DEPARTMENT OF JUSTICE

"Securing the Benefits of Global Competition"

Address by

R. Hewitt Pate
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented at

Tokyo American Center
Tokyo, Japan

September 10, 2004

Good afternoon, ladies and gentlemen. I am very pleased to be here today to talk with you about the globalization of competition law. This is my first visit to Japan, on the occasion of the 26th annual U.S. - Japan antitrust consultations. Chairman Takeshima has been a gracious host, and we have had very fruitful discussions over the past two days.

Introduction

Just two weeks ago, the 28th Olympic Games came to a conclusion in Athens, Greece. It was a tremendous event, with more than 10,000 athletes from a record 202 jurisdictions competing. As you know, this year's Olympics were the first to be held in Greece since the modern Olympics Games began in Athens at the end of the 19th Century. The modern Olympics started in 1896, only six years after the American Sherman Antitrust Act was enacted. Believe it or not, there are some important parallels between the modern Olympics and global competition law.

As for the most basic parallel, the Olympics are a microcosm of globalization and of competition. They are based on the principle that competition creates excellence by providing the incentive to bring out the best capabilities in the athletes. Through the constant challenge of new competitors and new training techniques, world records are made and shattered, and goals once thought impossible are reached and then exceeded. The Olympic Committee and other sports authorities, like antitrust enforcers, attempt to impose certain basic rules to ensure that the competitions are fair, and that cheating – such as fixing the outcome of events or taking banned substances – is not allowed to undermine competitive outcomes. (Like antitrust enforcers, the governing bodies face challenges, and can make no claim to be perfect.)

Participation in the Olympics started slowly. At the first Modern Olympic games in 1896, 241 athletes from 14 nations took part. All of the participants were from Western Europe and North America. One might even say that the early Olympic Games were a regional, rather than a global, market. In 1920, when Ichiya Kumagai won Japan's first Olympic medals – silver medals in singles and doubles men's tennis – the number of participating nations had doubled to 29. Just eight years later, at the 1928 Olympics in Amsterdam, 46 countries competed and Japan won its first gold medals, in the triple jump and in the men's 200 meter breast stroke. At the 1932 Olympics in Los Angeles, a Japanese 14-year-old "new-entrant" – Kusuo Kitamura – won the 1500 meter freestyle swimming competition, to become the youngest male ever to win a gold medal at the Olympics. By 1964, at the Tokyo Olympics, the number of participating nations had doubled again to 93, and Japan – foreshadowing its emergence as a major economic power – was third among all participating nations in the number of gold medals won by its athletes. By the time of the 26th Olympiad in Atlanta in 1996, a truly competitive global athletic market had been established: 10,318 athletes from 197 countries competed in 271 different events, and men and women from 79 different nations won medals.

The Globalization of Competition Law

The history of antitrust laws also started slowly. In the 1890s, only the United States and Canada had comprehensive antitrust laws. It took some time, even in the United States, before enforcement became active or vigorous. By 1950, you still could count on the fingers of both hands the number of countries that were enforcing antitrust laws. Even in the 1970s, by which time many developed countries had adopted comprehensive antitrust laws, efforts by the United States to use our antitrust laws against harmful international cartels were met by strong resistence from our trading partners. U.S. approaches to antitrust law, including the criminalization of cartel behavior and the prosecution of corporate executives, were viewed with puzzlement and suspicion by other governments and their business communities. A number of countries even adopted blocking statutes aimed at thwarting the application of U.S. antitrust laws in the international context. Most countries did not view a law aimed at protecting the competitive process as something that was compatible with their economic or social cultures. And countries that did enact antitrust laws were more concerned with using them to maintain stability in the marketplace than in promoting real competition. In Japan, as we all know, the Antimonopoly Act (AMA) was adopted by the Japanese Diet in 1947. But it was not well accepted by Japanese society, and it was soon subject to amendments that substantially weakened the impact of the AMA on the economy. It was not until the oil shocks of the 1970s that the AMA and the Japan Fair Trade Commission (JFTC) began to be invigorated.

