DEPARTMENT OF JUSTICE

CURRENT ISSUES IN INTERNATIONAL ANTITRUST ENFORCEMENT

Presented by

R. HEWITT PATE
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Introduction

Barry Hawk has once again produced an excellent program, in which a very wide range of observations have been made by my co-panelists. These observations include those that are insightful and practical, those that are interesting and perhaps motivated by laudable principles but that are in my view unrealistic, and those that are downright frightening – such as the idea of unleashing economists on a particular market segment so that they can refashion it according to their supposedly expert view of how that market segment might function better. For my part, I would like to address the issue of cartel enforcement, the Antitrust Division's top enforcement priority, and then offer some observations on some significant personnel transitions in our antitrust world.

Cartel Enforcement

My treatment of the topic of cartel enforcement can be somewhat cursory here, thanks largely to the excellent presentation that Commissioner Sheridan Scott of the Canadian Competition Bureau has prepared on the subject. Those who follow this most important of antitrust enforcement issues should also pay close attention to recent developments in Japan, which Secretary-General Uesugi of the Japanese Fair Trade Commission discusses in his presentation.

Regarding private anticompetitive practices, cartels remain our top enforcement priority at the Antitrust Division. When we act aggressively in the field of cartels we know at least two things: (1) that we are doing no harm, and (2) that we are doing good. Contrary to David Lewis, who elsewhere suggests that merger enforcement can function rather like training wheels for countries that are beginning to develop their own antitrust enforcement regimes, I do not put merger enforcement into a "the more the merrier" category of enforcement activities.

Inappropriately blocking procompetitive mergers harms consumers. But with respect to cartel enforcement, we can all benefit from more aggressive enforcement against cartels. Indeed, if new enforcement agencies were to do nothing else but focus on cartel enforcement, they would be using their resources wisely.

We have had a very good year at the Division in the cartels area. We have collected $349 million in criminal fines for the fiscal year that just ended, the second-highest year the Division has ever had. This year President Bush signed the Antitrust Criminal Penalty Enhancement and Reform Act, which revised maximum antitrust criminal penalties in the United States from three years imprisonment for price-fixing activity to ten years, and which increased maximum fines under our guidelines system from $10 million to $100 million. The Act also introduced a de-trebling provision into our leniency system that is meant to address a weakness in that otherwise successful program. The ability of "private attorneys general" to recover treble damages, while not without its significant problems, is an important component of our system in the United States. In our judgment, however, the risk of exposing themselves to liability for treble damages in private antitrust litigation has from time to time prevented firms from taking advantage of our amnesty program and exposing their and their co-conspirators' illegal activity. The Act enhances the incentive for corporations to self-report illegal conduct by limiting the damages recoverable from a corporate amnesty applicant to the actual damages inflicted by the amnesty applicant's own conduct, provided that the applicant also cooperates with private plaintiffs in their damage actions against remaining cartel members. This should remove a major disincentive for submitting amnesty applications, encourage the exposure of more cartels, and make our leniency program even more effective.

Looking beyond our cartel enforcement efforts in the U.S. to the global marketplace, I

think it is worth noting that, according to Barry Hawk, when the Fordham conference began 30 years ago it was often used by people from other countries as an opportunity to complain about how the United States was acting as the world antitrust policeman by imposing its laws extraterritorially. For their part, U.S. government officials used the conference as an opportunity to defend our government's practices. Fast forward to 2004 – a year in which the Division, with the cooperation of a number of our most important trading partners, urged the Supreme Court in the *Empagran* case to conclude that U.S. courts should not be open to treble-damages actions arising from non-U.S. transactions between non-U.S. buyers and non-U.S. sellers. In doing so, the U.S. government argued that our system should not put a brake on the very laudable efforts of other government enforcers around the world to act as a network to break cartels. I even observe in the remarks of David Lewis and others the suggestion that the U.S. should use its Sherman Act to combat practices that harm other countries' economies. That the U.S. government is now encouraged to be a *more aggressive* world policeman is an interesting evolution – a revolution, one might say – of positions.

