



DEPARTMENT OF JUSTICE

INTERNATIONAL ENFORCEMENT AT THE ANTITRUST DIVISION

Address by

DIANE P. WOOD
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Greater Cleveland International Lawyers Group
Cleveland, Ohio

January 17, 1995

Good afternoon. I am delighted to appear -- as Henry King mentioned, for the second time -- before this distinguished group of international lawyers. The Greater Cleveland International Lawyers Group includes a rare combination of legal specialists and representatives from the important industries located in this area. For my part, this makes me especially eager for today's discussion to be a two-way street: I will give you an overview of the international enforcement activities that are underway at the Antitrust Division, with particular emphasis on the draft International Guidelines that we published jointly with the Federal Trade Commission last October, and I hope that you will let me know your thoughts on those guidelines, and more generally your views about the direction we have taken and should take in the coming year.

I hardly need remind this audience of the importance of the international dimension of antitrust enforcement. As Assistant Attorney General Anne Bingaman frequently notes, international transactions today account for nearly a quarter of the United States' Gross Domestic Product. Imports provide a nearly bewildering array of choices for U.S. consumers, and the competition they provide for domestic industries has helped to stimulate technological advances here at home, which in turn make our products more competitive overseas. Exports play an equally important role in the health of our economy, both for the industries that export goods and services directly, and for the many upstream jobs that each export supports. Our emphasis on international enforcement of the antitrust laws is, in light of the global nature of business, simply inevitable.

In the time I have available, I will begin by discussing some of the major cases we have brought since Anne Bingaman became the Assistant Attorney General in June of 1993, and I was fortunate enough to be asked by Anne and the Attorney

General to serve as the International Deputy. I will then bring you up to date on the International Antitrust Enforcement Assistance Act of 1994, which President Clinton signed into law on November 2, 1994. Finally, as I noted above, I will discuss the high points of our draft Antitrust Enforcement Guidelines for International Operations. I will leave plenty of time for questions and comments from the group, either on these topics or others of particular interest to you.

I. International Case Initiatives

Our international cases have arisen in virtually every area of antitrust enforcement: we have had civil cases under both section 1 and section 2 of the Sherman Act; we have reviewed and addressed our concerns in a variety of international mergers and acquisitions; and we have been active in international criminal enforcement. I will review these quickly, since I assume that you are generally familiar with the story.

Civil Enforcement. Let me begin with the civil, non-merger, cases, both in the international field and across-the-board. While I cannot discuss most of our activities here, because they involve on-going investigations, three matters are on the public record, and they indicate the scope of what we are prepared to do.

First is the action we brought against the United Kingdom company Pilkington, which was settled by a consent decree filed in the District of Arizona. That case is well known as the first action challenging restraints on U.S. exports since the Bush Administration in April 1992 withdrew the famous (or infamous) "footnote 159" of the 1988 International Guidelines, which had stated that the Department would not bring actions

when the only anticompetitive effect was on the exports of U.S. exporters, and thus no immediate consumer welfare harm in the United States was discernible. I will have more to say about that policy and its repeal when I discuss our draft International Guidelines, but for now it is enough to say that the Division has consistently supported the restoration in April 1992, under Jim Rill's leadership during the Bush Administration, of the longstanding U.S. concern with restraints on exports. The Pilkington consent decree is the first one filed under the restored policy.

Beyond the fundamental jurisdictional point, there are several other important lessons to be drawn from the Pilkington decree. First, it involved a complex network of licenses, whose scope was greatly in excess of any remaining intellectual property they purported to protect, and that literally had the effect of dividing up the entire world for glass-making technology and plant construction. Second, all relevant actors had extensive contacts with the United States market, including of course Pilkington itself. Third, the decree does not require Pilkington to give up any legitimate trade secrets that it still retains, which illustrates both our commitment to respect *bona fide* intellectual property and our determination not to allow restrictions that go far beyond those needed to protect such property rights. Finally, the case illustrates how the elimination of anticompetitive restrictions can create market opportunities for all competitors. As a result of our consent decree, U.S. firms will have the right to bid on projects that will involve up to \$1 billion during the next few years.

The international dimension of the Microsoft case was different in a number of respects from Pilkington. First, of course, it did not focus on exports from the United States, but rather on the effect of the challenged practices on

competition within the United States market. Second, the decree was the result of an unprecedented type of cooperation with a foreign competition authority -- the Commission of the European Union -- because the company itself believed it would be beneficial to allow close cooperation to take place. Microsoft accordingly agreed to waive whatever confidentiality rights it would otherwise have been able to assert to prevent the two agencies from working together, which allowed both the investigations and the eventual settlement negotiations to take place in a fully coordinated manner.

