We're not in the business of absolution

Following is a summary of a presentation on 9 October 2001 by James Griffin, Assistant Attorney General of the Antitrust Division at the United States Department of Justice, on the US amnesty/leniency policy, criminal investigation issues with cartels and international cooperation.

The new team

A new team in the anti-trust division of the Department of Justice was recently finalised with Bill Kolasky being put in charge of international anti-trust issues. Charles James is the Assistant Attorney General and Debbie Herman Deputy Assistant Attorney General for mergers and civil enforcement in the general markets area. Ms Herman will be joined by Hewitt Pate who, as another deputy, will be responsible for intellectual property and regulated industries. I am in charge of cartel prosecution.

There is always much speculation about how anti-trust enforcement will change in the United States with each change of administration. The reality is that it changes very little and this is going to be particularly true with this change. In essence, the new Deputy Assistant Attorney General in the merger and civil area will focus just as much on economic analysis and the law as the previous group. I think that those who predicted great cut backs in what the division will be doing over the next four years will be proven wrong.

That is not to say that there will not be some change. Some organisational changes are already occurring that allow us to act more efficiently, particularly for merger investigations. Other structural changes will reflect more accurately what we do. Hewitt Pate will focus primarily on the intersection of intellectual property rights and anti-trust in recognition of the important role that intellectual property rights play in today's economy.

Probably the most important structural change is the appointment of Bill Kolasky as the deputy in charge of international policy matters. His main task will be to develop and implement US anti-trust policy and a growing number of international laws across a whole host of international issues both bilateral and multilateral. We can no longer function in isolated countries or groups of countries. As the business of the world has to globalise, so must anti-trust enforcement.

Issues of current concern

Much has been said about the GE/Honeywell merger case, and while I do not want to add to the debate I do want to acknowledge it. The merger was approved by the US with some minor adjustments and the EC ultimately blocked it. However, the bilateral cooperation between the US and EU has resulted in far more convergence than disagreement — in fact, in merger enforcement probably the US and EC have cooperated and collaborated more than any other two jurisdictions.

So the GE/Honeywell result did not come about through a failure of cooperation and coordination. There was probably more contact on the merger than any we have undertaken. Our economic staff and legal staff met in Washington and Brussels on several occasions, and made countless telephone calls.

Nor was there a difference between how we and they viewed the market. Nor a difference in the materials or information and facts that we had. The different results in those two investigations came from a markedly different view of the proper scope of anti-trust enforcement.

We concluded that the merged firms would be in a position to produce more efficient and better products and services at more attractive prices, which to us is the essence of competition and an efficient merger. The EC saw those same efficiencies resulting from the merger but was concerned about the impact on competitors in the market, an impact that might ultimately lead to anti-competitive results.

So we differed at a basic level of law and economic policy. That is going to happen from time to time but one thing we have learned is that we should continue the discourse and consultations both on individual cases and in general. In fact we put together an EC and US working group on mergers that is going to examine the disagreement in further detail — not in the context of that particular merger, but of economics and policy.

Because a proliferation of anti-trust regimes are reviewing mergers there has been a call for a global competition forum on various aspects of procedural and substantive anti-trust convergence issues. Since becoming Assistant Attorney General, Charles James has fully endorsed the concept of a global competition initiative that would focus on substantive and procedural issues surrounding international anti-trust enforcement.

In a speech last month in Canada he outlined his view of what it should be — that is, all anti-trust all

the time. It should not involve discussions of larger or more grandiose policy or competition policy issues. It should be very practical, allowing convergence of procedure and substance particularly in the merger review area — at least to the extent that it will not deter efficient mergers from occurring and will not impose excessive costs on merging parties.

We hope this will lead to discussion of practical issues with recommendations for anti-trust enforcement agencies to adopt and implement best practice recommendations.

More on Microsoft

In the Microsoft case the Court of Appeal's decision in mid-2001 did several things. First, it affirmed the District Court's finding that Microsoft did exercise monopoly power in the operating systems market and that they abused that power in several ways — through their licensing provisions and by foreclos-ing Internet browser competition.

But the Court of Appeal reversed them on a couple of issues too. It reversed the decision that Microsoft had engaged in an illegal tying arrangement and also reversed the District Court's decision granting us structural relief. We were faced with two decisions when that reversal occurred.

First, what to do about the tying issue. We could retry it under the Court of Appeal's ruling because it was not reversed on the basis that it was totally wrong but rather because we had not presented sufficient evidence at that point and the District Court had applied the wrong standard. However, retrying would have led to another year in trial and the decision was unlikely to significantly affect the remedy we would seek. So we decided not to retry but rather to get the remedy phase before the District Court as quickly as we could.

The second decision to be made was whether or not to press for structural relief. For a whole host of reasons, including some fairly strong language from the circuit board, it was decided that we would not seek structural relief and that much of what we wanted to accomplish could be done through conduct remedies. We made that known in September with the new District Court judge. At a meeting with the judge on 28 September Microsoft still asked for bifurcated proceedings — the first to determine the scope of remedies that might be considered and then a possible second phase to determine what the remedy should be.

