



The Federal Trade Commission

Reflections in an Election Year: Challenges in Antitrust Enforcement

Remarks of Chairman Deborah Platt Majoras¹

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Good evening, and thank you for your warm welcome. It is a pleasure to return to your meeting and to see so many friends and colleagues. I congratulate award recipients, Joel Klein and Barbara Anthony. Joel, of course, admirably ran the Antitrust Division and contributed significantly to the development of modern antitrust. We have all watched with deepest gratitude as he has worked as Chancellor to give New York kids the education they deserve. And I had the pleasure of working directly with Barbara for much of my tenure at the FTC; she is a tremendous lawyer and a great friend.

We now are five days from Super Tuesday and a particularly important primary here in New York. With the process of selecting our next president well underway, it will not be long before we experience the consequent turnover at the federal antitrust agencies. So with my nearly seven years as an antitrust enforcer drawing to a close, I thought I might offer some

¹ The views I express here are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

reflections on what I have learned and what challenges will face our successors.

A. The Obligation to Pursue Tough Cases

To begin, the agencies have an obligation to pursue the tough cases. While we get the occasional outlier, for the most part it is only the closest of cases that will be litigated. Years of experience with the *Horizontal Merger Guidelines*, increasing transparency by the agencies, and an antitrust bar comprised of highly knowledgeable and effective counselors result in you knowing to some degree of certainty where on the spectrum your client's deal will fall. In FY 2007, of course, the FTC litigated three merger challenges in district court, but that was a high number when compared to the Commission's record over the past 20 years.² We also challenged 19 other transactions that resulted either in consent decrees or abandonment.

Having lost in district court in the three cases that we brought, it might be tempting to retreat from our willingness to bring the tough cases, taking consents when we can get them and folding quietly when we cannot. There is no question, of course, that we must listen to what the courts are telling us, perhaps especially when we lose, and we have been engaged, accordingly, in a process of assessment over the past several months. As I reviewed and analyzed our losses, as well as some DOJ losses from a few years ago, I began to wonder whether we have been doing a sufficient job of explaining and proving cases based on unilateral effects theory. To get some help in thinking through these issues, on February 12, 2008, the FTC will hold a one-day workshop on unilateral effects in which panels drawn from the bar, economics firms, the judiciary, and the academy will explore a range of analytical and evidentiary issues. For example, addressing market definition, particularly in a merger involving differentiated products,

² Twice in the last twenty years, the Commission has litigated two merger challenges in district court (2002 and 1990), but never three.

has proven to be a particularly thorny issue. But, market definition is no more than a means to an end – it merely provides an analytical framework to determine if the merged entity will have the ability to exercise market power. In a differentiated products case, such as *Whole Foods*, the central question is whether, for a substantial number of consumers, the parties are each other's closest substitute. If that is the case, then in essence the merging parties, under the *Merger Guidelines*' analysis, really become the relevant market. Unfortunately, that result may appear to judges like a gerrymandering of the relevant market.

One highlight of the day will be a short, mock closing argument of a hypothetical merger between ice cream manufacturers. Chief Judge Douglas Ginsburg and Judge Diane Wood will preside over the argument, and then discuss their reactions to the case. The argument and discussion will illuminate the way at least these two judges evaluate merger challenges, including the types of evidence and arguments they find persuasive, unconvincing, or even confusing.

This type of self-assessment is healthy. Retreating from our obligation to challenge a merger when the evidence shows that it is potentially anticompetitive is not. I thought that I would have the opportunity this fall to put my money where my mouth is when it appeared that the parties in two separate mergers intended to proceed with their transactions despite serious competitive issues. But, ultimately, those parties, too, decided to remedy the competitive problems rather than move toward litigation.

The obligation to bring tough cases should not be confused with a license to bring cases based on whims or political pressure. We cannot bring cases without solid evidence. The Commission's challenge to Whole Foods' acquisition of Wild Oats was in some ways a tough case, and we knew it; but we brought it because we were confronted with compelling evidence

that the transaction would harm consumers by eliminating competition between two uniquely close competitors. There was no doubt that Whole Foods and Wild Oats competed at a certain level with other supermarkets, and we never denied that. But what the evidence showed was that the competition between the parties was uniquely intense and that the elimination of that competitive dynamic would result in price increases. The case currently is on appeal in the D.C. Circuit.

While each case that we bring has a direct impact on the markets at issue, ultimately each case – win or lose – contributes to setting the standards for competitive business behavior. By bringing the tough cases, we contribute to defining the lines. Time and again, business people have said to me, “We can handle rules; we just need as much certainty as possible about what they are.” Each case, appropriately brought, represents another opportunity to explicate the rules.

