
Interview with U.S. Senator Herb Kohl [D-WI], Chairman, Antitrust Subcommittee

Editor's Note: U.S. Senator Herb Kohl (D-WI) has played a key role in helping to shape U.S. antitrust policy for many years. As a member of the Senate Judiciary Committee since 1989, he has taken a consistently active role in developing antitrust legislation and participating in oversight of the antitrust enforcement agencies.

Senator Kohl has served as the Ranking Minority Member for the Judiciary Committee's Antitrust Subcommittee since 1997, and served for a time as the Chairman of the Subcommittee from June 2001 until the end of 2002. With the election last fall, and the change in control of the Senate, Senator Kohl has once again become Chairman of the newly constituted Subcommittee on Antitrust, Competition Policy and Consumer Rights.

Senator Kohl grew up in Wisconsin, received his bachelor's degree from the University of Wisconsin-Madison, and his masters degree in business administration from Harvard University. Before being elected to the Senate in 1988, he helped to build his family-owned business, Kohl's department stores.

Associate Editor Larry Fullerton and Editorial Chair Mark Whitener conducted this interview for ANTITRUST. We thank Seth Bloom and Jeff Miller, Senior Counsel and Chief Counsel on the Antitrust Subcommittee respectively, for their invaluable assistance with this interview.

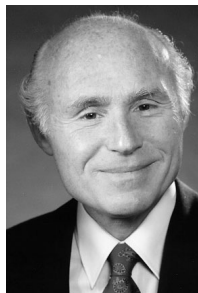
ANTITRUST: Senator Kohl, congratulations on the results of the election and on your appointment as Chairman of the Antitrust Subcommittee. And thank you very much for taking the time to talk to us today.

Perhaps we could begin by noting that you have an MBA degree, not a law degree, and that you have a background in business. Do you feel that your business background helps you to sort out the antitrust issues that come before the Subcommittee?

SENATOR KOHL: Certainly. I think that I bring a unique perspective to this issue.

Before coming to the Senate, I was a businessman, not a lawyer. I want to make that clear at the outset. And so, it is sometimes easy and sometimes not so easy for me to understand all of the technicalities of antitrust law because many of these technical issues require a legal background.

But despite that, I think I do a good job on this Subcommittee. My 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.



I try to bring my strengths and my point of view. As a businessman, I am very familiar, comfortable, and instinctively appreciative of our particular type of capitalism and how it works and how it should work in the interests of the people who buy—consumers—as well as the people who are engaged in capitalism by way of their business activities.

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 best opportunity to buy goods and services at the best prices as the result of a healthy, competitive, and vibrant economy. And in my non-legal way, that's the way I tend to approach this assignment.

I am sure that the ranking member or chairman that I've worked with on the Committee has appreciated the fact that I'm not an overly "lawyerly" kind of a person. It enables us and our staffs—both majority and minority—to get along well, not to look for areas to be disruptive about, but to look for ways in which we can cooperate and find common ground and move a balanced agenda.

And it is not hard, I think, to find chairmen like Mike DeWine who I was fortunate to work with in the last ten years who see it that way. And I hope and expect that Orrin Hatch and I now will get along fine and be able to move an agenda that is in the public interest.

One of the things that I hope I can work on, with Senator Hatch's support, is the promotion of generic drug competition in the marketplace.

This is so important to me because the more vigorously we can push generics, the more money we can save consumers. And it's huge.

ANTITRUST: You mentioned Senator Hatch, who will be the Ranking Republican on the Antitrust Subcommittee. In the past, the Subcommittee has been seen as unusually bipartisan in its approach. Do you expect that to continue?

SENATOR KOHL: Yes, I very much do hope and expect that Senator Hatch and I will be able to pursue that kind of an approach. I've gotten along very well with him in the past. We've worked together for years and years on the Judiciary Committee, of which our Antitrust Subcommittee is a part. He served as Chairman of the Judiciary Committee for many years until 2004, while I was serving in the minority on the Committee, and we always had an excellent working relationship.

It's been my observation that Senator Hatch has always looked to me as one of the people on the other side with whom he could reason and find common ground. I think he would say that I'm the last person he thinks of—or hopefully I'm the last person that he thinks of—as just a reflexive-type Democrat.

