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DOES COMPETITION CREATE OR KILL JOBS

Contribution from the United States

-- SESSION I --

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1. Introduction

1. The U.S. Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) (“the antitrust agencies”) do not consider employment or other non-competition factors in their antitrust analysis. The antitrust agencies have learned that, while such considerations “may be appropriate policy objectives and worthy goals overall ... integrating their consideration into a competition analysis...can lead to poor outcomes to the detriment of both businesses and consumers.”¹ Instead, the antitrust agencies focus on ensuring robust competition that benefits consumers² and leave other policies such as employment to other parts of government that may be specifically charged with or better placed to consider such objectives.

2. This submission explains the evolution of the antitrust agencies’ approach to considering employment in their antitrust analysis over the course of antitrust enforcement in the United States. The antitrust agencies hope agencies considering their approaches to these issues will find our experience instructive.

2. Historical Development and Modern Treatment in U.S. Antitrust Law

3. U.S. antitrust laws³ are broadly worded and rely on judicial interpretation to delineate their contours.⁴ Until the 1970s, economic analysis had little impact on the U.S. agencies’ and U.S. courts’ interpretation of the statutes. Courts construed antitrust laws broadly, considered many types of conduct to be illegal *per se*, and found mergers to be anticompetitive based on small changes to the structure of the market.⁵ For example, in *U.S. v. Trans-Missouri Freight Ass’n*,⁶ the U.S. Supreme Court expressed a concern that, even if lower prices result from a merger, “[t]rade or commerce...may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein.”⁷ Similarly, the Supreme Court, in cases such as *Brown Shoe Co., Inc. v. U.S.*,⁸ cited what it saw as Congress’s intent behind the Sherman Act to “promote competition through the protection

¹ “Core Competition Agency Principles: Lessons Learned at the FTC”, Keynote Address by FTC Chairwoman Edith Ramirez, May 22, 2014, available at https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf; see also “International Antitrust Enforcement: Progress Made; Work To Be Done”, Keynote Address by DOJ Assistant Attorney General of the Antitrust Division Bill Baer, September 12, 2014, available at <http://www.justice.gov/atr/speech/international-antitrust-enforcement-progress-made-work-be-done> (“We must continue to seek broad international consensus on the principle that enforcement decisions be based solely on the competitive effects and consumer benefits of the transaction or conduct being reviewed.”).

² See *id.*

³ 15 U.S.C. §§ 1-7 (Sherman Act); 15 U.S.C. §§ 12-27 (Clayton Act); 15 U.S.C. §§ 41-58 (FTC Act).

⁴ Scholars have described the U.S. antitrust statutes as “consciously evolutionary.” See William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPECTIVES 43, 58 (2000).

⁵ See, e.g., *U.S. v. Von’s Grocery Co.*, 384 U.S. 270, 276-77 (1966) (upholding FTC determination of illegality of a merger of two grocery store chains with a combined market share of seven percent, in part to prevent “concentration [from] gaining momentum in the market”).

⁶ 166 U.S. 290 (1897).

⁷ *Id.* at 323.

⁸ 370 U.S. 274 (1962).

of viable, small, locally owned businesses” even when the result was “higher costs and prices [that] result from the maintenance of fragmented industries and markets.”⁹

4. During this period of U.S. enforcement activity, academics and others began to question the extensive rules of *per se* illegality created by the U.S. Supreme Court, arguing that many forms of conduct that courts deemed *per se* illegal, such as vertical restraints, often are pro-competitive. This led to a major change in the interpretation of the U.S. antitrust laws based on greater reliance on economic analysis to determine whether a transaction or conduct harms competition or consumer welfare.

