

# Dominance, duopoly and oligopoly: the United States and the development of global competition policy

By **William Kovacic**, commissioner, US Federal Trade Commission and professor on leave from George Washington University Law School



**J**ULY this year marked the 120th anniversary of the adoption of the Sherman Act and the establishment of a national competition policy system in the United States. Seen from an international perspective, the enforcement of competition laws since this formative event has featured three distinct historical phases: monopoly, duopoly, and the beginnings of an oligopoly.

The first phase was an era of uncontested American dominance. From 1890 through most of the 20th century, antitrust was overwhelmingly an American endeavour. Even at the Sherman Act's centennial in 1990, relatively few nations had competition laws, and fewer still applied them. The gravitational pull of US doctrine, theory and enforcement methods ordered the competition policy universe.

In the past 20 years, US dominance has dissolved. The adoption and application of the European Union merger regulation created an EU/US duopoly. At first, the US was the more significant duopolist. Today, measured by influence in shaping the design and content of competition policy globally, the EU is the world's most influential system.

A further major transformation is under way, spurred by extraordinary decentralisation and diversification. Today, some 112 jurisdictions have competition laws, and a dozen more are likely to

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form systems in the next five years. These changes are converting the EU/US duopoly into a policy-making oligopoly, and a loose oligopoly at that. A growing number of newer systems, such as Brazil, China and India, are gaining the ability to set global standards by their own treatment of dominant firm conduct, mergers and other business behaviour. Beyond individual initiative, some countries also are building competition policy institutions atop regional platforms, such as ASEAN (the Association of Southeast Asian Nations). These collective ventures eventually could become formidable enforcement mechanisms no less important than the leading single-country systems.

As many dominant companies can attest, new entry can be hard to take. So it seems to be with competition policy. Some Americans who entered the field of competition law during the era of US dominance express dismay about the broad decentralisation of influence and call for steps to re-establish the uncontested preeminence that the US

Federal Trade Commission (FTC) and US Department of Justice's antitrust division (DoJ) enjoyed in the past. This lament sometimes suggests that the natural order of things is a world where the ideas that set global norms originate at the DoJ or the FTC.

It is a remarkable conceit to expect the modern competition policy world to orbit the United States. The notion that formative ideas about institutional arrangements and substantive competition policy would arise in many jurisdictions should neither be surprising nor distressing. To build new competition systems or renovate older regimes, many countries have assembled exceptional talent. The combination of superb analytical skills and practical experience often yields useful insights into the design of institutions and substantive rules. By engaging more, rather than fewer, nations in this pursuit, the antitrust community can accelerate the discovery of superior substantive concepts and implementation techniques.

To focus on the restoration of past dominance deflects attention away from a question that is a worthy subject of attention within the US competition policy community. Amid decentralisation and diversification of decision-making power, how can the United States best influence the global acceptance of wise substantive standards and procedures? The growing importance of cross-border trade has

underscored the interdependence of national regulatory systems. Because single jurisdictions by their own actions can create standards for international commerce, the US competition agencies – and their many foreign counterparts – have a great stake in the global identification and acceptance of superior norms.

How best to promote the attainment of such norms, and the improvement of standards with advances based on theory and experience, when persuasion is the chief means of influence and a discussion worth having?

### The elements of competition systems

The paths of possible influence on global standards are a function of how competition systems are constructed. A competition system can be likened to a suite of computer software with two elements. The first is an operating system of implementing institutions, such as enforcement agencies and courts. The second is a set of applications, which encompass analytical methodologies (such as guidelines that convey an agency's approach to reviewing mergers or other forms of business conduct), techniques for gathering information relevant to law enforcement (including leniency programmes), and methods for managing an agency's operations (such as the placement and role of economists in agency decision making).

The most prevalent operating system among the world's competition agencies is an EU design. The EU competition system architecture is rooted in the institutions of the civil law. Paramount among these is the implementation of the law by an expert public administrative body whose enforcement decisions are subject to review in the courts. Unlike the US Sherman Act, which dedicates to the courts the elaboration of the statute's terse, general commands,

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the competition articles of the European Treaty contain more fully specified prohibitions and do not engage the courts in so central a role in interpretation. Most nations have civil law systems, and the EU framework is naturally more compatible with their legal regimes than the US model – save for the FTC, which has some characteristics of a civil law administrative design. This circumstance, coupled with the aspirations of many nations to gain membership in or a strong affiliation with the European Union, means that the dominance of the EU influence in this aspect of system design promises to be enduring.

The US framework, which relies so extensively on litigation in the courts – neither the DoJ nor the FTC can block a proposed merger without an injunction issued by a federal district court – is destined to be a secondary force in shaping the basic operating system institutions of competition law abroad, yet it has some notable influence. Two of the central issues facing regimes founded upon civil administrative enforcement are whether to:

- establish or expand private rights of action; and
- subject violators to criminal sanctions.

