# DEPARTMENT OF JUSTICE

# Effective Antitrust Enforcement: The Future Is Now

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Good morning, and thank you for the introduction. I am pleased to be here in person after speaking at USC virtually last July.

When I spoke here last year, I took the opportunity to highlight recent developments in criminal antitrust enforcement and reflect on the key principles underlying that work. But there was less I could say about forward-looking initiatives, because the Antitrust Division was still awaiting our Senate-confirmed Assistant Attorney General — whose nomination was announced just the day before my remarks last summer.

Now, six months into AAG Kanter's tenure, I'm pleased to be able to discuss the division's current enforcement priorities and our plans for the future. And — after nearly a year as Acting AAG — I am also going to offer a few thoughts on the division's civil antitrust work and the ways in which it can complement criminal enforcement to ensure we are using all available tools to protect and promote competition.

But first, let me set the stage and provide some critical context. As I'm sure all of you in this room know, in 1890, Congress passed a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." That charter is the Sherman Antitrust Act, which empowered the Justice Department to criminally and civilly prosecute conspiracies in restraint of trade and monopolization offenses. The department seized on that mandate and

successfully broke up trusts that had become chokeholds to competition, innovation, and prosperity for everyday Americans.

Unfortunately, consolidation and concentration are not just the relic of an earlier age. As our Attorney General recently said, "too many industries have become too consolidated over time."[1] From my vantage point as an antitrust prosecutor, I have seen time and again that collusion and other anticompetitive crimes thrive in consolidated industries. I also know that underenforcement allows antitrust crime to flourish. When we allow criminals to stifle competition, we lose out on many vital benefits: not just lower prices, but also improved quality, greater choice of products and services, healthy incentives to innovate, and workers' ability to negotiate better working conditions or switch jobs.

That is why vigorous enforcement of the Sherman Act has never been more important and relevant.

## I. What Effective Antitrust Enforcement Looks Like

I am incredibly proud of the work that the division's criminal program has done recently and the work it continues to do. The criminal program has set the tone for the aggressive antitrust enforcement required to meet the economic realities of our time. To understand what aggressive antitrust enforcement will look

[1] Merrick B. Garland, Att'y Gen., Remarks at the Roundtable on Promoting Competition and Reducing Prices in the Meatpacking Industry (Jan. 3, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-roundtable-promoting-competition-and.

like in the future, the best place to start is to look at what the criminal program has done recently.

I won't go through the statistics today, but Antitrust Division prosecutors are bringing more cases to trial now than any time in the recent past and continue to have a record number of open investigations. Of course, not all of these investigations will result in prosecutions, but I expect to continue to see high levels of litigation going forward.

The division's criminal enforcement spans across all sectors of the economy. We are prosecuting cases involving kitchen table issues for American families, from food to pharmaceuticals. We are prosecuting wage-fixing and employee allocation conspiracies to protect workers from employer cartels.

Our labor market cases provide an important example for what thoughtful, aggressive antitrust enforcement looks like. The Supreme Court held long ago that the Sherman Act applies equally to all industries and markets, including labor markets. Yet the division did not, until recently, use the tools Congress had given it to protect workers from criminal collusion. Today that is no longer the case. Labor competition enforcement goes straight to the heart of the Antitrust Division's economic justice mission. So protecting workers is — and will remain — a priority for the division.

In addition to protecting labor markets, we are also working tirelessly to protect public procurement. Two and a half years ago, we launched the Procurement Collusion Strike Force, an interagency partnership to safeguard taxpayer dollars by deterring, detecting, and prosecuting antitrust crimes and related schemes that undermine the government procurement process. The Strike Force is dedicated to rooting out collusion in the government procurement setting — at all levels, federal, state, and local.

Our work to protect procurement is paying off. Earlier this year, we secured a trial conviction of a former executive charged with bid-rigging and fraud schemes targeting the North Carolina Department of Transportation. And just last month, the division secured two more convictions — a guilty verdict against a former Department of Energy employee for conspiring to defraud the United States and making false statements to federal agents; and a guilty plea from a former CalTrans employee for rigging bids on state government contracts and bribery concerning programs receiving federal funds.

These cases demonstrate the division's commitment to holding companies and individuals accountable when they cheat the government procurement process. This work is especially important in light of the recent passage of $1.2 trillion in infrastructure spending in the Investment in Infrastructure and Jobs Act.

