

Roundtable Conference with Enforcement Officials

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KATHRYN FENTON: On behalf of the Section of Antitrust Law, I would like to welcome everyone to the highlight of our Fifty-Sixth Annual Spring Meeting, the discussion with enforcement officials.

As you know, over the years this roundtable has been an opportunity to hear about the year in review and, more importantly, recent developments that you need to be aware of as you deal with antitrust and competition law issues throughout the world.

I am going to take advantage of the fact that all of our panelists are extremely well known to you to avoid lengthy introductions. We simply want to thank them for their graciousness, which they have shown year after year, in making themselves available in this forum.

I also would like to introduce Chris Hockett, who is Program Officer for the Section of Antitrust Law, who will explain the slightly different format that we are using this year.

CHRISTOPHER HOCKETT: We were inspired this year by the CNN YouTube debates, in which all of America was solicited for questions to ask the presidential candidates. And Kathy has come up with the idea of soliciting the membership for videoed questions for today's session.

So the call went out, and you responded, and we are very grateful to those of you who did. As you will see, the questions we got are excellent. They come from a wide variety of perspectives. They're provocative. They're on point.

We are also very grateful to Matthew Bye and Peggy Ward, who helped us assemble the videos and straighten them out so that they could be heard.

We hope you like this format. Please let us know your feedback about it.

FENTON: With that, as they say, let's go to the tape.



Gary Zanfagna
Honeywell,
Morristown, NJ

GARY ZANFAGNA: Good morning. My name is Gary Zanfagna. I'm in-house antitrust counsel for Honeywell, in Morristown, New Jersey. My question is for all of the panelists. One of the reasons that I attend the Antitrust Spring Meeting each year is to be able to report back to my company on what's happening at the government antitrust enforcement agencies.

My question is the following: What is the key message I should bring back from the meeting this year on the developments and activities in your agency?

FENTON: Debbie, since we know this will be the last time you will be joining us as Chair of the Federal Trade Commission, why don't we ask you to start?

DEBORAH PLATT MAJORAS: I think there are some important messages that you ought to take back to your clients, particularly in light of some of the rhetoric that can be floating around.

The first is that the FTC is remaining very vigilant, very active, in enforcing both the antitrust and the consumer protection laws. There was talk yesterday at the very good Chair's Showcase Program about the need to engage the courts. I'll go through a few examples in a minute. We are absolutely doing that. I agree with the sentiment; my fellow Commissioners, I believe, agree with it, and we are engaged in various stages of important litigation.

One of the reasons I think that message is so important right now is that, with the political campaigns going on and the like, we sometimes hear offhand comments reported in different publications—I'm always surprised when I hear them from someone in the antitrust bar—that say, "You know, there really hasn't been much enforcement." I guess you haven't checked our Web site recently if you think that. But it can be dangerous because we've had situations where people have come to do mergers recently and have been surprised because they believed that, and have seen really how we are analyzing these mergers—the same as always.

The second message I would take back is that—and this is related—there is a full pipeline at the FTC. I won't know after today, but I certainly know where it stands today.* I'm proud to say that there's still plenty there. So I wouldn't expect a real slowdown from now through this transition and then seeing what happens in November.

The final thing I hear from time to time is, "The agencies are really worried because the FTC has lost some cases and they're probably worried about bringing other cases, afraid to go back into the arena." I wouldn't make that mistake either.

I was thinking about it last night: I don't know of a single person in the FTC who's cowering in fear at the moment. So, in all seriousness, I really wouldn't be concerned about that.

Let me just put a little bit of flesh on this quickly.

If you just take the fiscal year 2007, for example, where we issued thirty-one second requests and took twenty-two enforcement actions, including three that were litigated, by any standard over history that's a fairly active agenda in mergers.

We also brought two HSR violation actions. Those are always important to remind people of what the requirements are.

We also won a very important case, the *Chicago Bridge* case, in the U.S. Court of Appeals.¹ I haven't heard a lot of talk about this case, but the fact is there are so few merger decisions that reach appellate courts these days, that I think any one of them is very important. You won't be sur-

* Ms. Majoras resigned as FTC Chairman effective March 30, 2008.

¹ *Chicago Bridge & Iron Co. v. FTC*, 515 F.3d 447 (5th Cir. 2008).

prised that I like that particular case, because it upheld the FTC on nearly every point. And it does say some interesting things about concentration levels in certain industries and about entry. But I think, overall, what it shows is that the appellate courts think that the analysis that we're applying in mergers is sound. I think that's very important.

The other thing I'll say, though, with respect to these cases is there are some we have not brought, cases like Google/DoubleClick,² and those are important to look at as well.

But I want to emphasize—here I am playing this statistical game a little bit; everybody does it—but what you have to focus on is bringing good cases, bringing the right cases, and not bringing cases in which there really would not likely be harm to consumers. I mention that for you, too.

Our non-merger docket also continues to be a healthy one. We recently filed a case against Cephalon, attacking Cephalon's conduct under Section 2 for entering into patent settlement agreements with four different generic challengers, and several side agreements with those, and setting a particular date, the same date, for all four of them to be permitted to enter. That I think will be another important case in a line of others.

Along the same lines, we concluded this year our *Warner Chilcott* case in federal court with a very favorable settlement for consumers.³ We managed to get a generic product onto the market and save consumers some money.

Our staff tried the *Realcomp* case⁴ before administrative law judges, one in a series of real estate cases that we brought, where we found exclusionary behavior in the residential real estate sector. You can keep following these.

And we have a couple of cases in the circuit courts right now: the *Rambus* case⁵ was argued on February 14 in the D.C. Circuit; the *Whole Foods* merger case⁶ is also pending in the D.C. Circuit; and *Realcomp* will be argued before the Commission next Tuesday, April 1.

So as you can see, in terms of engaging the courts, pushing the bounds of the law, we have a number of things.

The last thing, though, that I do want to mention—I want to make sure this never gets lost—is that our policy agenda is very vibrant, including our advocacy work. In the last year, for example, we issued a report on the net neutrality debate, a very important debate going on in the broadband space, explaining what we are seeing in that market and what we think various regulatory proposals could mean for competition. That demonstrates how competition policy goes well beyond our own little antitrust space here, into actual effects on markets, and how public policy throughout Washington and the fifty states can affect consumers and competition. So our broadband report is an example of that.⁷

We held a unilateral effects workshop recently, which I think was terrific. We had very good experts talking about issues that we're a little concerned about in unilateral effects analysis. I'll be excited to see from the sidelines what kind of report can come out of that.

[W]hat you have to focus on is bringing good cases, bringing the right cases, and not bringing cases in which there really would not likely be harm to consumers.

—DEBORAH MAJORAS

² Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

³ *FTC v. Warner Chilcott Holdings Co. III*, CV No. 1:05-cv-02179-CKK (D.D.C.).

⁴ *Realcomp II Ltd.*, FTC Docket No. 9320.

⁵ *In Re Rambus*, F.T.C. Docket No. 9302 (Liability Opinion, Ag. 2, 2006), appeal pending (D.C.Cir. 2007).

⁶ *F.T.C. v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

⁷ *Broadband Connectivity Competition Policy: A Federal Trade Commission Staff Report* (June 2006), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

You should also look for two new workshops that are coming up in the health care space. There's one on new health care delivery models. Health care is changing so quickly every day, and so we are doing an update—if you will, a checkup—since the health care hearings that the two agencies had. And we are doing another one, separately, on clinical integration, which is raising some new issues.

With that, I just wanted to give you a bit of an overview of what I see going on at the FTC.

FENTON: Thank you, Debbie. Could we hear from Tom Barnett and the Justice Department?

THOMAS BARNETT: The first message I would suggest that, Gary, you take back, and the rest of you take back, to your clients is: to the extent that any of you might be considering entering into price fixing, market allocation, or other naked agreements not to compete, now is the most dangerous time in the history of the world to do so. I say that for several reasons.

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First, in terms of the Division's cartel enforcement program, it is by all measures doing as well or better than it ever has before.

We put a great premium on obtaining prison sentences, putting people who fix prices into jail. In fiscal 2007, we more than doubled the previous record for the aggregate months of prison sentences imposed on Antitrust Division defendants. That is a phenomenal statistic. That is a result not only of the fact that we are bringing many cases, but the average sentence imposed per defendant has gone up significantly. Not that long ago people were saying, "It's hard to put somebody in jail at all." In fiscal 2007, the average sentence imposed on a defendant prosecuted by the Antitrust Division was thirty-one months. That's a huge jump from what it was before.

In addition, we are getting financial penalties. Over the last two fiscal years, we have obtained over \$1 billion in fines. Our current pending grand jury investigations number more than 135. I think it is quite defensible to say that, on just purely the domestic front, the Division's cartel enforcement program has never been better.

But I also say it's more dangerous to participate in cartels because internationally we are seeing more, deeper, better, richer cooperation on cartel enforcement. The European Commission has also been a strong leader on this front through high fines and effective leniency programs. Many other jurisdictions—Japan, Korea, Canada, Australia, the United Kingdom, Ireland (and I know I'm forgetting a number of them)—are now aggressively pursuing cartel enforcement. There is an international consensus that this should be a priority and should be prosecuted aggressively.

—TOM BARNETT

I hesitate to say it, but it is almost routine now for us to coordinate searches on two, three, or more continents simultaneously. "Routine" is not giving credit to the people who organize this, because it is tremendously complicated to line everything up so that in Europe, the United States, and Asia there's a knock on a door within minutes of each other.

But we have also expanded now to coordinating not only during the investigation but on the resolution. The marine hose matter, which I think we'll talk about a little bit more later, sets an interesting precedent.

The second message would be that the Division, like the FTC, remains very focused on aggressive but appropriate merger enforcement. We do take great pride in maintaining the efficiency of the process, trying to avoid second requests where we can, and trying to minimize the burden where we can. What we do is we follow the evidence under the principles as set forth in the Merger Guidelines where it takes us. That has led us in certain instances to challenges you might not have necessarily expected, where the combined market shares might be below 50 percent but nonetheless the evidence supported a valid theory of anticompetitive harm, and we pursued it.

At the same time, it has led us in instances to not pursue challenges where the evidence didn't support it. The most recent example of that would be *XM/Sirius*. The evidence simply wasn't there, and so we closed our investigation.⁸

I guess I will add to Debbie's comment, because people do ask about it. Are we, or the FTC, afraid to litigate a merger case? We like to litigate merger cases—it's professionally very rewarding—but you have to pick the right cases. We are ready to do it.

There have been times where I have signed a complaint, on the expectation that we would be filing it within days. The parties then elected to come to the settlement table and we resolved it through a consent decree. That's a win/win. It's a very positive outcome. But I mention it to underscore that at the time we actually thought we were going to litigate. We are willing to litigate cases, as we are in Charleston, West Virginia, right now, involving two newspapers in a merger.⁹

The third message is, again like the FTC, the Division has a very strong policy/advocacy program. We've been very active, and I think very successful, in terms of our amicus program in the Supreme Court. Obviously, in the last term the Court issued several decisions: the *Twombly* decision,¹⁰ the *Leegin* decision on resale price maintenance,¹¹ and the *Credit Suisse/Billing* decision.¹² I think these decisions by the Supreme Court, the engagement on the issues, is very healthy. They are largely doing, I think, two things: updating old antitrust precedent in light of modern economic and legal thinking, and that is a very healthy thing. The *Leegin* case is a great example of that. Second, the court is also trying to fine-tune the antitrust laws so that they are better focused on protecting competition and consumer welfare. I think *Twombly* is a good example of that, trying to rein in some of the potential excesses of litigation.

We have engaged in other types of advocacy. We have a long-running program focused on the real estate industry. We published an Internet Web site to educate people in this area. We've also been engaged on airport congestion issues, as well as a range of others.

Finally, I think I will return to the issue of international cooperation and developments there. We spend a significant amount of resources in this area. As you know, it is very important.

China and India are implementing their antitrust laws this year. We have been engaged there. We continue to send people to help train, help exchange ideas. It's a cliché, but it is a global world out there now and we are dealing on a global level. There have been tremendous steps forward.

I think at this point in time it's appropriate to remind people that when Debbie first stepped onto the stage of government enforcement, we were all talking about *GE/Honeywell*. Gary, you may not have been there at the time—you have a personal interest in that. We haven't had a *GE/Honeywell* since then. That's because the communication, the cooperation, the substantive and procedural convergence that we have achieved, have avoided it. I can assure you there have been opportunities for divergence in this area that the improvements to the processes have helped us to avoid. I think that's a great thing.

⁸ Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), http://www.usdoj.gov/atr/public/press_releases/2008/231467.wpd.

⁹ *United States v. Daily Gazette Co.*, Civil Action No. 2:07-0329 (S.D. W. Va. filed May 22, 2007).

¹⁰ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

¹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹² *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

FENTON: Thank you. And now we turn to Bob, who is speaking on behalf of the National Association of Attorneys General Antitrust Task Force.

ROBERT HUBBARD: The message from the states is that a lot of the same old stuff is going on. There's a lot of continuity. People sometimes lose track of that.

First, the states were audacious enough to continue the Microsoft consent decree for another two years.¹³ We are still working on pharmaceutical matters with the FTC and otherwise.

We got penalties in the Ovcon litigation that Debbie referred to.¹⁴ We think ultimately that the settlements were very favorable and that the parties were completely disgorged of the profits that they got from their anticompetitive acts.

Just recently, we brought the *Tricor* case,¹⁵ which we hope will reinforce the message. States look for abuses that occur in pharmaceutical markets, and try to do our part with the FTC to make sure that those abuses are lessened and remedied.

We've engaged in advocacy in pharmaceutical markets too, in the *Cipro* amicus¹⁶ and the *DDAVP* amicus.¹⁷ A very active state group, the Pharmaceutical Industry Working Group, continues to do a lot in pharmaceutical markets, through litigation, legislation, and otherwise.¹⁸ I expect all that to continue.

We've gotten enmeshed in this DRAM litigation.¹⁹ That litigation is continuing, and significant state resources are committed to it. The defendants made some aggressive standing arguments that the judge accepted. Judges can do that. We hope to deal with the challenges of that decision going forward.

I would be remiss if I didn't talk about vertical restraints. As I discussed last spring meeting, the states engaged in the briefing in the *Leegin* case,²⁰ and the New York Solicitor General participated in the oral argument. The Court rendered its decision in June. We have tried to think through what that decision means and to coalesce as a group of states on what the decision means.

We have given some indication of how that process is going.

We submitted comments on the *Nine West* petition to the FTC, talking about how in that specific instance resale price fixing is appropriately considered "inherently suspect."²¹ If the goal of the restraint is to raise prices for consumers, you ought to be a little skeptical about the restraint promoting consumer welfare, particularly if it's not ancillary to another purpose. We've tried to

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—BOB HUBBARD

¹³ *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141 (D.D.C. 2008).

¹⁴ *Colorado v. Warner Chilcott Holdings*, No. 05-02182 (D.D.C. Nov. 10, 2005).

¹⁵ *Florida v. Abbott Labs.*, No. 08-155 (D. Del. Mar. 18, 2008).

¹⁶ Brief for the States as Amici Curiae Supporting Plaintiffs-Appellants, In re Ciprofloxacin Hydrochloride Antitrust Litigation, No. 08-1097 (Fed. Cir. Jan. 24, 2008).

¹⁷ Brief for the States, In re DDAVP Antitrust Litigation, No. 06-5525 (2d Cir. May 30, 2007) (purchasers have standing to assert *Walker Process* claims), available at http://www.oag.state.ny.us/business/new_antitrust/antitrust_amici_new.html.

¹⁸ The co-chairs of PIWG are Florida's Elizabeth Arthur and Ohio's Beth Finnerty.

¹⁹ In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, No. 06-xxxx (N.D. Cal.), No. 06-5309 (S.D.N.Y.). In the indirect purchaser case in that litigation, the court rejected as too remote the standing of indirect purchasers to assert damage claims under various state laws for price-fixing of a component within computers.

²⁰ Brief of Amici States, *Leegin Creative Leather Products, Inc.*, No. 06-480 (U.S. Feb. 26, 2007), available at http://www.oag.state.ny.us/business/new_antitrust/antitrust_amici_new.html.

²¹ Amended States' Comments Urging Denial of *Nine West's* Petition, In the matter of *Nine West Group Inc.*, FTC Docket No. C-3937 (Jan. 17, 2008)(27 States); States' Comments Urging Denial of *Nine West's* Petition, In the matter of *Nine West Group Inc.*, FTC Docket No. C-3937 (Dec. 28, 2007) (11 states), both available at http://www.oag.state.ny.us/business/new_antitrust/antitrust_amici_new.html.

specify what our views on those vertical restraints are. We had a vertical restraints case settlement in *Herman Miller*.²²

We are undergoing a process internally to think about the Vertical Restraints Guidelines,²³ to consider whether to update the guidelines, think through the issues that arise in the federal legislation that has been proposed. We'll see how that goes.

States continue, I think more than other public enforcers, to act as in-house antitrust counsel for our states. That certainly could be more extensive. And a lot is behind-the-scenes. The people who work in-house understand the amount of work that's necessary, that you never really see.

We have ongoing efforts to reach out to state purchasers, trying to make sure that they recognize the red flags of bid rigging and get competitive results when they spend taxpayer money. We put out pamphlets.²⁴ We talk about when kickbacks may be antitrust violations. The outreach is really quite extensive.

States also engage in many comparatively unsung accomplishments. New York just convicted Marsh employees for state antitrust violations, with sentencing to come.²⁵ Nevada, along with DOJ, did a lot of work on a local health insurance merger.²⁶ Many little things, from the perspective of this international group, are going on in all corners of this country.

Finally, this is an election year. Some are talking about hope and change. Others talk about staying the course. I can't help but think that things may change. I don't know how the elections are going to affect the antitrust portions of our lives, but we will see. Perhaps we'll have an infusion of different kinds of analyses and different kinds of thoughts. This will be an interesting year.

FENTON: Thank you, Bob. And, as always, we are deeply grateful for and honored by the presence of Neelie Kroes, the EU Competition Commissioner. Welcome to Washington.

NEELIE KROES: I am grateful not only to be here, but also for this question. I am a bit puzzled, and I need you to please give me a hand with this. Take my story, if you believe it—and you should believe it—take it home, not only to the client but to everyone. For there is a misunderstanding.

Europe and its competition policies have a reputation on this side of the Atlantic for being anti-businesses, and even socialist in certain situations, if you believe certain commentators and certain papers—and a highly respected paper, by the way, in this case, *The Wall Street Journal*. But if you believe what you read on the opinion page of the *The Wall Street Journal*, there is a canal in Amsterdam that I would like to sell you!

Just speaking for myself, a number of you are aware that I have quite a bit of experience in the past century. My experience was from a young age in the business world and I am probably more capitalist than all of you together.

²² *New York v. Herman Miller*, No. 08-02977 (S.D.N.Y.).

