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## Protecting Consumers by Championing Antitrust Law

by Seth Bloom

A highlight of Sen. Kohl's service on the Judiciary Committee was his leading role on the Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights, where he served as either Chairman or Ranking Member for 16 years, from 1997 onwards. Sen. Kohl served as Chairman from June 2001 until the end of 2002, and from 2007 until his retirement at the end of 2012. He served as the senior Democrat on the Subcommittee from 1997 until June 2001, and from the beginning of 2003 until 2006.

Sen. Kohl's principal goal during his service on the Antitrust Subcommittee was to ensure that consumers received the benefit of the maximum degree of competitive choices to keep prices low and quality of goods and services high. Drawing on his considerable experience in business prior to his service in the Senate, Sen. Kohl favored a practical, "real world" approach to reviewing antitrust and competition issues, an approach focused on consumers and market conditions. This perspective proved invaluable to what too often is a highly technical field.

In an interview he gave to the magazine Antitrust in early 2007, upon assuming the Chairmanship of the Antitrust Subcommittee for the second time, he stated that "[m]y mission is not to be a legal technician but to oversee antitrust and competition policy in the interests of my constituents and the American people. And I believe my non-legal, business background is a great asset to me in this work. . . . In my view, my effort in this job is to bring about a balance so that capitalism flourishes, but at the same time consumers are not taken advantage of and, on the contrary, are afforded the opportunity to buy goods and services at the best prices as a result of a healthy, competitive, and vibrant economy."

Sen. Kohl's work on the Antitrust Subcommittee covered nearly every vital industry sector affecting American consumers, including telecommunications and media, high tech industries, health care, energy, transportation and aviation, retailing,

and agriculture. He engaged in serious oversight over mergers, acquisitions, and allegations of anticompetitive business practices in these industries by conducting more than 60 hearings investigating these issues during his tenure on the Antitrust Subcommittee. These hearings and other staff inquiries he supervised led to numerous letters to the leadership of the Justice Department's Antitrust Division, the Federal Trade Commission, the Federal Communications Commission, the Department of Transportation, the Department of Agriculture and other federal agencies recommending actions or investigations to protect competition in the economy. Sen. Kohl engaged in close oversight over these agencies, particularly the antitrust enforcement activities of the Justice Department and FTC, throughout his tenure on the Antitrust Subcommittee.

Sen. Kohl also introduced and championed vital pieces of antitrust reform legislation. These include legislation to give consumers greater access to low cost generic drugs; legislation to repeal the outmoded and wholly unwarranted antitrust exemptions protecting the freight railroad industry from competition, exemptions which injure numerous railroad shippers in the coal, agricultural, chemical, paper and other industries; legislation to restore the rule prohibiting manufacturers from setting minimum retail prices and therefore preserving consumers' access to discount prices; and legislation to make the actions of member states of the OPEC oil cartel subject to U.S. antitrust law when they attempt to raise the price, or limit the supply, of oil and gas in the United States. Each of these bills passed the Judiciary Committee several times. Sen. Kohl's antitrust reform bills to reform the merger review process, to strengthen court review of Justice Department antitrust settlements, to give the Justice Department wiretap authority when investigating criminal antitrust conduct, and to give the Justice Department additional authority to detect criminal antitrust conspiracies were each enacted into law during his tenure.

Sen. Kohl placed a priority on working on a cooperative, bipartisan, and consensus-driven manner with his Republican counterparts, whether Sen. DeWine when he served as Chairman, or Sens. Hatch or Lee when they served as ranking member on the Subcommittee. He strove, to the extent possible, to sign joint letters with his Republican counterparts, to introduce and advance legislation in a bi-partisan manner, to jointly arrive at the Subcommittee's agenda, and to plan hearings and staff investigations together. His goal was also to maintain a bipartisan consensus on the importance of strong antitrust enforcement to maintain a free and open competitive economy in the interests of consumers.

Sen. Kohl's leadership of the Antitrust Subcommittee received numerous accolades during his tenure. In 2006, he received with then-Chairman Sen. DeWine the American Antitrust Institute's Antitrust Achievement Award for "His Enduring Dedication to the Bipartisan Tradition of Antitrust." In October 2012, in an article in the online legal journal Law360 reviewing Sen. Kohl's tenure on the Antitrust Subcommittee, Bert Foer, Executive Director of the American Antitrust Institute, stated that Sen. Kohl "had a background in business and understood business but also understood the need for antitrust laws to keep the marketplace operating according to legitimate rules, and so his positions . . . were good, solid reflections of traditional, moderately aggressive antitrust enforcement. The bar will be looking at him as a good, solid friend of antitrust whose presence in the antitrust world is going to be missed." In the same article, former FTC policy director David Balto commented that Sen. Kohl has "been one of the most effective Chairman of that committee, and his leadership on the importance of progressive antitrust enforcement has really been critical."

The following discussion will examine each of the major subject areas that Sen. Kohl examined on the Antitrust Subcommittee, roughly in order of priority.

## **Telecommunications and Media**

### *General Approach*

An area of special emphasis was preserving and promoting competition in the telecommunications sector. Sen. Kohl's 16 years of service on the Antitrust Subcommittee saw explosive growth of burgeoning new communications technologies such as widespread adoption of mobile phones, broadband internet connections, and satellite television. While these technologies revolutionized communications and access to information, they also posed enormous competition policy challenges. Sen. Kohl began his service as Ranking Member in early 1997, shortly after passage of the landmark Telecommunications Act of 1996. The Act - whose principal purpose was to encourage new forms of competition between phone and cable companies - led to a wave of mergers, acquisitions, and a widespread transformation of the telecommunications industry.

Senator Kohl's efforts in this area were to insure that consumers faced adequate competitive choices and that the development of new innovative, technologies was not blocked by old communications monopolies. Consumers continued to face limited cable TV competition, continually rising cable TV rates, and limited choices for broadband

internet providers. Senator Kohl became a leading voice supporting competition in this vital economic sector. As he said in an interview in 2007, “We’re . . . worried about rising cable and phone bills. So telecom competition is also a big issue for us on the Subcommittee – increasing so in this age, given the importance of telecommunications to our society – and I’m sure even more so in the decades to come. It would be a tragedy if there were so little competition in this sector, and if consolidation trends continued, so that consumers were held totally hostage to the big telecom companies.”

Early in his tenure on the Antitrust Subcommittee, Sen. Kohl was a key co-sponsor of the Satellite Home Viewer Improvements Act (SHVIA, S. 1485), legislation introduced in January 1999 to amend copyright law to permit satellite TV companies to offer local broadcast TV stations to consumers. This was essential for satellite TV to be truly competitive with cable TV, and having vigorous competition between satellite and cable TV was essential to holding pay TV rates down. SHVIA was enacted into law in 1999. Sen. Kohl worked to get this bill reauthorized in 2004 and 2010.

