

Past and Future in the Evolution of US Policy in the Field of Competition

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Abstract

American competition policy is based on three normative acts: The Sherman Act, The Clayton Act and the Federal Trade Commission Act, even though they will see many amendments and different interpretations with time. Competition regulation has evolved through the decisions of the American Courts of Justice through which the legislation was interpreted, as well as a result of the priorities and directorial paths of the implementing agencies.

Key Words: The Antitrust Division of the Department of Justice, investigative model, Federal the Federal Trade Commission

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1. Introduction

The international leader in the evolution of competition regulation is the USA, the first to create and implement laws in this field. A public policy regarding competition appeared in the US at the end of the 19th century, as a reaction to the economic concentrations which existed in the American economy.

The first American competition legislation adopted at a federal level, The Sherman Act of 1890, appeared in a special historical context, that of a period characterized by an increasing number of industrial concentrations or trusts in different sectors, such as oil, metalworking or the electricity industry, processing industries of meat, sugar, lead, tobacco and gunpowder and on the backdrop of the severe economic depression throughout the 1880s [7,8]. Thus, the farmers' organizations, syndicates, as well as the smaller entrepreneurs united to promote a law to protect them from the economic power of these new trusts. There are two important sections of the Sherman Act. Section 1 forbids the contracts, combinations and conspiracies to restrict trade between federal states or with tertiary states. Section 2 interdicts monopolizing or the attempts and combinations intended to monopolize any part of the commerce between states, and tertiary states. The penalties for those who break the law can be prison and/or fines. In order to supervise and apply the Sherman law, an implementing agency was created, the Antitrust Division of the American Justice Department¹⁰. This division investigates the severe infringements of competition laws which may lead to the issuing of severe fines and even jail time sentencing for the accused, should legal action be taken.

2. Fines and penalties for competition in the US after 1999

An essential question is whether the *potential threatening of companies and individuals with federal penal fines and private lawsuits for damages is the most powerful means of deterring trusts?* According to studies by Block, Nold and Sidak¹¹, the main conclusion is that this threat is *the main deterrent for the creation of trusts*, therefore, lately, the Antitrust Division of the Department of Justice tried to consolidate this deterrent through the imposing of larger fines for corporations that fix prices and

¹⁰ The Antitrust Division of the American Justice Department has the following website: www.usdoj.gov/atr/

¹¹ Block, M.K., Nold, F.C., Sidak, J.G. (1981) , „The Deterrent Effect of Antitrust Enforcement”, *Journal of Political Economy* 89, June, pp.429-45.

through extending the clemency program for companies which unveil the role they played in a conspiracy and cooperate with the government. Thus, after 1994, infringements to the Sherman act have led to penal fines of at least 10 million dollars for each case and 11 fines of at least 100 million per case. The biggest fine, of 500 million dollars, was served to the F. Hoffmann-La Roche firm. (Table 1)

Table 1. Fines of over 100 million dollars levied by the American Justice Department, Antitrust Division

Year	Incriminated Company	Type of activity	Value of the fine (millions of dollars)
1996	Archer Daniels Midland Co.	Citric acid and lysine	100
1998	UCAR International, Inc.	Graphite electrolytes	110
1999	SGL Carbon AG	Graphite electrolytes	135
1999	BASF AG	Vitamins	225
1999	F. Hoffmann-La Roche, Ltd.	Vitamins	500
2001	Mitsubishi Corp.	Graphite electrolytes	134
2004	Infineon Technologies AG	Semiconductors	160
2005	Hynix Semiconductor, Inc.	Semiconductors	185
2006	Samsung Electronics Company, Ltd.; Samsung Semiconductor, Inc.	Semiconductors	300
2007	British Airways	Air transport	300
2007	Korean Air Lines Co., Ltd.	Air transport	300

The deputy assistant to the Minister of Justice, responsible with the penal implementation of competition legislation, Scott Hammond, in "Recent Developments, Trends, and Milestones in the Antitrust Division's criminal Enforcement Program"¹², references the jail penalty enforced on the individuals who broke competition legislation, and in 2007, 87% of the accused in the lawsuits filed by the Antitrust Division of the American Department of Justice have been sentenced to jail. Starting with the year 2000, more than 150 individuals have done prison time as a direct result of lawsuits filed by the Antitrust Division of the American Department of Justice. One may surmise that this criminal aspect of the behavior of individuals represents one of the characteristics of the American model of applying competition policy, both conventionally, through fines, as well as penal, through imposing detention terms (Table 2).