²³ Guidelines and protocols for state antitrust enforcement, including the vertical restraints guidelines, are available at <http://www.naag.org/protocols.php>.

²⁴ Many states have brochures for public purchasers about maximizing vendor competition and for identifying bid rigging. States also prepare brochures on these themes as the result of investigations or otherwise. For example, as a result of its participation in a multistate investigation of a merger of school bus companies, Illinois recently prepared and distributed a brochure for school district administrators on these themes.

²⁵ *People v. Gilman*, No. 05-4800 (Sup. Ct. N.Y. County).

²⁶ *Nevada v. UnitedHealth Group Inc.*, No. 2:08-cv-233 (D. Nev. 2008).

Before I elaborate on that, let me give you just a little context, not just on competition policy but on Europe, and the European Union overall.

The Single Market has twenty-seven Member States. In Europe we are doing something no one has ever done before, merging on a consensual basis twenty-seven very different economies that speak twenty-one languages.

To bring that closer to home for you, imagine for a moment that France hadn't sold the Louisiana Purchase territories; imagine that Spain would like the idea of keeping California; and that Alaska wasn't bought from Russia for \$7 million (that was a good buy, by the way). Imagine then that the Sherman Act was passed in 1957 rather than in 1890. And imagine that Cuba had abandoned communism and joined the United States. In short, imagine a different America, of dozens of countries rather than one.

We are very similar in

If that was what you woke up to tomorrow, how would you react—that is an interesting question—and what would be the state of U.S. antitrust?

competition policy.

That is the sort of complicated scenario we face in the European Commission every day. It is not easy. But it doesn't mean we are anti-business or that our cases are decided on anything other than merit. It just means that our efforts are built on a different history and a different timeline.

We will not always

I am making this analogy because you will certainly better appreciate where we are going if you remember where we come from. That is most important in life. Looking at our systems from a distance, they are actually very similar. We are very similar in antitrust. We are very similar in competition policy. We will not always tread the same path at the same pace, but we are heading in the same direction.

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We have similar starting points in attitude, and at the end of the day we are working towards the same goal: competitive markets as a basis for prosperity. Like you, we believe it is competition and not competition policy that makes markets work. Sometimes I also need to explain this at home.

the same direction.

—NEELIE KROES

Of course, markets need referees from time to time, and we are referees, so to say. But we are no fans of excessive regulation either, neither my colleagues in the United States, nor we in Europe.

But while I firmly believe our systems are on a path of convergence, no one has a monopoly on antitrust innovation, and no one should want to have a monopoly in that field. I think we can all agree that a bit of competition never did anyone harm.

So I am pleased to be here to share some insights into our innovations and into our cases. We are proud of our use of economic analysis in our decisions and count our non-horizontal merger guidelines amongst our best achievements.

It is also useful to touch on our White Paper on antitrust private damages actions. It will be published quite soon, next week. But don't mention it to the outside world. I am not allowed to say that. I first need the backing of my colleagues, I should say.

We have the luxury of learning from your experiences in this area. I think that is key, for we have big debates in the European Parliament because there is so much misunderstanding of what is going on in your country when we follow a path towards more private enforcement, but do it our own way.

What's the difference? It's no great secret for you, nor for me. Your experiences aren't all positive. But the fundamental issue is that at present Europe has no effective means for private actions. I think we should change that.

In depriving ourselves of many eyes and ears in the fight against competition problems, we rely almost solely on public enforcement, such as fines—and they are not coffee money; that is

absolutely clear in Europe. I am not pleading for lower fines, for I am aware that those who misbehave take into account what the chances are that they will be caught. And then, if they are caught—and we are doing our utmost to catch them—then they should pay the bill.

But we are working to ensure our proposals exclude incentives for litigation without merit. We hope to develop a new way of delivering justice to the victims of competition problems.

My problem is that you get fined if you are caught; but those who pay the bill, they are just left with empty hands. So that is what we are filling in now, hopefully, with the White Paper, and we would partially close the gap between our systems as we do it, again in our own way.

Beyond that, our goal in everything that we do is to be clear, transparent, and predictable. Those are the words that are above my bed and they are above my people's beds. It is vital for the business world. It is vital to both the legal profession and for U.S. businesses operating in the European Union. These guiding values are essential in a world where we have scarce resources to piece together the competition puzzle.

In conclusion, be assured that I stand for a level playing field in Europe for all companies and that we in Europe are not that different from you. We are all in this together and not different from each other. So let's keep talking to each other and questioning each other on the difficult points, and remembering why we believe in competition in the first place. It is first about why and then about how. We should start with why competition policy is so important—to provide a fair playing field, and really make competition recognizable, and at the end of the day recognizable for consumers, and then we can fight this battle together.

HOCKETT: Let's go to our next question, which I think is a very nice follow-up to your remarks, Commissioner Kroes.



Rachel Brandenburger
Freshfields Bruckhaus
Deringer, Brussels,
Belgium

RACHEL BRANDENBURGER: Rachel Brandenburger, Freshfields Bruckhaus Deringer, Brussels. My question is for all the panelists.

European antitrust agencies appear keen to encourage the development of private enforcement, but they have also expressed concern about the need to avoid a so-called “American litigation culture.” However, in the United States unmeritorious cases are increasingly unlikely to obtain standing, given various Supreme Court cases.

What advice do the U.S. enforcers have for Europe in developing private enforcement, and what lessons does Commissioner Kroes draw from the United States' experience in recent years?

HOCKETT: Bob, do you want to start us off?

HUBBARD: A fundamental point for any state enforcer is that competition among enforcers is a good thing. I have always tried to think about public enforcers and private parties having the right to vindicate the public interest underlying the antitrust laws.

We get approached by businesses all the time that complain about being harmed. It's appropriate to ask them: “What is it that a state enforcer can do that you can't?” We note that private parties can bring their own action if they're harmed. That's a way to address our limited resources. Moreover, private rights make sure that competition gets extended throughout the economy, that competition becomes a part of daily life, that people have their own opportunities to foster competition.

Now, all of that is not to say that the American litigation style has no problems, and obviously giving a private right of action has to be adapted to the European model. I don't purport to understand the details of European litigation rules.

I think that our litigation system is criticized more than is justified. I think the rule of law and making sure that people pay for the harm they inflict on others is a good thing. There are burdens imposed by our system. Certainly, we should consider how to achieve justice without imposing litigation burdens in the antitrust context or in any context.

So I'm a longstanding advocate of private actions and allowing people to further their own rights. I think that competition is very fundamental right for any society including Europe and the United States.

HOCKETT: Tom, I'd like to hear your perspective. And if you could, talk a little bit about whether you would proselytize on behalf of a treble-damages remedy in civil actions.

People deserve to be compensated for the anticompetitive harm that has been inflicted upon them. And, given the uncertainties and expense of litigation, treble damages is a useful aspect of that.

BARNETT: Well, I do think that it is a good thing that the Europeans are looking at expanding private rights of action. They serve very valuable purposes, two of which readily come to mind.

One is the compensation issue that Neelie has referenced. People deserve to be compensated for the anticompetitive harm that has been inflicted upon them. And, given the uncertainties and expense of litigation, treble damages is a useful aspect of that. The second thing is it expands the reach of government enforcement. In a large economy, it is very difficult for government agencies to pursue every possible lead or complaint in the way that private parties may be willing to do.

So private enforcement is a positive thing, and I readily support and encourage Neelie's and her colleagues' efforts to expand this.

There can be excesses, but I think that those can be addressed. We have the Class Action Fairness Act.²⁷ We have rulings like *Twombly* that are trying to address those issues.

But what I would say is if you look at a spectrum here, and if you say the U.S. system was at one end, with maybe some substantial excesses, and at the other end, no private right of action in antitrust at all, the ideal might be in the middle. Europe needs to be cautious, and I wouldn't jump in with both feet right away. I would say Europe is way over on the other end of the spectrum and you're a long ways from having to worry about a lot of the problems that are at least discussed or asserted to be problems here in the United States.

—TOM BARNETT

MAJORAS: I think treble damages is something we focus on so much in antitrust cases, for obvious reasons. But if you are looking at the system and what the excesses may be and where they come from, you really have to go broader and look at our entire system. You have to look at things like class actions and their impact, contingency fees, discovery rules, and the like, because I think all of these various facets of our system have had an impact on cases.

I do think in a case like *Twombly*, where the Supreme Court grappled with the issue of how much needs to be pled—and as we heard the other day if you were at the antitrust lunch, *Twombly*, not surprisingly, is being cited much more outside the antitrust context on 12(b)(6) motions than it is just in the antitrust world. So that is something else that one could look at. What would you like your standards to be in getting past a complaint?

I understand there was a time when the United States wasn't quite so litigious and businesses didn't sue businesses so often, and it may have been harder to get lawyers. So perhaps then having a treble-damage incentive was very, very important. Some have questioned whether it is as important today to have such a heavy incentive. I don't know the answer to that.

²⁷ Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332 (d), 1453, and 1711–1715.

But those are the various things that you must look at because, I agree, there are real benefits to the system. You just need to zero in on where the excesses may be coming from.

KROES: We won't jump in—I can assure Tom we won't—immediately into a position like your system. No doubt about that. That wouldn't be accepted by the European Parliament. It wouldn't be accepted by me.

What is the main lesson that we have learned from your system? Putting it simply, to avoid incentives for unmeritorious litigation, in the area of collective redress and access to evidence in particular. Many thanks to quite a number of you who have contributed to the discussions that we are having. After publishing the White Paper there will be a next round, so I am looking forward to your thoughts. We are considering this issue very, very carefully, learning our lessons, in our culture, from your experiences.



Eleanor Fox
New York University
School of Law

ELEANOR FOX: This question is for Commissioner Kroes, Chairman Majoras, and AAG Barnett. It is about the ease of clearing international mergers. Correctly or not, the United States is perceived as an easier jurisdiction in which to clear mergers than is the European Union, especially in view of the *Impala—Sony/BMG* judgment,²⁸ in which the Court of First Instance held that the Commission had not given a sufficient justification for clearance. Has this judgment led to any real problems in clearing international mergers?

KROES: I'm not sure why you say that, correctly or incorrectly, the United States is perceived as an easier jurisdiction. It's not the truth. There is not that much difference; that is quite clear. I think that we have very similar approaches and that we have similar systems.

The truth is that in Europe we clear most of the mergers that are notified. I have now been in office more than three and a half years. Last year we had 400 merger notifications and only one was blocked. I'm talking about *Ryanair/Aer Lingus*.²⁹ In the whole three and half years, we have only blocked two. So I think we do have a good record and do the job as you are used to in the United States.

FENTON: Reactions from Tom or Debbie?

MAJORAS: I was surprised at the premise of Eleanor's question because, honestly, I just hadn't heard that previously. I think it is because substantively we really are so similar. And we both have fairly developed systems of allowing for fixes to mergers if in fact there is a problem, and of course most people avail themselves of that.

On the question of whether the fact that in Europe, the Commission—if they have a complaint about a merger and are going to close the investigation—then has to provide the justification for that, and whether that has an impact on us, I really haven't seen that it does. It really does not interfere with our cooperation in any way. I certainly have some sympathy for the Commission on this issue, only because I worry that competitors' incentives to make mischief can make more work.

But make no mistake about it, the analysis that the Commission undertakes in their written work to show why in fact they closed a particular merger investigation rather than taking some action

²⁸ *Independent Music Publishers and Labels Association v. Commission*, Case T-464/04, July 13, 2006, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-464/04&datefe=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

²⁹ Case No. COMP/M.4439 of June 27, 2007.

is the type of analysis that we have to go through anyway, and it is the type of analysis that our staff has to provide to us before we are willing to close matters, typically. So we are really still going through the same type of analysis.

I think, as you can see in some recent matters—I think *Google/DoubleClick* is a very good example—we cooperated extensively and ultimately reached the same result. The timing was slightly different, but that had nothing to do with the issue that is the subject of the question.

So no, I don't see any problem whatsoever that this presents for international cooperation.

BARNETT: If I could just add, I think of this question from both a procedural and a substantive perspective. I guess I should say at the outset that I also don't agree with the premise.

Procedurally, you can talk about some issues. You know, filing a Form CO is generally considered more difficult than filing an HSR form. On the other hand, if you happen to get one of our second requests, I'm not sure many people would be saying that they would prefer that to going through the European process, which is generally easier, more efficient, in some ways.

KROES: Not easier. More efficient.

BARNETT: I corrected myself.

But I took the thrust of Eleanor's question to be to the bottom-line substantive analysis. I have to say that there is just tremendous convergence, not only in the examples that you all have given. We recently resolved the *Thomson/Reuters* transaction, where we were at the table with the Europeans, and with the Canadians as well, as well as with the parties, working through the substantive analysis, the remedy, and we came up with something that was a win/win/win/win/win for everyone involved. That's fairly routine now.

Accordingly, my main reaction to the *Impala* decision is that it is potentially an unfortunate burden and distraction for the Commission if they have to spend a lot of time and resources drafting decisions on why they are not bringing a challenge or not entering a prohibition for a proposed merger.

The vast number of transactions that we all see, we don't pursue. We do go through an analysis. In many cases, that's not hard to do. In higher-profile cases, closing statements of some sort are appropriate. But, depending on the standard that's applied and how often you have to do that, that can distract time and resources from the other transactions where you really do think there's a problem.

MICHAEL FANELLI: Michael Fanelli of Covington & Burling and a Vice Chair of the Antitrust Section's International Committee.

My question is for Commissioner Kroes, Chairman Majoras, and Assistant Attorney General Barnett. During the remedies stage of an international merger review, do you consider that in some cases it would be more efficient and/or effective for the United States agency or the European Commission to take the lead in designing and seeking remedies that could take care of all competition concerns in a one-stop solution?

KROES: One-stop solution, no. One solution, yes.

MAJORAS: Wow. I can't best that.

Well, I'm really not just trying to put on a happy face. Today, of all days, I could let loose and



Michael J. Fanelli
Vice Chair of the ABA
Antitrust Section
International Committee,
and Covington &
Burling LLP,
Washington, D.C.

give you the truth. But I don't see a problem in our coordinating remedies. I, and I know that our staff, would be willing to change the process through which we work with our colleagues in Europe and other places on remedies if we saw an efficiency or effectiveness problem. But I don't see it.

I think there are some times where one jurisdiction might naturally end up taking the lead a little bit more, perhaps because that jurisdiction first came to the conclusion that there was a problem that might need to be remedied, or something of that nature. But the fact is, I think the process is working quite well the way we're doing it.

My fear is that if we tried to set up some special system where it would be "here's who takes the lead" and "the merger matters more to this jurisdiction than the other," there will be too many where it would take forever just to figure that out. As the clearance process between FTC and DOJ shows you, that's probably not worth it. So I think we're better off doing it on a case-by-case basis, as we've been doing.

KROES: And to avoid a timing nightmare, for that would be the case. We would lose more than we would gain.

BARNETT: I think the answer is more cooperation and close communication than it is the idea of one country taking the lead or not. Each country has to look at the competitive conditions in its own jurisdiction and make its own assessment.

I just mentioned *Thomson/Reuters*. We also coordinated our investigations in the *Cookson/Foseco* transaction with that common household item of carbon-bonded ceramics used in steel production, which got a lot of press, of course.

We really do coordinate closely. I think, Neelie, I'll just end with what you said—one solution but not one stop.



James Musgrove
Lang Michener LLP,
Toronto, Canada

JAMES MUSGROVE: I'm James Musgrove, and I practice at the Lang Michener firm in Toronto. I have a question to which I hope each of our panelists can offer a brief answer.

As we know, one of the subjects at the recent OECD Competition Committee meeting was the issue of minority ownership and cross-directorships in merger review. Many of us are wondering what prompted a reconsideration of that issue at this time. Would it be possible for each of our panelists to briefly tell us whether there are any new considerations related to that question at their agency, and also what guidance they can offer us as to how such interests would be addressed in merger reviews by their agencies in the next little while?

MAJORAS: The one thing that you need to be careful about when you look at the issues that we're considering in the OECD is that we meet three times a year, and we have to come up with new things all the time. So you shouldn't always take what we're talking about to mean that it's the hottest issue and that we have something absolutely new to say.

But remember, we have new experiences, and of course we have developing countries that come to our global forums and so forth at the OECD and always read our OECD papers.

In this instance, I know that, with some of the private equity deals that we've all been seeing, it's an issue that had reared its head. But I don't think that it was so much that we had new policy guidance, or a new policy direction if you will, that we needed to set down for OCED.

I think the OECD paper summarized quite adequately what we look at in such transactions, so I won't elaborate on it here.

BARNETT: I would agree with Debbie. I think the original reason we floated that topic was, as you say, we were reaching broadly for new and different topics we hadn't addressed in a while. Minority ownership had been around forever. And, somewhat to my surprise, when we raised this, it got an overwhelming response of interest.

I think the reason for that probably is exactly what Debbie pointed to. There has been a surge of private equity deals or other deals with minority investments, and I think you are probably seeing that in more countries around the world. So while in the United States or in Europe we may be a little more familiar with it, it probably is a somewhat newer topic for some jurisdictions.

The substance of it is in the OECD paper. We looked at whether or not a complete merger would be a problem. If it wouldn't be, we're probably not concerned. If it would be, then you look at whether there are any financial incentives created by the equity ownership interest or whether there are any levers of influence that could cause a reduction of competition. That is a high-level review of it.



Christi Braun
*Ober Kaler, Washington,
D.C.*

CHRISTI BRAUN: My name is Christi Braun and I am an associate with the law firm of Ober Kaler in their Washington, D.C., office.

My question is for the entire panel. When competing businesses discuss and ultimately negotiate a merger and acquisition transaction or a joint venture, it's inevitable that the managers running those businesses are at the table, actively engaged in the discussions. What guidance do you have for the lawyers advising those business managers as to how to conduct themselves and their meetings so as to avoid the appearance of impropriety, particularly in light of the fact that the transaction may not go through and those businesses may continue to compete in the marketplace? Does the European Union have the same concerns about "gun-jumping" and information exchanges that have been articulated in the United States?

FENTON: Neelie, I know that's a question I have heard from many clients, so we'll be interested in your answer.

KROES: Well, it's better to be safe than sorry with any ethical issue.

Having said that, until now I haven't had the experience, either with legal advisors or with companies, that they were not acting in the way that we would expect them to. I imagine that it would not be difficult to minimize the risk either for your clients or for yourself.

You could consider the following: that you have a clear agenda; that those who are invited to join the meeting are not involved in the daily running of the business. Those are a couple of issues.

FENTON: I am not aware of anything at the state level that has focused on gun-jumping or pre-merger coordination.

HUBBARD: States have not brought enforcement actions for gun jumping that I'm aware of. Gun jumping issues certainly come up. For example, a significant regulatory delay in getting approvals can lead parties to ask what things can they do and what things can't they do. Gun jumping issues are certainly something we try to think through and get right.

But you're right, there hasn't been state enforcement of gun jumping. It's not a "gotcha" kind of thing. Everybody understands that you are supposed to put together a transaction and not do things until you have authority to do things.

