



Federal Trade Commission

Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector

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Good afternoon. Over the last few years—and the last year, in particular—the Commission has tackled several challenging and thought-provoking cases in the high-tech sphere. The leading cases that come to mind are the Commission’s decisions not to challenge the Google/DoubleClick and Google/AdMob mergers and the Commission’s litigation against (and settlement with) Intel. In bringing these cases, the Commission has not been without its critics who say these cases are too high stakes, involve industries that are too fast-moving, and are essentially too difficult for the Commission to handle. It may surprise you to learn that I share some of these concerns; indeed, in the throes of

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Amanda Reeves, for her invaluable assistance preparing this paper.

these cases, I have spent hundreds of hours trying to make sure that the Commission gets it right. These concerns will be the subject of my remarks today.

First, I will discuss the arguments against the Commission challenging mergers and conduct in the high-tech sphere. Second, I will discuss some considerations that I believe should inform the Commission's analysis when it does decide to litigate a case in the high-tech sphere.

I.

Over the last year, I have heard the FTC's opponents make six arguments as to why the agency should, as a general matter, stay out of cases involving high-tech industries.

The first argument is that market definition in these cases – a necessary prerequisite to any litigation – is too difficult because of the multi-sided nature of the markets generally at issue. That is to say, in these cases, the Commission is not looking at a conduct or transaction's effect on just one market (such as whether consumers will pay more for a product), but at how the conduct or transaction will affect at least two interrelated markets. In the online advertising cases, for example, those two markets are typically the market for advertisers and the market for consumers of those ads. As a firm's control over one increases, it inherently enjoys benefits in the others; the more users (i.e., consumers) for which a firm can claim credit, the more advertisers that will flock to that firm's service. The alleged problem is that looking at the effects in both of these markets (to say nothing of defining them, given that they are sometimes in a nascent state) is too hard for the agencies. I half agree.

First, let me be clear about a legal point. While I have said that in merger cases, market definition is not a “gating” or threshold issue in the sense that the agencies have to prove a relevant market before it can look at a merger’s competitive effects,¹ I do not believe that the agencies in merger or conduct cases can avoid defining a relevant market altogether.² In the Section 7 context, the statute plainly requires that we define a relevant market.³ And in conduct cases, the case law requires that we at least define the “rough contours” of a relevant market. Nevertheless, as I explained in my concurring opinion in *Evanston*, I believe that the market can be defined by reference to competitive effects.⁴

Second and more generally, as a matter of proof, multi-sided markets are not new. To the contrary, I think it’s safe to say that officials at both agencies would agree that multi-sided markets describe newspapers, television networks, radio stations, and advertising more generally, with which the agencies have a long experience. These multi-sided markets differ only in that the business models of firms trying to attract consumers differ; for example, Google offers information search capabilities, Apple offers “Apps” (among other things, games), and Facebook offers communication with “friends.”

¹ Commissioner J. Thomas Rosch, “Litigating Merger Challenges: Lessons Learned,” Remarks presented at the Bates White Fifth Annual Antitrust Conference (June 2, 2008), available at <http://www.ftc.gov/speeches/rosch/080602litigatingmerger.pdf>.

² Concurring Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines, available at <http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pdf>

³ *In the Matter of Evanston Northwestern Healthcare Corp.*, Docket No. 9315, concurring opinion of Commissioner J. Thomas Rosch at 8-9 (Aug. 6, 2007), available at <http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf>.

⁴ *In the Matter of Evanston Northwestern Healthcare Corp.*, Docket No. 9315, concurring opinion of Commissioner J. Thomas Rosch (2007), available at <http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf>.

