

The Interface of Competition and Consumer Protection

Prepared Remarks of

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¹ The views expressed are those of the Chairman and do not necessarily reflect the views of the Commission or of any other Commissioner.

E.g.,

² E.g., Timothy J. Muris, *Competition and Intellectual Property Policy: The Way Ahead*, Before the American Bar Association, Section of Antitrust Law, Fall Forum (Nov. 15, 2001), available at <<http://www.ftc.gov/speeches/muris/intellectual.htm>>; Sheila F. Anthony, *Antitrust and Intellectual Property Law: From Adversaries to Partners*, 28 AIPLA 1 (Winter 2000).

³ E.g., *Ministerial Declaration, Ministerial Conference (Fourth Session)* ¶¶ 23-25, WTO Doc. WT/MIN(01)/DEC/W/1 (9-14 Nov. 2001), available at <http://docsonline.wto.org/gen_search.asp>; Philip Marsden, *Trade and Competition: Why Antitrust Lawyers Should Pay More Heed*, EUROPEAN ANTITRUST REVIEW, 2000, at 97.

⁴ 15 U.S.C. § 45 (2000).

⁵ *Id.*

policing the market against acts and practices that distort the manner in which consumers make decisions in the marketplace. The practices we attack are those that prevent, or at least hinder, honest competition. Terminology matters here because in some countries this category of practices is referred to as “unfair competition.” Thus, I ask your forbearance if your country calls “unfair competition” what I refer to as “consumer protection” and ask you mentally to substitute one term for the other.

Today, I first will discuss the relationship between antitrust and consumer protection. I then will consider the international dimension of the relationship between the two, and compare the convergence issues we are addressing in antitrust with those in consumer protection. I then will suggest that just as we began the antitrust convergence effort with hard-core cartels, we should begin the consumer protection convergence effort with cross-border fraud. Next, I will discuss why we as antitrust enforcers and practitioners should participate in this debate. I will conclude with a discussion of what we are doing about cross-border fraud in the United States.

II. The Relationship Between Competition Policy and Consumer Protection

A. Complementarities

As my colleague, Commissioner Thomas Leary, stated last year, “I predict that the

from Commission to Hon. Wendell H. Ford and Hon. John C. Danforth (Dec. 17, 1980), *available at* <<http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>> (unfairness). Both were subsequently transformed from policy statements into rules of law through FTC decisions in adjudicated cases. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) (deception statement); *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984) (unfairness statement). The legal standards set forth in the unfairness statement were subsequently codified at 15 U.S.C. § 45(n) (2000).

⁶ Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium* 7, Before American Bar Association, Section of Antitrust Law, 48th Annual Spring Meeting (Apr. 6, 2000), *available at* <<http://www.ftc.gov/speeches/leary/learyantitrustspeech.htm>>.

⁷ See Neil W. Averitt and Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

offerings of one seller, they can turn to others. The consumers' ability to shift expenditures imposes a rigorous discipline on each seller to satisfy consumer preferences. Competition does more than simply increase the choices available to consumers, however. It often motivates sellers to provide truthful, useful information about their products and drives them to fulfill promises concerning price, quality, and other terms of sale. Consumers can punish a seller's deceit or its renegeing on promises made by voting with their feet – and their pocketbooks.

Sometimes robust competition alone will not punish or deter seller dishonesty or renegeing. Some products may be purchased so infrequently that consumers' decisions to shop elsewhere are ineffectual constraints on seller behavior. For other products, usually called "credence goods,"⁸ consumers cannot readily use their own experiences to assess whether the seller's quality claims are true. The typical consumer knows whether a food product "tastes great;" she probably cannot judge whether consuming the same product reduces the risk of cancer. Competing firms may not have strong incentives to identify their rivals' misrepresentations.

Companies that are in business for the long run care about how consumers regard them. They count on repeat business and word-of-mouth endorsements to increase sales. By contrast, the commercial thief loses no sleep over its standing in the community. The fraudsters – as we call them – cheat consumers, grab the revenues, disappear from sight, and often emerge in another guise to steal again.

Consumer protection policy has a vital role to play in addressing the phenomena I have just described. Consumer protection works to ensure that consumers can make well-informed decisions about their choices and that sellers will fulfill their promises about the products they offer. Simply stated, the core of modern consumer protection policy consists of preventing sellers from increasing sales by lying about their products⁹ or by engaging in unfair practices such

⁸ See Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. LAW & ECON. 67 (1973).

⁹ See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 103-04 (1993) (discussing rationales for policing fraud).

as unilateral breach of contract or unauthorized billing.¹⁰ If sellers make a habit of lying about their products, a pernicious atmosphere of consumer distrust may well develop.

An atmosphere of consumer distrust can harm society in several ways. Deceit by one group of sellers may lead consumers to doubt the integrity of an entire industry or to distrust markets generally. Deception by Internet sellers, for example, could discourage consumers from using the Internet to gather information and make purchases. Truthful sellers must resort to extraordinary measures to persuade consumers of their honesty. Even if honest suppliers take such precautions to show their trustworthiness, some consumers may reduce their purchases and go without products whose acquisition would improve their well-being. By striving to keep sellers honest, therefore, consumer protection policy does more than safeguard the interests of the

¹⁰ After a long struggle with the extent of its unfairness jurisdiction, the Commission adopted a cost-benefit analysis for unfairness. See Letter from Commission to Hon. Wendell H. Ford and John C. Danforth, *supra* note 5. The primary purpose of the Commission's unfairness authority is to protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices. Consumer sovereignty may be frustrated *ex ante* if, for example, important information is not provided. See Labeling and Advertising of Home Insulation, Statement of Basis and Purpose, 44 Fed. Reg. 50218 (1979). It may be frustrated *ex post* if sellers do not honor their contracts with consumers. See *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff'd sub nom*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988). The three-part unfairness test – the injury must be (1) substantial, (2) without offsetting benefits that outweigh the harm, and (3) one that consumers cannot reasonably avoid – specifically is designed to provide a rational, empirical means to determine whether the challenged acts or practices interfere with consumers' ability to make choices.