FENTON: Tom or Debbie?

BARNETT: How do I say this? I never try to question the subjective motivations for a question, but I will say objectively that this question leads to the antitrust enforcement officials up here underscoring that you need good, competent antitrust counsel in the room with you virtually at all times. I understand that may be in some of your financial interest. But at the end of the day, having good counsel there is important.

Now, I understand the question is what should the counsel say and do. You can address these concerns in terms of preparing written agendas, making a record of what was discussed and what wasn't discussed, limiting the people involved, trying to create firewalls, etc., etc.

But at the end of the day, my experience or observations about the cases we pursue for gun jumping—is that it's not a "gotcha" exercise. It is in situations, for example, where an express provision in the final contract says, "I get to sign off on all customer proposals that you present," which presents some gun-jumping issues. I hope most people in here would realize that.

Or situations where somebody has not produced 4(c) documents under circumstances where they had no reasonable basis, such as a board-of-directors-type document that should have been obvious and when, for example, they had more than one chance to give it to us.³⁰

So in those circumstances I really don't think they're close to the line. If there is common sense applied here, I think you generally don't run into too much trouble.

MAJORAS: I agree with all that has been said here.

I think the two agencies have brought six cases in ten years on gun-jumping issues. I think if you look at those cases, you will see what all the folks here have said, that this is not a "gotcha" exercise.

If you look at the *Computer Associates*³¹ case, for example, in 2002 that we brought when I was at the Justice Department, the buyer was signing off on every discount above 20 percent, and there were a number of things where they had taken effective control of the business. It ought to be obvious that that's problematic.

As far as advice to give going forward—and I admit I take a little of this probably from back when I was in private practice—I think businesspeople make a mistake when they just throw up their hands and say, "Well, we have to sit down and talk about all of this, so we can't put any rules in place." Whereas, if you really start unpacking it, I would say, whatever information is being shared, look at the type of information, look at the folks who are needed to share it, and see whether you can carve out some type of clean teams in certain circumstances. That's the reasonableness that I think Tom is talking about.



Robert Langer
ABA Antitrust Section
Finance Officer, and
Wiggin and Dana,
Hartford, CT

ROBERT LANGER: My name is Bob Langer. I'm the Finance Officer of the Antitrust Section and I'm with the law firm of Wiggin and Dana in its Hartford office.

My question is for NAAG Task Force Chair and New York Assistant Attorney General Bob Hubbard. Bob, as we know, the United States Supreme Court last term in *Leegin* overturned *Dr. Miles*, its ninety-six-year-old per se rule against minimum vertical price fixing. The Court announced that the rule of reason would replace the per se rule but left to the lower courts the development of a new common law regarding how the rule of reason should be applied to RPM agreements.

³⁰ See, e.g., *United States v. Iconix Brand Group*, Civil Action No. 1:07-CV-01852 (D.D.C., filed October 15, 2007).

³¹ *U.S. v. Computer Associates Int'l., Inc.*, Civ. Action No. 01-02062 (D.D.C. 2002).

Subsequent to the *Leegin* decision, you and other state antitrust enforcers quickly reminded antitrust practitioners not to forget the states, in terms of state enforcement of federal law, state enforcement of state analogs to the Sherman Act, as well as unique state laws, such as New York's Section 369(a), which purports to render RPM agreements in your state unenforceable.

My question is this: How can antitrust practitioners provide coherent advice to their clients in the wake of *Leegin*? As long as the states threaten enforcement of RPM agreements as per se violations under their respective state laws, there is, frankly, very little chance for the common law to develop post-*Leegin* under the Sherman Act, because seasoned practitioners will not advise their respective clients to incur such risk.

HUBBARD: Well, Section 369(a) doesn't just purport to make resale price-fixing unenforceable. I think the statutory language is pretty clear.³²

I don't apologize for trying to protect consumers. Most RPM policies are designed to raise prices for consumers and they do raise prices for consumers. I don't apologize for being skeptical when businesses argue that making consumers pay more is good. I think generally it's not good. It's appropriate to be skeptical and appropriate to take action when the restraint is about raising prices for consumers. It's usually not about providing services; it's usually not about providing extra value.

Leegin came down this year. A lot in *Leegin* is thought-provoking. States continue to have discussions about what *Leegin* means. *Leegin* didn't say that all you have to do is come up with a justification and the plaintiff is out. Rather, the Court said that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated."³³

For too long, with the per se rule, the arguments were based on theoretical literature, rather than the actual substance. State enforcers didn't really get beyond the theoretical arguments about whether resale price-fixing is good for consumers. Since *Leegin* has come down we've engaged in a lot more of that.

We've talked about applying the theories. How do the theories apply to facts? Are we really talking about providing additional value to consumers? Are these theories actually something more than just theories?

When we tried to apply the theories, we tried to develop frameworks that take skepticism about these restraints into account. We put that skepticism in our comments on the petition that Nine West submitted to the FTC.³⁴ We are trying to think through these issues. We're trying to get them right. But we don't apologize for trying to make sure that consumers are protected.



Milton Marquis
Dickstein Shapiro LLP,
Washington, D.C.

MILTON MARQUIS: This question is for Chairman Majoras and Assistant Attorney General Barnett. Inquiries by the European Commission and U.K. antitrust agencies have identified some competition issues in the European Union and United Kingdom, respectively. Could and should U.S. antitrust agencies undertake similar investigations here in the United States; and, if so, what industries would be at the top of your list?

³² N.Y. Gen. Bus. Law § 369-a provides: "Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law."

³³ 127 S. Ct. at 2717.

³⁴ Amended States' Comments Urging Denial of Nine West's Petition, In the matter of Nine West Group Inc., Docket No. C-3937 (Federal Trade Commission January 17th, 2008) (27 states); States' Comments Urging Denial of Nine West's Petition, In the matter of Nine West Group Inc., Docket No. C-3937 (Federal Trade Commission, Dec. 28, 2007) (11 states), both available at http://www.oag.state.ny.us/business/new_antitrust/antitrust_amici_new.html.

MAJORAS: I think it all depends on what type of industry-wide investigations you are talking about. In one sense, we do them all the time.

In the last year, we've done another inquiry into the oil industry. I tell you this every year. We do them every year. We are asked to do them or we find a reason to do them.

As I said, we looked at the broadband industry and what's going on there, various issues related to Internet access. We did a study recently on postal services that Congress asked us to do.

We are undertaking a study right now into authorized generics in the pharmaceutical industry and what has happened since they have entered the market. There we are actually using formal process in the form of subpoenas. We can't, of course, do surprise raids.

I think that those types of studies are extremely important for a number of reasons. First, it's true that we might find something that tips us off to some form of anticompetitive conduct, and if that's the case, we can then move to opening a formal law enforcement investigation to see whether in fact there has been anticompetitive conduct.

Second, though, I'm pleased to say that these studies are used by other policymakers to make sound policy. We don't operate in a competition vacuum. It is part of all economic policy throughout the world economy. So when Congress uses our stuff to see whether new legislation is necessary, when other agencies whose missions overlap with ours can use our work, I think this is very, very valuable, not just for law enforcement but for policymaking.

But I believe enforcement agencies should not undertake a study of a particular industry, say, "We think this industry could be a little more competitive in the way it's behaving. We haven't found any behavior that rises to the level of a law enforcement violation. But, if we just asked them to do some tinkering here and there, and maybe a little over here, that would make it a more competitive market." That I would not support, if there were anyone inclined to do that, because I just don't think, outside of law enforcement, that we are able to better tell the market what it ought to be doing.

Sometimes there are going to be market anomalies. If we can't take law enforcement and Congress doesn't want to act, then I think that's probably the end of it for us, though we can keep an eye on it for the future.

BARNETT: In addition to readily endorsing everything that Debbie has just said, I would suggest that we might want to start looking at market leaders in consumer products such as shampoo, antiperspirant, toothpaste. I don't know if she would endorse that concept or not.

On a more serious note, just to underscore the last point that Debbie made, I do think industry studies can be very valuable for the reasons she said. Going in and trying to restructure an industry because you think it could be more competitive, not only can result in mistakes, but you really do affect the incentives of the market participants in a way that can affect investment and development.

But there are very strong areas where such studies can be useful. I know Neelie has done some terrific work in this regard in Europe.

KROES: I am very much in favor of sector inquiries, but it is a bit different from what you were touching upon.

Number one, it is not a hobby, or an indication that we don't have enough to do. It is resource-intensive. But we are aware that in the last century, in the 1980s and in the 1990s, quite a number of sectors were liberalized or privatized in Europe. It is interesting to get more knowledge on whether what was decided at that moment has really been implemented. There were a couple of

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—DEBORAH MAJORAS

sectors in which we had the feeling that things was not completely implemented, and this concerned sectors that are important for the consumer and for competitiveness for the business world.

The energy sector provides an interesting example. The Commission also has a Commissioner for Energy. And finding out the facts and figures through a sector inquiry, what was, and what sometimes still is “rotten in the state,” is of importance for the proposals my colleague Andris Piebalgs has made to Parliament and to the Council.

I am a great believer that a Commissioner for Competition Policy should be a member of the Commission, for then you can add to the total policy of the Commission.

Having said that, there should be a real feeling that there is something worthwhile to get more information about. I learned quite a bit in our discussions, Debbie, about pharmaceuticals, about innovation in the pharmaceutical sector, and more research and what have you, but also about more competition, because it is so important for consumers. The average family in Europe spends more than 1,000 euros on pharmaceuticals, and since one euro is worth more than one dollar, as you are aware, that is quite a bit of money for the consumer, for the citizen. So that was one of the reasons for launching a sector inquiry in the pharmaceutical sector.

Of course, sometimes you are forced to go after an infringement, but all in all it starts with the knowledge you have and what could be done in a better way.

HUBBARD: If I could add, states also try to make markets work better. Pharmaceuticals is an example of that. A number of states have Web sites that post the pricing information for pharmaceuticals so that consumers can go onto those Web sites and explore their alternatives for filling their prescriptions.³⁵

Similar efforts at creating greater transparency of the competitive alternatives exist for gasoline pricing and otherwise. We think that’s an important part of trying to make markets work better when information flows are not as good as they could be.



Andrew Gavil
Professor of Law,
Howard University
School of Law, and
Sonnenschein Nath &
Rosenthal LLP,
Washington, D.C.

ANDREW GAVIL: This is Andy Gavil in Washington, D.C. I’m professor of law at Howard University School of Law and of counsel at Sonnenschein Nath & Rosenthal.

This is a question that was submitted to me. It is directed to all panelists. This question is about government antitrust enforcement in the area of unilateral conduct. U.S. judicial opinions and the U.S. enforcement climate have been less and less receptive to claims in this area. On the other hand, non-U.S. authorities, especially in the European Union, have pursued abuse-of-dominance claims with increased vigor. Given this disparity, are we entering an age where non-U.S. jurisdictions are going to set the global enforcement agenda for unilateral conduct claims? If not, why?

HOCKETT: Neelie, do you want to start us off?

KROES: I was just wondering whether this is the correct question. In my opinion, it’s the wrong question. My agenda is quite clear: I need to take responsibility to guarantee that citizens in the

³⁵ Addressing the Cost and Benefits of Prescription Drugs, 2005 National Association of Attorneys General Presidential Report 94–95, available at <http://www.atg.state.vt.us/display.php?smod=151>. In 2005, Arizona, Florida, Indiana, Maryland, New York, Ohio, and West Virginia had those Web sites. Vermont’s Web site is available at <http://www.atg.state.vt.us/display.php?smod=185>. See generally Julie Brill & Ano Lobb, State Attorneys General and Pharmaceuticals: Writing a New Prescription to Curtail Drug Costs 20 (Dec. 2007), available at http://www.law.columbia.edu/center_program/ag/Pharma_Conf.

European Union do not suffer undue harm from the abusive behavior of companies enjoying market power. Where we get our knowledge from, whether it is from the United States or from our own territory, I couldn't care less. It's just about ensuring that there is a fair, level playing field. If you take the lead, go on. But sometimes we will take the lead. That is not an important question for me.

HOCKETT: Tom, an important question for you?

BARNETT: Well, it's an important issue, but I also generally disagree with a large portion of the premise. I do think it is important to step back and take a slightly broader perspective.

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similar results.*

There is a lot more convergence here than people like to write about in the press, because it doesn't make as interesting an article. But you'll hear Neelie, you'll hear me, you'll hear Debbie, you'll hear lots of other people who are sitting out there talk about the focus on the competitive process, not individual competitors, and about the use of rigorous economic analysis. In large measure, we are looking at it the same way, with the same framework, and even reaching similar results.

Sometimes you see more activity because of different facts. I applaud a lot of what Neelie has been doing in Europe. She has referred to dealing with twenty-seven Member States that have national boundaries that you are trying to break down and forge into one market. That presents significant challenges.

Or take former Soviet bloc countries, or other countries, where I've talked to them about cartel enforcement being very important. They look at me and they say, "I agree. I just wish I had more markets where I had more than one participant." It is because the only participant is a former state-owned enterprise, and, therefore, they focus a lot on dominance issues. We in the United States have the luxury of a very mature market, with free-flowing capital and relatively low barriers to entry. So it is not surprising that you would see some different levels of activity on that front.

That's not to say there aren't individual cases where we might come out differently, and we talk frankly about that. I think the answer on that front is continued engagement and continued discussion. I think we all are very relevant, in terms not only of our own economies, but in dealing with some of the other economies out there that are standing up or trying to further develop their competition regimes, and we work very well together on that.

—TOM BARNETT

MAJORAS: I think in terms of who sets the agenda, the more enforcers you have in the global marketplace today, the more you have who are helping to set the agenda. That's just a fact of life. So to answer the question head-on, no, I am not worried that we won't be part of setting this agenda. I think we are. I think we have been and will continue to be.

Without question, you can say, "Well, whichever jurisdiction is most restrictive therefore absolutely sets the agenda," because we understand that businesses may have to conform to the most restrictive and feel they just have to do that around the world, especially if there is uncertainty as to particular countries. I certainly understand that aspect of it.

But, in antitrust, the cases you bring and the cases you don't bring really help set the agenda, because when you don't intervene in a market, that's actually a very powerful signal as well.

But I do have to go back to what I think is the premise of the question. It's right about the court cases in the United States. In fact, everyone should remember, when we make decisions, we read those court cases and we are responsive. That's part of that dialogue with the courts.

But the suggestion that somehow we are not engaged in this area is just absolutely ludicrous. At the FTC, in the last seven years we've brought seven single-firm conduct cases. You'd have to

go back to the 1970s before you find that level of activity.

Yesterday we had a fantastic panel, Kathy's Showcase Program. Five highly respected minds. It was a lot of fun for me to sit and listen. But the one place where I was scratching my head—and both my good friends Bob Pitofsky and Doug Melamed said it—was, “Oh yes, the FTC has brought these cases,” but I think Bob even said, “but those are sort of masquerading as Section 2.” I don't know what words he used, but they were sort of not “real” Section 2 cases. And Doug said, “Well, but that's in the standard-setting area and the patent-settlement area.”

My response is that, first of all, it's not as though I have this long list of complaints coming in the door on which we're not pursuing Section 2. That's simply not true. And most of these cases get started, by the way, through complaints from the outside. But also, naturally, the types of cases you bring are going to shift and change as the economy changes. And even if a case like *Microsoft*,³⁶ which has a broader number of issues because Microsoft was accused of engaging in more anticompetitive conduct than, say, the conduct that Unocal engaged in, okay, I understand that. You might get more issues decided in one case. But that doesn't mean *Unocal*,³⁷ where we saved consumers \$500 million a year, wasn't an important case and that it doesn't send very strong and powerful signals in an area like standard setting, which has become critical in this information economy. So I'd be careful with that.

Going forward, I think this is the most interesting dialogue in global antitrust. I think it will continue. We all have a lot to contribute to it. Experience certainly is the best thing we all have to contribute, and we'll continue doing that.



Amanda Wait
Hunton and Williams,
Washington, D.C.

AMANDA WAIT: My name is Amanda Wait. I'm from the Washington, D.C., office of Hunton and Williams.

My questions are about the state of the law of Section 2 of the Sherman Act. First, for AAG Barnett and Chairman Majoras: The DOJ and FTC had a series of hearings on the state of the law of Section 2 that ended last spring. Do the agencies still plan to issue a report on the hearings? If so, when can we expect such a report to issue, and can you offer any preview of its content?

Second, for all panelists: In light of these hearings, do you envision or would you recommend any changes to the application of the antitrust laws to unilateral conduct in your jurisdiction; and, if so, what?

FENTON: Debbie, do you want to start?

MAJORAS: Well, a ton of work on the part of the FTC and DOJ staffs has been put forward on a report, which I am very excited about. It's probably one of my great disappointments that I'm not here to see it through. I don't know whether there will be a report. As of today there's a plan that there will be a report that is released. That is certainly the great hope, I believe, of both agencies.

What we said at the beginning when we started this project was that we were hoping to find the areas of great consensus and identify those, but then also look at where we might be able to illuminate our thoughts in some of the more difficult areas, areas we could identify that might need some further work or further study.

I'll just say one thing before I turn it over to Tom, who will be here going forward. I think that we

³⁶ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

³⁷ *In re Union Oil Co. of Calif. (Unocal)*, Docket No. 9305, Decision & Order, available at <http://www.ftc.gov/os/adjpro/d9305/050610do9305.pdf>.

have proceeded according to that plan. The one thing that has come out of this for me—and we'll see whether this is ultimately the way it comes out—but the one thing that I have learned through all this is that there really is no unitary test for all conduct that falls within Section 2 rubric. To keep searching for that, while there may be principles that would stem from such a thing that you need to apply—and clearly there are—is not a productive exercise. It's not productive to say that we have to have the same exact test concerning the same exact factors for every single type of Section 2 conduct, because they're not all the same; they don't manifest themselves necessarily in the same way. So that's something that I was hoping to get a handle on and that came out of my understanding at the hearings.

Section 2 shouldn't be

something like the tax

code . . . Section 2

is designed to be

flexible . . .

—BOB HUBBARD

BARNETT: I guess I would start off with a prediction, with as high a degree of certainty as I think I've ever made any prediction since I assumed this job, which is that the agencies will not be issuing a report before Debbie's departure.

Having said that, there is still a plan to issue a report, and I very much hope that we are able to do so. It's a very extensive and rich set of materials that were compiled in nineteen days of hearings, twenty-nine panels, a hundred-and-some panelists. This is the area of least consensus within the United States, as well as abroad. Our goal is not simply to summarize the debate. Our goal is to try to advance the analysis, if we can do so.

In terms of previews, it's hard for me say unilaterally. This is not a completely unilateral exercise. But some things, at least from my perspective, are reasonably clear.

I generally agree with Debbie that it's very hard to come up with a unitary test. You can come up with something at a very high conceptual level, but the challenge is of course to translate that into something that's administrable and operable, such that businesses can use it in their day-to-day decision-making at the time they're making decisions. To do that in each area with one test is a great challenge.

