Prepared Testimony

of

Sean Heather

on behalf of the

Chamber of Commerce of the United States

before the

Federal Trade Commission and Department of Justice

Hearings on Single-Firm Conduct

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Thank you for the opportunity to appear before you today to address the important issue of whether and when specific types of single-firm conduct may violate the antitrust laws.

I appear today on behalf of the U.S. Chamber of Commerce, the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. As the Chamber noted in its September 5, 2006 written submission in these proceedings, the Federal Trade Commission and the Department of Justice are to be congratulated for holding these hearings and reaching out to the business community for its views on this critical topic.

At the Chamber, we work continuously to promote free market principles, because we see a free market system as essential to ensuring a vibrant and productive economy. And we believe that balanced and effective antitrust enforcement is critical to ensuring a free market. In the U.S., we support the application of Section 2 of the Sherman Act to conduct that threatens

competition and harms consumers; and outside the U.S., we support the application of similar laws.

At the same time, the Chamber believes that U.S. and foreign competition authorities must use special care in policing single-firm conduct, to avoid chilling behavior that is both pro-competitive and beneficial to consumers. To accomplish this, antitrust rules must be transparent, predictable, consistent across jurisdictions, and reasonably stable over time. After all, new products and new business practices are developed well ahead of their actual introduction and ahead of any scrutiny by antitrust regulators. Firms want to obey the rules of the road, and yet discerning and applying those rules is becoming increasingly difficult.

In its September 5th submission, the Chamber focused on the need for clear, predictable standards for tying and essential facilities analyses in domestic enforcement under Section 2. In today's testimony, I would like to extend these principles to international antitrust enforcement, and highlight the importance of cooperation among antitrust enforcement officials in different jurisdictions around the world.

I'm leading a new U.S. Chamber of Commerce initiative, known as the Global Regulatory Cooperation Project. This project aims to increase awareness about, and to develop successful strategies for combating the growing threat that divergent regulatory systems pose to competitive markets and to international trade. The need for the Global Regulatory Project is clear. Barriers to international trade are more than market access issues. Trade negotiations in the world are largely focused on issues like tariff reduction. While market access should remain a priority, divergent regulations are increasingly impeding trade, and governments around the world need to better understand the impact of behind-the-border barriers. While the Chamber's

project focuses on many types of divergent regulations, one area we are addressing is competition policy.

The U.S. Chamber of Commerce would like to make the following three points at today's hearing.

1. The growing proliferation of antitrust enforcement around the world, together with the increasing globalization of business, creates an increasing risk of conflict in the application of antitrust to single-firm conduct. These conflicts impose costs on firms and harm consumers, and they are becoming an increasingly important barrier to international trade.

2. Significantly, while many differences may be discerned between U.S. and foreign standards for single-firm conduct, the differences in the enforcement approach to tying and essential facilities analysis feature prominently.

3. U.S. antitrust enforcement officials have recognized this growing conflict and the costs associated with it. Now, it is time to act. The U.S. must lead a cooperative effort among industrialized nations to develop and recommend appropriate standards for single-firm conduct, and to promote their adoption around the world.

Risks of increasing conflict

Over the past 15 years, the number of jurisdictions with antitrust laws has grown from about 25 jurisdictions to approximately 100 today. Many of the newer enforcement agencies have limited training, experience, and resources to police anticompetitive behavior and enforce their laws appropriately. And one thing is certain: The impacts of competition decisions by any given enforcement agency are no longer confined to their home jurisdiction. Increasingly, those decisions reverberate around the world, forcing firms to conform their behavior to the most restrictive enforcement policies, and impacting the global marketplace.

The underlying goals of antitrust enforcement and trade liberalization are similar, in that both aim to achieve open and competitive markets. In their application, however, competition laws may sometimes constitute barriers to trade. In some countries, particular enforcement

actions may be motivated by protectionist goals. In other instances, differences in generic legal standards or in remedies may have a chilling effect on trade.

