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Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission

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Introduction

We are pleased to participate in the Federal Trade Commission's examination of the Changing Nature of Competition in a Global and Innovation-Driven Age. Public institutions rarely entertain a probing assessment of their policies and purpose. The Commission's hearings of the past two months offer the potential for valuable adjustments in the antitrust system and, more broadly, serve as an important example of critical institutional self-evaluation.

Our presentation seeks to do two things. The first is to propose a general analytical framework for the Federal Trade Commission's consideration of the many recommendations made in these hearings. The second is to explore institutional processes that might be used to implement specific recommendations. In pursuing both tasks, we have sought to draw upon the testimony of witnesses who have appeared previously in these hearings, as well as offer our own suggestions for further agency initiatives.

Despite the substantial integration of economic analysis into antitrust doctrine and policy during the past two decades, today's antitrust too often is governed more by history than analysis. An important theme of earlier testimony in these hearings is that "rational" antitrust policy will not impede, and may enhance, the competitive posture of American firms in the world economy.(1) Yet a number of features of the antitrust system remain distinctly irrational.

Important doctrinal and institutional anomalies continue to encumber planning by business managers. Broad interpretations of the Robinson-Patman Act treat a wide range of price differences as unlawful price discrimination. The absolutist *per se* prohibition against vertical price fixing coexists along-side permissive rule of reason tests for equally restrictive nonprice restraints, and resale price maintenance is subject to harsher legal scrutiny than agreements among competitors affecting prices.(2) Analytically incoherent "soft core"

or poorly specified analytical processes impose costly burdens on the economy.(5) In making adjustments that curtail

baseball's anachronistic status as a sport, not commerce.**(11)** The extraordinary market and nonmarket tests in the

Third, we read the record of antitrust enforcement as demonstrating both the durability of competition -- even when anticompetitive actions are strongly supported by government -- and inefficient legal rules. On the one hand, this seemingly permits antitrust enforcers wide latitude for error insofar as competition is likely to correct false positives or even false negatives. But the broader lesson of antitrust experience is the decidedly mixed record of antitrust achievement over the past 105 years. The ability of regulatory bodies to improve the performance of the economy and best the market place in disciplining restraints is exceptionally mode

The tools that the Commission can take to directly challenge regulatory obstacles to competition are comparatively weak. At the federal level, Congress has established numerous exemptions, subsidies, and regulatory schemes with dubious economic justifications and demonstratively adverse competitive effects. Emboldened by *Parker v. Brown*(40) and its progeny,(41) state and local government entities have enacted many restrictions on competition. In the courtroom, existing antitrust law limits the Commission to pursuing a strategy of containment against statutory and regulatory dispensations from competition.(42) Here the Commission can seek to ensure that competition-suppressing measures are narrowly construed.(43) This battle is surely worth the continuing struggle, even though legal doctrines governing the effect of federal and state involvement minimize the Commission's ability to block the creation of damaging exceptions to the nation's competition laws.(44) Consideration also might be given to granting U.S. antitrust authorities some of the more potent tools (such as Article 90 of the Treaty of Rome) that European Community competition officials have at their disposal to attack anticompetitive government intervention in the economy. In this vital respect, our competition system would do well to emulate the European model.

Beyond a litigation strategy of containment, the Commission can and should continue to draw on its competition and consumer protection expertise to urge legislatures and regulatory 85(e t)-5n 70.9tion-7(y)4(op0.4 0.6 ss 0 scn /T1(o)-7()-3(or)ss 0 sc

important were it not for the significance that antitrust analysis continues to attach to concentration effects in merger control.

Fifth, global economics, network effects, installed base opportunism, first-mover advantages, game theory, raising rivals' costs, and similar ideas, while interesting, should not be exempt from any of these principles. Whether they can contribute to long-lasting policy is unclear; but the presumption should be that they are only possible explanations for certain market place effects until demonstrated otherwise.

Sixth

conventional Clayton Act or Sherman Act principles. The application of Section 5 to treat behavior that escapes

Price Discrimination. As the sole source of federal enforcement of the Robinson-Patman Act since the 1950s, the FTC should identify what it believes to be the high policy ground for continued enforcement of the statute. If a probing assessment of the price discrimination law reveals (as we expect it would) that there is little high ground and an abundance of swamps, the Commission should be willing to say so and to advocate the statute's demise.**(65)** Politics should not be allowed to trump sound policy, and this Commission may be particularly well-placed to lead us out of the current morass.

