State Intervention/State Action – A U.S. Perspective

Remarks of

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I. Introduction

Last December, in discussing the "positive agenda" of the Federal Trade Commission ("FTC") for competition policy, I identified four general principles:[1]

1. play an active role in promoting competition as a basic principle of economic organization through strong enforcement and focused advocacy;

2. focus antitrust enforcement resources on conduct that poses the greatest threat to consumer welfare;

3. make full use of the agency's distinctive institutional capabilities by applying the entire range of policy instruments to solve competition policy problems; and

4. attach a high priority to improving the institutions and processes by which antitrust policy is formulated and applied.

Today, I will focus on the second of these principles: targeting resources. Shaping a rational antitrust program requires identifying the practices that should receive the greatest scrutiny. Although *private* restraints have received the most attention in antitrust, focusing

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The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

[1] *See* Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 363 (2003).

exclusively on these restraints leaves a gaping hole in the antitrust enforcement net. Therefore, I will discuss the problem of *public* restraints and a few promising strategies for addressing them that highlight the FTC's recent efforts to make public restraints a focus of antitrust scrutiny. To illuminate our work in the United States, I will also compare the European approach to the issue.

Although I intend to focus on the second of the four guiding principles of the FTC's "positive agenda," I hope that my discussion of the agency's approach to the problem of public restraints will showcase all four. By identifying and scrutinizing public restraints, we continue to promote competition as a basic principle of economic organization. Likewise, the task of combating public restraints requires use of the full range of the FTC's policy instruments, from economic studies and competition advocacy to administrative litigation. Finally, because a successful campaign against public restraints will require an exceptional level of coordination between governmental units – at the state, federal, and international level – it will necessarily entail improvements in the institutions and processes by which antitrust policy is applied.

In my presentation I will highlight three themes. First, I will explain the importance of devoting substantial resources to opposing public restraints. Second, I will emphasize the need to use a multi-faceted strategy that invokes a broad range of policy instruments. Finally, I will underscore the need for competition agencies to build new institutional relationships with other government bodies whose decisions involve the competitive process.

II. The Problem of Public Restraints

Attempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel.

The same is true of antitrust enforcement. If you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. You have simply dictated the form that it will take. Let me restate the point in the form of a competition policy theorem: as a competition system achieves success in attacking private restraints, it increases the efforts that fi

The rational use of public restraints is not a new phenomenon. Nor is it something unusual. Rather, it happens all the time. Recent high profile examples include physicians and automobile dealers.

Those familiar with the Commission's antitrust enforcement in health care are well aware of the increasing number of physician price fixing cases. Since May 2002, for example, the Commission has issued complaints

III. Strategies for Addressing the Problem

Both the United States and the European Union have attempted to address the issue of public restraints by creating a single market. Given the significant differences in U.S. and E.U. institutions, the similarities in the attitudes and approaches are impressive. Since their inception, both jurisdictions have recognized that governments often erect the most pernicious barriers to competition. From tariffs and state subsidies, to overly burdensome licensing and advertising restrictions, to other policies inspired by what economists call rent seeking, governments can damage consumers severely. Fortunately, both the U.S. Constitution and the Treaty of Rome incorporate open markets as one of their fundamental tenets. Both limit member states from burdening interstate commerce. Both give central government institutions the responsibility to curtail protectionism. Moreover, in many ways, both share parallel histories in creating and implementing competition policy.

A. U.S. History

Let me start with the United States. As you know, the United States declared independence 227 years ago. We achieved our own regime change – with, I might add, the assistance of France – over the objection of Great Britain. In the immediate aftermath, the Articles of Confederation governed the United States. The Articles, unfortunately, gave very few powers to the central government, including no power to regulate commerce among the states. Consequently, many states erected tariffs and other protectionist measures against out-of-state competitors.

