# "U.S. ANTITRUST PRACTICE - HOW DOES IT AFFECT EUROPEAN BUSINESS?"

**remarks by**

**DEBORAH PLATT MAJORAS, CHAIRMAN,[1]**
**U.S. FEDERAL TRADE COMMISSION**

**before the Studienvereinigung Kartellrecht**
**Brussels, Belgium**
**April 7, 2005**

It is a pleasure to be back in Brussels, among friends and colleagues in the competition

[1] The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other individual Commissioner.

without question, global faith in competition and the benefits it provides consumers continues to spread. Just last week, the American Bar Association Section of Antitrust Law held its annual Spring Meeting, which attracted a record nearly 2000 attendees, including nearly 300 from outside of the United States. Plainly, there is strong interest in competition and in enforcement of the laws that protect it.

With such interest climbing on a global basis, comes interest in the U.S.-EU relationship

*FTC Enforcement Actions:  A Sample*

Perrigo and Alpharma, two of the largest makers of over-the-counter medications in the United States, each sought, and obtained, approval from the Food and Drug Administration ("FDA") to sell a generic version of children's liquid Motrin, a drug used to relieve pain and

[3] *See* FTC Press Release (Aug. 12, 2004), *available at* http://www.ftc.gov/opa/2004/08/perrigoalpharma.htm.

[4] FTC Press Release (July 30, 2004), *In the Matter of California State Board of Dentistry*, FTC Docket No. 9311, *available at* http://www.ftc.gov/opa/2004/07/scdentists.htm.

Two other pharmaceutical merger cases illustrate the flexibility – as opposed to rigid reliance on past practice – we must show in devising remedies that directly correct the harm anticipated to arise from the transactions: *Cephalon/Cima Labs*[7] and *Genzyme/Ilex*.[8]

In

---

[7] FTC Press Release (Aug. 9, 2004), *In the Matter of Cephalon, Inc., and Cima Labs, Inc.*, FTC Docket No. C-4121, *available at* http://www.ftc.gov/opa/2004/08/cimacephalon.htm.

[8] FTC Press Release (Dec. 20, 2004), *In the Matter of Genzyme Corporation and Ilex Oncology, Inc.*, *available at* http://www.ftc.gov/opa/2004/12/genzyme.htm.

[9] Complaint, *In the Matter of Union Oil Co. of California,* FTC Docket No. 9305, *available at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

claims on these research results. Unocal's actions allegedly led to the adoption of a regulatory standard that overlapped with Unocal patents, giving Unocal a monopoly over the technology used to produce and supply California "summertime" reformulated gasoline. According to the complaint, Unocal is now claiming that it is entitled to royalties that potentially could result in hundreds of millions of dollars per year in additional costs to consumers. A trial on the merits of the *Unocal* case before an administrative law judge ("AJL") ended on January 28, 2005, and the parties are now preparing post-trial pleadings.[10]

Another monopolization case involving standard-setting that now is before the commission is the *Rambus* matter. The complaint charged that Rambus knowingly failed to disclose its relevant intellectual property holdings to a standards organization - the JEDEC Solid State Technology Association - that develops and issues widely adopted technical standards for a common form of computer memory known as synchronous dynamic random access memory, or "SDRAM."[11] According to the complaint, Rambus participated in JEDEC's SDRAM-related work for more than four years without making it known to JEDEC or its members that Rambus was actively working to develop, and did in fact possess, a patent and several pending patent applications that involved specific technologies proposed for, and ultimately adopted in, the relevant standards. The complaint charges that, by allegedly concealing this information,

[10] In an Opinion issued in July 2004, the Commission reversed an ALJ's initial decision that the *Noerr-Pennington* doctrine protected Unocal from charges of monopolization, thus sending the matter back before an ALJ for a full trial on the merits. *See* FTC Press Release (July 7, 2004), *In the Matter of Union Oil Co. of California,* FTC Docket No. 9305, *available at* http://www.ftc.gov/opa/2004/07/unionoil.htm.

[11] Complaint, *In the Matter of Rambus, Inc.,* FTC Docket No. 9302, *available at* http://www.ftc.gov/os/adjpro/d9302/020618admincmp.pdf.

Rambus purposefully sought to, and did, convey to JEDEC the false impression that it had no relevant intellectual property rights. Rambus' conduct allegedly has caused substantial harm to competition because it placed Rambus in a position to assert patent rights over the relevant JEDEC standards, and to obtain substantial royalties from memory manufacturers producing products in compliance with those standards.

Rambus maintains that its conduct did not violate the antitrust laws.[12] Rambus has argued to the Commission that it did not violate JEDEC's rules, that JEDEC's members were aware during the relevant time period that Rambus might acquire patent rights over features that could be incorporated in JEDEC standards, and that JEDEC would have adopted the same standards even if Rambus had made additional disclosures. Rambus further argued that, even if Rambus had violated a JEDEC duty to disclose its patents, such conduct does not constitute unlawful exclusionary conduct, and also that complaint counsel has failed to prove that Rambus' conduct produced anticompetitive effects.

