DEPARTMENT OF JUSTICE

ANTITRUST ENFORCEMENT PRIORITIES AND EFFORTS TOWARDS INTERNATIONAL COOPERATION AT THE U.S. DEPARTMENT OF JUSTICE

Remarks by

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I. Introduction

Good afternoon. As I mentioned this morning, it is a great pleasure to be here in Taipei for this event. This morning's exchanges on antitrust enforcement were both interesting and enlightening, and I enjoyed them very much. In my remarks this afternoon, I will give you an overview of the antitrust enforcement priorities at the U.S. Department of Justice, say a few words about our very successful corporate leniency program, and then conclude with a description of our ongoing efforts to promote international cooperation and convergence in antitrust enforcement.

II. Antitrust Enforcement Priorities in the United States

Antitrust law in the United States has been evolving for more than 110 years. After more than a century of thoughtful analysis and practical experience, doctrines that were intellectually unsupportable or impractical have given way to more refined approaches that are both economically sound and can be practically employed. We sometimes find it useful to talk about cartels, mergers, and single-firm conduct as forming a continuum of conduct in which the first is the most damaging to competition, the easiest to identify as anticompetitive, and the most deserving of enforcement attention, while the last is the most difficult to identify as anticompetitive and more challenging to remedy in a way that does not harm innovation or chill legitimate conduct. Each of these three categories of conduct poses its own unique issues for antitrust enforcement, and I will touch briefly on each of them.

A. Anti-cartel Enforcement

There is little dispute that hard-core cartels are so clearly devoid of any efficiency-enhancing potential that no inquiry is required to conclude that they are anticompetitive. As the United States Supreme Court aptly put it this year, collusion among competitors is the "supreme

evil" of antitrust.[1] In the United States, cartel conduct is condemned as *per se* illegal and subject to criminal penalties, including imprisonment.

Anti-cartel enforcement is our top priority at the Department of Justice, and we believe it should be a top priority for every antitrust agency. Cartels are an attack against free market economies. They inflate prices, restrict supply, inhibit efficiency, and reduce innovation. Moreover, once cartels are uncovered, they are the easiest targets for antitrust authorities because there is typically strong consensus concerning their malicious effects, and little sophisticated analysis is required to determine their legality.

We have found that cartel behavior is extremely profitable and often very difficult to detect. Therefore, to be successful in uncovering and challenging cartels, we must have the most modern and effective investigative tools. Among other things, Antitrust Division lawyers, working with the FBI and federal grand juries, can subpoena relevant documents from corporations and individuals, question witnesses, compel reluctant witnesses to testify before grand juries in exchange for immunity and, with the consent of a cooperating participant, record conversations. In proper circumstances, Division attorneys can also obtain search warrants from the courts that allow the FBI to search premises where relevant evidence may be found and seize any such evidence they find. These investigative tools are backed by significant penalties for obstruction of justice (e.g., for destroying documents responsive to a subpoena rather than producing them) and perjury (e.g., for knowingly providing false testimony to a grand jury).

We also believe that penalties for cartel conduct need to be severe if they are going to

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[1] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 124 S. Ct. 872, 879 (2004).

have any chance of counteracting the allure of the large profits that await successful cartel participants. The Department of Justice pursues two types of penalties that we believe create a powerful deterrent to prospective participants of cartels:

- First, we subject companies that join cartels to high monetary fines. This summer, our Congress enacted and President Bush signed legislation to increase the maximum criminal fine for companies violating the antitrust laws from 10 million to 100 million U.S. dollars.

- Second, it is our standard policy to pursue criminal prosecution against culpable corporate officials. Our experience is that the prospect of prison sentences is a uniquely effective deterrent. This year, our Congress enacted and President Bush signed legislation increasing the maximum term of imprisonment to 10 years, from the former three-year maximum, and we are hopeful that deterrence will be greatly increased.

Of course, U.S. law also provides for private treble damages liability. Companies found to have participated in cartels are subject to lawsuits by the victims to recover three times the economic harm they suffered in the United States as a result of the cartel. This private damage liability will often greatly exceed the criminal fines imposed on the corporation, and the potential for such liability plays a significant role in my country's approach to deterring hard-core antitrust violations.

