions of health care, vertical restraints and leniency policies to encourage participants in criminal conspiracies to come forward with information about antitrust violations. By the time the conference in San Francisco concludes this May, we and the FTC will have explored "common ground" with antitrust enforcement officials from some thirty states.

In addition to these Common Ground conferences, which cover an array of issues, the FTC and we also sponsored a seminar last year devoted exclusively to health care issues. Eighteen states sent 26 representatives for a very productive discussion about developments in the health care area and the implications for competition in that vital sector of the economy.

And we do not limit our interaction to formal conferences. Just last week, Duncan Currie, the Assistant Chief of our Dallas Field Office, and Jane Phillips, an attorney in the Dallas office, traveled to Little Rock to brief attorneys and investigators in the Arkansas Attorney General's Consumer Protection Division on general antitrust law principles and the methods that we use to evaluate and investigate suspected antitrust violations. Likewise,

Division attorneys recently briefed the Texas AG's antitrust staff on enforcement issues in the health care area.

We also have opened the in-house training that we conduct for our own attorneys to the State AGs and to the FTC. Last month, five states sent ten of their antitrust attorneys to a course on cross-examination and several states sent a like number of attorneys to a class on discovery of computerized data.

Having described these conferences and training programs, let me hasten to add that we and the states are doing more together than merely talking about enforcement. We are enforcing the law together.

Last June, for the first time ever, the Division filed suit jointly with a state when the Division and the State of Florida challenged the merger of two hospitals in North Pinellas County, Florida. The proposed combination would have accounted for nearly 60 percent of general acute care hospital services in the county. If it had been allowed to proceed, it would have created a dominant provider of those services and reduced the options of managed care plans that have been so instrumental in containing hospital costs.

Working closely with Jerome Hoffman and others from Attorney General Robert Butterworth's staff, we succeeded in negotiating an innovative settlement that preserves competition between the two hospitals for most services, while allowing them to act jointly where such action will not harm competition. Our teamwork with the State of Florida was critical to achieving a rapid, just solution to the problems posed by the merger while minimizing the burden that the parties would otherwise bear in having to address the concerns of separate enforcement agencies. This case illustrates the tremendous potential that federal-state cooperation offers for

achieving the most effective enforcement of the antitrust laws with the most efficient use of resources.

In August, we joined the Arizona Attorney General in a challenge to the use of a "most favored nation" clause by the Delta Dental Plan, the dominant dental plan in Arizona. In that case, we and the State of Arizona jointly alleged a violation of Section 1 of the Sherman Act, and the State by itself alleged a violation of the Uniform Arizona Antitrust Act. As in the Florida hospital case, the result was an efficient and just settlement that achieved important protections for Arizona consumers.

In December, we joined with the States of Florida and Maryland to challenge the acquisition by Browning-Ferris Industries (BFI) of Attwoods, one of its major competitors in the trash hauling business. We settled that suit when BFI agreed to divest Attwoods' assets in several markets where competition otherwise would have been lessened and to begin offering less restrictive contract terms in certain areas. The settlement preserved competition and protected consumers, and illustrated once again the value of pooling of resources to address common concerns.

We also recently coordinated with the State of Pennsylvania to achieve a simultaneous proposed settlement of vertical price fixing charges with Playmobil USA. The State originally brought the case to our attention, and we worked closely together throughout the investigation.

One other joint effort bears noting. We worked closely last fall with the Maine Attorney General's office in investigating and ultimately challenging a proposed bank merger in that state. The AG staff's extensive knowledge of the local market was absolutely essential to our success in obtaining effective relief.

You will see more cooperative prosecutions in the future. We have some 12 on-going civil investigations in which we are working jointly with states in investigating alleged antitrust violations. Most of these ongoing investigations are in health care, which is characterized particularly by local markets where the combination of the states' deep knowledge and contacts in their own communities, with our long experience in health care antitrust can provide better, faster and more uniform enforcement decisions in this important area. In addition to this civil effort, four states have cross-designated staff members to participate in federal grand jury investigations. By designating state attorneys as Special Assistant U.S. Attorneys to assist in federal prosecutions, we eliminate duplicative investigations, maximize the efficient use of prosecutorial resources and give state staffs more criminal experience to enhance their ability to undertake enforcement of the criminal provisions of state antitrust statutes.

COOPERATION WITH FOREIGN AGENCIES

Finally, it is an inescapable fact of today's global economy that antitrust enforcement cannot stop at our nation's borders if it is to be effective. Restraints imposed by foreign firms can harm American consumers and the American economy just as surely as those imposed by domestic firms. Our antitrust laws also serve to protect American exporters from anticompetitive restraints imposed in U.S. export markets.

More and more, effective antitrust enforcement will require global cooperation. We must develop strong, cooperative enforcement relationships with foreign antitrust enforcement officials in order to improve our mutual ability to enforce the competition policies of our respective nations. Thus, it is no accident that a major focus of the DOJ/FTC International Guidelines announced here on Wednesday of this

week is our fundamental commitment to the principles of international comity and cooperation.

The experience of the past year has demonstrated the importance of such cooperation. Cooperation between countries -- each enforcing the law in its respective jurisdiction -- enhances the efficiency of our efforts, ensures for each nation the most effective enforcement possible and promotes for consumers in the global economy a freer market in goods and services.

