Federal Trade Commission

COMPETITION AND THE PROMOTION OF COMPETITIVENESS

MARY L. AZCUENAGA
COMMISSIONER

FEDERAL TRADE COMMISSION

before the

1993 SECOFI National Meeting of Delegates
"La Promocion de la Competitividad en Mexico"

Monterrey, N.L.
Mexico

October 5, 1993

The views expressed are those of the Commissioner and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

Buenas tardes y muchas gracias. I am delighted to be in Monterrey and to participate in this important seminar. This afternoon I am going to talk about the importance of competition policy to international competitiveness and about the implementation of competition policy in the United States. As a commissioner on the Federal Trade Commission, my job is to enforce the antitrust laws,[1] and that is the perspective that I bring today. At this point, I should add that the views I express are my own and are not necessarily the views of the Federal Trade Commission or of any other commissioner.

Competition policy in the United States is expressed in laws that are designed to prevent or arrest anticompetitive private restraints on competition and on the rivalry among firms to win customers and sell products. In the United States, "competitiveness" is a term usually employed in a more global context, as in improving the international ability to compete or competitiveness of firms. My premise is that competition enhances competitiveness in world markets.

The economic theory underlying the U.S. antitrust laws is that competition will result in an optimal price-quality mix for goods and services. The Supreme Court has said that the antitrust laws "reflect[] a legislative judgment that ultimately competition will produce not only lower prices but also better goods and services . . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[2]

A firm that faces the prospect of losing sales to its competitors because its products are too expensive or of poor quality will have incentives to improve them. A monopolist, lacking the discipline of competition, can raise prices and reduce output without consideration for consumer demand. Consumers will benefit when competition spurs the efforts of businesses to increase efficiency and innovate in bringing goods and services to the market. The Commission's consumer protection authority is based on the complementary premise that truthful advertising about price, quality and the specific attributes of goods and services is a vital source of information for

---

[1] The Federal Trade Commission enforces Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which, among other things, empowers the FTC to prevent unfair methods of competition. In this discussion, I use the term "antitrust laws" to include the Commission's enforcement of Section 5.

[2] National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); see also Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5 (1958).

consumers. False or deceptive advertising, on the other hand, distorts consumer decisionmaking, harming both consumers and honest businesses.

In the United States, concern about the international competitiveness of domestic firms has spurred a debate about the proper role of antitrust. Although a few have argued for relaxation of the antitrust laws in an effort to support selected domestic industries against foreign rivals, the stronger view seems to be that vigorous domestic competition lays the foundation for international competitive strength. Michael Porter, an influential and informed authority on matters of international competitiveness, has taken the position that strong antitrust enforcement with respect to horizontal mergers and collusive behavior is essential to insure competitiveness.[3] Porter views the cartelization of an industry as the "beginning of the end of international success" and regards leniency toward mergers as "counterproductive."[4]

Consistent with the belief that a strong antitrust regime to promote domestic rivalry can foster innovation and thereby competitiveness, Michael Porter would circumscribe cooperative research, prohibit joint production and marketing between leading rivals, block mergers of leading firms, and generally promote deconcentration of economic power. Others, such as Jorde and Teece, argue that innovation requires an array of linkages and feedback mechanisms among firms. They believe that efficiencies afforded by the horizontal or vertical linkages of joint ventures promote innovation, and they argue that overly strict antitrust enforcement can hamper the process of innovation.[5]

Although both the Commission and the Department of Justice are committed to prosecuting illegal cartel behavior, both have clearly indicated that joint ventures that are output enhancing and are not merely vehicles for price fixing or collusion do not violate the antitrust laws. Alliances or specific joint ventures may help firms lead or keep up with succeeding steps in innovation. Agreements among firms may be made for a wide variety of procompetitive reasons, and antitrust authorities should be careful not to chill joint efforts necessary to encourage or facilitate innovation or other efficiencies.

---

[3] M. Porter, The Competitive Advantage of Nations 663 (1990).

[4] Id.

[5] Jorde & Teece, "Acceptable Cooperation Among Competitors in the Face of Growing International Cooperation," 58 Antitrust L.J. 529 (1989).

