

**Competition Policy Research Center, Fair Trade Commission of Japan  
Inaugural Symposium**

***How Should Competition Policy Transform Itself?  
Designing the New Competition Policy  
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**Competition Policy and Regulatory Reform: Means and Ends**

**I. Introduction**

I would like to thank the JFTC and the Economic and Social Research Institute for inviting me to speak to you today. It is always a pleasure to discuss competition policy and regulatory reform, and I am especially honored to address your Inaugural Symposium on Competition Policy. The symposium's title asks "How Should Competition Policy Transform Itself." By bringing together competition officials from around the globe, you have made an excellent start in answering that question. I applaud Chairman Takeshima and President Kosai for organizing this symposium. Let me add our customary disclaimer, which is that the views expressed here are my own, and do not necessarily reflect those of the Commission or any individual Commissioner.

History has taught us that economic growth and consumer welfare depend on robust competitive markets, and that well-informed competition policy is essential to having robust markets. In the United States, we learned this the hard way. During the 1960s and 70s, in my view, American competition policy often had the unintended effects of reducing competition, discouraging new entrants, and protecting producers, not consumers. Those policies contributed to a decade of "stagflation," in which the economy suffered from low growth (stagnation) and high inflation. Innovation and entrepreneurship stagnated. Consumers suffered. American companies became inefficient and unresponsive, and foreign competitors, including, of course, many Japanese firms, gained market share. Global competition eventually forced American companies to improve their performance and helped force American policymakers to undertake comprehensive regulatory reform. Competition authorities refocused competition policy to protect the competitive process, not particular competitors, and consumers, not producers. They extended efforts to attack public restraints on competition, such as barriers to entry and price controls, as well as private restraints on competition, such as cartels and bid rigging. They used an array of tools, including research, litigation, and public advocacy, to encourage policymakers to adopt pro-competitive policies. As we'll see, this refocused competition policy helped revive the American economy.

In many respects, Japan's recent history reminds me of the U.S. in the 1970s. Japan has suffered from a decade of slow economic growth. A number of leading Japanese policymakers, from President Kosai to Chairman Takeshima, have courageously noted that regulations here too

often have protected producers and discouraged competition, such as during the so-called “Dark Age of the Antimonopoly Act.” As in the U.S., however, Japanese officials are wisely using competition policy to initiate comprehensive regulatory reform. Prime Minister Koizumi is exactly right to say “No growth without structural reform.” Structural reform is a prerequisite to sustained economic growth and effective competition policy is essential for genuine structural reform. Japan already has had some success. Since President Bush and Prime Minister Koizumi established the U.S.-Japan Regulatory Reform and Competition Policy Initiative three years ago,<sup>1</sup> the Japanese government has focused on deregulation and structural reform. The JFTC has become an agency under the Cabinet Office. The Special Zones initiative is starting to show great promise. Under Chairman Takeshima’s excellent leadership, the JFTC is seeking to expand enforcement of the Antimonopoly Act and promote pro-competitive policies with other ministries. As a lifelong baseball fan, I would say that Chairman Takeshima is the Hideki Matsui of regulatory reform.

Based on successes in the U.S., Japan, and also Europe, we now know many of the elements that constitute an effective competition policy. First, competition policy should focus on enhancing competition and consumer welfare, not protecting producers from competition. This focus necessitates targeting both private conduct as well as public policies that interfere with competition. Second, competition authorities should use an array of tools to encourage competition, including litigation, advocacy, and research. By using these tools, competition agencies can help to create a culture of competition in which policymakers, courts, and even the public come to understand and support competition policy as a means of protecting consumers and promoting economic growth.

## **II. Ends of Competition Policy**

### **A. Consumer Welfare**

Let me start by discussing the appropriate ends or goals of competition policy. In the past, in both the U.S. and Japan, competition policy has focused on a variety of goals, such as protecting domestic producers from foreign competition and protecting small competitors from more efficient large competitors. Over the past 20 years, however, policymakers have come to agree that the *single* unifying goal of competition policy should be to enhance consumer welfare, and that the best way to enhance consumer welfare is through competition. This consensus rests on sound economics, both empirical and theoretical, finding that competition achieves the optimum mix of products and services in terms of price, quality, and consumer choice.

Robust competition also advances economic growth. Competition forces producers to become more efficient and responsive to the marketplace. By enabling the spread of knowledge through the economy, competitive markets enable the efficient use of dispersed knowledge.<sup>2</sup> As

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<sup>1</sup> A discussion of this initiative is available at <<http://www.ustr.gov/regions/japan/reform.shtml>>.

