DEPARTMENT OF JUSTICE

LAST YEAR AND THIS YEAR:
THE VIEW FROM THE ANTITRUST TRENCHES

Address by

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It is a personal and a professional pleasure to be with you this evening. It is personal because for twenty years, while I was engaged in private practice and before I joined the Antitrust Division two years ago, I had the opportunity to meet and get to know many of you. It is nice to see so many friends again. It is professional because this is one of the few times during the year that a representative of the Antitrust Division has the opportunity to review and discuss antitrust developments with an audience that includes so many of the lawyers that advise major companies about the antitrust consequences of proposed transactions and business behavior.

There is an understandable temptation at times like this to try to place current antitrust enforcement efforts in the context of worldwide economic developments. Much has been written and said, particularly as we approached the year 2000, about the implications of globalization for antitrust enforcement and the success of the American model. This evening, though, I would like to take a different approach and review for you some of the important enforcement initiatives that the Antitrust Division undertook last year and tell you what we are likely to be doing this year.

In doing so, I do not wish to be misunderstood. The "vision thing" is very important. But, as clients come to you for antitrust advice about whether they can do a certain deal or engage in a certain practice, they are probably less interested in where antitrust law will be five or ten years from now than they are in where antitrust law is right now. That is why I have entitled these remarks "The View From the Antitrust Trenches."

I. Criminal Enforcement

The Antitrust Division's criminal enforcement program has seen dramatic changes in recent years that culminated in record-shattering criminal fines in FY 1999. Criminal prosecutions of domestic companies for price-fixing, bid-rigging, and market-allocation agreements have long been at the heart of our criminal enforcement program. In the past few years, however, the Antitrust Division has detected and prosecuted a significant number of international price-fixing cartels that have directly impacted substantial volumes of U.S. commerce. We have found that many of these international price-fixing cartels were highly sophisticated, involved leading firms in the industry, and have affected a wide variety of goods sold to business and individual consumers.

They also are particularly brazen. I suspect that not many of you have had the opportunity to observe an unlawful price-fixing conspiracy in action. In the ADM trial, the Antitrust Division played for the jury audio and videotape excerpts of price-fixing meetings. On one occasion, the conspirators, who had come to Atlanta to attend customer trade association meetings, arranged to meet privately in a hotel room. To avoid arousing suspicions among their customers who were also staying at the hotel, they decided to stagger their arrivals at the room. In one tape, some of the conspirators are shown awaiting the arrival of others when there is a knock at the door. One of foreign conspirators quips, "FTC?" The others laugh. (Actually, it was not the FTC, but an FBI agent working for the Antitrust Division, who was dressed as a bellhop to deliver a briefcase with a hidden recording device.) On another occasion, a senior executive in a U.S. company shares his company's credo with a foreign competitor: "We have a saying here in this company that penetrates the whole company, its a saying that . . . our competitors are our friends. Our customers are the enemy." The knowing yet callous disregard of the antitrust laws is unmistakable.

In FY 1999, the Antitrust Division obtained over $1.1 billion in criminal fines, the vast majority of it attributable to prosecution of international price-fixing cartels. Let me try to put that in historical perspective. Prior to FY 1997, the highest amount of fines obtained by Antitrust Division in any given year was roughly $42 million. In the two years before FY 1999, that figure rose first to $205 million and then to $265 million. The fines obtained in the last three fiscal years are many multiples higher than the sum of all criminal fines imposed for antitrust violations since the Sherman Act was enacted in 1890. The Antitrust Division has also been successful in negotiating plea agreements and obtaining litigated convictions that resulted in imposition of substantial jail sentences for business executives found to have engaged in illegal behavior, including foreign citizens who had never come to the United States to conduct conspiratorial business.

These recent successes are destined to have a substantial impact upon criminal enforcement efforts this year and in years to come. The Antitrust Division has undertaken a number of initiatives, including the corporate amnesty program and the pre-adjudication protocol with the Immigration and Naturalization Service, that encourage firms and individuals to report illegal cartel behavior. At the present time, there are over 30 grand juries investigating international cartel behavior. Antitrust enforcement agencies around the world are developing their own criminal enforcement programs, often patterned after the American experience. Indeed, just last fall, the Antitrust Division hosted a two-day program for representatives of more than two dozen countries to discuss criminal enforcement techniques.

