



# The Federal Trade Commission

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**Opening Remarks of Chairman Deborah Platt Majoras  
at the workshop on  
“The Role of Competition Analysis in Regulatory Decisions”  
AEI/Brookings Joint Center  
May 15, 2007  
Washington, D.C.**

## **Introduction**

I appreciate having the opportunity to address this critical topic, the role of competition analysis in regulatory decisions. The United States has organized our economy through a market system characterized primarily by competition and not by government control. Although this system certainly has its detractors, Americans enjoy the benefits of market-based competition every day, and recent empirical research affirms its unique advantages. In a recent 12-year study, the McKinsey Global Institute, led by founding director William W. Lewis, gathered empirical data on national economic differences among thirteen countries, including such varied economies as the United States, Poland, South Korea, and India. The researchers compared a few selected industries across those countries, to build a “ground-up” model that would explain the differences between rich and poor nations. They found, first of all, not terribly surprisingly, that the differences in wealth were due to differences in productivity. But that led to the next question, what accounts for the differences in productivity? Economic theory would suggest that

labor and capital productivity would account for much of the difference.

The answers, however, confounded the conventional wisdom. Differences in labor and capital markets did not account for differences; nor did massive investment in education and physical infrastructure or efforts to create a favorable financial environment through measures like market pricing and good corporate governance. All of these measures were important, but not primary. So what did explain the differences? The productive countries were most productive because they had undistorted competition in product markets. Competition, in other words, made workers and their companies measurably productive than their counterparts in countries with a less competitive economic environment.<sup>1</sup>

McKinsey also asked why competition appeared more effectively beneficial in some countries than in others.

I would submit that legal culture plays an important role. Even free markets need some rules to function most effectively – some people will always seek to cheat – and among those rules are the antitrust laws, which the Supreme Court once described as “the Magna Carta of free

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<sup>1</sup> WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* at 101 (2004). For a shorter, article-length version of this thesis see William Lewis, *The Power of Productivity*, *THE MCKINSEY QUARTERLY*, 2004 No.2, at 101.

<sup>2</sup> *United States v. Topco Associates*, 405 U.S. 596, 610 (1972) (Thurgood Marshall, J.).

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<sup>4</sup> Robert J. Samuelson, *Competition's Anxious Victory*, WASHINGTON POST, Feb. 2, 2005, at A-23.

<sup>5</sup> REPORT OF THE AMERICAN BAR ASSOCIATION

level of resources that we devote to this important work and have given it increased prominence.

It is important to note that the FTC does not casually comment on legislation or other agencies' regulatory decisions (even though we are often asked to do so). Rather, we use a careful analytical approach that considers the costs and benefits to consumers and relies on empirical evidence, asking three basic questions:

First, what specific harm to consumers is the barrier designed to address? The Commission looks for empirical evidence of consumer harm. Because states may vary in the degree to which they regulate various activities, we can often look for evidence on the presence

Let me offer some examples of our recent advocacy in federal regulatory decisions. For the past dozen years, the FTC has provided competition, as well as consumer protection, expertise to FERC (and state regulators) to assist them in making the transition from regulation to increased reliance on competitive markets in the electric power industry. Our suggestions have been based on core economic principles. They have highlighted the importance of efficient price signals to provide incentives for investment and to encourage consumers to reduce consumption when the social costs of electricity are the highest; the importance of accurate and timely information to help consumers make good choices between alternatives; and the advantages of structural over conduct remedies to directly remove incentives to discriminate against unaffiliated customers, particularly with respect to access to transmission services. This transition in electricity markets has not been easy, but nonetheless nearly 20 states now have some degree of consumer choice at the retail level, and FERC works for competition at the wholesale level.

We also have weighed in, when appropriate, on regulatory decisions affecting entry. In 2004, for example, Eurex, a German-Swiss futures trading exchange, applied to the Commodity Futures Trading Commission for permission to set up an electronic operation in the United States to compete with the Chicago Board of Trade and the Chicago Mercantile Exchange. Not surprisingly, the incumbents opposed the application, arguing that the new entrant could engage in predatory pricing. Without examining or endorsing this particular applicant's submission, we filed comments in which we argued that new entry in general would benefit consumers of the trading services, pointing to economic studies that showed that the presence of multiple

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<sup>6</sup> FTC Comment Before the Commodity Futures Trading Commission Regarding the Application of U.S. Futures Exchange,

data permitted on food labeling.<sup>9</sup> Developing and marketing new, healthful versions of good-tasting foods is expensive and risky. If producers cannot tout their advances in these areas, they will have little incentive to make the investments and take the risks.

