



DEPARTMENT OF JUSTICE

THE DOJ INTERNATIONAL ANTITRUST PROGRAM — MAINTAINING MOMENTUM

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Good afternoon. It is a pleasure to be here today with such a talented group of practitioners and enforcement officials.

Since becoming Acting AAG, I have thought a good deal about the Division's accomplishments in the international area and what our priorities should be going forward. I have also tried to keep in mind that, as Acting AAG, my principal job is to provide the Division continuity and support during a transition period, not to make bold policy pronouncements. So my main message here today is that we at the Division are working hard to maintain the positive momentum we currently enjoy on the international front. Principal Deputy Deborah Majoras is doing that by stepping in to take up the slack following Bill Kolasky's departure as DAAG for International Enforcement. Ed Hand is doing that by serving as Acting DAAG for International Enforcement. Anne Purcell likewise is keeping our Foreign Commerce section under good management as Acting Chief.

This afternoon, I would like to focus on three general areas. First, I want to focus on our international cartel enforcement program, a core mission of the Division in which we have enjoyed many recent successes, including many involving cooperative efforts with our foreign counterparts. Second, I would like to mention some extraordinary things that happened bilaterally and multilaterally last year — particularly on merger issues. Third, I will share a few thoughts on the Division's commitment to the International Competition Network and to enhancing the substantive nature of our bilateral relationships with foreign antitrust authorities, such as the European Commission.

I. International Cartel Enforcement — The Division’s Core Mission

An effective anti-cartel enforcement program should be the top enforcement priority for every antitrust agency, and it will continue to be so for us. International cartels have become more common in recent decades as the economy has become more globalized. Cartels often involve massive volumes of commerce, which in turn means they inflict great harm on American businesses and consumers. We have continued our decade-long concentration of criminal resources on our international cartel program. This focus has led to increased detection and prosecution of major international cartels. At the same time, many other governments have strengthened their own anti-cartel enforcement programs and cooperated with the Division in prosecuting international cartels. Building on these successes is a key priority for the Division.

A. The Division’s Recent Anti-Cartel Enforcement Record

Since late 1996, the Division has prosecuted international cartels affecting over *\$10 billion* in U.S. commerce. Well over 90 percent of the total criminal fines we have obtained in this time period were from international cartel cases. Many of you have spent much of your professional careers in an antitrust world where \$1 million fines were extraordinary: we now have obtained 38 fines of \$10 million or more and six fines of \$100 million or more. The international cartels we have uncovered involved a wide range of industries, including the food and feed additives, graphite electrode, vitamins, construction, fine arts, and textile industries. These illegal cartels have cost U.S. victims many hundreds of millions of dollars annually. Victims have included individual consumers and some of the most well known names in American business — Coca-Cola, Proctor & Gamble, Tyson Foods, Kellogg, and Nestle, just to name a few.

Recently, we have concentrated not just on prosecuting corporate cartel members but also on punishing individuals who create and operate the cartels. We remain convinced that the single best deterrent to cartel behavior is the imposition of meaningful prison sentences against the guilty individuals. Recently, we have sought the imposition of prison sentences with increasing frequency and sought longer periods of incarceration. In the past fiscal year, defendants in Division cases were sentenced to more than 10,000 jail days — a record — with an average sentence of more than 18 months. In the last four years, a total of over 75 years of imprisonment have been imposed on antitrust defendants, with more than 30 defendants receiving prison sentences of one year or longer. It is not just U.S. executives who are facing prison sentences, but foreign executives as well. Business people from Canada, France, Germany, Sweden, and Switzerland have now served time in U.S. prisons for violating our antitrust laws.

To take two examples, we recently tried international cartel cases against two individual defendants, Alfred Taubman¹ and Elmore Roy Anderson.² Both of these trials resulted in convictions and significant jail sentences for the defendants. The Taubman case received lots of media attention, especially here in New York. Mr. Taubman, is the former chairman of Sotheby's auction house and was convicted of fixing prices with Sotheby's supposed archrival Christie's. He was sentenced to serve a one-year jail term and pay a \$7.5 million fine.

¹ United States v. A. Alfred Taubman, Cr. No. 01 CR 429 (S.D.N.Y. 2001), aff'd, 297 F.3d 161 (2d Cir. 2002).

