Department of Justice

STATEMENT
of
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Concerning

Mergers and Corporate Consolidation

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Mr. Chairman, and members of the Committee, it is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice. Sound antitrust enforcement is vital to America's economic health. American consumers benefit from the kind of free-market economy that antitrust enforcement engenders. Protecting against anticompetitive actions, including anticompetitive mergers, helps consumers obtain more innovative, high-quality goods and services at lower prices, and enhances the worldwide competitiveness of American businesses by promoting healthy rivalry, encouraging efficiency, and ensuring a full measure of opportunity for all competitors.

Today's hearing, on mergers and consolidations, is certainly a timely one. There can be no doubt that we are currently in the midst of an enormous merger wave that is sweeping the U.S. economy.

To try to grasp the enormous level of on-going merger activity, I have looked at some historical and projected data that I would like to share with you. For every $1 of U.S. merger activity that occurred in 1992 (only six years ago), today there is $10 dollars occurring (a 1000% increase). Another amazing comparison is the following: if you combined the value of all U.S. merger activity that took place in 1990, 1991, 1992, 1993, 1994, 1995, and early part of 1996, it would approximately equal the value of merger activity that can be expected in 1998 alone. We will likely see close to $1.75 trillion worth of U.S. merger activity in 1998, equal to over one-fifth the value of our entire gross national product.

This merger wave is not slowing down; in fact it appears to be increasing. In the last year alone, the value of U.S. merger activity doubled, a bigger one-year percentage increase than any other year in the

1990s. The dollar value of the *increase* in merger activity from 1997 to 1998 alone is likely to surpass the value of *all* merger activity in the years 1990, 1991, 1992, and 1993 *combined*, by a healthy margin.

Looking at the number of mergers, instead of the dollar value of mergers, confirms the existence of a merger wave. In the last four years, the number of Hart-Scott-Rodino premerger notification filings has doubled. Since 1992, the number of merger filings has tripled. There simply can be no doubt that, however you analyze it, there is an enormous current level of merger activity.

Many explanations have been given for the increase in merger activity that we have seen, among them the following: a robust economy and stock market; increased globalization; rapid technological change; deregulation; and general industry upheaval in particular industries. At this point let me just say that whatever the reason or reasons for the increase in mergers, a crucial, absolutely essential requirement that needs to accompany any merger wave of this size and scope is rigorous and vigorous antitrust enforcement.

Importance of Antitrust Enforcement with Respect to Mergers

Section 7 of the Clayton Act is an incipiency statute. That is, it is designed to prevent the potential for anticompetitive activity before it occurs. In pertinent part, Section 7 reads as follows: No person shall acquire stock or assets where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." To the extent that a proposed merger may substantially lessen competition by facilitating collusion between remaining competitors or by creating or enhancing market power, the merger would violate Section 7.

The fact that Section 7 is an incipiency statute evidences a recognition by Congress that it is crucial to make predictive judgments about the potential for competitive harm resulting from a merger rather than letting the merger go through and awaiting the anticompetitive results prior to challenging the merger. Section 7, in conjunction with the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, allows us to prevent anticompetitive mergers before they can harm consumers.

Our focus as antitrust enforcers in reviewing mergers is always on whether a particular merger will hurt consumers by raising prices, reducing quality or limiting innovation. While most mergers either are competitively neutral or beneficial for competition and consumers, there can be no doubt that there are some anticompetitive mergers proposed that would endanger choice, innovation and low prices, and these mergers should and must be prevented.

Sometimes people complain about a merger solely based on its size. From our perspective, however, I want to make clear that antitrust analysis focuses on the specific competitive harms that may be associated with a particular merger, not on its size in the abstract. Thus, for example, a big merger may not be challenged because the merging parties are not competitors or potential competitors of one another and the merger does not raise any vertical antitrust issues. At the same time, we may challenge a smaller merger that involves the only two firms that make a particular product. The key for our review is whether the merger will harm consumers, not the sheer size of the corporate entities involved.

In contrast to the 1980s, when many mergers were primarily motivated by financial considerations, many of today's mergers are primarily motivated by business strategy. This means that more than ever before, mergers may raise competitive questions that need to be reviewed carefully to ensure that the mergers will not harm competition and consumers.