Speaking of which, last week, the United States Court of Appeals for the Fifth Circuit upheld the Commission’s merger decision in the *Chicago Bridge* matter.³ The Commission had found that Chicago Bridge & Iron’s (CB&I) acquisition of its primary competitor violated Section 7 and Section 5, and the Commission ordered CB&I to divest the acquired assets. Given that appellate merger decisions are fairly rare, they provide particularly valuable guidance when we can get them.

B. Facts, Not Rhetoric

My second observation is that, whether in case work or policy work, we must avoid succumbing to the sirens of politics or rhetoric and tie ourselves to the mast of evidence. It is

³ *Chicago Bridge & Iron Co., N.V. v. F.T.C.*, --- F.3d ----, 2008 WL 203802 (C.A.5), 2008-1 Trade Cases P 76,019.

healthy that, fueled by high-profile cases like *Microsoft*, the American people and their elected representatives – and increasingly, citizens from around the world – understand that antitrust has an important role to play in our successful market system. But like any other generally positive force, it can be misused or just misunderstood. Outside pressure in major merger and conduct investigations has many sources – pointed editorials carefully cultivated by interested parties, Congressional hearings and press conferences, well-funded interest group submissions and public pronouncements. There may be a valid reason why, when I first entered law school, my image of antitrust lawyers was one of wonks huddled together with their theories and their numbers – ours is a discipline that requires a thorough, grind-it-out analysis of the facts, according to applicable law and sound economic theory. Do not mistake me to be saying that we do not have an obligation to listen to a variety of points of view; of course we must, particularly outside of our own discipline, lest we lose grounding. But in listening, we must pull out evidence and separate it from rhetoric or misimpression about what antitrust can and cannot do. Waver from that, and we are nothing more than a breeding ground for individual interests.

The reality is that sometimes the facts tell us things we do not want to hear. Markets, even when working competitively, may produce results we do not like. That is when we hear that antitrust is not working or that we are not applying it right. In no area is this more apparent than in petroleum markets. You may recall that I have been asked repeatedly to take some action to deal with rising gasoline prices – as was my predecessor and his predecessor. Given the importance of this sector to the American people, there may be no single industry in which we have devoted more resources. The Commission has investigated every major merger in the petroleum industry for the last quarter-century, challenging mergers at lower levels of concentration than in any other industry. Indeed, last year, we challenged Western Refining's

acquisition of Giant Industries but lost in federal court in New Mexico.⁴ In addition, we carefully watch for potentially anticompetitive behavior; our economists, for example, monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major urban areas, looking for evidence of any unusual price movements.

What we have not done, however, is fold to the pressure to “just do something” when our investigations have turned up no actionable conduct, or to support well-intentioned but misguided legislative attempts to control prices. Last April, the FTC hosted a three-day conference on Energy Markets in the 21st Century.⁵ Among issues explored by the expert panelists was the effectiveness of competition policy and enforcement as compared to other ways of trying to ensure adequate supplies of affordable energy, such as direct government regulation of output and prices. We looked back at the regulation of gasoline prices and refining of the 1970’s and viewed the resulting harm to consumers. The economics have not changed. Prices play a critical role by signaling producers to increase or reduce supply and signaling consumers to increase or decrease demand. Interfere with those signals and you hurt consumers in the process.

Some of you may recall that when I spoke to you two years ago, I took aim at proposed federal “price gouging” legislation (while members of Congress took aim at me). Versions of such legislation – which the FTC strongly believes would be harmful to consumers – were reintroduced last year. While these efforts may re-surface, especially the next time we

⁴ *F.T.C. v. Foster*, 2007 WL 1793441 (D.N.M.), 2007-1 Trade Cases P 75,725.

⁵ FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr.10-12, 2007), available at <http://www.ftc.gov/bcp/workshops/energymarkets/index.html>.

experience a crisis like Hurricane Katrina, I am pleased to report that the Energy Bill passed and signed into law in December did not contain “price gouging” prohibitions, as had been proposed.

Our recently concluded investigation of Google’s proposed acquisition of DoubleClick was one in which we experienced a great deal of pressure from outside parties. Interestingly, a lot of the pressure came from privacy advocates who, believing that Google would use data acquired in the merger in ways that would violate consumers’ privacy, urged the Commission to use our merger authority to block the transaction. As we ultimately explained in the Commission’s statement of reasons for closing the investigation, we cannot extend our merger authority beyond competition issues and, moreover, the privacy issues, if any, extended beyond just this merger and, in any case, could be dealt with under Section 5 if Google’s conduct met our standards for unfair or deceptive actions.⁶ Of course, we did also hear arguments about why the deal might be anticompetitive. Staff conducted an eight-month investigation and, I must say, did an extraordinary job of unearthing the facts and separating them from rhetoric, unsupported speculation, or concerns that cannot be addressed in a merger challenge.

