DEPARTMENT OF JUSTICE

VIGOROUS AND PRINCIPLED ANTITRUST ENFORCEMENT: PRIORITIES AND GOALS

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I. Introduction

Good afternoon. I am very pleased to have the opportunity to speak to you today at the Annual Meeting of the American Bar Association here in San Francisco. Many thanks to my gracious hosts, in particular Kevin Grady and Bob Joseph. It is of course a special privilege to watch the peaceful transition of power as a new chair takes over at the ABA's Section of Antitrust Law. Bob, the good work of the Antitrust Section over the past year truly reflects your dedication and commitment. Kevin, I look forward to working with you to build upon the many successes of the past year.

This speaking engagement presents my first real opportunity to address an antitrust audience as a Senate-confirmed Assistant Attorney General. I would like to use this opportunity to talk about a few areas in which we can improve our abilities to enforce the law and promote competitive markets. They include reexamining the adequacy of criminal penalties for antitrust violations; continuing to sharpen our coordinated effects analysis in merger review; achieving greater clarity in the standards governing single-firm conduct; continuing to improve our investigative processes; and working toward principled international convergence.

II. Management and Leadership

Let me begin by mentioning a few personnel changes at the Division. We now have a full complement of Deputies in the Front Office. The latest addition to the team is Makan Delrahim, who is the Deputy for International, Policy and Appellate Matters. Makan joins us from the Senate Judiciary Committee, where he had served as the Staff Director and Chief Counsel since 2001. Makan's expertise extends beyond the antitrust field to include experience in the fields of patent law and international trade. Makan is, I believe, the first patent lawyer ever to hold the position of Deputy Assistant Attorney General at the Antitrust Division. We undoubtedly will be drawing upon some of Makan's patent law expertise as we move forward in drafting and preparing for publication the joint DOJ/FTC report on the Antitrust-IP Hearings and as the Antitrust Commission begins its work.

Bruce McDonald is another recent arrival, and serves as the Deputy for Regulatory Matters. His responsibilities include oversight of airline, transportation, energy, and telecommunications matters. Prior to joining the Division, Bruce developed extensive antitrust experience in dealing with regulated industries while practicing as a partner at the law firm Baker Botts L.L.P. Deborah Majoras, the Principal Deputy, no longer has the Herculean task of managing all six civil litigating sections while handling international and policy matters as well. The Division owes a great debt to Debbie for her dedication over the past several months.

As many in the audience know by now, our Director of Civil Enforcement, Connie Robinson, after devoting much of her professional career to government service in the Antitrust Division, soon will be departing the Division to pursue an opportunity in the private sector. I consider this a great loss for the Division, for we all have benefitted greatly from Connie's experience, counsel, and good judgment. I look forward to working with Connie's successor, Litigation II Section Chief Bob Kramer, who has already begun the transition into his new role.

III. Reexamining Criminal Antitrust Penalties

Criminal antitrust enforcement continues to be a core priority of the Antitrust Division. Clandestine agreements to fix prices, allocate customers, or reduce output are a direct assault on the principles of competition that drive our market economy. Businesses that engage in this conduct are committing a criminal fraud against their customers. Cartel conduct inflicts tremendous harm. Those who engage in it deserve both moral stigma and severe penalties.

Our experience with cartel enforcement demonstrates both that cartel behavior is extremely profitable to those who engage in it and that this type of criminal conduct is very difficult to detect. Frequently, those who engage in cartel behavior go to elaborate lengths to conceal their activities. In order to address this problem, the Division has had great success in combining vigorous criminal prosecution with an amnesty program in order to increase detection. This program uses a classic carrot and stick approach to anti-cartel law enforcement. It provides major incentives for companies that choose to self report antitrust offenses – relief from criminal conviction and sentencing for the reporting corporation and its officials. On the other hand, this amnesty is available only on strict conditions – it is not available to "ring leaders" and requires full, complete, and truthful cooperation. And it is available only to the first one in the door. Those who do not win the "race to the prosecutor" face severe penalties. This situation leads to tension and mistrust among the cartel members. In this way, the program can serve to prevent cartels from forming, or to destabilize them by causing members to turn against one another in a race to the government.

