

U.S. Department of Justice ANTITRUST DIVISION *update*

Protecting and Promoting Competition

Spring 2005



R. Hewitt Pate, Assistant Attorney General, at the Conference Board's 2005 Antitrust conference in New York, NY.

MESSAGE FROM THE AAG

Our Hierarchy of Antitrust Enforcement

One of our priorities at the Antitrust Division is providing the Bar and the public with better and more useful information about our work. We hope this brief publication will give readers a greater understanding of our enforcement agenda and also highlight significant recent events in the work of the Division. A coherent philosophy of antitrust enforcement is important for setting the Division's priorities. As antitrust enforcement

regimes proliferate around the world, promoting agreement on fundamental principles is the starting point for all meaningful substantive and procedural convergence.

The Division pursues internally and promotes internationally a hierarchy of antitrust enforcement aimed at protecting and promoting competition without unintentionally harming it. At the top of this hierarchy is criminal cartel prosecution. Cartels inflate prices, restrict supply, inhibit efficiency, and reduce innovation. Our next priority is merger enforcement based on sound economic analysis and appropriate respect for private property rights. While the government must have sound evidence before seeking to block a transaction, preserving the benefits of competition demands that decisive merger enforcement remain a practical reality. Finally, the Division places a high priority on promoting sound and objective analysis of unilateral conduct. Anticompetitive behavior can be hard to distinguish from vigorous competition that produces innovation and lowers prices. Particularly in a system such as ours that places so much emphasis on private treble damages litigation, caution is warranted to ensure that the antitrust laws do not cause unintentional harm to competition and innovation.

Cartel Enforcement

Secret agreements among competitors to fix prices, allocate customers, or reduce

output are a direct assault on the principles of competition that drive our market economy. The United States Supreme Court recently called collusion the "supreme evil" of antitrust. Companies that participate in cartels are committing frauds against their customers and deserve severe penalties. During the past four years, the Department of Justice has actively pursued cartel enforcement to keep the nation's economy competitive. Substantial prison sentences are the single most successful way to deter anticompetitive cartel behavior that robs American consumers.

The Department has aggressively sought jail time for individuals engaged in cartel behavior that exploits U.S. consumers. The aggressive pursuit of these criminals has resulted in a 123% increase in days of jail time imposed for the fiscal years 2001-2004, in comparison to fiscal years 1997-2000. For that same period, 20% more individuals were sentenced to jail. The Division has even greater tools at its disposal now that President Bush has signed the 2004 Antitrust Criminal Penalty Enhancement and Reform Act. This new law increases criminal antitrust penalties to ensure that the antitrust laws remain a strong deterrent to cartel activity and includes provisions to enhance our amnesty program.

International cartels are an important focus for the Division because they typically affect very large volumes of commerce. The past four years have seen a 56% increase in the number of international grand jury investigations initiated. The Division has also successfully pursued an aggressive restitution program, returning money to the victims of antitrust crimes. The Division's efforts in the past four years have produced an 847%

increase in the amount of restitution recovered for the victims of those crimes in comparison to the previous four-year period.

Merger Enforcement

Anticompetitive mergers can lead to fewer choices, less innovation, and increased prices to American consumers. Merger enforcement is second, rather than first, in our enforcement hierarchy for the simple reason that the potential anticompetitive effects require careful evaluation—nothing like our per se condemnation of cartels. A merger can increase market power, but can also result in greater efficiency that may reduce prices to consumers. In short, determining the competitive effects of mergers requires careful analysis. The Division devotes significant resources to merger analysis, including the extensive efforts of our Economic Analysis Group and the hard work of our attorneys in gathering and evaluating market evidence.

The last four years have seen several initiatives to improve our work. Under the leadership of Charles James, we implemented a merger process improvement initiative to lower the costs of merger reviews. Together with the FTC, we issued the first-ever merger review data on our past enforcement cases, and co-hosted a merger workshop touching on all areas of merger review. We have also stressed the crucial importance of adhering to merger filing laws and procedural obligations, with a 26% increase in the level of merger filing penalties assessed over the past four years.

Unilateral Conduct

A rough continuum has developed in the type of analysis that is required to assess the likely competitive effects of different categories of conduct. The analysis of cartels and hard core price fixing falls at one end of the spectrum, clearly devoid of any efficiency-enhancing potential. At the other end is single firm conduct. Here, the most careful analysis is needed. It is with respect to this type of conduct that it may be most difficult to differentiate between healthy competition on the merits and harmful exclusionary conduct. It is here where enforcers and courts run a signif-

"The Division pursues...a hierarchy of antitrust enforcement aimed at protecting and promoting competition without unintentionally harming it."

— Hewitt Pate

icant risk of deterring hard yet legitimate competition. It is in this area that disappointed competitors are most likely to seek government action to avoid the hard realities of competition.

Given the difficulties of distinguishing between competitive and predatory conduct, should courts and enforcement agencies focus only on cartel and merger enforcement and look the other way when it comes to single firm conduct? No, courts and enforcers should be vigilant in taking action against anticompetitive single firm conduct. It is important, however, that the antitrust laws allow even dominant firms to compete aggressively. To maintain this difficult balancing act, we have sought to apply standards of single firm con-

