BACKGROUND REPORT ON

THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM*

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1. THE CONCEPTS OF COMPETITION POLICY IN THE UNITED STATES: FOUNDATIONS AND CONTEXT

The US's conception of competition policy as a principal component of its economic "constitution," and the central role competition policy plays in the design of economic legislation and regulation, constitute a powerful basis for fundamental reform. Basing regulation on a presumption of competition is not a radical idea in the United States, as it is in some OECD countries. Instead, reforms that emphasise competition can be represented, accurately, as a return to political and policy roots. That basic political support probably explains why the United States has done so much to remove price and entry controls over industries that are structurally competitive.

In the last 20 years, the two US competition policy agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, as well as the courts, which are the ultimate authorities, have embraced a basically economic conception of competition policy. In truth, US competition policy has been based on economic principles for at least the last 50 years. A principal reason for establishing the Federal Trade Commission in 1914 was to bring economic and commercial expertise to the application of general competition law. As different economic principles have gained ascendancy, antitrust law has generally followed.

Competition law prevents private constraints on the achievement of economic goals, principally the more efficient use of resources. This basically economic purpose for the law about competition is consistent with the directions and foundations of regulatory policy generally. The annual economic report of the President in 1996 introduced its discussion of regulatory policy by highlighting the importance of market competition to drive down costs and prices, induce firms to produce the goods consumers want, and spur innovation and the expansion of new markets from abroad.[1] Policies pursued by other federal regulatory agencies are typically conceived as intended to promote competition, rather than substitute for it, as much as possible. For example, the mission statement for the federal agency that regulates energy requires it "to foster and assure competition among parties engaged in the supply of energy and fuels."[2]

Box 1. **Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Despite the strong support for the idea of competition in US political culture, there is no single, generally accepted, authoritative statement of purpose for national competition policy. The first national competition laws, the 1887 Interstate Commerce Act and the 1890 Sherman Act, made federal powers and institutions available to apply substantive principles that were derived largely from common law. Just exactly what purpose those laws were to accomplish by challenging cartels and abusive monopolistic practices was debated then and has been debated since. Later laws, such as the 1936 Robinson-Patman Act about price discrimination and the 1950 Celler-Kefauver Act about mergers, seem to respond to different purposes at the time they were enacted, namely to protect firms against unfair practices by their competitors and suppliers and to control industrial concentration. No doubt the lack of a single authoritative statement in the basic legislation re

applied by the Environmental Protection Agency, the Food and Drug Administration, the Department of Agriculture, and the Consumer Product Safety Commission. Some of this is regulation to correct market failures, especially those due to consumers' lack of accurate information. Direct regulation avoids the inefficiency that would result from preventing competition; however, it remains to be determined in particular cases, whether the benefits of direct regulation justify the costs. The refusal of competition law to admit defences based on protecting other values does not prevent competitors from acting together to

The “rule of reason” approach to nearly all vertical relationships exemplifies how US law follows economic principles. The agencies and courts are sensitive to the difficulty of determining the net competitive effect of most vertical restraints and to the likelihood that they serve some useful, efficient purpose. And the approach is consistent with the US libertarian streak. Presuming that parties to business contracts entered them freely, competition law does not usually intervene to redress a perceived imbalance in negotiating power.

Nevertheless, there are some curiosities in US vertical restraint law, mostly related to the effort to maintain *per se* treatment for resale price maintenance.

2.4. Mergers: rules to prevent competition problems arising from corporate restructuring, including responses to regulatory change

Combinations of all kinds, including joint ventures and open market acquisitions, are covered by the general merger statute, the Clayton Act. The lega

made, such as retail trade. Another example is professional codes of ethics that try to prevent price competition or advertising, which have been frequent targets of competition law enforcement.

despite the law-enforcement culture in which each operates, and the fact that policies other than competition are not formally taken into account in determining liability, both agencies have proven sensitive to regulatory contexts. They have tried to ensure that their enforcement programmes are consistent with regulatory reform initiatives. In some respects, notably concerning the time and expense of their procedures, the agencies' own regulatory process might be improved; for the most part, though, the agencies are taking steps to meet appropriate standards.

