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Interview with J. Thomas Rosch, Commissioner, Federal Trade Commission

Editor's Note: *In his first interview since becoming an FTC Commissioner, J. Thomas Rosch discusses a wide range of issues confronting the current and future FTC. He assesses the prospects for convergence with both the Department of Justice and antitrust enforcement agencies abroad, the substantive reach of Section 5, and the impact of the current economic crisis upon merger analysis. A significant part of the interview is devoted to the ongoing and controversial reform of the FTC's investigative and administrative litigation procedures.*

Commissioner Rosch is no stranger to the FTC in a time of transition and revitalization. He served as the director of the Bureau of Consumer Protection from 1973 to 1975, when the agency was in the early days of administrative reorganization and expanded powers of investigation and enforcement. (The S&H *decision was handed down in 1972; FTCA Section 13(b) was enacted in 1973.) After he left the FTC for private practice he continued to observe and advise on agency practice and priorities, serving on the 1989 ABA Antitrust Section Special Committee to Study the Role of the FTC. He was Chairman of the Antitrust Section in 1990. He came to the FTC in 2006 from the San Francisco office of Latham & Watkins, where he was the former managing partner and most recently a partner, working in the firm's antitrust and trade practices group. He has over forty years experience in antitrust counseling and litigation, and he has been a felllow of the American College of Trial Lawyers for more than twenty years.*

FTC Commissioner J. Thomas Rosch

Commissioner Rosch has not shied away from controversy during his tenure at the FTC. He has written numerous forceful speeches, concurrences, and dissents (available at http://www.ftc.gov/speeches/rosch.shtm). He advocates application of Section 5 to conduct not covered by the Sherman Act, such as an effort to exploit licensees who were locked into a standard, by refusing to honor limitations on royalty fees. He has become personally involved in the Part 3 reform process, sitting as the administrative law judge in Equitable Resources, INOVA, *and* Whole Foods*—three of the most important merger challenges brought by the agency in the last two years. In this interview he discusses how his thinking on such issues has been influenced by his experience as counselor and litigator, as well as candidly disclosing antitrust issues where his views are still evolving.*

This interview was conducted on January 26, 2009, by ANTITRUST *Editorial Chair Mark D. Whitener.*

ANTITRUST: You came to this job with decades of experience as an antitrust lawyer, litigator, bar leader, and former FTC official. How has this experience shaped your approach to being a Commissioner?

J. THOMAS ROSCH: The first thing I did before taking this job was to take stock of the expertise that was either already at the Commission or about to join the Commission and to determine whether or not there was anything I could add in those respects. In thinking over what was already there or about to be there, these were my conclusions: first, Debbie Majoras was an antitrust agency administrator par excellence. She'd had a good deal of experience in management at the Department of Justice, and she was reputed to be an excellent administrator at the Commission.

Although I had helped manage the McCutchen firm (in San Francisco) and I was the office managing partner of the Latham firm when I went over there, the fact of the matter was that I was not in Debbie's league when it came to being an administrator. So I figured that there wasn't an awful lot that I could add in that respect.

I then considered international matters because I knew that the Commission had a substantial role in dealing with various countries with respect to its competition and consumer protection missions. There the expert was Bill Kovacic, without any question. He had a worldwide reputation, in terms of both substantive convergence and comity and he was conversant with the competition laws of many countries. By contrast, I had focused almost exclusively on United States antitrust law during the period that you're talking about and

consequently I concluded that there wasn't very much I could add in that regard. Bill was just joining the Commission—and he clearly had superior expertise and experience.

With respect to dealing with the Hill, which I knew from both experience and by way of hearsay was a very important part of any Commissioner's job, the expert was Jon Leibowitz. He had spent years on the Hill with the Senate Judiciary Committee and more specifically with the Antitrust Subcommittee. It had been years, dating back to 1975, since I'd last appeared at all on the Hill. I had virtually no experience politically. And as a consequence, I didn't think there was anything significant I could add in that regard.

In terms of outreach to the states, the expert was Pam Harbour. She had, as you know, been the head of antitrust law enforcement in New York after Lloyd Constantine. She had excellent relations with NAAG (National Association of Attorneys General). I didn't think there was anything important I could add in that respect either.

On the other hand, I had spent four decades as a defense antitrust litigator and counselor. And I'd had the great good fortune to have Judge Bill Schwarzer as my mentor when I started at McCutchen. As a result of that, I had tried a lot of antitrust cases at a very early age. And I was fortunate enough also to be co-counsel with some of the best and the brightest trial lawyers in the United States—in the *Oracle* and the *Chronicle-Examiner* merger cases and in the *Brand Name Prescription Drug* class action that was tried in Chicago, for example.

Although I didn't consider myself to be one of those best and brightest litigators, I'd seen them do their work. And I'd also dealt with the Commission from time to time in merger cases so I had criticisms that were pretty much along the lines of those which have been expressed by a number of people in the Antitrust Section, both about the Part 2 (investigation) process at the agencies, including the second request process, and about the Part 3 (administrative trial) process at the Commission.

Consequently I felt that what I could bring to the Commission specifically was experience and expertise as an antitrust trial lawyer and experience and expertise as an antitrust counselor. I hoped to have a hand in reforming the Part 2 and Part 3 processes in response to some of the criticisms that have been leveled with respect to those processes. I also hoped to be able to help the Commission staff deal effectively with the best and the brightest litigators in the United States.

I guess my final thought on this score, though, is that I came to the job with a different outlook than I had as a defense antitrust litigator. I think that in that role one tends to focus rather narrowly on one side of an issue because you're advocating one side of the issue; you're advocating your client's position. And that's what I had done during my career as an antitrust litigator.

That wasn't true when I wore my counseling hat in private practice, especially toward the end of my career. More specifically, my predecessor as a Commissioner, Tom Leary, told the students at the Antitrust Section's Masters Course three years ago that the best counselors he knew were ones who not only spotted the issues but looked at both sides of the questions and gave some thought as to how they might be answered creatively instead of just saying "no." I hadn't heard Tom's remarks before the Masters Course, but I thought he was right. Increasingly, as an antitrust counselor I tried to be more open-minded and tried to develop creative solutions where I thought there were roadblocks involved.

Similarly, when I came to the Commission I felt that I should be more open-minded than I had been as a defense antitrust litigator; that I could not be a single-minded advocate; that I had to take a look at both sides of the issue in a way that I really hadn't done as a litigator. I felt that I shouldn't take a job at the Commission in which I was not only a prosecutor but also a judge unless I was prepared to be more open minded about the issues I would encounter.

ANTITRUST: What do you see as your main accomplishments, and the Commission's main accomplishments, since you took office?

COMMISSIONER ROSCH: Let me start first with the Commission's main accomplishments. Not surprisingly, given my primary interest, in my view the Commission's greatest achievements have related to litigation. I've said it before but I'll emphasize it again: although litigation is not the only tool that the agency has to implement the competition law enforcement role that Congress envisioned, it is one of the most important tools. I count as the Commission's main achievements in the three years that I've been here to be its determination to protect its Part 3 administrative proceeding by appealing the denial of the preliminary injunction in *Whole Foods*; reforming the Part 3 process to render it less protracted and more likely to yield quality decision making; and developing in-house expertise to litigate against America's finest litigators, whom the Commission faces in both the federal district courts and in Part 3.

