JUSTICE NEWS

Acting Assistant Attorney General Andrew Finch Delivers Remarks at Global Antitrust Enforcement Symposium

Washington, DC~ Tuesday, September 12, 2017

Thanks very much for that kind introduction and for inviting me to speak at today's symposium. This gathering really has become one of the premier antitrust enforcement events of the year, and it is a wonderful honor to speak here today. I would like to talk a little bit about the mission of the Antitrust Division, the rule of law, and the importance of stability and transparency in antitrust enforcement, both in the U.S. and abroad. But first I have to say what a privilege it is to return to government service at the Antitrust Division as Principal Deputy and to serve for a time as the Acting Assistant Attorney General.

Since coming back to the Division, I have enjoyed reconnecting with many attorneys and economists that I came to know during my prior service. The career staff really are the heart of the Division's work, and the fact that it has retained so many capable people is indicative of its strength as an institution. I have also met a number of impressive people who have joined the Division in the intervening years—and I am happy to see that the Division has continued to attract top talent.

Together we have been welcoming other new leadership to the Front Office. You have already heard from International Deputy Roger Alford, who has an extraordinary background in international law, and from Barry Nigro, who brings a wealth of antitrust enforcement and investigation experience to the Deputy role. This afternoon our Litigation Deputy Don Kempf will be speaking. Don brings decades of experience as a renowned antitrust litigator to the team. We have also welcomed Economics Deputy Luke Froeb, an outstanding economist who has previously served at both the DOJ and the FTC. Finally, Marvin Price—an almost 35-year veteran of the Division—has stepped in as Acting Criminal Deputy since the departure of Brent Snyder earlier this year.

Let me pause there to note my tremendous appreciation for the role Brent Snyder played as Acting AAG at the beginning of this year, shepherding the Antitrust Division through the transition between presidential administrations. Brent did an outstanding job keeping the Division engaged and on course.

Our Front Office is an excellent team marked by tremendous experience and respect for the antitrust laws and the role of the Division in their enforcement. It is a great group, but of course we are still missing one key element of the leadership team. We are still eagerly awaiting Makan Delrahim's arrival as Assistant Attorney General.

A Senate-confirmed AAG is important for the Division. A key part of the Division's role is international engagement—promoting sound antitrust policies abroad— and a Senate-confirmed AAG can speak with unique authority and gravitas on the world stage.
Similarly, in our competition advocacy work within the U.S. Government, and in our relationship with Congress itself, it is important to have a leader at the Division who carries the full weight of authority conveyed by a Presidential appointment with the advice and consent of the United States Senate.

That is not to say the Division sits idle—not at all. Acting AAGs have the full authority to open and pursue investigations, issue CIDs, bring civil cases, enter into consent decrees (subject to the Tunney Act, of course), authorize grand juries, seek indictments, enter into plea agreements, and issue leniency letters. And they have traditionally executed all of those law enforcement roles.

In fact, if one counts the seven months at the end of the prior administration, the Antitrust Division has now operated under Acting AAGs for over a year. This audience probably knows how busy the Division has been in that time. It has

filed, litigated, and won the two largest health insurance merger challenges in history, and brought numerous other significant civil and criminal enforcement matters.

The Division's many successes and accomplishments reflect a core feature of public antitrust enforcement: fostering stability and continuity in antitrust enforcement consistent with the rule of law. I will elaborate.
In 2001, Judge Richard Posner published a Second Edition of his short but groundbreaking book entitled Antitrust Law. I am sure many of you in this audience are familiar with the book, which is just one of many important contributions Judge Posner— who retired from the bench last week—has made to our field.

In the 25 years between the first and second editions of the book, a debate arose as to whether the antitrust laws were "up to the task" in the "new economy." Judge Posner concluded "that antitrust doctrine is sufficiently supple, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents."

He also wrote that "[t]he antitrust laws are here to stay," but said "the practical question is how to administer them better —more rationally, more accurately, more expeditiously, [and] more efficiently."
But how do we administer the antitrust laws more rationally, accurately, expeditiously, and efficiently? There are many answers to that question. Today I would like to talk about one important answer for any law enforcement regime, not just antitrust: Law enforcement requires stability and continuity both in rules and in their application to specific cases.

Indeed, stability and continuity in enforcement are fundamental to the rule of law. The rule of law is about notice and reliance. When it is impossible to make reasonable predictions about how a law will be applied, or what the legal consequences of conduct will be, these important values are diminished. To call our antitrust regime a "rule of law" regime, we must enforce the law as written and as interpreted by the courts and advance change with careful thought.

The reliance fostered by stability and continuity has obvious economic benefits. Businesses invest, not only in innovation but in facilities, marketing, and personnel, and they do so based on the economic and legal environment they expect to face.