² United States v. Elmore Roy Anderson, Cr. No. 01-PT-0302 (N.D. Ala. 2001).

Taubman's trial was the first that involved testimony from a witness protected by amnesty — in this case, Christie's CEO. Mr. Taubman currently is serving out his prison sentence.

Mr. Anderson is the former president and CEO of an international construction firm, Bilhar International Establishment, and was convicted of rigging bids for construction contracts the U.S. Agency for International Development funded in Egypt as part of the Camp David Peace Accords and conspiring to defraud USAID through the bid rigging. He received a sentence of three years in prison and a \$25,000 fine. Anderson's former employer, Bilhar, pled guilty on the first day of trial and was sentenced to pay a \$54 million fine.

Turning to our current docket, we now have almost forty grand juries investigating suspected international cartel activity, representing almost half of the Division's criminal investigations. One specific investigation I will highlight is our carbon brush and collector cartel matter — the third spin-off from our highly successful graphite electrodes investigation. Carbon brushes and collectors are used to transfer electrical current in automotive and rail applications. For over a decade, manufacturers of these products colluded on prices. In November 2002, the Division charged Morganite, Inc., a North Carolina company, for its involvement in this lengthy price-fixing conspiracy, and the company pled guilty and was sentenced to pay a \$10 million fine.

The Division also charged Morganite's British parent, The Morgan Crucible Company PLC, with two counts of obstruction of justice stemming from its efforts to interfere with our price-fixing investigation through witness tampering and document destruction. Morgan Crucible gave the Division false information in an attempt to hoodwink us into believing that the price-fixing meetings its representatives attended were legitimate business meetings. It also

gave a co-conspirator a written “script” containing the false information and requested that it be followed when questioned by the Division.³ In addition to tampering with witnesses, Morgan Crucible instructed an employee of one of its U.S. subsidiaries to destroy documents relating to contacts with competitors. Morgan Crucible pled guilty to obstruction charges and was sentenced to pay the statutory maximum of \$500,000 on each obstruction count for a total fine of \$1 million. Our investigation of price fixing and obstruction is continuing.

The carbon brush investigation demonstrates the Division’s firm resolve to prosecute conduct that interferes with our cartel investigations, regardless of the nationality of the firm involved or where the acts of obstruction took place. With increased frequency, the Division is uncovering evidence of obstruction of justice, and we will aggressively investigate such conduct. In the last two and one-half years alone, the Division has brought five cases charging obstruction of justice — a high number by historical standards. There are a number of other cases where we have not brought obstruction charges separately but instead obtained sentencing enhancements based on the obstruction.

In an effort to emphasize individual accountability more strongly, Congress significantly raised the penalties for individuals who obstruct justice. Under the new Sarbanes-Oxley Act, individuals can now receive twenty years in prison under some obstruction statutes.⁴ With the enhanced penalties, an executive who obstructs justice to avoid a three-year Sherman Act

³Interestingly, recognizing the increasing aggressiveness of the EU in anti-cartel enforcement, Morgan Crucible representatives warned the co-conspirator that if the United States grand jury investigation went forward, the investigation would spread to the European Union, where the co-conspirator’s company had more business and would face more serious economic consequences.

⁴ 18 U.S.C. §§ 1512(c) and 1519.

penalty is taking a significant risk that he will be subject to a much lengthier jail sentence.

B. Cooperating with Foreign Authorities in the Fight Against Cartels

A real highlight of our recent achievements in anti-cartel enforcement is our increasingly fruitful cooperative efforts with enforcers from other countries. The Division's ability to detect and prosecute international cartel activity has been enhanced significantly by the changing attitudes abroad with respect to anti-cartel enforcement. The growing worldwide consensus that international cartels harm consumers and damage economies has led many governments to enact or strengthen anti-cartel laws and to provide investigative assistance to other governments in specific investigations. Nearly all of the nearly 100 antitrust regimes in the world now ban cartels either civilly or criminally.

