

**Keynote Remarks of FTC Chairwoman Edith Ramirez
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Good afternoon. I want to thank Dean Traynor, Georgetown University Law Center, and the Symposium organizers for inviting me to be here today. It is a pleasure to be back this year.

With election day fast approaching, we find ourselves in the midst of a public debate over the effectiveness of current competition policy in the United States. From some, we hear that U.S. markets have become too concentrated and that there has been a corresponding and disproportionate rise in corporate profits for large firms. The suggestion – and sometimes outright criticism – is that antitrust enforcement has been too lax in recent years, with adverse consequences for consumers and economic productivity and growth.

Others contend that the antitrust agencies tend to overstep their bounds and are often too interventionist, acting more like regulators than enforcers. According to these critics, we are sometimes more likely to get in the way of efficiencies and innovation than to do good, especially in high-tech and dynamic markets.

The attention that antitrust enforcement is getting in our public discourse is both a positive development and an important reminder of the significance of our work. In my view, however, neither side of the debate gets it quite right. Broadly speaking, those who think we are too intrusive underestimate our ability to distinguish between procompetitive and anticompetitive conduct. Those who think we are too permissive overestimate antitrust enforcement as a way of addressing some of our country's economic ills. In setting competition policy, it is important that we have a nuanced understanding of both the benefits and the limitations of antitrust

enforcement. To that end, I would like to share my thoughts about what is – and what is not – properly within the reach of antitrust.

I. Role of Antitrust Enforcement

I will start with my view of the role the Federal Trade Commission plays in enforcing the antitrust laws. For me, the FTC is like a lifeguard on duty at the beach.¹ This may have something to do with the fact that I am a Southern Californian who grew up in a small beach town, but I think the analogy is apt. Let me explain.

A lifeguard must continuously monitor the activities of swimmers and other beachgoers to ensure their safety. She prefers to stay out of the way in the lifeguard tower while everyone has fun. But if someone is acting unsafely or unlawfully or there are dangerous conditions posing safety risks, the lifeguard must spring into action to prevent harm.

Like the lifeguard, at the FTC we must keep a watchful eye on markets to ensure fair competition that enhances consumer welfare. We are not in the business of picking winners or losers; our job is to enforce the rules that safeguard vigorous competition if we see them being broken. We prefer to leave markets alone, allowing customer preferences to dictate what will be produced and sold, and competition to determine which firms make what goods and at what price. Competition leads to lower prices, higher quality, and innovation, all to the benefit of consumers.

But just as there may be unsafe conditions or illegal behavior at the beach warranting intervention, market participants do not always behave properly. Market power resulting from

¹ I have also used this analogy to describe the FTC's role in our consumer protection work. See Edith Ramirez, Chairwoman, Fed. Trade. Comm'n, Keynote Address at the Technology Policy Inst. Aspen Forum, *The Privacy Challenges of Big Data: A View from the Lifeguard's Chair* (Aug. 19, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/privacy-challenges-big-data-view-lifeguard%E2%80%99s-chair/130819bigdataaspen.pdf.

an anticompetitive merger or anticompetitive conduct can distort the competitive process and harm consumer welfare by raising prices, degrading quality, lowering output, and stifling innovation. When that happens, like a vigilant lifeguard, the FTC does not hesitate to jump in to preserve or restore competition.

As our record plainly shows, the FTC consistently strives to strike the right balance, intervening only when necessary. To those who think us too permissive, I note that the Commission has challenged 44 mergers in the last two years alone, including suing to stop eight transactions outright. Among other major wins, we successfully challenged the Sysco/US Foods, Staples/Office Depot, and St. Luke's/Saltzer mergers. We have been particularly active in addressing what we believe to be anticompetitive consolidation in the healthcare, pharmaceutical, retail, and energy sectors, among others.

