The Federal Trade Commission

Opening Remarks of Chairman Deborah Platt Majoras
at the workshop on
"The Role of Competition Analysis in Regulatory Decisions"
AEI/Brookings Joint Center
May 15, 2007
Washington, D.C.

Introduction

I appreciate having the opportunity to address this critical topic, the role of competition analysis in regulatory decisions. The United States has organized our economy through a market system characterized primarily by competition and not by government control. Although this system certainly has its detractors, Americans enjoy the benefits of market-based competition every day, and recent empirical research affirms its unique advantages. In a recent 12-year study, the McKinsey Global Institute, led by founding director William W. Lewis, gathered empirical data on national economic differences among thirteen countries, including such varied economies as the United States, Poland, South Korea, and India. The researchers compared a few selected industries across those countries, to build a "ground-up" model that would explain the differences between rich and poor nations. They found, first of all, not terribly surprisingly, that the differences in wealth were due to differences in productivity. But that led to the next question, what accounts for the differences in productivity? Economic theory would suggest that

labor and capital productivity would account for much of the difference.

The answers, however, confounded the conventional wisdom. Differences in labor and capital markets did not account for differences; nor did massive investment in education and physical infrastructure or efforts to create a favorable financial environment through measures like market pricing and good corporate governance. All of these measures were important, but not primary. So what did explain the differences? The productive countries were most productive because they had undistorted competition in product markets. Competition, in other words, made workers and their companies measurably productive than their counterparts in countries with a less competitive economic environment.[1]

McKinsey also asked why competition appeared more effectively beneficial in some countries than in others.

I would submit that legal culture plays an important role. Even free markets need some rules to function most effectively – some people will always seek to cheat – and among those rules are the antitrust laws, which the Supreme Court once described as "the Magna Carta of free enterprise." Said the Court, "Antitrust laws . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[2] As if to punctuate such a statement, in the United States today we have not one but two federal agencies charged with enforcing the antitrust laws, not to mention 56 state or territorial enforcers and as many "private attorneys general" lawsuits as the

---

[1] WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY at 101 (2004). For a shorter, article-length version of this thesis see William Lewis, *The Power of Productivity*, THE MCKINSEY QUARTERLY, 2004 No.2, at 101.

[2] United States v. Topco Associates, 405 U.S. 596, 610 (1972) (Thurgood Marshall, J.).

bar can muster.

The need for general competition awareness

Having now been at either the FTC or the DOJ Antitrust Division for the better part of the past six years, however, what has become abundantly clear to me is that antitrust enforcement is necessary but not sufficient to protect competition. I frequently remind the FTC staff that they are not simply antitrust enforcers; they must also be champions for competition, standing up for it throughout the marketplace, regardless of whether those who seek to restrain it are private actors or government officials.[3]

Numerous agencies are involved. Given that market-based competition is so fundamental to the American system, it is simply not possible for two agencies of relatively modest size to act as its only guardians. The myriad issues influencing the level of competitiveness in our markets do not come marked in packages destined for the FTC or DOJ. Rather, officials across the spectrum of government agencies confront these issues every day. Their decisions affect, for example, the ease with which firms can enter the market, or how readily a new invention can be introduced and accepted. And where agencies oversee industries that have antitrust immunity, those agencies may be the only source of competition input for entire sectors of the economy. Thus, it is critical that sound competition principles infuse decision-making throughout the federal government, as well as state and local governments.

Unfortunately, however, decision-makers are consistently pressured to favor industries or businesses, often by protecting them from the harsh realities of competition. Virtually all firms

---

[3] For an elaboration of this thesis see "Promoting a Culture of Competition," remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, before the Chinese Academy of Social Sciences (April 2006).

profess a desire to keep government out of business, but the instinct to seek protection from competition is nonetheless very widespread. Often, the requested legislation or agency decision is "dressed up" as being necessary to protect consumers. But as one commentator put it, "calls to restrict competition, through government regulations and import barriers, are understandable – and usually wrong."[4] Moreover, while we can combat illegal private restraints on competition through effective law enforcement, government-imposed protections are legal, and, quite often, effectively permanent. The U.S. federal code is strewn with exemptions to the antitrust laws, many of which are decades old, most of which do not appear to serve any end other than the protection of certain industries from competition.

