

Before beginning, I note that my remarks do not necessarily reflect the policy or views of the Commission, or any individual Commissioner.

A revolution in antitrust and consumer protection law began fifty years ago. The foundation of that revolution was the recommendation of President Johnson's Task Force on Antitrust Policy that the antitrust laws be used and strengthened so as to affect a significant restructuring of the American Economy. The Task Force Report, completed in July 1968 and made public in May 1969, found that "highly concentrated industries represent a significant segment of the American economy."

In support of “effective antitrust”, the Task Force recommended legislation to give antitrust enforcement authorities a “clear mandate to use established techniques of divestiture to reduce concentration in industries where monopoly power [was] shared by a few very large firms.” The Task Force also recommended legislation that would prohibit mergers in which a “very large firm” acquires one of the “leading firms in a concentrated industry.” The Task Force recognized that the primary impact of the legislation would be on “diversification” or “conglomerate” mergers and explained that the basis for this recommendation was their understanding that Section 7 of the Clayton Act was not effective against mergers where the detection of adverse effects would depend on “factual and theoretical judgements” that “are highly speculative.”

The spark of the revolution was two reports that concluded that the FTC was failing in its mission to protect consumers and maintain competitive markets. The Nader Report on the Federal Trade Commission, the summer work project of a small handful of law students, criticized the Commission's consumer protection program – although some practitioners and agency officials found the report's findings unfair, they also recognized the criticisms as “nothing new.”

The Kirkpatrick Report – more formally the 1969 Report of the American Bar Association Commission to Study the Federal Trade Commission – published fifty years ago this coming Sunday (September 15) – heavily criticized the agency’s application of its antitrust and consumer protection authority. It found that the agency largely pursued trivial matters, and, absent a radical change and significant redirection, believed Congressional action to shutter and replace the agency was warranted.

In response, the FTC began a decade long effort to deconcentrate significant sectors of the U.S. economy, and to expand significantly its industry wide consumer protection trade rules.

Bill Kovacic identifies a partial list of the firms and industries caught up in the FTC's monopolization and attempted monopolization claims and industry restructuring efforts:

Exxon, Mobil, Chevron, Amoco, Gulf, Atlantic Richfield, Shell, Texaco; Borden, Coca-Cola, Pepsi-Cola, Crush, Seven-Up; IT&T, General Foods, Kellogg, General Mills, Sunkist; the American Medical Association; Levi Strauss; Boise Cascade, Weyerhaeuser; General Motors; Boeing, Lockheed, McDonnell Douglas; Xerox; Hertz, Avis, and National Car Rental.

Also in response to the ABA and Nader questions of its vigor and utility, the FTC completed six major consumer protection trade regulation rules between 1969 and 1977, and, in the period 1973-1976, had proposed and had pending an additional 16 such rules. The appointment of Michael Pertschuk as Chairman in 1977 added a boost to the FTC's expansive use of its antitrust and consumer protection authority. Pertschuk wanted to use the Commission's authority to restructure the economy "into line with the nation's democratic political and social ideals" on issues such as "social and environmental harms" including "resource depletion, energy waste, environmental contamination, worker alienation, and the psychological and social consequences of marketing-stimulated demands."

By the early 1980s, the revolution had run its course, with the agency having very little to show for its efforts to restructure the U.S. economy and better oversee consumers and firms market interactions. Starting with the Reagan administration, the FTC, across politically different administrations, has pursued a sharply more defined and restrained antitrust and consumer protection mission.

However, fifty years later, there is a strong body of interested and informed or important opinion that challenges the enforcement choices and performance of the Commission and the Department of the last 20-40 years – Republican and Democratic administrations alike. This opinion advocates for a program of antitrust enforcement that would, among other things:

- (i) more aggressively investigate, challenge, and reverse the conduct and transactions of significant and otherwise successful tech firms;
- (ii) undertake a review and restructuring of the investment choices of the multi-trillion dollar investment industry;
- (iii) increase, substantially, legal challenges to vertical integration by acquisition, and break-up or prevent certain firms from being both vertically integrated and a supplier of services to competitors;
- (iv) prevent or in some cases bar the acquisition of relatively small but growing firms on the speculative concern that such acquisitions eliminate unique and significant competitive threats to the acquiring firm;
- (v) address concerns about economic mobility, and income and wealth disparities through the prohibition of firm expansion, organically or through acquisition;



- (vi) limit the amount of personal information collected and retained by firms; and,
- (vii) take account of the alleged power of large corporations to impact legislation, regulation, and political outcomes.

