Department of Justice

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ADDRESS

BY

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BEFORE

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The nation's antitrust laws are designed to provide maximum freedom of economic action up to the point where that freedom conflicts with the good of society.

At first glance, the mandate of the Department of Justice's Antitrust Division looks elementary. Two statutes account for the bulk of the Division's enforcement responsibility -- the Sherman and Clayton Acts -- and they could be carried around on a piece of paper small enough to tuck into your pocket. The Antitrust Division's attorneys use simple terms: Sherman 1, Sherman 2, and Clayton 7.

The complaints and indictments also speak succinctly -- in terms of conspiracy in restraint of trade, monopolization or attempts to monopolize, and mergers that may substantially lessen competition.

Why, then, is the Antitrust Division's mission so complicated? Why is the study and understanding of antitrust law a complex matter? Why are monopoly cases among the most difficult and time-consuming of all litigation?

To answer that, you must realize that the Sherman Act is not unlike the Constitution. The language is simple and to the point -- and always current. As a result, the Sherman Act, like the Constitution, adapts to changing economic and social conditions.

Interpretation of the Sherman Act since 1890 has given rise to a highly complex body of case law.

Just as the law has become complex, so has the economic system to which it is applied. The intricacies of today's business and financial affairs were unforeseen when the Sherman Act was passed.

The parallel growth of complexities in both case law and business practice requires more sophisticated enforcement -- enforcement that is as flexible and innovative as the practices with which it deals.

I.

Congress has recently reemphasized its regard for the importance of antitrust enforcement by expanding the tools available to both government and private parties.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 established a new system of advance warning for significant mergers and acquisitions. It also gave the Antitrust Division much-needed civil investigative powers and significantly lessened the burden of private enforcement.

This last step was achieved by granting to state Attorneys General the right to bring treble damage actions, as <u>parens patriae</u>, on behalf of individual consumers in their states.

This 1976 law is probably the most important antitrust legislation since the 1950 Cellar-Kefauver Amendments to the Clayton Act. It is a welcome addition to the antitrust arsenal.

The premerger notification program should eliminate the phenomenon of "midnight mergers" -- mergers consummated before the antitrust enforcement agencies know of the plans. It provides the antitrust agencies with the information needed to make intelligent judgments about proposed mergers and acquisitions before these agreements are consummated.

Premerger enforcement is vitally important -- given the extraordinary difficulties of divestiture. It avoids the difficulty of recreating a new organization after it has been absorbed.

Preliminary injunction enforcement will be significantly aided, in my view, by the premerger notification authority given to the Antitrust Division and the Federal Trade Commission.

The amendments to the Civil Investigative Demand (CID) authority of the Antitrust Division are also significant. For the first time, the Division has authority that most other government agencies have always had -- to issue what in effect are subpoenas, both for depositions and interrogatories.

In other words, the Antitrust Division can now -- just as the Veterans Administration can -- determine the facts through use of compulsory civil process, enabling the Division to make a much more intelligent judgment on a proposed enforcement action. New powers in the CID amendments, especially the oral deposition authority, will be of enormous assistance to the Antitrust Division.

II.

The Antitrust Division of the Department of Justice is now engaged in a vigorous drive on criminal price-fixing. Even in the face of this type of hard-core criminal conspiracy, there are those who question the propriety of using the antitrust laws to put respected businessmen behind bars.

The controversy has been heated. But Judge T. Cullen Ganey, who sentenced seven businessmen to prison (although no sentence exceeded 30 days), minced no words in a 1961 price-fixing conspiracy. Judge Ganey declared:

> This is a shocking indictment of a vast section of our economy, for what is really at stake here is the survival of the kind of economy under which America has grown to greatness, the free enterprise system.

That 1961 conspiracy is a classic in the annals of price-fixing. The businessmen concocted a complex scheme whereby bids were allocated according to phases of the moon. They communicated with each other using plain, unmarked envelopes. They referred to the lists of those who attended meetings as "Christmas card lists" and to their meetings as "choir practice

Opponents of criminal sanctions for price-fixing argue that it is nothing more than normal business conduct. They note that Adam Smith observed two hundred years ago that businessmen cannot get together without reaching agreement on prices.