¹¹ See AMERICAN BAR ASSOCIATION, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 109-110 (Apr. 7, 1989) [hereinafter "KIRKPATRICK II REPORT"] (noting, *inter alia*, that combination of functions allows consideration of whether antitrust or consumer protection remedies are most appropriate and permits consumer protection decisions to be informed by considerations of economic efficiency).

schemes.¹⁶ Today, the disgorgement of revenues obtained by fraud is a centerpiece of our consumer protection program.¹⁷ The experience with restitution and disgorgement in consumer protection laid the foundation for the Commission to use those remedies in antitrust.¹⁸

Perhaps the more important form of osmosis runs from competition to consumer protection policy. As I mentioned earlier, robust competition is the best single means for protecting consumer interests. Rivalry among incumbent producers, and the threat and fact of entry from new suppliers, fuels the contest to satisfy consumer needs.¹⁹ In competitive markets, firms prosper by surpassing their rivals in identifying and serving consumer needs.²⁰

This feature of the market system has important implications for the design of consumer protection policies affecting the regulation of advertising and marketing practices. Without a continuing reminder of the benefits of competition, a consumer protection program might tend to impose controls that ultimately may diminish the very competition that increases consumer choice.²¹ Competition principles can help ensure that consumer protection is consistent with consumer sovereignty. They remind us that some consumer protection measures – even those motivated by the best of intentions – can also create barriers to entry that limit the freedom of

¹⁶ *E.g.*, *FTC v. H.N. Singer*, 668 F.2d 1982 (9th Cir. 1982); *FTC v. Southwest Sunsites*, 665 F.2d 711 (5th Cir. 1982); *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1280 (D. Minn. 1985).

¹⁷ FTC Strategic Plan 2000-2005, Under the Government Performance and Results Act (Sept. 2000), available at <<http://www.ftc.gov/opp/gpra/index.htm>>. That disgorgement was an appropriate remedy as well as restitution was first raised in cases such as *FTC v. U.S. Oil and Gas*, 1987 U.S. Dist. LEXIS 16137 (S.D. Fla. 1987), and was later established in *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997); and *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 (C.D. Cal. Mar. 28, 1991), *aff'd without op.*, 9 F.3d 1551 (9th Cir. 1993) (*reported in full at* 1993 U.S. App. LEXIS 28684 (Oct. 22, 1993)).

¹⁸ *FTC v. Mylan Labs, Inc.*, 62 F.Supp.2d 25 (D.D.C. 1999); *FTC v. The Hearst Trust*, No. 1:01CV00734 (D.D.C. filed Apr. 4, 2001), available at <<http://www.ftc.gov/os/2001/04/hearstcmp.htm>>.

¹⁹ See FTC Staff Comments on EU Green Paper on Consumer Protection (Feb. 2002), available at <http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/responses/responses_en.html> (encouraging the EU to consider competition issues in formulating consumer protection policy).

²⁰ *E.g.*, John Vickers, *When is Trading Unfair* 2-3, Address Before David Hume Institute (Apr. 26, 2001), available at <<http://www.oft.gov.uk/News/Speeches/2001/When+is+trading+unfair.htm>>.

²¹ *E.g.*, KIRKPATRICK II REPORT, *supra* note 11, at 36-38 (noting that some state consumer protection activities may not serve interests of competition), and at 109 n. 166 (noting tendency of some other federal authorities with consumer protection responsibilities to over-regulate).

²⁷ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909 (D.C. Cir. 1984). Laker brought a private action in the United States against several foreign and domestic airlines, alleging a conspiracy in violation of the antitrust laws. The defendants responded by seeking an injunction in a British court ordering Laker to take action to have the case in the United States dismissed; the British courts issued an injunction on behalf of the British defendants. Laker responded by seeking and obtaining an injunction in U.S. District Court prohibiting the remaining defendants from seeking an injunction like that obtained by the British defendants. *Laker Airways, Ltd. v. Pan American World Airways*, 559 F.Supp. 1124 (D.D.C. 1983). Meanwhile, Laker obtained from the British High Court a dismissal of the injunction previously granted by the High Court on behalf of the British defendants. *British Airways Bd. v. Laker Airways, Ltd.*, [1984] 1 QB 142, [1983] All ER 375, [1983] 3 WLR 544, [1983] ComLR 212. The British Government thereupon intervened in the matter under the terms of the Protection of Trading Interests Act of 1980 and ordered the British defendants to refrain from complying with any U.S. antitrust measures. The D.C. Circuit Court of Appeals, in the case cited, affirmed the District Court order to preserve the court's jurisdiction to enforce U.S. antitrust law.

³⁰ Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, *reprinted in* 4 Trade Reg. Rep (CCH) ¶ 13,502, *available at* <<http://www.usdoj.gov/atr/public/international/docs/austral.us.txt>>.

³¹ Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503A.

³² See The Right Honourable Sir Leon Brittan QC, *Jurisdictional Issues in E.E.C. Competition Law* 28, Hersch Lauterpacht Memorial Lectures, Cambridge, Feb. 8, 1990 (“The U.S. and the [European] Community may well one day soon take different views of a competition case.”).

