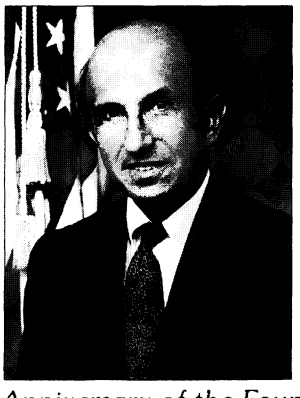
The Commission concluded that, given:

- the small number of 'between threshold' mergers;
- the small regulatory cost to most of the parties involved; and
- its concerns with at least one merger falling between the two thresholds,

it was not convinced that changes to the thresholds were necessary at this stage.

The Commission will continue to collect information against both thresholds. Until it has more conclusive evidence, it will continue to use its current thresholds. Statistical information collected for the purposes of the review has been published in *The Commission's approach to mergers: A statistical summary*, published in February 1998 (see 'Guidance and information', this Journal).

International cartel enforcement: A shared opportunity



The following is an edited version of a speech given by Joel I. Klein, Assistant Attorney General of the Antitrust Division of the US Department of Justice at the Symposium in Commemoration of the 50th Anniversary of the Founding of the Fair Trade Commission of Japan, Tokyo, on 2 December 1997.

Introduction

This paper discusses a subject that I believe has become one of the most important challenges — if not the most important — for antitrust authorities throughout the world: the fight against international cartels that victimise consumers and businesses in all parts of the world.

In today's global economy, international enforcement of competition laws is essential to preserve a free marketplace. In the United States alone nearly one-quarter of our Gross Domestic Product is accounted for by export and import trade; that's double what it was when the Japan Fair Trade Commission (JFTC) was established in 1947. And for many other nations the figure is much higher. Not surprisingly, now that nearly one-quarter of the US economy is international, we at the Antitrust Division have an increasing number of cases that have an international dimension. Indeed, in the US roughly 25 grand juries currently are looking into suspected international cartel activity, and the subjects and targets of these investigations are located in over 20 countries on four continents.

In my view the greatest challenge we face is adapting competition policy to globalisation. We must make sure antitrust works effectively in the increasingly global economy, where many corporations have multinational operations and even powerful nations find it harder and harder to go it alone. This is critically important, because our ultimate ability to overcome the few remaining pockets of resistance to the argument that open and vigorous competition is the most efficient way to run a world economy depends on our commitment to fulfilling the promise of the structures and models we have set in motion.

Let me be more specific about the challenge I think we face. Unquestionably the increased liberalisation of international trade has fostered many benefits, but it has also created an environment in which international cartels seem to flourish. Perhaps this is because firms, once protected by governmentally imposed trade barriers, are looking increasingly to self-help measures to shield themselves from the rigours of competition.

Of course, to have a private agreement two persons must be able to communicate. One of the results of the information and telecommunications revolution — in many cases the product of tough competition policy

coupled with wise regulation — has been that it is now easier than ever for business executives to communicate at the touch of a button with their counterparts in other countries, via phone, fax, or video conferencing. Increasingly it seems that although borders have meaning for nations, borders have less and less meaning for business activity. Since the focus of competition law is private business activity that restricts competition, it is the challenge of competition authorities to keep up with the ever changing business world, in which international cartels are distressingly common. It is an inescapable fact of today's global economy that antitrust enforcement cannot stop at our nation's borders if it is to be effective.

This is indeed a challenge. For years the field of antitrust has been commonly recognised to be one of the most, if not the most, complex areas of the law due in large part to the sophisticated understanding of business practices and economics that is required. I even once heard a lawyer say, after having worked on an antitrust matter, that he would never do it again, quoting the Japanese proverb that everyone should climb Mt Fuji once, but only a fool does it twice. Perhaps we are all fools because we enjoy climbing Mt Fuji so often as antitrust enforcers. But my point is that a purely domestic antitrust case is already complex, so adding an international element makes it even more challenging. Nonetheless, we can't reverse the trend towards more globalisation — instead we must face the challenge by putting our considerable expertise together through increased cooperation.

Difficulties

It is no surprise that international cartel enforcement raises a number of difficult and, often, novel issues. In my work on such matters, not surprisingly, I have often found that these cartels tend to be more complex, broader in geographic scope, and larger in terms of affected volumes of commerce than our purely domestic cases — some of the markets involve hundreds of millions, or even billions, of dollars. Naturally, in such cases, national boundaries may present the biggest hurdle to a successful investigation of the cartel.

The most typical problem any antitrust authority confronts in an investigation of an international cartel is that key documents and witnesses are located abroad — in many cases out of the reach of the authorities' power to compel action. Our own courts have recognised this problem, and it was a key factor in the Antitrust Division's prosecution of General Electric and De Beers for price fixing in the industrial diamonds market where we sought evidence overseas, largely without success, and where the court directed a judgment of acquittal against us. We continue to run into this practical problem in other cases that we're currently investigating. Despite our loss in *GE/De Beers*, it certainly gave additional force to the widespread recognition of the need for better tools for international information gathering and underscored the urgency of cooperation among the world's competition authorities.

