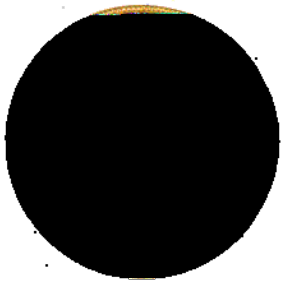

The Federal Trade Commission Was gai

Threat to Global Stability

[1] Martin Wolf, *Competition Would Overthrow the Tyranny of Vested Interests*, Fin. Times (Jan. 18, 2006), at 17.

evidence that competition likely will be harmed. This is an important feature of our systems, because it disciplines our enforcement decisions, ensuring that they are based on marketplace facts, not on enforcers' or judges' predilections.

In the United States, the evolving relationship between the enforcers and the courts has produced not only a mutual respect for the important roles of each, but also an interactive process in which each makes the role and analysis of the other stronger. For example, during the 1960s and 1970s, the FTC tried to carry out its mandate through rigid structural rules, focusing on reducing the market positions of dominant firms and deconcentrating industries, basing enforcement policy on simple market concentration numbers and ignoring the fact that lower costs might explain the superior profitability of large firms. Such an approach nearly seems like ancient history, as the FTC's approach in that era was discredited and replaced with modern antitrust theory, steeped in facts and economics. Significantly, the change initially came not though internal reassessment at the FTC but through defeats suffered in the federal courts, as the courts reminded the agencies of the importance of applying the new antitrust thinking based on economic principles. During that time, academics, the courts and ultimately the enforcement agencies reached widespread agreement that the purpose of antitrust is to protect consumers; that economic analysis, both theoretical and empirical, should guide case selection; and that horizontal cases are the mainstays of enforcement.

Likewise, developments in the agencies' work and analysis has impacted how the courts analyze competition cases. U.S. courts today, for example, often look to the Department of Justice-FTC Horizontal Merger Guidelines for guidance on merger analysis. While not binding on the courts, of course (or the agencies, for that matter), the courts have recognized that the two

competition agencies are experts in the framework for reviewing mergers. The courts also pay close attention to the agencies' assessment of the economic costs and benefits in cases of suspected anticompetitive conduct.

In the five years that I have been engaged in competition enforcement, I have learned that three realities make jobs of courts and enforcers particularly challenging. First, we cannot carry

relieved of the burdens of competition. This is particularly true of firms in industries that previously were regulated but now turn to antitrust for protection. Because market stakes are so high, many try to use political pressure to ensure a result that is good for them but perhaps not beneficial to competition and therefore consumers. The United States Department of Justice case against Microsoft is illustrative. Early in the case, it was reported that Microsoft, on the one hand, lobbied Congress to put an end to the case. Throughout the case, Microsoft's competitors, on the other hand, pressed the

[2] *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1231 (D.C. Cir. 2004).

[3] Allocution de Monsieur Jacques Chirac, President of France, Jan. 4, 2005, *available at* http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2005/05VXF.html.

[4] *US v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

[5]

Finally, any hope that we in competition agencies might hold that courts would give our judgment any deference must be tempered by recognition that such deference must be earned. When the U.S. Department of Justice first began enforcing our Sherman Antitrust Act in 1890, and when the FTC opened for business in 1915, we received no such deference, nor were we entitled to it. I believe that a competition agency may expect its decisions to be relied upon only