If you are familiar with our hearings, you know we sought comment on whether current antitrust and consumer protection law and doctrine could effectuate such a program, and how to best exercise antitrust law in response to concerns of novel forms of anticompetitive conduct, anticompetitive transactions, and allegedly diminished competitiveness of U.S. markets.

If we are to revisit issues from four and five decades ago, it seemed sensible to determine what we could learn from that experience. In the footnotes of these remarks I cite to published works of Bill Kovacic, Tim Muris, Bob Pitofsky – all former Chairman -- and Robert Katzmann, now Chief Judge of the U.S. Court of Appeals, 2<sup>nd</sup> Circuit – that recount the history of, and also analyze, the FTC’s activities during the 1970s. A review of those works, and some others – including the 1980 Report of the ABA’s Antitrust Section Concerning Federal Trade Commission Structures, Powers and Procedures – was instructive.

What stood out was not the breadth of the FTC actions but the near unanimous agreement that the agency embarked upon its efforts to reshape whole industries without a clear framework of what it was looking for and how it would analyze what it found. For example, Bob Pitofsky concluded that “*[i]ndustry-wide investigations and cases were initiated under section 2 with no clear theory of what constituted monopolizing behavior.*” Jim Liebeler, a former head of the FTC’s Office of Policy Planning and Evaluation, wrote similarly: “*most industry-wide matters have been instituted without any clear articulation of a theory of how successful prosecution of the case will improve economic welfare.*” Such conclusions are common to the literature evaluating the FTC’s antitrust and consumer protection program in the 1970s.

I note that a troubling new narrative is beginning to be advanced – that the antitrust challenges, while not successful, were important to changing the behavior of the targeted firms such that new firms could enter and make markets more competitive. A good example of this is Professor Tim Wu’s discussion of the Department of Justice’s unsuccessful 13-year prosecution of antitrust claims against IBM: that it changed IBM’s behavior sufficiently to allow the entry of new firms into its markets, thus accomplishing what a successful prosecution would have achieved. As a rationale for the filing of an antitrust complaint this strikes me as an abuse of prosecutorial power. I think if it came from someone other than the always amiable and provocative Professor Wu we would immediately recognize it as a highly problematic rationale for initiating and continuing an investigation.

No Clear Theory. Without Any Clear Articulation of a Theory. Proceeding as such today is, to me, inconsistent with stewardship of the Commission's resources, and the public good. It is neither good government nor good enforcement policy and of course raises concerns about what opportunities were and would be lost through the misallocation of Commission resources.

The antitrust law enforcement entities – the Commission, the Department and Antitrust Division, and the States – are at or just off the starting blocks of a series of significant single firm conduct investigations. There also appears to be a material percentage of the Congress interested in revamping existing antitrust law to accomplish both the de-concentration goals of the 1960s and 1970s and broader current societal and political objectives.

In this situation, it seemed to us that the most beneficial next step in our Competition and Consumer Protection Hearings is the articulation and publication of a clear analytical framework for the evaluation of:

- (i) unilateral conduct by allegedly dominant technology platforms;
- (ii) vertical integration through acquisition or merger;
- (iii) certain horizontal merger transactions;
- (iv) whether common ownership has been shown to have anticompetitive effects;
- (v) the authority and limitations on the authority of the FTC to identify and prohibit or remedy anticompetitive and unfair or deceptive acts or practices within the broadband industry; and,

- (vi) the consumer welfare standard and alternatives to the consumer welfare standard, as an organizing principle of antitrust analysis.

This effort will help us identify areas where the case law could be clarified or improved to allow for more certain and successful challenge to anticompetitive or unfair conduct. The Commission can achieve that clarification or improvement through its own case selection and amicus participation – the development of the common law – or through a request or support for legislative action. It may also strengthen the basis and direction of ongoing or future investigations of dominant firm conduct or anticompetitive mergers, through the development of the case law and agency practice.



Our models for this type of output are the Guidelines and Commentary the agencies have periodically issued (and updated) in the areas of horizontal mergers, competitor collaborations, and intellectual property rights, and Statements the Commission has issued with respect to its unfairness and deception authority, and its application of its statement on unfair methods of competition.