Looking at the global situation today, we see a remarkable change in the global acceptance of antitrust law as a promoter of economic growth and prosperity. More than 100 countries have adopted antitrust laws and there is unprecedented cooperation among countries in acting against international cartels. We now have the International Competition Network, an organization composed of antitrust enforcement agencies from, at current count, nearly 80 nations, working to improve our understanding of how best to apply competition laws in an era of globalization.

What happened to cause this remarkable change in the global recognition of the importance of competition law? Probably the most important single event was the triumph of capitalism over the failed command and control model of the Soviet Union. With the dismantling of the Berlin Wall came the realization by many countries that the path to successful economic growth lay in fostering market-based competition, and that one of the building blocks of successful market economies was the protection of the competitive process through strong and well-focused antitrust laws. This was accompanied by a more sophisticated understanding of how markets operate and a greater appreciation of the harm caused to consumers, to the business community and to our economies as a whole by anticompetitive practices.

In addition, the tensions over U.S. application of its antitrust laws in international matters gradually gave way to increased dialogue and cooperation. This was demonstrated by the antitrust cooperation agreements entered into between the United States and a number of major antitrust enforcing countries in the 1980s and 1990s. Increased cooperation was bolstered by the recommendations of the OECD Council on Cooperation on Restrictive Business Practices affecting International Trade in 1986 and on Hard-Core Cartels in 1998. Around the same time, some highly visible and economically damaging international cartels were uncovered – notably the feed additives, graphite electrodes and vitamins cartels – that gave concrete evidence of the need for governments to work together and protect their consumers from these harmful global conspiracies.

Antitrust Enforcement Priorities in the United States

For the United States, our reevaluation of the proper role of antitrust law occurred somewhat earlier, in response to advances in economic learning that established the foundation for the landmark Supreme Court decision in the GTE Sylvania case. This reevaluation was based upon the recognition of the importance of promoting business efficiency through market mechanisms. It led to a clarification of the appropriate analytical framework and antitrust enforcement hierarchy for different categories of business conduct, a hierarchy that remains valid today.

At the top of this hierarchy is enforcement against cartels, conduct that is devoid of any efficiency justification and inflicts tremendous harm on our economy. Our Supreme Court, in its recent Trinko decision, described collusive behavior as "the supreme evil of antitrust." Obviously, this is our core priority at the Antitrust Division. Second, we review mergers using the best analytical tools available, and make judgments on whether the effects of the merger may be "substantially to lessen competition or to tend to create a monopoly." If so, we must back up that judgment with a suit in court to block the merger. Third, we analyze unilateral conduct, as well as agreements subject to rule of reason analysis, in a cautious and objective manner. We do this mindful that it is often difficult to tell the difference between good, hard competition and anticompetitive conduct, but ready to challenge conduct that is harmful to competition. Let me discuss each of these priorities in turn.

A. Cartel Enforcement

Criminal enforcement against cartel behavior has long been a core priority of the Antitrust Division. Secret agreements among competitors to fix prices, allocate customers, or reduce output are a direct assault on the principles of competition that drive our market economy. Companies that participate in cartels are committing a fraud against their customers that deserves severe penalties. There is now widespread agreement among countries around the globe on the serious harm caused by cartels, and the need for antitrust enforcement agencies to give their highest priority to rooting out and punishing this behavior. Imagine if Olympic athletes agreed among themselves who would be the winner in a particular competition, or agreed not to run too fast so that none of them would have to exert themselves too much. The result would be immediate world scandal and outrage. In my view the same reaction is appropriate toward companies who fix the outcome of business competition at the expense of consumers.

We have found from our experience in prosecuting cartels that this behavior is extremely profitable and often very difficult to detect. To be successful in uncovering and challenging cartels, we must have the most modern and effective investigative tools. We use a "carrot and stick" approach in dealing with cartel participants. The "stick" or penalty for antitrust violations needs to be very severe if it is going to have any chance of counteracting the allure of the large profits that await successful cartel participants – ill-gotten gains that come out of the pocket of consumers and businesses that are downstream purchasers of the cartelized products.