A number of U.S. government officials have acknowledged these developments. Indeed, in her statement opening these very hearings, FTC Chair Deborah Majoras remarked that "disagreement among competition authorities about how to treat unilateral conduct produces uncertainty in national and world markets, reducing market efficiency and imposing costs on consumers."[1]

The current, preliminary draft outline of the Antitrust Modernization Commission's final Report to Congress includes a finding that:

> "Global competition requires antitrust enforcers to increase their efforts to harmonize different standards and processes to minimize the potential for the application of inconsistent or contradictory legal requirements and to minimize businesses' compliance costs, which are often passed on to consumers."[2]

Other government officials, both in the Executive Branch[3] and in Congress,[4] and many business[5] and bar association groups[6] have recognized as well the growing potential for conflict and the costs and burdens associated with it.

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[1] "The Consumer Reigns: Using Section 2 to Ensure a 'Competitive Kingdom,'" Remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, at the Opening Session of Hearings on Section 2 of the Sherman Act (June 20, 2006) at 4.

[2] Preliminary Draft Outline, Antitrust Modernization Commission Report, Introduction and Executive Summary (January 10, 2007) at 6, available at: http://www.amc.gov/pdf/meetings/Rep-ExecSum_070110circ.pdf.

[3] *See, e.g.*, "The Best Approach to Enforcement Against Single-Firm Conduct: Caution," Remarks by Gerald F. Masoudi, Deputy Assistant Attorney General, before the ABA Antitrust Section's Fall Forum (November 17, 2006) at 2-3 ("In an increasingly globalized economy, it is imperative that multi-jurisdictional businesses understand the appropriate line between procompetitive and anticompetitive single-firm conduct in every jurisdiction in which they operate.").

[4] *See, e.g.*, Letter from Sens. Mike DeWine and Herb Kohl to Deborah Garza and Jonathan Yarowsky, Antitrust Modernization Commission (October 1, 2004) at 3 ("With the increasing globalization of the economy, international antitrust enforcement—and the need to avoid conflicts with foreign antitrust authorities—has grown more and more important."); Letter from Reps. James Sensenbrenner and John Conyers to Attorney General Alberto Gonzales, (November 9, 2005) ("The application of multiple and potentially discriminatory antitrust laws could adversely affect American businesses and consumers.").

[5] *See, e.g.*, Comments of the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Antitrust Modernization Commission's Request for Public Comment (February 15, 2006) at 1 ("the proliferation of national competition regimes … has created the potential for a variety of adverse consequences … ").

Demonstrated conflicts

The record demonstrates that these costs are very real. Microsoft has been subjected to three different sets of remedies in three different jurisdictions for what is essentially similar allegedly anticompetitive conduct.

In March 2004 the European Commission held that Microsoft had abused a dominant position in violation of Article 82 of the EC Treaty by tying the purchase of Windows Media Player to the purchase of the Windows operating system, and by refusing to share proprietary communications protocols with competitors and allow their use in developing operating systems that would compete with Microsoft's own products.

When the EC issued its decision, then-Assistant Attorney General R. Hewitt Pate issued a statement criticizing it as both costly and unnecessary in light of the Final Judgment entered against Microsoft in the U.S. in 2001.[7] Later, Pate expressed his "deep concern about the apparent basis of this decision and the serious potential divergence it represents," noting that "it is unfortunate that considerations of international comity and deference did not, in the Commission's judgment, carry sufficient weight to avoid the significant divergence that has now occurred."[8]

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[6] *See, e.g.,* Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association, in Response to the Antitrust Modernization Commission's Request for Comments Regarding the Role of Comity in International Competition Law Enforcement (February 2006) at 4 ("multiple reviews by multiple authorities can lead to different outcomes and also may be an inefficient use of resources for the parties and the competition authorities involved …").

[7] Assistant Attorney General R. Hewitt Pate, Statement on the EC's Decision in its Microsoft Investigation (March 24, 2004). In particular, Pate criticized the Commission's "code removal" remedy, noting that: "Imposing antitrust liability on the basis of product enhancements and imposing 'code removal' remedies … risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it."