Even with the difficulties encountered in international cartel cases it is important to keep things in context. Compared to civil and merger cases, which often involve complex economic and legal arguments, cartel cases tend to be straightforward.

First, in cartel cases the questioned practices are generally prohibited by virtually all of the world's major trading nations. Consequently, one doesn't confront the tricky questions presented when countries have different legal requirements — on vertical restraints or essential facilities, for example. This common approach heightens the chances for cooperation between authorities.

Second, the evidence that a competition authority needs in an international cartel case rarely, if ever, involves the kind of confidential business information that tends to cause concern in civil or merger cases. Rather, much of what we need is evidence concerning the existence of a cartel agreement, which — although it might be understandably embarrassing to those involved — is not the kind of trade secret or sensitive financial data that all agree deserves appropriate protection. In these cases, the key evidence almost always involves past conduct, not future business plans.

Third, as I mentioned earlier, the volume of commerce involved is often staggering. This should catch the eye of any antitrust enforcer because the degree of consumer harm is often proportional to the volume of commerce — that is, the greater the commerce, the greater the consumer harm. For example, it is well-known that the Antitrust Division has prosecuted an international cartel in the worldwide citric acid and lysine markets. Let's focus for now only on the volume of commerce in citric acid. Citric acid is used as a food additive and preservative in products. To give you a sense of its use, at least in the United States, it is found in nearly every home. Such products as soft drinks and processed food, as well as detergents, pharmaceuticals and cosmetic products, contain citric acid. Therefore to some degree this conspiracy affected every US consumer and I would expect it affected millions of consumers outside the US who buy these types of products. Such a tremendous volume of commerce usually means that more than one market is being affected by the alleged conduct and the effect is widespread among the world's consumers.

International cooperation

So in a world where international cartel activity seems to flourish, what do we as antitrust enforcers do? I think the answer is we cooperate — a lot. It is not an accident that a major focus of the 1995 Department of Justice and Federal Trade Commission International Guidelines is a fundamental commitment to the principles of international comity and cooperation.

We in the Antitrust Division are keenly aware of what cooperation can do for us in defeating worldwide cartels. Two matters stand out as examples of how we derived tremendous benefit from cooperation with governments.

First is our investigation and prosecution of companies involved in the thermal fax paper market. Subjects of the investigation included United States and Japanese manufacturers, distributors and trading companies involved in the manufacture, distribution and sale of jumbo rolls of thermal fax paper. After two years of cooperative investigation with Japanese and Canadian authorities we successfully uncovered an international cartel that was inflating prices in the $120 million thermal fax paper market.

As the case was developing the Department of Justice requested assistance from the Japanese Government to obtain evidence in Japan. The Japanese Prosecutor's Office agreed to provide unprecedented assistance to us in this international cartel investigation — they raided and seized documents of two Japanese companies and secured the cooperation of other Japanese companies. The Prosecutor's Office, again at the request of the Department of Justice, questioned representatives of Japanese thermal fax paper manufacturers in the presence of Department of Justice officials.

On the other side of the Pacific we cooperated with the Canadian authorities under a mutual legal assistance treaty between our countries. Some of the same defendants who pleaded guilty to violations of US law also pleaded guilty to criminal violations of Canadian law and agreed to pay substantial fines there as well. These convictions in both countries were possible only because of the sharing of confidential information which otherwise would have been available only to one of the two countries.

Similarly, the assistance of Canadian authorities was instrumental in gathering the evidence used to charge three corporations and seven executives with conspiring to drive up the price of plastic dinnerware products, a $100 million market. That prosecution resulted in fines totalling more than $8 million and jail sentences of up to 21 months. In this case, the Federal Bureau of Investigation and the Royal Canadian Mounted Police simultaneously executed search warrants on both sides of the border, ultimately leading to guilty pleas by several corporations and executives.

Obviously, without the invaluable cooperation of foreign counterparts we would not have been able to prosecute these illegal conspiracies effectively because crucial evidence was located beyond our investigative reach. In the fax paper investigation, important and confidential evidence in the hands of the Antitrust Division was vital to the Canadian's case. As these cases demonstrate,

international cooperation in antitrust enforcement is a win–win situation: by promoting each country's antitrust enforcement efforts, it benefits each country's consumers.

Other areas of cooperation

Although the topic of my speech is cartel enforcement, I should not leave the mistaken impression that this is the only area where cooperation is occurring. Despite the difficulties inherent in the civil arena we have successfully undertaken cooperation efforts here too. For example, we worked closely for almost a year — and for over two weeks virtually around the clock — with Directorate General IV (DG-IV) of the European Commission to achieve the historic Microsoft consent decree — the first ever joint resolution of a case on identical terms by the US Department of Justice and DG-IV. What is more, Microsoft itself requested the joint settlement discussions, underscoring how important it can be for any business engaged in international commerce to play under one set of rules worldwide. Also, we have recently made our first ever positive comity referral to the European Union regarding alleged anti-competitive activity in the European computer reservation systems market. Because most of the evidence in this case is located in Europe and the main effect of the alleged activity is upon European consumers, this case was in many ways the model for referral under the cooperation agreement between the Division and DG-IV. The Europeans are currently investigating this matter.

