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JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from the United States

-- Session II --

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Judicial Perspectives on Competition Law

-- United States --

1. Evidentiary Matters in Competition Cases before Courts

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- x Economic issues can present challenges to judges who may have no previous experience in adjudicating competition cases. Few other areas of law require this type of exacting review of economic principles. Most judges are not trained economists and are not necessarily equipped by training and experience to assess economic evidence or evaluate the credibility of expert economists. Economic principles cannot always be applied in a mechanical fashion. To partially compensate, in the United States, as in other jurisdictions, the judiciary has been given important tools to ensure that it has the capacity to review competition cases.
- x The United States relies on an adversarial system in which each party presents its best case to an impartial judge. This may include opposing expert reports and live testimony by economic experts. This system allows the opposing party to challenge the economic model and the underlying factual assumptions so that the court may assess the strengths and weaknesses of each argument. This process

5. The opportunity for judicial review of the initial legal determination is essential to the effectiveness and efficiency of any adjudicative system. In the United States, there is generally a different standard of review for factual and legal determinations. A federal court will generally be upheld unless they are unsupported by substantial evidence, lack adequate evidentiary support in the record, or are against the clear weight of the evidence. An appellate court will reverse and remand the matter, typically with instructions, so that the lower court may apply the correct standard. Notwithstanding some differences in the standards of review applicable to FTC administrative adjudication and DOJ court cases, the two agencies tend to achieve broadly similar results in civil cases.

2. Interactions between Courts and Competition Authorities

6. While it is not unusual for judges and attorneys for the United States antitrust agencies to encounter each other outside of the courtroom through participation in bar association activities,⁶ principles of due process generally minimize the interaction between judges and the agencies

prosecutor. Given that standards for adjudication were not well advanced at the time, the results were mixed. A quarter century later, Congress considered whether to create an independent expert body to enforce the law. This debate ultimately resulted in a political compromise, which led to the establishment of the Federal Trade Commission as a second enforcement agency.⁹ The Department of Justice retained the authority to enforce the Sherman Act before the general federal courts, while the Federal Trade Commission was authorized to enforce a prohibition against unfair methods of competition as well as to share enforcement of the newly-enacted Clayton Act with the Department of Justice.¹⁰ The FTC was established as an expert body with the authority to adjudicate through the administrative process, with its final rulings ultimately subject to review by the federal appellate courts.¹¹ While a few specialized courts have been established in the United States in other fields, no specialized court has been established for competition law cases.

9. U.S. law provides a private right of action that allows aggrieved private parties to seek treble damages, including an action by an individual state on behalf of its state residents injured by conduct that violates the antitrust laws.¹² In addition, all of the 50 American states have state antitrust laws that are sometimes enforced before non-specialized state court judges. Neither involves the competition authorities. This body of jurisprudence is supplemented with numerous compilations of relevant precedent in publications and periodicals compiled by bar and academic institutions.¹³

⁹ Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust Law Journal 1 (2003), Available at: <https://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf>

¹⁰ The courts have ruled that any conduct that violates the Sherman Act is also an unfair method of competition, thus including within the FTC authority the same substantive civil authority as exercised by the Justice Department.

¹¹ See_0DXUHHQ . 2KOKDXVHQ 3\$GPLQLVWUDWLYH /LWLJJDWLRQ D Developing the Law RU 5XEEHU 6WDPS " -RXUQDO RI &RPSHWLWLRQ /DZ (de7325D C: 2376(W237.88999938/GS2 gs/Cs20.339996)-284(sup6(e)-k9(D(/)2rscn[()]TJET/GS1 /GS1 /GS)]TJEH 2