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SIGNIFICANT EVENTS

- ◆ U.S. Supreme Court *Trinko* decision provides fundamental guidance to significantly diminish the potential that Section 2 will be applied to harm competition (January 2004)
- ◆ Antitrust Division and FTC host first joint workshop on merger enforcement (February 2004)
- ◆ Crompton Corporation agrees to pay a \$50 million fine for participating in an international conspiracy to fix prices of rubber chemicals (March 2004)
- ◆ ICN adopts recommended practices to improve merger review processes and establishes cartel working group (April 2004)
- ◆ President Bush signs Antitrust Criminal Penalty Enhancement and Reform Act of 2004, increasing maximum Sherman Act fines and prison terms, and detrebling civil liability for amnesty recipients that cooperate with civil plaintiffs (June 2004)
- ◆ U.S. Supreme Court *Empagran* decision holds that a foreign plaintiff must show that an antitrust violation's effect on U.S. commerce gave rise to its claim (June 2004)
- ◆ U.S. Court of Appeals for the District of Columbia Circuit en banc decision affirms the District Court's finding that the Department's settlement with Microsoft is in the public interest (June 2004)
- ◆ U.S. and Chinese competition authorities hold first meeting to discuss China's draft antimonopoly law (July 2004)
- ◆ Bayer AG agrees to pay a \$66 million fine for participating in an international conspiracy to fix prices of rubber chemicals (July 2004)
- ◆ U.S. District Court for the Northern District of California rules against the Division's challenge to Oracle Corp.'s acquisition of PeopleSoft Inc. (September 2004)
- ◆ Infineon Technologies AG, a manufacturer of dynamic random access memory (DRAM), agrees to pay a \$160 million fine (third largest ever) for participating in an international conspiracy to fix DRAM prices (September 2004)
- ◆ Antitrust Division releases Policy Guide to Merger Remedies (October 2004)
- ◆ Cingular Wireless Corporation consent decree requires divestitures in 13 markets as part of \$41 billion acquisition of AT&T Wireless (October 2004)
- ◆ ICN holds first cartel conference in Sydney, Australia (November 2004)
- ◆ DuPont Dow Elastomers L.L.C. agrees to pay an \$84 million fine for participating in an international conspiracy to fix prices of synthetic rubber (January 2005)
- ◆ U.S. Court of Appeals for the Third Circuit reverses district court in *Dentsply*, sustaining the Division's Section 2 challenge to an exclusionary policy imposed by a manufacturer on its dealers (February 2005)

ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM:

An Overview Of Recent Developments

The detection, prosecution, and deterrence of cartel offenses is the highest priority of the Antitrust Division. The Division places a particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of the harm that they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable executives, and obtaining record-breaking corporate fines.

- ◆ Since FY 2001, over 70 individuals have been sentenced to incarceration in cases prosecuted by the Antitrust Division. This total includes 15 foreign nationals from 10 different countries who submitted to U.S. jurisdiction and were sentenced to incarceration in U.S. prisons.
- ◆ The five longest jail sentences in the Division's history have all been imposed in the last five years – including a 10-year jail sentence in one case.
- ◆ There is a strong trend towards more frequently imposed and longer average prison terms for antitrust offenders. Since FY 2001, 57 percent of the individuals sentenced have had to serve prison time as compared to 37 percent for the previous 10 years. In addition, the average jail sentence since FY 2001 (16 months) is double the average imposed in the 1990s (8 months). The trend has increased in FY 2005 with the first five months yielding a 22-month average.
- ◆ In FY 2004, \$360 million in criminal fines were obtained against 17 corporations and 15 individuals. This total includes a \$160 million fine against Infineon Technologies AG – the third largest criminal antitrust fine ever. In addition, five other companies agreed to pay fines of \$10 million or more in FY 2004.
- ◆ These trends can be expected to continue: in 2004 President Bush signed into law legislation substantially increasing criminal antitrust penalties.



First-ever meeting of senior U.S. and Chinese government officials to discuss China's recent efforts to develop a comprehensive competition law. Beijing, China, July 2004.

PROFILE: SCOTT HAMMOND, DEPUTY AAG FOR CRIMINAL ENFORCEMENT

On February 2, 2005, R. Hewitt Pate, Assistant Attorney General for the Department's Antitrust Division, announced that Scott Hammond had been appointed to serve as the Deputy Assistant Attorney General for Criminal Enforcement having supervisory authority over the Antitrust Division's criminal antitrust investigations and prosecutions.

Hammond joined the Division in 1988, through the Attorney General's Honors Program. He started his career as a trial attorney in the Litigation II section of the Division, where he participated in a wide array of antitrust matters.

One of the most prominent cases he worked on while serving in the Litigation II section involved price-fixing in the plastic dinnerware industry. Through the course of the criminal investigation, the government convicted seven individuals and three corporations that were fined more than \$8 million. The case represented some "firsts" for the Division. It was the first time that foreign nationals were sentenced to serve time in U.S. prisons. The case also represented the Division's first use of a criminal Mutual Legal Assistance Treaty, using the treaty for the execution of search warrants in the U.S. and Canada.

Hammond remained with the Litigation II section until 1995, when he was selected as

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Message from the AAG*

duct that are transparent, objective and administrable, asking whether conduct would make economic sense for the defendant but for its elimination or lessening of competition. There may be no end to the quest for antitrust's holy grail—a perfect all-purpose test—but a framework for objective, transparent and economically-based assessment of single firm conduct is certainly preferable to the sloganeering and subjectivity that too often characterize argument and scholarship in this area.

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Protecting and promoting competition is our mission at the Antitrust Division. In addition to our enforcement program, we seek opportunities for competition advocacy both in the U.S. and abroad. The United States took the lead in encouraging jurisdictions around the globe to develop legal protection for competitive markets. Now that so many nations have done so, government officials, economists, and members of the Bar in established jurisdictions share an obligation to promote sound competition law principles. Fortunately, the Division's strong relationships with the members of the Antitrust Bar (or, in some quarters, the "Competition Bar") remain an important asset to our work. We hope this publication will be useful to the Bar, and offer an open invitation to work together with us to improve antitrust enforcement for the benefit of consumers and the economy.

THE SAN FRANCISCO FIELD OFFICE OF THE ANTITRUST DIVISION

*From Citric Acid to Memory Chips:
A Decade of Successful Prosecutions*

The Antitrust Division's 20-lawyer San Francisco field office historically prosecuted cases arising within the 11 western states. Today, however, nearly all of the office's criminal investigations and prosecutions are international in scope. In the past decade, the office's criminal cases, most of them involving international cartels, resulted in total fines of over \$650 million. The experience and knowledge of the San Francisco staff in international matters has contributed to many milestones in the Division's international cartel enforcement program.

The San Francisco office's first prosecution of an international cartel was in 1996, when Archer Daniels Midland Company (ADM) pleaded guilty and paid a \$30 million fine for participating in a global conspiracy to raise the price of citric acid. Four other companies also pleaded guilty to participating in the conspiracy and paid fines totaling more than \$75 million. The ADM case started a new era in criminal antitrust prosecutions for the Division and provided an opportunity for the San Francisco office to develop an expertise in dealing with many of the unique and complex issues encountered in international investigations and prosecutions. Over the last decade, the office has developed a successful practice in identifying, investigating and prosecuting international cartels and working closely with foreign agencies involved in their own investigations.