The second argument I have heard is that the transactions or practices involved in high-tech cases are too dynamic to effectively challenge. There is certainly some validity to this critique. For one, the constant innovation in fast-moving markets means the market at issue in a case or investigation can literally change. One moment we may be claiming Intel is a monopolist in the market for the x86 processor (the only major processor that most of us use for daily computing) and is seeking to take control of the entire computing platform, but the advent of tablets and smartphones may mean that the market tips such that ARM or some other processor is the dominant processor. In other instances it may be that when we start an investigation, mobile advertising is offered through one means (such as cost-per-click), but that some new, better technology (be it developed by Apple, Google, Microsoft, or a startup we've never heard of) comes up with a better means to deliver targeted advertising. This can make market definition very challenging – particular when these events occur (as they sometimes have) during our investigations. Indeed, one can argue that the more thorough the agencies are in their investigations (or, to put it bluntly, the longer the investigations drag on), the more we risk having events overtake us.

This raises a related problem with fast-moving high-tech markets which is that they do not fit snugly into the drawn out litigation process that we have in the U.S. By my estimate, from the time an agency sues until all appeals are exhausted, a case can take (conservatively) 3-4 years to work its way through our court system – and that assumes no bumps along the way. In this regard, while I laud the Justice Department for their suit against Microsoft, I think it's safe to say that the drawn out process there to secure a remedy is a cautionary tale that we at the government live with every time we decide to

sue a major player under Section 2 or Section 5 in the high-tech sector. The flipside to this, of course, is that in an effort to avoid drawn out litigation and remedies that come too late, the agencies run a serious risk of doing quick and dirty investigations or accepting less than optimal settlements because litigation simply takes too long. The Commission's settlement in Intel—which Chairman Leibowitz explicitly noted was an attempt to avoid drawn out litigation⁵—has been criticized on this ground.

These problems, however, are not insurmountable. In fact, while I know we are not without our critics, I think the Commission's experiences in Google/DoubleClick and Google/AdMob show that we can change on the fly. In the former, over an objection from Commissioner Harbour, the Commission declined to challenge a merger because the majority of the Commission could not find a reason to believe that the merger of the leading provider of sponsored search advertising (Google) and the leading firm in the United States serving third-party ad markets (DoubleClick) would be anticompetitive.⁶ In the latter case, the Commission unanimously closed its investigation after it became clear that Apple was in a position to (and likely would) nullify any anticompetitive

⁵ FTC News Release, *FTC Settles Charges of Anticompetitive Conduct Against Intel* (Aug. 4, 2010), *available at* <http://www.ftc.gov/opa/2010/08/intel.shtm> (“By accepting this settlement, we open the door to competition today and address Intel’s anticompetitive conduct in a way that may not have been available in a final judgment years from now. Everyone, including Intel, gets a greater degree of certainty about the rules of the road going forward, which allows all the companies in this dynamic industry to move ahead and build better, more innovative products.”).

⁶ Statement of the Federal Trade Comm’n concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

effects of the Google-AdMob merger.⁷ Likewise, while the Intel settlement was not perfect, I think the Commission did a good job of exercising its prosecutorial discretion in, first, deciding to sue Intel when it did not think there was a viable settlement on the table and, second, settling the case when it became clear that consumers (and Intel for that matter) would be better served by a quick resolution, than by a drawn out *Microsoft*-type litigation. To be sure, I personally would have liked to have seen the Section 5 issues in the Intel case litigated to a conclusion simply to get some more clarity on the issues, but even I had to admit that the settlement that Intel agreed to was not worth rolling the dice on some interesting questions of law.

The third argument that I have heard against challenging conduct by firms in high-tech markets is that we can't challenge conduct by firms that only have "incipient" monopoly power, as may be the case in conduct cases where a firm is on the cusp of achieving monopoly power, but the market has not yet tipped. This, for example, could have become an issue in the Google/AdMob merger. Google and AdMob were the number 1 and 2 mobile advertising networks, respectively. Apple was not in the market when the investigation began. As the Commission noted in its closing statement, however, during the investigation, Apple acquired the third largest mobile advertising network and soon thereafter unveiled its own mobile advertising network, iAd.⁸ Given that mobile advertising appears on apps—and at the time the Commission closed its investigation, approximately 85 percent of those apps were on the Apple platform—the Commission concluded that "Apple's ownership of the iPhone software development

⁷ Statement of the Federal Trade Comm'n concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), *available at* <http://www.ftc.gov/os/closings/100521google-admobstmt.pdf>.