Because government restrictions on competition can produce such substantial inefficiencies and harm to consumers, the FTC has developed advocacy mechanisms to oppose ill-advised restrictions on competition and to urge legislatures and other agencies to incorporate sound competition principles into their analyses. Certainly we work closely in our analysis with agencies with whom our jurisdiction overlaps – for example, when we and the FCC both review a merger. But we have gone beyond that essential cooperation to advocate for sound competition principles in decision-making outside of the antitrust context. Almost two decades ago, an American Bar Association Report observed: "Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget."[5] I agree, and accordingly I have increased the

---

[4] Robert J. Samuelson, *Competition's Anxious Victory*, WASHINGTON POST, Feb. 2, 2005, at A-23.

[5] 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).

level of resources that we devote to this important work and have given it increased prominence.

It is important to note that the FTC does not casually comment on legislation or other agencies' regulatory decisions (even though we are often asked to do so). Rather, we use a careful analytical approach that considers the costs and benefits to consumers and relies on empirical evidence, asking three basic questions:

First, what specific harm to consumers is the barrier designed to address? The Commission looks for empirical evidence of consumer harm. Because states may vary in the degree to which they regulate various activities, we can often look for evidence on the presence or absence of consumer harm in states that allow the practice in question.

Second, is the proposed restriction appropriately tailored to address that harm? To answer that question, we look at whether the restriction will inadvertently curtail pro-competitive activity, in addition to halting the activity which it attempts to prevent.

Third, does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition? Here, we help to perform the cost-benefit analysis that all policymakers should undertake, emphasizing that competition is generally more successful than government regulation in protecting consumers.

In doing this we try to choose areas where we already have expertise as a result of litigation or policy hearings; areas where we have already reached a robust internal consensus on the merits; and areas where the same issue is likely to recur in multiple jurisdictions, thus giving us some useful scale economies in the production of comments. Our recent advocacy filings generally have sought to achieve one of three objectives: (1) facilitating entry, (2) eliminating perverse market incentives, and (3) making it easier for consumers to get useful information about goods and services.

Let me offer some examples of our recent advocacy in federal regulatory decisions. For the past dozen years, the FTC has provided competition, as well as consumer protection, expertise to FERC (and state regulators) to assist them in making the transition from regulation to increased reliance on competitive markets in the electric power industry. Our suggestions have been based on core economic principles. They have highlighted the importance of efficient price signals to provide incentives for investment and to encourage consumers to reduce consumption when the social costs of electricity are the highest; the importance of accurate and timely information to help consumers make good choices between alternatives; and the advantages of structural over conduct remedies to directly remove incentives to discriminate against unaffiliated customers, particularly with respect to access to transmission services. This transition in electricity markets has not been easy, but nonetheless nearly 20 states now have some degree of consumer choice at the retail level, and FERC works for competition at the wholesale level.

We also have weighed in, when appropriate, on regulatory decisions affecting entry. In 2004, for example, Eurex, a German-Swiss futures trading exchange, applied to the Commodity Futures Trading Commission for permission to set up an electronic operation in the United States to compete with the Chicago Board of Trade and the Chicago Mercantile Exchange. Not surprisingly, the incumbents opposed the application, arguing that the new entrant could engage in predatory pricing. Without examining or endorsing this particular applicant's submission, we filed comments in which we argued that new entry in general would benefit consumers of the trading services, pointing to economic studies that showed that the presence of multiple

exchanges increases competitive pressure and leads to significantly lower bid-ask spreads.[6] The CFTC ruled in the new entrant's favor, with Commissioner Lukken indicating that he placed "great weight" on the FTC's analysis.[7]

Just as consumers are well-served by markets in which efficient entry is not deterred, they generally are well-served by regulations that permit them access to the maximum amount of truthful and non-misleading information that markets can provide. Consistent with this goal, the Commission strives to work with other agencies to stop deception without imposing unduly burdensome restrictions on commercial speech.[8]

In the food and nutrition sector, for example, we have advocated allowing manufacturers to provide more accessible and useable information to consumers. Last year, the FTC staff commented on an FDA Draft Guidance document regarding whole grain label statements. We suggested that the FDA should permit – and illustrate through guidance – some ways in which producers could provide additional useful and accessible information to consumers, such as information that would provide consumers a context within which to understand the quantitative

---

[6] FTC Comment Before the Commodity Futures Trading Commission Regarding the Application of U.S. Futures Exchange, LLC for Contract Market Designation (Jan. 2004) (FTC File No. V040004).

