



Department of Justice

STATEMENT

OF

**BILL BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION**

BEFORE THE

**SUBCOMMITTEE ON ANTITRUST, COMPETITION
POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

HEARING ON

**“OVERSIGHT OF THE ENFORCEMENT
OF THE ANTITRUST LAWS”**

PRESENTED ON

MARCH 9, 2016

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Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee, thank you for the opportunity to discuss the work of the dedicated men and women of the Antitrust Division on behalf of American consumers and businesses. It is a privilege, as always, to appear with my enforcement colleague, Federal Trade Commission (FTC) Chairwoman Ramirez.

This month 126 years ago, the Senate Judiciary Committee of the 51st Congress was considering S. 1, which upon enactment became known as the Sherman Act, our nation’s first federal antitrust law. The bill passed with broad and nearly unanimous support (there was only one “nay” vote in the Senate).

Beginning with the Sherman Act, our antitrust laws have sought to enshrine the core principle that consumers win from competition, and lose when it is unfairly restricted. As the Supreme Court has said, “The heart of our national economy long has been faith in the value of competition.” It is the foundation of our uniquely American tradition of entrepreneurialism, delivering to consumers here at home and around the globe lower prices, higher quality, and unparalleled innovation. The antitrust agencies play a key role in delivering on this promise. Our mission is to enforce our antitrust laws in a vigorous, transparent, even-handed, and fact-based fashion in order to ensure that consumers benefit from a competitive marketplace.

We work hard to do just that. To name a few recent examples:

- We preserved head-to-head competition and choice for major household

cooking appliances by suing to block Electrolux's acquisition of General Electric's appliance business.

- Comcast and Time Warner Cable abandoned a merger after hearing our view that the deal risked making Comcast an all-powerful gatekeeper for internet-based services that rely on a broadband connection to reach consumers.
- We exposed price fixing by big banks that threatened the integrity of important financial markets. Last May, Citicorp, JPMorgan Chase, Barclays, and the Royal Bank of Scotland pled guilty to conspiring to rig the foreign currency exchange spot market.
- Other recent efforts successfully challenged anticompetitive transactions and conduct in industries including wireless services, retail banking, health care, food, ebooks, beer, and airline travel.

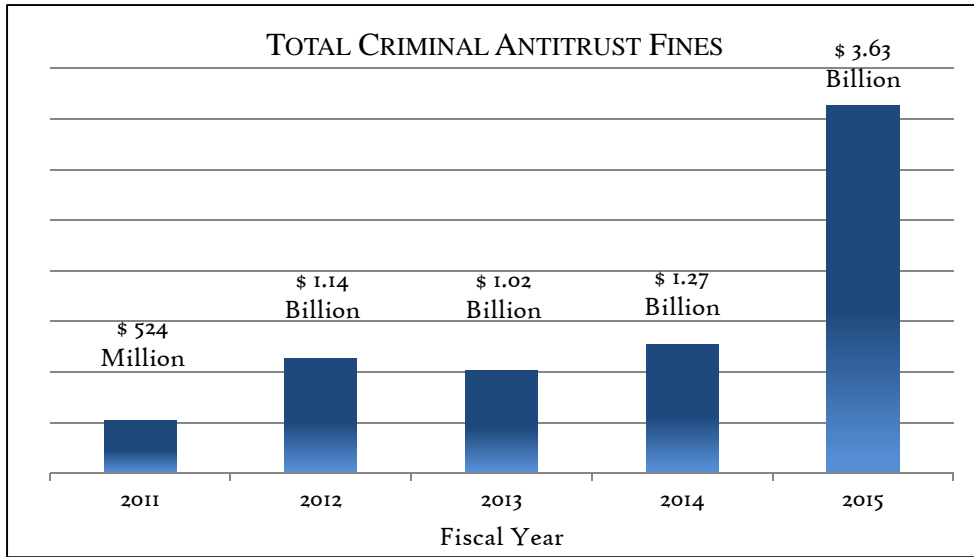
The Antitrust Division appreciates that fiscal resources are limited. The resources entrusted to us by Congress provide a real return on investment for American consumers, businesses, and taxpayers. Roughly 50 percent of our funding is offset by Hart-Scott-Rodino (HSR) premerger filing fees paid by companies planning to merge. In addition, the criminal fines we obtain, which are deposited in the Crime Victims Fund, are routinely more than 10 times our annual direct appropriation. In short, antitrust enforcement remains a good value proposition.

