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Contribution

by

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The views expressed are those of the author and do not necessarily reflect the views
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Submission of U.S. Federal Trade Commission

The Secretariat's paper regarding the role of the judiciary in competition cases builds on the important work done by the Organization for Economic Cooperation Development¹ and the International Competition Network.² This submission draws on the experience of the Federal Trade Commission, in litigating cases before judges and in conducting numerous capacity-building programs for foreign judges who are new to competition law. This paper will discuss the challenges for judicial review in competition matters and identify those factors that are relevant in providing capacity-building for the judiciary.

I. The role of adjudication in competition cases

Effective independent review of an authority's enforcement decisions, competition and otherwise, is an essential element of a fair system that produces accurate and credible results.³ In competition cases, substantive judicial review of economically-based decisions helps ensure a result that will fulfill the purpose of competition law – *i.e.*, to promote consumer welfare and economic efficiency. The effective judicial review of competition matters requires ensuring that judges can meaningfully review economic evidence and assess economic analysis.

In jurisdictions where the competition authority functions as a prosecutor, judicial review occurs when an independent judiciary or specialized council or tribunal determines whether the law has been violated and, if so, what remedy or sanction should be imposed. In jurisdictions where the competition authority makes the initial decision, that decision is subject to independent review by the judiciary or specialized tribunal. The United States has a unique perspective, with one competition authority (the Antitrust Division of the Department of Justice) following the first model, and the other (the Federal Trade Commission) having the option of following either the first or the second.⁴ In addition, a private

¹ Organization of Economic Co-operation and Development, Policy Roundtables, *Judicial Enforcement of Competition Law*, 10 (1996). Available at: <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> (hereinafter OECD Judicial Roundtable); Organization of Economic Co-operation and Development, Policy Roundtables, *Presenting Complex Economic Theories to Judges* 8-9 (2008). Available at: <http://www.oecd.org/competition/abuse/41776770.pdf> (hereinafter OECD Economic Evidence Roundtable).

² International Competition Network, 12th ICN Annual Conference Special Project: Working with Courts and Judges (2013), <http://www.internationalcompetitionnetwork.org/uploads/library/doc926.pdf> (hereinafter ICN Special Project); International Competition Network, Competition Policy Implementation Working Group: Sub Group 3, *Competition and the Judiciary – A Report on a Survey on the Relationship between Competition Authorities and the Judiciary*, 2 (2006). Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf> (hereinafter ICN Survey).

³ ICN Survey, *supra* note 2, p. 2; OECD Judicial Roundtable, *supra* note 1, p. 10.

⁴ In some cases, the Commission decides cases administratively; the decisions are then subject to appellate review in federal court. In other cases, the FTC uses a hybrid procedure, whereby FTC staff litigating the case act as prosecutors in federal courts to seek preliminary injunctive relief before litigating within the FTC's administrative system, where the Commission makes the final decision on the merits. In still other cases, particularly where the

right of action exists in the United States that allows aggrieved private parties to seek treble damages in court, without necessarily involving the competition authorities. Increasingly, other jurisdictions are adopting private rights of action.⁵

a. The challenge of economic decision-making

Judges are typically well trained to determine whether past conduct violates the law. They routinely decide, for example, whether a driver ran through a red light, whether a contract was materially breached, what a testator intended by a will, or whether a defendant intended to murder. In certain types of competition cases, factual conduct determines whether a violation of competition law has occurred. For instance, judges can determine whether competitors reached an agreement to fix prices, divide markets, or rig bids for a public tender. In antitrust cases involving that type of conduct, referred to in the United States as “per se” illegal cases, the law presumes the conduct to have anticompetitive effects. Thus, there is no need for the plaintiff to provide economic evidence that the conduct at issue caused competitive harm.⁶

