



DEPARTMENT OF JUSTICE

Public and Private Antitrust Enforcement in the United States

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Thank you, Alexander, for that kind introduction. I am grateful to you and to Vice President Almunia for the opportunity to participate in the third annual European Competition Forum. This increasingly important and prominent event typifies how the European Commission, under Mr. Almunia's leadership, has continued to encourage us all to focus on the challenges involved in developing and implementing a modern competition policy agenda. I applaud the effort.

In the panel that follows, Luc Gyselen—formerly at DG Competition and formerly my partner in private practice—will lead a discussion of what lies ahead for the European Competition Network, including issues involving the enforcement roles to be played by the Commission, by member states and by private actions. As an outsider, I do not presume to advise Europe on these important policy questions. That is for the experts on the next panel. What I can do, however, is discuss how we in the United States have approached similar questions. If the old proverb “experience is the best teacher” applies here, then the United States has been in school for a long time. Indeed, our first state antitrust laws were enacted 125 years ago, and the Sherman Act, our first federal competition law, is 124 years old.¹

Since the 19th Century, the United States has relied on a combination of federal, state² and private enforcers to combat anticompetitive conduct. The idea has always been that these three enforcers should play different, yet complementary, roles. Federal and state competition law enforcers have similar missions: both protect the public from the harms flowing from anticompetitive conduct. But federal enforcement seeks to protect the interests of all consumers across the nation, while state enforcers understandably focus their efforts on the consumers in their respective states. Similarly, private enforcers act on behalf of the specific concerns of their clients, usually seeking damages for any antitrust harms that have been inflicted.

¹ The five states and their anniversaries are: Maine (March 7), Kansas (March 9), North Carolina (March 11), Nebraska (March 29), Texas (March 30). The 125th anniversary of the first competition law in Canada is May 2.

² For simplicity, I use the term “state” to refer to all 55 sub-federal units of government, and all have competition laws. In addition to the 50 states and commonwealths, these are the District of Columbia, the Commonwealth of Puerto Rico and the U.S. territories of Guam, Northern Mariana Islands, and the Virgin Islands.

The roles played by federal, state and private enforcers have evolved over the decades. The precise role each enforcer now plays has been determined to an extent by what economists call the principle of comparative advantage: each enforcer focusing on what that enforcer is best positioned to do.

Cartel Enforcement

Cartel enforcement provides a good starting point. Having a single agency take the lead is particularly advantageous in uncovering and prosecuting price fixing and bid rigging. The lead agency has always been the U.S. Department of Justice, and that has been all the more important since 1974, when cartel activity became a felony under U.S. federal competition law. The department has the enforcement resources and powerful criminal investigative tools that private enforcers lack.

These tools include the grand jury and its power to compel both the production of documents and testimony, lawyers specialized in cartel enforcement, and the support of skilled investigators in the Federal Bureau of Investigation (FBI). In addition, efforts to frustrate Justice Department cartel investigations often are themselves federal crimes that subject the perpetrators to incarceration. Making knowingly false, material statements under oath before a grand jury is the crime of perjury.³ Making unsworn, knowingly false, material statements to department investigators or FBI agents also is a crime.⁴ And, various sorts of actions designed to interfere with a cartel investigation can constitute the crime of obstruction of justice.⁵ All of this machinery strengthens the department's ability to uncover and prosecute cartels.

Federal competition law applies to local cartel activity when the bad conduct has a nexus to interstate commerce, which it typically does.⁶ Although the Justice Department stands ready to refer cases involving local

³ See 18 U.S.C. §§ 1621, 1623.

⁴ See 18 U.S.C. § 1001.

⁵ See 18 U.S.C. §§ 1503, 1510, 1512 & 1519.

⁶ See, e.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) (A conspiracy to exclude a single ophthalmological surgeon from "the Los Angeles market" supplied the requisite nexus to interstate commerce.).

activity to state prosecutors,⁷ local cartels in the United States nevertheless often are investigated and prosecuted by the Justice Department.

The states more typically focus on securing monetary redress.⁸ In the U.S. system, our states have the same rights as private parties to sue for damages when they are the victims of cartels.⁹ In addition, a provision of federal competition law authorizes states to bring what are called *parens patriae* actions to recover damages on behalf of their people.¹⁰ Finally, the competition laws of most states allow the imposition of civil penalties—essentially fines—rather than criminal prosecution.¹¹

To assure that private parties have an adequate economic incentive to undertake costly antitrust litigation, federal competition law in the United States authorizes the award of treble damages, plus attorneys' fees. As our Supreme Court has explained: "By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'"¹² The Supreme Court also has called the "treble-damages provision wielded by the private litigant . . . a chief tool in the antitrust enforcement scheme" because the treble damage threat creates "a crucial deterrent to potential violators."¹³ And the Court has observed that this remedy was "also designed to compensate victims of antitrust violations for their injuries."¹⁴

In the United States, private treble damages actions against cartels promote both deterrence and compensation. Cartel defendants are jointly and severally liable for damages caused by the entire conspiracy. In major cartel cases, the damages recovered on behalf of U.S. consumers often

⁷ See Protocol for Increased State Prosecution of Criminal Antitrust Offenses (1996), available at <http://www.justice.gov/atr/public/guidelines/0618.pdf>.

