Toward a Domestic Competition Network

I. Introduction

Modern discussions about pursuing convergence among dissimilar competition policy systems focus mainly on differences among national or multinational jurisdictions. Efforts to address the divergence across nations in antitrust procedures, substantive standards, and implementation capabilities typically assumes that individual jurisdictions have achieved harmony within their own borders. For example, when we speak of attaining convergence of competition policy between the United States and European Union (EU), we tend to overlook the question of whether each jurisdiction has developed internally consistent analytical principles and coherent mechanisms for making competition policy within its own borders.

In many countries, national competition agencies share power to enforce antitrust commands and shape competition policy with other government bodies and private actors.[1] In the United States, the degree of decentralization is extraordinary and unsurpassed. Authority to prosecute antitrust claims is vested in two federal antitrust agencies, the governments of the individual states, and private parties. For mergers in some industries, sectoral regulators such as the Federal Communications Commission and state public utility commissions also exercise power to perform competition policy reviews.

The decentralization of authority can generate the same tensions and divergent policy outcomes within any single jurisdiction that we observe internationally. The energy devoted to addressing cross-border phenomena tends to deflect attention away from consideration of the consequences of decentralized authority and institutional multiplicity within individual jurisdictions.

This paper makes the case for using convergence techniques from the international policy field to improve the development and implementation of U.S. competition policy. No jurisdiction has more to learn from competition policy experience with international multiplicity and the

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[1] The decentralization of authority in the United States is described in William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 St. John's L. Rev. 361, 375-83 (2000). The increasing role of private enforcement in other Argentina, Canada, the European Union, and the United Kingdom is examined in Symposium, *Private Enforcement of Competition Laws*, 31 Int'l Bus. Law. 149 (Aug. 2003).

[2] I am grateful to Michael Greve for focusing my attention on this feature of the modern competition policy environment.

[3] The origins of and rationale for the International Competition Network are reviewed in William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 ASIL Proc. 309 (2003).

[4] *See* William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 Chi.-Kent L. Rev. 265, 281-86 (discussing concept of "competition policy"); Timothy J. Muris, Chairman, Federal Trade Commission,

certain business practices, such as agreements among direct competitors to fix prices.[5] The United States decentralizes the decision to enforce antitrust rules to an unequaled degree.[6] By statute and judicial decision, a number of public institutions and private entities enjoy power to enforce antitrust commands governing such behavior as abuse of dominance, horizontal price fixing, mergers, and vertical contractual restraints.

Merger enforcement provides an example. In the typical merger case, several entities have power to challenge a transaction. Two federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), share authority to review mergers and establish policy guidelines. Since the late 1940s, the federal competition authorities have coordinated merger enforcement through a liaison arrangement that determines which agency will review a specific transaction.[7]

Since the mid-1980s, the state attorneys general have emerged as a second significant public institution for antitrust merger control. Acting under the federal antitrust laws or, in rare cases, under state antimerger laws, the states have conducted antitrust reviews of mergers and have sued to challenge a number of transactions. The states and the federal antitrust agencies have developed agreements that promote cooperation in reviewing transactions of common interest.

In addition to public enforcement, the U.S. competition policy system gives private entities the power to challenge antitrust violations, including anticompetitive mergers. Eligible private candidates include competitors, customers, and suppliers of the merging parties. Although Supreme Court decisions since the late 1970s have place formidable hurdles in the path of competitors,

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[5] For a discussion of the rationale for enacting antitrust laws and of common elements of the world's antitrust statutes, see Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 22-69 (2002).

[6] *See* William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 Econ. Inquiry 294, 295 (1992) (describing decentralization of prosecutorial power under US antitrust laws).

[7] The "clearance" mechanism by which the DOJ and the FTC decide which agency will treat matters over which both share jurisdiction is described in ABA Section of Antitrust Law, The Merger Review Process 133-34 (2d ed.; Eileen K. Gotts, ed. 2001).

[8] *See* ABA Section of Antitrust Law, Antitrust Law Developments 838-69 (5th ed. 2002) (discussing standing requirements that private plaintiffs must satisfy in antitrust cases).

[9] The disparities between existing Supreme Court merger jurisprudence and the current federal merger guidelines are noted in William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 Antitrust L.J. 5 (2000).

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such agreements.[12] In these matters, DOJ plays an advisory role exclusively.

Electric Power. Transactions involving energy companies are subject to competition policy review or challenge by the DOJ or the FTC, the Federal Energy Regulatory Commission (FERC),[13] the public service commission (PSC) of each state in which the parties do business, and, for some transactions, the Securities and Exchange Commission (exercising powers granted by the Public Utility Holding Company Act).[14]

Financial Services. DOJ shares competition policy jurisdiction over mergers involving banks with three federal banking regulators: The Office of the Comptroller General, which reviews transactions involving national banks; the Federal Deposit Insurance Corporation, which reviews transactions involving federally-insured, state-chartered banks that are not members of the Federal Reserve System; and the Board of Governors of the Federal Reserve System, which reviews transactions involving banks that create a state-chartered bank that is a member of the Federal Reserve System.[15] In general, the banking regulators apply standards similar to those established under § 7 of the Clayton Act and must consider a report filed by DOJ before completing their own assessment of a transaction.

Railroads. Jurisdiction over mergers involving railroads resides solely in the Surface Transportation Board (STB).[16]

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[12] *Id.*

[13] 16 U.S.C. §§ 791a-828c (1994).

[14] 15 U.S.C. §§ 79i, 79j (1994).

[15] *See* ABA Antitrust Section, *Antitrust Law Developments*, at 1317-22.

