United States of America
Federal Trade Commission

An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification

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Eleventh Annual Competition Day
Fiscalia Nacional Economica
Santiago, Chile

November 5, 2013

I. Introduction

Good morning. I am delighted to be here at the Eleventh Annual Competition Day at the Fiscalia Nacional Economica (Fiscalia). I would like to thank Felipe Irarrazabal and Jaime Barahona for inviting me to speak at this wonderful event. I also would like to congratulate Felipe and all of his colleagues at the Fiscalia, who are celebrating the fiftieth anniversary of that agency's creation.

As many of you know, the U.S. Federal Trade Commission (FTC) has enjoyed a cooperative and beneficial relationship with the Fiscalia for many years. Even before the Fiscalia signed an antitrust cooperation agreement with the FTC and the U.S. Department of Justice (DOJ) in March 2011, we had worked together on competition issues. Last year, when the Fiscalia was revising its merger review guidelines, the FTC had the opportunity to provide comments on the draft. We appreciated that the Fiscalia was interested in receiving our input on

[1] 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.

the guidelines, and we look forward to working with the Fiscalia on competition matters for many years to come.

Today, I will address two areas of focus at the FTC: competition advocacy and premerger notification. Although these two topics may seem to be unrelated, they have something very important in common: both of these areas present the FTC or any other competition authority with an opportunity to prevent enduring harms to consumer welfare before it is too late to undo or remedy those harms. Competition advocacy can help persuade government entities not to enact anticompetitive laws or regulations, which may be difficult or impossible to repeal once they are passed. A premerger notification system, in turn, allows the competition authority to block or restructure anticompetitive transactions before they are consummated and become difficult or even impossible to undo.

In English, there is a saying: "An ounce of prevention is worth a pound of cure." In Spanish, I believe you would say, "Mas vale prevenir que curar." With both competition advocacy and premerger notification, competition agencies can take preventative measures that protect competition and consumers and ultimately yield benefits in excess of the costs involved in pursuing these two important programs.

II. The Important Role of Competition Advocacy

First, let me address the important role that competition advocacy can play in the economy. I will provide some background on the Federal Trade Commission's advocacy program and then talk about what I believe are keys to a successful advocacy program. I will also briefly discuss some of the FTC's recent advocacy efforts.

Competition advocacy is an area of particular interest to me. From 2004 to 2008, I was Director of the FTC's Office of Policy Planning, which oversees the agency's competition and consumer advocacy efforts. I was a strong supporter of our advocacy program during that time.

Now, as a Commissioner, I continue to support the FTC's efforts in advocating for procompetitive policies.

A significant focus of competition advocacy efforts tends to be on governmentally-imposed restraints on competition. In countries with a history of government control over sectors of the economy, there may still be vestiges of unnecessary, anticompetitive restraints in their laws and regulations. Even in historically free-market economies, such as the United States, there are often industries that benefit from government-imposed restraints on competition. Further, private entities may pursue government measures to protect themselves from the competitive forces of the free market.[2]

Some entities try to justify their requests for anticompetitive government action in terms of safety or some other type of consumer protection. In reality, what they often are seeking is a law or regulation to hamper their rivals and entrench their advantageous position as incumbents, not to protect consumers. Based on our experience as both a competition and consumer protection agency, we can see that the relationship between the restraint and the purported consumer protection benefit is often poorly defined or even non-existent.

It is, of course, completely rational for such entities to pursue anticompetitive government restraints. After all, engaging in private anticompetitive conduct is risky: aside from potentially resulting in jail time and significant monetary fines, collusion may not even be effective, particularly if it is being undercut by cheating within the cartel. By contrast, persuading the government to adopt an anticompetitive restraint is much less risky: lobbying the

[2] *See, e.g.*, Timothy J. Muris, Chairman, Fed. Trade Comm'n, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Prepared Remarks before the International Competition Network Panel on Competition Advocacy and Antitrust Authorities (Sept. 28, 2002), *available at* http://www.ftc.gov/speeches/muris/020928naples.shtm ("Constant vigilance and continuing efforts are necessary because there will always be pressures from the private sector, and often its government allies, to maintain old anticompetitive constructs or to create new ones.").

government is relatively inexpensive and may even be protected under the law; the government, rather private parties, enforces the restraint and ensures that there is no cheating from the anticompetitive arrangement; and the ability of the competition agencies to intervene is likely limited.[3]

A. The FTC's Advocacy Program

The advocacy program at the Federal Trade Commission has been in existence in one form or another for quite some time. The agency's modern advocacy program has its roots in the mid-1970s.[4] Our program was significantly revitalized in the early 2000s by then-Chairman Timothy Muris, and each of his successors has demonstrated a strong interest in maintaining an active advocacy program.

