

## Interview with Thomas Barnett, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

**Editor's Note:** In this interview, Thomas O. Barnett discusses the priorities for civil enforcement at the Antitrust Division, including insights about cartel enforcement, the importance of domestic coordination with state attorneys general, and the increasing collaboration with international enforcement officials. As the Deputy Assistant Attorney General, Mr. Barnett is in charge of civil enforcement for the Division and oversees three of the Division's civil sections.

When R. Hewitt Pate, Assistant Attorney General for the Antitrust Division, announced Mr. Barnett's appointment on March 31, 2004, he noted: "Tom's mergers and acquisitions experience, as well as his litigation expertise, will make him a valuable addition to the Division. . . . The Department is extremely fortunate to have someone of his intellect and expertise on its antitrust enforcement team."

Prior to joining the Division, Mr. Barnett was a partner in the Washington, D.C. office of Covington & Burling, where he served as Vice Chair of the firm's Antitrust and Consumer Protection Practice Group.

The Antitrust Source conducted this interview on May 9, 2005.



Thomas O. Barnett

**ANTITRUST SOURCE:** Let's start with some basics. What falls under your bailiwick as Civil Deputy?

**TOM BARNETT:** I have responsibility for three of the Division's six civil litigating sections: Lit II, Lit III, and the Networks & Technology section. As you know, our sections are organized by industry, so my three sections cover, just as examples, the defense industry, the waste industry, media, newspapers, data networks, and computer software. My responsibilities cover both mergers and nonmerger issues that arise within those sections.

**ANTITRUST SOURCE:** You've been with the Antitrust Division for about a year. What are some of the highlights or your accomplishments in your first year?

**BARNETT:** I would say a few things, the first of which is hard to convey to an outsider. We have focused a lot of time and attention on the management of investigations, and we've made some progress in managing matters to a prompt resolution, whichever direction they go. I think it is important for all involved to try to reach an answer quickly, and then to move forward.

For example, there have been some consent decree violation matters in the waste industry that we resolved in a few months without extensive document productions, which is shorter and less burdensome than the average civil nonmerger investigation. In these cases, the prompt resolution also brought a quick stop to what we believed were ongoing violations.

There have also been some merger investigations in which the staff—implementing the merger review process initiative that Charles James rolled out a few years ago—was able to reach a quick decision. In those cases the staff was able to get information quickly, identify and evaluate

issues, and close the matter within the initial 30-day HSR waiting period, avoiding the need to issue second requests. Many of those matters were close calls that once upon a time would almost certainly have led to second request investigations, but the good work of the staff and the cooperation of the parties enabled us to shut down the investigations in a timely manner. In some instances, we issued second requests, but the staff focused on a few key issues and—again with the cooperation of the parties—we were able to close the investigation based on a production of only a small fraction of the information covered by the second request.

Another area that bears mention is our dealings with other antitrust enforcement officials and agencies. Within the United States, we have worked on a number of matters with the offices of various state attorneys general. For example, in the *Oracle/PeopleSoft* matter several states were co-plaintiffs, and we had a very productive relationship that included not only coordinating and cooperating on traditional things like fact-gathering, but also preparing the case and bringing it to trial, and consulting afterward in deciding whether to appeal.

There are other matters, most of which are pending right now, so unfortunately I can't discuss them publicly, where we have been working with State AG offices. In some matters the state officials are helping us work through our issues and in some they are taking the lead, with us providing support.

Finally, the antitrust world in this day and age is global, and for me a highlight of my first year has been the opportunity to meet and work with officials from various competition authorities around the world. Those experiences have ranged from working on merger and intellectual property issues with representatives at the OECD, to discussing China's draft antitrust law with representatives from their government.

I also was fortunate to have the opportunity to help lead a conference among competition officials from Southeastern European countries—a group that is trying to establish antitrust enforcement regimes in economies where the values of competition are not exactly deeply entrenched. I spent about a week with these officials in Budapest discussing antitrust enforcement issues, and we all learned something from each other during the conference.

