



DEPARTMENT OF JUSTICE

Remarks by

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Consistent with the theme of this conference, I will talk tonight about possible future developments in U.S. antitrust policy and the report and recommendations of the Antitrust Modernization Commission in this regard. Some people predict change in antitrust policy in the future. Most of them, however, appear to concede that any change likely would be incremental, representing evolution, rather than revolution. Even the most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy – a consensus forged on a solid foundation of economic learning.

I believe specific antitrust cases will continue to be decided on their facts, rather than on the basis of politics or ideology. Current policy is supported by substantial economic learning. We won't return to what antitrust enforcement looked like 40 years ago. Nor will we abandon our national commitment to free market competition unfettered by unreasonable, anticompetitive restraints. Because current enforcement decisions are based on a full assessment of the facts, moreover, I believe that in virtually all cases essentially the same enforcement decisions would be made from one Administration to the next. This essential consistency of enforcement – and a consciously *apolitical* application of the antitrust laws – are key to an effective, broadly supported enforcement policy.

But it is certainly true that there will be new people appointed to head the Department of Justice Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC”) in the future. Those people will set enforcement priorities and shape the rhetoric of enforcement. They may also have opportunities to help develop case law in areas where there may be uncertainty – in the

area of bundling, for example – or where judicial adoption of certain principles might be helpful – perhaps in the merger context.

These new leaders will face interesting opportunities and challenges going forward. Notwithstanding that there is a substantial degree of consensus within the U.S. antitrust community on the appropriate objectives of antitrust enforcement and how to achieve them, there is also room to improve our understanding of the effects of both private and public conduct on competition and innovation.

Over the next many years, antitrust policy makers will likely continue to debate and shape standards to achieve optimal outcomes in matters involving single firm conduct under Section 2 of the Sherman Act. To be most effective, moreover, this effort will have to include not only our domestic institutions, but also the enforcement authorities of other jurisdictions, some of which may bring different experiences and ideas about the appropriate role of government regulation of markets. Enforcement actions taken outside the U.S. regarding a multinational firm's exploitation of its intellectual property, as one example, could significantly affect U.S. consumer welfare by affecting incentives to innovate. This is, and will continue to be, an agenda-forcing issue for the U.S. antitrust agencies.

Antitrust enforcers will also have work to do in the area of merger enforcement, as we continuously strive to improve our ability to identify competitive issues and litigate challenges.

Further, the DOJ and FTC could find themselves playing significant roles as competition advocates with respect to future policy decisions affecting the energy, airline,

telecommunications, healthcare, financial, and other industries. Both agencies possess tremendous economic and legal resources and substantial expertise, not only with respect to how markets operate, but also with respect to many specific industries. Should there be serious discussion on regulating or re-regulating electricity, gas, airlines, the internet, et cetera, the antitrust agencies should be there offering their expertise. When price regulation and windfall profits taxes are discussed, or when decisions are made on how to deal with airport congestion, the agencies should be at the table. Government policy, after all, can be the most lasting and powerful impediment – as well as a spur – to competition and innovation. Decisions should be made with full information about the likely consequences and options.

ANTITRUST MODERNIZATION COMMISSION

In its report to Congress and the President, the Antitrust Modernization Commission (the “Commission” or “AMC”) made a number of recommendations about the future development of antitrust. I hope some of these recommendations will receive serious consideration.

For those of you who may be unfamiliar with the Commission, it was created by an Act of Congress in 2002 to report to the President and Congress on “whether the need exists to modernize the antitrust laws.”¹ There were 12 Commission members. Four were appointed by the House of Representatives, four by the Senate, and four by the President. Appointments by both houses of the Congress were evenly split between the Majority and Minority parties, and no

¹ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856 (2002), *amended by* Antitrust Modernization Commission Extension Act, Pub. L. No. 110-6, 121 Stat. 61 (2007).

more than two of the President's appointments could be from the same party. The Chair was designated by the President. (It was my honor to serve in that role.) My Vice-Chair, Jonathan Yarowsky, was appointed by the Senate Democrats. In other words, the Commission was a bi-partisan body.

Eleven lawyers and one economist served as Commissioners. I understand that one can be a lonely number, but the Commission was fortunate that the one economist was Dennis Carlton, who until recently also served as the Deputy Assistant Attorney General for Economics at the Antitrust Division.

The Commission had three years and almost \$4 million to select issues and then study and report on them.² All of the Commission's hearings and deliberations were held in the sunshine. The Commission received 192 comments from 126 persons or organizations, held 18 hearings over 13 days, took testimony from 120 witnesses, and generated almost 2,500 pages of transcripts.³ At the end of the process, the Commission produced a Report and Recommendations, numbering 377 pages, excluding appendices and the separate statements of several commissioners.

