United States of America

Federal Trade Commission

Reflections on Recent Competition Enforcement at the FTC

I led an initiative to promote economic liberty, which has helped to spotlight unnecessary or overbroad occupational licensing, which often disproportionately harms those near the bottom of the economic ladder and burdens our military families. Excessive occupational licensing in the United States remains a big problem, but our efforts are starting to pay off. Already, a number of states have made some early moves towards reform. While there is much more to do here, these early signs are encouraging, with state legislators and thought leaders at the state level increasingly interested in the issue.

The problems we have sought to highlight with the Economic Liberty Task Force do not end at our borders, and this domestic initiative has already drawn interest from some overseas enforcers, who similarly recognize the potentially harmful effects of excessive and unnecessary occupational licensing on their citizens.

Speaking of international engagement, we have also been continually engaged with our counterparts overseas, through both direct, bilateral meetings with individual enforcers, and through the ICN and the OECD. On all of these fronts, we have continued to press for greater convergence, transparency and due process around the globe. In early 2017, the U.S. agencies issued joint guidelines for international enforcement and cooperation, [2] an effort I was closely involved with. As global trade has spawned more and more global markets, we've been focused on the extra-territorial reach of competition enforcement and providing the necessary protections to intellectual property necessary to spur future innovation.

By necessity, the great bulk of the FTC's international work is quiet, and it generates few headlines in the press. But that does not make it any less important. The process of building a

[2] U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for International Enforcement and Cooperation,* January 13, 2017, *available at* https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.

baseline of common legal and procedural norms around the world is never going to be easy, and there will always be setbacks and challenges along the way. That said, I am ultimately an optimist about our ability to move these issues forward over the long-term. I am heartened to see how countries with little or no history of competition enforcement or even market-based economies are increasingly coming to recognize the importance of sensible competition enforcement. I am very proud of the efforts we made under my watch to continue and hopefully even strengthen the positive and constructive working relationship the FTC has enjoyed with many of our counterparts overseas.

Finally, before we start talking about some of our specific cases, I want to take a minute to address how the FTC functioned during a very unusual period, when, as the Acting Chairman, I ran the agency with just one fellow Commissioner for almost a year and a half. Not to belabor the obvious, but when there are only two Commissioners, and one of them is a Republican and one of them is a Democrat, no case goes forward unless there is a bipartisan consensus.

Now, some Washington pundits and members of the bar assumed that the composition of the Commission during my tenure was a recipe for inaction, and occasional stories reflected such assumptions, without examining the underlying facts. Honestly, I didn't have all that much time to read such stories because I was occupied bringing cases and coming up with creative ways to deploy already busy staff and stretch a tight budget to pay for expert testimony in all the big cases we were pursuing.

Here are the actual facts. During my time as the Acting Chairman, the FTC identified a total of 32 proposed mergers with significant competition concerns. Of these, the agency accepted a consent agreement to protect consumers in 19 cases, with the balance of these deals

litigation docket. At one point, we had ten competition matters in active litigation at the same time, with three more on appeal, which approaches historic levels. Several of these contested matters are still pending. We also brought, and won, a litigated challenge to the Wilhelmsen/Drew merger[3], which I will discuss in more detail shortly. In addition, Walgreen's substantially restructured its proposed acquisition of Rite Aid due to Commission concerns[4]. The work we did during my term continues to pay dividends. Earlier this week, we won a PI in our challenge to Tronox's acquisition of Cristal, a matter initiated during my tenure. And the action didn't stop at merger review; we also brought forward nine different conduct cases, including several challenging anticompetitive behavior by drug manufacturers.

Overall, these numbers actually reflect a slight uptick in the pace of enforcement from what prevailed during the previous administration. Far from being hamstrung by having two Commissioners who needed to cooperate, our impressively bipartisan record managed to keep the Bureau of Competition quite busy.

