mainly to restrict socially beneficial competition. These interventions typically benefit entrenched, politically powerful special interests to the detriment of the broader public good.

Second, competition enforcement actions guided, either expressly or implicitly, by non-competition factors like industrial policy. Here, there is a clear diversity of opinion. In the United States today, federal antitrust enforcers would tell you that non-competition factors play no role in their analysis. In many other countries, the answer is distinctly different. In particular, competition regimes in several emerging economies, like South Africa, apply a statutory "public interest" standard that involves consideration of, for example, the potential impact of a transaction on fairness, access to goods and services, and domestic employment.[2] Other nations' agencies say little about their internal analysis but end up taking actions that appear to favor domestic industry, suggesting industrial policy concerns may be at play.

I will focus my remarks today on how my agency, the Federal Trade Commission, is using its research, advocacy, and enforcement tools to advance free market principles and antitrust economics to address both of these government restraint of trade scenarios. On the enforcement side, for decades the FTC has challenged state and local public restraints in the United States that attempt to protect businesses under the cloak of "state action immunity." On the advocacy side, the FTC conducts research, hosts workshops, and, when asked, submits comments to states and foreign governments about the benefits of free market and the pitfalls of using government authority to favor one group of consumers or competitors over another.

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[2] *See, e.g.*, John Oxenham and Patrick Smith, *What is Competition Good For – Weighing the Wider Benefits of Competition and the Costs of Pursuing Non-Competition Objectives*, White Paper (2014), *available at* http://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf.

II. Concerns About

oppose foreign merger attempts while supporting domestic ones that create national champions, or companies that are deemed to be too big to be acquired."[6]

Some Americans have also expressed concern that repeated EU investigations of American technology companies reflect an interest in using competition law to further a protectionist agenda. Similar concerns have also been voiced about the platform sector inquiry recently announced as part of the EU's Digital Single Market initiative.

In Asia, American government enforcers have raised questions about the neutrality of China's merger review and antitrust enforcement regime, spurred on in part by recent reports from the U.S. Chamber of Commerce and the U.S.-China Business Council suggesting that the Chinese government is taking non-competition factors into account when applying the law.[7] For example, the Chamber report notes that although roughly 80% of Chinese deals with a Chinese target are domestic-to-domestic, only 7.6% of reviewed deals were domestic-to-domestic.[8] In addition, the Chamber report asserted that every case in which the Chinese merger enforcer, MOFCOM, took action to reject or conditionally approve a proposed deal involved a foreign company.[9] By comparison, between 2008 and 2012, about a third of U.S. conditional approvals and rejections involved foreign companies.[10]

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[6] Serdar Dinc & Isil Erel, *Economic Nationalism in Mergers & Acquisitions*, 68 J. FIN. 2471, 2504 (2013); *see also* D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, GEORGE MASON L. REV. 8 (forthcoming 2015) (internal citations omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596266 (discussing same and other examples).

[7] *See, e.g.*, U.S.-China Business Council, *Competition Policy and Enforcement in China*, 5 (Sept. 2014), *available at* http://uschina.org/reports/competition-policy-and-enforcement-china; U.S. Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy* (Sept. 9, 2014), *available at*
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Concerns about the potential use of government regulation to indirectly support industrial policy objectives can also arise in areas beyond competition enforcement. For example, American business and political leaders have criticized European authorities for imposing stringent privacy rules.[11] Probably the most controversial issue along these lines has involved an attempt by the French data privacy agency, Commission Nationale de l'Informatique et des Libertés or CNIL, to require Google, an American company, to comply with the EU's "right to be forgotten" order globally, prompting a strong reaction in the United States.[12] This debate is likely to continue with the introduction of the new EU data regulations.[13] Similarly, EU leadership has expressed frustration with member states' policies that slow transnational innovation and efficiency gains, such as country-level copyright protections and the high cost of crossborder package delivery.

In this era of dynamic global innovation, competition agencies like the FTC need a multi-faceted response to these developments. At home, we need to take the lead in tackling domestic restraints that favor inefficient incumbents. Abroad, we need to be an unswerving voice for politically neutral, analytically sound competition enforcement that benefits consumers. With that in mind, let me offer a few thoughts on the historical influence of industrial policy on competition enforcement and then give you a few recent examples of how the FTC has been working to promote competition and consumer welfare, even in the face of government restraints on trade.

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[11] Henry Farrell, *President Obama Says That Europeans Are Using Privacy Rules to Protect Their Firms Against U.S. Competition. Is He Right?*, WASH. POST. BLOG, Feb. 17, 2015, http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/17/obama-says-that-europeans-are-using-privacy-rules-to-protect-their-firms-against-u-s-competition-is-he-right/.

