UNITED STATES OF AMERICA

Federal Trade Commission

Prepared Remarks of Commissioner Noah Joshua Phillips[1]

Championing Competition: The Role of National Security in Antitrust Enforcement

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Introduction

became regional “Baby Bells”.[5] But it included a condition that the Baby Bells must have a single point of contact—an organization called Bellcore—that would function as a control center in the event of a national emergency.[6] A National Security Emergency Preparedness group within Bellcore would make sure that the regional Bells could respond to everything from hurricanes to nuclear war.[7]

National security concerns also entered into a recent case, against Qualcomm. The FTC sued the company, a dominant wireless modem chip designer and producer, alleging it withheld chips to extract standard-essential patent royalty rates in a manner that harmed competition in cellular modem chips.[8] The district court granted the FTC a permanent injunction, prohibiting Qualcomm from conditioning the supply of modem chips on whether a customer has purchased a license, and requiring it to make its patents available to rival chipmakers.[9]

On appeal, in an extraordinary move, the Antitrust Division of the Justice Department filed a brief, in favor of Qualcomm and against its sister agency.[10] The Justice Department argued that the injunction against Qualcomm “would

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significantly impact U.S. national security" by diminishing Qualcomm's R&D expenditures and reducing America's ability to compete in global 5G markets.[11] In an attached statement, the Defense Department agreed, emphasizing how harming Qualcomm could undermine American efforts to reduce China's dominance in 5G.[12] The FTC answered that these national security arguments were incognizable under modern economics-focused antitrust law, while also disputing the assertion that the injunction would harm innovation and therefore national security.[13]

The Ninth Circuit considered the national security arguments in granting a

So, as you can see, national security concerns are not foreign to antitrust enforcers. Unlike many of the non-competition goals some are trying to force into the antitrust regime, whether it be data privacy or racial equity, antitrust enforcers have had to contend with advocacy for national security goals for a long time.

Non-Competition Goals

So what about those other goals? An antitrust debate is raging today, in the halls of Congress, on op-ed pages, in academia, abroad in places from Brussels to Beijing and, as it happens today, in tweet after podcast after Substack post. Some tout antitrust enforcement as the solution to a host of problems that traditionally have little to do with U.S. competition law: income inequality, labor relations, data privacy, race relations, etc.

Antitrust law protects competition. It ensures the integrity of the competitive process, which benefits consumers by ensuring lower prices and new and innovative products and services. Correlatively, it does not purport—and never has purported—to solve every problem that markets will not solve on their own. (Indeed, that is the classic justification for regulation: to solve problems the market cannot.) Lately, some voices are calling to use antitrust to take non-competition goals into account, to solve those other problems.[18] It is perhaps not unfair then to

[18] *See e.g.*, Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Se3 Tw [(,4 (T)w)4.5chb C 156 -1.lc (r)-.5 6o (r)-.5 61.7 (B) (.)0.5 (g)-3.9 (.B (CTc -.5 6)Achb)0.5 6lc -

ask why antitrust enforcers *should not* consider national security when evaluating

from national champions abroad. The most important strategic threat the U.S. faces today is from China, where the state has sponsored technology companies. Meanwhile, Europe, which has always had "tougher" competition laws, continues to try to find a path toward tech competitiveness.

Defenders argue that technology companies' size is instead a source of national strength due to their ability to counterbalance similarly sized foreign competitors, and that they are—at the end of the day—American companies subject

these other values can themselves argue against liability in one case or another.[22] But leaving that aside, the broader point is that arguing for the inclusion of non-competition values requires justification on its own, and relative to other goals. If you think the law should countenance, say, privacy or the interest of labor, why not national security?

National security best left for national security laws, not antitrust ones

So should we use antitrust to pursue national security goals, or forbear in enforcing it because of them? As the U.S. Constitution itself makes clear, there is no responsibility more essential for a government than the protection of its citizens. My humble premise is that, like other non-

And a very effective one at that. Look no further than Broadcom's recent (unsuccessful) bid for Qualcomm.

