reflections on what I have learned and what challenges will face our successors.

A. The Obligation to Pursue Tough Cases

To begin, the agencies have an obligation to pursue the tough cases. While we get the occasional outlier, for the most part it is only the closest of cases that will be litigated. Years of experience with the *Horizontal Merger Guidelines*, increasing transparency by the agencies, and an antitrust bar comprised of highly knowledgeable and effective counselors result in you knowing to some degree of certainty where on the spectrum your client's deal will fall. In FY 2007, of course, the FTC litigated three merger challenges in district court, but that was a high number when compared to the Commission's record over the past 20 years.[2] We also challenged 19 other transactions that resulted either in consent decrees or abandonment.

Having lost in district court in the three cases that we brought, it might be tempting to retreat from our willingness to bring the tough cases, taking consents when we can get them and folding quietly when we cannot. There is no question, of course, that we must listen to what the courts are telling us, perhaps especially when we lose, and we have been engaged, accordingly, in a process of assessment over the past several months. As I reviewed and analyzed our losses, as well as some DOJ losses from a few years ago, I began to wonder whether we have been doing a sufficient job of explaining and proving cases based on unilateral effects theory. To get some help in thinking through these issues, on February 12, 2008, the FTC will hold a one-day workshop on unilateral effects in which panels drawn from the bar, economics firms, the judiciary, and the academy will explore a range of analytical and evidentiary issues. For example, addressing market definition, particularly in a merger involving differentiated products,

[2] Twice in the last twenty years, the Commission has litigated two merger challenges in district court (2002 and 1990), but never three.

has proven to be a particularly thorny issue. But, market definition is no more than a means to an end – it merely provides an analytical framework to determine if the merged entity will have the ability to exercise market power. In a differentiated products case, such as *Whole Foods,* the central question is whether, for a substantial number of consumers, the parties are each other's closest substitute. If that is the case, then in essence the merging parties, under the *Merger Guidelines'* analysis, really become the relevant market. Unfortunately, that result may appear to judges like a gerrymandering of the relevant market.

One highlight of the day will be a short, mock closing argument of a hypothetical merger between ice cream manufacturers. Chief Judge Douglas Ginsburg and Judge Diane Wood will preside over the argument, and then discuss their reactions to the case. The argument and discussion will illuminate the way at least these two judges evaluate merger challenges, including the types of evidence and arguments they find persuasive, unconvincing, or even confusing.

This type of self-assessment is healthy. Retreating from our obligation to challenge a merger when the evidence shows that it is potentially anticompetitive is not. I thought that I would have the opportunity this fall to put my money where my mouth is when it appeared that the parties in two separate mergers intended to proceed with their t

healthy that, fueled by high-profile cases like *Microsoft*, the American people and their elected representatives – and increasingly, citizens from around the world – understand that antitrust has an important role to play in our successful market system. But like any other generally positive force, it can be misused or just misunderstood. Outside pressure in major merger and conduct investigations has many sources – pointed editorials carefully cultivated by interested parties, Congressional hearings and press conferences, well-funded interest group submissions and public pronouncements. There may be a valid reason why, when I first entered law school, my image of antitrust lawyers was one of wonks huddled together with their theories and their numbers – ours is a discipline that requires a thorough, grind-it-out analysis of the facts, according to applicable law and sound economic theory. Do not mistake me to be saying that we do not have an obligation to listen to a variety of points of view; of course we must, particularly

acquisition of Giant Industries but lost in federal court in New Mexico.[4] In addition, we carefully watch for potentially anticompetitive behavior; our economists, for example, monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major urban areas, looking for evidence of any unusual price movements.

What we have not done, however, is fold to the pressure to "just do something" when our investigations have turned up no actionable conduct, or to support well-intentioned but misguided legislative attempts to control prices. Last April, the FTC hosted a three-day conference on Energy Markets in the 21st Century.[5] Among issues explored by the expert panelists was the effectiveness of competition policy and enforcement as compared to other ways of trying to ensure adequate supplies of affordable energy, such as direct government regulation of output and prices. We looked back at the regulation of gasoline prices and refining of the 1970's and viewed the resulting harm to consumers. The economics have not changed. Prices play a critical role by signaling producers to increase or reduce supply and signaling consumers to increase or decrease demand. Interfere with those signals and you hurt consumers in the process.

