

Antitrust in the Digital Age:
How Enduring Competition Principles

guide competition policy through changing competitive environments, and since 1914 the Commission has used its competition policy tools to inform its enforcement agenda and to help it apply traditional antitrust concepts to new markets and changing business models. We hold public workshops, engage in economic research, and discuss competition issues with other policy makers, like the members of this Committee, to develop and refine our understanding of established and developing markets and to ensure that we are doing the right thing for American consumers and businesses—encouraging robust competition, spurring economic growth, and sweeping away impediments to competitive change.

The remainder of this testimony will focus on two of the areas in which the Commission is applying the tried and true principles of competition to markets characterized by technological change: unilateral conduct by firms with market power, and mergers.

Monopolies

There is a fundamental tension in antitrust law when dealing with unilateral conduct by a firm that is trying to obtain or maintain monopoly power. On the one hand, it is not illegal to have a monopoly, and many monopolists obtained their status by inventing new and highly desired products. On the other hand, competition policy generally relies on rivalry to discipline the behavior of firms in the market. The challenge is clear: the Commission must act to prevent unreasonable exclusionary and predatory conduct by firms with monopoly power while making sure not to limit their incentives to innovate and compete aggressively. As Judge Learned Hand put it nearly

three quarters of a century ago, “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”³

This task is made more complex in a rapidly evolving marketplace, but the antitrust laws are flexible enough to meet the challenge, and the Commission is well-equipped to scrutinize conduct by dominant firms in dynamic markets because of its enforcement and policy expertise and because of its jurisdiction under the FTC Act. The FTC Act, which prohibits “unfair and deceptive acts and practices and ... unfair methods

the potential for unduly harsh or punitive responses to what may be somewhat novel situations in new markets. Second, a finding of a Section 5 violation by the Commission should greatly limit treble damage liability in private litigation against the same defendant. Thus, the Commission can apply antitrust principles in new situations and dynamic markets with reduced risk of unduly chilling a leading firm's incentives to compete aggressively.

The Commission's recent administrative suit against Intel Corporation demonstrates how antitrust principles can be applied to remedy abusive conduct of an innovative company that simply went too far. The Commission's complaint challenged Intel's unfair methods of competition and unfair acts or practices dating back to 1999.⁵ Our proposed consent order with Intel, which has now received public comment and is being considered for possible final approval by the Commission, settles these charges and seeks to restore lost competition, remedy harm to consumers, and ensure freedom of choice for consumers in this critical segment of the nation's economy.⁶

According to the Commission's complaint, Intel's conduct was designed to maintain its monopoly in the markets for computer chips (also known as Central Processing Units, or "CPUs") and to create a monopoly for Intel in the markets for graphics processing units. The complaint alleges that Intel engaged in unfair methods of competition and unfair practices to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers. Some of those practices punished Intel's own customers – computer manufacturers – for using non-Intel products.

⁵ *FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets*, news released dated December 16, 2009, available at <http://www.ftc.gov/opa/2009/12/intel.shtm>.

⁶ Intel Corporation, Docket No. 9341, available at <http://www.ftc.gov/os/adjpro/d9341/index.shtm>.

Some of those practices deceived purchasers by leading them to believe that the chips sold by Intel's competitors were less capable than Intel chips, when in fact those chips were sometimes superior to Intel chips. According to the Commission, Intel's course of conduct over the last decade stalled the widespread adoption of non-Intel products, and limited market adoption of non-Intel CPUs to the detriment of consumers, allowing it to unlawfully maintain its monopoly in the relevant CPU markets, and keep prices higher to consumers than they would otherwise be.

The Commission's proposed settlement aims to prevent the recurrence of Intel's unreasonable exclusionary and deceptive conduct without stifling its ability to continue to innovate and compete fairly. Notably, the proposed settlement does not seek to strip Intel of its chip monopoly, which was in large measure gained through innovation and the development of associated intellectual property. Rather, it provides structural relief

likely happen if a merger proceeds as compared to what will likely happen if it does not.”⁷ Using the fact-specific approach laid out in the Guidelines, the Commission uses its extensive experience and applies a range of analytical tools to the evidence to evaluate the likely competitive effects of a merger. As part of this process, we ask: will this merger reduce competition in the future, or will new or existing competitors emerge to challenge the merged firm so that customers will receive the benefits of competition going forward?

One particular challenge when examining markets characterized by rapid technological change is that

of other firms and products that will likely shape future competition as well, taking note of facts that develop as we are investigating.

A good example is the Commission's recent investigation of Google's acquisition of AdMob. Initially the Commission had concerns that the loss of head-to-head competition between the two leading mob

anticompetitive mergers, and promote competitive markets where innovation and change can occur.

Conclusion

Our competition laws have served America well. They have proven adaptable to changes in markets and business models across a span of more than 100 years. The Commission's work enforcing the antitrust laws will continue to be an important part of our national success in preventing competitive harm in new and dynamic markets while fostering and rewarding innovation and entrepreneurship.