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United States

1. Introduction

1. In the United States, the jurisdiction and responsibilities of the competition agencies (the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”), together the “Antitrust Agencies”)) at times intersect with those of sector-specific regulators. In general, the federal antitrust laws provide the framework for the protection of competition across all sectors of the economy. In some markets, however, Congress has determined that a sector-specific regulator should supplement, or, in a few limited cases, supersede antitrust enforcement.

2. In the following sections, this note will: provide an overview of sector-specific regulators in the United States and describe the general framework for interaction between regulatory oversight and antitrust enforcement; provide examples of shared jurisdiction in the telecommunications, electricity, and aviation industries; describe the Antitrust Agencies’ competition advocacy efforts in regulated sectors; and conclude with some observations on the costs and benefits of shared jurisdiction.

2. Overview of Sector Regulation and Interaction with Antitrust Enforcement

3. The federal sector-specific regulatory agencies, which were established by Congress at different times with different authorizing statutes, were often created for the purpose of regulating industries perceived to be at greater risk of market failure, such as industries assumed to be prone to natural monopolies. To protect consumers, sector-specific regulators typically were authorized to regulate rates, terms of service, and entry (*i.e.*, licensing) and prevent the exercise of monopoly power. They were also typically charged with promoting broader social goals, such as promoting universal access to services or providing for environmental and safety regulations. In the past several decades, the United States has eliminated or reduced regulation in many previously-regulated sectors and sought instead to introduce competition and market disciplines to the greatest extent possible. Where industry-specific regulation is still in place, sectoral regulators have increasingly emphasized competition analysis and the benefits of free markets in pursuing their broader objectives.

4. Federal regulatory rules and policies are often shaped by other authorities, including state regulators, multinational agreements, and the judicial system. Federal regulators often share jurisdiction with individual states in some respects. The federal regulatory agencies were sometimes created to increase uniformity of regulation, introduce a different regulatory approach, or to fill in gaps in regulation that the states could not provide. Where an industry operation spans national borders, multinational agreements may also be an important part of the regulatory system. In addition, court rulings can substantially influence regulatory policies, as courts are frequently called upon to review regulatory rules and decisions.

5. Although each regulatory context is unique, there are some generally applicable distinctions between antitrust enforcement and regulatory oversight. As law enforcement agencies, the competition agencies avoid ongoing government oversight and entanglement

with business operations when possible. Instead, they focus on preserving market mechanisms and addressing violations with one-time structural remedies—*e.g.*, requiring a firm to sell businesses or assets to remedy a problematic merger rather than proscribing aspects of the merged firm’s conduct. Sectoral regulators, in contrast, have a greater capacity for ongoing industry oversight and monitoring. As a result, they take a more active role in promulgating and implementing standards and rules governing activities within an industry and may be more inclined to impose conduct-based remedies.

6. In cases where the antitrust agencies and a sector regulator share jurisdiction to review the competitive aspects of mergers or conduct, they often do so under different legal standards. While the antitrust agencies apply the antitrust laws to regulated industries in the same way they apply the laws elsewhere (with consideration of any impact regulation may have on competition in the market), the regulatory agencies generally apply some version of a “public interest” standard. This standard typically includes competition concerns similar to those underlying the antitrust laws, but also takes other considerations, such as safety, health, universal access, or environmental concerns, into account.

7. The legal burdens may also differ. In the merger context, for example, when the antitrust agencies seek to challenge a transaction, the agencies have the initial burden to prove to a federal court or in an administrative proceeding that the merger is likely to lead to anticompetitive effects. In contrast, applicants in a regulatory proceeding often bear the burden of proving that their transaction is consistent with the public interest.

8. Importantly, regulatory review generally does not preclude antitrust enforcement. For example, the antitrust agencies can sue to challenge a merger pursuant to the antitrust laws, even when another agency has approved the transaction, except in narrowly defined circumstances where the other agency’s review creates an immunity from suit.¹ A discussion of specific immunities is outside the scope of this paper.

3. Examples of Shared Authority Between Antitrust and Regulatory Authorities

9. There are categories of conduct where the antitrust agencies and the sector regulators have concurrent or shared jurisdiction, most frequently with respect to merger review, but also sometimes with respect to conduct. Shared authority appears most often in industries that previously have been the subject of comprehensive regulation, such as telecommunications, electric utilities, and aviation. The interrelationships between the antitrust agencies and the sectoral regulators overseeing those industries are described below.