When there's an issue, he can talk to me. We can talk together. And he's reached across that divide on the Committee to reason with me and find ways in which we can cooperate. A couple of examples—we co-sponsored Tunney Act reform to ensure that the courts were giving meaningful scrutiny to Justice Department antitrust settlements. And just a few days ago, we sent a letter together asking the Justice Department to take a close look at USAirways proposal to acquire Delta Airlines, a proposal which they have since abandoned.

I recognize that Senator Hatch has a very intelligent legal mind. And he's got a lot of experience. He does approach things for what he is, which is a very fine lawyer. And I think he's been considered from time to time as a potential Supreme Court nominee, which is a great credit to him and attests to his background and scholarly approach to the law and legal issues.

So he and I will have to maybe work together a little bit to come to understand each other's styles. But having said that, we're good friends. We get along. I know in no way has it ever occurred to me to think to show him up or to try and

get the upper hand in some kind of an issue or an argument. And I would like to hope that my modest approach would encourage him to treat me in a similar fashion.

ANTITRUST: What are your thoughts at this point about the antitrust agenda for the Subcommittee?

SENATOR KOHL: We expect to have an active antitrust agenda this year. And I think we have several important issues that we probably are going to find common ground on.

One of the things that I hope I can work on, with Senator Hatch's support, is the promotion of generic drug competition in the marketplace. This is so important to me because the more vigorously we can push generics, the more money we can save consumers.

And it's huge. Right now generics are about 53 percent or 54 percent of all prescriptions that are filled. Using today's average price differential between branded drugs and competing generic drugs, for each 1 percent increase in the utilization of generic drugs, we can save \$4 billion a year. That's an enormous amount of money. So if our country could increase, for example, from 55 percent to 75 percent generic usage, you could save \$80 billion a year in the cost of medicine at various levels.

Pharmaceutical companies would obviously take the biggest hit, but most of all, it would save consumers a lot of money and save the government and taxpayers enormous sums. The government is the largest single purchaser of prescription drugs because of the Medicare Prescription Drug Benefit program.

So there's an enormous amount of money we can save, and I'm encouraged by the knowledge that you could save an enormous amount of money and not hurt anybody, except maybe very profitable companies' bottom lines.

When policy makers talk about saving money in Medicare, the unfortunate truth is that they are almost always talking about hurting somebody—whether cutting doctor payments, cutting reimbursements to hospitals, or reducing coverage to patients—things that truly do take a bite out of people or institutions or professionals. But, on the other hand, here we can theoretically, at least, save an enormous amount of money and not hurt anybody or harm the quality of treatment any patient receives, because the generic drug is the exact same medication as the brand name drug, as you know.

But anyway, that's the biggest competition issue for me and I hope we can work together with Senator Hatch on that. I hope that Senator Hatch agrees with its importance, especially as he is the author of the Hatch-Waxman Act, which was of great importance in bringing generic drugs to the market in the first place.

Oversight of the Justice Department is another very important issue. There's not been any oversight now for pretty much the length and time of the Bush administration. The last antitrust oversight hearing we held was in the Fall of

2002, the last time I was Chairman of the Antitrust Subcommittee. The previous majority in Congress did not place a priority on oversight over any part of the executive branch, which of course is not surprising, since we've had the same party controlling both branches of the government.

But now that we are in charge of Congress, and I'm the Antitrust Subcommittee Chairman, I hope that we can do a better job of oversight, which I think is in the public interest. It's not a witch-hunt or anything like that, but just oversight to make sure the Justice Department and FTC are carrying out their responsibilities to protect the consumer fully and are enforcing the law properly.

As we have found during the six years of the Bush administration, which also of course coincided with six years of Republican rule, oversight of the executive branch has been lax, and it has been to the detriment of our country, and, let me say, to the detriment, I believe, of the executive branch. I think with more oversight they might have done a better job in many areas over these past six years. And the Justice Department is one of them.

Another issue we want to take a careful look at is competition in oil and gas markets, in order to keep prices down, again, in consumers' best interests. Prices have come down recently, but just before that we 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.

Well, that type of suspicion is not good for our democratic society, and we held several hearings on this issue last year and considered several legislative approaches to bring more competition to this vital industry.

