DEPARTMENT OF JUSTICE

STATEMENT

of

JOEL I. KLEIN

Assistant Attorney General

Antitrust Division

U.S. Department of Justice

Before the

Committee on the Judiciary

United States House of Representatives

Washington, D.C.

April 12, 2000

Good morning, Mr. Chairman and members of the Committee. It is a pleasure for me to appear again before you today on behalf of the Antitrust Division of the Department of Justice. I would like to say a few words about the current environment in which we enforce the antitrust laws, and then highlight some of our recent enforcement initiatives.

As members of this Committee appreciate, sound antitrust enforcement is vital to America's economic health. Competition is the cornerstone of this country's economic foundation. American consumers and businesses all benefit from the kind of robust free-market economy that antitrust enforcement promotes and protects. Effective antitrust enforcement helps consumers obtain more innovative, high-quality goods and services at lower prices, and enhances the competitiveness of American businesses in the global marketplace by promoting healthy rivalry, encouraging efficiency, and ensuring a full measure of opportunity for all competitors.

Antitrust enforcement has rightly enjoyed substantial bipartisan support through the years, and we appreciate the active interest and strong support this Committee has shown toward our law enforcement mission.

Our economy is in the midst of dramatic changes, with increased globalization and rapid technological innovation, and deregulation creating an environment in which many firms are choosing to merge or undertake other types

of strategic business alliances. While most of these arrangements foster efficiency to the benefit of consumers and businesses alike, some can result in market power that decreases competition. That is why we must look at these arrangements carefully, so that we can take appropriate steps to protect American consumers and businesses from those that threaten competition.

RESPONDING TO CURRENT CHALLENGES

Before I turn to some of our recent enforcement actions, let me talk for a minute about what the changes in the marketplace mean for antitrust enforcement, and how we are responding.

Globalization of Markets

We are responding to the fact that we live in a global marketplace. Our legal authority under the antitrust laws reaches anticompetitive conduct that takes place off U.S. soil if it has significant effects here, as reaffirmed most recently in the Nippon Paper Industries Co. case. But to help us make effective use of that authority to protect competition in U.S. markets against conduct taking place abroad, we have negotiated numerous mutual assistance agreements with our foreign counterparts. One agreement, negotiated with Australia under the International Antitrust Enforcement Assistance Act of 1994, allows us to share

certain confidential information under appropriate protections.

There are an increasing number of mergers that cross international boundaries and are subject to review by more than one country's antitrust authority. To minimize the burden of multi-jurisdictional review on merging parties, and the conflicts that can result from differing conclusions regarding a merger, we have worked hard to cultivate good relations with foreign enforcers so that we understand each other's merger enforcement policies and practices, and to coordinate where it makes sense, bearing in mind each country’s sovereign right to conduct its own review of mergers that impact its markets. We learned some valuable lessons from the Boeing/McDonnell-Douglas merger, where the FTC and the EC reached differing conclusions. I believe the more recent MCI/WorldCom and Dresser/Halliburton mergers are a good model for how close consultation in international merger enforcement can and should work. The parties agreed to waive confidentiality, enabling us and the EC to share our independent analyses as they evolved, and we ultimately reached essentially the same conclusions. We’ve formed a US-EU merger working group, along with the FTC, to build on our experiences in these cases.

At times, due to jurisdictional and practical limitations, it may make more sense, if a foreign country’s markets are most directly affected, for the antitrust

authority in that country to investigate a matter in the first instance. To that end, we have included so-called "positive comity" provisions in bilateral cooperation agreements with several of our major trading partners, including the European Union, Canada, Japan, Israel, and Brazil -- as well as in a special enhanced positive comity agreement with the EU. Our one formal positive comity experience to date -- the referral to the European Commission of possible anticompetitive conduct by several European airlines with respect to computer reservation systems -- has thus far been successful. In all such agreements, the U.S., of course, retains its sovereign right to undertake antitrust actions under its own laws.

