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Competition Enforcement and Regulatory Alternatives – Note by the United States

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United States

1. Introduction

1. In the United States, competition enforcement and economic regulatory instruments both play important roles in ensuring that markets function efficiently for the benefit of consumers. As the agencies charged with enforcing the federal competition laws, the Antitrust Division of the Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) (collectively the Agencies) have extensive experience protecting competitive markets through enforcement mechanisms. They also have a long history of using their competition advocacy tools to foster competition, including by discouraging unnecessary regulations that impede free markets, and, where possible, to align necessary and beneficial regulations with competition principles.

2. In the following sections, this note will: (1) provide an overview of the interplay between competition enforcement and economic regulation in the United States; (2) describe some examples of express and implied antitrust exemptions; (3) discuss the limitations on federal antitrust enforcement imposed by the "state action" doctrine; (4) provide some examples of concurrent authority between the Agencies and sector regulators; and (5) highlight some recent competition advocacy efforts.

2. Overview of Competition Enforcement and Economic Regulation in the United States

3. Competition through free enterprise and open markets is the organizing principle for the U.S. economy. As the Supreme Court has explained:

> *The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.*[1]

4. The federal antitrust laws generally apply to interstate commerce or any activity affecting interstate commerce, whether or not the conduct at issue is subject to state or federal regulation. In most cases, regulation serves goals that Congress has determined are distinct from, but not inconsistent with, the competition standards of the antitrust laws. For example, Congress may, without displacing the antitrust laws, provide for environmental and safety regulations. Congress may also enact legislation that promotes activity that the antitrust laws neither prohibit nor require.

5. Some regulatory statutes, however, do displace the antitrust laws to a limited extent, either expressly or by implication. The nature and extent of such exemptions or immunities is a policy decision made by Congress; the role of the courts is to interpret the relevant statutes. Congress may provide an express statutory exemption when it determines that specific conduct otherwise prohibited by the antitrust laws should be permitted or required to further non-antitrust goals, or that competition should be "balanced" with other

[1] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

factors that can best be evaluated by a specialized regulatory agency. Even absent express statutory exemptions, the Supreme Court has held, in limited situations, that regulatory statutes may be construed as intended by Congress to create implied exemptions from the antitrust laws to the extent necessary to avoid conflict with a regulatory scheme. In addition, relying on "principles of federalism and state sovereignty," the Supreme Court has long held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'"[2]

6. At the federal level, regulation has often been adopted to address perceived market failures, such as industries assumed to be prone to natural monopolies. To protect consumers, sector-specific regulators often are authorized to regulate rates, terms of service, and entry (i.e., licensing) and to prevent the exercise of monopoly power. They are also typically charged with advancing 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.

7. U.S. experience demonstrates that competition enforcement is a highly effective tool for addressing anticompetitive conduct or transactions in nearly all industries. In general, enforcement is most successful where remedies can be fashioned that allow the market to return to the state of competition that existed prior to the targeted practice, such that market forces, rather than continuing monitoring by the government, will again determine prices and output. For example, enforcement is a powerful tool to limit harm to otherwise competitive markets resulting from agreements among competitors. Similarly, enforcement actions have successfully countered anticompetitive conduct that is likely to create or maintain a monopoly in a market that could otherwise support competition. Likewise, the Agencies regularly obtain injunctions or structural remedies to protect against harmful effects on competition from mergers.

8. Regulation can be appropriate, however, where legitimate market failures impede competitive markets.[3] In some instances, an expert regulatory agency with adequate knowledge and resources may be better suited to address durable structural concerns, *e.g.*, by monitoring and limiting the exercise of market power or enforcing market access conditions on an ongoing basis.[4] A regulatory authority may be able successfully to promulgate narrow, industry-specific rules to address market failures in a quasi-legislative procedure with public comments. Even where regulation is needed, however, regulators should beware of unintended consequences to ensure that regulation to address a demonstrated market failure does not unduly restrict competition.

[2] *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991).

[3] Regulation may also be justified to pursue outcomes unrelated to competition (*e.g.*, rural access to electricity or telecommunication services).

[4] For example, the Federal Energy Regulatory Commission (FERC) seeks to ensure just and reasonable rates, terms, and conditions for the wholesale sale and transmission of electricity and natural gas in interstate commerce. It utilizes a range of ratemaking activities as well as market oversight and enforcement in regulating those services.

