Department of Justice

THE INTERNATIONALIZATION OF ANTITRUST

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Good afternoon. It is a pleasure for me once again to spend sixty minutes with the cream of the nation's antitrust bar as the Assistant Attorney General in charge of the Antitrust Divison. This is my last time -- I promise. I know that many of you are disappointed -- as are my banker and my wife -- that my replacement is not on board to inaugurate his or her tenure with this annual tradition. But I will try to make things as interesting as I can.

In keeping with the fact that there is a new Administration in the White House, I want to devote most of my obligatory opening remarks to a discussion of where antitrust is headed. I do not mean that I intend to lay out policy for the next four or eight years; I'll leave that to my successor. Although that person surely will bring a somewhat different style, I personally do not expect significant substantive changes. After all, Dick Thornburgh will be Attorney General for some time to come, and it was his Justice Department that published the Antitrust Enforcement Guidelines for International Operations, which is a compendium of the antitrust policies of the last eight years. 1/ To the extent the Attorney General has raised any question about the policies of the past, it is

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1/ U.S. Department of Justice, Antitrust Division, Antitrust Enforcement Guidelines for International Operations (November/10, 1988).

whether we have gone far enough in reforming the antitrust laws to ensure that they do not harm American competitiveness. Furthermore, I know of nothing that President Bush has said before or after his inauguration that suggests dissatisfaction with the Reagan Administration's antitrust record. Certainly, there is still room to improve on the record of the last eight years, and the Bush Administration has a strong base on which to build.

My purpose today is not, however, once again to defend the Division's record. I have stupefied my last audience with the long, impressive -- and some claim boring -- litany of our enforcement statistics. Yet I cannot resist this final opportunity to supplement the record with just two more statistics. First, in fiscal year 1988, the Division established a new record for the amount of antitrust fines, damages and civil penalties obtained for the Treasury. That amount -- almost $39 million -- was more than 80 percent of the Division's total FY 88 budget and is about double the previous record for collections, which was set in fiscal year 1987.

Second, I stand before you as the head of the Antitrust Division who has filed more criminal cases -- 261 to be exact -- than any of my predecessors. Yes, I have filed more criminal cases than even Thurmond Arnold, who served a substantially longer time and whose name is synonymous with vigorous criminal enforcement. Interestingly, despite his reputation, Arnold, who filed 220 cases, is only the third most

vigorous prosecutor in the Division's history; Bill Baxter, the first Reagan antitrust chief, filed two more criminal cases than Arnold.

These two statistics, along with inumerable others, depict an eight-year record of sound yet vigorous antitrust enforcement to which I am very proud to have made my contribution. I sincerely believe that in the fullness of time, when today's passions have cooled and the partisan invective has lost its appeal, the last eight years will be seen as a high-water mark in the protection and promotion of the welfare of the U.S. consumer -- or at least the watershed for protection that I expect to continue under President Bush.

The Division has shrunk considerably over the last eight years -- frankly, it has shrunk too much. But despite working above and beyond the call of duty, morale in the Division, particularly in the field offices, is extremely high. We have as fine a group of Honors Graduates coming into the Division next fall as we have ever had, in large part because of the recruiting efforts of Ken Starling and the allure of plenty of white collar criminal work.

Moreover, by focusing on the criminal prosecution of naked horizontal restraints and by carefully identifying and challenging those mergers that truly harm competition, we have given taxpayers a handsome return on their investment in the Division. I have already mentioned the money collected for the Treasury. Recently one of our economists roughly estimated

that the Division's enforcement activities saved the federal government -- that is, restrained the price of goods and services purchased by the government -- anywhere from $400 million to $1.85 billion a year. Those savings result from the deterrence of collusive price increases that on average would otherwise have raised prices by one-tenth to one percent. Economy-wide, the savings from the deterrence generated by our vigorous criminal enforcement are surely much higher.

Despite the impressive size of these numbers, they are probably smaller than another type of savings derived from the more sophisticated, more discerning enforcement of the last eight years -- that is, the elimination of the dead-weight loss resulting from unnecessary and wasteful government interference in the marketplace. To me, the single most important legacy of the Reagan Administration is the sense of institutional humility that I hope has been permanently instilled in the Division. Much of the change and redirection in enforcement can be understood as an attempt to reduce "false positives" -- that is, attacks against procompetitive or competitively neutral conduct -- that I believe were prevalent under the old regime of antitrust enforcement. In my view, the higher level of civil enforcement activity during the sixties and seventies does not reflect the fact that back then the Division was challenging more truly anticompetitive conduct. Rather, much of the civil enforcement represents challenges to conduct that was misperceived or superficially perceived to harm competition.