The ALJ dismissed the *Rambus* complaint, concluding that Rambus' conduct did not amount to deception or a violation of Rambus' duties, and that complaint counsel did not prove that Rambus' conduct violated the antitrust laws. Complaint counsel appealed the decision to the full Commission. The Commission heard oral argument in December 2004, and a decision is forthcoming.

[12] Brief of Appellant and Cross-Appellant Rambus, Inc., *In the Matter of Rambus, Inc.*, FTC Docket No. 9302, *available at* http://www.ftc.gov/os/adjpro/d9302/040602rambsbriefofappelle.pdf.

***Merger Enforcement Issues***

As merger notifications are increasing, I have committed to improving our review process. First, although the FTC's Bureau of Competition has made some useful efforts to streamline merger review[13] and make it more transparent, the second request process still needs work. European firms have been particularly vocal about the burdens of the U.S. merger review process and I agree, up to a point, that we can do better. What we need is balance, based on our 28 years of merger review under Hart-Scott-Rodino, and 12 years of experience under the Horizontal Merger Guidelines.

If we are not sufficiently disciplined and rigorous in collecting and dissecting information during the merger review process, then we are not spending the taxpayer's dollar appropriately. Similarly, however, if firms are not appropriately cooperative and responsive during this process, then they are wasting the shareholder's dollar. In each instance, consumers lose. I have established a task force to assess the merger review process and determine how we may improve.

But I must stress that we will likewise hold parties to their responsibilities. Last month, the FTC sued Blockbuster Video for failing to comply with the requirements of the Hart-Scott-Rodino Act. Blockbuster had failed to produce pricing data that was vital to evaluating the transaction's competitive effects. The suit - known as a (g)(2) action – was necessary because Blockbuster had advised the Commission that it considered itself free to close the transaction even though it had not produced the pricing data. After the suit was filed, Blockbuster agreed to produce the data and agreed upon a date before which it would not close. Blockbuster

---

[13] *See, e.g.*, the FTC's Merger Best Practices, *available at* http://www.ftc.gov/bc/bestpractices/index.htm.

subsequently abandoned the transaction. I hope never to have to file a similar action again, but we will do so if necessary. While I am determined to improve and streamline the FTC's merger review process, I am equally determined to enforce the requirements of the merger review process.

Second, the FTC, along with the DoJ, intends to produce a Commentary on the 1992 Horizontal Merger Guidelines. The consensus that emerged from the Merger Enforcement Workshop hosted by the FTC last year was that the Guidelines are fundamentally sound, but additional explanation of how the Guidelines are applied in actual practice would be useful. We hope, through the Commentary, to provide this additional transparency.

Third, we are reflecting on the losses we suffered in the courts last year. The FTC and DoJ each suffered a loss - the *ArchCoal* and *Oracle/PeopleSoft* cases, respectively. One of the factors that we are examining is customer testimony. The courts in both cases discounted the significance of the testimony of many of the agencies' largest customer witnesses. My view is that we should continue to give significant weight to the views of customers in our merger investigations, and continue to present customer testimony at trial. Customers are valuable sources of information about many mergers' competitive effects because they have the most to lose from an anticompetitive deal, and usually have little incentive to provide misleading information. We are, however, carefully evaluating how we present customer testimony at trial.

[14] Deborah Platt Majoras, *A Dose of our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's*

15

officials, business representatives, independent inventors, scholars, lawyers and other members of the patent community to discuss recommendations for patent reform. In February and March, we held three workshops, each in a town-meeting format, in San Jose, Chicago and Boston. We will hold a final workshop in Washington, on June 9.

Three broad points have emerged from the meetings conducted to date. First, there is consensus that patent reform is required. Participants differed on what and how to reform, but not on whether to reform the patent system. The same types of patent quality problems that spurred the FTC's Report and its recommendations for patent reform are causing problems for many companies in various industries.

Second, the patent reform debate has new participants, which may change some of the dynamics of the movement toward patent reform. In contrast to earlier patent reform efforts, this one involves big players from the computer hardware and software fields. For some of these companies, preventing so-called hold-ups by firms that use their patents to generate licensing revenue rather than to commercialize products is quite important.

Third, there seems to be broad support *in principle* for adopting a post-grant review procedure and for doing something to restrain the scope of the willful infringement doctrine.

We understand that some members of Congress also are devoting significant attention to intellectual property issues. The Senate Judiciary Committee has scheduled a hearing on patent

and to produce a draft patent reform bill this Spring. Our June workshop will focus discussion on that draft bill, as well as on what we have learned in the town meetings.