Sen. Kohl also examined numerous mergers in the telecommunications sector, including the 2000 AOL/Time Warner merger, the attempted merger in 2001 between MCI Worldcom and Sprint, which Sen. Kohl opposed and was ultimately blocked by the Justice Department, the 2003 NewsCorp/DirecTV merger, the 2004 SBC/ATT and Verizon/MCI mergers, the 2005 Comcast/ATT Broadband cable merger, the acquisition by Comcast and Time Warner of the Adelphia cable system, and the 2012 acquisition by Verizon of wireless spectrum owned by four leading cable companies, among others. The Antitrust Subcommittee became the leading public forum for serious examinations of these mergers, in which all parties, industry stakeholders, experts, and consumer groups were represented. The keystones of these hearings were the transactions’ impact on consumers, competitive choices, and the prices consumers paid for competitive telecom services.

### *Cable TV*

A principal focus of Sen. Kohl’s work in this area was designed to promote greater competition in the cable TV industry, where consumers had few competitive choices and annual cable price increases averaging triple the rate of inflation. The Antitrust Subcommittee held numerous hearings on this topic. Sen. Kohl’s initiatives in this area included his efforts to ensure that competitive cable TV and satellite companies had access to vital programming through the enforcement of statutory provisions governing program access, and closing loopholes in such statutes; efforts to

ensure that independent programmers had a fair chance to get carried by the major cable TV companies; and efforts to ensure that new technologies such as the online delivery of video content were not blocked by existing cable TV companies.

Senator Kohl was a prominent critic of the proposed merger in 2002 between the two satellite TV companies, Echostar (Dish Network) and DirecTV. This merger would have reduced the competitive choices for many consumers for video from three to two. After the Antitrust Subcommittee's hearing on the deal, Sen. Kohl (joined by then-Chairman DeWine) wrote the Justice Department and FCC urging that the deal be blocked. The two agencies ultimately took action to block the deal.

### *Wireless phones*

Sen. Kohl also spent considerable efforts on the Antitrust Subcommittee to assure a competitive mobile phone market. With wireless phones becoming an increasing important communications tool, both for voice and as a way to access the Internet with the development of smart phones, ensuring that consumers had ample competitive choices in the wireless market became increasingly important. Two Antitrust Subcommittee investigations and hearings highlighted Sen. Kohl's work on this issue.

First, in 2008 and 2009, Sen. Kohl investigated the identical parallel price increases in the per message cost of text messaging by the four national cell phone companies - AT&T, Verizon, Sprint, and T-Mobile. These companies increased the per message price of text messages from first 10 to 15 cents, and then 15 to 20 cents over the course of little more than a year, all at about the same time. These price increases occurred despite the fact that the cost of each text message to the phone company was well under a penny.

Sen. Kohl convened an Antitrust Subcommittee hearing on June 16, 2009 to examine these parallel price increases, and called leading executives from the cell phone companies to testify, as well as a consumer representative and industry experts. While the hearing did not uncover evidence of outright collusion, it did reveal a lack of competition in the cell phone industry that made such price increases possible. Sen. Kohl followed the hearing with a July 2009 letter to the Justice Department and FCC suggesting a number of regulatory and policy changes to combat the lack of competition in the cell phone industry. The letter noted that "these identical price increases are hardly consistent with the vigorous price competition we hope to see in a competitive marketplace. Indeed, these price increases may represent a warning sign for the state of competition in the cell phone market." Among Sen. Kohl's suggestions

was that the FCC strengthen roaming requirements by requiring the national cell phone competitors to permit roaming for data for Internet connections by their smaller regional competitors. The FCC subsequently adopted such a requirement.

Sen. Kohl's second major initiative on the issue of wireless phone competition was his examination of the proposed AT&T/T-Mobile merger in 2011. In February 2011, AT&T announced its intent purchase its competitor T-Mobile for \$ 39 billion. This acquisition would have combined two of the only four national cell phone companies. It would have resulted in AT&T having over 40 percent of the national cell phone market, and two companies AT&T and Verizon forming a duopoly with over 80 percent of cell phone subscribers. On May 11, 2011, Sen. Kohl convened an Antitrust Subcommittee hearing examining the merger with, among others, the CEOs of AT&T, T-Mobile, and Sprint testifying. In his statement opening the hearing, Sen. Kohl pointed out that "[a]n industry that once a monopoly owned by AT&T in the last century is in danger of reverting to a duopoly in this new century. An so we must ask: is putting the control of such a vital economic sector relied on daily by millions of people in just two or three companies good for our country?"

At the hearing, Sen. Kohl sharply questioned the CEOs of AT&T and Verizon for their filings at the FCC claiming that they were not competitors. He won a major concession from each CEO when they admitted that they did indeed compete with each other.

Several weeks after the hearing, on July 20, 2011, Sen. Kohl wrote a detailed seven page letter to the Justice Department and FCC analyzing the merger, concluding that it was anti-competitive, and recommending that it be blocked. He stated that "[a]n acquisition which would decrease the number of national competitors from four to three in an already highly concentrated market, and one that eliminates the low price competitor from this market, is in my view highly dangerous to competition and consumers."

In August 2011, the Justice Department filed an antitrust lawsuit to block the merger, and in November the FCC took action to block the merger as well. In December 2011, AT&T and T-Mobile abandoned the transaction.

When the AT&T/T-Mobile acquisition was announced in February 2011, nearly all analysts expected the transaction to be approved. There is no question that had it been approved, it would have done substantial damage to competition in this vital market, an even tighter cell phone oligopoly, and higher prices for consumers. Sen.

Kohl's examination of the deal, his Antitrust Subcommittee hearing, and especially his letter to the Justice Department and FCC recommending it be blocked was a major factor turning the tide against this merger and creating the political climate for the antitrust regulators to seek to block the deal. The Wall Street Journal called the letter "the most significant political rebuke" yet of the deal, and predicted, on July 21, 2011, that the letter would "carry weight" with the Justice Department.

### *Media Mergers*

Sen. Kohl also spent considerable time examining media mergers during his time in the leadership of the Antitrust Subcommittee. In a 2007 interview, he stated that media consolidation "is such an important issue . . . because it has the potential to reduce if not eliminate the opportunities people have to read and think about differing opinions and independent opinions. If this were to happen, it would have a devastating impact on our society and our democracy. . . . In sum, I believe it is very important that we in government – including here in Congress and in the antitrust enforcement agencies too – stand in the way of excessive media consolidation."