The citric acid case was followed by successful prosecutions of international cartels in the sorbates and monochloroacetic acid (MCAA) industries. In the sorbates case, five companies (three Japanese, one German, and one U.S.) pleaded guilty to participating in a 17-year conspiracy—the longest criminal conspiracy ever prosecuted by the Division—to fix the price of the food preservatives potassium sorbate and sorbic acid. The five companies paid fines totaling more than \$130 million, and eight high-level executives either pleaded guilty or were indicted. In the MCAA case, three companies (one Dutch, one French and one German) pleaded guilty and paid fines totaling \$29 million for price-fixing and market allocation of a chemical used in the production of numerous commercial and consumer products. Three executives, one Swedish and two French, also pleaded guilty and served jail time in the U.S. for participating in the conspiracy.

During the start of one investigation in 2003, the office coordinated with three other foreign authorities—the European Commission, Canada and Japan—in unprecedented simultaneous searches of companies and drop-in interviews throughout the world. Recently, Hitoshi Hayashi, a Japanese executive who became a fugitive after indictment for participating in the sorbates conspiracy, agreed to plead guilty and serve jail time in the U.S. Mr. Hayashi is the first Japanese citizen to serve a prison sentence in the U.S. for an antitrust offense.

The San Francisco office has been particularly active this past year, securing guilty pleas from seven corporations, resulting in fines exceeding \$325 million, and eight executives for participating in international cartels in seven industries: dynamic random access memory semiconductors (DRAM), nitrile butadiene rubber, organic peroxides, polyester polyols, rubber chemicals, chloroprene rubber and sorbates.

The DRAM and rubber-related cartels are examples of the massive harm created by international cartels. In October 2004, Infineon Technologies AG pleaded guilty to participating in an international conspiracy to fix DRAM prices and was sentenced to pay a \$160 million fine, the third largest in antitrust history. The annual U.S. market for DRAM is over \$5 billion. In December 2004, four Infineon executives, three German nationals and one U.S. citizen, pleaded guilty to participating in the conspiracy and were sentenced to serve prison terms ranging from three to six months. During the past year, several companies, including Bayer AG, Dupont Dow Elastomers L.L.C., Crompton Corporation and Zeon Chemicals L.P., and numerous individuals pleaded guilty to participating in international cartels for various rubber-related products with combined annual sales in the U.S. of over \$1 billion. Fines in these cases total more than \$200 million.

RECENT CRIMINAL LAW STRENGTHENING

On June 22, 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The measure had strong bipartisan support in Congress led by Senator DeWine and Senator Kohl, the Chairman and Ranking Member, respectively, of the Antitrust, Competition Policy and Consumer Rights Subcommittee of the Senate Judiciary Committee. The Act increases the maximum Sherman Act corporate fine to \$100 million, the maximum individual fine to \$1 million, and the maximum Sherman Act jail term to 10 years. The Act also enhances the incentive for corporations to self-report illegal conduct. It limits the damages recoverable from a corporate amnesty applicant that also cooperates with private plaintiffs in their damage actions against remaining cartel members to the damages actually inflicted by the amnesty applicant's own conduct.

The increase in criminal penalties will bring antitrust penalties in line with those for other white-collar crimes and will ensure the penalties more accurately reflect the enormous harm inflicted by cartels in today's marketplace. As Senator DeWine stated, "Antitrust crimes such as bid rigging and price-fixing cheat consumers and must be strongly punished." Senator Kohl added, "Antitrust criminals steal from consumers just as surely as a thief on the street."

The detrebling provision of the Act removes a major disincentive for amnesty applications and will lead to the exposure of more cartels, making the Division's Corporate Leniency Program even more effective in detecting and prosecuting price-fixing. The detrebling applies to a corporation and its executives who cooperate with the government investigation through the Antitrust Division's Corporate Leniency Policy. The legislation limits the liability of a successful leniency applicant and its executives to single damages without joint and several liability—i.e., the applicant would only be liable for actual, compensatory damages attributable to the harm its own conduct caused—if the applicant and its executives provide cooperation to the victims in their lawsuit against the other conspirators for treble damages. The aim of the legislation is to: increase the number of criminal antitrust conspiracies that are exposed and prosecuted; increase compensation to victims of criminal antitrust conspiracies through the required cooperation provided to the victims by the amnesty applicant; further destabilize, and deter the formation of, criminal antitrust conspiracies by creating an additional major incentive to self-report the violation; reduce the costs of investigating and prosecuting criminal antitrust conspiracies; and reduce the cost for victims to recover the damages they suffer from criminal antitrust conspiracies.

INTERNATIONAL CARTEL ENFORCEMENT

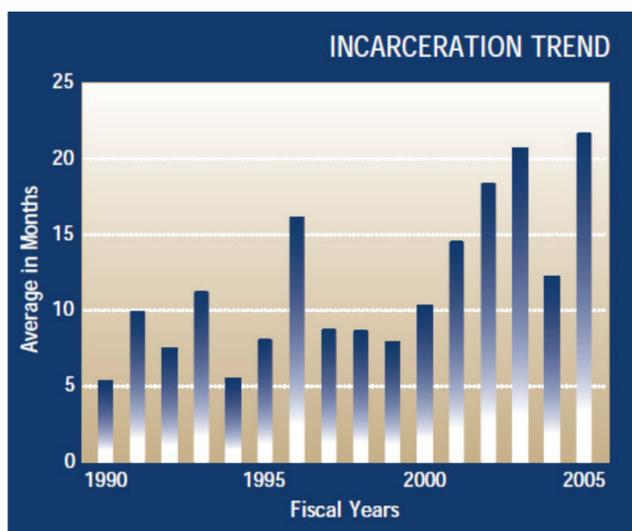
Investigations. The Antitrust Division is extremely active in pursuing international cartel activity. There are approximately 50 sitting grand juries investigating suspected international cartel activity. The subjects and targets of the Division's international investigations are located on 6 continents and in nearly 25 different countries. The investigations have uncovered meetings of international cartels in well over 100 cities in more than 35 countries, including most of the Far East and nearly every country in Western Europe.

Prosecution of Individuals. The best and surest way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences. Antitrust offenders are being sent to jail with increasing frequency and for longer periods of time.

Division in FY 2004 totaled \$350 million, the second highest total in Antitrust Division history. During FY 2004, the Division obtained six corporate fines of \$10 million or more, including the third largest criminal fine in the history of the Antitrust Division: \$160 million from Infineon Technologies AG.

Ten years ago the largest corporate fine ever imposed for a single Sherman Act count was \$6 million. But fines of \$10 million or more have now been imposed against 48 corporate defendants and one individual defendant, including six in FY 2004. In addition, the Division has now obtained fines of \$100 million or more in seven cases, including one in FY 2004.