[16] 49 U.S.C. § 11321 (Supp. 1999).

[17] *See* ABA Antitrust Section, *Antitrust Law Developments*

powers and resources will depend on how each agency executes its existing duties. Without a substantial expenditure of resources to evaluating the result's of each agency's activities, it may be difficult for Congress or any other monitoring body to determine which agency is worthy of receiving a larger budget or greater authority.[22]

Modern experience with bid protests in the U.S. federal procurement system shows how new

[22] The importance of and difficulties associated with assessing the consequences of public antitrust enforcement are addressed in William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 Geo. Mason L. Rev. 843 (2001).

[23] *See* William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L.J. Am. U. 461 (1995). Concluding that the protest reforms of the 1980s elicited excessive scrutiny of purchasing agency decisions, Congress ended this experiment in 1996 by eliminating the GSBCA's protest authority.

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economic regulation (antitrust) in the late 19th Century and early 20th Century, there was uncertainty and disagreement about the best way to implement competition policy commands. Congress decided to endorse three implementation options: enforcement by private parties in the courts, enforcement by DOJ in the courts, and enforcement by an administrative tribunal (the FTC) akin to the recently (1887) established Interstate Commerce Commission.[25]

One way to test the merits of different implementation options is to conduct a natural experiment with more than one technique. Experimentation generates an empirical basis for determining what the long-term enforcement system should be. Actual experience provides insights for adjusting the mix of enforcement institutions by revealing which techniques are successful and which are not.

A second diversification rationale is to insure against the possibility that any single enforcement entity may fail to execute its responsibilities (for example, through sloth, corruption, or flawed institutional design), leaving an important public policy goal unfulfilled. Redundancy creates alternative paths for implementation if any single approach fails. The more vital the government function, the stronger the case for diversifying sources for supplying it. For example, one reason to maintain the Air Force, the Army, and the Navy as distinct bodies (rather than establish an single Armed Service) is to provide multiple independent centers for developing new tactics and weapon systems.

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[25] For an important recent interpretation of the origins of the U.S. antitrust system at the turn of the 20th century, including the decision to diversify the enforcement system by creating the Federal Trade Commission, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003).

[26] *See* Thomas L. McNaugher, New Weapons, Old Politics: America's Military Procurement Muddle 38-48 (1989).

on the owner on such facilities. The design and implementation of mandatory access and nondiscrimination requirements can confront antitrust

review the same antitrust matter or sue the same defendant for identical conduct. In general terms, the operation of the clearance process can generate significant inter-agency friction and raise the costs of routine cooperation. Perhaps the most serious cost stems from measures the agencies take from time to time to position themselves to claim priority over new matters. Each agency invests strategically in at least some investigative ac

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policy processes and substantive standards. Decentralization and multiplicity in U.S. competition policy making complicates the attainment of a nationwide consensus about the appropriate content of procedures and substantive requirements. This is evident where two or more independent institutions exercise overlapping authority in the absence of a hierarchy of authority that makes the decision of one actor binding on another institutions. The DOJ and the FTC may be seen as lacking the ability to speak authoritatively to foreign governments about U.S. competition policy because their pronouncements do not bind other institutions, such as sectoral regulators and state attorneys general, which independently exercise policymaking power over a wide range of business activity.

Coordination of competition policy making for individual transactions among foreign competition authoriti.00sfs189 Tuuaddacign thr pe frsencsn ofgecti.,g

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[31] I am grateful to Richard Epstein for focusing my attention on this concern.

Yet not all poorly conceived enforcement measures, public or private, result in full litigation on the merits and the publication of judicial opinions. Nor is litigation necessarily an available or effective means to correct errors in policymaking – for example, the issuance of guidelines – that take forms other than litigation. It may be necessary to consider other devices by which superior norms are identified and by which various enforcement agents are persuaded to accept the superior norms.

IV. Toward a Domestic Competition Initiative

The existing distribution of competition policy authority may prove to be an enduring condition of the U.S. legal system. It is possible that Congress and other policymakers will reassess the rationality of the U.S. antitrust enforcement system and undertake significant adjustments, including the withdrawal of prosecutorial power from selected public authorities or private entities that currently exercise important competition policy functions.. I make two assumptions in

[32] This discussion uses the model of convergence presented in Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy* (Brussels, Belgium, July 23, 2002) (Prepared remarks at the Annual Lecture of the European Foreign Affairs Review), *available at* <http://www.ftc.gov/speeches/muris/020723/brussels>.

the identification of best practices or techniques, and opting-in to superior norms by individual jurisdictions. Of the international institutions that are facilitating the process of convergence, the most intriguing institution for U.S. domestic purposes is the International Competition Network (ICN).

Created in the Fall of 2001, the ICN is a virtual network of competition agencies representing over 80 jurisdictions. The ICN operates through working groups consisting of government officials and representatives from academia, consumer groups, legal societies, and trade associations. One group has focused on merger control and has prepared a widely-praised body of guiding principles and best practices for notification practices and procedures. Other working groups have addressed competition advocacy and capacity building in emerging markets. ICN has considerable promise to promote the development of an intellectual consensus about competition policy norms.[33]

A domestic equivalent to ICN could serve similar ends in identifying best practices that have emerged through experience with decentralized policymaking and promoting the adoption of such practices. A DCN could pursue a variety of "soft" convergence strategies to achieve greater

[33] The ICN is not the only instrument for developing global competition policy norms. The World Trade Organization and the Organization for Economic Cooperation and Development are but two of the global and regional networks that are devoting significant effort to competition policy convergence issues.