However, the workload we currently face is daunting and we hope Congress will look favorably upon the President's request for an additional \$16 million, \$180 million in total funding, for the Antitrust Division for Fiscal Year 2017. I assure you we will put those additional funds to good use by enhancing the Division's efforts to challenge problematic mergers and unlawful efforts to collude or monopolize markets – in short to promote competition and protect consumers from economic harm.

Holding Companies & Individuals Accountable

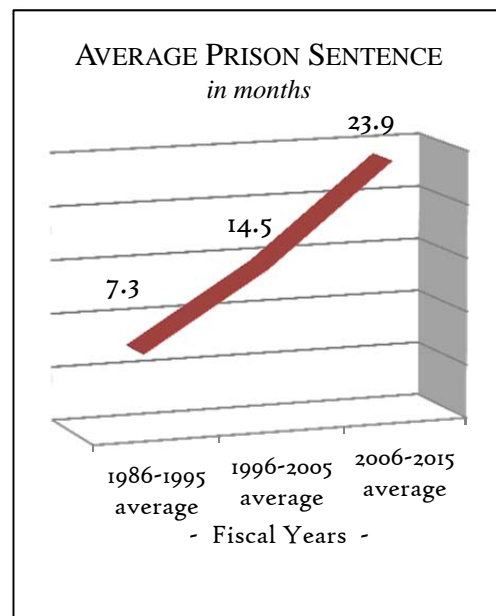
As we discussed at this Subcommittee's 2013 hearing, halting and deterring pricing fixing cartels, dubbed the "supreme evil of antitrust" by the Supreme Court, is a top priority for us. Working with the Federal Bureau of Investigation (FBI) and other law enforcement partners, we hold both corporations and senior

executives accountable for criminal antitrust misconduct. We seek monetary penalties and jail sentences that are commensurate with the harm these crimes inflict on American consumers and businesses.



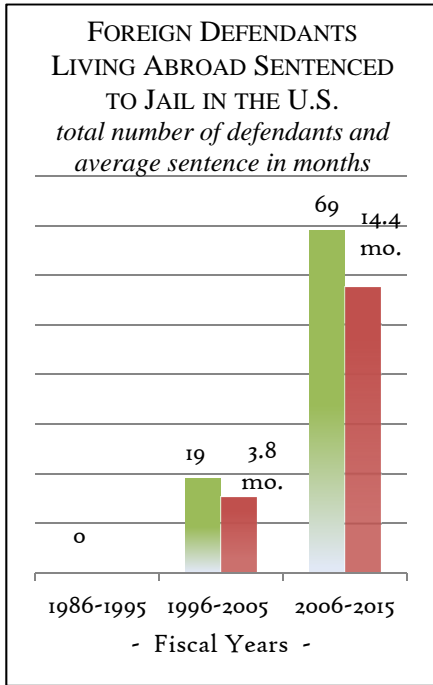
Last year we obtained over \$3.6 billion in criminal fines and penalties, which resulted from our prosecuting collusion in many sectors. But a key target in recent years is the financial industry where we have exposed collusive conspiracies, including manipulation of the foreign currency exchange (FX) spot market and LIBOR rate setting, as well as bid rigging for municipal bond investment instruments and real estate foreclosure and tax lien auctions. The FBI is a critical partner to many of these investigations, providing support, expertise, and state-of-the-art investigative techniques and technologies.