Nonetheless, it should be clearly understood that a cartel will not be permitted to operate under the guise of a joint venture. When competitors act together in a joint venture, there is always a concern that they may share prices, costs and marketing information, the use of which may result in adverse competitive effects. When a joint venture is contemplated, the participants should take care to minimize these risks.

The process of meeting competition in domestic markets helps prepare firms to compete effectively in international markets. A firm that ventures into international markets with a product that consumers want at a price that consumers will pay is more likely to succeed than a firm that offers a high-cost, poor quality product. Put another way, competition improves competitiveness. Failure to enforce the antitrust laws may undermine both competition and competitiveness. The antitrust laws, properly interpreted, should never clash with or inhibit competitiveness.

Let me now turn to the implementation of competition policy. The goal of competition policy is to promote vigorous competition, which, in turn, will redound to the benefit of consumers. How do we get there? In a perfect world, our law enforcement efforts would deter unlawful restraints of trade while not imposing undue costs. To that end, we must focus on refining our analysis to identify anticompetitive conduct accurately and on informing the public what the standards are, so that businesses can tailor their conduct accordingly. In some sense, we are dealing here with conflicting interests. Bright line rules of law offer simplicity and ease of predictability. On the other hand, to the extent that careful antitrust analysis is complex and fact-intensive, some divergence from bright line rules of law may be necessary, especially in certain kinds of cases. If the analysis leads to accurate enforcement decisions, then the trade off may be worthwhile.

The focus of competition policy in the United States is on preventing market power or the power to reduce output and raise prices. Price fixing and other forms of collusion and single firm market power injure consumers now and probably also in the long run, by reducing the pressure on firms to innovate and cut costs, which in turn weakens the competitiveness of businesses.

The rule of reason is the mode of analysis that we use to apply the general language of the antitrust statutes to specific conduct and mergers. The plain language of the Sherman Act, from which the fundamentals of our antitrust policy stem, bans all contracts in restraint of trade but, because every contract restrains trade to some extent, a literal interpretation of the Act would stifle commerce. The law does not ban all contracts. Only restraints that are unreasonable under all the circumstances

of the case are unlawful.[6] From this principle, we derive the rule of reason.

Some restraints -- horizontal price fixing and agreements to allocate markets, for example -- have been adjudged so inimical to competition that they are deemed presumptively unreasonable or, in more common parlance, per se unlawful. In these cases, the government need only prove that the conduct occurred, it need not consider the reasons why the conduct occurred or the merit of the resulting effects.

In some early cases, cartels argued in defense of their conduct that the price on which they had agreed was reasonable and, therefore, lawful. The Supreme Court rejected these arguments. The Court said that "[t]he power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices."[7] We cannot depend on self-interested cartels always to fix a reasonable price. Even if we could, "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."[8]

The per se rule against price fixing offers the virtue of predictability, but even this bright line rule is not always easy to apply. Considerable analysis sometimes is necessary before it becomes clear whether the challenged conduct is price fixing or something more benign.[9] Antitrust analysis is highly fact-intensive, and this can be true even in per se cases. The facts are fundamental in any enforcement decision.

Mergers are assessed under the rule of reason. The issue in analyzing mergers is whether the acquisition is likely to create or enhance the power to reduce output and raise prices. Most mergers are competitively neutral or procompetitive. Only a small percentage of the mergers that are reported each year are investigated, and less than 1% of reported mergers are challenged.

Merger analysis has become far more sophisticated as our economic learning about markets and competition has increased.

---

[6] E.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982).

[7] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[8] Id.

[9] E.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

Merger decisions of the 1960's and 1970's have been much maligned for blocking transactions, on the basis of market concentration data alone, that posed no threat to competition. Market share and concentration data still are important as preliminary measures of market power, and the merger guidelines issued in 1992 by the FTC and the Department of Justice[10] define "safe harbors" and areas of greater enforcement interest on the basis of concentration. But this is just the beginning of a sophisticated economic analysis of the facts.

Outside the circle of cognoscenti, merger analysis, indeed all rule-of-reason cases, may appear to offer little predictability. There are important reasons for the extended analysis, however, and perhaps more predictability than may first appear. A bright line rule of law for mergers based on concentration data would carry the risk of both under-enforcement and over-enforcement. If we want to identify anticompetitive mergers and allow other transactions to proceed unimpeded, there is no substitute under our present state of knowledge for an analysis that extends beyond statistical data about market shares and concentration.