While today the price of crude oil and gasoline is down from last year's record highs, it is still at historically high levels, so oil and gas competition remains a very big issue for us. For example, we're concerned about the fact that there's been no increase in refinery capacity in our country for over 25 years. Oil industry critics contend that the oil industry actually has an interest in keeping refinery capacity tight in order to gain market power to raise price. We need to look at this very closely.

And so there are many competition issues that are important in the oil and gas industry that need oversight.

In addition, we want to work to be sure that the airline industry stays healthy and competitive. We're concerned about mergers, consolidation, and loss of choice for consumers. If that occurs to an extent that's not healthy, it will of course result in higher prices for consumers.

And competition being the foundation of our business environment in this country, it's important to see to it that in the airline industry consolidation does not go beyond a point that it gives the surviving airlines the market power to raise price or reduce service to consumers. There's a judgment involved as to when one reaches this point, and different antitrust experts look at it differently. But I want to be sure

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that we do our job in seeing to it that airline consolidation is not allowed to go too far, however one would define that.

Another priority 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 their grains. Captive shippers believe they are held hostage by the fact that there's only one 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.

We're also worried about rising cable and phone bills. So telecom competition is also a big issue for us on the Subcommittee—increasingly so in this age, given the importance of telecommunications in 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. We on the Antitrust Subcommittee, as well as the antitrust enforcement agencies, therefore need to be very careful about further consolidation. Telecom services like Internet access, video, and telephony are absolutely vital to our economy and society, and we must avoid a situation in which a few large companies gain so much market power that they can charge consumers whatever they want.

Another important item on our agenda is oversight of hospital group purchasing organizations (GPOs). We'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 done a lot of work in that area. We don't want to let go.

We've made significant progress on this issue over the last several years, most recently with the GPO industry creating a new self-regulatory organization to eliminate anticompetitive and unethical business practices. So our oversight has worked well. The companies have changed their behavior as a result of us watching them. And they deserve commendation for that. But we have found that if you don't maintain some oversight over this industry, it backslides, and the progress you have made seems to slip away.

The GPO industry would prefer that we leave them alone, terminate our oversight, and go away. And we say we're not going away because we've found that once we remove our scrutiny the industry seems to go right back to where they were. So that oversight is important and we're going to continue that.

Those are some of the issues that we worry about and will focus on this year, but I'm sure there are others that Orrin Hatch and I will talk about. But anyway, that's where we are. Senator Hatch and I have worked together now for years and we feel pretty comfortable that these are the issues that we want to concentrate on.

ANTITRUST: Do you plan on developing and releasing a formal agenda for the Antitrust Subcommittee, as you did last year?

SENATOR KOHL: Yes, and when it is released, it will be available on my Web site—www.kohl.senate.gov.*

ANTITRUST: This is a very ambitious agenda, but of course you have started into it already. You have introduced legislation (S. 316) dealing with the generics patent settlements issue, and the Senate Judiciary Committee held hearings on this bill on January 17. What are the prospects and timing for this legislation?

SENATOR KOHL: This legislation—the Affordable Access to Generics Act—is very important to me. As I discussed earlier, one of my top priorities on the Antitrust Subcommittee this year is removing obstacles that prevent generic competition to brand name drugs.

This legislation is intended to end one anticompetitive abuse—brand name drug companies' paying large sums of money to generic drug manufacturers to settle patent cases in return for an agreement by the generic drug company to stay off the market. These agreements are plainly anticompetitive and should be forbidden. S. 316 will do just this—make these anticompetitive patent settlements illegal under antitrust law.

I am hopeful that this legislation has strong prospects for passage. We have assembled a bipartisan coalition in support of the bill, including Judiciary Committee Chairman Leahy, Senator Grassley, Senator Schumer, and Senator Feingold. We intend to proceed to Judiciary Committee consideration of this important bill as soon as possible and are very optimistic about the bill being reported favorably to the floor. Once that occurs, we will press for consideration of this measure on the Senate floor—and, while floor schedules are sometimes unpredictable, my colleagues and I will aggressively work for this bill's passage with the Senate leadership.

ANTITRUST: Can you be more specific about your legislative agenda in the oil and gas industry?