Over the last seven years, we have prosecuted over 400 individuals who committed antitrust crimes. We strive to hold accountable the highest level executives who participated in these conspiracies. In our ongoing auto parts investigation, for example, we so far have prosecuted nine parent or subsidiary presidents, seven vice presidents, two executive managing directors, one CFO, and 30 division directors and general managers. We charged high-level executives in the DRAM and LCD investigations, including



two chairmen/CEOs and four presidents. The president of the third largest LCD maker in the world is currently serving a 36-month jail term—the longest sentence ever imposed on a foreign national defendant for antitrust offenses.

The threat of prison time for individuals provides the single most valuable deterrent from cheating the system and profiting from collusion. The executives we convict are going to jail and for increasing periods of time. From 2006 to 2015, the average number of individuals sentenced to prison increased 85



percent, and the average sentence increased 65 percent over the preceding decade.

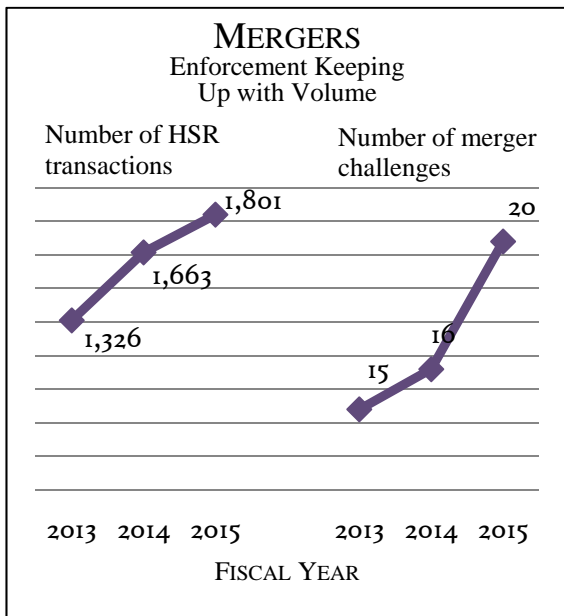
We hold offenders responsible for actions that injure U.S. commerce regardless of where they reside or whether they are citizens of the United States or foreign nationals. In the last ten years we have increased by more than three times the number of foreign defendants convicted and jailed over the previous ten year period. Over that same time period, the length of sentence increased by more than four times. Working with our international partners and Department of Justice colleagues, we seek extradition where appropriate and will continue to seek it in appropriate cases.

We continue as well to prosecute local, regional, and national criminal conspiracies. In recent years, we have charged over 100 individuals in four states – Alabama, California, Georgia, and North Carolina – for conspiring at local real estate foreclosure auctions. These conspiracies depressed auction prices and stole money from distressed homeowners and their lenders. In another example, the presidents of two heir location services firms recently pled guilty to conspiring to eliminate competition among their firms that identify people who may be entitled to an inheritance from the estate of a relative who died without a will. For nearly a decade, these companies lined their pockets at the expense of those heirs.

The use of technology to manipulate the prices for products and services is a growing concern for us. American consumers have the right to a free and fair marketplace online as well as in brick and mortar businesses. We recently charged two individuals and a U.K. corporation for fixing the price of certain

posters sold online through Amazon Marketplace. The scheme was 21st century for sure. The conspirators coordinated pricing algorithms to offer identical prices for the sale of certain poster art on the Internet. This eliminated price competition by offering online shoppers the same price for the same product. The effect on consumers was the same as any other price-fixing scheme—eliminating the price competition to which they were entitled.