Both agencies implement their enforcement programmes independently and can take initiatives without necessarily obtaining formal authorisation from other parts of the government. The two agencies may consult informally, though, with other parts of the government that are known to have regulatory or law enforcement interests in particular companies or industries. Both agencies have broad powers to demand documents and testimony. The enforcement processes differ slightly, although both contemplate adversarial evidentiary hearings. The Antitrust Division appears in federal court as a party plaintiff or prosecutor, filing a conventional complaint or indictment. The process may lead to a trial before a jth ag (or)4an tak1

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review also tends to ensure continuity of policy. The increasing influence of judges with an economic perspective has reinforced the economics-oriented antitrust policy of the last 20 years.

Box 3. **Enforcement powers**

Does the agency have the power to take action on its own initiative? The FTC, like most Member country agencies (19), has power to issue prohibitory orders on its own initiative. The Antitrust Division does not, though; it must make its cases in court. Neither is required to wait for a complaint. Unlike the agencies in about half of Member countries, neither agency can usually assess financial penalties directly, but instead must obtain a court order.

Does the agency publish its decisions and the reasons for them? Like virtually all Member country enforcement agencies, the FTC publishes its decisions, and courts publish opinions in many of the Antitrust Division's cases. (Trial-level opinions do not appear in criminal cases decided by juries).

Are the agency's decisions subject to substantive review and correction by a court? All Member country competition agencies must defend their actions in court if necessary.

Can private parties also bring their own suits about competition issues? Some kind of privately initiated suit about competition issues is possible in nearly all Member countries, but provisions for private relief in US law are probably the most .7(av1 g 52.t.1(bring.1.88T)5 Tc99.0-)1s g 52.2(th)6.1(gth)6. ara9(s .7(avt.1(brees ie m)19.9(a)-1

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It is difficult, though, to estimate what proportion of enforcement resources the agencies have applied to cases where regulation has a significant competitive effect. Both competition agencies have been active advocates for competition policy solutions; those efforts are described in more detail below, in Section 5. The resources devoted to advocacy efforts have declined significantly in the 1990s.

when the Supreme Court was still developing some of its details, is a statutory immunity from liability for damages in private actions, for conduct engaged in or directed by a local government official or employee acting in an official capacity.)[32]

Small and medium sized enterprises

There is no general exemption from the federal antitrust laws for small and medium sized enterprises. And there is no *de minimis* rule for conduct covered by the *per se* standard of liability. Of course, a firm that is too small to affect competition is unlikely to be subject to any enforcement attention concerning conduct subject to the rule of reason. The one statutory immunity for small business is not really an exemption, for the conduct it covers would probably not violate the law. Certain narrowly defined agreements (joint research and development and those that the President determines contribute to the national defence) among small "independently owned and operated businesses" that are "not dominant" in their "field of operation" are immune from antitrust attack.[35] (The enforcement agencies are unaware of any instances in which this protection has been invoked). Small and medium sized enterprises enjoy no particular protection against liability as defendants,[36] but there are some provisions that were intended to benefit them as plaintiffs. One of the justifications offered for awarding treble damages plus attorney's fees, and of permitting parties to join together in class actions, is to encourage smaller firms, with fewer resources, to initiate private lawsuits.

Joint research and production

Special legislation ensures that joint ventures for research, development, and production (even between horizontal competitors) will not be judged by the harsh *per* se standard, but instead by the multi-factor rule of reason.[37] This protection was first enacted in 1984, applicable only to research and development, and was expanded in 1993 to cover production joint ventures as well. The protection does not extend to agreements about marketing and distribution, exchanges of information on costs, sales, profitability, and prices, or allocating markets with a competitor. It is an example of a response to concern that stringency of the basic competition law was inappropriate for these activities, and indeed was likely to have discouraged them unnecessarily. In addition to ensuring rule of reason treatment, the law also provides for a reduction in potential liability in private lawsuits, to single damages, if parties file their joint venture plans with the enforcement agencies. The concerns about chilling may have been overstated, for filings are infrequent, averaging about 60 per year. There may be some differential impact on foreign firms, for the limit to single-damages exposure for production activities only applies if there are production facilities in the US.