But enough about the past, rather, as I promised I want to give you my views of where antitrust is going. The received wisdom notwithstanding, reports of the demise of antitrust are premature -- and, in fact, are unlikely ever to come to pass. Antitrust, for better or worse, is alive and well, albeit in a largely more rational and efficient form.

The perception that antitrust has disappeared has resulted perhaps because so many practitioners find the new modes of analysis so different from those they replaced. The current antitrust focus on economic analysis has given businesses greater flexibility and created new opportunities to undertake productive, profitable, and innovative activities, but it has not given them carte blanche. If businesses fail to understand the subtleties of the new analysis, the cost can be high. Hundreds of thousands or millions of dollars may be needlessly expended on transactions that cannot pass government muster or, worse, a businessman or woman that fails to take antitrust seriously may find himself or herself the target of a grand jury investigation.

Thus, rather than bemoaning the demise of antitrust, the bar should focus on the trends that are emerging and that will affect the economy for years to come. First, as I indicated earlier, I think we will continue to see the Division emphasize criminal enforcement. I expect an increase in the diversity of industries within which naked horizontal restraints are prosecuted, and I expect we will see increasingly that the

prosecuted conspiracies have more of a regional and national scope. As the nature of the prosecuted conspiracies changes, we will probably see more follow-on damage cases than we have in the last few years. Moreover, because under the Sentencing Guidelines the government's ability to plea bargain is limited and because sentencing hearings will often be more like mini-trials, criminal litigation itself will increase. The only constraint on the increase in such activity will be the Division's budget.

Second, although the Supreme Court has become much more economically sophisticated and rational in its approach to the antitrust laws and although federal courts like the Seventh Circuit have radically transformed their approach toward such once prevalent features of the antitrust landscape as dealer termination suits, some recent court decisions reflect a disturbing judicial restiveness. For example, the Second Circuit in the recent Bigelow 2/ and Minorco 3/ decisions has greatly expanded the standing of competitors and targets to challenge mergers. These decisions, particularly Minorco's automatic grant of standing to targets who compete with their acquirers, are difficult to reconcile with Monfort. 4/ Given

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2/ R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2d Cir. 1989).

3/ Consolidated Gold Fields PLC v. Minorco, S.A. ___ F.2d ___, (2d Cir March 22, 1989).

4/ Cargill, Inc. v. Monfort, Inc., 107 S.Ct. 484 (1986).

the significance of the Second Circuit as a venue for mergers and acquisitions, however, these decisions will likely engender a significant increase in private merger litigation.

Another area where some circuits seem to be swimming against the Supreme Court tide is predatory pricing. Over the last ten years, the courts have become increasingly skeptical about allegations of predation. This trend culminated in the Supreme Court's statement in Matsushita 5/ that "predatory pricing schemes are rarely tried, and even more rarely successful." 6/ But the failure to establish a cost-based test has left some circuits such as the Federal and Eleventh Circuits free to develop predatory pricing standards that give plaintiffs wide berth to attack vigorous price competition. At a time when inefficient domestic firms are seeking any and all forms of protection from their more efficient rivals, such open invitations to attack vigorous competition will likely result in a significant increase in spurious predatory pricing suits.

Another trend that is at least troublesome involves state antitrust enforcement. The seeds for the trend were planted in the form of federal grants to the states more than ten years ago. Initially -- and in fairness to a large extent today --

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5/ Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

6/ 475 U.S. at 589.

this flourishing of federalism in the area of antitrust enforcement was healthy and generally beneficial. State attorneys general bring added resources to the fight against naked horizontal restraints, and their parens authority can serve as an efficient claims' aggregation mechanism. But some state attorneys general, more interested in headlines than in sound law enforcement, have begun to use antitrust enforcement as a means of advancing their political careers. This trend is profoundly disturbing, particularly to a federalist like myself, but I am afraid it will not end soon.

There are other trends that I view with what can best be described as mixed emotions. For example, we are seeing an increase in the number of very large treble damage suits. To the extent these are follow-on suits to criminal prosecutions, they are commendable and important components of effective deterrence; to the extent the treble damage suits represent an attack on hard-core anticompetitive conduct that the Division is unable to prosecute, they are indispensable. On the other hand, some of the very large treble damage actions seem simply to be magnified, more complex versions of the breach-of-contract claims that, in the seventies, made their way into federal antitrust courts characterized as dealer termination cases. Only now the stakes involve ten rather than seven figures. At what point these abuses create sufficient pressure for reform of the current scheme of automatic treble damages, I do not know, but I do expect the trend toward antitrust mega-suits to continue for the time being.