It is only grudgingly that we afford the opportunity for amnesty to cartel participants. The preferred result would be to see the full weight of prosecution fall on all members of a cartel. The experience of the last several years has made clear, however, that without the Division's amnesty program, cartel activity of great significance would simply never come to light. Only when criminal conduct comes to light can prosecution occur. Likewise, only then can consumers obtain redress through restitution pursued by the Division or state attorneys general or through the follow-on process of civil damages actions.

This program has achieved great successes and there are several significant new matters now active at the Division. But we remain convinced that – because this form of crime is so profitable – substantial cartel activity continues to occur and to remain undetected. For that reason, we think the time has come to consider measures to toughen our cartel enforcement program. Let me discuss a few possible aspects of this issue.

First, the current three-year statutory maximum jail sentence for antitrust offenders is unjustifiably among the shortest for federal white-collar crimes. With the passage of the Sarbanes-Oxley Act, twenty-year statutory maximum jail sentences are now available for white-collar fraud offenses. The current gulf between the statutory maximum sentences for antitrust versus other white-collar crimes must be narrowed to reflect the enormous harm caused by antitrust crimes. Current bipartisan legislative proposals introduced by Senators Hatch and Leahy would increase maximum prison terms for cartel violations to ten years. This legislation in my view represents good public policy that deserves strong support from the antitrust community.

Second, although I have not reached any conclusions on this point, it may be appropriate to reexamine the Sherman Act's $10 million statutory maximum corporate fine cap. The Sentencing Guidelines establish a methodology for calculating corporate fines based on a percentage of the volume of commerce affected by the conspiracy. But for many of the national and international conspiracies we prosecute, the Sentencing Commission methodology results in a fine greater than the current $10 million maximum. In such cases, the only way to impose the appropriate fine is for the offending corporation to be sentenced under the "twice the gain or twice the loss" alternative sentencing provision, 18 U.S.C. § 3571(d). Thus, for the largest, most harmful antitrust conspiracies – typically those involving international cartels and foreign corporations – the Guidelines methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a fine calculation that tends to be considerably more difficult to administer, less certain, and potentially more lenient toward the offender. The ABA Section of Antitrust Law recognized this disparity in August 1999 when it issued a detailed report supporting an increase in the corporate antitrust fine. I look forward to working with the Antitrust Section in considering whether this is a recommendation that the Division should now support.

Third, in the context of increasing the penalties for hardcore cartel behavior, it may be appropriate to consider enhancing our amnesty program in order to increase exposure of cartel activity. One concept that is favored by a number of experienced antitrust prosecutors would involve amending the antitrust laws to limit the damage recovery from a corporation that meets the strict criteria of our amnesty program, *and* that also cooperates with the consumers victimized by the cartel in their suits to recover damages from the remaining members of the cartel, to the actual damages caused by the corporation. A carefully limited detrebling concept of this type could address a major disincentive that currently confronts companies who are contemplating exposing cartel activity to the Division – the threat of treble damage lawsuits with joint and several liability. A concept of this type could be carefully drawn to ensure all other conspirator firms would remain jointly and severally liable for treble damages caused by the conspiracy, so the full potential for victims to be compensated civilly would remain. Of course, without detection, the potential compensation to consumers harmed by antitrust crime is zero, and fraudulent anticompetitive conduct will continue. In my personal view, it would be worthwhile to consider whether a carefully crafted provision of this type could enhance detection, and thereby enhance overall punishment and deterrence of cartel activity.

Bear in mind when considering the need for toughening our approach to cartels that the conduct we are talking about is hard core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior. In an economy based on free and open competition, hardcore cartel activity cannot be justified or excused.

IV. Sharpening Coordinated Effects Analysis

In the merger area, we have devoted a significant amount of resources to reinvigorating coordinated effects analysis in merger review. This project began under the direction of my predecessor, Charles James. In fact, it was one year ago tomorrow that Charles announced the Division's Coordinated Effects project during an address before the Antitrust Section of the ABA. This initiative has most recently borne fruit both for enforcers and consumers in the Division's win in the *UPM/Bemis* labelstock case.[1]

Coordinated effects analysis focuses on whether, following a merger, firms will have a greater incentive and ability to coordinate. As the Merger Guidelines put it, the relevant inquiry is whether the merger will make coordination more likely, more complete, or more durable. At the Division, this involves a fact-intensive inquiry in which we ask first, what constraints exist, pre-merger, on the incentive and ability of suppliers to coordinate; and second, how will the proposed merger change those constraints?