⁸ See Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001).

⁹ See *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

¹⁰ See 15 U.S.C. § 15c.

¹¹ See ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK 19 & n.96 (2d ed. 2008).

¹² *Hawaii*, *supra* note 9, at 262.

¹³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

¹⁴ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

exceed the fines imposed in the Justice Department’s prosecutions.¹⁵ Most of this recovery goes to victims. Only direct purchasers can recover under federal law,¹⁶ but many state laws allow indirect purchaser recovery as well.¹⁷ And claims under the laws of many states can be combined in a single lawsuit in federal court.

The Justice Department does not directly assist private plaintiffs’ lawyers pursuing damages actions. For the most part, we are legally barred from doing so. Access to grand jury material is tightly controlled, and “particularized need” must be demonstrated before grand jury material can be obtained in civil discovery, and even then the interest in grand jury secrecy is balanced against the need for discovery.¹⁸

Nevertheless, the Justice Department’s cartel prosecutions facilitate success in follow-on private damages actions. The cartel convictions the department secures, including those secured through guilty pleas, constitute “prima facie evidence” in follow-on private damages actions against those convicted.¹⁹ As a practical matter, therefore, plaintiffs need show only the fact of harm and the amount of damage in order to recover. The rules of civil discovery in the United States allow plaintiffs to obtain from cartel participants whatever data and documents might be needed to carry their evidentiary burdens.

Private cartel damages actions also benefit from the cooperation of leniency applicants seeking to take advantage of the damages limitation provided in the Antitrust Criminal Penalty Enhancement and Reform Act of

¹⁵ See generally Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315 (2011).

¹⁶ *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 204 (1990); *Illinois Brick*, *supra* note 14, at 746.

¹⁷ This inconsistency between state and federal law was held not to be a basis to invalidate the state law in *California v. ARC America Corp.*, 490 U.S. 93 (1989).

¹⁸ See, e.g., *In re Air Cargo Shipping Antitrust Litig.*, 931 F. Supp. 2d 458, 463 (E.D.N.Y. 2013).

¹⁹ 15 U.S.C. § 16(a) (A conviction in a “criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .”).

2004, which we call ACPERA.²⁰ Under ACPERA, a company accepted into the Antitrust Division's leniency program has its exposure in civil damages litigation limited to its pro rata share of the total damages before trebling, provided that the company cooperates with the plaintiffs in the damages action. De-trebling eligibility determinations are determined by the court presiding over the damages action.

Our courts actively supervise the timing of civil discovery in private damages actions. Cartel damages actions commonly are filed while the Justice Department's criminal investigation of the conduct is ongoing. The department evaluates on a case by case basis whether certain types of civil discovery are likely to interfere with its investigation and, if so, whether to seek a stay of civil discovery, or limitations on its scope. Our attorneys are in contact with plaintiffs' attorneys in private cartel cases and receive status updates on the progress of the civil litigation and information regarding the effect of any stays as the civil cases progress.

Private damages cases against cartels usually are brought as class actions, though individual class members have the right to opt out and pursue separate cases and, in competition cases, this is increasingly common. The procedural rules for class actions in the United States were substantially revised in 1966 to make it easier to proceed on behalf of a class. Responding to the opportunity thereby created, some lawyers in the United States began to specialize in antitrust class actions. These lawyers pursue antitrust damages actions whenever the amount of money at stake is substantial and the prospect of recovery is significant. Our courts are frequently presented with issues that go to whether it is appropriate for a single plaintiff or small group of plaintiffs to maintain an action on behalf of a class in a particular case. The law continues to evolve in this regard.

Merger Enforcement

Merger enforcement also typically is led at the federal level. As you know, the Justice Department and Federal Trade Commission share that responsibility. Both agencies have experienced investigators, and between them, they conduct about 50 in-depth merger investigations per year. The department and the FTC coordinate on which agency will handle each merger and jointly promulgate guidelines setting out how horizontal mergers

²⁰ Pub. L. No. 108-237, §§ 201-214, 118 Stat. 666-67 (2004) (codified at 15 U.S.C. § 1 note).

are assessed. Both agencies also must litigate under the same court precedents.