[12] Sam Schechner, *French Privacy Watchdog Prompts Google to Expand "Right to Be Forgotten,"* WALL ST. J. (June 12, 2015) http://www.wsj.com/articles/french-privacy-watchdog-orders-google-to-expand-right-to-be-forgotten-1434098033

[13] Press Release, European Commission, Commission Proposal on New Data Protection Rules to Boost EU Digital Single Market Supported by Justice Ministers (June 15, 2015), *available at* http://europa.eu/rapid/press-release_IP-15-5176_en.htm.

remarking that the Court “cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.[16]

This philosophy was not limited to the courts. In the 1930s, the U.S. Congress passed the National Industrial Recovery Act (NIRA) in reaction to the Great Depression. NIRA allowed industries to agree to certain “industrial codes” that, while subject to nominal governmental oversight, ultimately encouraged the formation of cartels to restrain prices and output and restrict entry. Many economists have studied NIRA and co

development, effects on local or national control, and international competitiveness, may be considered in competition analysis.[19]

Several retrospective studies have shown that in roughly the last twenty-five years, the shift to a more empirically-grounded approach to antitrust in the United States has yielded a federal antitrust enforcement program that remains remarkably stable across different government administrations.[20] This stability can also be tied heavily to the 1992 FTC and DOJ horizontal merger guidelines which, along with subsequent revisions, formally shifted merger review away from advocacy of proxies, simple labels, and other factors to increasingly nuanced and sophisticated empirical tests designed by economists. These tests include measures of concentration in the 1992 guidelines and the endorsement of upward pricing pressure in the 2010 revision.[21] Simply put, the inclusion of economists in the analysis now leaves less room for antitrust lawyers or others to advocate using non-competition factors.

C. Lingering Public Restraints at the State and Local Level

Although a philosophy of economically-grounded competition analysis and faith in the consumer welfare benefits of robust competition now generally prevail at the federal level, many U.S. states and municipalities continue to take steps through laws or licensure requirements to protect local businesses at the expense of free market competition. Finding the right boundary between federal antitrust enforcement and these state and local laws that are often motivated by industrial policy or protectionism is one of the most important competition law challenges being tackled by the FTC right now.

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[19] *See*, U.*S. v. Philadelphia National Bank*, 374 U.S. 321, 371-72 (1963); Sokol, *supra* note 6, at 5.

[20] *See*, *e.g.*, Ronan Harty, Howard Shelanski & Jesse Solomon,

favor incumbents.[23] At issue in this case was an attempt by a hospital system to immunize a merger to monopoly by cloaking the acquisition under the authority of the state. The hospital system arranged to have the local hospital authority buy the target hospital and then transfer management control to the acquirer, Phoebe Putney Health System, under a long-term lease. The agency challenged this action. Normally, state entities like the hospital authority – since they are not sovereigns – depend upon a grant of authority directly from the state. The authority argued that even though the state did not expressly state that the hospital authority could make acquisitions that harmed competition, a merger to monopoly was a reasonably foreseeable outcome of its authority to purchase, sell, and lease hospitals in the area to provide better access to health care for the indigent.[24]

The Supreme Court disagreed. It sided with the FTC to narrow the inferences that could be drawn about reasonably foreseeable consequences of a state law and the immunity available to substate entities. The court reaffirmed the principle that the scope of immunity for local bodies may encompass only situations in which the state has "clearly articulated and affirmatively expressed" a desire to supplant competition and then actively supervised the local entity.[25] The court then went on to hold that general corporate powers do not satisfy the clear articulation prong of state action immunity. Because the law here did not expressly authorize the hospital authority to make acquisitions of existing hospitals that would substantially lessen

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2. ***North Carolina Dental*** and State Licensing Boards

Another area where state regulation can serve as an unwarranted government restraint of trade relates to state licensing of professionals. Here, the concern is the artificial and unjustified barriers to entry erected by some state licensing boards, including, in particular, those composed of active participants in the very markets they regulate. This issue came to a head in the Commission's successful case against the North Carolina Board of Dental Examiners (the Board).

In that case, the FTC sued the Board alleging that its dentist members—through the Board—were "colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services" in North Carolina.[30] After deciding that whitening teeth constitutes the practice of dentistry, the Board issued at least forty letters to non-dentist teeth whitening providers, informing them that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing those services.[31]

Our case ended up at the Supreme Court, which ruled in the Commission's favor last February. The Court held that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state action antitrust immunity."[32]

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[30] *In re* N.C. Bd. of Dental Exam'rs, Docket No. 9343, Complaint, at 1 (June 17, 2010) [hereinafter *N.C. Dental* Compl.], *available at* https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf. The Board consists of six licensed dentists, one licensed hygienist, and one "consumer member," who is neither a dentist nor a hygienist. *Id.* ¶ 12.