C. Advocacy Is an Underappreciated Guardian of Consumer Welfare

While our enforcement work is and must be the first priority at the FTC, our advocacy work is critically important and, indeed, has the potential to impact even more consumers. A 1989 American Bar Association Report observed: “Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program

⁶ See Statement of the Commission Concerning Google/DoubleClick, FTC File No. 071-0170 [hereinafter Google/DoubleClick Statement], *available at* <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

exceed the Commission's entire budget."⁷ Because it garners fewer headlines, you may not even realize how often we advise Congress, state legislatures, courts, and other federal agencies about the likely effects of potential actions on markets and consumers. This advocacy work is a powerful tool for protecting consumers from special interests that seek governmental protection from unfettered markets and may yield some of the most impressive returns by preventing governmental interference with beneficial market mechanisms. Government-imposed restrictions are among the most durable and effective restraints on competition and, accordingly, are best stopped before enactment.

Just over the past year, for example, we have advised state officials in writing, at their request, on how consumers and competition likely would be impacted: in the health care area, by proposed limited service clinic regulations⁸ and by proposed regulations of pharmacy benefit managers;⁹ in the energy area, by regulation of gasoline prices¹⁰ and by divorcement

⁷ REPORT OF THE AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *in* 65 ANTITRUST AND TRADE REGULATION REPORT S-23 (Apr. 6, 1989). Previous qualitative evaluations of the advocacy program included work by Arnold Celnicker, who surveyed the recipients of state-level advocacy filings, finding that the comments were of value to the decision-making process. Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. L. UNIV. L. J. 379, 379-405 (1989). The FTC staff updated that survey about a year later with similar results.

⁸ FTC Staff Comment Before the Massachusetts Department of Public Health Concerning Proposed Regulation of Limited Service Clinics (Sept. 27, 2007), *available at* <http://www.ftc.gov/os/2007/10/v070015massclinic.pdf>.

⁹ FTC Staff Comment to the Hon. Nolie Pou Concerning New Jersey A.B. A-310 to Regulate Contractual Relationships Between Pharmacy Benefit Managers and Health Benefit Plans (Apr. 17, 2007), *available at* <http://www.ftc.gov/be/V060019.pdf>.

¹⁰ FTC Staff Comment to the Hon. Christopher R. Stone Concerning Connecticut S.B. 1336 to Regulate Retail and Wholesale Petroleum Pricing (May 2, 2007), *available at* <http://www.ftc.gov/be/V070008.pdf>.

requirements;¹¹ and in the professional services area, by restrictions on attorney advertising,¹² by overly broad definitions of the practice of law,¹³ and by minimum service requirements for real estate brokers.¹⁴

Congress, of course, often calls on the FTC to study issues that have important implications for competition and consumers. For example, earlier this month, we provided Congress with a report on the economic effects of the legal differences between the United States Postal Service and its private competitors, like UPS, FedEx, and DHL.¹⁵ This report is part of the ongoing process to reform the marketplace for competitive mail products, like expedited mail and parcel services. We found that Congressionally-imposed constraints on the Postal Service's operations, primarily those affecting labor costs and network configuration, increase its costs by around a half billion dollars annually.¹⁶ At the same time, we estimated that due to its unique legal status, the Postal Service enjoys an implicit subsidy of between \$39-\$117

¹¹ FTC Staff Comment to Councilmember Mary M. Cheh Concerning the District of Columbia Retail Station Act (June 8, 2007), *available at* <http://www.ftc.gov/os/2007/06/V070011divorcement.pdf>.

¹² FTC Staff Comment to Ms. Lilia G. Judson, Executive Director, Indiana Supreme Court, Concerning Proposed Rules on Attorney Advertising (May 11, 2007), *available at* <http://www.ftc.gov/be/V070010.pdf>.

¹³ FTC Staff Comment to Mr. Carl E. Testo, Counsel, Rules Committee of the Superior Court, Concerning Proposed Rules on the Definition of the Practice of Law in Connecticut (May 17, 2007), *available at* <http://www.ftc.gov/be/v070006.pdf>.