In the United States we use three different, complementary "sticks" to create a climate that will provide a sufficient deterrent to prospective participants of cartels. First, we subject companies that join cartels to high monetary fines. This summer, our Congress enacted legislation to increase the maximum criminal fine for companies violating the antitrust laws from $10 million to $100 million, making antitrust fines one of the most severe under our criminal laws. Our Sentencing Guidelines set a baseline fine for antitrust violations of 20% of the sales involved in the cartel; and in extraordinary cases could be increased to as high as 80% of sales where aggravating factors exist. "Sales involved in the cartel" means all of the company's sales of the cartelized product in the United States for the *full duration* of the conspiracy. Ordinarily, fines actually imposed by judges in the majority of cartel cases range from about 25% to 35% of the company's total cartelized U.S. sales, although in some cases the percentage is significantly higher. Based on the Sentencing Guidelines, it has been commonplace for judges to impose fines of $10 million or more, with more than 40 such fines imposed in the last seven years. For example, Crompton Corporation recently pled guilty to participating in an international rubber chemicals cartel and agreed to pay a $50 million fine. Just last month Bayer AG agreed to plead guilty and pay a $66 million fine for its involvement in the same conspiracy.

The United States is not alone in imposing stringent fines against cartel participants. The EU and Canada also regularly impose very significant fines against companies that conspire to increase prices in their markets. In Europe, the Treaty of Rome's maximum penalty of 10% of worldwide turnover has resulted in the European Commission imposing penalties on cartel members totaling more than 3 billion euros over the past three years alone. By contrast, the AMA's maximum six percent surcharge rate -- applicable to only the last three years of sales in the cartel – is significantly lower than the fine levels in the United States and in other countries. The JFTC's proposals to double or triple the surcharge rate would help cure this deficiency in Japanese law.

The second "stick" we use to deter cartels is severe penalties, not just on the corporations that engage in cartels, but also on the responsible executives of those corporations. It is our standard policy to pursue criminal prosecution against culpable corporate officials. Our courts understand the importance of this policy. They have regularly imposed prison sentences – last year averaging 21 months – as well as requiring them to pay substantial individual fines. In our experience, companies may weigh the potential profits to be gained by cartel behavior against the possibility of paying large antitrust fines. But few corporate executives view spending a year and a half or more of their life in jail as a convicted felon part of their job responsibilities. Our experience is that the prospect of prison sentences is a uniquely effective deterrent. This year, our Congress enacted legislation increasing the maximum term of imprisonment to 10 years, from the current three year maximum, and we are hopeful that deterrence will be greatly increased.

Part of this individual penalty “stick” is the fact that foreign nationals who violate our antitrust laws will not be able freely to travel to the United States or elsewhere to conduct their business. Since 2001, we have adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that subjects the fugitive to arrest and possible extradition to the United States if he or she travels to a number of INTERPOL member nations. A number of fugitive antitrust defendants have already been detected through this approach. Our immigration policy prohibits foreign executives convicted of antitrust crimes from obtaining a visa to enter the United States, even after they have served their time in jail and paid their fines, unless they obtain immigration relief as part of a cooperation agreement with the Antitrust Division. The effect of these policies is to raise the stakes for foreign executives who hope to avoid prosecution, and to limit the ability of these corporate officials to travel to many parts of the world. Perhaps this factor played a part in the decision last month by Hitoshi Hayashi, an executive of Daicel Chemical Industries, Ltd., to plead guilty and agree to come to the United States to serve a 3-month jail sentence for his role in the 17-year international price-fixing and market allocation cartel for sorbates, a food preservative.

The third "stick" in our anti-cartel arsenal is private treble damages liability. Companies found to have participated in cartels are subject to lawsuits by the victims to recover three-times the economic harm they suffered in the United States as a result of the cartel. When those companies have been convicted of a criminal violation, victims that directly purchased the products from the cartel participants need not prove that the antitrust laws were violated, but only the amount of the damages that they incurred as a result of the illegal behavior. This private damage liability will often greatly exceed the criminal fines imposed on the corporation, and plays a significant role in the system of "sticks" adopted in my country to deter hard-core antitrust violations.