Vertical restraints. For most of the post-World War II era, the FTC has been the preeminent source of federal enforcement activity involving vertical restraints. In light of the withdrawal of the Justice Department's Vertical Restraint Guidelines, there is considerable room for the FTC to develop a comprehensive statement of the methodology it will use to pursue cases in this area. We make this recommendation while urging great caution in the Commission's consideration of any extension of current law. In fact, we believe, as with the Robinson-Patman Act, that past efforts to impose antitrust liability for vertical restraints have contributed more mischief than good to competition. A careful statement of guidance by the Commission could play a significant leadership role. For example, in addressing vertical price restraints, the Commission should identify which episodes of resale price maintenance it intends to prosecute. In particular, it makes a great difference -- for business planning and economic efficiency -- whether the Commission means to challenge all instances of RPM, whenever found, or will permit exceptions where the manufacturer is a new entrant or an older incumbent experimenting with a new distribution technique to arrest a decline in its market position.**(66)**

A clarification of enforcement intentions and analytical methodologies should address the role, documented in these

Federal antitrust policymaking in the past 15 years has featured progressively greater reliance on consent

A second approach is to rely on periodic, *ex post* audits to examine the decisionmaking process, to evaluate its soundness, and to consider the effects of the consent agreement. The *ex post* audit would be performed by an individual or entity outside the agency and having no relationship to the respondent or industry members affected by the consent agreement. The results of the audits would be made public.

Policy Formation and Coordination within the Commission

If the Commission were to accept these recommendations and issue new guidelines and policy statements, as well as conduct more *ex post* analysis of enforcement initiatives, it will be especially important for the FTC to monitor policy coherence and to guarantee that the results of efforts to assess its work are incorporated into future decisionmaking. **(85)**

competition policy community must confront the genuine possibility that state resistance to a loosening of restrictions on mergers will retard efforts to implement new, consistent competition policies in these areas.**(92)** No amount of federal-state dialogue or cooperation promises to alter this condition. If, as we believe it should, the Commission concludes that a more permissive policy toward consolidation is appropriate, and it desires such a policy to be truly national in scope, it must either persuade the states to accept the policy or convince Congress to limit the states' role in merger oversight for transactions with significant regional or national effects. It is irrational to allow individual state antitrust officials to obstruct the attainment of important national and international competition policy goals through their enforcement of federal antimerger laws.

Conclusion

In reviewing the statements and presentations made to the Commission over the past two months, we were reminded

such pleas. Many complained of their competitors' conduct; none acknowledged any fencing-out ambitions of their own; no one complained about having too many advantages or of the need for more competition in her industr2 0 Tf 9 -G14-3(i)ah.-3(o

(2) In Broadcasting Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979), the Supreme Court said it would entertain at least a cursory examination of the defendant's claims that conduct facially resembling horizontal "price-fixing" was justified by efficiency rationales and was worthy of analysis more elaborate than per se condemnation. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) and subsequent cases, the Supreme Court has never explicitly endorsed so discriminating an approach for resale price maintenance.

(3) 388 U.S. 365 (1967).

(4) *Cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (discussing and distinguishing the Court's earlier intra-enterprise conspiracy cases without specifically repudiating them).

(5) *See* Abbott B. Lipsky, Jr., "Geography, Competition and Market Definition: The Proper Use of Economic Theory in Antitrust Decisions" 2 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Oct. 18, 1995: mimeo) ("the economic reasoning underlying every antitrust enforcement decision must be made explicit if antitrust law is to weed out invalid theories and adopt sound reasoning"); Statement of James F. Rill, *supra* note 1, at 2 ("enforcement of the antitrust laws that does not focus on consumer welfare or conduct bearing a direct and substantial effect on foreign commerce would be costly"); David J. Teece, "Assessing Competition, Firm Performance, and Market Power in the Context of Innovation: Implications for Antitrust Enforcement" 33-34 (Prepared Statement for FTC Hearings on the Changing Nature of Competition, Oct. 24, 1995: mimeo) ("Antitrust Enforcement, private and public, cannot improve the chances for innovation based competition very much, but it can surely get in the way.").

(6) *Compare* Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988) *with* Joseph Kattan, "The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis" 9-14 (Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 14, 1995: mimeo) (recommending abandonment of *Massachusetts Board* methodology).

(7) *See* Darcey v. Allein, 77 Eng. Rep. 1250 (1602); Mitchel v. Reynolds, 24 Eng. Rep. 347 (1711).

(8) *See* Chicago Board of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

Behalf of the Coalition for Open Trade Before the Federal Trade Commission Hearings on Global and Innovation-Driven Competition 14 (Oct. 19, 1995: mimeo).

(46) A relatively fresh example can be found in the emphasis that the district court placed on the procurement policies of the Commonwealth of Puerto Rico as determinants of the respondent's behavior in Federal Trade Commission v. Abbott Labs., 853 F. Supp. 526 (D.D.C. 1994). The court's decision to reject the Commission's complaint in *Abbott Laboratories* suggested that the respondent was responding rationally to incentives provided by Puerto Rico's approach to managing the procurement of infant formula.

(47) *See* Barry C. Harris & David D. Smith, *Survey of Economic Studies*, Appendix B to Testimony of Richard L. Scott, Hearings Before the Federal Trade Commission on Global and Innovation-Based Competition 5 (Nov. 7, 1995: mimeo) ("A review of the economics literature, both theoretical and empirical, indicates that there are no numerical concentration standards that apply across product and service markets."); Prepared Statement of James F. Rill, *supra* note 1, at 10-11 (observing that "there is no economically compelling basis for viewing the current HHI thresholds of the Merger Guidelines as rigid or to speak in terms of transactions which exceed these thresholds as 'Guidelines violations'" and calling for an increase in the Guidelines quantitative thresholds)

(48) *See* General Motors Corp., 103 F.T.C. 374 (1984).