Several recent cases illustrate the importance of cooperation with other countries' enforcement agencies. For example, we worked closely for almost a year -- and for over two weeks virtually around the clock -- with Directorate General IV (DG-IV) of the European Commission to achieve the historic Microsoft consent decree -- the first ever joint resolution of a case on identical terms by the U.S. Department of Justice and DG-IV. What is more, Microsoft itself requested the joint settlement discussions, underscoring how important it can be for any business engaged in international commerce to play under one set of rules world-wide.

Successful cooperation breeds further cooperation. In part because of our experience working together on the Microsoft case, we and the EU have had a firm basis for interacting on the development of intellectual property guidelines. We and the EU independently initiated the process of formulating guidance on IP issues, both responding to the critical importance of intellectual property to the 21st Century economy. Once we became aware of our parallel efforts, we continued to exchange views about this vital subject. Over time, this exchange I think inevitably will lead to more consistency in our approaches, which can only inure to the benefit of both European and U.S. companies that license intellectual property.

We also have derived tremendous benefit from forging close bonds with our Canadian neighbors. Cooperation with Canadian authorities pursuant to a mutual legal assistance treaty between our countries was essential to the Division's success in breaking up two criminal price-fixing conspiracies that were hurting North American consumers. In July, the Division announced that it -- with the help of the Canadian Bureau of Competition Policy and after two years of cooperative investigation -- had uncovered an international cartel that was inflating prices in the \$120 million thermal fax paper market. Each agency prosecuted the cartel under its respective law, with the U.S. prosecution resulting in guilty pleas and some \$8 million in fines. Similarly, the assistance of Canadian authorities was instrumental in gathering the evidence used to charge three corporations and seven executives with conspiring to drive up the price of plastic dinnerware products, a \$100 million market. That prosecution resulted in fines totalling more than \$8 million and jail sentences of up to 21 months.

Without the invaluable cooperation of the Canadian Bureau of Competition Policy and other Canadian agencies, we would not have been able to prosecute those illegal conspiracies effectively, because crucial evidence was located in Canada and beyond our investigative reach. Similarly, in the fax paper investigation, important and confidential evidence in the hands of the Division was vital to the Canadians' case.

We continue to strengthen our relationship with the Canadian antitrust authorities. For example, Canadian officials recently assisted us in conducting training on international investigations for the Division staff.

As the cases I noted demonstrate, international cooperation in antitrust enforcement is a win-win situation: by promoting each country's antitrust enforcement efforts, it

benefits each country's consumers. International price-fixing conspiracies hurt American consumers in the same way as domestic conspiracies, but they obviously pose special challenges to enforcement authorities. Often, cooperation with authorities in other countries absolutely is necessary in making prosecution in the United States or an effective foreign proceeding possible, and the absence of such cooperation may effectively offer a risk-free license to pick the pockets of American consumers.

Our determination not to allow foreign companies fixing prices to U.S. consumers to enjoy a safe haven outside our borders made it a priority for us to seek legislative authority to facilitate the exchange of critical information with foreign antitrust enforcement agencies. We therefore worked with members of Congress in both parties, the bar and the business community to draft the International Antitrust Enforcement Assistance Act of 1994 -- the International Cooperation Act.

Attorney General Reno enthusiastically supported our proposal; it also received the unqualified support of a bipartisan coalition of lawmakers. We received vital assistance from many people in this room today, including the unstinting efforts of former Assistant Attorney General Jim Rill -- who testified twice in support of the Act -- Janet McDavid, Alan Silberman and a host of other members of the Antitrust Section. A number of major United States corporations -- including American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX, Viacom and Xerox -- also supported the legislation. In large part due to this broad-based and completely bipartisan support, Congress passed the bill overwhelmingly ten weeks after it was introduced. President Clinton signed it into law on November 2, 1994.

The Act authorizes the Department of Justice and the FTC to negotiate written reciprocal assistance agreements with foreign antitrust agencies. These agreements, which will be subject to public notice and comment in the United States, will enable us to obtain evidence already in the files of foreign antitrust enforcement agencies or in the possession of persons in their territory by permitting the U.S. agencies to offer reciprocal assistance to foreign antitrust investigators.

Specifically, the Act permits the Department and the FTC to exchange otherwise confidential investigative information with foreign antitrust authorities, provided that the exchange is in the public interest of the United States and that we have determined that the foreign agency will provide appropriate confidentiality requirements and other specified safeguards. In addition, the Act authorizes the Department and the FTC to obtain information from firms or individuals in the U.S. on behalf of foreign antitrust authorities, either by using their civil investigative powers or, in the case of the DOJ, by going to court and seeking an order compelling the production of evidence.

We have taken large strides in the past decade toward more antitrust cooperation with other countries through a series of bilateral agreements. But it is evident that greater efficiency in antitrust enforcement requires continued progress in the areas of mutual assistance and procedural reciprocity, progress that the International Cooperation Act will promote. To that end, we already have begun to work actively with a number of countries to lay the groundwork for the eventual negotiation of mutual assistance agreements.

CONCLUSION

Let me emphasize in conclusion that teamwork will be the hallmark of effective antitrust enforcement in the 21st Century. Every step we take toward strengthening our bonds

and deepening our interaction with our colleagues in antitrust enforcement in the United States and around the world is a step toward a more prosperous America, an America that enjoys the benefits that free and open markets provide -- lower prices, better quality, more choice and more rapid innovation. We at the Division have made great strides in building upon the progress made by our predecessors in working closely with the FTC, the States and foreign enforcement agencies. We pledge to continue that cooperation for our own good and for the good of all Americans.