⁸ *Id.*

tools, and its control over the developers' license agreement, [gave] Apple the unique ability to define how competition among ad networks on the iPhone will occur and evolve.”⁹ Put differently, once Apple entered the mobile advertising market, it was in a position (depending on how it decided to leverage its closed platform and its proprietary information) to go very quickly from zero to a very substantial share of the mobile advertising market.

This begs the question, however, whether in these instances where incipient monopoly power can very quickly become entrenched monopoly power we should act, let the market tip, or whether there is a compromise position. The problem here is both legal and one of prosecutorial discretion. Section 2 of the Sherman Act may apply in these instances because it prohibits “attempts to monopolize” as well as monopolization. However, in both cases, the plaintiff must show either monopoly power or near monopoly power. Near monopoly power may include incipient monopoly power in some cases, but in others it may not. (This stands in stark contrast to Section 102 of the Competition Law administered by the European Commission which requires that the EC establish that the firm is “dominant” *before* any further inquiry can occur.)

If Section 2, however, is an impediment, it is only an impediment to DOJ, which must challenge conduct under Sherman or Clayton Acts or not at all. In contrast, the FTC can challenge a transaction or conduct of an incipient firm under Section 5, if needed, which is not only broader than the Sherman Act,¹⁰ but which Congress specifically envisioned could be used to go after incipient conduct. As I noted at the Spring Meeting, while it may not make sense that the FTC, but not the DOJ has Section 5 authority, the

⁹ *Id.* at 1.

¹⁰ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

answer is not to deny the FTC Section 5 authority, though it may be to augment DOJ's powers with Section 5 authority.¹¹ I have yet to make up my mind on that one, which, in any event, is a debate for another day.

A fourth challenge I have heard is that we should stay out of high-tech markets because, as a matter of policy, we should not be in the business of challenging an inventor's conduct. Or, to put it differently, we don't want to deter inventors from innovating, so their conduct should be *per se* legal. In the alternative, conduct by innovators in the high-tech sphere – regardless of its horizontal nature – should be subject to the rule of reason. I completely disagree with these arguments.

As a threshold matter, it would be irresponsible of us to treat any transaction or conduct by an inventor as *per se* legal. That would be like creating a super-immunity for patent holders. To be sure, patent law grants a period of exclusivity to an inventor who lawfully obtains a patent from the PTO. But even determining the bounds of that exclusivity is not easy. On the one hand, we must be sensitive—as Justice Scalia noted in *Trinko*—to the fact that monopoly profits are often what incentivize a firm to innovate in the first place.¹² On the other hand, however, as the FTC acknowledged in its amicus brief to the Federal Circuit in the *TiVo v. EchoStar* litigation (which dealt with incentives

¹¹ Commissioner J. Thomas Rosch, *Rewriting History: Antitrust Not As We Know It . . . Yet*, Remarks before the ABA Antitrust Section 2010 Spring Meeting (April 23, 2010), available at <http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf>.

¹² *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”).

for work around innovators), we must also protect the incentives of parties to compete with the original innovator.¹³

Moreover, from a doctrinal standpoint, I'm not sure the rule of reason is all it's cracked up to be. Professor Hovenkamp (one of the principal champions of a full-blown rule of reason) may know how to "weigh" anticompetitive effects and procompetitive effects, but I sure don't. The Supreme Court rarely applies the rule of reason and provides no guidance on how to weigh rule of reason considerations more generally—a fact that is underscored by the appellate courts' own disarray. Indeed, even the D.C. Circuit's decision in *Microsoft*¹⁴—arguably the most sophisticated Section 2 decision on the books – didn't explain very well how to weigh anticompetitive effects against procompetitive effects or how to decide which prevails. So, to put it bluntly, I'm not persuaded that applying the rule of reason to all conduct by innovators—simply because they are innovators—would result in anything more than additional discord (as opposed to certitude) for the business community.