3. Express Statutory Exemptions

9. Over the past century, Congress has enacted a number of express statutory exemptions from the full application of the federal antitrust laws in certain regulated sectors.[5] In some cases, the exemption is dependent on action taken by the regulatory authority. The exemption may also be limited to particular activities or types of agreements. Importantly, the Supreme Court has repeatedly emphasized that courts should narrowly interpret these exemptions.

10. To the extent outdated or unjustified exemptions and immunities put anticompetitive conduct outside the reach of the antitrust laws, the benefits of unfettered competitive markets may be lost. In 2018, the DOJ hosted a public roundtable to hear views from industry participants, academics, think tanks, and other interested parties regarding exemptions and immunities from the antitrust laws, and their impact on free markets and consumers.[6] The roundtable reflected a general consensus that Congress should not enact future antitrust exemptions or immunities and also should explore actively studying, sunsetting, or eliminating current statutory exemptions and immunities.

11. Two examples of express statutory immunity in the transportation sector are described below, followed by a summary of a recent law limiting the longstanding statutory exemption for conduct within the "business of insurance."

3.1. Ocean shipping

12. The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998[7] exempts certain agreements among ocean common carriers (*i.e.*, those operating vessels and providing service to the public between the United States and a foreign country) from the antitrust laws and subjects them to oversight by the Federal Maritime Commission (FMC), an independent regulatory agency. The Act expressly confers an exemption from the antitrust laws for agreements on shipping rates, pooling arrangements, and shipping route allocations, so long as those agreements are first submitted to and reviewed by the FMC. This is the oldest surviving U.S. statutory antitrust exemption, having been originally adopted in 1916. The exemption covers not only agreements that have gone into effect under the Act, but also activities undertaken "with a reasonable basis to conclude" that they were pursuant to an agreement that has gone into effect. The antitrust exemption also covers intermodal through rates incorporating rail, truck, and ocean legs of particular cargo movements.

13. A carrier agreement does not require FMC "approval," but is subject to several specific statutory conditions and goes into effect—and thereby becomes immunized from the antitrust laws—45 days after it is accepted for filing or submission of any additional information requested by the FMC. Once an agreement has been filed, the only way it can be challenged as anticompetitive is if the FMC successfully seeks to have a court enjoin the agreement on grounds that it is "likely, by a reduction in competition, to produce an

[5] Congress also has authority to create exemptions for non-regulated conduct.

[6] Roundtable on Exemptions and Immunities from Antitrust Laws (March 14, 2018), https://www.justice.gov/atr/events/CompReg/roundtable-exemptions-and-immunities-antitrust-laws-wednesday-march-14-2018.

[7] Shipping Act of 1984, 46 U.S.C. App. §§ 1701-1719, as amended by the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998).

unreasonable reduction in transportation service or an unreasonable increase in transportation cost."[8]

14. Conduct that does not satisfy the statutory requirements for the antitrust exemption remains subject to the antitrust laws. For example, immunity does not extend to mergers and acquisitions involving ocean carriers. The DOJ has also successfully prosecuted price-fixing cases involving international trade lanes. A recent example involved a world-wide conspiracy involving price fixing, bid rigging, and market allocation in international ocean shipping services for roll-on, roll-off cargo to and from the United States and elsewhere. Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and off of an ocean-going vessel; examples include new and used cars and trucks and construction and agricultural equipment. In 2015 and 2016, four companies (Wallenius Wilhelmsen Logistics AS, Kawasaki Kisen Kaisha Ltd., Nippon Yusen Kabushiki Kaisha, and Compañia Sud Americana de Vapores S.A.) pled guilty and were sentenced to pay total fines of $234.9 million, and four corporate executives pled guilty and were sentenced to an average of over 16 months in jail.[9]

15. The DOJ has long advocated that the general antitrust exemption granted by the Shipping Act is no longer justified and should be eliminated.[10] In addition, the American Bar Association Antitrust Law Section's monograph on Federal Statutory Antitrust Exemptions[11] describes why the arguments traditionally asserted to justify the exemption (*i.e.*, ruinous competition due to overcapacity) are dubious. The ABA Antitrust Law Section concludes that the conferences "typically result in inefficiently high rates" and have at least "some ability to inflate price."[12]

3.2. Civil Aviation

16. 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 Department of Transportation (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. In 1988, however,

[8] 46 U.S.C. § 41307(b)(1).

[9] *See* https://www.justice.gov/opa/pr/three-ocean-shipping-executives-indicted-fixing-prices-and-rigging-bids; https://www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks; and https://www.justice.gov/atr/public/press_releases/2015/312415.htm.

