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Luncheon Address

Maureen Ohlhausen
Commissioner, U.S. Federal Trade Commission

MR. KEYTE: Commissioner Ohlhausen has agreed to give some remarks at lunch today and also will be a keynote speaker on Friday. For today, there will be some questions at the end. Maybe she’s feeling that she might have a little more freedom these days to say what’s on her mind. You never know.

As everybody knows, Commissioner Ohlhausen really has been holding, and has held, the Federal Trade Commission together during some quite interesting times and really, both analytically and in terms of enforcement, kept the FTC on-track when they were down to essentially two Commissioners.

The anecdote I have, however, which I think is in some sense even more interesting, is one of Commissioner Ohlhausen's hobbies that I learned about firsthand. When I signed up to do skeet shooting at one of these post-annual conferences, I thought: *Okay, well, that'll be fun. You get to schmooze with the Commissioner. Skeet shooting. This should be interesting.*

Of course, I show up with eight other people. The Commissioner has her own gun, her own case, her own stuff. I'm worried about killing somebody. I think Maureen proceeded to hit twenty-three of twenty-five while the rest of us were trying to hit three and not kill each other.

She's very tough in many respects. She may have — I just saw an announcement — just had a victory like five minutes ago —

MS. OHLHAUSEN: Yes.

MR. KEYTE: — that she may want to talk about.

We welcome you both for our practitioners' lunch and for speaking on Friday as well. Thank you.

MS. OHLHAUSEN: Thank you, James, for that very nice introduction, and I hope my record in court is as good as my record on the skeet shooting range, but we'll see.

It's always an honor to participate at the annual Fordham event where international enforcers from around the world share observations about their competition policies and their regimes.

As many of you know, my term as an FTC Commissioner draws to a close at the end of this month. It has been a wonderful experience, and I'm very proud of my tenure at the FTC, but as the saying goes, "All good things must come to an end."

Which leads me to my topic today, which is remedies and what we do at the end of a successful competition case. I know there has been some discussion this morning of what are the appropriate remedies, and I'll expand a little bit on what was said earlier.

There has been a lively discussion at the Commission recently about a host of issues, including remedies in both competition and consumer protection cases. Thus, I believe it's a good time for me to address several topics about competition remedies.

First, I'll talk about the purpose of remedies in a competition case; second, what we at the FTC have learned about how merger remedies are working; and third, how we've been applying that knowledge. Finally, I'll mention a recent challenge to our ability to get the remedy of injunctive relief in federal court.

Taking on the first topic, the purpose of remedies in a competition case necessarily requires an understanding of the goals of competition law itself. In the United States we believe — and I think the courts have made clear — that the government's role in competition enforcement is to safeguard and preserve competition. An important corollary to this fundamental principle is that it is not the role of antitrust to create or direct competition.

In practice, this means that competition enforcers should not intervene simply because they dislike certain market outcomes. Antitrust is about protecting the process, not guaranteeing a particular result at a particular time. Instead, we trust that markets, in which firms must endure competitive pressures, will produce favorable outcomes in terms of price, output, quality, and innovation in the long run. But if prices seem excessive or output stagnant at a point in time, we don’t use antitrust enforcement to require firms to charge less or to produce more.

In short, antitrust is not regulation. This is because, as the Supreme Court observed in the *National Society of Professional Engineers* case, “Competition is the best method of allocating resources in a free market, and even occasional exceptions to the presumed consequences of competition are not grounds for antitrust enforcement."

But this isn't to denigrate competition enforcement, which plays a vital role in overall government efforts to provide a framework in which competition can thrive. Rather, this speaks to the government's appropriate task in competition enforcement. As Milton Friedman described: "The purpose of government in a free economy is to do what markets cannot do. That is, serve as an umpire, create money, build roads and parks. The role of government is not to dictate outcomes of the market process."[1]

I agree with that description of our role as an umpire, making sure that competitors compete fairly on the merits. We shouldn't dictate outcomes, however, or pick the winner or loser of the game. But government should make sure that the sides are not agreeing to shave points, prevent better players from

[1] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

playing, or colluding to undermine the nature of the contest.

If we agree, at least for now, that the role of antitrust enforcement is to preserve competition and not to create or direct it or pursue some other goal than consumer welfare, then we have a starting point from which the government can appropriately begin to seek remedies. Because merger remedies are the most common form of competition remedies, I'll start with those.

I've long called for transparency and predictability and fairness in competition enforcement. What these principles mean in the context of merger remedies is that the parties and the public should know among other things what remedies the FTC is likely to seek to mitigate potential harm to competition from a combination of particular firms.