The result was that on July 15, 1994, the Antitrust Division and the Commission reached essentially identical settlements with Microsoft, which the Commission implemented immediately under its procedures by obtaining binding "undertakings" from Microsoft, and which we implemented by filing a proposed consent decree in the U.S. District Court for the District of Columbia pursuant to the Tunney Act. Proceedings on the consent decree are still pending in that court.

The third civil matter that I want to bring to your attention may not be one that is quite as well known. It involves one of our pending investigations, into possible world-wide anticompetitive arrangements in the distribution and performance of music videos and related programming. We sought, through Civil Investigative Demands, to obtain information located within the United States, from U.S. companies, that is relevant to this investigation. When the CID recipients resisted, on the ground that any eventual lawsuit relating to non-U.S. activities would exceed our jurisdiction, we filed a motion to enforce the CID's in U.S. District Court in the District of Columbia. That motion has now been briefed by all parties, and is awaiting argument in the court.

Obviously, there are limits on what I can say about the case itself. However, the motion to enforce the CID's makes several points clear. First, we are just as concerned with service and intellectual property based industries as we are with more traditional "goods" industries. Second, when we have reason to believe that anticompetitive restrictions in world markets exist that affect both exports from the United States and industries within the United States, we will investigate these matters carefully. Third, we clearly have jurisdiction to look into such matters using U.S. based materials: this is *not* a case where the existence of foreign blocking laws or other evidentiary issues are even remotely relevant. I invite you to watch the progress of the motion to enforce as it moves through the courts.

Mergers and acquisitions. Mergers and acquisitions frequently involve some foreign dimension, if one of the parties has a foreign owner, or has foreign affiliates, or has foreign assets. I could not possibly describe all these cases, nor would you want me to, because most mergers will not have anticompetitive effects, and most do not present anything noteworthy from the standpoint of international enforcement. As the Clayton Act mandates, our question is always whether the transaction may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the United States, and the pre-merger notification system of the Hart-Scott-Rodino Act allows us to investigate this question just as effectively in cases with international elements as in others.

Two cases do stand out, however, because they involve more than the normal process. During the General Motors (Allison Division)/Zed F investigation -- which is better known for the concept of innovation markets for heavy-duty transmissions alleged in the third Court in the government's

case challenging that acquisition -- we knew that the German Federal Cartel Office was also reviewing the same deal. Through coordination with that office on key points such as the procedural status of each of our cases, we were each able independently to come to a satisfactory solution. In our case, we filed suit to block the transaction, and the parties decided to abandon it. The Federal Cartel Office was also prepared to move to block it.

British Telecom/MCI is an instructive example of an acquisition that was allowed to proceed after creative conditions were devised to alleviate our concerns about competition both for U.S. consumers' access to various international telecommunications services, and for access to the U.K. market for other U.S. long distance providers, were addressed in a consent decree. The consent decree takes full account of the regulatory situation in the U.K., and of the fact that U.K. law itself is committed to the principle of nondiscrimination and competitive access. The decree acknowledges the role of the U.K.'s Office of Telecommunication (OFTEL), and carefully seeks to avoid conflicts between the Antitrust Division's continuing role in enforcing the decree (designed to protect the U.S. interests I noted) and OFTEL's responsibility for the U.K. market. Particularly in sectors where regulation plays an important role, this approach will be important. It is a good illustration of what we mean when we say that we incorporate principles of international comity in our enforcement decisions.

Criminal. Criminal enforcement continues to be a core part of the Division's mission. We have expanded certain aspects of our criminal enforcement program, through greater efforts to coordinate and cooperate with the state attorneys general, through more effective use of our own seven field

offices, through our new Individual Leniency Program and our broader Corporate Leniency Program, and through our intensive efforts to increase our own internal efficiency.

With respect to international cartels, the greatest single obstacle we face is practical: how to collect the evidence we need to persuade a jury beyond a reasonable doubt that the crime has occurred, and how to get the individuals and companies involved before our courts. I do not mean to say that these problems are insurmountable; plainly they are not, given the fact that the Division has brought many successful international criminal cases over the years. Nevertheless, it is time-consuming and cumbersome to use procedures such as formal letters rogatory; those procedures are often not available at the investigatory stage of a case, as opposed to the post-filing stage; and there can be problems using them for antitrust criminal enforcement in countries whose own antitrust law does not include criminal penalties, and who insist on dual criminality as a condition for rendering assistance. Most importantly, the traditional procedures evolved at a time before the major industrial countries all had competition laws. Often they are simply not well adapted to antitrust enforcement needs.