There clearly was a time when companies thought that they could evade the constraints imposed by our antitrust laws by holding their conspiratorial meetings outside of the United States.

Our criminal enforcement efforts have given new meaning to the phrase "you can run, but you can't hide." To be sure, it may not become an annual event to obtain a criminal fine of $500 million, as we did last year from F. Hoffman-La Roche Ltd., or even $225 million, as we did last year from BASF AG, but even if those fines are excluded, criminal fines over the past three years have averaged well over $200 million. Our goal is to ensure that every business person around the world who contemplates price-fixing behavior that could adversely impact American businesses and consumers will choose to forgo such illegal activity because of concern that antitrust enforcement authorities will find out about it and prosecute to the full extent of the law. Our efforts to achieve that goal will continue unabated this year and for years to come.

II. Merger Enforcement

The continued success of the American economy in recent years has been mirrored by an unprecedented level of merger and acquisition activity. Hart-Scott-Rodino filings, which had remained roughly constant around 1,400 during the first three years of the decade, reached 2,800 in FY 1996, jumped by 600 in FY 1997, and then ballooned by over 1,000 in FY 1998 to top 4,500. Those who thought that this increase in activity was to be short-lived were proven wrong when filings for FY 1999 continued at that level. Moreover, for the first three months of the current fiscal year, we are up over 14 percent on a year-to-year basis compared to FY 1999.

Numbers, of course, do not tell the full story. An increase in filings does not necessarily mean a commensurate increase in competitively problematic transactions, as the LBO wave in the late 1980's demonstrated. However, the mergers and acquisitions that we are seeing these days are quite different. Companies are making strategic decisions to exit markets that they cannot dominate, often selling out to firms that can. Buyers are trying to position themselves for the global

economy, often equating size with success. With breathtaking technological developments occurring everyday, we see firms anxious to seize first-mover advantages in network industries or to take out nascent entrants that threaten their long-term dominance. In such dynamic industries, the task of distinguishing between anticompetitive and procompetitive transactions has never been more important.

Last year, we challenged or advised parties of our intention to challenge 46 transactions, which was comparable to the number challenged in FY 1998, although substantially in excess of levels in prior years. While most of the cases were resolved by consent decrees, the Antitrust Division has not been hesitant in seeking to block transactions in their entirety. Both the Lockheed Martin-Northrop Grumman and the Primestar transactions were abandoned after we filed complaints and were well into discovery, and parties have abandoned other transactions, such as Monsanto-Delta & Pine Land, after learning of our intention to sue.

Those of you who counsel clients about mergers and acquisitions presumably took note of the fact that the Antitrust Division brought two cases last year predicated in whole or in part on monopsony concerns. In Cargill-Continental, we found that the geographic market for inputs was narrower than the geographic market for outputs and concluded that the combining firms would have been able to depress the price paid for inputs even though we did not have a concern that they would have the ability to raise the price of outputs. Monopsony allegations were also made in the Aetna-Prudential complaint.

On a going forward basis, there are two areas of some concern to us that may be of interest to you. First, we have seen a number of transactions, involving such products as computer software, in which it appears that a dominant company has sought to acquire a recent entrant because of its

concern that the recent entrant will evolve into a substantial threat if it remains independent. Often, we find that the dominant company intends to discontinue the products formerly offered by the recent entrant. These kinds of transactions pose interesting doctrinal issues because the recent entrant is unlikely to have a substantial market share at the time of the proposed acquisition. Yet, we will challenge such a transaction if we conclude that the elimination of the recent entrant is likely to lessen competition substantially. We had anticipated that our Compuware-Viasoft case would present this issue with respect to one product market, but the parties abandoned the transaction last week.

