DEPARTMENT OF JUSTICE

Remedies Matter:
The Importance of Achieving Effective Antitrust Outcomes

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Introduction

Good afternoon. It is an honor to be here. I congratulate Georgetown on its 7th Annual Global Antitrust Enforcement Symposium, which has become a key competition forum for practitioners, academicians, and enforcers.

This is my first opportunity – after nine months on the job – to deliver formal remarks as the Assistant Attorney General for Antitrust. I am honored to have this position and to follow in the footsteps of so many talented predecessors. Whether appointed by Republican or Democratic administrations, they shared a commitment to making our free-market economy work to the benefit of American consumers. I am particularly indebted to my Federal Trade Commission (FTC) colleagues and to my immediate predecessors at the Department of Justice – Christine Varney, Sharis Pozen, Joe Wayland, and Renata Hesse – who have done so much to promote sound and consumer-oriented antitrust enforcement during the Obama administration.

Today, I would like to discuss the importance of achieving effective outcomes in both criminal and civil actions brought by the division. Antitrust's touchstone should be the preservation or restoration of competition in the affected market. Nothing less. As the Supreme Court noted decades ago in *International Salt,* if a remedy fails to pry open the market to competition, then the government "has won a lawsuit and lost a cause."[1]

You may recall, my friend and mentor, former FTC Chair Bob Pitofsky, and I devoted considerable energy to this issue during the Clinton Administration.[2] Likewise, my law school antitrust professor, Bill Baxter, emphasized the issue when he was Assistant Attorney

[1] *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947) (abrogated on other grounds).

[2] *See e.g., A Study of the Commission's Divestiture Process*, Staff of the Bureau of Competition of the Federal Trade Commission (1999), http://www.ftc.gov/os/1999/08/divestiture.pdf.

General for the Antitrust Division under President Reagan. He captured the essence with his repeated emphasis on both “catchin’ ‘em” and “cleanin’ ‘em.”[3]

The issue was important then, but it is even more critical today. We need to challenge anticompetitive conduct. We need to achieve results that ensure competitive markets and deter illegal behavior going forward. When the government marshals its limited resources to challenge an anticompetitive transaction or conduct, it *must* obtain a meaningful remedy. That is central to our mission and our obligation to use wisely the taxpayer resources entrusted to us.[4]

Merger Remedies

Let me start with merger enforcement. Once the division concludes that a transaction is anticompetitive, we should only consider remedies that effectively resolve the competitive concerns and protect the competitive process. In some mergers, that means a full stop injunction is the only right law enforcement outcome. AT&T’s proposed acquisition of T-Mobile was such a case. The United States concluded that eliminating a significant competitor from an already concentrated market would fundamentally alter the national competitive dynamic. There was no easy fix, no negotiated disposition that would work. The Antitrust Division challenged the deal. The parties ultimately abandoned the merger. That was the right call. Today, T-Mobile remains a vigorous, independent force in the wireless industry.

[3] On this, as with so many issues, the Justice Department and the Federal Trade Commission are closely aligned. Last week the new FTC Competition Bureau Director, Debbie Feinstein, provided thoughtful guidance on many of these issues. *See* Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Commission, “The Significance of Consent Orders in the Federal Trade Commission’s Competition Enforcement Efforts,” (Sept. 17, 2013), http://www.ftc.gov/speeches/dfeinstein/130917gcrspeech.pdf.

[4] In evaluating potential remedies, we coordinate our analysis with enforcement agencies in other jurisdictions to avoid imposing remedies that place inconsistent or conflicting obligations on the merging parties.

Litigation is not our preferred option. In most cases, we are able to work with the parties and preserve competition through a consent decree that separates the anticompetitive parts of a transaction from the remainder. One caveat: negotiating a decree that leaves us confident that consumers will be protected usually is not an overnight exercise. We appreciate that time is almost always precious to merging parties. Early and constructive engagement with the division regarding remedies often allows the merging parties to close a transaction sooner and on terms they find palatable. Waiting until the 11th hour to present a last, best offer may be tempting. But in my experience – in and out of government – it does not correlate with quicker or better outcomes for the merging parties.