Of course, we want businesses to make those investments—and shape their overall conduct—in accordance with the antitrust laws. But to do so, they need to be able to rely on future application of those laws being largely consistent with their expectations. An antitrust enforcement regime with frequent changes is one that businesses cannot plan for, or one that they will plan for by avoiding certain kinds of investments.

That is certainly not to say there has not been positive change in the antitrust laws in the past, or that we would have been better off without those changes. U.S. antitrust law has been refined, and occasionally recalibrated, with the courts playing their appropriate interpretive role. And enforcers must always be on the watch for new or evolving threats to competition. As markets evolve and products develop over time, our analysis adapts. But as those changes occur, we pursue reliability and consistency in application in the antitrust laws as much as possible.

Indeed, we have enjoyed remarkable continuity and consensus for many years. Antitrust law in the U.S. has not been a "paradox" for quite some time, but rather a stable and valuable law enforcement regime with appropriately widespread support.

I would like to spend the remaining time talking about three areas where we have enjoyed—and where I believe we will continue to enjoy—the benefits of stability and continuity in antitrust enforcement.

First is the role of economics. Economics has played, and will continue to play, a fundamental role in antitrust enforcement. Thinking about Judge Posner's retirement reminds me of the importance of economic analysis to antitrust, and even how I came to be an antitrust lawyer in the first place.

My father attended the University of Chicago Law School in the late 1950s, where he had the great opportunity to take the Antitrust class—which has now become famous—that was co-taught by Edward Levi (who later served as the Attorney General in the Ford Administration) and a renowned economics professor, Aaron Director. According to my father, each week Levi would present the current doctrine on a particular antitrust issue, and Director would then use economics to demonstrate why that doctrine was completely wrong. That antitrust course has been credited by some with giving birth to the broader field of law and economics at Chicago. When I attended the University of Chicago

almost forty years later, my father encouraged me to take the Antitrust course and the Law and Economics course then taught by Judge Posner, and those classes led me into this outstanding field of law.

I cannot say that I agree with all of Judge Posner's views, but I do agree with him on the fundamental role of economic analysis in antitrust enforcement. To understand the reason for that, we need look no further than the nature of antitrust law itself—it is about the economic organization of our country. Our economy is organized around free market competition—around economic liberty—and the Sherman and Clayton Acts reflect a congressional recognition of the dangers certain abuses pose to that organizational structure.

Early in the development of antitrust jurisprudence, courts struggled to distinguish between conduct that was harmful to competition and conduct that actually reflected competition, and economics later provided concepts—and methods of analysis—that increased the likelihood of getting to the right answer. I do not just mean that in terms of complex econometrics and merger simulations, but also in terms of the most basic concepts of industrial organization like substitutes and complements, supply and demand, and price elasticity. In nearly every area of antitrust enforcement, economic analysis has either shaped our understanding of the business practices at issue, or developed our ability to predict the consequences of enforcement actions, or both.

Of course, there are certain categories of conduct where experience has shown that economic analysis always—or almost always—comes out the same way. As a result—and to aid efficient administration of the antitrust laws—courts long ago settled on certain types of conduct whose nature and effect are, as the Supreme Court explained in Professional Engineers, "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." Of course, I am talking about the per se rule—another important area of stability and consensus.

Now nearly a century old, the per se rule against price fixing and similar naked restraints of trade has long condemned conduct inherently detrimental to competition. And although that boundary is sometimes contested in our cases, I think all sides of the antitrust bar appreciate the clarity and predictability that come from applying the per se rule to certain well-defined categories of notoriously harmful conduct.

It is important that well-defined lines identify the conduct that is deemed to be per se illegal. As former Assistant Attorney General Tom Barnett explained in 2006, per se rules are crucial because they provide "clear, predictable boundaries for business." Business leaders ought to know what could potentially subject them or their companies to severe sanctions. The lines need to be bright so that executives can identify them and avoid them. Bright lines are helpful on the enforcement side as well, for many of the same reasons. We also want to promote regularity and compliance. Moreover, when the boundaries are clear, any violations are that much more glaring and easy to identify.

Defense attorneys zealously representing their clients occasionally call into question not just whether their clients engaged in the charged conduct, but whether that conduct is properly deemed to be per se illegal. And the resulting disputes lead from time to time to new case law.
For example, per se treatment of sometimes procompetitive vertical arrangements has appropriately been withdrawn, such that per se treatment of price fixing and similar restraints now requires that the conduct have a horizontal element in that it eliminates actual or potential competition.

That is an important point. We often think about per se rules under Section 1 by focusing on labeling the conduct, such as "price fixing," "bid rigging," or "customer or market allocation." But the application of the per se rule for all of those types of agreements also crucially depends on their involving a horizontal relationship—one between actual or potential competitors.

