

**Differential Pricing & Financing of Essential Drugs**  
**A WHO/WTO Secretariat Workshop**  
**Norway**

**Antitrust/Competition Law Considerations and Trade Law Considerations**  
**April 9-10, 2001**

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There follows a summary outline of the antitrust/competition law cautionary warning presented on April 9 and the regular presentation presented on April 10.

- I. Introduction.
  - A. Pleased to make these presentations at the invitation of the WTO Secretariat.
  - B. Not acting as counsel to the Workshop or to the WTO but rather appearing as an invited participant and speaker.
  - C. The antitrust/competition law cautionary warning is not intended to prevent legitimate discussion of important public policy matters.
- II. The Antitrust/Competition Law Prohibition Against Agreements Among Competitors that Restrain, Limit or Impede Competition.
  - A. All major antitrust regimes condemn horizontal agreements or cartels that restrain competition.
  - B. In the United States the antitrust laws contain criminal enforcement provisions, both as to companies and individuals, and provide for private actions for treble damages filed by any party (domestic or foreign) injured by an illegal agreement.
  - C. In the United States certain horizontal arrangements are unlawful *per se* and cannot be defended regardless of the objaslsvveor fmosvveor the



- IV. Relationship of Antitrust/Competition Laws and Intellectual Property Laws.
- A. The antitrust/competition and intellectual property laws generally share the objectives of enhancing consumer welfare and promoting innovation.
  - B. There is thus no inherent conflict between intellectual property protection and antitrust/competition law.
  - C. In the United States, there are circumstances in which the antitrust laws can limit the exercise of intellectual property rights, particularly where those rights are being abused or are being used to achieve leverage in a separate market from that covered by the intellectual property rights.
  - D. Similarly, the Federal Trade Commission has in recent years challenged agreements between pharmaceutical brand companies and generic manufacturers that allegedly restrained competition. These cases involved Abbot, Hoechst, and Schering-Plough (also Mylan Laboratories - a generic manufacturer).
- V. Possible Antidumping or Predatory Pricing Actions by Pharmaceutical Producers in Countries Which Are the Beneficiaries of Tiered or Discriminatory Pricing.
- A. The WTO Dumping Code and the antidumping laws of WTO members prohibit dumping where it causes injury to a local domestic industry.
  - B. Thus, where a pharmaceutical company sells at a lower price in a country in which there is a competing pharmaceutical producer, there can be an antidumping suit -- South Africa initiated an antidumping proceeding involving pharmaceutical products from India.
  - C. Where a country that benefits from tiered or discriminatory pricing has a predatory pricing law and a local producer, such laws may also potentially be invoked against a pharmaceutical company engaged in such pricing. Predatory pricing, at least in the United States, requires a showing of predatory intent, defined as below cost selling and capability of recoupment of the losses sustained from the below-cost selling.
  - D. The antidumping laws and the predatory pricing laws should not be of concern in connection with differential pricing in the absence of local domestic pharmaceutical companies.