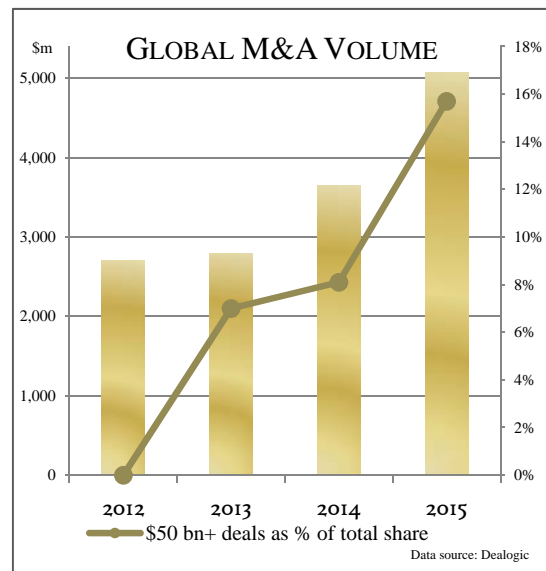
Litigation Readiness



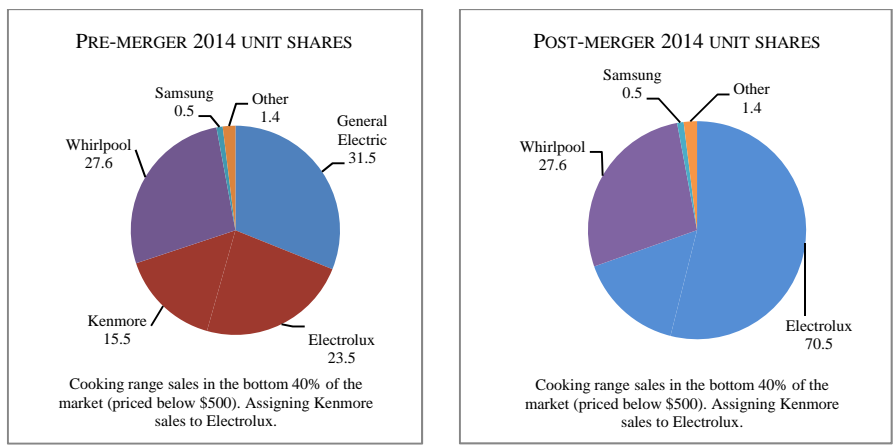
Another core aspect of the Division’s work is to address illegal conduct and anticompetitive mergers through civil enforcement of the antitrust laws. Being trial-ready is key to effective enforcement. Companies take our concerns more seriously when they know we are prepared to be put to our proof. In recent years we have repeatedly demonstrated that we are willing and able to go to court where necessary, and will reject settlement offers that do not fully protect competition and consumers.

We face considerable challenges in doing this part of our job. The merger wave is back. Big time. Global merger and acquisition volume has reached historic levels in terms of number, size and complexity. In FY 2015, 67 proposed mergers were valued at more than \$10 billion. That is more than double the annual volume in 2014. Last year 280 deals were worth more than \$1 billion, nearly double the number from FY 2010.

We approach every merger with an open mind. We do not pick winners and losers. Our mission is to protect competition; our resolve is to serve the American consumer. Our job is to expose transactions where maximizing



shareholder value is being done at the expense of, and not on behalf of, the American consumer. To this end, we challenged Electrolux’s acquisition of a key competitor, General Electric’s appliance business. The merger would have left millions of Americans vulnerable to price increases for ranges, cooktops, and wall ovens, products that represent large purchases for many households. Post-merger, Electrolux (including its production of the Kenmore brand) would have produced 70 percent of the ranges at the more affordable end of the market (those priced below \$500). After four weeks of trial, and when confronted with our team’s vigorous prosecution, the merger was abandoned, thereby preserving the head-to-head competition that leads to lower prices, better services, and greater innovation for consumers.



Similarly, we challenged a merger-to-monopoly between the nation’s two largest cinema advertising networks (which provide preshow advertisements services to movie theaters). On the eve of trial, the parties called off the deal, and competition was preserved. I said at the time, and I believe to this day, that this is representative of an anticompetitive transaction that never should have made it out of the boardroom. That is not the only example of merger overreach we have seen in recent years. For instance, Bazaarvoice and PowerReviews were the only significant rivals in the business of providing ratings and review software to shopping websites. They brazenly assumed the government would overlook a consummated merger to monopoly. Our win at trial and the post-trial remedy entered by the court restored competition so that online retailers and manufacturers would continue to benefit from a competitive market.