The Commission presented 80 conclusions and recommendations covering the waterfront of antitrust enforcement. Ninety-six percent of those recommendations garnered support from at

² Thanks go to the Commission's talented Executive Director and General Counsel, Andrew Heimert, who enabled the Commission to complete its work on time and under budget.

³ All of these materials are available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

least nine commissioners. About 57 percent were unanimous.

I won't try to drive you from your dessert plates by reviewing all of the recommendations. Let me summarize just those recommendations dealing with substantive civil enforcement under the Sherman and Clayton Acts. Let me also state that the Justice Department has not taken a position on any of the recommendations I am about to describe. My remarks about the AMC recommendations should not be taken as expressing a view of the Department of Justice.

Merger Enforcement

With respect to substantive merger enforcement, the Commission recommended there be no legislative changes to the Clayton Act or special standards adopted for specific industries. Although issues may arise from time to time concerning specific, close enforcement decisions both to challenge and not to challenge the Commission found that the basic legal standards that have been developed by the agencies and courts are sound.

However, the Commission recommended that the federal enforcement agencies continue to seek to increase understanding of the basis for, and efficacy of, merger enforcement policy. Specifically, the Commission urged the agencies to conduct or commission further study of the economic foundations for merger enforcement policy, including the relationship between market performance and market concentration and other market characteristics. The Commission also recommended increased retrospective study of the effects of decisions to challenge or not challenge specific transactions.

These recommendations were unanimous. In the Commission’s view, although such empirical evidence would be difficult to gather and perhaps even more difficult to interpret, it nevertheless would provide a better basis for an informed and effective merger policy than relying on subjective impressions or statistical comparisons of the number of merger enforcement challenges brought from year to year. In addition to the dubious value of this latter sort of “data,” its use can tend to politicize antitrust enforcement, and such politicization could pose a substantial long-run risk to an effective antitrust policy. In fact, I consider a true value of the Antitrust Modernization Commission’s work to be the way that it left politics out of antitrust.

The Commission also made three specific recommendations regarding the treatment of efficiencies in merger review.

First, the Commission recommended that the DOJ and FTC should increase the weight they give to fixed-cost efficiencies, such as R&D related costs, in innovation-driven industries where marginal costs are low relative to typical prices.

Second, the Commission recommended that the agencies should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the merging firms to increase innovation.

Third, the Commission recommended that the agencies should be flexible in adjusting the two-year time horizon for entry where appropriate, to account for innovation that may change competitive conditions.

Each of these three recommendations was unanimous.

Single Firm Conduct

With respect to single firm exclusionary conduct, the Commission similarly recommended that there was no need to revise Section 2 of the Sherman Act. The Commission concluded that standards currently employed by the courts are generally appropriate. Additional clarity in regard to issues such as bundling and when a firm has a duty to deal with rivals would best be achieved through continued evolution of the law in the courts, rather than through legislation. The Commission recommended continued research and public discourse to aid the development of a consensus. These recommendations were unanimous.

The Commission went further to opine in two specific areas. First, a unanimous Commission agreed with the U.S. Supreme Court in *Trinko*⁴ that firms have no general duty to deal with rivals in the same market.⁵ *Trinko* characterized the Court's prior decisions in *Aspen Skiing*⁶ and *Otter Tail*⁷ as "limited exemptions" to this general principle.⁸ The Commission's report observes that, although *Trinko* provided some guidance as to the circumstances when liability might apply, that guidance is "far from definitive." The business community would

⁴ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁵ Commissioners Jacobson and Shenefield joined the recommendation with qualifications.

⁶ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁷ *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

⁸ 540 U.S. at 414.

benefit from greater clarity from the courts on how to avoid antitrust liability for refusing to deal with a rival.

Second, the Commission proposed a three-part test for determining whether bundled discounts or rebates violate Section 2. Commissioner Carlton and I joined the recommendation with reservations, which are expressed in the separate statement of Commissioner Carlton.

Under the AMC's proposed test, in addition to the traditional requirements of Section 2, to prove a violation, a plaintiff would have to show (1) that after allocating all discounts or rebates attributable to the bundle to the non-monopoly product, the price of that product was below the defendant's incremental cost to produce it; (2) that the defendant is likely to recoup short-term losses incurred as a result of offering the rebate or discount by charging a monopoly price for the previously non-monopolized product; and (3) that the discount or rebate has had, or is likely to have, an anticompetitive effect. (For the purpose of discussion, I will assume that the seller alleged to have engaged in illegal bundling or mixed rebates already possesses market power with respect to one product Product A and is alleged to be "leveraging" that power to exclude competition with respect to a second product Product B as to which it did not possess market power prior to employing its allegedly unlawful discounting practices.)

