



Nurturing Competition Regimes: Evaluation and Evolution

II.

United States beginning to take on once-feared monopolies controlling the nation's oil, rail, and machinery industries.⁶

Although this enforcement helped the country break loose from the grip of some trusts and set the precedent for firm government intervention where necessary, some scholars recognized that the Sherman Act, as it was then understood, was in some respects too blunt an instrument to handle the more nuanced problems that can affect competition and could not offer meaningful guidance on less clear cut violations, particularly for smaller companies. It left those smaller businesses wondering whether or not their conduct was lawful and if they would be sued by the government. The pendulum of enforcement had swung too far the other way without offering the predictability, transparency, and fairness that are among the key aims of good government.

George Rublee, at the time a prominent lawyer

expertise in the legal and economic issues necessary for competition enforcement.⁹ He was unhappy when the President, instead of filling the Commission with lawyers, economists, or academics, chose businessmen with no antitrust experience for the majority of the Commission, mainly for political reasons.¹⁰ In addition to this lack of expertise at the top, the agency had relatively few personnel, a limited sense of its mission, and barely any understanding of the nature of its relationship with the Department of Justice, the agency with which it shared competition jurisdiction, which led to interagency disputes.¹¹ Mr. Rublee also claimed that the Chairman of the FTC had incorrectly handled the agency's first request for appropriations from Congress. As a result, the FTC had so little money that it could not buy furniture or other basic supplies.¹²

The agency also had a very different, some would say casual, perspective on how to enforce the antitrust laws as compared to today. It frequently offered businesses informal advice about whether their conduct would be legal, considered a recommendation to Congress to allow price fixing in the coal industry, and even went so far as to advise trade associations on ways to reduce "overly aggressive forms of competition."¹³ Mr. Rublee was disappointed about those early years and later noted, "The truth is that the Commission has not yet made a record to justify its existence and to fulfill the expectations of those who hoped it might become an agency of great benefit to the public."¹⁴

So, you can see that in the United States, both the Sherman Act and the FTC Act did not meet with great success in their first years. Perhaps in part because we were operating in

⁹ *Id.*

¹⁰ *Id.* at 110.

¹¹ William E. Kovacic and Marc Winerman, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 *Antitrust L.J.* 1, 145-147 (2010).

¹² Kolasky, *supra* note 7, at 107.

¹³ *Id.* at 110 (citation omitted).

¹⁴ *Id.* at 111 (citation omitted).

uncharted territory and were led more by an intuitive belief in fairness in the marketplace than by scientific evidence, we had difficulty in everything from defining the meaning of the law to structuring our agencies, and even the very nature of enforcement. But we persisted in our efforts and over the years developed a strong and viable competition regime that has served as a good model for other agencies around the world. I hope you would agree that the FTC has made significant strides in the nearly one hundred years since these early missteps. And no, those of you here from the private sector, you should not try coming down to my office and asking me to recommend price fixing legislation or for advice on how to reduce competition with your rivals.

My point in discussing this early history of American competition enforcement is to highlight that from what I can see, the Chinese competition authorities have skipped over many of the issues we had during the infancy of our competition regime. In just five years you are already engaging in sophisticated analysis and working hard to join the ranks of the more mature competition agencies of the world. I hope that in some small way our outreach has helped make your early days smoother than our own. Although there is certainly more to be done, I acknowledge and appreciate your efforts, as the diligent work of competition agencies often goes unrecognized or even misunderstood by others, including citizens and sometimes even officials elsewhere in the government. And, frankly, as with most government actions, the fact that many people do not notice our work is a sign that we are doing our jobs well.

b. Economic Benefits of a Successful Competition Regime

What many people outside our relatively small universe of antitrust practitioners often do not comprehend is that protecting and promoting competition is critical to the wealth and prosperity of a nation. As business scholar Michael Porter observed, “Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry. Rivalry at home is not only uniquely important to fostering innovation, but benefits the national

industry . . . In fact, creating a dominant domestic competitor rarely results in international competitive advantage. Firms that do not have to compete at home rarely succeed abroad.”¹⁵

National prosperity is clearly linked to healthy domestic competition.

