Competition and Deregulation Roundtable #3

Anticompetitive Effects of Regulation

Remarks of Assistant Attorney General Makan Delrahim

Thursday, May 31, 2018

Welcome to the third in our series of roundtable discussions on competition and deregulation. I am joined at the table by several of my colleagues from the Antitrust Division: Douglas Rathbun from our Competition Policy & Advocacy Section, Rene Augustine from our Front Office, Bob Potter, the Chief of our Competition Policy & Advocacy Section, and Daniel Haar, the Assistant Chief of our Competition Policy & Advocacy Section, formerly with the Appellate Section.

At this roundtable, we will focus on the consumer costs of anticompetitive regulations. The costs are, no doubt, significant. The Competitive Enterprise Institute's annual publication on federal regulations, aptly called "Ten Thousand Commandments," notes that federal regulation costs each U.S. household almost $15,000 per year. To illustrate the significance of that amount, CEI notes that this is second only to housing in spending categories for American families.[1] Today, we will consider whether and how regulation has handcuffed the invisible hand of the free market.

At the beginning of our last roundtable, I recounted General Ashcroft's comment that the Department of Justice is the only agency in the federal government with a moral imperative in its name. Antitrust – and its role in protecting competition -- has long been a central part of our Nation's moral imperatives.

The very first Assistant to the Attorney General for antitrust, William Day, was appointed by the legendary "trust buster" Teddy Roosevelt. More than half a century later, Justice Black in *Northern Pacific*[2] described the Sherman Act as a "comprehensive charter of economic liberty." Milton Friedman explained this in his 1962 work *Capitalism and Freedom*, in which he wrote, "the organization of the bulk of economic activity through private enterprise operating in a free market as a system of economic freedom and a necessary condition for political freedom."[3]

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[1] Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTER. INST. 3 (2018).

[2] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[3] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 12 (1962).

These principles soon began to be applied in a wave of major industrial deregulation lasting at least two decades from around 1970.[4] The deregulatory wave brought many benefits for consumers: lower rates and prices, more choice, and higher quality. It also brought greater innovation, entry, and opportunities for many to create new businesses and, indeed, new industries, driving economic growth and increased productivity.[5] While the Department of Justice has accomplished a lot in the last half a century of antitrust enforcement, there is still work to be done, and our sleeves are rolled up.

The Administrator of the Office of Information and Regulatory Affairs at OMB, Neomi Rao, better known as the "regulatory czar," recently conveyed that the Administration's current deregulatory initiative "is part of a larger effort to promote a more constitutional government and thereby to enhance individual liberty."[6] She said, "[g]overnment regulation … can serve vital health and safety goals, and … Congress has ensured that we already live in a highly regulated society. But even against that backdrop, government intervention should still serve a purpose. It shouldn't be a solution in search of a problem."[7]

Virtually every aspect of our lives is regulated in some fashion. We eat food grown with chemicals subject to regulation, processed in regulated facilities, and sold with mandatory labels in stores subject to regulation. We live in homes and apartments for which their zoning, construction, and codes are highly regulated. Our children's schools teach material regulated by

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[4] This was a bipartisan effort. Deregulation was a key focus of the Carter Administration. Carter's chair of the Civil Aeronautics Board, the economist Alfred Kahn who oversaw airline deregulation in the late 1970s, was probably the most insightful proponent of deregulation. In his words, "airline regulation was government cartelization, plain and simple: the only sensible reform, it rather quickly became evident, was disassembly and abandonment." Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. TELECOMM. & HIGH TECH. L. 159, 164 (2006).M. & HIGH TECH. L. 159, 164 (2006). Deregulation of the transportation industries (and others) continued under the Reagan Administration. In the 1990s, under Presidents Bush and Clinton, deregulation of electricity markets introduced market forces in another critical industry to American consumers.

[5] *See, e.g.*, RICHARD H. K. VIETOR, CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA (Belknap 1994); DANIEL F. SPULBER, REGULATION AND MARKETS (MIT Press 1989); Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998), http://scholarship.law.marquette.edu/facpub/296/; Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSPECTIVES 89 (1998); PAUL W. MACAVOY, INDUSTRY REGULATION AND THE PERFORMANCE OF THE AMERICAN ECONOMY (1992); ORG. FOR ECON. CO-OPERATION AND DEV., REPORT ON REGULATORY REFORM 252 (1997) (summarizing various sources); Robert W. Crandall, *Extending Deregulation: Make the U.S. Economy More Efficient*, BROOKINGS INSTITUTION (2008) (reviewing studies of specific industries).

