Federal Trade Commission

ANTITRUST ENFORCEMENT UNDER THE CLINTON ADMINISTRATION

A PERSPECTIVE FROM THE FTC

Remarks by

Mary L. Azcuenaga
Commissioner
Federal Trade Commission

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Good afternoon. I am very pleased to be here and to speak about antitrust enforcement under the Clinton Administration, from my perspective at the Federal Trade Commission. My customary disclaimer at the beginning of every speech is that I speak only for myself, not for the Federal Trade Commission or for any other commissioner. Given the subject matter of the panel, I should perhaps add a second disclaimer. Although I have been a close and interested observer of antitrust enforcement trends for more years than I might care to admit, my remarks about what is to come, although informed to some extent by my vantage point and my experience, are more in the nature-of--a wish list about the direction of antitrust in the new administration rather than a program on which you can rely.

One of the first questions, of course, is who the players will be. One notable feature of the Clinton Administration is the amount of antitrust expertise at the very top. The President has taught antitrust law, and the Vice President chaired the Senate subcommittee with oversight responsibility for the Federal Trade Commission. Having so much antitrust expertise at the very highest levels is surely a promising sign for antitrust enforcement.

At the Department of Justice, Anne Bingaman, of course, is the new Assistant Attorney General and that is an excellent appointment. At the Federal Trade Commission, President Clinton has not yet had the opportunity to make any appointments. The Commission has a full complement of five commissioners who have staggered seven year terms. The President will have his first opportunity to appoint a commissioner when the first term expires in September 1994 or when one of the five commissioners leaves by his or her own volition, whichever comes first. At the moment, I know of no commissioner planning to leave before September 1994. The President has authority to appoint a different chair from among the sitting commissioners, but he has not done so.

Resources, of course, are directly relevant to the strength of any enforcement program. From 1980 to 1989, the size of the Commission, expressed in terms of the number of employee workyears, was cut approximately in half. Beginning in 1990, we expanded almost ten percent, but we are again cutting personnel. A troubling trend from the enforcement standpoint is that Congress is increasingly assigning new duties to the Commission without providing additional resources to complete them.[1] Certainly, it is appropriate for the Congress to set priorities and assign the Commission new duties, but this may entail a tradeoff in enforcement activity.

One theme that has emerged in the reporting on the economic policy of the new administration is the need to make the United States more internationally competitive. Although a few have argued for relaxation of the antitrust laws in an effort to support selected domestic industries against foreign rivals, the stronger view seems to be that vigorous domestic competition lays the groundwork for international competitive strength. Michael porter, an influential and informed authority on matters of international competitiveness, has taken the position that strong antitrust enforcement with respect to horizontal mergers and collusive behavior is essential.[2] Porter views the cartelization of an industry as the 'beginning of the end of international success" and regards leniency toward mergers as "counterproductive ."[3] I am hopeful that strong antitrust enforcement will be recognized as an important foundation of our competitiveness policy.

Merger enforcement remains at the top of the Commission's antitrust priorities, as it has for some years. One prediction, or perhaps I should say one item from my wish list, for antitrust enforcement in this administration is that the enforcement agencies will challenge more mergers under Section 7 of the Clayton Act. The agencies have a record of vigorous enforcement in this area, but I believe there have been and are likely to be even more mergers that may have substantial anticompetitive effects and that should be challenged. In saying this, I do not mean to suggest a sea change. It is important to keep in mind that the enforcement agencies investigate only a small percentage of all proposed transactions that come within the scope of Section 7, and they challenge only a small percentage of those

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[1] For example, the amendments to the Federal Deposit Insurance Act required the Commission to develop disclosure and other regulations for depository institutions not covered by federal insurance. The Commission has a temporary reprieve from these new responsibilities in the form of a rider on our appropriations bill. Another example is the Energy Policy Act of 1992, which gave the Commission substantial new duties. The Telephone Disclosure and Dispute Resolution Act of 1992 required the Commission to complete a major rulemaking proceeding within 270 days related to 900-number services.