Some of you may recall that when I spoke to you two years ago, I took aim at proposed federal "price gouging" legislation (while members of Congress took aim at me). Versions of such legislation – which the FTC strongly believes would be harmful to consumers – were reintroduced last year. While these efforts may re-surface, especially the next time we

---

[4] *F.T.C. v. Foster*, 2007 WL 1793441 (D.N.M.), 2007-1 Trade Cases P 75,725.

[5] FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr.10-12, 2007), *available at* http://www.ftc.gov/bcp/workshops/energymarkets/index.html.

experience a crisis like Hurricane Katrina, I am pleased to report that the Energy Bill passed and signed into law in December did not contain "price gouging" prohibitions, as had been proposed.

Our recently concluded investigation of Google's proposed acquisition of DoubleClick was one in which we experienced a great deal of pressure from outside parties. Interestingly, a lot of the pressure came from privacy advocates who, believing that Google would use data acquired in the merger in ways that would violate consumers' privacy, urged the Commission to use our merger authority to block the transaction. As we ultimately explained in the Commission's statement of reasons for closing the investigation, we cannot extend our merger authority beyond competition issues and, moreover, the privacy issues, if any, extended beyond just this merger and, in any case, could be dealt with under Section 5 if Google's conduct met our standards for unfair or deceptive actions.[6] Of course, we did also hear arguments about why the deal might be anticompetitive. Staff conducted an eight-month investigation and, I must say, did an extraordinary jobAwy m

[6] *See* Statement of the Commission Concerning Google/DoubleClick, FTC File No. 071-0170 [hereinafter Google/DoubleClick Statement], *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[7] REPORT OF THE AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRA

requirements;[11] and in the professional services area, by restrictions on attorney advertising,[12] by overly broad definitions of the practice of law,[13] and by minimum service requirements for real estate brokers.[14]

Congress, of course, often calls on the FTC to study issues that have important implications for competition and consumers. For example, earlier this month, we provided Congress with a report on the economic effects of the legal differences between the United States Postal Service and its private

Code econ (p1)Tj.3 P80000
ents for real ions13 with a report on the econ rdFlsm P.12.7200 0.0000 TD(m)Tj

[11] FTC Staff Comment to Councilmember Mary M. Cheh Concerning the District of Columbia Retail Station Act (June 8, 2007), *available at* http://www.ftc.gov/os/2007/06/V070011divorcement.pdf.

[12] FTC Staff Comment to Ms. Lilia G. Judson, Executive Director, Indiana Supreme Court, Concerning Proposed Rules on Attorney Advertising (May 11, 2007), *available at* http://www.ftc.gov/be/V070010.pdf.

[13] FTC Staff Comment to Mr. Carl E. Testo, Counsel, Rules Committee of the Superior Court, Concerning Proposed Rules on the Definition of the Practice of Law in Connecticut (May 17, 2007), *available at* http://www.ftc.gov/be/v070006.pdf.

[14] FTC and Department of Justice Comment to Governor Jennifer M. Grahholm Concerning Michigan H.B. 4416 to Impose Certain Minimum Service Requirements on Real Estate Brokers (May 30, 2007), *available at* http://www.ftc.gov/be/v050021.pdf.

[15] *See* FEDERAL TRADE COMMISSION, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS (2007), *available at* http://www.ftc.gov/os/2008/01/080116postal.pdf.

ng y m

[16] *Id.* at 8.

P Term1.000057.0000 0 0.00000 1.00'ionpe15.24000 0.8 0.0000 0.0000 cm1.(s w)Tj14..0000 TD(s m)Tjarily.(oET affm00 2lab

million a year.[17] We concluded that consumers would be well-served if Congress and the PRC acted to eliminate both of these legal differences, because they compound one another.[18] If policy makers were to take both of these recommendations, we estimate that the USPS would likely enjoy lower costs of operation, which could be passed along to consumers in the form of lower prices. With lower costs, the USPS could be a more effective competitor.

And, of course, sometimes we take on issues that we identify as those that have a significant impact on consumers and for which our analysis might add something to the debate or inform us in our future work. That was the case with our w[illegible]

[17] *Id.* at 8-9.