[6] Neomi Rao, Adm'r, Office of Info. & Regulatory Affairs, That's Next for Trump's Regulatory Agenda: A Conversation with OIRA Administrator Neomi Rao, Brookings Institution 9 (Jan. 26, 2018), *available at* https://www.brookings.edu/wp-content/uploads/2018/01/es_20180126_oira_transcript.pdf. [hereinafter Rao, What's Next].

[7] *Id.* at 10.

the state, serve food subject to regulation, and their playgrounds are certified based on government-mandated safety standards. As former federal judge Richard Posner observed, "regulation is pervasive, embracing the whole of criminal, tort, contract, property, labor, securities, antitrust, and environmental law, and a great deal besides."[8]

Twitter has an account exclusively devoted to amusing or absurd government laws and regulations. I haven't verified it, but according to this account, it is "a federal crime to sell ear plugs if their noise reduction rating isn't written in Helvetica Medium,"[9] or "to sell wine with a brand name including the word 'zombie,'"[10] or "to take home milk from a quarantined giraffe."[11] Let's hope there are reasonable safety justifications for these.

While certain kinds of government regulation are necessary, this role was never intended to be without appropriate limits. Thomas Jefferson, at his first inaugural address, observed that "a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."[12]

Unfortunately, governments at all levels, encouraged by the success of appropriate areas of regulation, all too often encroach on other areas where unencumbered markets function best. John Stuart Mill observed: "Every function superadded to those already exercised by the government, causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers-on of the government, or of some party which aims at becoming the government."[13]

Former Antitrust Division chief economist, Dennis Carlton, and his colleague, Jeffrey Perloff, highlighted one example of the effects of unnecessary regulation. Until they were repealed in 2006, there were 310 separate rules, filling over 40 pages of federal documents, governing what goes on pizza. Yes, pizza! Under these regulations, the U.S. Department of

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[8] Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT'L L.J. S7 (1999).
[9] @CrimeADay, TWITTER (Dec. 4, 2017, 5:22 PM), https://twitter.com/crimeaday/status/937854668117508096 (citing 42 U.S.C. §§4909(a)(1) and 4910, 40 C.F.R. §211.106).
[10] *Id.*, (Mar. 25, 2015, 1:36 PM), https://twitter.com/crimeaday/status/580830706424766464 (citing 27 U.S.C. §207, §205(e) and 27 C.F.R. §4.39(a)(9)).
[11] *Id.*, (July 8, 2015, 9:33 PM), https://twitter.com/CrimeADay/status/618956122330935296 (citing 7 U.S.C. §8313, 9 C.F.R. §§93.400 and 93.414).
[12] Thomas Jefferson, First Inaugural Address (Mar. 4, 1801).
[13] JOHN STUART MILL, ON LIBERTY Ch. V (1869).

Agriculture concluded that Wolfgang Puck's pizzas could not be called pizza because they didn't have tomatoes on them, compelling a change in his recipe. He also changed his labelling because the "country sausage" on his pizzas was not made in a location that conforms to the regulatory definition of a rural area.[14]

More pernicious examples abound when state and federal policymakers have forayed into new areas to control. When special interests focus their influence on obtaining regulations that promote their own positions, they often do so at the cost of others. Self-interested regulation can erect barriers that shut out new competitors, and impose costs on existing competitors. As George Stigler put it in his influential article *The Theory of Economic Regulation*, "regulation is acquired by the industry and is designed and operated primarily for its benefit."[15] Whenever regulations displace market-based free enterprise, others in the economy are likely to suffer.

Areas of our nation's economy can, no doubt, wither under regulatory burdens. The President has issued an ambitious series of executive orders to reduce them.[16] OIRA is working across the federal government to reduce regulatory burdens. As OIRA Administrator Rao recently said: "Many regulatory burdens are often put in place by big business or by powerful interest groups. Because regulation often creates barriers to entry, it can limit competition, and when it does, it can raise costs of ordinary goods and services, and it can blunt and stifle innovation."[17]

In keeping with the Antitrust Division's core function of enforcing the antitrust laws to preserve competition and protect consumers, it is important for the Division to identify circumstances in which regulations run counter to, or infringe upon its mission.

