

Making the Grade? A Year at the FTC

Remarks of FTC Chairman Jon Leibowitz
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Thank you Jim, for that kind introduction.

One of the reasons why I really enjoy speaking at this conference is that it gives us an opportunity to take stock of what the Commission has done in the preceding year, and assess how well we've met our goals. In fact, some of you may recall that William Safire a number of years ago wrote a column in the *New York Times* in which he explained, in his usual clear and persuasive way, why Presidents should hold regularly scheduled press conferences – to make sure their administrations would work hard to accomplish the tasks they had set out for themselves.¹

I don't want to suggest that the only reason we work hard is that we're afraid we'll be held to account at this conference – but we are a competition agency, and I'm reluctant to totally discount the impact of incentives, even on our highly motivated staff. So we're going to try to make Bill Safire proud, by using the time today to discuss what we have done, and if we've accomplished what we set out to accomplish.

Last September, I announced four major antitrust goals for the FTC: (1) ensuring a cooperative relationship between the FTC and the Department of Justice; (2) substantially revising the Horizontal Merger Guidelines for the first time since 1992 – a task Christine Varney and I announced a year ago, at this very conference; (3) changing the way we look at monopolization cases; and (4) expanding our use of Section 5 of the FTC Act to bring cases involving unfair methods of competition.² In addition, and just as important, I also promised to try to strengthen the FTC's partnerships with our counterpart agencies around the world.

Now, as many of you know, at the Commission we take very seriously our obligation to constantly critique ourselves and see how we measure up to the mission of protecting consumers and competition. So this is a good time for a report card. I'm going to give myself a report card right now – but you should all feel free to weigh in if you want to give me (or the agency) higher grades.

¹ William Safire, *Question Time*, N.Y. TIMES, Feb. 15, 2001, at A31.

² FTC Chairman Jon Leibowitz, Remarks at the 36th Annual Conference on International Antitrust Law & Policy (Sept. 24, 2009), available at <http://www.ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf>.

Cooperation with the Department of Justice

When we set out this goal a year ago, the Department of Justice and the FTC had recently emerged from a period of major substantive disagreements. For example, many of our international colleagues took note of the DOJ-FTC fissure over the Section 2 Report when it was issued in late 2008.³ And several years prior to that, our two agencies had been unable to agree on a *certiorari* petition in *Schering-Plough*, an early but important pay-for-delay case.⁴

Both Christine Varney and I are well aware of how important it is that our agencies cooperate — so that we can better aid consumers, better develop sound antitrust law, and better maintain the confidence of our international partners. And I am happy to say that today we are working together closely and cooperatively.

This cooperation starts in our day-to-day enforcement actions, where we've seen a decline in the number of clearance fights between our agencies — which, to be honest, were often exaggerated anyway. In any event, we are doing well on this front now. For example, in FY 2009 we had 716 HSR reportable mergers — of that total, one or both of the agencies made a clearance request in 92 of the cases, and all but 8 of them were cleared without being contested. Of those 8, they were resolved in an average of less than 6 days from the time the clearance dispute began. So as you can see we're doing better on clearance and in fact, we're cooperating all across the board, on some of the most significant issues we handle.

This cooperation extends to our highest priority issues. For example, one of the FTC's top priorities over the past year has been putting an end to pay-for-delay pharmaceutical settlements. In these deals, a brand-name pharmaceutical company will pay a generic company to not market a dramatically cheaper generic version of a drug. Both the generic and the brand-name company earn windfall profits from these deals, while consumers are left holding the bag — to the tune of billions of dollars a year in more expensive drugs.

We've been urging Congress and the courts to put a stop to this unconscionable and anticompetitive practice. And we've made significant progress in Congress, where both the full House as well as the Senate Appropriations and Judiciary Committees have passed some form of pay-for-delay legislation. But we haven't yet made it over the finish line to a legislative solution.

So we've continued to vigorously challenge pay-for-delay settlements in court. And we're appreciative of the great support we've gotten from the DOJ, which filed an *amicus* brief supporting our position that the Second Circuit court

³ Press Release, Fed. Trade Comm'n, FTC Commissioners React to Department of Justice Report "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act" (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

⁴ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006).

should accept a motion for a rehearing in *Cipro*.⁵ We were disappointed that the court declined to rehear the case *en banc*, but we continue to aggressively litigate other pay-for-delay cases, and it sends an important message to our partners in enforcement abroad that the FTC and the DOJ see eye-to-eye on our top priorities.

This issue is particularly important because anticompetitive behavior by pharmaceutical companies is not exclusively an American problem. I assumed when I started work on this subject several years ago that each country's regulatory context is so unique that pay-for-delay couldn't transcend borders in any meaningful way. But in my discussions with our European colleagues, we've found that they are often confronting practically the same problems within their own markets. This underscores just how important it is that we meet regularly in bilateral and multilateral forums, share our experiences in handling these cases, and continue to learn from one another.