Rapid Technological Change

We have also responded to the challenges posed by the rapid technological advances evidenced in many industries. We spend significant time and energy developing the expertise needed to understand the competitive impact of the new technology. We are mindful that technological change can bring industries previously considered separate and distinct into the same competitive marketplace. And we critically evaluate the increasingly frequent claim by the parties we are investigating, that technology is changing their industry so rapidly that we should not be concerned. We know, however, that in some cases rapid technological change can actually increase barriers to entry through network externalities and first

mover advantages that may cause the market to tip quickly toward a dominant supplier and thereby make new entry extremely difficult.

The more important that innovation becomes to society, the more important it is to preserve economic incentives to innovate. Timely and effective antitrust enforcement may be essential to preserving the kind of environment in which companies new and old, large and small, can be confident that there will be no anticompetitive barriers to bringing their new products and services to market.

Deregulation and the Introduction of Competition

In recent decades, legislative and regulatory changes in the United States have reversed a generation of pervasive government regulation and deregulated such basic industries as telecommunications, energy, financial services, and transportation. As competition displaces regulation as the industry norm, antitrust enforcement becomes important to ensuring that the procompetitive goals of deregulation can be achieved. In telecommunications, we are seeing the effects of the 1996 Act unfold. When successfully implemented, that Act will significantly restructure the industry and bring enormous competitive benefits to consumers and the economy; but bringing competition to segments of an industry in which regulated monopolies have long held sway will not be fully accomplished overnight. In addition the role we play in advising the Federal Communications Commission

on section 271 long-distance entry applications, helping to ensure that the local market is open to competition before long distance entry is granted, we are also paying close attention to mergers and alliances being undertaken in response to deregulation, to ensure that competition is able to spread and flourish.

For example, we challenged the proposed acquisition by Primestar, a joint venture controlled by five of the largest cable companies in the U.S., of the direct broadcast satellite assets of News Corp. and MCI, because we were concerned that it would allow those cable companies to prolong their monopoly in multi-channel video programming distribution. The assets in question included a satellite at the last orbital slot available to independent DBS firms for reaching the entire continental U.S., and allowing it to be transferred to the dominant cable companies would have eliminated one of the most important avenues of new competition to cable. In the face of our challenge, Primestar abandoned the acquisition.

The electric power industry is beginning to follow a similar path from regulation to competition, and we and others in the Administration look forward to working with Congress to ensure that regulatory restructuring at the federal level is consistent with fundamental competitive principles, and that competition is protected and nurtured as restructuring in the industry proceeds.

RECENT ENFORCEMENT INITIATIVES

I would now like to highlight a few of our important enforcement initiatives over the past year or so, first in criminal enforcement, then in merger enforcement, and finally in civil non-merger enforcement.

Criminal Enforcement

In the area of criminal enforcement, we are continuing to move forcefully against hard-core antitrust violations such as price-fixing and market allocation. In the past few years, a significant number of our prosecutions have been against international price-fixing cartels that have directly impacted substantial volumes of U.S. commerce. We have found that many of these international price-fixing cartels were highly sophisticated, involved leading firms in the industry, and affected a wide variety of goods sold to business and individual consumers. They are also often particularly brazen.

The past fiscal year set yet another new record in terms of criminal antitrust fines secured, on top of several previous record-breaking years -- a total of $1.1 billion. One single fine, the $500 million fine against Swiss pharmaceutical giant F. Hoffman La Roche in relation to the international vitamin cartel, was the largest

criminal fine in the entire history of the Department of Justice, antitrust or otherwise.

You should not presume that we will continue breaking records every year. The order of magnitude of criminal antitrust fines since FY 1997 is unprecedented -- in the previous decade, they averaged $29 million annually, and that average was itself higher than previous periods. In fact, the amount of fines obtained since FY 1997 is many multiples higher than the sum total of all criminal fines imposed previously for violations of the Sherman Act, dating all the way back to the Act's inception in 1890. The FY 1999 record was itself an almost four-fold leap over the record set the previous year. But the recent fine levels are a direct result of our sustained effort to crack not just domestic price-fixing schemes, but also to focus our resources on the biggest international cartels that victimize American consumers and businesses, to bring the violators to justice, and to send a strong deterrent message throughout the world -- an effort that we will continue.