While all these trends are important and by themselves guarantee that the Antitrust Section will still be holding spring meetings in the 21st century, the single most significant trend in antitrust today is toward its "internationalization." I recognize that this sounds trite: after all, the internationalization of markets has been used over the last ten years as the rationale for virtually every antitrust proposal. But trite though it may be, the world economy is in fact becoming increasingly interdependent -- to the point that one prominent Japanese recently commented that what matters now are not countries but rather multinational companies. And this economic fact of life has had a profound impact on antitrust law and antitrust lawyers.

The most obvious impact of the diminished significance of national boundaries to the flow of goods and services has been on antitrust analysis, which is affected in two ways. First, the presence of foreign firms selling products or services to U.S. consumers lessens the willingness and ability for domestic competitors to exercise market power. Effective foreign competition serves as a more expedient and efficient check on competitive abuses by domestic firms than U.S. antitrust enforcers can ever hope to be. Moreover, there is at least some reason to believe that, all other things being equal, tacit collusion among purely domestic competitors is less difficult than collusion that requires the involvement of foreign firms. Of course, explicit collusion may still occur,

but it can be dealt with through criminal sanctions rather than structural remedies.

Second, the presence of foreign competition increases society's desire to reduce false positives by government enforcers. Society tends to be much more tolerant of enforcement mistakes that condemn the efficient behavior of domestic firms when it does not result in the loss of domestic jobs. When jobs are at stake, however, an overly interventionist enforcement policy will quickly fall into disfavor if it hampers the ability of domestic firms to increase their efficiency and so their ability to compete with foreign rivals. Indeed, one can argue that in the late seventies popular support for our antitrust laws had begun to erode precisely because of the perception that they unduly hampered the ability of American firms to compete.

On the other hand, some have tried to use the "internationalization" of the U.S. economy as a smoke screen for a policy of mercantilism. The notion is that domestic firms should be allowed to ban together, not to create real efficiencies, but to generate "revenues" (by which the proponents really mean supracompetitive profits) that can be invested in order to make the domestic firms more competitive in world markets. A mercantilist policy that promotes the interests of domestic producers at the expense of domestic consumers is at the very least distasteful. More importantly, it will not work. There is no guarantee, short of the utterly

unthinkable option of government planning, to ensure that such excess revenues will be used to enhance the competitiveness of the recipients of the largesse. If the investment makes sense, then the parties can likely generate the funds from some source other than monopoly rents; if, relative to the available alternative uses for the funds, the investment is unprofitable, then short of government coercion the monopoly rents will not -- nor should they -- be reinvested in the business.

In legitimate, as well as illegitimate ways, then, the internationalization of the world economy has affected competitive analysis under U.S. antitrust laws. But, frankly, that is only the most obvious aspect in the trend toward internationalization. Another result of this trend is the increasing frequency with which the antitrust and trade laws must interact. Not only does that result necessitate continuing evolution of such doctrines as Noerr Pennington and foreign sovereign compulsion, but it also has led to an increasing blending of antitrust and trade law principles. While I am optimistic that the economic principles that have evolved in the area of antitrust can ameliorate to some extent the protectionist tendencies of the trade laws, there is always the threat that the interaction will work in the opposite direction and antitrust will become a tool of protectionism. In this area, the antitrust bar must remain vigilant.

To my mind, however, by far the most interesting antitrust aspect of the internationalization of markets is the

increasingly significant impact that the competitive laws and regulations of other nations are having on the planning and conduct of American firms.

The United States has never been unique in terms of its development and enforcement of competition law. In fact, the Canadians are fond of pointing out that they adopted their antimonopoly laws before the United States. Moreover, since World War II it has been de rigeur for any country that wants to be considered "developed" by the international community to adopt antimonopoly laws. And at least since the late sixties, the developed countries have urged competition laws on developing nations, often with the same missionary zeal that Christianity was promoted in past centuries.

But, at least for most American companies, the only regime of competition laws that has mattered until recently was U.S. antitrust law. To the extent that there were jurisdictional squabbles, they generally involved a choice between applying U.S. antitrust law or nothing rather than a choice between the competition laws of the U.S. and other countries. Whereas ten years ago the U.S. was roundly criticized by its trading partners for the so-called extraterritorial application of U.S. antitrust law, today other enforcement agencies routinely investigate and even attack the conduct of foreign persons, including U.S. firms, that takes place at least in part beyond that country's territorial boundaries but affects commerce within those boundaries. The EEC's Wood Pulp case is a prime example.

The increased relevance of foreign competition laws can be seen in several different areas. The most prominent substantive area involves mergers and acquisitions. The German Cartel Office is every bit as sophisticated and experienced at merger control as its U.S. counterparts, and the British and Australians have been active for years. In 1986, the Canadians changed their competition law and made pre-merger clearance as important in the Canadian economy as the Hart-Scott-Rodino Act is in ours. And while the EEC is on the verge of adopting a merger control regulation, they have already begun an ad hoc merger enforcement program.