³³ Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <<http://www.usdoj.gov/atr/public/international/docs/ec.htm>>. The Agreement states that its purpose is “to lessen

³⁴ Organization for Economic Cooperation and Development, Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, July 27-28, 1995, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, (Apr. 27, 1995), *available at* <http://www.usdoj.gov/atr/public/international/docs/council_recs.htm>

³⁵ Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503, *available at* <<http://www.usdoj.gov/atr/public/international/docs/uscan721.txt>>.

³⁶ Agreement Between the Commission of the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws, June 4, 1998, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504A; OJ L 173/26 (18 June 1998), *available at* <<http://www.ftc.gov/bc/us-ec-pc.htm>>.

³⁷ Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, Apr. 27, 1999, *available at* <<http://www.ftc.gov/os/1997/9704/lastaus.htm>>.

the harm.⁴⁰ As a result, many other countries prosecuted these cartels under their own laws, as well.⁴¹

This cartel experience exposed two fundamental but related issues: how to obtain evidence of anticompetitive activities taking place abroad for use in domestic prosecutions and how to share information with other countries so that they can act as well. The Justice Department addressed the first problem through cooperation with other nations, particularly through the use of Mutual Legal Assistance Treaties that permit criminal authorities to gather evidence for each other.⁴²

Through these and other mechanisms, cooperation has become a reality, and numerous examples of convergence have followed. The number of jurisdictions that treat hard-core cartels as criminal, for example, now includes countries as diverse as Canada, Japan, Israel, and Norway,⁴³ and others are considering criminal sanctions. Leniency policies have evolved, and

⁴⁰ A recent study of 16 cartels, for example, suggested that the impact on developing economies imports are significant. Simon J. Evenett, *Private International Cartels and Developing Economies*, OECD Doc. CCNM/GF/COMP/WD(2002)34 (Mar. 7, 2002).

⁴¹ E.g., Federal Court Imposes Record \$26M Penalties Against Vitamin Suppliers, Aust. Comp. & Cons. Comm. Press Release (Mar. 1, 2001), available at <<http://www.accc.gov.au>>; Commission Imposes Fines on Vitamin Cartels, Case. No. IP/01/1625, available at <<http://europa.eu.int/comm/competition/antitrust/cases/>>; Competition Bureau Investigation Leads to over \$4-million in Fines for International Bulk Vitamin Conspiracies, Canadian Comp. Bureau Press Release (Oct. 16, 2002), available at <<http://strategis.ic.gc.ca/ssg/1/ct02437e.htm>>; Korea Fair Trade Commission imposes surcharge of US \$8.5 million on international cartel of graphite electrodes , KFTC Press Release (March 21, 2002); referred to at <<http://www.ftc.go.kr/english/html/index.htm>>.

⁴² Mutual Legal Assistance Treaties (MLATs), which are generally applicable to most criminal offenses, see <<http://travel.state.gov/mlat.html>>, in some cases may provide law enforcers with enhanced tools to combat criminal antitrust conduct. The MLAT with Canada, for example, covers examining objects and sites; exchanging information and objects; locating or identifying persons; serving documents; taking the evidence of persons; providing documents and government records; transferring persons in custody (to provide assistance under the treaty, including testimony); executing requests for searches and seizures; and providing notification and assistance related to forfeiture of proceeds of crime. Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can. CTIA-No: 6813.000, 1985 WL 301941 (Treaty). The sharing of information might also be facilitated through the International Antitrust Enforcement Assistance Act and reciprocal provisions under the laws of other nations. 15 U.S.C. §§ 6201-6212 (2000). Among the other nations that have enacted reciprocal information sharing legislation are Australia, see Mutual Assistance in Business Regulation Act, 1992, Mutual Assistance in Criminal Matters Act, 1987 (Australia), and Canada, see Competition Act, R.S.C. 1985, c. C-34, Part III, as amended. (Can.).

⁴³ Competition Act, R.S.C. 1985, c. C-34, Part II, § 45 (Can.); Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of Apr. 14, 1947, as amended) ch. X, §§ 89-91 (Japan); Restrictive Business Practices Law § 47(a) (Israel); Act No. 65 of 11 June 1993 Relating to Competition in Commercial Activity § 6-6 (Norway).

other jurisdictions have begun to adopt policies similar to those in the United States.⁴⁴ The OECD Recommendation Concerning Hard Core Cartels⁴⁵ reflects the convergence that had developed, as do the prosecutions I mentioned.

Merger enforcement has followed a similar path for a number of years. For example, because of the Tj -34.25 -18.5 -TD 0.10548 Tc -0.34
the s 1] 1903 0 -TD /F 2 8.7953 -Tf 0.1211 Tc -0.0598 Tw (Boeing/McDonnell Douglas)

⁴⁴ E.g., The Competition Authority, Cartel Immunity Programme (Dec. 20, 2001), *available at* <<http://www.tca.ie>> (Ireland); Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ C 45, 19.02.2002 pp. 3-5, *available at* <<http://europa.eu.int/comm.competition/antitrust/leniency>> (European Commission); Leniency Guidelines in Relation to the No-imposition or Reduction of Fines in Cases Pursuant to Section 6 in Conjunction with Sections 56, 57, and 62 of the Competition Act (June 28, 2002), *available at* <www.nma-org.nl/english> (Netherlands).

⁴⁵ Organization for Economic Cooperation and Development, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, Mar. 1998 [hereinafter OECD Hard Core Cartel Recommendation], *available at* <http://www.usdoj.gov/atr/public/international/docs/hard_core.htm>

⁴⁶ *GE/Honeywell*, Case No COMP/M.2220, Comm. Dec. of 3 July 2001, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf>; U.S. Dept. of Justice press release, *available at* <http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm>.