Second, we are seeing an increasing number of partial acquisitions, often in industries in which minority investments create a complex web of interrelated relationships. Traditionally, small minority equity purchases have not received much attention from antitrust enforcement agencies. That is likely to change for two reasons. First, unlike purely passive minority equity investments, minority investments these days are often far more intricate. They may carry the right to representation on the board, confer supermajority or other special voting rights, or permit the exercise of influence over management, that are inconsistent with notions of a purely "passive" investment. Second, there are certain industries in which these so-called minority investments are not isolated occurrences, but rather a pattern of dealing. In both types of situations, questions can reasonably be asked about the likelihood that the firms involved will compete as vigorously against one another -- either in markets they presently serve or in markets in which they are potential competitors -- as they would have absent these investments. Some of these issues will be addressed in our Northwest-Continental case, which challenges Northwest's acquisition of a class Continental

common stock that gives Northwest over 50 percent of the voting interest although only 14 percent of the financial interest in Continental. The case is scheduled for trial next fall.

Thus, it is not only the number of HSR filings but also the complexity of transactions that combine to make this a challenging time for antitrust enforcement agencies. It is ironic, in my view, that some people have chosen this time to re-examine the second-request process and to consider imposing substantial restrictions that can only inhibit our ability to conduct timely and complete merger investigations. We issue second requests only when we have significant competitive concerns about a transaction. It might surprise you to know that, while HSR filings are up significantly over FY 1997, the number of second requests issued by the Antitrust Division and the FTC is actually down. Last year, HSR filings were made for 4,679 transactions, but the agencies issued only 111 second requests -- less than 2.5 percent. Even so, we are aware of complaints that second requests can be burdensome in particular circumstances, and we are on the look-out for ways to make the process work better. But make no mistake about it. The HSR process is absolutely essential if mergers and acquisitions are to be reviewed in a way that gives the antitrust enforcement agencies a reasonable opportunity to halt transactions that pose a significant threat to competition.

III. Civil Non-merger Enforcement

The third primary component of our antitrust enforcement program involves civil non-merger matters. In the not too distant past, this was often a relatively low priority matter, due both to competing resource needs in the Antitrust Division and the nature of those matters. Civil non-merger matters often do not face the same time constraints as other matters, such as mergers that are subject to HSR timetables. At the same time, some of our civil non-merger investigations have

involved issues of substantial complexity that have necessitated thorough and time-consuming analyses.

Whatever may have been the circumstances in the past, however, this paradigm no longer holds true for civil non-merger enforcement efforts. In the first place, some of the most important competitive developments affecting our economy are occurring in markets characterized by rapid technological change. In addition, there are developments in network industries that have far-reaching competitive implications, even in industries not characterized by rapid technological change. Sometimes these activities involve collaboration between and among competitors; other times they involve a single dominant firm. In either case, the message to antitrust enforcers is clear. It is important to make enforcement decisions quickly and it is important to make those decisions correctly.

Any description of our civil non-merger enforcement program must begin with the Microsoft case. Brought in May 1998, testimony was completed in 1999. Judge Jackson issued his findings of fact in November. The parties are completing their submissions of proposed conclusions of law, and oral argument is scheduled for February 22.

The Microsoft case has so dominated the popular and trade press that sight may have been lost of two other significant civil non-merger cases also filed in 1999. In May, the Antitrust Division sued American Airlines, charging unlawful monopolization and attempted monopolization by American at its hub in Dallas-Ft. Worth. The complaint alleges that American engaged in a variety of predatory practices, including price reductions and additions of capacity, intended to drive start-up carriers out of Dallas-Ft. Worth markets. This is the first predation case brought against an airline by the Antitrust Division since the industry was deregulated in 1979. It is, and deserves to

be, a very closely-watched case, not only for the airline industry but also for other network industries, as well. Earlier, in January, the Antitrust Division filed a case against Dentsply International, Inc., the dominant U.S. manufacturer of false teeth, alleging that Dentsply had unlawfully sought to maintain its monopoly through exclusive dealing agreements with 80 percent of the distributors that sell false teeth to dental laboratories, depriving its rivals of effective distribution networks. Both of these cases are likely to be tried in 2000.

What is notable about these three cases -- Microsoft, American Airlines, and Dentsply -- is that all of them are single-firm cases. If anything surprised me in coming from private practice to the Antitrust Division, it is the amount of resources that are going into analyses of single-firm behavior. For a significant number of years, the Antitrust Division brought virtually no section 2 cases. Now, it has brought three in the past two years. Firms with significant market power would do well to revisit section 2 standards and to follow developments in these cases.