Aggressive antitrust enforcement requires deterring, detecting and prosecuting collusion that harms Americans even if that conduct occurs outside U.S. borders. That is why international cartel enforcement remains a priority for us. Experience has taught that enforcement is stronger when enforcers around the globe work together, and we are grateful for the relationships that we have formed with our colleagues around the world. Last month, I attended the annual International Competition Network conference in Berlin with AAG Kanter and others from the division. It was great to connect with our fellow enforcers. And next year, the division will co-chair the ICN Cartel Working Group along with the Italian and Chilean competition authorities.

Our recent extraditions are a good example of the division's commitment to prioritizing international cases. In January 2020, a former air cargo executive pleaded guilty after being extradited from Italy on charges that she participated in a long-running, worldwide conspiracy to fix prices of air cargo.[2] A few months later, a former auto parts executive pleaded guilty to participating in an international conspiracy to rig bids and allocate the market for instrument panel clusters after being extradited from Germany.[3] And, earlier this year, a German national who remained a fugitive for five years after being indicted for fixing the price of

[2] https://www.justice.gov/opa/pr/extradited-former-air-cargo-executive-pleads-guilty-participating-worldwide-price-fixing
[3] https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge.

parking heaters was arrested while attempting to enter the Canary Islands. That defendant was incarcerated in a Spanish prison for 15 months before pleading guilty.[4]

The takeaway is clear: attempting to wait us out from overseas risks a protracted process that can involve a substantial period of incarceration as the proceedings unfold.

In addition to the international arena, I also want to highlight the accomplishments of our appellate team in defending two important trial convictions. In *United States v. Lischewski*, the division opposed a petition for certiorari from a Ninth Circuit decision upholding the conviction of the former CEO of Bumble Bee Foods for price fixing. At the division's urging, the Supreme Court, once again, declined to consider whether longstanding case law holding price fixing per se unlawful under the Sherman Act should be jettisoned as unconstitutional; accordingly, the Supreme Court left in place the former CEO's price-fixing conviction (and 40- month prison sentence, which was not appealed). The division also briefed and presented oral argument in the criminal appeal in *United States v. Aiyer*, which followed the defendant's conviction in late 2019 for price fixing and bid rigging for foreign exchange trading. Consistent with the

[4] https://www.justice.gov/opa/pr/fugitive-executive-pleads-guilty-parking-heaters-price-fixing-conspiracy

division's arguments, last month the Second Circuit affirmed the judgment of conviction.

These cases, and other recent district court opinions show that the *per se* rule, and the Sherman Act more broadly, is on solid footing. The law remains on our side and we will continue to prosecute our cases accordingly.

As I just outlined, recent criminal enforcement efforts have resulted in convictions, prison sentences, and fines for antitrust offenders. I am proud of our prosecutors whenever they secure a conviction through a guilty plea or guilty verdict, or when a court imposes a punishment on antitrust offenders at a criminal sentencing because those litigation results punish wrongdoers and provide deterrence to would-be offenders.

Of course, aggressive antitrust enforcement means the division will not secure convictions in every case. If we did that, we wouldn't be enforcing the antitrust laws forcefully enough and anticompetitive conduct would go undeterred. So while we did not obtain the verdicts we sought in several recent cases, that does not mean those cases were not worth bringing.

The division takes a long view of its enforcement efforts that undoubtedly will include mixed outcomes at trial. But the message of the division's Front Office to our prosecutors has been and will continue to be clear: you have our support and we will have your back when you bring tough, principled cases.

## II. The Future of Antitrust Enforcement

I will now turn to the future of antitrust enforcement. In short, we are not slowing down. The division is prepared to meet the challenges of today. But we are also preparing for what is on the horizon — for the problems we have yet to encounter.

### A. Transparent, Predictable, and Accessible Policies

A key to the future success of our enforcement program is ensuring that our decisionmaking process is transparent and our policies are clear and accessible, especially for companies weighing whether to self-disclose misconduct. We recently made important updates to the division's Leniency Policy and issued updated and comprehensive Frequently Asked Questions about our Leniency Program. We added the Leniency Policy as well as other key criminal policies and practices to the Justice Manual. These publicly available documents are where our criminal enforcement policies are now exclusively found, making them fully and easily accessible to all.

These updates have been the subject of significant discussion recently, so I'm not going to spend much time talking about these today. I would encourage anyone with questions to review these publicly available documents. As we've said

time and again, leniency remains by far the best option for a company that discovers its participation in a cartel.