Broadly speaking, advocacy at the FTC involves the use of our expertise in competition, consumer protection, and economics to persuade other government actors to pursue policies that promote competition and consumer welfare. Sometimes, this advocacy is conducted in support of a particular law or regulation that, in our view, would benefit competition and consumers. All too often, however, this advocacy is directed to proposed laws or regulations that would limit choices and make consumers worse off—by, for example, restricting certain business practices or prohibiting some business models altogether, or even seeking to immunize certain anticompetitive conduct from the federal antitrust laws. Even if well-intentioned, these government-imposed restraints can inflict as much, if not more, harm on consumers than private

[3] *See, e.g.*, Maureen K. Ohlhausen, *Identifying, Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition*, 2 COMPETITION POLICY INT'L 151, 152 (2006) ("There are strong incentives for competitors to seek through legislation and regulation what they cannot lawfully obtain through private actions."); Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Promoting a Culture of Competition, Remarks before the Chinese Academy of Social Sciences, at 5 (Apr. 2006), *available at* http://www.ftc.gov/speeches/majoras/060410chinacompetitionadvocacy.pdf.

[4] For a history of the FTC's advocacy program, see James C. Cooper, et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1094-97 (2005).

anticompetitive conduct, and, as I mentioned earlier, because they are enforced by the government, these restraints are more durable than any private conduct could be.

The FTC engages in competition (and consumer protection) advocacy before other policymakers, including state legislatures and regulatory boards; state and federal courts; other federal agencies; and professional organizations, such as bar associations. Typically, the FTC issues comments or other advocacies either in response to specific requests from policymakers or where public comments are sought.

The FTC's advocacy can take many different forms, including formal actions, such as providing testimony or written comments to state legislators or filing amicus briefs with courts. We also work behind the scenes with other policymakers, providing informal consultations and presentations; these non-public efforts can be as or more effective than our public efforts, particularly in situations where our public input would create political tensions. Advocacy also can take the form of public hearings and workshops, which can bring together experts from business, government, law, and academia to discuss competition issues of interest, including the agency's views on those issues. FTC staff and Commissioners also promote competition principles through a variety of activities, such as speeches before associations of state regulators or industry members, interviews with the press, and articles in general interest publications.

The main objective of our advocacy work is to provide policymakers with a framework to analyze competition issues raised by pending governmental actions or ongoing judicial disputes and to advocate for procompetitive policies. In providing this analytical framework, we attempt to focus policymakers on the following questions regarding a proposed restriction on competition: First, what specific harm to consumers is the proposed restriction seeking to address? Second, is the proposed restriction tailored to address the anticipated harm, or does it unnecessarily burden competition? Third, does the consumer harm that the restriction seeks to

prevent exceed the loss in consumer welfare resulting from the lessening of competition?[5] In raising these questions, the goal of our advocacies is to convince policymakers to take full account of the adverse impact on competition and consumer welfare that may result from proposed laws and regulations.

Let me briefly touch on a few of the recurring themes in the FTC's recent advocacies. One of those themes has been facilitating entry or avoiding new and unnecessary entry barriers. This issue often arises in the health care sector, which represents a significant portion of our economy. In that sector, there are regulations that define which types of medical services that certain types of providers may lawfully provide. Recently, we have encountered regulations that seek to limit competition from newer or less established health care providers that are able to supply comparable (or even superior) services, often at lower cost.

As one example, there has been an interest in many states in allowing basic medical services to be provided, not just by physicians, but by advanced practice registered nurses, or APRNs, which are nurses with specialized training in particular areas. This expanded licensing of APRNs could have the beneficial effect of increasing affordable access to quality care in rural and poorer areas of the country—that is, where there are fewer physicians. Expanded licensing of APRNs also may encourage greater price competition among health care providers. The FTC's Office of Policy Planning has been actively advocating to state legislatures in reports and testimony to loosen the restrictions on APRNs to allow them to provide certain treatments and to prescribe certain medications, subject, of course, to responsible measures to control for quality

[5] *See* Majoras, *supra* note 3, at 7-8. *See also* Tara Isa Koslov, *Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Successes*, CPI ANTITRUST CHRON. 2-3 (Aug. 2012), *available at* https://www.competitionpolicyinternational.com/file/view/6732 (discussing analytical framework advocated by FTC to policymakers).

and safety.[6] In short, our advocacies have suggested that any limits on APRNs' ability to provide medical services should be no stricter than necessary to protect patient safety.