A familiar form of anticompetitive regulation can present itself in the form of occupational licensing. Back in 1971, Stigler found "evidence to suggest that [such] licensing

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[14] DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 685 (4th ed., 2005); Jennifer Kabbany, *Armey Targets Waste in Federal Agencies*, WASHINGTON TIMES, Feb. 12, 1999, at A6.

[15] George J. Stigler, *The Theory of Economic Regulation*, BELL J. OF ECON. AND MGT. SCIENCE 3 (1971) [hereinafter Stiger, *Theory of Economic Regulation*]. The Bell Journal, published by the research wing of the telephone monopoly, became the definitive journal for advances in antitrust economics, producing much work that formed the basis for the lawsuit that led to its breakup.

[16] *See, e.g.*, Exec. Order No. 13,711, 80 Fed. Reg. 71,921 (Nov. 12, 2015), Exec. Order No. 13,722, 81 Fed. Reg. 14,943 (Mar. 15, 2016), Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017), Exec. Order No. 13,789, 82 Fed. Reg. 19,317 (Apr. 21, 2017).

[17] Rao, What's Next, *supra* note 6, at 8.

exists not to protect consumers but to limit the availability of potential entrants to practice the profession."[18]

Forty-four years later, in 2015, the Obama Administration issued a report on occupational licensing.[19] It found that the share of U.S. workers holding an occupational license has seen a *five-fold increase* since the 1950s. It concluded that "the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job."[20] The report further noted that "there is evidence that licensing requirements raise the price of goods and services."[21] It found that while "most research does not find that licensing improves quality or public health and safety … the evidence on licensing's effects on prices is unequivocal: many studies find that more restrictive licensing laws lead to higher prices for consumers."[22] To take just two examples from the report, regulation of nurse practitioners "raises the price of a well-child medical exam by 3 to 16 percent," and on dental hygienists "increases the average price of a dental visit by 7 to 11 percent."[23] Former Acting Chairman of the FTC, Maureen Olhausen, has spoken on this issue as well and I fully support her efforts on this front.

Just two months ago, the Antitrust Division filed a statement of interest in TIKD Services' suit against the Florida Bar, supporting the new entrant, TIKD, an innovative app to help people dispute traffic tickets.[24] The Ticket Clinic, a private ticket defense law firm, filed complaints with the Florida Bar. It claimed that TIKD was practicing law without a license or providing false or misleading information to its customers. The Ticket Clinic also filed grievances against lawyers who have represented TIKD customers, threatening to have them disbarred. The Board of Governors of the Florida Bar accepted a recommendation from a committee of lawyers backing up The Ticket Clinic's position.

The State bar asserted that it is entitled to protection against antitrust claims without having to satisfy either the "clear articulation" or "active supervision" requirements of the state

[18] Stigler, *Theory of Economic Regulation*, *supra* note 14, at 17.
[19] THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015).
[20] *Id*. at 3.
[21] *Id*.
[22] *Id.* at 13-14.
[23] *Id*. at 14 (citing Morris Kleiner, Allison Marier, Kyoung Won Park, & Coady Wing, *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service*, NBER Working Paper 19906 (2014)).
[24] Statement of Interest of the U.S. Dep't of Justice, TIKD Services LLC v. Florida, No. 1:17-cv-24103-Cooke/Goodman (S.D. Fla. Mar. 12, 2018), https://www.justice.gov/atr/case-document/file/1042666/download.

action doctrine, notwithstanding the Supreme Court's most recent state action decision in *North Carolina State Board of Dental Examiners*.[25] In that case, 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." We should be vigilant in making sure private market participants don't use states as tools for their anticompetitive goals.

This is just one an example of an innovator using new technologies to bring transformational change, facing opposition by incumbents pushing for regulation aimed directly at keeping out the innovator. Other notable examples are the byzantine Certificate of Need regulations that hamper competition in health care markets. Certificates of Need, or CONs, require health care providers to get approval from state regulators before offering new services or building additional facilities. Though the provider already determined it makes business sense to enter, in some cases making investments to do so, it then faces the hurdle of going through the CON process. Incumbent providers can take advantage of the CON process to thwart or delay their rivals. The Division has been active in providing its expertise in this area through comments and testimony on state legislation, whenever possible, supporting repeal or curtailment of state CON laws because of their anticompetitive effects.