SENATOR KOHL: As I mentioned earlier, bringing more competition to the oil and gas industry is another one of my key priorities. Consumers face very high prices for gasoline and other energy products, such as home heating oil, at the same time that the oil companies continue to amass record profits. Many of us suspect that failures of antitrust enforcement are at least partly to blame.

We've not decided precisely which pieces of legislation we'll introduce on this topic next year, but I'm happy to discuss those that I introduced in the last Congress.

One item of legislation that I have introduced every Congress since 2000—and expect to reintroduce shortly this year—is our “NOPEC” bill—the No Oil Producing and Exporting Cartels Act. This bill would bring the activities of OPEC under the jurisdiction of U.S. antitrust law. It would provide that any foreign conspiracy to limit the supply or fix the price of oil or any petroleum product that affects the U.S. market is illegal under U.S. antitrust law (just like any domestic conspiracy of this nature). Further, the bill would strip the protections of sovereign immunity and the act of state doctrine from nations that participate in such an anticompetitive cartel. Finally, the bill would authorize the Attorney General to file suit against any member of an oil cartel.

While we recognize that this bill would not be a panacea to prevent international price fixing in the oil market, it would give an important weapon to our government to combat illegal conduct by OPEC designed to raise the price of oil to the U.S. market. We would expect it would deter nations—especially those that wish to remain on friendly terms with the United States—that might otherwise cooperate with or join the OPEC oil cartel.

This bill attracted 16 co-sponsors last Congress. It has passed the Judiciary Committee in the last three Congresses, and last Congress it passed the full Senate as part of the 2005 Energy Bill. Unfortunately, it was stripped from the bill during the House-Senate Conference on the bill.

Another concern of mine is the enormous consolidation in the oil and gas sector over the last two decades and serious doubts we have that the antitrust enforcement agencies' (in

* *Editor's note:* Senator Kohl and Senator Hatch issued a press release announcing the Antitrust Subcommittee's agenda on January 30, 2007.

this case, the Federal Trade Commission) response to this consolidation has been adequate. In 2005, the Government Accountability Office released a study reporting that there had been over 2,600 mergers in the oil and gas industry since 1990, and found that this consolidation contributed to rising gas prices. It appeared to many of us that the FTC had in many cases not enforced the antitrust law with sufficient vigor to arrest this consolidation trend.

So last year I introduced the Oil Industry Merger Antitrust Enforcement Act. This bill, co-sponsored by Senator Specter, would increase the scrutiny of mergers in oil and gas industry in two respects. First, it would reverse the usual rule, and place the burden of proof on the merging parties to establish that their merger does not cause substantial injury to competition. Second, it would require the Justice Department and FTC to rewrite their merger guidelines to take into account the special conditions prevailing in the oil industry that make mergers more damaging in this industry—for example, difficulties in obtaining new supplies, refinery capacity limits, high demand for oil with few alternatives for consumers. I believe, if enacted, this bill would ensure that the FTC engage in the needed scrutiny of oil mergers and take action to prevent those that would be likely to harm competition.

Last year I also introduced a couple of non-antitrust oil industry bills. I authored a bill to address the refining bottleneck in our country by creating a strategic refining reserve, and another to authorize the Secretary of Energy to stop the export of gasoline and home heating oil when there are supply shortages. I would expect we'll be working on similar pieces of legislation this year.

ANTITRUST: Your mention of legislation specific to the oil and gas industry brings up an issue that is sometimes debated in antitrust circles. As you have noted, you have sponsored legislation specific to this industry, and the House has passed legislation making price gouging at the pump illegal. Some people in the antitrust community believe that we should be cautious about enacting antitrust laws that are industry-specific—as opposed to more general antitrust laws that apply across the board in all industries.

Are there other industries like the oil and gas industry, where you believe special rules might be necessary? How should Congress decide when generic antitrust rules should apply and when industry-specific rules should apply instead?

SENATOR KOHL: As you know, we have two basic functions in our work on the Subcommittee—first, oversight of the enforcement agencies' application of antitrust law and, second, the consideration of legislation to improve and revise the antitrust laws.

With respect to oversight, it seems to me that we need to approach each issue on its own merits and take a look at the specifics of each industry. I think it would be hard—for me anyhow—to think that there's a generality about how we

look at antitrust and competition issues in different industries facing different economic and competitive conditions. It would be hard to say that, well, this is the way we did it here so therefore this is the way we should do it there for another industry with totally different conditions. My own sense is that would be not doing justice to the job of oversight, because conditions are different in different industries.

