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INTERNATIONAL ASPECTS OF ANTITRUST ENFORCEMENT: A U.S. PERSPECTIVE

Outline of Remarks

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Introduction

In recent years, U.S. antitrust authorities have paid increased attention to the international aspects of antitrust enforcement. This emphasis reflects the pervasive internationalization of the economy: import and export transactions now account for nearly a quarter of the United States' gross domestic product.

Recent Antitrust Division actions and activities aimed at making antitrust more effective in dealing with the global marketplace include --

- The creation of a new senior-level position in the Antitrust Division with principal responsibility for international matters;
- Revision of the *Antitrust Enforcement Guidelines for International Operations*;
- Confirmation of the Department's intention to challenge anticompetitive conduct affecting U.S. export as well as import commerce, and the filing of the first case in several years based principally on export effects;
- Emphasis on cooperation with foreign antitrust authorities, including
 - a growing number of cases in which international cooperation has played a major role, and
 - enactment of the *International Antitrust Enforcement Assistance Act of 1994*, which enables U.S. and foreign antitrust authorities to share confidential investigative information and engage in other types of mutual assistance that were not possible under prior law.

Antitrust Enforcement Guidelines for International Operations

The U.S. antitrust agencies from time-to-time issue "guidelines." Other examples include the 1992 *Horizontal Merger Guidelines* that were issued jointly by the Justice Department and the Federal Trade Commission, and the draft *Guidelines for the Licensing and Acquisition of Intellectual Property* on which public comments were invited in August 1994 and in which we are currently considering revisions in light of the comments received.

Guidelines are statements of enforcement policy. They are issued to advise the business and legal communities and others of the antitrust agencies' policies and methods of analysis. Although the agencies naturally intend these Guidelines to be an accurate reflection of law and policy at the time they are issued, the Guidelines themselves are not binding on the courts, private parties, or the agencies themselves.

Justice Department guidelines for international antitrust were previously published in 1977 and 1988. A draft of revised *Antitrust Enforcement Guidelines for International Operations*, which will supersede the 1988 version, was published with an invitation for comments on October 19, 1994.

The draft *Guidelines* include discussion of --

- Relevant provisions of the antitrust laws;
- Provisions in the trade laws of the United States that may bear on application of the antitrust laws;
- Subject matter jurisdiction;
- Comity;
- The effect of foreign government involvement in conduct that might be subject to the antitrust laws;
- Antitrust enforcement and international trade regulation;
- Personal jurisdiction; and
- Investigatory practices in instances in which evidence is located outside the United States.

The draft *Guidelines* reflect continuity in the Justice Department's approach to international antitrust issues, but there are notable differences from earlier guidelines:

- The new draft *Guidelines* have been issued jointly by the Department of Justice and the Federal Trade Commission. Earlier versions were issued solely by the Department of Justice. This change reflects the importance given by the agencies to speaking with a single voice in the international antitrust area.
- They retain the basic thrust of the Department's approach to issues of jurisdiction and comity as it has stood for many years, while bringing it up to date to reflect changes in the law. They emphasize that the agencies are prepared to consider enforcement action whenever the jurisdictional and substantive requirements of the law are met. At the same time, they stress that considerations of international comity play an important role in the agencies' decisions, as well as the priority the agencies give to cooperating where possible with foreign counterparts.
- The draft *Guidelines* focus exclusively on matters that are unique to antitrust's international setting. In this they differ from the 1988 Guidelines, which were intended as a broad statement of the Department's then-current substantive antitrust views in areas such as mergers, joint ventures, intellectual property licensing and distribution restraints.
- They retain the approach to anticompetitive restraints on export trade that was adopted in 1992 and that reinstated the policy that had been in effect prior to the 1988 revision. The 1988 guidelines had eschewed the possibility of acting in cases in which there was no direct impact on U.S. consumers. Prior to 1988 and since 1992, the Department's stated policy -- reflecting statutory jurisdictional provisions -- has been to take antitrust enforcement action in appropriate cases against anticompetitive conduct that adversely affects U.S. export trade.
- They include a more extensive discussion than the previous version of doctrines that affect the way in which the antitrust laws apply where foreign governments are in some way involved in the conduct at issue. These include the Foreign Sovereign Immunities Act; the Act of State doctrine; the *Noerr-Pennington* doctrine (which generally

immunizes petitioning to secure governmental action that is anticompetitive); and the foreign sovereign compulsion defense. In the case of foreign sovereign compulsion, the draft limits the availability of the defense if the conduct took place in the United States, or if compulsion is not associated with significant penalties for noncompliance.