¹⁴ FTC and Department of Justice Comment to Governor Jennifer M. Grahholm Concerning Michigan H.B. 4416 to Impose Certain Minimum Service Requirements on Real Estate Brokers (May 30, 2007), *available at* <http://www.ftc.gov/be/v050021.pdf>.

¹⁵ *See* FEDERAL TRADE COMMISSION, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS (2007), *available at* <http://www.ftc.gov/os/2008/01/080116postal.pdf>.

¹⁶ *Id.* at 8.

million a year.¹⁷ We concluded that consumers would be well-served if Congress and the PRC acted to eliminate both of these legal differences, because they compound one another.¹⁸ If policy makers were to take both of these recommendations, we estimate that the USPS would likely enjoy lower costs of operation, which could be passed along to consumers in the form of lower prices. Further, with lower costs, the USPS could be a more effective competitor.

And, of course, sometimes we take on issues that we identify as those that have a significant impact on consumers and for which our analysis might add something to the debate or inform us in our future work. That was the case with our work on broadband connectivity competition policy – more commonly known as the “network neutrality” debate. Back in 2006, as the debate over whether access to the Internet should be regulated was reaching fever pitch, I did some work to try to learn what the issues were. What I found was an astonishing lack of substance in the debate. So, I formed an Internet Access Task Force within the agency, and within nine months, they had thoroughly researched the issue, held a public event in which more than 40 experts engaged in a lively discussion of the issues, and developed a comprehensive report that lays out the issues on both sides and recommends that any policy maker who treads into this area should do so with extreme caution in this young, dynamic marketplace in which no market failure has yet been demonstrated and to which the antitrust laws already apply.¹⁹ The Commission voted out that report last year, 5-0, and we have heard very positive feedback about its contributions to the debate.

¹⁷ *Id.* at 8-9.

¹⁸ *Id.* at 9.

¹⁹ FTC STAFF, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), *available at* <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

The opportunities for competition and consumer advocacy continue to grow, and I believe this will continue to be an important role for the Commission.

D. The Commission Must Be Efficient and Transparent

While our advocacy work turns a lens of scrutiny on others to encourage competitive marketplaces, the Commission must itself be willing to look inward to improve its effectiveness. To that end, it is critical to continue making strides in improving efficiency and transparency. Over the past few years, we have improved our technology capabilities, and that must continue. We have, for example, introduced an Electronic Filing System that allows parties to submit HSR Notification and Report Forms electronically via the Internet, and placed all of the FTC's administrative decisions online, making them readily searchable. We also have upgraded our IT systems, purchased blackberries for our managers, redesigned our website, and become one of the first federal agencies to use podcasts, blogs, and webcasts.

Our merger process reforms seem to be working well to reduce burdens on merging parties.²⁰ Aside from the specific terms of the reform initiative, Bureau of Competition staff, outside counsel, and the parties have worked constructively to implement the spirit of the reforms, and to negotiate modifications to second requests that ensure that the Commission obtains only the information that it needs, while minimizing the burdens on the parties.

We also have worked to promote transparency in our decision making, understanding that you and your clients are the first line of defense against antitrust violations. That, of course,

²⁰ Reforms to the Merger Review Process: Announcement By Deborah Platt Majoras, Chairman, Federal Trade Commission (Feb. 16, 2006), *available at* <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

was the aim of the Merger Guidelines Commentary we released in 2006,²¹ and that is why we are endeavoring to make formal statements explaining decisions to close investigations, particularly those that attract a high level of public interest, such as the Google/DoubleClick decision.²²

Still, there is more to be done; working for efficiency and transparency takes continued effort. Presently, for example, the Commission is in the process of upgrading its information technology systems to better accommodate electronic production of documents.

E. Health Care Antitrust Enforcement Must Evolve to Meet New Challenges

The Commission will need to devote increasing attention to the health care sector. Health care expenditures in the United States now total almost \$2 trillion annually, such that our health care sector represents 16 percent of GDP. And as costs continue to rise, ensuring affordable health care is an issue of paramount importance. Drug prices, in particular, are a significant concern for America's consumers. Ten percent of our total health care expenses are attributable to prescription drugs, meaning that prescription drugs constitute a \$200 billion market.²³ Given the amount of national resources that we expend on health care and pharmaceuticals, it is vitally important that consumers purchase these services in competitive markets. Whereas many throughout the world believe that competition has no place in health care, we respectfully, but firmly, disagree. Sound competition policy is a crucial tool to

²¹ FEDERAL TRADE COMMISSION AND UNITED STATES DEPARTMENT OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

²² See Google/DoubleClick Statement, *supra* note 6.

