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**Federal Trade Commission**

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**Reflections on Recent Competition Enforcement at the FTC**

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Thanks for having me, it is nice to be back again this year. This event is always one of the highlights on the calendar, and so as my time at the FTC draws short, it is perhaps particularly appropriate that one of my last public appearances as a Commissioner will be here at Fordham.

As many of you know, I am rounding out what has been six incredible years as a Commissioner at the Federal Trade Commission. I have had the honor of serving across two presidential administrations, three different Congresses, and with ten other Commissioners. My service has been rewarding because, through the FTC's truly bipartisan efforts, we have advanced the knowledge and tools needed to protect consumers and promote competition in our free market economy. And although I will focus most of my remarks on recent enforcement today, my work at the FTC has encompassed so much more. For example, as Acting Chairman,

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<sup>1</sup> The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I led an initiative to promote economic liberty, which has helped to spotlight unnecessary or overbroad occupational licensing, which often disproportionately harms those near the bottom of the economic ladder and burdens our military families. Excessive occupational licensing in the United States remains a big problem, but our efforts are starting to pay off. Already, a number of states have made some early moves towards reform. While there is much more to do here, these early signs are encouraging, with state legislators and thought leaders at the state level increasingly interested in the issue.

The problems we have sought to highlight with the Economic Liberty Task Force do not end at our borders, and this domestic initiative has already drawn interest from some overseas enforcers, who similarly recognize the potentially harmful effects of excessive and unnecessary occupational licensing on their citizens.

Speaking of international engagement, we have also been continually engaged with our counterparts overseas, through both direct, bilateral meetings with individual enforcers, and through the ICN and the OECD. On all of these fronts, we have continued to press for greater convergence, transparency and due process around the globe. In early 2017, the U.S. agencies issued joint guidelines for international enforcement and cooperation,<sup>2</sup> an effort I was closely involved with. As global trade has spawned more and more global markets, we've been focused on the extra-territorial reach of competition enforcement and providing the necessary protections to intellectual property necessary to spur future innovation.

By necessity, the great bulk of the FTC's international work is quiet, and it generates few headlines in the press. But that does not make it any less important. The process of building a

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<sup>2</sup> U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for International Enforcement and Cooperation*, January 13, 2017, available at [https://www.ftc.gov/system/files/documents/public\\_statements/1049863/international\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf).

baseline of common legal and procedural norms around the world is never going to be easy, and there will always be setbacks and challenges along the way. That said, I am ultimately an optimist about our ability to move these issues forward over the long-term. I am heartened to see how countries with little or no history of competition enforcement or even market-based economies are increasingly coming to recognize the importance of sensible competition enforcement. I am very proud of the efforts we made under my watch to continue and hopefully even strengthen the positive and constructive working relationship the FTC has enjoyed with many of our counterparts overseas.

Finally, before we start talking about some of our specific cases, I want to take a minute to address how the FTC functioned during a very unusual period, when, as the Acting Chairman, I ran the agency with just one fellow Commissioner for almost a year and a half. Not to belabor the obvious, but when there are only two Commissioners, and one of them is a Republican and one of them is a Democrat, no case goes forward unless there is a bipartisan consensus.

Now, some Washington pundits and members of the bar assumed that the composition of the Commission during my tenure was a recipe for inaction, and occasional stories reflected such assumptions, without examining the underlying facts. Honestly, I didn't have all that much time to read such stories because I was occupied bringing cases and coming up with creative ways to deploy already busy staff and stretch a tight budget to pay for expert testimony in all the big cases we were pursuing.

Here are the actual facts. During my time as the Acting Chairman, the FTC identified a total of 32 proposed mergers with significant competition concerns. Of these, the agency accepted a consent agreement to protect consumers in 19 cases, with the balance of these deals either abandoned in the face of our challenge or contested in litigation. That made for a very full

litigation docket. At one point, we had ten competition matters in active litigation at the same time, with three more on appeal, which approaches historic levels. Several of these contested matters are still pending. We also brought, and won, a litigated challenge to the Wilhelmsen/Drew merger<sup>3</sup>, which I will discuss in more detail shortly. In addition, Walgreen's substantially restructured its proposed acquisition of Rite Aid due to Commission concerns<sup>4</sup>. The work we did during my term continues to pay dividends. Earlier this week, we won a PI in our challenge to Tronox's acquisition of Cristal, a matter initiated during my tenure. And the action didn't stop at merger review; we also brought forward nine different conduct cases, including several challenging anticompetitive behavior by drug manufacturers.

Overall, these numbers actually reflect a slight uptick in the pace of enforcement from what prevailed during the previous administration. Far from being hamstrung by having two Commissioners who needed to cooperate, our impressively bipartisan record managed to keep the Bureau of Competition quite busy.

We also got some help from the well-developed state of the law. Today, the case law in the United States generally reflects the contours of a broad, bipartisan consensus that antitrust should be used to protect consumers, and that our enforcement work should be well grounded in modern economic analysis. Despite some discrete criticism at the margins, that consensus remains alive and well, and it continues to govern much of the routine decision-making within the agency.