Table 2. Investigations initiated by the Department of Justice

Investigations initiated	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Sherman cap.1- trade restraining	74	85	84	95	137	79	118	104	77	76
Sherman cap.1- monopoly	6	10	10	13	11	7	8	3	6	-

Along with the Sherman Act of 1890, the fundamental legislation on which the antitrust policy is based is the Clayton Law¹³ the Federal Trade Commission Law¹⁴ (Federal Trade Commission - FTC) of 1914 as well as the Robinson-Patman Law of 1936.

The motivations for adopting the Sherman Law were preponderantly political, such as the aversion to the economic power of the "big businesses" and the desire of the political factor to protect small

¹² Speech available at www.usdoj.gov/atr/public/speeches/232716.pdf

¹³ The Clayton Act is available at: www.usdoj.gov/atr/foia/divisionmanual/ch2.htm#a1

¹⁴ The Federal Trade Commission Act is available at: WWW.law.cornell.edu/uscode/15/

business against which the big trusts would compete and which they would abuse¹⁵. An extreme activism of US policy in the field of competition manifested in the 60s, a period during which horizontal concentrations which aim to obtain economies of scale are blocked precisely for this reason, in order to not eliminate from the market the less efficient competitors. The perspective of the authorities is modified radically though, starting with the later have of the 70s.

3. New approaches in the US competition

One of the fundamental theses of the new approach is constituted in promoting of the criteria of efficiency in the evaluation of the compatibility of business practices with the objectives of the competition legislation and not just by deeming them as being anti-competition. Thus, a business practice is qualified as pro-competition if it has as an effect the increase of the efficiency of resource allocation in the economy and, finally, an increase of consumer welfare¹⁶. In a practical sense however, this transition process is not instantaneous. If the efficiency criteria is mentioned in the Merger Guidelines of the Department of Justice in 1968, it will not be completely adopted until 1997, through the publication of a common document by the DoJ and the FTC, *Horizontal Merger Guidelines*).

In fact, American competition policy is based on three acts: The Sherman Act, The Clayton Act and the Federal Trade Commission Act, even if these will see numerous amendments and interpretations in time. The Clayton Act has a much better delimited sphere of comprehension, defining more clearly the anti-competition acts and practices.

Section 2 of this act forbids discrimination based on price within trade between a seller and different buyers of goods of the same category and quality.

Section 3 declares as illegal for any person engaged in trade, within such a trade situation, the lending or selling of goods for the use or reselling within the United States, with the condition that the buyer not use or distribute the products of the seller's or lender's competitor.

Section 6 excludes from the application of the law of competition the organizations of agriculture, horticulture and work, stipulating that these institutions are not to be treated as illegal combinations or conspiracies.

Section 7 forbids the acquisitions of companies which may have as an effect the severe weakening of the competition or that tends to create a monopoly. The Clayton Act outlawed price discrimination, clauses and accords referring to exclusive deals, as well as mergers between competing companies. However, these practices were illegal only in the event in which they would substantially weaken the competition or would tend to create a monopoly. Section 7, which dealt with mergers, was inefficient, for the most part, because of the existence of a legal loophole. Later on, the Hart-Scott-Rodino Act of 1950 will add a new Section 7, demanding that certain acquisitions and mergers be notified to the Federal Trade Commission as well as the Antitrust Division of the Department of Justice.

Section 8 of the Clayton act forbids any person to hold a position of director within two or more corporations which are or have been competitors on any market, when one of these corporations holds actives in excess of 1 million dollars.

¹⁵ The Aluminum Company of America (ALCOA) case, instrumented by the American antitrust authorities in 1945, is suggestive to this effect: "there is no exclusion of competitors more efficient by the respective company, than to follow progressively any new opportunity which appears on the market and to meet any new competitors with a production capacity in reserve at the disposal of a large organization which enjoys the advantage of experience, well established business connections and elite personnel".

The investigations of large companies, such as American Telephone & Telegraph and International Businesses Machine, are closed in this period, and the attitude towards vertical deals (producer-distributor) and concentrations (especially horizontal ones, between competitors) becomes more favorable.

The Federal Trade Commission Act stipulates substantial antitrust provisions in Sections 5 and 12, and in Section 8, a special agency is created (The Federal Trade Commission) holding both investigative duties as well as legal ones. The Federal Trade Commission is an administrative authority with a certain degree of independence, as opposed to the Antitrust Division of the Department of Justice which represents, in fact, executive power. The competences are imparted as follows: The Federal Trade Commission ensures that the interdictions of the Clayton Act and the Federal Trade Commission Act are respected, while the Department of Justice ensures the application of the Sherman Act, being the only body with the ability to issue penal fines. Therefore, civil and penal actions are brought to court by the Antitrust Division of the Department of Justice, and the civil implementations and interest-injury actions against persons are brought to court by the Federal Trade Commission.