Given the dramatic increase in merger activity, it comes as no surprise to learn that we spend significant effort and resources investigating mergers. Where our investigation reveals competitive problems, we act. In FY 2015, eight mergers

were abandoned after we expressed competitive concerns, and three so far have been abandoned in FY 2016. For example, two of the largest makers of semiconductor manufacturing equipment, Applied Materials Inc. and Tokyo Electron Ltd., abandoned their \$10 billion merger after we rejected settlement offers that were insufficient to protect competition and future innovation for the development of machinery used to make the memory and logic chips that power smartphones, tablets, computers, and many other products. We secured a similar result for consumers of canned tuna when Chicken of the Sea International and Bumble Bee Foods—the number two and three producers—abandoned their plans to merge after the Division informed the companies that we would challenge the transaction.

As markets and competitive dynamics evolve, we adjust our analysis to make sure we are forward looking. For example, wireless services once focused on local customers and competition. The competitive dynamic changed over time. In reviewing the proposed AT&T/T-Mobile merger, we determined that nationwide networks were increasingly a critical feature of competition between the four carriers that competed throughout the U.S. We sued to block the merger and maintain the strong head-to-head competition between AT&T and its maverick competitor T-Mobile.

To be effective, antitrust enforcers need to be nimble. We need to look to the future. We need to make sure we are not missing the emerging forest because merging parties want to focus us on the trees.

We are also mindful of competitive harm caused by incremental accruals of market power by dominant firms. For that very reason we challenged the effort by United Airlines, which already controls most takeoff and landing rights at Newark Airport, to further entrench its monopoly position. As our complaint makes clear, we reject the argument that dominant firms should be allowed incrementally to unlawfully enhance their monopoly power from 73 to 75 percent. There is no safe harbor in antitrust law for that sort of incrementalism.

Antitrust misconduct takes many forms, and our enforcement efforts focus on behavior that limits meaningful competition. Last year, we successfully contested American Express's rules barring merchants from offering consumers rewards and discounts for using lower-cost cards. This ruling, which is currently on appeal, would benefit the millions of merchants who pay more than \$50 billion in credit card swipe fees annually, as well as the consumers who ultimately bear these costs. Finally, last June, the Second Circuit upheld the

Division's 2013 trial victory in the ebooks case, in which the Division established that Apple, Inc., and five of the six major book publishers entered into an illegal agreement designed to raise ebook prices. Two days ago, the Supreme Court denied Apple's petition for certiorari. This means Apple must credit consumers who bought ebooks at unlawfully inflated prices \$400 million in refunds. At the end of the day our successful pursuit of this conspiracy between Apple and book publishers returned some \$570 million to consumers denied market-based prices for their purchases.

Securing Strong and Effective Results

When we find a merger between rivals that risks decreasing competition in one or more markets, we are invariably urged to accept some form of settlement, typically modest asset divestitures and sometimes conduct commitments or supply agreements. We thoroughly review every offer to settle, but we have learned to be skeptical of settlement offers consisting of behavioral remedies or asset divestitures that only partially remedy the likely harm. We will not settle Clayton Act violations unless we have a high degree of confidence that a remedy will fully protect consumers from anticompetitive harm both today and tomorrow. In doing so, we are guided by the Clayton Act and the Supreme Court, which instruct us to not only stop imminent anticompetitive effects, but also to be forward-looking and arrest potential restraints on competition "in their incipiency." Settlements need to preserve the status quo ante in markets where there is a risk of competitive harm. Where complex transactions pose antitrust risks in multiple markets, our confidence that Rube Goldberg settlements will preserve competition diminishes. Consumers should not have to bear the risks that a complex settlement may not succeed. If a transaction simply cannot be fixed, then we will not hesitate to challenge it. I have already cited examples, including the proposed mergers between Electrolux and GE, Tokyo Electron and Applied Materials, and Chicken of the Sea and Bumble Bee.