The establishment of private rights or criminal punishment requires major adjustments to the civil law operating system. Private rights, for example, divest the public administrative authority of complete control over the selection and prosecution of cases. Criminalisation also alters the enforcement architecture by engaging a second public body – an executive branch prosecutor – to commence criminal proceedings to challenge infringements identified by the administrative agency.

The United States has much to say about the benefits and costs of enforcing the law with private rights and of treating antitrust violations as crimes. For example, its experience with both forms of enforcement can highlight important links between the method of enforcement (administrative civil case, private civil case or public criminal case), the quality of evidence needed to establish culpability and the manner in which courts are likely to interpret substantive liability standards. The DoJ can explain how the modern development of its criminal enforcement programme was an evolutionary process, which featured incremental enhancements of information-gathering methods, a progressive increase in sanctions, and a programme of prosecution that gradually built acceptance, among academics, judges and practitioners, for a norm-favouring criminal prosecution for horizontal price fixing. By drawing upon its experience to inform discussions abroad about private rights and criminal sanctions, the

US competition agencies can exert significant influence over these major modifications of the EU-based civil law operating system.

The more powerful path to influence involves what can be called the applications of competition policy. There are many actual and potential sources of high-quality competition policy applications. Merger control illustrates the point. Many jurisdictions have issued merger guidelines, with the most recent notable additions coming this

year in the form of horizontal guidelines issued by the United Kingdom and the United States. A second example is leniency, which substantially reduces the punishments for cartel insiders who are the first to reveal the existence of their illegal collaboration. The modern, high-powered version of leniency originated in the United States

in the first half of the 1990s, and the DoJ has issued a series of upgrades, such as 'amnesty plus', in the subsequent years. In the field of management and operations, the DoJ's and FTC's approach to locating economists in a distinct organisational unit and allowing economists to make an independent recommendation on individual cases to agency leadership has become an increasingly common element of competition systems worldwide.

There is a global open-source quality to these and other antitrust applications. Individual jurisdictions, including those with relatively new antitrust laws or with small populations, often adopt variations of models conceived in the older competition policy systems. Adaptations, in turn, become available for consideration by the larger international community. To an ever-greater degree, individual agencies share drafts of proposed guidelines with foreign counterparts, participate in international discussions of possible future refinements and embody ideas created in other jurisdictions in their own practice. It is the rare competition policy application today that does not reflect significant borrowing from the growing pool of international learning and experience.

Good applications can confer powerful global influence upon their authors. Global merger policy strongly reflects the vocabulary and analytical concepts of the US merger guidelines introduced in 1982 and refined in 1984, 1992, and 1997. Learn phrases such as "SSNIP test" and "hypothetical monopolist" and you can speak merger law in nearly every part of the competition policy world. The establishment of mandatory premerger reporting in the United States in the 1970s provided the template for notification systems employed in dozens of countries today. As mentioned above, the US experience with leniency from the 1990s onward has inspired many countries to establish amnesty programmes of their own.

These processes of emulation took place by choice, not by compulsion. No multinational treaty, regional pact, or bilateral agreement compelled any nation to create replicas of the merger guidelines, premerger notification mechanisms, or leniency programmes first tested by the US competition agencies. What made these experiments attractive to other countries, and what does the experience with adoption tell us about the ingredients of success for new applications? The answer is a combination of compelling conceptual design and demonstrated success in implementation. The US innovations in merger guidelines, premerger notification, and leniency gained broad acceptance because they embodied well-conceived advances in procedure or in substantive analysis, and because the US agencies demonstrated that these approaches could

yield good results in practice. Potential adopters had the opportunity to see the US deploy and refine these applications and accumulate a substantial body of experience in implementation. The guidelines that eventually command attention and emulation are rugged in theory and well tested in practice.

The market for competition policy applications is competitive, and the sources of high-quality applications – with respect to substantive standards, procedures, and management methods – increase each year. Three major attributes determine the attractiveness of an application product to potential adopters. One is the quality of the application’s intellectual vision: does it reflect state-of-the-art thinking in economics and law about the subject it addresses? The EU guidelines on non-horizontal mergers have gained considerable influence because of their currency (issued in 2007) and their careful effort to synthesise modern perspectives on vertical and horizontal transactions. By contrast, the last US guidelines on non-horizontal mergers, which bear a 1984 issuance date, are obsolete and ignored in international circles – and within the United States as well. Similarly, the EU guidance paper on the European Commission’s enforcement intentions with respect to article 102 of the European Treaty is a recent and significant influence on global discourse about dominant firm conduct.

A second important attribute is testing in practice: what does actual experience in implementation say about the soundness of the application? An agency’s implementation experience before the issuance of guidelines helps establish the credibility of the new instrument, for it gives a sense of confidence to observers that the agency knows what it is talking about. An agency that approaches new guidelines with extensive experience is more likely than an inexperienced agency to understand the compromises associated with different drafting challenges, for example, the trade-offs between clarity and accuracy. Experience in implementation following the issuance of guidelines gives potential adopters assurance that the concepts contained in the instrument operate well in practice.

