An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification

Maureen K. Ohlhausen[1]
Commissioner, U.S. Federal Trade Commission

Eleventh Annual Competition Day
Fiscalia Nacional Economica
Santiago, Chile

November 5, 2013

I. Introduction

Good morning. I am delighted to be here at the Eleventh Annual Competition Day at the Fiscalia Nacional Economica (Fiscalia). I would like to thank Felipe Irarrazabal and Jaime Barahona for inviting me to speak at this wonderful event. I also would like to congratulate Felipe and all of his colleagues at the Fiscalia, who are celebrating the fiftieth anniversary of that agency's creation.

As many of you know, the U.S. Federal Trade Commission (FTC) has enjoyed a cooperative and beneficial relationship with the Fiscalia for many years. Even before the Fiscalia signed an antitrust cooperation agreement with the FTC and the U.S. Department of Justice (DOJ) in March 2011, we had worked together on competition issues. Last year, when the Fiscalia was revising its merger review guidelines, the FTC had the opportunity to provide comments on the draft. We appreciated that the Fiscalia was interested in receiving our input on

the guidelines, and we look forward to working with the Fiscalia on competition matters for many years to come.

T

Now, as a Commissioner, I continue to support the FTC's efforts in advocating for procompetitive policies.

A significant focus of competition advocacy efforts tends to be on governmentally imposed restraints on competition. In countries with a history of government control over sectors of the economy, there may still be vestiges of unnecessary, anticompetitive restraints in their laws and regulations. Even in historically free-market economies, such as the United States, there are often industries that benefit from government-imposed restraints on competition. Further, private entities may pursue government measures to protect themselves from the competitive forces of the free market.[2]

Some entities try to justify their requests for anticompetitive government action in terms of safety or some other type of consumer protection. In reality, what they often are seeking is a law or regulation to hamper their rivals and entrench their advantageous position as incumbents, not to protect consumers. Based on our experience as both a competition and consumer protection agency, we can see that the relationship between the restraint and the purported consumer protection benefit is often poorly defined or even non-existent.

It is, of course, completely rational for such entities to pursue anticompetitive government restraints. After all, engaging in private anticompetitive conduct is risky: aside from potentially resulting in jail time and significant monetary fines, collusion may not even be effective, particularly if it is being undercut by cheating within the cartel. By contrast, persuading the government to adopt anticompetitive restraints is much less risky: lobbying the

[2] *See, e.g.*, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Prepared Remarks before the International Competition Network Panel on Competition Advocacy and Antitrust Authorities (Sept. 28, 2002), *available at* http://www.ftc.gov/speeches/muris/020928naples.shtm ("Constant vigilance and continuing efforts are necessary because there will always be pressures from the private sector, and often its government allies, to maintain old anticompetitive constructs or to create new ones.").

anticompetitive conduct, and, as I mentioned earlier, because they are enforced by the government, these restraints are more durable than any private conduct could be.

The FTC engages in competition (and consumer protection) advocacy before other policymakers, including state legislatures and regulatory boards; state and federal courts; other federal agencies; and professional organizations, such as bar associations. Typically, the FTC issues comments or other advocacies either

prevent exceed the loss in consumer welfare resulting from the lessening of competition?[5] In raising these questions, the goal of our advocacies is to convince policymakers to take full account of the adverse impact on competition and consumer welfare that may result from proposed laws and regulations.

Let me briefly touch on a few of the recurring themes in

and safety.[6] In short, our advocacies have suggested that any limits on APRNs' ability to provide medical services should be no stricter than necessary to protect patient safety.

Another recurring theme in our advocacies is opposition to antitrust immunity for certain types of anticompetitive conduct. For example, we often encounter federal and state legislative proposals seeking to create antitrust immunity for certain health care providers to bargain collectively over reimbursement rates with health insurers and other third-party payers. Health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from health insurers and other payers, asserting that immunity for joint bargaining is necessary to "level the playing field" with insurers who have market power. Our response has come down to the following point: reducing competition on one side of a market (that is, the physicians) is not the answer to a perceived lack of competition on the other side of that market (that is, insurers). The FTC has long advocated against such immunity because it is likely to harm consumers by increasing costs without improving quality of care,[7] and I expect that we will continue to oppose these attempts to authorize departures from competition.