Box 5. **Scope of competition policy**

Is there an exemption from liability under the general competition law for conduct that is required or authorised by other government authority? Like most Member countries (15 out of the 27 reporting), the US

proposed rule has been endorsed by two economists who have held top positions at the Antitrust Division. But it could be difficult to implement in court proceedings. Standard US antitrust law rules about predatory pricing are wary of discouraging vigorous price competition, and thus they impose a stringent cost-based test, as well as require showing the likelihood of recoupment, in order to avoid "false positives." It remains to be seen whether a sectoral regulator, familiar with its industry's strategic methods, might be able to apply the economically more sensitive, but more difficult, test based on opportunity costs, without discouraging more competition than it protects. If the test succeeds, the demonstration might be a basis for extending it to other areas, and potentially for changing the rules that apply under the competition law generally.

On the other hand, a special airline-industry rule might not have been necessary to counter this conduct, had the industry not been permitted to consolidate into "fortress" hubs in the decade after deregulation. Preventing any single airline from domin

government supervision and enforcement of the cartel, nor open competition, but a combination of all these elements. The mixture of elements probably reflects the mixture of contradictory reasons for oversight. On the one hand, US law has to recognise the fact that international liner shipping has long been dominated by cartels that have enjoyed some legal protection elsewhere. On the other hand, the US antitrust tradition is uncomfortable with such thorough-going price-fixing. The result is a regulatory system that permits considerable cartel conduct that would be *per se* illegal, indeed criminal, if attempted in other sectors. Conference agreements fixing rates, dividing markets, pooling revenues, limiting output, and otherwise preventing competition, as well as conduct pursuant to them, are immune from antitrust liability if they are filed with the FMC. But, at least, conferences in US trades must be open and they must not discriminate among shippers or ports. Moreover,92 Tw [(aw1ility)1..(ipp0024 1.0muudm)18.j0pen92 Twud29w

vulnerable. But if there are aspects of the regulatory structure that unnecessarily reinforce the *de facto* monopoly, more competitive alternative approaches should be explored.

Energy

Special sectoral regulation of the natural gas and electricity industries at the federal level has moved steadily toward increasing consistency with generally applicable competition policy. This contrast with the more uncertain course of transportation regulation is due to several factors. The regulatory structure did not displace the competition law completely, but coexisted with it. The courts have instructed the regulator to include competition policy in its understanding and application of broader "public interest" criteria, and gulat2 TD 0.0

Securities and futures

The courts have fashioned a limited immunity for the securities industry, inferred from the extensive system of regulation and oversight by the SEC. The statute providing for securities industry regulation calls on the SEC to consider the competitive impact of its actions. The course of deregulation in this sector demonstrates the potential value of private antitrust litigation for that purpose. A court decision in a private lawsuit extended antitrust immunity to agreements to fix commissions.[56] Congress responded by revising the basic securities law to forbid such price-fixing. Similar rules and results apply to commodity futures, which are subject to a different regulatory body. For commodity futures, there is also a limited, implied immunity and a "competitive effects test" in the basic law, and there too antitrust litigation led to the abandonment of fixed commissions. As legislative and regulatory actions have moved these industries strongly toward competitive market methods, the judicially created implied immunities may no longer be very important.

Insurance

The business of insurance is not subject to the Sherman or Clayton Acts, nor to the Federal Trade Commission Act, to the extent it is regulated by state law. This statutory exemption, the McCarran-Ferguson Act,[57] was a direct Congressional response to a government prosecution for price-fixing. The law was said to protect the states' traditional powers to tax insurance companies and regulate the content of insurance contracts, after the Supreme Court's finding that insurance was interstate commerce subject to oversight by Congress.[58] The exemption does not apply to actions that amount to boycott, coercion, or intimidation. And mergers in the insurance industry are still covered by the general merger law. But Congress has generally kept the antitrust enforcers away from the insurance industry where possible. In the late 1970s, the FTC staff studied and reported on consumer protection and competition problems in the insurance industry. Even though these were only studies, and did not call for law enforcement action, Congress responded by preventing the FTC from using any of its funds to study or report on any aspect of the business of insurance, unless specifically requested by Congress. Promoting competition in this sector is the responsibility of state law and state insurance regulators. The funding limitation prevents the FTC from advocacy action here, and the Antitrust Division has historically done little advocacy at the state level. The institutional basis for applying national competition policies consistently in this industry is therefore weak.