<sup>2</sup> F. A. Hayek, *The Use of Knowledge in Society*, 45 American Econ. Rev. 519-30 (Sept. 1945).

Joseph Schumpeter famously observed, competition is a process of “creative destruction.”<sup>3</sup> Competition overturns the established order, but also provides the means and incentives for progress.<sup>4</sup> Protecting producers from the rigors of competition may help them in the short run, but in the long run, protection ultimately leads to those producers’ stagnation and decline.

## **B. Targeting Both Private and Public Restraints**

For these reasons, competition policy should play an essential role in regulatory reform. Competition policy is more than enforcement – it’s an organizing principle for our economy. Competition policy helps to shape our markets, our institutions, and often our very attitudes toward business and government. In this sense, competition policy is a form of regulation that competes with other regulatory structures, many of which are hostile to free markets. Competition agencies must represent the interests of dispersed consumers, who benefit from competition, against concentrated economic interests that can apply pressure to limit competition.

A successful competition policy must target threats to competition from two fronts. One front involves purely private efforts to undermine competition, such as price-fixing and bid rigging. The other, often more subtle, front involves private efforts to convince governments to suppress competition – in other words, rent seeking. As long as governments have existed, interested businesses have asked government officials to give them an advantage over their competitors.<sup>5</sup> These efforts have often succeeded. Typically promulgated under the banner of consumer protection, or the “public or national interest,” many regulations artificially reduce the number of competitors and limit the ability of existing companies to compete. Public restraints often can harm consumers for far longer than private restraints. Cartels inevitably fall apart over time, but anticompetitive laws can last indefinitely. Public restraints can be open and notorious and are far easier to enforce. While private cartelists may cheat on their agreements, public cartels may be enforced through the government.

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. It is a

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<sup>3</sup> Joseph A. Schumpeter, *CAPITALISM, SOCIALISM AND DEMOCRACY* 82-85 (Harper, 1975) (orig. pub. 1942).

<sup>4</sup> F. A. Hayek, *Competition as a Discovery Procedure*, in *The Essence of Hayek* 254 (Chiaki Nishiyama and Kurt R. Leube eds., 1984).

<sup>5</sup> See generally Mancur Olson, *THE RISE AND DECLINE OF NATIONS* 75-117 (1982).

hollow victory to break a price-fixing cartel if its members successfully lobby for a government-granted authority to set prices collectively.

### **III. Means of Competition Policy**

This brings me to the question of how best to promote competition policy. Law enforcement and litigation are, of course, important tools. We have also found, however, that competition advocacy can play as useful a role as litigation in promoting competition. By encouraging policymakers to adopt pro-competitive rules in the first instance, competition agencies can promote competition in entire sectors of the economy, especially when governments are making major policy changes. Through advocacy, research, and litigation, competition agencies can spread the gospel of competition to the widest possible audience.

#### **A. Advocacy**

Of these three tools, competition advocacy in particular can help advance the cause of comprehensive regulatory reform.<sup>6</sup> By competition advocacy, I mean promoting pro-competitive laws and regulations with legislatures, local officials, regulators of particular economic sectors, and other policymakers. Advocacy can include studies, reports, testimony, informal discussions, and speeches. In Japan, for example, the Council for Regulatory Reform has been a strong and vocal advocate for comprehensive regulatory reform.

Competition authorities are uniquely well-positioned to represent the competitive process itself. Although every consumer benefits from robust competition, each benefits only a little. Thus, they have little incentive to advocate competition as a virtue in itself. By contrast, every producer is ready to explain why he or his industry should be exempt from competition. Given these dynamics, competition agencies have a responsibility to articulate the value of competition as a value in and of itself.

In the U.S., our competition agencies typically provide comments to other government entities if those entities specifically invite us to comment on something specific, such as a proposed bill or regulation, or if they invite comments from the general public. We also generally push for greater competition informally with other government entities and in various public forums. For instance, currently we are contacting state attorneys general to discuss competition in the professions. In the recent past, we have worked with many federal agencies to persuade them to adopt pro-competitive rules. While their tasks are undeniably important, in these settings we must remind them that competition and consumer choice are the economy's baseline principles, and that they should remember these values in pursuing their mission.