Sen. Kohl therefore spent considerable effort scrutinizing media mergers on the Antitrust Subcommittee. He strongly believed that fulsome competition among media outlets was essential to insure that citizens had the benefits of diversity of opinions and expression. As he said in 1999 at his opening statement at the Antitrust Subcommittee hearing examining the Viacom/CBS merger "In our subcommittee, we have always taken the position that a media merger is different from, say, a merger between telephone companies, oil companies, or cereal manufacturers. When we are examining media mergers, we need to take special care to ensure that we protect the free flow of information and ideas. . . . We should be careful to pay attention to [this merger's] effects on the marketplace of ideas and not merely the marketplace of dollars."

Sen. Kohl's examination of media mergers included Antitrust Subcommittee hearings on the mergers between Viacom and CBS in 1999 (a merger that was unwound in 2009), AOL and Time Warner in 2000, NewsCorp and DirecTV in 2003, the satellite radio broadcasters in XM and Sirius in 2007 (a merger that Sen. Kohl opposed but was ultimately approved by the Bush Justice Department), Universal Music and EMI in 2012, and culminated in the Subcommittee's investigation and hearing into the Comcast/NBC Universal merger in 2010. The Comcast/NBC Universal merger brought together the nation's largest cable TV provider, and one of the largest Internet service providers with the television and movie powerhouse NBC Universal, one of the largest

content companies in the nation. In his Feb. 4, 2010 statement opening the Antitrust Subcommittee hearing on the deal, Sen. Kohl noted that “[t]he combination of NBC’s content holdings with Comcast’s distribution power would create a media powerhouse of unmatched size and scope which, if approved, will have far-reaching consequences for competition and consumers.”

In May 2010, Sen. Kohl wrote to the Justice Department and FCC urging those agencies to adopt 11 pro-competition conditions on the deal. These conditions were designed to assure that Comcast could not deny “must-have” programming it owned from competing cable or satellite TV providers; that Comcast would not move free over the air programming to pay cable TV; that the deal would not make it significantly more difficult for independent programmers to be carried on Comcast cable TV systems; and that this deal not impede the development of new forms of video distribution over the Internet. The Justice Department and the FCC ultimately conditioned their approval of the merger on the adoption, in whole or in part, on nine of these conditions. Many industry observers believe that Sen. Kohl’s hearing and letter were a very important factor in the agencies’ requiring these conditions.

### **Antitrust Enforcement in High Tech Industries**

The sixteen years of Sen. Kohl’s leadership on the Antitrust Subcommittee saw emergence of high tech industries such as computer software, computer hardware, mobile devices, and the Internet itself as a major driver of economic growth and occupying an increasingly important position in the economy. Much of commerce, entertainment and information moved from brick and mortar stores, traditional media such as broadcast television, newspapers, magazines and physical books to the Internet. The innovation in high tech industries was essential to economic growth.

Questions were frequently raised as to whether antitrust was still well suited for these high tech industries, given this sector’s frequent technological change and the emergence of new products and services. But, as Sen. Kohl noted in a June 2010 antitrust oversight hearing, “[w]hile we must be balanced and fair in our approach, I believe antitrust is as essential to protect competition with respect to today’s Internet and telecom sectors as it was to the railroad industry of more than a century ago.” While recognizing that antitrust laws need to be flexible and cognizant of changing technologies, he believed that consumers need the same protection against monopolistic conduct and anti-competitive mergers in this sector as in all others.

## *Microsoft*

Two matters stand out in Sen. Kohl's examination of high tech industries. The first was his examination of the allegations that Microsoft was engaged in illegal, monopolistic conduct in the computer software industry in the late 1990s. Sen. Kohl actively participated in two Judiciary Committee hearings on this topic in 1998. In the March 1998 hearing, Sen. Kohl noted that Microsoft had achieved large profit margins and "had a huge incentive to maintain and extend that monopoly." Under questioning from Sen. Kohl, Microsoft CEO Bill Gates admitted his profits on sales were approximately 24 percent. Sen. Kohl compared this profit margin with profits in the retail industry, where "if you make 2, 3, 4, percent on sales, it is considered to be very successful." Sen. Kohl added that "if your industry were much more competitive, your prices would be a lot lower. . . . And if your prices were a lot lower, your profits would be a lot lower." In other words, Microsoft's very high profit margins indicated that the computer software industry was not truly competitive. The Justice Department ultimately brought an antitrust case against Microsoft for illegally maintaining a monopoly.

Sen. Kohl also examined the settlement reached by the Bush Justice Department to settle the Microsoft case in 2001. Many competition advocates were concerned that the settlement was on too easy terms and did not address many of the issues essential to curing Microsoft's anti-competitive conduct. At the Judiciary Committee hearing examining this settlement on December 21, 2001, Sen. Kohl noted that

The critical questions remains, will this settlement break Microsoft's stranglehold over the computer software industry and restore competition in this vital sector of our economy? I have serious doubts that it will. . . . It seems to me . . . that this settlement agreement is not strong enough to do the job, to restore competition to the computer software industry. It contains so many loopholes, qualifications, and exceptions that many worry that Microsoft will easily be able to evade its provisions.

Sen. Kohl eventually wrote comments to the U.S. District Court in Washington, D.C. that was reviewing the settlement agreement under the Tunney Act to determine if it was in the public interest. These comments were a detailed explanation of why he believed the settlement was inadequate.

## *Google*

Later in his tenure on the Antitrust Subcommittee, Sen. Kohl closely examined competition issues caused by Google's dominance of the Internet search and advertising markets. Google gained a 70% or higher market share in computer based Internet search, giving it the power to make or break e-commerce sites and to have a tremendous effect on the price of Internet advertising. In 2007, the Antitrust Subcommittee held a hearing regarding Google's acquisition of Doubleclick, a leading company serving Internet advertising. The next year Google's planned joint venture with Yahoo for Internet advertising was examined. Serious questions regarding the effect of this joint venture were raised at the hearing, and the Justice Department subsequently decided to block this joint venture.

The culmination of Sen. Kohl's work in the high tech sector was his 2011 investigation and hearing into allegations that Google was biasing its search engine to favor its own products and services and disfavor those of its competitors. Google was responsible for 65-70% of Internet searches in the United States done on computers and over 95% done on mobile devices. Given this market share, Google had tremendous power over how consumers access the internet, and over advertising on the internet. Various e-commerce sites alleged that they had been treated unfairly with respect to placement on the Google search engine, and alleged that they had been discriminated against in the Google search engine. Google's critics alleged that Google unduly favored its own e-commerce sites in Google searches, and improperly disadvantaged its competitors.