Another recurring theme in our advocacies is opposition to antitrust immunity for certain types of anticompetitive conduct. For example, we often encounter federal and state legislative proposals seeking to create antitrust immunity for certain health care providers to bargain collectively over reimbursement rates with health insurers and other third-party payers. Health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from health insurers and other payers, asserting that immunity for joint bargaining is necessary to "level the playing field" with insurers who have market power. Our response has come down to the following point: reducing competition on one side of a market (that is, the physicians) is not the answer to a perceived lack of competition on the other side of that market (that is, the insurers). The FTC has long advocated against such immunity because it is likely to harm consumers by increasing costs without improving quality of care,[7] and I expect that we will continue to oppose these attempts to authorize departures from competition.

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[6] *See, e.g.*, Letter from Fed. Trade Comm'n Staff to the Hon. Theresa W. Conroy, Conn. H.R., Concerning the Likely Competitive Impact of Conn. H.B. 6391 on Advanced Practice Registered Nurses (Mar. 19, 2013), *available at* http://www.ftc.gov/os/2013/03/130319aprnconroy.pdf; Testimony of Fed. Trade Comm'n Staff before Subcommittee A of the Joint Comm. on Health of the State of W. Va. Legis. on the Review of W. Va. Laws Governing the Scope of Practice for Advanced Practice Registered Nurses and Consideration of Possible Revisions to Remove Practice Restrictions (Sept. 10, 2012), *available at* http://www.ftc.gov/os/2012/09/120907wvatestimony.pdf; Comment of Fed. Trade Comm'n Staff before the La. H.R. on the Likely Competitive Impact of La. H.B. 951 Concerning Advanced Practice Registered Nurses (Apr. 20, 2012), *available at* http://www.ftc.gov/os/2012/04/120425louisianastaffcomment.pdf.

[7] *See, e.g.*, Letter from Fed. Trade Comm'n Staff to Conn. Gen. Assemb. Labor & Pub. Emps. Comm. Regarding Conn. H.B. 6431 (June 4, 2013), *available at* http://www.ftc.gov/os/2013/06/130605conncoopcomment.pdf; Prepared Statement of the Fed. Trade Comm'n before the Subcomm. on Intellectual Property, Competition, and the Internet of the Comm. on the Judiciary, U.S. H.R. concerning H.R. 1946, Preserving Our Hometown Independent Pharmacies Act of 2011 (Mar. 29, 2012), *available at* http://www.ftc.gov/os/testimony/120329pharmacytestimony.pdf.

A third recurring theme in our advocacies is that courts should narrowly construe existing antitrust exemptions and immunities. One of those exemptions is found in the state action doctrine, which exempts from the federal antitrust laws otherwise anticompetitive transactions and conduct if (1) the state has clearly articulated a policy of displacing competition in a given area of the economy, and (2) if private parties are involved, they are actively supervised by the state.

This antitrust exemption is grounded in legitimate, non-competition goals—federalism and state sovereignty, which call for the federal government's strong interest in competition to yield in certain circumstances to an individual state's decision to opt for regulation over competition. Nonetheless, the FTC has long argued for narrowly construing the doctrine to minimize the adverse impact on competition that necessarily results from the doctrine. After carefully analyzing the doctrine, an FTC task force issued a report in 2003,[8] recommending various approaches to clarifying the doctrine to bring it more closely in line with its original objectives. Since then, while we have continued to advocate against attempts by the states to immunize anticompetitive conduct from the antitrust laws, the FTC also developed a litigation program to address the doctrine in the courts.

Earlier this year, in a unanimous decision, the U.S. Supreme Court issued a decision in the FTC's challenge to a hospital merger that resulted in a near-monopoly in southern Georgia.[9] At issue was whether the state of Georgia had clearly articulated a policy of displacing competition in hospital markets through acquisitions by local hospital authorities. The Supreme Court found that the state had not clearly articulated such a policy and, in the process, narrowed

[8] *See* FED. TRADE COMM'N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[9] *See* FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003 (2013).

the scope of the state action doctrine. In my view, this was an example of a long-term advocacy effort by the FTC that ultimately paid off for consumers and competition.

B. Benefits of a Competition Advocacy Program

Let me next discuss what I believe are some of the primary benefits of an active competition advocacy program. First, competition advocacy can be useful to persuade government actors to tailor their policies to protect or foster competition—or, at the very least, minimize the adverse impact on competition and consumers. Often, competition advocacy may be the only option to address anticompetitive government action—due to certain antitrust immunities, such as the state action and *Noerr-Pennington* doctrines in the United States, or where law enforcement otherwise is not possible.