**ANTITRUST SOURCE:** Do you have any observations about the difference between private practice and government service?

**BARNETT:** I'll start with an observation about something that's the same. In both areas I've had the good fortune to work with highly professional people who are very capable, very dedicated, and very interested in antitrust. And that's certainly been my experience at the Division. I feel very fortunate to work with these folks.

In terms of differences, unlike private practice, working in the Division is all antitrust, all of the time, which is a terrific thing for somebody who enjoys being an antitrust lawyer. There is an incredible array of cutting-edge policy issues that we deal with across the various matters within the Division. One faces many challenges in private practice, of course, but the sheer variety of the matters that cross our desks at the Division—individual cases, industries, economic, legal, and policy issues, and so on—is unique to government practice. Here, it is a smorgasbord of antitrust issues unmatched in the private sector.

**ANTITRUST SOURCE:** In a speech you gave last fall, [[http://www.usdoj.gov/atr/public/speeches/speech\\_tbarnett.htm](http://www.usdoj.gov/atr/public/speeches/speech_tbarnett.htm)], in which you identified the Division's top three priorities, you said cartel enforcement was number one, merger review was second, and the promotion of objective stan-

*[T]he sheer variety of the matters that cross our desks at the Division—individual cases, industries, economic, legal, and policy issues, and so on—is unique to government practice.*

dards for evaluating monopolization and other single firm conduct was third. Let's talk about them individually, starting with mergers.

How would you describe the Division's merger enforcement priorities going forward?

**BARNETT:** Starting with merger review, our priority is to identify transactions that we think are likely to substantially lessen competition. We don't have a particular priority on a set of industries, or a particular kind of case. But we are focused, as the Division has been for a number of years, on improving the process, on trying to identify as quickly as possible the cases that really do require close scrutiny, ideally within that first 30-day period. I think I previously mentioned that we have had some success in that regard.

Where we've decided that there are serious issues, our second priority is to be transparent with the parties in terms of what we're doing, what our issues are, and then try to enable the parties to educate us about their responses to our concerns. Where we conclude that a merger is likely to be anticompetitive, our priority is to bring a challenge and fix the problem as efficiently and expeditiously as possible.

*Customer testimony is most effective when it is concrete, based upon personal experience, and detailed enough to convey the richness of that experience to the court.*

**ANTITRUST SOURCE:** The *National Law Journal* recently chose *Oracle/PeopleSoft* as the top defense win in 2004. I believe you were quoted in the article as saying "you don't see any fundamental need to change the Division's approach." What lessons, nonetheless, should be taken from the *Oracle/PeopleSoft* case?

**BARNETT:** One lesson is that even when you have a sound case, the government doesn't always win. More generally, I do not see the decision in *Oracle/PeopleSoft* as indicating any fundamental flaw in our theory or the way that we presented the case.

We had a sound theory, we had solid evidence in terms of not just customer testimony, but also internal documents from the company, and expert economic testimony. The combination of all of this evidence was certainly an adequate basis for the judge to have concluded that the merger was likely to substantially lessen competition.

I respect the fact that the judge did not reach that decision. Although I don't agree with the decision, that's his role. However, the fact that the Division and a particular judge did not agree on how to interpret a particular body of evidence does not mean that we need to make any fundamental changes.

**ANTITRUST SOURCE:** Let's turn to customer testimony. The judge in *Oracle*, as well as the judge in the FTC's *Arch Coal* case, essentially dismissed or at least took much less seriously the customer testimony that the government presented. What, if anything, should the Division and the FTC do differently in the future with regard to customer testimony? Can customer testimony still carry the day, or is it now essentially just evidence that supports the economic evidence that is presented in court?

**BARNETT:** I believe that the right customer testimony can still carry the day. Customer testimony is most effective when it is concrete, based upon personal experience, and detailed enough to convey the richness of that experience to the court. I don't think that's a new lesson. That's something we've always known.