Even then, policymakers recognized that government barriers to competition threatened commercial prosperity. For example, Alexander Hamilton, who would later become our first Secretary of the Treasury, helped write *The Federalist Papers*. These were essays designed to convince the public to ratify the new constitution. In 1788, Hamilton wrote that:

> An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part.[10]

Persuaded by such logic, state conventions soon ratified the U.S. Constitution, the

second, the Commerce Clause, provided that Congress could regulate commerce with foreign nations and among the states.[12]

Although Congress used its new authority to enact commercial legislation, the Supreme Court effectively wielded the Constitution against state and local barriers to competition. In a crucial interpretation, the Supreme Court held that because the Commerce Clause affirmatively granted power to Congress to enact laws affecting interstate commerce, this Clause necessarily deprived the states of power to impede that commerce.[13] This aspect of the Commerce Clause has become known to generations of lawyers as the “dormant” or “negative” Commerce Clause.

Using the Supremacy and Commerce clauses, the Supreme Court invalidated state laws that unduly burdened interstate commerce, that overtly discriminated against out-of-state competitors, and that conflicted with Congress’s creating a national market. In a well-known twentieth century case, a city banned the sale of milk that was not pasteurized within five miles of town. The Court said the ban disadvantaged out-of-state suppliers and lacked any plausible health justification.[14]

In some respects, however, the E.U. made a more positive commitment to the creation of a common market. The Treaty of Rome prohibits its Member States from interfering with commerce among themselves,[17] whereas the Commerce Clause merely grants Congress the authority to regulate commerce among the states. Furthermore, Article 86 of the Treaty limits the powers of the Member States to enact measures adversely affecting competition and empowers the European Commission to remedy them.[18] Similarly, Article 87 of the Treaty lets the European Commission challenge and order the repayment of competition-distorting state aid.[19] I applaud the Commission for its campaign against government intervention in the economy. We are acting to use our own antitrust laws to emulate this success.

C. Combating Public Restraints through Competition Advocacy

Despite the progress in the E.U. and United States, both must continue to use all available tools to fight public restraints on competition. As long as governments have existed, interested businesses have asked them to harm their competitors. As discussed above, these efforts often succeed. Typically promulgated under the banner of consumer protection, many regulations artificially and needlessly reduce the number of competitors and limit the ability of existing companies to compete.

Through competition policy, U.S. and E.U. competition agencies can and should help limit the impact of such rent seeking. Much of this work will involve persuading other government bodies and their constituents to adopt policies that promote competition. Rent seeking may have greater chances of succeeding at more local levels, because the interests may be more concentrated and because the costs of capturing a local government are often less than the costs of capturing a national or international body. Moreover, state and local officials have fewer resources to review regulation for its competitive impact. In the United States, some states may have only a few officials responsible for competition issues, and in the E.U. some member states have only recently enacted competition laws.

1. Advocacy Addressing Professional Licensing

A prime example of successful rent seeking involves the regulated professions, in particular overly strict licensing rules. I read with great interest Commissioner Mario Monti's March announcement of the E.U.'s study on the liberal professions.[20] This comprehensive,

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[17] *Id*.

[18] *Id*. at Art. 86 (formerly Art. 90).

[19] *Id*. at Art. 87 (formerly Art. 92).

[20] *See* Mario Monti, Commissioner for Competition, European Commission, *Competition in*

empirical analysis provides an excellent resource for policymakers and can generate support for easing rules in a manner that protects consumers. On October 28, the Competition Directorate General of the European Commission will hold a conference on "Regulation of Professional Services" in the European Union.[21] We look forward to learning the results of that conference.

In the United States, we also have examined licensing's costs and benefits. When it effectively restricts the supply of qualified professionals, licensing tends to raise prices. Studies of licensing in dentistry, perhaps the most analyzed profession, find price increases from 4 to 15 percent.[22] In eye care, studies find price increases from 5 to 33 percent from a variety of advertising and commercial practice restrictions.[23] The studies also find an ambiguous effect on overall quality.[24] While licensing can and should lead to higher competence for those allowed to practice, the higher prices can lead to lower consumption, and qualified professionals can be excluded.