For example, I think Matt Reilly, Phil Broyles, and Markus Meier have what it takes to be excellent "First Chair" trial lawyers. They are not alone. Today there a number of other members of the Bureau of Competition staff who are increasingly better able to face the best litigators in the country. I also think the addition of Robby Robertson, a very skilled and seasoned trial lawyer from Kirkland & Ellis in Chicago, as our lead trial lawyer has enhanced our ability to try cases. Robby is a plain-spoken David Boies. His presence should not inspire either resentment or envy on the part of aspiring staff trial lawyers because his leadership will create more opportunities for them to help try cases. My former attorney advisor, Kyle Andeer, is Robby's right hand, and Kyle not only knows antitrust law cold but also has keen litigation instincts because of his prior experience as a litigator at the Antitrust Division. So if I were to single out the number one Commission accomplishment that stands out in my mind

during the three plus years I've been here, it probably is the enhancement of the agency's trial capabilities.

If I brought anything important to the table in that respect it was probably a willingness to lose. It's hard to lose, but as a trial lawyer you do lose; it's just part of the bargain. And the trick, as our new President has said, is to pick yourself up off the ground, dust yourself off, and I would have added get back on the horse and ride it again because the sooner you do that, I think the better off you are.

I've also devoted a lot of attention to reforming Part 3. I've tried to make our administrative process much faster so that, particularly in unconsummated merger cases, the transaction doesn't crater before the administrative process has run its course. Additionally, I've tried to enhance our ability to make not only speedy decisions but quality decisions in Part 3. We're not there yet but we're getting there. And I would count that as the Commission's second most significant achievement.

I've tried to be more broad minded than I was as a defense antitrust litigator. I try to look at both sides of an issue instead of just being a defense advocate. I think that anybody who comes to this agency should do that.

I've been equally concerned about the Part 2 process. As I say, before I came I was mindful of the criticisms that have been leveled at the second request process—that it took too long, that it was opaque and one-sided, that it resulted in the staff getting discovery which the parties to a merger could not get. And so I've tried to focus on that process as well. The Commission has made various efforts to speed up the second request process too.

Lamentably, I think those efforts have fallen short. But our Bureau of Competition management these days is giving the staff tighter deadlines for conducting all Part 2 investigations, not just those generated by second requests. I would like to see that process enhanced even more over time. I think we can do it. What it's going to take I think is a willingness on the part of the staff to conduct more discovery post-complaint, just like litigators do in federal or state court civil litigation. The latter conduct most discovery after the complaint has issued. They don't have the benefit of a lot of pre-complaint discovery. And so I think that one of the keys to this problem is to rely more on post-complaint discovery and that will allow both an accelerated Part 2 process and a less opaque Part 2 process because parties will know exactly what discovery the staff is conducting.

All that said, there are trade-offs. The change would mean that the Commissioners would have to determine whether or not there's "reason to believe" that a transaction or practice will violate the law without the benefit of the extensive pre-complaint discovery that is conducted in Part 2 and in the second request process, specifically. And the outside bar and their clients are going to have to understand that that is the trade-off for effectively dealing with the criticisms that have been leveled at the Part 2 process in general and at the second request process, specifically. But I don't think the critics can have it both ways.

Third, and finally, I am very proud that the Commission had the courage to appeal the decision denying the preliminary injunction in *Whole Foods*. The decision to appeal was not an easy one. I had appeared before Judge Friedman in the *Medical Residents* case and felt he was a fine judge. I knew he would be respected by the D.C. Court of Appeals. But I felt—and more important, a majority of the Commission felt—that the standard that was applied in denying preliminary injunctions in *Arch Coal*, *Western Refining*, and *Whole Foods* was not the standard intended by Congress and that an appeal was imperative in order to protect the Part 3 administrative trial process that Congress intended the Commission to implement. I would count that successful appeal as the Commission's third most significant achievement.

ANTITRUST: As a general matter you have, I think it's fair to say, become one of the most influential and controversial Commissioners in some time. Given your background when you were appointed as a Republican Commissioner in 2005, few might have anticipated that. Some of the controversial issues relate to Section 5 policy, merger policy, the administrative litigation issues that you've already touched on, the Section 2 Report and other issues. How do you view this controversy over some of your policy positions?

COMMISSIONER ROSCH: First of all, I would take issue with the "influential" premise of the question. To my way of thinking, the Commission is a collegial body, and it always should be. So I'm just one of five Commissioners. The only special expertise I bring to the agency is my antitrust litigation experience and perhaps my antitrust counseling experience with respect to the laws of the United States.

In terms of the controversy that has ensued, I'm mindful of that. As I indicated earlier, I've tried to be more broad minded than I was as a defense antitrust litigator. I try to look at both sides of an issue instead of just being a defense advocate. I think that anybody who comes to this agency should do that. And it may be that people who were my sponsors and my friends did not fully expect that. But, in my view, that's misunderstanding the different role of a Commissioner.

And frankly, that's what I think some of the best Commissioners in the past have done. I think Bob Pitofsky, for example, ended up being a different kind of Chairman than many expected him to be based on his prior experiences. Moreover, Tim Muris was more activist than some might have expected that he would be, based on his prior track record.

In terms of being "controversial," to be sure, I had spent a lot of time studying and litigating United States antitrust law before I came to the Commission. It wasn't as though this was a clean slate. So I had some views about these matters, including about the economics underlying the antitrust laws, before I ever got here. But one of the great luxuries of this job is that a Commissioner has time—time to think, time to study. It's not a situation where as soon as you're done with one case you're picking up the file on the next one; it just doesn't happen that way. So I've been able to give the antitrust laws, particularly of the United States but increasingly those of some other countries, much more time and attention than I had before I got to the job. The ability to think about these things and to worry them through and to discuss them with your staff is just a luxury I never had in private practice. And maybe I've overthought some of these things. Some might say that's true, but I think it's probably contributed to some of the positions I've taken that might be described by some as being controversial.

ANTITRUST: You talked about the role of a Commissioner, and I want to ask you how you think of that role as opposed to the role of the Chairman. Some of the policies that you and other Commissioners have driven forward in recent years have not been shared by the then-Chairman—the *N-Data* case and Section 5 policy, for example, and the response to the DOJ Section 2 Report. And then there are other issues such as the increased focus on administrative litigation in merger cases, where the impetus seems to be coming in large part from you and others but not necessarily from the Chairman. How do you view the role a non-Chairman Commissioner? Should a Commissioner make an effort to be on board with a Chairman from the same party, or is that just something that happens or it doesn't—the views either align or they don't?

COMMISSIONER ROSCH: First of all, as you know, by statute three Commissioners can be of the same party. And when I first came to the Commission there were three of us from the same party. Debbie Majoras was the Chairman, and there were two other Republicans, Bill Kovacic and I. And there were two others who were not Republicans—there was one Democrat, Jon Leibowitz, and then there was Pam Harbour, an Independent. On the face of it, the Republicans could prevail anytime the Chairman wanted to.

But the Chairman's role is very different from that of the other Commissioners, even the other Commissioners from the same party. It's different, first of all, in that the Chairman has administrative responsibilities that the rest of us simply do not have. The Chairman appoints the management of each of the Bureaus and, while we have sort of a veto power, it's certainly an informal veto power.

The Chairman's job is also different from the other Commissioners in that the Chairman does not have the luxury of time that I described. The Chairman's plate is full 24/7—making speeches, policy judgments, administering the Agency, dealing with the care and feeding of the other Commissioners, etc. It is a more than a full-time job. And that difference in jobs means that the Chairman has to lean on the other Commissioners to some extent, and that's generally on substantive matters.

On the other hand, I don't think that the other Commissioners should feel compelled to defer to the Chairman with respect to substantive matters, and I certainly did not think I should defer to the Chairman with respect to litigation matters. I felt that I had particular expertise in that area and that was what I brought to the table. I think from day one Chairman Majoras understood that I was going to defer to her entirely as an administrator, but when it came to substantive matters both in terms of making decisions at the Commission and when it came to litigating Commission matters, I considered myself to be my own person. I know Chairman Kovacic understood that because we discussed that when he was just a Commissioner, and I think he felt the same way.