[18] *Id.* at 9.

[19] FTC STAFF, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

Reforms to the Merger Review Process: Announcement By Deborah Platt

was the aim of the Merger Guidelines Commentary we released in 2006,[21] and that is why we are endeavoring to make formal statements explaining decisions to close investigations, particularly those that attract a high level of public interest, such as the Google/DoubleClick decision.[22]

Still, there is more to be done; working for efficiency and transparency takes continued effort. Presently, for example, the Commission is in the process of upgrading its information technology systems to better accommodate electronic production of documents.

E. Health Care Antitrust Enforcement Must Evolve to Meet New Challenges

The Commission will need to devote increasing attention to the health care sector. Health care expenditures in the United States now total almost $2 trillion annually, such that our health care sector represents 16 percent of GDP. And as costs continue to rise, ensuring affordable health care is an issue of paramount importance. Drug prices, in particular, are a significant concern for America's consumers. Ten percent of our total health care expenses are attributable to prescription drugs, meaning that prescription drugs constitute a $200 billion market.[23] Given the amount of national resources that we expend on health care and pharmaceuticals, it is vitally important that consumers purchase these services in competitive markets. Whereas many throughout the world believe that competition has no place in health care, we respectfully, but firmly, disagree. Sound competition policy is a crucial tool to

---

[21] FEDERAL TRADE COMMISSION AND UNITED STATES DEPARTMENT OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

[22] *See* Google/DoubleClick Statement, *supra* note 6.

[23] *See* Aaron Catlin et al., *National Health Spending in 2005: The Slowdown Continues*, 26 HEALTH AFFAIRS 142, 149 (2007), *available at* http://content.healthaffairs.org/cgi/content/full/26/1/142.

constrain rising costs without harming innovation or quality, and we must adapt our thinking as the health care markets evolves.

We have had, of course, a steady supply of health care matters to address. Last year, after investigation and an administrative trial, the Commission ruled that Evanston Northwestern Healthcare Corporation's consummated acquisition of its important competitor, Highland Park Hosp

[24] *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (Opinion of the Commission), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

[25] *In the Matter of Kyphon, Inc., Disc-O-Tech Medical Technologies Ltd. (Under Voluntary Liquidation), and Discotech Orthopedic Technologies Inc.*, FTC File No. 071 0101, *available at* http://www.ftc.gov/os/caselist/0710101/index.shtm.

they provide for the branded company to provide something of value to the generic company, which then agrees to stay out of the market until a particular date – and require action. In the meantime, Congress is considering whether legislative changes to more expressly prohibit such settlements are warranted. The answer is not easy, however. Drawing a clear, bright line between anticompetitive settlements and those settlements that are reasonable and competitively neutral is difficult. So, we are listening to pharmaceutical companies (those who will talk to us) and trying to determine whether there is an acceptable solution that protects consumers.

The Commission must always, however, look at what issues may next appear on the horizon. As health care payors turn to providers to further reduce prices, we are seeing a new wave of provider calls for antitrust immunity – efforts by doctors, pharmacists, and others to permit collective bargaining. In the pharmaceutical sector, some have raised concerns about what has been called "product hopping" or "product switching." Innovator drug firms often introduce "follow-on" versions of their successful drug products. Product changes undoubtedly can be procompetitive, introducing drug improvements, greater consumer choice, or new approved indications. Certainly, we do not want to discourage follow-on innovation and improvement. Questions have been raised, however, about certain situations involving follow-on drug marketing that some say amount to gaming the FDA regulatory system and state drug substitution laws. For example, has a manufacturer reformulated a drug just as a generic version is about to enter, and taken steps to prevent automatic generic substitution for the original drug at the pharmacy level – without any countervailing benefit, such as greater efficacy or reduced side effects? We are following controversies and research in this area, so that we can better understand the market issues and whether there is any role for antitrust law in addressing them.

In addition, we are, at the request of Congress, conducting a study on the effect that "authorized generics" – branded drug manufacturers authorizing and selling generic versions of their own drugs – may be having in the marketplace. We have received numerous comments from the public on our study, have issued requests for information from certain firms, and are preparing a report on the subject for release in the coming months.