5. Beginning in the 1960s, academic literature explained that using antitrust law to achieve non-competition goals, which often resulted in the protection of inefficient competitors, was inimical to consumer welfare and was not Congress’s intent in enacting the U.S. statutes.¹⁰ This scholarship argued that the Sherman Act was not intended “to achieve...broad noncommercial goals”¹¹ and that the “test of illegality was entirely the effect upon commerce, not an effect upon some other thing or condition, such as a supposed social or political evil.”¹² This emphasis on competition and consumer welfare as the primary goals of antitrust consistently has been reflected in the subsequent literature.¹³ Similarly, economics literature published during the 1960s began to focus on balancing cost savings from merger efficiencies with consumer harm from possible merger-related price increases.¹⁴

6. By the 1970s, those principles gained judicial approval in the U.S. Supreme Court, as reflected in cases such as *Continental T.V., Inc. v. GTE Sylvania Inc.*,¹⁵ *Nat’l Soc’y of Prof. Engineers v. United*

⁹ *Id.* at 344. See also *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945) (discussing reasons to forbid monopoly, including “the belief that great industrial consolidations are inherently undesirable, regardless of their economic results”).

¹⁰ See, e.g., Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

¹¹ *Id.* at 13.

¹² *Id.* at 33.

¹³ See, e.g., Robert Pitofsky, *The Political Context of Antitrust*, 127 U. PENN. L. REV. 1051, 1059 (1979) (“Non-economic concerns play no useful role because it is not possible to achieve those goals to any significant extent through antitrust interpretation.”); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987) (arguing that the pursuit of populist goals is inappropriate for antitrust analysis because they “would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved”); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J. L. PUB. POL’Y 217, 222-23 (2010) (“[T]he Court should answer questions of antitrust law by promoting consumer welfare and economic efficiency and not by making political judgments about economically irrelevant matters.”). Accord Howard A. Shelanski, *Enforcing Competition During an Economic Crisis*, 77 ANTITRUST L. J. 229, 239-45 (2010) (discussing difficulty in predicting and comparing short-run and long-run effects of competition measures during an economic crisis).

A similarly persuasive article, in the context of dominant firm pricing, was published in 1975 and argued that a dominant firm can be presumed to operating within the bounds of the antitrust laws if it sets its prices at or above its average variable costs. Philip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). This influential article was frequently cited in judicial opinions during this period. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) (Breyer, J.).

¹⁴ See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECONOMIC REV. 18 (1968).

¹⁵ 433 U.S. 36 (1977). *GTE Sylvania* overturned the Supreme Court’s holding in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), by determining that a location restriction for franchisees should be judged under the rule of reason rather than under a *per se* standard. See also *GTE Sylvania Inc. v. Continental T.V. Inc.*, 537 F.2d 980 (9th Cir. 1976). Beyond its holding in the specific case relating to territorial restraints, the opinion is widely viewed as a

States,¹⁶ and *Nat'l Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Okla.*¹⁷ The antitrust agencies have incorporated this learning and these judicial interpretations into their analysis of mergers and conduct, precluding the consideration of employment in their analysis and decisions.¹⁸

7. Although for the last half-century the antitrust agencies have applied only competition and consumer welfare standards, the agencies are sometimes urged to consider employment effects.¹⁹ For example, in a brief to the U.S. Eleventh Circuit Court of Appeals in a matter brought by the FTC, the United Steelworkers argued that “labor’s interests in industrial stability should outweigh the antitrust laws’ emphasis on competition.”²⁰ The FTC’s brief countered that “the antitrust laws are not subject to this proposed weighing of policy interests”²¹; the Eleventh Circuit did not accept the Steelworkers’ position.²² In addition, in a 2012 DOJ merger review, comments filed during the statutory public comment period for a proposed consent decree asserted that the proposed divestiture would result in job losses, and that concern for lost jobs should outweigh any DOJ concerns about the anticompetitive effects of the merger. The DOJ responded that its complaint was brought in order to prevent a potential Clayton Act violation and to protect consumers from the economic consequences of an anticompetitive merger; the Clayton Act seeks to prevent the higher prices, lower quality, or reduced innovation that may result from such transactions. Because the proposed divestiture resolved that violation and the comment did not criticize the efficacy of the relief in remedying the alleged competitive harm, the DOJ responded that the comment did not provide “an appropriate rationale for rejecting the proposed” consent decree, which the Court entered.²³

signal of the U.S. Supreme Court’s “determination to anchor antitrust rules in microeconomic analysis and to insist on proof of anticompetitive effects as a condition to subjecting business conduct to *per se* condemnation.” William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 60 (2007).