For each of these "sticks," we have developed an enticing "carrot" – in the form of our amnesty program – to induce companies to cooperate in our investigations. Under this program, the corporation that is first to bring to our attention a cartel that we were not aware of, or the first to come forward to cooperate in an investigation already underway, will (subject to certain conditions) receive three significant benefits unavailable to any of its co-conspirators that arrive at our door too late. First, the company itself receives complete immunity from prosecution. This means that it will not be subject to the heavy fines imposed on the other members of the cartel. Second, subject to certain exceptions, the executives of the amnesty applicant that agree to cooperate in our investigation will also receive immunity from prosecution, meaning that they will not have to serve time in jail or pay any monetary fines. Likewise, the executives of the company qualifying for amnesty need not worry about the Red List notice, or about our visa denial policy, since these executives will never have been indicted or convicted of an antitrust felony.

The third carrot to companies participating in our amnesty program is a benefit just recently made available as a result of our Congress' enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. Under the new legislation, companies that qualify for amnesty will be liable to pay only actual damages attributable to their own conduct – rather than treble damages based upon joint and several liability – to the victims of the cartel, provided that the amnesty company cooperates fully in the private plaintiff's efforts to seek compensation from the other members of the conspiracy. This legislation ameliorates one of the major disincentives for companies considering seeking amnesty – that they would be subjecting themselves to hefty treble damage liability – consistent with the requirement that amnesty applicants agree to make full restitution to the victims of the cartel.

Our amnesty program has proven to be our most effective tool for uncovering and successfully prosecuting cartels. Under this program we are currently receiving approximately 2 amnesty applications every month, each of which discloses the existence of another illegal conspiracy that is harming our consumers and our economy. Our amnesty program has another, equally important benefit. It serves to prevent or destabilize cartels, by causing members to worry that one of their co-conspirators will – to return to my Olympic theme – win the "race" to our door to gain amnesty by being the first to reveal illegal cartel activity.

Our amnesty program has been so effective in rooting out cartels that many antitrust enforcement agencies around the world are adopting similar programs of their own. Most significant was the European Union's adoption of a revised program in February 2002. Countries such as Brazil, Canada, the Czech Republic, Germany, Ireland, Korea, Sweden and the United Kingdom have also announced new or revised enforcement programs, and a number of other countries are currently in the process of adopting amnesty programs as well. Japan's absence from this list is unfortunate. I have heard that there are traditional and cultural objectives to a system of this type, both on grounds that wrongdoers should not receive a lenient "plea bargain" and on grounds that it is objectionable to give evidence against a fellow competitor. I hope that my explanation of our program will demonstrate that this is a necessary tool of detection, not a part of a "plea bargaining" system. I also hope that growing recognition of the dishonesty and harmfulness of cartel conduct will allow greater openness to the need to involve honest business executives in eliminating this conduct if it is discovered in their companies.

A cooperating network of international antitrust enforcement agencies can produce substantial synergies in the fight against international cartels. In many ways, Japan is a key partner in this effort. This is reflected in the JFTC's participation – along with EC, Canadian and U.S. antitrust authorities – in simultaneous, coordinated dawn raids and service of subpoenas last year in the four country investigation of price-fixing in the impact modifier industry. Continued moves by a larger number of countries to an effective enforcement program is critical to our progress. That is why we believe it is important for Japan to take the steps recommended by the JFTC to strengthen its effectiveness in enforcing the AMA against cartels and bid-rigging conspiracies. Japan's adoption of a corporate leniency policy along the lines proposed by the JFTC – and accompanied by a significant increase in surcharge levels – would be a substantial step that would bring Japan's approach closer to that of others in the international antitrust enforcement community. It would greatly increase the JFTC's capability to uncover and prevent domestic and international cartels that harm Japanese consumers and the Japanese economy.