---

[6] *See, e.g.*, Letter from Fed. Trade Comm'n Staff to the Hon. Theresa W. Conroy, Conn. H.R., Concerning the Likely Competitive Impact of Conn. H.B. 6391 on Advanced Practice Registered Nurses (Mar. 19, 2013), *available at* http://www.ftc.gov/os/2013/03/130319aprnconroy.pdf; Testimony of Fed. Trade Comm'n Staff before Subcommittee A of the Jud. Comm. on Health of the State of W. Va. Legis. on the Review of W. Va. Laws Governing the Scope of Practice for Advanced Practice Registered Nurses and Consideration of Possible Revisions to Remove Practice Restrictions (Sept. 10, 2012), *available at* http://www.ftc.gov/os/2012/09/120907wvatestimony.pdf; Comment of Fed. Trade Comm'n Staff before the La. H.R. on the Likely Competitive Impact of La. H.B. 951 Concerning [illegible]

A third recurring theme in our advocacies is that courts should narrowly construe existing antitrust exemptions and immunities. One of those exemptions is found in the state action doctrine, which exempts from the federal antitrust laws otherwise anticompetitive transactions and conduct if (1) the state has clearly articulated a policy of displacing competition in a given area of the economy, and (2) if private parties are involved, they are actively supervised by the state.

This antitrust exemption is grounded in legitimate, non-competition goals—federalism and state sovereignty, which call for the federal government's strong interest in competition to yield in certain circumstances to an individual state's decision to opt for regulation over competition. Nonetheless, the FTC has long argued for narrowly construing the doctrine to minimize the adverse impact on competition that necessarily results from the doctrine. After carefully analyzing the doctrine, an FTC task force issued a report in 2003,[8] recommending various approaches to clarifying the doctrine to bring it more closely in line with its original objectives. Since then, while we have continued to advocate against attempts by the states to immunize anticompetitive conduct from the antitrust laws, the FTC also developed a litigation program to address the doctrine in the courts.

Earlier this year, in a unanimous decision, the U.S. Supreme Court issued a decision in the FTC's challenge to a hospital merger that resulted in a near-monopoly in southern Georgia.[9] At issue was whether the state of Georgia had clearly articulated a policy of displacing

the scope of the state action doctrine. In my view, this was an example of a long-term advocacy effort by the FTC that ultimately paid off for consumers and competition.

B. Benefits of a Competition Advocacy Program

know about or participate in the political process to oppose such policies. Those seeking the policies, however, are often organized firms or professional associations that will reap concentrated benefits from reduced competition.[11]

Advocacy also can serve an important function in the political process by highlighting the costs to consumers of the anticompetitive law or regulation under consideration. This help

1. Firm Grounding for Advocacies

First, a firm grounding for an agency's advocacy efforts is crucial. We have based our advocacies in competition principles, a comprehensive understanding of the industry at issue, economic theory and analysis, and, where available, empirical evidence. Many of our advocacies build on the experience and industry-specific knowledge that we have obtained in the course of our law enforcement and policy work. For example, in the 2000s, we saw that some online business models were starting to gain traction in the area of real estate brokerage. Not surprisingly, this elicited certain reactions from more traditional parts of the real estate industry. For example, local realtor associations urged state legislators to require agents to offer a minimum set of brokerage services, which would prohibit some popular low-service/low-cost brokerage offerings. We filed comments opposing those requirements in several states. We also combined competition advocacy with other agency efforts, including bringing cases, jointly holding a workshop and issuing a report with the Justice Department, and providing educational materials to consumers.[13]

Our efforts in the real estate brokerage area highlight the importance to our advocacy efforts of what former FTC Chairman William Kovacic has called competition policy research and development (R&D). For the FTC, that term refers to a wide array of activities designed to inform the agency's pursuit of its competition mission, including, for example, academic-style research, information gathering, holding conferences and workshops focused on specific policy and legal issues, and writing reports. Competition policy R&D is undertaken at the FTC to

[13] Materials related to the FTC's efforts in the real estate brokerage area are available at http://www.ftc.gov/bc/realestate/index.htm.

Unlike law enforcement actions, in which the agency either succeeds or fails in stopping the anticompetitive conduct at issue, the effectiveness of competition advocacy can be difficult to measure. For example, it may not be easy to determine whether a particular advocacy was successful. Further, it is often difficult to discern the extent of an advocacy's influence on policymaking. Even if a particular policy decision is consistent with an agency's recommendation, it may merely mean that the agency's views and those of the decision maker already were the same.

not presented by other sources or not well understood by the decision maker; and (2) the weight, if any, given to the advocacy filing.

We track our advocacy outcomes on an ongoing basis. Then, periodically, we conduct a more comprehensive assessment of our advocacy outcomes. Overall, the survey results that we have received over the years indicate that our advocacies do influence ultimate outcomes. Policymakers more often than not consider our views in their decision

This type of advocacy to the public sector may very well prevent other government agencies from enacting laws or regulations that inhibit competition, to the detriment of consumers. In my view, my own agency, the FTC, ought to consider publishing a similar document for use in our country.

III. The Important Role of Premerger Notification Systems

The second area I would like to focus on this morning is premerger notification. By that, I mean a system in which qualifying transactions must be notified to, and reviewed by, the relevant competition authority. I understand that there is an ongoing discussion here about enacting a premerger notification program in Chile, where currently merger filings with the Fiscalia are voluntary.