Broadcom, the eighth-largest chipmaker in the world, formerly named Avago, is the product of numerous acquisitions, most notably its $37 billion acquisition of California-based Broadcom in 2016.[24] Avago was incorporated in Singapore, but the majority of its personnel and facilities were in the United States.[25] On November 2, 2017, Broadcom CEO Hock Tan stood in the Oval Office alongside President Trump and announced Broadcom's plan to redomicile in the United States from Singapore.[26] Within days, Broadcom disclosed a hostile bid for Qualcomm.[27] Qualcomm requested tah3ed an 0wep70enr8 271n 0wep70enr8 7ADC 0 / fAvagomlc28 26 3BDC BT

in supply to critical Department of Defense and other government contracts.[29] One week later, after CFIUS had met with Broadcom, the President issued an order blocking the transaction, one of only five such orders ever and the first one in which a transaction was blocked before an agreement was even entered into.[30]

Even the threat of a CFIUS action can scuttle a deal that is problematic for national security, as it did in 2005, when China National Offshore Oil Company (CNOOC) proposed to acquire Unocal[31]; or in 2006, when Dubai Ports World considered purchasing the right to operate six major U.S. ports, including terminals in the New York/New Jersey area, Philadelphia, and New Orleans.[32]

CFIUS is effective and efficient, and Congress—led by my former boss, U.S. Senator John Cornyn—added to the quiver in August 2018 with the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA broadened CFIUS's jurisdiction to include investment in a U.S. business that "maintains or collects personal data of United States citizens that may be exploited in a manner that threatens national security."[33] In the spring of last year, CFIUS informed the Chinese company Kunlun that its ownership of the popular gay dating app, Grindr,

constituted a national security risk, prompting Kunlun to divest the app.[34] CFIUS

companies by the antitrust agencies, an important input to ensure that national security needs account for competition.

The U.S. government is equipped with tools to monitor and, if need be, take action with respect to national security goals as they arise the private sector. I am glad it has these tools, to provide for the national defense. I am also glad that the national security experts are in charge of these processes, and that they are politically-accountable for their decisions. Charging antitrust authorities with vindicating national security goals would undermine both.

Protecting Competition in the Defense Sector

While national security authorities have the means to deal with the national security implications of mergers, antitrust authorities must grapple with the competitive implications of transactions in markets of interest to national security. Consistent with the existing antitrust framework, mergers of companies that supply, say, the Defense Department, take into account the government—and the taxpayer—in its capacity as a consumer.[40]

In 1994, prompted by a wave of defense mergers, the Defense Department's Defense Science Board released a report that examined the Department's role in

[40] Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the U.S. Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Fed. Trade Comm'n), *available at* https://www.ftc.gov/es/public-statements/1997/04/mergers-ands:9

defense merger reviews.[41] The report noted the argument by some commentators that the Department's role as a monopsonist with an interest in keeping prices low rendered antitrust oversight redundant—the Defense Department had buyer power, and so even a monopolized seller would be equally matched.[42] Though regulators and courts have consistently (and sensibly) rejected such arguments, which would nullify antitrust review of defense mergers, enforcers do take account of the Defense Department's expressed views on proposed mergers.[43]

This is not unusual. The courts and enforcers take stock of testimony from customers who stand to incur the costs of potentially lost competition as the result of a merger. Although the Defense Science Board agreed with enforcers that an exemption for defense mergers was unwarranted, some worried that antitrust enforcement could undermine national security by blocking mergers essential to the national defense.[44] These commentators synonymized the well-being of companies

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[41] Office of the Under Sec'y of Defense for Acquisition and Technology, *Report of the Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation* (Apr. 1994), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a278619.pdf; *see also* Cullen O'Keefe, *How Will National Security Considerations Affect Antitrust Decisions in AI? An Examination of Historical Precedents*, Centre for the Governance of AI, UNIV. OF OXFORD HowJ0 TCo H 3124 0 Td[04.74 25/. ue - availbNa9 (/)3.6l.9 ( )

in the defense industry with that of the nation, a particularized form of the national champion arguments historically more common outside the United States. The Defense Science Board saw the poverty in the argument and declined to get behind the idea of national champions in the defense industry.

The Defense Science Board also recognized that "[m]ost claims that a merger or joint venture is important to national security are recognized… as "efficiencies"…—*i.e.*, the combined firms can produce a better product at a lower price, maintain long-term R&D capacity, or put together complementary resources or staff that will produce a superior product."[45] As former FTC Chairman Robert Pitofsky told Congress just a few years later: "[t]he Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner."[46] But he was also not shy about stating plainly that the FTC strongly believes that "competition produces the best goods at the lowest prices and is also most conducive to innovation."[47] Competition authorities recognized the needs of the Defense Department, as a market participant, not the sole decisionmaker on transactions implicating national security. Recognizing its view should not be

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[45] *Id.; see also* Office of the Sec'y of Defense, *Defense Science Board Task Force on Vertical Integration and Supplier Decisions* (May 1997), *available at* https://apps.dtic.mil/sti/pdfs/ADA324688.pdf.

