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Federal Trade Commission

What Are We Talking About When We Talk About Antitrust?
Remarks at the Concurrences Review Dinner
65 East 55th Street, New York

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I. Introduction

Many thanks for your kind introduction. And thank you, all, for attending the Concurrences Review Dinner. It is one of the finest antitrust events of the year, and I am honored to be here.

This evening, I will address a question that lies at the heart of our chosen practice: what are we talking about when we talk about antitrust? More simply, what is an antitrust violation? Although that issue might strike you as fundamental, I fear that it is increasingly misunderstood. Specifically, I believe some commentators and competition agencies around the world are blurring the lines between regulation and antitrust.

This evening, I hope to convince you that a defining quality of an antitrust violation is the elimination or dilution of a demand- or supply-side market constraint on a firm's power. I also hope to persuade you that a violation does not simply mean high prices, low output, reduced quality, limited choice, or compromised innovation incentives. Such effects, as unpopular as they may be, are market outcomes. And such outcomes—standing alone—never define an antitrust violation.

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[1] The views expressed here are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I would like to thank Alan Devlin for his contributions to this speech.

theory for "unfair methods of competition" have raised problematic issues, such as in *Google-MMI* and *Robert Bosch*[5]

These examples involve a common theme. In each one, an antitrust agency first identifies a market outcome that it deems unsatisfactory. For instance, an antitrust enforcer may observe high prices that reduce consumer welfare, at least in the short run.[6] Similarly, the owner of an essential facility or key patented technology restricts choice, and denies consumers higher

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of competition, not competitors.[15] For the next few minutes, I would like to briefly address some case law that illustrates my core point.

A. ***Absent Harm to Competition, There Is No Antitrust Violation***

First, a firm can harm consumers without damaging a competitive limit on its market power. In those situations, there is no antitrust issue. I will mention three Supreme Court cases that support that proposition.

First, consider *Trinko*, a lawsuit that accused Verizon of [illegible]

customers through higher, regulator-approved rates.[19] The Supreme Court found that the *per se* rule did not apply because the telephone monopolist that allegedly passed on the higher rates enjoyed a regulatory monopoly.[20] Hence, the Court explained, the "consumer injury naturally flowed not so much from a less competitive market for removal services . . . as from the exercise of market power that is lawfully in the hands of a monopolist . . . combined with a deception[.]"[21]

Finally, in *Weyerhaeu-2(e)4(di)2(e)/534(x)-1(t)]T,2 333.6 5eP2f(l)-12(y[bMC /P1438u0T2(e)4(di)2(e)*

B. ***An Antitrust Violation May Occur Absent Negative Market Effects***

Now consider a different question. What happens when a firm damages the competitive process, but no harmful market effects seem to result? Interestingly, many—though not all—such decisions recognize an antitrust violation. To me, that is a telling outcome.

There is a fascinating line of cases involving competition for a natural monopoly. In such cases, firms vie to own a regulated monopoly or to run a franchise for which no good economic substitute exists. Competition usually benefits consumers, but if a monopoly results no matter who wins the race, it might sever the link between competition and market outcomes.[25]

These cases are illuminative because, if antitrust law recognizes a claim at all in such circumstances, it can only be because it focuses on the competitive process, as opposed to demonstrable market effects.

A leading case is the Seventh Circuit's decision in *Fishman*, where two firms competed to buy the Chicago Bulls.[26] One of the prospective buyers lost its bid when the owner of the Chicago Stadium—a natural monopoly—would only rent it to another purchaser.[27] The disappointed buyer sued, alleging a conspiracy and group boycott to deny it access to the Chicago Stadium. The district court found violations of Sections 1 and 2 of the Sherman Act.[28]

On appeal, the defendants made an interesting argument, namely that "competition between IBI and CPSC to acquire a natural monopoly was not protected by the antitrust laws because substitution of one competitor for another would not injure competition: Whether CPSC

or IBI ultimately managed to acquire the Bulls was a matter of little difference to the Chicago fans, who would face a monopoly in any event."[29]

That position raises the question of what defines an antitrust violation. Is it identifiable consumer harm that flows from a restraint or is it the restraint that corrupts the competitive process, even if no discernible antitrust injury results?

Writing for the Seventh Circuit, the late Judge Cudahy considered the issue to be profound.[30] The court concluded that the "antitrust laws are concerned with the competitive *process,* and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest."[31] Judge Cudahy explained that the Supreme Court "has never given us [reason] to believe that anything save unfettered competition is the key to consumer well being."[32] For that reason, "we should not be so quick to assume that there is no consumer interest in this case" and "there seems to be no way of telling whether IBI or CPSC would be a 'better' owner from the perspective of basketball fans-14(g)6(s)-15(av)-4(e u)-4(n)88Ikm5u4/6(d)71 e(J)-1

consumer injury. Clearly, an antitrust jurisprudence that began with the quality of market outcomes and traced those outcomes to a restraint would not reach the same result.