[2] M. Porter, The Competitive Advantage of Nations 663 (1990) .

[3] Id. at 663.

investigated. This is in part, I believe, because most firms are well counseled and do not attempt mergers or acquisitions that clearly would violate the law. Even if the government were to double the number of mergers it challenges, the number of Section 7 cases would remain relatively small in absolute terms.

If we become more aggressive in challenging mergers, we may sustain some losses in court, but this is a risk we should be prepared to take. Through careful case selection and continued good staff work, the Commission should be able to continue its relatively good track record in winning preliminary injunctions. Our staff has been effective in putting on minitrials even at this early stage of a case. If we believe we have an anticompetitive story to tell, we should not be deterred from proceeding by undue fear of--litigation risk.

A related item from my wish list relating to merger enforcement is that we continue to challenge mergers when otherwise appropriate that fall within the moderate range of concentration as defined by the Merger Guidelines. Concentration is merely the starting point in merger analysis that enables the agencies to winnow out transactions that merit particular attention. The agencies then conduct a detailed, usually complex analysis of the competitive implications of those transactions.

The temptation, at this point, to find answers based on quantifiable, objective factors is great, but there are dangers in relying too heavily on concentration data in merger analysis. One risk is that reliance on levels of concentration may become a crutch. Its attractions may lead us to displace the time-consuming process of sifting through other, more probative facts or to make decisions based on relatively small differences in HHI numbers.

Merger decisions of the 1960's and 1970's have been much maligned for blocking transactions, on the basis of the numbers alone, that posed no threat to competition. Given the widespread recognition today that most mergers are competitively neutral or procompetitive, repetition of that enforcement approach is unlikely. In today's world, the result of greater reliance on numbers may be under-enforcement, particularly in moderately concentrated markets, rather than over-enforcement. That is my concern. Under-enforcement is inconsistent with our mandate under Section 7 of the Clayton Act and is likely to harm consumers.

Although we have made impressive progress in our analysis of the competitive implications of mergers, this is an area in which important questions remain. Antitrust analysis historically has benefited from new ways of looking at familiar patterns, from fresh insights and new economic learning. No doubt this growth and refinement will continue during the Clinton Administration.

Also in the area of merger law, I hope that the enforcement agencies will continue to challenge anticompetitive vertical mergers and mergers that have anticompetitive effects as a result of the loss of potential competition. Fewer vertical mergers pose a likelihood of anticompetitive effects than horizontal mergers, but the Commission has challenged vertical mergers during my tenure on the Commission and I hope it will continue to - do so. The Merger Guidelines recognize that the loss of potential competition is a source of concern under Section 7. I agree and hope that the Commission will not be deterred by dicta in B.A.T. Industries, Ltd., 104 F.T.C. 853 (1984), from continuing to bring potential competition cases.

The remainder of our antitrust enforcement resources not devoted to mergers is allocated over a wide range of industries and antitrust theories. Given the limits on our resources, we have tried to concentrate on a few industries that pose special antitrust concerns, and at the same time, we have tried to maintain a credible enforcement presence in the full range of civil antitrust law. Within the Bureau of Competition, we have a division that specializes in health care issues, and we recently have devoted resources to high technology companies. Unlike private plaintiffs who are concerned primarily about their interests in a particular case, our Continued commitment of resources to markets such as health care also allows us to gain institutional knowledge and a long-term perspective of competition in those markets.

The Commission's efforts in the health care area have helped set the competitive ground rules under which efficient, low cost providers of health care services, such as HMOs, have started to evolve. Recall that it was not much more than a decade ago that the Commission successfully challenged the American Medical Association's restrictions on advertising.[4] Now advertising by professionals is taken for granted, and its importance to competition is easy to overlook. Unless a provider with a better or lower cost service can get his or her message out to the public, the provider's innovation may not succeed. Although many restrictions on medical advertising have been abandoned, we continue to bring cases in this area. For example, the Commission recently issued a complaint against the California Dental Association for its restrictions on advertisings

[4] American Medical Association v. FTC, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 452 U.S. 960 (1982).