ANTITRUST: I want to talk about divergence between FTC and DOJ policies and processes, which is a topic that seems to be on the front burner again. Do you think it's important for the two U.S. antitrust agencies to approach their overlapping missions in as similar a way as possible, both substantively and procedurally?

COMMISSIONER ROSCH: Well, the key words are "in as similar a way as possible" because the bedrock principle here is that the Congressional intent is what matters. As we sit here today, it doesn't bother me at all that there are differences between the standard that exists in 13(b) cases (where the Commission seeks a preliminary injunction pending an administrative trial in Part 3) and the standard that exists in permanent injunction proceedings litigated by the Antitrust Division of the Department of Justice, because I think that difference is fully consistent with what Congress intended. Indeed, I think the Antitrust Modernization Commission (AMC) should have expressly acknowledged that in its Report.

Specifically, both Sections 5 and 13(b) of the FTC Act are clearly to the effect that the Commission is a very different kind of agency than any division of the Department of Justice, including the Antitrust Division. And Congress deliberately intended for that to be the case. The legislative history behind both of those statutes establishes that Congress considered the FTC to be an expert and independent agency—independent of the Executive Branch—and not just a prosecutor but a prosecutor and a judge.

Congress intended Justice, including the Antitrust Division which is a part of Justice, not to be independent of the Executive Branch but a part of the Executive Branch and to be strictly and solely a prosecutor, not a judge at all. So it is no surprise that the standard applicable in a preliminary

injunction proceeding where the case is handled by the Commission would differ from the standard in a permanent injunction proceeding where the case is handled by the Antitrust Division.

More specifically, a majority of the judges of the D.C. Court of Appeals held in *Whole Foods* that Congress made it clear in Section 13(b) that the public interest lies in having antitrust cases that are entrusted to the Commission be brought to trial before the Commission, not in the federal district courts. The federal district courts are generalist courts, they're not specialized courts. Most federal district court judges are very fine judges but they don't handle antitrust policy or cases on a daily basis the way that the Commission does. So it doesn't surprise or bother me that the standards that apply in different kinds of federal district court proceedings are different as between ourselves and the Antitrust Division.

You asked, however, should the standards and procedures in federal court proceedings be "as similar as possible"? I interpret that to take into account the difference in statutes. And, yes, I do think that as much as possible they should be the same, but I certainly don't think that we can neglect the Congressional intent in creating two different agencies that were quite different one from the other.

ANTITRUST: You've been very forthright in your views, and I want to give the critics their due, because one does hear a lot of criticism of some of your positions, and while you've already responded to several of these points I want to walk through some of them a bit more. The critics include former government officials, practitioners, and some members of Congress who are now expressing their own view, I suppose, of Congressional intent. So there's a body of criticism from several quarters. And granting that the statutes say what they say and that the Commission has the power to do much of what it's doing, the questions focus more on what the right policy is.

Here's a view I'd like your further response to: Over time there has evolved a merger enforcement system applying current law—current law including the HSR Act, which gave both agencies the power to investigate proposed mergers before they are consummated and decide whether to go to court to enjoin the merger. In 1995 the FTC under Chairman Pitofsky, with the support of former Chairman Steiger, said in essence that the policy going forward for the Commission, as it had largely been in the years since enactment of the HSR Act, was to rely on preliminary injunction proceedings as the primary litigation of a merger case.

And so while there were clearly still some differences depending on whether your deal goes to DOJ or the FTC, those differences had been minimized through this and other policies to the point where the differences were generally viewed as tolerable.

The AMC said that some statutory changes were still needed to bring the agencies closer together in merger enforcement, while other people disagreed, thinking that the agencies seemed to have the "divergence" issue more or less under control. But now—under the FTC's current policies that you strongly support, in which administrative litigation is a much more important element of merger enforcement—the random or arbitrary allocation of a deal between two agencies can result in very significantly different prospects facing that deal. These are much more significant differences than was the case when the 1995 Pitofsky statement was still understood to be the policy of the Commission.

COMMISSIONER ROSCH: Let me address the bar critics first. It has been said, for example, that former Chairmen Pitofsky and Muris favored requiring the Commission to litigate the cases it brings in the federal district court as permanent injunction proceedings like the Antitrust Division, instead of in Part 3. That is wrong. To begin with, former Chairman Pitofsky was the driving force behind the 1995 Statement to which you referred. That Statement noted:

> Some commentators have suggested that because the Department of Justice lacks the ability to challenge mergers in the administrative process, the Commission's litigation should be confined to the federal courts in order to bring the two agencies' enforcement powers in line with one another. The problem with such an approach is that the significant benefits of administrative litigation outlined above would be lost in such a change in enforcement policy. The business community would be denied the guidance provided by merger decisions based on a complete analysis of a full evidentiary record, and Congress' vision of the FTC's central role in merger enforcement would be subverted.[1]

Beyond that, in commenting on proposed changes in the Part 3 rules recently, former Chairman Pitofsky recognized that the position we are in today is considerably different than the situation in 1995. In the past five years, federal district courts ostensibly contravened the intent of Congress repeatedly in 13(b) proceedings, deciding cases on the merits instead of determining whether there was a fair ground for litigation in Part 3. I'm referring to the *Arch Coal*, *Western Refining*, and *Whole Foods* federal district court decisions that I talked about before. Neither the 1995 Policy Statement nor Chairman Pitofsky has ever said that under those circumstances, the Commission should eschew Part 3 proceedings. To the contrary, the Comment that he and former General Counsel Mike Sohn authored last Fall regarding the proposed Part 3 reforms expressly stated that they didn't agree with the AMC's recommendation (which, incidentally, was not unanimous) that Congress should require the Commission to litigate in a manner eschewing Part 3 proceedings.

As for former Chairman Muris, he did nothing to disturb the 1995 Statement when he was Chairman. To the contrary, he was a fan of the administrative process. He stated that:

> Yet another arena for employing our distinct institutional attributes is administrative litigation. During my tenure as director of the Bureau of Competition in the 1980s, I made

special efforts to make the fullest possible use of our administrative process to address important and difficult issues of antitrust law. In several instances, the FTC made substantial contributions to antitrust jurisprudence. . . . The FTC's current roster of administrative adjudication matters reflects its commitment to use the administrative process to address difficult areas of competition policy.[2]

To be sure, former Chairmen Pitofsky and Muris have expressed reservations about the Commission litigating merger cases in Part 3 where the merger does not involve any difficult or complex issues. But I have yet to see a merger that meets that description, and I don't think the merger cases that were considered when Bob and Tim were Chairmen met that description either. Certainly *Heinz* and *Genzyme/Novazyme*, for example, weren't easy cases. Nor, I would argue, were any of the three cases I've mentioned.

Second, let me briefly consider the Congressional critics. I can be brief because I know of none specifically. To be sure, several members of Congress have asked us to address this issue. But none have embraced the AMC's legislative proposal. Beyond that, I can't believe that this President and this Congress, which have been so supportive of vigorous antitrust enforcement and so critical of the prior regime at the Antitrust Division, would weaken antitrust enforcement at the Commission by eliminating its Part 3 authority and require it instead to emulate the Antitrust Division.

ANTITRUST: Chairman Muris seemed to be more a proponent of administrative litigation in non-merger cases than in merger cases.

COMMISSIONER ROSCH: Possibly, but an astute counselor at that time would have pointed out, for example, that Tom Leary voted against sending *Arch Coal* to the federal district court at all. He would have preferred that it be tried simply and solely as a Part 3 case. And that was a merger case that was an unconsummated merger case as well.