Of course, many mergers are notified and investigated in multiple jurisdictions around the world. For such transactions, the U.S. agency handling a merger works in coordination with counterparts in other competition agencies, especially the Competition Directorate of the European Commission under our 1991 cooperation agreement and 2011 best practices document. In the year I have been back in government, once again doing antitrust enforcement, I have been impressed by the scope, the scale and the success of our cooperation with the talented public servants working at DG Competition.

Like the EU, we require advance notification for large transactions and the associated statute allows the federal agencies to obtain additional documents and data from the parties. Both U.S. federal enforcement agencies also have powers to obtain documents and data in investigating transactions not subject to the notification requirement and that already have been consummated. While the vast majority of the transactions do not pose competitive problems, both agencies challenge anticompetitive transactions where appropriate, and both have had successes in doing so.

The states also are active in merger enforcement.²¹ To facilitate coordinated merger review and enforcement, the states have established the Multistate Antitrust Task Force of the National Association of Attorneys General.²² The federal enforcement agencies have a protocol under which they cooperate with the states in merger investigations.²³ Each year,

²¹ The ability of states to challenge mergers under federal law and obtain full relief, including divestiture, was upheld in *California v. American Stores Co.*, 495 U.S. 271 (1990). On the other hand, contested merger challenges by states, and not joined by a federal agency, only rarely have been successful in obtaining relief. An example is *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994) (preliminary injunction granted in consolidated actions brought by a competitor and a state).

²² See Michael F. Brockmeyer, *Report on the NAAG Multi-State Task Force*, 58 ANTITRUST LAW JOURNAL 215 (1989). The states also sought voluntary disclosure by merging parties of their notifications to the federal enforcement agencies through the Voluntary Pre-Merger Disclosure Compact of 1987, which was revised in 1994.

²³ Protocol for Coordination in Merger Investigations between the Federal Enforcement Agencies and States Attorneys General (Mar. 1998), available at <http://www.justice.gov/atr/public/guidelines/1773.pdf>.

cooperation with states occurs in a dozen or so of the Justice Department's merger investigations, and the department typically works with multiple states that could be affected by the proposed merger. As part of this cooperation, the department shares materials provided by the parties if they waive their confidentiality rights.

When the Justice Department challenges a merger, several states often are co-plaintiffs. For example, seven states were co-plaintiffs in the challenge to the merger of US Airways and American Airlines.²⁴ And, in 2011, eight joined the department's challenge to the merger of AT&T Inc. and T-Mobile USA, Inc.²⁵ On occasion, when the department decides not to challenge a merger, one or more states may nevertheless continue to seek remedies.²⁶

Private merger litigation is unusual. Because private plaintiffs lack the investigative tools available to the federal agencies, these cases are more difficult for them to maintain. In recent years, several private merger challenges have been launched on behalf of allegedly harmed consumers. One such challenge remains pending, but others were dismissed.²⁷

Non-Merger Civil Enforcement

Federal civil non-merger enforcement is a priority for both the department and the FTC. Over the years, some of the department's biggest litigation victories have been civil non-merger cases litigated with our state partners, from Microsoft in the 1990s to e-books just this past year. Since our challenge to the e-books conspiracy orchestrated by Apple and certain

²⁴ Complaint, United States and Plaintiff States v. US Airways Group, Inc., (D.D.C. filed Aug. 13, 2013) (No. 1:13-cv-01236), *available at* <http://www.justice.gov/atr/cases/f299900/299968.pdf>.

²⁵ Second Amended Complaint, United States and Plaintiff States v. AT&T Inc. (D.D.C. filed Sept. 30, 2011) (No. 1:11-cv-01560), *available at* <http://www.justice.gov/atr/cases/f275700/275756.pdf>.

²⁶ An example is a 2007 merger of providers of school bus services. The department closed its investigation after the parties divested one of their operations, but eleven states brought suit under federal competition law. *See* STATE ANTITRUST ENFORCEMENT HANDBOOK, *supra* note 11, at 97.

²⁷ *See* Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943 (E.D. Mo. 2010), *affirmed*, 623 F.3d 1229 (8th Cir. 2010); Taleff v. Southwest Airlines Co., 828 F. Supp. 2d 1118 (N.D. Cal. 2011), *affirmed*, No. 11-17995, 2014 WL 407449 (9th Cir. Feb. 4, 2014).

book publishers is recent and has generated a significant amount of interest both in the U.S. and abroad, I thought I would spend a few minutes talking about it.

In the e-books case, we worked extensively with several states to investigate the conduct of Apple Inc. and five book publishers relating to the pricing of e-books. On April 11, 2012, this resulted in the simultaneous filing of complaints by the department and a group of states alleging that they violated Section 1 of the Sherman Act by conspiring to raise e-books prices and to end e-books retailers' freedom to compete on price. The factual allegations in the two challenges were the same. But the DOJ action focused on securing injunctive relief while the states also were seeking damages for citizens who were forced to pay more for e-books.