A fifth challenge I have heard concerns innovation more generally. In the 30 years since the consent in *Xerox*,¹⁵ the agencies have never litigated to conclusion a

¹³ Brief of Amicus Curiae Federal Trade Commission on Rehearing *En Banc* Supporting Neither Party, *TiVo, Inc. v. EchoStar Corp.*, No. 2009-1374 (Fed. Cir. Aug. 2, 2010) (argued Nov. 9, 2010), available at <http://www.ftc.gov/os/2010/08/100802tivoechostarbrief.pdf>.

¹⁴ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹⁵ See Complaint at ¶¶14 (a)-(c), 15, *Xerox Corp.*, Docket No. 8909 (Jan. 16, 1973), reprinted in *In re Xerox Corp.*, 86 F.T.C. 364 (Jul. 29, 1975). The *Xerox* case is discussed in detail in Willard K. Tom, *The 1975 Xerox Consent Decree: Ancient Artifacts and Current Tensions*, 68 ANTITRUST L.J. 967 (2000-01). In *Xerox*, the Commission alleged that Xerox violated Section 5 of the FTC Act by creating and preserving a noncompetitive market structure in the market for plain paper copiers by, among other things, developing an extensive patent portfolio through acquisition of control over Rank

challenge to a transaction or conduct that threatens innovation alone. In fact, the best case on this point to my knowledge is the Second Circuit’s 1981 decision in *SCM Corp. v. Xerox Corp.*¹⁶ There, the Second Circuit held that a defined product market is a prerequisite to an antitrust claim.¹⁷ Moreover, while there have been challenges to innovation markets in pharmaceutical merger cases, those challenges have all resulted in consents that the parties agreed to in order to get the deal through.¹⁸ I find this objection—that we should not be in the business of challenging innovation markets as such—to have the most credibility.

Xerox, a joint venture in which Xerox had previously held a non-majority stake. Because Xerox had acquired patents to all of the technologies needed to engage in xerography, the Commission alleged that Xerox was eliminating the competition in the development and creation of office copiers. The Commission settled the *Xerox* suit in 1975 with a consent decree that required Xerox to permit the use of any three of its dry paper copier patents on a royalty-free basis and to desist in pursuing certain of its infringement suits.

¹⁶ *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981).

¹⁷ *Id.* at 1206 (rejecting the claim that acquisition of patents alone could create antitrust liability and observing that “[t]he patent system would be seriously undermined . . . were the threat of potential antitrust liability to attach upon the acquisition of a patent at a time prior to the existence of the relevant market and, even more disconcerting, at a time prior to the commercialization of the patented art.”). More recently, courts have reiterated in cases that did not concern innovation that a pre-existing market is a prerequisite to liability under Section 7 of the Clayton Act. *See Crucible, Inc. v. Stora Kopparbergs Bergslags AB*, 701 F. Supp. 1157, 1162-63 (W.D. Pa. 1988) (ruling that “the absence of a relevant [product] market . . . at the time of patent acquisition precludes the applicability of Section 7”); *Fraser v. Major League Soccer, LLC*, 97 F. Supp. 2d 130, 140-41 (D. Mass. 2000) (“Where there is no existing market, there can be no reduction in the level of competition . . . Competition that does not exist cannot be decreased.”), *aff’d* 284 F.3d 47, 71 (1st Cir. 2002) (“Even advocates of a broader reading of Section 7 concede that striking down a combination that does not threaten present competition could be justified . . . *only in already concentrated markets.*” (emphasis added)).

¹⁸ *See generally* Commissioner J. Thomas Rosch, Antitrust Regulation of Innovation Markets, Remarks presented at the ABA Antitrust Intellectual Property Conference (Feb. 5, 2009), available at <http://www.ftc.gov/speeches/rosch/090205innovationspeech.pdf> (discussing the agencies’ various challenges to mergers under innovation market theories).