To better prepare us to tackle emerging health care issues, we are planning, in the first half of this year, two public events to examine emerging issues raised by new health care delivery models. First, on April 23, we will begi

the health care sector relating to “clinical integration” among otherwise independent health c

technology sectors.[26] The *Rambus* case, resolved with an opinion on remedy and final order in February 2007,[27] is the Commission's first litigated case in the standard-setting area and, we believe, the first time in 22 years that the Commission has heard a monopolization case in administrative litigation.[28] Rambus has appealed that decision, and the D.C. Circuit will hear oral argument on it two weeks from today.

One issue that the *Rambus* case highlights that continues to be a challenge for antitrust enforcers is the issue of how to remedy violations. Without question, markets march on as we investigate and litigate. That makes devising remedies even more difficult, because we have an obligation to remedy violations in a way that does not itself harm the market. In its 2001 *Microsoft* decision, the D.C. Circuit recognized that "six years seems like an eternity in the computer industry," and acknowledged that the passage of time in fast-changing settings

---

[26] *In the Matter of Rambus Inc.*, FTC Docket No. 9302 (Aug. 2, 2006) (Opinion of the Commission on Liability), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

[27] *In the Matter of Rambus Inc.*, FTC Docket No. 9302 (Feb. 5, 2007) (Opinion of the Commission on Remedy) (Harbour, P., and Rosch, T., concurring in part, dissenting in part), *available at* http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf; *In the Matter of Rambus Inc.*, FTC Docket No. 9302 (Feb. 2, 2007) (Final Order), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf.

[28] Rambus is a developer and licensor of computer memory technologies. For more than four years during the 1990s, Rambus participated as a member in an industry-wide standard-setting organization ("SSO") that operated on a cooperative basis. Contrary to SSO practice and policy, Rambus concealed its patent interests and, using information it gained from participating in SSO proceedings, modified its patent applications to ensure that its issued patents would apply to those industry standards. As a consequence, once the industry became locked into the standards, Rambus became a monopolist, able to exact high royalty payments through patent infringement claims. In August 2006, the Commission unanimously found that Rambus' acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips.

"threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions."[29] Nonetheless, the court emphasized, "Even in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not."[30] In its *Rambus* remedy opinion, the Commission took up the issue of royalty-free licensing, which Complaint Counsel had requested. What the case law indicated, however, is that while the Supreme Court and lower courts acknowledge such a remedy, they have imposed a high burden of proof and have almost never imposed such a remedy. In this case, we went on to find that Complaint Counsel had not satisfied their burden that such remedy was necessary.[31] Accordingly, we required Rambus to license technologies at a specified royalty rate determined by comparison to arms' length rates charged by Rambus for similar technology unaffected by anticompetitive conduct.[32] But, two of my fellow Commissioners disagreed and dissented.

At our recent hearings on Section 2 of the Sherman Act, held jointly with the Antitrust Division, we explored remedy issues, and I expect that they will have a prominent place in our upcoming report. I continue to maintain, however, that more attention must be given to this area, which is, I believe, even tougher to get right than Section 2 liability itself.

---

[29] *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001).

[30] *Id*.

[31] *See In the Matter of Rambus, Inc.*, FTC Docket No. 9302, at 12 (Feb. 5, 2007) (Opinion of the Commission on Remedy) (Harbour, P., and Rosch, T., concurring in part, dissenting in part), *available at* http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf.

[32] *See id.* at 19-24.

Contrast *Rambus* with the Section 5 complaint filed by the Commission last week against N-Data.[33] I dissented from the Commission's decision in *N-Data* because I could discern no limiting principle to the majority's application of Section 5.[34] What distinguishes *N-Data* from *Rambus* is the absence of exclusionary conduct. In 1994, National Semiconductor – which later sold the subject patents to Vertical Networks, which then assigned the patents to N-Data – made a commitment to an electronics industry SSO, the IEEE, that if the IEEE adopted a standard based on National's patented NWay technology, National would offer to license the technology for a one-time, paid-up royalty of $1,000 per licensee. In marked contrast to Rambus, there was

[33] *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-0094, *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[34] *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-0094, Dissenting Statement of Chairman Majoras, *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

of individual decisions impacting competition grows with each new law passed, enforcement action taken, and court decision issued.