In most competition cases, however, the law requires an assessment of the economic effects of the challenged behavior. In the United States, judges in these so-called “rule of reason” cases must, in addition to determining that the conduct occurred, consider the conduct’s pro-competitive and anticompetitive effects. In some cases, such as unconsummated merger challenges, this is a predictive exercise, as the effects of the merger will not be known until after the merger takes place. Judge Diane Wood of the United States Court of Appeals for the Seventh Circuit discussed the challenge of deciding unconsummated merger cases at an OECD Roundtable several years ago:

The economic theories do not differ substantially, but their application does for the simple reason that most merger analysis is prospective in nature. An antitrust authority or a court can feel fairly confident in condemning an existing agreement that is provably anticompetitive, but the same authority or court may hesitate to prohibit a merger just because it might turn out badly.⁷

In non-merger cases, it is often necessary to consider how the effects of the conduct differ from what would have occurred otherwise in a “but-for” world. While the results of a dominant firm’s exclusive dealing policy, for example, may be relatively simple to observe, the conduct can be understood to be anticompetitive only with some understanding of what would have happened in the marketplace absent

legal standards are well-settled and only a court has the power to issue the appropriate remedy, the FTC may seek an ultimate decision from the court without using the administrative process.

⁵ See e.g., European Commission, Directive 2014/104/EU on Antitrust Damages Actions, OJ L 349, p. 1–19 (Dec. 5, 2014); Chinese Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, effective June 1, 2012; Canada Competition Act, RSC 1985, cC-34, section 36; Brazilian New Competition Act, Law No. 12.529/2011, article 47; South African Competition Act 89 of 1998, as amended, sections 51, 65.

⁶ In the United States, the Supreme Court established the applicability of the per se approach based on its assessment as to whether the presumption was justified by economic evidence.

⁷ OECD Judicial Roundtable, *supra* note 1, p. 68.

such a policy. Additional challenges arise if the adjudicator must take some action to restore competition, compensate those who were injured, or prevent future harm.

Apart from “per se” illegal conduct such as price fixing, of the conduct adjudicated in competition cases is not inherently harmful. Discounting is normally the kind of behavior that competition policy seeks to encourage, but when the economic effects are to prevent competition, it can constitute predatory pricing. Unilateral decisions about distribution of products, which can lead to claims of unilateral refusal to deal, tying, resale price maintenance, or price discrimination, are often at the heart of ordinary business decision-making. What differentiates legal from illegal conduct is the competitive effects of the conduct.

In these “rule of reason” cases, economic evidence is necessary to show that the challenged conduct is illegal.⁸ For example, to determine whether a transaction or conduct has anticompetitive effects, it is often necessary to define a relevant market, which may require consideration of quantitative evidence if such evidence is available. The hypothetical monopolist test is often used as a framework to do so. In applying the test, the question posed is whether a hypothetical monopolist would be able to impose a small but significant non-transitory increase in prices. Similarly, determining whether a merger is anticompetitive may require predicting whether it would produce efficiencies sufficient to offset the anticompetitive effects, *and* whether those efficiencies will likely be passed on to consumers. To determine whether a pricing practice is predatory, it is often necessary to predict whether the alleged predator could sustain a below-cost price long enough to drive competition out of the market, and then recoup the money it lost during the period of predation.

Questions of this sort present challenges to judges who have no previous experience in adjudicating such issues, or lack relevant guidance. Few other areas of law require this type of exacting review of economic principles, so caution must be used in adapting approaches from other areas of law.

b. Institutional implications

The nature and scope of judicial review have implications for the design of a system of competition laws.⁹ The appropriate institutional design will depend on a number of factors, such as the nature of the legal system, the sophistication of the judicial system, and traditions of governance.

In the United States, an early and fundamental question regarding the competition laws was whether to entrust their enforcement to the general judiciary or to an expert body. When the Sherman Antitrust Act was passed in 1890, the power to decide liability was given to the general federal judiciary, with the Department of Justice serving as a prosecutor. A quarter century later, Congress considered whether to create an independent expert body to enforce the law. This debate ultimately resulted in a political

⁸ See ICN Special Project, *supra* note 2, p. 9 (Economic evidence is especially useful where the likely effects of undertakings’ behavior is essential to the decision).

