

Remarks of Chairman Jon Leibowitz
36th Annual Conference on International Antitrust Law & Policy
Fordham Competition Law Institute at Fordham Law School
September 24, 2009

I. Introduction

Thank you for that kind introduction. I am happy to be here with so many smart antitrust lawyers, economists and enforcers from all over the world. When Debbie Majoras was here a few years ago – a very smart antitrust lawyer herself – she gave a detailed 35-page exegesis on “Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy.”¹ As much as I admire Debbie and appreciate her gift for alliteration, I think I’ll give a much shorter speech.

It’s only been a few months since I became Chairman of the FTC and Christine finally got her office at the Antitrust Division, and I am sure many of you are curious to see how we are going to enforce the U.S. antitrust laws. Christine is here so she can speak for the Division, so I am just going to give some brief comments speaking for myself.

At the FTC, even when administrations change, there is also continuity. There have already been some changes. We’ve brought on some outstanding new people to run the Bureaus and the Office of General Counsel, for example: Joe Farrell and Howard Shelanski in the Bureau of Economics, Rich Feinstein and Pete Levitas in the Bureau of Competition, and David Vladeck in the Bureau of Consumer Protection. Our new General Counsel is Will Tom. And more changes are to come as two new commissioners are waiting to join the Commission. We hope to hear something official about those nominations soon.

Even with all the changes, there is still a lot of continuity. Many of the people running the various shops at the Commission are the same as they were in prior administrations and, even with the addition of two new commissioners, sixty percent of the Commission itself will be the same as it was nearly four years ago.

There is yet another reason why there will be continuity – every Chairman has to get a majority and that means in practice that the Commission largely moves forward in a bipartisan way.

With that in mind, let me talk about some of my priorities going forward.

¹ Deborah P. Majoras, Remarks at the 34th Annual Conference on International Antitrust Law & Policy: Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy (Sept. 27, 2007), available at <http://www.ftc.gov/speeches/majoras/070927fordham.pdf>.

II. Merger Guidelines

One important change is that the two agencies are on the same page far more than we have been in the recent past. A lot of hand-wringing was caused by the obvious split between the agencies last year. When we talk to our international colleagues, we hear consistently that the FTC-DOJ fissure in connection with the Section 2 Report – not a single FTC Commissioner joined the Division’s Section 2 report and three of us criticized it² – damaged the U.S. agencies’ credibility and leadership. I agree.

Of course, the fissure between the agencies began before that report and included our disagreement over how to treat the *certiorari* petition in *Schering*, a reverse payments case.³

But now the agencies are much closer on substantive antitrust issues. We hope that achieving greater consensus between our agencies at home will enable us to work more effectively with our international partners on developing sound and compatible antitrust policies.

As an example of our cooperation, we announced a few days ago in Washington that Commission staff is working with staff from the Antitrust Division to modernize the Horizontal Merger Guidelines in order to bring those Guidelines closer to the way the agencies actually evaluate mergers.⁴

As you know, the two agencies jointly issued these Guidelines back in 1992.⁵ Thus the bulk of the Guidelines is over seventeen years old.

The areas we will be looking at closely as we think about updating the Guidelines include: the agencies’ use of direct evidence of anticompetitive effects as an indication that the merger may harm consumers; whether we should clarify how and why the agencies use the hypothetical monopolist test to define markets; whether we should update the description of how the agencies use concentration statistics like HHIs to understand the impact of the merger on the market; and whether we should put remedies in the Guidelines.

² 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>.

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

⁴ Jon Leibowitz, Remarks at the Third Annual Georgetown Law Global Antitrust Enforcement Symposium: Introduction of Philip Lowe and Announcement of Joint FTC/DOJ Project to Modernize the Horizontal Merger Guidelines (Sept. 22, 2009), *available at* <http://www.ftc.gov/speeches/leibowitz/090922mergerguideleibowitzremarks.pdf>.

The Commission and the Department of Justice have also created a website to solicit public comments and publicize the joint workshops: <http://www.ftc.gov/bc/workshops/hmg/index.shtml>.

⁵ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (1992), *available at* <http://www.ftc.gov/bc/docs/horizmer.htm>.

