

Prepared Remarks of D. Bruce Sewell
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Federal Trade Commission and Department of Justice
Hearings on Section 2 of the Sherman Act
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I want to begin by thanking the antitrust enforcement agencies for giving me the opportunity to participate in these very important hearings. I appreciate the considerable effort that has been devoted to these hearings and the dedication that the agencies' able staffs have brought to bear on these issues. I am confident that the agencies' report will make a significant contribution to the analysis of single-firm conduct.

The development of the law of single-firm conduct is of obvious interest to my company. We are the defendant in a highly visible Section 2 litigation that has generated considerable interest in the press and among antitrust specialists. I was somewhat dismayed to see that the plaintiff in our case used these hearings as a forum to rebroadcast allegations that it has already made in its district court filings and in the press. With respect to this, I will only say the following: Intel prefers to litigate in the courtroom, and I therefore will not use this policy forum to argue the merits of our case, other than to state that I unequivocally deny the allegations that were made against Intel at the January 30 hearing in Berkeley.

Instead, my remarks today will address the policy issues that have been the focus of these hearings. In particular, I would like to discuss the appropriate role of Section 2 with respect to pricing and discounting practices. I hope that my company's perspective on these policy issues will help to advance the debate that the agencies have generated through these hearings.

At the risk of stating the obvious, the challenge of Section 2 enforcement is to curb anti-competitive single-firm conduct that harms consumers without deterring the type of aggressive competition that benefits consumers through lower prices and greater innovation. This is a great challenge. As Professors William Baumol and Janusz Ordover observed 20 years ago; "[t]here is a specter that haunts our antitrust institutions. Its threat is that, far from serving as the bulwark of competition, these institutions will become the most powerful instrument in the hands of those who wish to subvert it."¹ Professor Baumol and Ordover stressed the important concept that "rules that make vigorous competition dangerous clearly foster protectionism,"² and they warned of the "runner-up who hopes to impose legal obstacles on the vigorous competitive efforts of his all-too-successful rival."³ These observations were more recently echoed by Professors Preston McAfee and Nicholas Vakkur, who catalogued seven strategic abuses of the antitrust laws, including punishing non-cooperative behavior and preventing a successful firm from competing

¹ William J. Baumol and Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 247 (1985).

² *Id.* at 255.

³ *Id.* at 253.

aggressively.⁴ In his presentation at these hearings, Professor McAfee stressed that the antitrust laws can be used to “harass,” “harm,” and “extort” in order “to induce cooperation.”⁵

The strategic abuse of the antitrust laws is of more than a passing concern to Intel. I was therefore particularly pleased to see both Chairman Majoras and Assistant Attorney General Barnett, in their remarks at the beginning of these hearings, underscore the importance of having rules of law that do not deter procompetitive, aggressive competition. As Chairman Majoras stated in her remarks, “there is consensus that antitrust standards that govern unilateral conduct must not deter competition, efficiency, or innovation. This is why we frequently worry about ‘false positives.’ Pervasive and aggressive competition, in which firms consistently try to better each other by providing higher quality goods and services at lower costs, is crucial to maximizing consumer welfare and economic growth.”⁶

Assistant Attorney General Barnett echoed one of our chief concerns, as a business that devotes considerable resources to antitrust compliance, by stating that antitrust rules in the unilateral conduct area must set forth “clear, objective standards that businesses can follow and are also administrable for enforcers, courts, and juries.”⁷ Particularly in the area of pricing behavior, as the Supreme Court has emphasized on many occasions and Mr. Barnett endorsed in his remarks, antitrust rules must “avoid ‘chilling legitimate price cutting.’”⁸ This requires objective standards that rely on information that is available to corporate decisionmakers when they act and that allow more efficient firms to exploit their cost advantages. Sound antitrust policy also requires sensitivity to the potential misuse of the antitrust laws by less efficient competitors to reduce price competition.

Government enforcement policy has been appropriately cautious in the area of pricing, taking heed of the risk of chilling the very conduct that the antitrust laws seek to encourage – that is aggressive price cutting – and thereby harming consumers. At the same time, the enforcement agencies have aggressively pursued many other forms of conduct that anticompetitively creates or maintains monopoly power. Without getting into the merits of any individual case, it is

⁴ R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. Strategic Mgmt. 1, 2-3 (2004), available at <http://www.hss.caltech.edu/~mcafee/Papers/PDF/strategicantitrust.pdf>.