But of course there are general principles of competition policy that we must apply to all industries when examining each specific situation. Which brings me to the second part of our work—antitrust legislation. I agree generally that there shouldn't be special antitrust rules for different industries and that antitrust law ought to be uniform to the greatest extent possible. On the other hand, we must recognize that there are certain exceptional situations when this principle should give way—such as with respect to the oil and gas industry where we're dealing with a commodity crucial to millions of Americans, such as gasoline and other petroleum products like home heating oil and natural gas. Protecting Americans from being victimized by anticompetitive conduct that drives up prices for the essential products they need to heat their homes and drive to work must take priority. It is our job to assure that government has adequate tools to protect consumers when we're talking about a commodity as essential as gasoline and petroleum, whatever our feelings about the importance of uniformity in antitrust law as a general principle.

ANTITRUST: We would like to turn next to the Tunney Act, the statute requiring the district courts to find that Department of Justice antitrust settlements are in the public interest before they are finalized. You've had an interest in the Tunney Act process for some time.

SENATOR KOHL: Right.

ANTITRUST: In 2004, Congress enacted amendments to the Tunney Act, which you sponsored, which were intended to make it clear that the courts are not just to rubber stamp DOJ settlements. Courts are to evaluate them in a meaningful way.

And last fall, you wrote a letter to the Antitrust Division expressing a concern about the DOJ's policy of allowing mergers to close prior to the completion of the court approval process. Is this an issue that the Antitrust Subcommittee might take up? You didn't mention it earlier as a part of your agenda.

SENATOR KOHL: Thank you for bring up this topic—I should have mentioned this issue at the outset. It is one of a few major issues we're looking at, and a very important issue.

I strongly believe that before these antitrust settlements are finally blessed by the 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

We in government must look to the public interest. We need to be very much on guard to see to it that media consolidation doesn't happen to the extent that we have a society where the Fourth Estate has lost its spontaneity, its vigor, and its ability to encourage debate and to get people thinking. It's so important to our democracy. Multiplicity of independent ownership and vigorous competition is what is essential.

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.

In authoring my amendment to the Tunney Act, I thought that the oversight given by the judicial branch—and the fact that the courts are yet another independent hurdle—would tend to make the parties pause in order to be sure that what they're doing is in the consumer's interest as well as in their own business interest. So the implementation of my Tunney Act amendments is very important to me. And you can expect the Justice Department's implementation of these amendments to be an important part of our oversight of the Department this year.

ANTITRUST: Can we talk about media consolidation? At times in the past, you have mentioned that this as an issue of concern, and that one of your specific concerns is that media consolidation may lead to a loss of diversity in viewpoints.

SENATOR KOHL: Yes, absolutely.

ANTITRUST: Our question is this: Is this an issue that should be taken into account by the antitrust enforcement agencies when they review a media merger or is that a role that should be reserved to the Federal Communications Commission or the Congress?

SENATOR KOHL: That's a good question. I suppose we each have a role.

It's such a very important issue, media consolidation, 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. So I believe both the FCC and the antitrust enforcement agencies, and our Antitrust Subcommittee, all have an important role to play in addressing this issue. Perhaps they're overlapping. Hopefully, they'll be collaborative.

Media consolidation is ongoing, and most industry observers think it will continue to take place. Naturally, media owners can be expected to consolidate as much as we

let them because that makes them more profitable. And that's all right for them to seek higher profits; after all, they are in business to make money for their shareholders. I understand that.

But we in government must look to the public interest. We need to be very much on guard to see to it that media consolidation doesn't happen to the extent that we have a society where the Fourth Estate has lost its spontaneity, its vigor, and its ability to encourage debate and to get people thinking. It's so important to our democracy.

Multiplicity of independent ownership and vigorous competition is what is essential. If we have just a few companies that control vast portions of the media, I cannot imagine how that's in the interest of anyone, except of course media owners who would profit greatly.

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. And I understand that this may make some people in the private sector upset because they think maybe you're going too far. But if you gave me the choice of going too far and not going far enough, in the effort to keep the media as independent and competitive as we can, I'd rather go too far than not go far enough.