### B. Proactive Enforcement

Transparent, predictable and accessible policies encourage self-disclosure, but the division cannot and will not wait for cases to come to us. The future of antitrust enforcement will require proactive enforcement efforts.

Proactive antitrust enforcement at the division is already underway. In the international cartel context, as I mentioned earlier, we continue to focus on building and strengthening our relationships with fellow enforcers, including through the use of intelligence sharing frameworks and working groups. A recent example of this is from February of this year when the Antitrust Division and the FBI announced an initiative to deter, detect and prosecute those who would exploit supply chain disruptions to engage in collusive conduct.

As part of this initiative, we formed a working group focusing on global supply chain collusion with some of our global partners, the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority. The working group is developing and sharing intelligence, utilizing existing international cooperation tools, to detect and combat collusive

schemes. After a recent trip to Brussels, I can report that we are working closely with the Directorate General for Competition on this effort as well.

And just last month, I, and other division attorneys, met virtually with more than 40 jurisdictions to discuss the updates to our Leniency Program. When our fellow enforcers understand the division's policies and priorities, our collective enforcement efforts are stronger.

Domestically, the PCSF has trained more than 20,000 agents, attorneys, auditors, analysts, and procurement officials on how to detect and report possible bid rigging schemes. The Strike Force also launched its Data Analytics Project to facilitate collaboration across the law enforcement community in developing and using data analytics to identify signs of potential criminal collusion in government procurement data for further investigation. The goal is not to build a "one size fits all" data analytics program but instead to build collusion analytics capacity across all levels of government.

The division intends to employ the successes and lessons learned from PCSF to proactively identify and root out collusive conduct beyond the procurement

context. With our law enforcement partners, the division's detection capabilities have never been better, and these capabilities are only getting stronger.

### C. Proactive Compliance

Companies, in turn, must be proactive with their compliance programs. For its part, the division is encouraging proactive compliance. Beginning in 2019, we made clear that we would look at the effectiveness of a company's compliance program when making charging decisions and made public our internal guidance to prosecutors for undertaking this assessment. Most recently, the updated Leniency Policy requires improvements to a company's compliance program to qualify for leniency, and as specified in the revised FAQs, a company has an obligation to self-report when a compliance officer becomes aware of the criminal conduct. The division is also engaging directly with the compliance community by providing presentations about the Leniency Program and ways to strengthen compliance programs.

Compliance must be at the forefront because wrongdoers will always be looking for easier and more secretive ways to engage in crime. The division has seen antitrust offenders utilize encrypted messaging to carry out criminal antitrust

conspiracies.[5] And the division has prosecuted cases in which conspirators utilized algorithms to carry out the conspiracy.[6]

Companies should consider whether permitting their employees to use personal devices with encrypted apps to conduct business is consistent with a culture of compliance. Likewise, as the technology used to create pricing algorithms continues to develop, it is increasingly possible that competing companies will use algorithms that communicate and coordinate with each other without any human-to-human communication. But just as a corporation is responsible for the acts of its employees who engage in collusive conduct, a corporation is responsible if its algorithm reaches a price-fixing agreement with the algorithm utilized by a competitor.

Corporate compliance programs need to account for and undertake measures to prevent collusion in a way that reflects the realities of how their businesses operate. If algorithms play an integral role in operations, including pricing, then that must be accounted for if the program is to be considered "truly effective." A company that is sophisticated enough to utilize AI or algorithm-based pricing tools

[5] https://www.justice.gov/opa/pr/president-e-commerce-company-pleads-guilty-price-fixing
[6] https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace

is also sophisticated enough to understand and mitigate the associated antitrust risk.

The division will stay ahead of the curve. We are committed to educating our attorneys and economists on machine learning, artificial intelligence, and blockchain technologies. And we will continue to develop our capacity in this area: we intend to harness the power of algorithms to detect collusive conduct. With that backdrop, and the incentives for self-disclosure, companies should invest in compliance now to prepare for the future.

### D. Increased Litigation Capabilities

As I mentioned before, we have more criminal cases in litigation than any time in recent memory. The division also has four ongoing civil cases: the monopolization case against Google and merger challenges to American Airlines, UnitedHealth Group, and Penguin-Random House.

We do not see the uptick in litigation as an anomaly. In light of that, the division is growing our litigation capabilities — both criminal and civil — to meet the increased demand. The talent and experience of division attorneys, economists, paralegals and support staff is unmatched. To support our increased litigation focus, we are hiring even more attorneys, paralegals, and support staff with an enthusiasm for litigation to complement our already formidable internal talent. We are institutionalizing shared resources to support trial teams and enhancing our

litigation capabilities across the board. And for the first time I'm aware of, we have not one, but two, acting litigation deputies overseeing all of this work.