Finally, let me say to those who, like some of the AMC's members, lament the disparity between the way that merger challenges are handled at the Antitrust Division, on the one hand, and at the Commission, on the other: one way to change the current situation as a matter of statute is to require the Antitrust Division to bring its challenges not in the federal district court but in a Part 3 proceeding so that that challenge will be decided by a specialized administrative agency like the Commission. Again, it's not a one-way street. I don't think the FTC can be blamed for the difference that exists if and to the extent there is any blame to be leveled.

ANTITRUST: I think the concern is less that we don't know how to counsel than it is the fundamental fairness point—what reasonable explanation can be offered to a client, or a critic of the FTC's current approach, for the fact that a given deal is more likely to be impeded because of the process and timing the parties will face at the FTC, mainly because the FTC is likely to continue to pursue administrative litigation even if the parties defeat a preliminary injunction action.

You've got at least a six-month HSR process—perhaps that can be tightened up if the agencies work on it—and then even under the expedited rules you have a twelve-month-plus administrative proceeding. And then, if there is an appeal, that's several months more. So I would have to tell my client that if the FTC wins the clearance lottery, we don't have the prospect of a final litigated outcome for more like two years versus the one-year timeframe we might hope for with a government injunction action.

Various people have run the numbers on how long these cases take, and of course it varies from case to case and agency to agency, but counselors would typically tell a client that if you can hold a deal together for up to a year from signing—if the parties will agree to stay with the deal for a year—they can probably complete the second request process and get a litigated outcome in a preliminary injunction action by either agency. But if they're at the FTC, they could win that injunction case and still face an additional year or more of litigation. They may be able to close the transaction, but they still face continued litigation and tremendous uncertainties. And I think a lot of counselors would therefore say to their clients that you're in a much more difficult situation, in the realities of the deal world, if you're at the FTC. So that's the counseling concern and the broader fairness concern.

COMMISSIONER ROSCH: Now you are talking about differences in time. You're talking about whether a client is more likely to face a protracted proceeding if the FTC handles the matter than if the Antitrust Division handles the matter. And if you're counseling clients about that, the answer is no, not under the revised rules. To be sure, the revised rules are only interim rules. But keep in mind that those rules require the agency to come to trial in the administrative proceeding within a very short period of time. In fact, some of the comments we've received say that time is so short as to implicate due process. The Antitrust Section's Comment, on the other hand, said the five-month period of time prescribed in the interim rules is too long a period in unconsummated cases.

The fact is that five months is a shorter period of time than it takes to get to trial in many federal district court cases. It was patterned in large measure after the time to trial in the *Oracle* case. That was a permanent injunction case litigated by the Antitrust Division. The time from complaint to trial in the interim rules is also almost identical to the time to trial ordered by the Northern District of Illinois in the Beef-Packing merger case where the Antitrust Division sought a permanent injunction last Fall.

As for the time it takes between the end of the trial and issuance of the ALJ's decision, the interim rules expressly cabin that time period. The prescribed time period is comparable to the time period for decision in many permanent injunction proceedings conducted in the federal district

courts. In *Oracle*, for example, the decision was issued about two months after the trial record closed.

Now the next question is what happens when there's an appeal to the Commission? Well, the Commission has taken the unprecedented step in these interim rules of putting a governor on itself. I know of no federal district judge who has ever done that.

I would suggest that the proper comparison is between the time that passes from issuance of a complaint, on the one hand, until the beginning of an appeal to a federal appellate court, on the other hand. Under the proposed interim rules there's not much difference between that elapsed time at the Commission and the elapsed time in a number of federal district court proceedings. For example, in *United States v. Primestar*, where the Antitrust Division sought a permanent injunction from a federal district court, the elapsed time to trial was nine months. Add to that the time from trial to judgment (which is when an appeal to a federal appellate court can be taken), and the time it takes from issuance of a complaint to such an appeal is not much different than it would be at the Commission under the interim rules (including Commission review). Now that's not true of all federal district court proceedings because, as I say, some judges manage their dockets extraordinarily well. That was the case with Judge Walker in *Oracle*. It's also true of some of the cases brought in the D.C. federal district courts.

But it is a fallacy on the part of some counselors to tell their clients that you can expect a much shorter time period if you're in the hands of the Antitrust Division than you can if you're in the hands of the FTC. It may have been correct before, but the disparity is one of the things I was trying to correct with respect to the Part 3 process.

ANTITRUST: Once a deal is challenged, as I count the timing under the new Part 3 rules, it's about twelve months start to finish, including the deadline the Commission has admirably put on itself to render its decision.

COMMISSIONER ROSCH: I think we are going to make every effort to make sure that in a merger case the elapsed time from complaint to the end of the administrative proceeding, including Commission review, is no more than a year.

And when you compare that with the time it takes in federal district court in permanent injunction cases brought by the Antitrust Division to get from issuance of the complaint to the point that it's in the appellate court, the question is whether the elapsed time is materially shorter than a year. The answer is sometimes yes, but sometimes no.

And any counselor who's counseling a client that he or she should expect to get a final decision with respect to a merger any sooner than that is doing their client a disservice because that ignores the possibility of an appeal to the federal appellate court, which can occur from either a federal district judgment or a Commission decision.

ANTITRUST: Some numbers I looked at do suggest, going back three or four years, that the duration of FTC preliminary injunction cases ranged from three to six months from the end of the second request process. And DOJ permanent injunction cases averaged six to nine months.

The other assumption I was making is that a prudent counselor would also tell the merging parties that the track record indicates—as fair-minded and impartial as the Commissioners are—that you are highly likely to lose the Part 3 action. One would have to tell the parties that this is the track record—you are highly likely to lose the administrative case, and therefore you don't get an independent judicial look at your issues until the appeals process runs its course. And that appeal will apply a very deferential standard to the FTC fact findings. These are concerns that I hear a lot.

COMMISSIONER ROSCH: First of all, in terms of time, those numbers compare apples and oranges: they compare the time from the end of the second request process to the end of the preliminary injunction proceeding in the case of the FTC (during which time the Part 3 proceeding will normally only be stayed if the parties request a stay), and then the time from the end of the second request process to the end of a *permanent* injunction proceeding in the case of the Antitrust Division.

Second, however, your question compares not only the time that it takes to get through the federal district court injunction proceedings but also what a client should be told about outcomes. I agree that you cannot in good conscience tell a client that one is likely to fare as well before a federal district court in a 13(b) preliminary injunction action as in a permanent injunction proceeding brought by the Antitrust Division before a federal district court. But that difference is, as I say, attributable to the difference in standards applicable in the two federal district court proceedings: the district court in the FTC's preliminary injunction proceeding, as a matter of Congressional intent, is only able to determine whether or not there's a fair grounds for litigation, not decide the merits.

Third, that said, on the question of whether clients should be told that the track record of the Commission is to affirm the staff in Part 3 administrative proceedings, particularly in merger cases, that is a question that has given me many sleepless nights. Currently I can't guarantee that a Commission decision to vote out complaints won't morph into a decision on the merits. I can say that *shouldn't* happen because the standards are different: the Commission is supposed to vote out a complaint when there is "reason to believe" there is an antitrust violation and prosecution is in the public interest; the Commission is supposed to sustain a challenge only when it concludes, on the basis of the record, that a violation has occurred, or, in the case of the Clayton Act, will probably occur. But it may be that the current pre-complaint discovery in which no stone is seemingly left unturned and which is arguably one-sided, may result in a blurring of these stan-

dards. If so, that is arguably another reason for requiring more post-complaint, instead of pre-complaint, discovery.