⁴⁷ *The Boeing Co., et al.*, Joint Statement closing investigation of the proposed merger and separate statement of Commissioner Mary L. Azcuenaga, FTC File No. 971-0051, July 1, 1997, reported in 5 Trade Reg. Rpt. (CCH) ¶ 24,295; *Boeing/McDonnell Douglas*, Case No IV/M.877, European Commission Decision of 30 July 1997, OJ L 336/16 (8 Dec. 1997).

⁴⁸ The best practices paper is available on the FTC Web Site, <<http://www.ftc.gov>>.

The experience gained during the merger wave of the 1990s built a reservoir of trust on which we could draw to discuss and deal with differences when they arose. That trust makes it easier to deal with the hard questions that remain. One issue is the risk that, as multiple arbiters judge the same transaction, the decision of the most restrictive jurisdiction will prevail, effectively dictating policy to all the others.⁴⁹ This was the result in *GE/Honeywell* and was nearly so in *Boeing/McDonnell Douglas*. As many have noted following those two cases,⁵⁰ the EC and the U.S. redoubled their efforts to understand each other and, along the way, continued to cooperate effectively as the recent *Solvay/Ausimont*⁵¹ and *Bayer/Aventis CropSciences*⁵² cases demonstrate.

Our differences have led us to supplement cooperation with convergence. Convergence, put simply, involves discussing the issues and learning from each others' experience to move toward a general consensus about how best to enforce our antitrust laws. Over time, national laws are likely to evolve to reflect that consensus. In addition to the U.S./EC mergers working group, we are working together on similar issues at the OECD, and are addressing thorny questions about the relationship between competition and trade at the World Trade Organization. The convergence movement took an important step forward through the International Competition Network (ICN), which celebrates its first anniversary at this Conference. At its first annual conference, which just took place in Naples, the ICN's 75 member competition agencies adopted a set of Guiding Principles for Merger Notification, and endorsed a set of Recommended Practices for Merger Notification Procedures, that are designed to promote convergence in multi-

⁴⁹ See J. HOWARD BEALES & TIMOTHY J. MURIS, *supra* note 24, discussed in more detail at notes 62-64 and accompanying text, *infra*.

⁵⁰ See, e.g., Klein, *Anticipating the Millenium: International Antitrust Enforcement at the End of the Twentieth Century*, 1997 FORDHAM CORP. L. INST. 1, 8 (1998) (quoting with approval Barry Hawk, stating in the wake of *Boeing/McDonnell Douglas*, that while “[s]ome have suggested that the public controversy between the U.S. and the EC may result in a cooling of enforcement cooperation between their respective competition authorities, . . . it is more likely the opposite will occur”); Robert Pitofsky, *EU and U.S. Approaches to International Mergers – Views from the U.S. Federal Trade Commission*, Remarks Before the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, Sept. 14, 2000, *available at* <<http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm>>.

⁵¹ *Solvay/Ausimont*, Case No COMP/M.2690, Comm. Dec. of 9 Apr. 2002, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2690_en.pdf>; *Solvay S.A.*, File No. 021-0067, Docket No. C-4046, Consent Agreement announced May 2, 2002, *available at* <<http://www.ftc.gov/opa/2002/05/solvayausimont.htm>>.

⁵² *Bayer/Aventis CropSciences*, Case No COMP/M. 2547, Comm. Dec. of 17 Apr. 2002, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2547_en.pdf>; *Bayer AG, and Aventis S.A.*, File No. 011 0199, Docket No. C-4049, Consent Agreement announced May 30, 2002, *available at* <<http://www.ftc.gov/opa/2002/05/bayeraventis.htm>>.

jurisdictional merger review.⁵³ The ICN launch succeeded, in my opinion, because of the widely-shared desire for convergence and the excellent relationships that have been established in working on matters about which we substantially agree.

2. *And now, consumer protection*

Consumer protection is now moving on the same trajectory as antitrust. While the differences in approach to consumer protection were as significant as those surrounding antitrust, the issues of international cooperation and convergence simply did not arise for many years. These issues did not get much notice largely because consumer protection issues usually involved only one country. While consumer goods themselves have long crossed national borders, marketing campaigns until recently remained domestic in nature. There are many reasons for this, including different languages, cultural barriers that required different marketing strategies for different countries, different competitive environments, and different labeling rules. There may have been significant differences between nations on issues like comparative advertising, the amount of substantiation necessary to support an advertising claim, and the extent to which disclosures might cure marketing problems. These differences did not become points of contention, however, because products usually were marketed separately in different countries.

Just as globalization has changed the landscape in antitrust, it is changing consumer protection. Today, we see satellite networks broadcasting advertisements around the world, with operators waiting to take your order in the language of your choice. Telemarketers routinely call U.S. consumers from Canada. Most significantly, in many markets the Internet is turning national borders into historical anachronisms. As my colleague Commissioner Orson Swindle has stated, “[t]he phenomenal growth of commerce on the Internet has provided a greater sense of urgency to the FTC’s seeking cooperation with its foreign counterparts.”⁵⁴ We cannot avoid considering global consumer protection issues.⁵⁵

⁵³ Both documents are available on the ICN Web Site, <<http://www.internationalcompetitionnetwork.org>>.

⁵⁴ Orson Swindle, *Enforcement of Consumer Protection and Competition Laws in the Global Marketplace: the North American Experience*, Before the Sydney Global Commerce Conference, Nov. 10, 1998, available at <<http://www.ftc.gov/speeches/swindle/austspch.htm>>.