[10] *See, e.g.*, Letter from Renata B. Hesse, Acting Assistant Attorney General, to Secretary, FMC, Re: The OCEAN Alliance Agreement, at 2, FMC No. 012426, Sept. 19, 2016, https://www.justice.gov/atr/file/909131/download; Statement of Charles A. James, Ass't Atty. Gen., before the House Committee on the Judiciary on H.R. 1253, The Free Market Antitrust Immunity Reform Act of 2001 (June 5, 2002), https://www.justice.gov/archive/atr/public/testimony/11244.pdf; Statement of John M. Nannes, Dep. Ass't Atty. Gen., before the House Committee on the Judiciary on H.R. 3138, the Free Market Antitrust Immunity Reform Act of 1999 (March 22, 2000), https://www.justice.gov/archive/atr/public/testimony/4377.pdf.

[11] ABA Section of Antitrust Law, Federal Statutory Exemptions from Antitrust Law, 182-183 (2007).

[12] *Id.*

Congress transferred authority for review of airline mergers from the DOT to the DOJ.[13] 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.

17. Although antitrust jurisdiction over airline mergers was 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.[14] 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.[15]

18. 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."[16] 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.[17] 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.

19. 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).[18] 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.[19]

20. The DOJ plays an advisory role with respect to immunity applications.[20] 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

[13] 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.

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

[15] 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).

[16] 49 U.S.C. §§ 41308–09.

[17] 49 U.S.C. § 41309(b).

[18] *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.

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

[20] 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.

be strongly disfavored across all industries, including the airline industry.[21] The DOJ has urged that the DOT, at a minimum, condition the immunity grants with provisions to protect competition on overlap routes. In some cases, the DOJ has urged the DOT to reject the immunity applications entirely.

3.3. Insurance

21. In a rare example of the removal of an antitrust exemption, on January 13, 2021, the Competitive Health Insurance Reform Act of 2020 was signed into law, amending the McCarran-Ferguson Act to limit the antitrust exemption for the "business of health insurance."

22. Under the McCarran-Ferguson Act, an activity was exempt from the federal antitrust laws if the activity (1) fell under the "business of insurance," (2) was regulated by state law, and (3) the activity did not involve "an agreement to boycott, coerce, or intimidate." This broadly written immunity has been interpreted to allow a range of harmful anticompetitive conduct in health insurance markets to occur unimpeded by the antitrust laws.

23. Courts have sometimes struggled with interpreting the scope of the exemption, and the DOJ engaged in advocacy efforts to minimize the risk that courts would immunize anticompetitive conduct. For example, in 2020, the DOJ submitted an amicus brief in *Oscar Insurance Company of Florida v. Blue Cross and Blue Shield of Florida, et al.* arguing that the district court erred in holding that the appellee was immune from federal antitrust claims under the "business of insurance" exemption because the court disregarded Supreme Court precedent and protections of federal antitrust law.[22]

24. The amendment to the McCarran-Ferguson Act clarifies that, except for certain activities that improve health insurance services for consumers, health insurers are subject to the federal antitrust laws just as in nearly every other industry.

4. Implied Immunity

25. In narrow circumstances, antitrust exemptions have been implied by courts where the antitrust laws and the regulatory scheme are deemed incompatible. Since "a cardinal principle of construction [is] that repeals by implication are not favored,"[23] however, the Supreme Court has held that implied immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[24] The Supreme Court has made clear that the "proper approach" to a claim that a federal regulatory statute impliedly repeals the antitrust laws with regard to challenged conduct "is an analysis which reconciles the operation of both statutory schemes with one another

[21] *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).

[22] https://www.justice.gov/atr/case-document/file/1158296/download.

[23] *Silver v. NYSE*, 373 U.S. 341, 357 (1963) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

[24] *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) (NASD); *National Gerimed.*, 452 U.S. at 388.

rather than holding one completely ousted."[25] The Court has described this admonition to give effect to both regulatory policies as the "guiding principle" for resolving claims of implied antitrust immunity.[26] Thus, the Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law.[27]

26. In *Credit Suisse Securities (USA) v. Billing*,[28] the Supreme Court examined the interaction of the antitrust laws with certain SEC regulations, and used four factors to guide its determination of whether implied immunity applied: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. Based on the extensive regulatory authority exercised by the Securities and Exchange Commission over the alleged activity, the Court found that, in that particular context, even assuming that the SEC had disapproved the alleged conduct, the private litigation was "likely to prove practically incompatible with the SEC's administration of the Nation's securities laws."[29] Such a "serious conflict" between "application of the antitrust laws" and "proper enforcement of the securities law," the Court held, requires implied antitrust immunity.[30] The Court's opinion did not address the scope of implied antitrust immunity for other securities-related conduct or in other regulated industries. Courts have rarely found implied antitrust exemptions outside the securities and commodities contexts.

