Department of Justice

# CURRENT TRENDS IN ANTITRUST POLICY AND THEIR EFFECT ON SMALL BUSINESS

Remarks by

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I appreciate the opportunity to participate in this panel discussion of antitrust issues affecting small business. It is appropriate that this my first speaking engagement as the head of the Antitrust Division should deal with this important topic. Small business has a critical role if we are to maintain a strong, dynamic economy. Small businesses are often the source of new ideas--both technological and managerial--that spur competition. In many industries, particularly those charaterized by new technology, small businesses have had admirable records of inventing new products and providing consumers with low cost, high quality goods and services. Even in industries that include large companies, small businesses provide the vigorous competition that lowers prices and that enables this country to participate fully in world markets.

The antitrust laws and the antitrust policy that the Department of Justice has pursued recently and that I intend to pursue in the future play a crucial role in protecting and promoting competition, which in turn is the life blood of small business. Increasingly, the Supreme Court in decisions such as GTE Sylvania 1/ and ASCAP 2/ and the antitrust enforcement

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1/ Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

2/ Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1 (1979).

agencies have come to interpret the antitrust laws with the objective of maximizing efficiency and consumer welfare. The practical effect of concentrating our efforts on these objectives is to foster an economic climate in which small business can thrive. By condemning anticompetitive practices that artificially inflate costs and that unreasonably exclude competition from concentrated markets, this policy serves to protect small business as well as consumers. Moreover, by recognizing the efficiency-enhancing effects that cooperative arrangements among businesses can have, this antitrust policy gives small businesses greater freedom and flexibility to compete effectively against their larger counterparts.

In my limited time today I will touch briefly on a few areas where current trends in antitrust policy are particularly helpful to small business.

First, our current policy places a great deal of emphasis on vigorous enforcement of the antitrust laws to deter collusive efforts to raise prices artificially or unreasonably to exclude or limit competition. Obviously, practices that unreasonably exclude competition from concentrated markets limit the competitive opportunities of small business. In addition, small businesses are frequently the customers, and therefore the victims, of price-fixing conspiracies. Payment of inflated prices can hamper those small businesses that must

compete against firms that have their own internal, captive supplies or that otherwise can circumvent the price-fixing conspiracy.

It is also true that small businesses are at times the defendants in such enforcement actions. However, even in such cases, other small businesses, or at the very least the owners of those small businesses, are likely to be victims. Moreover, I refuse to believe that small businesses can survive only if they engage in anticompetitive conduct. When small businesses engage in felonious conduct, they must face the consequences, including jail sentences. However, I want to make it clear that we will not selectively prosecute small businesses because they are less likely to have the resources to mount a successful defense; rather, we will prosecute anticompetitive conduct, regardless of the size of the defendants.

Second, the current trend in antitrust law toward focusing on the economic effects of particular conduct also promises to free small business from the shackles of occasionally irrational antitrust analysis. For example, in the area of merger enforcement, the law has moved away from a strict, formalistic reliance on simplistic market definition and concentration ratios to a greater appreciation of the various factors that can affect the competitive prospects of a merger. Recognizing the substantial benefits of mergers, antitrust enforcement agencies and the courts now interfere only with

those mergers and acquisitions that threaten to facilitate collusion among competitors. The Department's recent revision of the Merger Guidelines, I believe, successfully embodies these trends.

These trends in merger policy should benefit small businesses. Mergers can be an important device to allow small businesses to obtain the size or scope of operation that is often necessary to compete effectively with larger or more fully integrated firms. In addition, less unnecessary interference in mergers and acquisitions should enhance the marketability of small businesses. Consequently, entrepreneurs are better able to realize the full commercial reward for their endeavors. A ready market for corporate assests can be particularly important when entrepreneurs decide to exit a market because of exigencies like the recent recession.

One complaint often voiced about the current merger policy is that it facilitates the conglomeration of corporate giants that threaten the existence of small businesses. The evidence is to the contrary. First, economy-wide concentration has been relatively stable in recent years, and there is a whole galaxy of laws, including the securities, tax, and election campaign laws, that are designed to check the misuse of corporate power. Second, it is misleading to view any merger in isolation. Often, an acquisition may be only one part of the planned transformation of a company. In recent years a high

percentage of mergers actually involves the spin-off of corporate assets, actually leading to a reduction in corporate size. Moreover, if it develops that the merger or acquisition reduces, rather than increases, the efficiency of the acquiring firm, that firm will lose business to its smaller, more efficient competitors.