As for the *Oracle* case, as I said, we disagree with much of the judge's factual findings. That disagreement includes the conclusions that the judge reached with respect to the testimony we presented from enterprise software customers. We think there was very specific testimony—for

example about the relative cost and suitability of products that Oracle argued were in the market—to which the judge decided not to give weight or credence. That, of course, was his right.

But as a general matter, I come back to the point that customer testimony can be very effective in educating the court about the industry and the needs of customers in that industry. Concrete illustrations of customers' prior purchasing habits, as well as examples of where they have tried to reach out to other suppliers in the past, can be very effective in educating the judge about the factual background of the market and the industry and in providing a basis from which to infer the potential anticompetitive effects of the transaction.

**ANTITRUST SOURCE:** The EU antitrust regulators approved the Oracle/PeopleSoft deal. Did the Division have discussions with the EU regulators before filing the *Oracle* case?

**BARNETT:** I was not here at the time but I can say that as a general matter, the Division and the European Commission certainly consulted on the *Oracle* case throughout the process, as we do with many cases.

**ANTITRUST SOURCE:** Looking forward, do you see the Division having different priorities for coordinated versus unilateral effects cases, perhaps making one or the other a priority?

**BARNETT:** No. We take the cases as we see them. Our mandate or charge, if you will, is to look at the transactions that people in the marketplace put together or propose and to decide whether they are likely to substantially lessen competition. If the facts lead us to a unilateral effects analysis, that's what we'll do. If they lead us to a coordinated effects analysis, then that's what we'll use. And I should point out that those two theories, or labels for types of theories, are not mutually exclusive. There could well be cases in which we pursue both types of analysis.

**ANTITRUST SOURCE:** And the Division still intends to pursue both?

**BARNETT:** Absolutely.

**ANTITRUST SOURCE:** Is vertical merger enforcement likely to be a priority or a focus of the Division?

**BARNETT:** Again, we take our cases as they're presented. We certainly do look at vertical issues. I routinely see and discuss with staff potential concerns from vertical aspects of transactions. At the end of the day, all anticompetitive effects are horizontal, so horizontal mergers are, in my view, more likely to present serious competition issues, all else being equal. But that doesn't mean that we ignore vertical issues, or that we wouldn't bring a vertical case. We have done so in the past.

**ANTITRUST SOURCE:** Let's turn to monopolization. Again, in your November speech you identified promoting objective standards for evaluating monopolization and other forms of single firm conduct as a priority. You spoke about attempting to clarify the line between harmful exclusionary conduct and beneficial hard-nosed competition. What's the Division doing to pursue this goal or priority?

**BARNETT:** In our investigations we try to employ a standard that focuses as much as possible on objective criteria. In general we look to whether the conduct at issue makes any economic sense

for the firm under investigation but for the tendency of that conduct to reduce competition. In cases where there are legitimate reasons for engaging in a particular kind of activity, that justification is going to give us pause in deciding whether to challenge the activity as an antitrust violation.

This approach generally reflects the hierarchy of priorities I talked about last fall in my speech. As I discussed there, the issue with single firm conduct, or unilateral monopolization allegations, is that it can be difficult to distinguish conduct that is procompetitive from conduct that is not. We should not simply go after successful companies on the theory that the fact of their success somehow proves that they are acting anticompetitively. We want all firms—even those with large market shares—to compete aggressively.

Given that it can be difficult to distinguish between aggressive, procompetitive behavior and conduct that is exclusionary, we want to be particularly cautious in our enforcement decisions in this area. And so we are trying to live up to that standard by identifying those cases where we would be doing good for consumers by pursuing an antitrust enforcement action.

**ANTITRUST SOURCE:** In the amicus brief in *LePage's*, part of what the government essentially seemed to be saying was the Supreme Court shouldn't take the case up at this time because the law is not sufficiently developed in the application of Section 2 to bundled rebates or the like. Can we expect anything from the Division in this regard going forward? Is the Division trying to clarify the law in that area?