Horizontal Merger Guidelines

Let me turn to the agenda item about which the antitrust bar may be most well-informed: our update of the 1992 Horizontal Merger Guidelines, which affect antitrust practice every day, for enforcers, for the private sector, and for the courts.⁶ I'm very proud of the open and transparent process we used to draft the revisions, and I'm very grateful for the crucial input we received from members of the antitrust bar, the business community, consumer advocates and members of the international antitrust community as well.

I'd like to just take a moment at this point to offer my special thanks to Jim Rill. Of course, Jim is an organizer of this conference and we owe him thanks for that, and for inviting me to speak, but more particularly for his advice and wise counsel as we worked through the process of revising the Guidelines. He was the moving force behind the 1992 revisions and his help in 2010 was just as important. I hope that our efforts on this revision meet the high standards he set in 1992.

We will know our effort is successful if it also lasts 18 years.

So let me say just a few words about what we've done on the new Guidelines, and why we've done it.

Above all, we have been meticulous in revising these Guidelines to reflect the way we actually analyze cases, and to ensure that we use the best tools available to analyze the anticompetitive effects of a merger. We've worked hand-in-

⁵ Brief Amicus Curiae for the United States in Support of Rehearing En Banc, *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, No. 05-2851-cv (2d Cir.) (June 3, 2010), available at <http://www.justice.gov/atr/cases/f259300/259325.pdf>.

⁶ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://ftc.gov/os/2010/08/100819hmq.pdf>.

hand with DOJ on this project, and I think our productive cooperation is another testament to the professionalism of the staff at both agencies.

In fact, as I just noted, we had access to a wealth of knowledge from the private and public sectors, both in the United States and abroad.

It shows. The new Guidelines incorporate many of the insights of modern antitrust law, more sophisticated economic thinking, and global enforcement experience. For example, they reflect the reality that market definition is an important part of the analysis, but not necessarily the starting point and certainly not the end. They explicitly recognize the risk that a merger will move a firm into a market position from which it may be tempted to engage in exclusionary conduct, or which may lead it to engage in conscious parallelism that harms competition and consumers. They modify entry analysis to avoid the rigid formalism of the two-year standard and focus more on the practical reality of entry in a given market. And finally, the revised Guidelines explain in more detail the economic basis of unilateral effects, which we only briefly described in the 1992 Guidelines and the 2006 Commentary.

We recognize that not everyone – even on the Commission – agreed with all of the changes we made – but altogether, these are major improvements that we’re eagerly putting into practice. Ultimately, we are confident that our experience under these Guidelines will allow us to continue to make a significant contribution to the international conversation about merger review, and we hope that our colleagues in other jurisdictions will find the new Guidelines useful as they continue to evolve their analytic approaches.

Monopolization

With respect to monopolization, last year I argued against the effort by many courts – arising out of concerns that rule of reason analysis creates too much uncertainty and judicial error – to create a presumption of legality for monopolistic conduct, even when it is starkly anticompetitive. As I said then – and as I still believe now – competition is what deserves a presumption. Several of our monopolization cases in the past year, I believe, show that we’ve been vigilant in protecting consumers in the high tech market from attempts to abuse market dominance. Let me highlight one of our major monopolization cases in this area, and discuss also a merger investigation that raised important issues for competition enforcement in high-tech markets.

First, as you’re all probably aware, the Commission settled in August with the computer chip giant Intel after eight months of litigation.⁷ Intel’s decade-long

⁷ Fed. Trade Comm’n, Analysis of Proposed Consent Order to Aid Public Comment in the Matter of Intel Corporation, FTC File No. 061 0247 (Aug. 4, 2010), *available at* <http://www.ftc.gov/os/adjpro/d9341/100804intelanal.pdf>.

attempt to monopolize the computer chip market manifested itself, we believe, in a number of ways. The company entered into *de facto* exclusive dealing agreements with computer manufacturers, without significant efficiency justifications. It threatened to charge higher prices to manufacturers who considered buying its competitors' products. When manufacturers did buy from its competitors – who sometimes sold superior products – Intel deceived manufacturers into believing that slower performance caused by Intel's own compilers was actually caused by flaws in its competitors' chips. And Intel designed some of its products to be incompatible with its competitors' products. As a result of this behavior, Intel increased prices (over what they would have been) for millions of end users buying nearly every kind of computer available on the market today.

The Commission's settlement with Intel will put an end to these practices and prevent similar anticompetitive conduct going forward. Intel won't be able to penalize its customers for using its competitors' chips, stunt its competitors' growth with the threat of intellectual property litigation, or lock its competitors out of the market by designing incompatible products.

Just as important, Intel gets to move forward using a more procompetitive approach. Intel can get back to competing on the basis of high quality, innovative products, as it has for much of its time in the market, and consumers will reap the benefit of Intel's efforts.

This settlement is also notable because it was made possible by a legal theory combining both monopolization claims under Section 2 as well as unfair methods of competition and unfair and deceptive acts and practices claims under Section 5. In a fast-moving, high-tech industry like Intel's, using all of our tools proved to be a highly effective way of getting relief for consumers quickly – before the market had changed so much that nothing could be done.