In light of these circumstances, it is no accident that the biggest news for our international criminal enforcement program comes from Canada, where we have had in effect since 1990 a Mutual Legal Assistance Treaty that explicitly covers antitrust. Both countries have successfully used the MLAT for investigatory assistance. It has operated as a genuine two-way street: to date, there has been no serious imbalance in the number of requests for assistance by one side to the other as compared with the occasions when assistance was rendered.

In 1994, we used the MLAT successfully in two major cases. In the first, plastic dinnerware, we were able to obtain guilty pleas in this industry thanks in large part to assistance from the Canadians (including the Royal Canadian Mounted Police) in obtaining evidence located in Canada. In the second, fax paper, we brought the first joint (or perhaps more accurately, simultaneous) prosecutions, also due to very close cooperation under the MLAT.

The third prominent international criminal case did not have such a successful outcome, from the Division's point of view, but it certainly gave additional force to the widespread recognition of the need for better tools for international information-gathering. I am speaking, of course, about the prosecution of General Electric and De Beers for price-fixing in the industrial diamonds market. As you certainly know, since this trial was in Ohio, the judge ordered a Rule 29(a) judgment of acquittal at the conclusion of the prosecution's case, finding that the government's evidence was insufficient to sustain a conviction on the offenses charged.

I am not here today to reargue that case. As Anne Bingaman said when the judgment was entered, we respect the judge's decision. The message I take is forward-looking: we must have better tools to seek foreign-located evidence, and we believe the IAEAA is a major step forward in that direction. There will be many cases where key actions take place in Europe, Asia, or Latin America. Key witnesses will often be outside of the United States. When we investigate foreign price-fixing conspiracies, we do so because they inflict serious harm on U.S. customers for the product in question. Why should criminal price-fixers be able to hide their documents and witnesses outside our country and escape all accountability for their actions? Or, look at the problem from the opposite perspective: suppose we were investigating

a matter in which the parties actually were innocent. With full access to investigatory facts, wherever they were located, we would be able to determine this too, and we would not seek indictments. *Either way*, antitrust enforcement and the interests of law-abiding companies are served by full access to the evidence.

The future of international enforcement will depend in large part on our efforts and those of our counterparts in other countries to address this problem. We have taken the first few steps to do so, both through our program of Mutual Legal Assistance Treaties (which in some but not all cases cover antitrust) and, more importantly, through our new legislation. Let me turn now to that law, known to the cognoscenti as the IEAA.

II. International Antitrust Enforcement Assistance Act of 1994

This law was passed in record time -- only ten weeks -- thanks to the strong bi-partisan support it enjoyed in the Congress and in the business community. It was co-sponsored in the Senate by Senators Metzenbaum, Thurmond, Kennedy, Biden, Leahy, Simon, Simpson, Grassley, Hatch, and Specter and in the House by Representatives Brooks and Fish. Former AAG James Rill led an ABA task force that supported the bill, and he personally testified in support of it in both Houses. It was passed with overwhelming support from both sides of the aisle, and signed into law by President Clinton on November 2, 1994.

Perhaps the most important message I can deliver about this new law is this: it enables the Department of Justice and the Federal Trade Commission to create a framework within which the U.S. agencies will be able to cooperate and to

exchange information on a case-by-case basis with a foreign agency that is prepared to do the same for us. It does so first by making it perfectly clear that we will be able to extend the necessary protection to confidential information we receive from a foreign agency, when the necessary antitrust mutual assistance agreement covering that country or agency is in place. Second, it does so by lifting the prohibition under which we would otherwise be operating against the exchange of certain categories of confidential information that we collect: namely, information either agency collects through civil investigative demand, information the FTC gets through administrative subpoenas, and -- only when a federal judge issues an order under Federal Rule of Criminal Procedure 6(e) -- information the Antitrust Division acquires in the course of grand jury proceedings. The statute does not lift existing prohibitions protecting the confidentiality of materials submitted pursuant to the Hart-Scott-Rodino pre-merger notification procedures, nor does it permit the sharing of information that is either classified or in the process of being classified. Third, if a foreign agency party to an antitrust mutual assistance agreement needs the assistance of a U.S. court, it permits the Attorney General to go to court to seek such assistance.

