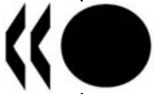
Unclassified **DAF/COMP/GF/WD(2005)36**



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **10-Feb-2005**

English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2005)36
Unclassified

Global Forum on Competition

THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from the United States

-- Session II --

This contribution is submitted by the United States under Session II of the Global Forum on Competition to be held on 17 and 18 February 2005.

English text only

JT00178358

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

RELATIONS BETWEEN ANTITRUST AND REGULATORY AUTHORITIES[1]
SUBMISSION OF THE UNITED STATES

1. Introduction

1. In the United States, the various industry-specific regulatory agencies, such as the Federal Communications Commission (FCC), and the non-industry specific federal antitrust authorities, the Antitrust Division of the Department of Justice ("Justice Department") and the Federal Trade Commission (FTC), were created at different times with different authorizing statutes. Generally, regulatory programs were established with objectives beyond just protecting competition, such as universal access and media ownership diversity. In contrast, in modern times the U.S. antitrust agencies have focused solely on competition with an emphasis on consumer welfare, although the authors of some of the antitrust laws also had populist or business-protection goals in mind. However, the movement toward deregulation of many industry sectors over the past several decades has led the regulatory agencies increasingly to emphasize competition analysis and respect for free market forces. This shift has changed the dynamic between the industry-specific regulators and the antitrust agencies.

2. In general, U.S. federal law addresses the competitive effects of business conduct in one of three ways. First, in a few limited instances, conduct is statutorily exempt from the antitrust laws. An example is the "business of insurance," which is exempt under the McCarran-Ferguson Act, but which is regulated to various degrees by the states.[2] In such cases, the regulated company is expressly exempt or immune from the federal antitrust laws.[3] Antitrust immunity may also be implied when there is a "clear repugnancy between the antitrust laws and the regulatory system."[4] A discussion of express and/or implied antitrust immunities is outside the scope of this paper.[5]

3. Second, certain types of conduct are evaluated only under the antitrust laws with respect to their possible effect on competition. For example, an industry-specific regulator may have jurisdiction to set prices, but not have jurisdiction to criminally prosecute price fixing.

4. Third, there are categories of conduct over which the antitrust agencies and the industry- specific regulator have concurrent or shared jurisdiction, most frequently in the area of merger enforcement but also in some non-merger situations. Congress has decided whether to grant an industry regulator exclusive jurisdiction over competition matters within an industry or to establish concurrent jurisdiction between the industry regulator and the antitrust agencies on a sector-by-sector basis. This paper will focus on relations between the antitrust agencies and industry-specific regulators in the banking, electricity and telecommunications industries.

2. Antitrust Framework

5. There are three major federal[6] antitrust laws: the Sherman Antitrust Act,[7] the Clayton Act,[8] and the Federal Trade Commission Act.[9] The Sherman Act, enacted in 1890, prohibits all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign commerce, and prohibits monopolization of or attempts to monopolize any part of interstate or certain foreign commerce. A Sherman Act violation may be subject to both civil and criminal penalties; however, only the Justice Department is empowered to bring criminal prosecutions. The Clayton Act is a civil statute, enacted in 1914 and substantially amended in 1950. The Clayton Act, *inter alia*, prohibits all mergers and acquisitions that are likely to substantially lessen competition in any relevant line of commerce. Under the Clayton Act, all transactions above a certain financial threshold must be notified to both the Justice Department and the FTC. The Federal Trade Commission Act, which created the FTC, also was enacted in

1914. The FTC Act is a civil statute enforced only by the FTC that prohibits unfair methods of competition affecting interstate commerce.

6. Although the Sherman Act took effect in 1890, it was not until 1903 that the United States Congress first appropriated funds for antitrust enforcement and authorized the appointment of an assistant within the Department of Justice to advise the Attorney General on antitrust matters.[10] Congress established the FTC in 1914. Both the Justice Department and the FTC have jurisdiction to investigate and bring cases under the Sherman and Clayton Acts. The Clayton and FTC Acts limit the FTC=s jurisdiction over certain industries (e.g., telecommunications common carriers, banking, aviation).

