THE ROLE OF THE JUDICIARY IN ENFORCING AND LEGITIMIZING COMPETITION LAW AND POLICY

Remarks before the Asian Competition Law Conference 2005

Hong Kong
December 12, 2005

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Competition polices and programs are like any other government policy or program. To survive, to endure, to be effective, they must be institutionalized and made legitimate in the eyes of the broad public, who must agree with the purpose and goals of the program or policy. The final decisions of the competition authorities and the "results" of the program must be viewed as legitimate by all sectors of the society, even by those who do not prevail in the process. Ultimately, competition law and policy must be woven into the very fabric of the culture and the nation so that it affects not only the way people do business, but the way they think about doing business.

Competition attorneys, economists, and other people of similar mind when gazing outward from the secure perches of their respective government ministries, university classrooms, and well-appointed conference and boardrooms readily recognize the benefits of free markets and open competition. Economic theory and a century of experience in the United States solidly demonstrate the welfare benefits that derive from competitive markets. Resources are allocated efficiently, product output and quality

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increase over time, and prices fall. Consumers reap the benefits of competitive markets and national wealth increases.

Despite these substantial benefits, competition policy sometimes produces results that seem counterintuitive to the uninitiated. Competition itself has a harsh side. For example, the result can appear counterintuitive when competition law "protects" a major retailer who profitably sells merchandise at prices that may be unprofitable for its competitors. Yet, basic economics teaches us that consumers benefit when efficiencies and scale economies enable a retailer to sell a good or service at a low price, and the fact that such a price may be below the costs of less efficient competitors is not proof of predatory conduct. Similarly, a highly successful business might rightfully hold a strategic position in a market that it refuses to share at any price with its competitors. While denial of such an "essential facility" may seem unfair to disadvantaged competitors, a sound competition policy is one that does not chill firms' incentives to innovate, invest, and compete. "To assure that investment and innovation are not discouraged, competitors must be confident in advance that they will not be required to share their successful assets with competitors."[2] A competition policy that fails to recognize the right of the successful firm to enjoy the fruit of its successes in all but the

[2] William Blumenthal, General Counsel, Federal Trade Commission, *Reducing Government Impediments to Capital Mobility*, Remarks before the ASEAN Consultative Forum on Competition at 8 (Aug. 17, 2005), *available at* http://www.ftc.gov/speeches/blumenthal/050817asean.pdf.

most extraordinary situation is a policy that strips away the key incentive that fosters efficiency and innovation in the first place.

Such "counterintuitive" results can have harsh practical consequences. In every competition, whether it is between sports teams or economic enterprises, there are winners and losers. Although losing sports teams usually go home to fight another team on another day, losing economic enterprises usually go out of business. Some entrepreneurs lose the source of their livelihood and their employees and their families suffer unemployment and, frequently, emotional and financial crises. Those at the bottom of the socio-economic ladder as well as their former employers will remember their lost livelihood and the accompanying dislocation much longer than they will recall that the price of the good or service they manufactured or sold decreased for all consumers – or at least increased less quickly.

Those who place last in an economic competition are not necessarily the only ones who might begrudge a strong competition policy. More than one observer has commented that businessmen hate competition. Although economic theory and real-word experience suggest that cartels are inherently unstable and tend to break up over time, human nature and real world experience also show that businessmen almost always looks for ways to make deals. Safety and guaranteed income lie in collusion: the fixed price, the divided market, the "secret deal" – or better yet, the open deal that is protected by an exception to the competition laws – all have the potential of making life a little easier for the cartelist and other deal makers.

So it is that competition policy once enacted is subject to constant assault not only from those who stand to lose in any rigorous competition, but also from those who stand to gain by anticompetitive practices. Challenges to competition law and policy are mounted before the national executive, the national legislature, and in the courts. The nation's executive is frequently urged to appoint secretaries and ministers who will favor the economic interests of particular groups or entities. Interest groups will also try to persuade the executive to adopt policies and programs that will advance the economic self-interest of the group to the detriment of sound competition policy. Similarly, interest groups and well-financed enterprises will urge the national legislature to enact laws that shield, or even encourage, anticompetitive conduct, or that carve out special exceptions to the nation's competition laws. And last, those who would challenge competition law and policy will frequently ask the courts to set aside or otherwise allow conduct that violates the competition decisions made by the competition agencies, the national executive, or the legislature.[3]

The obvious question is how can any competition law or policy possibly survive and become part of a nation's business culture, if it is subject to such constant unrelenting warfare? The complete answer to this question depends on the architects of competition law and policy and how well they provide for two key institutions: the

[3] To be sure, this does not mean, or even suggest, that every contact with the nation's executive or its agencies, or every attempt to change or secure special legislation, or every judicial challenge constitutes an assault on competition policy. Indeed, such contacts are for the most part an integral and vital part of a nation's dialogue on competition issues and policies.

competition enforcement agencies and the courts. Here, I discuss the courts, and will turn only briefly to the agencies at the end, when I discuss their ability to influence court decisions.