ANTITRUST: So it sounds like you believe that this issue of preserving diversity of viewpoint should be a part—perhaps a big part—of the antitrust review.

SENATOR KOHL: Yes, very much so. I strongly believe that antitrust enforcement agencies should be aware of, and consider, the likely effects on diversity and the marketplace of ideas when they review a media merger.

ANTITRUST: Last year, when the Subcommittee released its antitrust agenda for 2006, the Subcommittee expressed an interest in how U.S. multinational companies have been affected by antitrust enforcement in foreign countries. Is this still an interest of yours? Do you anticipate any activity on this issue?

SENATOR KOHL: I think we need to revisit that and continue to work to try and harmonize the approach that's taken by the United States and international antitrust authorities.

Over the last several years, we've heard from several important U.S. corporations with international operations about the difficulties they face from foreign antitrust authorities in such places as Europe, Korea, Japan, and other jurisdictions. Companies must comply with burdensome and expensive filing requirements in dozens of different nations. Most disturbing is when foreign antitrust authorities occasionally reach different results than the U.S. antitrust agencies. We saw this several years ago in the proposed GE/Honeywell merger, which the U.S. Justice Department approved, finding no injury to competition, but then the European Commission blocked. It was disturbing to us that the Europeans would block a merger between two U.S. companies that the U.S. antitrust regulators had approved.

There have also been allegations that the EC and other foreign antitrust authorities have engaged in protectionism, and used antitrust as a tool to protect local companies against U.S. competition. If this occurs, it is unacceptable.

In the past, we have worked to harmonize U.S. and international antitrust enforcement. My staff and I met with Mario Monti, the previous EC Competition Commissioner, and his staff, and obtained assurances that antitrust enforcement will be conducted fairly and without the influence of protectionism. I myself held meetings several times with Mario Monti. We always had good meetings with Mr. Monti.

We will continue to work on this important issue and find ways to assure that U.S. companies are treated fairly by foreign antitrust regimes and to harmonize international antitrust enforcement to the fullest extent possible.

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. A common, easily understood international antitrust approach would greatly benefit U.S. companies so that they would know if a merger or acquisition passed muster here, it would pass muster at the EC and vice versa.

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. The present system—with all its inconsistencies and unpredictabilities—just isn't fair to U.S. businesses trying to do business overseas.

ANTITRUST: It's good to know that your interest in this issue continues.

SENATOR KOHL: It certainly does—we'll continue to work on this issue.

ANTITRUST: It's an important issue, and one that is likely to resurface when the Antitrust Modernization Commission releases its report in April, with its recommendations on

what to do to improve antitrust enforcement.

And that's a sort of a segue into a question about the Antitrust Modernization Commission itself. Have you had a chance yet to give any thought to how the Commission's report ought to be considered in the Congress as a matter of process? Would you expect to have hearings, for example? Either general or issue specific hearings?

SENATOR KOHL: We will study the AMC's recommendations and consider carefully their merits. There is no specific procedure required under the law, but the Antitrust Subcommittee will take a serious look at their recommendations in consultation with Senator Hatch. We'll perhaps have some hearings and try to sort through their recommendations. I think it would be premature for me to say anything more than that now.

ANTITRUST: The Supreme Court has agreed to hear a number of antitrust cases this term. One case that is attracting attention in particular is the *Leegin* case, which involves the issue of vertical price fixing. Many speculate that the Supreme Court has agreed to take this case because it wants to revisit the long-standing per se rule against minimum vertical price fixing, and treat such conduct more leniently. Is this issue on your radar?

SENATOR KOHL: I have some background in that area because I was a retailer before I came to the Senate. My family started Kohl's department stores. And I worked there for many years after we started the stores and until they were sold in the 1980s.

So what happened when we started Kohl's department stores is that we had a lot of trouble getting some branded merchandise, like Levi Strauss jeans. Levis wouldn't sell to us under the threat from the traditional department stores—or Levis would only sell to us if we would agree to maintain a certain minimum price. Levis didn't want Kohl's to buy the merchandise and then discount it, because if we did that, it would obviously incur the displeasure of their primary customers at that time, which were the traditional department stores.

