

**STATEMENT OF GERALD F. MASOUDI
ON BEHALF OF
THE UNITED STATES DEPARTMENT OF JUSTICE**

**ANTITRUST MODERNIZATION COMMISSION
HEARING ON INTERNATIONAL ANTITRUST ISSUES**

FEBRUARY 15, 2006

I. Introduction

The Antitrust Division is pleased to participate in the Commission's hearing on international antitrust enforcement issues. In a global economy, with antitrust enforcement regimes increasingly being established around the world, it is critical that we continue to strengthen international cooperation and promote convergence based on sound economic and legal principles.

II. Increased Cooperation in International Cartel Enforcement

Criminal enforcement of the antitrust laws against unlawful horizontal cartels – including international cartels – is the Division's top enforcement priority, and increased cooperation with foreign antitrust enforcers is critical to our success. A growing worldwide consensus that international cartels victimize businesses and consumers everywhere, and a shared commitment to fighting those cartels, has led to improved cooperation among antitrust enforcement authorities. This strengthened cooperation has contributed to the Antitrust Division's ability to detect and prosecute international cartels that have subverted competition and victimized American businesses and consumers on an order of magnitude in the billions of dollars.

In some recent investigations, the Division has been able to coordinate dawn raids, searches, service of grand jury subpoenas, and drop-in interviews to occur simultaneously in multiple jurisdictions, helping to preserve the element of surprise and to prevent the possible destruction of evidence. In one investigation, more

than 250 investigators and agents in four jurisdictions on three continents were involved in coordinating these parallel efforts.

There are now more than fifty sitting grand juries investigating suspected international cartel activity, focused on subjects and targets located on six continents and in nearly twenty-five different countries. The Division is also able to place international antitrust fugitives on INTERPOL's "Red Notice" list – essentially an international "most wanted" list – a move that has already netted several apprehensions. With the vigorous response many foreign governments are making in combating cartels, and the increased willingness to assist the United States in prosecuting them, safe havens for antitrust offenders are rapidly shrinking.

Since fiscal year 2001, fourteen foreign nationals from seven countries have submitted to U.S. jurisdiction and been sentenced to incarceration in U.S. prisons. International prosecutions in the most recent fiscal year included new guilty plea agreements with corporations and individuals in our ongoing investigations into the rubber chemicals and synthetic rubber industries, where total fines exceed \$200 million and two foreign nationals have pled guilty and been sentenced to serve time in prison, and in dynamic random access memory, where total fines exceed \$730 million and three foreign nationals and one U.S. citizen have served time in U.S. prisons.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 has further strengthened the weapons in our arsenal against international cartels. The Act increased maximum criminal Sherman Act penalties to ensure that antitrust laws remain a strong deterrent to cartel activity. It further augmented our corporate amnesty program to include de-trebling of damages for eligible defendants who cooperate satisfactorily with the victims in private lawsuits as well as with the Department in its criminal prosecution. We expect these changes to induce more cartel participants to break the code of silence and come forward, and ultimately to make more potential violators think twice before forming cartels.

Our success thus far with our amnesty program has also influenced foreign antitrust authorities to adopt or strengthen their own programs. The European Commission revised its amnesty program several years ago to closely mirror ours. This and similar actions in other jurisdictions should further increase opportunities for multi-jurisdictional cooperation in cartel enforcement.

III. Promoting International Convergence in Enforcement Policy

Our other international priority, promoting convergence in antitrust enforcement around sound economic and legal principles, has been advanced significantly through the International Competition Network (“ICN”), which we and the Federal Trade Commission helped organize in 2001.

The ICN has grown into a global network of ninety-five members from eighty-four jurisdictions on six continents, where senior antitrust officials and non-governmental advisors from developed and developing countries can work together to achieve practical improvements in international antitrust enforcement.

In the merger area, ICN members have adopted eight Guiding Principles around which a merger enforcement regime should be built – sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely, and effective review; coordination; convergence; and protection of confidential information – and thirteen Recommended Practices for merger notification and review procedures. ICN members have developed and amended their merger review laws and policies with an eye to these principles and practices, bringing greater consistency to the merger review process across jurisdictions, and reducing delay and the investigative burden on merging firms. Another ICN merger subgroup focuses on the substantive analytical framework, investigative techniques, and remedies.

In the criminal enforcement area, an ICN Cartel Working Group is focused on helping enforcers develop a sound legal and institutional framework for anti-cartel enforcement, including obstruction-of-justice prosecutions, as well as on effective investigative techniques, including use of a corporate leniency policy to break up

cartel cohesion. The Working Group devoted a 2004 workshop in Sydney, Australia, entirely to corporate leniency policies, with demonstrations showing the kinds of interactions that take place and the issues companies face in deciding whether to pursue leniency. More recently, in November 2005, more than 100 representatives from thirty jurisdictions met in Seoul, Korea, for a workshop devoted solely to the complex area of electronic evidence gathering.