**BARNETT:** That's certainly something that, from my perspective, the Division ought to try to do. I personally think that the law on bundled rebates is quite muddled right now. If you try to parse through the Third Circuit's *LePage's* decision, it's difficult to discern exactly what the rule is, or what the proper analysis is. So some clarification in this area would be a very good thing.

**ANTITRUST SOURCE:** Do you scout for appropriate cases to bring? In the search for clarification do you take advantage of cases that come up, or has the Division given some thought to how it might clarify the standard on its own?

**BARNETT:** In the first instance the Division does look for appropriate cases that present the issues in a manner that will enable a court to provide some clarity—for example, cases that rest on clear and thorough factual records. Aside from that, we take advantage of our ability to further our policy agenda through speeches and articles. *LePage's* in particular raises issues that require some significant thought and study, so I wouldn't limit what we do in that regard. But good cases are always a prime vehicle for trying to move the law forward.

**ANTITRUST SOURCE:** Cartel enforcement, as you've mentioned, is the Division's top priority. Do you see the Division's stepping up of enforcement efforts in the past few years as having a deterrent effect on cartel behavior?

**BARNETT:** I do, personally, but I want to start by saying that I am, of course, a Deputy for civil enforcement. Scott Hammond is the Deputy for criminal enforcement, and as a general matter I refer people to Scott and defer to Scott when it comes to matters of criminal enforcement.

Having said that, cartel enforcement is indeed the top priority of the Division, and with good reason. Cartels are nothing less than assaults on our free market system—the Supreme Court recently called them “the supreme evil” of antitrust. So the Division is pleased that, in addition to

the enforcement successes we've had in the U.S., we've had a fair amount of success in encouraging other jurisdictions around the globe to recognize that cartel enforcement is an important component of antitrust enforcement. We have worked to persuade other enforcers that it should be their top priority as well, and we have encouraged them to adopt tough penalties. We have also advocated the importance of effective leniency programs to help identify and root out often-clandestine cartel behavior.

In this regard, Commissioner Kroes in the European Commission has spoken about cartel enforcement as a top priority, and that's very gratifying to us. Australia, to cite just one other example, has announced that it's planning to adopt a criminal provision for its cartel enforcement program.

All of these things are extremely important in a global economy with global cartels. In such an environment it can be challenging for any one jurisdiction to play the role of solo enforcer. As more countries place a priority on cartel enforcement, and as penalties become suitably severe around the world, it will become more difficult for cartels to operate, and easier for the enforcers to detect and penalize them.

In this environment, it is hard for me to believe that there has not been increased deterrence of cartel activity. I can only point to anecdotal evidence, but my impression is that the culture in the business community around the globe is much more aware of and likely to respect the possibility of cartel enforcement than was the case, say, ten or fifteen years ago.

*We have long believed that criminal penalties, and prison sentences for individuals in particular, are the most effective deterrent to cartel activity.*

**ANTITRUST SOURCE:** To follow up, last year the President signed legislation that increased criminal penalties for both individuals and corporations. Do you think that the increase in criminal penalties has had an effect on cartel behavior? And, for example, the Division's amnesty program?

**BARNETT:** It's kind of early to draw conclusions, but I think it inevitably will have an increased deterrent effect. We have long believed that criminal penalties, and prison sentences for individuals in particular, are the most effective deterrent to cartel activity. As you know, the Division places a high priority on ensuring that the executives responsible for illegal cartels go to prison.

So increasing the maximum prison term for antitrust crimes from three to ten years, along with the recent adjustment by the Sentencing Commission of its guidelines to help implement that increase, should enhance the deterrent effect of our cartel enforcement program.

**ANTITRUST SOURCE:** Criminal enforcement often seems to be focused on, and public attention is drawn to, the international behavior of multinational cartels in high-profile industries. Is the less glitzy, smaller price-fixing and bid-rigging conduct also a criminal enforcement priority for the Division?