Conviction of Foreign Executives. The Division has prosecuted foreign executives from Austria, Belgium, Canada, France, Germany, Italy, Japan, Korea, Mexico, Norway, the Netherlands, Sweden, Switzerland, and the United Kingdom for engaging in cartel activity, resulting in heavy fines and,



Source: DOJ Antitrust Division

Jail Sentences Have Increased. The average jail sentence in the 1990s was 8 months, but already the average jail sentence for the 2000s is over 16 months. Since FY 2001, over 100 years of incarceration have been imposed on antitrust offenders, with more than 40 defendants receiving jail sentences of one year or longer, including 9 defendants in FY 2004 and 4 defendants in the first five months of FY 2005.

Criminal Fines Have Increased. International cartels affect massive volumes of commerce and deserve heavy fines. In some matters currently under investigation, the volume of commerce affected by the suspected conspiracy is over \$1 billion per year. In roughly two-thirds of our international investigations, the volume of commerce affected exceeds \$100 million over the term of the conspiracy.

In FYs 2001-2003, fines obtained exceeded \$280 million, \$75 million, and \$107 million respectively. The fines obtained by the

in some cases, imprisonment. Foreign defendants from Canada, France, Germany, Japan, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom have served, or are currently serving, prison sentences in U.S. jails for violating U.S. antitrust laws.

Tracking Down International Fugitives. In 2001, the Division adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have already been apprehended through a Division INTERPOL red notice. The Division's use of red notices clearly raises the stakes for foreign executives who hope to avoid prosecution by simply remaining outside of the United States.

GLOBAL CONVERGENCE BOOSTS CARTEL ENFORCEMENT

The Division has long advocated a system of vigorous international anti-cartel enforcement based on cooperation among government enforcers, using the combination of significant penalties and effective amnesty programs. As cooperation has become more effective and obviously beneficial to enforcers in numerous jurisdictions, we have seen significant convergence on a range of cartel policy issues. This shared commitment to fighting international cartels has led to the establishment of effective cooperative relationships and enhanced policy convergence among competition law enforcement authorities around the world.

Recent months have seen important successes in furthering the global fight against international cartels through the variety of methods detailed below.

New Legislation

On February 2, 2005, the Australian Government announced that it will soon



Scott Hammond, Marc Siegel (Director of Criminal Enforcement), Phillip Warren (Chief, San Francisco Field Office).

introduce legislation amending its competition law to introduce criminal penalties for serious cartel conduct.

In the fall of 2004, the Japanese government submitted legislation to its Diet proposing major revision of the Antimonopoly Act that would authorize the Japanese Fair Trade Commission (JFTC) to adopt a Corporate Leniency Program. The proposed amendments also include a substantial increase in the administrative fine that the JFTC imposes on cartel participants.

The criminalization of cartel offenses in the U.K. and the passage of the U.K. Extradition Act of 2003 have paved the way for future extradition of individuals involved in cartels from the U.K. to face antitrust charges in the United States.

Convergence in Leniency Programs

The extraordinary success of the Division's leniency program has generated widespread interest around the world. The Division has worked with many foreign agencies in drafting and implementing effective leniency programs in their jurisdictions. As a result, countries such as Australia, Brazil, Canada, the Czech Republic, France, Germany, Ireland, Korea, and the United Kingdom have announced new or revised leniency programs, with still other countries (e.g., Japan) in the process of devising their own programs.

Of special significance was the European Commission's (EC's) adoption of a revised leniency program in 2002. The revised program brings the EC's program closely in line with the Division's Corporate Leniency Policy. The convergence in leniency programs has made it far more attractive for companies simultaneously to seek and obtain leniency in the United States, Europe, Canada, and in other jurisdictions where the applicants have liability concerns.

International Workshops and Convergence

The sixth annual International Cartel Workshop took place in Sydney, Australia from November 19-21, 2004, for the first time under the umbrella of the International Competition Network (ICN). The workshop, which was attended by more than 100 antitrust officials and non-governmental advisors (NGAs) from over 35 jurisdictions, covered evidence-gathering techniques, international cooperation, search warrants, obstruction, and use of border watches and extradition. The Division also chaired the follow-on ICN Leniency Workshop in Sydney from November 22-23. Scores of antitrust enforcers and NGAs came together to participate in this practical, comprehensive and intensive seminar on leniency programs.

Cooperation and Coordination of Investigations

The Division's cooperation with foreign antitrust authorities has never been better or more effective. In one investigation in February 2003, four enforcement authorities—the Antitrust Division, the EC's Directorate-General for Competition, the Canadian Competition Bureau, and the Japanese Fair Trade Commission—coordinated searches and drop-in interviews. This was the first time that an international cartel investigation had gone over simultaneously in four jurisdictions.

Adoption of Agreements to Foster Cooperation

Another example of governments' increased willingness to assist each other in the enforcement of anti-cartel laws is the May 2001 agreement between the U.K. and U.S. governments to remove a "side letter" to the U.K.-U.S. Mutual Legal Assistance Treaty (MLAT), which had excluded antitrust matters from the scope of the cooperation provi-

sions of the MLAT. The types of assistance in antitrust matters that the U.K. can now provide to the Division include the use of the U.K. courts to take testimony from witnesses, obtain documents, and assist in the collection of criminal fines.

Maintaining Momentum on Anti-Cartel Convergence

Continued progress on convergence in this area, as in others, depends in important part on the willingness of jurisdictions to respect the legitimate enforcement concerns of their partners, as the pending *Empagran* litigation illustrates. The United States in our recent amicus brief on remand in the D.C. Circuit urged the court to reject plaintiffs' remarkably expansive theory of Sherman Act jurisdiction. We emphasized that allowing lawsuits of this kind threatens adverse effects on both U.S. and foreign cartel enforcement. Six foreign governments filed amicus briefs supporting that view, representing another significant example of international convergence.

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Profile: Scott Hammond, Deputy
AAG for Criminal Enforcement*

Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement. He continued his duties as Senior Counsel until becoming the Director of Criminal Enforcement in 2000, a position he held until succeeding Jim Griffin as Deputy Assistant Attorney General for Criminal Enforcement.

During Hammond's tenure as Director of Criminal Enforcement, the five longest jail sentences in the Division's history were imposed, international criminal cartels affecting more than \$10 billion in U.S. commerce were prosecuted and large criminal fines were levied against price fixers.

