DEPARTMENT OF JUSTICE

Remarks Delivered at
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Introduction

Although the focus of today's conference is "Trump antitrust policy after one year," I should note at the outset that antitrust policy for the United States is established and executed through a dual agency structure, one in which the Department of Justice shares certain of its responsibilities for enforcing the antitrust laws with the Federal Trade Commission.

For example, both agencies have authority to review mergers and bring suits to enjoin transactions under Section 7 of the Clayton Act. Both agencies also share authority to bring civil cases to enjoin other forms of conduct that violate the antitrust laws.

The two agencies' jurisdictions do differ in several important ways. Unlike the FTC, the Antitrust Division has authority to bring criminal charges for violations of the Sherman Act. The FTC, however, has a consumer protection mission and is empowered to bring suit against unfair or deceptive trade practices.

The two agencies also have different leadership structures. There is one Senate-confirmed Assistant Attorney General in charge of the Antitrust Division, and there are currently six Deputy Assistant Attorneys General and a number of talented counsel in the Front Office who assist the AAG. The AAG reports to the Attorney General, who reports directly to the President. The FTC, by comparison, is an independent agency with seats for five commissioners, and it takes action through a majority vote of seated commissioners.

As a result of this dual-agency structure, there is not one "grand, unified antitrust policy" within any administration. But the two agencies do share common goals, and they rarely differ on the interpretation and application of the antitrust laws.

With that background, I would like to describe a few of the policy initiatives that the Antitrust Division undertook during the past year that we plan to carry forward into 2018.

Intellectual Property

I will start with the application of antitrust law to intellectual property. Shortly after his confirmation last September, our Assistant Attorney General delivered a speech on intellectual property that kicked off the Division's global effort to caution against the misapplication of antitrust law to intellectual property disputes.[1]

I wholeheartedly share our AAG's concern that antitrust enforcers may have been focusing too heavily on the concerns of technology implementers who participate in standard setting organizations, and that this focus risks undermining incentives for the innovators who are responsible for creating IP in the first place.

If a patent holder is alleged to have violated a commitment to a standard setting organization, there are common law and statutory remedies available to address that misconduct. Indeed, a recent district court decision demonstrated that courts are capable of remedying violations of commitments to license on FRAND terms without resorting to antitrust remedies.[2] By contrast, expanding the use of antitrust law to police private commitments to standard setting organizations threatens to distort the bargaining process in a way that undermines innovation.

[1] Makan Delrahim, Assistant Attorney General, Antitrust Division "Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law" (Nov. 10, 2017), https://www.justice.gov/opa/speech/file/1010746/download.

[2] Memorandum of Findings of Fact and Conclusions of Law, TCL Communication Technology Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson, No. 8:14-cv-00341 (C.D. Cal. Dec. 21, 2017).

The Antitrust Division also shares the concern expressed by the Supreme Court in *Hydrolevel* that standard setting organizations "can be rife with opportunities for anticompetitive activity."[3] Experience has demonstrated that, whenever competitors come together, there is always a risk that they will engage in naked cartel-like behavior.

The Division has begun scrutinizing what may appear to be buyer's cartel or seller's cartel behavior that's designed to artificially shift bargaining leverage from IP creators to implementers, or vice-versa. In particular, the Division is focused on rules of SSOs that purport to clarify the meaning of "reasonable and nondiscriminatory," but that may instead serve to skew the bargain clearly in the direction of implementers. In this regard, I would underscore Assistant Attorney General Delrahim's suggestion that standard-setting organizations should proactively evaluate their own rules and maintain internal antitrust compliance programs.

The Division's senior leadership intends to engage in further advocacy efforts on this issue in the coming year, elaborating on ways antitrust enforcers and courts may help restore the balance between intellectual property and antitrust law.

Consent Decrees and Other Remedies

A second policy initiative of the Antitrust Division is to continue to streamline and improve its use of consent decrees and other remedies. Our overall approach to consent decrees is guided by the principle that antitrust enforcement is law enforcement, not regulation.

Antitrust enforcement is designed to help the forces of competition guide the markets, and it therefore plays an important role in deregulating the economy so that

[3] Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp. 456 U.S. 556, 571 (1982).

innovation can thrive, businesses can enter markets and compete, and consumers can benefit from low prices and increased output. As Justice Black explained in *Northern Pacific*, the Sherman Act is a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[4] The Antitrust Division will aim to further that goal with its approach to consent decrees.

Among other things, the Division will continue to favor structural relief rather than behavioral relief. Behavioral relief can be at odds with the purpose and design of the Sherman Act because behavioral conditions are fundamentally regulatory, imposing ongoing government oversight on what should preferably be a free market.

The Division's recent merger consent decrees have reflected its preference for structural relief. This past December, in a single week, we entered into three different settlements for three separate mergers that the Division determined would be unlawful. In each case, we required divestitures, not behavioral restrictions, as the key component of each settlement.

We are also taking steps to improve the enforceability of our consent decrees by including provisions that are designed to place the risk of failure on the parties, not on the American consumer. All three of the settlements I just mentioned included the provisions, and the Division will include these provisions in settlements of future merger and civil non-merger actions.

Among other things, we are including a provision requires defendants to agree that the government may establish a violation of a consent decree by a preponderance of the evidence (that's instead of the government having to prove a violation by clear and

[4] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

convincing evidence). By modifying the standard in this way, we believe we will reduce the costs and increase the effectiveness of consent decree enforcement.

In addition, we are including a provision that allows the United States to apply for an extension of a consent decree's term if the court finds a violation of the decree. At the same time, we are also including a provision that after a certain number of years, the United States may terminate the decree upon notice to the court and the defendants.

Overall, the goal of these new provisions is to improve consent decree enforcement and shift the risk of failure to the parties and away from the taxpayer and American consumer.

Criminal Developments

On the criminal side, we hope to see continuing success in our efforts to combat price fixing, bid rigging, and market allocation schemes throughout the country.

One important area which the Division will continue to monitor closely is the employer-employee relationship and, in particular, what are sometimes called "employee no-poach" agreements. Agreements between employers that eliminate competition for employees in the form of no-poach agreements are per se violations of the Sherman Act.

In October 2016, the Division issued guidance reminding the business community that no-poach agreements can be prosecuted as criminal violations. For agreements that began *after* the date of that announcement, or that began before but *continued after* that announcement, the Division expects to pursue criminal charges. As our Assistant Attorney General explained last week, the Division expects to initiate multiple no-poach enforcement actions in the coming months.

Conclusion

To conclude, it is an incredibly exciting time to be at the Antitrust Division. With a Senate-confirmed Assistant Attorney General and full front office, we look forward to fulfill our mission of protecting competition and consumers.