As this audience knows — and I think it was referenced earlier today — in the last few years there has been a robust academic debate about the efficacy of merger remedies, which previous FTC chairs have addressed at this very conference. In fact, the most recent issue of the *Antitrust Law Journal* includes the latest chapter of that discussion authored by two FTC economists, which I commend to all of you.

Although I acknowledge this larger debate, what I'd like to talk about today is what the agency has been doing to address such concerns regardless of their actual magnitude.

As one of my first actions as Acting Chairman, early last year I announced the release of the FTC's 2017 *Merger Remedies Report*. In building on the FTC's 1999 Divestiture Study, the 2017 Report provides the latest insight into the efficacy of the Commission's merger remedies. In preparing this Report, staff reviewed all of its remedial orders between 2006 and 2012, eighty-nine orders in all, variously using a case study method, questionnaires, and data.

The conclusions are heartening because they suggest that the FTC's remedies work well in most cases, and the conclusions were useful because they identify imperfections that the Commission and its staff have not only begun addressing but are implementing in reaching merger consent orders today.

An important highlight of the Report's findings is that while over 80 percent of the FTC's remedies succeeded, all of the consents containing fix-it-first structural divestitures of ongoing businesses successfully maintain competition. By comparison, divesting partial assets and hold-separate agreements were not always effective remedies. Sometimes the divested partial assets were not as competitively robust as anticipated. When competitive businesses were maintained by neutral third parties under hold-separate agreements, those businesses sometimes missed opportunities that would have made the divested asset more competitive.

FTC staff is already moving forward on improving those outcomes. Not only are we seeking more fix-it-first divestitures, but as current Bureau of Competition (BC) Director Bruce Hoffman explained recently, "Going forward, the Agency will negotiate consents to ensure that the risk of failure be placed on the parties to the merger and not the FTC." Indeed, this is already evident in some recent orders.

For example, the CRH acquisition of Ash Grove involved products of cement and aggregates — always a popular antitrust topic — such as crushed stone, gravel, sand, and similar products with operations throughout the United States. There are many competitors nationwide, but distribution of these products tends to be regional — they are heavy products — and so geographic markets tend to be smaller.

In this case there were potentially anticompetitive overlaps in Montana; Omaha, Nebraska; and eastern Kansas. As one would expect, the FTC ordered divestitures of the complete ongoing businesses' operations in these three markets to competitors around the industry. These buyers were ready to move into the ongoing operations quickly with minimal competitive disruption. But to shift the risk and preserve competition in Montana the order also guaranteed that CRH provide the buyer of the Montana assets access to certain CRH rail terminals to ensure they would be able to compete on an equal footing with the incumbent and that there wouldn't be any disruption in distribution.

The 2017 Remedy Study was also useful in formulating the order in Grifols's acquisition of Biotest. This merger involved blood plasma collection centers throughout the United States and it raised competitive concerns in three markets. The order required that the parties sell the full business operations in those three markets to a buyer that already competed in other markets. But to maintain the competitive status quo better and shift the risks, the order also required the parties to give all potentially affected employees at the divested assets sufficient financial incentives to stay with the divested assets, and this helped ensure that competition would be preserved in those three markets.

The cases I've discussed so far have involved horizontal mergers. Vertical merger challenges are less frequent, though certainly not rare, and vertical merger review is a meaningful part of FTC merger enforcement. In fact, since the year 2000 the FTC and Department of Justice have challenged twenty-two vertical mergers, which is about one per year.

That being said, vertical merger enforcement is still a small part of our merger workload, and I think this likely reflects the overall broad consensus in competition policy and economic theory that the majority of vertical mergers are beneficial because they reduce costs and increase interbrand competition.

But this doesn't mean that all vertical mergers are benign, however, and we have challenged vertical mergers on grounds such as a reduction in the likelihood of beneficial entry, anticompetitive foreclosure, or anticompetitive behavior due to information sharing about a rival. For cases where the vertical merger would benefit consumers as long as the anticompetitive effects were mitigated, the FTC has successfully developed remedies to prevent harm.

I'd like to stress that the FTC prefers structural remedies even with vertical mergers, but in some cases we believe that a behavioral or conduct remedy can prevent competitive harm while still allowing the benefits of integration to occur. For example, in our experience firewalls can prevent information sharing, and nondiscrimination clauses can eliminate incentives to disfavor rivals.

Notably, the 2017 Merger Study included four orders related to vertical mergers, and each one succeeded in maintaining competition at premerger levels. Although it's a small sample, it does suggest we have the expertise and experience to fashion conduct remedies in vertical mergers that control opportunities and incentives for anticompetitive behavior.

Our most recent example of a vertical merger remedy involved the tie-up of Northrop and Orbital ATK. Defense contractor Northrop sought to acquire Orbital ATK, which manufactures solid rocket motors. There was no horizontal product overlap. However, Orbital ATK sells solid rocket motors to Northrop and its rivals, who sell them with other products to the Department of Defense. Northrop also purchases solid rocket motors from Orbital ATK and other competitors.