The Antitrust Division's remedy in Anheuser-Busch InBev's (ABI) recent $20 billion acquisition of Grupo Modelo (Modelo) illustrates both the division's commitment to achieving effective and tailored merger remedies, and the time required to reach a procompetitive outcome. That transaction, as initially proposed, would have combined the largest and third-largest brewers of beer sold in the United States. Pre-merger, Modelo acted as a maverick, refusing to follow efforts by market leaders to increase U.S. beer prices, and pricing to steal market share from ABI and others.[5] The potential harm to U.S. consumers from the loss of Modelo as a competitor was significant. In a market with at least $80 billion in annual sales, even a small price increase would have cost consumers billions of dollars.

Although early in the process the parties publicly announced a "fix", it was a non-starter. It contained many problematic elements, including a long-term supply agreement with a U.S. importer, rather than real structural relief. The importer, Constellation, would not have owned any brewing or bottling facilities or other production assets. It would have been totally

[5] Complaint ¶¶ 48-60, 65-67, *United States v. Anheuser-Busch In Bev SA/NV and Grupo Modelo* (D.D.C. 2013) (No. 1:13-cv-00127) (filed Jan. 31, 2013), http://www.justice.gov/atr/cases/f292100/292100.pdf.

dependent on ABI. The parties' proposal failed to preserve the competition provided by Modelo, and would have led to a lengthy entanglement between ABI and Constellation.[6]

After the United States filed suit to prevent the transaction, the merging parties worked with us to create a settlement that effectively preserves competition and Modelo as an independent force in the U.S. beer market.[7] ABI is divesting Modelo's entire U.S. business, selling Modelo's newest and most technologically advanced brewery, and conveying broad rights to use Modelo brands in the United States, and other intangible assets. The decree, which is pending entry by the district court, ensures that the upfront buyer – Constellation – will build out the capacity of the Modelo brewery to permit it to step into the shoes of Modelo as an independent, fully-integrated beer brewer capable of meeting future demand in the United States.[8]

The decree contains provisions that experience has taught us can be important to an effective merger remedy – including structural relief, an upfront buyer that we were able to vet fully before finalizing the settlement, a monitoring trustee, and conveyance of the intellectual property and know-how needed to ensure the buyer's effectiveness.

Sometimes we confront consummated deals that are problematic from an antitrust perspective. We apply the same remedial principles there. We recognize that restoring competition in the wake of a consummated transaction can pose unique challenges. Where parties have already begun the integration of assets it may be necessary for the merged firm to

[6] *See id.* ¶¶ 8-9. *See also*, Antitrust Division Policy Guide to Merger Remedies, U.S. Department of Justice, Antitrust Division (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf , at 23 (a fix-it-first solution is unacceptable if it involves remedial provisions that entail continuing, post-consummation obligations, such as a supply agreement, on the part of the merged firm).

[7] *See* Proposed Final Judgment, *United States v. Anheuser-Busch In Bev SA/NV and Grupo Modelo* (D.D.C. 2013) (No. 1:13-cv-00127) (filed April 19, 2013), http://www.justice.gov/atr/cases/f296000/296044.pdf.

[8] A short-term, interim supply agreement ensures that the buyer will be able to fully meet U.S. demand during the required capacity expansion. *See id.* §§ V, IV.H.

"unscramble the eggs" to create an effective, stand-alone competitor, as our FTC colleagues required in the *Chicago Bridge* case.[9] We look to remedy an unlawful consummated deal in a fashion that restores a meaningful competitor and deprives the acquirer of unlawfully obtained market power. An effective remedy may need to include assets beyond those previously held by the acquired firm. The parties should be compelled to do what is necessary to restore the competition eliminated by their unlawful conduct.

Civil Non-Merger Remedies

In fashioning relief in civil non-merger cases, the courts recognize many of the principles that guide the division and the FTC in merger cases. Permanent injunctive relief in a Sherman Act case should end the violation, prevent recurrence, and restore competition in the market.[10]

The injunctions obtained in the Antitrust Division's recent e-books case incorporate these key concepts. This was the first civil conduct case the division has tried to decision in some time. The court's decision finding a *per se* unlawful conspiracy forcefully confirmed our view of the facts and the law. But, for the millions of Americans who purchase e-books, success is measured not by our ability to prove the violation, but rather by the effectiveness of the remedies that we and our state co-plaintiffs obtained.