²³ See Aaron Catlin et al., *National Health Spending in 2005: The Slowdown Continues*, 26 HEALTH AFFAIRS 142, 149 (2007), available at <http://content.healthaffairs.org/cgi/content/full/26/1/142>.

constrain rising costs without harming innovation or quality, and we must adapt our thinking as the health care markets evolves.

We have had, of course, a steady supply of health care matters to address. Last year, after investigation and an administrative trial, the Commission ruled that Evanston Northwestern Healthcare Corporation's consummated acquisition of its important competitor, Highland Park Hospital, was anticompetitive because it resulted in substantially higher prices and a substantial lessening of competition for acute care inpatient hospital services in parts of Chicago's northern suburbs.²⁴

Late last year, we challenged Kyphon's acquisition of Disc-O-Tech, a company that represented the only significant threat to Kyphon's monopoly position in its minimally invasive treatment for vertebral compression fractures, which typically result from osteoporosis.²⁵ As compared to previous products in this market, Kyphon's product offered a significantly improved safety profile, and rapidly attained a nearly a 90 percent market share. Disc-O-Tech, however, recently developed a similar, but somewhat different product with a safety profile equivalent to Kyphon's. In the face of an FTC challenge, the parties agreed to address the agency's concerns by divesting Disc-O-Tech's technology to Johnson & Johnson.

And we continue, as we are required by statute, to scrutinize settlements of Hatch-Waxman patent litigation to determine whether any are anticompetitive – typically meaning that

²⁴ *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (Opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>.

²⁵ *In the Matter of Kyphon, Inc., Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation), and Discotech Orthopedic Technologies Inc.*, FTC File No. 071 0101, available at <http://www.ftc.gov/os/caselist/0710101/index.shtm>.

they provide for the branded company to provide something of value to the generic company, which then agrees to stay out of the market until a particular date – and require action. In the meantime, Congress is considering whether legislative changes to more expressly prohibit such settlements are warranted. The answer is not easy, however. Drawing a clear, bright line between anticompetitive settlements and those settlements that are reasonable and competitively neutral is difficult. So, we are listening to pharmaceutical companies (those who will talk to us) and trying to determine whether there is an acceptable solution that protects consumers.

The Commission must always, however, look at what issues may next appear on the horizon. As health care payors turn to providers to further reduce prices, we are seeing a new wave of provider calls for antitrust immunity – efforts by doctors, pharmacists, and others to permit collective bargaining. In the pharmaceutical sector, some have raised concerns about what has been called “product hopping” or “product switching.” Innovator drug firms often introduce “follow-on” versions of their successful drug products. Product changes undoubtedly can be procompetitive, introducing drug improvements, greater consumer choice, or new approved indications. Certainly, we do not want to discourage follow-on innovation and improvement. Questions have been raised, however, about certain situations involving follow-on drug marketing that some say amount to gaming the FDA regulatory system and state drug substitution laws. For example, has a manufacturer reformulated a drug just as a generic version is about to enter, and taken steps to prevent automatic generic substitution for the original drug at the pharmacy level – without any countervailing benefit, such as greater efficacy or reduced side effects? We are following controversies and research in this area, so that we can better understand the market issues and whether there is any role for antitrust law in addressing them.

In addition, we are, at the request of Congress, conducting a study on the effect that “authorized generics” – branded drug manufacturers authorizing and selling generic versions of their own drugs – may be having in the marketplace. We have received numerous comments from the public on our study, have issued requests for information from certain firms, and are preparing a report on the subject for release in the coming months.

To better prepare us to tackle emerging health care issues, we are planning, in the first half of this year, two public events to examine emerging issues raised by new health care delivery models. First, on April 23, we will begin an inquiry into recent developments in the health care sector, building on our ongoing work in health and technology markets. We will examine, for example, the emergence of new markets for limited service or “retail” health clinics. These new models for providing limited medical services, such as clinics affiliated with retail outlets, could potentially improve consumer access to the health care system, by expanding hours of operation, increasing presence in under-served areas, and lowering prices due to more limited operating costs. In the workshop, we will consider, among other things, whether early regulatory efforts by the states are unduly hampering expansion of these new delivery models. Also, we will look at emerging issues in health care IT such as telemedicine, electronic health records, and electronic prescribing. These areas suggest the great procompetitive potential of new health care technology to improve the quality of health care, lower its costs, and increase its distribution. At the same time, concerns about interoperability have raised competitive concerns about standard-setting, among other things. We plan to stay at the forefront of understanding both the benefits and risks posed by innovations in health technology and delivery, and the workshop will be an important next step along that path.