Hammond graduated from the University of North Carolina at Chapel Hill in 1985, receiving his B.S. in the Administration of Criminal Justice. He went on to receive his J.D. in 1988, also from the University of North Carolina at Chapel Hill.

Hammond lives in Silver Spring, Maryland, with his wife and three sons.





Dorothy Fountain (Deputy Director of Operations), Robert Kramer (Director of Operations).

MERGER REVIEW PROCESS INITIATIVE SCORECARD

A lot of hard work goes into announcing an initiative. Implementing it can be even harder. In October 2002, then Assistant Attorney General Charles James announced the Merger Review Process Initiative. After two and a half years, it is appropriate to ask how the Division and Bar have responded to the Initiative.

The Initiative was designed to more quickly identify critical legal, factual and economic issues regarding a proposed transaction, to facilitate more efficient and more focused investigative discovery and to provide for an effective process for the evaluation of evidence, in an effort to deploy the Division's resources more efficiently.

The Initiative has three distinct pieces, tied to the three critical periods in a Hart-Scott-Rodino (HSR) merger investigation.

First, Division staff was encouraged to use the initial 15/30 day HSR waiting period aggressively to close matters not candidates for further investigation. The major investigative changes included issuing early voluntary information and document requests and engaging with the parties on important issues through early consultations.

Second, staff was asked to use its knowledge to tailor Second Requests "as narrowly as possible." Assistant Attorney General James, however, linked narrow Second Requests with "appropriate timing and procedural protections for the Division in the event of a challenge to the transaction."

Third, the post-Second Request issuance period was to be marked by regular consultations with the parties and negotiated scheduling agreements.

On review, it appears that the Division and Bar are doing well on two of these three fronts.

There have been big improvements in Division staff's use of the initial 15/30 day HSR waiting period. Voluntary requests are sent to parties in almost every HSR preliminary investigation and the merging parties have almost uniformly responded in a timely manner. There is also much more dialogue between staff and the merging parties. In the four full fiscal years (1999-2002) before the Initiative, 27.8% of Preliminary Investigations led to the issuances of Second Requests. In the full two fiscal years since the Initiative, that rate has fallen to 19%, an overall drop of 32%.

The benefits of the Initiative might have been even greater, however, if some of the gains were not compromised by the clearance process. Clearance is taking more time to complete after the collapse of the 2002 clearance agreement. In fiscal year 2002, the average number of business days from the date a clearance request was contested by the other agency to resolution of that contest was just under three days. Now it is about six days.

Interestingly, the biggest change in practice during the initial waiting period is the greater use by the Bar of the technique of withdrawing and refiling an HSR filing to give staff an additional 15/30 days of review before deciding on whether to send a Second Request. In the four fiscal years before the Initiative, parties used this technique in 14% of HSR Preliminary Investigations. In the past two fiscal years, that has risen to 28%. During those two years, in 61% of instances where a filing was withdrawn and refilled, no Second Request was issued.

The second phase of the Initiative, tailoring the Second Request to reduce burdens on both the merging parties and agencies, is

the one with little progress to report. Aggressive use of the initial waiting period has allowed staff to tailor Second Requests, but by adding specific additional requests, not by narrowing the model Second Requests. In part, this is because merging parties have been unwilling to promise the Division a substantial period of post-complaint discovery in return for the Division narrowing a Second Request to a couple of determinative issues. From the Division's standpoint, the unwillingness

to make this trade is often hard to understand. In the past six fiscal years, 113 transactions at the Division have resulted in full or partial compliance with a Second Request and only four cases have been tried. In many deals, there are huge potential savings of time and money for both the Division and the merging parties if Division staff and the parties' counsel can agree to narrow Second Requests.

The final phase of the Initiative covered both scheduling agreements and continued transparency at the Division. Here, there has been a lot of progress. Almost every matter that results in a meeting between the parties and the Division's Front Office has a scheduling agreement in place to allow for an orderly review of the matter. And as important, the meetings are focused on critical issues because of the improved dialogue between staff and the parties.

The Division looks forward to further potential gains from a cooperative and responsible approach to merger review from both Division staff and merging parties. As Charles James said at the outset, "It takes two to tango."



Edward Hand (Chief, Foreign Commerce Section), Makan Delrahim (Deputy Assistant Attorney General for International, Policy and Appellate Matters).

INTERNATIONAL COMPETITION NETWORK—THE FOREFRONT OF ANTITRUST CONVERGENCE

Just four years after its creation, the International Competition Network (ICN) is at the forefront of antitrust convergence. From 15 founding members in 2001 to nearly 90 members from six continents in 2005, the ICN has grown into the global network its founders envisioned—a venue where senior antitrust officials and non-governmental advisors from developed and developing countries work together to promote cooperation and greater convergence around sound competition principles. The ICN has begun a truly global dialogue and chartered a course to achieve practical improvements in international antitrust enforcement.

Thus far, the ICN has made its greatest strides in the merger area, where ICN members have adopted eight Guiding Principles around which a merger regime should be built: sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient,

timely and effective review; coordination; convergence; and protection of confidential information—and 11 Recommended Practices for merger notification and review procedures. The Recommended Practices articulate a detailed ICN consensus on sound merger processes that agencies can use as a baseline for measuring the quality of their own practices.

ICN members' adherence to the principles and practices is already having a positive impact on the merger review process. The principles and practices are bringing greater consistency to that process across jurisdictions, and are making it more efficient and effective, while reducing delay and the investigative burden on merging firms. Not coincidentally, the principles and practices already are having a positive effect on multi-jurisdictional merger review. Dozens of members, including the European Commission, have used the Recommended Practices as a guide in making changes to their notification regulations.

The ICN's Recommended Practices have tended to receive the most attention from the international antitrust community, but work instrumental to convergence also is conducted in two other ICN merger subgroups that focus on the analytical framework for mergers and investigative techniques for conducting effective merger review. The Analytical Framework subgroup created a concise, valuable discussion paper examining basic issues involved in choosing a particular substantive framework. The subgroup built on this work by explaining the analytical frameworks of a dozen different members, through analyzing their existing or proposed merger guidelines. The final product represents one of the most comprehensive reviews of merger guidelines to date.