[8] "Roundtable Conference with Enforcement Officials," Remarks by R. Hewitt Pate, Assistant Attorney General, before the American Bar Association Section of Antitrust Law Spring Meeting, Washington, D.C. (April 2, 2004) at 7. The EC's decision also proved controversial in Congress and the press. *See, e.g.,* Letter from Reps. James Sensenbrenner and John Conyers to Attorney General Alberto Gonzales (November 9, 2005) (expressing concern that the "precedent established by the Commission's actions" could be used to "compel other American companies to disclose [their] intellectual property."); Editorial, "Europe Takes on Windows," NEW YORK TIMES (March 20,

Soon after the EC decision, the Korea Fair Trade Commission held that Microsoft had abused a dominant position in South Korea by integrating media and instant messaging software into Windows, imposing a "code removal remedy" similar to the one imposed in Europe. On the day this decision was announced, Deputy Assistant Attorney General Bruce McDonald released a statement stating that: "The Antitrust Division believes that Korea's remedy goes beyond what is necessary or appropriate to protect consumers."[9]

More recently, allegations of illegal tying have been the focus of attacks on Apple in Europe. Apple uses the Fairplay digital rights management (DRM) technology to encode songs purchased through iTunes, its online music store. As a result, the songs may only be downloaded using Apple's iPod device. Norway's Consumer Ombudsman has found that Apple's DRM policies have effectively tied the purchase of iPods to the purchase of its online music, and has ordered Apple either to license its Fairplay technology to competing producers of music players or to develop a new open standard with those companies.

According to press reports, the authorities in Sweden and Denmark may follow suit in formally charging Apple with violations of local laws. And the French Parliament has enacted legislation that may require music downloads to operate across a range of devices, empowering a government body to force digital music providers to share the information that is needed to ensure such interoperability. Significantly, while the EC has launched an investigation into Apple's music pricing policies, the EC investigation reportedly does *not* focus on this purported tie.

2004) ("the commission is overreaching in seeking remedies that could hurt not only Microsoft, but consumers, as well.").

[9]Deputy Assistant Attorney General J. Bruce McDonald, Statement on Korean Fair Trade Commission's Decision in its Microsoft Case (December 7, 2005).

Apple's success came about as a result of innovation. Consumers voted with their wallets to reward Apple for its ability to innovate and to commercialize its ideas. Competition authorities should recognize the right of innovators to reap the rewards of their innovation. That is the way forward to protect competition, not competitors. Assistant Attorney General Tom Barnett made this point recently in criticizing the attack on Apple, pointing out also that "if the government is too willing to step in as a regulator, rivals will devote their resources to legal challenges rather than business innovation."[10]

Potential for future conflict

In addition to the cases involving Microsoft and Apple, where U.S. companies have actually been charged with violations of foreign laws based on legal standards that are arguably divergent with those in the U.S., there are several pending investigations of Intel and Qualcomm that may well result in similar, significant conflicts.

Recent press reports indicate that EU Competition Commissioner Neelie Kroes might formally charge Intel with abusing its dominance in the market for microprocessors in Europe.[11] According to press accounts, EC investigators potentially believe that Intel has interfered improperly with the distribution and purchase of rival products, in part by offering rebates to customers that agree to purchase from Intel exclusively. The Korean Fair Trade Commission is also investigating Intel's rebate policies.

Qualcomm is reportedly under investigation by both the Korean Fair Trade Commission and the Japanese Fair Trade Commission—in part, for offering lower royalty rates for its CDMA wireless technology if licensees agree to license such technology exclusively from Qualcomm.

[10] "Interoperability Between Antitrust and Intellectual Property," Remarks of Thomas O. Barnett, Assistant Attorney General, before the George Mason University School of Law Symposium (September 13, 2006) at 13.
[11] Mary Jacoby, "EU Investigators Urge Intel Charge," WALL STREET JOURNAL, January 17, 2007, at A10.

The EC has received a formal complaint about Qualcomm's conduct from a group of Qualcomm competitors, but has yet to initiate a formal investigation.