With respect to cartel enforcement, we in the U.S. believe that significant penalties, coupled with a transparent and certain amnesty program, are the keys to a successful enforcement regime. That is why I think what is happening in Japan under Chairman Takeshima's and Secretary-General Uesugi's leadership is so important. That does not mean that every country will agree with the United States (for example, that we should focus on prison sentences as a deterrent, although we will continue to advocate for that), but different specific approaches within this general broad outline can be very effective.

Strengthened inter-agency cooperation and information sharing, as Commissioner Monti and others have noted, is also a critical component in a successful international cartel

enforcement effort, and I note with approval that the ICN has now taken on cartel enforcement as a topic for its work. We have had some good developments recently in this area, such as this year's coordinated raids and service of subpoenas by the United States, the European Union, Canada, and Japan. I think we should be able to do more of those kinds of joint actions, and I am looking forward to continued discussion on the subject at the Sixth Annual International Cartel Workshop, which is being hosted by Australia this year.

Finally, no discussion of cartel enforcement this year would be complete without the acknowledgment of an important transition at the Department of Justice. Important to everyone involved in cartel enforcement efforts but of special significance to me personally, is the impending departure of Deputy Assistant Attorney General Jim Griffin from the Antitrust Division. Jim heads up our criminal antitrust enforcement efforts, and after a quarter century of public service he has decided to pursue new challenges in his professional career. He leaves the Department of Justice on a high note after what has been a very successful fiscal year, a year that has seen the Division secure near-record fines and prison sentences, as well as the passage of legislation that Jim has been advocating since before I arrived on the scene. This year also saw President Bush personally present Jim with the Distinguished Executive Award, the highest award that can be bestowed upon a U.S. civil servant. We at the Division, and I personally, wish Jim great success as he begins the next phase of his professional life.

The European Commission

Another approaching transition is the conclusion this year of Mario Monti's tenure as the Commissioner for Competition in Europe. I would like to comment briefly on why I believe that his tenure will be seen over time as one of truly lasting significance, and a very positive development for Europe. I say that not as someone who agrees with everything that comes out of the EC by any means, but rather as an admirer of Mario Monti and the success of his tenure as Commissioner.

Among many developments and accomplishments that have taken place on his watch and under his guidance, the simple recognition that antitrust enforcement is fundamentally about protecting and enhancing consumer welfare, rather than punishing efficiencies, will prove to be of tremendous significance in the coming years. I also applaud his efforts to encourage consensus regarding global antitrust enforcement priorities, and I strongly share his belief that combating cartels and working to eliminate or reduce government restrictions that hinder competition should be our top two priorities. I have worked to reaffirm cartel enforcement as our top enforcement priority at the Division, and our cooperative efforts with the Commission in this area have never been stronger.

Regarding government restrictions, we have a great deal less experience with direct state involvement in business enterprises in the United States than others may have, but we nevertheless recognize that the issue of government impediments is critically important in much of the rest of the world. The Commission must deal with unique challenges as new member states with histories of planned economies and state-owned or state-sanctioned monopolies join an economic union with states that basically rely upon free market principles. Going forward, I submit that we need to consider making explicit the important difference between an

enforcement approach appropriate for companies that have grown through competition in free market economies and one appropriate for eliminating market power produced through state involvement or intervention in the market. Nothing could be more important to avoiding "divergence" in our approaches to dominance that risk punishing successful competitors.

To highlight specific achievements of Mario's tenure, I note some of the fundamental structural changes to the European system that have been wrought in large part as a result of his leadership: the end of notification, which allows the Commission to devote its resources so much more effectively to other matters; and a new merger review standard under which transactions are examined to determine whether they may be significant impediments to effective competition. This standard recognizes the importance of unilateral competitive effects analysis and converges somewhat with the U.S. "substantial lessening of competition" standard. (Some may consider this development particularly ironic given the views expressed recently by one of our hundreds of federal district court judges in the United States that unilateral effects cases cannot be brought unless the merging parties would achieve a monopoly or a dominant position.) And of course, one cannot examine Commissioner Monti's tenure without taking note of his efforts to institutionalize the role of economic analysis – and economists, such as the Commission's fine Chief Economist Henrik Roller – in its work.

