

Interview with Joseph Simons, Director, FTC Bureau of Competition

Editor's Note: As many observers have noted, the Federal Trade Commission and its Bureau of Competition have been exceptionally active over the last two years, in spite of the change in administrations and a declining number of reportable mergers. In this interview, the Director of the Bureau of Competition, Joseph J. Simons, discusses a broad range of issues, including the effort to reinvigorate the FTC's administrative litigation process; the reasons behind the FTC's recent focus on abuse of the Noerr-Pennington and State Action doctrines; and the possibility that the FTC will advocate a less stringent standard than that established by the Supreme Court in *Professional Real Estate Investors*. He also asserts that the FTC's competition philosophy is not at odds with the philosophies of either the Department of Justice or the European Commission, and reveals how the FTC's new statement on negotiating merger remedies can be of most utility to parties.



Joseph J. Simons

Simons has served as Director of the Bureau of Competition since 2001. No stranger to the FTC, he previously served as the Bureau of Competition's Associate Director for Mergers in 1989 and also oversaw analysis of the Bureau's non-merger matters in his position as Assistant Director of Evaluation. Immediately prior to serving as Director of the Bureau of Competition, Simons was a partner at Clifford Chance Rogers & Wells LLP. Along with Barry Harris, a former DOJ chief economist, Simons is responsible for the development of "critical loss analysis," a technique for applying the market definition test of the DOJ/FTC Horizontal Merger Guidelines, which is used widely by both the DOJ Antitrust Division and the FTC. (See Paper Trail, this issue.)

The Antitrust Source conducted this interview on May 2, 2003.

ANTITRUST SOURCE: Let's start off with some policy questions. Specifically, let me ask you about the FTC's use of administrative litigation, which seems to have increased recently. Is that true, and if so, why has it happened?

JOSEPH SIMONS: You are right about the increased use of Part 3, and in my mind it is certainly assuming much greater importance. Today we have five antitrust cases in Part 3. [*Polygram Holding, Inc.*, Docket No. 9298 (June 28, 2002) (Initial Decision); *Schering Plough Corp.*, Docket No. 9297 (July 2, 2002) (Initial Decision), *Chicago Bridge & Iron Co.*, Docket No. 9300 (October 25, 2001) (complaint), *Rambus Inc.*, Docket No. 9302 (June 18, 2002) (complaint), *Union Oil Co. of California*, Docket No. 9305 (Mar. 4, 2003) (complaint).]

The increase is partly intentional and partly due to external factors. One external factor is the change in the HSR thresholds. Although the change has reduced the number of filings for us to review, we're still looking at the smaller mergers—just not in the HSR context. We don't find a need to challenge many of these smaller transactions, but when we do, the big difference is that we typically can't prevent the transaction from taking place. So instead of going to federal court for an injunction, our only realistic option is to go the administrative route. After many years of no

Part 3 merger cases, the Commission issued two Part 3 merger complaints last year. One, *MSC Software*, settled [*MSC Software Corp.*, Docket No. 9299 (Oct. 29, 2002) (consent order)] and the other, *Chicago Bridge*, is still in litigation.

The other external factor is the decline in merger activity in the current economy. The resulting easing of our merger workload has allowed the Agency to spend more of its resources on non-merger cases. In addition to these considerations, we are emphasizing Part 3 for several policy reasons.

First, we have a fairly extensive positive agenda involving non-merger enforcement. The agency is now able to commit more of its resources to this agenda, given the decline in M&A. Another reason that we are very enthusiastic about administrative litigation is the improvements that have occurred over the last several years in that process. If you go back to the mid-1980s, there was a case in the federal district court here in Washington involving Occidental Petroleum where the federal district court judge referred to the glacial pace of the FTC's administrative proceedings as one reason for denying a preliminary injunction motion by the Commission.¹ The judge cited the average time from issuance of the complaint to the administrative law judge's initial decision as 35 months. Today, with reforms that were introduced in the 1990s,² that time is cut by about a third. The Commission's rules now generally provide that an ALJ's decision should come within a year of the issuance of the complaint.³ That's a lot faster than you would expect to see in the overwhelming majority of federal district courts.

Another reason why we are so interested in Part 3 cases is the substantial public policy benefit that results when the Commission itself gets to write an opinion. The carefully-written opinions that accompany final litigated orders increase the transparency of the Commission's decision-making process and can provide considerable guidance to the Bar and the business community.