On the merger side, the best-known example of dual antitrust enforcement during the past year is of course the *Boeing/McDonnell Douglas* merger case, in which the FTC and the EU antitrust authorities reached famously different conclusions. I'm not going to get into the merits, but as DG-IV's review process was drawing to a close I did take part in consultations in Brussels that the US Government requested with the European Commission under our cooperation agreement. Now, it is neither surprising nor objectionable that different national competition authorities could reach different results on a given merger. Differences can arise from different competitive effects in different product or geographic markets in different countries or simply from the existence of different legal standards. The point I want to make here is that however difficult this matter was for both US and EU antitrust enforcers, our discussions would have been far more difficult had we not already established a strong relationship based on common antitrust enforcement interests. This cooperation continues as the Antitrust Division and DG-IV staff recently have been exchanging ideas on the proposed American Airlines/British Airways transaction, which is of obvious interest to both agencies.

The future

When I joined the Division as a deputy to then-Assistant Attorney General Anne Bingaman, I began by working hard on many of the cartel and civil cases I have discussed. That experience has had a profound impact on how I view the future course of international enforcement. I learned that successful cooperation breeds further cooperation. I think we as antitrust enforcers have to enter into more bilateral agreements that provide for comprehensive law enforcement cooperation in cartel cases. I am fond of quoting Benjamin Franklin on this point who said upon the signing of the Declaration of Independence to his colleagues: 'If we hang together, we will surely stand, but if we stand separately we will surely hang'. There are significant impediments — some real and some imagined — to fulfilling this goal and, given the pace of international relations, it won't be done quickly. But I am committed to seeing this all happen.

This is not to say that all the problems have been solved and that I see nothing but clear sailing ahead. Traditionally, cooperation agreements have involved only competition authorities, but the kind of effective agreement we need now may also require the involvement of Ministries of Justice, which are often the agencies that have the kind of authority necessary to compel evidence. And, perhaps due to different national histories and experiences, even though hard-core cartels are generally prohibited, they are not always subject to the same enthusiastic condemnation. This is changing, and as competition officials who are especially well situated to see the damage done

by cartels we have a responsibility to foster and strengthen this condemnation.

I think any differences regarding hard-core cartels though are basically on the margins. Regarding cartel activity, over 70 countries now have antitrust laws that prohibit cartel behaviour, and several large countries, including the United States, Japan, Canada and Brazil, treat price fixing as a crime. Given this major consensus on cartel activity, and in order to advance efforts on cartel enforcement, we have been working over the past year in the OECD to encourage an expression of consensus on the importance of enforcing national competition laws against hard-core cartels, and of anti-cartel law enforcement cooperation. In October 1996 we introduced a paper seeking support for this concept, and two months ago we had an important discussion at the OECD of a proposed recommendation that member countries have competition laws that effectively prohibit and deter hard-core cartels, with effective sanctions, enforcement procedures and institutions, and that OECD countries cooperate to the extent possible, consistent with their important interests, in combating such cartels. We are encouraged by the support this proposal has received and look forward to its adoption in the near future.

Although the proposed recommendation would be advisory, we hope that attaining an OECD consensus on the importance of vigorous enforcement action and cooperation against hard-core cartels will give momentum to this fight. These conspiracies commonly involve many firms based in Europe, Asia and America, and inflict serious injury on European and Asian, as well as American, consumers. I would hope that European and Asian antitrust agencies would want to redress any such injury; the proposed OECD recommendation would help them do so.

Conclusion

This is all as exciting as it is difficult. More importantly, it is absolutely essential. I am convinced that international cartels will be an ever-increasing problem and that effective international law enforcement techniques will be required to combat them. I have little doubt that we will eventually get where we need to be in this effort. My only concern is how long 'eventually' will be.

I am committed to doing that and will put a lot of resources into the effort to build a worldwide consensus on, and enforcement network directed against, international cartels — I genuinely believe it is a shared opportunity for the world's antitrust enforcers. The experience of the past couple of years has demonstrated the importance of such cooperation. Cooperation between countries — each enforcing the law in its respective jurisdiction — enhances the efficiency of our efforts, ensures for each nation the most effective enforcement possible and promotes for consumers in the global economy a freer market in goods and services. The absence of such cooperation may effectively offer a risk-free licence for international cartels to pick the pockets of the world's consumers.

Evaluation of the use of s. 87B undertakings

In 1997 the Commission asked Associate Commissioner Don Watt to evaluate whether the use of s. 87B (court enforceable) undertakings was an efficient and effective method of ensuring compliance with the Trade Practices Act. The following is a slightly edited text of Don Watt's review. Readers' comments are welcome.

Process

First, using the goals and objectives of the Commission as a starting point, two broad policy issues were identified for review:

- frequency of use of undertakings; and
- content of undertakings.