[1] *U.S. v. UPM-Kymmene OYJ, et al.*, No. 03-C-2528 (N.D. Ill. July 25, 2003).

In his speech last year, Charles noted that unilateral effects had emerged as the predominant theory of economic harm pursued in government merger investigations and challenges. He suggested that "reaching too quickly for unilateral effects theories to the exclusion of meaningful coordinated effects analysis could result in the Division missing cases that should be brought or crafting its relief too narrowly in cases that we pursue."[2] He commissioned a team of lawyers and economists, led by then-Economics Deputy Michael Katz and former EAG chief Andrew Dick to engage in an intensive review of the literature, case law, and agency experience regarding coordinated effects. Their comprehensive and thorough analysis took the form of a substantial coordinated effects manual that we have rolled out internally for the benefit of our attorneys and economists.

Our emphasis on improving our coordinated effects analysis has not been limited to the theoretical realm. Over the past few months the Division challenged two mergers on coordinated effects grounds. First, the Division filed suit to block SGL Carbon AG and its U.S. subsidiary, SGL Carbon L.L.C., from acquiring certain assets of Carbide/Graphite Group in a bankruptcy court action.[3] The Division concluded that the merger would facilitate coordination among the three remaining producers of large graphite electrodes sold in the United States. Relevant to the Division's analysis was the history of collusion among graphite electrode producers – in fact, SGL Carbon AG was one of the manufacturers that participated in a conspiracy to fix prices and

[2]Charles A. James, "Rediscovering Coordinated Effects," Remarks at the Annual Meeting of the Antitrust Section of the American Bar Association's, August 13, 2002, available at <http://www.usdoj.gov/atr/public/speeches/200124.htm>.

[3]*U.S. v. SGL Carbon AG*, No. 03-521 (W.D. Pa. filed April 15, 2003).

allocate markets for graphite electrodes worldwide in the 1990s. Also significant was the fact that the market structure – which obviously had sustained collusion over a number of years – had not significantly changed. After the bankruptcy court determined that SGL's bid was not the highest and best offer and awarded the assets to a third party, the Division withdrew its complaint.

A little over two weeks ago, the Division successfully obtained a preliminary injunction to block the acquisition of Bemis Corporation's MACtac subsidiary by UPM-Kymmene's Raflatac subsidiary. It did so by bringing the case solely on coordinated effects grounds. Raflatac and MACtac, the second and third largest producers of pressure-sensitive labelstock in North America, would have had a combined market share of less than 25 percent. Along with leading producer Avery, however, the firms collectively account for over 70 percent of total sales in North America.

The Division concluded that the proposed merger would have facilitated coordination between the merged company and Avery in the markets for bulk paper labelstock. By acquiring MACtac, Raflatac would more than double its current North American labelstock sales, achieve its strategic growth objectives, and begin to approach parity with Avery in sales volume and market share. Raflatac's incentive to compete for sales to Avery's customers would diminish (and its incentive to coordinate increase) because Raflatac would stand to lose proportionately more business than otherwise if Avery retaliated by competing for Raflatac customers. Moreover, Raflatac's parent, UPM, supplies a significant amount of paper to Avery, and would want Avery to continue buying its paper in sufficient quantities. Raflatac thus had a disincentive to go after one of its parent's significant customers, and tended to view other second-tier labelstock producers as its primary competition. We concluded that post-acquisition, these remaining labelstock producers would have neither the capability nor the incentive to prevent the merged firm and Avery from engaging in anticompetitive coordination.

The court found it probable that price competition would diminish if the merger went forward, and granted the preliminary injunction. It held that the central question in the case was whether a merged Raflatac/MACtac would compete against Avery, and concluded that "the substantial probability is that it will not do so for a significant period of time."[4] It concluded that the merged firm would prefer price stability to competition because the industry has been experiencing declining costs and profit margins. As for the willingness and ability of smaller producers to defeat any price increase, the court found that competitors would have a greater incentive to go along with any price increases, and ultimately would be unable to expand their output as much as would be required to defeat any such price increases.

We were exceedingly pleased by the decision, and I am very proud of the good work and tremendous dedication of our trial team, whose efforts led to this successful outcome for consumers. As we move forward in our merger reviews, we will continue to be vigilant in considering the full range of possible competitive effects of a merger, be they coordinated or unilateral. I would encourage you to stay tuned for our *DFA/Southern Belle* case, which challenges on coordinated effects grounds the consummated merger of two dairy processors in the Tennessee and Kentucky area, where there is a history of criminal collusion in the school milk market.