And finally, and perhaps most important, we view administrative litigation as a means to create sound antitrust jurisprudence. For example, the *AMA* case [*American Medical Association*, 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982);] helped open up the door for alternative forms of health care delivery, and *Indiana Federation of Dentists* [*Indiana Fed'n of Dentists v. FTC*, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986)] established the principle that direct evidence of anticompetitive effects minimizes the need for a rigid showing of market definition and market power. So we think there are lots of good reasons to reinvigorate the administrative litigation process of the Commission.

ANTITRUST SOURCE: Do you think that the outcomes of administrative litigation are given as much deference as the outcomes of proceedings in federal district courts?

SIMONS: I think that the outcomes in the FTC administrative cases probably receive more deference than those of a federal district court because federal district court judges typically are generalists and ordinarily have not had an opportunity to develop an expertise in antitrust law. By and large,

¹ *FTC v. Occidental Petroleum Corp.*, 1986 U.S. Dist. LEXIS 26138; 1986-1 Trade Cas. (CCH) ¶ 67,071 (1986).

² See 61 Fed. Reg. 50,639 (Sept. 26, 1996) and 63 Fed. Reg. 7525 (Feb. 13, 1998).

³ *Id.*, 16 C.F.R. § 3.51(a) (2003).

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when you look at the Commission's opinions, you will find that they generally are much better reasoned than an opinion that a typical federal district court judge would likely issue in an antitrust case.

ANTITRUST SOURCE: You don't think that the "home court advantage" enjoyed by the Commission in administrative proceedings might lead people to give less weight to the results in terms of precedential value?

SIMONS: I guess the question you're asking revolves around findings of fact in a particular case. Someone might wonder if the Commission would be inclined to find facts sufficient to support a violation under the applicable legal standard. I don't think so, but in any case, the so-called "home court advantage" wouldn't be an issue in terms of development of the law. That's where we see the most benefit—not so much on the fact finding as in the development of the law. The Commission can articulate or refine a legal standard just as easily in an opinion supporting a dismissal of a complaint as it can in an opinion supporting a remedial order, so I don't see the "home court" as meaningful in terms of the weight given Commission decisions.

ANTITRUST SOURCE: Can you describe what the Bureau of Competition's current non-merger enforcement priorities are and explain the reasons for them?

SIMONS: The first thing that we try to do is focus on the sectors in the economy that have the biggest impact on consumers. These would include health care and oil and gas, in particular, in terms of what we deal with here.

Health care is tremendously important to the economy, both locally and nationally. Health care products and services account for about 15 percent of the gross domestic product, and that's up fairly sharply in the last ten years. In the past year we've settled a bunch of cases with physicians' groups that were engaged in price-fixing activities. Some of these groups were quite large and so our cases had a very substantial impact. We have quite a few more cases of this type in the pipeline. Prescription drugs are very costly for consumers, government, employers, and others. We've been very active here. We're bringing three types of cases. One type involves agreements between branded manufacturers and generics to keep the generics out of markets that otherwise would open up after a patent expires. The second category involves unilateral conduct by branded drug manufacturers to delay generic entry, either by improperly listing patents in the FDA's "Orange Book"⁴ or by, in one case, an illegal patent acquisition. The third area involves agreements among generic manufacturers to divide markets.

In the area of oil and gas, anyone who reads the newspapers or listens to the radio knows about the significant public concern about prices in that sector. Most of the Commission's previous energy-related activities have focused on mergers, but the Commission recently issued a very important complaint charging that Unocal defrauded the California Air Resources Board in the context of a standard setting rulemaking. Unocal's action could subject California consumers to an additional five cents a gallon in the price of gasoline, according to the complaint.

⁴ When a drug manufacturer submits a New Drug Application to the FDA, the holder of a patent may list its patent in the FDA's "Orange Book" if the patent may claim the drug product described in the application. The FDA does not assess the validity of these listings. Under current law, an Orange Book listing triggers an automatic 30-month stay of FDA approval of any generic competitor to the branded product.

