



focused on more familiar antitrust theories.<sup>4</sup> Even as we push forward with innovative theories, we still bring bread and butter cases to stop significant competitors in an industry from merging.

I can't remember a time when the Bureau has been so active on so many fronts. I want to take this opportunity to thank the staff who work tirelessly on behalf of all consumers to get to the right resolution. I also want to do something we don't always do, and thank those who work on the cases that we end up closing. It's in the nature of our work that most attention is paid to the cases where we take public action, but a tremendous amount of staff time and expertise is invested in cases where the right thing to do turns out, after a careful investigation, to be not taking action.<sup>5</sup> I want to recognize that crucial work as well.

Turning now to the FTC's remedy toolkit. While finding and stopping anticompetitive conduct and mergers is the primary goal of the Commission's antitrust enforcement actions, just as important is how we fix those antitrust violations. Remedies are crucial because they are where the abstract theoretical and analytical work of antitrust meets the real world. There is a current perception in some corners that antitrust is, or should become, all or nothing. At the same time, others argue that antitrust is moribund and should be overhauled. I think the truth is that antitrust law is neither a blunt instrument nor a relic from a bygone era: rather it is far more like a chisel, useful to target a specific set of illegal conduct that distorts the competitive marketplace. And, just as important, is the remedial effort, seeking to restore the competitive dynamics – the vigor, the innovation, and the market opportunity that the anticompetitive conduct stifled. Antitrust is a great set of tools for solving real competitive problems that harm real consumers in real markets. When antitrust succeeds in making the world a more competitive and innovative place, it does so with remedies.

Today I want to address some misperceptions about the Commission's remedial powers in competition cases. My main message is that the Commission relies on a variety of different tools to design a remedy that fixes the competitive problems in each case. The Commission has honed these tools over 100 years of practice, and we use them every day as part of our enforcement work. In fact, our expertise in constructing customized remedies for complex cases is one of the Commission's flagship advantages as an antitrust enforcer. And we are not deterred by the potential difficulty in crafting a remedy; and we will bring a case when it's the right thing to do even though restoring competition may be difficult. This is true for both conduct matters and for acquisitions, whether they affect segments of the economy or significant industries. Our two guiding principles in enforcement are stop the conduct and restore competition. Sometimes we cannot fully ring the bell, but we will do our best.

I know we have limited time so there are a couple of things I'm not going to talk about: the ongoing litigation surrounding the FTC's Section 13(b) authority; remedies for order violations; and the relative virtues of structural versus behavioral remedies. All are important

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<sup>4</sup> In re Post Holdings, Inc, Dkt. 9388 (complaint Dec. 2019; dismissed Jan. 16, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/190128/postholdingsinc-matter>; In re Axon Enterprise, Inc, Dkt. 9389 (complaint Jan. 3, 2020), <https://www.ftc.gov/enforcement/cases-proceedings/1810162/axonenterprise-matter>

<sup>5</sup> FTC Press Release, Federal Trade Commission Closes Investigation of Roche Holding AG's Proposed Acquisition of Spark Therapeutics, Inc. (Dec. 16, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/federal-trade-commission-closes-investigation-roche-holding-ag>

topics, but they are not the focus of today's discussion. Today's discussion is focused on remedies crafted by the Commission in a voluntary consent or following administrative litigation pursuant to Part 3 of our Rules of Practice

Let's start with a couple of fundamentals. The Commission's authority to write its own orders derives from Section 5(b) of the FTC Act, which gives the Commission a pretty expansive remedial toolbox. Section 5(b) talks on its face about orders to "cease and desist" from unlawful practices, but our remedies frequently do more than simply bring specific ongoing conduct to an end (or command that past conduct not be repeated). Commission orders are not limited to simply stopping past violations. In the words of the Supreme Court, "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its orders to the



Parties can mitigate t



employees) in order to facilitate switching to competitors and entrants.<sup>24</sup>

Software Corporation

IP rights may be central in cases dealing with nascent or potential competition. As

in a monopolization case (such as *McWane*<sup>83</sup>) will contain different prohibitions than an order that addresses an illegal agreement among competitors, like the one the Commission recently issued in the *Benco* case.<sup>34</sup>

Sometimes fencing relief takes the form of or is supplemented by notice or reporting obligation. This is a requirement to make the Commission aware of future potentially problematic actions. Prior notice provisions may, for example, impose a company-specific merger notification system where there is reason to think that a company may harm competition through transactions that would not meet HSR reporting thresholds.<sup>39</sup> Imposing a reporting obligation in a remedial order may be an efficient way to ensure that further acquisitions will not escape the attention of the Commission.

Other provisions in an order may require the respondent to mitigate the impact of its previous unlawful conduct in some way. For instance, the Commission may require respondents to notify customers who might have been affected by the illegal conduct, for example by giving them the option to terminate an existing contract without facing an action for breach by the respondent. In the *Victrex* order, for example, the Commission required respondents to notify all customers with existing contracts that required exclusivity and give them the opportunity to change the terms of their contracts.<sup>40</sup> The Commission may also require notice to individuals who need to know that the Respondent's conduct will or may change in the future because of the order.<sup>41</sup> The Commission can also prohibit the inclusion of certain similar terms in future agreements.<sup>42</sup>

The Commission will also seek in appropriate cases to obtain equitable monetary relief and compensate those harmed due to a party's anticompetitive conduct. The *Macoswell* example of such a remedy is the *Cephalon* matter.<sup>43</sup>

Last but not least is a set of what you might think of as compliance obligations. Many competition conduct orders require the respondent to implement an antitrust compliance program to reduce the chance that the same (similar) illegal behavior will occur in the future. These programs, which are commonplace at many larger companies, are intended to help create a culture of competition and help employees throughout the firm understand the types of conduct that may violate the Commission's order or otherwise attract antitrust scrutiny. These programs can be comprehensive: for one trade association that ejected members who violated non-solicitation rules, the Commission required the association to designate an antitrust compliance monitor, mandated in-person training for the association's board and employees for five years,

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<sup>39</sup> See, e.g., *In re Charlotte Pipe and Foundry*, supra, n. 24; *In re Graco, Inc.*, supra, n. 26.

<sup>40</sup> *In re Victrex, D&O*, Paragraph III G, <https://www.ftc.gov/system/files/documents/cases/160714victrexdo.pdf>

<sup>41</sup> *In re Professional Skaters Association, Inc.* 4509 (Dec. 23, 2014), [https://www.ftc.gov/enforcement/cases-proceedings/133d-\(\)Tj-ET-CS1-cs-0-0-1-scn-231.6-i17-\(nc\)Tc-.169-e/p4-\(-\)-2310-0-9.96-\(m\)5.9-\(1-\(\),1-\(1-\(\),1-\(1-\(\),1-\(1-f](https://www.ftc.gov/enforcement/cases-proceedings/133d-()Tj-ET-CS1-cs-0-0-1-scn-231.6-i17-(nc)Tc-.169-e/p4-(-)-2310-0-9.96-(m)5.9-(1-(),1-(1-(),1-(1-(),1-(1-f)