[31] *Id.* ¶ 20.

[32] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015). Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Alito, with Justices Scalia and Thomas joining, dissented. Among other things, the dissent argued that *Parker* immunizes state agencies, the Board is a state agency, "and that is the end of the matter." *Id.* at 1117–18 (Alito, J., dissenting). The disseum

enforcers to abandon or modernize antiquated regulatory structures, like the certificate-of-need process, to allow more new innovative forms of business.

For example, many U.S. states have automobile distribution laws that prohibit cars to be sold directly by manufacturers to consumers. These laws were originally intended to protect both the distributors of cars from abuse by manufacturers and to guarantee that consumers would

V. The Role of the FTC in Shaping Global Competition Norms

A. Generally

As I mentioned at the outset today, a second and even more controversial area of concern for market participants and policymakers is the potential for national governments to use the competition laws to promote industrial policy objectives. The response of these concerns by an agency like the FTC is more challenging and indirect than with respect to domestic restraints where we have the authority to take our concerns before a court, if necessary. In this regard, our work is focused more on education, engagement, and soft advocacy, particularly because many of the issues prompting concern will require legislative or executive action that is beyond the control of the overseas competition agency.

B. An Issue of Statutory Design

Unlike the antitrust statutes in the United States, which are open-ended and subject to interpretation, the statutory foundation in many other prominent jurisdictions, including the European Union and China, are more specific. These competition laws often expressly contemplate or even command the consideration of "public interest" factors in the antitrust analysis. Thus, for instance, the European Court of Justice in a recent decision noted that Section 101 of the TFEU, "like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."[40]

China's antitrust laws contemplate non-competition factors expressly. For example, Article 1 of the Chinese Anti-Monopoly Law (AML) says it was created for, among other things,

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[40] Case C-8/08, 2009 E.C.R. I-4529 ¶ 38; *see also* Sokol, *supra* note 6, at 6 (discussing same and offering additional examples).

"*promoting the healthy development of the socialist market economy*."[41] This could mean anything, including the protection of jobs, Chinese state-owned entities, or other aspects of a socialist economy.

C. The FTC's Advocacy for Competition-based Enforcement

Given these differing legal authorities, the FTC must take a less direct approach in much of its international work. The agency participates in several multilateral fora on competition law and policy issues. Prominent among these are the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD).[42]

Despite its diverse membership, the ICN has succeeded in achieving consensus on recommended practices in several areas, including merger review procedures, substantive merger analysis, and the criteria for assessing abuse of dominance. Work product by the ICN has included recommended practice manuals, case-handling and enforcement manuals, reports, legislation and rule templates, and workshops.[43] Nations in emerging economies around the world have adopted these practices. For example, in addition to bringing its three competition agencies

The FTC also works regularly on a bilateral basis with other antitrust agencies, offering commentary on laws and rules under development and engaging other competition authorities with technical assistance or even participating in high-level dialogues with other governments about issues of mutual interest. The FTC's bilateral work is incremental, but over time can achieve meaningful results. For example, the agency supported the U.S. government last year in connection with the U.S.-China Joint Commission on Commerce and Trade (JCCT), which resulted in several major Chinese commitments, including the application of competition-based remedies despite the language of the AML calling for a broader public interest inquiry.[45]

VI. Conclusion

The antitrust agencies in the United States were originally tasked with policing the anticompetitive behavior of private individuals. That concern remains the central focus of our mission.

However, if you generally believe in the value of free market capitalism to improve society, it is almost impossible to ignore the inevitable situations where harm to competition is inflicted by the actions of government rather than by private actors. The appropriate response to these situations must be nuanced.

But those of us who do competition work for a living are uniquely attuntt5.9 -2.(us)seey Tc 0 Tw

Let me give you an excellent, concrete example. As part of the reorganization that created the Competition and Markets Authority ("CMA"), greater collaboration between the CMA and sector regulators is envisioned. David Currie has spoken about the value of integrating the deep industry expertise of a sector regulator with the competition expertise of the CMA. That sort of collaboration, where competition expertise is closely integrated into the decisions of government, seems to me like an excellent idea, and it is a development worth watching carefully in light of some of the concerns I have outlined today.

Thank you very much for your attention. I would be happy to answer any questions and look forward to the discussion.