The FTC also maintains a robust program to identify and stop anticompetitive conduct. Here too we have had significant success, including three Supreme Court victories, in areas that range from pay-for-delay agreements to exclusive dealing to state action. Most recently, the FTC filed a complaint against 1-800 Contacts for allegedly entering into agreements with online rivals that have suppressed competition in online search advertising auctions and restricted internet advertising, resulting in some consumers paying higher prices for contact lenses.²

We have seen the same type of vigorous enforcement from our colleagues at the Department of Justice. This includes challenges to a number of significant transactions, among them actions in the health insurance and oil services industries as well as a number of important conduct cases against companies like Apple and American Express.

² Compl., *1-800 Contacts, Inc.*, FTC Docket No. 9372 (Aug. 8, 2016), <https://www.ftc.gov/system/files/documents/cases/140228nielsenholdingstatement.pdf>.

At the same time, while there is no question that we are committed to robust antitrust enforcement, our role is by necessity a limited one. First and foremost, we are law enforcers, not sector regulators. Our job is not to transform markets; we must take them as they are. We also have no direct authority over prices. High prices unaccompanied by anticompetitive behavior do not violate the antitrust laws. Without more, neither do price increases resulting from inadequate supply or other natural market disruptions. We act only when the competitive process itself is harmed or threatened, through anticompetitive combinations or conduct.

Second, we intervene only when the facts warrant it. This requires a deep analytical dive into reliable qualitative and quantitative evidence to understand the actual or likely competitive impact of the merger or conduct under scrutiny. Certainty is neither necessary nor practical, but we must do our best to make informed judgments based on the evidence that is reasonably available to us. Sometimes our analysis shows that there will be no anticompetitive harm. When we do have reason to believe that action is needed, we must be prepared to prove our case in court.

Finally, we are not – nor can we be expected to be – infallible. While our understanding of markets and the competitive process as well as the sophistication of our analytical tools have vastly improved, much of what we do requires us to make predictions about the future with limited information. Sometimes events do not play out as we want or expect.

I am proud of the FTC's record, even though we have had a few disappointing outcomes. Courts do not always agree with us, as in two recent hospital merger cases that we are currently appealing. And last year, the remedy we ordered in connection with Albertsons' acquisition of Safeway clearly did not achieve our intended goal when one of the divestiture buyers unexpectedly declared bankruptcy. In most if not all of these instances, I think we did the best

we could with the information and evidence that was available to us. But I can assure you that we are committed to learning from our experiences – both good and bad – with the aim of becoming even more effective as we seek to promote competition and advance consumer welfare.

With these observations in mind, let me address in greater detail some of the specific concerns that have been raised about our enforcement efforts.

II. Concerns about Industry Concentration

As I noted earlier, one of the concerns we hear, especially in light of the recent surge in M&A activity, is that a number of U.S. industries have become too concentrated. Commentators in this camp point to a handful of broad industry measures that purportedly show a decline in competition in certain key sectors, like transportation, retail, and health care.

The Council of Economic Advisors, for example, cites increases in corporate profits and revenue share of the 50 leading firms in various industries, as well downward trends in firm entry and exit rates to suggest there may be reason for concern about the current state of competition.³ *The Economist* similarly identifies high profits, particularly in certain sectors like technology and health care, as a basis for concluding that the U.S. economy must be “too cozy for incumbents,”⁴ while the *Wall Street Journal* attributes lessened innovation and weak startup activity to supposed market concentration.⁵

As policymakers seek to do what they can to improve economic productivity and growth, increase jobs, and reduce income inequality, it is perfectly sensible to ask questions about

³ Council of Economic Advisors Issue Brief, *Benefits of Competition and Indicators of Market Power*, Apr. 2016, at 4, https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

⁴ *Too much of a good thing: Profits are too high. America needs a giant dose of competition*, THE ECONOMIST 23, Mar. 26, 2016.

⁵ Greg Ip, *Why Corporate America Could Use More Competition*, WALL STREET J. (July 8, 2015), <http://www.wsj.com/articles/why-corporate-america-needs-competitive-spirit-1436384494>.

concentration and the impact consolidation may have on our economy. But are these concerns well founded?