3. Relations Concerning Mergers

3.1 Banking

7. There are four industry-specific regulators with authority to approve or deny bank and bank holding company mergers: the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.[11] In 1963, the Supreme Court upheld the Justice Department=s authority to challenge a banking merger under the antitrust laws.[12] Prior to that, it was believed that the antitrust laws largely did not cover bank mergers.[13] To resolve industry and Congressional concern over potential harm to the safety and soundness of the banking system from inconsistent outcomes, the Bank Merger Act and the Bank Holding Company Act were amended in 1966 to include a provision for concurrent independent review of competitive effects by the Justice Department and the bank regulatory agency.

8. Under the Bank Merger Act of 1966, the regulator must request and the Justice Department must provide to the relevant banking agency a competitive factors advisory report that the agency *must* consider in its decision.[14] The Act prohibits the relevant banking agency from approving any transaction that "would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States,"[15] or "whose effect in any section of the country may be substantially to lessen competition," unless the anticompetitive effects of the proposed transaction are clearly outweighed by the public interest.[16] The regulatory agency must notify Justice Department of its approval of a proposed transaction.[17] Absent exigent circumstances (e.g., imminent failure of one of the banks or bank holding companies), the companies may not consummate the merger for thirty days following approval by the regulatory authority, to give Justice Department an opportunity to review and, if appropriate, challenge the merger.[18] The regulatory authority may, with Justice Department's concurrence, reduce the post-approval waiting period to 15 days, but this period must last at least 15 calendar days after the date of regulatory approval.[19]

9. To ensure that the regulatory agencies and the Justice Department apply similar standards, in1994 the Justice Department, the Federal Reserve Board, and the Office of the Comptroller of the Currency jointly published the "Bank Merger Competitive Review," which outlines the bank merger antitrust review process. As highlighted in this joint statement, the bank regulatory agencies and the Justice Department in practice do not necessarily use the same product market definition and, as a result, may disagree on the geographic market definition. For example, in the merger of BayBanks and Bank of Boston Corp., the Federal Reserve Board, using their "cluster of banking services" product market, would have cleared the transaction without any divestiture in the Boston market.[20] The Justice Department, however, required a divestiture in the Boston market after its investigation determined possible anticompetitive effects for small and lower middle market business banking services.[21]

10. As in other industries, the requirement that the bank regulatory agencies apply some of the same antitrust standards as the Justice Department has not hindered the banking agencies= efforts to carry out

the other facets of their regulatory policy. Competition analysis is only one of several criteria that the banking regulators must consider in their approval process, and the regulator can override competitive concerns if the public=s "convenience and needs" so warrant.[22] Indeed, in cases where Justice Department has ultimately sued following agency approval, the relevant agency has intervened in the case on behalf of the bank to defend the agency=s approval in court.[23]

3. 2Electricity

11. Electric utilities in the United States are regulated by both the states and the Federal Energy Regulatory Commission (FERC), a successor to the Federal Power Commission. The FPC was created by the Federal Power Act of 1920 and became an independent commission in 1930.[24] In its declaration of policy explaining the need to regulate electric utility companies, the Act states "that the business of selling electric energy for ultimate distribution to the public is affected with a public interest."[25] Historically, the FERC has focused on wholesale electricity sales and associated transmission services. Under the Act, the rates that the FERC establishes for wholesale electricity sales and transmission must be "just and reasonable."[26] The states, on the other hand, traditionally have focused on retail electricity rates and transmission. States also retain control over the sitting of generation and transmission lines within their borders.

