



## HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

1. This paper provides brief descriptions of past enforcement actions by the US antitrust agencies and of the economic effects of these actions. The first section describes FTC enforcement in the healthcare sector; the second describes DOJ enforcement in the telecommunications sector.

2. The U.S. Federal Trade Commission's Antitrust Enforcement Program in Health Care: the *American Medical Association* Case and Its Progeny

### Introduction

3. One of the most noteworthy developments in U.S. competition policy in the 1970s was the decision of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to devote significant resources to law enforcement involving restraints of trade in the professions.<sup>1</sup> In a substantial number of antitrust cases initiated in this decade, the federal enforcement agencies opposed restrictions on pricing, advertising, and marketing that associations of professionals imposed upon their members.<sup>2</sup>

4. As a vehicle for considering the economic impact of antitrust enforcement against private trade restraints, this paper reviews one of the FTC's most influential contributions to competition policy involving the professions -- an administrative case brought in 1975 against the American Medical Association (AMA). The paper first summarizes the content and outcome of the proceeding and then considers its economic consequences.

### 1. The American Medical Association Litigation

5. Measured by total membership and its influence on the standards of practice for the medical profession, the AMA is the leading U.S. professional association for physicians. As the principal professional group in the field, the AMA and its policies play a major role in determining how markets for

legislative exemption from FTC oversight. In the late 1970s and early 1980s, the AMA and various other professional societies mounted a vigorous campaign to persuade the U.S. Congress to withdraw the FTC's

CCNM/GF/COMP/WD(2004)36

collection of feedback that shows whether the agency's enforcementCCNM/GF/COMP/WD(2004)36

The RBOC entry has also stimulated changes in marketing tactics, including the proliferation of bundled offerings by both RBOCs and long distance carriers. Consumers in many areas can now buy local, long distance, and in some cases, high-speed Internet and wireless services from one provider at a discounted, flat rate.

16. At the time of the 1996 Act, the RBOCs provided virtually all local telecommunications services. The advent of competition in this sector has been slow but steady.<sup>24</sup> FCC figures suggest that by 2002, CLECs served over 13% of local lines nationwide.<sup>25</sup> This represents all modes of entry allowed by the Act, including resale, use of unbundled network elements ("UNEs"), and facilities-based. In many areas and for some customers, the numbers are significantly higher. In some states, CLECs now serve over 33% of business customers using their own facilities.<sup>26</sup>

## NOTES

1. The origin of these initiatives is difficult to identify precisely, but a formative event was the lawsuit initiated by DOJ in the first half of the 1970s to challenge restrictions on competitive bidding by a major professional association, the National Society of Professional Engineers. The DOJ case generated a landmark ruling of the U.S. Supreme Court that, in the course of striking down the challenged restrictions, expressed acute skepticism about the defendant's arguments that the competition ethic embodied in the U.S. antitrust laws posed a serious social and economic danger if it were allowed to govern the supply of professional services. *See* National Society of Professional Engineers v. United States, 435 U.S. 679, 692-96 (1978) (considering and rejecting the argument of the defendant professional association that uninhibited competitive bidding "would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." The decision marked a major turning point in modern U.S. horizontal restraints jurisprudence and the application of competition policy to professional groups. The significance of these developments in modern U.S. competition law is examined in William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *Journal of Economic Perspectives* 43 (2000).
2. *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *Antitrust Law Journal* 377, 426-30 (2003) (highlighting the DOJ and FTC's professions cases of the 1970s as a major ingredient of the U.S. trend toward making horizontal restraints the centerpiece of government civil non-merger enforcement).
3. American Medical Association, 94 F.T.C. 701 (1979).
4. American Medical Association v. Federal Trade Commission, 638 F.2d 443 (w [(An3p(e)-94. )Tj /F6 1 Tf5u.4(o)-11

9. On the FTC Eyeglasses Rule, see Dorsey D. Ellis, Jr., *Legislative Powers: FTC Rule Making*, in *The Federal Trade Commission since 1970: Economic Regulation and Bureaucratic Behavior* 161, 166-68 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981).
10. See Federal Trade Commission, *Impact Evaluations of Federal Trade Commission Vertical Restraints Cases* (Ronald N. Lafferty et al. eds., 1984) (vertical restraints studies).
11. See Timothy Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 *American Economic Review* 15 (May 1985) (presenting results of impact evaluation sponsored by FTC concerning consequences of abuse of dominance case brought against Xerox).
12. Harold Saltzman et al., *Transformation and Continuity: The U.S. Carbonated Soft Drink Bottling Industry*

19. *Id.*
20. FCC, *Statistics of the Long Distance Telecommunications Industry*, Report at 29 Table 15 (May 2003).
21. *Id.*
22. *Id.*
23. Griff Witte,