The Division has also been active for many years in the Organization for Economic Cooperation and Development (“OECD”), a multilateral organization whose thirty member governments comprise much of the industrialized world. The OECD’s Competition Committee and the Committee’s two working groups have been important fora for promoting sound convergence in the antitrust world, with respect to both policy and process. In March 2005, for example, the OECD Council of Ministers adopted a recommendation relating to merger review that buttresses the ICN’s important work in this area. And just last October, the Committee approved a set of best practices on information sharing among antitrust authorities in cartel investigations, which strengthens the international consensus on the value and methods of meaningful law enforcement cooperation against cartels. I and other Antitrust Division officials just returned from an OECD meeting, and I can assure you that the Division will continue to be a vigorous participant in the OECD’s work

in international antitrust convergence.

In addition to our work in the ICN and the OECD, the Division has continued its bilateral efforts with the EU, Canada, Japan, Australia, and others. We are committed to further progress in promoting cooperation and convergence around sound antitrust principles, to strengthen enforcement while minimizing unnecessary burdens on corporations doing business around the world.

IV. Interpretation of the Foreign Trade Antitrust Improvements Act

One of the most significant developments in international antitrust was the resolution of the *Empagran* case, *F. Hoffmann-LaRouche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), a very important case concerning the subject matter reach of the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), 15 U.S.C. § 6a. We participated as amicus, urging the Supreme Court not to permit foreign purchasers of vitamins to use the U.S. courts and U.S. antitrust laws to recover treble damages for harm they allegedly suffered in purchasing vitamins overseas, from overseas producers, for overseas delivery.

This case had important implications for international criminal enforcement and cooperation. Germany, Belgium, Canada, Japan, the United Kingdom, Ireland, and the Netherlands joined us in urging the Supreme Court to reverse the court of appeals.

Although we had prosecuted the international vitamin cartel, that was for injury it had caused to U.S. commerce by inflating prices of vitamins sold here. The foreign purchasers' claims had at most only a remote connection to the United States. Had their claims been allowed to go forward, the result would have been that, as long as an international cartel's activity had any anticompetitive effect on U.S. commerce, the doors of our courts could be open to victims everywhere in the world. This would, in our view, have contradicted the Supreme Court's admonition that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

We were concerned that the plaintiffs' proposed aggrandizement of U.S. antitrust jurisdiction would undermine effective antitrust enforcement by interfering with incentives for corporations to cooperate under our amnesty program and would set back efforts to promote international cooperation and convergence. The foreign governments had similar concerns.

The Supreme Court agreed and, based on an assumption that the conspiracy's effects in foreign markets were independent of its effects in the United States, held that U.S. antitrust laws would not reach the alleged overseas harm. The Court declined to consider the foreign purchasers' alternative claim that the U.S. harm was a

“but for” cause of their own injuries, remanding that issue to the court of appeals.

We urged the court of appeals to reject the alternative claim as well, as did the foreign governments. Last June, the appeals court held that this alternative theory did not satisfy the FTAIA’s required proximate causal nexus, and affirmed the district court’s dismissal of the case. *Empagran, S.A. v. F. Hoffmann-LaRouche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005).

The Commission has asked about the advisability of statutory amendments to the FTAIA relating to the issues raised in *Empagran*. We believe *Empagran* is moving the case law in the right direction on jurisdictional issues involving private plaintiff claims. Rather than try to anticipate other related FTAIA issues that might arise in the future and attempt to craft statutory language to deal with them in the abstract, we recommend instead waiting until the issues do arise in particular cases and attempt to resolve them first in the courts. We are always open, of course, to considering concerns that others may put forward.

V. The International Antitrust Enforcement Assistance Act

The Commission has also asked about the advisability of amending the International Antitrust Enforcement Assistance Act. That Act permits evidence obtained under an agreement to be used for non-antitrust enforcement purposes if “essential to a significant law enforcement objective.” 15 U.S.C. § 6211. The

Commission's International Working Group notes that some believe this provision may be deterring some foreign jurisdictions from entering into antitrust mutual assistance agreements with us.

I understand that this provision may have been an issue in some of our discussions with foreign antitrust authorities regarding antitrust mutual assistance agreements. We can all think of critical law enforcement matters – such as imminent threats to public safety – for which placing important information off-limits would be unacceptable. As written, the provision already requires that the antitrust authority furnishing the information be consulted in advance of any non-antitrust use, and that such use be conditioned on the furnishing authority's prior consent to the specific use. These requirements provide significant protection against expansive use of this provision. The Antitrust Division, of course, remains open to considering ways to revise the kinds of matters for which information obtained under an agreement can be used beyond antitrust enforcement.

VI. Conclusion

The Antitrust Division believes that its steadfast engagement in the international antitrust policy arena has been of tremendous benefit to the continuing development of antitrust regimes around the world, including our own. We will continue to pursue these efforts, based on sound legal and economic principles, for

the good of competition and consumers in all corners of the globe.

We appreciate being a part of the Commission's exploration of this important area of federal antitrust enforcement.