Much progress has been made toward convergence, but differences remain. There are two primary areas in which I have concerns about the levels of global divergence and believe stronger efforts at convergence are imperative. First, the globalization of the economy, together with distrust among nations, has led to the re-emergence of nationalist sentiments. By now, however, it should be clear that promoting competition domestically is the best way to achieve global success for a country and its companies. Competition, regardless of its origin, begets efficient, productive firms that are better able to compete in global markets. More efficient firms in turn increase economic growth and standards of living.

The consequences of protection from competition have been documented. For example, as described by William Lewis in his book examining differentials in national wealth, Japanese industries that face intense domestic and international competition – automobiles, electronics, and steel – perform at productivity levels that are, on average, approximately 130 percent of the levels in the United States.[35] In contrast, Japan's large retail sector, which is heavily sheltered from competition by tax laws, zoning requirements, and other government-imposed restrictions, functions at roughly 50 percent of U.S. productivity levels.[36]

National champion promotion – indeed, taking into account at all the nationality of the firm in question – is simply inconsistent with the central objective of antitrust law: to promote competition to the benefit of consumers. What is more, permitting antitrust enforcers to promote

---

[35] WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY 25 (2004).

[36] *Id.*

national champions, rather than protect competition, undermines the important goal of producing clear and predictable antitrust law and enforcement standards. Clarity and predictability are crucial to promoting efficient resource allocation. Fortunately, on this issue, I believe that the U.S. antitrust agencies and the European Commission are of a like mind. As Commissioner Kroes put it in a speech last year, "Open competition—tough competition even—is essential for a dynamic market. This drives European companies on to do better—to keep adapting, innovating, and winning."[37]

The second area of concern is raised by differences in enforcement against firms acting unilaterally. No area of global antitrust enforcement policy today creates more controversy than monopolization. This perhaps is not surprising given that distinguishing between aggressive, procompetitive conduct, which is good for consumers even when engaged in by dominant firms, and exclusionary or predatory conduct, whicl(nt f)Tj16.3200 0.lw00 TD56.1000 0.0000 TD(orfu9,g4ire TD(ing)

[37] Neelie Kroes, European Competition Policy in a Changing World and Globalized Economy: Fundamentals, New Objectives, and Challenges Ahead, Speech Before GCLC/College of Europe Conference on "50 Years of EC Competition Law," at 2, Brussels, Belgium (June 5, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/364&format=PDF&aged=0&language=EN&guiLanguage=en.

To consider this issue, I find it helpful to contrast the different approaches taken by the CFI and the U.S. courts. First, I suggest examining the difference in how the U.S. courts and the CFI treated the question of what technical information Microsoft had to disclose to its server operating system competitors so they could interoperate with Windows. While the U.S. courts and the CFI were reviewing different underlying cases, both upheld a remedy that required Microsoft to disclose certain information to developers of server operating systems.

The difference between the two remedies requiring disclosure of interoperability information comes in the breadth and implementation of the disclosures. Determining what

[38] *See* Case T-201/04, *Microsoft v. Comm'n* [2007], ¶ 230.

[39] *Microsoft v. Comm'n* [2007], ¶ 697.

[40] *Id*. ¶ 698.

Microsoft's products.[41] To the contrary, the CFI determined that the remedy imposed by the EC was a necessary prerequisite for differentiation to occur.[42]

The U.S. courts' approach was based on a concern that broader disclosure of interoperability information would facilitate competitors' ability to clone Microsoft's product. The district court found that broader disclosure obligations would erroneously equate interoperability with interchangeability.[43] The resultant risk of cloning, according to the district court, would deny Microsoft returns from its intellectual property and inherently decrease incentives to innovate on the part of Microsoft and its competitors.[44] In describing the decreased

---

41 *Id*. ¶ 234.

42 *See id*. ¶ 656.

43 *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 227 (D.D.C. 2002).

44 *Id.* at 227-228.

45 *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1219 (D.C. Cir. 2004).

economic reasoning, the DOJ and FTC participate in ongoing ICN and OECD initiatives. Just as important, however, and often overlooked is the international technical assistance work of the FTC and DOJ. Thanks to funding from USAID, the FTC and DOJ have for years sent experienced lawyers and economists to participate in investigations with their counterparts at many newly minted competition agencies. Now, the newly passed U.