⁵⁵ An increasing number of consumer complaints collected by the FTC and its law enforcement partners involve international transactions. In 2001, approximately 13 percent of the complaints collected in the FTC’s *Consumer Sentinel* database involved a cross-border element (either foreign consumers complaining about U.S. businesses or domestic consumers complaining about foreign businesses), compared to less than 1 percent in 1995. The 2001 cross-border complaints came from about 15,000 consumers complaining about transactions involving almost \$30 million. See <<http://www.consumer.gov/sentinel>>.

As with antitrust, many countries are establishing consumer protection regimes.⁵⁶ Fortunately, a solid groundwork for cooperation already exists. We have recognized the importance of building international cooperation in consumer protection, just as we have done in competition. We recently have entered into bilateral consumer protection agreements with Canada,⁵⁷

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⁵⁶ The International Marketing Supervision Network, which is the consumer protection analog to the International Competition Network, has 31 members, including agencies from Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, South Korea, Spain, Sweden, Switzerland, United Kingdom, and the United States. The European Commission and the OECD participate as observers. See <<http://www.imsnricc.org/>>.

⁵⁷ Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, *supra* note 35.

⁵⁸ Agreement Between the Federal Trade Commission of the United States of America and the Australian Competition & Consumer Commission on the Mutual Enforcement Assistance in Consumer Protection Matters, July 20, 1999, available at <<http://www.ftc.gov/os/2000/07/ftcaccagrmt.htm>>.

⁵⁹ Memorandum of Understanding on Mutual Enforcement Assistance in Consumer Protection Matters Between the Federal Trade Commission of the United States of America and Her Majesty's Secretary of State for Trade and Industry and the Director General of Fair Trading in the United Kingdom, Oct. 31, 2000, available at <<http://www.ftc.gov/os/2000/10/ukmemo.pdf>>.

⁶⁰ OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, available at <<http://www.ftc.gov/opa/1999/9912/occdguide.htm>>.

⁶¹ See *supra* note 56.

⁶⁵ *See* FEDERAL T

A similar, if less visible, convergence has taken place regarding substantiation for certain advertising claims. In 1984, the FTC issued a deception-based policy statement reaffirming its commitment to the requirement of advertising substantiation. The statement, issued after we solicited comment on how to make our advertising substantiation program more effective, emphasized that “[o]bjective claims for products or services represent explicitly or by implication that the advertiser has a reasonable basis supporting these claims.” The statement also noted that “the goal of the advertising substantiation requirement is to assure that advertising is truthful.”⁶⁹ At approximately the same time, the European Commission issued its directive on misleading advertising, which took the same general approach to substantiation in Europe.⁷⁰ While there may yet be room for discussion, we are in general agreement with the European Commission on this critical broad principle.

The European Commission’s work on commercial communications in the common market encourages me to believe that further convergence is a reasonable goal. The European Commission issued a Green Paper on commercial communications in 1996, which notes, for example, that differing national regulations could create obstacles for companies seeking to offer such services across national borders, and proposes a review of restrictions that form barriers to entry.⁷¹ These are ideas on which we could find considerable common ground.

trade names or trademarks and does not discredit, denigrate, or take unfair advantage of them. It does not prohibit Member States from taking more liberal approaches if they choose.

⁶⁹ FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839, 841, *appended to Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

⁷⁰ Council Directive of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Members States Concerning Misleading Advertising ¶ 6 (84/450/EEC), OJ L 250, 19. 9. 1984, p. 17., *available at* <http://europa.eu.int/comm/consumers/policy/developments/adve/adve03_en.html>. The EC Directive recognizes that “the advertiser should be able to prove, by appropriate means, the material accuracy of the factual claims he makes in his advertising.” It requires Member States to empower their courts or agencies to require advertisers to “furnish evidence as to the accuracy of factual claims in advertising,” if such a requirement appears appropriate, and to consider factual claims as inaccurate if the evidence demanded is not furnished or is deemed insufficient. The Directive does not, however, address the level of substantiation that is needed to be deemed sufficient. By contrast, in the United States the rules in this area have been developed in some detail. *E.g.*, FTC Policy Statement Regarding Advertising Substantiation, *supra* note 70; *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *Removatron Int’l Corp.*, 111 F.T.C. 206 (1988), *aff’d*, 884 F.2d 1489 (1st Cir. 1989).

⁷¹European Commission, Green Paper on Commercial Communications in the Internal Market 2b (COM(96)) 192 08.05.96. The Green Paper led the EC to issue a follow-up paper, in which it was proposed to establish an expert group on commercial communications “to establish transparent and efficient administrative cooperation between itself and the Member States and a dialogue with interested third parties.” *See* The Follow-up to the Green Paper on Commercial Communications in the Internal Market (Apr. 2, 1998), *available at*

The common framework we have established thus far is heartening. Yet the remaining issues to be resolved – including e-commerce, distance selling, and consumer fraud – are significant. If different arbiters apply different standards in these areas, then marketers who wish to apply identical techniques across borders may have to design a strategy that complies with the standards of the most restrictive jurisdiction in most countries, a result that might not maximize consumer welfare. International convergence in consumer protection is thus as important as international convergence in competition.

I see at least two important questions before us. First, can we find vehicles for practical cooperation that will lay a foundation for further convergence, just as cartel enforcement has done in the antitrust area? Second, how can we ensure that economic analysis adequately informs consumer protection enforcement and complements our antitrust enforcement efforts?