One area in particular where we have made great deal of progress recently with our foreign antitrust counterparts is corporate leniency. The Division's leniency program has played a major role in cracking the majority of the international cartels that the Division has prosecuted. The application rate has surged over the last year to better than two per month, and to over four per month in the first three months of the 2003 fiscal year. The remarkable success of this program has generated widespread interest around the world, with many foreign governments following our lead by developing effective leniency policies of their own. These enforcers recognize that a properly conceived leniency policy — which encourages disclosure of secret cartel activity — is a necessary law-enforcement tool for combating cartels. By our count, over a dozen foreign governments now have leniency programs in place or are in the process of drafting or implementing them.

The Division has advised many of these governments in drafting or revising their leniency policies. In particular, we consulted closely with the EU prior to its adoption of a revised leniency policy in February 2002. The increased transparency and predictability of the this new policy greatly increase the incentives for seeking leniency in the EU. And, now that the EU and U.S.'s programs are more or less in line with one another, it is much more attractive for companies to seek and obtain leniency simultaneously in the two jurisdictions. This will further enhance our success in the fight against international cartel activity.

Improved cooperation among anti-cartel authorities has proven to be instrumental in attacking a number of international cartels. Many foreign governments have executed search warrants and obtained testimony and other evidence at our request, and it is no longer uncommon for the Division and foreign governments — particularly Canada and the EU — to coordinate simultaneous searches, service of subpoenas, and “drop-in” interviews to avoid the premature disclosure of an investigation and the possible destruction of evidence. Foreign governments are also providing investigative leads to the Division at a growing rate, and are requesting that we coordinate investigative strategies in order to maximize the success of each other's investigations.

International authorities also are helping the Division locate and obtain the surrender of foreign nationals who have been indicted in Division cases. In 2001, the Division adopted a policy of placing indicted fugitives on a "red notice" list maintained by INTERPOL, the International Criminal Police Organization headquartered in Lyon, France. A red notice is basically an international “wanted” notice that, in many of the 181 INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple

Division fugitive defendants have already been apprehended through the use of an INTERPOL red notice, and the Division is currently pursuing their extradition to the United States for prosecution. The Division's use of red notices clearly raises the stakes for foreign executives who attempt to avoid prosecution by simply remaining outside the United States.

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For decades, U.S. antitrust enforcement authorities have recognized that per se illegal cartel behavior — including price fixing and market allocation — is the most damaging and harmful to ultimate consumers. With the globalization of the economy, the ability of firms and executives to escape prosecution for such damaging behavior by locating and remaining abroad potentially could have created a major gap in our ability to protect consumers from anticompetitive behavior. Fortunately, through our efforts and the efforts of like-minded enforcement agencies, the geographic safe harbors for executives and companies who choose to participate in international cartels are shrinking. Going forward, we will continue to pursue international cartels aggressively and do all that we can to encourage foreign antitrust authorities to continue cooperating and strengthening their anti-cartel policies.

II. Rationalizing Antitrust Enforcement in a World of Many Enforcers

I'd like to turn now to the issues in the world of international antitrust that seem to have gotten the most attention in the past year — those involving our relationship with the EU and the launch of ICN. Nearly 100 jurisdictions now have comprehensive antitrust laws. During the past year, we focused not only on rationalizing enforcement procedures in this new world of many enforcers, but we also concentrated on substantive issues. We did so in a way that was consistent with sound antitrust policy and grounded in solid economics. Convergence is a

worthy goal, but as we have repeatedly stressed, we will not sacrifice sound enforcement principles for the sake of convergence.

A. Our Bilateral Relationship with the European Commission

You would never know it from reading the press reports, but our already strong relationship with the EU continued to improve over the past year. In focusing on the EU, I don't mean to minimize the importance of many of our other bilateral relationships, such as with Canada and Japan. However, I think our affiliation with the EU has become increasingly effective, and in many ways is a good model for how a bilateral antitrust relationship ought to work. In particular, our relationship with the EU shows that the strongest of bilateral relationships should benefit both sides and include not only notification and coordination on particular cases, but convergence on substantive antitrust principles.

The U.S. antitrust authorities and the EU are of the view that the proper objective of antitrust policy is to promote consumer welfare. This common vision, along with a great deal of hard work on the part of investigative staffs to coordinate on individual enforcement matters, has resulted in a remarkable record of cooperation and convergence over the past decade. This past year was one of the most productive ever in our relationship, as a result of increased contact between senior antitrust officials on both sides of the Atlantic, as well as a reinvigorated U.S.-EU merger working group.

