Comments of the American Antitrust Institute Prepared for the Antitrust Division Roundtable on Anticompetitive Regulations

May 31, 2018

The American Antitrust Institute (AAI) is pleased to participate in the Antitrust Division's Public Roundtable Discussion Series on Regulation and Antitrust Law and this third session which focuses on "consumer costs of anticompetitive regulation."[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society.

AAI frequently engages in competition advocacy before regulatory agencies to enhance competition in regulated industries such as airlines, telecommunications, and energy. AAI has been particularly critical of the use of regulation at the state and federal levels to restrict competition on behalf of incumbents. For example, AAI has criticized unjustified occupational licensing regimes, opposed dealer protection laws that limit the ability of innovative car manufacturers to distribute directly to consumers, and criticized certificate of need laws. On the other hand, regulation that restricts competition may be fully justified to correct market failures, or may involve legitimate tradeoffs that antitrust enforcers should respect. Moreover, regulation can also *enable* competition in ways that the antitrust laws cannot. We offer certain principles to guide the Division's advocacy on anticompetitive regulations.

I. Regulation Legitimately May Promote Other Values That Conflict with Competition

The Division should exercise "competition humility" in its advocacy related to anticompetitive regulations. Critics of the antitrust enterprise have attacked antitrust's focus on consumer welfare and maintained that antitrust law should take into account other important concerns, such as the welfare of workers, inequality, democracy, privacy, and community welfare, among other things. If antitrust enforcers are to resist such calls as beyond the ken of antitrust, they must avoid the perception that they reject such concerns altogether.

In a recent speech, Assistant Attorney General Delrahim said that antitrust's "narrow focus on competition and consumers is a feature, not a bug."[2] He continued:

> The burden of curing our economic woes rests on the shoulders of policymakers and agencies with the institutional capacity and statutory mandate to tackle other complex

[1] AAI's comments filed in connection with the first two sessions are available at http://www.antitrustinstitute.org/content/aai-participates-us-department-justice-public-roundtable-discussion-series-regulation.

[2] Makan Delrahim, Assistant Attorney General, Antitrust Division, Don't Stop Believin': Antitrust Enforcement in the Digital Era, as Prepared for Delivery at Booth School of Business, The University of Chicago (Apr. 19, 2018).

> issues. Shifting this responsibility to antitrust enforcers would require us to make tradeoffs between competition and non-competition goals on a case-by-case basis. I view this as dangerous. It would threaten to disrupt the bipartisan economic consensus that has emerged by making antitrust a political tool that changes significantly depending on the party in power.[3]

Likewise, when other regulators *do* tackle social problems with regulations that have the effect of restricting competition, and those tradeoffs reflect a reasoned balancing of interests, antitrust enforcers should be circumspect in challenging those tradeoffs.[4] Indeed, to do otherwise would risk the same dangers Assistant Attorney General Delrahim was referencing.

For example, some advocate for allowing gig economy workers to bargain collectively with platforms like Uber in order to improve working conditions.[5] Putting aside the issue of whether such bargaining would constitute an unreasonable restraint of trade among independent contractors, states plainly could enact laws authorizing such conduct under the *Parker* doctrine. One might question whether the benefit to workers is worth the potential cost to consumers and possibly in less dynamic platform competition, and whether platform competition for workers is sufficient to protect them. But antitrust enforcers would be wise to stay out of the debate over the wisdom of these tradeoffs. To be sure, advocacy that focuses on whether state or local regulation to protect gig economy workers satisfies the demanding requirements of the state action doctrine is well within the realm of consensus antitrust enforcement.[6] But advocacy on policy grounds against the use of non-antitrust tools to protect workers may only lend support to the populist critique of antitrust.

II. Regulation May Be Necessary for Promoting Competition

Regulation has been an essential enabler of competition in network industries like telecommunications, electricity, and natural gas that involve elements of natural monopoly or bottlenecks. Open access and unbundling requirements imposed on incumbent network operators have facilitated the development of competitive ancillary markets. It is widely accepted that, at least absent vertical divestiture, a global regulatory solution to the access problem is preferable to piecemeal antitrust remedies that target particular instances of anticompetitive discrimination. Similar

[3] *Id.*

[4] The Division has recognized the legitimacy of other values in its competition advocacy. For example, it has explained: "In some industries, such as agriculture and banking, there are Congressionally-approved, legitimate, noncompetition policy goals at stake. The Antitrust Division has an important role to play in working with other Federal agencies to promote those goals in ways that are consistent, to the extent possible, with competition principles." Antitrust Division Manual, Fifth Edition, Chapter 5, Competition Advocacy.