As you know, the case challenged a conspiracy among Apple and five of the nation's largest publishers to stifle retail price competition for e-books. Over three days in January 2010, each of the publishers signed contracts with Apple, under which Apple agreed to let

[9] *See In the matter of Chicago Bridge & Iron*, FTC Docket No. 9300, *aff'd Chicago Bridge & Iron Company v. Federal Trade Commission*, 534 F.3d 410 (5th Cir. 2008), http://www.ftc.gov/os/adjpro/d9300/index.shtm; *see also* Policy Guide to Merger Remedies, *supra* note 6, at n2.

[10] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *United States v. E. I. du Pont de Nemours & Co*., 366 U.S. 316, 326 (1961).

publishers set retail e-books prices – often referred to as the agency model. The contracts set pricing tiers that were virtually identical for all five publishers.[11] They also included most-favored-nation (MFN) provisions, which effectively compelled the publishers to pull other retailers onto the same agency model.[12] The effect of the illegal agreement was demonstrable and profound. Once Apple's retail competitors were forced to adopt the agency model, retail prices for the publishers' e-books jumped in unison. Almost overnight, the prices of the defendant publishers' best sellers sold on Amazon increased by more than 40 percent.[13]

Within months of filing suit in April 2012, the division reached settlements with the five publishers. Each was required to terminate its agency agreements with Apple and other retailers, and refrain from entering new agreements with retailers that contain MFN provisions or would otherwise restrict the retailers' ability to set e-book prices.[14] As soon as these settlements took effect, competition began to return to the e-books market. Consumers benefited. With these settlements, the average price of e-book bestsellers has already fallen from a little more than $11 to closer to $6, according to published reports.[15]

[11] *See* Opinion and Order at 12, 59-66, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) (July 10, 2013), http://www.justice.gov/atr/cases/f299200/299275.pdf.

[12] *See id*. at 12.

[13] *See id.* at 96 (chart showing that average weighted prices increased by 18.6% on all defendant publishers' e-books sold at Amazon, including 42.7% increase on NYT bestsellers).

[14] *See e.g.*, Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Shuster, §§ V.A.-C, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) (Sept. 6, 2012), http://www.justice.gov/atr/cases/f286800/286808.pdf.

[15] *Compare* Apple Opinion & Order, *supra* note 11, at 97 (quoting table created by Apple's trial expert reporting that average new release and bestseller e-book prices after agency rose to $12.28, $11.60, and $11.97 respectively at Amazon, Barnes & Noble, and Sony), *with* Jeremy Greenfeld, *Retailers Discount Big-Five Best-Sellers*, *Keeping Prices at All-Time Low*, *Digital Book World Daily (Sept. 4, 2013*) (reporting weekly "average price of a best-selling e-book[s] hit an all-time low: $6.33"), http://www.digitalbookworld.com/2013/retailers-discount-big-five-best-sellers-keeping-prices-low/.

The publishers settled, but Apple fought on, which is its right, maintaining that its conduct raised no competitive issues. Judge Cote of the U.S. District Court for the Southern District of New York disagreed. Her ruling concluded that the United States had shown, "through compelling direct and circumstantial evidence that Apple participated in and facilitated a horizontal price-fixing conspiracy."[16] And her opinion expressed concern with the credibility of several Apple witnesses who had appeared before her under oath.[17]

Our approach to remedy here – after a hard-fought litigation battle – was to obtain an injunction that would stamp out any lingering effects of the conspiracy, prevent Apple and others from engaging in similar conduct in the future, and ensure that Apple put in place the training and internal compliance controls needed to avoid a recurrence. The final judgment entered by the court earlier this month accomplishes this.[18] Most prominently, it requires significant improvements to Apple's antitrust compliance program, including the designation – over Apple's strenuous objection – of an external compliance monitor. The external monitor, whose salary and expenses will be paid by Apple, is charged with evaluating Apple's antitrust compliance policies and training programs and recommending changes to ensure their effectiveness. He or she will work with a new, full-time, internal antitrust compliance officer, who reports directly to outside directors – not to management or the legal department – and is responsible for ensuring that senior executives across *all* of Apple's businesses

[16] Apple Opinion & Order, *supra* note 11, at 120.