Further, competition advocacy can be a very cost-effective way to prevent harm to consumers.[10] Advocacy typically involves a small amount of resources relative to an agency's other tools, especially law enforcement, while at the same time reaping potentially significant consumer benefits if successful. Changing or eliminating a single law or regulation can be more effective in opening the market to competition than any given law enforcement action. Particularly for smaller or newer competition agencies that are unable to pursue more resource-intensive enforcement actions, advocacy may be a more feasible option.

Next, advocacy by competition officials can serve as the voice of consumers, who otherwise may not be represented in the political discussion surrounding a potentially anticompetitive law or regulation. Because consumers' interests are diffuse and the cost of the anticompetitive restraint for any individual consumer is often small, consumers are unlikely to

[10] *See, e.g.*, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted in* 58 ANTITRUST L.J. 43, 116 (1989) ("Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget.").

know about or participate in the political process to oppose such policies. Those seeking the policies, however, are often organized firms or professional associations that will reap concentrated benefits from reduced competition.[11]

Advocacy also can serve an important function in the political process by highlighting the costs to consumers of the anticompetitive law or regulation under consideration. This helps to assign political responsibility to the policymakers endorsing the anticompetitive policy. To the extent that such information advances consumers' knowledge of the potential effects of a law or regulation, advocacy can move public opinion in a direction that is more favorable to competition. The attention that advocacy brings to a topic also can result in additional press coverage and academic research on that topic, both of which can further the policy debate.

Finally, an active competition advocacy program may have spillover effects beyond the particular matters on which an agency is advocating. When an agency is actively touting the many benefits that competition can yield, it may also create or nurture a culture of competition among regulators and the public more generally.[12]

C. Factors that Make an Advocacy Program Successful

Next, I would like to discuss some of the factors that I believe have helped the FTC succeed in its advocacy efforts. We, of course, have been doing this for some time now and have been able to refine and adjust our program over the years. There are three factors that I believe have significantly contributed to our success and that should be considered by any agency pursuing competition advocacy.

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[11] *See, e.g.*, Ohlhausen, *supra* note 3, at 152; Cooper, *supra* note 4, at 1099-1102 (economic theory of regulation suggests political outcomes may tend to restrict competition more than they otherwise would).

[12] *See* Todd J. Zywicki & James C. Cooper, *The U.S. Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy* 36-37 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 07-07, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960893.

1. Firm Grounding for Advocacies

First, a firm grounding for an agency's advocacy efforts is crucial. We have based our advocacies in competition principles, a comprehensive understanding of the industry at issue, economic theory and analysis, and, where available, empirical evidence. Many of our advocacies build on the experience and industry-specific knowledge that we have obtained in the course of our law enforcement and policy work. For example, in the mid-2000s, we saw that some online business models were starting to gain traction in the area of real estate brokerage. Not surprisingly, this elicited certain reactions from more traditional parts of the real estate industry. For example, local realtor associations urged state legislators to require agents to offer a minimum set of brokerage services, which would prohibit some popular low-service/low-cost brokerage offerings. We filed comments opposing those requirements in several states. We also combined competition advocacy with other agency efforts, including bringing cases, jointly holding a workshop and issuing a report with the Justice Department, and providing educational materials to consumers.[13]

Our efforts in the real estate brokerage area highlight the importance to our advocacy efforts of what former FTC Chairman William Kovacic has called competition policy research and development (R&D). For the FTC, that term refers to a wide array of activities designed to inform the agency's pursuit of its competition mission, including, for example, academic-style research, information gathering, holding conferences and workshops focused on specific policy and legal issues, and writing reports. Competition policy R&D is undertaken at the FTC to

[13] Materials related to the FTC's efforts in the real estate brokerage area are available at http://www.ftc.gov/bc/realestate/index.htm.

improve agency decision making across the many efforts underlying our competition mission, including, importantly, our advocacy program.[14]

The FTC's economists also typically play a significant role in our advocacies, making sure that our advocacies are firmly grounded in economic analysis and, where possible, empirical research. Empirical support for an advocacy position is important: if an agency can point to rigorous empirical analysis demonstrating that a law or regulation is likely to harm consumers, it is likely to be more persuasive in its advocacy efforts.[15]

For example, in the e-commerce area, the FTC evaluated state prohibitions on the interstate direct-to-consumer shipment of wine. At the time—the early 2000s—many states banned or severely restricted the direct shipment of wine to consumers, thereby creating an entry barrier for numerous, particularly small, wineries seeking to sell their products online. We developed a staff report addressing the risks and benefits of allowing out-of-state wineries to ship directly to consumers.[16] The report included an economic study about the effects of one state's wine shipment ban on the price and variety available in a particular market. When the U.S. Supreme Court eventually took up this issue, it relied heavily on our report to conclude that states did not have sufficient reason to discriminate against out-of-state commerce in the direct shipment of wine.[17]

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[14] *See* WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES 91-94 (2009), *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

[15] *See, e.g.*, Cooper, *supra* note 4, at 1108 ("[C]omments with a substantial empirical component appear to have met with success.").