Other accomplishments in the merger area include the two highly successful workshops on investigative techniques for merger review, hosted by the Division and the European Commission (EC), respectively. With nearly 50 participating jurisdictions at each of the two workshops, they were the largest, most comprehensive and far reaching gatherings of agency merger attorneys to date. As we continue to compare, identify, and promote better merger investigative practices across jurisdictions, the benefits of more effective and efficient merger review will be realized.

In April 2004, at the urging of Assistant Attorney General Pate and EC Commissioner Mario Monti, the ICN established a Cartel Working Group. The identification of anti-cartel enforcement as a topic for the ICN confirms what we have seen over the past 15 years—the emergence of a truly global effort against cartels and its general recognition as the top priority for antitrust enforcers. Deputy Assistant Attorney General (DAAG) Scott Hammond co-chairs the subgroup devoted to the legal framework of anti-cartel enforcement. The Division also participates in the second subgroup, focused on investigative techniques, which also sets the agenda for the annual cartel workshop for enforcers from around the world, held last year in Sydney, Australia. DAAG Hammond spearheaded the organization of an enforcer workshop on leniency, held in conjunction with the cartel workshop. The Sydney leniency workshop was the most comprehensive global discussion on the effectiveness of leniency programs to date.

Shortly after releasing the data, the Division and the FTC conducted a three-day merger enforcement workshop in February 2004. The primary purpose of the workshop was to assess the practical application and efficacy of the 1992 Horizontal Merger Guidelines. The workshop confirmed the current viability and analytical soundness of the Guidelines. It also provided the Agencies with important insights and suggestions from leading antitrust practitioners and economists on how best to employ the Guidelines to ensure the most effective enforcement of our nation's merger laws. Presentations and transcripts of the workshop are available at <http://www.usdoj.gov/atr/public/workshops/mewagenda2.htm#feb17>.

PROMOTING TRANSPARENCY IN MERGER ENFORCEMENT

Effective merger enforcement is an important priority for the Antitrust Division. To enhance the Division's merger enforcement program, the Division has recently undertaken four important initiatives to ensure that its merger analysis is focused and up-to-date and that merger enforcement decisions are transparent to the public. First, the Division issued, together with the Federal Trade Commission (FTC), the first-ever merger review data on past enforcement cases and hosted a first-ever merger workshop touching on all areas of merger review. Second, as an important follow-up to the merger workshop, the Division has recently embarked on a project with the FTC to provide a Commentary on the Horizontal Merger Guidelines. Third, the Division released publicly an "Antitrust Division Policy Guide to Merger Remedies." Finally, the Division adopted a new policy to issue, in appropriate circumstances, public statements setting forth the reasons for closing civil antitrust investigations without filing a lawsuit.

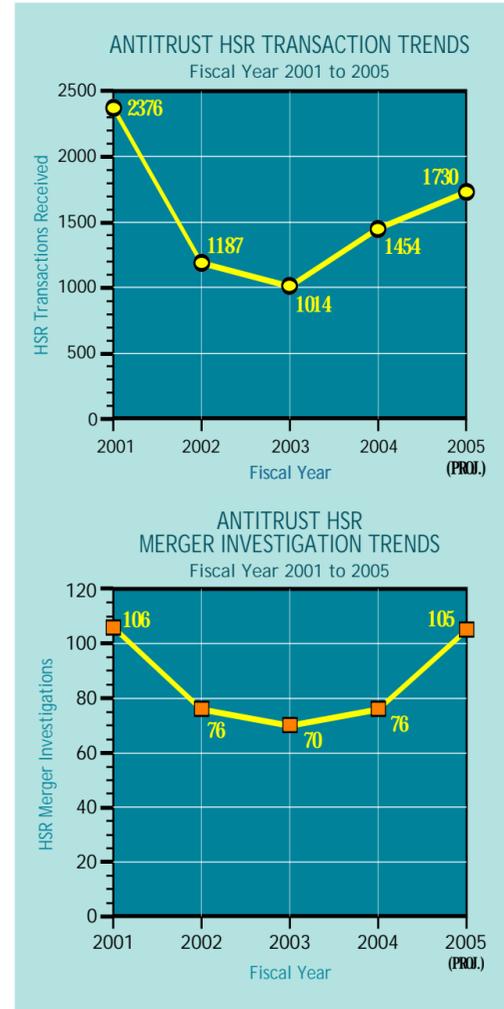
Merger Data Release and Workshop

In 2003, the Division and the FTC initiated a comprehensive review of the Agencies' horizontal merger investigations and cases over the past five years. The goal was to provide the business community and antitrust practitioners with more and better information about when a merger is likely to raise competitive concerns and thereby make merger enforcement policies more transparent. In particular, the review focused on market share and concentration levels associated with the Agencies' decisions to challenge horizontal mergers. In December 2003, the Division and the FTC released HHI data for the Agencies' horizontal merger challenges for fiscal years 1999-2003. In total, the Agencies provided HHI data for 173 mergers and 1,263 markets. The data can be found at <http://www.usdoj.gov/atr/public/201898.htm>.

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Commentary on Horizontal Merger Guidelines

The Antitrust Division, together with the FTC, intends to apply the learning from last year's merger workshop and produce a Commentary on the Horizontal Merger Guidelines. The Division and the FTC have had over a decade of experience in implementing the Merger Guidelines and applying them to individual cases—some of which involved complex issues that were not readily apparent or particularly significant when the Guidelines were first issued. The goal of the Commentary will be to use this experience and learning, together with the valuable input from the merger workshop, to provide the business community, the antitrust bar, foreign antitrust officials, and industry regulators with further information on how we analyze mergers and apply the Guidelines.



Source: DOJ Antitrust Division

Policy Guide to Merger Remedies

In Fall 2004, the Division publicly released an "Antitrust Division Policy Guide to Merger Remedies." The Guide sets out important principles and policy considerations for the design, implementation and enforcement of remedies in Division Merger cases and can be accessed at <http://www.usdoj.gov/atr/public/guidelines/205108.htm>.

Effective merger enforcement requires both effective remedies and full disclosure to the public of what those remedies are and how they are formulated. The Guide explains that once the Division determines that a merger is likely substantially to lessen competition, the Division will insist upon relief that preserves or restores the competitive conditions the merger would remove. The Guide emphasizes that this is the only appropriate goal of a merger remedy. The remedy, therefore, should not seek to improve or enhance pre-merger competition, nor should it seek to protect or promote particular competitors.