Entertain no doubt about this: A properly defined judicial role in competition cases will provide the foundation that supports, defines, and gives shape and integrity to the competition program that a nation creates and staffs. For competition law and policy to survive and be effective, its fate must be consigned to judicial bodies whose decisions are trusted and respected by the public and whose members understand, support, defend, and enforce the policy and the law. If the judiciary performs its role properly, competition policy and the competition decisions reached by the enforcement agencies will be made valid and legitimate in the eyes of the public, and business entities will learn to shape and conform their conduct to the law and policy enforced by the courts.

So what does this mean? What is a "properly defined" role for the judiciary? How can the legislature ensure that the judiciary's competition decisions will be trusted and respected by the public? How can the judiciary be made and encouraged to understand, support, defend, and enforce competition law and policy? And finally, how can we be sure that the decisions of the enforcement agencies will be validated and made legitimate in the eyes of the general public and that business entities will conform their conduct – *i.e.*, comply – with competition law and policy?

In large measure, the answers to these questions depend on how well the national legislature and executive deal with three matters: (1) judicial independence and transparency, (2) defining the role of the judiciary with respect to competition issues, and

(3) judicial education and training. The first matter, judicial independence and transparency, should be self-evident and easy to describe. An effective judiciary is one that is seen and understood by the public to be "independent" – free from political influence or meddling. It is one in which the judge presiding over any particular matter lacks any financial interest in the outcome of the case and has no personal or professional tie to any party or party's representative. The judiciary must be, and appear to be, impartial, and the courts must decide each case on the basis of the law and the facts and record that are placed before them by the parties. Courts should not decide cases based on preconceived notions or on extra-record evidence that they have collected on their own initiative, and they must explain their decisions in written, published opinions that are available to the public. Finally, the decision of the first court to consider a case should itself be subject to further review by at least one higher-level similarly independent court.

To the extent the competition laws vest independent courts with jurisdiction over competition matters, and judges base their decisions on some sort of record and explain the basis for their decisions, the public and the litigants will necessarily have confidence in the decisions rendered by the courts. To the extent court decisions and actions are subject to further review for correctness by higher-level courts, the public's confidence in the judicial process will only be enhanced. Conversely, public confidence in competition laws and decisions will be undermined if the public or business community believes that judges are subject to political influence or have a personal or financial stake in the

outcome of the cases they decide or if they believe that cases are decided on the basis of personal information, whims, or extra-judicial fact-gathering.

The drafters of competition laws may well ponder and debate the "best" type of judicial forum for hearing competition cases. But in the end, the independence of the judiciary and the transparency of court decision making is far more important than the type of court that decides competition matters. Thus, the legislature may reasonably decide to vest jurisdiction in specialized courts, whose members have expertise in economics and competition issues, or courts of general jurisdiction whose members may preside over matters as diverse as criminal drug-smuggling, contract disputes, and competition matters, or in some sort of mixed system such as the United States Federal Trade Commission, which is an expert adjudicative body whose final written decisions are subject to review by appellate courts of general jurisdiction.

What matters is that the judicial function be seen by the public and by litigants as both fair and transparent. The judges must be independent and disinterested, and their decisions must be rationally explained and based on a record of the proceeding. Such judicial decision making has the dual benefit of informing the parties and the public of the results of a judicial proceeding and the rationale supporting the court's decision. Well-reasoned, published, judicial decisions educate the public and the business community about the nature and reach of competition law, and potentially make some of competition law's "counterintuitive" results understandable and therefore palatable.