⁹ See generally, David A. Hyman and William E. Kovacic, Institutional Design, Agency Life Cycle, and the Goals of Competition Law, 81 Fordham L. Rev. 2163 (2013). Available at: <http://ir.lawnet.fordham.edu/flr/vol81/iss5/3>.

compromise, which led to the establishment of a second enforcement agency.¹⁰ The Department of Justice retained the authority to enforce the Sherman Act before the general federal courts, while a new administrative agency, 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.¹¹ 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. 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.

An effective enforcement regime must define the scope of judicial review of a competition authority's decision. There is generally a different standard of review for factual and legal determinations. In the United States, a federal judge's factual findings will be upheld if they are not clearly erroneous. Generally, factual findings by the court are upheld unless they are unsupported by substantial evidence, lack adequate evidentiary support in the record, or are against the clear weight of the evidence. A judge's interpretation of the law is given less deference. An appellate court reviews de novo the lower court's articulation of the legal standard and its application of the legal standard to the facts. If the appellate court finds that the lower court applied the incorrect legal standard, it will reverse and remand the matter, typically with instructions, so that the lower court may apply the correct standard. By contrast, administrative agencies are given deference in their interpretation of the statutes they enforce, and their findings of fact are upheld when they are supported by substantial evidence on the record as a whole. 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.

The ultimate burden of proof in all cases, regardless of where they are brought, rests with the FTC and DOJ, as it does with the plaintiffs in private cases. To sustain a civil case, the court must determine that the authority, or the plaintiff in a private case, has proved its case by a preponderance of the evidence, meaning that it must be shown to be more likely than not that the law was violated.¹² In cases where economic effects are in doubt, the burden of proof creates an important protection against the possibility that competitively neutral conduct will be found unlawful.

c. Approaches to judicial examination of economic evidence

The need for judicial review of competition cases to account for economic issues would not seem to be controversial, but can nevertheless prove challenging. Most judges are not trained economists and are not necessarily equipped by training to directly assess economic evidence or evaluate the credibility of expert economists. Economic principles cannot always be converted into "black letter" or "per se"

¹⁰ 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>

¹¹ The courts quickly ruled that any conduct that violated the Sherman Act was an unfair method of competition, giving the FTC authority the same substantive civil authority as the Justice Department.

¹² Criminal cases must be proved beyond a reasonable doubt.

liability rules. 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 meaningfully review competition cases.

i. Developing the capacity to assess economic evidence

Equipping the judiciary with the ability to assess economic evidence requires giving judges the tools to apply analysis in competition cases. The United States relies on an adversarial system in which each party may offer 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 gives judges a basis by which to assess competing expert opinions.¹³ Even without formal economic training, a judge can still demand a logical, common-sense explanation as to why a particular economic theory is likely to accurately predict the economic effects of the conduct. The judge also can hear and consider explanations from other experts. As noted by the ICN, in some jurisdictions, standards have been established that are designed to exclude irrelevant or unreliable expert testimony. The ICN cited the United States example, where courts consider whether the expert's knowledge will be helpful for the court, whether the expert's testimony is based on sufficient facts or data and is the product of widely accepted principles and methods, and whether these have been reliably applied to the facts of the case.¹⁴ While advanced economic training may not be necessary, a basic understanding of economic principles can help a judge question the factual assumptions that underlie the competitive analysis and can aid judicial decision-making.

The United States, like many countries, has also developed a rich body of jurisprudence on the proper application of economic principles on which generalist judges can draw. Given that the principles of economics operate are the same in all jurisdictions, judges can look to sister jurisdictions to understand how other judges have applied those principles.¹⁵ This body of jurisprudence is supplemented with numerous compilations of relevant precedent in publications and periodicals compiled by bar and academic institutions.¹⁶

¹³ OECD Judicial Roundtable, *supra* note 1, p. 8-9.