Harm to competition can come in two forms – from the actions of private parties or from the government. Competition agencies must work hard to prevent both types of competitive harm. As my friend and former FTC Chairman

work, both in terms of people and money. And sometimes our efforts, like our pursuit of potentially unlawful pay-for-delay settlements in the pharmaceutical industry, can take many years to bear fruit. But this dedication to a competitive domestic economy has yielded many benefits over the last century. And I am sure that you will find the same to be true over at least the next 95 years here in China.

c. The Characteristics of a Successful Competition Regime

Competition agencies today should learn from our early years and aspire to certain goals to be effective in their mission. For me, the FTC's history teaches at least five such major goals.

First, competition-based factors must animate an agency's decisions. Political decisions that favor certain competitors, as some have claimed about President Roosevelt's enforcement actions, or that are about industrial policy, national security, employment, and other issues have no place in an antitrust agency. Those decisions, to the extent made at all, should fall to another part of government.

Second, unlike the informal advice from the former businessman in the early days of the FTC, an agency's decisions today should be based on the science of industrial organization economics and seek to promote consumer welfare. This at a minimum means policymakers and agency staff must be well trained in law and economics.

Third, with respect to merger review, the competition regime should follow commonly-accepted timing requirements, merger reporting thresholds, and other best practices in merger notification and review. This helps streamline government reviews around the world to handle more efficiently the ever-growing number of deals with global implications. Ideally, but not necessarily, these standards would follow norms like the Recommended Practices for Merger Notification and Review Procedures developed and adopted by International Competition

Network (ICN). This requires sufficient resources for the agency. However, as the FTC proved in its early days, furniture is optional.

Fourth, the agency must be transparent in its actions. It should be open with the public by releasing data about enforcement decisions, including notified, cleared, blocked, and conditionally-approved transactions. Again, an agency ideally would follow best practices like the ICN's Recommended Practices for Merger Analysis. In addition, agencies should be transparent with the parties appearing before them. This latter form of transparency can come in the form of statements and other broad articulations of agency policy as well as discussion with the parties about agency concerns and issues during the review process. These steps help in several ways, including to enhance agency credibility, increase predictability and fairness, create a roadmap to better self-regulation, and perhaps most importantly preserve rights of due process for parties. Publicly explaining agency decisions also encourages self-evaluation, improves understanding and implementation of decisions across agency ranks, and yields enhanced decision-making quality.

Fifth, and finally, a successful competition agency should engage with other agencies through international cooperation.¹⁸ Only in this way can we learn from each other's successes and mistakes and help improve agency enforcement efforts around the world.

III. The FTC's Continuing Efforts to Fulfill Its Mission

The FTC aspires to the predictability, transparency, and fairness that are the hallmarks of good government and the agency works hard to meet these guiding principles. We are an agency

¹⁸ This cooperation ideally follows certain guiding principles: (1) agency transparency and accountability, (2) mindfulness of other jurisdictions' interests, (3) broader and deeper engagement by agencies across jurisdictions, (4) dialogue on all aspects of international competition and enforcement, (5) respect for different legal, cultural, and political paradigms, (6) trust in different agencies' actions, and (7) greater convergence of competition regimes. Rachel Brandenberger, *International Cooperation: Taking a Broader View* at 9 (Dec. 6, 2012), available at www.justice.gov/atr/public/speeches/289760.pdf.

with over 1000 employees, including about 500 lawyers, 70 Ph.D. economists, and dozens of research analysts, accountants, and financial analysts. We pride ourselves on our independence and our bipartisan decision-making backed by the latest thinking and research on legal and economic matters. The agency also is committed to working with other agencies around the world on a bilateral basis and to participating in multilateral fora like the ICN, the Organisation for Economic Co-operation (OECD), and Asia-Pacific Economic Cooperation organization (APEC) to develop best practices and recommendations for the more than 125 antitrust and competition agencies around the world.

But even after 100 years, we continue to clarify our agency's mission and modify our practices to best ensure fair competition in American markets and protect consumers while not unduly burdening legitimate, procompetitive business activity. Among the more important ongoing discussions at the agency is our public deliberation about the scope of the agency's Section 5 authority. For those of you less familiar with the structure of US competition laws, Section 5 of the FTC Act allows the FTC to pursue and stop "unfair methods of competition." Historically, we have interpreted this to mean that we can at a minimum enforce the antitrust laws that the Department of Justice also enforces, including mainly the Sherman Act. One of the big questions that has troubled the FTC for the past 100 years is how far beyond the antitrust laws our Section 5 unfair methods of competition authority should go.