But the sixth and biggest stumbling block to the agencies challenging innovation markets is that, in my mind, the long-standing threshold question debated by Schumpeter, Arrow, and others—i.e., whether it is better to keep the scientists separate and in competition or put them together at the same place—has not been resolved. If it is the case that having all of the world’s experts meet together leads to better innovation, then we should allow consolidation and coordination. Conversely, if we’re better off having scientists and software developers in competition, then we should be vigilant about enforcement. For what it’s worth and to complicate things further, I’m not even sure there is a “one size fits all” answer here. After all, it may be that the answers to that question are different depending on whether the challenge is made in the pharma context (where the scientists are seeking a clear objective—such as a cure for Alzheimer’s) or in the high-tech context (where the sky is the limit as far as innovation goes). In any event, this objection was more persuasive to me when the challenge was to mergers/conduct in the pharmaceutical industry under the 1992 Guidelines. Then, we were limited to looking at whether entry was likely over a two-year time horizon.¹⁹ The need in the pharma context to get FDA approval before acting combined with the fact that predicting entry in high-tech markets made the hard-and-fast two-year cutoff very problematic. Given that the new guidelines have done away with that requirement and emphasize that the agencies will look carefully at whether a merger will diminish innovation, we have more flexibility to look at innovation markets because we can look at longer time

¹⁹ 1992 Horizontal Merger Guidelines, § 3.2 (entry is considered timely and can reverse any likely anticompetitive effects only if entry will be “achieved within two years from initial planning to significant market impact”).

horizons. Over the long run, I think that should help lead the agencies to better results—an outcome with which even members of the defense bar may agree.

II.

For the remainder of my remarks, I'd liked to switch gears and discuss a related topic, which are my thoughts on when and how the agencies should challenge mergers and conduct in the high-tech sector.

It will not surprise you to learn that, first and foremost, I believe the agencies should tell a good story that focuses on the resulting anticompetitive effects as opposed to relying—in some cases dispositively—on complex economic formulae, particularly simulation studies. Telling a story enables the Commission and courts to better consider the larger picture and, in turn, better predict what is likely to happen in dynamic, fast-moving markets by focusing the decision-maker on all of the relevant evidence including (1) whether the target has monopoly or near-monopoly power; (2) whether the firm is engaged in multiple or stand-alone practices; and (3) whether there is documentary or other evidence of intended results that illuminate the transaction or conduct's *likely* effects (and not just what the economists think is likely to happen).

Telling a story is also advantageous because, quite simply, courts like stories instead of simulation studies—they understand a story better. And with good reason: in a piece published last year, Judge Vaughn Walker, who had extensive economic training and who presided over the Oracle trial, argued that generalist judges lack economic training (and often interest) and that, as such, if economic evidence is to be persuasive, it must be communicated in a way that a generalist can understand and must be consistent

with other evidence.²⁰ Complex economic theories are simply not comprehensible to many specialists like myself, let alone to a generalist.

Moreover, framing a trial strategy around a story (as opposed to a formula) enables the introduction of more non-price evidence (i.e., evidence respecting effects on quality and safety), which gives courts more latitude. The FTC's recent loss in the *Ovation* litigation proves this point: there, the court viewed price elasticity as the trump card. This meant the court could neither account for the transaction's non-price effects on things like quality, safety, and innovation, or hold (as other courts have done) that functional interchangeability trumped price elasticity.²¹

Additionally, as James Langenfeld has observed, simulation studies inevitably include assumptions that may or may not be accurate.²² If they are inaccurate, the result of the study will be inaccurate.

What are the ingredients of a good story? I discussed many of those elements more generally in my remarks before the ABA's Masters Course in September and won't

²⁰ Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, 5 Competition Policy International 1 (Spring 2009). See also *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 914-15 (2007) (Breyer, J., dissenting) (opining that "economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views.").

²¹ See, e.g., *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *In re Super Premium Ice Cream Distribution Antitrust Litig.*, 691 F. Supp. 1262 (N.D. Cal. 1988), *aff'd sub nom. Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 F.2d 1417 (9th Cir. 1990).

²² Robert H. Lande and James Langenfeld, *The Evolution of Federal Merger Policy*, ANTITRUST (ABA) 5 (Spring 1997).

repeat them here,²³ though I will add a few additional ingredients that I think have particular bearing in the high-tech context.