Communications

In general, the competition laws are fully applicable to telecommunications, broadcasting, and cable. There are no general exemptions; indeed, the basic laws underlying broadcast and telecommunications regulation state explicitly that the antitrust laws also apply.[59] There are two, limited exemptions. The television industry enjoys a limited exemption for joint actions to develop and disseminate voluntary guidelines to reduce the negative impact of TV violence.[60] And local officials involved in granting cable franchises are immunised from treble damage liability in lawsuits over their decisions.[61] The sectoral regulator, the *Federal Communications Commission* (FCC), has promoted competitive methods where regulatory authority remains, although promotion of pro-competitive methods

supplemented by Antitrust Division law enforcement actions on the same issues, notably network control over programming. But as antitrust doctrine has changed, so have the FCC's rules, albeit with some delay.

The competition agencies have played an effective role in promoting competition in

Export trade

The antitrust laws do not apply to associations whose joint actions restrict competition in export trade, under certain conditions.[85] There must be no effect on US prices of the commodities being exported, nor any other substantial lessening of US competition. The association must be for the sole purpose of export trade and not in restraint of the export trade of the association's competitors. These associations

not apply if the actions are taken for the purpose of violating the antitrust laws. The competition agencies monitor these agreements.

5. COMPETITION ADVOCACY FOR REGULATORY REFORM

The US competition agencies have been unusually active in promoting competitive, market methods and outcomes in the policy-making and regulatory processes. Their advocacy contributed to the first major deregulation successes, in airlines and natural gas, and continued with trucking, communications, broadcasting, and electric power. The rate of their advocacy activity has declined substantially in the last few years, though. Since the 1970s, they have made over 2 000 comments or other formal public appearances in proceedings at other agencies or government bodies. In the late 1980s, these appearances came at a rate of over a hundred a year. By 1997, though, the annual total was less than 20. This decline probably reflects the fact that, at the federal level at least, the easier and more obvious battles have been fought and won. The Antitrust Division concentrates its advocacy almost entirely at other federal agencies and departments, while the FTC has addressed about half of its efforts to state and local issues.

The analytic principles motivating competition advocacy are summarised in the Antitrust Division's operating manual. The foundation assumption is that exceptions to the general rule of free market competition (subject to antitrust law oversight) can be justified only by compelling evidence that competition is unworkable or that it prevents achieving another, overriding social objective. Advocacy's goals are to eliminate existing regulation that is unnecessary or too costly, to discourage unnecessary new regulation, to minimise distortions where regulations are necessary by encouraging use of the least anti-competitive regulatory methods, and to ensure that regulation is properly designed to meet legitimate objectives. Some basic issues to address include: identifying the costs or disadvantages of competition in the setting at issue; determining whether regulation, if already in place, has actually fulfilled its purpose, and whether the conditions that were said to have justified it still obtain; and identifying the necessary elements of a transition from a regulated market to a competitive one. Ultimately, the question is the balance of costs and benefits. The agencies typically argue that the burden of proof is on those who would establish or maintain the regulatory system.

Competition issues in industries undergoing restructuring remain a focus of advocacy efforts. Several recent comments from both agencies have dealt with the electric power industry. They have pointed out the advantages of structural remedies over regulatory, behavioural solutions in safeguarding non-discriminatory access to the transmission grid and in dealing with market power in electricity generation. Comments have also discussed the appropriate framework of analysis for review of electric utility mergers, supporting the regulator's eventual decision to apply standard competition analysis in making its "public interest" determinations. In the last few years, comments have concentrated on the changes in the regulation of broadcasting and telecommunications. Many of these comments are related to the FCC's implementation of the Telecommunications Act of 1996. The competition agencies have successfully advocated, for example, cost-based pricing and forbearance where appropriate.

Some comments are in support of other agencies' efforts to apply competition principles under their own laws. Recent examples include the comments to FERC about electric power merger policy and comments to the Department of Transportation supporting proposed DOT rules under its unfair competition jurisdiction to address anti-competitive practices by airlines' computer reservation systems.

Some comments have assessed the likely effects of proposed exclusions and exemptions from competition law. A recent FTC staff report to Congress analysed a proposed settlement of litigation

against cigarette manufacturers, which would include an antitrust exemption for certain joint practices to implement the settlement. The report concluded that the exemption could enable cigarette companies to co-ordinate price increases and raise profits. Another FTC staff comment objected to proposed state legislation to authorise "certificates of public advantage" conferring state-action antitrust immunity on co-operative agreements among healthcare providers. The comment pointed out that the exemption could lead to reduction of consumer choices and increase in consumer prices. If the state nonetheless proceeded with the programme, staff recommended that the anti-competitive risk be reduced by setting fixed, limited terms and terminating certificates that are found to harm consumers.