[7] Statement of Commissioner Walter Lukken, Commodity Futures Trading Commission, USFE Designation Hearing (Feb. 4, 2004), *available at* http://www.cftc.gov/opa/speeches04/opalukken-07.htm.

[8] *See, e.g.*, FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 31000, 31000 (Aug. 2, 1984) ("The Commission's determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim."). These factors include consideration of the benefits of a truthful claim and the costs of a false or misleading claim, thus expressly balancing the goal of preventing deception with the need to ensure access to truthful information and vigorous competition. *Id.*; *see also* John E. Calfee & Janis K. Pappalardo, FTC BUREAU OF ECONOMICS, HOW SHOULD HEALTH CLAIMS FOR FOODS BE REGULATED? AN ECONOMIC PERSPECTIVE, ECONOMIC ISSUES PAPER 35 (1989).

data permitted on food labeling.[9] Developing and marketing new, healthful versions of good-tasting foods is expensive and risky. If producers cannot tout their advances in these areas, they will have little incentive to make the investments and take the risks.

In another advocacy on mandated information disclosure, FTC staff filed comments with the FDA regarding direct-to-consumer advertising of prescription drugs.[10] Our comments analyzed the economic effects of such advertising and suggested changes to the FDA's regulatory scheme that would permit information to be communicated to consumers in a more accessible way. Thereafter, the FDA issued several draft guidance documents designed to improve the information that consumers and health care practitioners receive in advertising about prescription drugs and certain medical devices. The FDA chose to permit advertisers to convey more limited and focused disclosure in direct-to-consumer print advertisements for prescription drugs, and to apply less burdensome regulatory standards to broadcast ads for restricted medical devices.

We also have advocated in favor of strong, consumer-friendly competition policy in appropriate state policy-making arenas, affecting, for example, the regulation of professionals. In recent years, a number of state legislatures and bar associations have sought to expand the

---

[9] *See* Comments of the FTC Staff Before the FDA in the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements (April 18, 2006), *available at* http://www.ftc.gov/os/2006/04/v060014FTCStaffCommentstotheFDAReDocketNo2006-0066.pdf.

[10] Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Consumer-Directed Promotion (Dec. 1, 2003), *available at* http://www.ftc.gov/be/v040002text.pdf; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf.

definition of "unauthorized practice of law." The practical result of this would be to expand the number of services for which a lawyer is required. It obviously is appropriate to ensure that lay persons do not sell legal services that they are not qualified to provide, but the primary purpose of some of these proposals appears to be protecting lawyers' profits.

For example, just last month the FTC and the DOJ Antitrust Division jointly filed comments with the New York State Assembly Committee on the Judiciary opposing such a piece of legislation.[11] Currently, parties to a real estate transaction in New York routinely rely on non-attorneys to provide real estate settlement services such as title abstracting and the preparation of closing documents. The proposed legislation would have defined all such work as the practice of law and by definition would exclude non-attorneys from nearly all aspects of real estate settlement services. In the absence of any clear showing that non-attorney provision of such services has caused consumer harm, the agencies advocated that the proposed legislation is not in the best interest of consumers. The comments filed in April were similar to those filed by the agencies in June, 2006, opposing a similar bill, on which no action was taken prior to the end of the 2006 legislative session.[12] This year, however, since receiving the joint letter, the Judiciary Committee has rejected the legislation outright, thereby preserving attorney/non-attorney competition in real estate closing services in New York State. Since 2002, FTC and DOJ have

---

[11] Fed. Trade Comm'n and U.S. Dep't of Justice, Comments to the Honorable Helene E. Weinstein, Chair, Committee on the Judiciary, New York State Assembly, Regarding New York Assembly Bill A01837, To Establish That Certain Services Related to Real Estate Transactions May Be Provided Only By Attorneys (April 2007) (FTC File No. V070004), *available at* http://www.ftc.gov/be/V070004.pdf.