We also got some help from the well-developed state of the law. Today, the case law in the United States generally reflects the contours of a broad, bipartisan consensus that antitrust should be used to protect consumers, and that our enforcement work should be well grounded in modern economic analysis. Despite some discrete criticism at the margins, that consensus remains alive and well, and it continues to govern much of the routine decision-making within the agency.

[3] *FTC v. Wilh. Wilhelmsen Holding ASA, Wilhelmsen Mar*

Merger Cases

Wilhlemsen/Drew

In Wilhelmson/Drew, we challenged the merger of the two largest suppliers of certain specialty chemicals to the marine industry. Our investigation ultimately showed that although the chemicals sold by the parties were widely available, fleet customers traveling all over the world needed consistent access to precise formulations at virtually every port where their vessels docked, as changing chemical suppliers from port to port is highly problematic and inefficient for customers. We also learned that the parties had the only viable global networks of supply points around the world that could meet this critical need for so-called "global fleet" customers. As we showed in court, this is how both the parties' own executives and their customers saw the market. We also demonstrated that price discrimination against these global fleet customers was possible, leading to a high risk of anticompetitive effects.

Proper antitrust analysis requires a careful evaluation of actual conditions in every market we investigate and sophisticated economic analysis. This case principally stands for the importance of that kind of careful, deep dive. This is very much a case where the "once-over-lightly" answer and the deep dive yielded markedly different conclusions.

The parties eventually abandoned the transaction after we successfully won a preliminary injunction in federal court.

Smuckers/ConAhal ccTJEMC /P <</MCID 5 >>BDC /TT0 1 Tf0.00004 Tw 10.0005 T(ncTJnnother perhated 3

going to be dissuaded from a conclusion that is firmly supported by the weight of the record evidence, even if it might seem contrary to many people's initial assumptions.

CDK/AutoMate

Next, I'll talk briefly about CDK/Auto/Mate[6]. This is case where the FTC ultimately blocked a proposed tie up between providers of specialized software used by automobile dealers.

The fact pattern was essentially a large, established firm with a substantial share of the market buying a relatively small upstart that had enjoyed some recent success and appeared poised to challenge the market leaders more aggressively. The market was concentrated and barriers to meaningful entry were substantial. To be sure, there was some current competition between the firms, but the greatest concern we identified during the investigation was the likely future competition that would be lost, should Auto/Mate be absorbed by CDK.

Some have questioned whether the existing antitrust paradigm can ever reach this kind of behavior, where a big player squashes or absorbs a promising upstart before it can ultimately grow into a more substantial competitor. Our action shows that the Commission can and will take these issues seriously.

I will also note that Auto/Mate had certain clear advantages, particularly reputational, that other, smaller providers lacked and that would be exceedingly difficult to duplicate rapidly. This gave us greater confidence that the loss of competition from Auto/Mate was unlikely to be replaced rapidly by another small firm. I think that was an important part of the analysis here

have become even more intense since this transaction. In fact, the March 2018 issue of Washingtonian Magazine had a cover story calling this the golden age of grocery shopping. I've put that one in my scrapbook.

When you embrace competitive markets, you also embrace change and the need for firms to constantly improve or risk being left behind. These are all things that the antitrust laws exist to foster, not prohibit.

Conclusion

In conclusion, it is clear the FTC pursued a robust enforcement agenda during my tenure as Acting Chairman. We executed a sensible, balanced merger control program deeply anchored in modern economic theory. We also brought conduct cases, tried to advance economic liberty, and engaged in lots of consumer protection enforcement.

As I prepare to leave the FTC, I feel proud that I have passed on to its next set of leaders an agency in excellent shape, if a bit tired out from litigating so much. This little agency, with its comparatively tiny budget, punches far above its weight on so many fronts. It is a wonderful place to work, chock full of very smart, hard-working, dedicated professionals, many of whom could be making a lot more money elsewhere. U.S. consumers are frankly lucky to have the FTC in their corner, just as I was lucky to have had the privilege of leading the FTC.

Thanks very much.