Competition advocacy can also help to educate the public about the benefits of competition. Competition ultimately cannot flourish if the public is convinced that sound

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<sup>6</sup> A list of recent advocacy comments is available on the FTC's website at <<http://www.ftc.gov/be/advofile.htm>>.

economic policy involves protecting producers. Public support for bad policy translates into bad policy. In Japan, it appears that some people still believe in the old system of government support and protection. Genuine structural reform likely cannot occur until and unless the public comes to understand that competition alone can improve the Japanese economy. Competition should be as popular as Morning Musume.

## 1. Transportation

In the United States, we repeatedly have seen the benefits of successful competition advocacy. Return to the year 1974. The U.S. economy was suffering from stagflation, the pernicious double whammy of stagnating growth coupled with high inflation. In the fall of that year, the Chairman of the Federal Trade Commission, Lewis Engman, gave a speech to financial analysts in which he tied the country's macroeconomic problems to its competition policy. In particular, Engman argued that burdensome federal transportation regulations contributed to the problem of slow growth. Engman explained that the Civil Aeronautics Board raised prices by limiting the entry of new carriers and controlling the distribution of airline routes. He noted that the Interstate Commerce Commission effectively sanctioned price fixing among trucking companies. Engman then concluded that the country's lack of sound competition policy led to higher transportation costs, which in turn hurt the overall U.S. economy.

Engman's speech may be considered one of the first contemporary examples of successful competition advocacy. Because his speech presented competition policy as a means of addressing the country's pressing economic problems, the speech received substantial coverage in the popular press. The New York Times covered the speech on its front page. Engman's speech also helped to convince companies that they would have the chance to benefit from deregulation. Deregulation was not a zero-sum game.<sup>7</sup> Transportation companies would have the opportunity to expand the market, not just their market share, and downstream companies would have the chance to benefit from lower prices.

The speech caused new interest in deregulating transportation. During the next decade, the Commission aggressively pursued competition advocacy to deregulate airlines, railroads, trucking, and inter-city buses. This advocacy used speeches and formal written submissions to regulatory agencies and legislators. Scholars estimate that transportation deregulation improved consumer welfare by tens of billions of dollars annually.<sup>8</sup> Although we cannot quantify the

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<sup>7</sup> See generally Todd Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 Tulane L. Rev. 845, 910-17 (1999).

<sup>8</sup> See generally Robert Crandall & Jerry Ellig, *ECONOMIC DEREGULATION AND CUSTOMER CHOICE: LESSONS FOR THE ELECTRIC INDUSTRY* (1997); Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 Yale J. On Reg. 233 (1991); Steven A. Morrison & Clifford Winston, *Enhancing the Performance of the Deregulated Air Transportation System*, in *Brookings Papers on Economic Activity: Microeconomics* 61 (Martin Neil Baily & Clifford Winston eds., 1989) (airline deregulation benefits equal \$19.4 billion per year); C.C. Barnekov & A.N. Kleit, *The Efficiency Effects of Railroad Deregulation in the United States*, 17 Int'l J. Transport Econ. 21 (1990) (railroad deregulation benefits equal \$9.7 to \$16.2 billion per year); John

impact of competition advocacy, I believe it's fair to say that the Commission's advocacy, later joined by the Antitrust Division of the Department of Justice, helped create a policy climate in the 1970s and early 1980s that favored liberalizing transport regulation.

## **2. Telecommunications**

A large part of competition advocacy involves convincing other policymakers, sometimes including the courts, of the benefits of competition. This happened in our telecommunications industry. In 1982, the Justice Department and AT&T entered into a consent decree that separated AT&T from its local phone companies. In addition to breaking up AT&T, the consent decree prevented the local phone companies from manufacturing telephone equipment or providing long-distance or information services.

Over the next few years, the federal court overseeing the consent decree repeatedly rejected the local companies' requests to provide these services. The Justice Department decided to reexamine them in a comprehensive manner. It hired Peter Huber, an engineer and lawyer, to analyze the competitive framework of the telecommunications industry. In a massive report titled *The Geodesic Network*, Huber argued that there was no economic or technological reason for any element of the network to remain a monopoly.

The Justice Department used Huber's report to argue that the court needed to take a more flexible approach to the waiver requests. Over the short term, the court did take a more flexible approach, such as allowing the local companies to provide voice mail. Over the long term, Huber's report helped pave the way for significant policy changes in the telecom sector, including the Telecommunications Act of 1996. While specific provisions of this Act are often criticized, the 1996 Act represents an important watershed: for the first time, the United States government stated unequivocally that competition is possible and desirable in all segments of the telecommunications industry.