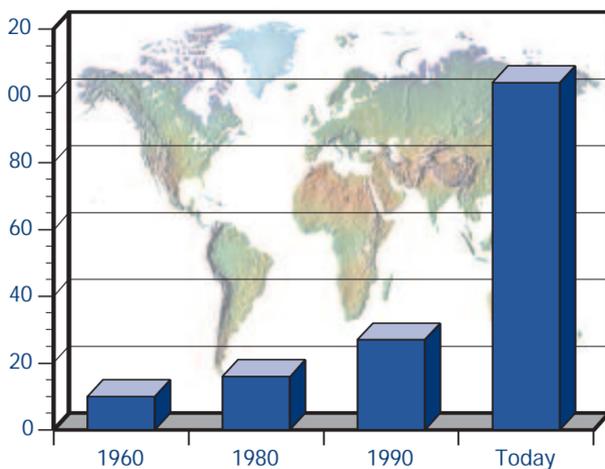
The Guide states that structural remedies (i.e., divestitures) are strongly preferred to conduct remedies in merger cases because they are relatively straightforward and easy to administer and avoid unnecessary and costly government entanglement in the market. Moreover, the Guide emphasizes that the goal of a divestiture is to create an effective, long-term competitor able quickly to replace the competition lost through the merger. Finally, the Guide stresses the importance of Division consent decrees being both enforceable and enforced. The Division will devote the time and resources necessary to ensure full compliance with all its judgments.

Issuance of Public Statements on Closed Investigations

Transparency of antitrust merger and civil conduct enforcement policy may require the Division, in appropriate instances, to explain what theories were explored with respect to a transaction in which no case was brought, as well as why no challenge was made. Such transparency helps the public, businesses and international enforcers understand the United States' standards for antitrust enforcement, encourages international convergence on enforcement standards, serves to prevent noncompetition issues from inappropriately influencing antitrust enforcement, and increases public confidence in enforcement decisions. As a result, the Division now will issue, in appropriate circumstances, a public statement describing the reasons for closing a civil antitrust investigation.

The issuance of a closing statement is not a routine occurrence. It is reserved for particular cases in which the issuance of such a statement is likely to be of substantial benefit to the public. The Division takes great care to ensure that no confidential or privileged information is divulged when it issues a closing statement.

COUNTRIES WITH ANTITRUST LAWS



Source: DOJ Antitrust Division

SUPREME COURT ANTITRUST DECISIONS

Trinko

The United States urged the Supreme Court to grant review in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), to clarify the relationship between the Sherman Act and the Telecommunications Act of 1996, as well as liability standards under Section 2 of the Sherman Act more generally. The government took the unusual step of filing a brief supporting the petition without an invitation in the hope that the Court would make clear both that the antitrust laws apply to regulated industries in the absence of a clear indication that Congress intended otherwise and that the Sherman Act does not impose a general duty on monopolists to aid their competitors.

The Court granted review and—following briefing and oral argument by Solicitor General Olson—issued a decision establishing unambiguously that the 1996 Act neither granted immunity from the antitrust laws nor expanded antitrust duties to encompass those imposed by the Act. It further reaffirmed that Section 2 of the Sherman Act does not impose liability on monopolists who decline to assist their rivals unless they engage in exclusionary conduct. In particular, the Court's opinion indicates that a monopolist's refusal to deal is unlikely to violate Section 2 in the absence of evidence that the monopolist refused to engage in profitable transactions in the interest of future monopoly profits. Without accepting or rejecting the "essential facilities" doctrine crafted by some lower courts, the Court substantially limited its potential reach (and rejected once and for all the notion of a stand-alone "monopoly leveraging" theory).

Trinko has already had a substantial impact on antitrust decisions. Most obviously, it has decisively affected numerous cases alleging refusals to deal in the telecommunications industry. But courts have applied *Trinko*'s principles in other regulated industries as well, and in Section 2 cases not involving regulated industries. *Trinko* has significantly diminished the likelihood that Section 2 will be applied so as to harm competition in the name of preserving it. The Department's decision to urge the Court to grant review in *Trinko* has thus borne important fruit.

Empagran

Empagran v. F. Hoffmann-LaRoche began when several foreign purchasers of vitamins for delivery and use overseas sued members of an international vitamin cartel that had also victimized U.S. consumers. The district court originally dismissed the case for failure to comply with the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. 6a, because the effect of the cartel's anticompetitive activities in the United States did not give rise to the plaintiffs' claim of harm. The court of appeals reversed. The Supreme Court then decided to hear the case.

The government, in an amicus brief and oral argument by Assistant Attorney General Pate, urged the Court to reverse. The government participated because of its concern that allowing suits of this type would dissuade cartel members from participating in the Antitrust Division's criminal amnesty program—the government's best means of detecting cartels. To allow the foreign plaintiffs' private claims would diminish detection and deterrence. The governments of six countries filed amicus briefs in support of this position, noting that encouraging private U.S. cases of this type would harm their own enforcement programs.

The Supreme Court unanimously overturned the court of appeals' decision. 542 U.S. ___, 124 S.Ct 2359 (2004). It held that when anticompetitive conduct independently causes foreign injury, the FTAIA bars the suit. In reaching this result, the Court relied heavily on: the principle of statutory construction that courts should avoid unreasonable interference with the sovereign authority of other nations; the difficulty and complexity of determining such interference on a case by case basis; and that Congress in enacting the FTAIA did not intend to expand the Sherman Act's reach over foreign commerce as the plaintiffs' theory would require. The Court observed that the plaintiffs also had argued that the foreign injury was not independently caused, because "but for" the cartel's illegal activities in the United States, the cartel would have failed overseas. The Court vacated and remanded for the appeals court to consider this contention.

On remand, both the U.S. government and foreign governments have again filed



Catherine O'Sullivan (Chief, Appellate Section).

amicus briefs, noting that the plaintiffs' "but for" theory of causation cannot be reconciled with the reasoning behind the Supreme Court's decision. The FTAIA's prohibition is jurisdictional, but determining at the jurisdictional stage whether any particular case factually fits the "but for" test and the plaintiffs' arbitration theory would present the very difficulties and complexities the Supreme Court wished to avoid. Opening U.S. courts to antitrust class actions from around the world would, as the Supreme Court feared, interfere with the sovereign decisions of other nations about the appropriate remedies to offer their consumers, their ability to regulate their commercial affairs, and their antitrust amnesty programs. And, a ruling for the plaintiffs would create the sort of major expansion in the foreign reach of the Sherman Act that the Court held Congress did not intend. Finally, "but for" causation has never been the test of causation under the antitrust laws. The correct test is proximate causation, and because the plaintiffs cannot meet that test this case should be dismissed, both under the FTAIA and for lack of antitrust standing under the Clayton Act.