Of course, an independent judiciary is only one important part of the process of institutionalizing and legitimizing competition law and policy. Not only must judicial

decision making be independent, fair, impartial, on-the-record, and transparent, it is also important that court decisions are for the most part correct. And here I do not only mean "correct" in the sense of analyzing the facts, the economics, and the law correctly, but I mean it in a larger sense – the process as well as the substance or merits. Courts must ensure that the process that led to the final decision in a matter was correctly followed in all respects that matter to the outcome. And if a court finds flaws in the legal process, it must be able to distinguish between mistakes that matter – could change the result and therefore require reversal of agency decisions – and those that do not and can therefore be corrected without disturbing the final agency decision. The judicial process serves as a check on the competition agencies and ensures that they perform their jobs correctly, and proceed fairly in each case they initiate. The judicial process also serves as a check on the final decisions made by the law enforcement agencies and ensures that the agencies have analyzed the case, the facts, and the economics correctly and have, as a matter of law, reached the correct result.

Just as judges must be free of outside influence in a given case, have no economic, personal, or professional self-interest in the outcome of the matter, be impartial in their decision making, and base their decisions on a defined record of evidence and arguments, so too must the enforcement agencies. An impartial judge's review of the impartiality and fairness of the enforcement agencies is necessary to validate and legitimize competition law and policy. Without that sort of review – and ultimate approval – neither alleged law violators, nor the business community, nor the

public as a whole will have any confidence in a competition law that sometimes reaches "counterintuitive" results.

The importance of judicial review of agency procedures is easy to see and appreciate when the issues are clearly defined and concern the integrity of the agency processes. Agencies must give "due process" to accused law violators. By that I mean that the accused violator must receive written notice of all the charges that the competition authority is asserting against it; the accused must have an opportunity to present evidence and argument in its defense, and it must have a right to appeal any ruling or order that is entered against it. Agency actions ought to be reversed and set aside when agencies have denied these fundamental rights to accused law violators, or when the agency decision makers should have disqualified themselves because of a conflict-of-interest, or when they have been arbitrary or capricious in their decision making.

Unfortunately, in the real world the issues that are presented to reviewing courts are not always so clear, and sometimes agencies commit errors that are not obvious. Such cases require judges to make difficult decisions. And, let's admit, competition issues can be very complex and require sophisticated economic analysis and human beings have to varying degrees a common, fundamental instinct when they do not understand something. Most people, judges included, are inclined to find a way to avoid it. Procedural issues can be a convenient avoidance tool.

Indeed, in my own experience, it is a common complaint leveled by enforcement agency attorneys, not only in the United States, where I present cases to courts, but in the

transition economies as well, that judges who do not thoroughly understand competition law or disagree with its purpose and goals frequently distract themselves with trivial or hyper-technical procedural issues in order to avoid deciding difficult competition cases on the merits.[4] I cannot comment on the accuracy of such charges. To my knowledge, no one has ever done a comprehensive survey of competition cases in which judges have ruled against agencies on procedural issues to see how frequently courts have acted correctly and how frequently they might have set aside agency actions for trivial or hyper-technical procedural flaws.

If I were to give my own best estimate of what happens, I would argue that judicial procedural rulings in agency cases fall into three categories: (1) first phase cases in which the ground rules are established to govern a new statutory regimen; (2) cases in which agencies that ought to know the proper procedures become lax and need to be set back on course; and (3) a hopefully small set of cases in which the judges either do not understand the law or simply do not agree with the purpose and policy of the competition program.

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[4] *E.g.*, *Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies*, Report prepared by the ICN Working Group on Capacity Building and Competition Policy Implementation, ICN 2nd Annual Conference, Merida, Mexico at 35-39 (June 2003), *available at* http://internationalcompetitionnetwork.org/Final%20Report_16June2003.pdf.

The so-called first phase cases arise when statutes are new and the agencies charged with enforcing them are untested. At that stage, there is, and there will be, a lack of common experience or ground between the courts and the agencies. The agencies will act, as they must, without knowing what the courts expect, and sometimes – perhaps even frequently – the agencies will miss something required by the statutes that the courts determine to be important. Similarly, courts, having no experience with the new regimen, will need to test and explore the law and the process and their implications before fully understanding and appreciating how to apply them. When agencies and courts are in the early stages of the learning curve, both may be prone to missteps.

The second category typically arises after a statutory regimen has been in place sufficiently long for everyone to know the fundamental rules. Even then, agencies may not be wholly free from violating the due process rights of the accused by committing the sort of fundamental procedural errors that can deprive an accused violator of sufficient notice of the charges against it or deny it a full opportunity to present evidence in its defense. To take but three examples from my own agency: the United States Federal Trade Commission had been in operation for nearly 45 years when an appellate court reminded it about the quantum of evidence needed to sustain a Commission charge;[5] 55 years when an appellate court reminded the agency that the individual Commissioners are not to prejudge the facts or the law of a particular case before deciding the matter;[6] and

[5] *Carter Products, Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959).