B. Merger enforcement

Our second priority area in our enforcement hierarchy is mergers. This is a topic that Mr. Abbott will address more fully in his remarks, so I will only make a couple of points on this topic. Merger enforcement is second, rather than first, on our enforcement hierarchy for the simple reason that the anticompetitive effects of mergers are not as clear as they are for cartels. A merger can increase market power but also result in greater efficiency that may reduce prices to consumers. For that reason, we have found that determining the competitive effects of mergers requires careful analysis. Over the years we have developed a sound framework for reviewing mergers in the careful way required. That framework is reflected in our merger guidelines, which set out a clear methodology for defining the parameters of the relevant market – based on the hypothetical monopolist paradigm – and provide for analysis of the potential anticompetitive effects of a merger based on both the likely unilateral effects of the combination and the possibility that the merger will result in anticompetitive coordinated effects.

One of the most important elements of merger review is to focus the analysis exclusively on preserving competition in the relevant markets and not to be distracted by other considerations. There may be temptations, for example, to intervene (or not intervene) in a merger in order to protect individual competitors. If a competitor complains because a merger will create efficiencies that will make it more difficult for the competitor to offer a similar value to consumers, we do not view such complaints as a reason to stop a merger. Indeed, this analysis is a large part of why we decided not to block the GE/Honeywell transaction. Similarly, we will not seek to protect a company from competition because the company is headquartered in the United States. Our recent challenge to Oracle's attempt to take over PeopleSoft provides a good illustration. SAP, a German company, is the largest provider of enterprise software in the world. We would give no weight to an argument by Oracle that it should be permitted to acquire PeopleSoft to create a U.S. "national champion" that could ensure a U.S. counterpart to SAP. Rather, we look to preserve competition that will benefit consumers regardless of the source of that competition.

With respect to evaluating the effect on competition of a particular merger or acquisition, economists have made tremendous improvement over the last couple of decades in our analytical an empirical tools. We have moved beyond simple market shares and HHI calculations, although these factors are still important. In determining the scope of the relevant market, for example, economists frequently perform cross-price elasticity studies. The data necessary to conduct fairly robust elasticity studies often exists, for example, in the retail industries where scanner data provides access to enormous numbers of transactions. The development of a critical loss analysis (though this type of analysis can be subject to abuse) has helped to focus our assessment of how much competition is necessary to protect consumers in a given market. We have also developed merger simulation techniques to estimate the likely price effects from a given merger. As with any evidentiary source, we exercise caution in how we apply these tools and interpret the results.

Where we determine that a proposed transaction will harm competition, the question of remedy arises. Because most mergers will create at least some efficiencies, we seek to find a remedy to the competition concern that will permit the transaction still to proceed. In general, we prefer what we call structural relief – such as a divestiture of a discrete set of assets – to behavioral relief. A structural remedy permits us to step back afterward and let the markets work on their own. Behavioral injunctions, in contrast, require us to expend resources monitoring and enforcing the behavioral restrictions and increase the possibility of inefficient regulation. In crafting a divestiture, we consider a range of factors to ensure that the divested assets will adequately replace the competition lost from the transaction. For example, we prefer that the divestiture include a complete business unit that credibly can operate under different ownership. We prefer to avoid supply contracts or other connections between the merged entity and the buyer of the divestiture package to help ensure that they will be truly independent competitors. In this regard, we find it useful periodically to look back at what has happened after a merger has been completed. Have the divested businesses thrived and adequately replaced the lost competition or have they failed for some reason? After-the-fact studies help guide us to more effective remedies in future transactions, and our work would benefit from more studies of this type.

Merger analysis is another area where the globalization of antitrust law is in full blossom. At last count the competition laws of nearly 70 countries provide for premerger notification. It is not uncommon for merging parties to file merger notifications in a dozen or more jurisdictions. This global expansion of antitrust merger review brings new challenges. From a procedural standpoint, the type of information requested and the timing of the review process can impose significant burdens on the parties to a transaction. From a substantive standpoint, the multitude of reviewing jurisdictions creates the risk of inconsistent results. We believe that all antitrust enforcement authorities should strive to reduce the procedural burdens and to apply consistent antitrust principles in their substantive analysis. In this regard, the International Competition Network's work in the merger area, including Guiding Principles and Recommended Practices for member countries, is a good example of the benefits that can come from antitrust agencies around the world working together.