**BARNETT:** Yes, certainly. It may not get as much press nationally or around the world, but it's certainly a priority.

**ANTITRUST SOURCE:** Absent from the Division's top three priorities that you outlined is noncriminal multi-firm conduct. Are Division resources focused in this area, as well?

**BARNETT:** We do have Division resources addressing this area. For example, we recently brought an action against the Kentucky Real Estate Commission over regulations it has promulgated that prohibit real estate brokers from offering rebates and other inducements to attract customers. We have other real estate investigations going on around the country. We also have provided our

views regarding some of the legislative and regulatory activity that is underway in this area at the state level. Those efforts go a bit beyond your question, but most of this activity is driven by realtors—what we might call traditional, full-service realtors—who are trying through various mechanisms to respond to competition from new brokerage models.

I should also mention our enforcement efforts involving the collective—and potentially anti-competitive—conduct of health care providers and hospitals in communities across the country. Those efforts fall within the bailiwick of my colleague Bruce McDonald, the Deputy Assistant Attorney General who has responsibility for the Division's other three civil sections, so I am not in a position to discuss them in detail. But they are additional examples of the Division's enforcement activities in the area of "noncriminal, multi-firm" conduct.

*[T]here's been great*

*progress in terms*

*of substantive*

*convergence between*

*the United States and*

*the European*

*Commission.*

**ANTITRUST SOURCE:** Let's turn to international issues. You have already identified and discussed your involvement and the Division's involvement with international antitrust enforcement. Let me ask a couple of specific questions about that area.

Let's talk about convergence with the EC. Do you think that there has been and will continue to be substantive convergence between EC competition enforcement and antitrust enforcement here? And specifically in merger enforcement, but also in nonmerger enforcement?

**BARNETT:** We are now in the realm of another of my colleagues, Makan Delrahim, the DAAG responsible for international issues. From my own perspective, yes, I think there's been great progress in terms of substantive convergence between the United States and the European Commission.

Taking mergers first, as you know the EC recently revised its substantive test in a way that can be construed as consistent with the substantial lessening of competition test used in the United States, the United Kingdom, Australia, and elsewhere.

In our dealings with the EC, both on specific cases and in discussions about broader antitrust policy issues, we find ourselves saying basically the same thing. At a recent OECD meeting I was listening to Commissioner Kroes talk about enforcement priorities with special emphasis on criminal cartel enforcement, and I found myself thinking that Hew Pate could have given the same speech. It was gratifying to see convergence at this senior level, in addition to experiencing it on a more day-to-day level.

The revisions to the technology transfer block exemption are another example of where they have moved in a direction that's consistent with us, as is their movement towards having fewer per se rules. And, of course, the creation by the EC of a senior economist position within the Commission, along with their general recognition of the importance of economic analysis in effective antitrust enforcement, is something the Division has applauded.

I am not suggesting that we never reach different conclusions, but the terms of the discussion and the analytical framework are closer than they have ever been.

**ANTITRUST SOURCE:** When we talk about collaborative work between the U.S. and Europe, do you see that specifically at the staff level, or do you see that at your level, or both?

**BARNETT:** I have to say that on individual case matters I rarely see it at my level. It takes place principally at the staff level, and that is, I think, a reflection of the substantive convergence that we were just discussing. In the time that I've been here, the two sets of staff have almost always reached consistent results in their analyses, and where you have agreement like that there's simply no need for me or another deputy or for Hew Pate to get involved.

Are there specific cases where we are coming out differently? Clearly, yes—*Microsoft* is one example of that. Sometimes we come out the same way in terms of liability, but come out differently in terms of remedies. But we think we're making progress in general both in achieving greater convergence on what the scope of a remedy should be, as well as in avoiding conflicting remedies. And we've worked well with the European Commission, mainly at the staff level, in coordinating our remedies so that the parties don't find themselves in a bind—unable to satisfy one jurisdiction without violating obligations in the other.

**ANTITRUST SOURCE:** Switching back to the the U.S., to what extent is the Division involved in the Antitrust Modernization Commission's activities?