Are there areas where changes should be made? Well, under the U.S. system at least, I would say I don't necessarily see legislative changes. We are not done in terms of working through it. But I think most of what we're talking about would be things that would be within the competence of the courts to clarify.

I have a great focus on trying to clarify objective criteria that are operational, that are administrable by the businesses and by the courts, so that they know where the line is. That not only helps them to comply with the law in that respect, but in many respects it will make it easier for the agencies to pursue actions if businesses have crossed what is a clearly demarcated line based on objective standards.

Beyond that, we are working hard, and hopefully we will get there.

HUBBARD: Unilateral conduct is a challenge. I think that one of the beauties of Section 2 is its flexibility. Section 2 shouldn't be something like the tax code, where you have everything written out and you can find your little niche here and you can find your little safe harbor there. Section 2 is designed to be flexible, so that jurors and judges can decide whether something is unreasonable. I think that's one of the beauties of Section 2 and we shouldn't lose sight of that potential for advocacy under Section 2. We shouldn't try to transform Section 2 into the tax code.

KROES: I'm not sure if it's a beauty in Europe, but we did review and focus on how we apply our rules, and especially Article 82 of the Treaty, which prohibits the abuse of a dominant position.

Having said that, as it stands, the examination of each case is rigorous, no doubt about that,

and there must be clear evidence of impeding competition and harm to consumers. The *Microsoft*³⁸ and *Telefonica*³⁹ cases are quite clear to show what I mean.

MAJORAS: Just commenting on Bob's comment: Bob, I agree with you that it is never going to be the Tax Code. But I do think that somewhere, given that (—and this is going to sound incredibly self-serving, I realize; it just hit me—) the first line of antitrust enforcement is back at the company, somewhere between the Tax Code and throwing it to a jury to say whether it's reasonable or not is desirable. That's why we grasp so hard for standards, recognizing that companies who want to stay on the right side of the line can know where the lines are. I agree with you, it's never going to be completely clear—I tell people all the time: “It's just the fact of a common-law system”—but somewhere between the Tax Code and throwing it completely open is appropriate.

HUBBARD: I mean that Section 2 is a flexible tool that can be applied in a number of circumstances. I don't apologize for trying to think through whether a firm with monopoly power is trying to avoid competition on the merits, whether there's a remedy for what appears to be wrong and whether the conduct harms consumers. I certainly do not believe that any twelve people can review every business decision and decide whether specific unilateral conduct is fair. But I am trying to push back on the sort of tax code themes that are all too frequently discussed here, which I don't think are a good way to analyze Section 2.

EDWARD HENNEBERRY: I'm Ted Henneberry, Chair of the European Competition Practice for Heller Ehrman in London.

I have the following question for Commissioner Kroes and Assistant Attorney General Tom Barnett. With the increasing globalization of the world's economy and the strengthening and expansion of national powers of competition enforcement, what steps do you believe can and ought to be taken to resolve the conflict among jurisdictions over the extraterritorial reach of enforcement, especially with respect to remedies, of each sovereign's respective competition laws? For example, in the case of cartels, we have multiple jurisdictions prosecuting the same companies and the same individuals for the same conduct. Is there a point that we reach diminishing returns?

BARNETT: I hear this question a lot. Maybe it's my own shortcoming, but I really don't see the problem. I'll address what I think is a potential concern, but at the end of the day in the cartel area I don't think it's a concern.

Think about two individuals who get together in a room and conspire that they're going to commit two murders, one in Washington, D.C., the other in London. Same people, same agreement, same conduct. Is anyone going to question whether or not we in Washington should prosecute them for murder and that the officials in London should prosecute them for the murder committed in London? I don't really think so.

That's what's going on in the cartel area. We prosecute people for harm to consumers in the United States. The OFT is prosecuting people for harm to consumers in the United Kingdom. There can be instances that arise—and the *Air Cargo* investigation is a good example—where the



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³⁸ Case COMP/C-3/37.792, *Microsoft*, Mar. 27, 2004, 2007 (L 32) 23, upheld in T-201/04, Judgment of September 17, 2007.

³⁹ Case COMP/38.784, *Wanadoo España v. Telefónica*, July 4, 2007.

commerce involved can be a little difficult to separate. That's an issue to be addressed, but frankly we do address it. So where you have these discrete retrospective fines or prison sentences, I think it's a very manageable issue.

Where it does become more of an issue is really in the non-cartel area, which Ted didn't raise. But if you are talking about prospective injunctive relief in worldwide markets, there can be issues of conflict and consistent standards and/or the least-common-denominator approach.

The short answer to that is close cooperation, communication, and engagement, which we've made a lot of progress on and we will still work on.

KROES: Just adding to what Tom has said, the relationship is excellent and we can, of course, always expand what can be done to improve our means of cooperation. Not in terms of sanctions, but in being more effective in our whole battle, and that makes sense.



Lesley Fair
Federal Trade
Commission

LESLEY FAIR: I'm Lesley Fair from the Federal Trade Commission.

This question is for Chairman Majoras and Commissioner Kroes. Antitrust lawyers and consumer protection lawyers seem to be talking to each other a lot more these days. In some recent antitrust cases, the Commission has applied traditional consumer protection concepts, like deception, and consumer protection attorneys are looking more at competitive issues in case selection and remedy. To use the word *du jour*, there seems to be a convergence between antitrust law and consumer protection law. Where do you see this trend heading?

MAJORAS: This is an issue that is very interesting to me because when I came to the Commission I didn't have a consumer protection background. Now I really love it and see its value. I guess I would look at it as less of a new convergence and more as maybe twins that were separated at birth and have been reunited. The fact of the matter is that both of these areas of the law have the same goals. We are today using a lot of the same tools—that is, many people may not realize, but we do use a lot of economic analysis now in our consumer protection work. The reason is that they really are two sides of the same coin.

In the *Rambus* case, which Lesley implicitly referred to, we looked at whether deception could be considered exclusionary conduct under a Section 2 framework, and the D.C. Circuit in *Microsoft* said yes, that was so, but hadn't really defined deception in drawing its conclusion that Microsoft had engaged in it. So we turned to the deception standard that has been in place since the early 1980s, which the FTC has been using and that courts have adopted. That was very useful. We'll see what the D.C. Circuit has to say.

It's very easy to look at consumer protection and think, "There are just so many other things we could do for consumers that would help their lives." Terry Calvani wrote a very interesting piece in Europe a couple of years ago that I think best illustrates the point.⁴⁰

There are also proposals in the subprime lending area in the United States that would illustrate my point. I'll just start with that. We obviously have had some real issues in subprime mortgage lending and the standards that have been applied to whether to lend money to people who have no choice but to go to that market. The problem, of course, is that in the name of protecting them, if you tighten the standards too much, then guess what? They're not going to have options in the marketplace any longer to get mortgages. Many of them today—you hear about all the problems

⁴⁰ Terry Calvani, *Do Europeans Want Higher Airfares?*, WALL ST. J. EUROPE (May 11, 2005).

but many of the people who went to that market are paying off their mortgages just fine and wouldn't have had houses otherwise. And so it's important.

The airline example was a good one. This was the passenger rights bill that was passed in Europe, which said that airlines, if they delay passengers, may have to provide all sorts of things (lodging, food, and the like), regardless of whether the delay was the fault of the airline or it might have been weather, which it often was. What Terry wrote, and what we feared as well—and as Russ Damtoft of the FTC actually experienced in Europe recently—was that statistics show that if the discount airlines on an average flight had to pay for food and lodging for everyone on the flight, that would far exceed their expected profit if the flight were actually able to go. So, if by protecting consumers you are then running out of business the low-cost airlines that consumers absolutely love, then we have to, as enforcers, ask ourselves the question: Are we really accomplishing something for consumers?

So I think those are ways in which we have to talk about competition and consumer protection often in the same sentences.

KROES: Adding to Debbie's remarks, consumer policy could of course increase competition by increasing transparency. And also, with your example, I think it is mainly that we also take into account that excessive consumer protection and regulation can have the opposite effect. That's not what we are looking for.

KEVIN O'CONNOR: My name is Kevin O'Connor. I'm a partner at Godfrey & Kahn, based in Madison, Wisconsin. Formerly, I was an Assistant Attorney General in the Wisconsin Department of Justice and I was formerly Chair of the NAAG Multistate Antitrust Task Force.

I have a question for my good friend Bob Hubbard. Bob, the states' vertical restraint guidelines have not been revised for over fifteen years. I know this because I was involved in the last revision. Since then, several significant decisions—*Leegin*, *LePage's*, *Dentsply*—have come down and have significantly changed the law governing vertical restraints. Moreover, the vertical restraint guidelines of the states contain then-current citations to the economic literature involving vertical restraints.

Two related questions for you. First, do the states intend to revise the vertical restraint guidelines any time soon; or do the states intend to do what DOJ did over fifteen years ago, and simply abandon guidelines on the premise that it is difficult to revise the guidelines to keep up with changes in the law and so forth? Secondly, if the guidelines are revised, do you intend to cite to or rely on the current economic learning regarding vertical restraints?

I would be happy to hear what Commissioner Kroes, Chairman Majoras, and Assistant AG Barnett have to say about your answer as well.

HUBBARD: Obviously, a lot of what Kevin says is true. *State Oil* also makes the states' vertical restraints guidelines clearly outdated.⁴¹ We've said that publicly. I don't think anybody would deny that.

But the guidelines process is difficult to undertake and complete. You have to build a consensus. If you can't really get almost everybody on board, is it really worthwhile? Shouldn't you be bringing cases instead of trying to set forth what the overall enforcement intent should be? It's hard



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⁴¹ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

enough to figure out when and where to use your resources for specific issues. Figuring out where and when to use your resources going forward is even harder.

But I do think that vertical restraints are significant. A lot is going on. States have thought about what to do with vertical restraints. *Leegin* and other developments have caused states to think about vertical restraints in a lot more depth.

And so, yes, a group of state enforcers regularly have calls about whether to revise the vertical restraints guidelines, how to set forth a framework for analyzing vertical restraints, and how to add to the analysis. We certainly will solicit reactions as the process goes forward. We are trying to make sure that we get it right and that we think through all the issues concerning vertical restraints.

As I mentioned earlier, the RPM literature is much more theoretical than the economic work for mergers, for example. Merger work has a lot more application of theories to particular facts. The literature on resale price fixing has less application of how theories actually apply. We tried to illustrate an actual application of the theories to facts in the mock trial program yesterday and otherwise.⁴² That's a challenge. That's the kind of economic thinking that we would like to consider and think through.

The time for ideological, almost theological, debate is past. Vertical restraints are often at the core of what states try to do and we are trying to move forward by applying theories to facts. But any revision of the vertical restraints guidelines is certainly not going to happen before Debbie leaves.

FENTON: With apologies to our panelists and the people who submitted questions, we clearly have a wealth of additional questions to explore that time is not going to permit. I think I am going to seek the indulgence of our participants to see if we can impose on them to answer some of the questions online and make this all available on the Section's Web site.

I'd like to finish up with one more question for each of the panelists, which I hope we can move through fairly quickly, and then we are going to have a general wrap-up question.



Joy Fuyuno
Partner, Paul Hastings,
Tokyo, Japan

JOY FUYUNO: My name is Joy Fuyuno. I'm a partner with Paul Hastings Janofsky & Walker in Tokyo, Japan.

This is a question for Chairman Majoras. The FTC's recent complaint and consent order in the *N-Data* case⁴³ was unusual in that it applied a Section 5 claim without a claim of antitrust violation. Should we expect more Section 5 enforcement activity like this in the future? If so, how will the Commission decide what cases to bring and how should we counsel our clients to avoid getting into trouble with the FTC?

MAJORAS: I think it's a tough question that Joy posed. As at least some of you know, the *N-Data* decision was one in which I dissented. It was the only dissent during my tenure at the FTC. I will be frank. It was not easy. We have a collegial group, and we work hard to get consensus. But I disagreed with the majority's decision in that case.

⁴² I am proud to convey that the jury in that program concluded unanimously that the resale price fixing was unreasonable. I thank New Jersey's Andrew Rossner, CRA's Tasneem Chipty, and New York's James Yoon for joining me in that effort.

⁴³ Negotiated Data Solutions LLC, FTC File No. 0510094, available at <http://www.ftc.gov/os/caselist/0510094/index.shtml>.

The primary reason was that I think, when Section 5 is untethered from the Sherman Act, at least today, we need to give real discussion and thought about whether there is a certain area of anti-competitive harm that is really not being addressed by the antitrust laws. One area that was found over the years, for example, was invitations to collude, and I did agree with the one case we brought on an invitation to collude, to bring that under Section 5. But I didn't see that in the N-Data area, if we think "this conduct here does not meet the requirements that the courts have set out for Section 2," that we should say "but it still looks to us like it was wrong and they shouldn't have done it, so we'll just bring a case under Section 5."

So where to draw the line? I'm afraid I don't know. The *DuPont* case⁴⁴ in the Second Circuit talks about how Section 5 should only be used to attack really, truly oppressive conduct and requires looking at whether there is malintent and not a sound business justification. But as we all know, that only provides minimal comfort, I think, in trying to sort this out.

So will there be more cases along these lines? I really don't know. I have a lot of respect for my fellow Commissioners. I think they believed very sincerely—I know this—that this was the right way to go. There could be other areas in which that is the case. But I think they will take it very seriously, and I don't think suddenly you'll just see Section 5 gone wild or something along those lines, and I certainly don't think you'll see that so much on the consumer protection side.

In terms of counseling your clients, I think it is an issue. I think when you are counseling clients about their business conduct and you get to the point where you're talking about whether something would be defined as exclusionary, if you're struggling a bit and you're not quite sure which side of the line it falls on, you might say, "And by the way, therefore, it may be 'close but no cigar' under Section 2, but someone might think in the future that it falls within Section 5."

I'm afraid that's all I can tell you.



Anthony Swisher
Akin Gump Strauss
Hauer & Feld LLP,
Washington, D.C.

ANTHONY SWISHER: My name is Anthony Swisher and I'm with Akin Gump in Washington, D.C.

My question is for Commissioner Kroes. Commissioner, the recent *Akzo*⁴⁵ decision reaffirmed that the attorney-client privilege will not protect communications between in-house counsel and companies in the European Union. Moreover, there is a question as to whether a document in the European Union prepared by U.S. counsel addressing U.S. legal issues would be protected by the privilege. How do you see the law of privilege in the European Union resolving these issues, and are you concerned that uncertainty in this area might hinder the ability of companies to obtain sound legal advice or might cause them to move their legal headquarters outside of the European Union?

KROES: Well, you can imagine that we were rather pleased with the decision of the Court of First Instance in this case and that we were backed by the Court that in-house lawyers are indeed employees of the company and thus not covered by legal privilege.

Having said that, it is not correct that under the EU case law companies might forgo legal advice that would help them comply with the law. This is, in my opinion, nonsense. It is never okay to enter into a cartel, and any lawyer is free to give that advice. Indeed, good lawyers will always give that advice. And of course the inside lawyer could do the job, but not block our investigative activities.

⁴⁴ E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), *vacating* 101 F.T.C. 425 (1983).

⁴⁵ Joined Cases T-125/03, T-253/03, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission* (Ct. First Instance Sept. 2007), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-125/03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

So I am also not worried that companies might relocate or whatever because of our legal privilege rules.



Allan Van Fleet
Greenberg Traurig LLP,
Houston, TX

ALLAN VAN FLEET: I'm Allan Van Fleet with Greenberg Traurig's office in Houston.

This setting Texas sun reminds us that with the change of administration, certainly for Chairman Majoras and probably for Assistant Attorney General Barnett, this is going to be their last Roundtable with us. So I'd like to ask both of you, Debbie and Tom, what are one or two accomplishments you're most proud of and what are one or two things you would have done differently?

MAJORAS: I guess I'll start with what I might have done differently. It's a hard question to answer. There are always things that you look back on and you think you would do differently. I think most of us are fairly self-critical. I'm sure there are some things that I've thought about that I'm not going to tell you, at least not now.

A lot of it goes to things that you run out of time to do, and if you had started sooner or pushed harder maybe. We've been working with the Justice Department on perhaps some new clearance measures, because I know this is a topic that just burns everybody, even though I think it's not as big a problem as people sometimes make it out to be. I admit that when we have a clearance dispute it's not good government. And so we've been working on that, and I think we're going to get there actually. I regret we didn't do that a bit sooner, especially because, personally, it's the thing I hate the most dealing with.

I do wish that I had started sooner on the Section 2 hearings and perhaps structured things a little bit differently so that we could have gotten it done faster. I think there's a real need for this report, and we should get it out to the public.

Finally, in nonmerger more generally, just as we did work in merger process—and I have many other things that I think we could do—I also might have put some measures in place in nonmerger process, because those investigations are incredibly resource-intensive. It's a little like pharmaceutical drugs: you go down certain avenues and you spend a lot of resources, and then you realize there's nothing there, and, as you have to, and as you should, you close the investigation. I learned over time we should get to that point a little more quickly when we can and free up our resources for actually going after the conduct that's indeed anticompetitive.

You know, when people ask your one or two greatest accomplishments, that's really hard. I think I'm going to ultimately leave that to all of you.

I'm very proud of a lot of the things that we did on both sides of the House. But I think if there's one thing that I hope I've left, it's the way we did things. I think that's perhaps what I'm most proud of. We worked very, very hard to always apply good law and sound economic analysis to facts, what was the evidence. We resisted political pressure. We resisted pressure to bring cases so that we could say we brought more cases, and we did it, I think, in an environment at the FTC where we respected our staff and their fantastic work. I think that's what I'm most proud of.

BARNETT: What would I do differently? It is a very hard question to answer. I actually had similar thoughts to Debbie.

I have learned a tremendous amount over the last almost four years now. If I could take all that knowledge and go back to when I started, I feel like we could do more. But of course you can't really do that.

One thing I'd do differently, and it's something I talked about during the time but still feel didn't do enough of, is to sit down and spend more time with the staff. As terrific as this meeting is,

one of the absolute best things about working in a place like the Antitrust Division—and, I strongly suspect, the FTC—is sitting down with a group of people who are passionate, capable, dedicated, and totally focused on trying to get to the right answer. That is as stimulating and challenging an intellectual exercise as I've been through. I realize that I'm eventually going to have to leave that behind in that sense. So I wish I had done more of that, and I am going to try to do more of that in the time I have left.

In terms of contributions, I guess I'm going to answer that this way. On one level, I'm actually very proud of the people whom I've had the privilege of serving with, not only the career Division staff, but some of the other people who were brought in, people like Deb Garza, David Meyer, Jim O'Connell, Scott Hammond, Hew Pate, Dennis Carlton, Ken Heyer, Makan Delrahim, Bruce McDonald, David Higbee, and Gerry Masoudi, all of whom are first-rate folks and are not only a pleasure to deal with but incredibly capable.