Then, in May, we plan to hold a one-day public workshop to examine developments in

the health care sector relating to “clinical integration” among otherwise independent health care providers. While the concept of clinical integration is itself nothing new, it appears that physician groups are now integrating beyond risk sharing arrangements with payers to develop a collaborative network of primary care and specialty physicians, including collaborative evidence-based practice guidelines, and integrated clinical information systems. If accomplished properly, this sort of clinical integration offers the promise of lower costs and improved quality of care. Our purpose in holding this workshop is to ensure that we are considering the issues properly so that we can safeguard consumers from anticompetitive conduct and that legitimate efficiency-enhancing joint venture activities are not discouraged.

F. Technology Markets Are Dynamic, But Not Immune to Competitive Harm

In technology markets, the speed of innovation has caused some to question whether antitrust enforcement – with its careful review of evidence – has any role to play. The answer to that question is clearly “yes,” so long as our analysis remains dynamic and continues to account for the unique characteristics of particular markets. I have little doubt that the rapid pace of innovation in the United States is the result of the operation of free markets unfettered by strict regulation and government intervention. But that does not mean that technology markets represent a lawless frontier. Failure to enforce the antitrust laws may allow companies to unlawfully acquire monopolies or enter into unlawful agreements to the disadvantage of consumers. And yet, our exercise of prosecutorial discretion must be tempered with a strong dose of modesty, lest we hinder the very engine that drives innovation.

Our legal proceeding against computer technology developer Rambus demonstrates the ability of our antitrust laws to effectively protect consumers from competitive harm in the high

technology sectors.²⁶ The *Rambus* case, resolved with an opinion on remedy and final order in February 2007,²⁷ is the Commission’s first litigated case in the standard-setting area and, we believe, the first time in 22 years that the Commission has heard a monopolization case in administrative litigation.²⁸ Rambus has appealed that decision, and the D.C. Circuit will hear oral argument on it two weeks from today.

One issue that the *Rambus* case highlights that continues to be a challenge for antitrust enforcers is the issue of how to remedy violations. Without question, markets march on as we investigate and litigate. That makes devising remedies even more difficult, because we have an obligation to remedy violations in a way that does not itself harm the market. In its 2001 *Microsoft* decision, the D.C. Circuit recognized that “six years seems like an eternity in the computer industry,” and acknowledged that the passage of time in fast-changing settings

²⁶ *In the Matter of Rambus Inc.*, FTC Docket No. 9302 (Aug. 2, 2006) (Opinion of the Commission on Liability), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

²⁷ *In the Matter of Rambus Inc.*, FTC Docket No. 9302 (Feb. 5, 2007) (Opinion of the Commission on Remedy) (Harbour, P., and Rosch, T., concurring in part, dissenting in part), available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>; *In the Matter of Rambus Inc.*, FTC Docket No. 9302 (Feb. 2, 2007) (Final Order), available at <http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf>.

²⁸ Rambus is a developer and licensor of computer memory technologies. For more than four years during the 1990s, Rambus participated as a member in an industry-wide standard-setting organization (“SSO”) that operated on a cooperative basis. Contrary to SSO practice and policy, Rambus concealed its patent interests and, using information it gained from participating in SSO proceedings, modified its patent applications to ensure that its issued patents would apply to those industry standards. As a consequence, once the industry became locked into the standards, Rambus became a monopolist, able to exact high royalty payments through patent infringement claims. In August 2006, the Commission unanimously found that Rambus’ acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips.

“threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions.”²⁹ Nonetheless, the court emphasized, “Even in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not.”³⁰ In its *Rambus* remedy opinion, the Commission took up the issue of royalty-free licensing, which Complaint Counsel had requested. What the case law indicated, however, is that while the Supreme Court and lower courts acknowledge such a remedy, they have imposed a high burden of proof and have almost never imposed such a remedy. In this case, we went on to find that Complaint Counsel had not satisfied their burden that such remedy was necessary.³¹ Accordingly, we required Rambus to license technologies at a specified royalty rate determined by comparison to arms’ length rates charged by Rambus for similar technology unaffected by anticompetitive conduct.³² But, two of my fellow Commissioners disagreed and dissented.

At our recent hearings on Section 2 of the Sherman Act, held jointly with the Antitrust Division, we explored remedy issues, and I expect that they will have a prominent place in our upcoming report. I continue to maintain, however, that more attention must be given to this area, which is, I believe, even tougher to get right than Section 2 liability itself.

²⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001).