3.1. Telecommunications

10. The sectoral regulator that oversees the telecommunications industry is the Federal Communications Commission (FCC), an independent agency created by the Communications Act of 1934 to regulate interstate communications by radio, television, wire, satellite, and cable. The FCC has authority under the Communications Act to review any transaction that requires transfer of an FCC license, which typically is required in the acquisition or merger of broadcast and cable television, broadcast radio, wireless and

¹ See, *e.g.*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964) (acquisition of pipeline violated Section 7 despite review by Federal Power Commission).

wireline telecommunications, and satellite providers. The FCC review is based on whether the transaction will serve “the public interest, convenience and necessity.”² The FCC’s public interest analysis includes an assessment of the competitive effects of the transaction, but it also takes into account a number of other considerations. Among other things, the FCC considers whether the transaction would promote “the broad aims of the Communications Act,” including such considerations as whether the transaction would protect service quality for consumers, accelerate private sector deployment of advanced telecommunications services, ensure diversity of information sources and viewpoints, and increase the availability of children’s programming and Public, Educational, and Government programming.³ In its evaluation of the competitive effects of a merger, the FCC’s analysis is “informed by, but is not limited to,” antitrust principles.⁴

11. In the majority of cases, the DOJ and FCC have reached similar outcomes when reviewing the same mergers.⁵ To minimize the possibility that their respective analyses of the competitive effects of the transaction will lead to inconsistent results, the DOJ and FCC cooperate extensively on an informal basis. Although FCC rules generally require it to disclose any meetings with outside persons, the rules contain an exception for meetings with the antitrust authorities. Consequently, the two agencies are able to share non-confidential industry information and discuss the appropriate relevant market parameters, theories of competitive harm, and proposed remedies. Cooperation is further enhanced when the agencies are able to share confidential information pursuant to a limited waiver of confidentiality by the parties to the transaction.

3.2. Electric Utilities

12. Electric utilities in the United States are regulated by the states and the Federal Energy Regulatory Commission (“FERC”), an independent agency officially organized as part of the Department of Energy. The FERC is a successor agency to the Federal Power Commission, which was created by the Federal Power Act of 1920.⁶ The FERC regulates the transmission and wholesale sales of electricity in interstate commerce. State public utility commissions, on the other hand, regulate local distribution and retail sales of electricity. States also control the siting of generation and transmission lines within their borders. Since the early 1990s, federal legislation has introduced competition into wholesale electricity markets,⁷ and several states have introduced competition into retail electricity markets.

² Communications Act of 1934, 47 U.S.C. §§ 214(a), 310(d) (2018). The FCC is also authorized to analyze telecommunications mergers under Section 7 of the Clayton Act. 15 U.S.C. § 21.

³ *See, e.g.*, In the Matter of Applications of AT&T Inc. and DIRECTV, 30 FCC Rcd. 9131, 9141 ¶ 21 (2015).

⁴ *See, e.g.*, *Id.* at 9140, ¶ 20 (2015).

⁵ One exception was the 1997 merger of Bell Atlantic and NYNEX, where the DOJ determined that the proposed merger would not substantially lessen competition and did not challenge it, while the FCC imposed conditions on its approval.

⁶ 16 U.S.C. § 791a (2018).

⁷ For example, 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 party access to transmission lines. 16 U.S.C. § 824(k) (2018).

13. Mergers in the electricity sphere often are subject to review by the FERC, the antitrust agencies (typically the DOJ), and the states.⁸ Their reviews typically are nonexclusive such that review of a merger by one agency does not preclude review by the others. In addition, clearance of a transaction by any one entity does not preclude a separate challenge by the others, and approval of a transaction by one entity subject to one set of concessions does not preclude another entity from insisting upon further concessions. It is not unusual for all three entities to analyze the competitive effects of, and seek remedies for, the same merger. Unfortunately, the entities operate under different statutory and policy regimes, which sometimes results in different review outcomes for the same merger.