12. In 1992 Congress enacted the Energy Policy Act which facilitated competition in the wholesaling of electricity by increasing the FERC=s authority to order third parties access to transmission lines even if the utility was not involved in a merger.[27] Both the FTC and the Justice Department filed extensive comments on how this objective could be best achieved, although the FERC did not accept all of the agencies' proposals. In the case of vertical unbundling, the FERC later accepted the agencies' proposals to move from behavioural rules to a structural approach (independent regional transmission organizations).

13. In addition to advising on competition-related rules and regulations, the antitrust agencies share jurisdiction with the FERC over electric utility mergers involving assists subject to its jurisdiction. Historically, Justice Department has taken responsibility for reviewing mergers between electric utilities, in part because of provisions in the Nuclear Regulatory Commission statute that specifies that Justice Department is to conduct an analysis of mergers involving nuclear power plants. Consistent with the objectives of the Federal Power Act, the FERC is charged with ensuring that a merger is in the public interest.[28] This "public interest" standard differs from the standard the Justice Department and the FTC apply in reviewing mergers pursuant to Clayton Act §7, which prohibits mergers that are likely to substantially lessen competition in any relevant market.[29] Another key difference between the agencies= reviews is that applicants in a FERC proceeding bear the burden of proving that their transaction is consistent with the public interest whereas to block a merger, the Justice Department must prove to a federal court, and the FTC must prove to an administrative law judge or to a court in an injunctive proceeding, that a transaction is likely to substantially lessen competition. These differing standards and burdens could, but rarely do, lead to situations where the antitrust agencies take no action regarding a particular merger, but the FERC conditions clearance of it on compliance with certain remedies.[30] Concurrent jurisdiction with different standards can, in some instances, provide important benefits. For example, FERC's merger notification thresholds are substantially lower than the antitrust agencies' thresholds. FERC may be able to identify significant, but localized, competitive problems in a transaction that was not reportable to the antitrust agencies and address the problems before approving the merger.

14. In 1996, in furtherance of the federal government=s deregulatory approach to wholesale electricity markets, the FERC adopted the Open Access Rule. This rule requires each public utility that owns, operates or controls interstate transmission facilities to file an open access transmission tariff. Thereafter, the FERC issued a new merger policy statement[31] that declared competitive effects to be one of three key inquiries under the FERC=s public interest analysis. Consequently, the competitive effects of

mergers are now analyzed by the FERC under its own standard. The FERC formally adopted the *Justice Department/FTC Horizontal Merger Guidelines* prior to its revised merger standard, but the FERC's merger standard departs from the Guidelines in potentially significant ways. In addition, the information sources used by the FERC to analyze proposed mergers are substantially different than those of the antitrust agencies. Hence there is potential for a FERC merger evaluation to yield different results than an antitrust agency evaluation of the same merger. The Justice Department and FTC staff has recently comments on information sources used in merger and market power evaluations and the differences between the FERC approach and information sources and those of the antitrust agencies. The FERC policy statement also makes clear that "there may be unusual circumstances in which, for example, a merger that raises competitive concerns may nevertheless be in the public interest because customer benefits (such as the need to ensure reliable electricity service from a utility in severe financial distress) may clearly compel approval."[32]

3.3 Telecommunications

15. The industry-specific regulator for telecommunications is the Federal Communications Commission (FCC) which was established by the Communications Act of 1934.[33] The purpose of the Communications Act is "to make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nationwide, and worldwide wire and radio communication service with adequate facilities at a reasonable price . . . ." Pursuant to sections 214(a) and 310(d) of the Act, the FCC must determine whether a proposed transfer of telecommunications licenses and authorizations (such as those involved in a merger of two telecommunications companies) will serve the public interest, convenience and necessity.[34] In conducting its public interest analysis, the FCC must consider the goal of the Communications Act, "which includes among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating the private sector deployment of advanced services."[35] Consequently, the FCC=s merger review analysis is broader than the Justice Department=s analysis under section 7 of the Clayton Act.[36] In some cases (e.g., AT&T/Comcast), this has resulted in the Justice Department deciding not to challenge a merger, while the FCC conditions clearance of the merger on compliance with certain remedies.