The publishers consented to a remedy, but the case went to trial against Apple. The department's case was consolidated for trial with that of the states. On July 10, 2013, Judge Denise Cote of the United States District Court for the Southern District of New York issued a 160-page opinion finding in great detail that Apple committed the violation charged.²⁸ Apple has appealed, and its opening brief is due in a few weeks.

The states secured settlements with the publishers that—in combination with the damages secured by private parties—will return more than \$160 million to e-books consumers through seamless credits to their accounts. Although Apple lost on liability, it continues to contest damages, and a damages trial with the states is set for later this year.

The factual findings by the court are detailed and compelling. Judge Cote found that the conspiracy among Apple and the publishers increased e-books prices. Essentially overnight, the price of the defendant publishers' bestselling e-books rose from \$9.99 to \$12.99 or \$14.99. The evidence the consumers benefitted from post-remedy price competition is equally strong. In the months since the conspiracy was halted and competition restored, the average price of the top 25 best-selling e-books dropped to around \$6.47.

Crafting effective remedies is critical in competition cases.²⁹ The public is entitled to remedies that will ensure that Apple changes its ways.

²⁸ United States v. Apple, Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

²⁹ See generally Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't. of Justice, *Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes*, Remarks as Prepared for the

The remedy ordered by Judge Cote includes an external compliance monitor to review and evaluate Apple's antitrust compliance policies and procedures, as well as the antitrust training the court ordered. An external monitor is especially important in this case, given the record evidence of Apple's unapologetically anticompetitive conduct, the involvement in the conspiracy by high-level company executives and lawyers, the court's findings that their sworn testimony lacked credibility, and the absence of a culture of antitrust training and compliance.

While the e-books case is an excellent example of federal non-merger civil enforcement, most non-merger civil cases are private. The U.S. federal courts work hard to guarantee that private actions proceed only when they protect competition, not just certain competitors. The courts apply substantive principles and procedural rules animated by the fundamental tenets of competition law.

A high volume of private litigation in the United States means a constant flow of new competition law decisions. We still rely on decades old court decisions, but we also have the benefit of new judicial glosses on them. And our courts are constantly presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking the rationale of older decisions and restating core principles with added clarity. Competition law in the United States is constantly evolving.

One feature of the U.S. legal system that can work to our advantage is having 11 regional circuit courts of appeals. In each circuit, decisions from other circuits might be persuasive but are not binding precedent, so each circuit has the opportunity to take a fresh look at every interesting question in competition law. Review by the Supreme Court in competition cases, as in most cases in the U.S., is taken by the Court only on a discretionary basis, and most attempts to obtain review are not granted. Typically, the Supreme Court does not take up a question unless and until a split in the circuits develops. The Supreme Court will then have the benefit not only of the opposing views of the litigants, but also the conflicting analysis of the circuit courts and generally also economic literature and legal commentary.

That said, our Supreme Court has shown a great deal of interest in competition law during the past decade or so, and has handed down important decisions on such issues as using the rule of reason in minimum resale price maintenance cases,³⁰ a general lack of duty to deal with competitors,³¹ when pharmaceutical patent settlements are subject to antitrust scrutiny,³² the viability of price squeeze theories of exclusionary conduct,³³ when the action of state governments displaces federal competition law,³⁴ and the significance of patent rights in assessing market power.³⁵ Although some of these decisions have been seen as reining in the scope of private damages actions, we continue to see a very active plaintiffs' bar in antitrust cases.

In nearly all competition cases that come to the Supreme Court—whether brought by federal, state, or private enforcers—the government, through the Solicitor General of the United States, shares its views. The Solicitor General also sometimes advises the Court on whether to take particular cases, and the Court very often takes cases the Solicitor General urges it to take. The Solicitor General is the chief appellate officer in the Justice Department, and we in the Antitrust Division of the department work closely with the Office of the Solicitor General on the competition cases it handles.

Outside the cartel and merger areas, competition law in the United States is largely developed in private litigation. Those judicial precedents often apply to our enforcement actions so these few cases are important both to consumers and to the development of the law. We monitor them closely and intervene as *amicus curiae*—as a friend of the court—where important principles are implicated.

³⁰ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

³¹ *Verizon Commc'n., Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

³² *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

³³ *Pacific Bell Tel. v. linkLine Commc'n.*, 129 S. Ct. 1109 (2009).

³⁴ *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013).

³⁵ *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

Conclusion

In closing, I want to thank Vice President Almunia and Director-General Italianer for inviting me to participate in this forum and share the U.S. experience with you. The close relationship between competition enforcers in Europe and in the United States is vital to vigorous and effective antitrust enforcement—not just in our respective jurisdictions, but around the world. I am honored to work with our friends and colleagues at the European Commission.