The final point I would make is that the Antitrust Division, again, plays a very different role than the Commission; its track record is one simply of being a prosecutor. And I don't think it's fair to look at just the last four years in terms of whether or not it's been a less vigorous prosecutor than the Commission. When you look at what Joel Klein did, for example, and certainly what Anne Bingaman did when she was the AAG at the Antitrust Division—it was impossible to tell a client with a straight face that they were more likely to fare better at the Department of Justice than they would fare at the FTC. So I think it makes a lot of difference who the AAG at Justice is.

ANTITRUST: On the question of pursuing an FTC administrative action if there is a denial of a preliminary injunction in a merger case, I think you said to the AMC that the FTC had not typically pursued administrative actions in those circumstances and it would be a rare or extraordinary circumstance when the Commission would do so. Is that still your position now? That it's not necessarily the case that administrative litigation will continue after the loss of a PI action, but only if there is some circumstance that you would regard as unusual or extraordinary? And if so, what would constitute such extraordinary circumstances?

COMMISSIONER ROSCH: Let me give you two polar opposites, and I hope these are useful in counseling clients. The first is a situation where it seems apparent to the Commission that the federal district court in the 13(b) proceeding, which I stress again is a preliminary injunction proceeding, has applied the wrong standard—it has adjudicated the merits rather than simply determining whether or not there's a fair ground for litigation in a Part 3 administrative proceeding.

If that seems apparent, then under the 1995 Policy Statement we can and we would continue the administrative process because I think in those circumstances we do not need to defer to the federal district judge. Indeed, we should not do so because I think the federal district judge has not applied the correct standard under the law. That's situation number one.

The polar opposite situation is where the Commission thinks that the federal district judge has applied the right standard. Or, suppose the Commission concludes that the federal district court judge has applied the wrong standard, but we take that to the court of appeals as we did in *Whole Foods* and, unlike that case, we're told that the appellate court affirms the federal district judge's decision that there is not a fair ground for litigation and that there's no likelihood of success on the part of the Commission in administrative litigation. In that circumstance I think that the 1995 Policy Statement says, and I would agree, that absent extraordinary circumstances we should not continue to pursue Part 3 litigation.

But it is a fallacy on the part of some counselors to tell their clients that you can expect a much shorter time period if you're in the hands of the Antitrust Division than you can if you're in the hands of the FTC. It may have been correct before, but the disparity is one of the things I was trying to correct with respect to the Part 3 process.

ANTITRUST: Next topic: merger policy. First, do you think there should be new or significantly revised Merger Guidelines?

COMMISSIONER ROSCH: The answer to that is I don't know yet. It's something that I haven't talked enough to my colleagues about, much less discussed with the new AAG over at the Department of Justice. That would have to be a joint effort. But perhaps that is something that would be considered in terms of the change in Administration.

I think it will probably be given more serious consideration than it has heretofore been given; I think that's fair to say. So if and when you ask me what I see resulting from the change in Administration, that would be one thing. The change in Administration enhances the chance of revision of the Merger Guidelines.

ANTITRUST: In the recent *Ovation* case, you wrote a statement about a precursor transaction that was not challenged and said that you would have challenged that transaction. You described it as neither horizontal nor vertical, and you cited some older cases including a conglomerate merger case—a topic which, as you might understand, gives me a bit of a queasy feeling.

COMMISSIONER ROSCH: You're not alone.

ANTITRUST: I don't think the prior acquisition in question in *Ovation* would be viewed as a conglomerate merger, nor was it horizontal or vertical. The asset that was alleged to confer monopoly power was transferred from a company that allegedly felt constrained not to charge the monopoly price by reputational and other concerns, to a company that allegedly felt no such compunctions. So the question is: to the extent it seemed well-established that U.S. antitrust law is concerned with horizontal or vertical acquisitions that lessen horizontal competition, and to the extent the initial deal in *Ovation* was neither, would your view that that deal should have been challenged break new ground in current U.S. merger policy, and if so—why do that?

COMMISSIONER ROSCH: Well, first of all, if one views a challenge to the first transaction in *Ovation* as a challenge to a conglomerate merger, that doesn't break new ground. There is Supreme Court precedent for that, and that precedent has never been overruled. To be sure, since the Non-Horizontal Merger Guidelines were issued, conglomerate merger policy has been in some disarray to say the very least.

ANTITRUST: Not to mention in Europe.

COMMISSIONER ROSCH: I'll get to Europe in a minute. That said, I must mention that Tom Leary has recognized that the theory behind a challenge to the first transaction in *Ovation* was not so much an embrace of conglomerate merger policy and law as it reflected a concern that our current economic thinking is wrong in the sense that it is too focused on the structure of the market and whether a merger will change that structure to the detriment of consumers.

What the statement in *Ovation* was intended to highlight was that a transaction may change the *incentives* of the parties to the transaction in a way that implicates Section 7. It involves the notion that economic theory should increasingly focus on incentives rather than on market structure. This is not a new insight. But it's an insight that Tom Leary had and is writing about now. I don't want to steal his thunder, but it's a critically important insight. He suggests, for example—and frankly he's correct though I did not articulate the thesis in the *Ovation* Statement—that economics has always largely focused on incentives. After all, in *GTE Sylvania* the whole free-rider notion is based upon incentives. That's an economic concept. Similarly, Judge Richard Posner opined that a tie would almost never be predatory because even a firm with monopoly power lacks an incentive to take more than one profit. That's an economic concept.

That kind of economic thinking is something that I think we ought to see more of. And I do think we see more of it in Europe than we do here. It's the sort of thinking that shows up in some of the post-Chicago school literature that's based less on complex formulae and more on how people are really behaving in the real world.

And insofar as incentives are changed by virtue of the transaction, I was suggesting in *Ovation* that that was something that might implicate Section 7. Again, one needs to focus on whether or not there's "reason to believe" that it implicates Section 7 rather than whether or not it definitely would. But I thought there was reason to believe that it would.

ANTITRUST: How would you expect the courts to deal with a transaction that simply moves an asset from a company with one set of incentives to a company with a different set of incentives—how does that fit within the Section 7 language prohibiting acquisitions that "lessen competition or create a monopoly"? Are you comfortable that challenging such mergers fits within that language?

COMMISSIONER ROSCH: To my way of thinking, that may have been the case—and again I stress that it's a "reason to believe" determination. That was a case in which the prong of the statute that talks about the creation of a monopoly was implicated to a greater degree than the lessening of competition prong. The way I saw the case it appeared to me that there was reason to believe that while the predecessor corporation did have exclusive power with respect to this particular product, it had an incentive not to exercise that power. Whereas after the transaction the acquiring party—or A side as we like to call it—had an incentive to exercise monopoly power which did not previously exist.

ANTITRUST: How would you describe the limiting principle here? Suppose someone is looking at this and asks, what's my risk if, for example, Company A looks at Company B's pricing and says these guys are simply bad price managers, they're leaving lots of money on the table and they don't recognize it. In my hands prices will go up because I see the potential. That's probably not a terribly uncommon situation—how would you say that fits into your *Ovation* analysis?

COMMISSIONER ROSCH: I tried to articulate a number of limiting principles in the Statement but in fact there were a number of others. One of them was that this was a consummated deal and there was no need to speculate about what was going to happen. It had happened. So that's one limiting principle.

A second limiting principle was that the post-transaction prices were not just high, they were monopoly prices. And the first transaction led to the second acquisition, which I considered might constitute a lessening of competition or at least I thought there was reason to believe that it might.