On the substance of it, what I have tried to focus on is trying to look at the law, look at the facts, follow the facts where the law leads you, and to do it with rigor, with discipline. At the end of the day, that's how you sleep well at night.

One area that I have tried to spend a fair amount of time and energy on is advocacy. I am particularly proud of the amicus briefs that we filed in the Supreme Court. We have a very good record of the Court agreeing with us on that front. That, obviously, has a very significant impact longer term, in terms of the development of antitrust law.

The other thing, which I didn't fully appreciate when I got there, is how international this job is. I've never added it up, but a very high percentage of my time is spent dealing with people like Neelie and representatives of other competition agencies. The ability to solidify what was started with the ICN into what is now an incredibly vibrant organization, with 102 or more agencies in about ninety jurisdictions, is a critical part of helping the world economy become more efficient and more efficacious in promoting consumer welfare.

I will just say that the most important thing to me is trying to make the right call on principles. You all can be the judge of that.

[A tribute was given to Deborah Platt Majoras by Thomas Barnett, the transcript of which has been omitted.]

FENTON: And to give another part of the country the final word, if we could turn to the tape.

VAN FLEET: Debbie, Tom, on behalf of the Section of Antitrust Law and the entire antitrust community, thank you for your service to this country and its consumers, and Godspeed down whatever trails you follow from here. ●

In the Matter of Negotiated Data Solutions— The FTC’s Expanded Application of Section 5 Authority to Patent Hold-Ups

George W. Jordan III

The Federal Trade Commission’s recent settlement with Negotiated Data Solutions LLC (N-Data) expands the limits of Section 5 authority as applied to a standard-setting process and patent hold-ups in particular.¹ Despite a predecessor’s commitment to license its technology for a specified fee if the Institute of Electrical and Electronic Engineers (IEEE) adopted the technology in an industry standard, N-Data sought a royalty beyond the specified fee for licensing its patent portfolio that included patents essential to using the technology. As a result, the Commission charged N-Data with violating Section 5 of the Federal Trade Commission Act by engaging in both “unfair methods of competition” and “unfair acts or practices” even though there was no allegation of deception or other exclusionary conduct by National Semiconductor Corporation (National), the originator of the technology that participated in the standard-setting process. Because the FTC’s charges were not premised on violations of Section 2 of the Sherman Act, only stand-alone violations of Section 5 were alleged. Though Section 5 of the FTC Act proscribes any anticompetitive conduct that is oppressive, the Commission’s antitrust analysis in a standard-setting context has traditionally relied upon Section 2 of the Sherman Act prohibiting monopolization based on “exclusionary conduct” such as deception.

The Commission’s reasoning in *N-Data* was grounded in its new view of a “patent hold-up” as inherently coercive and oppressive to a standard-setting process. While antitrust scrutiny is to be expected where there is deception in standard setting, it is surprising to see the Commission sanction a company for seeking to renegotiate the original patent holder’s licensing commitment to a standards development organization (SDO). Although the alleged patent hold-up is unique, the Commission’s reasoning in *N-Data* is troubling in many respects, as compared to then-FTC Chairman Deborah Platt Majoras’s vigorous dissent. The settlement raises the following questions: When is a repudiation of a predecessor’s licensing commitment to an SDO so opportunistic as to constitute bad faith abuse of standard setting? Under what circumstances would the Commission conclude that an SDO has the ability to protect its members from a breach of a patent licensing commitment? Will every departure from a prior licensing commitment to an SDO constitute an unfair method of competition? Do non-producing entities like N-Data have a heightened risk of their patent licensing commitments to SDOs triggering FTC scrutiny?

■
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¹ Analysis of Proposed Consent Order to Aid Public Comment, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008) [hereinafter *N-Data Analysis*], available at <http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf>.

² *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 310 (3d Cir. 2007).

A Patent Hold-Up Created Without Deception

A “patent hold-up” occurs when technology incorporated by an SDO into an open industry standard is found to be patented and the patent holder can threaten to prevent industry participants from making or selling products based on the standard.² At that point, industry participants are already “locked in” to the standard due to a collective decision to forgo alternative technologies and make a significant investment in developing products that conform to the standard. This inefficiency in the standard-setting process may afford the patent holder the ability to extract supra-competitive royalties from industry participants. Therefore, SDOs often require participants to disclose intellectual property rights (IPRs) and commit to licensing those rights under appropriate terms so members can weigh the costs and benefits of each technology before the industry commits to adopting a particular technology as the standard.

As demonstrated in its enforcement actions against Dell, Unocal, and Rambus alleging unfair methods of competition in violation of Section 5 of the FTC Act, the Commission has a record of acting to thwart deception intended to distort a standard-setting process and create a patent hold-up. The Commission charged Dell with deceiving an SDO through Dell’s failure to disclose a patent covering the proposed standard as it was certifying to the SDO that the standard did not infringe any of its patents.³ Similarly, the Commission charged Unocal with misleading an SDO by falsely implying that Unocal’s emissions research data and equations were non-proprietary, which the SDO relied on in developing a standard governing low-emissions gasoline.⁴ More recently, the Commission charged Rambus with violating Section 5 of the FTC Act based on deception constituting exclusionary conduct under Section 2 of the Sherman Act.⁵ In particular, Rambus was accused of violating the rules of an SDO by concealing its patents and patent applications while participating in a standard-setting process for a computer memory standard. Rambus was also accused of using information from the standard-setting process to amend its patent applications to cover the standard.

Importantly, the Commission did not treat the allegedly deceptive conduct by Dell, Unocal, or Rambus as an unfair act or practice under Section 5. Yet, in *N-Data*, the Commission is treating the alleged patent hold-up as a Section 5 violation without any accusation of deception or other exclusionary conduct in the standard-setting process.

A Patent Hold-Up Based Upon a Breach of a Licensing Commitment

National’s unambiguous licensing assurance to the IEEE may partly account for the Commission’s resort to its consumer protection authority. National had proposed that the IEEE, a non-profit SDO, incorporate its NWay auto-negotiation technology into a new industry standard commonly referred to as Fast Ethernet.⁶ In a June 7, 1994 letter to the IEEE, National confirmed its commitment to license the technology to any industry participant for a one-time fee of \$1000. In 1997, U.S. Patent No. 5,617,418 (’418 Patent) and U.S. Patent No. 5,687,174 (’174 Patent) issued to National based on a patent application filed in 1992 on the technology.

³ Dell Computer Corp., 121 F.T.C. 616, 616–18, 1996 FTC LEXIS 291, at *1–*5 (May 20, 1996) (complaint).

⁴ Complaint, Union Oil Co. of Cal., FTC File No. 9305 (Mar. 4, 2003), available at <http://www.ftc.gov/os/adjpro/d9305/030304unocaladmincompft.pdf>.

⁵ Complaint, Rambus, Inc., FTC Docket No. 9302 (June 18, 2002), available at <http://www.ftc.gov/os/adjpro/d9302/020618admincomp.pdf>; see also Opinion of the Commission, Rambus, Inc., FTC Docket No. 9302 (Aug. 2, 2006) (5–0 decision), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

⁶ *N-Data Analysis*, *supra* note 1, at 2.

Rights in the patented technology were transferred with full disclosure of National's licensing commitment to the IEEE. In 1998, National assigned rights in its patents to Vertical Networks, which received a copy of the June 7, 1994 letter and acknowledged the '418 Patent and the '174 Patent may be encumbered by National's actions with respect to the IEEE standard-setting process.⁷ Some years later, Vertical sought to alter the terms of National's licensing commitment by promising to make its patent portfolio, including the '418 Patent and the '174 Patent, available on reasonable and non-discriminatory (RAND) terms. The letter purported to supersede any prior licensing assurances by National. Vertical then proceeded to demand royalties beyond the specified one thousand dollars per company to license its patent portfolio. Before long, Vertical assigned its patent portfolio to N-Data, which was well aware of the June 7, 1994 letter of assurance to the IEEE. Given N-Data was a non-producing entity strictly in the business of licensing patents, it simply picked up where Vertical left off.

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By resorting to both its consumer protection authority and competitive enforcement authority under Section 5, the FTC suggests that *N-Data* presents a fundamentally new type of patent hold-up. Though *Broadcom v. Qualcomm* might be viewed as opening the door to antitrust claims based on anticompetitive conduct concerning licensing commitments to SDOs, even that decision does not fully explain the FTC's treatment of the N-Data patent hold-up. In *Broadcom v. Qualcomm*, Qualcomm was accused of breaching its promise to an SDO to license essential technology on RAND terms.⁸ The Third Circuit held the alleged breach was actionable under Section 2 of the Sherman Act even though there was no allegation of deceit.⁹ As a result, the Third Circuit placed a breach of a licensing commitment to an SDO on equal footing with deception of an SDO.

A Patent Hold-Up as Inherently Coercive and Oppressive

In considering an unfair method of competition under Section 5, the Commission emphasized the limiting principle that the method must be coercive or oppressive.¹⁰ The Commission has described a patent hold-up as inherently coercive and oppressive due to its exploitation of industry lock-in. Because an industry standard displaces competition, the Commission reasoned that the patent hold-up inhibits competition by undermining the standard-setting process through bad faith or deceptive behavior.¹¹ The problem with the majority's reasoning in *N-Data* is that there was no evidence of deception. As a result, the Commission stretches the notion of bad faith to include repudiation of a predecessor's licensing commitment.

As Chairman Majoras pointed out, the Commission's approach is also problematic because it fails to consider the competitive environment of the standard-setting process.¹² The Third Circuit has recognized that companies compete on the basis of their respective technologies, intellectual property positions, and licensing terms before an industry becomes "locked in" to a stan-

⁷ *Id.* at 3.

⁸ *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

⁹ *Id.* at 314 (denying motion to dismiss).

¹⁰ N-Data Analysis, *supra* note 1, at 5.

¹¹ Statement of the Federal Trade Commission at 2, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008) [hereinafter N-Data Statement], available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

¹² See Dissenting Statement of Chairman Majoras at 1, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008) [hereinafter Majoras Dissent] (noting technologies compete for incorporation into a standard), available at <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf>.

dard.¹³ Because SDOs generally aim to create an open standard based on an informed comparison of technologies to preserve interoperability and other competitive benefits, standard setting is not as susceptible to abuse as the Commission suggests. For example, the IEEE Standards Association (IEEE-SA) acknowledges that its standards development process is carefully crafted to develop consensus-based standards.¹⁴

The Commission's notion of the N-Data patent hold-up as inherently coercive and oppressive is at odds with the IEEE's ability to take measures to protect its members.¹⁵ As noted in Chairman Majoras's dissent, the IEEE did not object to Vertical's letter seeking to alter the terms of National's licensing commitment.¹⁶ In fact, the IEEE posted the letter on its Web site. Although the majority statement notes that SDOs have begun to develop policies to deal with patent hold-ups,¹⁷ the IEEE's subsequent measure to protect its members reflect exactly what it could have done in advance to protect members against a repudiation of National's licensing commitment.¹⁸

The Commission asserts that even the "most diligent standard-setting organizations" could fall victim to N-Data's patent hold-up.¹⁹ Yet there are numerous ways an SDO could protect its members against conduct like N-Data's: (1) the SDO could require a letter of assurance to be irrevocable and binding on any successor-in-interest of the essential patents;²⁰ (2) the SDO could require its written consent for any industry participant to assign a patent covering technology essential to a standard;²¹ or (3) the SDO could require any industry participant offering essential technology to agree that the SDO will be the sole authority for resolving any licensing dispute on patents covering the technology. Thus, contrary to the Commission's view, the possibility of patent hold-ups on essential technology if the patent is transferred to a new owner is not an insurmountable problem for SDOs.

A Patent Hold-Up as Enormously Harmful to Standard Setting

Though the Commission acknowledges that industry standards are the "engines" of the modern economy,²² its reasoning that the N-Data patent hold-up could be "enormously harmful"²³ to standard setting is dubious. Not a single industry participant sought to timely accept National's licensing commitment in 1994, suggesting that N-Data's patents were not of serious concern to the industry.²⁴

The Commission's notion of the N-Data patent hold-up as inherently coercive and oppressive is at odds with the IEEE's ability to take measures to protect its members.

¹³ *Broadcom*, 501 F.3d at 309.

¹⁴ Public Comments of IEEE Standards Association, Negotiated Data Solutions LLC, FTC File No. 051 0094 (Feb. 26, 2008), at 4 [hereinafter IEEE-SA Comments], available at <http://www.ftc.gov/os/comments/negotiateddatasol/index.shtml>.

¹⁵ See Majoras Dissent, *supra* note 12, at 1 (noting some SDOs take measures to protect their members).

¹⁶ *Id.* at 2.

¹⁷ N-Data Statement, *supra* note 11, at 1.

¹⁸ IEEE-SA Comments, *supra* note 14, at 5.

¹⁹ *Id.* at 1.

²⁰ See Majoras Dissent, *supra* note 12, at 2 (noting a new IEEE bylaw purporting to make patent letters irrevocable); see also IEEE-SA Comments, *supra* note 14, at 3 (noting a patent holder's assurance is irrevocable under the IEEE-SA's current policy).

²¹ In 2006, the IEEE-SA revised its rules to require a submitter to provide notice of a licensing assurance to the assignee of the encumbered patent. IEEE-SA Comments, *supra* note 14, at 5.

²² N-Data Statement, *supra* note 11, at 3.

²³ *Id.* at 1.

²⁴ Majoras Dissent, *supra* note 12, at 6.

The Commission's claim that N-Data's conduct may cause SDOs to avoid intellectual property entirely when creating new standards is also dubious.²⁵ Because of the competitive environment in evaluating technology to be included in an industry standard, there is a strong incentive for an industry participant seeking adoption of its technology to agree to an SDO's rules governing IPRs. These rules can mitigate the risk of patent hold-ups because an SDO need not refrain from considering technologies in which industry participants have intellectual property rights. For example, some SDOs require that contributors of technology essential to a standard commit to granting a royalty-free license to the technology. In that way, technology can be evaluated on its technical merit by an SDO without regard for each industry participant's intellectual property rights.

By urging a broad view of anticompetitive harm threatened by the N-Data patent hold-up, the Commission creates a question of whether every departure from a prior licensing commitment to an SDO will constitute an unfair method of competition.²⁶ As a consequence, not only are industry participants at risk of having their licensing commitments to SDOs deemed licenses in perpetuity, but they are also vulnerable to any dispute over the interpretation of these commitments prompting FTC intervention.

Substantial Consumer Injury from a Patent Hold-Up

Beyond finding the N-Data patent hold-up to be an unfair method of competition, the FTC found the alleged hold-up to be an unfair act or practice under Section 5. Although the Commission recognized the limiting principle that the conduct must cause "substantial consumer injury," it broadly construed "consumer" to encompass an industry of computer manufacturers.²⁷ The Commission reasoned it was not feasible for these companies to remove the relevant technology.²⁸ Based on that rationale, companies faced with a possible lock-in have an incentive not to take any remedial steps, anticipating the Commission will come to the rescue by deeming the industry to be a consumer.

Similarly, the Commission claimed the industry relied on National's assurances regarding pricing.²⁹ Yet, as noted in Chairman Majoras's dissent, no industry participant timely sought to accept National's licensing offer.³⁰ Only after being confronted with a demand letter from N-Data did any industry participant seek to rely on National's assurances.

As further support for substantial consumer injury, the FTC emphasized the "established public policy" of supporting efficient standard-setting activities.³¹ The danger of this reasoning is exposed by Chairman Majoras's dissenting opinion, which expresses concern with using consumer protection authority to intervene in a commercial transaction among sophisticated companies.

²⁵ N-Data Analysis, *supra* note 1, at 6.

²⁶ See *id.* at 6 ("A mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5. The commitment here was in the context of standard setting.")

²⁷ See Majoras Dissent, *supra* note 12, at 5 (noting the majority treats "large, sophisticated computer manufacturers" as "consumers").

²⁸ N-Data Analysis, *supra* note 1, at 7.

²⁹ *Id.* at 7.

³⁰ Majoras Dissent, *supra* note 12, at 2, 6.

³¹ N-Data Analysis, *supra* note 1, at 9.

In finding substantial consumer injury, the FTC also emphasized that the widespread use of N-Data's patents was an important factor.³² As a result, it is unclear whether substantial consumer injury turns on the degree of proliferation of the particular technology.

In support of its position that consumer injury in *N-Data* was substantial, the Commission relied on *Orkin Exterminating Co.*³³ as precedent that a unilateral price increase in contravention of a prior commitment constitutes an unfair act or practice.³⁴ The Commission had found Orkin violated Section 5 by unilaterally increasing its fixed annual renewal fees on lifetime contracts for extermination services.³⁵ While *Orkin* involved a widespread injury to a large number of individual consumers in need of protection, the industry participants in *N-Data* could either look to the IEEE to protect their interests or protect themselves by timely accepting National's licensing offer. In addition, while *Orkin* involved standard-form contracts, the industry participants in *N-Data* were in a position to negotiate and define the licensing commitments applicable to patents on technology essential to the new standard. Though the Commission acknowledged the "unique circumstances" of *N-Data* where industry participants are "locked in" to a standard, it nevertheless stated there is no meaningful distinction from the circumstances in *Orkin*.³⁶

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Reasonably Unavoidable Injury from a Patent Hold-Up

The Commission's application of the limiting principle that the injury must be one "consumers themselves could not reasonably have avoided" is further cause for concern. The Commission suggests the industry could not have reasonably anticipated N-Data's repudiation of National's licensing commitment.³⁷ As the three protective measures listed earlier demonstrate, the IEEE³⁸ could "reasonably have avoided" the hold-up problem. The IEEE's lack of objection to the repudiation of National's licensing commitment does not prove otherwise. Though the Commission acknowledges the requirements for an unfair act or practice would likely not be met if industry participants could exercise countermeasures to avoid injury from breach of a commitment by a patent holder,³⁹ the Commission fails to account for ex ante measures that industry participants can take through SDOs before industry "lock-in."

A Patent Hold-Up Attributable to a Non-Producing Entity

The Commission's resort to its consumer protection authority in *N-Data* may be partly explained by the nature of that company's business model. Like Rambus, N-Data is a patent licensing company, and both companies could be described as non-producing entities, i.e., companies that do not commercially practice or produce their inventions. In fact, the non-producing entity category is an even closer fit for N-Data than Rambus because Rambus at least develops computer memory technologies. The Commission has recognized that non-producing entities may harm con-

³² *Id.*

³³ 108 F.T.C. 263 (1986), *aff'd*, FTC v. Orkin, 849 F.2d 1354 (11th Cir. 1988).

³⁴ N-Data Analysis, *supra* note 1, at 8.

³⁵ *Orkin*, 108 F.T.C. at 341–71 (opinion of the Commission).

³⁶ N-Data Statement, *supra* note 11, at 3.

³⁷ N-Data Analysis, *supra* note 1, at 8.