For us, of course, stopping anticompetitive combinations is among the most important jobs we perform. And market shares and market structure continue to play an important role in merger analysis and enforcement, even as our focus has shifted to more direct assessments of competitive effects. Where a proposed merger significantly increases concentration in an already highly concentrated market, we are justifiably entitled to a presumption of competitive harm.⁶

But, in contrast to the granular assessment of individual markets that we undertake when evaluating the competitive effects of increases in concentration, broad industry measures like those cited by the CEA, *The Economist*, and the *Wall Street Journal* tell us little about market dynamics or the level of competition in a particular industry. The fact that there may be fewer firms today in certain sectors than in years past does not necessarily mean that these sectors are any less competitive from a consumer welfare perspective.

Nor can we simply decry an increase in the presence of large firms – or even dominant ones – merely because they are big or have a high market share, although deals and conduct involving such firms are more likely to draw antitrust scrutiny. In many cases, being big is a consequence of being better than rivals at offering customers what they want. We are rightly hesitant to view success, and by extension size, with automatic suspicion. Indeed, large firms can have scale economies and other efficiencies that are beneficial for consumers. In short, one

⁶ Our reliance on structural presumptions is supported by both economic theory and empirical research. See, e.g., Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 11 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), <http://scholarship.law.georgetown.edu/facpub/1304>; Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435, 443 (2004).

cannot assess the state of competition in the absence of a fact-intensive analysis of specific product and service overlaps, the availability of substitutes, and other relevant market dynamics.

For example, there have been a number of mergers between large supermarket chains in recent years that have resulted in greater concentration at the national level. But national statistics do not reflect the impact on consumers. Competition among supermarkets typically occurs locally, as consumers decide where to shop within their local communities. And size on a national scale may lead to greater bargaining power with manufacturers, operational efficiencies, and correspondingly lower prices. We have therefore sought to address competitive concerns with supermarket combinations through store divestitures in affected local markets.⁷

However, we also recognize that there may be instances when the combined size of the merging firms could have competitive implications beyond the scope of specific horizontal overlaps. In those instances, we will make sure to examine those potential effects during our investigation.

An example is our recent review of Teva's \$41 billion acquisition of Allergan's generic business, a deal that created the world's largest seller of generic drugs. Given the scope of the merger, we looked not only at overlapping drug products but also carefully considered whether the combination of these two companies might produce other adverse consequences to competition.⁸ Specifically, we evaluated whether the combined firm would be able to bundle its broad range of products to foreclose smaller competitors, and whether the transaction would decrease incentives or impede the ability of other firms to bring new generic drugs to market.

⁷ See, e.g., Decision & Order, *Koninklijke Ahold*, FTC File No. 151-0175 (July 22, 2016), <https://www.ftc.gov/system/files/documents/cases/160722koninklijke-do.pdf>.

⁸ Statement of the Fed. Trade Comm'n, *Teva Pharms. Indus. Ltd.*, FTC File No. 151-0196 (Aug. 5, 2016), https://www.ftc.gov/system/files/documents/public_statements/973673/160727tevaallergan-statement.pdf.

Ultimately, following an extensive investigation, we allowed the deal to go forward subject to substantial divestitures of overlapping products.

Now, as occurred with the Teva/Allergan merger, most often we are able to resolve the competition concerns we identify through consent orders requiring divestitures of overlapping products. Settlements offer the advantage of addressing the competitive harm of a transaction while still allowing realization of the merger's efficiencies. Despite their many advantages, however, our remedies have also been the subject of criticism.

Some contend that the FTC would rather accept an inadequate remedy rather than litigate. Our recent track record, including our merger suits in Sysco/US Foods, Staples/Office Depot, and Superior/Canexus, directly belie that contention. In each of these cases, the parties offered substantial divestitures to buyers ready to compete in the business, but we determined that the divestitures would not fully replicate the competition lost through the merger and appropriately rejected them.

Others argue that we are too intrusive, claiming the FTC has sometimes used the merger review process to extract commitments from parties beyond what the facts support.⁹ Our record, however, also shows that the Commission obtains only that relief which we believe to be necessary to maintain competition. We regularly close investigations when we do not have a factually or legally sound basis for taking action.