During the past few years, U.S. competition authorities have encouraged the states to adopt pro-competitive professional regulations. For example, we recently encouraged the Georgia bar to reject a proposal that would prevent nonlawyers from competing with lawyers to handle real estate closings.[25] We argued that the proposal could prevent competition from out-of-state and Internet lenders and force consumers and businesses to pay more.[26] We have made

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[21] *See* European Commission, Regulation of Professional Services (Oct. 28, 2003) (conference agenda) *available at* <http://europa.eu.int/comm/competition/liberalization/conference/conference_agenda.pdf>.

[22] Carolyn Cox & Susan Foster, *FTC Staff Report, The Costs and Benefits of Occupational Regulation* at 31 (Oct. 1990); Morris Kleiner & Robert Kudrle, *Does Regulation Affect Economic Outcomes?: The Case of Dentistry*, 43 J. L. & ECON. 547, 547-82 (Oct. 2000).

[23] Cox & Foster, *supra* note 22, at 31.

[24] *Id*. at 40-41.

[25] *See*

contact lenses have a Connecticut optician's license, given that such sellers merely mail out pre-packaged lenses pursuant to

consumers changed their cereal choices after manufacturers began advertising that fiber could reduce the risk of cancer.

many states joined in submitting an *amicus* brief in supporting the FTC's position in the *Ticor Title* state action case,[42] which we litigated to a successful conclusion before the Supreme Court.

Such cooperation increases the effectiveness of both the state and federal agencies. We can provide the states with the benefits of our expertise on competition policy, and give policymakers an unbiased perspective that focuses solely on consumer welfare. The state attorneys general, in turn, are well-positioned to understand and comment on regulatory proposals in their states. A state attorney general has greater knowledge of the state's policy goals, and the best ways in which the state can promote competition while meeting its other policy objectives.

We also have worked with other federal agencies to promote competition. For example, we have filed comments with the Environmental Protection Agency ("EPA") on boutique fuel regulations,[43] with the FDA on advertising regulations,[44] and with the Federal Energy Regulatory Commission ("FERC") regarding revisions to market-based rate tariffs and authorizations.[45] In connection with recent hearings on intellectual property jointly sponsored by the FTC and the Department of Justice ("DOJ"), we have sought to bring a competition perspective to the intellectual property rules formulated by the Patent and Trademark Office ("PTO").[46] In each case, we have encouraged our colleagues in other agencies to adopt rules that incorporate principles of competition.

Finally, we have also worked with our counterparts in other countries. The International Competition Network ("ICN"), launched here at Fordham two years ago, helps to promote competition in many different nations. Although the ICN's merger efforts have received much publicity, the ICN's second annual conference also discussed several constructive reports on competition advocacy. These reports focused on model advocacy provisions in member jurisdictions, advocacy efforts in specific sectors, and practical advocacy techniques. Such competition advocacy especially can help developing countries and those countries whose economies are in transition.

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[42] *Federal Trade Commission v. Ticor Title Insurance Co*, 504 U.S. 621 (1992).

[43] FTC Staff Comments to EPA on Unique Gasoline Fuel Blends ("Boutique Fuels"), Effects on Fuel Supply and Distribution (Jan. 30, 2002) available at <http://www.ftc.gov/be/ v020004.pdf>.

[44] FTC Staff Comments to FDA on Advertising and First Amendment Issues (Sept. 13, 2002) *available at* <http://www.ftc.gov/os/2002/09/fdatextversion.pdf>.

[45] FTC Staff Comments to the FERC on Terms and Conditions of Public Utility Market-Based Rate Authorization (Jan. 7, 2002) *available at* <http://www.ftc.gov/be/v020005.htm>.

[46] *See* FTC/DOJ Hearings on Competition and Intellectual Property Law and Policy in the

A few conclusions emerge from our history of trying to influence policy at the state, federal, and international level. Overall, policymakers largely have welcomed our efforts. Sometimes, they simply had not considered the regulation's impact on competition. We have made every effort, therefore, to inform others about the importance of competition principles.