[16] *See* FED. TRADE COMM'N STAFF, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[17] *See generally* Granholm v. Heald, 544 U.S. 460 (2005).

2. Careful Selection of Advocacy Issues

A second factor that has influenced our success rate is the careful selection of issues on which to advocate. We have tried to focus our efforts on proposed laws or regulations that can have a significant impact on consumers. We have found that targeted efforts can be more successful than trying to address every competition issue that we become aware of. Rather, we focus on areas where we can make multiple comments;[18] we avoid areas that are too contentious for us to reach consensus within the agency; and we choose our battles carefully to focus on areas in which we have expertise and good empirical evidence to support our position.

In deciding where to focus an agency's advocacy efforts, it is also very helpful to look over the horizon to determine what policy issues are going to come to the fore. Unlike litigation and merger review, which are inherently reactive, advocacy requires an agency to be proactive. Conducting workshops, sectoral studies, and other policy research can help identify issues ahead of time, as well as provide opportunities to assemble economic or empirical research to be used in support of an agency's advocacy positions. Further, having such research available will make an agency better able to respond quickly to advocacy opportunities, which are often time-sensitive.

3. Continual Self-Assessment

Finally, we have found it extremely useful to conduct regular assessments of our advocacy efforts. This is crucial to having a better understanding of the factors that contribute to both the success and failure of our advocacies. Assessing our outcomes also allows us to evaluate the criteria for selecting which advocacies to pursue and to identify areas of repeated concern.

[18] *See* Cooper, *supra* note 4, at 1111 ("[T]he FTC often can amortize the cost of advocacy activities over subsequent comments on similar issues; once the fixed costs of analyzing a restraint have been incurred, the marginal cost of each subsequent filing on the same or similar topics is often minimal.").

Unlike law enforcement actions, in which the agency either succeeds or fails in stopping the anticompetitive conduct at issue, the effectiveness of competition advocacy can be difficult to measure. For example, it may not be easy to determine whether a particular advocacy was successful. Further, it is often difficult to discern the extent of an advocacy's influence on policymaking. Even if a particular policy decision is consistent with an agency's recommendation, it may merely mean that the agency's views and those of the decision maker already were the same.

Occasionally, a policymaker specifically identifies an FTC advocacy as being influential. For example, in vetoing a bill in 2004, Arnold Schwarzenegger, then-Governor of California, cited the FTC's arguments about the potential unintended effects of a bill to regulate pharmacy benefits managers as a key reason for his veto. In addition, as I mentioned earlier, the Supreme Court relied extensively on the FTC Wine Report in reaching a decision in the area of direct wine shipments. Nonetheless, such explicit recognition of the effect of an advocacy is extremely rare.

So, how can an agency discover when its advocacy has had a positive impact on policy? One way is by sampling the views of participants in the policymaking process. The FTC conducted surveys of such participants in the mid- and late 1980s and then again in the mid-2000s. Since then, the agency has made it a regular practice to mail surveys to: (1) the policymaker who requested our view on a particular matter (typically state legislators), (2) the sponsor of a bill that the agency commented on, and (3) relevant officials at a regulatory agency to which we submitted comments. We also send follow-up letters a few months later to those recipients who have not responded. Survey recipients are asked questions about the effectiveness of an advocacy filing, including (1) whether it provided information or perspectives

not presented by other sources or not well understood by the decision maker; and (2) the weight, if any, given to the advocacy filing.

We track our advocacy outcomes on an ongoing basis. Then, periodically, we conduct a more comprehensive assessment of our advocacy outcomes. Overall, the survey results that we have received over the years indicate that our advocacies do influence ultimate outcomes. Policymakers more often than not consider our views in their decision-making and believe our advocacies are of high quality. The portion of recipients saying that the FTC influenced the ultimate outcome has varied over time; however, I can say with confidence that the FTC has had its fair share of successes in influencing competition policy outcomes.

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Before I conclude my remarks on competition advocacy, I would like to commend the Fiscalia for developing an active advocacy program over the last few years. As just one example, the Fiscalia should be commended for the guidelines it issued to the public sector in June 2012.[19] This document provides extensive guidance to other Chilean government entities on the importance of taking into account the effect on competition they may have in exercising their powers and pursuing their missions. For example, the guidelines suggest that these entities assess whether their proposed action or intervention has the potential to produce the following effects on competition: (1) Does it limit the number or variety of players who participate in the market? (2) Does it limit the ability of market participants to compete? and (3) Does it reduce the participants' incentive to compete?[20]

[19] *See* FISCALIA NACIONAL ECONOMICA, THE PUBLIC SECTOR AND FREE COMPETITION: ASSESSING ITS BEHAVIOR FROM THE COMPETITIVE PERSPECTIVE (2012), *available at* http://www.fne.gob.cl/english/wp-content/uploads/2012/07/Guia-final-sector-publico-ENG.pdf.