(49) *See, e.g.*, *General Motors*, 104 F.T.C. at 391, 397 (dissenting statement of Commissioner Bailey):

[I]f this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will? This is surely the question that potential joint venture partners will be asking themselves. In this decision, the Commission has swept another set of generally recognized antitrust law principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this case, the decision results in the blessing of a business proposal that is both breatb(e,)-5(t-8(a)-1(ng)-7(t)-5(hg)-7(t)-5s)-

(66) In an attachment to his presentation in these hearings, Daniel Roos describes how "[t]he Saturn Corporation has successfully pioneered a new marketing approach for auto dealerships based on no haggle selling and customer satisfaction." Daniel Roos, Sloan Foundation Study, *supra* note 50. Let us suppose for purposes of discussion, that Saturn's "no haggle" policy consists of a requirement by the General Motors Saturn Division that its dealers, including independently-owned outlets, advertise and adhere to a specified retail price. Would the Commission condemn such an arrangement out of hand as a violation of the rule of *Dr. Miles*, or would it permit the Saturn Division to use the

A. Proger, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6 (Nov. 7, 1995: mimeo) ("[O]ne issue that might merit further review by the FTC is the extent and nature of proof that it will require before recognizing efficiencies in connection with a particular transaction."); Prepared Statement of James F. Rill, *supra* note 1, at 9 ("the agencies should become more hospitable to the types of efficiencies that may be considered"); Prepared Statement of Steven C. Salop, *supra* note 72, at 24 (recommending addition of case-by-case evaluation of efficiency benefits in merger review); Prepared Statement of Richard L. Scott, *supra* note 71, at 10 ("[I]t is simply unconscionable to continue to evaluate efficiencies justifications for hospital mergers with the degree of skepticism you currently accord them."); Joe Sims, "Antitrust Treatment of Mergers in Distressed Industries: Hospitals as a Case Study" 15-16 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 14, 1995: mimeo) (proposing that FTC give greater emphasis to efficiency concerns in evaluating hospital mergers) *with* Kevin J. Arquit, "Efficiencies and Merger Analysis" 2, 10 (Prepared statement for FTC Hearings on Global and Innovation-Driven Competition, Dec. 5, 1995: mimeo) (opposing broadening of efficiencies defense but suggesting 16 3(t)-12 M0 Td [(C)-1(om)0 Td ies Pinal poB1(T)-1C(i)-h1(enc)grys-1(e)-14(w)13.2, 10 (Prepared statement(t)-5(hati)2 FTC Hearing

whether retrospective study of the assumptions and results of previous antitrust enforcement efforts would help to discover whether fundamental but unstated misconceptions about supply response may underlie some enforcement judgments."); David Pitts, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 3 (Nov. 2, 1995: mimeo) (suggesting that the government evaluate whether anticipated efficiencies in hospital mergers were realized in practice); Prepared Statement of Joe Sims, *supra* note 73, at 17 (proposing that FTC study actual effects of hospital mergers); Robert A. Skitol, Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition 6-7 (Oct. 26, 1995: mimeo) (proposing the Commission's Bureau of Economics review experience of selected consortia that filed notifications under the National Cooperative Research Act or the National Cooperative Research and Production Act); *cf.* Joseph F. Brodley, "Proof of Efficiencies in Mergers and Joint Ventures: Testing Ex Ante Claims Against Ex Post Evidence" (Preliminary Draft of Prepared Statement for FTC Hearings on Global and Innovation-Driven Competition, Nov. 1, 1995: mimeo) (advocating *ex post* verification that efficiencies claimed for mergers and joint ventures have materialized); Philip B. Nelson, Prepared Statement for Federal Trade Commission Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age 7 (Oct. 19, 1995: mimeo) ("[I]t appears that the FTC could perform a valuable service by researching and documenting more fully the economic circumstances under which shipments pattern data can be misleading").

(78) *See* **Business Disclosure: Government's Need to Know** (Harvey J. Goldschmid, ed. 1979); George Bentson, *An Appraisal of the Costs and Benefits of Government Required Disclosure*, 41 **L & Contemp. Probs** 30 (1977).

(79) *See, e.g.*, William Blumenthal, *Market Imperfections and Over-Enforcement in Hart-Scott-Rodino Second Request Negotiations*, 36 **Antitrust Bull.** 745 (1991); *see also* Thomas B. Leary, Transcript of Testimony Before FTC Hearings on Global and Innovation-Driven Competition, Oct. 17, 1995, at 242-43 (criticizing scope of second requests in merger investigations); Prepared Statement of Richard Rogers, *supra* note 57, at 10-11; Prepared Statement of Richard L. Scott, *supra* note 71, at 11 (In my view, hospital merger review imposes enormous, and largely unnecessary, discovery burdens on merging hospitals. . . . We contin1 24.4w())-M-7(i)-d to Kc-5(i)(of)-9'n4]TJ [(s)-30( )]TJ Ew())-M-3(

(84) *See*