Of course, there is still some uncertainty in the law governing competition for monopoly. Some cases may go the other way and, even within the Seventh Circuit, there is a question surrounding the necessity of consumer injury. mays2ng d4(r)3(e)4(que)4(s)-1ncar3.9( )-180(que)4(s)-1(t)

undertakings, though—to its credit—the European Commission has seldom used that provision of Article 102.[38] Nevertheless, emerging competition jurisdictions have adopted that rule and may be less scrupulous in wielding it.

The KFTC's 2016 IP guidelines prohibit the "act of unfairly demanding royalties" by a patentee.[39] In China, the NDRC's draft guidelines forbid a dominant firm from "licensing IP with unfairly high royalties" and SAIC's guidelines have a similar provision.[40] Further, we've seen enforcement actions in Asia where an underlying allegation seems to be excessive royalty charges.[41]

These developments are troubling because, although done under the flag of antitrust, they have nothing to do with enforcing competition law. Antitrust protects market constraints, which in turn determine pricing. To go beyond the market to condemn pricing also is to bypass the competitive process altogether, turning antitrust policy on its head.

There are other examples from overseas where enforcers have made antitrust issues of conduct that either promotes or does not restrict competition. But I wish to conclude my remarks by focusing on the United States. The most prominent area of enforcement to raise the "antitrust as regulation" issue involves standard-setting. As I have argued this evening, the foundation of

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[38] *See, e.g.*, European Commission Report on Competition Policy ¶ 207 (1994) ("[T]he Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behavior of the dominant company designed to preserve its dominance usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it."); Eur. Comm'n, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, ¶¶ 7, *passim* (acknowledging the possibility of exploitative abuses through excessive pricing, but focusing instead on exclusionary conduct).

[39] KFTC IP Guidelines, *supra* note 4, at III.3.A(3).

[40] NDRC Guidelines, *supra* note 4, at III.(ii)1; SAIC Guidelines, *supra* note 4, at Ch. 4, Art. 23.

[41] *See, e.g.*, NDRC, Administrative Penalty Decision on Qualcomm's Monopolistic Conduct (2015) (fining Qualcomm $975 million and observing that, "[i]n conclusion, Qualcomm was held liable for directly or indirectly charging the licensees at an unfairly high royalty rate").

standalone Section 5 enforcement.[49] In doing so, it has breezed past the difficult but critical—details that define a meritorious antitrust case.

In *Google-MMI* and *Robert Bosch*, for example, the Commission found reason to believe that SEP owners had engaged in unfair methods of competition by trying to enjoin accused infringers.[50] In arriving at that result, the Commission did not ask whether the patent had caused the SSO to adopt their technologies over alternatives. The FTC did not identify any injury to competition in an upstream technology market. It did not evaluate the firms' market power. Nor did it identify actual anticompetitive effects. Instead, the Commission embraced the conclusory rule that the owner of a RAND-encumbered SEP cannot ask a court to enjoin a willing licensee.[51]

Last year, of course, the FTC issued a one-page statement on its enforcement principles under Section 5.[52] I dissented because the statement was vague, failed to grapple with relevant case law, and perhaps most importantly did not require substantial harm to competition.[53] Although the statement purportedly requires some inquiry into the competitive process, some of my fellow Commissioners have opined that the statement merely codified existing practice and principles.[54] So, it leaves us with the deeply unsatisfactory result that modern FTC enforcement

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[49] *See* Maureen K. Ohlhausen, *Section 5: Principles of Navigation*, July 25, 2013, https://www.ftc.gov/public-statements/2013/07/section-5-principles-navigation.

[50] *In re* Google Inc., FTC File No. 121-0120, Statement of the Federal Trade Commission, Jan. 3, 2013, https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of the Fed. Trade Comm'n, Apr. 24, 2013, https://www.ftc.gov/enforcement/cases-proceedings/1210081/bosch-robert-bosch-gmbh. *But see supra* note 5.

[51] *Id.*; *see also In re* Google Inc., FTC File No. 121-0120, Analysis of Agreement Containing Consent Order and Compl., Jan. 3, 2013; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Analysis of Agreement Containing Consent Order, Apr. 24, 2013, and Compl., Nov. 26, 2012 (see links in note 50, *supra*).

[52] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, Aug. 13, 2015, https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

[53] Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement, Aug. 13, 2015, https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy.

[54] *See, e.g.*, Interview with Terrell McSweeny, Commissioner, Federal Trade Commission in ANTITRUST SOURCE (Aug. 2016) (opining that "the Statement reflected the principles that we have been following all along") *and*

actions under Section 5 do not rigorously require harm to competition. Rather, cases like *Google MMI*, *Robert Bosch*, and *N-Data* challenge conduct divorced from demonstrable injury to the competitive process.[55] Well intentioned as those cases may be, in my view, they diverge from appropriate antitrust enforcement.

IV. Conclusion

In summation, it is a serious error to equate a negative market outcome with harm to competition. Yet, it is a mistake to which many people and even an expert antitrust agency the