In order to benefit from these statutory provisions, the U.S. agencies must enter into specific antitrust mutual assistance agreements using the procedures spelled out in the statute. The statute also makes clear what those agreements must contain, at a minimum: provisions designed to assure that the confidentiality of any information sent to a foreign agency by a U.S. agency will be protected just as well as it would be here; provisions detailing required procedures in case a breach of confidentiality occurs, including notice to the providing agency, notice to the providing party, and an obligation on the entity which committed the breach to ensure

that steps are taken to prevent future occurrences (and if they are inadequate, termination of the agreement). The entire system operates on the principle of reciprocity: we need information from other countries, and in order to get it, we must be in a position to give them information when they need it.

We are now in the very preliminary phases of briefing all interested persons -- including groups like yourselves, the international business community, and our counterpart agencies in countries with antitrust laws that cover the same matters as ours. It is plainly impossible for me to say exactly which country might be interested in having such an agreement, or when we might either begin or conclude any negotiations. What I can say is that you and the public at large will be fully informed before any such agreement enters into force, and that is an iron-clad guarantee. The statute itself, using a system that is rather unusual for international agreements, requires us to publish the text of a proposed agreement in the Federal Register before it can enter into force. The public will be entitled to comment on the agreement, to bring to our attention any experience individual commentators may have with the country in question, or to address any other point. However, if on the basis of the comments we realize that we must go back to the bargaining table, any amended text we reach must go through the same comment process before the agreement can enter into force. This unusual level of public scrutiny is due to our recognition of the importance of the confidentiality concerns that the business community communicated to us, and our desire to be as certain as possible that we are fully informed before we create the framework for specific case cooperation.

We are aware that many people both here and abroad have expressed qualms about the prospect of antitrust agencies

sharing confidential business information. American businesses fear the foreign agencies, and foreign businesses are apprehensive about the fate of their documents in our hands. Let me assure you that we understand this, and from what I have heard from many foreign agencies, they appreciate it too. Frankly, the problem we all face is a practical one. Where business itself is multinational, two outcomes are predictable: first, more cases will involve conduct that takes place in one country but that has anticompetitive effects on consumer welfare within a second country; second, more cases will actually require enforcement action in two countries (like fax paper). It is in no one's interest to ignore the first kind of case, or to have the second kind handled with the two authorities hermetically sealed off from one another. The type of controlled and modest inter-agency information sharing arrangement we are now able to create seems greatly preferable to some kind of supranational World Competition Authority, to which everyone reports and which will receive itself all this confidential business information.

III. Draft International Guidelines

On October 13, 1994, the Department of Justice and the Federal Trade Commission released for public comment new Antitrust Enforcement Guidelines for International Operations. They were then published in the Federal Register on October 19th, which triggered a 60-day public comment period that ended on December 19th. They represent the two Agencies' attempt to provide clear and uniform antitrust guidance to the business community. We are in the process right now of reviewing the comments that were sent to us. I cannot say when the final guidelines will be published, because we intend to review these comments very carefully and respond to the best of our ability to the key points that have been raised.

If you have not seen the draft, it is readily available through BNA and CCH publications, and it is on the Department of Justice's Internet gopher, gopher@justice.usdoj.gov.

In the time I have remaining, I would like to describe briefly both what these draft guidelines do, and what they do not do. As I proceed, I will try to highlight the more important differences and similarities that exist when one compares this draft to the 1988 International Guidelines, which the draft withdraws.

Two differences in scope are immediately apparent to the reader, one that broadens these guidelines and one that narrows them. For the first time, the international guidelines are a joint product of the Department of Justice and the Federal Trade Commission. Both of our agencies are justifiably proud of this accomplishment, because we considered it especially important for the United States to speak with one voice when it operates in the international arena. It is in this respect that the new draft is significantly broader than any of its predecessors.

The 1994 draft is narrower insofar as it does not, unlike the 1988 guidelines (and somewhat more like the 1977 guide), attempt to provide encyclopedic guidance about the substance of antitrust law. Although the restatement of general antitrust law was undoubtedly helpful to the foreign portion of the audience for these guidelines, we had two reasons for refraining from following this model. First, and most important, we disagree with the implication (stated or unstated) that substantive antitrust law is different *in principle* for international transactions. It is not. The results in any given case might well be affected by the international context, since it will affect the data that go into market analysis, entry conditions, and those who suffer

anticompetitive effects. This, however, is only to say that antitrust results depend upon a case-by-case analysis of all relevant facts, which is a proposition that holds equally well for domestic cases.