³⁸ IEEE members include computer networking equipment manufacturers and telecommunication companies. See Majoras Dissent, *supra* note 12, at 6; see also IEEE-SA Comments, *supra* note 14, at 1 (describing the IEEE-SA as including technology experts from around the globe).

³⁹ N-Data Analysis, *supra* note 1, at 9.

sumers “when such firms force manufacturers to agree to license after the manufacturers have sunk substantial investments into technologies.”⁴⁰ Because N-Data does not practice its inventions, it may lack an incentive to behave competitively and instead make exorbitant licensing demands against manufacturers without fear of retribution. In contrast, a manufacturer may be less inclined to make such licensing demands because it could be on the receiving end of similar demands.

Conclusion

The Commission admits to “broadly” applying its consumer protection authority to stop N-Data’s patent hold-up.⁴¹ Rather than being the “pernicious problem” alleged by the Commission, the alleged hold-up is instead an oddity from a period before the IEEE and other SDOs had adopted adequate measures to protect their members from industry “lock-in.” Thus, *N-Data* is likely not an indication that all patent licensing commitments to SDOs will be subject to consumer protection scrutiny. Yet, the Commission’s claim that not all breaches of commitments by patent holders during a standard-setting process will constitute an unfair act or practice offers little assurance or guidance. Though *N-Data* might be viewed as extending Section 5’s reach to a non-producing entity’s repudiation of a predecessor’s licensing commitment to an SDO, the Commission should appreciate and defer to SDOs’ ability to protect their members as long as there is no deception in the standard-setting process. Overall, *N-Data* is an important reminder that a patent licensing commitment to an SDO should not be taken lightly. ●

Addendum

After this article was written, the Court of Appeals for the D.C. Circuit handed down its opinion in *Rambus Inc. v. FTC*, No. 07-1086 (D.C. Cir. Apr. 22, 2008). The court held that the Commission failed to demonstrate Rambus’s conduct was exclusionary in violation of Section 2 of the Sherman Act because there was insufficient evidence that the standards development organization (SDO) would have standardized other technologies had it known of Rambus’s patent interests. Unlike in *Rambus* where it was unclear if the SDO would have adopted other technologies, the SDO in *N-Data* considered competing technologies and adopted the technology proposed by N-Data’s predecessor based on its licensing commitment. *Rambus* and *N-Data* nevertheless are similar in that each patent disclosure policy was inadequate to address the alleged standard-setting abuse. Although *Rambus* is a Section 2 case, the court expressed concern with a broader Section 5 theory due to the limited scope of the SDO’s patent disclosure policy. Thus, both *Rambus* and *N-Data* demonstrate the importance of crafting patent disclosure policies of sufficient breadth to protect SDO participants and the industry as a whole.

⁴⁰ N-Data Statement, *supra* note 11, at 1 n.4 (citing Fed. Trade Comm’n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (Oct. 2003)).

⁴¹ *Id.* at 3.

New Thinking on the Role of Fixed Cost Savings in Merger Analysis

Robert N. Rubinovitz

Among the many motivations for mergers, one of the more important considerations is the extent to which the merger will generate cost savings for the firms involved, particularly the ability to reduce fixed costs.¹ Despite the importance of fixed cost savings in motivating mergers, it is only recently that sufficient attention is being paid to the ways in which fixed cost savings from a merger can lead to an increase in consumer welfare. For example, the report of the Antitrust Modernization Commission states that “the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries. . . .”² This is likely tied to the increasing recognition that mergers have the potential to improve consumer welfare through innovation³ and that dynamic efficiency gains can have the greatest impact on the U.S. economy. As a result, antitrust policy needs to preserve the proper incentives for innovation that leads to dynamic efficiencies.⁴

The Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, recognize the importance of efficiencies in mergers:

[M]ergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.⁵

Marginal cost savings are given the most weight because in basic economic models, reductions in marginal costs have a more direct effect on price, and antitrust enforcement focuses primarily on consumer welfare.⁶ Fixed costs do not play as direct a role in setting price⁷ and, there-

¹ See, e.g., Martin Lipton, *Merger Waves in the 19th, 20th and 21st Centuries*, The Davies Lecture, Osgoode Hall Law School, York University (Sept. 14, 2006), available at [http://osgoode.yorku.ca/media2.nsf/58912001c091cdc8852569300055bbf9/1e37719232517fd0852571ef00701385/\\$FILE/Merger%20Waves_Toronto_Lipton.pdf](http://osgoode.yorku.ca/media2.nsf/58912001c091cdc8852569300055bbf9/1e37719232517fd0852571ef00701385/$FILE/Merger%20Waves_Toronto_Lipton.pdf); Calvin S. Goldman, Ilene Knable Gotts & Michael E. Piaskoski, *The Role of Efficiencies in Telecommunications Merger Review*, 56 FED. COMM. L.J. 87 (2003).

² ANTITRUST MODERNIZATION COMMITTEE, REPORT AND RECOMMENDATIONS § I.B, at 49 (2007) (hereinafter AMC REPORT), available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

³ *Id.*

⁴ See, e.g., Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, Presentation to the George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007), available at <http://www.usdoj.gov/atr/public/speeches/227291.htm>.

⁵ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* § 4 (1992, revised 1997) [hereinafter *Merger Guidelines*], available at <http://www.ftc.gov/bc/docs/horizmer>.

⁶ William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, Delivered on the 20th Anniversary of the 1982 Merger Guidelines (June 10, 2002), available at <http://www.usdoj.gov/atr/hmerger/11254.htm>.

⁷ To determine the price or quantity that maximizes a firm’s profits, the first derivative with respect to price or quantity is calculated. Because fixed costs are not a function of quantity, the derivative of fixed costs with respect to price or quantity is zero, which means fixed costs do

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fore, it can be more difficult for merging parties to make the link between fixed cost savings and an improvement in consumer welfare.⁸

One example of a transaction in which fixed cost savings arguments were persuasive to the reviewing agency is the Genzyme-Novazyme merger.⁹ Though the merger may have eliminated the possibility of two competing therapies for Pompe disease being introduced into the marketplace, the reduction in the fixed costs of developing the therapy and the resulting increase in the probability that effective therapies would be introduced into the marketplace led the Federal Trade Commission to conclude that, on balance, the merger would improve consumer welfare.

In this article, I summarize some of the existing economic literature in which the connection between fixed cost savings and consumer welfare is more explicit. I also introduce a model that provides a new approach to this important subject. In particular, an alternative approach not previously applied in this context, in which firms choose quality levels first and then compete on price,¹⁰ provides relatively straightforward predictions on the relationship between fixed costs, price, and consumer welfare. When a decrease in the fixed cost of producing a given level of quality is introduced into this model, either due to a merger or an exogenous change, it is shown that prices, on a quality-adjusted basis, decrease and that consumer welfare increases. Therefore, this model presents a promising framework for convincing the antitrust agencies of the potential benefits of fixed cost savings. This is illustrated below in the context of the XM-Sirius merger, recently approved by the Department of Justice's Antitrust Division.

The role of fixed cost savings in merger analysis becomes more prominent once a merger is evaluated over a longer time horizon or in a dynamic context.

Fixed Cost Savings in a Long-Run or Dynamic Context

The Merger Guidelines include a consideration of fixed cost savings in the efficiency analysis of a merger, though fixed cost savings are given less weight than marginal cost savings. Specifically, the Merger Guidelines state that the "Agency also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies . . . will be given less weight because they are less proximate and more difficult to predict."¹¹

The role of fixed cost savings in merger analysis becomes more prominent once a merger is evaluated over a longer time horizon or in a dynamic context.¹² For example, in the simplest sense, fixed cost efficiencies become relevant once a longer timeframe is considered because even fixed costs are marginal over time and, just like any other marginal cost, would need to be given weight in merger analysis.¹³

not play a role in determining the optimal price or quantity. *See, e.g.,* DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 89–92 (4th ed. 2005). The extent to which a reduction in marginal cost will result in a lower price is not necessarily straightforward. *See, e.g.,* Jerry A. Hausman & Gregory K. Leonard, *Efficiencies from the Consumer Viewpoint*, 7 *Geo. Mason. L. Rev.* 707 (1999).

⁸ Even if fixed cost savings only lead to an increase in profits for the merging firms, fixed cost savings could still be given weight in merger analysis since the owners of the firms are consumers in their own right. *See* Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 *Geo. L.J.* 195 (1992).

⁹ *See* Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corp./Novazyme Pharmaceuticals, Inc., available at <http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf>.

¹⁰ *See* Massimo Motta, *Endogenous Quality Choice: Price vs. Quantity Competition*, 41 *J. Indus. Econ.* 113 (1993); Cristina Barbot, *Horizontal Merger and Vertical Differentiation* (Universidade do Porto Working Paper, June 2001), available at <http://www.fep.up.pt/investigacao/workingpapers/wp108.pdf>.

¹¹ *See* Merger Guidelines, *supra* note 5, § 4 n.37. For a discussion, see Kolasky & Dick, *supra* note 6, at 31–32.

¹² *See* Barnett, *supra* note 4.

¹³ *See* AMC REPORT, *supra* note 2, § I.B.3, at 58 (citing American Antitrust Institute Public Comments submitted to AMC regarding Merger Enforcement at 8–9 (July 15, 2005)).

Also, if firms have a long-run planning horizon when setting prices, they may use a full cost pricing approach.¹⁴ Though full cost pricing models can differ, generally these models are based on the premise that “the primary objective of a business is not to maximize profits but to earn a *satisfactory* return on the assets that it uses This leads to ‘full cost’ pricing as the normal practice.”¹⁵ In other words, price is set so that the mark-up over marginal cost covers the fixed costs of the firm and provides the firm some rate of return that is deemed to be satisfactory. Survey evidence has been developed to show that firms, in fact, use a full cost pricing approach, rather than one based on marginal costs, though the econometric evidence on this point is mixed.¹⁶

If prices are set in a full cost pricing manner, it might seem natural to conclude that a decrease in fixed costs, holding marginal cost constant, would lead to a decrease in price. However, this generally follows only if the target return stays the same. It could be just as likely that, if fixed costs fall, price minus marginal cost would be held constant, leading the return on fixed costs to increase. Thus, the full cost pricing approach does not lead to clear predictions as to how a decrease in fixed costs will affect price.

With dynamic efficiencies, fixed cost savings can be a vehicle for reinvestment in a company to improve its production technology and increase the quality of its output, an effect that would create direct benefits for consumers.

One reason a full cost pricing approach might be used by firms, rather than the standard model where price is a function of marginal costs and demand elasticity, is that a firm may not have a very clear sense of the demand curve for its product.¹⁷ Thus, natural extensions of a more standard maximization approach might include uncertainty about demand. In models of this type, profit maximization solutions are derived where price or price-cost margins are, in fact, a function of fixed costs, not just marginal costs.¹⁸ Unfortunately, models with demand uncertainty do not lead to clear predictions as to how changes in fixed costs would affect the equilibrium values of price or margins, but instead depend crucially on factors that may be difficult to observe, such as the relationship between changes in the uncertainty of profits and changes in price.¹⁹

A final approach can be characterized as a study of “dynamic efficiencies.” With dynamic efficiencies, fixed cost savings can be a vehicle for reinvestment in a company to improve its production technology and increase the quality of its output, an effect that would create direct benefits for consumers. For example, the Antitrust Modernization Commission’s report states that the “agencies should account for the value of fixed cost efficiencies in assessing the likely competitive effects of a merger,” particularly if these fixed cost savings result in improved innovation by the combined firm.²⁰ These increases in innovation can also have spillover effects to other firms in the marketplace, forcing them to improve their products, increasing the overall intensity of competition.²¹ Again, however, it is not clear how to translate these observations into a concrete model of how fixed costs savings affect consumer welfare. In particular, the authors of one of the main

¹⁴ Robert L. Hall & Charles J. Hitch, *Price Theory and Business Behaviour*, 2 OXFORD ECON. PAPERS 12 (1939).

¹⁵ Vijay Govindarajan & Robert N. Anthony, *How Firms Use Cost Data in Price Decisions*, 65 MGMT. ACCT. 30 (1983).

¹⁶ A survey of the financial vice presidents of the Fortune 1000 companies found that, of the 505 people who responded, 83 percent said they set prices based on full cost, not marginal cost. *See id.* at 31. One summary of the econometric evidence concludes that it is an unresolved question as to whether full cost pricing is the best description of how firms set prices. *See* Mike R. Lucas, *Pricing Decisions and the Neoclassical Theory of the Firm*, 14 MGMT. ACCT. RES. 201, 205 (2003).

¹⁷ *See* Govindarajan & Anthony, *supra* note 15, at 31–32.

¹⁸ *See, e.g.*, Hayne E. Leland, *Theory of the Firm Facing Uncertain Demand*, 62 AM. ECON. REV. 278 (1972); Robert W. Fraser, *Uncertainty and the Theory of Mark-Up Pricing*, 37 BULL. ECON. RES. 55 (1985).

¹⁹ *See* Leland, *supra* note 18, at 286.

²⁰ *See* AMC REPORT, *supra* note 2, at 58.

²¹ Gary L. Roberts & Steven C. Salop, *Efficiencies in Dynamic Merger Analysis*, 19 WORLD COMPETITION L. & ECON. REV. 1 (1996).

articles on this topic focus primarily on how savings in marginal costs would translate into increased competition and lower prices for firms other than the merging parties and do not address the issue of how fixed cost savings would affect price and consumer welfare.²²

Fixed Cost Savings Increase Consumer Welfare in Models Where Firms Choose Quality

One class of model, where a firm's decisions take place over time, is particularly useful for examining how a change in fixed costs affects consumer welfare. The original versions of these models do not explicitly look at changes in fixed costs, so I have extended these models to incorporate such a change.

The basic model is as follows: Suppose there are two firms—Firm 1 and Firm 2—that make choices regarding their products in two periods. In the first period, each firm chooses the level of quality for their product, and the costs of producing a given level of quality are assumed to be fixed. That is, although fixed costs increase when a higher level of quality is chosen, the costs of producing quality are not a function of the level of output produced. It is assumed that the quality chosen by Firm 1 is greater than or equal to the level of quality chosen by Firm 2. To make the relationship between the quality chosen by Firm 1 and Firm 2 concrete, consider an example from the cell phone industry. In this setting, if Firm 2 chose to develop a cell phone with a conventional screen and keypad (a low quality good), Firm 1 also would have to produce a similar phone with a conventional screen and keypad, or produce a cell phone of higher quality, such as a touch screen phone.

Next, given the choices of quality, in the second period of the model the firms choose the price that maximizes their profits. In equilibrium, the price of the high quality good is greater than the price of the low quality good, and the quantity produced and sold of the high quality good is greater than of the low quality good.²³

This framework has been extended by others in various ways, such as by adding a third firm to the analysis or allowing a merger between two of the firms.²⁴ However, none of these existing models has been used to examine what would happen if the fixed costs of producing a given level of quality were to decrease.

I have looked at this question in various ways and have shown how consumer welfare can increase as a result of a decrease in fixed costs.²⁵ For example, suppose there are three firms in a relevant market, each with the same fixed cost function of producing quality. In addition, suppose that Firm 1 produces a good with a high level of quality, Firm 2 produces a good with a medium level of quality, and Firm 3 produces a good with a low level of quality. Finally, in this context, suppose the two firms that produce the two lower quality goods merge (i.e., Firm 2 and Firm 3, which are the two smallest firms in the market), and the merger results in a reduction in the fixed costs of producing a given level of quality for the merged entity. This reduction in fixed costs might occur, for example, because each firm owns some intellectual property that is used in the production of the good and, without the merger, each firm has to expend resources to invent around the other firm's patent. However, with the merger, it is no longer necessary to invent around patents and this leads to a reduction in the fixed cost of producing a given level of quality.

²² *Id.*

²³ See Motta, *supra* note 10; Barbot, *supra* note 10.

²⁴ See Motta, *supra* note 10; Barbot, *supra* note 10; Carlo Scarpa, *Minimum Quality Standards with More than Two Firms*, 16 INT'L J. INDUS. ORG. 665 (1998).

²⁵ The details of this model, along with my extensions, are available upon request from the author.

Based on this set-up, I show that five things result. First, the lowest quality good is not produced by the merged entity post-transaction. Second, the quality of the good that is produced by the merged entity increases. Third, though the price of the good sold by the merged entity increases slightly, the price, on a quality-adjusted basis, is lower than it was prior to the merger. Fourth, the remaining non-merging firm (i.e., Firm 1) increases the quality of the good it produces slightly and charges a lower absolute price for its good relative to the pre-merger situation. Fifth, given the increase in quality of the two goods produced in the relevant market post-merger and the lower quality-adjusted prices, the reduction in fixed costs created by the merger causes an increase in consumer welfare.

Application of the Model to the XM-Sirius Merger

The DOJ Antitrust

Division's recent

approval of the

XM-Sirius satellite

radio merger provides

one important example

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significant weight.

The purpose of developing the model above is to provide additional guidance on how to construct an effective efficiencies defense based on fixed costs savings. Four key points to be derived from the model and discussion above that are likely to improve the chance of success with an efficiencies defense are:

- Demonstrate that the efficiencies that will be realized in the long-term will be significant and will lead to improvements in consumer welfare.
- Quantify the degree to which the merger will reduce the fixed costs of producing a given level of quality.
- Demonstrate that the merged firm, with a reduction in fixed costs, will have an incentive to increase the quality of the good it produces, which will cause other firms in the relevant market to increase the quality of their goods. This, in and of itself, can lead to an increase in consumer welfare.
- Demonstrate that the reduction in fixed costs from a merger, even if the marketplace is relatively concentrated, will cause a reduction in prices as the firms respond to the higher quality produced by the merged entity post-transaction.

The DOJ Antitrust Division's recent approval of the XM-Sirius satellite radio merger provides one important example where efficiencies, including fixed cost savings, appear to have been given significant weight. When the merger was initially proposed, the companies touted the fact that the combination would generate total efficiencies in the range of \$3 billion to \$7 billion and would allow the combined firm "to develop and introduce a wider range of lower cost, easy-to-use, and multi-functional devices through efficiencies."²⁶ The parties argued that the "efficiencies gained from the merger, including the marriage of the two engineering organizations, will *ensure better results from each dollar invested in research and development.*"²⁷ In turn, it was argued that this would allow the merged entity to improve on the products it currently offers, such as real-time traffic, and to introduce new products more quickly and with more capabilities.²⁸ In terms of pricing, the parties claimed that subscribers could continue to receive the same programming at the same price, or an improved programming package at a small premium above what they are

²⁶ Press Release, Sirius Satellite Radio, Sirius and XM to Combine in \$13 Billion Merger of Equals (Feb. 19, 2007), available at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=230306>.

²⁷ XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio Inc., Consolidated Application for Authority to Transfer Control at 14 (FCC Mar. 20, 2007) (emphasis added), available at http://fjallfoss.fcc.gov/servlet/ib.page.FetchAttachment?attachment_key=-126018.