And the third limiting principle lying in the weeds was that there was *allegedly*—and I want to underscore the term allegedly—evidence that the B side (the seller) knew full well that it had a monopoly but that it was not exercising it because it didn't want to hurt its image and the rest of the products in its portfolio. And that evidence allegedly included evidence that it was not willing to let the A side (the buyer) sell the product at an enhanced price in its wrapper. So who knows, but those are the limiting principles that come to my mind right now.

ANTITRUST: How do you see the current economic crisis affecting the Commission's enforcement mission? Mergers would seem to be the most likely area where there could be an impact—perhaps we'll see more failing or flailing firm arguments, different kinds of efficiency arguments, arguments about how viable competitors are, and the like. What's your sense of how these major economic problems are going to affect what the Commission does?

COMMISSIONER ROSCH: This is all crystal ball gazing because we really haven't been in the midst of the economic

crisis long enough to draw any firm conclusions about it. But I've made some remarks about this subject, that is to say what the implications are of the current economic crisis for the Commission's mission.

And so let me just share a couple of thoughts that have occurred to me, again emphasizing that they're crystal ball-type thoughts. The first thought is that orthodox and pure Chicago School economic tenets are at great risk—specifically the notions that markets are pretty much perfect; that imperfect markets correct themselves very quickly; that business people are rational.

Those are fundamental tenets that undergird orthodox Chicago School economics, and I think they've been called into question by the current economic crisis. And that may cause us to be much more modest in our claims about all of those tenets, particularly when we speak about them abroad as we have in the past.

Second, with respect to antitrust specifically, it may be that antitrust enforcement will be at least as vigorous as it has been in the past. There's a strong argument for that. As a matter of theory, competition spurs innovation, lowers prices, and enhances output—if and to the extent that one is worried about increasing unemployment, increased prices for consumers, etc., it may be that antitrust has more of a role to play than it has heretofore had. That's a second thought.

The third thought is, that said, *General Dynamics* may play a greater role. It may be that market conditions as you see them now, and the health of the parties as you see them now, are not what they are likely to be in the future. And so I think it's possible the agencies will take a closer look at that.

A fourth possibility is that the agencies will be taking a closer look to see whether or not the merger will result in a post-transaction firm that is too big to fail, or, conversely, that a transaction will result in a weakened competitor as compared with what has previously existed to constrain a more powerful firm with monopoly power. Put differently, if and to the extent that pre-transaction, the acquired or acquiring party could constrain a more powerful firm with monopoly or near-monopoly power from exercising that monopoly power, but post-transaction, the resulting firm is less likely to impose that constraint, that may be a concern for the agencies as well.

Finally, I think we have to reexamine the implications of the assumption that markets are more or less frictionless; that entry is easy; that fixes are easy. The credit crisis has called that into question. And the implications of that remain to be seen. It may be, for example, that some transactions where fixes were contemplated before should be challenged instead.

On the consumer protection side, the implications are more obvious. Today we see scams with respect to mortgage credit, but I think that's just the tip of the iceberg. We're going to see scams with respect to all kinds of other credit—school tuition credit, auto credit, credit card credit.

But on a macro level I think the big issue is one of consolidation. Are you going to consolidate all of the consumer protection law enforcement in one agency or spread it out throughout a lot of agencies in Washington? And if you're going to try and consolidate it in a single agency—which certainly seems to me to make sense from a dollars and cents standpoint because it's less costly to do it that way—in which agency should you concentrate it?

ANTITRUST: You've urged a more expansive role for Section 5 of the FTC Act in the antitrust area, in your vote and statements supporting the *N-Data* consent order and in other statements and speeches.

The FTC some years ago brought several cases arguing that Section 5 could be applied in various ways beyond the Sherman Act. Those cases resulted in mixed reactions, at best, from the courts. A large part of the courts' concerns included questions about arbitrariness and blurry lines between what is lawful and unlawful, once we start talking about a standard as broad as what is "unfair."

Then the Commission—and I'm going back, again, to the era of Chairmen Steiger and Pitofsky—crafted an approach that essentially said, let's use Section 5 to fill gaps in the Sherman Act. The Commission challenged invitations to collude because there is no "attempt" offense under the Sherman Act, so the Commission said let's seal that gap, but in a way that always applies the same ultimate antitrust analysis, looking for a likelihood of competitive harm as that term was then and I think still is understood.

Do you view your emerging approach to Section 5 as falling within what I'll call the Steiger/Pitofsky approach, or does it go further? And if it goes further, why? What problem are you trying to address?

COMMISSIONER ROSCH: The honest answer is, I don't know yet. For example, I've opined that Section 5 should not be applied where we could apply Section 2. In that sense I suppose it might be said that I consider Section 5 to be narrower than Section 2.

But first of all, with respect to *N-Data* specifically, the Commission majority tried to articulate limiting principles in the Analysis to Aid Public Comment. One of them was that the case arose in a standard-setting context, and that was extremely important. Also, although I did not say it, at the time I thought that Section 2 did not apply at all in that case because I did not see an exclusionary act or practice. It seemed to me that N-Data had simply declined to honor the commitments that its predecessor had made, and that did not seem to me to be exclusionary. So I felt that that was a very peculiar case.

The second point I would make, however, is that I may be wrong about my views about Section 5 and Section 2. I may have misread *Boise Cascade* in that regard. *Boise Cascade*, you'll recall, is a case in which the Ninth Circuit suggested that it would be improper for the Commission to apply Section 5 in circumstances where the Sherman Act would apply. Or at least that's the way I read it. I'm now not sure I

was right about that. It may be that the proper reading of *Boise Cascade* is that the Commission should not apply Section 5 where there are well-defined contours in the Sherman Act case law. That's different. That suggests a broader reading of Section 5 than I had given it because it would allow one to apply Section 5 in circumstances where the Sherman Act was applicable but where there were not well-defined contours in applying it.

I have in mind, for example, some kinds of facilitating practices cases where we see the same sorts of phenomena that exist when there are agreements among participants in a highly concentrated industry but there's no agreement as such; it's just that the firms are operating in an environment—some might say an oligopoly environment—where the market conditions are very similar to those in which facilitating practices result in an agreement. When I say "the same sorts of phenomena exist," I'm thinking, for example, not only of coordination with respect to price but I'm thinking of division of customers. Where you're talking, for example, about a duopoly, and you're seeing a division of customers or you're seeing coordination with respect to prices but you're not seeing an agreement as such, it may be appropriate to apply Section 5.

But the jury is still out on this in my mind. We had, as you know, a workshop on the scope of Section 5—the circumstances in which it might apply—and we don't have a report on that hearing yet. And I'm not going to form any final conclusions until I see that report. The only thing I can say about it right now is that my thinking about Section 5 is evolving. I'm not in cement about this at all.

ANTITRUST: The Justice Department's Section 2 Report provoked a fairly unusual episode. My first question is about the public disagreement between the agencies that emerged from the DOJ Report and the response that you and two other Commissioners issued. Stepping back, what do you think accounted for this failure of the agencies to come to consensus? Or, having failed to come to consensus, how did the agencies allow the disagreement to play out publicly as it did?

COMMISSIONER ROSCH: I really don't want to go into the communications that occurred between the two agencies before that occurred. But I think I can identify some reasons why the Department's Report and the Commission's differing Statement occurred.

The first reason is that the Antitrust Division and the FTC genuinely have different views about how Section 2 ought to be enforced. And the point I will make at this juncture is that I felt that whether the FTC was right or wrong, it was in the public interest to have a debate about that. Section 2 is far too complex to be susceptible to only one reading. And I felt that too often in the past the agencies had spoken with one voice, particularly to the Supreme Court, leaving the impression that there was only one answer to the questions that were raised about Section 2. So I thought it was very important to the public interest that the differences of opinion be aired.