In addition to focusing on these key sectors of the economy, we are looking at two other really important areas in our non-merger agenda: the *Noerr-Pennington* and State Action doctrines. We've seen an enormous proliferation of regulatory and licensing activity at every level of government over the past decade or two. This increase in the role of government provides very large opportunities for abuse and potentially subjects consumers to great harm. So, we're focusing on cases and initiatives that would circumscribe the application of *Noerr-Pennington* and the State Action Doctrines.

ANTITRUST SOURCE: Any thought being given to making Section 2-type cases a priority?

SIMONS: I would say actually that Section 2-type cases are already a priority. We've brought quite a few of them. For example, we've had a very significant consent order in Bristol-Myers-Squibb. That case involves various means of monopolization, one being a reverse payment in the context of a patent settlement to keep the generic out, and also repeatedly using improper Orange Book listings to delay generic entry. Two of our cases in administrative litigation, *Rambus* and *Unocal*, involve monopolization involving standard-setting activities. We also had a case [*Biovail Corp.*, Docket No. C-4060 (Oct. 2, 2002) (consent order)] involving Biovail's acquisition of a patent that it then used to keep a generic out of the market by listing the patent in the Orange Book and then suing for patent infringement. That case included both Section 7 and monopoly maintenance claims.

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ANTITRUST SOURCE: Are there differences in philosophy between the Antitrust Division and the FTC, in your opinion? And do you think it serves the interests of justice to have a dual federal antitrust enforcement system?

SIMONS: As a general matter, no, I don't think there's any difference in antitrust enforcement philosophy between the Antitrust Division and the Federal Trade Commission. I do think it's a pretty good idea to have the dual enforcement system. Each agency has its own special powers, such as the DOJ's jurisdiction over criminal matters, and areas of expertise. As an example of the latter, the Commission has particular expertise in retail-related matters and that's to some degree related to the fact that we also do consumer protection here. I think any time you do have dual enforcement, obviously there are potential pitfalls, but I think we've largely dealt with those. As I said, I think we do have doctrinal coherence. I think that is secured by our working closely with the folks at the Department of Justice, and examples of that include the fact that any guidelines we develop we generally issue jointly. Administratively, we have a clearance process which works well and prevents duplication of efforts on particular cases.

ANTITRUST SOURCE: One area that has been very active in both the FTC and the DOJ is the relationship between intellectual property and antitrust as it relates to unilateral refusals to license intellectual property. The DOJ has specifically supported the Federal Circuit opinion in the *CSU v. Xerox* case, in spite of the fact that there has been criticism of that opinion by some in the antitrust community; for example, from former FTC Chairman Pitofsky. What is the FTC's view on an IP holder's ability to refuse to license intellectual property, and does the FTC agree with or disagree with the *CSU v. Xerox* case?

SIMONS: As a general proposition, the intellectual property laws are not different from real property laws in terms of how antitrust applies. The antitrust laws do not impose a general unilateral duty

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to deal on owners of real property, even for monopolists. Only in those cases where the refusal to deal can be characterized as exclusionary behavior to maintain a monopoly have the courts imposed a duty to deal. Patent holders likewise enjoy protection from a general duty to deal, even when they have a monopoly. But they are still subject to the antitrust laws if the refusal constitutes exclusionary behavior to obtain or to maintain a monopoly in violation of Section 2 of the Sherman Act. In other words, the nature of the property, whether real or intellectual, makes no difference. The *CSU* brief basically says that exemptions from the antitrust laws are disfavored and that a holding exempting refusals to license patents from the antitrust laws would be inappropriate. The brief adds, however, that the Federal Circuit's *CSU* decision need not be read as adopting such a holding. I myself don't think *CSU* purports to state a blanket antitrust immunity under all circumstances for patentees who refuse to license.

ANTITRUST SOURCE: Would you characterize yours and the DOJ's positions on this case to be the same?

SIMONS: I think I would.

ANTITRUST SOURCE: Do you think that antitrust law ought to encourage subjective inquiry into the intellectual property holder's motivations in refusing to deal?

SIMONS: I think that subjective intent is relevant to the extent it illuminates the assessment of the conduct. Knowing the exact intent underlying some conduct informs the inquiry because the person who was actually involved is in the best situation to determine what objectively was going on. Now, having said that, you don't want to just take loaded words or statements relating to a desire to crush a competitor as having much meaning. What I'm talking about is something that's more specific than a broad generalization about a desire to dominate or crush a competitor.