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[4] *U.S. v. UPM-Kymmene OYJ, et al.*, No. 03-C-2528, slip op. at 17 (N.D. Ill. July 25, 2003).

V. Clarifying Standards of Single-Firm Conduct

A third area of emphasis at the Division has been working to achieve greater clarity in the standards governing single-firm conduct. I am sorry to say, however, that the most recent activity on this front has been the 10th Circuit's recent decision in the *American Airlines* predation case.[5] We are disappointed with the decision upholding the district court's grant of summary judgment for American. Nonetheless, we do see several positive aspects of the opinion. We agree with the court that predation claims should be approached with caution but not incredulity.[6] We also agree with the court that *Brooke Group*'s standards were appropriate for evaluating the predation claim in this case. And we agree with the court that because predation claims might chill aggressive competition, the evidence in such cases must be held to a high standard. While we disagree with the court's conclusion that our evidence did not satisfy the difficult evidentiary burden,[7] that is not an issue for further appellate litigation in this case.

We are heartened by the court's acceptance of our argument that the market-wide average

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[5] *U.S. v. AMR Corp., et al*, No. 01-3202 (10th Cir. July 3, 2003).

[6] It is informative that the court explained that past incredulity about predation stemmed largely from "the uncertainty of recouping losses" while "recent scholarship" has shown that predation can be profitable, "especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets." (Slip op. 9-11). Our argument that recoupment can occur outside of the alleged predation market is consistent with this insight. We conceded that American was likely to recoup only by preserving its monopoly on many DFW routes in addition to those on which it predated.

[7] We disagree with the court's characterization of Test 1 as an improper profit-maximization test. It asked whether American's profits fell as a result of its capacity additions, and not whether any other course of conduct would have been more profitable. We also disagree with the court that Test 4 did not employ a sound measure of the incremental costs attributable to the capacity additions. We proffered expert testimony, which the court did not address, explaining that Test 4's calculation of American's incremental or avoidable costs was actually conservative.

variable cost test insisted upon by the district court can "obscure a predatory scheme" and so is not always the appropriate measure of cost. The court accepted, at least in principle, our argument that in this case an appropriate test was whether American's cost of adding capacity on a route exceeded the revenues that the additional capacity generated. The court did not adopt a "meeting competition" defense to Sherman Act claims. Overall, on the important points of legal policy the court's opinion is difficult to fault. As for the court's factual finding that the Division did not meet its factual burden, all we can do is work harder to achieve better results in the future.

Another pending matter concerning the appropriate standards of evaluating single-firm conduct is *Verizon v. Trinko*.[8] The Division, along with the FTC, has filed an amicus brief in that case in which we state that in evaluating single-firm conduct – particularly in the context of claims for the imposition of a duty to assist competitors – an appropriate standard to use is whether the conduct asserted as an antitrust violation would make economic sense but for the elimination or lessening of competition. This test has support in existing case law and is consistent with well-established principles of antitrust jurisprudence. We believe that this test sets forth an objective, transparent and economically-based framework for assessing single-firm conduct, and it is a standard that the Department has used before as a plaintiff in both the *Microsoft* and *American Airlines* cases.

Other issues of particular relevance in the area of single-firm conduct involve discounting by dominant firms. Our Economics Deputy David Sibley has been overseeing the work of

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[8] *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko*, No. 02-682 (U.S. Sup. Ct. Dec. 13, 2002).

several Division economists who are trying to develop a better understanding and shed some light on the competitive effects of fidelity and other forms of discounting by dominant firms. We will be announcing in the next few weeks a workshop or program in which we plan to gather interested economists, academics, and members of the bar to discuss these issues.

VI. Continuing to Improve the Investigative Process

Although it does not make for drama, it will also be one of my priorities to continue pursuing improvement of our investigative process. Antitrust investigations can be time consuming, costly, and complex for all parties involved. I hope to build upon some of the reforms that the Division undertook nearly two years ago with the Merger Review Process Initiative, our program for conducting merger investigations more effectively and more efficiently. The Initiative encourages aggressive use of the initial HSR waiting period and early consultations between staff and the parties to negotiate procedural agreements for a merger investigation. We have received some extremely positive feedback on the Initiative. Both staff and private parties have indicated that when they have followed the best practices set forth in the Initiative and entered into such procedural agreements, investigations have tended to be more transparent, orderly, efficient, and ultimately, more effective in identifying the issues that are most relevant to the Division's merger review. The Division and private parties alike would benefit from more widespread use of the Initiative.