[5] *See, e.g.,* Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. Davis L. Rev. 1543 (2018).

[6] *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, *Chamber of Commerce of the United States of America v. City of Seattle*, No. 17-35640 (3d Cir. filed Nov. 3, 2017) ("Seattle Ordinance Amicus Brief").

considerations supported the FCC's net neutrality requirements, which ensured competition in ancillary content markets in ways that antitrust enforcement is unlikely to be able to achieve.[7]

III. Deregulation Requires Vigorous Antitrust Enforcement

Eliminating rate and entry regulation in markets capable of supporting competition—such as airlines and trucking—and limiting such regulation to the extent necessary in markets with natural monopoly elements—such as telecommunications, electricity, and natural gas—has produced significant gains for consumers. But one of the lessons of deregulation is that deregulation without vigorous antitrust enforcement fritters away the gains to consumers. Substituting anticompetitive private action for anticompetitive regulation is no bargain. A prime example is the airline industry, where the great promise of deregulation has been undermined to a significant degree by lax merger enforcement.[8] Wholesale electricity markets subject to market-based rates are another example of deregulated markets that require close attention from antitrust enforcers, particularly to police the use of transmission constraints to foreclose competition.[9] In short, in advocating further deregulation of markets, antitrust enforcers must be prepared to step up enforcement and (continue to) advocate for limiting antitrust immunities.[10]

IV. DOJ's Competition Advocacy Should Give Priority to Shaping Antitrust Law and Advocating Before Federal Agencies

The Division is to be applauded for its initiative to step up its amicus filings to "help shape the development and application of antitrust law in the earliest stages of private litigation."[11] It has filed four such briefs since February, whereas the Division apparently last filed an amicus brief in a district court in 2003. The Division's amicus program implicates the issue of anticompetitive regulations insofar as its advocacy involves the application of the state action doctrine[12] or other exemptions or immunities. While shaping the law on exemptions and immunities is a good use of the Division's resources, we would suggest caution in investing scarce resources to invalidate anticompetitive state government constraints on other grounds, such as the Dormant Commerce Clause

---

[7] *See* American Antitrust Institute, Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards (Dec. 22, 2017), http://www.antitrustinstitute.org/sites/default/files/AAI_Net Neutrality Repeal Comm_F.pdf.

[8] *See, e.g.,* Diana L. Moss, Revisiting Antitrust Immunity for International Airline Alliances (Mar. 2018), http://www.antitrustinstitute.org/sites/default/files/AAI_Revisiting Antitrust Immunity_4.6.18.pdf.

[9] *See* American Antitrust Institute, Antitrust Tools for Challenging Capacity Withholding in Wholesale Electricity Markets (July 22, 2014), http://www.antitrustinstitute.org/sites/default/files/AAI on Capacity Withholding_final.pdf.

[10] Notably, the Division advocated against immunity in both *Trinko* and *Credit Suisse*. In continuing its bipartisan advocacy in this area, the Division should look for an opportunity to seek to abolish the filed rate doctrine, or at least preclude its application to market-based rates.

[11] https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-expands-its-appellate-and-amicus-program.

[12] Statement of Interest on Behalf of the United States of America, *TIKD Services LLC v. The Florida Bar*, No. 1:17-cv-24103 (filed March 12, 2018); Seattle Ordinance Amicus Brief, *supra* note 6.

or perhaps Substantive Due Process.[13] Wading into these controversial doctrines, which are not themselves within the competition expertise of the Division, may weaken public support for its core mission.

The Division has particularly valuable expertise to offer federal regulators in industries like electricity, natural gas, telecommunications, and airlines. We note, however, that during the Obama administration, the number of Division comments with federal regulatory agencies fell.[14] And the Division has apparently stopped filing submissions on antitrust immunities sought by members of airline alliances.[15] We would urge the Division to increase its competition advocacy before federal agencies.

---

[13] The Division has recently supported a complaint alleging that a state law granting an incumbent utility a right of first refusal with respect to a transmission project violates the Dormant Commerce Clause. *See* Statement of Interest on Behalf of the United States of America, *LSP Transmission Holdings, LLC v. Nancy Lange*, No. 17-cv-04490 (D. Minn. filed April 13, 2018). AAI agrees that the state law is poor policy, but the Division has no institutional interest in expounding on the contours of the Dormant Commerce Clause.

[14] According to the workload statistics, the number of comments dropped from 57 between FY 2001-08 to 23 between FY 2009-16.

[15] *See* Moss, *supra* note 8.