[12] FTC File No. V060016 (June 2006) (commenting on Assembly Bill A05596).

filed similar comments in a number of other jurisdictions as well.[13]

In addition, over the last few years, a number of state legislatures have considered what are termed "minimum-service laws" for real estate brokers. These laws mandate a government-specified list of services that all real estate agents need to provide, rather than allowing the market to sort out the appropriate set of services that consumers want. These bills restrict consumer choice, price competition, and competition on the qualitative aspects of brokerage service, both amongst full-service brokers and between full-service brokers and those that provide fewer services at a much lower price than the standard 6% commission. For that reason, the FTC and DOJ jointly have opposed minimum service regulations in several states.[14] Our track record in this area is unfortunately mixed. The agencies have successfully opposed minimum services laws in Michigan, Kentucky, Idaho, and Mississippi. In 2005, however, we failed to dissuade Texas, Alabama and Missouri from adopting similar laws.

Another critical way that the FTC seeks to advocate for sound competition policy among decision-makers is by conducting market research and reporting facts to the public – a function that Congress explicitly assigned to the agency when it was first established. This not only

---

[13] These include Kansas (Feb. 2005) (FTC File No. V050002); Massachusetts (Dec. 2004) (FTC File No. V050002); Indiana (Oct. 2003) (FTC File No. V030016); Georgia (July 2003) (FTC File No. V030007); North Carolina (July 2002) (FTC File No. V020006); and Rhode Island (Apr. 2003) (FTC File No. V020013). *See also* FTC and U.S. Dep't of Justice, Comment to ABA Task Force on the Model Definition of the Practice of Law (Dec. 2002) (FTC File No. V030004).

[14] *See, e.g.,* Fed. Trade Comm'n and U.S. Dep't of Justice, Comment to The Honorable Alan Sandborn Concerning Michigan House Bill 4849, Which Would Change Current Law to Make it More Difficult for Michigan Real Estate Professionals to Provide Michigan Consumers With Customized Real Estate Brokerage Services (Oct. 2005), *available at* http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf.

provides expertise for our direct enforcement and advocacy work, but it also provides information that may assist other policy-makers.

There is probably no industry that we have studied more than the oil and gasoline industry. There may be no more visible and watched price in America than the price of a gallon of gasoline, and the FTC is charged with ensuring that competition remains vigorous in the petroleum industry. We do this by bringing enforcement actions, but also through constant study and monitoring. Thus, for example, prompted by widespread public concern about the spike in gas prices in the aftermath of Hurricane Katrina and as ordered by Congress, we conducted a study that found that, in light of the amount of crude oil production and refining capacity that was knocked out, the sizes of the post-hurricane price increases were approximately what would be predicted in a market that was performing competitively.[15] Our report also explained how price increases in response to supply disruptions can shorten the crisis period by creating incentives for suppliers to bring additional supply into the distressed market, and by giving consumers an incentive to use less of a scarce product, thus helping to balance supply and demand during the critical time of shortage.[16]

The Commission also has delved into the subject of ethanol. Late last year, the Commission issued a report that examined ethanol production in the United States and measured

---

[15] *See* Fed. Trade Comm'n, "Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases" (Spring 2006).

[16] *See* "FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases," prepared statement of the Federal Trade Comm'n to the Committee on Commerce, Science and Transportation, United States Senate, presented by Deborah Platt Majoras, Chairman (May 23, 2006).

market concentration using capacity and production data.[17] The study concluded that U.S. ethanol production currently is not highly concentrated and that market concentration based on production capacity had decreased over the past year. The study also examined the possible effect on concentration of agreements between ethanol producers and third-party marketers, and concluded that current concentration levels do not indicate that a single firm or a small group of firms could wield market power.

Last year, the Supreme Court relied on an FTC report in issuing a pro-consumer decision. A couple of years ago, the FTC issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.[18] Direct shipment is a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers that has been dominant in the United States. Many states, however, have banned or severely restricted the direct shipment of wine to consumers, thereby creating an entry barrier to the numerous, particularly small, wineries that seek to sell their products online.

The FTC staff report, reflecting the interest and sensitivity of the Commission to competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine in addition to more traditional forms of retail sales and distribution.[19] The report supported this conclusion with a study conducted by FTC economists, who found that many wines available to consumers online were not available in

---

[17] Fed. Trade Comm'n, "Report on Ethanol Market Concentration" (Dec. 2006), *available at* http://www.ftc.gov/reports/ethanol/Ethanol_Report_2006.pdf.