The results have been profound. Consumers can buy products that were hard to imagine even a decade ago, such as ever-shrinking cell phones. Between 1988 and 1998, long distance telephone traffic more than doubled. Between 1996 and 2001, competitive local carriers invested over \$50 billion and their revenues increased from \$3 billion to about \$10 billion.<sup>9</sup> I believe it is fair to say that much of the growth flows from effective competition advocacy.

## **3. Regulated Professions**

As this example suggests, competition advocacy best succeeds when there is supporting

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Richard Felton, *The Costs and Benefits of Motor Truck Regulation*, 18 Q. Rev. Econ. & Bus. 7, 15-17 (1978) (trucking deregulation benefits equal about \$10 billion per year).

<sup>9</sup> Jon Huntsman, Deputy U.S. Trade Representative, "Putting Sacred Cows to Pasture in the Year of the Horse: Structural and Regulatory Reform as a Prerequisite for Growth," (speech delivered in Tokyo on Jan. 24, 2002).

empirical research. For example, we have exhaustively studied gasoline markets and pricing, and these studies have helped us convince many state legislatures to defeat price-control bills. Another active area, both in the U.S. and Europe, are the regulated professions. Regulatory bodies and practitioners continually attempt to restrict advertising, proscribe relationships with commercial firms, and expand the list of services that only professionals can provide.

Under the leadership of Commissioner Monti, the European Union recently completed a study of several professions, including architects and engineers. The study evaluated competitive restrictions across various Member States. This comprehensive, empirical analysis provides an excellent resource for policymakers and can generate support for easing overly stringent rules.<sup>10</sup>

In the US, we have also examined licensing's costs and benefits. We have found that licensing restricts the supply of professional and thereby tends to raise prices. In the dentistry field, studies find that licensing increases prices from 4 to 15 percent.<sup>11</sup> Another study found that state restrictions on the use of dental hygienists and assistants cost consumers about \$700 million in fees.<sup>12</sup> In eye care, studies find price increases from 5 to 33 percent from a variety of advertising and commercial practice restrictions.<sup>13</sup> On the other hand, the studies find an ambiguous effect on overall quality.<sup>14</sup> While licensing typically leads to higher competence for those allowed to practice, the higher prices can lead to lower consumption.

During the past few years, U.S. competition authorities have encouraged the states to adopt pro-competitive professional regulations. For example, we worked with Connecticut's attorney general in commenting before the state opticians board, which was considering whether to require stand-alone sellers of contact lens to obtain state optician licenses.<sup>15</sup> We recently encouraged three states to reject proposals that would prevent nonlawyers from competing with

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<sup>10</sup> See Mario Monti, Commissioner for Competition, European Commission, *Competition in Professional Services: New Light and New Challenges*, Prepared Remarks for Bundesanwaltskammer, Berlin, Germany (Mar. 21, 2003) available at <[http://europa.eu.int/comm/competition/speeches/text/sp2003\\_007\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2003_007_en.pdf)>.

<sup>11</sup> See Carolyn Cox & Susan Foster, FTC Staff Report, *The Costs and Benefits of Occupational Regulation* at 31 (Oct. 1990) (hereinafter "Cox and Foster"); Morris Kleiner and Robert Kudrle, *Does Regulation Affect Economic Outcomes?: The Case of Dentistry*, *The Journal of Law and Economics* (Oct. 2000), at 547-82.

<sup>12</sup> J. Nellie Liang and Jonathan D. Ogur, *Restrictions on Dental Auxiliaries*, Bureau of Economics Staff Report to the Federal Trade Commission (May 1987), at 2.

<sup>13</sup> Cox and Foster at 31.

<sup>14</sup> *Id.* at 40-41

<sup>15</sup> See Comments of the Staff of the Federal Trade Commission, Intervenor, before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <<http://www.ftc.gov/be/v020007.htm>>.

lawyers to handle real estate closings.<sup>16</sup> We argued that the proposals could prevent competition from out-of-state and Internet lenders and force consumers to pay more.

In each instance, our comments had more persuasive force because we were able to point to objective, empirical economic evidence supporting the benefits of competition. Oftentimes, the state officials had not fully considered the competitive impact of the policy proposals. When we enter the debate on a proposed regulation, we often can sway policymakers through actual evidence, and through our independence and expertise. Our professional licensing studies gave us the credibility to comment on state proposals affecting numerous professions.