In addition, OPP, in conjunction with the Bureau of Economics, is reviewing the economic literature that supports arguments for a more expansive and structure based antitrust enforcement regime. Our intention is to advise on whether this research provides sufficient or strong support for a significantly broader and expansive commitment of resources to antitrust enforcement in general and to certain industries or practices in particular.

In that spirit, here is what we are working on, initially for Commission review and consideration.

Our highest priority is to complete and release a guidance document on the application of the antitrust laws to conduct by technology platforms. These guidelines will be similar in form, structure to and purpose of the [Competitor Collaboration Guidelines](#). If we are successful, this document will identify an analytic framework for identifying, evaluating and remedying conduct by dominant technology platform companies. It will help us, and the Commission, and interested parties, understand better whether there are limitations in antitrust law that prevent the agencies from prohibiting or successfully remedying anticompetitive or unfair conduct.

It will support, if appropriate, efforts by the Commission to further develop the law through case selection and amicus participation. The executive and legislative branch may find this document helpful as each considers whether new laws or new regulations with respect to single firm conduct by large tech platforms is appropriate and necessary to help maintain or create competitive markets. The hurdle, of course, is whether we can articulate a framework for evaluating single-firm conduct in this area, in the same way the CCGs did so for competitor collaborations.

We did hear some concern that we do not have much experience applying the antitrust laws to platforms. I think that is incorrect. Two-sided markets are not new to antitrust. And there are significant guideposts in Section 2 law and Section 5 law that we can apply. (The document will also discuss the application of Section 1.)

We also heard that such a document might make it more difficult to advance a theory of harm or an interpretation of law helpful to our case but that we did not advance or that we dismissed in the guidance document. This is a legitimate concern – but open-ended law enforcement or application of vague or speculative theories is not usually good practice; this, I think, is what Pitofsky and Leibler were in part referring to in the quotes I referenced earlier. The collective intellectual effort to define a framework and the manner in which that framework will be applied will strengthen our investigation and prosecution of conduct and transaction claims.

This document is an enforcement document – it is intended to support the immediate and long-term enforcement efforts of the Commission – much like the Horizontal Merger Guidelines, the Intellectual Property Guidelines, and the Competitor Collaboration Guidelines do by stating the Commission’s enforcement intentions, lay out the analytic framework but do not fix, as static, the application of the framework and allow for changes through updates and revisions and also through the development of agency practice and case law.

I do not want to discuss the substance of this document yet but do want to note the following:

OPP believes it is necessary for the Commission (and courts) to start with a careful evaluation of the effect of conduct under review, not its label. Characterizing a platform as an “essential facility” or a platform’s conduct as “an exclusive deal,” a “refusal to deal,” or a “product design decision” may be helpful in identifying relevant prior case law and in identifying the appropriate legal frameworks. Such labeling should not distract from the focus of the Commission’s inquiry, which should be on whether and how the conduct affects competition -- including competition for inputs – and consumers. We want to apply our enforcement resources to find, end, and deter practices that actually restrict competition and actually injure consumers.

Proposals to regulate the operational decisions of platform companies because of competitive concerns seem to me insufficiently confident in the strength, vitality and dynamism of the federal antitrust laws and of the common law's ability to integrate new or refreshed economic concepts. This guidance document will make clear, or perhaps just clearer, whether this view is correct and whether and where the utility style regulation proposed in some quarters is appropriate or necessary.



Also well up in the queue is guidance on the analytical framework used to evaluate vertical mergers. In conjunction with staff from the Bureau of Economics and Bureau of Competition, we are drafting a “vertical merger commentary,” similar in form and purpose to the [2006 Commentary on Horizontal Merger Guidelines](#). The Antitrust Division’s litigation of the ATT/Time Warner case identified substantial misconceptions about the antitrust agencies interest in and willingness to challenge vertical mergers.

This commentary, which could serve as a substitute to, or complement to, vertical merger guidelines, is intended to articulate and explain the Commission staff's analytic framework for reviewing, analyzing and remedying what might be an anticompetitive vertical merger, and will include case examples.

Unlike the 2006 Horizontal Merger Commentary, we do not have an up-to-date set of U.S. vertical merger guidelines to structure our analysis. Thus, the structure the commentary sets out could support a path to updated and joint FTC/DOJ vertical merger guidelines. The commentary will likely include a legal overview of the application of Section 7 to mergers, a discussion of the relevance of market definition and market shares, sources of evidence, and, more substantively, theories of unilateral and coordinated harm, the treatment of efficiencies, and consideration and adoption of remedies sufficient to address competitive harms.