*[C]ompetition is the best way to promote not only consumer welfare, but also many of the long-term goals that are often cited as excuses for setting the antitrust laws aside . . .*

**BARNETT:** In addition to contributing a Commissioner—my fellow deputy Makan Delrahim—Hew Pate provided a letter to the Commission in January setting forth suggested areas of focus, such as undertaking an empirical assessment of the benefits of antitrust enforcement, reconsidering immunities and exemptions, and evaluating the Robinson-Patman Act. Beyond that, in general we are open to discussions with the Commission and are ready to provide what help we can.

**ANTITRUST SOURCE:** Do you see any of the topics that were listed in Hew Pate's letter as being particularly significant or that you hope are addressed or focused on by the Commission?

**BARNETT:** I certainly agree that the Commission should study and hopefully recommend paring back some of the exemptions and immunities that are out there. As a general matter, I believe that competition is the best way to promote not only consumer welfare, but also many of the long-term goals that are often cited as excuses for setting the antitrust laws aside, such as increased employment and the fostering of an economy conducive to business growth. I think competition is the way to go.

Exemptions are rarely warranted in this day and age, and if the Modernization Commission can be instrumental in rolling some of them back, that would be helpful. One of the things that underscores this issue for me is when we talk with officials from other countries about preserving competition and not restricting competition, for example, to protect national champions. It is not helpful when they can say, "You all are not pure of heart. You have exemptions and immunities that you provide, as well."

The state action doctrine is another issue that I think is worthy of consideration by the Commission. There are some decisions out there that seem to read it too broadly. If states want to displace competition, they have the power to do so, but it should be done through a clear, express articulation of the state's policy, and the state must take upon itself the task of monitoring the market in which it has displaced competition. Short of that, the antitrust laws should apply.

**ANTITRUST SOURCE:** Do you currently see any need for new or revised policy guidelines in any area?

**BARNETT:** No, the merger guidelines are in good shape. And the remedies manual we put out last fall should provide some helpful guidance for practitioners and their clients. If there's a particular area you want to ask me about, that's fine, but as a general matter I don't see a specific policy area where we need to create a new set of guidelines.

**ANTITRUST SOURCE:** Let me just follow up on the merger guidelines. Is the Division working with the FTC on the merger guidelines commentary that's going to come out?

**BARNETT:** Yes.

**ANTITRUST SOURCE:** Do you see the commentary leading to or identifying areas for improvements in the merger guidelines in any specific areas? For example, entry is one area that people often talk about as maybe needing to be more industry-specific.

**BARNETT:** No. Let me just put it this way—the commentary is not intended to revise the guidelines, either expressly or implicitly. Our goal is to illustrate how we apply the guidelines and the principles behind them in the work that we do. And while the format has certainly not been completely worked through at this point, I envision some case studies, based where possible on actual cases that the agencies have handled. For example, you mentioned entry. We might describe a case in which, notwithstanding high market shares, we determined entry was likely to be sufficient to discipline potential anticompetitive behavior. In discussing the case, we might describe the key factors that we considered. Something along those lines, we hope, will provide more insight for people outside the Division and the FTC regarding how we apply these principles on a day-to-day basis.

**ANTITRUST SOURCE:** The Division, as you know, has a new policy for increased transparency in the decisions not to challenge mergers. Can you tell us a little bit about the Division's efforts here? How is it going? Can you think of any beneficial examples?

**BARNETT:** I do think it is a good policy and one that we intend to continue, and if possible expand upon. We obviously don't issue statements in every case that we decide not to bring. We try to identify cases that are of some interest. In some ways this is very similar to what I was just talking about with the merger commentary. If we have a particular case where entry was a key issue that enabled us to decide to shut down an investigation, a closing statement would give us an opportunity to explain how we reached that conclusion.

There are limits to what we can do in that regard. As you know, frequently much of the information we collect is confidential. Unlike cases that reach litigation in which information necessarily gets into the public record, if we never bring a challenge, the information we collect has to stay confidential, so there are limits to what we can say. We also need to be cautious about saying things in closing down an investigation that might be taken out of context or misconstrued in future cases, regardless of how many disclaimers we include.