14. The FERC reviews mergers under section 203 of the Federal Power Act (“FPA”), which requires the FERC to approve a merger if it will be “consistent with the public interest.”⁹ Under this public interest test, the FERC considers three broad factors: the effect of the merger on competition; the effect on rates; and the effect on regulation. In 1996, the FERC issued a Merger Policy Statement in which it adopted the antitrust agencies’ Horizontal Merger Guidelines as the analytical framework under which it would analyze the effects of a horizontal merger on competition.¹⁰ Following the Antitrust Agencies’ release of updated merger guidelines in 2010, however, the FERC decided to maintain its current approach and declined to adopt the 2010 Guidelines. Instead, the FERC reiterated that its analysis was largely in accordance with the 2010 Guidelines and stated that it would continue to take a similar approach to merger review as the antitrust authorities.¹¹

15. Notwithstanding the FERC’s view that its analytical approach is consistent with the Antitrust Agencies’ Guidelines, in practice, the FERC’s analysis of the competitive effects of mergers departs from the Antitrust Agencies’ approach in significant ways.¹² As a result, the FERC and the DOJ at times have reached different conclusions on whether an electricity merger harms competition and have imposed different remedies. One example is the 2004 proposed merger of Exelon Corporation and Public Service Enterprise Group, Inc.¹³ Both

⁸ The FTC typically reviews proposed mergers that involve electric and natural gas utility companies, where the primary effect of the merger is on gas markets. The DOJ typically reviews proposed mergers that involve electric utilities or that involve electricity and natural gas utility companies, where the primary effect of the merger is on electricity markets. While the FERC maintains jurisdiction over merger review of certain energy sectors, it has no authority over transactions involving securities acquisitions by natural gas companies or by oil and petroleum companies, which have historically been reviewed by the FTC.

⁹ 16 U.S.C. § 824(b) (2018).

¹⁰ Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement, 61 Fed. Reg. 68,595, 68,598 (Dec. 30, 1996) (to be codified at 18 C.F.R. pt. 2).

¹¹ Order Reaffirming Commission Policy and Terminating Proceeding, 138 FERC ¶ 61,109, 61,459–60 (Feb. 16, 2012), <https://www.ferc.gov/whats-new/comm-meet/2012/021612/E-2.pdf>.

¹² The Antitrust Agencies have filed a number of comments with the FERC pointing to differences between the antitrust agencies and FERC’s approach, and recommending that the FERC adopt the approach used by the Antitrust Agencies. *See, e.g.*, U.S. Dep’t Justice & Fed. Trade Comm’n, Comment Letter on Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rate Applications Under Section 205 of the Federal Power Act, Comments of the U.S. Department of Justice and Federal Trade Commission (Nov. 28, 2016), <https://www.justice.gov/atr/page/file/913741/download>.

¹³ See Proposed Final Judgment, *U.S. v. Exelon Corp. and Public Service Enterprise Group, Inc.* (June 22, 2006),

the DOJ and the FERC separately reviewed the transaction, and both agencies concluded that, as originally structured, it would likely substantially reduce competition in certain wholesale electricity markets. But because the agencies approached the analysis of competitive effects in different ways, the remedy required by the FERC fell short of what the DOJ would have required.¹⁴

16. Disparate results have also occurred in conduct cases. For example, in 2010, the DOJ filed suit against KeySpan Corporation, alleging a violation of Section 1 of the Sherman Act. The DOJ alleged that KeySpan's swap agreement with financial services firm Morgan Stanley gave KeySpan an indirect financial interest in a competitor's electricity sales, incentivizing KeySpan to raise market prices unilaterally. Pursuant to a settlement between KeySpan and the DOJ, KeySpan agreed to pay \$12 million in disgorgement. The DOJ subsequently entered into a consent decree with Morgan Stanley. The FERC, on the other hand, reviewed the same facts under the Federal Power Act and determined not to proceed against KeySpan. The FERC found the rates in the affected market were "just and reasonable" under the Federal Power Act and that the parties had not violated the FERC's market manipulation rules.

3.3. Airlines

17. The Department of Transportation ("DOT") oversees the airline industry, exercising varying degrees of economic regulatory authority depending on whether the air transport is domestic or international. The domestic airline industry is largely deregulated, although the DOT continues to engage in regulation of some aspects of domestic airline operations (e.g., fitness to provide service, ownership, advertising). The DOT's economic regulation of international aviation is more extensive.

18. From 1938 to 1978, the domestic airline industry was extensively regulated by the Civil Aeronautics Board ("CAB"), which had broad powers to regulate entry and exit, rates, mergers, agreements, and methods of competition. The CAB was eliminated in 1985, at which point the DOT took over its remaining regulatory responsibilities, including several relating to competition. The DOT authority initially included the power to regulate consolidations, mergers, acquisitions of control, interlocking relationships, and agreements among carriers. From 1985 to 1988, the DOT approved multiple mergers, including some over the objections of the DOJ.¹⁵ In 1988, however, Congress transferred authority for review of airline mergers from the DOT to the DOJ.¹⁶ Although the DOJ now has the lead role in merger review, the DOT continues to confer with the DOJ on the merits of each transaction.