Whether the Commission ought to be challenging more (or fewer) vertical merger transactions is a reasonable question to ask, but this document will not take a position on that question.

Viewers of our hearing session on vertical mergers will recall that BE Director Kobayashi expressed his and the Chairman's interest in vertical merger retrospectives; the over two dozen retrospectives the Bureau has done – all available on the Commission's website – have focused on horizontal transactions. Extending the merger retrospective program to include vertical merger transactions is a significant priority for the Chair and the Director. We are also considering how best to do retrospectives that help us identify conditions or situations where we might unnecessarily block or force divestiture as a condition to clearance.

We intend to prepare an update or addendum to the 2006 Commentary on Horizontal Merger Guidelines, addressing at least the following topics:

- i. elimination of future, nascent or potential competition;
- ii. acquisitions where the concern is diminished competition for non-price attributes;
- iii. acquisitions where “data” is a key asset or output of one or both parties, or a key input to competitors of the combining firms;
- iv. buyer and monopsony power, acquired through acquisition (including but not limited to labor markets); and,
- v. acquisitions that enhance and diversify the merged firms “portfolio” of products or intellectual property rights.

These are all topics that have come up in the Commission's previous horizontal merger reviews and a clear explication of the theory of competitive harm, the framework for identifying and remedying such harm, and the incorporation of case summaries, will, we think, be useful in identifying whether existing merger law and practice can and does successfully and sufficiently take account of these concerns.

Participants at our hearing session on nascent competition made the point that the large tech firms – defined usually to include or to be limited to Alphabet, Amazon, Apple, Facebook and Microsoft – have made hundreds of acquisitions in the past decade, or half-decade; some, they postulate, must have been anticompetitive.

Whether or not tech firms do more acquisitions than non-tech firms, we do know that only a relatively small percentage of those “hundreds” of transactions triggered a Hart-Scott-Rodino filing. This may be consistent with existing law and rules – the jurisdictional thresholds may not have been met, or a rule-based exemption, or an interpretation of a rule or statutory exemption, may have exempted any particular transaction from the notification and waiting period requirements of the HSR Act.

One area of interest is the exemption that applies to acquisitions of foreign entities that exceed the Act's jurisdictional requirements but do not have sufficient nexus with the United States, as measured by the HSR rules. In the tech space, and perhaps others, where adoption and sales growth might be rapid, looking to the sales in or into the United States in the most recently completed fiscal year (or assets in the United States at the time of the transaction) may not reflect the target's future impact on U.S. commerce.



The most recent legislative changes to the HSR Act – from December 2000 -- were intended to not only eliminate notification and waiting period requirements for relatively small dollar transactions unlikely to raise competitive concerns, but capture within the Act’s notification and waiting period requirements acquisitions of companies with limited current sales and assets but that might be a competitive threat in the future. Perhaps it is time to consider whether the Commission’s current rules implementing the Act are sufficient with respect to potential future competitors. The Commission’s regulatory rule review schedule brings the HSR rules up for consideration in 2020.

We are preparing an analysis of the “consumer welfare standard” and alternatives to the consumer welfare standard, as the proper organizing principle of judicial and agency antitrust review. This analysis will include a review and evaluation of the recent literature on trends in concentration in product and labor markets and in profits and margins, as this empirical work is often cited as evidence that the consumer welfare standard is an insufficient organizing principle for maintaining competitive markets or addressing issues not clearly associated with antitrust review. This research formed the basis for many of the comments we received questioning the current and recent historical direction of antitrust enforcement.

The research has been the subject of commentary by economists familiar with antitrust analysis. It bears similarities to the Structure-Conduct-Performance research of the 1950s and 1960s, and which formed the basis for some of the FTC's industry wide cases of the 1970s. Some reviews have found the results of this empirical research, because of methodological limitations of the studies, to be insufficient to serve as a basis for a change in antitrust policy, but we are reviewing this work with fresh-eyes, and will come to our own conclusion and recommendation for the Commission.

To the extent that courts and agencies believe that application of the consumer welfare standard turns solely on, or substantially on, short-term price effects, we intend to correct this view. FTC enforcement actions do not conform to this alleged limitation and I do not think the staff views itself as acting outside the law.