[18] Fed. Trade Comm'n, "Possible Anticompetitive Barriers to E-Commerce: Wine" (July 2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[19] *Id.* at 18.

local retail outlets, and that consumers could save money if they purchased their more expensive wines online.

Because underage drinking is a serious health and safety issue, the report examined various concerns that had been raised about the direct shipment of wine to consumers. The report concluded, however, that there was no systematic evidence of Internet-related shipments to minors.[20] In addition, data from states that permitted direct shipment suggested that consumer protection worries could adequately be addressed with regulations less restrictive than general bans on direct shipping.

In *Granholm v. Heald*,[21] the Supreme Court cited the FTC's wine report a dozen times in reaching the decision that Michigan and New York state laws that discriminated against out-of-state wine manufacturers violated the Commerce Clause of the United States Constitution.[22] Since the *Granholm* decision in May 2005, the number of states permitting some form of interstate wine shipping has increased from 26 to 33. To date, all of the states that had discriminatory direct shipping laws on their books at the time of *Granholm* have since opted to open up direct shipping to both in-state and out-of-state wineries, rather than eliminate the direct shipping privilege altogether. Several more states are now considering whether to change their laws in light of the Court's decision.

In another critical area of our economy, intellectual property, the FTC has issued two recent reports. In the first, the Commission recommended a series of changes to patent law and

---

[20] *Id.* at 34.

[21] 544 U.S. 460, 468 (2005) ("According to the Federal Trade Commission (FTC), '[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.'").

[22] *Id.* at 466.

policy to ensure that patents, which are critical to innovation, competitive markets, and economic growth, are enhancing and not reducing competition.[23] This report has contributed to the debate over patent reform, and some of the recommendations are being considered in Congress. The second report, issued along with the Department of Justice Antitrust Division, explains how, when properly construed, the antitrust laws and the intellectual property laws act as complements to promote incentives to innovate and increase efficiency in the economy.[24] It goes on to set forth the agencies' collective views on how issues at the interface of antitrust and IP will be analyzed.[25]

That type of transparency brings me to the final way that the FTC endeavors to spread sound competition principles. Because we are a law enforcement agency, we also strive to make certain that the business community and the public at large are well-informed about our competition policies. Ultimately, the FTC's work will not garner the needed public support unless we explain clearly the principles that apply and how we apply them. We strive to inform the public through a number of mechanisms, a particularly important one of which is the issuance of enforcement guidelines. The most prominent (and arguably influential) of these are

---

[23] FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 28, 2003). For a discussion of this and other intellectual property issues, including the important incentive role that patents provide, see "Government Policy for Fostering Innovation," remarks of William Blumenthal, General Counsel, Federal Trade Commission, before the Global Forum on Intellectual Property Rights Protection and Innovation (Mar. 28, 2007).

[24] FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 17, 2007).

[25] The agencies noted that they would apply the general rule of reason (rather than per se rules) to a variety of conduct, including joint negotiations by standard-setting organizations, patent pools, and licensing agreements.

the joint FTC/DOJ Horizontal Merger Guidelines. The Merger Guidelines provide a valuable road map for businesses to understand how the agencies review mergers, and they give information that allows firms to make informed decisions about the antitrust consequences, or lack thereof, of potential transactions.

In addition, however, the Guidelines also have affected how courts and other agencies analyze transactions. While not legally binding, judges frequently rely heavily on the Merger Guidelines' analytical framework. And, ten years ago, the FERC formally accepted the analytical framework of the Guidelines as a means of guiding its own assessment of the likely competitive effects of mergers in electricity markets.[26]

Conclusion

All agencies that make economic decisions face competition-related issues and thus contribute to making competition policy, whether explicitly or not. Monsieur Jourdain, the principal character in Moliere's play *The Bourgeois Gentleman*, once noticed, with a start, that he had been speaking prose all his life, and he resolved from that point on to produce better prose. So too, the FTC and, indeed all regulatory agencies are engaged, in part, in making competition policy, and it makes sense for all agencies to think about how to make better competition policy. Agencies can apply statutes and make rules and decisions in ways that enhance rather than squelch competition, and we can refuse to allow firms to undermine or manipulate regulatory processes to gain government-induced advantages. The FTC stands ready to help.

---

[26] *See* Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order 592, FERC Stats. & Regs. ¶ 31,044 (1996).

Thank you again for the opportunity to speak to you this morning.