[6] *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).

over 60 years when a court informed the agency that its remedies are not automatic and that it must show on the record the reasons why a cease-and-desist order should be imposed upon a law violator.[7] The point of these cases is that, even when relatively mature agencies operate under mature judicial systems, the agencies and the courts must always be watchful that the agencies do not develop bad habits and proceed in a manner that denies those charged with law violations a full opportunity to defend themselves and have their cases heard by fair and impartial tribunals.

The third category does not require any extended discussion. These are the cases that all committed competition attorneys, economists, and enforcement agencies dread – the situation where a court either does not understand competition law or, worse yet, does understand it, but for whatever reason refuses to support or enforce an agency's decisions.[8]

These three categories present a vexing problem for those who draft competition legislation. What sorts of terms can a legislature include in competition laws that will (1) give the judges the guidance they need and deserve in order to minimize risk of any

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[7] *SCM Corp. v. FTC*, 565 F.2d 807 (2nd Cir. 1977).

[8] *E.g.*, *Indiana Federation of Dentists v. FTC*, 745 F.2d 1124 (7th Cir. 1984) (citing the "legal, moral, and ethical" obligation of dentists not to compete with each other), *rev'd*, 476 U.S. 447 (1986); *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 473-479 (Ryan, J, *dissenting opinion*) (6th Cir. 1992).

potential long-term damage arising from the first-phase cases; (2) give the courts the latitude they need to fully and completely address agency procedural mistakes that can themselves work to undermine the competition laws; and (3) eliminate to the greatest extent possible the opportunities for the third category of case?

First and foremost, the greatest protection that can be built into legislation to protect against judicial error is a right of appellate review. If confidence in a system of competition laws derives from their enforcement by an independent, fair-minded judiciary, then that confidence can only be enhanced – and protected from occasional independent, arbitrary judges – by making decisions reviewable at a higher level.

Second, the enabling statute should serve to guide the judiciary in its decisions and to delineate to the greatest extent possible its responsibilities and limitations in reviewing agency actions. By way of example, the enabling statute that created the United States Federal Trade Commission clearly instructs the agency to give written notice and a full opportunity to be heard to the party who is accused of violating the law, to hold hearings, and to base its final law enforcement decisions on a record of the proceedings it conducts.[9] The same law also instructs reviewing courts to limit their review of the agency's proceedings to the record that the agency created;[10] and it instructs the courts that the agency's findings of fact are "conclusive" if they are

[9] 15 U.S.C. § 45(b).

[10] 15. U.S.C. § 45(c).

"supported by evidence."[11] As the American courts have acknowledged, the scope of review is narrow, and one court has commented:

> Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive. The findings must stand unless they were wrong, and they cannot be wrong that is, reversibly wrong if substantial evidence supports them."[12]

In short, the competition laws expressly inform courts that they are not to look outside the record created by the agency and must not waste their own energy and resources by engaging in new fact-finding because that role is left entirely to the enforcement agency.

With proper drafting, enabling statutes can, and should, define, guide, and circumscribe court review. Under the United States' Federal Trade Commission Act ("FTC Act") that means that courts review the agency's final decisions and orders to ensure that (1) the agency afforded the accused law violator due process by adhering to the requisite procedures by giving the parties sufficient notice, an opportunity to be heard, and basing its decision on the record evidence and not on any extra-record facts or influences; (2) the record evidence supports the agency's fact finding; (3) the agency has properly applied the competition laws to the facts of the case and correctly determined that the facts demonstrate a law violation – and here, because courts are the ultimate arbitrator of what the law means, the agency is accorded only "some deference;"[13] and

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[11] *Id.*

[12] *RSR Corp. v. FTC*, 602 F.2d 1317, 1320 (9th Cir. 1979) *quoting Colonial Stores, Inc., v. FTC*, 450 F.2d 733, 739-40 (5th Cir. 1971).

