ANTITRUST NEWSMAKER

Interview with J. ThomfiThiTi l JTd aebi dTi

about to be there, these were m conclusions· first

Ma oras was an antitrust agenc administrator p

lence. She'd had a good deal of e perie nag

the Department of Justice, and she ed

e cellent administrator at the Commi

FTC Commissioner
J. Thomas Rosch

conse uentl I concluded that there wasn't ver much I could add in that regard. ill was ust oining the Commission and he clearl had superior e pertise and e perience.

ith respect to dealing with the ill, which I knew from both e perience and b wa of hearsa was a ver important part of an Commissioner's ob, the e pert was Jon Leibowit . e had spent ears on the ill with the Senate Judiciar Committee and more specificall with the Antitrust Subcommittee. It had been ears, dating back to , since I'd last appeared at all on the ill. I had virtuall no e perience politicall . And as a conse uence, I didn't think there was an - thing significant I could add in that regard.

In terms of outreach to the states, the e pert was am arbour. She had, as ou know, been the head of antitrust law enforcement in ew ork after Llo d Constantine. She had e cellent relations with AA (ational Association of Attorne s ener rnn wcd r-eTsebddl -eTmegT dl redbTi eTledT·To n

during the three plus ears I've been here, it probabl is the enhancement of the agenc 's trial capabilities.

If I brought an thing important to the table in that respect it was probabl a willingness to lose. It's hard to lose, but as a trial law er ou do lose it's ust part of the bargain. And the trick, as our new resident has said, is to pick ourself up off the ground, dust ourself off, and I would have added get back on the horse and ride it again because the sooner ou do that, I think the better off ou are.

I've also devoted a lot of attention to reforming art . I've tried to make our administrative process much faster so that, particularl in unconsummated merger cases, the transaction doesn't crater before the administrative process has run its course. Additionall , I've tried to enhance our abilit to make not onl speed decisions but ualit decisions in art . e're not there et but we're getting there. And I would count that as the Commission's second most significant achievement.

I've been e uall concerned about the art process. As I sa , before I came I was mindful of the criticisms that have been leveled at the second re uest process that it took too long, that it was opa ue and one-sided, that it resulted in the staff getting discover which the parties to a merger could not get. And so I've tried to focus on that process as well. The Commission has made various efforts to speed up the second re uest process too.

Lamentabl , I think those efforts have fallen short. ut our ureau of Competition management these da s is giving the staff tighter deadlines for conducting all art investigations, not ust those generated b second re uests. I would like to see that process enhanced even more over time. I think we can do it. hat it's going to take I think is a willingness on the part of the staff to conduct more discover post-complaint, ust like litigators do in federal or state court civil litigation. The latter conduct most discover after the complaint has issued. The don't have the benefit of a lot of pre-complaint discover . And so I think that one of the ke s to this problem is to rel more on post-complaint discover and that will allow both an accelerated art process and a less opa ue art process because parties will know e actl what discover the staff is conducting.

All that said, there are trade-offs. The change would mean that the Commissioners would have to determine whether or not there's reason to believe' that a transaction or practice will violate the law without the benefit of the e tensive pre-complaint discover that is conducted in art and in the second re uest process, specificall . And the outside bar and their clients are going to have to understand that that is the trade-off for effectivel dealing with the criticisms that have been leveled at the art process in general and at the second re uest process, specificall . ut I don't think the critics can have it both wa s.

Third, and finall , I am ver proud that the Commission had the courage to appeal the decision den ing the preliminar in unction in *Whole Foods*. The decision to appeal was not an eas one. I had appeared before Judge Friedman in the *Medical Residents* case and felt he was a fine udge. I knew he would be respected b the D.C. Court of Appeals. ut I felt and more important, a ma orit of the Commission felt that the standard that was applied in den ing preliminar in unctions in *Arch Coal*, *Western Refining*, and *Whole Foods* was not the standard intended b Congress and that an appeal was imperative in order to protect the art administrative trial process that Congress intended the Commission to implement. I would count that successful appeal as the Commission's third most significant achievement.