16. In addition to the differing standards of review, the FCC and the Justice Department also use different processes and timetables to review mergers. For example, while both agencies may compel additional information from the merging parties, the FCC is required to publish any information on which it relies in reaching its decision (absent a protective order allowing such information to be placed under seal).[37] In contrast, the Justice Department has an affirmative obligation not to disclose to the public any party or third party information obtained pursuant to compliance with the mandatory reporting requirements of merger notification or the compulsory process.[38] Similarly, the FCC, by its own internal rules, aims to rule on merger applications within 180 days of filing[39] whereas the Justice Department is statutorily obligated to make a decision within 30 days of receiving the merging parties= completed application or, if the Justice Department request additional information or documents (referred to as a "Second Request"), within 30 days of certification of compliance with the Second Request.[40] Finally, the applicants in an FCC proceeding bear the burden of proving that a particular license transfer is in the public interest whereas under the Clayton Act, the antitrust authorities must convince a federal court of a likelihood that the transaction will substantially lessen competition in order to block the transaction.

17. Despite differences in standards, burdens of proof, and timing, the FCC and the Justice Department can and do cooperate on and coordinate their respective merger investigations. There are no rules governing which agency may initiate the contact or when they should do that. Typically, such cooperation begins once the parties have filed with one of the agencies, although in major cases contact may occur sooner. As noted above, although FCC rules generally require it to disclose *ex parte* meetings, the rules contain an exception for meetings with the antitrust authorities.[41] While the FCC and the Justice

Department are thus free to meet and discuss theories of competitive harm, proposed remedies, and timing, the Justice Department may not disclose any information it has obtained from the parties or third parties under the Hart-Scott-Rodino merger review process absent a waiver of confidentiality protections. Such waivers are useful in order to streamline the review process and avoid inconsistent results, and are granted in most relevant investigations.

4. Relations Concerning Non-Merger Matters

18. As noted above, the antitrust agencies often advise industry-specific regulators on non-merger matters that impact competition. This advice may take several forms. For example, both the FTC and the Justice Department participate in a number of inter-agency task forces or committees that formulate an Administration=s policies on various economic issues. Additionally, the antitrust agencies, like any private person, may file comments in regulatory proceedings before independent agencies. For example, both the Justice Department and the FTC submitted comments to FERC regarding its 1996 merger policy statement. In the electricity area, staff from Justice Department, FTC, Department of Energy, and FERC meet informally to discuss perspectives on regulatory reforms and competition enforcement matters. Finally, some statutes authorize the antitrust agencies to participate in certain regulatory proceedings and/or require the regulator to seek advice from the competition agencies in particular types of proceedings. An example of such a statute is the Telecommunications Act of 1996,[42] the purpose of which is to open all telecommunications markets in the United States, including local services, to competition. Section 271 of the 1996 Act conditioned Regional Bell Operating Company (RBOC) entry into the long distance market on a showing that the RBOC=s local market was open to competition. In making this determination, the Act required the FCC to consult with the Justice Department and accord "substantial weight" to the Justice Department=s analysis. As part of this consultative process, the Justice Department generally provided the FCC with a written evaluation within thirty days of the RBOC=s application. By statute, the FCC had ninety days to rule on an RBOC's application. Both before and after the Justice Department=s evaluation was filed, Justice Department and FCC staff consulted with respect to issues that the Justice Department believed may impede competition in the local market. These consultations fall within the exception to the FCC=s *ex parte* rules and, thus, are not required to be put on the public record. While the FCC was required to accord "substantial weight" to the Justice Department=s evaluation, the FCC was not bound to follow the Justice Department=s advice. As of today, the RBOC's have received long-distance authority in all fifty states.