Fortunately, Congress disagrees. It passed the Antitrust Procedures and Penalties Act of 1974, which made a criminal violation of the Sherman Act a felony rather than a misdemeanor. The Act raised the maximum fine for a corporation from $50,000 to one million dollars. For individuals, the penalty was increased from a $50,000 fine and one year in prison to a $100,000 fine and three years in prison.

Felony charges are becoming more common. They should be a deterrence. The stigma of becoming a convicted felon is difficult to reconcile with business leadership status in the community.

Even more significant is the fact that prison sentences for those convicted -- which have been extremely rare for antitrust violators -- may become much more commonplace under the new felony authority.

And judges, who have been extremely lenient in sentencing -- perhaps using the well-known electrical equipment conspiracy as a benchmark -- may become much tougher.

I believe firmly that hard-core price-fixing is a serious crime and should be prosecuted accordingly. I support the guidelines the Antitrust Division recently issued to its attorneys for recommending sentences in criminal antitrust cases.

These guidelines are an effort to increase the risks for price-fixing. They make clear to price-fixers that the Antitrust Division will move against them individually (and not just against their corporations) and that the Division will recommend stiff prison sentences upon securing convictions.

This is a necessary step if rhetoric about the evils of price-fixing is to be translated into effective action. Moreover, this approach actually strengthens the private sector of our economy. After all, the price-fixers are the exception rather than the rule.

The Antitrust Division will continue this strong emphasis on criminal enforcement. The FBI has the technical experts to help handle the documents and financial information common to antitrust cases. I expect to utilize these investigative talents and other skills of the FBI to assist the Antitrust Division in investigating and preparing cases.

Predatory pricing is another subject toward which I expect to direct more criminal enforcement. Persistent below-cost pricing designed to destroy competitors, to coerce suppliers or customers of competitors, or to enforce systematic

boycotts to drive a competitor out of the market, are *per se* violations. As such, they are well within the boundaries of traditional criminal antitrust enforcement.

Anticompetitive acts such as these are a serious danger. They are designed to make competitors less competitive and they increase the chances that monopolization will occur.

Where predatory conduct -- and by that I mean conduct that has no redeeming competitive virtue -- is uncovered, I support the use of all our criminal enforcement resources against it.

III.

Antitrust enforcement is much more than criminal enforcement. The Antitrust Division's mandate is to promote competition in all sectors of the economy, to the extent that competition can operate.

We live in a truly mixed economy, many sectors of which are governed more by regulation than by free-market forces. Even in those regulated sectors, however, there is a role for competition.

A prime example is the securities industry. In this industry it has recently been recognized that while "quality" regulation is necessary -- to protect the market and the investors from unscrupulous or underfinanced brokers, dealers, or advisers -- there is no justification for price regulation.

Accordingly, brokerage rates are now determined competitively rather than by fixed fee schedules.

The Antitrust Division is pursuing similar efforts before numerous regulatory agencies. In addition, the Antitrust Division is a strong advocate for business competition in its dealings with Congress and other departments within the Executive Branch.

As part of a comprehensive study of the role that antitrust policies can play in those segments of our economy currently subject to regulation, the Antitrust Division recently issued a report on antitrust immunities.

The Division focused on several exemptions -- milk marketing, insurance, and ocean shipping -- and conducted thorough studies of these exemptions.

Milk marketing, for example, appears to be a relatively innocuous subject -- until one realizes that regulations in this field affect the price and control the marketing of most of the milk produced in the United States.

As a result of milk marketing regulation, dairy cooperatives may have achieved monopolistic power in some regional markets. On occasion, the cooperatives have used provisions of the federal milk order system as predatory tools. These tools have included predatory pricing to further attempts to monopolize and price squeezes against consumers who are also processors so as to drive independents out of the market.

Such conduct is clearly subject to antitrust prosecution and is outside the scope of the agriculture antitrust exemption. The Antitrust Division has filed three cases in recent years charging dairy cooperatives with such conduct in violation of the Sherman Act. We will continue to be vigilant and will study the possibility of legislative or executive change as well.