For these reasons, we are pleased to see that Japan has sought to increase competition for legal services by amending the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers. These measures would substantially eliminate limits on the freedom of association between foreign lawyers and Japanese lawyers. Consumers of legal services, including many Japanese businesses, would benefit from increased competition.

#### **4. Advertising Restrictions**

Many competition issues, including licensing, involve an overlap between competition policy and consumer protection concerns, such as protecting consumers against fraud or misrepresentations. In these instances, competition agencies can help policymakers find the appropriate balance between protecting consumers and promoting competition. Advertising is a prime example. Certain advertising regulations, of course, help consumers. Governments should prohibit false or deceptive advertising. The Diet recently revised the Act Against Unjustifiable Premiums and Misleading Representations, which rightly requires companies to have rational evidence to support their advertising claims.

Many advertising restrictions, however, stop truthful advertising of price and quality, including comparative ads and ads that trumpet past success. Some governments reduce the flow of information in other ways. For example, some states prohibit lawyers from ads that are “undignified,” because such ads allegedly undermine respect for the legal profession. The evidence shows that truthful advertising provides valuable information and encourages firms to compete. Professional advertising leads to lower prices without lowering quality, while

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<sup>16</sup> FTC/DOJ Letter to the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003) *available at* <<http://www.ftc.gov/be/v030007.htm>>; FTC/DOJ Letter to the President of the North Carolina State Bar re: Proposed North Carolina State Bar Opinions Concerning Non-Attorneys’ Involvement in Real Estate Transactions (July 11, 2002) *available at* <<http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf>>; FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) *available at* <<http://www.ftc.gov/be/v020006.htm>>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Proposed Restrictions on Competition From Non-Attorneys in Real Estate Closing Activities (Mar. 28, 2003) *available at* <<http://www.ftc.gov/be/v020013.htm>>; FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) *available at* <<http://www.ftc.gov/be/v020013.pdf>>.

advertising restrictions tend to raise prices without raising quality. Advertising also facilitates the entry of new competitors by letting potential clients know that they have additional choices.<sup>17</sup>

## 5. Relation to Sectoral Regulators

One question that arises is the relationship between agencies that regulate competition, such as the FTC, and agencies that regulated particular sectors of the economy, such as the FCC, FDA, or Department of Transportation. Who should be responsible for primary regulatory oversight of a given industry?

There is no single correct answer to the proper division of responsibilities. Sectoral regulators have greater expertise in a given area, but competition agencies may have a better appreciation of the social and economic benefits of competition. Sectoral regulators may lack a background in competition policy and may view industry, rather than the consumer and the competitive process, as their client. Even if they want to promote competition, sectoral regulators may be subject to intense pressure from the industries that they oversee and from the legislators that oversee them, a problem of regulatory capture. Sectoral regulators may also be inclined, by disposition and training, toward the status quo, which is predictable and maintains their human capital.

Moreover, almost every economic sector can plausibly claim that it is somehow “different” and should be exempt from the competitive process. Based on their experience and breadth of interest, competition authorities may distinguish legitimate from illegitimate claims for preferential treatment. Sectoral regulation may be appropriate in certain, limited applications, but as FTC Chairman Muris has noted, sectoral regulation often has harmed consumers by imposing needless controls on entry, pricing, and new product development.<sup>18</sup>

In the U.S., we have found that several techniques help us maintain an appropriate balance with our sectoral colleagues. We often initiate discussions informally rather than publicly. This allows sectoral regulators to discuss policy issues with us freely, rather than defensively. Oftentimes, we submit public comments at the request of the sectoral regulators. U.S. legislation often includes clauses requiring that sectoral regulators consult the competition agencies as they develop new regulations. Finally, and as I will discuss next, we have been most

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<sup>17</sup> See Pauline M. Ippolito & Alan D. Mathios, *FTC Staff Report, Health Claims in Advertising and Labeling: A Study of the Cereal Market* (1989); Timothy J. Muris, Chairman, Federal Trade Commission, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, Prepared Remarks for the Aspen Summit, Cyberspace and the American Dream, the Progress and Freedom Foundation, Aspen, CO at 9-10 (Aug. 19, 2003) available at <<http://www.ftc.gov/speeches/muris/030819aspen.htm>>.