Privatisation issues arise infrequently. A recent FTC staff comment about introducing competition into the system for assigning Internet domain names assessed the likely consequences of using a not-for-profit corporation organised to include diverse stakeholders. The comment concluded that diversifying the board of directors would alleviate concerns about anti-competitive joint actions.

Many comments have addressed particular regulatory constraints on competition. Price and rate regulations subject to recent comments include those affecting long distance telephone service, liquor distribution, and marine pilotage. Entry has been addressed in such contexts as the allocation of airport landing and take-off privileges, certified public accounting, local multipoint telephone and video distribution services, and automobile sales. The two competition agencies filed a joint opposition to a rule preventing non-lawyers and title company attorneys from handling real estate closings, arguing that it would increase costs for consumers who would not otherwise hire an attorney and would increase prices by eliminating competition. Output regulation was the subject of comments on television's prime time access rules, must-carry rules for television retransmissions by satellite and open video system, allocation systems governing airport landing and take-off privileges, and restrictions on collision damage waivers for automobile rentals. Limitations on forms of practice are addressed in comments on optometrists' and veterinarians' commercial relationships with non-professionals and on linkages between cemeteries and funeral establishments.[91]

Fewer comments have addressed competition problems with social or environmental regulation. At one time, the FTC staff commented on such issues as economic impacts of auto fuel economy requirements and market-based methods for reducing CFC production. But since the 1980s, the only FTC comments on environmental issues have been about advertising claims. In comments on health care regulation, the agencies generally deal only with economic impacts and suggestions of market-based alternative methods. They typically decline to engage in debate about the priority and weight of other policy considerations.

Recent advocacy efforts represent the continuation, now on a somewhat smaller scale, of long-established themes. At the FTC, the programme is co-ordinated by one individual, now assigned to the Office of Policy Planning. At the Antitrust Division, the programme is generally monitored by a Deputy Assistant Attorney General. At both agencies, staff lawyers and economists with enforcement-based experience in the industries involved are more directly responsible for identifying problems and preparing responses. The exact resource commitment to advocacy is not clear, but is obviously very small. The FTC

conduct required by regulation has anti-competitive effects. And sometimes enforcement succeeds by failure. If an action brought against clearly anti-competitive behaviour must be dismissed because of a regulatory exclusion, the failure can support a call to eliminate the exclusion. Unsuccessful suits against tariff bureaux which were found to enjoy protection under the state action doctrine may have helped set the stage for trucking deregulation.

It can be difficult, perhaps impossible, to assess accurately whether advocacy is effective. There are too many other factors that may influence a regulator's or legislator's decision. A few generalisations about methods may be drawn from the two agencies' long experience, though. Advocacy is probably more effective when it is one part of a larger strategy that includes enforcement. And formal, public advocacy is more effective when it is combined with informal co-operation with other regulators. The relative success of deregulation in energy and communications might be traced to a long tradition of staff-level consultations and exchanges between the antitrust agencies, FERC, and the FCC, as well as shared ideas among political-level appointees. At the FCC, staff-level contacts have been facilitated by changes to the FCC's rules which now allow off-the-record, *ex parte* communications between its staff and other agencies. By contrast, at the Department of Transportation informal staff consultation is not permitted in contested matters. Thus, the Antitrust Division's participation in the recent rail merger matter had to be formal, public, and adversarial, rather than consultative. Competition policies could be integrated into other regulatory programmes more effectively if remaining barriers to informal staff-level consultations could be lowered.

6. CONCLUSIONS AND POLICY OPTIONS FOR REFORM

6.1. General assessment of current strengths and weaknesses

Competition policy and institutions have been employed very effectively in the process of reforming economic regulations to stimulate competition. At the federal level, commitment to competition is a part of general regulatory policy, so regulatory programmes are generally subject to statutory instructions to promote and protect competition. Where regulation has instead impaired competition, the legal and policy foundation for reform was already present. US competition policy is also strongly linked to consumer interests. Maintaining that linkage, embodied in the broad jurisdiction of the Federal Trade Commission, may justify the otherwise peculiar redundancy of federal law enforcement structures.