The Justice Department and Federal Trade Commission received a number of comments from both private parties and from some governments, including the British government. These comments are currently under review.

Recent Enforcement Activities

At the most general level, the Department's antitrust enforcement activities are, as they traditionally have been, divided principally among three areas:

- *Cartel enforcement.* Cartel cases, usually involving price fixing, bid rigging or market allocation among competitors, ordinarily are investigated and prosecuted as violations of criminal law, subject to fines and imprisonment.
- *Mergers and acquisitions.* These usually, but do not necessarily, involve transactions that are subject to premerger notification requirements.
- *Civil enforcement involving arrangements other than mergers and acquisitions.* These are predominantly transactions subject to analysis under "the rule of reason." Examples include joint ventures, licensing arrangements and distribution restraints.

Enforcement in all three areas is active, but the greatest relative growth has been in the area of non-merger civil enforcement. To put this more concretely, in the 1994 fiscal year the Division brought 57 criminal cases, challenged or announced its intention to challenge 22 mergers, and brought 10 non-merger civil cases.

Examples of recent cases of particular interest in the international context include --

- *U.S. v. Pilkington plc*, No. Civ 94-345 TUC (WDB) (D. Ariz., filed May 26, 1994). The case is significant not only as the first recent Justice Department case attacking anticompetitive restraints on U.S. export commerce, but because of its focus on innovation-retarding restraints in technology markets.

Pilkington was a civil case that was brought and simultaneously settled with a consent decree. Pilkington is a major manufacturer of flat glass, used for windows in buildings and automobiles. The complaint charged Pilkington with using anticompetitive licensing practices to close off foreign markets to U.S. companies by strictly limiting their use of float glass technology, some of which had been developed and patented by Pilkington some three decades earlier. According to the complaint, even though Pilkington's patents expired long ago and its technology is now largely in the public domain, the company used its licensing arrangements to prevent U.S. firms from competing in the design, construction or operation of float glass plants in other countries.

The consent decree entered in the case enjoins Pilkington from asserting claims of proprietary technology against U.S. licensees to prevent their use of float glass technology. The decree does not prevent Pilkington from asserting rights under (a) still-valid or future patents, or (b) specific and specifically-identified technology that qualifies as a trade secret under applicable law.

- *U.S. v. Microsoft Corporation*, Civ. Action No. 94-1564 (SS) (D. DC, filed May 15, 1994). *Microsoft*, apart from its significance for the computer and software industry, is significant as an instance of pathbreaking cooperation between the U.S. and EC antitrust authorities.

During 1993, both the Department of Justice and the European Commission had pending investigations of possible violations of their respective antitrust laws by Microsoft Corporation. There was extensive overlap in the practices under investigation in the two jurisdictions. However, neither the Department nor the Commission could share with the other information or documents it had obtained from Microsoft because of confidentiality provisions in U.S. and EC law. To overcome this inability to cooperate in their respective investigations, the U.S. and EC agencies asked Microsoft to agree to permit them to share information, and Microsoft agreed. Ultimately, Microsoft and the two antitrust agencies entered into joint settlement negotiations. These negotiations led to Microsoft's giving binding undertakings to the Commission, and entering into a proposed consent decree with the Department of Justice, containing substantially identical terms.

Benefits of these information sharing and joint settlement arrangements to the agencies and to Microsoft included prompter resolution of the matter and the assurance of consistent American and European remedies.

- *United States v. MCI Communications Corp. and BT Forty-Eight Co.*, Civ. Action No. 94-1317 (TFH) (D. DC, filed June 15, 1994). In this case, the Department of Justice considered issues of international comity in shaping relief to avoid conflict with British regulation.

The transaction was a joint venture and partial acquisition involving British Telecom and MCI Communications Corp., a U.S. based firm. One concern to the Department of Justice was to assure that MCI's relationship with British Telecom did not lead to discrimination against other U.S. carriers offering competing multinational communications services for which access to British Telecom's network was required. The case was settled by a consent decree which permitted the basic deal to go forward while putting in place measures to assure against such discrimination. The Department noted in its Competitive Impact Statement that it might have been necessary to seek more extensive remedial provisions if the policies of the British government and its telecommunications regulatory authority OFTEL had not been consistent with, and reinforced, this non-discrimination objective.