In June 1999, the FTC held a workshop on international consumer protection issues, with participants from industry, consumer associations, governments, and academia recognizing the “value of working toward building consensus on core consumer protections on the national and international levels.”⁷² In a subsequent report, the FTC described the benefits of convergence in consumer protection:

First, the more commonality among different consumer protection regimes, the less burdened merchants are in figuring out different, and potentially conflicting, marketing rules. . . . Second, it promotes consumer protection, because consumers are more likely to understand the rights available to them, regardless of a merchant’s location. Third, it promotes consumer confidence in cross-border transactions, to the extent that consumers know they have the same core protections as they do at home. Fourth, it is easier for governments to engage in joint law enforcement efforts when their cross-border colleagues are enforcing the same protections. Fifth, judgment recognition is more predictable and less problematic when both countries involved have rules reflecting the same public policy choices. Finally, it is particularly appropriate given the scope of Internet retailing: international rules for an international marketplace.⁷³

III. A Future Work Program

A. *Fraud is the place to start*

<http://europa.eu.int/comm/internal_market/comcom/docs/follupen.htm>.

⁷² FEDERAL TRADE COMMISSION, CONSUMER PROTECTION IN THE GLOBAL ELECTRONIC MARKETPLACE: LOOKING AHEAD 18 (Sept. 2000), *available at* <<http://www.ftc.gov/bcp/icpw/lookingahead/global.htm>>.

⁷³ *Id.* at 12.

some countries consider fraud to be a concern only for criminal agencies. Others equate fraud with egregious misleading and deceptive commercial practices generally. Despite some issues of classification, I am confident that consumer protection agencies worldwide would agree that certain types of seller deceit warrant categorical condemnation.

I also sense an increasing awareness that fraud is a serious threat to proper functioning of markets around the globe. The communications and information-processing revolutions that spur the globalization of commerce also facilitate the globalization of fraud. At the FTC, we have seen how fraudsters employ state of the art technology to amass huge revenues by operating on a truly international scale.⁷⁷ In recent years, for example, the FTC has addressed fraudulent schemes involving places like Moldova, Madagascar, and Dominica that take advantage of the Internet and improved telecommunications.⁷⁸

Although fraud imposes high costs in well-established market systems, in emerging markets, the damage of such fraud may be even greater. It is bad enough in any economy that

⁷⁷ For example, last year, the FTC halted an online pyramid scheme that allegedly had garnered more than \$175 million from consumers worldwide. *FTC v. Skybiz.com*, 1-CV-396-EA(X) (N.D. Okla.), FTC Press Release (Jan. 14, 2002) available at <<http://www.ftc.gov/opa/2002/01/sky2blanton1.htm>>.

⁷⁸ See, e.g., *FTC v. TLD Networks Ltd.*, No. 020C1475 (N.D. Ill. filed Feb. 28, 2002), FTC Press Release and court documents available at <<http://www.ftc.gov/opa/2002/03/tld.htm>>; *FTC v. BTV Indus.*, No. CV-S-02-0437-LRH (PAL) (D. Nev. filed Mar. 27, 2002), FTC Press Release and court documents available at <<http://www.ftc.gov/opa/2002/04/btv.htm>>; *FTC v. Zuccarini*, No. 01-CV-4854 (E.D. Pa. filed Sept. 25, 2001), FTC Press Release and court documents available at <<http://www.ftc.gov/opa/2002/05/cupcake.htm>>; *FTC v. Verity Int'l*, No. 00 Civ. 7422 (S.D.N.Y. filed Oct. 2, 2000), FTC Press Release and complaint available at <<http://www.ftc.gov/opa/2000/10/verity.htm>>; *FTC v. Audiotex Connection, Inc.*, CV-97-0726 (E.D.N.Y. filed Feb. 12, 1997), Consent Decree and Order available at <<http://www.ftc.gov/os/1997/9711/Adtxprmford.htm>>; *FTC v. Benoit* (previously *FTC v. One or More Unknown Parties*), No. 3:99 CV 181 (W.D.N.C. filed May 11, 1999), Complaint available at <<http://www.ftc.gov/os/1999/9905/7674451775.htm>>.

⁷⁹ E.g., Radio Free Europe/Radio Liberty, Albania: Pyramid Schemes Common Across Eastern Europe, Jan. 16, 1997, available at <<http://www.rferl.org/nca/features/1997/01/F.RU.970116172653.html>>; Chris Jarvis, *The Rise and Fall of Pyramid Schemes in Albania*, 47 IMF Staff Papers No. 1 (2000), available at <<http://www.imf.org/external/pubs/ft/staffp/2000/00-01/jarvis.htm>>.

As I mentioned in introducing this speech, for several reasons consumer protection is the next frontier that should command the attention of the antitrust policy community. First, the consumer protection community can borrow heavily from antitrust enforcement experience with hard-core cartels in designing strategies for attacking cross-border fraud. Cooperation between competition policy and consumer protection officials and practitioners can accelerate the pursuit of effective international approaches to detecting and punishing fraud.

A second, related reason is that limiting cross-border fraud is important to the establishment of successful market regimes. Losing the battle against cross-border fraud would undermine confidence in market processes, especially in transition economies. Moreover, consumers in countries that fail to develop effective anti-fraud strategies may become especially attractive targets for fraudulent schemes.

Countries that are homes to the targets of cross-border fraud are not the only victims. Countries that unwittingly host them are damaged as well. What country wants the dubious reputation as a haven for perpetrators of international fraud? Not only does this reputation give rise to questions about a country's commitment to the rule of law, but it also sows the seeds for corollary problems such as money laundering.