IV.

One of the areas that I am very much interested in is the problem of shared monopoly, or oligopoly, price leadership, conscious parallelism -- call it what you will.

The single-firm monopolist is relatively rare in this country. But there are many industries in which a very small number of firms hold dominant positions. A large and respectable body of economic opinion attributes enormous costs to this essentially non-competitive market structure. What should we do about it?

One possibility is to prosecute these situations under the antitrust laws as "shared monopolies," using Section 2 of the Sherman Act or, in the case of the FTC, Section 5 of the FTC Act.

Such cases obviously present novel legal issues. But perhaps more important, they eat up a lot of resources -- as many and maybe more resources than a monopolization suit brought against a single firm.

Our experience with single-firm monopolization cases, in terms of speedy resolution, is not very good. FTC's more recent experience with "shared monopoly" cases is not any better.

If the litigation approach is to be made workable, some procedural changes must be accomplished so that the process can run its course within the lifetime of a normal human being. This is a matter to which I am giving close attention and about which I will make a public statement at an early date. I want to develop expedited pretrial and trial procedures that will shorten the lifespan of the complicated and massive cases known to all of us.

Notwithstanding the recent step-up in criminal antitrust enforcement, the word "antitrust" causes most people today to conjure up a Dickensonian image of a case such as Jarndyce v. Jarndyce which "still drags its dreary length before the Court, perennially hopeless."

The stakes are high in structural cases -- either monopoly or merger. They are the antitrust equivalent of capital cases. Accordingly, the defendants' attorneys will, as they should in our adversary system, utilize every available resource to win -- or, what is often the same, to delay resolution indefinitely.

In recent years, the Department has focused on conduct by firms in these oligopoly industries. It has conducted economic analyses and looked very hard for price-fixing disguised as independent, parallel action.

In industries in which only a few people are required to agree to an effective scheme, it is much harder to identify the agreement. One must overcome the hurdle of "conscious parallelism" -- the argument that there has been no agreement but merely independent decisions to act in a parallel manner in the independent interest of each firm involved.

In industries dominated by a few large organizations, firms will undoubtedly be particularly aware of the potential reactions of their competitors to individual pricing actions. There are, under these circumstances, few incentives to lower prices across the board. The other competitors would likely match that reduction and overall profits of the industry would be lowered.

On the other hand, there are tremendous incentives to follow a competitor's raises, since that means more income from the same sales. If one firm does not emulate the raise, however, competitors may well be forced to bring their prices back down to the holdout's level. Holding the priceline, therefore, probably will not mean increased sales because the price advantage will quickly evaporate.

As a result, pricing in oligopoly industries tends to be done in lock-step. Price reductions -- and, much more common, price increases -- are followed by most or all major firms. In other words, the firms take parallel action, conscious of the likely reactions of their competitors.

Non-competitive pricing is the result. The hard question is whether such non-competitive pricing is, or ought to be, subject to antitrust attack. There are two basic difficulties with trying to deal with "conscious parallelism" through antitrust enforcement.

First, by definition, no direct communication occurs between the firms involved. Hence, there is no explicit agreement between the firms.

"Conscious parallelism" does not present us with a "smoking gun." We don't have, as we sometimes do in other circumstances, the minutes of price-fixing cabals.

Thus, we must seek to prove an agreement by inference by arguing that the course of the conduct under attack leads inevitably to the conclusion that there must have been an agreement, however implicit, among the firms.

There is, of course, at least one perfectly rational response to such a line of argument: that the conduct in question was reasonable business behavior by each individual firm acting independently.

Under the general state of existing law today, parallel action in order to be challenged as a conspiracy must at the very least be "consistent with the individual self-interest of the concerned only if they all decided [to act] in the same way." */

In the absence of such a showing -- and such a showing is likely to be quite rare -- something more than parallel conduct is required to carry the burden of proving an agreement by inference. It is that "something more" that antitrust enforcers look for.

There is, of course, a second problem with antitrust enforcement in this area: the difficulty of obtaining intelligent and effective relief.

If the basis of the antitrust complaint is that the pricing level in the industry was set through other than independent action, the relief must logically seek to require a different method of setting prices.