The court of appeals will hear oral argument on April 20, 2005.

UNITED STATES V. MICROSOFT CORP.

On June 30, 2004, the en banc D.C. Circuit Court of Appeals issued its decision in two appeals challenging the Final Judgment entered by the District Court in both the Department's case and the case pursued by the states. The two Final Judgments were virtually identical in substance and both were resoundingly approved by the D.C. Circuit. The *en banc* panel's opinion addressed the merits of every argument raised against the Department's remedy by two industry groups and the sole remaining state plaintiff (Massachusetts), and it clearly and thoroughly rejected all of them. The Court of Appeals described a portion of the remedy entered by the District Court in the companion case (*Massachusetts et al. v. Microsoft*) as follows: "Far from abusing its discretion, therefore, the district court, by remedying the anticompetitive effect of commingling, went to the heart of the problem Microsoft had created, and it did so without intruding itself into the design and engineering of the Windows operating system. We say, Well done!" (*Massachusetts et al. v. Microsoft*, 373 F.3d 1199, 1210 (D.C. Cir. 2004)).

The Court's forceful decision confirmed that the Department's Final Judgment protects the public by providing a full and effective remedy for Microsoft's anticompetitive conduct. The decision reflected the hard work of many Antitrust Division professionals, and the sound leadership of both former Assistant Attorney General Charles James and former Principal Deputy Assistant Attorney General Deborah Majoras (now FTC Chairman), who argued the case in the Court of Appeals.

On March 24, 2004, the European Commission issued a decision ordering that Microsoft disclose certain information to competitors, offer for sale a version of its Windows Operating System that does not contain the Windows Media Player, and pay a fine of 497 million euros (about \$613 million). The Division believes that the Commission's code removal remedy has the potential to harm innovation and the consumers that benefit from it. As Assistant Attorney General R. Hewitt Pate said in the statement he issued at the time of the Commission's decision, "[t]he U.S. experience tells us that the best antitrust remedies eliminate impediments to

the healthy functioning of competitive markets without hindering successful competitors or imposing burdens on third parties, which may result from the EC's remedy." The Commission and the Division continue to work under the terms of our 1991 Cooperation Agreement to avoid unnecessary conflicts between the Commission's decision and the Final Judgment.

The Division has a team of lawyers and economists engaged in a comprehensive compliance monitoring and enforcement effort relating to the Microsoft Final Judgment with the assistance of the Technical Committee



Renata Hesse (Chief, Networks and Technology Section), Patty Brink (Trial Attorney).

established under the Final Judgment. While this effort has covered all aspects of the Final Judgment, the team has given particular focus to Section III.E. (relating to the licensing of certain Microsoft proprietary technology) and Section III.H. (relating to enabling and removing access and default settings for certain middle-

"We say, Well done!"

— D.C. Circuit Decision, 2004

ware). Section III.E. mandates that Microsoft make available for license on reasonable and non-discriminatory terms technical information that, in most cases, Microsoft had never made available for license before. Twenty-one companies took advantage of this opportunity and a number of companies have already begun shipping products using this technology. Section III.H. requires Microsoft to allow Original Equipment Manufacturers (OEMs) and end users to switch the middleware that gets launched as a default (subject to two narrow exceptions). Some OEMs have taken advantage of this provision, shipping media player software developed and sold by vendors other than Microsoft.

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Economic Regulatory Section

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Assistant Chief: Scott Thompson

Contact: 202-307-6591

FIELD OFFICES

Each of the Division's field offices handles criminal matters within its respective area and serves as the Division's liaison with U.S. Attorneys, state attorneys general, and other regional law enforcement agencies. The field offices also handle national and international matters that arise within their territories.

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Cleveland

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Assistant Chief: Michael Wood

Contact: 216-522-4070

Dallas

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Assistant Chief: Mitchell Chitwood

Contact: 214-880-9401

New York

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Assistant Chief: Philip Cody

Contact: 212-264-0390

Philadelphia

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Assistant Chief: Joseph Muoio

Contact: 215-597-7405

San Francisco

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Assistant Chief: Niall Lynch

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National Criminal Enforcement Section

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Assistant Chief: Mark Rosman

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Antitrust Division: www.usdoj.gov/atr

OBTAIN DOCUMENTS

Law firms and the general public may obtain paper copies of Division documents from the Antitrust Documents Group:

Phone: 202-514-2481
Fax: 202-514-3763

E-mail: atrdocs.grp@usdoj.gov

WEB LINKS

The following links may be used to obtain Division documents online:

Public Court
and Administrative Filings:
<http://www.usdoj.gov/atr/cases.html>

Guidelines and Policy
Statements:
<http://www.usdoj.gov/atr/public/guidelines/guidelin.htm>

Speeches:
<http://www.usdoj.gov/atr/public/speeches/speeches.htm>

Congressional Testimony:
<http://www.usdoj.gov/atr/public/testimony/testimon.htm>

CONTACT INFORMATION cont.:

Business Review Letters:
<http://www.usdoj.gov/atr/public/busreview/letters.htm>

PRESS RELEASES

Copies of Division press releases (from 1994 to the present) can be found online at: http://www.usdoj.gov/atr/public/press_releases/2004/index04.htm

Media may contact the Office of Public Affairs at:

Phone: 202-514-2007
Fax: 202-514-5331

Law firms and the general public should contact the Antitrust Documents Group to obtain other documents.

ASSISTANT ATTORNEY GENERAL AND DIVISION STAFF

For contact information for the Office of the Assistant Attorney General and the Division's sections and field offices, see <http://www.usdoj.gov/atr/offices2.htm>.

Use the following link to obtain phone numbers for Division employees:

<http://www.usdoj.gov/atr/contact/phone-works.htm#S>

Comments

To comment on past or ongoing investigations, send an e-mail to antitrust.atr@usdoj.gov.

Report Possible Antitrust Violations

If you have information about a possible antitrust violation or potential anticompetitive activity please contact the Division:

E-Mail:

newcase.atr@usdoj.gov
Phone: 1-888-647-3258
(toll-free in the U.S. and Canada) or
1-202-307-2040

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