Precisely because many of today's mergers are strategically motivated, it is crucial that we have the resources and ability to conduct a comprehensive review of proposed mergers that raise competitive issues prior to their consummation. The mergers occurring today can be expected to have long-term effects on markets and on the future of our economy. In short, from a public policy standpoint, an ounce of cure today may prevent a pound of competitive harm later.

I frankly am concerned that the resources of the Antitrust Division are not keeping pace with this merger wave and that this could have deleterious ramifications for our economy. As I noted at the beginning of my testimony, the merger wave is expanding enormously and gives no evidence of cresting. In contrast, the Antitrust Division's funding has essentially remained constant in the last four years. That needs to change and to change significantly.

Antitrust Division Merger Enforcement

The merger wave of the 1990s has left us with a full plate of mergers to review. Fortunately, with a talented, hard-working professional staff and useful investigatory tools such as HSR premerger notification, we have the ability to identify proposed mergers which could harm consumers and the economy. In FY 1997, the Division brought a record 31 merger challenges. So far this fiscal year, we have brought 29 more, well on our way to another record level of merger enforcement.

The challenges we have brought do not necessarily share any particular theme, other than the fact that the merger as proposed would have substantially lessened competition and, by doing so, it would have harmed consumers. We have had concerns and sought competitive remedies in such diverse industries as banking, defense, radio, aluminum, electricity, cable, waste removal, telecommunications, and health care, among others. We have challenged horizontal mergers, vertical mergers, mergers between actual competitors and mergers between potential competitors.

But, at the same time, our enforcement record shows that we carefully review each merger so as not to hinder procompetitive, efficiency-enhancing transactions from going forward. Even during a record breaking merger wave, I think it is useful to remember that the majority of mergers do not threaten to harm competition and consumers; in fact, many mergers may increase efficiency, improve research and development, and lower prices to consumers. Because of these benefits, even when we do have reason to believe a merger as proposed may be anticompetitive, we examine whether there are effective ways to prevent the anticompetitive aspects of that merger from going forward, while not prohibiting parts of the deal that do not raise anticompetitive concerns.

Rationales for Mergers

Earlier in my testimony, I noted that there are a variety of different reasons proffered for many of the mergers currently being proposed. I mentioned technological change, increased globalization, deregulation, industry upheaval, and the robust economy and stock market. Of course, this list is not meant to be all-encompassing, but it illustrates some of the rationales that have been proffered for many mergers.

Some mergers are proposed as a response to technological changes in an industry. While many mergers of this type may raise no antitrust concern, we have to be cautious to ensure that a current dominant firm in the market is not merging to prevent an upstart from challenging its domination in an industry.

An example of an anticompetitive merger of this type is the Primestar merger that we sued to prevent last month. We filed suit to block Primestar's acquisition of the direct broadcast satellite (DBS) assets of News Corp. and MCI. We concluded that the proposed acquisition would allow five of the largest cable companies in the U.S., which control Primestar, to protect their cable monopolies and keep out new competitors. As you know, DBS is an alternative method of providing multiple channels of television programming to consumers. Under the proposed acquisition, News Corp./MCI would transfer to Primestar authorization to operate 28 transponders at the 110 west longitude orbital slot and two high-power DBS satellites currently under construction. The 110 slot is one of only three orbital slots that can be used to provide high-power DBS service to the entire continental U.S. and is the last position available for independent DBS firms to use or expand into.

As we have alleged in our complaint, high-power DBS is the most serious competitive threat the cable industry has ever faced, and, in many areas, is the only significant competitor to cable. Primestar would have no incentive to use the valuable 110 capacity to compete aggressively against cable companies, because doing so would "cannibalize" its owners' existing cable subscribers. Rather, acquisition of these assets by Primestar's cable owners would prevent an independent firm from using the assets to compete directly and vigorously with their cable systems. In the end, the transaction would deny millions of American consumers the benefits of competition, including lower prices, higher quality, better service, greater choice, and increased innovation.

Increased globalization is another reason for some mergers. Some companies seek to merge to better enable them to sell their products or services internationally -- they argue that they want to compete globally. The increasing globalization of markets certainly does not alleviate the need for antitrust review: if anything, it presents many new and difficult challenges for an antitrust enforcer.