But with that in mind, I think the more transparency that we can have the better off we all are. It enables counselors in the private sector to guide their clients to the right answer, and it makes our enforcement job easier.

**ANTITRUST SOURCE:** Improvement of the second request process is an area that FTC Chairman Majoras has some interest in. Is the Division focused on the improvement of the second request process? Are you working with the Commission on this?

**BARNETT:** We are focused on it, as well, and are discussing with the FTC what might be done to improve the process.

Of course, there are some tensions among the different positions taken by those who would seek to change the process fundamentally.

To the extent that people want to construe decisions like *Oracle* and *Arch Coal* as requiring plaintiffs to present fact-intensive, extensive, empirical analyses, and detailed testimony, et cetera, et cetera, that is likely to increase the burden upon the Division to put in a more detailed, fact-intensive case. Depending on how much time we have between filing the complaint, and when we go to trial—which may not be very long—that requirement will in turn make it more difficult for us to pare back what we ask for during the second request process.

So, while we very much would like to find ways to reduce the burden on the parties and on the Division for the vast majority of cases that never lead to a challenge—and for that matter for those that never see the inside of a courtroom for anything other than a consent decree—we also need to bear in mind the Division's responsibility to be in a position to present an effective case if and when that is necessary.

**ANTITRUST SOURCE:** There seems to be a decline in the number of business review letters that are issued yearly. In 2000, for example, there were 15 letters issued, I believe. And in 2004 there was one letter issued. Why is the number decreasing? Is it because they are less helpful? Is it because they're becoming harder to issue, or are people just asking for them less?

**BARNETT:** I suppose I could try to claim that we're being so successful in our transparency efforts that they aren't necessary, but I'm not sure I could prove that.

I would say—and this is impressionistic, I don't have a firm basis for drawing a conclusion—that there are a couple of factors driving that trend. I don't think they've become less useful or less easy to get. I think to some extent economic conditions affect the volume of requests for business review letters.

You mentioned 2000. As you know, that year was at the peak of the late '90s boom, when there was a lot of business activity going on. I think you're more likely during boom times to see an increase in joint ventures, strategic alliances, and other behavior that is likely to prompt someone to request a business review letter. So it's not surprising to me that we saw a decline in those requests when the markets slowed down.

There has always been an issue with these requests, of course. We do what we can to expedite the process and to get an answer out there as quickly as we can, but the way the program is set up—and it's set up in a sensible way—those who request a business review letter cannot start the activity in question until the business review letter process is completed. Some people just can't wait for the process to play itself out.

Finally, I think people might be more comfortable making decisions on their own about where the line is as standards have become better understood. So they may be requesting fewer business review letters. At least that's my impression.

**ANTITRUST SOURCE:** What is your view of the current balance between federal and state enforcement?

**BARNETT:** I believe that there's a role for both to play here, one that in recent years has worked reasonably well. I mentioned the Oracle/PeopleSoft investigation and trial as a good illustration of cooperation between the Division and the offices of the various state attorneys general.

I do think it is important that we coordinate with the states when they are involved in the same matters as the Division because it does not make sense for parties to have to deal with 2, 3, 4, or 12 different processes. That's unnecessarily burdensome and confusing for everyone involved. A certain degree of inefficiency is perhaps an unavoidable reality when it comes to multinational transactions, but I would hope we could keep things relatively efficient within the U.S., especially for matters that don't raise uniquely local issues.

**ANTITRUST SOURCE:** In reviewing the DOJ Web site, there seems to be quite a lot of "advisory outreach activity"—amicus briefs, letters, testimony, and the like—often in state fora. Does that fall within your bailiwick?