International Antitrust Enforcement Cooperation

The U.S. antitrust agencies' emphasis on international cooperation with foreign counterparts arises from several considerations:

- The internationalization of business means that a growing number of antitrust matters will be of interest to antitrust authorities in more than one country.
- The information needed to determine whether an antitrust violation has occurred, and to establish the violation before a court or administrative body, is located abroad increasingly often.
- There has been an enormous increase in the number of countries that have adopted or improved their antitrust laws and enforcement mechanisms, as well as growing convergence on basic substantive antitrust principles.

- There has been a significant lessening of jurisdictional conflict as most countries have come to accept that antitrust enforcement cannot be effective if it is confined to conduct or transactions that are limited within a single nation's borders.

In addition to *Microsoft*, a number of Department of Justice antitrust matters in the past year have involved extensive international cooperation. Among them --

- A joint U.S.-Canadian investigation into price fixing in the thermal fax paper industry that affected the markets in both countries resulted last July in criminal convictions under both Canadian and U.S. antitrust laws.
- A U.S. prosecution and conviction last June of firms in the disposable plastic dinnerware industry was facilitated by evidence obtained in coordinated searches in the U.S. by the Federal Bureau of Investigation and in Canada by the Royal Canadian Mounted Police.
- Cooperation between the Department of Justice and Germany's Bundeskartellamt in connection with last year's proposed acquisition by the German firm ZF of General Motors' Allison Transmission Division facilitated an outcome in which the parties abandoned the transaction in the face of challenges by both agencies.

The two Canadian matters were made possible a treaty between the U.S. and Canada for mutual legal assistance in criminal matters (these agreements are commonly referred to as "MLATs"), which applies to antitrust as well as other offenses. The German matter did not involve the exchange of confidential information obtained from the parties, which would not have been permissible under existing law, but did involve discussion of the timing and nature of our respective proceedings.

Existing antitrust-specific agreements between the U.S. and Australia, Canada, Germany and the EC² have been valuable but have important limitations. In particular, none of them permits the sharing of confidential information obtained in investigations, or calls for either party to use its powers to obtain evidence on the other's behalf. By contrast, securities and tax law authorities in the United States and elsewhere have for many years had legislative authority and a network of agreements to permit cooperation of this nature. In addition, experience under the Canadian MLAT has proven the value of such assistance in antitrust matters.

In July 1994, at the urging of the Department of Justice, legislation was introduced that would expand the ability of the U.S. antitrust agencies to cooperate in these ways with foreign antitrust authorities. The *International Antitrust Enforcement Assistance Act of 1994* passed both houses of Congress with bipartisan support and was signed into law by the President on November 2, 1994.

Specific provisions in the IAEAA will:

- On a reciprocal basis, permit the Justice Department and the FTC to exchange otherwise confidential investigative information with foreign antitrust authorities.
- On a reciprocal basis, permit the Justice Department and the FTC to obtain information from firms or individuals in the U.S. on behalf of foreign antitrust authorities, either by

²In August 1994 the European Court of Justice held that the U.S.-EC agreement was invalid as a matter of EU law because it had not been approved by the Council of Ministers. The Commission has said that it intends in the near future to seek Council approval.

using their respective civil investigative powers or, in the case of the Justice Department, by going to court and seeking an order compelling the production of evidence.

- Assure that the foreign antitrust agency will provide assistance that is comparable in scope to that provided by the U.S. agencies.
- Protect confidential business for information from improper disclosure or misuse by:
 - requiring that assistance be pursuant to a publicly disclosed antitrust mutual assistance agreement;
 - assuring that the foreign antitrust authority can and will meet stringent confidentiality requirements for any information provided by the U.S. antitrust agencies;
 - restricting the use of any information provided to antitrust enforcement purposes, subject to a limited exception for other essential law enforcement purposes; and
 - requiring termination of the antitrust mutual assistance agreement if there is a breach of confidentiality, unless adequate steps are taken to minimize the harm and assure that it will not recur.
- Exclude premerger information received by the U.S. agencies under §7A of the Clayton Act (Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976), as well as classified national security information, from disclosure under the IAEAA.
- Require that before providing any assistance under the Act, the Attorney General or the Federal Trade Commission, as the case may be, conclude that doing so is consistent with the public interest of the United States.