Over the years, many viewpoints have been offered, with some advocating for expansive use of Section 5 and others arguing that it should only cover Sherman Act antitrust violations. Based on my beliefs about what makes a successful competition agency and the principles of

good government including transparency, predictability, and fairness, I recently presented my views on the scope of Section 5.¹⁹

I believe that we should proceed under a philosophy of “regulatory humility,” by which I mean the agency should investigate certain conduct outside the antitrust laws with great caution and careful consideration. I offered for thought and discussion six factors that should guide the FTC whenever it would review conduct beyond the antitrust laws. These are as follows:

Factor 1: Substantial Harm to Competition

The FTC’s unfair methods of competition (UMC) authority should be used solely to address substantial harm to competition or the competitive process, and thus to consumers. We should refrain from attempting to use Section 5 for policing non-competition violations or achieving social goals.

Factor 2: Lack of Procompetitive Justification/Disproportionate Harm Test

To impose the least burden on society and avoid reducing businesses’ incentives to innovate, the FTC should challenge conduct as an unfair method of competition only where:

1. There is a lack of any procompetitive justification for the conduct; or
2. The conduct at issue results in harm to competition that is disproportionate to its benefits to consumers and to the economic benefits to the defendant, exclusive of the benefits that may accrue from reduced competition.

Factor 3: Minimizing Institutional Conflict

The FTC should minimize conflict with the Department of Justice and other agencies to reduce inconsistencies in enforcement standards for business.

Factor 4: Grounding UMC Enforcement in Robust Economic Evidence

¹⁹ Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n, Remarks at the U.S. Chamber of Commerce: Section 5: Principles of Navigation (July 25, 2013), available at <http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf>.

Any effort to expand Section 5 beyond the antitrust laws should rely on robust economic evidence that the challenged conduct is anticompetitive and reduces consumer welfare.

Factor 5: Use of Non-Enforcement Tools as Alternatives to UMC Enforcement

The FTC should consider addressing a competitive concern via its many non-enforcement tools, such as conducting research, issuing reports and studies, and engaging in competition advocacy.

Factor 6: Providing Clear Guidance on UMC

The FTC must provide clear guidance and seek to minimize the potential for uncertainty in the UMC area, giving businesses a reasonable ability to anticipate before the fact that their conduct may be unlawful under Section 5.

IV. Going forward – AML Goals to Celebrate in 2018

So, as you can clearly see, the job of improving and modernizing an antitrust agency is never done – even after one hundred years of experience. And while there is certainly more work ahead for you in China, I believe you have made impressive efforts in such a short time. In the spirit of friendliness, I hope that five years from now we will be here celebrating even more progress, such as in the following areas:

a. Non-Competition Factors. I hope that, just as we at the FTC have moved away from relying on non-competition factors, the Chinese competition authorities also will show consistent movement away from considering non-competition factors in their decisions. As I have said in the United States, I feel strongly that to promote predictability, fairness, and transparency, non-competition factors must fall outside the domain of a competition agency.

b. Transparency. I am also hopeful that in five years we will be able to celebrate the continuing efforts by the Chinese agencies to be transparent with the public and with parties appearing before them.

I have watched with great enthusiasm the disclosures that MOFCOM and Director-General Shang Ming made recently with respect to merger filings and reviews. I also appreciate that SAIC has just published a list of all twelve AML decisions thus far. I applaud these efforts at increased public transparency.

I continue to hear from some parties that they would like to be able to engage in more of a dialogue with your staff during merger and other investigations. We at the FTC find that these discussions with parties are very helpful to make our decisions more efficient and provide parties with more predictability in the outcomes. Although our decisions must remain completely independent and in the best interests of competition and consumers, we try not to surprise parties with our decisions when they are engaging us in good faith. This is why, for example, parties will often abandon mergers in the United States even before the FTC has made a final decision – because the parties know from their meetings with us that we will likely move to block their proposed merger and thus decide not to pursue it in litigation. This helps conserve our resources and it helps the parties avoid spending money and time unnecessarily.

c. International Engagement. As a fan of the work of the ICN, I would like to see the Chinese competition agencies become members and contribute their learning and understanding to the group in helping us shape best practices. I think many would like to see continued bilateral engagement with the Chinese agencies on reviews and other investigations. Even in situations where it seems that our agencies may diverge in their final decision or in their approach to remedies, working together is very helpful as it allows both sides to gain a better understanding of each other's markets and approaches to a particular issue. It permits us to move together to become better competition enforcers and protect the interests of consumers around our increasingly interconnected world.

Again, congratulations on your accomplishments and thank you for inviting me to address you upon the fifth anniversary of the AML.