Still other commentators advance a more fundamental critique. For example, relying on a meta-analysis of various merger retrospectives conducted over the past 40 years, Professor

⁹ See, e.g., Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM 177 (2012).

John Kwoka argues that conditions imposed by the FTC and DOJ have been largely ineffective in achieving their remedial goals.¹⁰

There is no doubt that evaluating the effectiveness of merger remedies is both necessary and important, and I commend Professor Kwoka for raising serious questions meriting our attention. However, as with the broad industry data I discussed earlier, one has to be careful not to draw generalized conclusions from limited data sets.

Notably, Professor Kwoka's conclusion is based on a sample of only seven structural remedies, many of which date back decades. Of those seven studies, the results of three are at best ambiguous. A fourth does not, in fact, consider the time period after the remedy commenced. Another study was never published, likely because of methodological problems. Finally, one of the studies he cites concludes that the divestiture was an unequivocal success. In the end, there is little relevant data from which to conclude that the hundreds of remedies imposed by the antitrust agencies in the last 40 years have been ineffective.

That being said, we recognize that we have to regularly assess the effectiveness of our remedies as we seek to achieve the best outcomes for competition and consumers. To that end, we are in the process of completing a study looking at 89 Commission merger orders issued between 2006 and 2012.¹¹ We expect that this study, which follows a prior remedy study completed in 1999, will provide the Commission with valuable insight into the factors that have contributed to our remedies either succeeding or falling short of their remedial goals.

III. Emerging Competition and Dynamic Markets

¹⁰ John E. Kwoka, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 120, Table 7.4 (2015); John E. Kwoka, *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcome*, 78 *ANTITRUST L.J.* 619, 621, 640 (2013).

¹¹ Press Release, Fed. Trade Comm'n, *FTC Proposes to Study Merger Remedies* (Jan. 9, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-proposes-study-merger-remedies>.

Let me now turn to emerging competition and dynamic markets – other areas about which we hear criticism.

Some critics argue that we have an “antitrust blind spot,” especially in instances where large internet companies might acquire smaller upstarts in order to nip potential future competition in the bud.¹² Meanwhile, others contend that antitrust intervention is ill advised in dynamic markets, as it is more likely to impede innovation and cause harm than to be beneficial.¹³ Both views overlook the careful calibration in which we engage in when deciding whether to stay in the lifeguard tower or jump down into the water.

The very fact that a market may be dynamic does not mean antitrust does not have an important role to play. To the contrary, we know that high tech and dynamic markets may have certain characteristics that have the potential to raise competition concerns. First mover advantages, network effects, and intellectual property or regulatory barriers can lead to winner take all markets and can slow or prevent effective entry or growth.

Moreover, monopolists often have strong incentives to prevent entry by new and potentially threatening technologies, whether through an anticompetitive acquisition of an actual or potential rival or through exclusionary conduct. A monopolist’s ability to stifle nascent competition opens the door for the possibility that dominance in one generation may position a firm to maintain its monopoly power well into the future regardless of the relative superiority or inferiority of the incumbent’s later-generation products. Given these dynamics, we must be ready to intervene when necessary to protect competition and consumers.

¹² Steven David Solomon, *Tech Giants Gobble Start-Ups in an Antitrust Blindspot*, N.Y. TIMES, Aug. 17, 2016, at B3.

¹³ See, e.g., Ronald A. Cass, *Antitrust for High Tech and Low: Innovation, Regulation, and Risk*, 9 J. OF L., ECON. & POL’Y 169 (2013).

Indeed, we often confront issues raised by dynamic markets and are entirely equipped to address them. For instance, when a merger involves parties that do not currently compete, but appear likely to do so in the future, and the deal is likely to harm future competition, we can and do take action to stop it. Last year we challenged the merger between Steris and Synergy Health, two of the three largest contract sterilization providers in the United States.¹⁴ We alleged that the merger would preclude Synergy from bringing a new, innovative sterilization technique to the U.S. market, x-ray sterilization, that would have competed with the incumbent gamma ray technology used by Steris and the only other significant competitor in the market. Unfortunately, a federal district court disagreed and denied our request for a preliminary injunction. While this loss highlights the challenges of bringing future competition cases, the outcome will not deter us from seeking to block what we believe are anticompetitive mergers.