[13] *FTC v. Indiana Federation of Dentists*, 476 U.S. at 454 (1986).

finally (4) the remedy selected and ordered by the agency is "reasonably related" to the law violation that the agency has found. Here, the courts have been highly deferential to the Commission's choice of remedy so long as it is "reasonably related" to the law violation,[14] although the Commission's statutes allow courts to modify or even set aside Commission orders, or parts of orders, when they are vague or overbroad or do not comport with the remedial purpose of the competition laws.[15]

These, then, are the principal tools both for guiding the courts and for insulating the competition laws from arbitrary manipulation or simple misapplication by the judiciary: (1) provisions for appellate review of the first court's decisions; and (2) statutory provisions that provide for meaningful review of agency action while giving courts needed guidance and limiting their opportunity to strike out on their own. Note too, that while I have taken some time to talk about the FTC Act and its principal statutory review provisions, that Act and its provisions plainly may not fit into another competition framework.

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[14] *FTC v. Ruberoid Co.* 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).

[15] 15 U.S.C. § 45(c); *see FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967) (upholding a final Commission order, but noting that the Commission "does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry.").

Concepts such as “substantial evidence,” “reasonably related,” “remedial purpose,” “deferential standard,” and “harmless error” are all firmly entrenched in American jurisprudence and therefore do not need to be defined by statute. If you mention any of these terms to almost any American judge or lawyer, he or she will have a pretty good idea of what you are talking about. Even if the FTC Act's judicial review provisions were used as a model for other competition laws, the drafters of those laws may be well advised to include additional definitions in the law when making other necessary adjustments to make the statute “workable.” In the end, what I encourage legislative draftsmen to do is to incorporate provisions for appellate review and to give the courts meaningful guidance and set limits concerning their role in reviewing agency decisions. The FTC Act is only a reference point, not a roadmap.

Of course, it is not enough for courts to be independent and to be guided by statutes that fully and usefully inform them of the methods and standards for doing their job. Judges must also be equipped to decide cases correctly – they must be able to identify and distinguish between conduct that harms competition and conduct that is either neutral or procompetitive. Arguably, the chances that judges will apply competition law correctly are influenced by two factors: (1) the extent to which they understand and accept the premises that underlie the competition law and policy, and (2) the extent to which they are proficient in applying the economic principles that guide competition decisions. Competition policy is best served by judges who understand and accept the principle that free markets and rigorous competition leads to an efficient allocation of resources and provides benefits for all consumers and the nation as a whole.

If they do not accept that idea, then competition policy is doomed. Similarly, when judges accept the idea that competition is beneficial, they still must be able to understand and apply economic and competition principles correctly in order to render the decisions that call for the "counterintuitive" and sometimes "harsh" results that I mentioned at the outset.

The obvious question that follows from this discussion about the importance of judicial understanding, acceptance, and proficiency is, of course, how does a nation find judges who understand, accept, and can readily apply competition principles? Plainly, knowledge and acceptance cannot be legislated, and therefore the answer to the obvious question is "training." But of course, there is a catch here. A truly independent judiciary is one that probably cannot be compelled to attend training programs and certainly cannot be compelled to learn and accept all the lessons that are taught at the training programs that are attended. Assuming we are not to give up on having an independent judiciary – and for all the reasons that I set out in the first part of this discussion, that is not an option – what can be done?

There are two major options to consider: specialized courts and voluntary training. The competition laws might channel competition issues into specialized courts whose judges would be appointed on the basis of their prior knowledge and expertise in dealing with competition issues. Whether that is a viable option probably depends on the culture of the country and the nature of the existing judicial apparatus. That, plainly, is a decision for the legislature and the draftsmen, and I will not say anything more about it here, except to note that specialized courts may present unique issues for the legislature

to consider. To the extent such courts are distant from the judicial mainstream of the country and are unfamiliar to the people and to the business community, there is a risk that their decisions will not be viewed by the public and by litigants as credible, or even relevant, to their lives and their businesses. Also, specialized courts have a circumscribed view of the law and the issues. Over time they may lose touch with the mainstream and, frankly, lose their way. At some point, they may be an obstacle to the integration of competition law and policy into the larger fabric of the culture. On the other hand, they may – as noted – have the singular advantage of understanding the laws they apply and appreciating fully the role those laws play in the welfare of the nation. The legislature needs to carefully weigh all the factors before embracing specialized courts.