²⁸ *Id.* at 14–15.

currently paying.²⁹ As a result, the “combination of an enhanced programming lineup with improved technology, distribution and financials will better position satellite radio to compete for consumers’ attention and entertainment dollars”³⁰

In other words, the parties, by arguing that each dollar invested in research and development would be more effectively used, believed the merger would allow them to reduce the fixed costs of producing a given level of quality. The result of this would be higher quality products introduced by the merged firm into the marketplace, at either the same price or at a slight premium, suggesting that its quality-adjusted price would be lower after the merger. The higher quality and lower price of the merged firm would make it a more effective competitor and would cause the other firms to respond to this increased competition. These are exactly the outcomes predicted by the model described above.

To place this merger in the context of the model described above, suppose the relevant market consisted of the two satellite radio firms, XM and Sirius, along with Apple’s iPods.³¹ Apple could be placed in the role of Firm 1 in the model, assuming one viewed the features it offers to be of higher quality than those offered by XM or Sirius. Certainly, iPods offer consumers more control over their listening experience, as well as, at least in some versions, video content along with audio content. Thus, XM and Sirius would be Firm 2 and Firm 3. Based on my model, a merger between XM and Sirius that results in a reduction in fixed costs of producing the quality of its product would lead to lower quality-adjusted prices for satellite-radio and would cause the combined firm to increase the quality of its product. The other benefit to competition would be that Apple, assuming it is the main competitor to satellite radio, would also be predicted to lower its price and improve the quality of its iPods in response to this merger.

The Antitrust Division appears to have incorporated thinking along these lines in its decision to approve the merger, specifically citing the prospect that the consolidation of “development, production and distribution efforts on a single line of radios [would] thereby eliminate duplicative costs”³² Though it is possible the Division was focusing more on marginal cost savings, the emphasis on the elimination of duplicative costs and the consolidation of development and production efforts on a single line puts this squarely in the framework of the model described above. In the case of XM-Sirius, the Division concluded that the fixed costs of producing a given quality of satellite radio will decrease after this merger. This, in turn, will lead to an increase in competition with the firms remaining in the marketplace and, as described above, lead to an improvement in consumer welfare.

Conclusion

The role of fixed cost savings in merger analysis is gaining increasing attention, though until now there has been a lack of rigorous analysis to explain how a change in fixed costs affects consumer welfare after a merger. Some work has progressed in papers where prices are set according to the full cost of production and in models where there is demand uncertainty. However, the pre-

²⁹ *Id.* at 11.

³⁰ See Press Release, *supra* note 26.

³¹ The Division concluded that the relevant market should not be limited to satellite radio, but did not state its conclusion regarding the scope of the relevant market for this transaction. Press Release, U.S. Dep’t of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm.

³² *Id.*

dictions of these models are not clear cut. By extending models that assume a fixed cost of producing a given level of quality it can be shown that a reduction in the fixed cost of producing a given level of quality can lead to an increase in consumer welfare. Fixed costs should be given greater weight in merger analysis when it can be shown that consumer welfare will be higher post-transaction. ●

Book Review

A Challenge to Orthodoxy

Edwin S. Rockefeller

The Antitrust Religion

Cato Institute • 2007

Reviewed by Ky P. Ewing, Jr.

The Antitrust Religion challenges the orthodox antitrust industry. Using history as a guide, and wit as a scalpel, author Ed Rockefeller issues a crackling indictment of conventional antitrust thinking, challenging the believers to prove that antitrust enforcement is a legitimate rational exercise. Rockefeller is a former FTC attorney, former Chair of the ABA Section of Antitrust Law (1976–77), and, since 1961, the Chair of the Antitrust Advisory Board of the Bureau of National Affairs' *Antitrust and Trade Regulation Reporter*. He uses strong rhetoric:

There is no such thing as antitrust law. Antitrust is a religion. Antitrust enforcement is arbitrary, political regulation of commercial activity, not enforcement of a coherent set of rules adopted by Congress. (p. 1)

The public should be told what is going on, that antitrust decisions are political decisions misleadingly portrayed as law and economics. . . . Law students should be taught that antitrust is not law enforcement. . . . Although today's antitrust community is alive and well, antitrust is atrophying. It is becoming a relic, an anachronism, the irrelevant debris of past political demagoguery. Education in the antitrust facts of life could accelerate the progress. (p. 103)

If one puts aside Rockefeller's perhaps too-strident words, and his implied call for abolition of all antitrust laws, his highly readable 123-page book can also be viewed as a wake-up call for more intellectual honesty in the discourse about antitrust law enforcement. That aspect is what merits this review, and should lead all who are interested in antitrust law enforcement to read this provocative book.

■
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Rockefeller begins with the simple truth that we “aspire to a government of laws, not of men” which “implies ascertainable, coherent rules for guiding and judging behavior.” Then he presents his thesis that the poorly (ambiguously) worded Sherman and Clayton Acts have given rise to “antitrust” as a religious faith independent of the statutes. “Antitrust” has become a noun, rather than continuing to be an adjective modifying the laws that Congress passed against (“anti”) the trusts in response to political pressures of the late 19th and early 20th centuries. He quotes President Franklin Roosevelt's great antitrust chief Thurman Arnold as saying: “Historians now point out that Theodore Roosevelt never accomplished anything with his trust busting. Of course he didn't. The crusade was not a practical one. It was part of a moral conflict and no preacher ever succeeded in abolishing any form of sin.” And then, with delicious wit, Rockefeller skewers the definitions of “antitrust” as defined by textbook authors ranging from Areeda to Fox, Sullivan, and Muris (who observed that there is much to do “to assure that antitrust avoids the mistakes of its past” as though “antitrust” is human). Those authors have asserted, inter alia, that antitrust “supplements,” “defines,” “assumes,” but “does not take things for granted,” “looks to perfect com-

petition for guidance,” has “central concerns,” “several goals,” “regulates economic structure and economic conduct through law,” and has “defeats”—in a grand anthropomorphic transmutation of the statutes.

Rockefeller argues that antitrust is really a religion: “Antitrust as faith endures not because it has a fixed basis in science or reason but because it does not. Faith in antitrust allows the pursuit of mutually exclusive goals. It serves the human desire for both justice and fairness.” “It also avoids facing three real issues: (1) how to state a normative rule that distinguishes between contracts that unreasonably restrain trade and those that do not; (2) how to distinguish between willful acquisition of ‘monopoly power’ and being an effective competitor; and (3) how to tell whether a merger may substantially lessen competition.”

Rockefeller argues

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Rockefeller has even more fun with the words used to justify enforcement actions even when no such words occur in any statute, such as “market,” “market power,” “oligopoly,” and even “competition,” which the Clayton Act uses but does not define. He rails against the use of human constructs in our attempts to enforce the statutory provisions. And he points up differing fads in antitrust jurisprudence, such as the now-outmoded fads against “oligopoly,” “conglomerates,” and “reciprocity.”

Of course, Rockefeller is off base when he takes the simplistic view that all real laws are clear “rules,” and that “facts” are existent in the real world to be “found” by judges. As Justice Frankfurter once opined, “Words are not pebbles in alien juxtaposition; they have but a communal existence.” He would do well (as would we all) to revisit *The Selected Writings of Benjamin Nathan Cardozo*¹ and consider such works as Myres McDougal’s *The Interpretation of of Agreements and World Public Order*² (about the nature of statutes and law). Most “laws” require the use of human constructs in order to be applied to “facts” of the real world, those facts often requiring predictions based on perceived probabilities in order to be used in a judgment enforced by governmental power. That antitrust law is a form of “common law” would not surprise Cardozo or Holmes, or even Plato and Aristotle.

Rockefeller cites Bork, Posner, Armentano, and Crandall and Winston for their views on how antitrust statutes should be amended, abolished, or empirically explored, and then segues into his description of the “antitrust community” which, he claims, is why the antitrust religion will continue as a faith-based enterprise.

The book is worth reading just to enjoy Rockefeller’s vision of all of us in Chapter Two: as the Scots poet Robert Burns wrote in 1786 in his “Tribute to a Louse,” “Oh wad some power the giftie gie us to see oursels as ithers see us! It wad frae monie a blunder free us, an’ foolish notion.” The “antitrust community,” says Rockefeller, was founded when President Eisenhower replaced Herbert Bergson as assistant attorney general in charge of the antitrust division. Bergson promptly founded a law firm and organized the ABA’s Section of Antitrust Law in 1952, becoming its first Chair. The “antitrust community” was consecrated by the *1955 Report of the Attorney General’s Committee to Study the Antitrust Laws*.

Today, says Rockefeller, the “faith” is preserved by a cult of professional followers, but “one cannot become a member overnight. It takes about six months to become familiar with the territory and comfortable with the language. The veteran has little advantage over the novice, since neither can predict results, but the practitioner has to speak the language.” He describes three

¹ THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 204–09 (Fallon Publications 1947).

² MYRES MCDUGAL, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (Yale University Press 1967).

steps: first, becoming familiar with a few statutory provisions; second, recognizing some terms not in the statutes, such as *per se* and *rule of reason* and a few case names like *Illinois Brick*; and third, picking up some terms from microeconomic theory and authoritatively using “meaningless or ambiguous” terms (or metaphors) such as “market,” “market power,” and “barriers to entry.” An additional “dimension” is government experience, because “[a]pppearance of proximity to the decision-maker adds value to the lawyer’s opinions. Much antitrust practice consists of assessing and influencing the thinking of middle-level government officials on matters over which they have broad discretion.”

Rockefeller says the antitrust community “includes practicing lawyers, law professors, economists, and government officials who hold conferences and publish materials propounding antitrust doctrines. The antitrust community comes together in the American Bar Association’s antitrust law section.” Describing the Section of Antitrust Law as having about 11,000 members, with numerous publications produced by the members, producing net revenues of over \$900,000 in fiscal year 2003–2004, and having reserves of some \$7,320,980 on June 30, 2005, Rockefeller then quotes Professor Spencer Waller: “The ABA Antitrust Section provides the most direct opportunities to demonstrate that you are a member, and major player, in the antitrust club. . . [ABA] socialization . . . provides . . . the language and acculturation to work the halls of power and interact with practitioners of similar backgrounds who may be friends, foes, or the government decision-maker in any given matter, and who may surface in the same or different posture in the next matter.”

Rockefeller notes that the “antitrust gospel” is being spread world-wide, with the active assistance of the U.S. antitrust community. As this reviewer has estimated in his own book, the world-wide gross receipts of the antitrust community of lawyers, economists, and government officials in the more than 100 countries that now have such regimes totals at least \$20 billion annually (and that does not count the cost to the businesses involved).

As might be expected, the participants in a profitable venture are loathe to change it, and are not willing to examine whether what they are doing produces good results. As to that, Rockefeller notes that the 1955 Committee on Antitrust Policy of the Twentieth Century Fund declared that “[a]lmost no one has bothered to enquire.” And the Antitrust Modernization Commission of 2002 (with \$4 million to spend over three years) rejected the advice of the then Assistant Attorney General in charge of the Antitrust Division that the Commission “should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement.” As could have been expected, it basically said all was well, but could be improved by expanding the reach of “antitrust” through abolition of exemptions and immunities, and minor tinkering around the doctrinal edges.

Rockefeller gives us a short history of “trust busting” from its early days promulgating the “myth of Standard Oil” through its various fads to its current sad condition (as he views it). Rockefeller is basically accurate as he takes the reader from the early years through the Depression Era of “cooperative competition,” to the period through the late 1970s (where the government supposedly always won, based on now-debunked concentration theories), to the 1980s model of the Chicago School’s economics-based theories, to the current Hovenkamp “post-Chicago” thinking.

Rockefeller highlights as a “revival meeting” of antitrust religion believers a conference held at Airlie House to condemn the Baxter Revolution. Various luminaries such as Bob Pitofsky there declared that “failures to act and loose rhetoric have contributed to a foolish and wasteful surge of giant consolidations” and urged that “a more vigorous, pragmatic antitrust policy should be restored.” In contrast, Richard Posner is quoted (not favorably) as claiming: “It is fair to say that

at the beginning of its second century antitrust law has become a branch of applied economics, has achieved a high degree of rationality and predictability, and is a success story of which all branches of law and allied disciplines can be proud.” Disagreeing, Rockefeller argues that “it is difficult to maintain that applied economics has given any precision to the problem of identifying illegal monopolization or that today’s merger regulation has any predictability at all. Ambiguous phrases in the antitrust statutes empower government officials to interfere in business activity but do not supply much guidance as to when or where or why to do so.”

Writing that “market power has replaced concentration as the all-purpose antitrust hobgoblin and the primary evil at which the ceremonial process of antitrust is now directed,” Rockefeller asserts, in colorful language, “This market power is not real. It is an analytical concept of economic theory. . . . It is an imagined power, like witchcraft. This imagined capacity of an imagined firm or group of firms would have in an imagined situation has been imported into the interpretation and enforcement of rules of law. . . . as though possession of such hypothetical power can be a matter of factual proof.” Rockefeller goes on to quote the many antitrust experts who acknowledge that we have a hard time actually proving possession of market power, noting a quote in the ABA Section of Antitrust Law *Market Power Handbook*³ from Areeda and Hovenkamp that “Economic theory alone . . . does not provide a bright line that indicates when such power raises concerns that violate the antitrust laws. . . . But decisions must be made even when available data are inconclusive.”

Not unreasonably, Rockefeller asks why government should act when data are inconclusive. Unless we can be sure, why intervene in the real world’s markets? In fact, decisions too often ultimately depend solely on concentration (market share) numbers, despite our knowledge from numerous studies that concentration is not a predictor of rent-seeking behavior. That is a continuing challenge for the antitrust community, a challenge that in the long run it will have to do better in answering. Empirical studies showing that prior interventions have done some public good would be helpful, but they do not exist, and the antitrust community seems loathe to undertake them.

Of course, before you can have market power, you have to define a market. Rockefeller quotes from, and further develops, the words of Fred Rowe, another former Chair of the ABA Section of Antitrust Law: “Fundamentally, the market is metaphor, not actuality, a mental picture in our heads Without empirical referents, identification of the market is perforce arbitrary, a façade for decisions elsewhere derived. . . . The rub is not with economic models as models, but their misuse as legal norms.”

Rockefeller has fun with the many assumptions one has to use in order to utilize the SSNIP test for defining a market. He is right. All we have in the real world are individual transactions. Which transactions we choose to collect together and call a “market” involves choices by a decision maker. The “market” then consists of those transactions by a real buyer or buyers and a real seller or sellers, of something (product attributes), somewhere (geographic area), at some time (period in which transactions are counted), at a price or prices. If you want to consider an automobile market, do you count trucks? Do you count 7-series BMWs along with VWs? Do you count sports cars? What about red sports cars in the Dallas/Ft. Worth area in the Spring when parents are buying their daughters and sons graduation gifts; would red sports cars be a separate antitrust market? Which transactions will the government official choose to count? Isn’t that what the antitrust community of experts makes its living advising about, and advocating about? Is this the rule of law, or of persons initiated into the antitrust fraternity? Rockefeller’s book demands an answer.

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³ ABA SECTION OF ANTITRUST LAW, MARKET POWER HANDBOOK: COMPETITION LAW AND ECONOMIC FOUNDATION (2006).

Rockefeller cites former Antitrust Section Chair Don Klawiter as saying in 2005 that “Every antitrust case now involves a battle of economic experts. . . . thus, the experts often simply cancel each other out.” Chapter Four pointedly sticks a pin in the balloon of certainty we fashion around our antitrust law enforcement decisions. Rockefeller could have cited the *Oracle* decision by a judge who is clearly an expert within the fraternity, but who derided the “expert” testimony in favor of common sense. In the long run, as the Antitrust Division learned in that case, we are going to have to do better. Again, we can still hope that empirical studies may show that, in general, antitrust law enforcement has not always been in vain, but those studies will increasingly be needed as more attention is drawn to the games we play with our models.

Chapter Five is a devastating romp through the history of “monopolization,” ranging from history’s explosion of the myth of Standard Oil, through the Supreme Court’s unsuccessful attempts to give the term meaning and the many cases now seen as misguided (such as *Alcoa* and *IBM*), to the academics’ many-splendored and distinctly varying proposals for normative rules, and finally, to the Antitrust Section’s proposed jury instructions on monopoly (which, for anyone who has actually served on a jury, clearly let the decision makers do whatever in the world they want). Rockefeller ends by citing the *Weyerhaeuser* case which, he says, “illustrates vividly the impossibility of distinguishing legitimate competition from unlawful attempts to monopolize and the symbolic political nature of the law of monopolization.”

Rockefeller abhors both the infelicity of language about, and the substance of what happens under the label “merger enforcement.” He rightly claims: “Most mergers are allowed. A few mergers are prevented. Some mergers are modified. *No* mergers are enforced.” He concludes that “Merger regulation is not law enforcement. No ascertainable rule is being enforced.” Rockefeller serves up Justice William O. Douglas’s concurrence in a 1966 beer case that viewed mergers with great alarm and to which Douglas appended the newspaper column of Art Buchwald about mergers of all companies east and west of the Mississippi and their subsequent negotiation to buy the United States. That is a metaphor for the concentration thesis adopted in *Brown Shoe*, followed by *Von’s Grocery*, and *Philadelphia National Bank*, and the era of the 1960s when, Rockefeller asserts, the cases “had the effect of declaring unlawful all mergers.” Because the authorities clearly did not want to stop all mergers, they had to be selective, and Rockefeller asserts: “Reluctant to contradict declarations of the Supreme Court or to renounce unlimited discretion to stop any merger should it become politically important to do so, the authorities have been unwilling to state unambiguously which mergers might be allowed.”

Rockefeller then takes us through the 1968 Turner Merger Guidelines, the 1982 Baxter Guidelines (with the footnote, later omitted, that “There is some evidence that, where one or two firms dominate a market, the creation of a strong third firm enhances competition. The Department has considered this evidence but is not presently prepared to balance this possible gain against the certainty of substantially increased concentration.”), to the 1984 revision, the joint DOJ/FTC Guidelines of 1992 and 1997, and the 2006 Commentary on the Horizontal Merger Guidelines. He quotes Tom Leary (while an FTC Commissioner) admitting that “Merger cases are fact intensive. People with the same basic philosophy can and do come to different conclusions on individual transactions.” Rockefeller cites some examples, including the *Heinz/Beech-Nut* baby food merger, where the district court had found that the FTC “made its prima facie case by showing increased market concentration. The defendants rebutted that case with proof that the proposed merger will in fact increase competition. The Commission responded to the rebuttal case essentially with only structural theory.” FTC Chairman Bob Pitofsky is quoted as saying the appellate court’s reversal of that decision “holds the line” on antitrust enforcement, while his successor, Tim Muris, “said he would have allowed the merger.”

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Noting that merger regulation according to the FTC used 70 percent of its resources in 2000, Rockefeller also notes that by 2005, the 1,695 proposed mergers (requiring some 3,390 Hart-Scott-Rodino Act filings with the FTC and DOJ), resulted in only 18 challenges. In this reviewer's mind, as a matter of public policy, that is an extraordinarily inefficient merger screening process that the agencies ought to fix. Rockefeller deserves credit for pointing up that fact.