[17] *See* Apple Opinion & Order, *supra* note 11, at n66.

[18] *See* Final Judgment, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) (Sept. 5, 2013), http://www.justice.gov/atr/cases/f300500/300510.pdf.

receive effective annual training on compliance with the final judgment and the antitrust laws generally.[19]

Why seek an external monitor in this case? The court concluded that Apple's senior executives and in-house counsel helped orchestrate the price-fixing scheme.[20] These are the very people who should have been ensuring Apple's compliance with the law. There was no evidence of antitrust awareness or of self-reflection by Apple during the conspiracy or afterwards. As our brief in support of an external monitor explained:

> Effective antitrust compliance requires corporate executives who know legal boundaries; it needs to empower lawyers with the ability to say "no" to bad behavior, even if proposed by senior executives; and it obligates employees to tell the truth and to confess error when bad behavior occurs.[21]

In discussing why an external monitor was warranted, Judge Cote expressed frustration that Apple had failed to demonstrate to the court that it had "taken the lessons of this litigation seriously." [22] The company, she noted, did not commit to the necessary "institutional reforms to ensure that its executives will never engage again in such willful and blatant violations of the law."[23] When conduct harms consumers and raises serious questions about a company's commitment and ability to police its own conduct, independent, external oversight may well be needed to protect consumers from future misconduct.

[19] *Id.* §§ V-VI.

[20] *See* August 27, 2013 Hr'g Tr. at 17:1-6, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) ("The record at trial demonstrated a blatant and aggressive disregard at Apple for the requirements of the law. Apple executives used their considerable skills to orchestrate a price-fixing scheme that significantly raised the prices of E-books. This conduct included Apple lawyers and its highest level executives.")

[21] Memorandum in Support of Plaintiffs' Revised Proposed Injunction, at 8, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826) (filed Aug. 23, 2013), http://www.justice.gov/atr/cases/f300200/300263.pdf.

[22] August 27, 2013 Hr'g Tr., *supra* note 20, at 17:7-16.

[23] August 9, 2013 Hr'g Tr. at 66, *United States v. Apple, Inc. et al.*, (S.D.N.Y 2012) (No. 12-cv-2826).

Civil Disgorgement

The division's decision to seek an outside monitor in the Apple case reflects our willingness to seek meaningful civil remedies. We will seek other equitable remedies in appropriate circumstances. Disgorgement of ill-gotten gains is one example. In 2010, the Antitrust Division required civil disgorgement for the first time to remedy a substantive civil violation. The case involved settlement of a Section 1 case brought against KeySpan, the largest supplier of electricity generating capacity to New York City.[24] The division's complaint alleged that KeySpan had used a derivative agreement to obtain a financial interest in the capacity sold by its largest competitor. This eliminated KeySpan's incentive to compete in the capacity market and likely led to higher prices.[25] In explaining why disgorgement was warranted in that instance, the division noted that injunctive relief alone would not have been meaningful because the offending agreement had expired.[26] The division also recognized that the "filed rate doctrine" raised significant obstacles to private damages actions. Absent disgorgement, KeySpan would likely have retained the monetary benefits of its anticompetitive conduct. [27]

In many cases we can ensure appropriate relief without seeking disgorgement. In the e-books case, for example, we worked closely with state enforcers, who sought monetary relief on behalf of their citizens. Our joint efforts obtained prospective relief from Apple and

[24] Competitive Impact Statement, § III.A-B, *United States v. KeySpan Corp.* (S.D.N.Y 2010) (No. 10-cv-1415) (filed Feb. 23, 2010), http://www.justice.gov/atr/cases/f255500/255578.htm.

[25] *See* Complaint ¶¶1-5, *United States v. KeySpan Corporation* (S.D.N.Y 2010) (No. 10-cv-1415) (filed Feb. 22, 2010), http://www.justice.gov/atr/cases/f255500/255507.pdf.

[26] Competitive Impact Statement, *supra* note 24, § III.A-B.

[27] *Id. See generally, Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922).

the book publishers, and the states and private plaintiffs at the same time reached settlements with the publisher defendants to refund more than $160 million to e-books consumers. Nearly 23 million purchasers have already received notices that they will automatically receive a *pro rata* share of the settlements as a credit to their e-book accounts. And, now that Apple's liability has been adjudicated, the court will decide on damages Apple must pay, at a trial set for May 2014.