¹⁶ 435 U.S. 679 (1978). (“[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.”).

¹⁷ 468 U.S. 85 (1984). *NCAA v. Board of Regents* concluded that because the activity involved was one in which “horizontal restraints on competition are essential if the product is to be available at all,” such activity should be analyzed using a rule of reason, rather than a *per se*, analysis. 468 U.S. at 103.

¹⁸ Other U.S. regulatory authorities are charged with applying different standards, which may include considering employment and other non-competition goals. For example, the Federal Communications Commission employs a “public interest” standard. In addition, at least one U.S. state recently incorporated employment factors into its resolution of an antitrust case. See [https://oag.ca.gov/system/files/attachments/press_releases/AG%20Letter%20to%20CEC%20\(Tesoro\).pdf](https://oag.ca.gov/system/files/attachments/press_releases/AG%20Letter%20to%20CEC%20(Tesoro).pdf).

¹⁹ Although employment is not a relevant policy goal in antitrust analysis, anticompetitive conduct affecting terms of employment can violate the Sherman Act. See, e.g., <http://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements> (DOJ settlement with eBay Inc. that prevents the company from entering into or maintaining agreements with other companies that restrain employee recruiting or hiring); <https://www.ftc.gov/news-events/press-releases/2014/05/ski-manufacturers-marker-volkl-tecnica-settle-ftc-collusion> (FTC settlement with ski equipment manufacturers settling charges that companies illegally agreed not to compete for one another’s ski endorsers or employees).

²⁰ Br. of Federal Trade Com’n, *McWane, Inc. v. Federal Trade Com’n*, No. 14-11363 at 45, n.20 (11th Cir. 2014); see also Br. of United Steelworkers at 14. See also Letter from the Honorable Anibal Acevedo-Vil, Feb. 27, 2003, available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/02/ftc.gov-letteracevedo.htm> (legislator in Puerto Rico requested that the FTC consider employment effects in its review of the Wal-Mart’s proposed acquisition of a Puerto Rican supermarket).

²¹ Br. of Fed. Trade Com’n at 45 n.20.

²² See *McWane, Inc. v. Fed. Trade Com’n*, 783 F.3d 184 (11th Cir. 2015).

²³ See *U.S. v. Grupo Bimbo, S.A.B. de C.V.*, <http://www.justice.gov/file/498066/download>

8. Because the U.S. antitrust agencies focus on consumer welfare and not on other objectives such as employment, the agencies have not developed expertise to address these other objectives. Nonetheless, two difficulties with expanding the scope of antitrust analysis to include employment concerns warrant discussion. First, a full accounting of employment effects would require consideration of short-term effects, such as likely layoffs by the merged firm, but also long-term effects, which could include employment gains elsewhere in the industry or in the economy arising from efficiencies generated by the merger. Measuring these effects would require additional resources and could extend the amount of time required to conduct a thorough analysis of the transaction or conduct in question. Second, unless a clear policy spelling out how the antitrust agency would assess the appropriate weight to give employment effects in relation to the proposed conduct or transaction's procompetitive and anticompetitive effects could be developed, the uncertainty caused by the pursuit of multiple objectives could create undue uncertainty in the economy. The difficulty of expressing a consistent set of weighting criteria could hamper an agency's ability to provide transparency on the standards used for its analysis.

3. Conclusion

9. For the reasons discussed above, employment and other non-competition factors do not play a role in the analysis conducted by U.S. antitrust agencies. The antitrust agencies hope that their experience is informative and useful to other competition agencies.