The second reason not to include general substantive guidance is our desire to avoid duplication or worse, confusion. We have already undertaken Herculean efforts to provide guidance in the particular areas that were treated in the 1988 guidelines, where we were in a position to do so. There is nothing to gain and everything to lose in an effort to restate the 1992 Horizontal Merger Guidelines, or the draft Guidelines for the Enforcement and Acquisition of Intellectual Property, in this document. The Assistant Attorney General has already explained her views on vertical transactions, in the statement she issued when she withdrew the 1985 Vertical Restraints Guidelines. Some have expressed a desire for joint venture guidelines, or vertical merger guidelines. If either or both are a good idea -- and I am not passing judgment right now on that question -- they are a good idea for all such transactions, not just those that fortuitously have an international element.

The topics included in the 1994 draft are the doctrines with particular relevance to international enforcement, as well as the effect of certain laws with particular international significance. Thus, section 3 of the guidelines covers key threshold issues such as subject matter jurisdiction, comity, defenses or additional considerations that arise when foreign government involvement exists, and the interaction between the antitrust laws and the international trade laws. For the first time, in Section 4, we have included a brief discussion of important investigative issues that arise in international transactions, such as the ability of the Agencies to obtain evidence located abroad and certain

Hart-Scott-Rodino exemptions for foreign transactions or parties. Throughout the draft, following the format we used in the Intellectual Property draft, we have interspersed Illustrative Examples.

The message that the reader should take from these guidelines, taken as a whole, is straightforward. We are committed to serious enforcement of the antitrust laws in the international area throughout the areas that Congress and the court have defined as within our responsibility. That means that we follow the Supreme Court's *Hartford Fire* test for jurisdiction when imports have a direct and intended effect in the U.S. market. That means that we follow the Foreign Trade Antitrust Improvements Act of 1982, or FTAIA, when it confers jurisdiction over foreign transactions and conduct that have a direct, substantial, and reasonably foreseeable effect on U.S. domestic or import commerce. And that means that we follow the FTAIA when it confers jurisdiction over conduct abroad that has a direct, substantial, and reasonably foreseeable effect on the export commerce of U.S. exporters. Let me emphasize that the latter two are statutory bases for our jurisdiction. This is why, in 1992, the Bush Administration, under the leadership of former Attorney General William Barr and former Assistant Attorney General James Rill, rejected the 1988 "footnote 159," and this is why we have consistently stated that we adhere to the 1992 policy, as is now set forth in 3.133 of our draft.

On the other hand, the draft guidelines are designed to send an equally strong message about the importance the Agencies attach to international comity, and our commitment to working cooperatively with our foreign counterparts. We no longer live in a world where only the United States has a strong antitrust law, and other countries are either hostile or indifferent to competition policy. I have been impressed

time and time again when I have attended meetings of the OECD's Committee on Competition Law and Policy with the sophistication, commitment, and seriousness of the antitrust enforcers from the various countries around the table. Activities and companies in the United States affect their markets just as often as activities and companies in their countries affect ours. Necessarily, we live in a world where overlapping antitrust jurisdiction is a fact. Enforcement in general, we believe, is best served when each country watches out for anticompetitive effects in its own market, but each country is also prepared to cooperate to the greatest extent legally possible with fellow enforcers. As Anne has said many times, we antitrust enforcers all sit at the same side of the table; we're all in the same business. That is why our message on the scope of our international responsibilities is in no way inconsistent with our strong commitment to international comity and cooperation. The guidelines have both messages woven throughout, and we will do our best to make sure that we are understood.

IV. Conclusion

This has been an incredibly exciting and challenging time to serve in the Antitrust Division. I am eternally grateful to Anne, to Attorney General Reno, and to President Clinton for giving me the opportunity to do so. I can assure you that, for me, nothing is more important than ensuring that the growing international sector of the U.S. economy abides by the same fundamental rules of competition policy that have worked so well for us for more than a century. We are working hard today to put in place the institutions, policies, and laws that will serve us in the years and decades to come, as the international economy becomes more and more integrated and the lines between "domestic" and "international" transactions blur perhaps beyond the point of recognition. With our cases, our

new legislation, and our guidelines, we have made a good start. With your help, we can continue and succeed. Thank you very much.