In the years before the hearing, Google had been on acquisition binge, acquiring dozens of internet-related businesses and e-commerce sites. Opening the hearing on September 21, 2011, Sen. Kohl stated that these acquisitions had "transformed Google from a mere search engine into a major internet conglomerate, and these acquisitions raise a very fundamental question: is it possible for Google to be both an unbiased search engine and at the same time own a vast portfolio of web-based products and services? Does Google's transformation create an inherent conflict of interest which threatens to stifle competition?"

Sen. Kohl also noted that "we need to be mindful of the hundreds of thousands of businesses that depend on Google to grow and prosper. We also need to recognize that, as the dominant firm in Internet search, Google has special obligations under antitrust law not to deploy its market power to squelch competition . . . As more and more of our

commerce moves to the Internet, it should be the highest priority of antitrust policymakers that the Internet remains a bastion of open and free competition as it has been since its founding.”

Several months after the hearing, on December 19, Sen. Kohl wrote jointly with Sen. Lee, the Antitrust Subcommittee’s Ranking Member, to FTC Chairman Leibowitz to summarize the results of the Subcommittee’s investigation. The letter stated that “[w]hile we take no position on the ultimate legality of Google’s practices under the FTC Act, we believe these concerns warrant a thorough investigation by the FTC.”

The letter highlighted the importance of the Internet to the American economy, and the dominance of the Google search engine for consumers performing Internet searches. The letter stated that “a key question is whether Google is using its market power to steer users to its own web products or secondary services and discriminating against other websites with which it competes.”

The letter also noted how Google’s business model had changed in recent years. Google has transformed itself into a web conglomerate, acquiring or developing numerous web based products and services, known as “vertical search sites.” The Senators stated that “[m]any question whether it is possible for Google to be both an unbiased general or ‘horizontal’ search engine and at the same time own this array of secondary web-based services from which the company derives substantial advertising revenues.”

The FTC initiated a formal antitrust investigation of Google subsequent to the Antitrust Subcommittee hearing on this issue, and the investigation was ongoing at the conclusion of Sen. Kohl’s service in the Senate.

## **Health Care**

One major concern of policymakers throughout Sen. Kohl’s service was reining in the fast growing price of health care services. On the Antitrust Subcommittee, the focus of Sen. Kohl’s work was to increase competition for health care products and services, and to remove obstacles to competition, as a way of ensuring competitive pressures were present to control spiraling health care costs. Sen. Kohl’s efforts in this area were mainly focused in two areas.

### *Hospital Purchasing of Medical Devices*

First was the issue of hospital group purchasing organizations (GPOs), an issue that Sen. Kohl began to focus on in 2002 and throughout the next few years. In 2002,

Sen. Kohl launched an Antitrust Subcommittee investigation into allegedly anti-competitive practices at the nation's leading GPOs, including four Antitrust Subcommittee hearings between 2002 and 2006. GPOs are independent organizations formed by hospitals to purchase hospital equipment and medical devices. Their objective is to gain volume discounts for hospitals by engaging in group purchasing of hospital supplies and equipment. GPOs negotiate with medical equipment manufacturers for discounted prices for medical equipment and devices. GPOs operate under a specific exemption from the Medicare anti-kickback law enabling to collect fees from suppliers. Sen. Kohl was concerned that the GPO system was having the effect of diminishing competition among medical device manufacturers because of the constraints imposed by the proliferation of long term and nearly exclusive GPO contracts.

The Antitrust Subcommittee heard numerous reports from medical device companies and other hospital suppliers that they were excluded from the hospital supply marketplace because of the operation of GPOs, including manufacturers of surgical devices, pacemakers, and retractable needles. The operation of GPOs – and their favorable deals with incumbent suppliers – were freezing out innovative medical devices from the marketplace, imperiling patients, and blocking competition in the medical device industry, causing prices to be higher than they otherwise be in a truly competitive marketplace. Some of these GPOs contracting decisions even appeared to be influenced by the stock holdings in medical device manufacturers of their senior executives.

In opening the first Antitrust Subcommittee hearing on the GPO industry in 2002, Sen. Kohl noted that “[t]oday this subcommittee turns its attention to an issue affecting the health and safety of every American who has or will ever need treatment at a hospital, in other words, every one of us. . . . Because [GPOs] represent more than 75% of the nation’s hospital beds, they are a powerful gatekeeper who can cut off competition and squeeze out innovation.” Referring to reports that GPO contracting decisions were influenced by the stock holdings of their senior executives, Sen. Kohl declared that “these practices . . . are appalling and should not be tolerated. We cannot accept a situation where a decision on which medical device will be used to treat a critically ill patient could conceivably or even theoretically turn on the stock holdings of GPO executive.”

Sen. Kohl's hearings and investigation of this issue resulted in fundamental reform in the GPO industry. At the urging of Senator Kohl at the 2002 Antitrust Subcommittee hearing, the nation's six largest GPOs and their trade association created codes of conduct to forbid many anti-competitive and unethical practices. The GPO industry committed to end such practices as sole source contracts for medical devices, and requiring hospitals to purchase a bundle of unrelated items in order to gain discount prices. The industry also enacted new ethical standards forbidding GPO executives from investing in medical device manufacturers and hospital suppliers. These were the first codes of conduct enacted in the GPO industry, and they were a direct result of Sen. Kohl's efforts. The hospital supply marketplace began to open, and several new innovative medical device suppliers obtained GPO contracts as a result of these reforms.

In the years following the 2002 hearing The Subcommittee's continued concern was to ensure that these voluntary codes of conduct were permanent and lasting, and that the codes were enforceable and transparent. Sen. Kohl conducted three additional hearings in the Antitrust Subcommittee, and sponsored several GAO studies, to examine the effectiveness of these reforms. As a further result of Sen. Kohl's efforts, the GPO industry in 2005 created a new self-regulatory organization, the Healthcare Group Purchasing Industry Initiative (HGPII). HGPII is a voluntary organization of GPOs who pledge to adhere to basic principles of business conduct which, in general terms, prohibit anti-competitive practices and unethical behavior. In 2004, the Medical Device Manufacturers Association, the association of small innovative medical device suppliers, presented Sen. Kohl with an award for his efforts on opening the hospital supply market to competition.

In a 2007 interview, summarizing his work on this issue, Sen. Kohl remarked that "[w]e're concerned about patients getting access to medical devices and removing anticompetitive obstacles that in the past have blocked patient access to lifesaving devices as a result of some GPO practices. . . . We've made significant progress on this issue over the last several years . . . The companies have changed their behavior as a result of us watching them. And they deserve commendation for that."