²⁴ Canada provides a good example of an effective response by a country that found 9 months of delinquent tax payments of \$32.25 billion and \$13.5 billion in tax arrears.
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⁸⁰ See Prepared Statement of the Federal Trade Commission on Cross-Border Fraud, Before the Senate Subcomm. on Investigations of the Comm. on Governmental Affairs, 107th Cong., 1st Sess. (June 15, 2001), available at <<http://www.ftc.gov/os/2001/06/cbftest.htm>>.

⁸¹ See *Charges Laid Against Toronto-based Telemarketers*, Canadian Competition Bureau Press Release, (Oct. 22, 2002), available at <<http://strategis.ic.gc.ca/SSG/ct024403.html>>; *Canadian Company Targets U.S. Citizens with Phony Credit Card Offers for an Advance Fee*, FTC Press Release, (Oct. 22, 2002), available at <<http://www.ftc.gov/opa/2002/10/firstcap.htm>>.

C. *How we're facing the issue here*

We are beginning to address the problem of cross-border fraud in the United States. As we see it, effectively fighting cross-border fraud requires several improvements.

For example, consumer protection enforcers in different countries must share more information about cross-border fraud. This step is essential to successful cross-border law enforcement. Often, consumer protection enforcers in different jurisdictions investigate the same targets, and sharing information could facilitate effective enforcement. More complete information sharing also could help avoid duplication.⁸² This issue is similar to the information sharing issues we face in antitrust, although we may be able to address them differently to the extent that confidentiality issues are not congruent.⁸³

In addition, countries should address gaps in the legal ability of their consumer protection agencies to exercise certain extraterritorial jurisdiction in cases involving fraud. The IMSN issued "Findings on Cross-Border Remedies" that discuss this problem of lack of jurisdiction.⁸⁴ The

⁸² The FTC's current ability to share information with foreign counterparts is limited. For a discussion of existing difficulties in sharing information with our foreign counterparts, *see* Testimony of the Federal Trade Commission Regarding International Telemarketing Fraud Before the Senate Comm. on Governmental Affairs, Subcomm. on Regulation and Government Affairs, 102nd Cong., 2d Sess. (Oct. 15, 1993); Prepared Statement of the Federal Trade Commission on Cross-Border Fraud, Before the Sen. Subcomm. on Investigations of the Comm. on Governmental Affairs, 107th Cong., 1st Sess. (June 15, 2001), *available at* <<http://www.ftc.gov/os/2001/06/cbftest.htm>>. There are also corresponding limits on the ability of foreign consumer protection agencies to share information with the FTC. *E.g.*, Competition Act, R.S.C., Part II, § 29 (1985) (Can.).

⁸³ Providing confidential information with appropriate protection from public disclosure remains both an important priority and the law. 15 U.S.C. §§ 18a(h), 50, 57b-2 (2000). Providing appropriate safeguards for sharing confidential information with foreign law enforcers is also important, but it may be appropriate to structure those safeguards differently for consumer protection investigations than for antitrust cases. In consumer fraud cases, for example, the information we seek to exchange is much less likely to include trade secrets, sensitive competitive data, or other confidential business information. The potential of an inappropriate disclosure to interfere with legitimate operations, and to deter the voluntary submission of information by investigative targets and third parties, also is mitigated. By contrast, the ability to engage in rapid information exchange, sometimes with multiple jurisdictions, to locate and halt conduct is particularly critical in consumer fraud cases.

⁸⁴ *See* International Marketing Supervision Network, Findings on Cross-Border Remedies, § 2, *available at* <<http://www.imsnricc.org/imsn/cross%20border%20findings.htm>>: "(a) some IMSN members lack authority to take action or enforce decisions taken against domestic entities that market only to consumers outside that member's country, and for some members the existence of that authority is unclear; (b) some IMSN members lack authority to take action or enforce decisions taken against entities located or conducting business from outside that member's country, even if they target or transact with consumers within that member's country; and (c) these limitations create enforcement gaps in the abilities of IMSN members to collectively protect consumers in IMSN

inability to take action hurts consumers: fraudulent companies can use one country as a home base from which to target only foreign consumers. As mentioned, we have seen exactly that in some of our investigations. We anticipate a broad degree of convergence on the need for combating cross-border fraud, as it is in the interest of both consumers and legitimate industry to eradicate this pernicious practice.

Moreover, we should find ways for prohibitive orders such as injunctions to be effective across borders. Injunctive relief against fraudulent companies is important to stop them from harming consumers. This relief is meaningless against foreign defendants if injunctive orders are unenforceable across borders. A court whose injunction is ignored can hold the defendant in contempt of court, but this sanction has little value if the defendant is overseas.⁸⁵ Mutual Legal Assistance Treaties, which are often useful in criminal antitrust cases,⁸⁶ are generally not applicable outside of the criminal context, and thus are not available in non-criminal fraud cases.

Finally, one of the key elements of an effective anti-fraud program is depriving wrongdoers of their ill-gotten gains, reducing the incentives to engage in fraud. To the extent that money can be returned to consumers, it reduces their injury and increases their confidence in law enforcement. One of the problems we face in obtaining redress is that fraud proceeds move off-shore quickly. Countries should explore procedures for preventing the transfer of fraudulently obtained assets abroad and for repatriating them once they are transferred.