[20] *See id.* at 20.

This type of advocacy to the public sector may very well prevent other government agencies from enacting laws or regulations that inhibit competition, to the detriment of consumers. In my view, my own agency, the FTC, ought to consider publishing a similar document for use in our country.

III. The Important Role of Premerger Notification Systems

The second area I would like to focus on this morning is premerger notification. By that, I mean a system in which qualifying transactions must be notified to, and reviewed by, the relevant competition authority. I understand that there is an ongoing discussion here about enacting a premerger notification program in Chile, where currently merger filings with the Fiscalia are voluntary.

At this point in the evolution of competition policy, the benefits of merger review, generally speaking, are fairly well established. Merger review is an integral part of an overall competition enforcement system. As a prospective means of preventing increases in market power, it complements the retrospective enforcement directed at anticompetitive conduct, either joint or unilateral, that has already taken place. In its 2012 Performance and Accountability Report, the FTC estimates that its merger review program saved consumers over fourteen times the amount of resources devoted to that program.[21]

The vast majority of mergers and acquisitions, of course, are benign or beneficial to competition. Many transactions enable the merged firm to reduce costs and become more

[21] *See* FED. TRADE COMM'N, PERFORMANCE & ACCOUNTABILITY REPORT, FISCAL YEAR 2012 78 (2012), *available at* http://www.ftc.gov/opp/gpra/2012parreport.pdf. For diverging views on whether the benefits of premerger review in the United States outweigh its costs, compare William J. Baer, *Reflections on Twenty Years of Merger Enforcement under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 853 (1997) ("The available evidence suggests strongly that the benefits of HSR outweigh its modest costs."), with Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 901 (1997) ("[T]he benefits [of HSR] are uncertain and the costs are real, large, and mostly unintended and unanticipated by the original sponsors [of the Act].").

efficient, leading to lower prices, higher quality products or services, or increased innovation. Thus, the goal of merger enforcement should be to identify and prevent transactions that are likely to substantially lessen competition, without delaying or obstructing transactions that actually enhance, or have no effect on, competition. In 2012, there were 1,400 transactions reported to the FTC and DOJ under the Hart-Scott-Rodino Act (HSR). The two agencies issued Second Requests in only 49, or 3.5 percent, of those transactions. The agencies challenged only 44, or 3.1 percent, of the transactions reported in 2012; conversely, the agencies determined that almost 97 percent of the reported transactions were unlikely to substantially lessen competition.[22]

A. Benefits of a Premerger Notification System

Let me next discuss the benefits of a premerger notification system. Such a system provides a competition authority the opportunity to investigate and either challenge or restructure the relatively few transactions that are likely to harm competition and consumers—before the competitive injury can arise. The authority can preserve the competitive status quo in the marketplace and require structural remedies to resolve any competitive issues, or, if necessary, seek to block the transaction altogether, if the competitive issues cannot be remedied. Competition authorities have neither the time nor the resources to monitor all of the corporate transactions that take place in their jurisdictions in an attempt to identify those that pose a material threat to competition. Nor is it practical to rely on concerned customers or other market participants to notify the authorities of potentially problematic transactions in time for the authority to act.

[22] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2012 5-6 (2013) [hereinafter 2012 HSR REPORT], *available at* http://www.ftc.gov/os/2013/04/130430hsrreport.pdf. In the vast majority of the merger challenges brought by the agencies, they reached settlements with the merging parties before any litigation took place.

Challenging and remedying anticompetitive acquisitions after they have been consummated is often difficult and ineffective. Post-acquisition litigation can take longer than pre-acquisition litigation, and, for anticompetitive transactions, the harm continues during the course of any legal challenge. Even when a competition agency is able to prevail in litigation to unwind an anticompetitive transaction, effective relief often may no longer be practicable. After firms consummate a transaction, the acquired firm's assets, operations, personnel, product lines, and other key business components are typically integrated with those of the acquiring firm—that is, they are "scrambled" together. "Unscrambling" the merger and restoring the acquired firm to its former status as an independent competitor is typically difficult and often impossible. Premerger notification requirements allow the reviewing agency a full opportunity to seek prompt and effective relief in cases of anticompetitive transactions.