Second, as the Antitrust Division's Report emphasized, certainty, transparency, and over-enforcement are concerns, to be sure. But there are other concerns as well. We felt—and maybe I should just speak for myself in this regard—I felt that in the circumstance where a firm has monopoly or near monopoly power and its exercise of that power would be constrained by either a new entrant or an existing competitor but the firm with monopoly or near monopoly power engages in practices which tend to exclude or cripple that nascent competitor, Section 2 should apply.

Now again I need to stress that view is not universally shared by others. Jon Jacobson has used a quotation from Justice Brandeis to illustrate the room for differences of opinion. Justice Brandeis touted the virtues of certainty, suggesting that it's very difficult to counsel a client who's walking close to a cliff about what it needs to do in order to avoid falling off the cliff.

My view is that it depends on who you're talking to. If you're talking to a firm with monopoly or near monopoly power then I think that the proper counsel is to say to the client that it needs to be very cautious about what it's doing or it's going to fall off the cliff. If you're talking about somebody who doesn't have that power and probably never will have it, I think the counsel is quite different.

ANTITRUST: Chairman Kovacic noted in his separate statement that a tension in Section 2 policy arises from the fact that most enforcement as a practical matter occurs in private cases, not in government cases, and that many of the concerns about improper or excessive enforcement of Section 2 stem from these private cases. Do you agree with the idea that an underlying challenge for Section 2 policy is this fact that most of the reported cases tend to come from private litigation, where the plaintiff's interests may or may not coincide with consumers? The government brings relatively fewer cases, so some might see the challenge as reining in weak private cases while preserving for the government the flexibility to bring good cases. Do you see that as a fair point, and if so how do you deal with it?

COMMISSIONER ROSCH: It's certainly a point that's been made before—not just by Chairman Kovacic, but by others. To my way of thinking it just underscores the problems with Supreme Court jurisprudence today. I think that to too great an extent the Supreme Court has let its concern about the problems with private treble damage class actions infect its decisions about the substantive law. And I fault to some extent the Antitrust Division and the Commission in this regard because we've urged the Court on in this respect. Let me make clear, I'm not a fan of private litigation, because I faced private plaintiffs throughout my entire career and litigated treble damage class actions on many occasions. And I know that there are abuses in that area.

ANTITRUST: Consumers are not always well represented.

COMMISSIONER ROSCH: I just draw on my own experience. AAI, God bless them, invited me to air my controversial views to a group of plaintiffs' lawyers about a month ago. There are statistics that would suggest I'm wrong. So I may be wrong about this. But I am convinced that the Supreme Court and the Antitrust Division should not be fashioning substantive antitrust principles based upon their concern about the abuses in private antitrust cases.

ANTITRUST: They shouldn't take it into account at all?

COMMISSIONER ROSCH: I don't think they should. What happens is that by shrinking substantive antitrust principles, which we've seen in *Credit Suisse* and *Trinko* for example, out of a concern about private litigation, that can slop over into public enforcement and it can hobble public enforcement as well. I don't think that's a sound way to address concerns about private treble class action abuses. Rather, I think a much sounder way is for the Supreme Court to consider remedying those abuses directly, head on. If it thinks that there's an unlevel playing field in discovery—and I think there is today because I think electronic discovery is frankly much more burdensome for defendants than it is for private plaintiffs in most instances—I think that the Supreme Court should insist that the federal district courts supervise discovery in those cases more closely. If the Court thinks there's abuse in private class actions, either in terms of certification or settlement, the Supreme Court ought to insist on more rigorous examination by the federal district courts of both certification and settlement. But I do not think the Supreme Court should address those concerns through changes in the substantive law. And I don't think the agencies should suggest to the Court that it do so.

ANTITRUST: In the Section 2 debate, some of your views seem to stem in part from the fact that you come to this job extraordinarily well versed in the law and in litigation. How do you mesh your knowledge of the law as it now stands with the task of being a policy maker?

For example, one of your criticisms of the Section 2 Report was it went beyond existing case law in some areas. Is that always a problem? Certainly it would be unusual if the agencies were to express a policy that directly contravenes recent Supreme Court precedent. On the other hand, government enforcement policies often layer prosecutorial discretion onto existing precedent. The agencies did that in 1995 in the Intellectual Property Guidelines when they said that tying would be looked at under essentially a full rule of reason analysis, notwithstanding that there is case law—cited in your response to the DOJ Report—that makes tying quasi-per se unlawful. The DOJ Report arguably tried to add a layer of prosecutorial discretion to the refusals to deal area, saying as a matter of discretion that typically they're just not going to go there. How do you see your role in terms of applying existing law versus expressing a policy view about where the law should be, or where it should go?

COMMISSIONER ROSCH: First of all, in general I believe that it's the role of the agency to enforce the law as it exists, not as it thinks it should exist. That's my first observation. In some instances that cuts against some of the prevailing wisdom. For example, frequently Part 2 of the *Trinko* decision is cited for the proposition that monopoly is good because it fosters innovation or competition. That's dictum. And in my first day in law school they taught us the difference between dictum and holding. So I don't always think that what the Supreme Court says in dictum is necessarily the law; sometimes the law is different.

Sometimes, of course, the Supreme Court's holdings will cut in favor of law enforcement with which I disagree. In *Weyerhaeuser*, for example, the Court read some of the older Supreme Court jurisprudence as holding that the Sherman Act protected sellers just as much as the statute protected buyers. I disagreed with that, as a matter of policy. As a matter of policy it has always seemed to me that when one protects sellers one is really taking chances in terms of consumer welfare because generally lower prices are good for consumers rather than bad for them, as the Supreme Court held in *Brooke Group*. But in *Weyerhaeuser* the Supreme Court said I was wrong as a matter of law, so I won't apply those views in deciding cases.

ANTITRUST: When there's either a conflict in the circuits, or there could be one coming, do you see it as the role of the Commission in the Section 2 area in particular to take positions on where you'd like to see the law go?

COMMISSIONER ROSCH: Well, I've done it. *linkLine* is probably the most recent example. It's a Section 2 case, and three of us at the Commission (Bill Kovacic was recused and took no position) felt that *Alcoa* should not be disturbed. It's the teaching of *Alcoa* that a price squeeze could be considered to be a violation of Section 2, and at least one post-*Trinko* case has questioned whether that remains the law. And of course that's before the Supreme Court right now.

ANTITRUST: Your statement on *linkLine* emphasized the fact that the law on price squeezes was settled in *Alcoa*. If you thought that the proper analysis, the better policy, the economics all suggested otherwise, how would you balance those things on an issue like price squeezes? What's more important, that the law has been settled or that policy may be right or wrong?

COMMISSIONER ROSCH: In that case I didn't really have to resolve it because Justice Breyer had identified in his *Town of Concord* decision some concerns that might arise as a matter

of economics, as a matter of consumer welfare, if there's a price squeeze by a regulated monopoly.

ANTITRUST: You saw it all going in the same direction?

COMMISSIONER ROSCH: So I saw it all going in the same direction. And I think perhaps the acid test will be what happens with respect to package pricing, loyalty rebates, etc., because the Supreme Court is likely to take those up, and what the Antitrust Division says about those will be very interesting at this point. But my feeling is that those practices involve mixed questions of law and policy in the same sense that *linkLine* involved such a mix.

Unlike the practice in *linkLine*, however, the law and policy implicated by those practices may not be aligned. I can see some real evils stemming from those practices, but I can also see some benefits stemming from them.

ANTITRUST: Would you like to see the Supreme Court take up those issues in properly framed cases—or would you just as soon they didn't?