First, when we are challenging a conduct or practice, I believe the story should be consisted with “settled” Sherman Act law. That may seem obvious, but let me explain why. If we are proceeding under a Section 1 or Section 2 theory (even though, at the FTC, we only have authority to sue under Section 5 of the FTC Act), of course our theory must follow from existing law or at least propose to nudge it, as we have done with the “inherently suspect” cases,²⁴ in a logical direction forward. Saying that our cases must comport with “settled” law, however, is a pretty low bar because especially when it comes to the cutting edge issues we are apt to litigate (as opposed to get a quick settlement out of), there is very little that is “settled” under conventional case law. The *Brooke Group* decision, for example, (while adding some clarity)²⁵ leaves open the standard for “below-cost pricing”; and the Court’s *linkLine* decision²⁶ left open the question whether a “price squeeze” violates Section 2 where there is unregulated predatory pricing. As for the federal appellate courts, as I’ve elsewhere remarked, the same conduct may be illegal under the Sherman Act, depending on where it is analyzed (as illustrated by the Ninth Circuit’s decision in *PeaceHealth*²⁷ and the Third Circuit’s

²³ Commissioner J. Thomas Rosch, Can Antitrust Skills Really Be Mastered? Tales Out of School About How to Try (or Not to Try) an Antitrust Case, Remarks presented at the ABA Antitrust Section Masters Course (Sept. 30, 2010), *available at* <http://www.ftc.gov/speeches/rosch/100930roschmasterscourseremarks.pdf>.

²⁴ *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). *See also N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 370 (5th Cir. 2008).

²⁵ *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

²⁶ *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 129 S.Ct. 1109 (2009).

²⁷ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007).

decision in *LePage's*²⁸) or whether it is analyzed under Section 1 or Section 2 (as illustrated by the competing approaches to exclusive dealing in *Dentsply*²⁹ and *Microsoft*³⁰). Moreover, on the merger side, the Supreme Court has not reviewed a Section 7 case for decades and, as Potter Stewart remarked in *Von's Grocery*, the only thing settled in Supreme Court merger jurisprudence is that that “the government always wins.”³¹

When it comes to pure Section 5 challenges to conduct in the high-tech sphere, I don't believe that the legal ingredients for our cause of action should be all that different. Although much has been made about the “trilogy” of Section 5 cases that the Commission last dug into during the 1980s—*Boise Cascade*, *DuPont*, and *Official Airline Guides*³²—if one reviews the decisions in those cases closely, one must conclude that they simply hold that the Commission should not use Section 5 when it would disturb “settled” Sherman or Clayton Act case law. To my mind, that means a Section 5 case should generally require showing of (1) anticompetitive effects and (2) either an attempted agreement (as in the invitation to collude cases) or incipient or actual monopoly power (as in cases like *N-Data* and *Intel* where we challenge unilateral conduct). Beyond that, the contours of any particular Section 5 cause of action should probably be identified on a case-by-case basis, not only because that's what Congress

²⁸ *LePage's Inc. v. 3M Co.*, 324 F.3d (3d. Cir. 2003) (en banc).

²⁹ *United States v. Dentsply Int'l*, 399 F.3d 181 (3d. Cir. 2005).

³⁰ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

³¹ *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

³² See, e.g., *Boise Cascade v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

intended, but because to the extent one believes (as I do) that Section 5 should apply in the “one off” case, predicting those elements in advance is a futile task.

Further, while I am on the topic of conduct cases that the Commission generally brings in Part 3 administrative litigation (and under Section 5 in particular), I believe there are a few additional considerations that should apply. To start, the Commission’s story should, if possible, exhibit the expertise that the Commission can bring to the analysis, especially as compared with a generalist federal district court judge in private antitrust cases. I’ve already alluded to the Commission’s expertise in analyzing conduct by a firm with “incipient” monopoly power, which may not amount to the market power required by the “attempt to monopolize” case law. The conduct may also, however, involve deception (as it did in *N-Data* and *Intel*) and hence trigger the agency’s consumer protection expertise and Section 5’s consumer protection prong. Indeed, the federal courts have recognized the Commission’s special expertise in this respect.³³ And, as Commissioner Kovacic has observed, the FTC is a better antitrust agency because of its consumer protection mission.³⁴

When the Commission brings a conduct case, it should be mindful that “collateral consequences” may follow from its decision and should limit the risk of false positives. To be sure, most collateral consequences are inevitably a result of the DOJ’s obligation to proceed in federal district court under the Sherman Act: plaintiffs’ counsel love to make a living riding the coattails of those cases in private treble damage class action cases.