Finally, our anti-cartel enforcement program is enhanced by our corporate leniency program, which I will discuss in more detail in just a few minutes, after I complete my overview of our enforcement priorities.

B. Merger Enforcement

In the middle of the antitrust enforcement spectrum are mergers, joint ventures and similar forms of competitor collaborations. Unlike cartels, mergers are typically procompetitive rather than anticompetitive. But, because certain mergers, particularly those between horizontal competitors, can often have substantial anticompetitive effects, mergers generally warrant more scrutiny than single-firm conduct.

We have found that determining the competitive effects of mergers requires careful analysis. Over the years, we have developed a sound framework for reviewing mergers that is reflected in the Horizontal Merger Guidelines.[2] Those Guidelines set out a clear methodology for defining the parameters of a relevant market and provide for analysis of the potential anticompetitive effects of a merger based on both the likely unilateral effects of the combination and the possibility that the merger will result in anticompetitive coordinated effects.

In our experience, one of the most important elements of merger review is to focus the analysis exclusively on preserving competition in the relevant markets and not to be distracted by other considerations. There may be temptations, for example, to intervene (or not intervene) in a merger in order to protect individual competitors. But we reject those temptations. If a competitor complains because a merger will create efficiencies that will make it more difficult for the competitor to offer a similar value to consumers, we do not view such complaints as a reason to stop a merger. Similarly, we will not seek to protect a company from competition just because

[2] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1997), available at http;//www.usdoj.gov/atr/public/guidelines/hmg.htm.

the company is headquartered in the United States.[3] Rather, we look to preserve competition that will benefit consumers regardless of the source of that competition.

C. Single-firm Conduct

Finally, at the other end of the enforcement continuum, is single-firm conduct. In the United States, we believe that antitrust authorities should be cautious about challenging such conduct. This belief is grounded in the notion that firms should be encouraged to compete hard by lowering prices, innovating, and making their products more attractive, even if the winner of the competitive struggle achieves some form of monopoly power. Thus, there is broad agreement that, in the words of Judge Learned Hand, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[4] The challenge is that, with respect to unilateral conduct, it is extremely difficult to distinguish between aggressive competition and anticompetitive conduct. As a result, over-zealous enforcers and courts run a significant risk of deterring hard—yet legitimate—competition. Enforcement in this area is further complicated because, even if we are able to conclude that certain conduct is anticompetitive, it may be more difficult to implement workable remedies that will restore any lost competition.

Standards for single-firm conduct will no doubt continue to evolve, both in the United States and around the world. This past year, the United States Supreme Court's *Trinko* decision addressed fundamental questions about the nature of the offense of monopolization under the

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[3] Our recent challenge to Oracle's attempt to take over PeopleSoft provides a good illustration. SAP, a German company, is the largest provider of enterprise software in the world. We would give no weight to an argument by Oracle that it should be permitted to acquire PeopleSoft to create a U.S. "national champion" that could ensure a U.S. counterpart to SAP.

[4] *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

antitrust laws.[5] Building upon the words of Judge Learned Hand almost fifty years ago, the Court declared that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[6] The Court then proceeded to reject expansive views of a monopolist's duty to deal with its competitors, emphasizing that compelling firms to share "is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[7]

III. The Corporate Leniency Program

Having now given you an overview of our enforcement priorities, I would like to tell you a little more about the most powerful tool we have for cracking cartels: our corporate leniency program. The original version of our leniency program actually dates back to 1978. Under that program, violators who came forward and reported their illegal activity before an investigation was underway were eligible to receive a complete pass from criminal prosecution. The grant of amnesty, however, was not automatic and the Division retained a great deal of prosecutorial discretion in the decision-making process. It eventually became clear over time that this program was flawed. It resulted in relatively few amnesty applications and did not lead to the detection of

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[5] *Verizon Communications Inc. v Law Offices of Curtis v. Trinko, L.L.P.*, 124 S. Ct. 872 (2004).

[6] *Id.* at 879.

[7] *Id.*

a single international cartel.