Similarly, nearly every state regulates new car dealerships. All states but one protect dealers from competition by awarding exclusive territories, limiting or banning carmakers from selling directly to consumers, and limiting carmakers' ability to terminate franchises. These regulations have been shown to cause higher retail prices and higher distribution costs, at the expense of both consumers and manufacturers—particularly U.S. carmakers.[26]

A particularly troubling example of how incumbents can work to craft regulations laser-focused on preventing entry took place in Michigan, home of the Big 3 automakers. The state legislature brought up a bill aimed at Tesla. The bill prohibited carmakers from selling, as the bill was drafted, "any new motor vehicle directly to a retail customer other than through its

[25] *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1115 (2015).
[26] Empirical studies on the anticompetitive harm from state car dealership franchising regulations have been carried out by franchising expert Francine Lafontaine of the University of Michigan. *See, e.g.*, Francine Lafontaine and Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233 (2010).

franchised dealers."[27] Tesla noticed that the language as drafted would still allow them to sell, because they didn't have any franchised dealers. Unfortunately for Tesla, the bill was later amended, with the word "its" removed, thus closing the unintended loophole for the one carmaker at which the regulation was directed.[28]

Another significant area in which regulation can impact consumers is in real estate. Buying or selling a home is the largest financial transaction most Americans will ever undertake, and in many cases the largest single investment. The Division has made it a priority to protect consumers in real estate markets, in part because regulators have been aggressive in preventing new business models and protecting incumbents from entry. For example, the National Association of Realtors states on their website that they were key in securing a rider in the 2009 Omnibus Appropriations Act that imposes a blanket ban on financial institutions from entering into real estate brokerage and management businesses. The Antitrust Division's website on competition and real estate describes the Division's multifaceted work in this area—the next installment being our joint workshop, next Tuesday, with the Federal Trade Commission to explore competition issues in the residential real estate brokerage industry.

Another regulated area that impacts competition and consumers is our nation's milk pricing and distribution system. A recent article by the American Enterprise Institute's Daniel Sumner, on the consumer harm from federal milk marketing orders and other regulations, is often cited by the Antitrust Division's economic staff. He describes the industry as being "dominated by an 80-year-old array of price regulations of mind-boggling complexity" which "set minimum prices" and "increase[e] price risk for farms and processors" while "putting incentives for innovation behind a heavy veil of regulations."[29]

There may be legitimate policy reasons for some of these regulations. I just want to point out the market-distorting aspects and anticompetitive effects these regulations have, and suggest we need to examine them to see if they are justified.

The Department of Justice has played an active role in supporting administrative and legislative initiatives to open regulated industries to competitive forces when appropriate. The

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[27] H.B. 5606, 97th Leg., Reg. Sess. (Mich. 2014). The bill as passed by the Michigan House contained the word "its," which was deleted in the version as passed by the Michigan Senate.
[28] Will Zerhouni, *Tesla Takes on Michigan*, CATO INST. (Feb. 27, 2018).
[29] Daniel A. Sumner, *Dairy Policy Progress: Completing the Move to Markets*, AM. ENTER. INST. 1 (Jan. 2018), http://www.aei.org/publication/dairy-policy-progress-completing-the-move-to-markets/.

Division works to share with regulatory agencies its expertise in all of these markets and its rich economics-based analysis.

As Anne Bingaman said in 1995 when she was Assistant Attorney General of the Antitrust Division, "[a]s we move forward with deregulating more industries—such as telecommunications and railroads—we should keep in mind that the goal of deregulation is to promote and protect competition, not to replace regulated monopolies or cartels with unregulated ones. The best way to achieve that goal is to provide a decisionmaking role in the deregulatory process to the agency that is the competition expert—the Department of Justice."[30]

Through the Antitrust Division's competition advocacy, we will focus on regulations that hamper competition without offsetting public health or safety benefits. The goal is to unleash, to the greatest extent possible, the creative energies of the American economy, by giving the greatest possible scope to economic liberty inherent in the free market.

We have assembled here today the thought leaders on these issues, representing a variety of viewpoints. I look forward to our discussion of the factors that cause policymakers to displace competition with regulation, and the impact those regulations have on the consumer.

Let me turn now to our participants. I want to thank each of you again for your willingness to participate in this roundtable and for the perspectives you bring.

[30] Anne Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Injecting Competition into Regulated Industries and Utilities, Remarks as Presented before the Pub. Util., Comm'ns and Transp. L. Section, Am. Bar Ass'n (Apr. 20, 1995), https://www.justice.gov/atr/file/519086.