THE WHITE HOUSE

WASHINGTON

July 14, 1983

Dear Senator Tsongas:

This is in response to your letter of June 17 to the President expressing your concerns about the Department of Justice's views regarding resale price maintenance.

The position taken by the Department of Justice with regard to resale price maintenance rests on two key considerations: its evaluation of whether or not (and, if so, under what circumstances) resale price maintenance has harmful economic consequences inconsistent with the aims and purposes of the antitrust laws, and the proper allocation of the Department's own enforcement resources.

Based on its analyses and studies, the Department's Antitrust Division has concluded that resale price maintenance agreements differ fundamentally in their economic consequences from price fixing agreements between competitors and other types of cartel arrangements, which in most instances serve no useful economic function whatever and are almost invariably harmful to the public interest. For this reason the courts properly hold price fixing between competitors and other cartel arrangements to be "per se" unlawful under the antitrust laws.

By contrast, resale price maintenance agreements can in a number of situations serve desirable economic ends consistent with the aims and purposes of the antitrust laws. The Department believes that resale price maintenance should not be treated as a "per se" violation of the antitrust laws but should be judged under the "rule of reason" standard applicable to most restrictive business arrangements, including other types of vertical restraints. The present court-developed rule that resale price maintenance is "per se" unlawful has the undesirable consequences that the courts cannot draw a distinction between those arrangements that serve an economically desirable purpose and those that do not: all are condemned alike.

Another undesirable consequence of the "per se" rule as currently applied in resale price maintenance cases is that in many instances dealers whose distributorships have been terminated by a manufacturer, on grounds wholly unrelated to resale price maintenance, have in court challenged the termination on the asserted ground that the true reason for the termination was the dealer's supposed failure to adhere to the manufacturer's suggested resale prices. In some instances, relying on this argument, dealers have challenged various conventional distribution arrangements, such as drop shipment programs, that by their terms did not deal with resale prices at all. Thus, the "per se" rule has been invoked to jeopardize the legality of business arrangements that in fact do not involve resale price maintenance. Adoption of the "rule of reason" standard would greatly limit such spurious challenges since the challenging party would be required to prove specifically the anticompetitive effects of the alleged restraints.

These points are spelled out in greater detail in a brief submitted by the Justice Department in May to the Supreme Court of the United States, in the case of Monsanto v. Spray-Rite, in which the Department urged the Court to adopt the "rule of reason" approach in adjudicating resale price maintenance cases.

The second key consideration underlying the Department of Justice's position in this matter is the belief that the Department should concentrate its enforcement resources on challenging activities that have an unequivocally harmful effect on consumers and on the economy, and where enforcement of the law by private action is often handicapped because the conspiring parties effectively conceal their wrongful conduct. Horizontal price fixing, bid rigging, and other cartel activities fall into this category. The Antitrust Division believes that resale price maintenance does not have an unequivocally harmful effect but, on the contrary, can in many instances serve a desirable economic objective. Further, resale price maintenance agreements in general cannot be effectively concealed by the parties, so that in most cases persons adversely affected by such an agreement will be aware of its existence and can seek relief by bringing a private lawsuit, thereby diminishing the need for action by the Department of Justice.

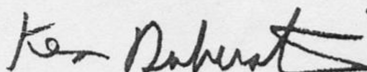
We wish to make clear that the Antitrust Division rejects the view that resale price maintenance should always be deemed lawful. Its position is that the legality of resale price maintenance ought to be determined on the basis of whether or not that practice has, or threatens to have, significant anticompetitive effects in the context of the particular factual situation in which it is employed. The same legal principle is currently applied by the courts in adjudicating the lawfulness under the antitrust laws of other types of vertical restraints.

In his public statements, William F. Baxter, the Assistant Attorney General in charge of the Antitrust Division, has repeatedly confirmed the Division's policy on this subject. In line with that policy, the Antitrust Division has not declined to investigate alleged incidents of resale price maintenance where it appears that significant competitive harm may result. When such instances are brought to the attention of the Antitrust Division, it is prepared to review them for possible enforcement action.

We hope that this information will help to clarify the Administration's position on this matter and to dispel any misconceptions that may still exist. Please be assured that we are deeply committed to vigorous enforcement of the antitrust laws against all practices that are truly harmful to consumers.

With best wishes,

Sincerely,



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