#### *Generic Drugs – Pay for Delay Deals*

The second major health care related initiative of Sen. Kohl on the Antitrust Subcommittee was his efforts to combat anti-competitive, anti-consumer "pay for delay" deals in the pharmaceutical industry which had the effect denying consumers

the benefit of competition from low cost generic drugs. These deals occur in the settlement of pharmaceutical patent cases. Under these settlements, brand name drug companies pay money or other valuable consideration to generic drug manufacturers in settlement of patent litigation, in return for the generic company agreeing to keep its competing drug off the market. These agreements delay the entry of generic drug competition for many years, and greatly increase prescription drug prices as generic drugs are priced as much as 85% less than their brand name equivalents. The FTC has found that these settlements would cost consumers \$ 35 billion over a ten year period in higher drug costs, and cost the federal government \$ 12 billion in high drug reimbursement in federal health care programs such as Medicare. The Congressional Budget Office calculated that ending pay for delay settlements would save the federal government around \$ 4.8 billion over a ten year period.

Beginning in the 110<sup>th</sup> Congress in 2007, Sen. Kohl introduced his bipartisan Preserve Access to Affordable Generics Act (S. 369). When first introduced, the bill would have enacted an absolute ban on these pay for delay deals. However, as a result of Judiciary Committee modifications to bill in the 111<sup>th</sup> Congress in 2009, the bill would enact a presumption of illegality of such deals, with the drugs companies permitted to rebut this presumption with clear and compelling evidence that the deals were pro-competitive. This modification was agreed to as a compromise measure as a result of drug industry contentions that not all deals of this type were necessarily anti-competitive. However, there is no question that enactment of this measure would be a significant deterrent to these deals, and prevent truly anticompetitive Pay for Delay deals. The legislation was reintroduced in the 112<sup>th</sup> Congress in 2011 (S. 27), and passed for a second time in the Judiciary Committee. The legislation attracted considerable support, including editorials in the New York Times and Washington Post. It also was included in the President's budget proposal for 2012. Late in 2012, the U.S. Court of Appeals for the Third Circuit found that Pay for Delay deals should be treated with a presumption of illegality similar to Sen. Kohl's legislation, and the U.S. Supreme Court decided to hear a case to determine the appropriate legal standard for reviewing these deal.

Sen. Kohl's health care antitrust efforts also included close monitoring of consolidation in this sector. One example was late in 2011, when he convened an Antitrust Subcommittee hearing on the competitive effects of the merger of two of the nation's largest pharmaceutical benefits managers (PBMs), Express Scripts and Medco. The hearing focused on whether this merger would lead to health plan sponsors and

employers paying more for PBM services. No major plan sponsor or employer publicly opposed the deal, and the FTC approved this merger in 2012.

## **Energy Sector**

Sen. Kohl's antitrust work in the energy sector focused on the oil and gas industry, and the prices consumers paid for such vital commodities such as gasoline. Through the first decade of the 2000s and until the end of Sen. Kohl's term, gas prices spiked on various occasions, particularly in the spring and summer or after natural disasters such as Hurricane Katrina, reaching over \$ 4.00 per gallon on several occasions. While there were many causes for this price increases, including refinery shutdowns, natural disasters, and political instability in the Middle East, concentration in the oil industry and especially the price fixing behavior of the OPEC oil cartel were principal culprits for price spikes in crude oil, and in turn, gasoline.

As Sen. Kohl commented in a 2007 interview, "we have had enormous spikes in the price of oil and gas to consumers. And many of us in Congress, as well as many people across the country, were suspicious that we may have been taken advantage of by the large oil companies."

In the spring of 2000, Wisconsin suffered from a gas price spike. Sen. Kohl convened a meeting in his office in June with other members of the Wisconsin Congressional delegation and the then Chairman of the FTC, Robert Pitofsky. As a result of this meeting, Chairman Pitofsky announced he would investigate the cause of this gas price spike, and, significantly, institute a program at the FTC to monitor the price of gasoline nationwide and examine price hikes to determine if they were caused by collusion or other anti-competitive practices. This led to an ongoing FTC gas price task force, which regularly monitored gas price fluctuations nationwide for anti-competitive conduct. The FTC gas price task force periodically reported to Sen. Kohl's Antitrust Subcommittee staff on its findings.

Sen. Kohl was the author of groundbreaking legislation to combat the OPEC oil cartel. His NOPEC legislation (the "No Oil Producing and Exporting Cartels Act") was first introduced in 2000, and was reintroduced in every Congress thereafter during Sen. Kohl's service in the Senate. The bill was intended to address the activities of the international oil cartel, OPEC, a cartel which operates contrary to basic principles of antitrust law and prevents free competition in the international oil industry. As a price fixing agreement among competitors, such an oil cartel plainly violates U.S. antitrust law. NOPEC would remove any existing legal ambiguity and explicitly provide that

any nation that acts with any other nation or person to fix the price of oil or any petroleum product, to limit the supply or restrict the distribution of oil or any petroleum product in a manner that substantially affects the U.S. market, violates U.S. antitrust law. Further, NOPEC provided that nations engaging in such activities were not immune from lawsuits in U.S. courts on the grounds of sovereign immunity or the act of state doctrine. The goal of NOPEC was to deter price fixing and supply limiting agreements among foreign oil producers by entities such as the OPEC oil cartel, and thus to ensure that free and open competition occurs in the international oil market.

Sen. Kohl's NOPEC legislation passed the Judiciary Committee in every Congress from 2000 onwards. In 2007, it passed the Senate floor as an amendment to an energy bill by a vote of 70-23. That year an identical version also passed the House floor with 345 votes. However, the Senate passed energy bill was never passed by the House, and stand-alone House legislation never passed the Senate floor; thus NOPEC was not enacted into law.

Sen. Kohl also participated in several Antitrust Subcommittee and Judiciary Committee hearings on competition in the oil industry. At a Judiciary Committee hearing in February 2006, Sen. Kohl noted that "the basic question remains, why should paying higher prices for crude oil lead to record high profits for the companies that refined this oil? One obvious answer is that oil companies are charging high prices and gaining record prices simply because they can." He called for greater antitrust scrutiny, passage of the NOPEC legislation and also legislation to direct the Secretary of Energy to develop a strategic refining reserve.

