Federal Trade Commission

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The views expressed are those of the Chairman and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Good morning. I am pleased to be here today. When I spoke before this group a year ago, I expressed three primary goals:

1. To secure public confidence in the Federal Trade Commission as a vigorous law enforcement agency;

2. To eliminate the appearance of a confrontational attitude toward Congress, the states, the legal community, and other public interest constituencies concerned with the work of the FTC; and

3. To attempt to halt the decline in resources at the Federal Trade Commission, and to make the FTC operate more efficiently to accomplish its statutory mission.

These goals are clearly interdependent and ultimately depend on our rationally and vigorously enforcing the antitrust laws, in ways that both benefit consumers and make economic sense. I think we have made significant progress in achieving these goals and I am proud of our work. Of course, none of this would have been possible without the dedication and cooperation of my colleagues on the Commission and at the Department of Justice, the hard work of our excellent staff of economists and lawyers -- and the assistance of the outside bar. I should note at this point that all of my remarks reflect my own views and not necessarily those of other Commissioners or the Commission as a whole.

Before I turn to the specifics of what has been accomplished over the last year, however, I want to mention briefly what we have done with respect to halting the budget decline and improving our relations with the states.

We were successful in our effort to halt the decline in budget authority that had steadily occurred in the past decade; in fact, we actually experienced a moderate increase in resources last year. We were able to protect that increase in spite of the budget planning nightmare that accompanied an appropriation that made us dependent upon the collection of HSR filing fees for approximately 25% of our budget. Under this newly instituted procedure, we found ourselves living, in a budget sense, from week-to-week as we tried to project widely fluctuating filing fees into a cogent operating plan.

For this year, FY 91, our appropriation is slightly more that $74 million, an increase of nearly $4 million over last year's operating level. While this increase is less than we had hoped, it will permit us to consolidate the gains from last year, and possibly, to increase them slightly. Equally important, however, this year's appropriation establishes a fixed budget level against which the Commission can develop an operating plan, independent of the amount of fees actually collected. This will provide for a significant improvement in our budget stability over last year.

We have made great efforts to improve our cooperation with the states, and I think we have been successful. We are working to implement mechanisms that will promote an efficient handling of various matters that arise. Of course, there are different constraints on our ability to share Hart-Scott-Rodino information as compared with other information. The establishment of the Executive Working Group for Antitrust, which consists of representatives of the FTC, the Department of Justice and the National Association of Attorneys General, has been an important vehicle for open discussion and airing of views. From those discussions, we are working to share information with the states more easily. Bureau of Economics staff assisted in an investigation in which the Colorado Attorney General charged the Colorado Union of Physicians and Surgeons ("CUPS") with engaging in price-fixing and group boycotts, and rejected CUPS' claim that it was a bona fide labor union. The settlement bars CUPS from bargaining with hospitals and insurance companies on behalf of private physicians. We have referred a variety of cases to Florida, Pennsylvania and Maryland, among others.

Because there occasionally is no sharp distinction separating the appropriate roles of the federal and state governments, close liaison is essential. Our regional offices have played a pivotal role in this effort. They have referred some cases to the states where it appears the impact of the

practice in question is strictly within one state. Conversely, states have referred matters to the Commission if the activity has broader regional or national impact. I am pleased with these developments and think they will lead to a greater overall level of antitrust enforcement and increased benefits for consumers.

I also want to note that our relationship with the Department of Justice has been a positive one and I have enjoyed working with Jim Rill immensely over the last year. The liaison agreement is operating better than it has in years and we have been working closely on matters that are not case specific, such as technical assistance to Eastern Europe. Indeed, the agencies recently participated in a Practicing Law Institute program on antitrust consisting solely of representatives of the two agencies. It was a standing-room only, turn-away crowd, and is likely to be repeated next year.

Let me now turn to a number of specific cases to provide you with a flavor of what we have done over the past year. Of course, many of the new initiatives we have undertaken are on-going and not yet visible. We have tried, however, to let the antitrust bar and the business community know what our concerns are to enable them to make rational decisions with knowledge of where they might go astray.

Mergers

As always, merger work, because of the statutory mandate under HSR and the attendant time deadlines, is a primary focus of our efforts. This year we took 20 enforcement actions in merger cases compared to 14 last year, despite a nearly 20% decrease in filings. Action has been taken with respect to transactions involving hospitals, food manufacturing inputs, automobile parts, rug cleaners and medical products, among other industries.

Far more important than the mere numbers, however, is what our merger actions mean for consumers. Our goal, of course, is not action for its own sake, but to protect consumers from the negative consequences of anticompetitive mergers in ways that make sense economically. Although it is frequently difficult to determine what would have happened if a transaction had not been challenged, we can sometimes see identifiable consequences of our actions.