Competition policy institutions have used their enforcement and advocacy powers widely, and sometimes quite systematically, to promote reform. Their efforts have helped eliminate economic regulations that restricted entry into airlines and other transport industries, that prevented exit from the rail industry, that controlled pricing for natural gas, electric power, and telecommunications, that limited output of airlines, and that prevented normal commercial practices and forms of business organisation in health care and other professional services.

Commitment to reform extends well beyond the national competition agencies. Since the 1970s, Congress and the federal courts have generally backed

significantly. For the general competition law, there are two essentially equivalent national enforcement agencies, fifty state officials with similar and overlapping responsibilities, and an unlimited number of

6.3. Potential benefits and costs of further regulatory reform

At the national level, completing the task of eliminating regulatory constraints on economic competition will not generate nearly the benefits of the major reforms already accomplished. But the costs should not be as great, either. First, the difference between the current state and the fully competitive market is smaller. Second, experience with previous deregulation should suggest likely restructuring strategies that will minimise transition costs.

At the state level, the balance is less clear, because there is no complete, systematic estimate of the net effects of anti-competitive state-level regulations. But it is likely that potential gains from eliminating them are substantial.

6.4. Policy options for consideration[92]

Further reform in the United States should:

- ***Undertake a comprehensive study of the extent and effect of the state action doctrine, in preparation for legislation to reduce its scope or even eliminate it.***

The impact of the state action doctrine, and of anti-competitive state and local legislation, is a matter of concern. State regulation and special legislation impairs competition and may delay reform, not only in professional services and distribution, but also in telecommunications and electric power. The state action exemption, and anti-competitive state laws that impair competition affecting interstate commerce, are within the power of Congress to correct, either in particular applications or by general legislation. Congress has already done so in some sectors, such as trucking, where the anti-competitive effects of continued state regulation were patent. A comprehensive study should be undertaken to assess the competitive effects of state laws and regulations and to identify sectors where reform is most needed. A model for such a study in a federal context is the review of state-level constraints on competition that is underway now in Australia. Prime targets for action would be state and local laws that continue to permit business and professional associations to restrict price and other forms of competition among their members and laws that protect dealers against new competition or prohibit aggressive pricing and other marketing methods.

- ***Develop clearer assignments of responsibility among different enforcement officials, particularly between the federal and state levels, to avoid overlap and duplication.***

At the federal level, the two competition agencies co-ordinate well, but the quality of co-ordination with other regulators that share competition policy authority varies. In general, that relationship is worked out through consultation, advocacy, and the intervention of the courts. Adoption of rules to permit greater informal staff-level consultation in enforcement matters among sectoral agencies with competition policy responsibilities would improve co-ordination even more.

The co-ordination problems are more difficult between the federal and state levels. State-level enforcement capacity adds resources, but the risk of multiple and inconsistent enforcement priorities is a significant cost. Some state-level officials have shown a greater interest than the federal agencies have in cases about vertical relationships. It has been said that, at one time, that concern filled a gap left by lax federal-level enforcement. But that interest is also consistent with the state laws protecting competitors against aggressive competition. A logical division of

NOTES

1. Council of Economic Advisors (1996), *Economic Report of the President*, p. 155.

2. 42 U.S.C. § 7112(12) (Department of Energy).

3. Northern Pacific Railway Co. v. United States, 356 US 1, 4 (1958).

4. A little-known example is the Federal Alcohol Administration Act, 27 U.S.C. § 203, which sets rules about marketing practices in distribution of alcoholic beverages. Although Congress stated that its purpose was to ensure a competitive market, the rules that the Bureau of Alcohol, Tobacco, and Firearms has adopted to implement the law prohibit many practices that current competition policy would not object to.

5. United States v. American Airlines, 570 F. Supp. 654 (N.D. Tex. 1983), *rev'd*, 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed*, 474 US 1001 (1985).

6. United States v /F1 1 ..3855 TD 0.0045 654)l5.5(cee)5.4(857027)2.(1Fr)l5.5f)12.2(f)12.2(Pucee)5.b45 654)l5.5shi(cee)5.§

16. National Society of Professional Engineers v. United States, 435 US 679 (1978).

17. United States v. AT&T, 552 F. Supp. 131, 150, 153 (DDC 1982), *aff'd sub nom.* Maryland v. United States, 460 US 1001 (1983).