## **Retailing**

Another important legislative initiative of Sen. Kohl's was his efforts to protect retail discounting. For nearly a century consumers benefited from the antitrust rule that manufacturers could not fix minimum retail prices, what is known as vertical price fixing or retail price maintenance (RPM). This led to the development of large discount store chains, such as Wal-Mart or Best Buy, as well as in recent years, Internet retailers such as Amazon and eBay. However, in its 2007 Leegin decision, a narrow 5-4 majority of the Supreme Court overturned this automatic ban on RPM and held that vertical price fixing should be evaluated under the lenient "rule of reason." This standard makes it very difficult, if not impossible, to challenge retail price maintenance. This decision significantly harmed consumers' ability to gain access to discount products.

Sen. Kohl spent considerable effort in the years following the Leegin decision to overturn it legislatively and restore the absolute ban on vertical price fixing. He held two Antitrust Subcommittee hearings, one in 2007 and 2009, to examine the effects of allowing vertical price fixing, hearings at which leading discounters testified. Sen. Kohl drew from his own experience as a retailer in the 1970s and 80s, when the manufacturer of a leading brand of brand name jeans attempted to cut off Kohl's from these jeans when the stores began to discount the product below that charged by traditional department stores. At the 2009 hearing, Sen. Kohl stated that "I know from my own experience in the retail industry decades ago that established retailers can take advantage of vertical price fixing to halt discounting dead in its tracks." Sen. Kohl added that "in the last few decades, millions of consumers have benefited from an explosion of retail competition from new large discounters in virtually every product, from clothing to electronics to groceries, in both big box stores and on the Internet. We have all taken for granted our ability to walk into discount retailers and buy brand name products at sharply discounted prices. It is essential that Congress act swiftly to enact my bill to once again make the setting of minimum retail prices illegal."

Sen. Kohl first introduced the Discount Pricing Consumer Protection Act in the 110<sup>th</sup> Congress in October 2007 (S. 2261). This legislation was reintroduced in the 111<sup>th</sup> Congress in 2009 (S. 148), and in the 112<sup>th</sup> Congress in 2011 (S. 27). This short and simple legislation simply stated that a manufacturer setting a minimum retail price violated antitrust law.

The Discount Pricing Consumer Protection Act passed the Judiciary Committee in both the 111<sup>th</sup> and 112<sup>th</sup> Congress (in 2009 and 2011). It garnered the support of the National Association of Attorneys General, 36 state attorneys general, all the major consumer groups, the American Antitrust Institute, Amazon, E-Bay, and numerous other internet retailers and brick and mortar discounters such as Burlington Coat Factory.

### **Airline Competition**

Another major focus of Sen. Kohl's work on the Antitrust Subcommittee was to preserve airline competition. The first decade of the 2000s and succeeding years were difficult ones for the airline industry. The airline industry confronted enormous pressures after the 9/11 terrorist attacks in 2001, followed by sharply rising jet fuel prices and economic recessions causing a decline in business and leisure travels.

During Sen. Kohl's tenure on the Antitrust Subcommittee, such major airlines as Continental, Northwest, TWA, Pan Am, and America West, among others, ceased operating, either as a result of merger, acquisition or economic difficulty. Consumers faced diminished choice on many routes, higher fares, diminished quality of service caused by overcrowded planes, and new fees such as fees for checked baggage and meals, and other ancillary services. As Sen. Kohl noted in a 2007 interview, "we've long been concerned with consolidation in the airline industry. . . . [T]hose of us who regulate the industry or have oversight over the industry have to do everything we can to see it that there is sufficient competition in this industry. We must ensure that people get a variety in choice of service and competitive pricing. This will not occur if we allow the airline industry to consolidate to such an extent - via mergers and acquisitions - so that airlines no longer need to worry about competing with their rivals. This would be a very bad result for consumers."

An early example of Sen. Kohl's work to preserve competition in the airline industry was his examination of the merger proposed by United and US Airways in 2000. As he pointed out in a 2007 interview, that deal "very much concerned us because it would have substantially diminished competition at many key airports across the nation." The Antitrust Subcommittee convened two hearings examining this proposed deal in 2000 and 2001, which Sen. Kohl opposed. Sen. Kohl and then-Antitrust Subcommittee Chairman Sen. DeWine co-sponsored legislation designed to thwart this deal in 2000. This legislation would have limited the takeoff and landing slots any one airline could control at a slot controlled airport. The merged United/USAirways would have exceeded these slot limits. The Justice Department ultimately decided to block the deal.

Throughout Sen. Kohl's leadership of the Antitrust Subcommittee, he examined several other large mergers, including US Airways attempt to buy Delta out of bankruptcy in 2006 (an effort that was ultimately abandoned), Delta/Northwest in 2008, United/Continental in 2010, and Southwest/ AirTran in 2011. While concerned about the effects of these mergers on consumers and competition, he was also cognizant of the serious economic pressures the airline industry was under. Opening the hearing examining the United/Continental merger, he stated "[a]t the outset, I should stress that we consider this merger with an open mind and do not reflexively oppose or support the merger. We are mindful of the difficulties faced by the airline industry today. In the last decade, the airline industry has faced unprecedented challenges from the devastating tragedy of 9/11 and crippling increases in fuel prices to bankruptcies

and a drop in travel due to the economic downturn.” But he also pointed out, that in examining that merger, “we must ask [the] critical question . . . : How will the loss of competition between these two national systems impact airfare and service?”

Sen. Kohl also spent considerable effort regarding the difficulties faced by Milwaukee’s hometown airline, Midwest Airlines, and protecting air service into Milwaukee. He opposed Airtran’s efforts to buy Midwest in 2007, pointing out that Midwest was “an airline that offers reasonably priced excellent service . . . and gives Wisconsin residents like me excellent connections to the major business centers around the country. [It is] most important to Wisconsin’s economy.” He opposed this proposed transaction, and AirTran ultimately dropped its bid. Midwest was ultimately acquired by Republic Airlines in 2009.

After Southwest announced its intention to acquire AirTran, Sen. Kohl held a field hearing in Pewaukee, WI in February 2011 to examine the effect of that merger on the Milwaukee and southeastern Wisconsin market. Southwest and AirTran both competed in Milwaukee. Southwest entered the Milwaukee market in November 2009 and had a 9% market share in Milwaukee prior to the merger. AirTran underwent major expansion in Milwaukee in recent years and had a market share of 27% prior to the merger.