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<sup>3</sup> *FTC v. Wilh. Wilhelmsen Holding ASA, Wilhelmsen Maritime Services AS, Resolute Fund II L.P., Drew Marine Intermediate II B.V., and Drew Marine Group Inc., Defendants*, Civil Action No. 1:18-cv-00414-TSC (D.D.C.), Public Memorandum Opinion (July 31, 2018), available at [https://www.ftc.gov/system/files/documents/cases/wilhelmsendrew\\_memorandum\\_opinion-redacted\\_public\\_version.pdf](https://www.ftc.gov/system/files/documents/cases/wilhelmsendrew_memorandum_opinion-redacted_public_version.pdf).

<sup>4</sup> See Statement of Acting Chairman Maureen K. Ohlhausen Regarding the Walgreens/Rite Aid Transaction, (Sept. 19, 2017), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1255033/1710181\\_walgreens\\_rite\\_aid\\_statement\\_of\\_acting\\_chairman\\_ohlhausen.pdf](https://www.ftc.gov/system/files/documents/public_statements/1255033/1710181_walgreens_rite_aid_statement_of_acting_chairman_ohlhausen.pdf).

The principal drivers of that consensus are unlikely to change anytime soon. For example, we know that mergers creating durable market power do not serve consumers well. Thus, it really should not be much of a surprise that the pace of merger enforcement at the FTC in recent decades probably varies more on the basis of overall economic activity than on who won the last election. Consistency in enforcement improves the predictability of government action, allowing all of you in the private bar to counsel your clients more effectively, while also ensuring that enforcement does not chill pro-competitive business activity unnecessarily.

This is all for the best and, frankly, it should not be a great surprise to anyone when the FTC stands up in court to challenge a problematic acquisition.

On the other hand, when antitrust enforcement becomes more of a political exercise instead of a dispassionate and apolitical law enforcement matter, predictability is lost, and the actions of government can appear arbitrary. In turn, injecting politics into antitrust enforcement undermines public trust and confidence in the entire exercise. A frequent topic of discussion among competition enforcers around the world is the importance of stripping away political preferences from what is and ought to be a fairly predictable and routine exercise of the government's law enforcement authority. I am very proud of the fact that during my tenure leading the FTC, the agency practiced what it preached in that regard.

Now on to some of the specific cases.

## **Merger Cases**

### *Wilhelmsen/Drew*

In Wilhelmson/Drew, we challenged the merger of the two largest suppliers of certain specialty chemicals to the marine industry. Our investigation ultimately showed that although the chemicals sold by the parties were widely available, fleet customers traveling all over the world needed consistent access to precise formulations at virtually every port where their vessels docked, as changing chemical suppliers from port to port is highly problematic and inefficient for customers. We also learned that the parties had the only viable global networks of supply points around the world that could meet this critical need for so-called “global fleet” customers. As we showed in court, this is how both the parties’ own executives and their customers saw the market. We also demonstrated that price discrimination against these global fleet customers was possible, leading to a high risk of anticompetitive effects.

Proper antitrust analysis requires a careful evaluation of actual conditions in every market we investigate and sophisticated economic analysis. This case principally stands for the importance of that kind of careful, deep dive. This is very much a case where the “once-over-lightly” answer and the deep dive yielded markedly different conclusions.

The parties eventually abandoned the transaction after we successfully won a preliminary injunction in federal court.

### *Smuckers/ConAgra*

Another perhaps surprising case to some outsiders was our challenge to the proposed merger of Smuckers and ConAgra<sup>5</sup>.

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<sup>5</sup> *In the Matter of The J.M Smucker Company and Conagra Brands, Inc.*, Docket No.9381, Public Administrative Complaint (Mar. 5, 2018), *available at*

In Smuckers/ConAgra, we opposed a merger between the Crisco and Wesson brands that would have given Smuckers control of 70% of the grocery market for *branded* canola and vegetable oils. The parties ultimately abandoned the transaction in the face of the FTC's complaint.

The entire case really turned on just one issue. Do the private label house brands meaningfully compete with the branded products in this market, or is their competitive effect going forward likely to be so *de minimus* that we should exclude them from the market? If the private label brands were in the market, there was not much reason for concern, but if they were excluded, the transaction was very problematic.

It turns out, when you really look carefully at this question, the narrower market definition is the correct one. Consumers in this market have extraordinary levels of brand loyalty. When you are making your grandmother's recipe for the holidays and that faded, stained index card in your recipe box calls for Crisco, many people are just not going to have a lot of interest in buying the cheaper, house brand alternative that might not work in the same way. Most consumers buy this product infrequently and, when they do, they tend to be fairly risk averse. We also had very good data here and the empirical work all pointed towards the narrower market being the correct one.