Whether the consumer welfare standard is otherwise still too narrow to address all competitive harms that can be associated with business conduct or transactions is something we will consider. There was a robust discussion of this issue at our hearing session on the consumer welfare standard and we intend to take the concerns and alternative proposals expressed at that session seriously. Our recommendations and conclusions should be of interest to the judicial and legislative branches. Our conclusions may also help flesh out the Commission’s Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act.

Antitrust law recognizes that minority ownership and cross-ownership – ownership stakes in a competing company – can have anticompetitive consequences. The early empirical literature on common ownership or horizontal shareholding of airlines and banking suggests the possibility of a long-term broad drag on competitive behavior. While other empirical studies have not reached the same conclusion, determining the merits of this position, and of any proposed remedies, is a high priority for us. A few commentators have suggested the Commission use its 6(b) authority to undertake a broad study of this issue; before determining whether our resources should be so directed, we are reviewing the empirical work.

With the support of the Bureau of Economics we are preparing an OPP staff paper evaluating and analyzing the empirical and theoretical literature on horizontal shareholding and common ownership. We are taking to heart Professor Martin Schmalz's criticism at our common ownership hearing session that his work and other work finding a competitive impact of such holdings, are treated as outliers and do not reflect, in his estimation, the broad support in the economic and legal literature for these conclusions. Martin noted in his appearance at our hearing on this issue that there are dozens of papers supporting a concern about common ownership.

We are doing a deep dive into those dozens of papers – it is about sixty – to determine whether they are closely applicable to the theory, and reviewing the newest economic literature on this topic. We will advise the Commission whether this literature is sufficient to support or require broad enforcement, policy and remedial changes proponents of the competitive theory have called for.



Our addendum to the 2006 commentary on the horizontal merger guidelines may articulate the theories of harm associated from minority and cross-ownership, and from passive or active common ownership stakes, and provide an analytic framework for considering the possibility and likelihood of such harm. I hasten to add that the theories are interesting but the evidence of anticompetitive common ownership appears to be limited, to date, outside of a few empirical studies.

Our hearing session on competition and consumer protection issues in U.S. broadband markets was done in conjunction with all the bureaus of the agency and our output is going to focus on the competition and consumer protection topics discussed at the hearing session and in our questions for comment. In part, our output will update, where useful or relevant, the Commission's 2007 Broadband Connectivity Competition Policy Report. However, our focus will be on addressing the technological, consumer protection and competition oriented questions we put out for comment.

We have not yet settled on the scope of our output related to our hearing sessions and questions in two areas where competition and consumer protection concerns are intertwined: Big Data and Artificial Intelligence, including Machine Learning and Machine Based Decision making. Here, however, are a few areas of interest. Whether we should and how we would take privacy considerations into account in antitrust, especially merger, review? How should harm be defined and measured? Are the Commission's statements on unfairness, and deception, and unfair methods of competition, sufficiently flexible to address consumer and competitive harms associated with the use of data, artificial intelligence and machine learning? And, what are those harms?

In a few weeks we will be able to articulate more clearly our approach to these two topics. Similarly, we are thinking about, but have not yet settled on, the scope of our output with respect to privacy and data security.

Where there are overlaps in authority or enforcement responsibility, we are consulting with the Antitrust Division to get the benefit of their thinking and to achieve consistency in analytic frameworks.

I have laid out quite a lot here, but before closing want to make sure I note that we continue to be active in reviewing proposed state legislation and federal regulations for comment where such legislation or regulations may have anticompetitive effects or otherwise diminish protections available to consumers.

We are also working to refresh and update the 2003 Report on State Action Immunity and the 2006 Report on the Noerr-Pennington Doctrine.

In terms of future hearings, we are considering whether to update the Commission's 2002-2003 Health Care Hearings and 2004 Health Care Report and whether we have the content for a significant series of sessions on IP issues that can build on our long-term interest in whether and how IP rights affect innovation and competition. Although we are neither a healthcare agency nor an IP agency, our enforcement colleagues spend significant time analyzing conduct in such markets; there are significant synergies in periodically doing some broad-based policy work in these areas. Finally, we are finalizing the agendas for two workshops tentatively planned for this fall.

All in all, we are quite busy in OPP. I said this last year and still believe it: I have the best job in the agency. The Chairman and I are grateful for all the hard work by and the professionalism of the OPP team.