19. In addition to seeking the antitrust agencies' advice on competition matters, a regulatory agency also may notify the antitrust agencies of conduct that falls within the regulatory agency's jurisdiction that may violate the antitrust laws. One example of such a referral involved allegations against three wireless communications firms that agreed not to bid against each other in license auctions conducted by the FCC. In numerous auctions conducted over a six month period, each company refrained from bidding on licenses that another wanted in exchange for the other=s agreement not to bid against them in markets that they wanted. As a result, the FCC received less money than it would have for licenses in markets that were the subject of the agreement. After receiving information about the alleged bid rigging from the FCC, the Justice Department launched an investigation that ultimately led to the filing of complaints and consent decrees against the three firms.[43]

5. Conclusion

20. There are advantages and disadvantages associated with concurrent or shared jurisdiction. One of the advantages is that it allows each agency to avail itself of the other agency=s expertise. For example, the antitrust agencies are experts in antitrust law whereas the regulatory agencies have broad knowledge of their respective industries. Interaction between the two agencies may be particularly helpful in defining markets, obtaining industry statistics, and articulating theories of competitive harm. Moreover, the

antitrust agencies generally have greater investigative powers (e.g., power to subpoena documents and depositions) than the regulatory agencies. In addition, consumers and competitors are more likely to complain to the antitrust agencies because of the strong confidentiality provisions that the antitrust laws provide.

21. An additional advantage for competition may come from the different standards applied by the antitrust agency and regulatory agency. As noted above, the antitrust laws are designed to protect against anticompetitive harm from certain activities (e.g., price fixing, monopolization), and with that narrow focus, the antitrust agencies are limited to redressing only anticompetitive harm. On the other hand, the regulatory agencies not only can redress anticompetitive harm in certain circumstances, but through their "public interest" standard they can also alter the competitive situation. A particularly important application of this difference is that the antitrust laws do not generally address concerns about existing market power that may have accumulated prior to liberalization of these sectors. Once liberalization has taken place, firms may have an increased ability to exercise this latent market power. State and federal sector regulators may be better positioned to address existing market power concerns of this type because their statutes are less narrowly focused than the antitrust laws on preventing increases in market power through mergers or anticompetitive activities.

22. In contrast, concurrent or shared jurisdiction imposes costs on the antitrust and regulatory agencies and the parties, especially in the merger context. In addition to increased transaction costs from duplication of effort within the agencies and by the parties in dealing with multiple agencies, one of the disadvantages is that shared jurisdiction can lead to inconsistent outcomes. For example, the antitrust agency may decide not to challenge a merger, but the sector regulator may impose competition related conditions to its approval. When an antitrust agency and sector regulator enforce the same competition laws, differences in enforcement approaches may emerge and can increase the difficulty of achieving consistent antitrust policies in a jurisdiction. Since regulatory outcomes can vary according to how individual regulators exercise their discretion, firms may expend additional resources to learn and monitor the preferences of both an antitrust agency and sector regulators. As regulatory agencies make competitive effects a more significant part of their analysis, the risk of inconsistent outcomes and greater duplication are increased. But these costs can be mitigated by early and regular contact between the agencies, which can reduce duplication of effort and limit the risk of inconsistent outcomes.

NOTES

1. This submission is adapted from a Department of Justice contribution to a report prepared by the Antitrust Enforcement in Regulated Sectors Working Group (AERS) of the International Competition Network (ICN). The original is available at: http://www.internationalcompetitionnetwork.org/seoul/aers_ch3_seoul.pdf, pages 100-108.

2 *See* 15 U.S.C. §1012(b).

3. Similar restrictions pertain to antitrust investigations of agricultural cooperatives, although it is less clear in this instance that an alternative regulatory regime is in place.

4. *United States v. Nat'l Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975).

5. For a discussion of express and implied immunities, see "Accommodating Regulatory Approaches in an Antitrust Universe: The U.S. Experience in Harmonizing Antitrust with Laws that Restrain Competition" in the Antitrust Enforcement in Regulated Sectors Working Group's *Report to the Third ICN Annual Conference*, at page 15. The report is available at: http://www.internationalcompetitionnetwork.org/seoul/aers_ch1_seoul.pdf.