27. Some statutes have antitrust "savings clauses," expressly preserving the applicability of the antitrust laws within a regulatory scheme. The Supreme Court's 2004 decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[31] involved the application of such clauses. The Telecommunications Act of 1996 (1996 Act), among other things, required that incumbent local exchange carriers "open" their networks to new entrants, under rules established by the Federal Communications Commission, in order to facilitate competition. The question in *Trinko* was whether a complaint alleging breach of such a duty stated a claim of illegal monopolization under Section 2 of the Sherman Act. The Court held that it did not. The Court considered the relationship between the Sherman Act and the 1996 Act, which imposed a comprehensive scheme of duties on incumbent local exchange carriers designed to introduce competition in telecommunications while maintaining appropriate incentives for investment in facilities by both incumbent and new entrants. Despite the comprehensive nature of the 1996 Act in regulating competition in the telecommunications industry, the Supreme Court ruled that the antitrust savings clause prevented the implication of immunity under the Sherman Act

[25] *Silver v. NYSE*, 373 U.S. 341, 357 (1963).

[26] *National Gerimed. Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 392 (1981) (*National Gerimed.*).

[27] *National Gerimed.*, 452 U.S. at 392. See also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) ("Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").

[28] 551 U.S. 264 (2007).

[29] *Id.* at 277.

[30] *Id.* at 284.

[31] 540 U.S. 398 (2004).

and expressly preserved antitrust claims under established law.[32] Nonetheless, while the savings clause "preserves claims that satisfy existing antitrust standards," the Court concluded that the allegations against Verizon failed to state a claim under Section 2 of the Sherman Act, given existing general antitrust principles governing the duty of companies to facilitate competition by their rivals.[33]

5. Concurrent Authority with Sector Regulators

28. As discussed in the United States' 2019 submission on Independent Sector Regulators,[34] there are categories of conduct where the antitrust Agencies and 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. Interaction between competition agency and sector regulator oversight is briefly discussed below with respect to telecommunications and electric utilities. More detail can be found in the December 2019 submission.

29. In the telecommunications sector, the Federal Communications Commission 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 wireline telecommunications, and satellite providers. The FCC review is based on whether the transaction will serve "the public interest, convenience and necessity."[35] The FCC's public interest analysis includes an assessment of the competitive effects of the transaction, but it also considers a number of other considerations. In its evaluation of the competitive effects of a merger, the FCC's analysis is "informed by, but is not limited to," antitrust principles.[36] 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. In the majority of cases, the DOJ and FCC have reached similar outcomes when reviewing the same mergers.[37]

30. 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 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

[32] 540 U.S. at 406.

[33] 540 U.S. at 407.

[34] Independent Sector Regulators – Note by the United States (2019) https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)18/en/pdf.

[35] 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.

[36] *See, e.g.*, Id. at 9140, ¶ 20 (2015).

[37] 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.

legislation has introduced competition into wholesale electricity markets,[38] and several states have introduced competition into retail electricity markets. Mergers in the electricity sphere often are subject to review by the FERC, the antitrust agencies (typically the DOJ), and the state agencies.[39] 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 agency does not preclude a separate challenge by the others, and approval of a transaction by one agency subject to one set of concessions does not preclude another entity from insisting upon further concessions. It is not unusual for all three agencies to analyze the competitive effects of, and seek remedies for, the same merger. Unfortunately, the agencies operate under different statutory and policy regimes, which sometimes results in different review outcomes for the same merger.

6. State Action Doctrine

31. In contrast to the exemptions and immunities discussed above, which relate to the interaction of regulation and antitrust at the federal level, the "state action doctrine" is grounded in principles of federalism and state sovereignty.[40] The doctrine exempts from scrutiny under the federal antitrust laws "anticompetitive conduct by the States when acting in their sovereign capacity."[41] As first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), state and municipal authorities are exempt from federal antitrust lawsuits for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects. A state legislature may, for example, "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives."[42] The state action exemption is an affirmative defense on which the party claiming the exemption bears the burden of proof.