The U.S.-EU merger working group has been the engine that has driven our increasingly successful efforts at convergence and coordination. The decision taken during the fall of 2001 to step up the work of our existing joint merger working group to promote convergence between U.S. and EU merger policy began to pay valuable dividends toward the end of last year.

Particularly important was the group's work on analyzing, and potentially reconciling, our differing policies towards conglomerate mergers, and its development of a set of merger review "best practices" that the Division, FTC, and the EC announced last October. The best practices are particularly significant in that they are a concrete demonstration of the U.S. and EU antitrust agencies' commitment to cooperate closely and keep each other fully informed of developments throughout their respective merger investigations. Many of the best practices memorialize and make more transparent practices that have been in place informally for quite some time. So, even though the U.S. and EC investigative staffs and senior officials have communicated effectively with one another in many merger cases over the years, the best practices should help to standardize "good practice," and will provide important guidance to all participants in the merger review process.

With its work on merger review best practices done, the U.S.-EU merger working group has now turned its attention to efficiencies, and we expect good things on this topic over the coming year. Moreover, the group has been — and will continue to be — the principal vehicle for providing feedback to the EU's draft horizontal merger guidelines, a high priority on both sides of the Atlantic. I foresee us continuing to use the highly successful U.S.-EU Merger Working Group over the coming years to build upon our solid record of cooperation and convergence with the EU.

Thanks in large part to the working group's efforts, we had one of the best U.S./EU bilateral consultations ever last July. During the bilateral, we had a very focused exchange about U.S. and EU policies toward conglomerate mergers. We also used the bilateral to discuss the Merger Working Group's recommendations for best practices. I hope last year's bilateral will

become a blueprint not only for future ones with the EU, but with other nations as well. These consultations are by no means a one-way street. Although we do not always agree, we certainly have the greatest respect for our EU colleagues. With their current reform efforts and willingness to examine first principles, Mario Monti and Philip Lowe are providing an excellent model for policy leadership.

Given that the working group model has proven successful in the merger context, we decided in the past year to begin using that framework in the civil non-merger context as well by launching an Intellectual Property Working Group with the EU. The group has already had two videoconferences — including one on patent pooling — with more sessions planned for this winter and spring. Through this group, talented government antitrust experts on each side of the Atlantic can learn from one another and come up with optimal approaches to many of the difficult issues that face enforcers in matters that involve both antitrust and intellectual property issues.

**B. Learning from the European Union:
Reviewing the Federal-State Enforcement Relationship**

In this vein, it is important for the American antitrust community — the government and private sector alike — to recognize that there are things we can learn from the EU. For example, the EU is now undertaking efforts to address the interrelationship between a “federal” enforcement agency, and many separate state (or Member State) enforcement agencies. In the United States, firms may confront not only a federal antitrust agency in the form of the Department of Justice or the Federal Trade Commission, but also attorneys general from up to 50 states, five territories, and the District of Columbia who are authorized to bring actions under state and federal law. Indeed, in the recent suit challenging the Echostar/DirecTV merger, 25 of

these attorneys general joined our Complaint. Although enforcement agencies within the United States work closely with one another, there remains the risk of divergence, of various enforcers pursuing different concerns and different forms of relief.

Division staff have been examining these issues closely and have been active in the federal-and-state-relations working group that was set up last year. As part of this review, we will continue to follow, and to learn from, the EU's modernization program, as well as the ongoing reform of its merger review system, where explicit jurisdictional rules create a "one-stop shop" so that either the Commission or the member states, but never both, rule on proposed mergers. Under the EU's recent "modernization" reforms, much enforcement responsibility will be transferred to the member states, who now will be empowered to rule on exemptions.

Many of the details of this shared competence remain to be worked out, including how the new European Competition Network will function in practice and guidelines for the allocation of responsibility for particular cases. The Division and the FTC certainly know how tough that can be. One particularly interesting feature of the new EU system allows the Commission to take over from a member state an investigation that presents issues of particular interest to the EU. The EU's reforms also include guidance to help enforcement authorities determine which cases are appropriate for member-state enforcement, and which are better suited to the Commission. The EU should be applauded for its attempt to create a complementary, and not conflicting, antitrust enforcement regime. One of the many benefits of our close cooperative relationship is that we have learned and will continue to learn much from the EU's reform process.