IV. The Year Ahead

When Joel Klein became Assistant Attorney General, he was fond of saying that the Antitrust Division had been out of the "litigation business" for too long. Perhaps he should have remembered the old proverb that warns: "be careful what you wish for." The Antitrust Division faces a daunting trial schedule in 2000. In addition to further Microsoft proceedings, American Airlines, and Dentsply, we will be litigating two section 1 cases: the challenge to the structure and practices of Visa and MasterCard and the challenge to alleged group boycott activities in Delaware by the Federation of Physicians and Dentists. We will also be trying the Northwest-Continental case. And, of course, there may be others on both the criminal and civil sides of the shop. No one

presently in the Antitrust Division can remember a time when there was more ongoing high-profile antitrust litigation.

We spend a good deal of time worrying about resource allocation. The Antitrust Division has just weathered a difficult attack on its budget. Nevertheless, we remain severely constrained. We currently employ 361 attorneys which, by way of contrast, is significantly less than the 456 attorneys employed by the Antitrust Division 20 years ago. The Antitrust Division's budget for FY 2000 is $110 million. That is an increase over FY 1999 expenditures but, after annual nondiscretionary cost increases and anticipated litigation costs are taken into account, that increase will permit us to add only two new attorneys and 16 new paralegals to handle a workload that is increasing on every front.

In the year ahead, we will also be trying to get a handle on a problem that seems to be arising more often. We are troubled by the number of instances in which the Antitrust Division has been provided with information that turns out not to be true. On a number of occasions over the past few years, attorneys have provided the Antitrust Division with materially erroneous representations. It is often difficult from our vantage point to know whether an attorney has knowingly done so. Sometimes the responsibility seems to rest with the attorney, and sometimes with the client. But whatever the source, these misrepresentations have frequently involved important matters going not only to facts relevant to the potential violation being investigated but even to the nature of relief proposed by private parties to resolve our antitrust concerns. We have also seen instances in which companies have sought to walk away from commitments made in consent decree negotiations and even knowingly and deliberately to violate the terms of consent decrees. If they had hoped that the

press of other business would cause us to give them a "free pass" on such conduct, they were badly mistaken.

People with more lengthy experience at the Antitrust Division than I report that the frequency and nature of such behavior seem to be growing. You should know that we take this matter very seriously, and we urge the bar to do so, as well. As those of you who practice regularly before the Antitrust Division know, the currency in which an effective attorney trades is credibility. If we have reason to believe that an attorney's representations are accurate, this can often streamline second-request modifications, reduce the need to interview business people, expedite consent decree negotiations, and ultimately improve an attorney's ability to "get the job done." Unfortunately, the converse is also true. When counsel lacks credibility because of knowingly false -- or even carelessly false -- representations, this will inevitably slow an investigation. We may have to insist upon further production and more interviews in order to assess the competitive situation, and more specific and readily enforceable undertakings in order to assure that relief will be effective.

The same principles apply to what we characterize as "repeat players," companies that appear regularly before the Antitrust Division, particularly with respect to proposed mergers and acquisitions. If a company fulfills its obligations under a consent decree by promptly divesting assets to a suitable purchaser, that affects the manner in which the Antitrust Division can deal with the company when it wants to do its next deal. If, however, a company fails to perform its obligations and seeks to frustrate agreed-upon relief, it can expect that the next time around the Antitrust Division will seek greater safeguards to assure effective relief. We may seek a shortened time for divestiture, or seek the immediate appointment of a trustee, or even insist upon a fix-it first

solution before the company can proceed with the core transaction even if the assets to be divested are a relatively minor part of the acquired entity.

We urge you to convey to your clients the importance of both personal and institutional credibility. Sometimes these days, when we confront attorneys with evidence of misrepresentations, they figuratively "shrug their shoulders" as if to say that the fault rests with the client. That doesn't cut it with us. We expect that attorneys will not make representations to us unless they have taken the steps necessary to ensure that those representations are true. That is the way to be an effective advocate for your client at the Antitrust Division.

V. Conclusion

So, let me thank you again for providing this opportunity to discuss the view from the antitrust trenches. There seems to be no doubt that 1999 was a year of substantial and important antitrust enforcement developments. And, whatever else may be said about 2000, there is no reason to think it will be any different.