Premerger notification also may result in the disclosure of more information concerning the competition authority's merger enforcement policy, yielding more information for firms considering a merger or acquisition. In particular, with a notification system, the authority is likely going to encounter mergers that require significant investigations, but that ultimately go unchallenged. Publicizing its views on why the agency chose not to block such mergers would provide additional transparency to firms contemplating various transactions. This increase in transparency may also have the beneficial side effect of deterring anticompetitive transactions from being proposed in the first place. Premerger notification requirements and sound, transparent merger enforcement thus may deter firms from proposing transactions that are likely to reduce competition.

B. Recommendations for Implementing a Premerger Notification System

As you may infer from my remarks, I see many benefits flowing from premerger notification systems. It is nonetheless crucial to be mindful of the additional costs that such systems impose. These include the direct and indirect costs imposed on firms that have to file notification forms, as well as the costs borne by the investigating agency in reviewing all of the notified transactions. An effective premerger notification system will focus agency resources on transactions that present the greatest risk to consumer welfare, while allowing the vast majority of transactions, which do not present any meaningful risk to competition, to proceed quickly through the review process. An effective premerger notification system also will seek to minimize the costs imposed on firms required to notify their transactions.

To achieve these objectives, legislators and other policymakers contemplating enacting a premerger notification system would benefit from taking a close look at the extensive work product issued by the International Competition Network (ICN). As many of you know, the ICN was founded in 2001 and now counts as members over 120 competition agencies, including, of course, the Fiscalia and the Tribunal de Defensa de la Libre Competencia (TDLC). The ICN has expended significant efforts in the merger review area, with a goal of promoting convergence of merger review systems toward recognized best practices. The FTC has had the opportunity to play a significant role in the ICN's efforts generally and within the merger review context specifically. For example, the FTC chaired the ICN Merger Working Group's subgroup on Notification and Procedures, which developed a set of eight Guiding Principles and thirteen Recommended Practices in the merger notification area.[23] These principles and practices reflect

[23] *See* INT'L COMPETITION NETWORK, GUIDING PRINCIPLES FOR MERGER NOTIFICATION AND REVIEW (2002), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf; INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES (2005) [hereinafter ICN RECOMMENDED PRACTICES], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. The OECD Council also has adopted

an international consensus on merger notification best practices, and, as I will discuss in more detail, they provide important and useful guidance for competition authorities in implementing their premerger notification systems. I am focusing on a few, significant notification issues in the limited amount of time that I have this morning. There are certainly many significant procedural and substantive issues raised by any merger review system, whether voluntary or mandatory. Those important issues, however, are beyond the scope of this speech.

1. Merger Notification Thresholds

A "threshold" issue for any premerger notification system is the selection of appropriate thresholds for requiring a merger filing. The ICN's Recommended Practices call for such thresholds to be clear and understandable and based on both objectively quantifiable criteria and information that is readily accessible to the merging parties.[24] Given the large and growing number of jurisdictions around the globe in which notification thresholds must be evaluated by merging firms, "the business community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests"[25] for whether a merger must be filed in a particular jurisdiction.

Typically, notification thresholds are based on the merging firms' assets and sales (or turnover), which are objective measures. In contrast, the ICN recommends against the use of market shares as notification thresholds.[26] Market shares are much more subjective than asset or sales figures. Market definition is one of the most controversial topics in merger review.

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recommended best practices for merger review, addressing many of the same issues covered in the ICN Recommended Practices. *See* ORG. FOR ECON. COOPERATION & DEV., RECOMMENDATION OF THE COUNCIL ON MERGER REVIEW (2005) [hereinafter OECD RECOMMENDATION], *available at* http://www.oecd.org/competition/mergers/40537528.pdf.

[24] *See* ICN RECOMMENDED PRACTICES, *supra* note 23, §§ II.A-.C, at 3-4. *See also* OECD RECOMMENDATION, *supra* note 23, § I.A.1.2.2, at 2 (recommending that OECD member countries "use clear and objective criteria to determine whether and when a merger must be notified").

[25] ICN RECOMMENDED PRACTICES, *supra* note 23, § II.A cmt. n.1, at 3.

[26] *See id.* § II.B cmt. n.1, at 3.

Defining the relevant market correctly is often difficult, and market shares, to the extent they provide useful information, are only meaningful if they are based on properly defined markets. Further, it can be quite costly and time-consuming to conduct a market share analysis.

In selecting notification thresholds, it is also crucial to set them at a sufficiently high level, so as not to impose unnecessary burdens on business or the reviewing agency and its limited resources. Merger review is a fact-intensive process that can require significant resources to review all of the transactions that may be filed with the competition authority, including the many transactions that are unlikely to raise competitive concerns. Low notification thresholds can impose unnecessary burdens on both parties required to provide notification and the agency staff who are tasked with reviewing all filed mergers. Rather than spending time investigating mergers that are unlikely to be problematic, agency resources likely would be better utilized in pursuing cartel cases or other anticompetitive conduct.