ANTITRUST: As a general matter ou have, I think it's fair to sa , become one of the most influential and controversial Commissioners in some time. iven our background when ou were appointed as a Republican Commissioner in , few might have anticipated that. Some isTe hTp fTumTth eTi
r

In terms of being controversial,' to be sure, I had spent a lot of time stud ing and litigating nited States antitrust law before I came to the Commission. It wasn't as though this was a clean slate. So I had some views about these matters, including about the economics underl ing the antitrust laws, before I ever got here. ut one of the great lu uries of this ob is that a Commissioner has time time to think, time to stud . It's not a situation where as soon as ou're done with one case ou're picking up the file on the ne t one it ust doesn't happen that wa . So I've been able to give the antitrust laws, particularl of the nited States but increasingl those of some other countries, much more time and attention than I had before I got to

omha l

in unction proceeding where the case is handled b the Commission would differ from the standard in a permanent in unction proceeding where the case is handled b the Antitrust Division.

More specificall , a ma orit of the udges of the D.C. Court of Appeals held in *Whole Foods* that Congress made it clear in Section ❦ (b) that the public interest lies in having antitrust cases that are entrusted to the Commission be brought to trial before the Commission, not in the federal district courts. The federal district courts are generalist courts, the 're not speciali ed courts. Most federal district court udges are ver fine udges but the don't handle antitrust polic or cases on a dail basis the wa that the Commission does. So it doesn't surprise or bother me that the standards that appl in different kinds of federal district court proceedings are different as between ourselves and the Antitrust Division.

ou asked, however, should the standards and procedures in federal court proceedings be as similar as possible'? I interpret that to take into account the difference in statutes. And, es, I do think that as much as possible the should be the same, but I certainl don't think that we can neglect the Congressional intent in creating two different agencies that were uite different one from the other.

ANTITRUST: ou've been ver forthright in our views, and I want to give the critics their due, because one does hear a lot of criticism of some of our positions, and while ou've alread responded to several of these points I want to walk through some of them a bit more. The critics include former government officials, practitioners, and some members of Congress who are now e pressing their own view, I suppose, of Congressional intent. So there's a bod of criticism from several uarters. And granting that the statutes sa what the sa and that the Commission has the power to do much of what it's doing, the uestions focus more on what the right polic is.

ere's a view I'd like our further response to· ver time there has evolved a merger enforcement s stem appl ing current law current law including the SR Act, which gave both agencies the power to investigate proposed mergers before the are consummated and decide whether to go to court to en oin the merger. In the FTC under Chairman itofsk , with the support of former Chairman Steiger, said in essence that the polic going forward for the Commission, as it had largel been in the ears since enactment of the SR Act, was to rel on preliminar in unction proceedings as the primar litigation of a merger case.

And so while there were clearl still some differences

> special efforts to make the fullest possible use of our administrative process to address important and difficult issues of antitrust law. In several instances, the FTC made substantial contributions to antitrust urisprudence. . . . The FTC's current roster of administrative ad udication matters reflects its commitment to use the administrative process to address difficult areas of competition polic .

To be sure, former Chairmen itofsk and Muris have e pressed reservations about the Commission litigating merger cases in ar where the merger does not involve an difficult or comple issues. ut I have et to see a merger that meets that description, and I don't think the merger cases that were considered when ob and Tim were Chairmen met that description either. Certainl *Heinz* and *Genzyme/Novazyme*, for e ample, weren't eas cases. or, I would argue, were an of the three cases I've mentioned.

courts. In *Oracle*, for e ample, the decision was issued about two months after the trial record closed.

ow the ne t uestion is what happens when there's an appeal to the Commission? ell, the Commission has taken the unprecedented step in these interim rules of putting a governor on itself. I know of no federal district udge who has ever done that.

COMMISSIONER ROSCH: ell, first of all, if one views a challenge to the first transaction in *Ovation* as a challenge to a conglomerate merger, that doesn't break new ground. There is Supreme Court precedent for that, and that precedent has never been overruled. To be sure, since the on- ori ontal Merger uidelines were issued, conglomerate merger polic has been in some disarra to sa the ver least.

ANTITRUST: ot to mention in urope.