<sup>18</sup> See, e.g., Timothy J. Muris, Chairman, FTC, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, Remarks before the Milton Handler Annual Antitrust Review, New York, NY, December 10, 2002, available at <<http://www.ftc.gov/speeches/muris/handler.htm>>; Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, in II Handbook of Industrial Organization 1449, 1479-82 (Richard Schmalensee & Robert D. Willig, eds. 1989) (describing U.S. experience with regulation of airlines and trucking).

effective in persuading sectoral regulators when we have actual empirical evidence regarding the particular industry.

## **B. Research**

A successful competition agency must commit itself to thorough conceptual and empirical analysis. I applaud Chairman Takeshima for creating the Competition Policy Research Center and for integrating economic analysis into enforcement efforts. Empirical analysis gives an agency more credibility with the public, the courts, and policymakers. Oftentimes the agency's empirical knowledge provides the only sound basis for the agency to inject its views into a particular policy debate. In that debate, empirical evidence will help to trump the arguments of those who seek to limit competition for their own self-interest.

Empirical work also benefits the agency itself. Thorough empirical work will prevent competition agencies from committing resources to ill-conceived theories that may have superficial appeal. In the last century, U.S. competition agencies often based their actions on assumptions and theories that sounded plausible but lacked empirical support. At various times, competition officials severely overestimated the prevalence of predatory pricing, ignored merger efficiencies, and adopted some theories, such as the theory of the "shared monopoly," that lacked a sound economic basis. Rigorous empirical work keeps a competition agency focused on those private practices and public policies that have the greatest impact on consumers.

In the past few years, the FTC has completed several research projects designed to influence the policy debate. We have studied pharmaceutical drugs, intellectual property, and energy markets, among many other issues. One recent project involves e-commerce. The Internet lets consumers purchase an unprecedented array of goods from the convenience of their homes. Moreover, perhaps for the first time, consumers can also purchase a wide array of services from distant sources, including legal and medical advice and even an education. In many instances, these consumers may find lower prices and a greater variety online.

Many states, however, have adopted regulations that may unduly interfere with consumers' ability to buy goods and services online. In some instances, the regulations are an appropriate response to new regulatory challenges, such as online fraud perpetrated by distant vendors. In other instances, they may be an ill-advised and mechanical application of existing regulations. Still others arise from the efforts of traditional companies to protect themselves from this new form of competition. According to some researchers, these regulations also may cost consumers several billion dollars annually.<sup>19</sup>

Japan, of course, faces similar barriers to e-commerce. In our Annual Recommendations to the Government of Japan under the Competition Policy Initiative, we called for Japan to remove barriers in existing laws and regulations that hinder e-commerce, such as requirements

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<sup>19</sup> See Robert D. Atkinson, *The Revenge of the Disintermediated: How the Middleman Is Fighting E-Commerce and Hurting Consumers* at 7 (Jan. 2001) available at <<http://www.ppionline.org/documents/disintermediated.pdf>>.

for face-to-face or paper-based transactions. As in the U.S., these types of barriers harm consumers and hamstring competitors.

In October 2002, the FTC held a workshop to study these issues. Over three days, Commission staff heard testimony on possible anticompetitive barriers to e-commerce in many different industries, including cars, contact lenses, legal services, and even funeral caskets. For each industry, we gathered evidence from many different perspectives, including online companies, bricks-and-mortar businesses, consumer groups, academics, and state officials.<sup>20</sup>

For many of these industries, however, we found that there was little empirical evidence available to policymakers. Policymakers were enacting regulations in a near vacuum. We decided that, as a competition agency, we could best promote competition by conducting empirical research. Our staff economists studied a local market to evaluate the effects of restrictive state laws on the wine market, a product that was fairly easy to study. The study concluded that consumers find substantially lower prices and greater choices over the Internet. We canvassed the states that allow Internet sales of wine and found that most reported few or no problems with online sales to underage drinkers, which had been the strongest argument against Internet sales.<sup>21</sup>

Partially because we were the first to provide empirical evidence, our report garnered enormous attention from both the press and policymakers. Our leading newspapers, including the Washington Post and New York Times, published stories about our findings. Television networks covered debates that focused on the report. As far as policymakers, several states asked us to submit copies of our report to them as they considered changes to their laws, and Congress itself held a hearing devoted to our report. As a result, we believe that our report will help to persuade policymakers of the benefits of Internet competition in wine and other industries.