It is not surprising, then, that increasingly the Division finds itself conducting investigations of mergers at the same time that one or more of its foreign counterparts are investigating the same mergers. For example, the Division and the Canadians simultaneously investigated the ABB/Westinghouse transaction, and the FTC and the British both took a look at Minorco's attempted takeover of Consolidated Goldfields. With respect to international transactions, antitrust counseling that ignores the possible risks under the competition laws of other countries and focuses solely on U.S. law is woefully inadequate. Moreover, the arguments and analyses that have been honed in connection with U.S. antitrust laws may prove persuasive to other competition authorities.

Similarly, in the area of technology licensing, intellectual property owners increasingly must negotiate the

structure of their licenses with the competition laws of several jurisdictions in mind. It is not merely serendipitous that the Department, the EEC and the Japanese Fair Trade Commission each have published almost simultaneously competition guidelines relating to the licensing of intellectual property. 7/ Technology development and dissemination are the fuel for world economic growth, and the national competition rules applicable to licensing can dramatically affect the growth and use of technology. Accordingly, in the United States the enforcement authorities have revolutionized their policy toward license restrictions. The same thing has occurred in Europe and Japan, although, as I will explain in a moment, the changes in policy have not been identical.

As the U.S. economy grows increasingly international, other substantive areas -- from joint ventures to distributional restraints to naked horizontal restraints -- will increasingly implicate the jurisdictions of more than one competition authority. The challenge for antitrust lawyers will be to stay ahead of the curve and to remain sensitive to the differing concerns of the various competition authorities. More

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7/ EEC Regulation 2349-84, O.J. Eur. Comm. (No. L219) 15 (1984); Japanese Fair Trade Commission, Guidelines for the Regulation of Unfair Trade Practice with Respect to Patent and Know-how Licensing Agreements (February 15, 1989).

staggering will be the challenge facing enforcement authorities around the world to minimize the proliferation of conflicting rules and regulations that can choke the world economy.

Currently, the antitrust authorities of the major developed countries regularly consult one another. Consequently, a rapport has been established that has fostered mutual respect and facilitated the exchange of ideas. For example, the fact that Sebastiano Gattuso of the EEC competition staff spent time at the Division sharing ideas on intellectual property with Roger Andewelt and me is reflected in our International Guidelines and in the EEC's block exemptions relating to patents and know-how.

The coordination and consultation will likely become more complex in the future, however. While there is a great deal of mutual respect and understanding among competition authorities around the world, differences remain. In the United States today, our competition laws have a narrow, specific focus: the protection of consumer welfare, economically defined. Other authorities often expect their laws to achieve other ends. For example, the EEC views its competition laws as promoting an internal, integrated market. Thus, they are somewhat hostile to vertical territorial restraints that impede the cross-border flows of goods and services, even though interbrand competition may not be harmed. This difference in approach can be detected, for example, by comparing the Division's analysis of licensing restrictions with the analysis of the EEC.

Similarly, the recent Japanese licensing guidelines reflect a desire to protect the interests of licensees as against licensors; the Department's analysis is, as a general matter, neutral as between the two groups.

These and other differences between the competition laws of the U.S. and its trading partners have only recently begun to have more than academic significance. And as transactions increasingly implicate multiple jurisdictions, I expect these differences will be highlighted if not exacerbated. The complexity of dealing with so many overlapping but at times inconsistent rules and regulations will surely make some otherwise worthwhile economic transactions prohibitively expensive. In a one-world economy, conflicting competition regimes threaten to create a regulatory "Tower of Babble."

Enforcement authorities will undoubtedly spend a great deal of time trying to resolve or at least to accommodate these differences so that they do not disrupt trade. There are essentially two routes to such an accommodation: first, the creation of one or several groups of supranational regimes of competition rules, similar to the trade law regimes represented by GATT and the U.S./Canada Free Trade Agreement; second, the development of a more elaborate international system for resolving conflicts of law. The ultimate resolution may well lie in a combination of the two. The EEC's current debate over merger control regulation is our object lesson in this regard: the member countries are debating substantive harmonization for

certain community-wide transactions and procedural rules for allocating enforcement authority between the Commission and the member states. The time and energy required to develop a consensus on EEC merger control regulation is merely a hint of the fun that enforcement authorities will have in trying to accommodate the increasing internationalization of the world economy.

Conclusion

But these are problems to be addressed by those who will remain in the Division after I have left. I am sure that there are few, if any, other jobs that can top my experience as Assistant Attorney General, but it is now time for me to make way for someone else. Next year, I will be down there with you, just waiting for an impressive panel of antitrust experts to let my successor have it. For one last time, however, I must subject myself to the scrutiny of my distinguished colleagues. Go ahead, gentlemen, take your last, best shot, for you won't have Rick Rule to kick around again!