[46] Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the U.S. Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Federal Trade Comm'n), *available at* https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry.

[47] *Id.*

conclusive, the Defense Department resolved to strengthen communication on the impact of defense mergers with the antitrust authorities.[48]

In late 2015, Defense Department officials, once again concerned about defense industry consolidation, proposed a legislative fix that would give the Department independent authority to review defense industry mergers.[49] After the antitrust authorities explained the ability of existing merger guidelines to handle defense industry mergers,[50] it withdrew the proposal. Since then, the Defense Department has continued to work closely with antitrust enforcers on mergers that potentially implicate national security concerns.[51] The antitrust agencies proudly consider such cooperation the "hallmark of the agencies' defense industry reviews."[52]

State owned enterprises and the challenge for antitrust

Over time, then, the U.S. has pursued national security goals using national security tools; and antitrust has protected the government as a market actor.

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[48] Office of the Under Sec'y of Defense for Acquisition and Technology, *supra* note 41; *see also* Office of the Sec'y of Defense, *supra* note 45.

[49] Colin Clark, *Whoa, Lockheed & Co.! Kendall Urges Congress To Protect Innovation*, BREAKING DEFENSE (Oct. 2, 2015), *available at* *https://breakingdefense.com/2015/10/whoa-lockheed-co-kendall-urges-congress-to-protect-innovation/*.

[50] *See* Joint Statement of U.S. Dep't of Justice & Fed. Trade Comm'n on Preserving Competition in the Defense Industry (April 12, 2016), *available at* https://www.ftc.gov/system/files/documents/public_statements/944493/160412doj-ftc-defensestatement.pdf.

[51] *See* Stmt. of Bureau of Competition, *In the Matter of Northrop Grumman Corp.*, Orbital ATK, File No. 181-0005 (June 5, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/1810005_northrop_bureau_statement_6-5-18.pdf.

[52] *Id.*

Antitrust agencies have deferred to national security authorities where appropriate, and worked with them to ensure their needs as buyers are met. Those trends should continue.

But I see another area where coordination should increase, and that has to do with evaluating the mergers and conduct of state owned enterprises (SOEs). SOEs are companies that are controlled, to varying degrees, by the state.[53] SOEs play an important role in many jurisdictions, often in key strategic sectors, such as utilities, transportation, telecom, and finance.[54]

Like privately owned firms, SOEs can have the incentives and abilities to engage in anticompetitive conduct. But they can also be deployed by the nations that own them to achieve ends not dictated by the normal incentives that companies face. That is, they may not be profit maximizing. Indeed, a defining characteristic of SOEs is that many have a broader set of objectives other than profit maximization, such as public policy goals. Many SOEs in emerging economies were originally established to provide public services and goods in the presence of a natural monopoly or of market failures.[55] SOEs often are a government tool for implementing industrial policies or to protect national security.[56] We may find

[53] Directorate for Fin. and Enterprise Affairs Competition Committee, *Competition Law and State Owned Entities*, OECD PUBLISHING (Nov. 2, 2018), *available at* https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf.

[54] *Id.*

certain of their ends sympathetic; others may repel us. But the point is: SOEs may not compete like other firms.

And that is a problem for antitrust. The profit maximization assumption that U.S. antitrust enforcers attribute to firms is a func

complicated common ownership issues—a task that could become significantly more

be honest and transparent and to have political accountability. As with the Defense Production Act, it may very well be warranted to have antitrust authorities involved to protect competition. But our primary job should be to do that, not to use antitrust law to do the planning itself.

As antitrust enforcers, we should not work to protect national champions from competition, foreign or domestic. Other nations do just that. But in ours, an open and free market is the centerpiece of our national economy. Nor should we pretend that competition law gives us license to champion every popular cause, no matter how important. Our work should be to champion competition.

Thank you again for the opportunity to speak and participate in the program today. I look forward to our discussion and any questions.