So we had a hard time, initially, in getting all the variety of merchandise that we wanted because a lot of the branded manufacturers wanted us to maintain the price being charged by the traditional department stores. Well, little by little, stores like Kohl's broke that down and I think today this practice is gone pretty much entirely. But I'm familiar with that.

Generally speaking, I don't think a healthy competitive marketplace is made more vibrant by this vertical price fixing. It seems to me that vertical restraints like this make the market less vibrant, less competitive. I understand the point of view of the manufacturers—maybe they would feel more comfortable if they could control the price of their merchandise. But I'm not sure it even works in their interest.

But whether or not it works in their interest, I don't think

it works in the consumers' interests for vertical price fixing to be allowed. Consumers obviously had an interest in seeing that our stores were able to price jeans at whatever price we thought best, even if it was less than the price charged by the department stores. So my experience in business has taught me to be suspicious of vertical price fixing.

The case at the Supreme Court right now—the *Leegin* case—is going to decide whether or not vertical price fixing is automatically illegal. There's an attempt to change the rules. As I understand it, right now, it's automatically illegal—per se illegal. And that's been an important rule in antitrust for a long time.

So, everybody is waiting to see what Supreme Court does in this case. It's a little hard to comment on what the reaction would be before we see what rule will be coming out of the Supreme Court. We'll be watching it closely to see what it is.

ANTITRUST: Could we go back to the agenda that you set out at the beginning of our talk, to the subject of airline mergers? The Commerce Committee held a hearing on that subject on January 24. And it's a subject on which you have never proposed to legislate in the past, at least insofar as we recall.

SENATOR KOHL: Actually, we've been active in this area for many years. Back in 2000, United sought to merge with US Airways, a deal that very much concerned us because it would have substantially diminished competition at many key airports across the nation. And we did in fact introduce legislation to address this situation. Our legislation would have limited the slots any one airline could control at a slot-controlled airport. The merged United/USAirways would have exceeded these slots limits, so this legislation was aimed at preventing this situation. The Antitrust Subcommittee—with the active cooperation of then Chairman Mike DeWine—opposed this merger, and ultimately the Justice Department decided to block it. So we've long been concerned about consolidation in the airline industry.

ANTITRUST: What might be your approach this year to attempts at consolidation in the airline industry? Might there be hearings before the Judiciary Committee, as well as the Commerce Committee? Is there a potential for legislative intervention?

SENATOR KOHL: This is a topic that we're watching very closely. In recent weeks we've seen two major merger proposals, and we've been looking at those. A few days ago, I sent a letter on one of them, on AirTran's attempt to purchase Midwest, which is a very big concern.

And there was also USAirway's attempt to purchase Delta Airlines out of bankruptcy, which US Airways recently announced it was abandoning. Before it was abandoned, we sent a letter with Senator Hatch asking that the Justice Department scrutinize the deal very closely. We're very con-

cerned about any deals that would concentrate this industry so vital to millions of American.

As I said earlier, when you're reducing choices for passengers, you have the concern about whether that's going to cause a diminished amount of service, or raise prices, both of which we obviously don't want to see.

In the case of AirTran's acquisition plans, I think we have been very clear that if they follow through with their intent to purchase Midwest, they will face hearings in our committee. Midwest is my home state's local airline. It is headquartered and has its main hub in Milwaukee. And the quality of the service they offer to travelers is superior. Their service are considered to be among the very best in the industry and they have devoted customers like you rarely see in most businesses and certainly not in the airline business. People who use Midwest Airlines truly appreciate the quality of their service in every way—from the type of aircraft that they use with only two seats across to the frequency and numbers of destinations they serve from their hubs, which is so important to those of us who live in Milwaukee, to their competitively priced air fares.

So here we have an airline that offers reasonable prices, excellent service in terms of the pilots and the attendants, and gives Wisconsin residents like me excellent connections to the major business centers around the country. Most important to Wisconsin's economy, Midwest Airlines is a local business, employing thousands of people in high quality jobs, so this airline is really appreciated by all of us in our state.

And now AirTran wants to buy it. And so, we wrote a letter to AirTran, just couple of days ago. I wrote not only as a Senator, but also as a consumer. We think this would be a bad deal for consumers. We understand it might be good for AirTran's own business interests and bottom line, but it would harm many thousands of travelers in Wisconsin and elsewhere in terms of quality of service. And in fact, the merger is being opposed by Midwest management.