At this point in the evolution of competition policy, the benefits of merger review, generally speaking, are fairly well established. Merger review is an integral part of an overall competition enforcement system. As a prospective means of preventing increases in market power, it complements the retrospective enforcement directed at anticompetitive conduct, either joint or unilateral, that has already taken place. In its most recent Performance and Accountability Report, covering fiscal year 2012, the FTC estimates that its merger review program saved consumers over fourteen times the amount of resources devoted to that program.[21]

The vast majority of mergers and acquisitions, of course, are benign or beneficial to competition. Many transactions enable the merged firm to reduce costs and become more efficient, leading to lower prices, higher quality products or services, or increased innovation. Thus, the goal of merger enforcement should be to identify and prevent transactions that are likely to substantially lessen competition, without delaying or obstructing transactions that actually enhance, or have no effect on, competition. Again, looking at fiscal year 2012, there were 1,400 transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act (HSR). The two agencies issued Second Requests in only 49, or 3.5 percent, of those transactions. The agencies challenged only 44, or 3.1 percent, of the transactions reported in fiscal year 2012; conversely, the agencies determined that almost 97 percent of the reported transactions were unlikely to substantially lessen competition.[22]

A. Benefits of a Premerger Notification System

Let me next discuss the benefits of a premerger notification system. Such a system provides a competition authority the opportunity to investigate and challenge or restructure the relatively few transactions that are likely to harm competition and consumers before the competitive injury can arise. The authority can preserve the competitive status quo in the marketplay

B. Recommendations for Implementing a

Defining the relevant market correctly is often difficult, and market shares, to the extent they provide useful information, are only meaningful if they are based on properly defined markets. Further, it can be quite costly and time-consuming to conduct a market share analysis.

In selecting notification thresholds, it is also crucial to set them at a sufficiently high level, so as not to impose unnecessary burdens on business or the reviewing agency and its limited resources. Merger review is a fact-intensive process that can require significant resources to review all of the transactions that may be filed with the competition authority, including the many transactions that are unlikely to raise competitive concerns. Low notification thresholds can impose unnecessary burdens on both parties required to provide notification and the agency staff who are tasked with reviewing all filed mergers. Rather than spending time investigating mergers that are unlikely to be problematic, agency resources likely would be better utilized in pursuing cartel cases or other anticompetitive conduct.

2. Nexus to Reviewing Jurisdiction

A second important consideration in selecting notification thresholds is the nexus to the reviewing jurisdiction of the transactions that must be notified. As the ICN recommends, a premerger notification system should not capture a foreign transaction unless there is a sufficient nexus between the reviewing jurisdiction and the transaction at issue.[27] Requiring merger notification in the case of transactions that do not have a material local nexus imposes unnecessary filing costs on merging parties and uses competition agency resources without any corresponding enforcement benefit. Thus, a premerger notification system should not require a

filing unless the proposed transaction is "likely to have a significant, direct and immediate economic effect within the jurisdiction concerned."[28]

3. Reasonably Short Review Periods

A third important consideration in designing a premerger notification system is the timeframe for the merger review. Merger reviews should be conducted in a reasonable and determinable timeframe.[29] Having reasonably short time limitations for each phase of review is necessary to avoid imposing undue burdens on the merging parties. Competition agencies need sufficient time to properly investigate and analyze mergers, which often present complex legal and economic issues. At the same time, mergers are usually time-sensitive, and unduly long review periods may jeopardize proposed transactions from being consummated. Undue

eighty-two percent of the transactions in which it was requested by the parties.[31] As another example, Brazil, which enacted a premerger notification system last year, reduced the average merger review period from about 150 days in 2011 to twenty-five days during the first year of its new system.[32] The average review period for mergers filed under Brazil's new fast-track process was nineteen days during the first year of the program.[33]

4. Continual Self-Assessment

Finally, as with all aspects of its performance, an agency enforcing a premerger notification program ought to engage in continual self-assessment of the program's impact and effectiveness. That is, the agency should continually assess how it may speed up the review process and reduce the burden on filing parties[34] without compromising the agency's ability to investigate and stop proposed transactions that will lessen competition. This is true for any agency overseeing a premerger notification system. Even with almost forty years of experience with such a system, the FTC and DOJ continue to seek ways in which we can make our premerger review process more efficient and less burdensome.

* * *

To conclude, I hope that I have convinced you of the benefits of both competition advocacy and carefully implemented premerger notification systems. Each of these programs plays an important role in a competition enforcement system, allowing competition agencies to prevent enduring harms to consumer welfare before it is too late to undo or remedy them.

[31] 2012 HSR Report at 4 tbl.1.

forward to seeing the Fiscalia continue to run an effective advocacy program. I will stay tuned to see if Chile adopts a premerger notification system

Thank you for your attention.