For example, the Dagher case decided by the Supreme Court in 2006 involved allegations of price fixing between two oil companies in the price of their gasoline. Shell and Texaco had in fact been jointly setting prices, but only through a fully integrated joint venture that effectively merged their downstream operations.

The District Court held that the per se rule should not apply, and when the Ninth Circuit concluded otherwise, the Supreme Court appropriately reversed. Justice Thomas explained that Shell and Texaco had effectively ceased to be competitors, and that the pricing policy amounted to "little more than price setting by a single entity . . . not a pricing agreement between competing entities with respect to their competing products." And Justice Thomas drove home the

point that the exercise is not just one about labeling the conduct when he wrote that, while the pricing policy at issue "may be price fixing in a literal sense, it is not price fixing in the antitrust sense."

The Second Circuit's recent Gelboim decision reflects a similar focus. In holding that per se treatment was appropriate for the alleged conduct at issue there, Judge Dennis Jacobs did not focus on the role of the defendant banks in collaborating to create the LIBOR interest rate benchmark itself. Instead, he focused on the complaint's allegation that the banks "as sellers" of certain financial products tied to LIBOR had purportedly colluded to depress the benchmark, which was alleged to be "an inseparable part of [the] price" of those financial products. The court thus concluded that per se treatment was appropriate based on its determination that the complaint alleged an agreement among competing sellers.

The Apple eBooks price fixing case, as decided by the Second Circuit, also reflects the importance that the horizontal nature of the agreement plays in answering the question whether the per se rule applies. As most of you know, the Antitrust Division proved at trial that Apple had orchestrated a horizontal agreement among publishers to raise prices. Although Apple characterized its conduct as a series of vertical agreements between itself and each individual eBook publisher, the Division proved otherwise. The Second Circuit held that the per se rule applied because the agreement was a horizontal one among competing publishers, notwithstanding that it was choreographed by a company that was a distributor of their products and thus in a vertical relationship with them.

There is one area in which application of the per se rule has received attention recently. In October 2016, the Division and the FTC issued their Antitrust Guidance for Human Resources Professionals. The Guidelines cautioned that naked agreements among employers not to recruit certain employees, or not to compete on employee compensation, are per se illegal and may thereafter be prosecuted criminally.

Here again, it is the horizontal nature of the agreement—the elimination of competition between employers—that justifies per se treatment for these types of agreements. Companies that sell different products or services might not compete for consumers, but they still can compete for workers. That horizontal element is important in assessing whether their agreements on employee hiring or terms of compensation are per se unlawful.

This is a point worth reiterating for the practitioners in the audience. Your clients should be on notice that a business across the street from them—or, for that matter, across the country—might not be a competitor in the sale of any product or service, but it might still be a competitor for certain types of employees such that a naked no-poaching agreement, or wage-fixing agreement, between them would receive per se condemnation.

We at the Antitrust Division will continue to advocate for a clear per se rule. Just this summer in the Kemp & Associates case we asked the District Court to reconsider its decision that the conspiracy we alleged in the indictment—which was a conspiracy to allocate customers—was not subject to the per se rule. We argued that the alleged conspiracy—like any naked horizontal agreement to allocate customers among competitors—was indeed per se unlawful. In our brief, we explained that such agreements deserve per se treatment because they "necessarily eliminate competition between competitors for the affected customers." It is not a novel position, but we in the Division continue to believe that antitrust law benefits from the clear guidance of the per se rule.

The last area of continuity I will mention is transparency, which enhances our credibility as competition enforcers. The faith of consumers and businesses in the enforcement of the laws is of paramount importance in a rule of law society, and transparency helps support that trust. When there are misgivings about an agency's process, or when agencies make unexplained decisions, it is easier to believe that the outcome or the process was flawed. In contrast, transparent decision-making has the opposite effect.

Our international engagement depends critically on having transparent processes ourselves because the best way to encourage effective approaches abroad is to point to our own work at home. Of course, American businesses increasingly operate across multiple jurisdictions, many of which have their own antitrust enforcement regimes.

Obviously it is difficult for those businesses if different enforcement regimes have very different processes, and especially if they reach contradictory conclusions. International engagement helps to foster congruent competition enforcement approaches abroad, which avoids these problems and benefits consumers and businesses.

To conclude, let me summarize why the Antitrust Division is such an important institution. It is important because of what it means both to the American economy and to American democracy. Whereas the organizing principle of our economy is competition, the organizing principle of our democracy is the rule of law. The Antitrust Division's enforcement mission challenges it to defend both principles in a changing world.

We meet this challenge by working from a stable baseline of sound antitrust principles. Economic analysis and the per se rule narrow the field of close questions and help us think about the answers in a consistent way across time. Transparency gives businesses and international enforcers insight into how we will conduct that analysis, apply those rules, and answer those questions. We look forward to continuing that work in the years and cases to come.

Thank you.

Speaker:
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Updated September 12, 2017