32. Under some circumstances, the defense is available to non-state actors, including quasi-governmental entities (*e.g.*, state regulatory boards controlled by active market participants) and private actors. Such entities may invoke the defense only where (1) the challenged restraint is "one clearly articulated and affirmatively expressed as state policy," and (2) the policy is "actively supervised by the State."[43]

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[38] 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).

[39] 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. Local distribution systems require franchises that cannot be transferred without permission from state regulatory agencies.

[40] *See* FTC Report of the State Action Task Force, *available at* https://www.ftc.gov/news-events/press-releases/2003/09/ftc-staff-report-recommends-clarifications-antitrust-state-action.

[41] *North Carolina State Bd. of Dental Examiners v. FTC ("North Carolina State Bd.")*, 135 S. Ct. 1101, 1110 (2015) (citing *Parker v. Brown*, 317 U.S. 341, 350-51 (1943)).

[42] *Id.*

[43] *Id.*; *see also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

33. The Supreme Court has emphasized, however, that "state-action immunity is disfavored" because it conflicts with "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws."[44] The Court explained that "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'"[45]

34. Two relatively recent FTC enforcement actions resulted in Supreme Court opinions that significantly clarified the elements and boundaries of the state action doctrine. In 2013, in *FTC v. Phoebe Putney Health System, Inc.*, the Supreme Court agreed with the FTC that a Georgia law, which created special-purpose public entities called hospital authorities and gave those entities general corporate powers, did not clearly articulate and affirmatively express a state policy to permit acquisitions that substantially lessen competition. The Court, unanimously upholding the FTC's position and reversing the lower court, reasoned that, because Georgia's grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, the clear articulation test was not satisfied and the state action doctrine did not immunize an anticompetitive hospital merger.[46]

35. In 2015, the U.S. Supreme Court upheld the FTC's determination that the North Carolina State Board of Dental Examiners violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists.[47] In this decision, the Supreme Court clarified that state boards controlled by market participants must satisfy the "active supervision" requirement in order to invoke state action antitrust immunity.[48] The Supreme Court recognized that when "a State empowers a group of active market participants to decide who can participate in its market," there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals."

36. In the wake of these important Supreme Court decisions, the Agencies have filed numerous amicus curiae briefs in lower courts advocating for pro-competitive application of the state action doctrine. For example, in 2019, the Agencies filed a joint brief in *SmileDirectClub, LLC v. Battle, et al.*[49], arguing that, if the Court addresses the active supervision component of the Georgia Board of Dentistry members' state action defense, the Court should affirm the district court's holding that the Board members did not meet their burden to show active state supervision of its challenged regulation. In 2018, the Division filed a statement of interest in *TIKD v. Florida Bar*[50], arguing that the Florida Bar

[44] *North Carolina State Bd.*, 135 S. Ct. at 1110 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. at 225 (2013).

[45] *North Carolina State Bd.*, 135 S. Ct. at 1110 (citing *Phoebe Putney*, 568 U.S. 216, 225 (internal quotations omitted).

[46] *See* www.ftc.gov/opa/2013/02/phoebe.shtm.

[47] *N.C. State Bd.*, 135 S. Ct. 1101 (2015).

[48] *Id.* at 1114.

[49] *SmileDirectClub, LLC v. Tanja D. Battle, et al.*, No. 19-12227 (11th Cir.). *See* https://www.justice.gov/atr/case-document/file/1205101/download. The Agencies recently reaffirmed their view in a brief to the court *en banc*. *See* https://www.justice.gov/atr/case-document/file/1369006/download.

[50] *TIKD Services, LLC v. The Florida Bar*, No. 1:17-cv-24103 (S.D. Fla. filed Nov. 8, 2017), Dkt. 115. *See* https://www.justice.gov/atr/case-document/file/1042666/download.

is not automatically immune under the state action doctrine, but must instead show "active supervision" and "clear articulation," as required under the Supreme Court's *North Carolina Board of Dental Examiners* decision.

7. Competition Advocacy

37. The Agencies deploy their competition advocacy resources 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.

38. The FTC and DOJ have sought to inform federal 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.[51]

39. In one recent example, the Antitrust Agencies submitted public comments to the FERC regarding how the FERC assesses market power in the agency's review of mergers and electricity sales rates under the Federal Power Act.[52] 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.