¹⁴ ICN Special Project, *supra* note 2, p. 10. The test is drawn from one established by the United States Supreme Court in the case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). See also 2008 US Submission, *supra* note 1 (“[T]he economic analysis should articulate a relevant model of competitive interaction and explain what assumptions drive the model and why they are reasonable in the context of the case.”).

¹⁵ For example, the Regional Competition Center for Latin America has created a database of judicial decisions from throughout the Western Hemisphere and made it available to judges in the region. *Available at*: base de datos de resoluciones en materia de competencia, <http://base.crcal.org/>.

¹⁶ See e.g., ABA, Antitrust Section, *Antitrust Law Developments* (Jonathan I. Glecklen; Thomas P. Brown ed., 7th ed., ABA 2011); Herbert Hovenkamp & Philip E. Areeda, *Antitrust Law* (4th ed. 2016); Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (Oxford University Press, 3d ed. 2014).

Judicial training programs are increasingly available in fields such as economics and the law and are becoming an important component of international competition technical assistance programs¹⁷ and local continuing education programs. For example, Judge Wood noted that in the United States:

a variety of sources offer economics training to federal judges who want it, both at periodic courses and through printed materials and videocassettes. Thus, if a federal district judge found his first antitrust case too daunting, help is available through the Federal Judicial Center, through the American Bar Association's Sections on Antitrust Law and Judicial Administration, and through other organizations serving the courts.¹⁸

ii. Economic effects-based analysis supplants form-based analysis

The current approach to enforcing competition law focuses on the economic effects of conduct or a merger. This approach evolved with advances in economic theory. In the days before the importance of economic analysis and the tools necessary to apply it were well understood, U.S. antitrust jurisprudence relied more on *per se* rules of liability that did not require exacting proof of anticompetitive effects. This approach assumed that the economic effects of the conduct could generally be predicted from its form. For many years, for example, resale price maintenance was prohibited in the United States, and evidence of the economic effects of the conduct was given little, if any, weight. Ultimately, after economic learning and evidence established that such conduct could be competitively neutral or possibly beneficial under certain circumstances, the Supreme Court concluded that resale price maintenance did not necessarily result in anticompetitive effects and that an assessment of the individual facts, including proffer of anticompetitive effects, was required before determining whether the conduct at issue was legal.¹⁹ Similarly, the use of *per se* or form-based prohibitions has also been curtailed in the United States for most types of tying arrangements,²⁰ predatory pricing,²¹ and exclusive dealing.²²

Today, the United States actively applies form-based prohibitions only to price fixing, bid rigging, and market division agreements, for which there is a broad economic consensus that injury to competition almost always results. For all other types of conduct, anticompetitive effects must be proven. As noted by Judge Wood, "If the practice does not fall within the *per se* rule, a much more sophisticated, economically based analysis is required."²³

iii. Judicial review of substance as well as process

¹⁷ See *infra* part 2.

¹⁸ OECD Judicial Roundtable, *supra* note 1, p. 69.

¹⁹ *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance). *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (minimum resale price maintenance).

²⁰ *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

²¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

²² *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977).

²³ OECD Judicial Roundtable, *supra* note 1, p. 62.

It seems inadvisable to limit the role of the judiciary to matters of process and procedure, while leaving economic review to the expertise of the competition authority. In the United States and many other jurisdictions, courts have the authority to review substantive decisions, including economic analysis, as well as procedural rulings.²⁴ Limiting judicial review to procedural matters, which is the case in some jurisdictions, may result in incorrect decisions by the authorities on substantive issues automatically becoming final and unreviewable. While expert competition authorities may have the capacity to conduct competition analysis, reasonable minds may differ on the assessment of potential competitive effects. An authority may make mistakes or rely on assumptions that lack a factual basis. Experts may differ about the best analytical model to employ. Even simple errors of mathematics can occur. The fact that in numerous jurisdictions with extensive experience applying competition law – including the United States – courts have overturned the decisions of competition authorities on substantive grounds establishes that reasonable minds can differ on the proper application of competition law.²⁵

II. Towards effective judicial capacity building

The United States antitrust agencies have cooperated in conducting numerous judicial education programs as part of their capacity-building efforts. They offer a few observations about what helps make them effective.²⁶

First, these programs are more effective and well-received when the impetus comes from within the judiciary. Outsiders may provide support and resources, but those resources are likely to be wasted unless a champion for building the capacity for sound competition law enforcement emerges within the judiciary. Any program that is developed should be carried out in close consultation with those champions.