³³ See *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied* 507 U.S. 909 (1993); *Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir. 1976).

³⁴ See, e.g., William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 J.L. & POL’Y 101, 114 (2007) (observing that “consumer protection laws are important complements to competition policy”).

The Supreme Court has issued several decisions designed ostensibly to rein in those cases.³⁵ But to put it bluntly, I worry that the Supreme Court is not only modifying procedural rules to cabin the private plaintiff's bar, but that it is curbing the substantive rules as well. Since 2004, the Supreme Court has decided ten antitrust cases – not one of those cases was brought by the government.³⁶ This means that the vast majority of substantive antitrust law is being made in cases involving private plaintiffs.³⁷

Notwithstanding all of that, I think the Court is on to something and that we, as prosecutors, should take our discretion seriously and only bring those cases where we have reason to believe there is real harm occurring and where, if it cannot be brought under Section 5, we recognize all of the effects – including supposed chilling effects and follow-on class actions – that may result from filing a complaint.

³⁵ See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007).

³⁶ *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Leegin Creative Leather Prods. v. PSKS*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

³⁷ As Dan Crane has observed, this feature of our common law process has negative spillover effects for public enforcement because “[t]he content of these liability rules is shaped by concerns peculiar to private litigation, such as abusive competitor suits, the risk that treble damage awards will chill vigorous competition, and the fear that setting the bar too low will encourage litigiousness.” Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 41 (2008). Thus, he goes on to observe “at least in recent years, courts have often established sharply underinclusive liability norms in private antitrust cases” even though “[l]ogically, the liability rules might very well be less stringent in public litigation where those limiting concerns are absent.” *Id.* Hence, Crane concludes, in the predatory pricing context and even in the Section 5 context, “the predominance of private antitrust litigation has stymied public antitrust enforcement by precipitating the creation of restrictive liability norms that are then applied to public lawsuits as well.” *Id.*

Second, the story in any high-tech case should include all factors that may affect consumer choice and the flip-side—consumer opportunity—which is a supply side consideration. Why? For one thing, consideration of consumer choice enables consideration of all dimensions of competition, including non-price factors, that may be less measurable. Moreover, consideration of consumer opportunity enables one to take into account consumer preference that may be irrational (as behavioral economics suggests) as well as rational consumer preferences (which the Chicago and post-Chicago Schools assume). If one truly believes in the market, producers will gravitate toward producing goods/choice that most consumers want, whether their preferences are rational or irrational. Indeed, there is a strong argument that having the state call the shots respecting consumer choice not only defeats the outcome that market forces would dictate, but also smacks of the kind of “central planning” characteristic of a totalitarian state.

Third, as noted earlier, I still believe that an important element of all cases—including high tech cases (mergers and otherwise)—is defining the relevant market. I feel compelled to mention that because in some of the recent commentary on the revised merger guidelines, I think that requirement has gotten lost in translation. In my experience in cases involving the high-tech sector, the easiest way to define the relevant market is to figure out how the firm at issue monetizes its intellectual property or innovation. How does Google monetize its searches? How does Apple monetize its apps and iTunes? How does Facebook monetize public profiles? And so on. Identifying how firms monetize their bread and butter enables the agencies to zero in on who the

customers are, whether there is competition, and whether the absence or potential absence of competition is a result of business acumen or anticompetitive conduct.