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At the hearing, Sen. Kohl noted that “The growth of air travel in recent years at Mitchell Airport has been essential for travelers throughout the Milwaukee region, and has been vital for our economic growth. In these difficult economic times, it is critical that Milwaukee have convenient, reliable and inexpensive air service to other vital business centers. And vigorous airline competition has been the key to the growth of air service at Mitchell Airport. We must take care that nothing in this merger will degrade airline competition here.” In response to questions at the hearing, both Southwest’s and Airtran’s CEOs pledged to continue and grow AirTran’s presence in Milwaukee, and argued that the merger would benefit national airline competition by giving Southwest additional capabilities and enabling it to enter important new markets. The merger was approved by the Justice Department in April 2011.

Sen. Kohl also closely monitored international aviation alliances, and efforts by international air carriers to gain antitrust immunity for their alliance activities, including joint fare setting and scheduling. The Department of Transportation has the power to grant such antitrust immunity for international airline alliances. Several such applications were filed during Sen. Kohl's tenure, including Continental Airlines's application to join the United/Lufthansa Star alliance and American and British Airways effort to gain antitrust immunity for their OneWorld alliance, both in 2009. While these alliances offered efficiencies and greater route networks for their participants, they also reduced the number of independent competitors on international routes, raising competition concerns. Sen. Kohl offered his comments regarding the likely competitive effects of these alliances in letters to the Department of Transportation, including these two 2009 alliance applications.

### **Freight Railroad Industry**

Another major initiative for Sen. Kohl and the Antitrust Subcommittee was his efforts to repeal the antitrust exemptions enjoyed by the freight railroad industry. The railroad industry is a highly concentrated industry with four large freight railroads controlled nearly 90% of the nation's rail shipping, as measured by revenue. The industry is the beneficiary of obsolete and wholly underserved exemptions from most aspects of antitrust law. As a result, rail shippers - including electric utilities that ship coal, farmers shipping grain, and chemical companies shipping raw materials and finished products - complain of anticompetitive practices by the large railroads but have little recourse under antitrust law. This issue was particularly of concern to many Wisconsin businesses, including the power industry dependent on rail transportation of coal, agricultural shippers, and the paper industry.

As Sen. Kohl noted in a 2007 interview,

Another priority [for me] is to help captive shippers by repealing the railroad antitrust exemption. These captive shippers are the many companies that need the freight railroads to obtain their raw materials or to get their products to market - for example, utilities that need coal for their power plants or farmers who ship grains. Captive shippers believe they are held hostage by the fact that there's only railroad that serves them. The railroads can take advantage of this lack of competition, and we have to take a look at that and see how we can modify some of the real damage that occurs when this lack of competition is, in fact, the case. A good place to start would be elimination of the railroad

industry's obsolete antitrust exemption so that shippers injured by anticompetitive conduct have recourse to antitrust remedies.

Beginning with the 108<sup>th</sup> Congress in 2006, and in every Congress afterwards, Sen. Kohl introduced his bipartisan Railroad Antitrust Enforcement Act. This bill would repeal every antitrust exemption protecting the freight railroad industry, and restore full antitrust enforcement authority to the Justice Department, Federal Trade Commission, state Attorneys General over anti-competitive conduct, and mergers and acquisitions, in the freight railroad industry. It garnered the support of a widespread coalition of over 300 rail shippers and trade associations in the electric power, agricultural, chemical, and paper industries (who formed the Coalition United for Rail Equity (CURE)), over twenty state attorney generals, and leading consumer groups. The bill passed the Judiciary Committee in each of three Congresses (the 110<sup>th</sup>, 111<sup>th</sup>, and 112<sup>th</sup> Congresses in 2007, 2009, and 2011). Each Congress saw this effort gain increasing momentum and support.

### **Agriculture**

Throughout his service on the Antitrust Subcommittee, Sen. Kohl focused on competition in the agricultural sector of the economy. The agricultural sector underwent considerable consolidation in this period among food processors and other agribusiness concerns. This consolidation created large agricultural conglomerates, leaving farmers with fewer and fewer purchasers for their products and thereby diminishing competition for their products. The problem of the disparity of bargaining power between farmers and processors, and of food processors gaining near-monopsony buying power, was closely examined at the Antitrust Subcommittee.

Sen. Kohl held several hearings examining competition in the agricultural sector during his tenure on the Antitrust Subcommittee. One notable hearing was his 2008 examination of two acquisitions planned by the large meatpacking conglomerate JBS/Swift. Opening the hearing, Sen. Kohl remarked that “[r]ecent years have witnessed an enormous transformation in the agriculture industry. Disparity in market power between family farmers and large agribusiness firms all too often leaves the individual farmer and rancher with little choice regarding who will buy their products and under what terms.” Turning to transaction under review, Sen. Kohl noted that [b]y reducing the number of major buyers for ranchers’ cattle from five down to three, and in some regions even two, this deal will give the remaining beef processors enormous buying power. With little choice to whom to sell their cattle, ranchers will increasingly be left in a ‘take it or leave it’ position.”

In June 2008, Sen. Kohl sent a letter to the Justice Department concluding that the merger was anticompetitive and that it be blocked. The Bush Justice Department – not known as particularly aggressive with respect to antitrust enforcement – subsequently decided to block a major component of this transaction – JBS Swift’s planned acquisition of National Beef.

In 2010 and 2011, the Justice Department and US Department of Agriculture jointly conducted a series of workshops on agricultural competition issues in several locations across the country. Sen. Kohl made a major contribution to these workshops by testifying at the session on June 25, 2010 in Madison, WI with Secretary of Agriculture Varney and Assistant Attorney General for Antitrust Varney. Sen. Kohl noted that “when processors gain too much market power and too much leverage, farmers suffer and lose the benefits of a competitive market.” He announced plans to develop a working group in Wisconsin to further analyze and make policy recommendations to address competition, consolidation and other issues impacting the dairy industry in the state. He also called for spot market pricing to be transparent, noting allegations of price manipulation in the spot market for cheese on the Chicago mercantile exchange.

Sen. Kohl also examined allegations of anticompetitive practices in genetically modified seed industry. The Antitrust Subcommittee received a number of complaints from seed manufacturers of allegedly anticompetitive behavior by Monsanto with respect to genetically modified seeds for soybean and corn. Monsanto manufactures seeds with genetic modifications to make them resistant to weed killers and insecticides. Some competitors, including Dupont, alleged that Monsanto was improperly refusing to license these biotech seed technologies, harming the development of competitive generic versions of these genetically modified seeds. Sen. Kohl inquired into these allegations at several antitrust oversight hearings, and the Justice Department launched an investigation into these allegations. This investigation was concluded late in 2012 with no action taken.

### **Antitrust Reform Legislation**

Beyond the five bills mentioned above (the Satellite Home Viewer Improvements Act, the Preserve Access to Affordable Generics Act, NOPEC, the Discount Pricing Consumer Protection Act, and the Railroad Antitrust Enforcement Act), Sen. Kohl was a lead sponsor of four pieces of antitrust reform legislation. Each of these measures was ultimately enacted into law.