In 1993, the Division revised its leniency program to make it easier and more attractive for companies to come forward and cooperate with the Division. Three major revisions were made to the program: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution. As a result of these changes, the leniency program became the Division's most effective generator of international cartel cases. The application rate jumped to more than one per month, and the Division frequently encounters situations in which a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for leniency. (Of course, only the first company to qualify receives amnesty.) Since fiscal year 1997, cooperation from leniency applications has resulted in scores of convictions and over 1.5 billion U.S. dollars in criminal fines.

That brings me to the most recent improvement to the leniency program, which came about as a result of legislation that our Congress passed and President Bush signed into law in June of this year. This new legislation gives cartel members an even greater incentive to turn themselves in. It does that by limiting their potential damages in private lawsuits to single damages based on their own role in the cartel, provided that they also cooperate with plaintiffs in the private lawsuit. Other cartel participants remain fully liable for treble damages based on harm caused by the entire conspiracy. The result should be more cartels exposed and brought to justice, both in criminal prosecutions and in private legal actions. It is important to emphasize that this provision reduces civil damages from corporate amnesty applicants to single damages in

a private lawsuit *only* if an applicant cooperates with the plaintiffs in that lawsuit. It will be up to the court in which the civil action is brought to determine whether cooperation is satisfactory, but the statute makes it clear that cooperation shall include providing a full account of all relevant facts known to the applicant. This "detrebling" provision was intended to provide the most incentive possible for firms and individuals participating in illegal conspiracies to seek the protection of the leniency program. We are looking forward to seeing the results of this new legislation.

As a final note, I should add that the extraordinary success of the Division's leniency program has generated widespread interest around the world. We have advised a number of foreign governments in drafting and implementing effective leniency programs in their jurisdictions. As a result, jurisdictions such as Canada, Brazil, the United Kingdom, Germany, Ireland, The Czech Republic, Korea, and the EC have announced new or revised leniency programs, with still other countries in the process of doing so.[8] The convergence in leniency programs has made it much easier and far more attractive for companies simultaneously to seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have exposure.

[8] Most significant was the European Union's recent adoption of a revised leniency program in February 2002. The new program establishes a far more transparent and predictable policy than its predecessor and brings the EC's program closely in line with the Division's Corporate Leniency Policy. In fact, in greatly reducing the amount of discretion involved in assessing amnesty applications and in creating the opportunity for companies to qualify for full immunity after an investigation has begun, the EC's revisions are similar to the ones made by the Division when we successfully expanded our program in August 1993.

IV. International Cooperation in Antitrust Enforcement

Finally, I would like to describe briefly some of the many things the Antitrust Division has been doing in its ongoing effort to promote international cooperation in antitrust enforcement. I will focus on three areas in particular: (1) cooperation in anti-cartel enforcement; (2) the intellectual property working groups we have formed with other jurisdictions; and (3) the tremendous success of the International Competition Network.

A. Cooperation in Anti-cartel Enforcement

Nowhere is the issue of international coordination more crucial to our enforcement mission than in the area of cartels. Cooperation among competition law enforcement authorities has undergone an extraordinary change in the past five years. During that period, there has been a growing worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere. This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to investigate and prosecute international cartels more effectively.

In the EC, for example, we now have an important partner in the fight against international cartels. We routinely share non-protected information and coordinate investigative strategies with the EC in order to maximize the success of each other's investigations. EC member states have executed search warrants and obtained testimony and other evidence at our request. The end result of our efforts is often coordinated, simultaneous raids, service of subpoenas, and drop-in interviews of targets located in the United States and Europe. A good example of just how smooth and effective our coordination has become occurred in February

2003, when the antitrust enforcement officials of the United States, the European Commission, Canada, and Japan coordinated surprise inspections, interviews, and other investigative activity in a cartel investigation relating to the impact modifier industry. Without highly effective working relationships among all of those jurisdictions, coordinated action on such a large scale would not have been possible.

B. Intellectual Property Working Groups

Another important area for cooperation is in the application of antitrust law to intellectual property. Of course, it has become widely recognized that intellectual property has in recent years become one of the most valuable assets in the global economy. In the Department's view, antitrust enforcement policies must be carefully designed not to interfere with or discourage the legitimate exploitation of intellectual property rights through technology licensing. After all, the economic return from technology licensing is what encourages innovative firms to produce new products and feed the global economy.