As our joint Commentary noted three years ago, the Guidelines exaggerate the extent to which the agencies follow a single, rigid, step-by-step approach in merger analysis.⁶ We don't always follow that approach when we evaluate mergers. Instead we center our inquiry on one key question: whether the merger under review is likely substantially to lessen competition. This won't be news to the antitrust *cognoscenti* in this audience, but the Guidelines are intended to tell everyone how the agencies look at deals.

From my perspective, the current Guidelines do not explain clearly enough to businesses how the agencies review transactions. They certainly do not explain clearly enough to judges how to review an acquisition. As many of you know, I've been a critic of the extent to which the Chicago School's optimism about efficiencies and about oligopoly conduct has affected merger reviews – as well as antitrust law more generally. But from my perspective, this effort is not about giving precedence to one antitrust approach or another; it is really about good government, and making sure that the rules of the road are clear and easily understood, especially by those who enforce them. Hopefully, by giving everyone a better idea of how we look at mergers, we can clear up some misconceptions and demystify the process.

If we can do that then everyone wins.

We will be as open as we can as we update the Guidelines. We are soliciting comments both generally and on a number of specific questions that our staffs have identified.⁷ We will also be holding a series of public workshops in several cities starting at the FTC in Washington D.C. on December 3, 2009.

We welcome input from non-U.S. practitioners and competition experts, as our rules will affect you and your clients, and we are eager to learn from your experience. We also intend to consult with our international colleagues, some of whom recently have gone through this process in their jurisdictions, so that we can benefit from their insights.

III. Monopolization

In the area of monopolization – also called “abuse of dominance” – there will be continuity, but also hopefully some change. One reason for continuity is that the Commission will still have to work, as will the Antitrust Division, in an antitrust environment – especially the judiciary – that has not changed much since the election.

What kind of change do I hope to see? Well, it is currently fashionable in parts of the antitrust bar to adopt the view that, to promote efficiency, it is more important to protect potentially efficient conduct by monopolists than it is to protect competition. Maybe the thought is that if someone really smart is in charge of an industry then things will be done better (it's a sort of Hobbesian approach to antitrust). These concerns have led to proposals for greater

⁶ FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

⁷ FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES: QUESTIONS FOR PUBLIC COMMENT (2009), available at <http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf>.

predictability – for *per se* legality and safe harbors for many types of conduct that could harm competition – because of fears that uncertainty might chill procompetitive conduct.

These proposals seemed to reach their apotheosis with the Division’s Section 2 report from last year.⁸ Christine withdrew that report for some very good reasons.⁹ As I see it, these notions are inconsistent with the fundamental policy of the antitrust laws that competition leads to efficiency and to consumer gains.

To some extent, the development of antitrust law to this point is an ironic tale. For many years antitrust did have fairly clear and predictable standards. Tying was illegal; so was exclusive dealing. Patents were presumed to confer market power. And in cases like *Von’s Grocery*,¹⁰ antitrust law seemed more interested in curbing the ability of firms to get bigger than in protecting competition. Of course, *Von’s* was a merger case and not a monopolization case, but the story was the same everywhere – at one point, prominent antitrust scholars proposed in the *Neal Report*¹¹ a sort of no-fault divestiture program for firms that became too big.

Then, with the aid of the Chicago School and Robert Bork’s book, *The Antitrust Paradox*,¹² courts increasingly recognized that these simple and clear rules could lead to bad results in particular cases. Tying is often efficient; so is exclusive dealing. Patents do not always confer market power. We learned that consumers often benefit from this conduct. More and more cases were brought into the rule of reason and subject to the question: how does this conduct actually affect consumers?

But then, courts grew more concerned that the rule of reason itself imposed uncertainty and was prone to error in implementation, and some became concerned that the courts are not well equipped for the challenges posed by the rule of reason. So people became homesick for the clear and simple rules.

But we did not go back to the old bright-line rules. Instead, some are tempted by dramatically different bright-line rules that would cut off analysis in favor of presumptive legality for conduct that could be anticompetitive. That takes us to the Section 2 Report.

It seems to me that when we see conduct that both has efficiency justifications and harms competition, we are going to have to be sure that harm to competition is going to be short-lived before we allow the conduct to continue. Efficient monopoly may be better than inefficient

⁸ U.S. DEP’T OF JUSTICE ANTITRUST DIVISION, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

⁹ Christine Varney, Remarks as Prepared for the Center for American Progress: Vigorous Antitrust Enforcement in this Challenging Era (May 11, 2009), available at <http://graphics8.nytimes.com/images/2009/05/12/business/VarneySpeech.pdf>.