We demonstrated the same sensitivity to a fast-moving, high-tech market, I believe, in our treatment of Google's acquisition of the mobile advertising company AdMob.⁸ In that case, we opened a merger investigation when we became concerned that Google would be able to behave as a monopolist in the mobile advertising market if it acquired its primary competitor. Initially, our investigation seemed to support these concerns. But we ended our investigation because the market changed – specifically, when Apple decided to launch its own competing mobile ad network – and these concerns were rendered moot – at least for the time being.

In a fast-developing market, we must be particularly careful to monitor developments in real time, and assess how they affect the competitive impact of a potential merger. I am proud that the Commission recognized in Google-AdMob, as in Intel, that policing high-tech markets requires both speed and adaptability. In

⁸ Fed. Trade Comm'n, Statement of the Commission Concerning Google/AdMob, FTC File No. 101 0031 (May 21, 2010), available at <http://www.ftc.gov/os/closings/100521google-admobstmt.pdf>.

Intel the proper course was to challenge the anticompetitive practices; in Google/AdMob the proper course was allowing a very controversial deal to proceed without challenge.

Unilateral conduct by companies with market power will continue to pose significant investigative, analytical, and jurisprudential challenges. I believe we have shown that we are up to facing those challenges, but there are always ways to improve. That's part of the reason why the FTC and the EC have directed our staffs to start a joint unilateral conduct discussion group. Together, we'll begin a comparative analysis of unilateral conduct under both U.S. and EU law and focus on the factors that the agencies consider in looking at predatory pricing, refusals to deal, tying and bundling, and conditional rebates. This work will complement similar efforts being undertaken in the International Competition Network's working group on unilateral conduct.

We hope that these discussions will broaden our perspective on unilateral conduct, improve our approaches, and help us lessen the differences between our antitrust regimes.

Section 5 (“Unfair Methods of Competition”)

The Intel settlement also spotlights the rebirth of an old and valuable tool that is proving to be well-adapted to modern times: our authority under Section 5 of the FTC Act to prohibit unfair methods of competition. Thirty years ago – at a time when the antitrust laws were construed perhaps too broadly – the FTC was unsuccessful in several cases where it asserted claims under Section 5. As a result, for a long time we'd shied away from using this key statutory provision in our competition cases. But as antitrust law has become more and more restrictive over the past thirty years, it's become increasingly important to utilize every tool available to preserve competition. After all, Congress gave us this authority, and both Congress and the Supreme Court have made it clear that the unfair methods of competition provision is meant to go beyond the antitrust laws, as an additional protection for competition and consumers.

So we've been using our Section 5 authority. I've already mentioned Intel, where we alleged several instances of anticompetitive conduct under Section 5, and I'd like to discuss the recent U-Haul case as well, because our settlement with U-Haul helps show precisely why Section 5 authority is necessary.⁹ In that case, we alleged that U-Haul's parent company had attempted to collude with its competitor, Budget, to raise prices in the truck rental market. This is clearly conduct that we would all want to prohibit – but mere “invitations to collude” are generally not

⁹ Fed. Trade Comm'n, Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch in the Matter of U-Haul Int'l, Inc. and AMERCO, FTC File No. 081 0157 (June 9, 2010), available at <http://www.ftc.gov/os/caselist/0810157/100609uhhaulstatement.pdf>.

violations of the Sherman Act. Section 5 provided an appropriate vehicle to go after U-Haul's unilateral anticompetitive conduct.

As this example shows, Section 5 claims sweep more broadly than the Sherman Act, but its sanctions are less onerous. Section 5 does not have any civil penalties attached to it, and in addition, because it is by its own terms not an antitrust statute, it is not as likely to support follow-on private class actions for treble damages. Because there is no private enforcement of Section 5, many of the excesses of class action suits that have led courts to limit antitrust actions in recent years simply don't apply. The balance that Congress struck in drafting Section 5 makes it particularly useful in certain situations, and as our international partners consider creating a private right of action, we look forward to engaging in further dialogue, and sharing our thoughts about the pros and cons of private enforcement.

Conclusion

The fact that we are engaged in international dialogue over such issues as the private right of enforcement, pay-for-delay settlements or merger guidelines is striking for those of us who may have once assumed that these topics would be of little interest outside of the U.S. One might guess that such issues are creatures of unique regulatory context and specific interpretation of particular antitrust laws – but as competition laws all around the world continue to converge, more and more we are finding many conversations worth having across borders, and we will continue to have those conversations.

So that is my summary, and my plan for moving forward. I'm proud of the work the Commission has done so far – much of this work, by the way, continues the work of previous Commissions with previous chairmen from both parties – and I'm confident that we will continue to promote competition and protect consumers in the future.

What grade do we get? I'd like to say that we get an A, and in many ways I believe we deserve it. But as part of an enforcement agency, which has the ongoing and never finished obligation to protect the public interest, it's probably more appropriate to mark the report card as "incomplete."

Thank you very much, and I look forward to answering any of your questions.