C. The International Competition Network

As valuable and productive as our relationships with the EU and other foreign governments are, we cannot accomplish everything that we should in international antitrust through bilateral relationships. My former boss at the Division, Charles James, also recognized that antitrust enforcement could not remain simply a concern of a few highly developed economies in the wake of the rapid globalization of business. He realized that if we are to achieve true global convergence and cooperation, multilateral efforts must supplement existing bilateral ties. One of Charles's main international priorities, therefore, was launching the International Competition Network ("ICN") as a platform for promoting convergence and cooperation among antitrust authorities worldwide.

Since its inception only fifteen months ago, the ICN has emerged as a global network of antitrust authorities from nearly 70 developed and developing countries — representing nearly 90 percent of the world's Gross Domestic Product. It is already serving as an important vehicle for international cooperation and convergence. The virtual network structure of ICN, and its organization around diverse working groups that consult frequently and informally throughout the year, have enabled ICN to produce meaningful results very quickly. Ensuring ICN's continued success will remain a critical priority for the Division in 2003.

I know that Konrad von Finckenstein — who has been delivering a tremendous performance as Chair of the ICN Steering Group — provided a summary of the ICN's achievements and prospects at the very beginning of this long day. I will not presume to compete with Konrad on this subject. What I will do is to say a few words about the Justice Department's continued commitment to this extraordinary project. (By focusing here on ICN, I

do not mean to dismiss the extremely important work going on in the OECD, WTO and UNCTAD.)

First, I want to assure you that there will be no diminution of effort on our part to ensure that the ICN is a successful vehicle for soundly grounded antitrust convergence. Principal Deputy Assistant Attorney General Deborah Majoras has taken over from Bill Kolasky as Chair of ICN's Merger Working Group, and a wide range of Division staff is continuing to devote many hours to supporting all of the ICN's many working groups. Among other things, the Division's Director of Civil Enforcement Connie Robinson, along with Division staff and staff members from the Israel Antitrust Authority, put together an excellent merger workshop last November in Washington for officials from 40 ICN member agencies. We hope to repeat these staff-level workshops in the future, with a view to building the same strong working relationships that now exist in the cartel area. Looking forward, we will work with Konrad, our Mexican colleagues, and the other ICN members to make the upcoming conference in Merida, Mexico a success to rival last year's inaugural conference in Naples.

Second, I want to thank our many private sector advisors who have devoted their own time, thoughts, and drafting skills to turning diverse points of view into guiding principles and recommended practices for merger review that will have a broad legitimacy in the global antitrust community. I know that many people in this room have made major contributions to the work of the ICN, and I ask you to continue to assist the ICN member agencies with your expertise and insights, so that we can achieve the best product possible. I also ask your help in turning the ICN's voluntary recommendations into practice, by educating the global community

about the guiding principles and recommended practices and helping ICN members to implement them.

Finally, the ICN's success has brought growing pains. It's easy to say that something can be run as a "virtual" organization when you don't really know — as we did not know at this time last year — whether a new network will amount to anything useful. We certainly have learned over the past year that it is challenging to run a virtual organization solely by Internet, teleconference and videoconference, and many of us — but especially the Canadian antitrust agency — have found it costly in personnel resources. Nevertheless, my view is that the flexibility and immediacy of ICN's virtual nature is precisely what has made it the success that it is. I think it would be a great mistake to create a new and formal bureaucracy for the ICN, however small. Even small bureaucracies tend to grow and take on lives of their own. We want the ICN's views and achievements to be those of its Members, the government antitrust officials. ICN can derive great benefit from the expertise of its private sector advisors. We will continue to be proactive and open to proposals in dealing with the many organizational issues raised by ICN as it grows and matures. But the founding agencies' decision to make it a virtual organization of government antitrust enforcers was the right one. I strongly recommend that we remain on that track.

III. Conclusion

Let me thank you again for providing this opportunity to discuss the Division's recent international accomplishments and my perspectives about the future. Last year was a year of substantial and important progress for international antitrust. There is every reason to believe we will continue to build and expand on these successes in 2003.