In IMO Industries,[1] the Commission successfully won a preliminary injunction against IMO's proposed acquisition of Optic-Electronic Corp., and the transaction was abandoned. At issue were certain image intensifier tubes used by the Department of Defense in night vision devices. The Department of Defense indicated that if the acquisition proceeded, it expected to pay

[1] FTC v. Imo Industries, Inc. and Optic-Electronic Corporation, Civ. Act. No. 89-2955 (D.D.C. Nov. 22, 1989).

about $1450 per tube. We have since learned that IMO won the three year contract with a bid price of $950 per tube. Thus, our challenge to the acquisition may have saved the Department of Defense close to $22.5 million.

In another matter, after the acquiring company announced its planned acquisition of its primary competitor, it announced significant price increases and contrary to its prior practice refused to negotiate lower than list prices with customers. Following the Commission's vote to seek an injunction against the acquisition, the parties abandoned the transaction. Immediately thereafter, the acquiring company's salesmen began once again to negotiate with customers and to quote below list prices.

Recently, the Commission has accepted consents in two cases involving potential competition. In ARCO/Union Carbide,[2] the Commission authorized seeking an injunction rescinding ARCO's acquisition of certain Union Carbide assets. Along with finding that the acquisition could substantially reduce actual competition in two products, the Commission unanimously charged that the transaction could reduce potential competition in a third product, propylene oxide, the basic feedstock for the production of the two other products. There are only two US producers of "PO", and the complaint alleges that the acquisition

[2] Atlantic Richfield Co./Union Carbide Corp., No. 901-0010 (consent placed on public record Sept. 7, 1990).

prevented the likely entry of a third producer. The consent agreement prohibits ARCO from suing a potential entrant for its continued development and commercialization of PO technology.

In Roche/Genentech,[3] the Commission approved a consent with respect to certain pharmaceutical assets because the acquisition was likely to eliminate actual and potential competition in the markets at issue. The interesting thing to note in this case was that for some markets, neither company was an actual participant, but was believed by a majority of the Commissioners to be likely to enter shortly -- a dual potential entrant situation, if you will. Naturally, individual Commissioners may differ as to whether the specific facts in a case support a potential competition case. However, the lesson to be learned from Arco and Roche is that the Bureau of Competition is on the look-out for other good potential competition cases, and they will be brought in appropriate circumstances.

Although the Commission has authorized a number of preliminary injunctions -- 7 to date, it is always amenable to accepting a consent order that solves the particular anticompetitive problem identified. In some cases, a traditional divestiture of the acquired company's overlapping assets may solve the competitive problem. In others, we may have to require

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[3] Roche Holding Ltd./Genentech, Inc., No. 901-0072 (consent placed on public record Sept. 7, 1990).

more, or at least a more creative remedy. In one case,[4] the Commission accepted the divestiture of the acquiring company's business. In another case,[5] where there was concern that divestiture of a plant would not by itself be enough to maintain a competitive market, the Commission required the divestiture of know-how, customer lists, trade names and other information. In designing our remedies we recognize the procompetitive aspects of mergers and are attempting to take only the action necessary to prevent any anticompetitive consequences.

While we are investigating more mergers, we are also undertaking measures to minimize the burden placed on parties. Where there appears to be a key issue that is sufficient to establish that the acquisition is not anticompetitive, the Bureau is experimenting with a "quick look" approach. We will focus the investigation on the key issue and invite the parties to address this issue first, rather than submitting a full response. If staff is convinced on the key issue, they will not require further compliance and will recommend early termination of the waiting period.

In one case, the question concerned the product market. If defined broadly, there was no competitive concern. The parties

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[4] Reckitt & Colman, plc/American Home Products Corp., No. 901-0096 (Sept. 26, 1990).

[5] Emerson Electric Co./McGill Manufacturing Co., No. 901-0009 (June 22, 1990).

turned over documents relevant to that issue as an initial matter. The parties' studies of consumer preferences, marketing documents and competitive decisions all pointed to a broad product market that included the substitute in question. Staff has also used the quick look in analyzing the relevant geographic market, ease of entry, the existence of potential competition and the failing firm defense.

Another development on the merger front has been the increased attention to non-HSR mergers given by our regional offices. Many times smaller, more local mergers come to the attention of our regional staff, who have begun pursuing those. Often we learn of these transactions before they are consummated and staff is able to ask the parties to defer consummation until we have had a chance to conduct our investigation. Staff attempts to adhere to the deadlines used in HSR investigations so as to not unduly delay the time at which the parties can consummate.