<http://www.usdoj.gov/atr/cases/f216700/216784.htm>; Order Authorizing Merger Under Section 203 of the Federal Power Act, 112 FERC ¶ 61,011 (July 1, 2005), <https://www.ferc.gov/whats-new/comm-meet/063005/E-4.pdf>.

¹⁴ See Mark J. Niefer, *Explaining the Divide Between DOJ and FERC on Electric Power Merger Policy*, 33 ENERGY L.J. 505, 514–519 (2012) (describing the FERC and the DOJ analyses of, and remedies for, the Exelon-PSEG merger). Ultimately, the DOJ dismissed its complaint when Exelon abandoned the transaction due to objections from New Jersey state regulators.

¹⁵ See NWA-Republic Acquisition Case, DOT Dkt. 43754, Order 86-7-81 (July 31, 1986), <http://dotlibrary.specialcollection.net/>.

¹⁶ Airline Deregulation Act 40(a), Pub. L. No 95-504, 92 Stat. 1705 (codified at 49 U.S.C. §1371 (2018)). Air carriers are exempt from the jurisdiction of the FTC.

19. Although antitrust jurisdiction over airline mergers transferred to the DOJ, the DOT retained the authority to review international airline joint ventures, and to confer upon such agreements immunity from the U.S. antitrust laws.¹⁷ A grant of antitrust immunity enables competing or potentially competing airlines to coordinate routes, schedules, pricing, and other service without risk of violating the antitrust laws.¹⁸

20. The DOT's review of international alliances encompasses both a competitive analysis of the transaction and public interest considerations. The DOT first determines whether an agreement "substantially reduces or eliminates competition."¹⁹ If it does, then the DOT must deny the application for immunity unless the DOT finds that the agreement is "necessary to meet a serious transportation need or to achieve important public benefits" and there is no less anticompetitive alternative.²⁰ Congress has enumerated a wide range of factors that the DOT must consider in its public interest analysis, including the availability of a variety of air services, maximum reliance on market forces, the avoidance of unreasonable industry concentration, and opportunities for the expansion of international services.

21. The DOT has granted immunity over the past two decades to over twenty international alliance agreements, including to certain participants in the three major global alliances (SkyTeam, Star, and oneworld).²¹ The DOT has at times imposed conditions on immunity grants, including carving out specified city-pairs from the scope of the immunity or requiring carriers to divest slots at specific airports. In one recent case, the DOT placed a 5-year sunset provision on its grant of antitrust immunity.²²

22. The DOJ plays an advisory role with respect to immunity applications.²³ The DOJ may confer with the DOT off the record or file formal public comments. Given the scope of the immunity granted by the DOT, the DOJ applies the same analytical framework as it does in reviewing airline mergers. The DOJ has taken the position that immunity should be strongly disfavored across all industries, including the airline industry.²⁴ The DOJ has urged that the DOT, at a minimum, condition the immunity grants with provisions to protect

¹⁷ DOT also retained jurisdiction to review all cooperative arrangements between airlines, domestic and international, for unfair methods of competition. 49 U.S.C. § 41712.

¹⁸ 49 U.S.C. §§ 41308–09. U.S. air carriers are not allowed to merge with foreign air carriers because of longstanding statutory restrictions on foreign ownership and control of U.S. carriers. 49 U.S.C. § 40102(a)(2).

¹⁹ 49 U.S.C. §§ 41308–09.

²⁰ 49 U.S.C. § 41309(b).

²¹ See U.S. DEP'T OF TRANSP., AIRLINE ALLIANCES OPERATING WITH ACTIVE ANTITRUST IMMUNITY, <https://www.transportation.gov/office-policy/aviation-policy/airline-alliances-operating-active-antitrust-immunity>.

²² Delta Air Lines Inc. and Aerovias De Mexico, S.A. Antitrust Immunity Application, Docket DOT-OST-2015-0070, Final Order (Dec. 14, 2016).

²³ Recently, airlines have pursued equity stakes in their partners as an alternative to, or in conjunction with, pursuing antitrust immunity. In such cases, the DOJ has jurisdiction to review the stock acquisition under its usual merger review process.

²⁴ See, e.g., DOJ Comments on Joint Application of Air Canada to Amend Order 2007-2-16 under 49 U.S.C. § 41308 & § 41309 so as to Confer Antitrust Immunity, Comments of the Dep't of Justice on the Show Cause Order, DOT, Dkt. OST-2008-0234, at 17 (June 26, 2009).

competition on overlap routes. In some cases, the DOJ has urged the DOT to reject the immunity applications entirely.