Finally, I note with a great deal of satisfaction the very cordial and productive personal and professional relationships that have developed between the Division and the Commission, at all levels. These relationships survive even the most controversial developments, such as the EC's recent decision in the *Microsoft* case, about which Mario and I strongly disagree. Indeed, already strong ties are strengthened by our demonstrated ability to have frank and constructive discussions about such topics – a sign of a truly healthy relationship.

Current Issues in International Antitrust Enforcement

My fellow presenters have made a number of points regarding international antitrust programs that are worthy of further comment, and I would like to address some of them here. I would like to start by posing an obvious, but often un-asked, question: What is our mission as antitrust enforcers? Put another way – should there be more to antitrust enforcement than just protecting competition?

Some have suggested moving issues of international antitrust policy out of the hands of the enforcers and the regulators – and perhaps even the courts – and into the hands of an organization like the WTO. We are not remotely ready for that, in my view, so perhaps that issue can wait for another day. But in this globalized age it is impossible to ignore the fact that international competition policy is bound up with – or at least affects and is itself affected by – trade policy, and even foreign policy. Should our goal then be to merge antitrust with trade and foreign policy – to follow on some of what David Lewis has said – under the banner of eliminating hypocrisies or inconsistencies? I would submit that while the enthusiasm for antitrust is great to see, as a vessel for some kind of grand international policy harmonization it has its limits. Indeed, we risk jeopardizing our pro-competition priorities if we attempt to stretch antitrust policy to cover other aspects of international policy.

The search for objective, non-political principles for competition law has meant that over the last few decades antitrust has become increasingly about economics. Whether analyzing the competitive effects of a merger or determining which rules are best and most administrable to protect competition, economics – both theoretical concepts and practical analysis – lies at the heart of what we do. In contrast, trade policy and foreign policy – as well as the more specific

subjects that some would like to see folded into the antitrust arena, such as labor policy and environmental regulation – involve very different questions and priorities that are much more appropriately addressed through the political process, rather than law enforcement. If we were to merge antitrust enforcement with these other issues, then instead of seeing the antitrust community magically rise up and reform all of the potential problems and conflicts that occur in these broader policy areas, there is a greater chance that we will simply pollute our competition analysis with a lot of extraneous political considerations. Our efforts to come to agreement on a body of law that protects and enhances competition while being economically sound is difficult enough without the importation of other concerns and controversies.

That is not to say that we should be shy about promoting the merits of competition in other policy arenas and to other parts of our governments. It is somewhat unrealistic to expect antitrust enforcers to "confront our own governments publicly," as some have suggested. Although it would be an entertaining spectacle, I question the effectiveness of such an approach. Nevertheless, we take our role as competition advocate very seriously at the Division, and we often share the benefits of our expertise with other government agencies and departments in the United States. For example, the Division has been vocal in its opposition to immunities under U.S. law, such as in the Shipping Act. We periodically offer comments during the rule-making processes of agencies such as the Securities Exchange Commission. In the British Airways/American Airlines code share matter we advocated a market-based redistribution of landing slots that ultimately was not adopted by the responsible decisionmakers. We also advocate the merits of competition within the various professions, and we try to take on the state action doctrine, under the leadership of our Trade Commission. Undoubtedly, we should do more. But it remains the case that competition is not the *only* value that our government, or any

other government, must advance, and if we are to be effective advocates we must recognize that fact.