Finally, in a closely related field, we have not relaxed our vigilance over Hart-Scott-Rodino reporting requirements. In the Arco case I mentioned earlier, each party also agreed to pay $1 million in civil penalties to settle charges that it had failed to report the acquisition to the government in a timely manner. The Department of Justice, with our cooperation, is enforcing a number of § 7A violations.

Non-merger Matters

On the non-merger front, we have been equally busy, taking 9 enforcement actions this year and opening nearly twice as many investigations as we did last year. The Bureau has also established a task force to focus solely on non-merger cases, and the regional offices have been increasing the amount of competition work they do. The ABA's Kirkpatrick II report noted the FTC's special role in investigating these cases because of our ability to devote substantial time to cases involving complicated economic questions.

A primary focus continues to be horizontal restraints, since this is the area in which we are most likely to find obvious anticompetitive effects. Indeed, many of the actions we have taken this year involve horizontal agreements. The one you are probably most familiar with is the administrative complaint issued against the College Football Association and ABC[6] for allegedly restricting competition in the marketing of college football games. Because this is in the administrative arena, I cannot discuss further details of that case; I refer you all to the press release and complaint for as much further information as is publicly available at this time.

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[6] College Football Association/Capital Cities-ABC Inc., D. 9242 (Sept. 5, 1990).

In another horizontal restraints case,[7] we obtained consents from several New York pharmaceutical societies charged with illegally boycotting a state insurance plan. The complaints charged that members of the societies agreed to refuse to participate in a new reimbursement plan at the proposed level. The harm alleged was that these actions injured consumers by reducing price competition, coercing the state into raising the prices paid to pharmacies and forcing the state to pay substantial additional sums for prescription drugs under its insurance plan.

The consent accepted by the Commission is particularly interesting, because it contained not only cease-and-desist provisions, but "fencing in" provisions to further prevent anticompetitive behavior in the future. Along with committing not to enter into any agreement to refuse to participate in any reimbursement plan, the societies agreed, for 10 years, not to communicate to any pharmacist or pharmacy firm any information concerning any other pharmacy firm's intention with respect to participating in any plan. They also agreed, for 8 years, not to provide comments or advice to any pharmacist or pharmacy firm on

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[7] Pharmaceutical Society of the State of New York, Inc. ("PSSNY"), Long Island Pharmaceutical Society, Inc., the Pharmaceutical Society of Orange County, Inc., and Westchester County Pharmaceutical Society Inc., File No. 861-0134 (July 9, 1990); Empire State Pharmaceutical Society, Inc., D. 9238 (accepted for public comment Oct. 3, 1990); Capital Area Pharmaceutical Society and Alan Kadish, the former President of PSSNY, D. 9239 (accepted for public comment Oct. 3, 1990).

the desirability or appropriateness of participating in any existing or proposed plan. Thus the tools of tacit collusion have been declared "off-limits" to alleged conspirators. This case should signal to Commission watchers that the agency is prepared to consider collusion cases in which there is no explicit evidence of agreement.

The Bureau of Competition is currently investigating a variety of non-merger matters. We have heard allegations of behavior by infant formula manufacturers -- such as frequent, substantial and parallel price increases -- that may cause antitrust concern. The Bureau is examining whether the industry characteristics facilitate pricing above a competitive level. Another investigation is focusing on allegations that a producer of a major consumer product may have, through practices and contracts, acted to raise barriers to competition. In other matters, we are pursuing claims that competitors have invited other firms to agree on prices or have shared sensitive price information in the context of merger negotiations. These are interesting issues which often raise complex legal and economic questions and we cannot yet predict what will come of our inquiries. This list, however, indicates the wide range of activities we are looking into.

Just as with mergers, there are examples of Commission activity in non-merger arenas we have not seen for some time.

For the first time in 10 years, the Commission issued a consent order involving a tying arrangement.[8] Tying cases require careful economic analysis because tying only makes sense when monopoly profits are otherwise unattainable. After all, most monopolists can simply charge a high price for the product they make, and do not need to assume the expense of forcing consumers to buy a tied product they may not want. The complaint charged that a physician illegally required doctors seeking to use his out-patient kidney dialysis services to use his in-patient dialysis facilities as well. The physician allegedly has market power with respect to out-patient services, but is not able to exploit it directly because Medicare limits the amount of reimbursement available for that service. Medicare does not, however, regulate reimbursement for in-patient dialysis. The physician, therefore, apparently adopted the tying arrangement to circumvent Medicare's price regulation and charge supracompetitive prices for the tied in-patient services.