⁵ R. Preston McAfee, *The Strategic Abuse of the Antitrust Law*, at 9 (Dec. 6, 2006), available at http://www.usdoj.gov/atr/public/hearings/single_firm/docs/220041.pdf.

⁶ Remarks of Deborah Platt Majoras, Chairman, Federal Trade Commission, *The Consumer Reigns: Using Section 2 to Ensure a “Competitive Kingdom”* at 9 (June 20, 2006), available at http://www.usdoj.gov/atr/public/hearings/single_firm/docs/219108.pdf.

⁷ Remarks of Thomas O. Barnett, Assistant Attorney General for Antitrust, *The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act* at 17 (June 20, 2006), available at <http://www.ftc.gov/os/sectiontwohearings/docs/Barnett-statement.pdf>.

⁸ *Id.* at 9 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)).

important to note that the agencies have pursued a number of different forms of conduct under Section 2 theories. Recent cases include:

- Patent settlements that may delay entry and thereby extend incumbent suppliers' exclusive rights to supply products.
- Representations to standard-setting organizations or governmental bodies regarding patent positions.
- Exclusive dealing.
- Product design.

The enforcement agencies have recognized the challenges inherent in aggressive enforcement of Section 2 cases. While bringing a number of Section 2 cases in recent years, the agencies have also expressed cognizance of the potential misuse of the antitrust laws by less efficient rivals. As Deputy Assistant Attorney General Masoudi has noted elsewhere, "[a]n antitrust agency must be cautious about complaints it receives from competitors. Such complainants often try to avoid legitimate competition by seeking protection from the government from competitive pressures."⁹ This is particularly true when the subject of such complaints is price cutting. We hope that the agencies' final report on these hearings will impart to the courts the benefits of the agencies' experience in enforcing the law aggressively while resisting the demands of complainants who seek to use Section 2 to dampen competition.

I read with considerable interest the assertion made at the January 30th hearings that the enforcement agencies have been asleep on the job, that they have somehow failed to enforce section 2. This view cannot be squared with the record of aggressive enforcement that I just outlined.

It was also suggested at that hearing that the enforcement agencies have given the high-tech area a free pass. Even ignoring the fact that high technology is not limited to the computer industry, this claim is equally hard to square with reality. The agencies' recent actions in the high tech area include:

- Monopolization cases against Microsoft and Rambus.
- A substantial number of merger enforcement cases involving software companies (Oracle / PeopleSoft being the best known, but it is only one of many) and many other high tech markets, including communications technology, disaster recovery systems, and 3D prototyping.

⁹ Remarks of Gerald F. Masoudi, Deputy Assistant Attorney General for Antitrust, *Key Issues Regarding China's Antimonopoly Legislation* at 6 (May 19, 2006), available at <http://www.usdoj.gov/atr/public/speeches/217612.pdf>.

- Massive fines imposed on DRAM companies (and jail sentences on company executives) and ongoing criminal investigations involving SRAM, flat panel displays, and graphics processors.

The criminal cases and investigations are particularly notable because they involve price fixing – conduct designed to and having the effect of making consumers pay more. It seems eminently sensible that antitrust enforcement should direct itself at conduct that demonstrably leads to higher prices rather than to attack price cutting, which is the very conduct that the competition laws are designed to promote. It was suggested at the Berkeley hearing that antitrust enforcement should be directed at price cutting and that the “reality” (as opposed to the “myth”), is that consumers are harmed when prices come down due to discounting. Here, I could not disagree more with the position espoused by AMD. On the issue of discounting, we have a fundamentally different point of view. We think that enforcement resources are appropriately directed at conduct that makes consumers pay more, not conduct that gives them lower prices.

I believe that our position is supported by both the law as articulated by the Supreme Court and by very sound policy considerations that underlie the Court’s decisions. The Court’s statement in *Matsushita* cogently expresses both the policy and its underpinnings: “[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”¹⁰ Justice Breyer, while sitting on the First Circuit, made a similar observation in the *Barry Wright* case: “[T]he consequence of a mistake here is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to penalize a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry where prices typically exceed costs.”¹¹

This policy has broad application across all areas of pricing conduct. As the Supreme Court said in *ARCO v. USA Petroleum*, “Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.... We have adhered to this principle regardless of the type of antitrust claim involved.”¹² This is not only the law, but it is also the right antitrust policy. This policy recognizes that false positives, which are very likely to occur in the absence of clear-cut cost-based rules, can impose a high cost on society by punishing, and thereby, deterring aggressive price competition. The courts and the enforcement agencies have recognized that the very tangible bird in the hand, lower prices enjoyed by consumers today, must not be sacrificed for the bird in the bush, the speculative (and almost always illogical) hope that attacking price cutting and thereby producing higher prices today will produce lower prices tomorrow.