[5] California Dental Association, Docket No. 9259 (Complaint Issued July 9, 1993).

The Commission has brought many cases against medical professionals who have unlawfully resisted competition from low cost providers. One obstacle to the expansion of innovative health care delivery systems has been the occasional obstruction by those who prospered under the traditional system. A typical example of such behavior involved an expansion by the Cleveland Clinic into a new market in Fort Lauderdale, Florida. The Clinic charges for its services in a manner different from the traditional fee-for-service. As I understand it, the Clinic charges a flat fee for all services related to a particular surgical procedure.

Our complaints against the medical staffs of two large Fort Lauderdale hospitals alleged a physician. conspiracy to prevent a joint venture between the Cleveland-Clinic and a tertiary care hospital by threatening the hospitals with a loss of patient referrals. The medical staffs also allegedly conspired to prevent the Clinic physicians from obtaining hospital admitting privileges by such tactics as refusing to give them the forms necessary to make application for privileges and needlessly stalling the applications.[6] Our consent order paved the way for Cleveland Clinic to enter the Fort Lauderdale market.

The Commission recently has devoted resources to investigations of various high technology companies. High technology industries present a special challenge to antitrust enforcers. As in other contexts, scholars hold strongly divergent views about how antitrust rules should apply to high tech industries. On one hand, scholars such as Michael Porter argue for a strong antitrust regime to promote domestic rivalry as a way to foster innovation.[7] To this end, he would circumscribe cooperative research, prohibit joint production and marketing between leading rivals, block mergers of leading firms, and generally promote reconcentration of economic power. .

Others, such as Jorde and Teece, argue that innovation requires an array of linkages and feedback mechanisms among firms. They believe that efficiencies afforded by the horizontal or vertical linkages of joint ventures promote innovation, and they argue that overly strict antitrust enforcement can hamper the process of innovations

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[6] Medical Staff of Broward General Medical Center, Medical Staff of Holy Cross Hospital, FTC Docket Nos. C-3344, C-3345 (June 13, 1991).

[7] M. Porter, The Competitive Advantage of Nations (1990).

[8] Jorde and Teece, "Acceptable Cooperation Among Competitors in the Face of Growing International Cooperation," 58 Antitrust L.J. 529 (1989).

Alliances or specific joint ventures may help high tech firms lead or keep up with succeeding steps in innovation. Agreements among firms may be made for a wide variety of procompetitive reasons, and antitrust authorities should be careful not to chill joint efforts necessary to encourage or facilitate innovation. The rapid pace of change in high tech markets poses a special challenge for antitrust analysis, which frequently relies on static observation of a market at a given moment in time.

Because of the inherent difficulties in obtaining a clear understanding of the competitive implications of conduct in dynamic, innovation-driven industries, I think that the Commission should be careful to ensure that our activities do not discourage the innovation that we seek to promote. This does not translate into any exemptions or special preferences under the antitrust laws. High tech firms should be held to the principles of fair competition; but it is appropriate, in reviewing their conduct, for the government to maintain a healthy respect for their visionaries and their competitive successes.

Merger enforcement and our continuing examination of specific-industries together consume a substantial portion of the CommissionJs antitrust enforcement resources, but we continue to be active in a wide variety of other important areas that also merit serious attention. The Commission has continued its commitment to all areas of antitrust and has brought cases involving collusion, Robinson-Patman, resale price maintenance, and tying, as well as less traditional cases in which the Commission has used the penumbra of Section 5 of the Federal Trade Commission Act to charge firms with violations of law that do not meet the established elements of a violation under the Sherman or Clayton Acts. I expect that will continue.

For example, the Commission continues to bring cases that involve hard core conduct that is <u>per se</u> unlawful but that is not being prosecuted as a criminal matter. Recently, the Commission imposed an order on three school bus companies that engaged in a horizontal market allocation scheme under the guise of a joint venture.[9] Although I would have preferred a stronger order, and so stated in a separate statement, the serious nature of the conduct made this an appropriate case to bring, and I hope we will see more cases like this one in the future.