The first prong of the AMC's proposed test is designed to ensure that bundled discounts would be subject to scrutiny under Section 2 only if they could exclude an equally efficient competitor. It is also intended that this first screen would serve as a relatively easy-to-administer "safe harbor." The second and third prongs of the AMC's proposed test are intended to further

screen out discounts that fail the first prong screen but are not exclusionary.

The overall objective of the Commission's proposed test is to identify non-efficient, predatory conduct that will diminish the welfare of consumers of Product B by excluding competitors that supply it in competition with the defendant. The proposed test is also intended to be sufficiently clear and administrable that firms can determine with reasonable certainty when their discounting practices could cross the liability line. The test is designed to avoid unduly chilling the kind of vigorous competition the antitrust laws are intended to promote.

The Commission's proposed three-part test is not perfect, or perfectly articulated, and it has been subject to thoughtful critique.⁹ For example, it seems clear that the first prong's screen would likely catch bundled discounts that are used to price discriminate among buyers of Product A, but are not exclusionary with respect to Product B. In the case of single-product discounts, it is reasonable to suspect that pricing below marginal cost might reflect a predatory strategy and to go on to examine the prospects for recoupment. In the case of bundled discounting, however, there may be non-predatory reasons why pricing would not pass the first screen of the Commission's proposed test. As Dennis Carlton has explained, bundling can simply be a profitable way to distinguish consumers of Product A according to the value they place on consuming Product A alone or with Product B.¹⁰ As a result, the AMC test may provide relatively little "safe harbor" protection at all, subjecting a good deal of competitively

⁹ See, e.g., Dennis Carlton and Michael Waldman, *Safe Harbors for Quantity Discounts and Bundling* (Jan. 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089202.

¹⁰ See *id.* at 6.

inconsequential bundling to a complex rule of reason analysis insufficiently calibrated to the competitive effects we are trying to address. There has also been substantial confusion about the Commission's requirement of recoupment, which was rejected by the Ninth Circuit in the *PeaceHealth* decision.¹¹

In my view, the Commission's recommendation is best regarded as a basis for further discussion. The key take-away should be the last statement in the Commission's report, that the Commission "encourages additional empirical economic research in this area" to improve understanding of the likely competitive effects of bundled discounts in a variety of settings.¹²

Other Commission Recommendations

There are many more, and more ambitious, Commission recommendations, some of which would require Congressional action, such as reform of indirect purchaser litigation; reform of rules relating to joint and several liability, contribution, and claim reduction; the elimination of statutory immunities and exemptions; and repeal of the Robinson-Patman Act. While these legislative reforms would be difficult to achieve, and did not all garner the unanimous consensus on the Commission, they nevertheless merit serious consideration.

¹¹ See *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 921 n.21 (9th Cir. 2007).

¹² Bundling is scheduled to be a topic of discussion at the OECD meeting in June. See Submission of the United States to Working Party No. 3 on Co-operation and Enforcement, Organisation for Economic Co-operation and Development Competition Committee, "Roundtable on Bundled and Loyalty Discounts and Rebates" (June 10, 2008), available at <http://www.usdoj.gov/atr/public/international/234014.pdf>. Assistant Attorney General Thomas O. Barnett chairs Working Party No. 3 of the OECD's Competition Committee.

With respect to indirect purchaser litigation, in particular, the Commission found that the current system of state and federal actions is so problematic that reform that brings the states on board should very seriously be considered. The Commission perceived that reform would benefit all stakeholders.

Under the current system, whether a consumer or other indirect purchaser can recover for overcharges imposed under a nationwide conspiracy depends on the state in which the consumer lives. That does not make sense.

On the other hand, defendants should be able to litigate in a single forum, rather than run the risk of different results in different fora. Today, if a defendant prevails in one state court, it cannot use this judgment as a shield in subsequent litigation in another state court. Instead, plaintiffs can continue to try to obtain a contrary result.

Litigation in a single forum addressing the claims of all allegedly injured consumers would be more efficient, enabling quicker resolution to cases and putting more money in the pockets of consumers where they have suffered antitrust injury. Yet, this kind of ambitious reform needs motivated champions to help move it through Congress, and it is not clear whether those champions exist.

CONCLUSION

Thank you for allowing me to take your time this evening. Conferences like this one are a tremendous opportunity to share ideas and advance the development of sound and effective antitrust policy.