In merger analysis, it is especially important to determine the market in which competition is occurring. A merger or other activity that may appear to violate the antitrust laws if the market is presumed to be national in scope may be permissible if the market is actually international (or even global) in scope. This is because the broader geographic scope of the market may result in additional competitors being included within the market, which is one of the main indicators for whether a merger can go forward without harming competition and consumers. At the same time, however, we have heard the mantra of increased globalization as the reason for mergers where the particular markets affected were likely to remain local, not global, for many years to come. Thus, the mere invocation of increased globalization as a purported rationale for a merger does not result in a free pass from competitive review. Instead, the particular facts and circumstances surrounding the markets involved need to be examined closely in order to ensure that consumers will not be harmed.

An example of a proposed merger where we concluded that purported global rationalizations did not suffice to prevent anticompetitive harm was our review of the proposed merger between Inco and Hanyes, two high performance nickel alloy manufacturers. After examining the facts and circumstances of that matter, we concluded that a global market definition did not withstand scrutiny and that the merger of these two producers would substantially lessen competition in the United States. Faced with an antitrust challenge, the parties abandoned the proposed merger.

Deregulation of an industry may provide heretofore unavailable merger options for companies. Our experience shows that we often see an increase in mergers after deregulation. In part, that may be the result of natural market forces that have been constrained due to the artificial restrictions of regulation. In many industries, it is likely that the majority of mergers following deregulation will not raise serious competitive concern, but specific mergers may well concern us.

One example of an industry where there has been significant consolidation following deregulation is radio. There have been hundreds of radio mergers since Congress lifted the cap on the number of radio stations that could be owned in a single market in the Telecommunications Act of 1996. Many of these mergers did not raise significant antitrust problems. But, a not insignificant number did cause us concern. In the last two years, we concluded that a total of 15 radio mergers would likely be anticompetitive. We concluded that many other radio mergers did not raise serious anticompetitive concerns and allowed the market to adjust to the lifting of the restrictions on ownership.

A similar story could be told with respect to banking mergers. As laws were changed to permit interstate banking, the industry adjusted, in part, through mergers. Many of these mergers did not raise antitrust concern and were a natural market response to the lifting of the restrictions on the market. At the same time, certain individual proposed banking mergers did cause us concern. In the last two years, we have sought competitive remedies in a total of 21 banking mergers, including First Union/Corestates, Nationsbank/Barnett and Banc One/First Commerce.

While the merger wave of the 1990s has come ashore across our entire economy, for certain key sectors of our economy, it has included a substantial number of the major firms. In defense, for example, there has been declining demand resulting in substantial overcapacity. A number of defense mergers proceeded unchallenged over the last 5 years, which rationalized capacity, but, if that rationalization goes too far, it can harm competition. Thus, in two cases in 1997 and one in 1998, we challenged major mergers in the defense industry due to competitive concerns. In 1997, we reached consent decrees with companies proposing mergers in the defense industry -- they involved two acquisitions last year by Raytheon, one of the defense electronics division of Texas Instruments, and one of General Motors' Hughes Aircraft subsidiary -- and earlier this year, we sued to challenge the proposed merger between Lockheed and Northrop Grumman.

In the Raytheon/Texas Instruments matter, we reached a settlement that allowed the acquisition to go forward, but required Raytheon to sell the Texas Instruments business that produces a key component for radar systems. I believe that the merger as originally proposed would have resulted in significantly higher prices paid by the Department of Defense -- and ultimately by taxpayers -- for advanced military radars used in major weapons systems.

We also concluded that the other Raytheon acquisition, of Hughes Aircraft, would harm competition if it went forward as proposed. We insisted on a broad range of remedies, including divestiture of two defense electronics businesses, to preserve competition in sophisticated technology for U.S. weapons systems. For another weapons system for which both Hughes and Raytheon were competing for development and production of at the time of the merger, a new anti-tank missile for the Army, we required Raytheon to establish procedures to prevent the two competing teams of employees from sharing information with each other, thereby preserving the independence of these teams in the competition.

And as an additional remedy, Raytheon agreed to set firm prices with the Air Force on certain air-to-air missiles for which Raytheon and Hughes had given competing bids before the merger, saving the Air Force $180 million over the next 4 years.