[18] *United States v. Alcoa*, 148 F.2d 416, 430 (2d Cir. 1945).

known example, DoJ consistently indicated in the Microsoft case that "if Microsoft had confined itself to improving and promoting its products on the merits, it would have faced no antitrust liability, whatever the effect on its rivals."[19] But, DoJ argued, and the Court of Appeals subsequently agreed, that Microsoft took actions to discourage the development and deployment of rival web browsers and Java technologies – beyond just making their own product better – in an effort to prevent them from becoming middleware threats to Microsoft's operating system monopoly.

Recently, in *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko, LLP*[20] the United States Supreme Court rejected a claim that Verizon's refusal to provide a competitor with various types of access to its telephone network violated Section 2 of the Sherman Act. The Court emphasized the well-established principle that a party can decide with whom it chooses to deal and determined that the facts did not support an exception to that principle.

In its opinion, the Court sounded a cautionary note, highlighting the importance of avoiding "false positives." Said the Court, "[a]gainst the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 'can be difficult' because the means of illicit exclusion, like the

---

[19] Brief of the Appellees United States and State Plaintiffs, *United States v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

[20] 540 U.S. 398 (2004).

means of legitimate competition, are myriad."[21] The Court cited the D.C. Circuit's opinion in *Microsoft*.[22]

In another recent U.S. case, however, where hard facts showed that a dominant firm's exclusive dealing practices had effectively undermined competition, the U.S. Court of Appeals for the Third Circuit reinstated DoJ's Section 2 case.[23] There, with the benefit of a substantial factual record, the court could determine that the defendant's conduct had significantly reduced competition in the artificial tooth market. Dentsply's exclusive dealing contracts were found to have led directly to price increases and the inability of other firms to enter and compete effectively. Further, Dentsply had no plausible business justification, other than to exclude rivals. Accordingly, the court found that on these facts, distributional restraints that are generally efficient were not in this case. The key was reliance on the facts.

***Antitrust Modernization Commission ("AMC")***

If imitation is the sincerest form of flattery, Europe should be flattered that the U.S. Congress named the commission it created to study antitrust policy after the modernization effort undertaken by the EU that took effect last May 1. So far, however, it does not appear that this modernization effort will recommend changes as extensive as those adopted here in Europe. In its initial meetings, the AMC appears to be focusing more on issues that are more likely to result

[21] *Id.* at 414.

[22] *Id.*

[23] *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3rd Cir. 2005).

in some consensus.[24] The AMC's term extends into 2007, and one of the issues it will consider is clarification of the Foreign Trade Antitrust Improvements Act of 1982, the law that is at the heart of the controversy in the *Empagran* case – a case that I know many of you are watching closely.

Officials at both antitrust agencies continue to provide substantial input to the AMC. My strongest recommendation has been that the AMC take a hard look at all statutory exemptions and immunities from the antitrust laws and recommend abolition of most, if not all of them.

---

[24] A list of the AMC issue study groups is *available at* http://www.amc.gov/pdf/meetings/list_of_study_groups_rev.pdf.

[25] For information on Exon-Florio, *see* http://www.treas.gov/offices/international-affairs/exon-florio/.

[26] Public Law 109-2 (Feb. 18, 2005), *available at*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ002.109.pdf.

sale of its PC business to Lenorvo, a Chinese computer firm. Announced deals such as British Aerospace's proposed acquisition of United Defense Industries also will be reviewed by CFIUS.

The Class Action Fairness Act of 2005 was signed into law by President Bush on February 18, and while it is not completely clear how this Act may affect class actions brought under U.S. federal antitrust laws, it does make it easier for defendants to move actions to federal court from state courts, and it limits the use of settlements in which consumers get coupons while lawyers get big fees.

***Enforcement Cooperation Continues***

As of the year 2000, American firms held 3 trillion dollars' worth of assets in Europe and European firms held 3.3 trillion dollars worth of assets in the United States.[27] In terms of jobs, U.S. firms directly employed 4.1 million workers in Europe in 2000 while European affiliates employed roughly 4.4 million American workers. So, despite some differences over trade, competition, and other policies it seems that European and American firms find it not only possible but highly desirable to do a substantial amount of business in each other's territory.

The late former President of the Bundeskartellamt, Wolfgang Kartte, lamented that, "[m]y cannons shoot only as far as Aachen." But that is not true any more. Acting in concert with its fellow members of the European Competition Network or in cooperation with U.S.

---

[27] Joseph P. Quinlan, *Drifting Apart or Growing Together? The primacy of the Transatlantic Economy* (Washington, DC, Center for Transatlantic Relations, 2003), *available at* http://transatlantic.sais-jhu.edu/PDF/publications/Quinlan%20Text%20FINAL%20March%202003.pdf, *cited in* Timothy Garton Ash, *Free World*, 122 (2004).

[28] In particular, the 1991 EC-U.S. cooperation agreement and the 1976 Germany-U.S. cooperation agreement. Cooperation between the U.S. agencies