A recent case of the implementation of antitrust legislation, considered a success, is the one regarding *the vitamins producers cartel* (the cases of 199 SAU c.F.Hoffman-La Roche and USA c.BASF AG). At the end of the 90s, the Antitrust Division began an investigation of a cartel of vitamins producers which affected over 5 billion dollars of American trade. The evidence showed that the members of the cartel had reached detailed accords regarding the quantities that each company should produce, the prices they should set, as well as the clients to whom they should deliver their products. The ones who had the most to suffer from buying the products from the members of the cartel were important brands such as General Mills, Kellogg, Coca-Cola, Tyson Food and Procter & Gamble, as well as American consumers. This investigation led to the indictment of American, Swiss, German, Canadian and Japanese companies and to the jail sentencing of a number of managers. The members of the cartels were fined for an excess of 850 million dollars, including a record-breaking fine of 500 million dollars given to Hoffman La Roche and a 225 million dollar fine for BASF AG¹⁷.

Another recent case, this time of investigation of possible infringements of the Hart-Scott-Rodino Act, was that of Google/DoubleClick from 2008. In December 2007, the Federal Trade Commission announced that it will not attempt to block the acquisition of the Double Click internet publicity server by Google INC. The reasoning invoked referred to the fact that Google and Double Click were not direct competitors on any relevant competition market. Even so, in order to respond to the concerns regarding the confidentiality of certain data regarding consumers, the Federal Trade Commission proposed that the two firms respect certain principles regarding confidentiality for online publicity and demanded commentaries for the interested parties¹⁸. A subject of recurrent debates in American society, was the dual character of the American implementation system. Critiques referred the useless duplication which may lead to the inconstancy of competition policies, additional administrative burdens on companies, or other obstacles in the path of correct implementation in the field of federal competition. Some have proposed an entire redistribution of responsibility of implementations towards the Federal Trade Commission, and others suggested the elimination of the Federal Trade Commission altogether, the Department of Justice covering the legal actions referring only to the infringements of the Sherman Act. The American Congress, on the basis of a piece of legislation promulgated in 2002, constituted the Commission for Modernizing Competition Legislation which was active until May 31st, 2007. This Commission had the stated mission to examine the necessity for the modernization of competition legislation and to identify and study connected aspects, to seek feedback from all sides implicated in the operation of the competition laws, as well as to evaluate the appropriateness of the current arrangements and proposals regarding the aspects defined prior. At the end of the term, in 2007, the Commission for Modernizing Competition Legislation, underlined in its Report¹⁹ addressed to the Congress and the President, that it doesn't recommend any institutional change in the current American dual system of implementation of competition legislation.

¹⁷ Rapport The FTC in 2008: A Force for Consumers and Competition, available at: <http://www.ftc.gov/bc/anncompreports.shtml>, p.4

¹⁸ Rapport The FTC in 2008: A Force for Consumers and Competition, p.27

¹⁹ The rapport of the Competition Legislation monitoring commission, chapter 2, 2007, p.129

In the Celler-Kefauver Act of 1950, which reformed and consolidated the Clayton Act, the American Congress supported the control of mergers by forbidding the consolidation of actives and stocks which did not lead to a dominant position. There is a system of pre-notification of mergers, at the basis of the Consolidated Hart-Scott-Rodino Act of 1976, of Section 13 (b) of the Federal Trade Commission and of Section 15 of the Clayton Act, which allows the Federal Trade Commission and the Antitrust Division of the Department of Justice to protect competition through the identification and investigation of those mergers and acquisitions which raise important concerns from a competitive point of view. In 2008, 1,726 transactions have been reported, which represents a 22% decrease from 2007. One of the most significant cases managed by the Federal Trade Commission was the one between the already established merger between Polypore International and Microporous Products, in which the Federal Trade Commission established the fact that the acquisition made in February of 2008 led to the decrease of competition and the rise of prices on markets of different types of battery separations films used in battery generators. Also in 2008²⁰, The Federal Trade Commission blocked the merger proposed between Inova Health System Foundation and Prince William Health System, which had prejudiced competition in North Virginia, on the health services for chronic diseases provided by the hospitals market. According to the annual Hart -Scott-Rodino report, in 2008, the Antitrust Division of the Department of Justice analyzed 16 merger transactions and concluded that, in case they had been permitted to take place, the effect would have been competition loss, and 15 of them were settled out of court. A recent case is USA c.AT&T Inc. and Dobson Communications Corporation, for which the Antitrust Division of the Department of Justice analyzed the proposed acquisition, valued at 2.8 billion dollars of Dobson Communications by AT&T. The Division considered that, in case the respective transaction had taken place, it would have led to substantial competition loss, to the detriment of the rural consumers of non-cable telecommunication services on seven markets in Kentucky, Missouri, Pennsylvania, Oklahoma and Texas. This, in turn, would have led to increased prices, inferior quality and decreased investments for the upgrading of the grid. More precisely, in these areas, the companies which were completely or partially the property of AT&T and Dobson offered services to more than 60% of subscribers, and on two of the markets, where the main competitor of AT&T also operated on a Cellular One license of Dobson, AT&T would not have been stimulated and would not have had the capacity to contact competition through limiting the licensor from using the Cellular One brand efficiently. This case was brought to court in May 2008. With regards to the activity of the Federal Trade Commission, in 2008 there were 21 transactions for which the Commission considered that competition loss was possible in case they took place, sending just as many orders. According to these opinions of the Commission, the parts needed to either abandon the deals, or modify them after receiving the information.