ANTITRUST SOURCE: In your view, should liability ever turn on the subjective intent of the holder of the intellectual property right?

SIMONS: Yes, at least sometimes. I'll give you an example. In cases involving the listing of a patent in the Orange Book, I think we would take the position that the party's good faith, reasonable belief—both subjectively and objectively—that the law required the listing should preclude liability. On the other hand, if the party didn't ever bother to find out whether a filing was appropriate or not, and made it really clear that it didn't care, we would have serious concerns. I'd take the position that the listing could violate Section 2, providing all the other requirements of Section 2 were met.

ANTITRUST SOURCE: You mentioned earlier that one of the enforcement priorities of the Bureau of Competition was the area in which federal regulations or government processes were abused. Can you explain why it is that this has become such a focus for the FTC and the Bureau?

SIMONS: One of the things I'm fond of saying is that, in terms of our enforcement agenda under Chairman Muris, the past is prologue. The kinds of cases brought when Tim was the Bureau Director in the 1980s foreshadow what we are doing today. So if you went back and looked at the cases from that period, you would see that abuse of government process was a very high priority. It remains a priority today, for reasons that are quite well established. Predatory conduct

can often be very expensive to implement. It often requires the alleged predator to experience very high costs. For example, predatory pricing, which involves taking a loss on every sale, is rarely a viable strategy. In contrast, monopolization that uses abuse of governmental processes can be extremely cost-effective. An extreme version of that is the situation involving improper Orange Book listings. It costs almost nothing to list a patent in the Orange Book, and then within forty-five days after that, to file a lawsuit, the effect of which, under FDA law and procedures, is an automatic delay in the FDA's grant of regulatory authority to the generic drug-maker. So that strategy is very cheap to implement, and the effects are very strong—the generic is lawfully prohibited from selling a product without FDA approval. So when you have a situation where the cost of anticompetitive conduct is very low, and the impact of that conduct on consumers is very high, then it is definitely going to be a priority for us.

ANTITRUST SOURCE: In your view, are courts too willing to apply *Noerr-Pennington* immunity?

SIMONS: Let me say it this way. There is concern here that at least some courts have found *Noerr-Pennington* immunity in instances in which it's inappropriate. So one of the reasons that we created a *Noerr-Pennington* task force is to try to identify cases and enforcement actions that will develop the law and limit the overly broad application of *Noerr*.

ANTITRUST SOURCE: What is the task force doing specifically to accomplish that goal?

SIMONS: It is engaged in a study and will be producing a report shortly, and the Bureau has had the benefit of that research.

ANTITRUST SOURCE: One of the recent speeches given by Chairman Muris lists several issues in this area that merit special attention, citing immunized petitioning and private settlements, such as the *Bristol-Myers* case, the *Walker Process* doctrine, and independent misrepresentation, such as in the *Unocal* case. Are there any other initiatives or types of cases the Bureau expects to bring as a result of the work of the *Noerr* Task Force?

SIMONS: Pattern cases are an example, where we would argue that the requirements of *PREI* [*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49 (1993)] would not apply and that the requirements would be less stringent. By pattern case, I mean a pattern of anticompetitive behavior. An example of that would be the conduct laid out in the complaint against *Bristol-Myers*.

ANTITRUST SOURCE: Are you saying that if there were a pattern of ill-founded litigation, the case wouldn't have to meet the Supreme Court's standard in *Professional Real Estate Investors*?

SIMONS: Correct. So, in other words, even if the conduct was not objectively baseless, if the alleged predator was filing lawsuits or taking other actions without regard to the merits, then that conduct could be sufficient to void *Noerr* protection, even if any one of the lawsuits, standing alone, would not.

ANTITRUST SOURCE: Should the qualification for being part of a pattern mean that the actor had nefarious intent?

SIMONS: Well, nefarious intent in the sense that the party didn't care whether the claims were meritorious or not.

ANTITRUST SOURCE: Is nefarious intent necessary but not sufficient? Or is it sufficient?

SIMONS: Well, it would be sufficient to avoid *Noerr*, but the elements of Section 2 would have to be met as well.

ANTITRUST SOURCE: Let's talk about mergers, specifically the new statement of the Federal Trade Commission's Bureau of Competition on negotiating merger remedies. What do you think the most immediate effects of that will be, and what do you think its long-term impact is going to be?