So as the head of the Antitrust Subcommittee, you can be sure that I'm going to be looking at this deal very carefully should it go forward, including having hearings at our Subcommittee regarding what this deal would mean for consumers and the thousands of people that rely on this excellent airline.

In general, we care about competition in aviation because this industry is so critical to our country's economy. Airlines are America. America is airlines. Of course, you can say that about other industries, too. But, with respect to airlines, in our modern economy and society, people have to travel. In today's modern times, the airlines are the lifeblood for our nation's commerce and our citizen's travel.

And therefore, those of us who regulate the industry or have oversight over the industry have to do everything we can to see to 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. That would be a very bad result for consumers.

And so, yes, I feel strongly about this issue. Now, we also need to recognize that there is a balance when we consider this issue—airlines, like all other companies in our economy, still need to make a profit. If you have a ruinous level of competition, so that airlines go bankrupt, then of course, that's not good for anyone, consumers included. And we've all seen the industry struggle with real problems in the last few years in the aftermath of 9/11 and with the sharp rise in jet fuel prices. So we need to be conscious of that too, and I think there's a balance that needs to be struck, and maybe my background in business is what helps me to appreciate that balance.

ANTITRUST: You've mentioned mergers and oversight in the same sentence several times. When you embark upon your oversight of the Department of Justice, do you plan to emphasize oversight of its merger enforcement activities or some other issue or all the issues across the board? Is merger policy of particular interest?

SENATOR KOHL: Absolutely. Mergers are certainly a particular interest. Antitrust enforcement advocates and consumer groups are concerned about the downturn in merger enforcement activities at the Justice Department, and we'll have to examine this issue carefully. Of course, mergers are the first

thing we notice off the business pages when it comes to antitrust. But we recognize that there are many other important antitrust issues, as well.

We're also interested in looking at how the enforcement agencies handle monopolistic and unilateral behavior by large firms. Several years ago, one of our main oversight issues was the settlement of the *Microsoft* case, which of course didn't involve a merger. We continue to be interested in how the agencies examine unilateral behavior by dominant firms.

We're also interested in other issues, such as the Justice Department's criminal enforcement activities. We've authored legislation over the last several years to strengthen criminal antitrust enforcement, such as increasing criminal penalties and giving the Justice Department the power to obtain wiretaps in criminal antitrust investigations, so we want to see how these legislative enhancements have been implemented. And, of course, as we've already discussed, we want to examine how the Justice Department has implemented our Tunney Act amendments. And antitrust enforcement with respect to each of the industries we've discussed today is obviously a major interest of mine. So all these topics are likely subject of our oversight activities this year.

ANTITRUST: Mr. Chairman, thank you once again for your time and for your very thoughtful comments, which will be of great interest to the antitrust community. ■

Legislative Scorecard

BY LARRY FULLERTON

A NUMBER OF STATUTES AND BILLS are mentioned in the interview with Chairman Kohl. The following is intended to supplement the interview by providing some details about these measures.

Generic Drugs. As mentioned during our interview, Chairman Kohl re-introduced his proposed Preserve Access to Affordable Generics Act (S. 316) on January 17, 2007. The Senate Judiciary Committee held a hearing on this measure on the day it was introduced, and on February 15, following our interview, the Committee approved it by unanimous consent. As reported, S. 316 would make patent settlements involving branded and

generic drug manufacturers illegal if, as part of the settlement, the generic drug manufacturer both receives "anything of value" and at the same time "agrees not to research, develop, manufacture, market, or sell" its new product. S. 316 is similar to a bill Senator Kohl introduced last fall (S. 3582), which saw no action before Congress adjourned for the year.

Oil and Gas. Senator Kohl introduced or co-sponsored two bills concerning antitrust enforcement in the oil and gas industry during the last (109th) Congress. One such bill was the "Oil Industry Merger Antitrust Enforcement Act" (S. 2854). This bill would have required the Department of Justice and the Federal Trade Commission to revise both the Horizontal and the Non-Horizontal Merger Guidelines so that they specifically address mergers and acquisitions in the oil and gas industry, taking into account certain "special conditions" in the industry, such as high inelasticity of demand, limits on refining capacity, and barriers to entry. This bill would have also reversed the burden of

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