U.S. antitrust enforcement officials have been far more cautious than foreign jurisdictions, however, about investigating and challenging such "fidelity rebates" and related volume discount and exclusive dealing practices, because in many cases they may be procompetitive and result in lower prices for consumers.[12] Because Intel and Qualcomm may not be formally charged in these proceedings, it is hard to tell what conflicts with U.S. law may emerge, how severe they may be, and what consequences may result.

Emerging risks: China

As significant as these conflicts among jurisdictions with mature antitrust enforcement regimes may be, they may be eclipsed in coming years by the conflicts generated by the adoption of new antitrust laws in emerging and transitioning economies.

For example, the current draft of a new Anti-Monopoly Law in China,[13] now under consideration by the PRC's National Peoples' Congress, contains prohibitions of "abuse of dominance" that remain unclear, creating fears of an expansive, and inconsistent enforcement approach:

1. The available English translation of Article 14 of the draft law states that firms with a market share of greater than 50% "can be concluded to hold a dominant position." It is unclear whether this provision creates a mandatory presumption of dominance, or whether it is intended only to identify one of the factors that may be relevant in determining dominance.
2. Articles 12 and 14 appear to embrace the novel concept that "dominance" may be abused by "several undertakings as a whole" as well as by a single firm.

[12] "North Atlantic Competition Policy: Converging Toward What?" Address by William Kolasky, Deputy Assistant Attorney General, before the BIICL Second Annual International and Comparative Law Conference (May 17, 2002) at 7 ("We have generally refrained … from challenging discount programs like these under our antitrust laws.").
[13] Anti-Monopoly Law of the People's Republic of China (draft dated June 22, 2006) (unofficial English translation).

3. Once a firm or group of firms is found to be "dominant," Article 15 prohibits various forms of "abuse" of that dominant provision. It is difficult to predict how this novel concept could be applied.
4. Significantly for present purposes, Article 15(v) prohibits dominant firms from "tying products or imposing other unreasonable trading conditions" in transactions with their trading partners. Without appropriate clarification, this language could lead to challenges to beneficial product integrations similar to the ones that have taken place in Europe and South Korea.
5. Finally, while the current draft law does not contain any provisions mandating access to "essential facilities," Article 54 creates an undefined antitrust offense for "abuse" of intellectual property rights, which could lead to the imposition of unjustified compulsory licensing remedies, as has occurred in other jurisdictions.

A greater effort must be made among the jurisdictions with established antitrust enforcement regimes to improve the content and the consistency of their rules governing single-firm conduct, and then share their learning and comparatively greater experience with countries that may be developing new antitrust statutes or modernizing existing ones. Legislative drafters in China and elsewhere will be influenced in a positive way by the development of such a consensus.

Suggested solutions

In my testimony, I have quoted a number of different U.S. officials who have recognized the growing divergence in the antitrust standards governing single-firm conduct, and what that means for U.S. companies and consumers. But recognizing the problem isn't enough. The U.S. government needs to address this problem with an increased sense of urgency. The DOJ and the FTC have devoted resources for many years to fostering cooperation, convergence and consistency in antitrust enforcement efforts and in remedies.[14] They have been successful to a

[14] A good summary of the U.S. enforcement agencies' efforts to promote international antitrust cooperation and convergence may be found on the FTC's website at: http://www.ftc.gov/bc/international/docs/ftcintantiprogram1206.pdf . *See also,* "The Federal Trade Commission's International Antitrust Program," Remarks of Randolph Tritel and Elizabeth Kraus before the American Bar Association Section of Antitrust Law Spring Meeting, Washington, D.C. (April 1, 2005); "The Reality of

degree, but the successes have been realized largely in the cartel and merger enforcement areas. Greater priority must be given to the area of unilateral conduct. Today a handful of companies have been caught up or face the potential of being caught up in divergent interpretations of anti-competitive unilateral conduct. If this divergence in understanding of single-conduct behavior continues amongst the world's competition jurisdictions, more companies globally will be the target of future investigations and proceedings. It is this divergence that the Chamber's Global Regulatory Cooperation project seeks to counter.