In March of this year, we filed suit to block the acquisition of Northrop Grumman by Lockheed Martin. Working closely with the Department of Defense, we concluded that if the proposed merger were allowed to proceed, the U.S. military would suffer a substantial loss of competition and innovation for a number of critical systems and components, including high performance military aircraft, radar for use in military aircraft, sonar systems used on submarines and surface ships, and electronic warfare systems designed to protect pilots from missile attack. The proposed $11.6 billion acquisition is the single largest ever challenged by federal antitrust authorities. Trial is scheduled to begin September 8.

The increase in the market value of a company's stock may enable it to effectuate a merger using its stock more easily. Thus, the robust stock market and robust economy could result in more mergers. Most of these mergers are likely to be competitively neutral or even beneficial; however, some may be attempts to preserve or enhance market power. Expanding economy or not, we are tasked to and will review all mergers to ensure that they do not substantially lessen competition.

Challenges Ahead for Antitrust Enforcement Regarding Mergers

Antitrust enforcement in the merger area has never been as time-consuming, complex, or as central to the functioning of our economy as it is today. I would like to briefly touch on just two of the major challenges I see ahead for the Antitrust Division's merger enforcement efforts.

Global Antitrust Enforcement

Because we are increasingly seeing mergers that may affect competition and consumers in more than one country or continent and because of the increasing importance of antitrust in many countries around the world, it is not surprising that we increasingly are reviewing transactions that are also being considered by foreign competition authorities.

In mentioning this, of course, I am immediately reminded of the concerns that arose last summer when the Federal Trade Commission and the DG IV of the Commission of the European Communities (EC) reached different conclusions with respect to the Boeing/McDonnell-Douglas merger. While that kind of divergence is unique in our experience, we still must explore ways to avoid any recurrence and, to that end, we and the FTC have been working closely with DG IV. Given the understandable concerns about national sovereignty, navigating these waters -- along with other issues raised by multi-jurisdictional merger review -- will not be easy.

On this point let me emphasize that notwithstanding the great strides we have made in cooperative merger enforcement with the EC, the

Department of Justice makes its own decisions, based on U.S. antitrust law, in all of its matters, independent of the enforcement decisions or interests of the EC. We have heard concern in this regard specifically as to the MCI/Worldcom merger. While cooperation can be very beneficial in cases where two different antitrust authorities are reviewing the same matter, we will not permit such cooperation to affect the independence of federal antitrust enforcement in the United States with respect to our review of the MCI/Worldcom merger or any other matter.

Efficient Merger Review

Another significant challenge to antitrust enforcers involves how to keep up with the influx of premerger filings, how to effectively review them in a timely fashion without imposing substantial unnecessary cost on businesses or sacrificing consumer interests, and how to resolve cases when antitrust concerns exist after the investigation. I believe we have taken a number of important steps in these regards -- such as speeding up our clearance procedure and our review of matters that do not raise serious antitrust concerns, focusing our investigation at its earliest stages, and working closely with parties regarding our concerns so that they can take steps to alleviate them. We are ever watchful, of course, that we are doing the best we can with the resources we have.

One area where we are attaining new efficiencies in merger review is through improved cooperation between the Division and the state attorneys general. Where appropriate, we try to work with state investigators, interviewing and even deposing witnesses together, and sharing documents where the parties consent or where the law permits. In several instances in the past few years, this close cooperation has led to the Division and states filing joint complaints. In March of this year, the Department, the Federal Trade Commission and the National Association of Attorneys General released a protocol under which federal and state antitrust enforcers will cooperate on merger investigations. The protocol reduces to writing the procedures that the Department and the FTC staff and states have been following in recent years. Working together with state AGs has helped both in achieving consistent antitrust enforcement and in extending our resources.

Finally, I will come back to the need for additional resources. In the past year alone, HSR filings have increased 30%. The four largest mergers in this country's history are currently pending before the Antitrust Division. These mergers take significant time and resources to evaluate properly. Ensuring that the antitrust agencies have the resources to keep up with the merger wave is essential. The mergers are there; the resources need to be there as well.

Conclusion

I would like to conclude my remarks by reiterating that our focus in reviewing each merger is on whether the merger will hurt consumers by raising prices, reducing quality or limiting innovation. While we will not stand in the way of mergers that are competitively neutral or even beneficial for competition and consumers, we will continue to take whatever action is necessary -- and insist on whatever remedy is necessary -- to prevent anticompetitive mergers.