International cartels typically pose an even greater threat to American businesses and consumers than domestic conspiracies, because they tend to be extremely broad in geographic scope and amount of commerce affected, as well as highly sophisticated, characterized by precise and elaborate agreements among the conspirators to carve up the world market by allocating sales volumes among themselves and agreeing on what prices would be charged to customers around the

world, including in the United States.

International cartels victimize a broad spectrum of U.S. commerce, costing American businesses and consumers hundreds of millions of dollars a year.

The record-setting fine I mentioned a minute ago resulted from a major investigation into an international cartel organized to fix prices and allocate market shares for vitamins. The conspiracy affected $5 billion in U.S. commerce, involving vitamins used not only as nutritional supplements and food additives, but also as important additives in animal feed; it may well be the most harmful conspiracy we have ever uncovered. The victims who purchased directly from the cartel members included companies with household names such as General Mills, Kellogg, Coca-Cola, Tyson Foods, and Proctor and Gamble. As a result, for nearly a decade, every American consumer -- anyone who took a vitamin, drank a glass of milk, had a bowl of cereal, or ate a steak -- ended up paying more so that the conspirators could reap hundreds of millions of dollars in additional, ill-gotten revenues.

Last May, two firms, F. Hoffmann-La Roche and a German firm, BASF Aktiengesellschaft, agreed to plead guilty, with Hoffman-La Roche to pay a fine of $500 million and BASF to pay a fine of $225 million. These prosecutions are part of an ongoing investigation of the worldwide vitamin industry in which there have

been 18 prosecutions to date. It has resulted thus far in convictions against Swiss, German, Canadian, and Japanese firms, with over $875 million in criminal fines against the corporate defendants, and in convictions against eleven American and foreign executives who are now serving time in federal prison or awaiting potential jail sentences along with heavy fines.

Other industries where we have brought major criminal prosecutions recently, in addition to vitamins, include: graphite electrodes used in electric arc furnaces in steel mills to melt scrap steel; sorbates used as chemical preservatives to prevent mold in cheese, baked goods, and other food products; marine construction and transportation services; point-of-purchase display materials such as plastic and neon signs; the livestock feed additive lysine; citric acid; the industrial cleaner sodium gluconate; commercial explosives; real estate foreclosure auctions; and metal buildings insulation.

International enforcement of our criminal antitrust laws is a top priority of the Antitrust Division. At present, more than 35 sitting U.S. antitrust grand juries are looking into suspected international cartel activity. We are determined that international cartels not be permitted to prey on American businesses and consumers with impunity. An equally important goal is to ensure that every business person around the world who contemplates price-fixing behavior that

could adversely impact American businesses and consumers will choose to forgo such illegal activity because of concern that we will find out about it and prosecute to the full extent of the law. Our efforts to achieve that goal will continue unabated this year and for years to come.

Merger Enforcement

We are in the midst of a continuing merger wave throughout our economy. A record $1.4 trillion in U.S. merger transactions took place in 1999. In each of the last two fiscal years, more than 4600 transactions were reported to us under the Hart-Scott-Rodino Act, the most in our history, and more than double the number being filed per year just a few years ago. And mergers are continuing at a record pace.

We have devoted tremendous energy to staying on top of this merger wave, so that we can challenge the mergers that would harm competition while minimizing any delays and disruptions in competitively beneficial or benign business combinations, which constitute the overwhelming majority.

In the last fiscal year, we brought 47 merger challenges, the highest level of merger enforcement in our history. So far this fiscal year, we have brought 16 more. While most of our merger challenges have been resolved by consent

decrees, we have not hesitated to seek to block transactions in their entirety when necessary to preserve competition. Both the Lockheed Martin/ Northrop Grumman and the Primestar transactions were abandoned after we filed complaints and were well into discovery, and parties have abandoned other transactions, such as Monsanto/ Delta & Pine Land, after learning of our intention to sue. Since July 1, 1997, we have gone to court ten times to full-stop block merger transactions; and on seven other occasions we have been prepared to go to court to full-stop block a merger, but the parties abandoned the transaction prior to our filing a lawsuit.