The court rejected that and said in effect that the government had removed most of the complicating factors by taking structural relief off the table. The court ordered the government and Microsoft to engage in a two-week period of negotiations to see if settlement could be reached. That will be followed (presuming that no settlement has been reached) by a period of court ordered and supervised mediation with the mediator to be appointed by the District Court. That process will not be very long. Even if the outcome is not a full settlement, the court hopes there will at least be a narrowing of the issues.

Once that mediation process has run its course the court will proceed with the remedy phase based on the schedule that we outlined. (See International chapter for the outcome of the Microsoft case.)

Cartel investigations

Cartel investigation and prosecution will continue to be one of the division's top priorities. International cartels will continue to be a priority because of the enormous damage they inflict on consumers throughout the world. But we have directed some additional resources to domestic markets. Our focus over the past few years on international prosecutions may have given domestic and regional markets in the United States the wrong message — that is, since we're so busy looking at international cases we don't have time to deal with them. We want to make sure that that is not the case.

We are developing some close ties with big-spending Federal agencies, for example, the Department of Agriculture, who may be victimised by cartel activities in the United States.

Jail sentences for defendants

We will continue to emphasise jail sentences for individual defendants as the major deterrent. No matter how much we fine corporations, no matter how high the fine, at some point the deterrent effect of fines is overtaken by the possibility for even greater returns, particularly in international cartel activity. The gains to be made from that type of conduct are huge as we've seen in many cases recently.

As Professor Fels has said:

> ... looking at deterrents, nothing will focus the mind of an executive like the threat of imprisonment.

A former assistant attorney general for anti-trust in the US, Don Baker, recently quoted a senior corporate executive who told him:

> ... as long as you're only talking about money, at the end of the day the company can take care of me. If you start talking about taking away my liberty, there is not a damned thing that the company can do for me.

I have been at this for 24 years now and I have lost count of how many time counsels for individual defendants have attempted to negotiate an additional or higher fine and all sorts of additional charitable works and contributions — anything to avoid jail terms. Not once have I had a lawyer for a corporate executive tell me that if I would just lower that fine by $100 000 he would do an extra month in jail.

Our average jail sentence this year was 14 months, which is a significant amount of time for an individual to spend in jail. I think it is appropriate and I am pleased that the focus on individual jail sentences has led to an increase in that level.

The amnesty program

The amnesty program has played a significant role in our successes and will continue to be a primary and potent investigative tool in prosecuting both domestic and international cartels. It amuses me that in 1993, when we first considered making the necessary changes in our amnesty program, we were criticised for proposing a program that amounted to absolution for the sinful. We argued that we were not in the business of absolution, we were in the business of destabilising and prosecuting cartels and we would leave absolution for another estate.

I think that that criticism was born of a natural tendency of prosecutors, myself included, not to want to give up prosecutorial discretion — you want to prosecute the people who are breaking the law. So often you lose sight of the fact that what we are talking about is an increased prosecution, an increase in the number of cartels that will be detected, broken up and prosecuted. By allowing or creating the incentive for one cartel to break ranks and cooperate we have made cases that we never would have made — obviously a leniency policy aimed at unilateral conduct would not do much good.

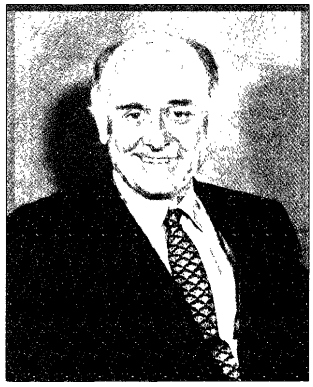
But since all cartel activity is conspiratorial it has been very successful in increasing the number of successful prosecutions. I believe that will continue to be our most important prosecutorial tool.

International cooperation

Aside from the amnesty program the most important source of evidence for our prosecution in international cases is cooperation from other jurisdictions. That has increased over the past years as evidence of international cartel activity has spread throughout the world. In the United States the cooperation we have received from jurisdictions has been critical to the success of our prosecutions. In the past 18 months we have been helped by five countries that executed search warrants and took other action at our request.

Over the past 24 months we have responded to requests for help from seven countries, mostly in the form of informal communications, assisting them with their investigations of cartel activities that affected their jurisdictions as well. I hope to see that increase.

Telecommunications: competition, effective regulation and investment



The following is an edited version of a presentation by Professor Allan Fels, Commission Chairman, given to the Australian Telecommunications Users Group (ATUG) Industry Seminar in Sydney on 2 October 2001, Sydney.

The opportunity to speak on this subject is both timely and welcome.

It is timely because the telecommunications industry, and the telecommunications market, are undergoing rapid technical and structural change. An audit helps us to identify what is done well in the industry, and what can be done better. In addition, it helps us identify both the Samaritans and the villains. It is welcome because it enables me to outline the Commission's approach to important competition and regulatory issues.

The necessary background to my comments is the introduction of full competition in the telecommunications industry in 1997. Competition has opened the way for new participants, and has catalysed innovation and new and different types of investment. The clear and unremarkable rationale of such reform is that competition provides benefits to consumers and to citizens, new opportunities to business, and an expanded market.