C. Unilateral Conduct

The third leg of our enforcement hierarchy is dealing with monopolization and other single firm conduct. This is the area where it is the most difficult to distinguish between harmful exclusionary conduct and beneficial hard-nosed competition. It is also an area where the significant differences of approach and understanding by antitrust enforcement agencies around the world continue to exist.

Since the enactment of the Sherman Act over a hundred years ago, U.S. courts and antitrust enforcers have been struggling with the bounds of unilateral conduct cases. A core principle of these cases was perhaps best stated by Judge Learned Hand in his famous warning in the Alcoa case: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[1] This principle underscores the fact that even dominant firms – many of which achieve their success due to superior skill and industry – must be allowed to compete aggressively. That being said, and as the Antitrust Division's recent efforts in the Microsoft case and elsewhere attest, we are vigilant in taking action against anticompetitive single firm conduct when it is warranted.

Determining whether a competitor is competing aggressively or acting anticompetitively is a significant challenge that is best met by the application of objective, economically based, transparent standards. Under U.S. antitrust doctrine, these standards have evolved over time, and were most recently discussed by our Supreme Court in the Trinko case. In that case, the DOJ

[1] *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

and FTC advocated a standard under which a refusal to assist rivals cannot be exclusionary unless it makes no economic sense for the defendant but for its tendency to reduce or eliminate competition. Although the Court did not explicitly adopt this standard, we believe the Court's analysis was consistent with the approach, and provided important guidance on the fundamental principles of U.S. monopolization law.

The Supreme Court in Trinko also clarified that there is no basis in U.S. antitrust law for a stand-alone essential facilities doctrine. The Court expressed profound skepticism that the antitrust laws were intended to create a duty by one competitor to assist its competitors by assuring them access to its tangible or intellectual property. Some antitrust authorities around the world continue to cling to this increasingly discredited approach, placing themselves on a collision course with sound economic thinking and U.S. approaches in this area. But there are hopeful signs of progress. The most recent developments in the EC's long-running abuse of dominance case against IMS Health, for example, indicate that the European Court of Justice recognizes that mere denial to competitors of access to certain intellectual property rights, standing alone, is not sufficient to constitute an abuse of dominance.

On the other hand, where an appropriate standard is met, and anticompetitive conduct by a monopolist is found, we will move aggressively to end the conduct and devise an appropriate remedy. The Antitrust Division took such a course in the Microsoft case, where it was clear to the Division, and ultimately to the courts as well, that Microsoft had acted to illegally maintain its monopoly. It did so by engaging in a series of anticompetitive acts that made no economic sense *but for* their tendency to eliminate or lessen threats to Microsoft's monopoly.

Devising a remedy for unilateral antitrust violations requires at least as much care as the initial rooting out of the violations. The potential for causing more harm than good through counterproductive remedies is great in the single firm context, particularly when combined with the practical problems of enforcing conduct remedies. Remedying single firm conduct is also one of the areas of greatest difference among antitrust enforcement bodies around the world. Here again our Microsoft case is illustrative, particularly in the area of product design-based remedies. We believe, and our courts have held, that antitrust enforcers should generally be skeptical about claims that competition has been harmed by the product design choices of a dominant firm. While anticompetitive single firm conduct is both a challenge to identify and a challenge to remedy, combating it is an important part of sound antitrust enforcement.

Conclusions

We need only look at the Olympic gold-medal performances of Mizuki Noguchi (who won the women's marathon) and Kosuke Kitajima (who was victorious in the men's 100-meter and 200-meter breaststroke), to understand how competition produces excellence. To make sure that competition continues to produce excellence in our economies, antitrust enforcers need the most modern investigatory tools and sanctions. The proposals by the JFTC to increase surcharge levels, introduce a corporate amnesty program, and strengthen its investigatory powers are important steps that reflect sound global trends in the antitrust area. They deserve strong support. At the same time, our challenge as antitrust enforcers is to ensure that our antitrust laws are applied in a manner that does not hinder the competitive process. I look forward to working hand-in-hand with the JFTC and our other antitrust colleagues around the world in continuing to promote convergence in the antitrust area and in stoking the flame of competition for the benefit of all our citizens.