Our important merger enforcement actions of the past year include the Cargill/ Continental Grain merger, where we insisted on divestitures in a number of grain storage facilities throughout the Midwest and in the West, as well as in the Texas Gulf, to protect competitive options for grain and soybean producers and to protect competition in the delivery points for the corn and soybean futures markets. This was a particularly important case in that it demonstrates that antitrust enforcement is concerned not only with market power in the possession of sellers, but so-called "monopsony" power in the possession of buyers. In this case, the concerns that led to our challenge had to do entirely with the creation of monopsony power in the mergers firm as buyers of grain and soybeans.

In addition to Cargill/Continental and Primestar, other recent merger

challenges include:

- Lockheed/ Northrop Grumman, where the merger would have resulted in unprecedented vertical and horizontal concentration in the defense industry, substantially lessening and in some cases outright eliminating competition in major product markets critical to our national defense. In the face of our challenge, the parties abandoned the merger.
- Northwest/Continental, where the proposed transaction would allow Northwest to acquire voting control over Continental, substantially diminishing the incentives for the two airlines -- the nation's fourth and fifth largest -- to compete against each other. This case is pending and is currently scheduled for trial in October.
- Monsanto/ DeKalb Genetics, where the merger as proposed would have substantially lessened competition in biotechnological innovation in corn. Monsanto agreed to spin off claims to an important cutting-edge technology used to introduce new genetic traits into corn seed, and to license its proprietary Holden's corn germplasm, to numerous seed companies so they could develop their own special hybrids.

While we have worked hard to keep top of the merger wave, we have also worked hard to strike the correct balance in merger reviews between our need for

information about the industry and the merger and the parties' desire to quickly complete their transaction. Last Thursday, we announced a set of improvements to our procedure for requesting additional information -- so-called "second requests" -- under the Hart-Scott-Rodino Act. (The Federal Trade Commission announced similar measures earlier in the week.)

- Centralized high-level review of second requests prior to issuance.
- Early conferences with the merging parties to identify competitive issues.
- Quick turn-around of requests for modifications of a second request.
- New procedures for appealing second request issues.
- "Best practices" for second request procedures.
- Specialized staff training on second request investigations.
- Ongoing consultation with the business community and the private bar to identify further possible means of easing merger review.

We appreciate the assistance of members of this Committee, particularly Chairman Hyde, Congressman Conyers, Congressman Rogan, and Congressman Delahunt, in helping with the development of these proposals.

Civil Non-merger Enforcement

Civil non-merger enforcement has become especially important in this era of

rapid technological change and the growth of network industries, and we have also been very active in this area to ensure that antitrust enforcement keeps up with these changes to protect competition in a variety of industries important to our economy.

Perhaps our best-known recent civil non-merger case is our pending case against Microsoft under sections 1 and 2 of the Sherman Act. Two years ago, we brought suit challenging Microsoft's widespread abuse of its monopoly power in the market for personal computer operating systems and its attempt to extend its monopoly power into the Internet browser market. Last week, after a 78-day trial and review of thousands of pages of Microsoft's own documents, the federal district court ruled that Microsoft's conduct violated the Sherman Act as we alleged. After reviewing the extensive evidence regarding Microsoft's actions, the court concluded:

> [O]nly when the separate categories of conduct are viewed, as they should be, as a single, well-coordinated course of action does the full extent of the violence that Microsoft has done to the competitive process reveal itself. In essence, Microsoft mounted a deliberate assault upon entrepreneurial efforts that, left to rise or fall on their own merits, could well have enabled the introduction of competition into

> the market for Intel-compatible PC operating systems. While the evidence does not prove that they would have succeeded absent Microsoft's actions, it does reveal that Microsoft placed an oppressive thumb on the scale of competitive fortune, thereby effectively guaranteeing its continued dominance in the relevant market. More broadly, Microsoft's anticompetitive actions trammeled the competitive process through which the computer software industry generally stimulates innovation and conduces to the optimum benefit of consumers. (Citations omitted).

The court has ordered the Department to submit its recommendation regarding appropriate relief by April 28, 2000, and it has set the matter for hearing on May 24, 2000. While we are committed to seeking relief that will stimulate competition, innovation, and consumer choice in this important market, we have not made a final decision regarding the relief that we will recommend to the court.

