Remarks by Tom Rosch at Trieste Global Forum 2013

I started out by thanking Sylviane, Sebastien, and the moderator for including us and by declaring that I spoke only for myself.

I then summarized the principal arguments that had been made against FTC enforcement in high-tech industries.

The first was that market definition was too hard because the markets were generally multi-sided (in that they included both consumers and others, generally advertisers). I acknowledged that under US antitrust law, the Commission always had to define a market, but that the market could sometimes be defined by where there were competitive effects. I also noted that multi-sided markets were not new--they included many markets with which the Commission was familiar, including markets involving newspapers, television, and radio.

The second complaint was that the transactions/practices in high tech cases were too dynamic--the markets changed too much and too often. I acknowledged that the DOJ's Microsoft case served as a cautionary tale for the FTC. But I observed that Google's Double Click and Ad Mob cases showed the Commission could change "on the fly" and the Intel decree showed the Commission could settle a case quickly even when a Commissioner wanted to litigate it (as I had wanted to do so.).

The third complaint was that the FTC couldn't challenge conduct by firms that only have incipient market power --firms that are on the cusp of having market power, but have no monopoly power because the market hadn't yet tipped, which was true of most firms in high-tech industries--because the case law prevents a challenge. I reminded the audience that the Sherman antitrust law prevents both an "attempt" to monopolize as well as "monopolization, unlike Section 102 of Competition Law in the EU which simply prohibits conduct by "dominant" firms so that "dominance" must be shown before an investigation could be launched.

Fourth, I said the Commission was sometimes criticized for challenging inventors in a secondary market like "trolls". I acknowledged that the Commission needed to be wary about challenging inventions (as we were reminded by Justice Scalia in the Trinko case. But I suggested there was no need for such a concern in cases involving "work arounds" because rules restricting "work arounds" could not apply to rules challenging practices that might impede inventions, by definition.

Finally, I observed that the fundamental question in this area was whether rules requiring innovators to compete at all were sound or whether it was best for innovation to lock all scientists working on a project in the same room and encourage them to conspire. I said that Schumpeter and Arrow had debated this basic question ad nauseum and I had nothing to add to their remarks.