The Initiative was not conceived with the goal of either shutting down more investigations or bringing more challenges. Rather, the purpose has been to make merger investigations more efficient and effective. In some cases this may mean more quickly closing a case; in others it may mean more quickly bringing a challenge. Two recent cases illustrate this point – the Procter & Gamble/Wella merger and the *UPM* labelstock challenge. In the labelstock case, the staff engaged in an aggressive quick look analysis, aided by the willingness of the parties and the staff to apply the best practices of the Initiative. In the end, our staff efficiently moved toward the conclusion that the transaction was anticompetitive and was well prepared to block the merger in court. In the P&G/Wella matter, the staff likewise engaged in an extensive review of the transaction in which the best practices of the Initiative avoided wasteful and unnecessary activity, and the staff efficiently came to the conclusion that further investigation was not warranted.

Where parties believe they are proposing a transaction that does not present competitive problems, the P&G/Wella matter provides a good example of how the Initiative can be used to help both the Division and the parties. The P&G/Wella review involved aggressive use of the initial waiting period by the staff, combined with prompt response to requests for information from the parties. Similarly, the parties in that case made their expert economists available for a timely and frank economist-to-economist dialogue. These are examples I commend to those of you who want to see investigations move more efficiently toward the right resolution.

Merger review is not the only area that could benefit from continued procedural reforms. The pace of civil nonmerger investigations – which are not subject to the same stringent timing requirements as merger investigations – could stand to improve. Historically within the Division, civil nonmerger investigations have tended to move to the back burner when deadline driven merger reviews have come along requiring more urgent staff attention. Private parties, in turn, sometimes have taken a "long walk through the park" approach to civil nonmerger investigations by attempting to stall our progress. Over the coming months I intend to explore with staff ways in which we might be able to make the civil nonmerger investigative process more effective and more efficient. I also hope, as with our recent closing statement in the Orbitz investigation as an example, to explore what steps we can take in appropriate cases to increase transparency in our decision making process.

VII. Ensuring a Principled Path Towards Convergence

Let me conclude by spending a few moments talking about international antitrust convergence. The move towards greater convergence of antitrust enforcement standards and processes has been steady and incremental. It has been a top priority at the Antitrust Division and will continue to be so. But it would be foolish to follow a "mixing bowl" approach for convergence that blends together a variety of different standards and processes without any regard for whether some might be more effective or appropriate than others. Some who lament the introduction of economic rigor into American antitrust and would prefer to turn back the clock embrace convergence as a way to water down American antitrust with concepts from other countries having less experience and history with open market competition. Developing an international "competition law" on this basis is not a step forward.

Different jurisdictions face different sorts of competition challenges, and it may be the case that they should prioritize their antitrust enforcement goals differently. For developing economies with fledgling free markets, for example, it may make more sense for antitrust authorities to focus on competition advocacy and enforcement targeted at price-fixing and bid-rigging, rather than merger review. Likewise, economies with historical vestiges of state-owned monopolies may present different sorts of competition concerns than those that are characterized by a more free-market orientation.

For these reasons, multilateral, consensus-building efforts – in particular, the International Competition Network – present the most promising opportunity to achieve principled and lasting convergence. In June, ICN issued recommended practices for merger notification and review procedures. ICN also is exploring ways of assisting new antitrust agencies in developing economies, and how competition advocacy efforts can promote procompetitive outcomes across other areas of government. ICN recently established a new working group on the role of competition enforcement in regulated sectors and agreed to explore the potential for work on the topic of cartel enforcement. Other fora are also important, such as the OECD, where I plan to make sure the Division is fully engaged. It is through this type of multilateral dialogue and cooperation – supplemented, of course, by our continuing bilateral efforts – that we stand the best chance to achieve sound and principled convergence on standards of antitrust enforcement.

VIII. Conclusion

The Antitrust Division must continue to be a vigorous and effective enforcer of the antitrust laws. Today I have touched upon only a few of the ways in which I think we can better fulfill this mission. Other challenges await, but I believe that the Division is well equipped to meet those challenges and will remain committed to protecting and promoting competition. Thank you.