So we followed where the facts led in this matter, even though they ultimately brought us to a rather surprising conclusion. I would caution all of you to be careful about generalizing from this example to other retail markets. What I would say is that you should expect that once we inevitably figure out the right question to ask, we will put in the time and effort necessary to make sure we get to the answer best supported by the facts and economics. We are also not

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[https://www.ftc.gov/system/files/documents/cases/d09381\\_smucker\\_conagra\\_part\\_3\\_administrative\\_complaint\\_redacted\\_public\\_version.pdf](https://www.ftc.gov/system/files/documents/cases/d09381_smucker_conagra_part_3_administrative_complaint_redacted_public_version.pdf)

going to be dissuaded from a conclusion that is firmly supported by the weight of the record evidence, even if it might seem contrary to many people's initial assumptions.

*CDK/AutoMate*

Next, I'll talk briefly about CDK/Auto/Mate<sup>6</sup>. This is case where the FTC ultimately blocked a proposed tie up between providers of specialized software used by automobile dealers.

The fact pattern was essentially a large, established firm with a substantial share of the market buying a relatively small upstart that had enjoyed some recent success and appeared poised to challenge the market leaders more aggressively. The market was concentrated and barriers to meaningful entry were substantial. To be sure, there was some current competition between the firms, but the greatest concern we identified during the investigation was the likely future competition that would be lost, should Auto/Mate be absorbed by CDK.

Some have questioned whether the existing antitrust paradigm can ever reach this kind of behavior, where a big player squashes or absorbs a promising upstart before it can ultimately grow into a more substantial competitor. Our action shows that the Commission can and will take these issues seriously.

I will also note that Auto/Mate had certain clear advantages, particularly reputational, that other, smaller providers lacked and that would be exceedingly difficult to duplicate rapidly. This gave us greater confidence that the loss of competition from Auto/Mate was unlikely to be replaced rapidly by another small firm. I think that was an important part of the analysis here

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<sup>6</sup> *In the Matter of CDK Global, Inc., a corporation; CDK Global, LLP, a limited liability company; Auto/Mate, Inc., a corporation; Robert Eustace, an individual; Elsa Eustace, an individual; G. Larry Colson, Jr., an individual; Michael Esposito, an individual; and Glen Eustace, a representative*, Docket No. 9382, Public Administrative Complaint (Mar. 20, 2018), available at [https://www.ftc.gov/system/files/documents/cases/docket\\_no\\_9382\\_cdk\\_automate\\_part\\_3\\_complaint\\_redacted\\_public\\_version\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf).



and likely to be an issue that will arise frequently in cases where there is substantial evidence that the current market shares understate the likely competitive significance of the transaction.

In the face of our challenge, the parties ultimately abandoned the deal. Shortly thereafter, Auto/Mate referenced the FTC's actions to protect competition prominently in its marketing materials, while announcing that it was "back to doing business differently than giants do... And the big guys? They're back to shaking in their boots."<sup>7</sup> It is not often that we get such a quick and definitive affirmation of our analysis.

#### *Amazon/Whole Foods*

Finally, I want to talk just briefly about a case we did not bring. When Amazon decided it wanted to buy Whole Foods, we did not intervene<sup>8</sup>. At the time, this was a not a popular decision in some quarters, and we were criticized for not being sufficiently aggressive.

Now, I obviously cannot talk about the details of a case we ultimately decided not to bring. However, I do want to talk about what has happened since the transaction occurred.

A year after the transaction, Whole Foods continues to operate largely as it has previously, while prices have either remained the same or fallen for many products at Whole Foods. Consumers have more alternatives for purchasing Whole Foods products, even in markets where there were no Whole Foods locations previously. More importantly, we are seeing rivals adjusting to this new reality, beefing up their own home delivery offerings, and investing in the modernization of their own supply chains to defend their existing positions from a new, nimble, and well-heeled rival. Competition remains robust, and in some ways seems to

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<sup>7</sup> Auto/Mate (last visited Sept. 5, 2018), available at <https://www.automate.com/slayer/>.

<sup>8</sup> See Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc., (Aug. 23, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau>.

have become even more intense since this transaction. In fact, the March 2018 issue of Washingtonian Magazine had a cover story calling this the golden age of grocery shopping. I've put that one in my scrapbook.

When you embrace competitive markets, you also embrace change and the need for firms to constantly improve or risk being left behind. These are all things that the antitrust laws exist to foster, not prohibit.

### **Conclusion**

In conclusion, it is clear the FTC pursued a robust enforcement agenda during my tenure as Acting Chairman. We executed a sensible, balanced merger control program deeply anchored in modern economic theory. We also brought conduct cases, tried to advance economic liberty, and engaged in lots of consumer protection enforcement.

As I prepare to leave the FTC, I feel proud that I have passed on to its next set of leaders an agency in excellent shape, if a bit tired out from litigating so much. This little agency, with its comparatively tiny budget, punches far above its weight on so many fronts. It is a wonderful place to work, chock full of very smart, hard-working, dedicated professionals, many of whom could be making a lot more money elsewhere. U.S. consumers are frankly lucky to have the FTC in their corner, just as I was lucky to have had the privilege of leading the FTC.

Thanks very much.