³⁰ *Id.*

³¹ *See In the Matter of Rambus, Inc.*, FTC Docket No. 9302, at 12 (Feb. 5, 2007) (Opinion of the Commission on Remedy) (Harbour, P., and Rosch, T., concurring in part, dissenting in part), available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>.

³² *See id.* at 19-24.

Contrast *Rambus* with the Section 5 complaint filed by the Commission last week against N-Data.³³ I dissented from the Commission’s decision in *N-Data* because I could discern no limiting principle to the majority’s application of Section 5.³⁴ What distinguishes *N-Data* from *Rambus* is the absence of exclusionary conduct. In 1994, National Semiconductor – which later sold the subject patents to Vertical Networks, which then assigned the patents to N-Data – made a commitment to an electronics industry SSO, the IEEE, that if the IEEE adopted a standard based on National’s patented NWay technology, National would offer to license the technology for a one-time, paid-up royalty of \$1,000 per licensee. In marked contrast to *Rambus*, there was no evidence that National attempted to deceive the standard setting body as a means to obtaining monopoly power at a later point. It appears that at worst, N-Data attempted to strike a better bargain than National had made several years earlier. Such opportunistic conduct, without more, does not in my view rise to the level of an antitrust violation and I fear that this expansion of Section 5 liability may actually chill useful good faith bargaining before standard setting bodies.

G. Convergence In Global Antitrust Enforcement Is Imperative

One of the great successes of recent years – the global spread of competition law – also presents the difficult issue of harmonizing enforcement. International competition policy today is reflected in roughly 100 sets of laws purportedly directed at protecting competition, along with the decisions of governing institutions – legislatures, enforcement agencies, and courts – that make, apply, and interpret these laws. The challenge of bringing coherence to this resulting web

³³ *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-0094, available at <http://www.ftc.gov/os/caselist/0510094/index.shtm>.

³⁴ *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-0094, Dissenting Statement of Chairman Majoras, available at <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf>.

of individual decisions impacting competition grows with each new law passed, enforcement action taken, and court decision issued.

Much progress has been made toward convergence, but differences remain. There are two primary areas in which I have concerns about the levels of global divergence and believe stronger efforts at convergence are imperative. First, the globalization of the economy, together with distrust among nations, has led to the re-emergence of nationalist sentiments. By now, however, it should be clear that promoting competition domestically is the best way to achieve global success for a country and its companies. Competition, regardless of its origin, begets efficient, productive firms that are better able to compete in global markets. More efficient firms in turn increase economic growth and standards of living.

The consequences of protection from competition have been documented. For example, as described by William Lewis in his book examining differentials in national wealth, Japanese industries that face intense domestic and international competition – automobiles, electronics, and steel – perform at productivity levels that are, on average, approximately 130 percent of the levels in the United States.³⁵ In contrast, Japan’s large retail sector, which is heavily sheltered from competition by tax laws, zoning requirements, and other government-imposed restrictions, functions at roughly 50 percent of U.S. productivity levels.³⁶

National champion promotion – indeed, taking into account at all the nationality of the firm in question – is simply inconsistent with the central objective of antitrust law: to promote competition to the benefit of consumers. What is more, permitting antitrust enforcers to promote

³⁵ WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* 25 (2004).

³⁶ *Id.*

national champions, rather than protect competition, undermines the important goal of producing clear and predictable antitrust law and enforcement standards. Clarity and predictability are crucial to promoting efficient resource allocation. Fortunately, on this issue, I believe that the U.S. antitrust agencies and the European Commission are of a like mind. As Commissioner Kroes put it in a speech last year, “Open competition—tough competition even—is essential for a dynamic market. This drives European companies on to do better—to keep adapting, innovating, and winning.”³⁷

The second area of concern is raised by differences in enforcement against firms acting unilaterally. No area of global antitrust enforcement policy today creates more controversy than monopolization. This perhaps is not surprising given that distinguishing between aggressive, procompetitive conduct, which is good for consumers even when engaged in by dominant firms, and exclusionary or predatory conduct, which harms consumers, is difficult – because the conduct often looks the same. Given that identifying anticompetitive conduct by a single firm with market power is so difficult, enforcers are unlikely to get it right all of the time. Thus, the important issue becomes a jurisdiction’s tolerance for erring on the side of overenforcement versus erring on the side of underenforcement. That is, in developing competition policy as applied to monopolists, the question is whether we most fear the potential harm to consumers from overenforcement or from underenforcement. Jurisdictions calibrate their enforcement according to how they answer that question.