As a general matter, we have found that the use of working groups devoted to specific policy issues is one of the most important informal cooperation tools we have. Working group sessions usually proceed by video or telephone conference and are supplemented by some in-person meetings. The antitrust agencies on both sides commit experienced lawyers and economists to the discussions. Group meetings consist of presentations of each agency's approach on one or two focused issues. The sessions are intended to create an open exchange of ideas to question and analyze one another's premises, assumptions and theories. We have used the working group format with great success with the EC to address merger review topics such as conglomerate mergers and efficiencies. The most notable result from the merger working group

between the US and the EC thus far is the development of a set of best practices for coordinating our merger reviews.

Specifically with respect to intellectual property, we have formed a number of working groups with other agencies to address the challenging IP issues that arise in the antitrust context. Over the past two years, we have had very informative and candid discussions on intellectual property topics, such as patent pools, in our bilateral IP Working Group with the EC. This year we also established an Intellectual Property and Competition Law Working Group with the Japan Fair Trade Commission to promote convergence on the proper relationship between antitrust laws and intellectual property laws in order to best preserve innovation incentives. We have had two meetings of the Working Group so far, and we expect to meet again in the coming months. We have also established an Intellectual Property and Competition Law Working Group with the Korea Fair Trade Commission, and we had our first meeting by videoconference in August.

C. International Competition Network

Finally, of course, there is the important work of the ICN. As many of you know, the ICN was founded just over 3 years ago by the Justice Department, the United States Federal Trade Commission, and 13 other jurisdictions. It now has roughly 90 members from 80 jurisdictions, and is at the forefront of global antitrust convergence. In the thirty months since its inception, the ICN has proven to be successful. The ICN is a platform unlike any other – exclusively devoted to antitrust. That focus drives the efforts of working groups focused on specific competition law issues. But the ICN has none of the formal trappings of an organization. It is a member-driven virtual network organized around goal-oriented working groups that consult regularly and informally. There are no binding obligations, just a desire to identify and promulgate best

practices. This aspirational working model allows us to make faster progress than is usually possible in multilateral organizations.

The ICN has made its greatest strides in the merger area where – under Antitrust Division leadership – ICN members have adopted eight guiding principles around which a merger regime should be built and 11 recommended practices for merger notification and review. The Recommended Practices are already having an effect on multijurisdictional merger review. More than one dozen ICN members have made changes to their laws, practices, and procedures to bring their laws into greater conformity with the ICN practices. Over one dozen additional jurisdictions are in the process of developing or amending merger review laws and policies and are now looking to the guiding principles and recommended practices as models.[9]

The work of the ICN, of course, is not limited to mergers. Last spring, the ICN established a Cartel Working Group, chaired by the EC. The Antitrust Division is co-chairing a subgroup on the general framework for anti-cartel enforcement. Our subgroup's initial projects include an evaluation of the definition of hard-core cartel conduct, an analysis of the elements of effective institutions that investigate and prosecute cartels, and a study of effective penalties for cartels. The second subgroup is focused on Enforcement Techniques. Later this week (Nov 19-21), Australia is hosting the 2004 ICN International Cartel Workshop, the first time this event has been planned under the auspices of the ICN. The Enforcement Techniques subgroup will also

[9] Other ICN accomplishments in the merger area include the very successful merger investigation techniques workshop held last month in Brussels (October 20-21). The workshop revolved around a hypothetical transaction involving the merger of two soy milk producers. Over 100 staff lawyers and economists from nearly 50 agencies, plus 13 European and American NGAs participated in interactive sessions on investigative techniques for merger review, including sessions on planning the investigation, interaction with the merging parties and third parties and developing quantitative evidence.

hold a Leniency Workshop after the Cartel Workshop (Nov 22-23) to discuss leniency programs and their implementation, with members from around the world. These workshops demonstrate the important role the ICN can play in promoting cooperation and convergence among international antitrust enforcement agencies.

V. Conclusion

In conclusion, I hope that I have given you some sense of our priorities at the Department of Justice, both in terms of our enforcement priorities at home, as well as the priority we place on international cooperation and convergence.