Let me turn briefly to a few of our other important civil non-merger cases. First let me say a few words about our pending case against American Airlines under section 2 of the Sherman Act for monopolizing airline passenger service on routes emanating from its hub at Dallas/Ft. Worth International Airport. As the complaint we filed sets forth in detail, American repeatedly sought to drive small,

start-up airlines out of DFW by saturating their routes with additional flights and cut-rate fares. After it succeeded in driving out the new entrant, American would re-establish high fares and reduce service. Passenger traffic surged when the low-cost airline began operations and more people could afford to fly, and then fell back dramatically after American had driven out the upstart and resumed monopoly pricing. American knew this strategy was a money-loser in the short term, but expected to make that up by preserving its ability to set fares at monopoly levels.

American, like anyone else in our capitalist economy, is free to compete, and compete aggressively. But it crossed a fundamental line into predation. This is the first predation case brought against an airline by the Antitrust Division since the industry was deregulated in 1979. I think it will be tremendously important for our traveling public throughout the country, who deserve the lower fares and expanded choices available in a competitive airline marketplace.

Our case against VISA/MasterCard is also an important civil non-merger enforcement action. We are charging VISA and MasterCard, the two dominant general purpose credit card networks, with restraining competition among themselves through overlapping governance arrangements among the large banks that own and control them, as well as adopting rules to prevent their member banks from dealing with other credit card networks. The result is that competition and

innovation are severely impaired. This case is also pending, and trial is expected this summer.

The final civil non-merger case I'll mention is our case against Dentsply International for unlawfully maintaining a monopoly in the market for artificial teeth in the U.S. Dentsply entered into restrictive dealing arrangements with more than 80 percent of the nation's tooth distributors, preventing them from selling products made by its competitors. Dentsply's efforts to deprive its rivals of an effective distribution network have resulted in increased prices for artificial teeth; they have reduced innovation; they have prevented other firms from competing effectively; and they have deterred new entry into the market. Trial in this case is expected sometime this year.

ANTITRUST DIVISION BUDGET AND STAFFING

As you can see, our workload is expanding, its complexity is increasing, and its importance to American businesses and consumers has never been greater. To continue to effectively carry out our mission, we need increased resources.

For the current Fiscal Year, the Antitrust Division's budget is $110 million, providing for an appropriated staffing level of approximately 360 attorneys. In light of our tremendous ongoing workload and its projected expansion, the President's

FY 2001 budget request for the Antitrust Division is $134 million, which includes increases to handle cost-of-living expenses as well as to hire additional attorneys, economists, paralegals, economic research assistants, and other critical support. This increase is needed in light of our increasing workload and the clear importance of competition to the nation's economic health and prosperity. It will for the first time in 20 years enable us to bring our staffing level back up to where it was in 1980, a time when the economy was significantly smaller, less complex, and less globalized. I can assure you that we will put the additional resources to productive and cost-effective use.

Let me mention something that was included in the President's Budget for the Federal Trade Commission, but also affects our funding. That is a proposed change in the reporting thresholds and filing fee structure for mergers reviewed under the Hart-Scott-Rodino Act. We believe it makes sense to revise the HSR filing fee threshold structure to account for inflation and economic growth since the HSR Act was enacted in 1976. Last week, members of this Committee introduced a very similar proposal, H.R. 4194. Raising the HSR thresholds responsibly, while ensuring the effectiveness of the premerger review program and ensuring that adequate antitrust funding exists, as this legislation does, is good for consumers, businesses, and the American economy.

CONCLUSION

The Supreme Court has described the Sherman Act as the "Magna Carta" of the free enterprise system. The responsibility we are given to enforce it is one we take very seriously. We are working hard to carry out our enforcement mission to protect competition in the marketplace against private efforts to thwart it. We are not in the business of picking winners and losers. In a free market economy, that responsibility falls to consumers, who make that determination through their purchasing decisions. The job of the antitrust enforcement is to ensure that the benefits of the competitive process are not blocked by private anticompetitive conduct. We look forward to meeting the ongoing challenge to ensure that businesses can compete on a level playing field and that consumers and businesses are benefited by competition that produces low prices, high quality, and innovative goods and services.