SIMONS: The point of that statement was just to set out in one place what the Bureau does in negotiating and evaluating remedies. It's really another example of our efforts relating to transparency.

The remedy negotiation is often a critical, sometimes the most critical, part of getting a transaction through the Commission.

One of the specific benefits that we hope to achieve from issuing the statement them is to give parties a better idea of what the Bureau and the Commission are looking for in discussing remedies, and to point out that parties actually can exercise a huge amount of control over the process and that they should take advantage of it. The remedy negotiation is often a critical, sometimes the most critical, part of getting a transaction through the Commission. So this process should be considered with great care by the parties as part of their overall strategy for completing a merger.

For example, for most transactions the parties have in their mind a time frame in which they want to complete the transaction. So it would help the parties substantially, I think, to develop an approach to potential consent negotiations in light of their overall timetable. A divestiture of an ongoing independent business can be negotiated very quickly and would not have to be done up front. So, if the business strategy of the companies (in particular, the acquirer) is consistent with that type of a potential remedy, they might embrace that approach as one that could dramatically shorten the process. If, on the other hand, that type of remedy would not fit the circumstances, then an alternative approach could involve an asset package that clearly would be very attractive to potential buyers and for which the agency would have a lot of confidence that the divestiture could be very successful. In circumstances like that, we probably wouldn't require an up-front buyer, either. An example of that was the divestiture of the Malibu brand in the *Seagrams-Diageo* [*Diageo PLC and Vivendi Universal S.A.*, Docket No. C-4032 (Feb. 4, 2002) (consent order)] transaction.

If, on the other hand, those circumstances aren't present and what the parties would seek to divest would be something that is much more limited, then they'd have to recognize that the Commission likely would require an up-front buyer and then they'd have to make a judgment about the negotiating strategy. Do they want to start with something that's very minimal, and inch by inch build it up to a point where the Commission would find it acceptable? Or do they want to propose something that is much more substantial at the outset? So, in this way, with these types of considerations, the parties really can exercise a lot of control over the timing of their transaction. One of the objectives of this statement was to clarify that.

ANTITRUST SOURCE: In a similar vein, the FTC's Statement Regarding Guidelines for Merger Investigations gave guidelines for electronic production, and some of the advice in it was contingent upon the FTC obtaining additional experience in electronic productions. What steps has the Bureau taken towards gaining that additional experience? And what direction do you see electronic production taking so that practitioners can take advantage of it?

SIMONS: We are doing extensive amounts of our own research in terms of the best way to do electronic productions, and we are talking extensively to IT specialists who have expertise in this area. We've had one very successful electronic production and one that was less successful, and we're trying to learn from those experiences. As we go forward, we are very committed to sharing what we've learned with the private bar and the business community. We are certainly prepared to do that in discussions with recipients of our second requests who have pending document productions. We hope to be able to talk about it on a broader basis as well in the near future. But, as much as we are interested in electronic production, it is still very new, so it will take some time before we can say exactly how we'd like to see it work.

ANTITRUST SOURCE: Is the goal of it to streamline and make more efficient the production and review process, or alternatively, to ensure that you get all of the responsive documents?

SIMONS: It's a little bit of both. We certainly want to minimize the burden on the parties and ourselves at the same time that we are getting all of the documents and information that we need to evaluate the transaction effectively. So it's really balancing both of those concerns.

ANTITRUST SOURCE: You alluded to the Commission's interest in the increasing transparency of its decision-making processes. A prominent example of that is the Cruise Line merger investigation in which the Commission issued a statement explaining its decision not to challenge. Do you anticipate more of the same kind of thing in the future?

SIMONS: Yes, I absolutely do. I don't expect the Commission to issue a statement every time it decides not to vote out enforcement action, but I do expect that the Commission will continue to issue statements to clarify its position in situations involving significant policy issues. For example, we recently looked at a grocery merger involving the same market (Las Vegas) involved in another grocery merger in 1999. The Commission obtained a consent agreement in the earlier case, but chose not to take enforcement action in the recent matter. Because of concern that the bar might wrongly infer a change in policy, the Commission wanted to make very clear the reasons for its decision. For this reason, the Commission issued a statement explaining that the prior order had been predicated on a belief that grocery entry was difficult in Las Vegas, but subsequently concluded otherwise.⁵ As the statement explained, during the intervening period, very significant entry had occurred in the market, disproving the assumption that entry was difficult. That's an example of the Commission wanting to make clear the basis for its decision to prevent the substantial ambiguity that otherwise likely would have resulted.