4. Competition Advocacy

23. Where sectoral regulators have a lead or shared role in promoting or preserving competition in a sector, the Antitrust Agencies regularly share their expertise with the relevant regulator through competition advocacy. The Antitrust Agencies generally seek to promote reliance on competition rather than on government regulation, unless there is compelling evidence that regulation is necessary to achieve an important social objective. They also seek to ensure that when regulation is necessary, it is properly designed to accomplish its objectives as efficiently as possible, for example, through market-based solutions and structural, rather than behavioral, remedies. The Antitrust Agencies also seek to inform regulators of the costs associated with restrictive regulation. The FTC and DOJ have sought to inform sectoral regulators about the impact of regulation on efficiency and consumer welfare and potential benefits of deregulation in various sectors of the economy, including electricity, natural gas, telecommunications, broadcasting, cable television, and electricity generation and distribution. They communicate their views to other agencies through informal consultations, or more formally, through letters or regulatory filings.

24. In one recent example, the Antitrust Agencies submitted public comments to the U.S. Federal Energy Regulatory Commission (“FERC”) regarding how the FERC assesses market power in the agency’s review of mergers and electricity sales rates under the Federal Power Act. The Antitrust Agencies encouraged the FERC to look beyond market share and concentration statistics in this analysis, which should ultimately be aimed at understanding the competitive effects of proposed transactions. Due to features specific to electricity markets, even firms with relatively small market shares may be able to exercise market power, and so other evidence should be considered in determining whether, for example, a proposed combination of assets would enhance the ability and incentive of a firm to raise prices.²⁵

25. The Antitrust Agencies also opine on specific transactions, or aspects of them. For example, in April 2016 the DOJ formally opposed the structure the Canadian Pacific Railway proposed for its merger with Norfolk Southern Corp. The Canadian Pacific Railway had proposed to create an “independent voting trust” that would hold the shares of Canadian Pacific for the pendency of the Surface Transportation Board’s (“STB”) substantive analysis of the merger.²⁶ The DOJ argued that this ownership arrangement would undermine the independence of the two companies and effectively combine the two companies before a regulatory review could be completed. In the face of the opposition to the voting trust arrangement by the DOJ and by other parties that submitted their views at

²⁵ A listing, in reverse chronological order, of FTC and FTC staff competition advocacy comments to federal and state electricity regulatory agencies is available at http://www.ftc.gov/policy/advocacy/advocacy-filings?combine=&field_matter_number_value=&field_advocacy_document_terms_tid=5290&field_date_value%5Bmin%5D%5Bdate%5D=2013-10&field_date_value%5Bmax%5D%5Bdate%5D=&=Apply. Staff of the FTC and DOJ submitted some comments to the FERC jointly.

²⁶ The STB is exclusively authorized to review certain rail mergers. 49 U.S.C. § 11321(a).

the STB, the companies abandoned the deal before the STB had the opportunity to rule either on the voting trust or on the merger itself.

5. Pros and Cons of Concurrent Jurisdiction

26. There are advantages and disadvantages associated with concurrent or shared jurisdiction. One advantage is that it allows each agency to avail itself of the other's expertise. The Antitrust Agencies are experts in competition policy generally whereas the sectoral regulators have broad knowledge of their respective industries. The Antitrust Agencies can benefit from the regulators' access to industry-specific information, expertise on industry dynamics, and insight into the market and its participants. Interaction between the 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.

27. On the other hand, concurrent or shared jurisdiction can impose costs on the antitrust and regulatory agencies and the parties. For example, where the regulator and the agencies are pursuing the same goals, there may be costly duplication of investigative efforts by the agencies and compliance efforts by the parties. Shared jurisdiction can also 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 both address the same conduct but have different competition goals under their respective statutory authority, differences in enforcement approaches may emerge and can increase the difficulty of achieving consistent competition policies.

6. Conclusion

28. Antitrust enforcement and regulatory oversight often co-exist, particularly in industries with a history of extensive regulation. The United States has adopted a number of different models for structuring the allocation of authority between the sectoral regulator and the antitrust agencies. Where the regulator takes the lead on competition issues or must balance competition with other considerations, advocacy by the competition agencies can provide valuable assistance to the sectoral regulators in accomplishing their policy objectives as efficiently as possible. Experience has shown that there are ways the competition agencies and sectoral regulators can benefit from each other's expertise, but there may also be costs associated with dual oversight, including the potential for inconsistent outcomes and duplicative reviews.