Second, in many cases judges prefer learning from their judicial peers. While competition authorities, practitioners, and academics may have great expertise, judges often welcome programs led by fellow judges. The programs conducted by the U.S. antitrust authorities in jurisdictions such as China, Mexico,

²⁴ See e.g., *FTC v. Penn State Hershey Medical Center* (3d Cir. 2016). *Available at:* <http://www2.ca3.uscourts.gov/opinarch/162365p.pdf>

²⁵ See e.g. *Case T-342/99, AirTours v. Commission*, 2002 E.C.R. II-2585; *Case T-5/02, Tetra Laval v. Commission*, 2002 ECR II-4381, *aff'd in part*, *Case C-12/03P*, 2005 O.J. (C 82); *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *United States v. Oracle*, 331 F.Supp.2d 1098 (N.D. Cal. 2004); *Amparo En Revision 2589/96, Quejosa: Grupo Warner Lambert Mexico, S.A. DE C.V., Pleno de la Supreme Corte de Justicia de la Nación, Semanario Judicial de la Federación y su Gaceta, XIX, Abril de 2004 (Mex.)*; *Tervita v. Commissioner of Competition*, [2015] 1 SCR 161, SUPREME CT. OF CAN. (Dec. 3, 2012). Citation of these cases does not suggest that these cases were rightly or wrongly decided; they are cited only for the proposition that judicial review of cases on the merits can lead to substantive results different from those reached by an expert agency.

²⁶ See e.g., *FTC Office of International Affairs FY2014 Technical Assistance Report 11. Available at:* <https://www.ftc.gov/system/files/documents/reports/ftc-office-international-affairs-technical-assistance-report-fy2014/fy2014oiatarpt.pdf>. See also the *International Competition Networks, Findings Related to Technical Assistance for Newer Competition Agencies. Available at:* <http://www.internationalcompetitionnetwork.org/uploads/library/doc366.pdf>, (Many of the ICN's findings are applicable to technical assistance for the judiciary).

Central America, Russia, and the Caribbean have all been conducted in partnership with distinguished U.S. judges who have been willing to share their experiences with their counterparts abroad.

Third, in jurisdictions with established national judicial training institutions, capacity building is best carried out in partnership with those institutions. Judges are used to relying on those institutions, and programs presented in cooperation with them are more likely to be accepted by the judges and to fit into their schedules.

Fourth, any judicial training must take into account the relevant legislation, jurisprudence, and legal traditions of the relevant jurisdiction. Because economic principles do not differ from one jurisdiction to another, case examples from other jurisdictions can be useful to illustrate economic concepts and analyses. However, reliance on legal principles, formulations, and doctrines that are not common across jurisdictions is unlikely to be welcome. A U.S. presenter, for example, can talk with confidence about the SSNIP test, market definition, and conditions that make collusion more likely and expect to be understood. However, references to legal issues that arise from the speaker's home jurisdiction, such as the "state action doctrine," "Noerr-Pennington," and the Hart-Scott-Rodino Act are more likely to result in puzzled stares. A keen understanding of the difference between civil and common law and the binding nature, or lack thereof, of prior judicial precedents is also critical.

III. Conclusion

The experience of the United States Federal Trade Commission has been that a judiciary that is capable of effectively reviewing economic evidence strengthens the ability of a competition law enforcement system to fulfill the significant economic purposes of the law.