In 1999, Sen. Kohl co-sponsored with then-Judiciary Chairman Hatch the 21<sup>st</sup> Century Acquisition Reform and Improvements Act (S. 1984). This bill was enacted into law in 2000. This bill enacted reforms to the government pre-merger review process, including raising the monetary thresholds making a transaction subject to pre-merger review by the Justice Department or FTC.

In 2004, Sen. Kohl sponsored with then Antitrust Subcommittee Sen. DeWine, and Sens. Hatch and Leahy, then Chairman and Ranking Member of the Judiciary Committee, the Antitrust Criminal Penalty Enforcement and Reform Act. The bill was enacted into law by the end of year, and had three central provisions. The first reformed the standard under which Justice Department antitrust settlements were reviewed by the federal courts. It strengthened the standard of review for these settlements to determine that they were in the public interest, in response to criticism that such settlements were too often “rubber stamped” by federal judges after they were agreed to by the Justice Department, contrary to the intent of the Tunney Act, the federal statute requiring court review of settlements. Discussing this legislation in a 2007 interview, Sen. Kohl explained that “I strongly believe that before these antitrust settlements are finally blessed by courts, we need to be sure that the courts have actually determined, after conducting a meaningful review, that they reflect the public interest. So I think the courts have the responsibility to take a look at these settlements and be comfortable that we’re talking about settlements that are not just in the interest of the competing parties but that they are in the interests of consumers, whose interests are paramount.”

A second central provision of the 2004 legislation raised criminal fines for violations of antitrust law. Finally, the bill authorized what is known as an antitrust leniency program at the Justice Department. This would permit those who voluntarily revealed a criminal antitrust conspiracy to only face single, rather than treble, civil liability for their conduct violating antitrust law. This program created a strong incentive for participants in illegal antitrust conspiracy to reveal the conspiracy to the Justice Department, and greatly assisted in the detection of criminal antitrust conspiracies.

In 2005 the Antitrust Investigative Improvements Act, co-sponsored by Sens. Kohl and DeWine was enacted into law. This bill gave the Justice Department the ability to obtain wiretaps in criminal antitrust cases, upon showing of probable cause.

In 2010, Sen. Kohl's Antitrust Criminal Penalties Enforcement and Reform Act of 2004 Extension Act (S. was enacted into law. The 2004 legislation authorizing the Justice Department's leniency program had a 6 year term. This legislation reauthorized this very successful program for an additional ten years.

### **Antitrust Oversight**

Sen. Kohl engaged in extensive oversight of the Justice Department's and Federal Trade Commission's antitrust enforcement efforts during his tenure leading the Antitrust Subcommittee. Typically once every Congress, Sen. Kohl would hold (or be ranking member on) oversight hearings in the Antitrust Subcommittee, at which the Assistant Attorney General for Antitrust and the FTC Chairman would testify. This would be an opportunity for Sen. Kohl to ask the critical questions of antitrust enforcement and the priorities of the antitrust agencies. Sen. Kohl opened his 2010 antitrust oversight hearing by noting that "[v]igorous and aggressive enforcement of our Nation's antitrust laws is essential to ensuring that consumers pay the lowest possible prices and gain the highest quality goods and services."

Sen. Kohl was particularly critical of the decline in antitrust enforcement in the Bush Justice Department in the first decade of the 2000s. As he noted at an Antitrust Subcommittee hearing in May 2008, [p]reviously unthinkable mergers among direct competitors in many . . . highly concentrated industries affecting millions of consumers have been approved by the Justice Department, often over the reported objections of career staff. . . . In this era of rising prices and ever increasing consolidation, the need for vigorous enforcement of the antitrust laws has never been greater."

Sen. Kohl also played a leading role in the Judiciary Committee's confirmation hearings for nominees to be Assistant Attorney General for Antitrust in the Justice Department. These include the nomination of Joel Klein in President Clinton's administration, the nominations of Charles James, Hew Pate, and Tom Barnett in President Bush's administration, and the nominations of Christine Varney and Bill Baer in President Obama's administration. As he noted at the confirmation hearing for Bill Baer in July 2012, "the position of Assistant Attorney General for Antitrust carries with it a special burden, and a special responsibility. The companies over whom the Antitrust Division has jurisdiction have ample resources to hire skilled and talented counsel to represent their best interests. But no one represents the interests of the American consumer other than the Antitrust Division. If you are confirmed, millions of consumers will be depending on your efforts and your judgment."

## **International Antitrust Issues**

During his tenure on the Antitrust Subcommittee, Sen. Kohl devoted considerable attention to international antitrust enforcement issues, particularly with respect to the antitrust enforcement activities of the European Union's antitrust agency, the Directorate General - Competition of the European Commission (EC). As globalization of the international economy continues to increase, an increasing amount of American business activities and transactions affected the European market and were subject to the competition policies and enforcement authority of the EU.

Sen. Kohl explored three issues of concern identified by the American business community. First, there were allegations voiced by several American companies that transactions entered into by American companies were being reviewed with greater scrutiny and that efforts were being made to "protect" foreign nations' industries under the guise of competition policy. A second concern involved issues of procedure. American companies complained about the lack of transparency and procedural uncertainties in the international merger review process. Third, and perhaps most important, many antitrust experts and commentators were concerned with instances of divergence on the substantive standards applied by U.S. antitrust regulators and those of foreign jurisdictions, particularly the EU, when reviewing mergers and other antitrust issues.

Additionally, the Subcommittee focused attention on the problems faced by U.S. businesses by multiple, expensive, and potentially conflicting antitrust mandates by numerous international jurisdiction outside the EU, especially in Asia and the emerging economies of the third world. Concerns were raised on occasion by U.S. companies of irregularities in antitrust enforcement in various Asian nations, including Japan and China.

Sen. Kohl placed priority in resolving these issues, by among other things, meeting with several EU Commissioners for Competition and sending letters on international antitrust issues to the EU competition authorities. As he explained in a 2007 interview, "we have worked to harmonize U.S. and international antitrust enforcement . . . In the best of all possible worlds - which is hard to get at - you would have a concurrence between how we view antitrust issues and how the leading foreign antitrust authorities - such as the EC - view these issues. . . . Now, reaching this goal of complete harmonization will certainly be difficult and may not even be possible. But it seems to me that we should do a much better job of harmonizing international antitrust

enforcement than we do today, especially between the U.S. and EC antitrust enforcement agencies.”