Fourth and finally, I believe that when the agencies bring cases in the high-tech sector, their story must be flexible not only to account for changes in the market place (be it competition for the x86 platform in the Intel litigation or Apple's entry into mobile advertising in the Google/AdMob merger), but that it should also account for dynamic effects and efficiencies. As I have said elsewhere, in my view, antitrust law has for far too long largely applied a static analysis, which looks mostly at marginal prices and costs in the short run.³⁸ In contrast, dynamic analysis focuses on the long-run considerations that capture the goals associated with innovation, including, among other things, the creation of new products and services. As economist Joseph Schumpeter long ago recognized—and with particular application to the high-tech sector, I might add—a certain amount of protection from competition is necessary for a firm to undergo the risks and costs of innovating and that innovation can ultimately have a great effect on consumer welfare.³⁹ The question is how much? I don't know the answer to that, but I do think we are shooting ourselves and consumers in the foot if we don't take very seriously the dynamic nature of these markets – even if it is very hard to quantify – when we tell our story in cases in the high-tech sector.

³⁸ Commissioner J. Thomas Rosch, Promoting Innovation: Just How “Dynamic” Should Antitrust Law Be?, Remarks before the USC Gould School of Law 2010 Intellectual Property Institute (March 23, 2010), *available at* <http://www.ftc.gov/speeches/rosch/100323uscremarks.pdf>; Commissioner J. Thomas Rosch, The Role of Static and Dynamic Analysis in Pharmaceutical Antitrust, Remarks before the Fifth Annual In-House Counsel Forum on Pharmaceutical Antitrust (Feb. 18, 2010), *available at* <http://www.ftc.gov/speeches/rosch/100218pharmaantitrust.pdf>.

³⁹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942).

All of this said, why do I dwell on the characteristics of a good story? The answer is that I believe a good story will provide the agencies and the ultimate arbiter with the flexibility they need to prosecute anticompetitive conduct, even if, at first blush, it does not fit neatly within a pre-existing Sherman or Clayton Act box. Put differently, because I spent 40 plus years as a defense attorney, I know that the best defense is often a good offense: if the Commission sues under Section 7, a defense attorney will wrap the case up into a series of threshold issues (like market definition) to make it more difficult for a prosecutor to prevail; likewise, if the Commission sues under Section 5, a defense attorney will argue that the conduct is clearly legal under some existing Sherman Act case law, in order to persuade a judge that the Commission is acting out of turn. A good story, however, can help an ALJ or federal judge focus on the big picture – whether (in the agency case) the case involves multiple practices by a dominant firm, a merger in an industry that has a recent history of collusion and concentration, or, conversely (in the defendant(s)' case), a firm that has sought to play fair or a merger in an industry with the prospect of entry or dynamic efficiencies. Far too often, however, I think we all get caught up in putting cases in perfect economic and legal boxes and lose sight of the fact that while the law and economics matter, the big picture matters too.

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To conclude and give you something to apply all of these considerations to in your own spare time, I'd like to make an observation about what I see as the most significant issue on the horizon in the high-tech sphere and that is the need for firms and enforcers to balance the need to protect consumer privacy on the one hand, and vigorous competition on the other.

Right now we are seeing firms respond to this need to balance in very different ways. On the one hand, you have firms like Google that pride themselves on maintaining an open platform. This means that any app developer that wants to get on the Android platform or any smartphone developer that wants to use the Android operating system is free to do so. This may mean that consumer data is handled more loosely than some would like, but it also means that there is competition along many different axes that we might not otherwise see. In contrast, there are firms like Apple that pride themselves on a closed platform not only because it allows them to control the quality of the operating system and content better, but also because it gives them much greater control over users' privacy. The issue here, of course, may be that the claim of privacy protection itself may become a barrier to entry in the sense that Apple may be able to leverage its power over iPhone, iPad, and other devices (and its sole control over user data) to eliminate competition in things like mobile advertising or app development.

To be clear, I am not saying Google is clearly good here or Apple is somehow bad. Rather, I am simply noting that an issue we will likely face on the horizon is what to do when high tech firms start using the need to protect consumers' privacy as a defense to an antitrust claim. I don't know what the answer is, but the question is looming on the horizon. More generally, I am thankful that I have the benefit of parsing through these very difficult issues at the FTC, where we have the benefit of both antitrust and consumer protection (and by that I mean, privacy) expertise. Stay tuned to see what happens next.