**BARNETT:** Some of it does. For example, the real estate matters I mentioned—the Division's recent letters to the Oklahoma legislature and the Texas Real Estate Commission—fall within my sphere of responsibility. Another example that arises frequently is the unlicensed practice of law. You probably won't be shocked to hear that there have been efforts to enact or promulgate definitions of the "practice of law" that unduly restrict competition. Our Networks and Technology section leads our advocacy in this regard. We work closely with the Federal Trade Commission on these issues.

More generally with respect to "competition advocacy," the Division has a long history of communicating with other federal agencies, and state governments. We seek to promote or defend competition by educating federal, state, and local officials about the competitive consequences of their actions so that they can make informed judgments in their efforts to serve the public interest.

**ANTITRUST SOURCE:** I think people are often just fascinated by how the agency works. Several times you alluded to the division of responsibility between the criminal deputy and the civil deputies, for example. Do you coordinate your activities? Does Hew Pate bring you together in policy meetings where you see if there are any issues that might straddle various sections? Or do you set-up a task force? In general, how do you and the other deputies and Hew Pate organize your work and keep in touch with each other?

**BARNETT:** We communicate and coordinate on a regular basis. We have periodic meetings, certainly. Every week we have a senior staff meeting in which Front Office personnel talk about the current issues that they have on their plate for the week. And through that mechanism we are generally aware of what everyone is doing. We also have an internal weekly report that summarizes major developments in the Division's more significant matters, upcoming decisions, and so on. Perhaps most importantly, David Higbee does a superb job as Deputy and Chief of Staff in coordinating all of the matters within the Division.

As to specific matters that might come up, fortunately the Front Office isn't a big place, and we all sit next door, across the hall, or around the corner from each other. So we don't have to schedule a formal meeting to consult with one another. It's like a practice group at a law firm. We're all right there, and the staff for the most part isn't far away. So I can easily consult with Scott Hammond on whether a particular multi-party Section 1 investigation that one of my sections is conducting should be pursued criminally. Bruce McDonald and I talk on a regular basis about the various civil merger and nonmerger enforcement issues that we face. And all of the deputies meet periodically with Hew to talk about policy issues, internal management issues, or whatever needs

to be addressed at that particular point in time. So, there is a lot of communication, and from my perspective it works fairly well.

**ANTITRUST SOURCE:** Because a lot of the Division's activities rely to a great extent on economic theory, do the lawyers share responsibility with the economists in deciding whether an activity would or wouldn't lead to an increase or decrease in competition? Who has input into that process?

**BARNETT:** With respect to the Division's lawyers and economists, economic analysis is such a fundamental part of what we do that it's hard for me to think of a matter in which I have been involved where I have not actively consulted with the economics group.

**ANTITRUST SOURCE:** Looking ahead, what do you think is the number one challenge for the Division over the next six months to a year?

**BARNETT:** Well, you ask about the Division, so I will answer that as best I can, with the caveat that I'm only responsible for a portion of the Division under the leadership of Assistant Attorney General Pate. I think our number one challenge is to continue our cartel enforcement efforts, not only in the United States but around the world. We have been successful in encouraging other countries to adopt or strengthen their cartel programs, to enhance penalties, and to adopt effective leniency programs, which are such a potent investigative tool in cartel enforcement. That has been a challenge, albeit a rewarding one, and it's one that I hope we can continue to meet.

I'll also answer the question with respect to myself and the civil enforcement activities for which I'm responsible. There are indications that merger activity is picking up, and our priority and our challenge is to stay on top of that, to continue to identify those cases that we can quickly allow to proceed, and in situations where we conclude that a transaction is likely anticompetitive, to put together the best, most persuasive case that we can, and to try to fix the deal as quickly and expeditiously as possible.

**ANTITRUST SOURCE:** Is there anything further you'd like to add to the conversation today?

**BARNETT:** I had heard very good things from people who had worked in the Division about the ability and the professionalism of the folks here, particularly the career staff, and about the interesting issues that you get to tackle in a job like this one. My experience at the Division over the past year has certainly lived up to those descriptions—in many ways it has exceeded them—and I feel very fortunate to have been given the opportunity to serve here. ●