I can tell you from personal experience, from years of advising a very successful corporation on how to compete against a very aggressive rival, that the need for clarity in this area is paramount. The challenge in counseling a business is to ensure that the company adheres to its

¹⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)

¹¹ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983)

¹² *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

legal obligations without forcing it to engage in “gentlemanly competition” in which business opportunities are squandered by pricing higher than needed to win the deal, even though the deal can be won profitably. Intel has long had a cost advantage due to its strong leadership position in manufacturing, and it is important to me and to the other lawyers advising our management that we neither deprive the company of the competitive advantages that come from its hard-won lower cost position nor deprive consumers of the benefit of lower prices, simply because of unclear antitrust rules.

You may have recently read on the front page of the New York Times about Intel’s latest breakthrough in semiconductor manufacturing technology. This is the most significant change in the materials used to manufacture silicon chips since Intel pioneered the modern integrated-circuit transistor more than four decades ago. It is no accident that Intel was first to achieve this breakthrough. Our company has enjoyed unparalleled leadership in manufacturing for most of its existence. And the benefits of this leadership position are very tangible. With every new generation of manufacturing technology, each of which is introduced roughly every two years, we double the number of chips that can be produced on a wafer, holding both the wafer size and the chip design constant. This means that the manufacturing cost of any given chip is cut by 50% when the new manufacturing technology is introduced. The story is a bit more complicated because we always take advantage of the lower cost to pack more features into new chips, which trades off some of the cost savings for better performing products; but the cost advantage of being first to adopt the new manufacturing technology is large and very tangible. Our recent manufacturing technology breakthrough will ensure that we can continue to progress along the same path for many years to come.

Intel has been on average nine months to a year ahead of its competitors in adopting new manufacturing technologies. This means that in any given two-year cycle, we are alone in achieving the cost savings during the first year and are ramped up on the new manufacturing process during the second year when the competition is just beginning to introduce the new manufacturing technology. Our sales executives want to use the cost advantage that they enjoy as a result of our manufacturing leadership to win business. Clear antitrust rules are essential to my ability to guide them to a winning outcome that does nothing more than exploit our competitive advantage.

A clear and sensible rule is offered by the Areeda & Hovenkamp treatise in its latest supplement: “[W]hen a discount is offered on a single product (whether a quantity or market share discount), the discount should be lawful if the price after all discounts are taken into account exceeds the defendant’s marginal cost or average variable cost. That is, such discounts are covered by antitrust’s ordinary predatory pricing rule.”¹³ A similar approach has been proposed by former FTC Chairman Tim Muris, who advocates a “modified *Brooke Group* test” based on whether the price of the total amount of goods sold exceeds the cost of the goods.¹⁴

¹³ Philip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 749 at 326 (Supp. 2006).

¹⁴ Timothy J. Muris, Comments on Antitrust Law, Economics, and Bundled Discounts, submitted to the Antitrust Modernization Commission at 21-27 (July 15, 2005), available at

Cost-based rules have a number of advantages, beginning with the avoidance of false positives. They enable companies to base pricing decisions on what they know, their own cost structures and the relationship of price to cost, instead of speculation about the meaning of potentially vague jury instructions that say, for example, that a firm must be allowed to compete aggressively but that it cannot behave in an unnecessarily restrictive manner. Because cost-based rules are more predictable than the vague standards that have been applied by some courts in Section 2 cases, they are also inherently more administrable. And they appropriately condemn the type of discounting that does cause competitive harm – predatory pricing.

The antitrust laws are a powerful instrument for consumer protection, but they can also be misused by rivals to attack competition. It is essential that the antitrust rules in the pricing area protect consumers both from anticompetitive conduct that create, maintain, or enhance a monopoly and from anticompetitive abuses of the law by rivals that seek to stifle price competition.

Thank you once again for the opportunity to provide these comments.

http://www.amc.gov/commission_hearings/pdf/Muris.pdf. Professor Muris treats market share discounts as a form of bundling. *Id.* at 5.