### E. Full Utilization of Statutory Tools

This expanded capacity will be critical in best positioning the division to bring righteous, but challenging, cases that may not settle pretrial. We must also be willing to utilize all of the statutory tools Congress put at our disposal.

One enforcement tool that the division has not recently utilized is Section 2. But unlike labor market collusion, Section 2 has not always been underenforced. Historically, the division didn't shy away from bringing criminal monopolization charges, frequently alongside Section 1 charges, when companies and executives committed flagrant offenses intended to monopolize markets.

Our job is straightforward: We enforce the laws that Congress passes. When it comes to criminal antitrust, that means prosecuting violations of not just Section 1, but also Section 2. Moving forward we intend to do our job as law enforcers and fully prosecute violations of our competition laws.

Section 2 is a criminal statute that's been on the books for over 130 years. It has been a felony for more than 40 years, which Congress reaffirmed in 2004 when it increased the felony penalties. Yet, since the late 1970s, the Antitrust Division effectively ignored Section 2 when it came to criminal enforcement. Going forward, the division will no longer ignore Section 2. A long history of Section 2

prosecutions and accompanying case law show us the way forward. If the facts and the law, and a careful analysis of department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the division will not hesitate to enforce the law.

Section 2 is not the only legislative tool the division will use to attack the excessive consolidation plaguing our economy. Some of those tools, like Section 8 of the Clayton Act, apply purely in the civil context but can provide an important complement to criminal enforcement. Section 8, which prohibits interlocking directorates, helps prevent antitrust crimes before they occur. That's because interlocking directorates can facilitate the exchange of competitively sensitive information and coordination between competing companies. And, last year, after we raised concerns with Endeavor and Live Nation about a Section 8 problem, two executives resigned their positions from Live Nation's board.

### F. Complementary Civil and Criminal Enforcement

Effective conduct enforcement also requires avoiding silos. So we are working creatively and thoughtfully to ensure that our criminal and civil enforcement efforts complement each other.

Historically, the division frequently brought civil cases alongside criminal cases. This can help hold antitrust offenders accountable by expanding the remedies available to address the illegal conduct and prevent future harm. For

example, where a defendant's conduct is likely to reoccur even after conviction, the division may be able to seek appropriately tailored injunctive relief barring employment through a parallel civil case. Alternatively, when appropriate, the division can consider referring defendants to regulating agencies with statutory authority to seek occupational bars.

If an investigation does not uncover evidence of an antitrust crime, but uncovers a civil antitrust violation, the division may pursue civil remedies in a manner consistent with the department's policy on parallel proceedings. To be clear, if that happens, and there is a good faith leniency applicant, that status will be respected completely and the applicant will be no worse off for having self-disclosed as long as it continues to fully cooperate with the Antitrust Division's investigations.

Our enforcement is also stronger when our criminal and civil programs learn from one another. For example, as we gear up for a period in which litigating multiple cases on the criminal and civil side is the norm, we are sharing lessons learned across the programs, on everything from staffing to effective presentation of evidence to handling the cross examination of experts. We are also working

across the programs to think creatively about the best ways to incentivize and reward timely cooperation that advances our investigations.

## III. Conclusion

Let me offer an observation as a West Point graduate (who once lived in Sherman barracks) and antitrust nerd: I've always enjoyed the symmetry of the history of antitrust enforcement and the origins of the Justice Department. Senator John Sherman led the passage of the act that bears his name to protect competition in our country. Senator Sherman's older brother, William T. Sherman, was the famed general who fought alongside and under Ulysses Grant, whom we can thank for creating the Justice Department to protect democracy in the post-Civil War era.

Consistent with that shared history, we must never forget that vigorous antitrust enforcement protects economic liberty and, as the Supreme Court said in *Northern Pacific*, provides "an environment conducive to the preservation of our democratic political and social institutions."[7] You'll often hear me, and other division officials, quote that language — and there's a reason for that. It's the core of what we do and critical for us to keep in mind as we continue to advance antitrust enforcement. The challenges ahead are significant, but I am optimistic about the future of antitrust enforcement.

[7] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958), quoted in Executive Order on Promoting Competition in the American Economy Sec. 2(b) (July 9, 2021).