In the case of The Great Atlantic & Pacific Tea Company, Inc./Pathmark Stores Inc, The Federal Trade Commission analyzed the acquisition proposed to Pathmark Stores by A&P, with a value of 1.3 billion dollars which would have led to a substantial loss of competition between the two supermarket companies in State Island and Long Island, New York. A&P operates 316 supermarkets in 5 states in the regions on the Atlantic Coast and north-eastern USA, as well as in the District of Columbia. Pathmark operates 141 supermarkets in four states. According to the complaint filed by the FTC to a court of law, the proposed deal would have allowed A&P to exercise more power in the market and raise prices for different foodstuffs, which would have led to a similar behavior from the operators in Staten Island and Long Island, which would have interacted coordinately. In order to remedy these concerns, the FTC issued an order through which it demanded that A&P sell six supermarket locations from the very concentrated markets of New York.

4. Important features of the American model competition

The American federal model is essentially an investigative one, in the way that the focus is on *ex post* application. Such an application has, essentially, a punitive and character and a discouraging

²⁰ The annual Hart -Scott-Rodino report for 2008, Section 7A, p.1-2.

effect of similar behavior in the future. As fundamental attributes, the American competition policy is characterized by:

- the criminalization of individuals' behavior: even though companies are the ones which indulge in different anti-competition practices and the result of those practices is found, in the end, in their profit and loss accounts, the individuals are really the ones making the decisions. The anti-competition practices of the companies are started by individuals from their leadership, who have the ability to modify the competition behavior of the respective entities. As a consequence, American competition legislation penalizes the individuals implicated in anti-competition practices as well, both through individual fines as well as in a penal manner, through imposing detention terms (starting with 1975, terms which may, presently, be as long as 5 years);
- the private application of competition legislation: In the US, any part which is affected by an anti-competition practice qualified as illegal by a decision of public authorities may initiate a process of obtaining damages from the company in question. The principle of damages calculation which may be obtained is that these may be up to three times the damages effectively sustained. This principle is applied not only in the case of large companies, which have the ability to initiate on their own such a process, but also by the consumers from the public, law firms awarding themselves the possibility to automatically represent their interests. One of the factors which may explain such an approach is that the Antitrust Office - the principal organ of the public administration which is invested with the application of competition legislation - is a division within the Department of Justice. Initially, the Division benefited from a significant transfer of competences and human resources from the Department of Justice, which may have explained some of the characteristics of the application process. Later on, though, economists have taken the place of jurists as the majority of the division's employees.

5. Conclusions

In the context of the global economic crisis which began in 2007, the analysts of the American Antitrust Institute²¹, considered that a series of institutional and legislative measures in the field of competition are suitable, proposals which have been brought before the American Congress in March of 2009. These regard, primarily, the creation of a deputy assistant of the minister of justice, within the Antitrust Division of the American Justice Department, whose appointment be approved by the Senate and whose mission to be to participate in the elaboration of national policy with an impact on competition. Secondly, analysts consider that there has to be kept in mind the initiation, by the American Congress, of a legislation which would allow the executive to stop the formation of new organizations which would be too big to fail and to facilitate a much faster decision making process regarding approval, by the President, of mergers within the system of their pre-notification.

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²¹ The American Antitrust Institute – independent, non-profit organization, established in April 2008, with the headquarters in Washington, which has as a mission the increase of the role of policies in the field of competition.