³⁷ Neelie Kroes, European Competition Policy in a Changing World and Globalized Economy: Fundamentals, New Objectives, and Challenges Ahead, Speech Before GCLC/College of Europe Conference on “50 Years of EC Competition Law,” at 2, Brussels, Belgium (June 5, 2007), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/364&format=PDF&aged=0&language=EN&guiLanguage=en>.

To consider this issue, I find it helpful to contrast the different approaches taken by the CFI and the U.S. courts. First, I suggest examining the difference in how the U.S. courts and the CFI treated the question of what technical information Microsoft had to disclose to its server operating system competitors so they could interoperate with Windows. While the U.S. courts and the CFI were reviewing different underlying cases, both upheld a remedy that required Microsoft to disclose certain information to developers of server operating systems.

The difference between the two remedies requiring disclosure of interoperability information comes in the breadth and implementation of the disclosures. Determining what information is necessary to allow two systems to interoperate is no simple exercise, because, apparently, there is a spectrum over which two systems can interoperate. To this end, the CFI remedy appears to require greater disclosures.³⁸ In no small part, this difference between the CFI and the U.S. court seems to be based on an evaluation of the effect of the remedy on Microsoft's incentive to innovate. In response to Microsoft's argument that any disclosure, and certainly broad disclosure, would impede incentives to innovate, the CFI said that Microsoft had not proven that the disclosure obligations would negatively impact Microsoft's incentives to innovate.³⁹ Merely offering economic theory was not enough, and the CFI faulted Microsoft for its failure to specify exactly which technologies or products would be affected.⁴⁰ The CFI also dismissed Microsoft's concerns that forced disclosure would allow competitors to clone

³⁸ See Case T-201/04, *Microsoft v. Comm'n* [2007], ¶ 230.

³⁹ *Microsoft v. Comm'n* [2007], ¶ 697.

⁴⁰ *Id.* ¶ 698.

Microsoft's products.⁴¹ To the contrary, the CFI determined that the remedy imposed by the EC was a necessary prerequisite for differentiation to occur.⁴²

The U.S. courts' approach was based on a concern that broader disclosure of interoperability information would facilitate competitors' ability to clone Microsoft's product. The district court found that broader disclosure obligations would erroneously equate interoperability with interchangeability.⁴³ The resultant risk of cloning, according to the district court, would deny Microsoft returns from its intellectual property and inherently decrease incentives to innovate on the part of Microsoft and its competitors.⁴⁴ In describing the decreased incentive to innovate as "inherent," the court determined that no specific proof was necessary. The U.S. Court of Appeals for the D.C. Circuit agreed: "the effect on Microsoft's incentive to innovate would be substantial; [and] not even the broad remedial discretion by the district court extends to the adoption of provisions so likely to harm consumers."⁴⁵

Bridging these differences will take time and a lot of hard work. But a resolution is imperative. Conflicting antitrust standards create uncertainty and impose organizational costs, which may deter efficient behavior, ultimately preventing consumers and the economy at large from enjoying the benefits of innovative business activity.

To foster convergence among jurisdictions based on recognized best practices and sound

⁴¹ *Id.* ¶ 234.

⁴² *See id.* ¶ 656.

⁴³ *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 227 (D.D.C. 2002).

⁴⁴ *Id.* at 227-228.

⁴⁵ *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1219 (D.C. Cir. 2004).

economic reasoning, the DOJ and FTC participate in ongoing ICN and OECD initiatives. Just as important, however, and often overlooked is the international technical assistance work of the FTC and DOJ. Thanks to funding from USAID, the FTC and DOJ have for years sent experienced lawyers and economists to participate in investigations with their counterparts at many newly minted competition agencies. Now, the newly passed U.S. SAFE WEB Act enables us to invite foreign enforcement colleagues to work with us on actual case matters so that they can observe firsthand how we prosecute investigations. And I am pleased to report that in our most recent appropriation, Congress provided additional funding to expand the reach of our technical assistance program. In executing upon Congress' request, we hope to work with strategically important countries making their first forays into antitrust to share the benefits of our long experience with competition policy.

I think that it bears emphasis, though, that we all have a responsibility to promote convergence. Too often, for the sake of short term gain, U.S. companies raise complaints in foreign jurisdictions that they know would not pass muster in the United States – regardless of which party is in control of the White House. I recognize that parties believe this is in their own interest, the only interest that they are obligated to protect. But nonetheless, companies should be mindful that this sort of forum shopping not only adversely affects convergence efforts, it can drive convergence toward the wrong standards – standards that may ultimately deter efficient behavior.

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As you can tell, these are interesting times to be guiding the Commission, and I have thoroughly enjoyed the opportunity. Thank you for inviting me to speak to you this evening.