COMMISSIONER ROSCH: I'd like to see them do it, but I have to stress that my view is that the Supreme Court ought to decide these cases incrementally and not as they did in *Trinko*—reach out and through dictum express cosmic views. I think the Court ought to decide just the case before it; that's the position we took in *linkLine* and that's the way I think they ought to do it. Incidentally, I think that may be the way that they will do it in the future because this Roberts Court seems to value collegiality a lot. And if you're trying to achieve collegiality you do tend to decide cases more incrementally than cosmically.

ANTITRUST: One last question on Section 2. Do you think the agencies will come to a consensus policy statement in the new Administration?

COMMISSIONER ROSCH: I think that the change in Administration certainly holds that out as a possibility. But heaven only knows what the attitude of the new AAG will be about the Section 2 Statement that was issued by the FTC or the Section 2 Report that was issued by the Antitrust Division.

ANTITRUST: What do you see happening in resale price maintenance in the aftermath of the Supreme Court's *Leegin* decision, whether in terms of what Congress should do or what you think the FTC should do? Is the Commission looking for a case in which to examine vertical price restraints under some form of the rule of reason, whether it's a full rule of reason analysis, or applying some sort of presumptions as the Supreme Court suggested in *Leegin*?

COMMISSIONER ROSCH: First of all, my view is that *Leegin* should not be legislated out of existence. I think we need to wait and see what *Leegin*'s progeny is before Congress takes that extreme step. My view is based on what Justice Kennedy said in *Leegin* when he mentioned the possibility of using presumptions to decide RPM cases. To my way of thinking, that creates the possibility that one could apply the *Three Tenors* presumption when you see a practice which is inherently suspect. For example, when you see resale price maintenance in a highly concentrated industry, that may be inherently suspect, and it may be appropriate under those circumstances to shift the burden of proof of pro-competitive effect over to the defendants. That's the possibility we left open in our ruling on the *Nine West* petition to abolish a prohibition on resale price maintenance. And I think that may be where the law will end up going.

ANTITRUST: Some might say that if there is an efficient use of RPM—which the Supreme Court found could be the case in refusing to uphold the per se rule—then why couldn't it be the case that firms in a concentrated industry would all have efficiency rationales?

COMMISSIONER ROSCH: All of those firms may indeed have efficiency rationales, but remember what we're talking about here is just the possibility of shifting the burden in that regard. The plaintiff still bears the ultimate burden of proof. Let's just consider how these cases are going to be litigated in the future. What may happen is that—particularly in a concentrated industry—the plaintiff is going to be able to show that resale prices went up after the policy was implemented. Is that the end of the day? I don't think so. There's solid thinking that says that as long as output increased too, RPM gave consumers the choice which they didn't have before. And it wouldn't bother me if that's the outcome. But it may be appropriate to impose on a defendant in those circumstances the burden of demonstrating that that is the effect.

ANTITRUST: A question about international cooperation and advocacy, which is an area that I believe has been a remarkable success story for the agencies, and in which the FTC has increasingly led the way. The U.S. business community has said in various settings that it's very important that the agencies are not just bringing sensible cases at home but also advocate sensible policies abroad, because U.S. companies and their competitive environment are now affected as much by what China does and what the EU does as what the U.S. government does.

And that being the case, a concern has been raised about the Commission—and perhaps, in the future, the DOJ—moving into a more innovative period, looking at more creative or aggressive enforcement theories. In isolation one could at least argue that it makes sense in a given case to let a novel theory play out—whether it relates to Section 5, or non-horizontal merger theories, for example. But the con-

cerns over these theories are compounded by the fact that what we do in the United States gets watched intensely, and that there's a sort of lowest common denominator at work in which whatever we do that's aggressive or creative gets adopted by others as a baseline for what is acceptable or mainstream. It must be okay because even the U.S. agencies are doing it. So other countries might decide, why don't we adopt a legal standard that says that certain conduct is unlawful because we find it's "unfair," or that a merger is unlawful even though it not horizontal or vertical and doesn't change market structure in any way. Do you think a Commissioner's decision making on domestic policy issues should factor in how the theory may play out abroad?

COMMISSIONER ROSCH: I'm tempted to leave this matter to Bill Kovacic because he's the expert on international convergence and comity.

I would say, however, that concerns about harmonization and convergence, etc., ought to play a role in our decision making. But it's a very minor role. We're obliged to enforce the laws of the United States, not Article 81 or 82 of the European Treaty. So I don't think that the tail should wag the dog, the tail in this case being harmonization and convergence.

My view in that respect is reinforced by other considerations. First of all, I think convergence, true convergence, substantive convergence is impossible in the immediate future. And I think that businesses over here ought to be told that. We tend to sweep divergence under the rug but there are some factors that make it impossible to do so. As long as we have different statutes—Article 2 of the Treaty is very different from Section 2 of the Sherman Act—there are bound to be differences in law enforcement. We also have different cultures and history than does Europe. They have state-owned enterprises that we never dreamed of having over here. So they can be expected to have different rules, like rules governing state subsidies and "national champions." To some extent their economics is different. Their current Chief Economist insists that's not so. But the cases indicate that it is so. They are more open minded about post-Chicago school economics than we are. Concepts that you see in Salop and Whinston and others show up in their jurisprudence with more frequency than they show up in our jurisprudence.

ANTITRUST: Some might say that's not such a good thing.

COMMISSIONER ROSCH: Some indeed might say that's not a good thing, but I'm saying that if one is counseling a business person who needs to do business overseas, I think you need to point out first of all that the two federal agencies here in the United States are obliged to enforce United States law with its peculiar cultural, historical, and economic underpinnings, not European law, and that those underpinnings are different in Europe than they are here.

And the second thing I think is that comity is impossible to achieve. To be sure, it can be achieved in the easy case where you can identify the country that has the greatest interest, but when the rubber really meets the road and there's a practice in which all countries claim that they have an interest, comity will only occur because of the sufferance of a country rather than because of a rule that requires that country to defer to another country.

ANTITRUST: I think most businesses understand that reality, that true convergence is not going to happen. And some probably would say they wouldn't want it, because the convergence might be in a direction that they wouldn't like.

COMMISSIONER ROSCH: The third observation I would make is that I don't think it's productive for people to throw bricks at each other on either side of the Atlantic. It just alienates those who are obliged to enforce the law on the receiving end. We have far too much to learn from each other to allow that kind of friction to exist. And that is not in the interest of the business community either.

ANTITRUST: What changes in antitrust policy do you see in the new Administration, and what would you like to see?

COMMISSIONER ROSCH: We've already touched on this to some extent. First, I think it's more probable than it has been that there will be convergence between the agencies on the desirability of revisiting the Merger Guidelines. Second, there may be more convergence of views on how Section 2 ought to be enforced, although I have to say on that score that the Antitrust Division may still find it more necessary than I currently do that we provide guidance on exactly how it's going to be enforced rather than speak in generalities. Finally, counselors and their clients alike ought to be interested in resolving the possibility that an impasse may occur between the Antitrust Division and the Commission when both seek to investigate a transaction or practice. We didn't solve the problem with that clearance process when Tom Barnett was the AAG although he and Chairman Majoras were pretty close on a lot of other matters. And whether we'll be able to make any greater progress with the change in Administration seems to me to be very much up for grabs. It depends so much on the personalities of the Chairman and of the AAG.

I think that Charles James and Tim Muris probably had it right. Having a protocol that's pretty much binding is probably the right way to go. But I must say I don't see that in the offing. ■

[1] Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995).

[2] Timothy J. Muris, Chairman, Fed. Trade Comm'n, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Remarks at the Milton Handler Annual Antitrust Review (Dec. 10, 2002), *available at* http://www.ftc.gov/speeches/muris/handler.shtm.