### **C. Litigation**

When persuasion fails, our third tool to promote competition is enforcement. Our counterparts in Japan have done a particularly good job in this area. I commend Chairman Takeshima for seeking to increase enforcement of the Antitrust Monopoly Act. By all accounts, Chairman Takeshima is helping to establish the JFTC as an institution that demands the attention and respect of Japanese corporations. I applaud your success.

In the U.S., as in Japan, competition agencies typically bring enforcement actions against private parties engaged in private anticompetitive conduct. Under Chairman Muris, we are also

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<sup>20</sup> See Agenda for FTC Workshop, available at <<http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>>.

<sup>21</sup> See FTC Staff, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), available at <<http://www.ftc.gov/os/2003/07/winereport2.pdf>>.

using litigation to advance the cause of regulatory reform. We have brought law enforcement actions against quasi-governmental entities that try to suppress competition. We have filed *amicus curiae* briefs – friend of the court briefs – in private lawsuits to persuade courts to write decisions that uphold the letter and spirit of our competition laws. Through litigation, we hope to remedy specific instances of anticompetitive conduct, but also to create legal precedent that will expand the scope of competition law and confine exemptions and immunities to their proper scope. Our efforts track the efforts of our Japanese counterparts, who have sought to minimize cartel exemptions and other exemptions from the purview of the Antimonopoly Act.

## 1. State Action

Currently, we are exploring antitrust review of state and local regulation. In a 1943 decision, our Supreme Court held that states have immunity from the antitrust laws when they exercise their sovereign power.<sup>22</sup> State legislatures have the authority to displace competition and consumer choice, but if they do, they must “clearly articulate” the policy and “actively supervise” the policy's implementation to ensure that the policy conforms with the legislature’s stated goals. These rules are known as the state action doctrine. There are some similarities with the European Court of Justice’s decision last year in *Arduino*, which clarified that Member States can regulate a profession if they retain decision-making powers and establish sufficient control.<sup>23</sup>

In the U.S., unfortunately, some courts have failed to impose the safeguards of the state action doctrine. Some courts insulate conduct from antitrust without carefully examining the state legislature’s intent. Other courts grant broad immunity to quasi-official entities that have only a tenuous link to the state, such as professional licensing boards dominated by members of the profession. The American Bar Association concluded that the state action doctrine, along with other antitrust exemptions, created a large hole in U.S. competition policy.<sup>24</sup>

As a result, we re-examined the state action doctrine to promote competition more effectively. In a lengthy report analyzing the doctrine and case law, we identified several recommendations to moor the clear articulation and active supervision requirements to their original intent.<sup>25</sup> Many of these recommendations would require state and local governments to consider the full competitive impact of any regulations, and to closely monitor any quasi-governmental entities that sought to limit competition. Based on our analysis, we have brought

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<sup>22</sup> *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>23</sup> See *Arduino*, Case C-35/99, Judgment of the Court of First Instance, 19 Feb. 2002, available at [http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999J0035](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61999J0035).

<sup>24</sup> American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2001*, A Report of the Task Force on the Federal Antitrust Agencies – 2001.

<sup>25</sup> Report of the State Action Task Force (Sept. 23, 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

several enforcement actions to force states to comply with the competition laws.

**a. South Carolina Board of Dentistry**

For example, we recently files an administrative complaint against the South Carolina Board of Dentistry. The South Carolina legislature created the Board to supervise the practice of dentistry and dental hygiene. According to the complaint, the Board unlawfully restrained competition by issuing an “emergency” regulation that had the effect of unreasonably restricting the ability of dental hygienists to deliver preventive services, including cleanings and fluoride treatments, to children in South Carolina schools. This had the effect of denying dental services to thousands of school-age, mainly poor children. Not surprisingly, most of the Board’s members are dentists.<sup>26</sup>

**b. Household Goods Movers Cases**

We have also challenged the public analog of bid rigging – joint rate setting of prices. In the state of Indiana, an association of 70 household goods movers prepares and files tariffs on behalf of its members with a state agency. We alleged that the association established collective rates for its members, and we ultimately entered into a consent order with it. The order prohibits the association from knowingly preparing or filing collective rate tariffs, facilitating communications between members concerning rates, or suggesting that members file or adhere to any rate. Our consent order also identified several elements that the FTC would consider in determining whether the state was satisfying the state action doctrine’s active supervision requirement.<sup>27</sup> With this and similar consent orders, we encouraged the states to take specific steps to ensure that they did not facilitate anticompetitive conduct.