A third attribute is the policy equivalent of what might be called post-sale services. A set of substantive guidelines provides a useful framework, but no guidelines can supply a complete exposition of a contemplated enforcement approach. The perfectly specified enforcement guidelines are no more attainable than the perfectly specified contract; drafting such an instrument would yield an immense document, which, for all of its apparent comprehensiveness, would still fail to address all possible situations. To be successful, guidelines often require a deliberate process of explanation and popularisation. Through speeches, round tables, frequently asked questions and other devices, the agency must clarify specific concepts and describe how operative principles are being applied in practice. The relevant audience includes not only the community of academics, practitioners and business managers inside the agency’s own jurisdiction, but a parallel international audience as well.

A useful example of the later proposition is the recently revised DoJ/FTC horizontal merger guidelines. The preparation of such a document entailed considerable effort, including various public consultations, the release of a public discussion drafts and extensive negotiations between the two US federal agencies. These steps, while impressive, only begin the difficult work of implementation.

The ultimate success of the document will require arduous efforts by agency officials to discuss its meaning and to provide – inter alia, through speeches, closing statements in individual mergers, notices to aid public comment in settlements – interpretations of the instrument. Only through a sustained process of discussion and disclosure can the new US guidelines gain broad international adoption.

### Competition policy R&D

The capacity to develop successful applications is a function of an agency’s investment in competition policy research and development. This consists of activities that build a base of knowledge that enables the agency to prepare and implement superior approaches to solving problems of substance or procedure. These include research projects – such as sectoral studies – that examine specific commercial phenomena, public consultations that seek to educate the agency on particular topics, and the evaluation of the effects of past agency initiatives. The last dimension – evaluation – is a particularly strong source of ideas for older agencies with extensive experience. A large body of experience is not especially useful unless it is linked to current policy developments. A routine process of evaluation assists in deriving lessons that can be applied to new circumstances.

A competition agency may find that its effectiveness in performing research and development functions will improve if it can form partnerships with what Allan Fels (former chair of Australia’s Competition and Consumer Commission) has called co-producers within the jurisdiction. These are institutions, such as universities and think tanks, which can perform research tasks that improve the agency’s base of knowledge. A major potential source of advantage for the DoJ and FTC in building a knowledge base is the strength of US graduate education programmes in business, economics, law and public administration. No other jurisdiction can match the overall quality of this resource. Programmes such as the FTC’s partnership with the graduate programmes at Northwestern University provide a conduit for two-way exchanges of information about matters relevant to competition law and consumer-protection policy.

With the establishment of larger numbers of highly capable competition policy systems around the world, comparative study will provide an increasingly valuable source of knowledge about the design of new substantive approaches and procedures. A major motivation for the FTC’s self-study in 2008, published as *The FTC at 100: Into Our Second Century*, was the awareness that jurisdictions

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outside the United States were achieving major advances in analytical concepts, operational procedures and management methods. The FTC held hearings in numerous countries and consulted over 30 competition agencies in this benchmarking exercise.

The agency that builds a superior base of knowledge places itself in a position to develop policy applications that will influence other institutions globally. Agencies that aspire to shape international norms will make conscious efforts to perform policy R&D that identifies superior practices and enables the agency to exercise

intellectual leadership. The persuasiveness of its policy guidance is directly tied to the quality of its ideas, and the ideas that shape global norms ordinarily are the result of deliberate programmes to improve the state of the art.

#### **International cooperation**

Extensive participation in international affairs is a vital determinant of a nation's ability to influence the development of global competition policy norms.

This encompasses investments in building relationships through bilateral, regional and multilateral arrangements. For the US agencies, these initiatives serve three major purposes: learning about the institutions and operations of other systems, providing information about developments in American policy – including the introduction of new competition law applications – supplying post-sale services about new applications, providing technical assistance and participating in processes that facilitate convergence upon superior norms.

During his chairmanship of the FTC, Timothy Muris described a three-stage process through which convergence of global norms might take place: decentralised experimentation, a collective identification of superior techniques through networks such as OECD, ICN and UNCTAD, and voluntary opting in by individual jurisdictions. Supplementing this process would be efforts to achieve interoperability across dissimilar systems. In this framework, the testing of new ideas continues to take place within countries or within

regions, and international networks provide a means for promoting convergence upon the best results of the experimentation process.

To operate successfully, this model of convergence requires significant investments in the international networks that increase understanding of individual systems, permit the identification of superior practices and stimulate opting in by individual jurisdictions. The requisite investment must come at all three tiers of a competition agency: top leadership, intermediate management and case handlers.

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The same level of commitment is necessary for the success of bilateral relationships and regional friendships. In large measure, the development of effective international links in all of these settings is the formation of strong personal relationships among agencies.

To make the requisite investments of resources to international matters amid conditions of increasing budget austerity requires greater efforts by the US agencies and their foreign counterparts to formulate strategies that maximise the impact of an agency's activities globally. This begins with an inventory of existing activity and consideration of which future outlays – bilateral contracts, engagement in regional networks, participation in larger multinational organisations – will yield the best returns.