Commissioner Monti, David Lewis, and others have addressed the subject of export cartels, and I admit that it would be impossible for me to claim that there is no inconsistency between the United States preaching tough action against cartels while having such exemptions enshrined in our laws. On the other hand, the last time I checked, our Congress was not empowered to give exemptions from the antitrust laws of other countries, so to the extent that non-U.S. cartel activity by U.S. or non-U.S. companies injures non-U.S. persons, in the spirit of the *Empagran* decision I suggest that such conduct might more properly be policed outside the U.S. That is not to say that I support a policy of national exemptions for export cartels, but I do believe this is an issue more of symbolic than substantive importance.

Some ask whether we should move towards a unified "one-world" law of competition. I think the answer to that is clearly "no," at least not anytime soon. Different economies have very different needs. Take, for example, the concept of "de-monopolization," or the use of antitrust laws to break up monopoly or dominant firms simply because they are monopolists or dominant firms. Clearly not the goal of Section 2 of the Sherman Act in the United States, and our Supreme Court has made this clear (if there was ever any doubt on that score, this year's *Trinko* decision dispelled it). On the other hand, for countries that are moving towards free market systems and away from state ownership models, the use of antitrust laws to introduce competition into sectors of the economy that perhaps have not experienced it for some time may be entirely appropriate. For example, in his paper Andrej Plahutnik of Slovenia suggests that competition laws should be applicable to all sectors without exemptions, and that state ownership of all or part of a company should not entitle that company to different antitrust

treatment. Whether such an approach is appropriate of course depends on a given country's market situation, and it would not do for me to say that all nations must make do with Section 2 of our Sherman Act as we interpret it in the United States. Different economies have different needs.

On the other hand, neither would it make any sense to say that because other economies have a need for de-monopolization as they develop towards a free market system, the concepts of more stringent de-monopolization approaches should be imported into U.S. law. Nor does it make any sense to say that rules that may be needed to displace state monopolies are appropriately applied to companies that have succeeded in a free marketplace without government assistance. The battle over whether "big is bad" was decided in the U.S. a long time ago.

So while convergence is in many ways a good thing, I suggest that we explicitly acknowledge that different systems may need different rules, and that "hard" and absolute convergence may not be an appropriate goal. A certain degree of harmonization or convergence is of course a good thing – any company engaged in a large cross-border transaction will quickly tell you so. I also think that "soft" convergence – the sharing of our experiences at the ICN, at the OECD, and at fora like the Fordham Corporate Law Institute – has great value, but expectations that such exchanges will result in agreement on a universal code are not realistic.

Comity – a certain degree of trust in each other's systems – <u>is</u> a realistic goal, however, and one that will become even more important as antitrust enforcement regimes spread around our shrinking world. Our recent unpleasant experience in the *Oracle* case, in which a U.S. district court judged ruled against the Division, and in which the EC shortly thereafter closed its own investigation without taking separate action, is a useful example. When a competent authority in a jurisdiction with which the parties have a particularly strong connection rules in a

case, especially in situations where the relevant market conditions in other jurisdictions are similar to those that prevail in the jurisdiction that has acted on the deal, the global antitrust community should be willing to take "No" – or "Yes," for that matter – for an answer.

The alternative – an international system of seriatim review of controversial matters by different authorities that enables opponents of a transaction to skip across the globe until they get an answer that they like – is unacceptable. By that of course I do not mean to suggest that what happens in the United States is legally relevant to a European Commission decision, or vice versa. Authorities are independent and have authority to act independently. But, when a jurisdiction is trying to determine what action to take, it surely must count for something under basic principles of comity that a competent system with a clear nexus to a matter has already made a full effort to address it and has already come to a result. A global antitrust system in which each agency simply lines up to take its whack at the piñata is not a model that is going to serve us, or the market, very well.

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I will conclude by returning to the subject of Mario Monti. Twenty years from now, when Fordham holds its 51st Annual Corporate Law Institute, I hope people look back and remember that Hew Pate was a person who showed up and did a reasonably good job for a while, but I don't expect that you will remember that I made any lasting supremely significant contribution. I don't think the same thing will be said about Mario Monti. His tenure will be seen as having had truly lasting significance, and I congratulate him on concluding a tenure of accomplishment. I have greatly enjoyed the privilege of working with him.