Vertical antitrust theories have not taken up a large proportion of our resources. Nonetheless, vertical price fixing is <u>per se</u> unlawful, and the Commission does not hesitate to pursue such unlawful conduct. Other vertical conduct can be

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[9] <u>Kansas City School Transportation</u>, FTC Docket No. C-3425 (April 22, 1993).

anticompetitive under the rule of reason. The Commission has obtained some consent orders involving vertical conduct, and several other investigations are underway. It is important for the Commission to maintain a credible enforcement presence in this area, and I believe the Commission will continue to make resources available to investigate and challenge vertical price fixing and other unlawful vertical conduct.

Similarly, the Commission continues to enforce the Robinson Patman Act. Our most recent case involves complaints against six book publishers, alleging that each discriminates in price in favor of large chain stores at the expense of independent booksellers.[10] Three years ago, the Commission issued a revised set of Fred Mever guidelines. Those guidelines, which were originally issued in 1960 and revised in 1969, are intended to assist businesses in complying with Sections 2(d) and 2(e) of the Act. Although Robinson Patman is complicated and unglamorous, a great many members of the business community and lawyers struggle with the fine points of the Act on a daily basis. They take any activity by the Commission in this area very seriously, and, clearly, continued federal enforcement efforts are warranted.

The Commission has again begun to test the limits of Section 5 of the Federal Trade Commission Act in the antitrust field, and I expect that will continue. Although the Supreme Court said that we have the power to condemn an unfair competitive practice that does not violate the letter or spirit of the antitrust laws,[11] throughout the Commission's history Section 5 enforcement has focused primarily on conduct that could be challenged under traditional antitrust theories.

I endorse the thoughtful extension of Section 5 beyond the strict metes and bounds of the antitrust laws. For example, I chose to support a complaint alleging that an acquisition was anticompetitive solely on the basis of Section 5 because the conduct in question did not fit squarely within the traditional confines of Section 7 of the Clayton Act, and I preferred not to reach the question of whether Section 7 applied.[12] Since the anticompetitive effects of an overall series of actions, including the merger in question and prior asset sales, seemed clear, that case invited the use of Section 5.

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[10] Harrier & Row, FTC Docket No. 9217; MacMillan, Inc., Ftc Docket No. 9218; Hearst Morrow, FTC Docket No. 9219; Putnam Berkley, FTC Docket 9220; Simon & Schuster, FTC Docket No. 9221; Random House, FTC Docket No. 9222 (Dec. 20, 1988).

[11] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239, (1972).

[12] The Vons Companies, FTC Docket No. C-3391 (August 7, 1992).

The Commission also has issued complaints and accepted consent orders involving unilateral solicitations to collude purely on the basis of Section 5 of the Federal Trade Commission Act.[13] Section 1 of the Sherman Act prohibits conspiracies, not unsuccessful attempts to solicit a conspiracy, and Section 2, which prohibits monopolization and attempts to monopolize, prohibits a monopolist's attempt to solicit a conspiracy.[14] Section 5 can fill the gap between Sections 1 and 2 for a unilateral solicitation to fix prices by a firm that has not achieved a monopoly. Solicitations of price fixing pose not only the obvious danger that they may be accepted, but also the more subtle danger that the communication can lead to tacit accommodations between competitors.

As the Commission continues to test the limits of Section 5, it is important that it seek cases that are factually strong and pose demonstrable competitive risks. In order for advances in theory to have lasting meaning, the Commission also should identify some test cases and litigate them to a successful conclusion. The Commission's acceptance of consent orders signals its adoption of the theory, but the courts historically have not been quick to endorse such novel theories. The Commission has a responsibility to the business community either to obtain some assurance that its creative enforcement initiatives will be sustained in the courts or to abandon them.

I anticipate that in the coming years we will see vigorous antitrust enforcement at the Federal Trade Commission across the entire range of civil antitrust law, and I look forward to participating in that effort.

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[13] E.g., Quality Trailer Products Corp., FTC Docket No. C-3403 (Nov. 5, 1992).

[14] United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984).