COMMISSIONER ROSCH: I'll get to urope in a minute. That said, I must mention that Tom Lear has recogni ed

crisis long enough to draw an firm conclusions about it. ut I've made some remarks about this sub ect, that is to sa what the implications are of the current economic crisis for the Commission's mission.

And so let me ust share a couple of thoughts that have occurred to me, again emphasi ing that the 're cr stal ball-t pe thoughts. The first thought is that orthodo and pure Chicago School economic tenets are at great risk specificall the notions that markets are prett much perfect that imperfect markets correct themselves ver uickl that business people are rational.

Those are fundamental tenets that undergird orthodo Chicago School economics, and I think the 've been called into uestion b the current economic crisis. And that ma cause us to be much more modest in our claims about all of those tenets, particularl when we speak about them abroad as we have in the past.

Second, with respect to antitrust specificall , it ma be that antitrust enforcement will be at least as vigorous as it has been in the past. There's a strong argument for that. As a matter of theor , competition spurs innovation, lowers prices, and enhances output if and to the e tent that one is worried about increasing unemplo ment, increased prices for consumers, etc., it ma be that antitrust has more of a role to pla than it has heretofore had. That's a second thought.

The third thought is, that said, *General Dynamics* ma pla a greater role. It ma be that market conditions as ou see them now, and the health of the parties as ou see them now, are not what the are likel to be in the future. And so I think

ANTITRUST: Consumers are not alwa s well represented.

COMMISSIONER ROSCH: I ust draw on m own e perience. AAI, od bless them, invited me to air m controversial views to a group of plaintiffs' law ers about a month ago. There are statistics that would suggest I'm wrong. So I ma be wrong about this. ut I am convinced that the Supreme Court and the Antitrust Division should not be fashioning substantive antitrust principles based upon their concern about the abuses in private antitrust cases.

ANTITRUST: The shouldn't take it into account at all?

COMMISSIONER ROSCH: I don't think the should. hat happens is that b shrinking substantive antitrust principles, which we've seen in *Credit Suisse* and *Trinko* for e ample, out of a concern about private litigation, that can slop over into public enforcement and it can hobble public enforcement as well. I don't think that's a sound wa to address concerns about private treble class action abuses. Rather, I think a much sounder wa is for the Supreme Court to consider remed ing those abuses directl , head on. If it thinks that there's an unlevel pla ing field in discover and I think there is toda because I think electronic discover is frankl much more burdensome for defendants than it is for private plaintiffs in most instances I think that the Supreme Court should insist that the federal district courts supervise discover in those cases more closel . If the Court thinks there's abuse in private class actions, either in terms of certification orer

of economics, as a matter of consumer welfare, if there's a price s uee e b a regulated monopol .

ANTITRUST: ou saw it all going in the same direction?

COMMISSIONER ROSCH: So I saw it all going in the same direction. And I think perhaps the acid test will be what happens with respect to package pricing, lo alt rebates, etc., because the Supreme Court is likel to take those up, and what the Antitrust Division sa s about those will be ver interesting at this point. ut m feeling is that those practices involve mi ed uestions of law and polic in the same sense that *linkLine* involved such a mi .

nlike the practice in *linkLine*, however, the law and polic implicated b those practices ma not be aligned. I can see some real evils stemming from those practices, but I can also see some benefits stemming from them.

ANTITRUST: ould ou like to see the Supreme Court take up those issues in properl framed cases or would ou ust as soon the didn't?

COMMISSIONER ROSCH: I'd like to see them do it, but I have to stress that m view is that the Supreme Court ought to decide these cases incrementall and not as the did in *Trinko* reach out and through dictum e press cosmic views. I think the Court ought to decide ust the case before it that's the position we took in *linkLine* and that's the wa I think the ought to do it. Incidentall , I think that ma be the wa that the will do it in the future because this Roberts Court seems to value collegialit a lot. And if ou're tr ing to achieve collegialit ou do tend to decide cases more incrementall than cosmicall .

ANTITRUST: ne last uestion on Section . Do ou think the agencies will come to a consensus polic statement in the new Administration?