Rockefeller concludes that "[u]npredictability is inherent in the merger regulation process. As the Guidelines point out, standards cannot be mechanically applied. Historical evidence may provide an incomplete answer. The inquiry is forward-looking. Regulators feel they must make assumptions about a future that cannot be known." Indeed, he asserts (with a great deal of justification in this reviewer's opinion after some forty-nine years of practice) that "Government harassment of mergers is arbitrary and unpredictable and is done in secret and randomly driven by complaints of competitors." Rockefeller notes that a merger may have substantial real world consequences on jobs, consumers, rivals, and other interests, and may be one that has to be reported to the government under the HSR Act, but "may be allowed by a secret decision of unidentified, unelected, unaccountable government officials." "Antitrust believers do not wish to acknowledge that the existing process of merger review is not law enforcement but whimsical government regulation of mergers."

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Whether or not the situation is as bad as Rockefeller portrays, he has made a case for a harder look at our currently inefficient merger review process.

Chapter Seven takes on "Tying" and "Exclusive Dealing." Rockefeller starts by repeating FTC Chairman Tim Muris's article stating that merger regulation is based on "quicksand" because of "the uncertain basis of existing theories for attacking mergers" and then concludes: "The law on what the antitrust community calls 'tying' is no better." Indeed, Rockefeller clearly agrees with Judge Bork that "the entire theory of tying arrangements as menaces to competition is completely irrational" and that "there is no validity to the law's explanation of tying arrangements." Those who are concerned about unilateral conduct would do well to analyze (and try to answer) Rockefeller's discussions in this chapter.

As to the core problem of "Price Fixing," in this reviewer's opinion the prize-fighter Rockefeller is felled by a self-administered blow to his own chin. Possibly recognizing that the essence of modern antitrust law is its prohibition of agreements to fix price or reduce output (the same basic prohibition that Lord Wilberforce found in laws going back ancient Egypt, Greece, China, etc.), Rockefeller begins the chapter by noting, first, the courts' willingness to infer agreements and, second, condemnation of price-fixing without proof of adverse effects under the per se rule. He summarizes his previous chapters and declares:

Courts have interpreted laws prohibiting contracts in restraint of trade as allowing criminal conviction for price fixing without proof that any price was fixed or that anyone was adversely affected. Antitrust is not what it once was. Enforcement of section 2 of the Clayton Act, which prohibits some forms of price discrimination, has been abandoned. Most mergers substantially lessen competition and therefore violate section 7 of the Clayton Act, but only a few are challenged. The *IBM* antitrust case was a fiasco and gave the anti-monopolization provision in section 2 of the Sherman Act a black eye that the *Microsoft* case has not erased. Pressed to defend irrelevance, incoherence, and irrationality, the antitrust believer responds, 'What about price fixing?' Defenders of the faith cling to the concept of the price fixer as a villain who should be vigorously prosecuted.

Rockefeller then cites Tony Freyer's historically accurate observation that this country's prohibition of agreements to fix prices led to more mergers (a policy choice opposite to that of the United Kingdom which openly advocated cooperative arrangements). This reviewer's response:

so what? Rockefeller himself wants no control of mergers. Rockefeller then points out that it is hard to distinguish a good collaborative joint venture (such as a joint selling agency or the joint blanket license in broadcast music) from a bad cartel. Rockefeller correctly asks why, if efficiency can be used to justify a merger, it cannot be used to justify cartel behavior. Of course, under today's analytical approach, if one can show an economic integration that leads to efficiency, one can usually persuade the government that the arrangement is a good joint venture.

More troubling to the intellectually honest scholar, however, are the citations Rockefeller gives to studies that question whether there is really hard evidence to show that "agreements as to price are necessarily sufficiently damaging to consumer welfare to outweigh the cost of government action against them." Further empirical studies are certainly to be desired.

Also to be desired is more real consistency of governmental action. Rockefeller details the almost sordid story of the U.S. Government-sponsored cartel in aluminum, as outlined in Joseph Stiglitz's book, *Globalization and Its Discontents*,⁴ which the Antitrust Division ignored (or was forced to ignore), compared with its criminal prosecution of a seller of aluminum signs for agreeing on their price, even though, according to Rockefeller, he "was probably a direct victim of the government-created cartel."

Rockefeller then takes a crack at the private treble damage actions, noting that in the *Visa/Mastercard* case:

Defendants agreed to create a settlement fund of \$3.05 billion to be shared by five million merchants, giving them \$610 each. Lawyers for the class sought reimbursement for costs of \$18 million and a fee of \$609 million. The Court ordered defendants to pay the costs and \$220 million in attorneys' fees. Some would say the attorneys earned it. They punished an evil trust.

What Rockefeller avoids mentioning, and cannot support in his attack on anti-cartel enforcement, is the *covert* cartel—the *secret* agreement to raise or stabilize prices or to reduce output, or to allocate territories or to rig bids. There is simply no reason for secrecy in collaborative agreements if their purpose or effect is useful or benign. Even the authorities Rockefeller cites for the proposition that "there is no evidence" that antitrust enforcement improves consumer welfare, such as Robert Crandall and Clifford Winston, reach a fundamentally different conclusion. In fact, Crandall and Winston state in their Brookings Institution Study of 2002:

[T]he case for a tough and broad antitrust policy must rest on empirical evidence that shows that such policies have worked in the broad social interest. . . . [W]e argue that the current empirical record of antitrust enforcement is weak. . . . We acknowledge that the literature has not been able to utilize all potentially fruitful sources of data and has rarely implemented recent empirical advances in industrial organization to analyze the effects of specific antitrust cases. Thus, the state of knowledge is not at a point where we are ready to make sweeping recommendations. Nonetheless, the economics profession should conclude that until it can provide some hard evidence that identifies where the antitrust authorities are significantly improving consumer welfare and can explain why some enforcement actions and remedies are helpful and others are not, those authorities would be well advised to prosecute only the most egregious anticompetitive violations.

Crandall and Winston conclude that the "egregious violations" that *should* be prosecuted include "blatant price fixing and merger-to-monopoly," while the agencies should treat "most other apparent threats to competition with benign neglect."

⁴ JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

Rockefeller, in contrast, concludes Chapter 9, with these words:

The antitrust laws provide a vehicle for the antitrust community to carry on a useless, mischievous activity portrayed as law enforcement. Antitrust has been called “a subcategory of ideology,” “a religion without a cause,” and “a hoax.” Whatever antitrust may be, it is not law enforcement. Justice Abe Fortas wrote: “Antitrust in the United States is not . . . a set of laws by which men may guide their conduct. It is rather a general sometimes *conflicting* statement of articles of faith and economic philosophy.

Rockefeller’s argument is that economics cannot make the antitrust laws rational. He also believes that the likelihood of Congressional repeal is near nil. He hopes education of the public about what really goes on will accelerate the “atrophying” of antitrust enforcement.

Rockefeller’s view that antitrust enforcement is “atrophying” seems extremely odd and wrong-headed, because in recent years over 100 nations have instituted antitrust-type regimes, including such giant economies as China and India.

Rockefeller’s view that antitrust enforcement is “atrophying” seems extremely odd and wrong-headed, because in recent years over 100 nations have instituted antitrust-type regimes, including such giant economies as China and India. The real issue for us all is how to avoid the growing risk of inconsistent governmental interventions in basically free-market economies. Rockefeller virtually ignores the already successful work of the International Competition Network in trying to work through various problems.

Rockefeller moves close to a real problem when he attacks the use of market share as a proxy for the “market power.” But he fails even to note the greater problem that the European Commission and many foreign agencies are mechanically using market share and a lingering odor of “shared monopoly” known as “joint dominance” to deprive successful enterprises of competitive tools allowed their rivals. And Rockefeller’s idea that cartels, including secret cartels, should be allowed to operate until they self-expire in some distant future seems downright perverse, especially in light of the recent evidence that global cartels have operated massively, and for very long periods of decades, and caused billions of dollars of injury to consumers. Rockefeller’s view runs counter to the wisdom embodied in laws against such agreements to forestall or engross (to use the medieval terms) that Lord Wilberforce found to have existed for thousands of years. Surely, even the Cato Institute’s adherents would render a Scots verdict of “Not Proven,” on the proposition that the evidence shows secret cartels to be benign.

Rockefeller’s book can also be criticized on the grounds that he quite selectively hits certain targets and does not address other issues, such as bid rigging and territorial allocation. His habit of playing off old antitrust cases from the era before World War II against more modern precedents also does a disservice to contemporary antitrust enforcement. Of course, as we have come to understand more about the competitive process over the years, the more recent cases reflect that knowledge. Do we still have a long way to go? This reviewer thinks so, particularly in achieving new and more rational Supreme Court precedents, but that is not a reason to throw the whole antitrust law enforcement enterprise overboard.

Finally, merely because the excellent intellectual case has already been made that free markets are better at allocating resources than governments are, it does not follow that private restraints are to be permitted free reign. Cynicism about the continuing intellectual failures of antitrust enforcement should lead to suggestions for improvement, not simply the abandonment of the effort.

Rockefeller is to be commended for writing an “agnostic” book that challenges the current orthodoxy of “antitrust.” It should be read by all who are interested in the subject. Hew Pate spoke well when he said, “If antitrust is a religion, Edwin Rockefeller has long been one of its high priests . . .” This reviewer wishes the High Priest would write a sequel telling us how to keep, but change, the antitrust laws and their enforcement, even if he believes such a book would have to be a novel. ●

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition, Bill Page invokes editorial privilege and notes two of his own recent papers, one on facilitating practices and one on the consequences of the European Microsoft decision. Send comments or suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

Recent Papers

William H. Page, Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act, available at <http://papers.ssrn.com/abstract=1117667>

William H. Page & Seldon J. Childers, Bargaining in the Shadow of the European *Microsoft* Decision: The Microsoft-Samba Protocol License, available at <http://papers.ssrn.com/abstract=1117641>

In the first of these papers, I consider the economic and legal significance of facilitating practices. In order to coordinate prices and outputs jointly, rivals must be able to reach consensus and control cheating. Facilitating practices (for example, price reporting systems, pre-announcements of price changes, most favored customer clauses, meeting competition clauses, delivered pricing, and industry-wide resale price maintenance) make these tasks easier by making the terms of transactions more transparent to rivals. My focus in this paper is on the relevance of these practices to proof of concerted action under Section 1 of the Sherman Act.

Economics and game theory have long shown that oligopolists can, in some instances, achieve market outcomes similar to those of an explicit cartel by consciously parallel action. Rival gas stations in a small town, for example, might coordinate a price increase by deciding to follow the lead of the first mover rather than attempt to gain market share by keeping prices lower. Richard Posner has argued that this sequence of decisions might satisfy Section 1's requirement of an agreement. Courts, however, have sided with Donald Turner, who argued that consciously parallel action could not sensibly be prohibited under Section 1 because it is rational and because it would be impossible for courts to provide an effective remedy. The Supreme Court in *Twombly*,¹ for example, observed that consciously parallel conduct is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." Thus, courts require something more: a "plus factor," that is, evidence that tends to exclude the possibility that the rivals were engaging only in consciously parallel conduct.

But what if oligopolists use facilitating practices to achieve noncompetitive outcomes? An explicit agreement to adopt a facilitating practice, for example by way of a trade association rule, may be illegal. If the practice facilitates price coordination by fixing terms of dealing, it is likely to

¹ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1963 (2007).

be illegal per se. Agreements, for example, to eliminate short-term credit² or to adhere to posted prices³ have been held illegal per se because they improved pricing transparency by limiting rivals' ability to engage in secret discounting. Analogously, state laws that mandate the use of similar facilitating practices have been held invalid as hybrid restraints. For example, lower courts invalidated state "post and hold" statutes, which require liquor distributors to adhere to announced price lists.⁴ Agreements to exchange information may also be unlawful, depending upon the nature of the information.

A more difficult issue is posed when rivals uniformly adopt facilitating practices without an explicit agreement. Both Posner and Turner believed that the presence of facilitating practices made conscious parallelism unlawful, because it solved the problem of remedy: if a practice aids price coordination, then courts can easily enjoin it. Courts, however, have rejected this reasoning. Facilitating practices are not necessarily plus factors, although they may provide part of the circumstantial evidence of agreement that amounts to a plus factor. The cases are complicated, however, by antitrust law's failure to adopt a coherent concept of agreement.

Courts still quote the Supreme Court's statement that an agreement requires "a unity of purpose, a common design and understanding, or a meeting of the minds."⁵ As I have argued elsewhere,⁶ this definition fails to distinguish lawful consciously parallel action from unlawful concerted action. I suggest that the law should recognize that the distinguishing characteristic of concerted action is communication among rivals of their goals and their reliance on each other's actions. Although economics has thus far been unable to establish the precise role of communication in achieving noncompetitive outcomes, most economists believe that successful concerted action requires ongoing communication of some form among the players. Carlton, Gertner, and Rosenfield, for example, have suggested that communications are likely to be anticompetitive if they are private, repeated, and relate to current and future prices.⁷ In recent years, I suggest, the courts have begun to apply, explicitly or implicitly, a definition of agreement that requires evidence that permits an inference that these kinds of communications have occurred.

In the remainder of the article, I show that the facilitating practices cases are generally consistent with this idea of agreement. Thus, in *Ethyl*, the court refused to condemn industry-wide use of advance notification of price changes, price protection clauses, and delivered pricing, even though they facilitated price uniformity, because they evidently served non-collusive purposes that consumers wanted.⁸ More recently, the Supreme Court in *Leegin* suggested that industry-wide adoption of resale price maintenance might be an anticompetitive facilitating practice, but did not

² *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

³ *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936).

⁴ See, e.g., *Costco Wholesale Corp. v. Maleng*, No. 06-35538, 2008 WL 852396 (9th Cir. Apr. 1, 2008), *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001); *Miller v. Hedlund*, 813 F.2d 1344, 1350 (9th Cir. 1986). For discussion of this issue, see John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 294–97 (2003).

⁵ *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

⁶ William H. Page, *Communication and Concerted Action*, 37 LOY. U. CHI. L.J. 405, 411–12 (2007).

⁷ Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 42 (1997).

⁸ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 133–34, 140–42 (2d Cir. 1984) (*Ethyl*). Although the claim in *Ethyl* was under Section 5 of the Federal Trade Commission Act, which does not facially require proof of agreement, the court imposed requirements evidently drawn from Section 1 of the Sherman Act.

suggest that the practice would by itself warrant an inference of a horizontal agreement.⁹ I argue that, in general, a finding of collusion involving facilitating practices will require evidence that permits an inference of communications, as in cases like *Cement Institute*,¹⁰ where the defendants engaged in coordinated efforts to punish deviators from a basing-point pricing system, or *Container*,¹¹ where the defendants routinely exchanged current pricing information about specific transactions.

The second paper considers Microsoft's recent agreement to license its communications protocols to Samba, an open-source development project that competes directly with Microsoft in the workgroup server market. My paper is a part of a broader study of the ongoing remedies in both the U.S. and European Commission Microsoft cases.¹² In researching this one, my co-author and I relied on published commentary on the agreement and on interviews with some of the key players in the negotiations, particularly David Heiner, Microsoft's lead in-house antitrust counsel; Craig Shank, Microsoft's lead negotiator for the license; and Eben Moglen, a professor at Columbia Law School, whose Software Freedom Law Center provided legal representation for Samba.

In 2004, the EC held that Microsoft had abused its dominant position by refusing to supply Sun Microsystems with information Sun needed to interoperate with Windows workgroup server products.¹³ The EC ordered Microsoft to disclose "complete and accurate specifications for the protocols used by Windows work group servers in order to provide file, print, and group end user administration services to Windows work group networks." Last September, the European Court of First Instance (CFI) affirmed the EC's ruling.¹⁴ Shortly thereafter, Microsoft's CEO, Steve Ballmer, agreed with EC Competition Commissioner Neelie Kroes on terms under which Microsoft would license its protocols. Last December, Microsoft reached a licensing agreement with Samba.

This agreement is the most important product of the European *Microsoft* case. The EC's other 2004 order, under which Microsoft created versions of Windows without Windows Media Player, was a complete failure in the marketplace. The Samba agreement, however, is more likely to have a significant impact because it requires Microsoft to provide detailed documentation of its communications protocols to its most important rival in the server market. Equally important, the terms allow Samba to use the information in open-source development and distribution.

In the paper, we briefly describe the function of servers and communications protocols in computer networks and the importance of Samba as a rival of Microsoft. One key lesson of this section is that Samba has successfully cloned many of the functions of Microsoft's server operating systems by protocol analysis, using information gathered by tracking communications between

⁹ *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

¹⁰ *FTC v. Cement Inst.*, 333 U.S. 683, 714 (1948).

¹¹ *United States v. Container Corp.*, 393 U.S. 333, 335 (1969).

¹² See William H. Page & Seldon J. Childers, *Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement*, 14 MICH. TELECOMM. TECH. L. REV. 77, 91–93 (2007), available at <http://www.mttlr.org/volfourteen/page&childers.pdf>; William H. Page, *Mandatory Contracting Remedies in the American and European Microsoft Cases*, 75 ANTITRUST L.J. (forthcoming 2008) (describing the failure of the EC-mandated versions of Windows to attract users), available at <http://ssrn.com/abstract=1073103>. These studies build on WILLIAM H. PAGE & JOHN LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (2007).

¹³ Case COMP/C-3/37.792 Microsoft, Commission Decision of 24 March 2004, at ¶¶ 779–84 4, available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf> (EC Decision).

¹⁴ Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 WL 2693858 (Sept. 17, 2007) (CFI Decision), available at <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04>.

Microsoft servers and clients. One feature it has not cloned, however, is Active Directory, Microsoft's user administration technology, which gives Microsoft its primary competitive advantage. This same technology was the focus of the EC's case. Thus, the EC's order requires Microsoft to provide interoperability information to its primary rival in the server market, a rival, moreover, that is particularly well situated to make good use of the information.

We describe the license negotiations from each side's perspective. In the last part of the article, we consider the possible implications of the license and the disclosure process for Samba, Microsoft, and competition policy. Samba, of course, will benefit from the information. The effect on Microsoft, however, is more complex. We consider the suggestions of some (non-Microsoft) participants and observers that Microsoft may actually benefit from the spread of its protocols and from the technical feedback from Samba engineers. The greatest danger to Microsoft is that Samba will be able to use the disclosures to clone the internal algorithms of Active Directory. Although the EC and the CFI insisted that the order would require the disclosure only of "specifications" and not Microsoft's source code, the CFI did suggest that Microsoft might be required to "describe" its algorithms in order to assure interoperability. If those disclosures result in cloning, the license may, contrary to the EC and CFI's predictions, ultimately inhibit dynamic competition by undermining the incentives of leading firms to innovate. ●

—WHP