6. In addition to the federal laws, most states have antitrust laws that closely parallel the federal statutes. These laws are enforced through the offices of state attorneys general. This paper does not cover the relations between federal and state antitrust authorities.

7. 15 U.S.C. "1 and 2.

8. 15 U.S.C. '12 *et seq.*

9. 15 U.S.C. '41 *et seq.*

10. The term "Antitrust Division" was not used within an official Department of Justice document until 1919. The first Assistant Attorney General for Antitrust was confirmed by the U.S. Senate in 1933.

11. *See* 12 U.S.C. §1828©) and 12 U.S.C. §1842.

12. *See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

13. *See* Bank Merger Act of 1960, H.R. 1416 (March 23, 1960).

14. 12 U.S.C. §1828©)(4). By statute, the FTC does not have jurisdiction over banking. *See* 15 U.S.C. §45(2).

15. 12 U.S.C. §1828(c)(5)(A).

16. *Id.* at §1828(c)(5)(B).

17. *Id.* at §1828©)(6).

18. *Id.*

19. *Id.*

20. 82 Federal Reserve Bulletin No. 9 at 856. The Federal Reserve Board order includes the Justice Department required divestiture.

21. Letter from J. Robert Kramer, II, Chief, Litigation II Section, Antitrust Division, Department of Justice, July 2, 1996, to the Honorable Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System.

22. 12 U.S.C. §1828 (c)(5)(B).

23. *See e.g*., *United States v. National Bank and Trust of Norwich*, 1984 WL 21972 (N.D.N.Y. June 12, 1984).

24. 16 U.S.C. §791a.

16 U.S.C. §824(a).

26. 16 U.S.C. §824(d).

27. 16 U.S.C. §824(k). Before this, the FERC sought to increase wholesale electricity competition in the 1980s by making its merger approvals contingent upon pledges by merging utilities to implement transmission open access policies.

28. 16 U.S.C. §824b.

29. 15 U.S.C. §18.

30. The lack of conflicting outcomes may be attributable to the growing convergence of the public interest standard and the antitrust standard in recent years.

31. FERC Order No. 592, 18 C.F.R. Part 2 (Dec. 19, 1996) (hereinafter *Policy Statement).*

32. *Policy Statement* at 7.

33. 47 U.S.C. §151.

34. 47 U.S.C. §§214(a), 310(b).

35. *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee,* 17 F.C.C.R. 23,246, at 23,255 (citing 47 U.S.C. §157; Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56).

36. By statute, the FTC does not have jurisdiction over telecommunications common carriers (e.g., wireline or wireless carriers). 15 U.S.C. §§21(a) and 45(a)(2). The FTC can review telecommunications matters involving non-common carrier issues such as cable distribution and programming.

37. *See* 47 C.F.R. §0.459.

38. 15 U.S.C. §18a(h).

39. *See* FCC Press Release, *FCC Implements Predictable, Transparent And Streamlined Merger Review Process* (Jan. 12, 2000).

40. 15 U.S.C. §§18a(b) and (e). The Hart-Scott-Rodino (HSR) reporting requirements (and the time limitations contained therein) apply to all mergers, including telecommunications mergers, above a certain financial threshold. 15 U.S.C. §18a(a)(2). Because the parties cannot consummate their merger until they receive all necessary regulatory clearances, as a practical matter the Justice Department may continue its investigation until the FCC issues its decision, if after the HSR deadline.

41. 47 C.F.R. §1.1204(a)(6).

42. 47 U.S.C. §151 *et seq.*

43. *See United States v. Mercury PCS II, L.L.C.,*1999-2 Trade Cas. P72,707 (D.D.C. 1999); *United States v. Omnipoint Corp.,* 1999-1 Trade Cas. P72,472 (D.D.C. 1999); *United States v. 21st Century Bidding Corp.*, 1999-1 Trade Cas. P72, 473 (D.D.C. 1999).