When FTC staff investigated the merger, they learned that both Northrop's and Orbital ATK's competitors were concerned that the merged company would share competitively sensitive information about each other's rivals and gain an unfair advantage in both markets.

To prevent the potential competitive harm from arising we crafted an order requiring the parties to create a firewall that will prohibit Northrop and

Orbital ATK, those units now owned by the same company, from sharing data with each other. To better guarantee compliance, the order also allows the Department of Defense to appoint a monitor to confirm compliance with these restrictions, and the Department of Defense was the real purchaser for most of these systems.

Turning to conduct remedies, the debate here often is about how far the agency should go to restore market competition and deter future anticompetitive conduct. That’s why it’s important — indeed critical — to remember that the role of the FTC is to restore markets to their competitive states and prevent future anticompetitive conduct, not to restructure markets or businesses to regulators’ preferences divorced from any underlying violation.

A good example of a typical conduct remedy is the order issued in the recent *Your Therapy Source* matter. This case involved an agreement between two parties and then a wider invitation to collude in the home therapist staffing market in the Dallas/Fort Worth area.

Home therapist staffing companies outsource therapist staffing to independent contractors, and the complaint alleged that one staffing company sought an agreement among competitors to place a ceiling on the wages paid to independent contractors. There was strong evidence that the respondent made an invitation to collude but that except for one competitor there was no evidence that other recipients acted on that invitation.

In cases like this, where the FTC catches the conduct in its incipiency, an order is still needed to prevent any future collusion, and thus our order required the parties to cease and desist from further inappropriate communications among competitors.

The need to prevent a recurrence of anticompetitive conduct brings me to an issue involving our remedial authority. It is currently on appeal before the Third Circuit in the *ViroPharma* litigation. Our complaint in federal court alleged the defendant engaged in repetitive sham petitioning before the Food and Drug Administration (FDA) to include a generic competitor to its branded product, and we sought to permanently enjoin ViroPharma from using similar methods to exclude generic competition in its other branded products.

The district court dismissed the complaint on what it believed were novel grounds, holding that Section 13(b) of the FTC Act allows injunctive relief "only if the Commission can prove that the defendant is imminently about to violate the FTC Act." Because ViroPharma's efforts to forestall generic competition for the particular product at issue ceased when the FDA finally dismissed ViroPharma's baseless petitions and the FDA then allowed the generics to enter, the district court found that ViroPharma was not about to violate the law, and therefore the Commission could not state a claim upon which relief could be granted.

The imminent standard applied by the district court risks radically altering the Commission's ability to challenge any competitive conduct in federal court. Section 13(b) is, at least today, the primary remedial tool the Commission uses when it litigates a conduct matter in federal court. By significantly narrowing its scope, the district court decision risks giving serial offenders a free pass and creates an almost impossible timing requirement for the Commission.

Speaking solely for myself, I'm hopeful that the Third Circuit will reverse the lower court, given that its decision is at odds with the standard applied in many other circuits, including the D.C. Circuit.

I'll close by reiterating that predicting competitive outcomes and finding the right enforcement remedies requires a clear understanding of the goals of antitrust law and careful analytical work. Every market is different, and each case presents its unique facts. We should, however, still strive to carry out this important work in a way that provides predictability, transparency, and fairness to parties and the public.

Thank you for your attention, and I'd be happy to take some questions.

James.

MR. KEYTE: Maureen, in terms of remedies, how has the FTC dealt with international cooperation for multijurisdictional protection?

MS. OHLHAUSEN: In my experience, we've been able for the most part to handle that pretty well. For example, a few years ago there was a music merger. We reviewed it in the United States, they reviewed it in Europe, and we found that though there were problems the European remedy really took care of it, so we were happy with that.

Certainly that is not always the case. Sometimes we have seen cases where we thought a remedy was sufficient and other regimes around the world may have wanted something different. Personally I do have some concerns about extraterritorial reach of some remedies or some of the hold-separate agreements for an indeterminate amount of time, remedies that we've seen some other enforcers impose.

But I think for many cases we really do try to strive to have a consistent remedy. Going back to some of the cement cases, we've had some. I think the Canadian remedy and the U.S. remedy really meshed together quite well. It's for the most part working okay, but every once in a while.

MR. KEYTE: Any other questions?

MS. OHLHAUSEN: Another question?

[No response]

MR. KEYTE: All right. Well, thank you, Maureen, and good luck with your judgeship, which we know will eventually happen.

MS. OHLHAUSEN: Thank you so much, everyone.

[Break: 1:36 p.m.]