18. Questar Corp., File No. 961-0001, 5 Trade Reg. Rep. (CCH) ¶ 23,949.

19. Time Warner Inc., File No. 961-0004, 5 Trade Reg. Rep. (CCH) ¶24,104. For a more detailed discussion, *see* PITOFSKY, Robert (1997), remarks before the Fordham Corporate Law Institute on "Vertical Restraints and Vertical Aspects of Mergers—A US Perspective," October 16-17, 1997, at 8-10.

20. On August 5, 1996, the Division sued to block the proposed merger of two of the nation's largest radio station owners, alleging that they would control more than 50 per cent of sales of radio advertising time in Cincinnati, and could enable the companies to increase prices to advertisers and substantially lessen competition. The parties agreed to divest a leading Cincinnati contemporary music station to an independent buyer. *See* 7 Trade Rep. Reg. (CCH) ¶ 50,807, Case No. 4225.

21. See Averitt, N. & Lande, R. (1997), "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", *Antitrust L. J.* Vol. 65, p. 713.

22. FTC Rule 3.51 and 61 Fed. Reg. 50,640 (1996).

23. See Swanson, Daniel G. and Diethelm, U. Markus (1998), "Ignore US Antitrust Rules at Your Own Peril", *Wall Street Journal Europe,* 9 February.

24. Sections 1.2, 1.3, and 3 of the *Horizontal Merger Guidelines*. The analysis in these sections about market definition, identification of market participants, and entry is similar to the analysis that is applied to foreign trade aspects of these issues in non-merger cases as well.

25. *See* section 4.22 of the *Antitrust Enforcement Guidelines for International Operations* and 16 C.F.R. §§ 801-803 (1994). In contrast to those exemptions that offer foreign firms some degree of relief from otherwise applicable requirements, a geographic requirement in the special program for joint research or production, discussed below in Section 4, might work to their disadvantage.

26. United States v. Philadelphia Nat'l Bank, 374 US 321, 350-51 (1963).

27. Gordon v. New York Stock Exchange, 422 US 659 (1975).

28. Keogh v. Chicago & North-western Railway, 260 US 156 (1922). The "filed rate" doctrine only protects against suits for damages based on the rate levels.

29. A relic in the statute book is an exemption for discussions held by subcouncils of the Council on

54. 12 U.S.C. §§ 1971-1978.

55. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. §§ 1849.

56. Gordon v. New York Stock Exchange, 422 US 659 (1975).

57. 15 U.S.C. §§ 1011-15.

58. United States v. South-Eastern Underwriters Ass'n, 322 US 533 (1944).

59. 47 U.S.C. § 313(a), Telecommunications Act of 1996 § 601(b)(1). The 1996 Act also made telephone company mergers subject to generally applicable antitrust procedures and standards under the Clayton Act.

60. 47 U.S.C. § 303c(c).

61. 47 U.S.C. § 555a. This immunity essentially duplicates that which is also available to local officials generally, discussed above.

62. Clayton Act, § 6.

63. 7 U.S.C. § 291.

64. 15 U.S.C. § 521.

65. 7 U.S.C. § 455.

66. 15 U.S.C. § 13b (1994); 7 U.S.C. § 207(f).

67. 7 U.S.C. § 608(b).

68. 7 U.S.C. § 671(d).

69. 7 U.S.C. § 852.

70. 7 U.S.C. §§ 181, 192.

71. 15 U.S.C. §§ 1801-1804.

72. 15 U.S.C. §§ 1291-1295.

73. Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-03.

74. 42 U.S.C. §§ 11101, 11111-11115.

75. 17 U.S.C. §§ 111, 114, 115, 116.

76. 17 U.S.C. §§ 118(b), (e)(1).

77. 17 U.S.C. §§ 1007(a)(2).

78. 15 U.S.C. §§ 44, defining "corporation" subject to FTC jurisdiction to exclude those not for profit.

79. 15 U.S.C. §§ 13c.

80. United States v. Brown University, 5 F.3d 658 (3d Cir. 1993).

81. Pub.L. 103-382, Title V, §§ 568(a) – (d), Oct. 20, 1994, 108 Stat. 4060.

82. There is also a curious immunity against treble damages for certain charitable gift annuities and charitable remainder trusts. Charitable Gift Annuity Antitrust Relief Act of 1995, Pub. L. 104-63. 15 U.S.C. § 37.