But since prices have been set in this situation through independent (albeit parallel) action, what the court could require to ameliorate the "illegal" conduct is hard to discern.

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*/ Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. Law Rev. 655, 658 (1962).

One approach would be to order the oligopolists to sell their products at a competitive price -- presumably marginal costs or some near equivalent.

Obviously, the supervision of such an order would place an enormous administrative burden on the courts. The courts would, in fact, become price regulatory agencies. This is not a satisfactory way to resolve whatever problems arise from oligopoly pricing -- for reasons apparent to those who believe in the free enterprise system. But neither is it satisfactory to permit a few firms that dominate an industry to act as if they were one. "Shared monopoly," where it truly exists, ought to violate the antitrust laws, and judicially-controlled pricing may be an approach we may have to consider further.

"Conscious parallelism" poses, therefore, a very difficult problem. Nevertheless, I am extremely interested in pursuing innovative ways to deal with this kind of tacit collusion. The Antitrust Division will vigorously search out that "something more" whenever and wherever it can.

I should note, however, that I believe successful, pure, tacit collusion (or true "conscious parallelism" without the "something more") to be more unusual than some might think. What would occur more often, I think, is some indirect agreement used to organize an industry into an effective cartel. If several competitors behave in a way that is not to the individual

benefit of each unless all of them act together, that behavior signals the possibility of a conspiracy or agreement, stated or implied.

I was interested, therefore, in the Antitrust Division's recent action proposing a modification of the old antitrust decrees outstanding against General Electric and Westinghouse. This approach may well be an important step in dealing with oligopoly pricing.

The situation was this: In 1963, in the wake of a period of overcapacity and low prices, GE announced a new -- and we feel anticompetitive -- pricing policy. GE promised to follow newly published price levels by quoting only book prices on all transactions. It adopted a "price protection clause" which promised that if GE lowered its price for any particular customer, any buyer within the previous six-month period would be given an identical retroactive discount upon request.

Finally, GE announced that it would publish all orders previously received and the quotations previously made at previous price levels. This was done to insure that any lower outstanding price quotations had, in fact, been given prior to the adoption of the new pricing policy.

Soon after GE implemented its new policy, Westinghouse began using the GE price book and GE's published multiplier to determine its prices too. The next year, Westinghouse adopted its own price book -- a book based on the GE book. It also instituted a price protection policy.

After a lengthy investigation, the Antitrust Division came to the conclusion that GE and Westinghouse, through indirect -- although public -- price communication and signaling had maintained a price-fixing conspiracy.

The two never sat down and reached an explicit agreement. But the Antitrust Division believed that the measures they both took, such as the "price protection clause," were a manner of policing an implicit agreement through eliminating the incentive for price cuts. Theirs was not a case of unavoidable conscious parallelism: It was a case of "avoidable cooperation." Apart from their tacit agreement the two firms would not have acted in this manner.

The relief we sought was designed to eliminate these abuses. It would eliminate public statements of pricing policy; enjoin the use of policing tools such as the price protection policy; prohibit the public dissemination of price and price-related information from which a general pricing policy or strategy can be inferred; and prohibit the manufacturers from examining each other's bids to individual customers.

The GE-Westinghouse case presents an unusual but important situation. Normally, of course, the marketplace performs better with the free exchange of price information. But because of the made-to-order product and two-firm structure of the industry involved, different relief was appropriate.

In that sense, the case underscores the need for innovative, creative thinking in the antitrust field. More important, it breaks new ground in our effort to deal with conscious parallelism, price leadership, or whatever your label may be.

I want this to only be one step. I hope there will be others.

V.

In conclusion, we come back to our starting point. The antitrust mission is extraordinarily clear and simple: to encourage business efficiency, to allow the market to serve as a measure of consumer preference and entrepreneurial reward. The rewards of the market, unfettered by cartels or conspiracies, are the surest way of assuring that American business efficiently produces what the American consumer wants.

I believe strongly in the free enterprise system. I believe with equal strength that vigilant antitrust action serves a vital role in guaranteeing that enterprise is truly free to produce and that consumers are truly free to choose.