In addition to cases involving future competition in existing markets, the FTC has investigated and challenged mergers that were likely to harm competition in markets that had not yet developed. For example, in 2013 we challenged Nielsen's proposed acquisition of Arbitron even though there was no current competition between the parties.¹⁵ While both companies offered audience measurement services, Nielsen focused on television while Arbitron's offering was limited to radio. However, both firms were developing cross-platform measurement services designed to measure viewership across television, the internet, and other platforms. Because the two merging firms were best-situated to compete in this emerging market, the Commission had a reasonable basis to conclude that the merger would likely harm future competition.

¹⁴ *FTC v. Steris, Inc.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015).

¹⁵ Statement of the Fed. Trade Comm'n, *Nielsen Holdings N.V.*, FTC File No. 131-0058 (2013), <https://www.ftc.gov/system/files/documents/cases/140228nielsenholdingstatement.pdf>.

We also consider a merger's impact on future innovation where there is evidence that it is an important dimension of competition in the relevant market. We aim to ensure that a merger will not harm innovation by reducing incentives to invest in R&D or develop new products.¹⁶ Notably, about a third of FTC merger enforcement actions in the last decade allege potential harm to innovation as a likely anticompetitive effect,¹⁷ and it continues to be a central focus of many of our merger investigations.

In our conduct work, we must determine whether actions by a dominant firm have the effect of preventing rivals or new entrants from being able to compete effectively. As part of that assessment, we consider whether the conduct in question can be justified as consumer-welfare enhancing. Our aim is to ensure that businesses have the freedom to innovate and compete aggressively, while prohibiting conduct that harms competition or the competitive process.

This type of careful consideration led the Commission in 2013 to close our investigation of Google's search practices. Following an extensive investigation, we concluded that, on balance, the evidence did not show that Google's design changes to its search algorithm and search pages were anticompetitive.¹⁸ On the whole, the evidence instead showed that Google was engaged in conduct designed to improve the overall quality of its search product. While some rivals may have been harmed as a consequence of those changes, we felt this resulted from competition on the merits. Wary of condemning what we saw to be legitimate product

¹⁶ Fed. Trade Comm'n & Dept. of Justice, HORIZONTAL MERGER GUIDELINES § 6.4 (2010).

¹⁷ Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1933 (Nov. 2015).

¹⁸ Statement of the Fed. Trade Comm'n, *Google Inc.*, FTC File Number 111-0163 (Jan. 4, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmttoftcomm.pdf.

improvements that benefited consumers, we concluded that an enforcement action was not warranted.

When we do encounter harmful exclusionary conduct that is not justified by countervailing benefits, we do not hesitate to take action. In July, for example, we charged Victrex with using exclusive agreements to foreclose competition in the market for a high-performance polymer used in advanced medical implants.¹⁹ Victrex was the market innovator and sole supplier for various years. When two lower-priced rivals threatened to enter, we alleged that Victrex sought to exclude them by locking up key customers with long-term contracts. To secure customer acquiescence, Victrex threatened to withhold needed supply, crucial regulatory support, and access to new products. Given the absence of countervailing customer benefits from these exclusive dealing agreements, we took action to stop Victrex's conduct.

IV. Conclusion

In sum, like the lifeguard, the FTC must constantly monitor competitive conditions in the markets it protects, always assessing whether we must intervene. Every decision is an exercise in judgment, based on facts, rigorous legal and economic analysis, and experience. I believe that as an agency we reach the right judgment far more often than not, and I am proud of the FTC's record and the benefits we have brought to U.S. consumers. Some may say that we intervene too much; some say too little. The question about who is right may never be fully answered, but I can assure you that the FTC will not let its vigilance waver.

Thank you.

¹⁹ Statement of the Fed. Trade Comm'n, *Victrex plc*, FTC File Number 114-0042 (July 13, 2016), https://www.ftc.gov/system/files/documents/public_statements/970923/160714victrexcommstmt.pdf.