Mergers, of course, are only one type of a broad variety of agreements that are affected by the current trends in antitrust policy. Small businesses are also the beneficiaries of the increasing sensitivity of antitrust policy to the economic benefits that can flow from a wide range of agreements among businesses. For example, the Supreme Court has recognized in its GTE Sylvania decision that non-price vertical restrictions can be procompetitive and so should be analyzed under a rule of reason approach. Unlike larger firms that may have the wherewithal to integrate forward and to distribute their products on their own, small businesses often must rely on others to distribute their products. The flexibility provided by the rule of reason can be very important in assuring that small businesses are able to compete on a par with their larger rivals. In fact, the appropriate vertical restriction can be critical when small businesses seek to enter a market.

Although it is now clear that a rule of reason analysis is to be applied to non-price vertical restraints, unfortunately, it is not always clear how the courts distinguish between

non-price vertical restraints and price vertical restraints--that is, resale price maintenance--nor are the courts generally clear as to precisely what they mean by a rule of reason. As a result, there is a great deal of uncertainty as to which vertical arrangements are legal and which are illegal.

The Department is currently attempting through various methods to give some content to the rule of reason in this area. For example, we are actively considering the publication of an "Antitrust Guide to Vertical Practices." Ideally, these efforts will yield operational rules that more effectively focus antitrust analysis upon factors that distinguish procompetitive from anticompetitive vertical conduct. Not only should the Department be able to use those rules to determine whether and when to bring cases but also the courts should be able to use them to increase significantly the predictability of the law. The increased certainty should further enhance the efficiency of small businesses and so increase the well-being of all consumers.

A related area of antitrust law badly needs clarification and reform--the law covering the development and dissemination of new technology. The important role that small business plays in generating new technologies is well known. Some of the most important technological ideas of our day originated in very small enterprises and reached the market through the dedicated efforts of small businesses. One example with which

we are all familiar is the personal computer. Although larger companies are now entering the industry, the industry itself was created and long dominated by innovative small companies.

Despite this impressive record, there are aspects of the antitrust laws that have probably hampered the ability of small business to generate, develop and disseminate new technology. First, it appears that an unreasonable fear of antitrust sanction may be deterring the formation of procompetitive joint research and development ventures, even those composed solely of small businesses. However, joint ventures may be essential to reduce the cost and risk of research and development. Fortunately, the importance of such joint ventures is now broadly recognized, and I am optimistic about the prospects for legislation that will assure favorable antitrust treatment of joint R&D. In particular, title II of the Administration's National Productivity and Innovation Act, 3/ is, I believe, the best legislative solution to the joint R&D problem.

In addition, sections 9 and 11 of the Small Business Act provide a means for small business joint ventures to obtain antitrust immunity. The Department, in conjunction with the Small Business Administration and the FTC, recently granted the first such immunity to the Small Business Technology Group.

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3/ H.R. 3878 (introduced by Congressman Moorhead); S. 1841 (introduced, by request, by Senator Thurmond).

Even more important than the need to clarify the antitrust rules concerning joint R&D ventures is the need to clarify the antitrust rules governing the licensing of technology. Perhaps the most anticompetitive set of antitrust rules has developed around this often economically misunderstood practice. A whole raft of older antitrust, patent and copyright decisions displays some hostility toward the licensing of technology. The effect has been to limit severely the options confronting the owner of an innovative new technology. If the owners cannot fully exploit new technology alone, then he or she faces the Hobson's Choice of either foregoing the revenue from full exploitation--and thereby denying the technology's full benefits to society--or licensing the technology without procompetitive restrictions that violate the antitrust laws even though they are necessary to protect the owner's exclusive rights and to develop the technology fully.

These outmoded antitrust rules not only interfere with the ability of small business to exploit the technology they create, but they also limit the access that small business has to the technology of others. Because of the risk that anti-trust law now creates for licensing, technology owners often refuse to license small businesses. Small businesses are denied commercial opportunities, while consumers are denied the benefits of quicker, more efficient dissemination of new technology.

While the current trend in antitrust law is beginning to make inroads into this hostility toward technology licensing, we need to redouble our efforts. In an age when we face increasingly stiff foreign competition, particularly in high-tech industries, we cannot afford the luxury of rules that needlessly ham-string the efforts of small business to develop and disseminate new technology. To this end, the Administration has proposed titles III through V of the National Productivity and Innovation Act. Those legislative reforms would improve the legal protection provided to the owners of technology and would largely reverse the harmful judicial hostility toward licensing practices.

We also will work to clarify the antitrust rules applicable to technology licensing. In speeches and amicus filings, and perhaps even in guidelines, we will attempt to spell out in clear, practical terms the appropriate antitrust approach in this area.

I have only been able to discuss briefly some of the antitrust issues affecting small business. I hope, however, it is apparent that we have a large area of common interest. I look forward to working with members of the small business community in the coming months to carry out this policy. Together we can improve the competitive opportunities for small business, enhance competition, and increase the economic well-being of American consumers. Thank you.