We have been particularly effective in influencing policy when we offer empirical evidence regarding the impact on consumers. Not surprisingly, most advocates of restrictive regulation are rent seekers, who of course purport to represent consumers. Accordingly, when we enter the debate on a proposed regulation, we often can sway policymakers through actual evidence, and through our independence and expertise. For example, we have exhaustively studied gasoline markets and pricing, and have used these studies to support our efforts to persuade many state legislatures – including the legislatures of North Carolina,[47] Virginia,[48] New York,[49] and Wisconsin[50]

in our economy. Antitrust plays a major role in sh

a. Problems the Task Force Identified

The Report finds that the clear articulation standard has repeatedly been interpreted too broadly.[56] According to several appellate courts, once a state broadly authorizes certain acts or implements a general regulatory scheme for an industry, *any* anticompetitive effects flowing from the acts must have been foreseeable and are, therefore, a product of deliberate state policy. In other words, these courts equate a state's mere grant of general authority with a state's clear articulation of a policy to restrain competition. Thus, for some courts, the more general the state legislation, the more likely it is that the legislature intended to displace competition. That result stands the "clear articulation" test on its head.

Regarding "active supervision," the Report finds that neither the Supreme Court nor the lower courts have provided adequate guidance on how to identify entities that should be subject to active supervision, and what states should do to provide meaningful supervision.[57] In evaluating whether an

b. Clarifications the Task Force Recommended

To address these problems with the state action doctrine, the Task Force Report recommends clarifications to bring the doctrine more closely in line with its original objectives. These clarifications include:

- *Re-affirm a clear articulation standard tailored to its original purposes and goals*

of Columbia v. Omni Outdoor Advertising[65] that a state action defense "does not necessarily obtain when the State acts not in a regulatory capacity but as a commercial participant in a given market."[66]

- *Undertake a comprehensive effort to address emerging state action issues through the filing of amicus briefs in appellate litigation.* As demonstrated by past Commission involvement, the Commission can play an important role in helping to explain the value of competition policy to the federal courts.[67]

3. Recent FTC Cases Raising State Action Issues

The Commission is not a newcomer to the state action area. The competitive impact of state regulations has long been a focus of the Commission's antitrust enforcement agenda. Indeed, many of the leading state action cases, including *Ticor Title*, originated as Commission investigations. Continuing this tradition, the Commission's litigating staff, working closely with the Task Force, have recently filed several cases that involve the Task Force's recommendations.

a. *South Carolina Board of Dentistry*

One such case was recently filed against the South Carolina Board of Dentistry. Because this matter is currently in administrative litigation, I will limit my description to the allegations in the administrative complaint, which issued last month.[68] The complaint alleges that the Board – a creation of the St4tio

agreement.[83] The Kentucky case is currently before an administrative law judge. In that case, the Association has filed an answer raising a state action defense, asserting that the challenged conduct was undertaken pursuant to a clearly articulated policy of, and was actively supervised by, the Commonwealth of Kentucky.[84]

IV. Conclusion

If you ask the Americans in this audience to describe their field of specialization, they probably will say it is "antitrust law." Put the same question to our foreign guests, and many will say it is "competition law." Do the different words describe the same body of public policy? Does one label capture more accurately what public enforcement agencies actually do, or should be doing?

As time goes on, I have come to realize that "competition law" is the better characterization. In U.S. experience, "antitrust" is mostly associated with stopping private behavior that restrains trade. This connotation may be an inevitable consequence of the origins of the U.S. system, which Congress established in the late 19th and early 20th Centuries in response to perceived abuses by private firms.

each jurisdiction can improve its capacity to resist both types of distortions. With the wisdom to adopt the good ideas of others, we can achieve a policy synthesis that surpasses what we could accomplish in isolation. To this end, we look forward to continued collaboration with our colleagues in the competition community with great enthusiasm.