Leaving aside the question of specialized courts, I will turn to the question of judicial training. Competition agencies indisputably serve an important function in training judges – a point I will elaborate on at the end – but I believe they should not directly conduct such training. Given the expertise that should reside in the competition agencies, this statement may seem odd. However, because the competition agencies must regularly appear before the courts to present their cases, an independent judiciary may in fact be reluctant, if not outright resistant, to being taught how to interpret and apply the law by the agencies. Even if the judges could overcome their reluctance to participate in such training, the very existence of agency sponsored training programs might well raise doubts in the minds of the business community and the general public about the impartiality and independence of the courts. For these reasons, judicial training

conducted by competition agencies has the potential to undermine the very process that it attempts to improve and may actually be harmful to sound competition policy.

There are probably many ways to put judges in the classroom with people who can teach them about competition law and economics. The national legislature should be encouraged to provide the judiciary with funds that are specifically earmarked for judicial training programs on law and economics. Even if such programs cannot be made mandatory, they can be made attractive to the judges if the government itself is making the programs available and encouraging judges to participate. The very fact that the legislature funds, sponsors, and encourages such programs would by itself inform the judiciary of the importance of competition law. Ideally, at the very moment that the legislature enacts the competition law and the nation develops a comprehensive competition policy, the legislature would fund judicial training programs to inform the judiciary about the new law and the manner in which it should be applied. In most situations, the legislature could undoubtedly enlist highly qualified people from the nation's universities to teach the relevant economic and legal principles. In situations where expertise in a subject matter may be lacking, as for example where an economy is in transition from state control of vital industries, the requisite knowledge can likely be secured from non-domestic sources.

Thus, the international competition community also can have a role in teaching law and economics to judges. Today, markets are global and there exists a robust dialogue among the world's competition agencies. The dialogue takes the form of conferences, seminars, technical programs, information exchanges in on-going

investigations, and discussions about law and policy. It is undoubtedly good. Even in the absence of anything approaching convergence of national laws and economic policies, the dialogue improves international understanding and enhances the exchange of views and ideas about effective competition policy. We learn from each other, even when we do not agree.

Given the breadth and scope of the dialogue among competition agencies, it is but a small step to focus at least some of the conferences and seminars on the judiciary. In such an environment, judges can have the benefit of hearing and discussing law and policy with knowledgeable people who do not appear before them to argue cases. Their participation in international programs does not threaten or in any way undermine their independence. Although the laws of nations differ, the principles of economics that inform competition decisions are universal. When judges are included in the international competition dialogue, and invited to attend and participate in conferences, seminars, and technical programs, everyone benefits.

Earlier I said that the competition agencies have an important role in judicial training, but they should not themselves directly provide the training. I will conclude my remarks here with a few comments on how the competition agencies can train judges. To accomplish that task, the agencies must be empowered to carry out their functions. This means they must be sufficiently independent that they can operate without intrusive political meddling and can give disinterested advice to the nation's executive and the national legislature on important competition issues. The agencies must also be able to educate the public at large on the benefits of the free market and be free to select the

cases or matters that they will pursue, and they must be staffed by people who are wise enough to pick cases that matter. Paradoxically, the competition agencies must also not be so free and so independent that they become bulwarks of unbridled and arbitrary power unanswerable and unaccountable to anyone.

The agencies must be respectable and respected institutions. If they achieve that status, the courts, the business community, and the public will listen to what they have to say. All this can perhaps be distilled to two words: competency and awareness. The staff of the competition agencies must consist of people who know and understand competition law and policy and who are proficient in its application. When they do an excellent job of putting together solid cases correctly, the judges who review those cases will, sooner or later, learn from what they see. The principle is a simple one. Quality work eventually yields quality results; shoddy work does not. Staff must be competent. Similarly, agency staff who appear before judges must be mindful of one unalterable fact – every court appearance is an opportunity to teach the court something about the pending case. Staff must be aware of these opportunities and take advantage of them to present and explain their cases and the legal and economic principles that govern their outcome. Competition attorneys teach judges in the courtroom, not in the classroom. Staff must be aware of these opportunities and take advantage of them.

Perhaps the best way to teach judges about competition law and economics is to train the competition agency's staff to train the judges through the presentation of their cases. This requires staff training at two levels: (1) law and economics; and (2) effective courtroom skills and techniques. Law and economics is what competition policy is all

about, and training in these subjects should yield a competent staff who can put together meritorious cases using proper procedures. Training in courtroom skills and techniques enables the staff to present their cases effectively and articulate clearly the reasons why the law and economics support the agency's decisions.

Thank you for the opportunity to be here today and to speak with you about the vital role the judiciary plays in competition matters.