ANTITRUST SOURCE: What's the process that the Commission or the Bureau goes through in deciding whether or not to issue a statement explaining the reason for not pursuing an action? Is it a systematic process, or is it ad hoc?

SIMONS: Ultimately, the Commission makes that decision. I guess we think about it with respect to every action that we take. So in that sense, it's systematic. And it just depends. Routine decisions—

⁵ FTC Press Release, Investigation of Kroger/Raley's Supermarkets Transaction Closed (Nov. 13, 2002), available at <http://www.ftc.gov/opa/2002/11/krogerraley.htm>.

those that fit well within our public policy statements or an established pattern—are not likely to be misinterpreted, so they typically would not require a statement or explanation. But when we come across a situation that's new or somewhat different, then the Commission would consider whether a public statement would be beneficial.

ANTITRUST SOURCE: Earlier in this interview, you referred to the change in the HSR thresholds and the fact that that had freed up additional resources for non-merger enforcement activity. Overall, what do you think has been the result of the higher notification thresholds for both merger and non-merger cases?

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SIMONS: Well, obviously the immediate result is that there are fewer filings. And on average, of course, that's better because the overwhelming majority of filings are not problematic, and I understand that the Commission's experience was that the smallest transactions were even less likely to raise concerns. But the probability of antitrust concerns for the smaller transactions, however small, is still more than zero, so we have had to develop a process of monitoring those transactions that are no longer subject to the filing requirement. We have in fact found some transactions that did not involve a filing but nevertheless caused us concern. As a result, we are pursuing more merger cases involving consummated mergers. So, in sum, that's the primary impact of the higher filing thresholds. We have fewer filings, are doing a little more monitoring, and will have some cases involving consummated mergers that previously would most likely have been handled in a pre-merger context.

ANTITRUST SOURCE: Talking still about mergers, David Scheffman, the FTC's Chief Economist, has said that the usual economic presumption is that if a competitor is complaining about a merger, it's because it's going to be procompetitive. Does that presumption apply when the rival is also a customer of one or both of the merging parties?

SIMONS: With any complaint, whether the source is a competitor or a customer or a competitor/customer, we carefully evaluate the substance of the complaint and consider any potential biases that the complainant might have. You can have complaints from customers that really don't get much weight because they're not really complaining about an antitrust type of injury. Sometimes one participant in the marketplace will provide a service in a manner that the particular customer is especially attracted to. If that participant is being acquired, and the customer, for whatever reason, doesn't have a good relationship with the acquiring company, the customer may well complain, but the basis for the complaint may have no relation whatsoever to potential anticompetitive effects. So even for a customer complaint, we carefully evaluate the substance of it for any bias. The competitor complaints are, as Dave Scheffman said, perhaps more likely to be biased (and in particular, biased against a procompetitive merger) and so we always pay especially careful attention to potential bias on the part of any competitors.

ANTITRUST SOURCE: What kind of evidence must a company give in order for the Bureau to find a valid efficiency defense? And even if you can't specify the entities, have there been any mergers cleared that, but for the efficiencies, would have been blocked?

SIMONS: Efficiencies come into play in two ways. One is by providing a motivation for doing the transaction. So in looking at two transactions, one that has identifiable efficiencies associated with

it and one that does not, we would feel more comfortable in predicting an anticompetitive effect in the transaction lacking an apparent efficiency motivation. In other words, in a close case where there is limited evidence of a potential anticompetitive effect, evidence of substantial efficiencies would make us feel more comfortable with a decision not to challenge. That is because the transaction is likely motivated by something other than a desire for increased market power. Under these facts, there isn't what I would refer to as a technical efficiency defense, but evaluating the efficiencies would still be highly valuable to us.