¹⁰ *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

¹¹ *Report of the White House Task Force on Antitrust Policy*, reprinted in 2 ANTITRUST L. & ECON. REV. 11 (1969) (the “Neal Report”).

¹² ROBERT BORK, THE ANTITRUST PARADOX (1978).

monopoly, but it is still a monopoly, and we are a competition agency, not an efficient-monopoly agency. So when a practice simultaneously hinders competition and facilitates the efficient operations of a monopoly, I know where I start out. You can look for more vigorous assertion from me, at least, that competition is the better answer.

In other words, you cannot have competition without competitors, and while antitrust law should never return to the era of *Von's Grocery* or the *Neal Report*, and cannot be based on the complaints of what Philip Lowe refers to as “grumpy competitors,” it also must avoid becoming so hypnotized by the possibility of efficiencies that it abandons competition.

Or as our outstanding new Bureau of Economics Director Joe Farrell has said, competition deserves a presumption, too.

IV. Section 5

Finally, one area of both continuity and change is Section 5 of the Federal Trade Commission Act, where you are likely to see us try to protect consumers by expanding the use of our authority to prohibit unfair methods of competition.¹³

During the 1970s and early 1980s, the Commission tried to use this authority as a lever to transform entire industries that were thought to be underperforming. To that end, the Commission in *Ethyl*¹⁴ and *Boise Cascade*¹⁵ took the position that conduct could be unfair under Section 5 of the FTC Act whenever the Commission perceived that the markets were performing poorly and the conduct might facilitate that poor performance – regardless of whether that conduct was unfair under any generally accepted definition of the term.

Among other problems, this theory made it virtually impossible for firms to discern what conduct was likely to be considered illegal by the Commission.

People have asked us, given the thumping we took in those cases, why we would want to revisit Section 5? The answer is simple: antitrust law is far more restrictive than it was thirty years ago and if we want to accomplish our mission of protecting consumers in an age of judicial conservatism, we need to use every tool in our arsenal. Moreover, it is what Congress intended: one can't look at the legislative history of the FTC Act and come to any different conclusions.

Senator Cummins of Iowa, one of the main proponents of the FTC Act, emphasized that the reason for the law was “to go further and make some things offenses” that were not condemned by the antitrust laws. As Senator Cummins explained to his colleagues, “the only purpose of Section 5 [is] to make some things punishable, to prevent some things, that can not be punished or prevented under antitrust law.”¹⁶

¹³ 15 U.S.C. § 45(a)(1) (2006).

¹⁴ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (“Ethyl”).

¹⁵ *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

¹⁶ 51 CONG. REC. 12,151 (1914) (statement of Sen. Cummins).

And of course, there is no private right of action under a pure Section 5 case, we cannot seek a fine or civil penalties as a result of a violation, and there is no right to treble damages from a violation.

So, ultimately, I am convinced that while the antitrust *cognoscenti* may be concerned, business executives will see some value in this approach.

But if we are going to use Section 5 beyond the antitrust laws, it seems to me that we are better off sticking close to Congressional intent and going after conduct that fails the most basic tests for fairness, when that conduct has the possibility of harming consumers. As the Second Circuit held in *Ethyl*, there must be some “indicia of oppressiveness” before the FTC will find a straight Section 5 violation.¹⁷

A good example of this idea is our *N-Data* consent where N-Data allegedly reneged on commitments made to a standard-setting organization.¹⁸ The case was not an antitrust case because the bad behavior did not cause or increase the firm’s monopoly power. But we stopped that conduct because we knew it was unfair – and that it would harm consumers by hindering standard-setting in general as well as at the standard-setting organization involved.

V. Conclusion

Finally, one area in which you will see continuity is in maintaining and strengthening the strong cooperative relationships with our counterpart agencies around the world. We will continue to work closely on cases of mutual enforcement interest to try to ensure compatible outcomes, and to pursue policy coherence through the International Competition Network, Organization for Economic Cooperation and Development, and other multilateral fora as well as through our excellent bilateral relationships.

I look forward to answering your questions and hearing from the rest of the panel.

¹⁷ *E.I. du Pont de Nemours*, 729 F.2d at 139.

¹⁸ Fed. Trade Comm’n, Analysis of Proposed Consent Order to Aid Public Comment in the Matter of Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf>.