We gain a substantial degree of predictability from the structured analysis of mergers that is described in the agencies' 1992 merger guidelines. Firms can determine with some degree of accuracy in advance of filing whether or not their transaction will be questioned by the antitrust agencies. Based on general knowledge and discussions with members of the private bar, it seems safe to assume that a number of contemplated acquisitions are abandoned or restructured by the parties in light of their own predictions of anticompetitive effects under the guidelines. Opinions of the courts in cases that have been litigated also help in analyzing acquisitions.

The Hart-Scott-Rodino premerger notification process[11] is intended to give the enforcement agencies the opportunity to review mergers before they occur. The short statutory time periods for government action work to ensure that potential competitive problems are quickly identified. As a result, although merger analysis is both broad and intensive, we think that our merger enforcement program is highly effective. Most mergers are cleared through the system quickly while problematic transactions are filtered out for further investigation.

---

[10] U.S. Department of Justice & Federal Trade Commission, 1992 Merger Guidelines (April 3, 1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

[11] See Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Our enforcement policy on the international front is not complicated: The basic rule is that we apply the same substantive rules of law to foreign firms that we apply to domestic firms. In reviewing a domestic or international merger, we ask whether the acquisition is likely to give the merging firms power to reduce output and raise prices "in any section of the [United States]."[12] We consider the influence on the market in question of foreign as well as domestic competition. If foreign firms do or can compete in the relevant market in the United States, their actual presence or even their anticipated entry may be enough to assure us that the market is likely to remain competitive and that the merger will not harm competition.

I cannot emphasize enough the importance of economic analysis to competition policy. At the Federal Trade Commission, we depend on our economists to help analyze the facts, to offer predictions about the competitive effects of challenged conduct and of enforcement action, and to advise on remedial solutions for anticompetitive problems. Economic analysis is at the heart of our analysis of mergers. Economic analysis also is important to our advocacy function in which we promote competition by educating others about the principles of competition. Our lawyers and economists have developed significant expertise in analyzing the competitive effects of proposed government regulations, and we try to share that expertise by offering a competition policy perspective to other government agencies and to private self-regulatory bodies.

More than two hundred years ago, Adam Smith wrote of the "invisible hand" that guides markets, through the individual, self-interested decisions of buyers and sellers, to the efficient allocation of resources.[13] We have learned much about markets since Adam Smith, and the learning process continues. But the basic principle of the value of competition has been a constant reference point.

Consistent with this tradition, the antitrust enforcement agencies in the United States work to keep markets open for the vigorous, challenging competitive process. This is entirely consistent with the interest of firms in remaining competitive in the international arena. As I suggested earlier, firms that succeed in the rough-and-tumble of competitive domestic markets are more likely also to succeed in the international marketplace.

The promotion of competition and competitiveness may be more complex as we look forward to more global markets and multinational businesses. The development of international

---

[12] Section 7 of the Clayton Act, 15 U.S.C. § 18.

[13] Adam Smith, The Wealth of Nations (Skinner abr. ed. 1982)

commerce and competition may be affected by the application of different and perhaps conflicting laws, including antitrust laws, and the costs of multinational compliance may be high. One challenge for the future will be to ensure that antitrust enforcement continues to encourage competition and economic growth.

For the longer term, national enforcement agencies are seeking to understand other antitrust systems through discussions and exchanges, in forums such as this, and to identify areas of common interest and policy, and possibilities for convergence of antitrust laws and procedures are being discussed.[14] Progress toward formal convergence among antitrust systems may be sporadic and possibly slow, because of differences unrelated to competition policy and analysis, such as differences among our political systems and our legal systems.

In the meantime, those of us in the antitrust enforcement community can contribute to maintaining competition and international competitiveness by explaining clearly our national laws and policies, by keeping our processes open and accessible, and, in our law enforcement decisions, by adhering to fair and responsible standards, fairly and evenhandedly applied.

---

[14] E.g., American Bar Ass'n Antitrust Section, Special Committee Report on International Antitrust (Working Draft Sept. 1, 1991).