We have developed a Five-Point Plan for Fighting Cross-Border Fraud to make improvements in these areas. The Plan borrows many of the tools used in antitrust. Under our Five-Point Plan, we will:

1. Advocate adoption of an OECD Recommendation on Cross-Border Fraud;
2. Seek legislative changes to improve our ability to fight cross-border fraud;
3. Hold a workshop on public/private sector cooperation to combat cross-border fraud;
4. Enter into new multilateral and bilateral agreements, and strengthen existing arrangements, to combat cross-border fraud through cooperation and coordinated enforcement activities; and
5. Provide targeted technical assistance to developing countries.

1. OECD Recommendation on Cross-Border Fraud

countries.”

⁸⁵ Contempt of court is not generally an offense subject to extradition. *See* Restatement (Third) of the Foreign Relations Law of the United States § 475 cmt. c (1987).

⁸⁶ *See supra* note 42 and accompanying text.

⁸⁷ OECD Hard Core Fraud Recommendation, *supra* note 36.

⁸⁸ Section 6(f) of the FTC Act authorizes us to “make annual and special reports to the Congress and to submit therewith recommendations for additional legislation.” 15 U.S.C. § 46(f) (2000).

The desire for improved bilateral cooperation is a shared one. I know that Konrad von Finckenstein, the Commissioner of Competition in Canada, agrees. Konrad and I will endeavor to bring cooperation in the field of consumer protection up to the level of cooperation in antitrust matters. Given the close cooperation of the U.S. and Canada, we believe that we have an opportunity to demonstrate how two nations can work together through enforcement partnerships, the sharing of information, and the crafting of domestic remedies that are effective in a borderless market.

Multilateral cooperation through international networks, such as the OECD, is another tool from antitrust that we can use to combat cross-border fraud. We will strengthen our multilateral cooperation network by focusing on increased cooperation with Latin American countries through a Pan-American dialogue on consumer protection. We also will work with our counterparts to expand the International Marketing Supervision Network to Latin America, Eastern Europe, and other interested countries. Latvia and Estonia recently joined the IMSN, and Brazil has expressed interest in joining. Together we will use the IMSN to coordinate more specific, targeted law enforcement activities to combat cross-border fraud.⁹² We will develop systematic procedures for notifying the IMSN of international law enforcement action and ongoing investigations.

We will also recruit countries to share consumer complaints with us to provide empirical data on the problems that cause consumers the most harm. Through the IMSN, we developed a website – www.econsumer.gov – where consumers can file cross-border e-commerce complaints online. Law enforcers in seventeen member countries can access these complaints. This site is a testament to how technological advances in collecting consumer complaint information efficiently can assist us in targeting those frauds that harm the most consumers worldwide. We will continue to expand this tool.

As with antitrust, bilateral and multilateral cooperation must be tied to actual enforcement. A key element of our Five-Point Plan is to bring cross-border cases and coordinate international law enforcement sweeps. These sweeps should draw international attention to certain types of frauds, deter cross-border fraud, educate the public, and identify further gaps in cross-border law enforcement efforts. Such sweeps will be conducted bilaterally through enforcement task forces with law enforcers in particular countries. For example, as part of the Canadian effort to crack down on telemarketing fraud mentioned earlier, we participate in two U.S.-Canadian consumer protection enforcement task forces, Project Emptor in British Columbia and the Strategic Partnership in Ontario. Since December 2001, through these alliances, the FTC and its Canadian partners have obtained nine orders against seventy-seven defendants. We already have awarded almost \$800,000 in consumer redress, and we have obtained default judgments totaling almost \$19 million. Over \$6 million in assets and funds remain frozen or encumbered in Canada, the U.S., and elsewhere, and will be available for redress to consumers if FTC and Canadian partners

⁹² The IMSN recently announced one such law enforcement sweep in the area of health fraud. Consumer Protection Agencies Combat Cross-Border Fraud, FTC Press Release (Sept. 24, 2002), *available at* <http://www.ftc.gov/opa/2002/09/imsnsydney.htm>.

prevail.⁹³ We will continue to bring cases through these task forces and will develop new task forces to bring cross-border cases.

5. Technical Assistance

No country should become a haven for fraud. To prevent this, we will help countries to develop tools to protect their consumers from fraud through targeted technical assistance. This project will complement our work in competition through which we have promoted market-oriented competition policies in developing countries. Through our technical assistance program, we will promote market-oriented policies to advance consumer protection as well, with particular focus on the need for strong fraud laws and enforcement of such laws. We will note that competition policies will fail if fraud in the marketplace dilutes consumer confidence. The assistance also will enable us to make contacts in developing countries, so that we can ultimately enlist new partners in our international fight against fraud.

This assistance will be accomplished through missions funded by the United States Agency for International Development, FTC staff comments on consumer protection legislation in developing countries, and FTC staff participation in multilateral meetings of developing countries. With our assistance, these developing countries can become partners in fighting cross-border fraud. Even before they are ready to join in more formal cooperation activities, we will identify contact points in as many countries as possible.

IV. Conclusion

As my colleague John Vickers, the head of Britain's Office of Fair Trading, succinctly put it recently, competition and fairness are natural allies.⁹⁴ We need to work together to make sure that these natural allies are complementing, not undercutting, each other. Because borders no longer constrain marketing any more than they constrain traditional subjects of antitrust enforcement, we should seek convergence in consumer protection policy just as we have done in antitrust policy. It will be a difficult task, but it will be easier to begin with the areas on which we agree. Fraud is a good place to start, and I invite you to join with us in this effort.

⁹³ See U.S.-Canadian Law Enforcers Target Cross-Border Telemarketing Fraud, FTC Press Release (June 10, 2002), available at <<http://www.ftc.gov/opa/2002/06/crossborder.htm>>.

⁹⁴ John Vickers, *supra* note 20, at 2-3.