Our skepticism about remedies in merger cases is well placed. But we appreciate too that in some circumstances, a well-structured settlement can improve competitive conditions. For instance, in 2013, the Division filed suit to stop Anheuser-Busch InBev's proposed acquisition of Grupo Modelo, the largest and third-largest firms selling beer in the United States, the world's second largest beer market. Our settlement required the companies to divest all of Modelo's assets, including brewing capacity that served the U.S. market to an independent, fully integrated, and economically viable competitor.

This outcome is paying off for the American consumer. Constellation, the new owner and brewer of brands including Corona, Modelo Especial, and Pacifico, has begun offering new products, bringing competition to segments of the market where Grupo Modelo had not previously competed. Constellation is also increasing capacity, planning to nearly triple production at one brewery and build an additional brewery. According to its executives, Constellation continues to grow its U.S. sales faster than the market as a whole. The company recently announced an eight percent increase in net beer sales and a 16 percent increase in beer shipments.

Consumers similarly are benefitting from the slot and gate divestitures we secured when we settled our challenge to the American-US Airways merger. At Reagan National Airport, the carriers who acquired slots divested by American have introduced more than 40 additional departures each day, including service to 14 new airports. Last year the airport served a record 23 million passengers, an increase of more than 10 percent over 2014. The local airports authority recently noted that, “Following the divestiture, airlines at Reagan National have maximized the slots they control to carry more passengers, on larger aircraft, than were flown prior to the merger.” At Love Field, where our gate divestitures were timed to coincide with the expiration of the Wright Amendment, consumers’ options and available seats have increased while fares have decreased at both Love Field and DFW. Similarly, slot and gate divestitures at LaGuardia and O’Hare have triggered new service to more destinations, lowered fares, and increased the number of passengers

Preventing Companies from Profiting from Bad Behavior

We also need to make sure that firms do not profit from their unlawful acts. In many cases, private treble damage actions make consumers whole and deprive wrongdoers of ill-gotten gain. But in places in which it does not, we will use the tools at our disposal, including disgorgement, to ensure that illegally obtained monies are not kept. For instance, we challenged Flakeboard’s acquisition of SierraPine (both are makers of particleboard widely used in furniture and kitchen cabinets). And, we held Flakeboard accountable for violating antitrust laws by agreeing to close one of SierraPine’s facilities during the pendency of our merger investigation. This conduct constituted unlawful pre-merger coordination. We insisted that Flakeboard surrender its ill-gotten \$1.15 million profit associated with its law violations. They ultimately abandoned the acquisition. We also remedied the competitive harm of the Coach USA-City Sights joint venture in New York City. In that matter, we also worked with the

New York Attorney General to secure a settlement that required the defendants to give up \$7.5 million in profits they obtained from the illegal operation of their joint venture.

Competition Advocacy, Collaboration, and Business Guidance

Other vital tools in our kit for improving competitive conditions include the work we do with our sister antitrust enforcer, the FTC, as well as with other agencies, the various states, and international antitrust entities. This work both bolsters our enforcement program and enhances our ability to make positive change in a number of markets for American consumers. It improves the flow of communication and information, helps more people understand and benefit from competition.

We regularly work with the FTC to hold public workshops to provide a forum for open discussion on the most challenging and cutting-edge competition issues of the day. We work together to help remove unnecessary regulation in a manner that fosters competition, innovation, and entrepreneurship. For example, at the request for our views by officials in Virginia and South Carolina, we urged these states last year to consider repeal or reform of their Certificate of Need (CON) laws. We were concerned that these laws harmed health care competition by creating barriers to expansion, limiting consumer choice, and stifling innovation. Reexamining the CON process gives policymakers an opportunity to invigorate competition to the benefit of patients, employers, and other health care consumers.