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The second way that the efficiencies are relevant is what is commonly understood to be the efficiencies defense. This involves a showing that the merger will produce efficiencies that will prevent any anticompetitive effects, i.e., they will prevent a price increase or other loss of consumer welfare. I don't think the burden of proof here is particularly high, but the parties must be able to provide a credible, coherent explanation of anticipated efficiencies, and support that explanation with facts. The problem we often see is that companies have only a very vague idea about what efficiencies they expect to achieve from the merger and they haven't had an opportunity to do any kind of detailed studies. And so it becomes very difficult at that point to provide credible evidence to support an efficiency claim. The best evidence often comes from companies that have completed similar transactions in the past and are able to demonstrate actual efficiencies in similar circumstances. This sort of evidence is quite compelling, but obviously not everyone can provide it. We are certainly open to other types of support for an efficiency argument, but do not limit our consideration of efficiencies to those situations are limited to that type of circumstance by any means. In response to your question about whether efficiencies have been the deciding factor in any merger investigations, I don't believe there has been such a case during my tenure as Bureau Director, but we certainly have looked very closely at efficiencies in a number of investigations.

ANTITRUST SOURCE: Let's talk about health care. What have been the major accomplishments of the hospital merger enforcement program under the new merger litigation task force?

SIMONS: Let's go back a few years. It is no secret that the government has gone zero for its last seven attempts to block a hospital merger. Assuming that record resulted from something other than coincidence, blithely continuing along the same path made no sense. That left us with two choices: either give up and abandon hospital merger enforcement completely, or try to figure out the source of the problem and develop a different approach. We choose the latter, deciding to go back and evaluate the outcomes of a number of hospital merger cases. We created the merger task force at least in part to carry out this work. The task force has been very busy for nearly a year now, looking at consummated hospital mergers, evaluating whether there have been anticompetitive effects or efficiencies, whether we could successfully bring a Section 7 case against an anticompetitive hospital merger, and, if we succeeded, whether we could craft an effective remedy to restore competition. I expect that the fruits of all these efforts will begin to emerge within the next few months. So, let me just stop there.

ANTITRUST SOURCE: In the United States' work with the International Competition Network, what in your view is the more important goal, substantive analytical convergence or procedural convergence?

SIMONS: Both are very important and they go hand in hand. Perhaps the most important way in which we are working toward substantive convergence is from the bottom up. What I am referring

to is the day-to-day interaction and work on cases jointly between, for example, our staff and the staff of the European Commission or any of its member states. That's how we can make real progress toward substantive convergence—people working through real problems in detail and talking extensively with each other and getting an understanding for how each other thinks about specific, concrete problems. And in order to have that kind of cooperation, procedural convergence is important, because that type of close interaction and cooperation is more likely and works better when both agencies are working on the same problems at the same time with the same information.

I think the biggest

challenge going

forward for us has to

do with the expanding

Part 3 administrative

litigation and the need

to develop a stronger

litigation capability in

the Bureau. I think

that's going to be a

real key to our success

in the future.

ANTITRUST SOURCE: How well do you think that process is working?

SIMONS: I think it's working extremely well. Folks point to *GE/Honeywell* and conclude that the U.S. and the European Commission are badly split because there seemed to be a big blow-up and a big division between us and the Europeans on that transaction. But if you look back, particularly at the eighteen months since Chairman Muris arrived, you'll find virtually no disagreement on the handling of similar cases. And, the disagreements that have occurred are not dissimilar to the sorts of disagreements we have among ourselves. Although the Commission in the last eighteen months or so has been virtually unanimous on competition enforcement matters, it hasn't always been that way. The Commission has often been split in its votes in the past. So if the members of the FTC don't always agree, it shouldn't be a big surprise when the European Commission or some of the member states might view a transaction somewhat differently compared to the U.S.

ANTITRUST SOURCE: During your two years as the head of the Bureau of Competition, what would you cite as the Bureau's biggest accomplishments and what, in your opinion, are the biggest challenges you face in the years ahead?

SIMONS: I think the biggest accomplishment is that we are making excellent progress in fulfilling the Chairman's positive agenda, which he laid out right at the outset of his term. It is a very ambitious program and it requires us to be extremely active and efficient. And I think we are fulfilling those requirements. If you look at the enforcement statistics and the number of investigations that we have initiated, the record so far is one of which we are justifiably quite proud. And we are not done yet, by any means. The pipeline has been quite full, and more and more of what we have been working on will be emerging in the next few months. I think the biggest challenge going forward for us has to do with the expanding Part 3 administrative litigation and the need to develop a stronger litigation capability in the Bureau. I think that's going to be a real key to our success in the future. ●