2. Nexus to Reviewing Jurisdiction

A second important consideration in selecting notification thresholds is the nexus to the reviewing jurisdiction of the transactions that must be notified. As the ICN recommends, a premerger notification system should not capture a foreign transaction unless there is a sufficient nexus between the reviewing jurisdiction and the transaction at issue.[27] Requiring merger notification in the case of transactions that do not have a material local nexus imposes unnecessary filing costs on merging parties and uses competition agency resources without any corresponding enforcement benefit. Thus, a premerger notification system should not require a

[27] *See id.* § I.A, at 1 ("Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned."). *See also* OECD RECOMMENDATION, *supra* note 23, § I.A.1.2.1, at 2 (recommending that OECD member countries "assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction").

filing unless the proposed transaction "is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned."[28]

3. Reasonably Short Review Periods

A third important consideration in designing a premerger notification system is the timeframe for the merger review. Merger reviews should be conducted in a reasonable and determinable timeframe.[29] Having reasonably short time limitations for each phase of review is necessary to avoid imposing undue burdens on the merging parties. Competition agencies need sufficient time to properly investigate and analyze mergers, which often present complex legal and economic issues. At the same time, mergers are almost always time-sensitive, and unduly long review periods may jeopardize proposed transactions from being consummated. Undue delay also defers the realization of any efficiencies arising from transactions undergoing review. Further, merging parties should be able to predict with some, even if not complete, certainty how long each phase of the merger review likely will take.

Premerger notification systems also should be designed to permit notified transactions that do not raise material competitive concerns—that is, the vast majority of mergers—to proceed expeditiously.[30] In the United States, for example, merging parties can request early termination of the initial thirty-day waiting period, and, wherever possible if a transaction does not present any material competitive concerns, the FTC and DOJ will honor this request. In 2012, the most recent year available, the two agencies granted early termination in eighty-two

[28] ICN RECOMMENDED PRACTICES, *supra* note 23, § I.C cmt. n.1, at 2.

[29] *See, e.g.*, *id.* §§ IV.A, .C, at 7-9; OECD RECOMMENDATION, *supra* note 23, § I.A.1.3, at 2 ("The review of mergers should be conducted, and decisions should be made, within a reasonable and determinable time frame.").

[30] *See, e.g.*, ICN RECOMMENDED PRACTICES, *supra* note 23, § IV.B, at 8; OECD RECOMMENDATION, *supra* note 23, § I.A.1.2.4, at 2 (recommending that OECD member countries "provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance").

percent of the transactions in which it was requested by the parties.[31] As another example, Brazil, which enacted a premerger notification system last year, reduced the average merger review period from about 150 days in 2011 to twenty-five days during the first year of its new system.[32] The average review period for mergers filed under Brazil's new fast-track process was nineteen days during the first year of the program.[33]

4. Continual Self-Assessment

Finally, as with all aspects of its performance, an agency enforcing a premerger notification program ought to engage in continual self-assessment of the program's impact and effectiveness. That is, the agency should continually assess how it may speed up the review process and reduce the burden on filing parties[34]—without compromising the agency's ability to investigate and stop proposed transactions that will lessen competition. This is true for any agency overseeing a premerger notification system. Even with almost forty years of experience with such a system, the FTC and DOJ continue to seek ways in which we can make our premerger review process more efficient and less burdensome.

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To conclude, I hope that I have convinced you of the benefits of both competition advocacy and carefully implemented premerger notification systems. Each of these programs plays an important role in a competition enforcement system, allowing competition agencies to prevent enduring harms to consumer welfare before it is too late to undo or remedy them. I look

[31] 2012 HSR REPORT, *supra* note 22, at 6 (early termination granted in 902 of the 1,094 transactions in which it was requested during fiscal year 2012).

[32] *See* Carlos Emmanuel Joppert Ragazzo & Mario Sergio Rocha Gordilho, Jr., *One Year After: Premerger Notification Unit in Brazil*, CPI ANTITRUST CHRON. 8 (Aug. 2013), *available at* https://www.competitionpolicyinternational.com/file/view/6979.

[33] *Id.* at 7.

[34] Agencies also should assess, among other things, the transparency and procedural fairness of their premerger notification systems.

forward to seeing the Fiscalia continue to run an effective advocacy program, and I will stay tuned to see if Chile adopts a premerger notification system.

Thank you for your attention.