Last month, the Division and the FTC issued a joint statement encouraging the Massachusetts legislature to consider expanding the services that optometrists can provide to glaucoma patients. Increasing competition, consistent with patient safety, can help provide greater access to care that is also more timely and cost competitive.

We appreciate the value that antitrust guidance can provide to industry as new business models and technologies emerge. For example, in April 2014, we issued a joint policy statement with the FTC to clarify that properly designed cyber threat information sharing is not likely to raise antitrust concerns. We subsequently issued a business review letter stating that the Division would not challenge a proposal by a company seeking to offer a cyber intelligence data-sharing platform that allows members to share threat and incident data about cyber attacks. Last year, the Division issued a business review letter in response

to a request from the Institute of Electrical and Electronics Engineers, Inc. (IEEE), a standard-setting organization, about a proposed update to its patent policy. This letter continued our effort to provide guidance with respect to the scope, interpretation, and application of the antitrust laws to particular proposed conduct that promotes the development of procompetitive patent policies for standard setting. We will continue to provide this type of good-government guidance.

We cooperate and coordinate with numerous federal agencies, including the Federal Communications Commission, the Departments of Agriculture, Commerce, Defense, Transportation, and Health and Human Services, among others, to ensure that public policy represents sound competition principles. We also have forged strong relationships with state attorneys general. In the last six years, we have partnered with 49 state attorneys general, the District of Columbia, and Puerto Rico, including 17 states in the American Express case and 33 states in our Apple ebooks case.

Antitrust Around the Globe

American consumers and businesses benefit from the Division's ongoing collaboration with foreign competition authorities. We devote significant resources to providing assistance to our sister agencies around the globe to help all antitrust authorities adopt and maintain merger and conduct enforcement policies that are economically and legally sound and consistent. These efforts help ensure that firms in the United States and abroad increasingly can expect competition enforcement that is even-handed and fact-based. We work with other nations' antitrust authorities on a number of enforcement matters, and continue to strengthen these working relationships. Such collaboration has been valuable in a number of actions. For example, in our investigation of General Electric's proposed acquisition of Alstom, we worked closely with the European Commission, greatly helping enforcers on both sides of the Atlantic Ocean secure remedies that will preserve competition in the United States and the European Union. In criminal antitrust enforcement, we work closely with foreign enforcers on our cartel investigations, including recent work with the United Kingdom on investigations into the financial sector and e-commerce sellers of posters, prints, and framed art.

When I left the FTC in 1999, after five years working on antitrust enforcement, we were just beginning to see progress towards convergence on substantive antitrust standards. The progress since then is noteworthy. It takes effort. We

work with fellow enforcers from many jurisdictions, both bilaterally and in organizations like the Organisation for Economic Co-operation and Development and the International Competition Network, to share best practices, strengthen the bonds that link the international antitrust enforcement community, and promote sound antitrust policy. We will continue to make it clear in our work with international competition authorities that competition enforcement should focus exclusively on competition and not be used to advance non-competition goals, and stress that lawfully obtained and maintained intellectual property rights are not challenged under United States antitrust laws. Securing commitment to principles of procedural fairness, transparency, and nondiscriminatory enforcement builds confidence in consumers, businesses, and national governments that antitrust enforcement is a key component to an increasingly globalized economy.



Conclusion

The Antitrust Division’s dedicated public servants continue to work hard to enforce the antitrust laws for the benefit of American consumers and businesses. We use our tools—criminal and civil enforcement, together with focused and effective competition advocacy—to do so. We have, and will continue to, vigorously enforce the law and hold accountable those who harm consumers and competition. We are ready to take whatever actions are within our authority to ensure that consumers get the full advantage of our free-market economy. I am honored to be part of a hard-working law enforcement team that is delivering real benefits to the American public.