The Commission also addressed certain aspects of the Robinson-Patman Act by adopting changes in the Fred Meyer guides. These are intended to provide the public with the Commission's views concerning the requirements of Sections 2(d) and (e) of the Robinson-Patman Act, which govern the provision of advertising and promotional allowances and services. The revisions are designed to reflect developments in the law since the Guides were

[8] Gerald S. Friedman, No. 861-0072 (June 18, 1990).

issued in 1972. First, the revisions make clear that the allowances and services that are subject to these sections of the statute must be provided in connection with the customer's resale of the product, if not the original sale to the customer. Second, the revisions clarify the standards that will be used to determine whether allowances or services are offered to all competing customers on proportionally equal terms, a central requirement under Sections 2(d) and (e). As revised, the Guides recognize two ways of measuring proportional equality. One way is based on the customer's cost -- for example, placing newspaper advertisements in connection with the resale of products for which advertising allowances are provided. The other way is based on the seller's cost. For example, offering an equal amount of allowances or services per unit of sales satisfies the proportional equality requirement.

Although we have not been granted additional resources, we intend to continue, as resources permit, our active enforcement in the merger and non-merger areas. In the non-merger area, we will continue to concentrate our efforts on traditional areas: horizontal restraints, vertical price and non-price restraints, predatory pricing and price discrimination. We hope that increased resources will also allow us to further pursue the less traditional non-merger areas that the Kirkpatrick II report isolated: facilitating practices, collusion that does not rise to the level of price-fixing and non-price predation. Although we

do not know where these inquiries will lead us, we intend to pursue those cases that are based on sound economic principles and will benefit consumers.

We pursue competition policy through mechanisms other than investigations. Our Consumer and Competition Advocacy program provides, upon request, analyses of competition issues to other federal agencies and to state and local legislative and policymaking bodies. Most recently, for example, in response to a request from the Illinois Commerce Commission, the FTC staff commented on the regulation of intrastate telecommunications services noting that economic theory and empirical evidence indicated that price cap regulation of telecommunications services would likely be preferable to the more traditional rate-of-return regulatory format, especially for those services where competition exists. In addition, the staff has commented on issues involving entry restraints. For example, staff noted that allowing additional entry into the intrastate trucking business in Tennessee and into cable TV markets in Ohio would likely benefit consumers in those states. The staff has also commented on vertical restraints issues at the Federal Communications Commission on TV network ownership of rights to programming, vertical restrictions on the distribution of power equipment in Alabama, and on the distribution of gasoline in Virginia. In addition, the staff analyzed the likely effects of state antitakeover laws in several states, most recently Pennsylvania.

As you can see, our Competition Advocacy program covers the same broad range of issues that we address in our casework.

Technical Assistance to Foreign Nations

Before I leave you today, I want to talk about one final area of our antitrust activities, one which I think has enormous utility, but which none of us could have contemplated a year ago a joint venture with the Department of Justice to provide technical assistance to Eastern European countries. We have had discussions on antitrust issues with other nations in the past and have done so this year with government officials from Canada, Japan, Korea, and the European Community. Because of this year's developments in Eastern Europe, we are now being called upon to share our learning and experience with many countries in that region of the world.

I believe these efforts are important because harmonization of competition rules is an extremely worthwhile endeavor. Competitive decisions and strategies of firms must sensibly be guided by the antitrust laws of the countries where they do business. When those laws differ, firms will face at a minimum the costs of discovering the differences and adjusting their behavior, and may well run the added risk of penalties if their adjustments are found to be insufficient. When the laws are unwise or non-existent, the markets may be constrained or distorted in ways that impede efficient trading and production.

The new governments in Eastern Europe now face a daunting challenge: to create economies that can satisfy the needs of their people and compete successfully in world markets. For most of them, privatization of state-owned enterprises and the decontrol of prices are seen as central to the overall goal of promoting free markets. Of course, privatization without competition will create only private monopolies and the officials we have spoken with are sensitive to the need to establish entities able to compete and rules to guarantee that they do so.

To date, the FTC and the DOJ personnel have had numerous meetings with officials from these countries. Several senior members of the Bureaus of Competition and Economics, as well as the Commission's Executive Director, as part of a joint DOJ/FTC training group have spent time in these countries discussing economic and legal theory, specific cases and investigations and the nuts and bolts of setting up and operating an antitrust agency.

It has truly been an honor for me to be involved in these efforts. I would not have believed a short year ago that the antitrust agencies would be asked for technical assistance regarding antitrust laws for the Soviet Union, Poland and Czechoslovakia. I hope that we can continue to be of help to them.

Conclusion

Over the past year, we have worked hard to make reality the message that antitrust enforcement is alive and well. I think our actions over the year have given us a record of which we can be proud. Many of the initiatives we have begun in the past year will become visible in the months to come. We intend to continue pursuing antitrust violations we learn of in ways that are rational and benefit consumers.