a. Convergence. The U.S. government must step up its efforts to encourage convergence in substantive antitrust standards for single-firm conduct, and in remedies. To do that, the U.S. must engage more countries bilaterally, and it must work toward greater convergence in the context of such multilateral organizations as the OECD and the International Competition Network (ICN).[15] The Chamber believes there is a significant opportunity for the U.S. Government to have an impact in this area, given that the FTC is the co-chair for the ICN's Working Group on Unilateral Conduct. In this leadership role, the U.S. should be in a position to call attention to diverging standards, and work to reduce and eliminate them, particularly in the tying and essential facilities areas, which have proved to be so important lately.

b. Enhanced comity principles. The preliminary draft outline of the Antitrust Modernization Commission recommends that "The United States should continue to pursue bilateral and multilateral antitrust cooperation and comity agreements with more of its trading

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International Antitrust Convergence," Remarks by Makan Delrahim, Deputy Assistant Attorney General, before the American Bar Association, Section of Antitrust Law Spring Meeting (March 30, 2005).

[15] The Antitrust Modernization Commission is poised to make a similar recommendation. *See* Preliminary Draft Outline, Antitrust Modernization Commission Report, Introduction and Executive Summary (January 10, 2007) at 6, available at: http://www.amc.gov/pdf/meetings/Rep-ExecSum_070110circ.pdf .

partners and make greater use of comity provisions in existing cooperation agreements."[16] The Chamber believes that the U.S. should explore the concept of "enhanced comity," including such elements as an agreement among jurisdictions to defer to one another in relation to remedies.[17] While existing bilateral agreements and the existing applications of comity principles have certainly been useful, they have limitations, as illustrated by the inconsistent remedies imposed by the U.S., E.U. and Korean enforcement authorities in the Microsoft matter. Jurisdictions such as these with mature antitrust enforcement regimes should set a coherent and unified example for other countries by expanding their cooperation and making them more consistently successful.

c. Participation in foreign proceedings. The U.S. enforcement agencies should be encouraged to participate more actively and cooperatively in enforcement and policy development activities with their foreign counterparts, by filing *amicus* briefs, for example, even when the U.S. agencies are not conducting parallel investigations. We applaud this series of hearings for giving your counterparts in Canada, Mexico, Japan, and the European Union the opportunity to testify last September. This kind of cooperative spirit and substantive sharing of ideas is the platform for starting to combat future competition divergence.

d. Technical assistance. It is difficult for even the most experienced jurisdictions to define appropriate rules governing single-firm conduct, so newer enforcement agencies may be expected to struggle with them. U.S. agencies should review the adequacy of the current technical assistance programs in the antitrust area, and implement any changes that may be necessary to make them more effective. An agency review should include: (1) a review of

[16] *Id.* at 6.

[17] *See* Testimony of James Atwood before the Antitrust Modernization Commission (February 15, 2006) at 13-14; Comments of the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Antitrust Modernization Commission's Request for Public Comment (February 15, 2006) at 7-8; Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Comments Regarding the Role of Comity in International Competition Law Enforcement (February 2006) at 8-10, 13-16.

programs sponsored by other countries, as well as by the U.S.; (2) a review of the work of international organizations such as the OECD and ICN; and (3) a review of the adequacy of U.S. funding levels and how funding is deployed within the U.S. The U.S. must approach this issue holistically and in cooperation with other developed countries to ensure that available resources are allocated efficiently and effectively and to ensure that other important initiatives – such as the protection of intellectual property – are pursued.

e. Government-wide focus. Finally, the FTC and DOJ must approach these issues with a greater awareness of the interface between competition policy and trade policy, and the impact of divergent antitrust standards on trade. To this end, the FTC, DOJ, Commerce Department, USTR and State Department must coordinate better on these issues. The Department of Treasury should also be involved, as it looks to lead a Strategic Economic Dialogue with China. And to address protectionist tendencies, agencies across the U.S. government must work cooperatively with their counterparts around the world to ensure that competition policies support liberal trade policies.

This effort is challenging, but critically important. The Chamber stands ready to assist the FTC and DOJ in any way it can. We look forward to working with you.