As the district court noted in approving the settlement in *Keyspan*, the availability of disgorgement as part of "the Government's arsenal" helps deter anticompetitive behavior.[28] Going forward, the division will consider disgorgement on a case-by-case basis – including both merger and conduct cases.[29] Among other factors, we will evaluate the effectiveness of other remedies, including injunctive relief, and the likelihood of private damages recovery. In doing so, we will be mindful of relevant changes in the broader legal landscape, which could, for example, affect the likelihood of success of private damages suits.[30] The touchstone is ensuring that defendants do not benefit from violating the antitrust laws.

Criminal Penalties

Criminal enforcement is a large part of what we do at the Division. Effective sanctions matter there too. Guided by the federal Sentencing Guidelines, our prosecutors seek criminal sentences that are consistent with statutory considerations and reflect the seriousness

[28] *United States v. KeySpan Corp*., 763 F.Supp.2d 633, 642 (S.D.N.Y 2011).

[29] Policy Guide to Merger Remedies, *supra* note 6, at n9.

[30] Some observers have opined that courts continue to raise hurdles to private antitrust actions, including heightened standards for class certification. *See also* Brief of the United States as Amicus Curiae Supporting Respondents, *American Express v. Italian Colors Restaurant*, (No. 12-133) (S.Ct. 2012) (mandatory arbitration provisions could prevent some plaintiffs from effectively vindicating their rights under federal antitrust law), http://www.justice.gov/atr/cases/f291900/291967.pdf.

of the offense, promote respect for the law, provide just punishment, afford deterrence, protect the public, and offer defendants an opportunity for effective rehabilitation.[31]

Last year, for the first time, the division recommended that a criminal antitrust defendant be required, as a condition of its probation, to retain an independent corporate monitor to develop and implement an effective antitrust compliance program. The defendant, AU Optronics Corporation (AUO), its U.S. subsidiary, and two of its top executives, had been convicted at trial for their role in a conspiracy to fix the price of liquid crystal display (LCD) panels – a conspiracy that had a significant impact on U.S. commerce.

Rarely has a company needed an effective antitrust compliance program as much as AUO. AUO was founded the very month the LCD conspiracy began. From its inception, AUO's standard operating procedure was collusion. "Antitrust compliance program" was not in its lexicon. Even after conviction, AUO continued to employ convicted price-fixers and indicted fugitives. As a result, the division argued that there was no reason to believe that AUO's conviction and the imposition of a criminal fine – even a large fine – would deter AUO from engaging in future collusive conduct.[32]

The court agreed. In addition to a $500 million fine, the court sentenced AUO and its subsidiary to three years of probation during which the companies are required to develop, adopt, and implement an effective compliance and ethics program, and to retain an independent monitor to oversee that program. Consistent with the division's willingness to

[31] *See* Eric H. Holder, Jr., U.S. Dept. of Justice, Department Policy on Charging and Sentencing (May 19, 2010), http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf; United States Sentencing Guidelines (U.S.S.G.) Chapter 1, Part A, Statutory Mission Statement (2012) (also citing incapacitation as a basic purpose of criminal punishment); *United States v. Booker*, 543 U.S. 220, 245 (2005); 18 U.S.C. § 3553.

[32] United States' Sentencing Memorandum, at 53, *United States v. AU Optronics Corporation, et al*. (N.D.CA. 2009) (No. 3:09-cr-00110) (filed Sept. 11, 2012), http://www.justice.gov/atr/cases/f286900/286934_1.pdf; see also U.S.S.G., *supra* note 31, § 8.D1.1(a)(6).

request external monitors in the civil context, the division will consider seeking conditions of criminal probation that include independent monitors when faced with circumstances in which the division is not persuaded that penalties alone will deter future illegal behavior.

Conclusion

During my tenure as Assistant Attorney General, the Antitrust Division will continue to emphasize effective outcomes and be open to new ideas that remedy anticompetitive conduct and guard against any recurrence. Our fundamental purpose remains: the effective protection of competition and American consumers.

Thank you.