**2. Noerr-Pennington**

We are also re-examining another antitrust immunity. The *Noerr-Pennington* doctrine immunizes individuals petitioning the government, whether through lobbying, administrative processes, or litigation. As originally conceived, this doctrine sensibly reserved a narrow sphere of political activity from antitrust. In the *Noerr* case, for example, a group of railroads conducted a public relations campaign to advance anti-trucking legislation. The Supreme Court properly found this type of petitioning immune from antitrust.<sup>28</sup>

Some courts, however, have immunized abusive tactics, such as repetitive lawsuits and

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<sup>26</sup> See *South Carolina State Board of Dentistry*, Docket No. 9311 (Sept. 12, 2003) (complaint), available at <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>.

<sup>27</sup> See *Indiana Household Movers and Warehousemen, Inc.*, Docket No. C-4077, at ¶ II. (Apr. 25, 2003) (consent order) available at <http://www.ftc.gov/os/2003/04/ihmwdo.htm>.

<sup>28</sup> See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

misrepresentations, that were clearly intended to delay a competitor's entry or raise its costs, rather than legitimate efforts to petition the government. We have challenged this conduct in the pharmaceutical industry when branded drug manufacturers have used the drug approval process to delay competition from generic drug manufacturers. For example, branded manufacturers have brought meritless patent infringement lawsuits and have deceived the Patent and Trademark Office to obtain unwarranted patent protection. This conduct can cost consumers hundreds of millions of dollars. We have filed complaints, and agreed to several consent orders, that prohibited the offending companies from abusing governmental processes.<sup>29</sup>

### **3. Amicus Briefs**

Finally, we will also promote competition policy by participating as *amicus curiae* in private litigation. Through amicus briefs, we can advise courts of our views on competition law without becoming a party to the litigation. Amicus briefs help the cause of regulatory reform because courts often decide important issues of competition law in lawsuits between private parties, such as whether a specific entity is entitled to immunity from the antitrust laws. Moreover, amicus briefs consume fewer resources than bringing an enforcement action, and we can limit our involvement to the appellate level, which helps to shape the law for the future.

Along with the Department of Justice, we have filed several amicus briefs in cases that implicated regulatory reform. For example, we filed a brief in an Oklahoma case where the court was considering whether the state had the constitutional authority to ban Internet sales of caskets.<sup>30</sup> In another case, a branded drug manufacturer argued that it was entitled to immunity from the antitrust laws, even though it had misrepresented important facts to the Food and Drug Administration. We filed an amicus brief arguing that the court should refuse to immunize such conduct, and the court agreed.<sup>31</sup> In both cases, our amicus briefs promoted regulatory reform.

## **IV. Conclusion**

I began this speech by describing the role that competition policy has played in recent history. Although the struggle continues, competition advocates have won many victories over the last few decades. We have largely won the intellectual debate: Economists and legal scholars around the globe now recognize the benefits of competition to consumers and the economy. We are winning the legal debate: Courts now recognize the importance of efficiency and robust price competition in evaluating mergers and business conduct. Lastly, and perhaps most critically, we are starting to win the policy debate: From airlines to telecommunications,

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<sup>29</sup> See Timothy J. Muris, Prepared Statement of the FTC Before the United States Senate Committee on Judiciary (June 17, 2003), available at <<http://www.ftc.gov/os/2003/06/030617pharmtestimony.htm>>.

<sup>30</sup> Memorandum of Law of *Amicus Curiae* Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. Sept. 5, 2002), available at <<http://www.ftc.gov/os/2002/09/okamicus.pdf>>.

<sup>31</sup> See *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

industry after industry has been privatized or liberalized. By using a mix of advocacy, research, and litigation, a competition agency can find the right tool for the job. Legislators often turn to competition policy, rather than to more burdensome forms of regulation, to create a free marketplace. In most cases, the public now recognizes that competition is the path to growth and prosperity.

I am extremely pleased to see that competition advocates are also starting to win the policy debate here. Prime Minister Koizumi has wisely committed himself and his government to structural reform. Under Chairman Takeshima, the JFTC is seeking to increase enforcement of the Antimonopoly Act. We applaud these efforts and hope that the JFTC will play an even larger role in the deregulation process going forward. As we all recognize, greater competition will benefit our economies, our consumers, and our countries, regardless of which side of the Pacific they happen to lie.