In another advocacy on mandated information disclosure, FTC staff filed comments with the FDA regarding direct-to-consumer advertising of prescription drugs.<sup>10</sup> Our comments analyzed the economic effects of such advertising and suggested changes to the FDA's regulatory scheme that would permit information to be communicated to consumers in a more accessible way. Thereafter, the FDA issued several draft guidance documents designed to improve the information that consumers and health care practitioners receive in advertising about prescription drugs and certain medical devices. The FDA chose to permit advertisers to convey more limited and focused disclosure in direct-to-consumer print advertisements for prescription drugs, and to apply less burdensome regulatory standards to broadcast ads for restricted medical devices.

We also have advocated in favor of strong, consumer-friendly competition policy in appropriate state policy-making arenas, affecting, for example, the regulation of professionals. In recent years, a number of state legislatures and bar associations have sought to expand the

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<sup>9</sup> See Comments of the FTC Staff Before the FDA in the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements (April 18, 2006), *available at* <http://www.ftc.gov/os/2006/04/v060014FTCStaffCommentstotheFDAREDocketNo2006-0066.pdf>.

<sup>10</sup> Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Consumer-Directed Promotion (Dec. 1, 2003), *available at* <http://www.ftc.gov/be/v040002text.pdf>; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* <http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf>.



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<sup>11</sup> Fed. Trade Comm'n and U.S. Dep't of Justice, Comments to the Honorable

filed similar comments in a number of other jurisdictions as well.<sup>13</sup>

In addition, over the last few years, a number of state legislatures have considered what are termed “minimum-service laws” for real estate brokers. These laws mandate a government-specified list of services that all real estate agents need to provide, rather than allowing the market to sort out the appropriate set of services that consumers want. These bills restrict consumer choice, price competition, and competition on the qualitative aspects of brokerage service, both amongst full-service brokers and between full-service brokers and those that provide fewer services at a much lower price than the standard 6% commission. For that reason, the FTC and DOJ jointly have opposed minimum service regulations in several states.<sup>14</sup> Our track record in this area is unfortunately mixed. The agencies have successfully opposed minimum services laws in Michigan, Kentucky, Idaho, and Mississippi. In 2005, however, we failed to dissuade Texas, Alabama and Missouri from adopting similar laws.

Another critical way that the FTC seeks to advocate for sound competition policy among decision-makers is by conducting market research and reporting facts to the public – a function that Congress explicitly assigned to the agency when it was first established. This not only

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<sup>13</sup> These include Kansas (Feb. 2005) (FTC File No. V050002); Massachusetts (Dec. 2004) (FTC File No. V050002); Indiana (Oct. 2003) (FTC File No. V030016); Georgia (July 2003) (FTC File No. V030007); North Carolina (July 2002) (FTC File No. V020006); and Rhode Island (Apr. 2003) (FTC File No. V020013). *See also* FTC and U.S. Dep’t of Justice, Comment to ABA Task Force on the Model Definition of the Practice of Law (Dec. 2002) (FTC File No. V030004).

<sup>14</sup> *See, e.g.*, Fed. Trade Comm’n and U.S. Dep’t of Justice, Comment to The Honorable Alan Sandborn Concerning Michigan House Bill 4849, Which Would Change Current Law to Make it More Difficult for Michigan Real Estate Professionals to Provide Michigan Consumers With Customized Real Estate Brokerage Services (Oct. 2005), *available at* <http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf>.

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<sup>17</sup> Fed. Trade Comm'n, "Report on Ethanol Market Concentration" (Dec. 2006), *available at* [http://www.ftc.gov/reports/ethanol/Ethanol\\_Report\\_2006.pdf](http://www.ftc.gov/reports/ethanol/Ethanol_Report_2006.pdf).



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the joint FTC/DOJ Horizontal Merger Guidelines. The Merger Guidelines provide a valuable road map for businesses to understand how the agencies review mergers, and they give information that allows firms to make informed decisions about the antitrust consequences, or lack thereof, of potential transactions.

In addition, however, the Guidelines also have affected how courts and other agencies analyze transactions. While not legally binding, judges frequently rely heavily on the Merger Guidelines' analytical framework. And, ten years ago, the FERC formally accepted the analytical framework of the Guidelines as a means of guiding its own assessment of the likely competitive effects of mergers in electricity markets.<sup>26</sup>

### **Conclusion**

All agencies that make economic decisions face competition-related issues and thus contribute to making competition policy, whether explicitly or not. Monsieur Jourdain, the principal character in Moliere's play *The Bourgeois Gentleman*, once noticed, with a start, that he had been speaking prose all his life, and he resolved from that point on to produce better prose. So too, the FTC and, indeed all regulatory agencies are engaged, in part, in making competition policy, and it makes sense for all agencies to think about how to make better competition policy. Agencies can apply statutes and make rules and decisions in ways that enhance rather than squelch competition, and we can refuse to allow firms to undermine or manipulate regulatory processes to gain government-induced advantages. The FTC stands ready to help.

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<sup>26</sup> See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order 592, FERC Stats. & Regs. ¶ 31,044 (1996).

Thank you again for the opportunity to speak to you this morning.