COMMISSIONER ROSCH: I think that the change in Administration certainl holds that out as a possibilit . ut heaven onl knows what the attitude of the new AA will be about the Section Statement that was issued b the FTC or the Section Report that was issued b the Antitrust Division.

ANTITRUST: hat do ou see happening in resale price maintenance in the aftermath of the Supreme Court's *Leegin* decision, whether in terms of what Congress should do or what ou think the FTC should do? Is the Commission looking for a case in which to e amine vertical price restraints under some form of the rule of reason, whether it's a full rule of reason anal sis, or appl ing some sort of presumptions as the Supreme Court suggested in *Leegin*?

COMMISSIONER ROSCH: First of all, m view is that *Leegin* should not be legislated out of e istence. I think we need to wait and see what *Leegin*'s progen is before Congress takes that e treme step. M view is based on what Justice enned said in *Leegin* when he mentioned the possibilit of using pre-

cerns over these theories are compounded b the fact that what we do in the nited States gets watched intensel , and that there's a sort of lowest common denominator at work in which whatever we do that's aggressive or creative gets adopted b others as a baseline for what is acceptable or mainstream. It must be oka because even the .S. agencies are doing it. So other countries might decide, wh don't we adopt a legal standard that sa s that certain conduct is unlawful because we find it's unfair,' or that a merger is unlawful even though it not hori ontal or vertical and doesn't change market structure in an wa . Do ou think a Commissioner's decision making on domestic polic issues should factor in how the theor ma pla out abroad?

COMMISSIONER ROSCH: I'm tempted to leave this matter to ill ovacic because he's the e pert on international convergence and comit .

I would sa , however, that concerns about harmoni ation and convergence, etc., ought to pla a role in our decision making. ut it's a ver minor role. e're obliged to enforce the laws of the nited States, not Article or of the uropean Treat . So I don't think that the tail should wag the dog, the tail in this case being harmoni ation and convergence.

M view in that respect is reinforced b other considerations. First of all, I think convergence, true convergence, substantive convergence is impossible in the immediate future. And I think that businesses over here ought to be told that. where ou can identif the countr that has the greatest interest, but when the rubber reall meets the road and there's a practice in which all countries claim that the have an interest, comit will onl occur because of the sufferance of a countr rather than because of a rule that re uires that countr to defer to another countr .

ANTITRUST: I think most businesses understand that realit , that true convergence is not going to happen. And some probabl would sa the wouldn't want it, because the convergence might be in a direction that the wouldn't like.

COMMISSIONER ROSCH: The third observation I would make is that I don't think it's productive for people to throw bricks at each other on either side of the Atlantic. It ust alienates those who are obliged to enforce the law on the receiving end. e have far too much to learn from each other to allow that kind of friction to e ist. And that is not in the interest of the business communit either.

ANTITRUST: hat changes in antitrust polic do ou see in the new Administration, and what would ou like to see?

COMMISSIONER ROSCH: e've alread touched on this to some e tent. First, I think it's more probable than it has been that there will be convergence between the agencies on the desirabilit of revisiting the Merger uidelines. Second, there ma be more convergence of views on how Section ought to be enforced, although I have to sa on that score that the Antitrust Division ma still find it more necessar than I currentl do that we provide guidance on e actl how it's going to be enforced rather than speak in generalities. Finall , counselors and their clients alike ought to be interested in resolving the possibilit that an impasse ma occur between the Antitrust Division and the Commission when both seek to investigate a transaction or practice. e didn't solve the problem with that clearance process when Tom arnett was the AA although he and Chairman Ma oras were prett close on a lot of other matters. And whether we'll be able to make an greater progress with the change in Administration seems to me to be ver much up for grabs. It depends so much on the personalities of the Chairman and of the AA .

I think that Charles James and Tim Muris probabl had it right. aving a protocol that's prett much binding is probabl the right wa to go. ut I must sa I don't see that in the offing. ■

---

[1] Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995).

[2] Timothy J. Muris, Chairman, Fed. Trade Comm'n, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Remarks at the Milton Handler Annual Antitrust Review (Dec. 10, 2002), *available at* http://www.ftc.gov/speeches/muris/handler.shtm.