40. The DOJ also frequently coordinates with officials from the Department of Transportation on matters of mutual interest. In 2015, the DOJ brought suit to stop United Airlines from acquiring additional takeoff and landing slots at Newark Airport, alleging that United was already dominant and underutilizing its slots in order to keep them out of the hands of competitors. Not long after, the FAA eased the slot regime at Newark, paving the way for more competition from low-cost carriers.

41. The Agencies also work with state legislatures and agencies to promote competition principles in state regulatory laws. A few recent examples follow.

- On September 10, 2018, in response to a state legislator's request for comment, the Department provided guidance to the Maryland state legislature with respect to professional standards setting for the medical profession. Because medical doctors have raised concerns that the requirements to maintain specialty certification from private certifying bodies have become increasingly costly, the State of Maryland was contemplating legislation that would restrict hospitals and insurance

[51] DOJ's public comments to other agencies are available at https://www.justice.gov/atr/comments-federal-agencies.

[52] Comment of the U.S. Department of Justice and the Federal Trade Commission, 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 (Nov. 28, 2016), https://www.justice.gov/atr/page/file/913741/download.

companies from using information about a medical doctor's maintenance of certification record. The Division encouraged the Maryland legislature to consider ways to facilitate new entry by and competition among legitimate certifying bodies, while continuing to allow hospitals and insurers to decide whether to consider a medical doctor's maintenance of certification record when making business decisions, such as granting hospital privileges. The Division also encouraged certifying bodies, which are frequently governed by active market participants and may have market power, to ensure that their policies promote procompetitive goals, that their standards are applied objectively, and that input is available from, and decision-making is vested in, groups that represent a balance among the various relevant stakeholders.[53]

- On March 7 and March 11, 2019, the Agencies submitted joint letters on pending legislation before the States of Alaska and Tennessee. The letters shared the agencies' past guidance on potential competitive problems posed by Certificate of Need (CON) laws. Generally speaking, CON laws prevent firms from entering certain areas of the health care market (e.g., building a new hospital) unless they can demonstrate to a state regulator that there is an unmet need for the services. Reflecting current research, the letters noted that "[b]y interfering with the market forces that normally determine the supply of facilities and services, [CON] laws can suppress supply, misallocate resources, and shield incumbent health care providers from competition from new entrants."[54]
- On March 14, 2019, the Agencies submitted a joint letter to the Nebraska Legislature regarding proposed state legislation to remove restrictions on automobile manufacturers selling and servicing new motor vehicles directly to consumers. The proposed legislation would benefit only manufacturers who had not previously used independent, franchised dealers in Nebraska. The letter emphasized previous guidance that these restrictions on automobile manufacturers interfere with "the competitive process [that] effectively aligns the interests of firms and consumers on the issue of distribution method" and "can discourage innovation and new forms of competition." Instead, the Agencies suggested that wherever possible, "the law should permit automobile manufacturers to choose their distribution method to be responsive to the desires of car buyers," and that "full repeal" can offer "even greater benefits to competition and consumers."[55]
- On April 19, 2019, the DOJ submitted a letter to the State of Texas regarding a bill that would prevent development of high-voltage transmission facilities in Texas by non-local companies. In the letter, the Division warned Texas legislators that restrictions on new entry "would likely reduce the competitive pressure on [local] incumbents to develop higher quality, lower cost transmission facilities." As a result of lost competition, transmission rates may be more expensive. Moreover, if the bill reduced construction of transmission, electricity rates may be higher and service less reliable because it could limit "the supply of generation available to serve a local territory or area." As a result, the Division urged the State of Texas

[53] *See* https://www.justice.gov/atr/page/file/1092791/download.

[54] *See* https://www.justice.gov/atr/page/file/1146346/download; https://www.justice.gov/atr/page/file/1146241/download.

[55] *See* https://www.justice.gov/atr/page/file/1146236/download.

to "consider whether it can achieve [its objectives] through mechanisms that do not restrict unnecessarily competition to develop transmission facilities in Texas."[56]

8. Conclusion

42. Competition is the foundational economic policy of the United States, and enforcement of the antitrust laws is the primary means of ensuring the integrity of the competitive process. The Agencies use all available tools to ensure that markets are as competitive as possible, primarily vigorous enforcement of the antitrust laws. The Agencies also engage in competition advocacy to discourage exceptions to the general rule of free market competition. Where regulations are necessary, the Agencies encourage the use of the least restrictive regulatory methods, and seek to ensure that regulation is properly designed to meet legitimate objectives while preserving as much competition as possible.

[56] *See* www.justice.gov/atr/page/file/1155881/download.