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Competition Regulatory Assessments and Advocacy

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Competition Regulatory Assessments & Advocacy

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*The views expressed are those of the speaker and not of the Commission or an individual Commissioner

Four Questions

- What, in general terms, is a regulatory assessment?

- At the national level, what are the U.S. policies on regulatory assessments?

- How are competition regulatory assessments similar to, but more specific, than general regulatory assessments?

- What role do competition authorities play?

In General Terms, What Is A Regulatory Assessment?

Focus Is On Governmental Regulatory Systems

Governmental Regulatory System Defined

- By “regulatory system” we mean any governmental interventions in the economy through acts, decrees, bylaws, decisions, etc.
- By “government” we mean all levels of government, the national and provincial levels, and the very local municipal or more narrow levels such as quasi-governmental associations, e.g., licensing boards.

What Is An “Assessment”?

- It is a careful review and analysis of the ***costs and benefits*** of existing or proposed “regulations”, as broadly defined in the previous slide
- Regulations generally seek to insure a primary, or a few primary, ***beneficial*** outcomes, but almost always come at the ***cost*** of other desirable outcomes.
- ***Benefits***: “Regulations play an indispensable role in protecting public health, welfare, safety and our environment.” https://obamawhitehouse.archives.gov/the-press-office/2012/05/10/executive-order-identifying-and-reducing-regulatory-burdens
- ***Costs***: Monetary that is quantifiable (e.g., cost of retrofitting power plant to scrub pollution emitted from burning fuel); Hours complying with paperwork; Non-quantifiable effect on market supply & demand.

Steps In A Cost–Benefit Analysis

- “Describe the need for the regulatory action, [i.e., what is the nature of the problem requiring government intervention?]
- Define the baseline
- Set the timeframe of analysis
- Identify a range of regulatory alternatives
- Identify the consequences of regulatory alternatives
- Quantify and monetize the benefits and costs
- Discount future benefits and costs
- Evaluate non-quantified and non-monetized benefits and costs
- Characterize uncertainty in benefits, costs, and net benefits.” https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pd

The Need For The Intervention

- "To address market failures where true costs and benefits are not reflected correctly in market prices;
- To reduce entry barriers, "level the playing field," encourage greater competition and innovation, and combat short-sightedness—all to increase economic growth; and
- To ensure consumer, worker and investor safety, transparency in information about products and services, and a fair distribution of net benefits. This category is often labeled "social regulation," but these policies also have economic justifications and implications." https://www.ced.org/reports/regulation-and-the-economy

What Is Done At The National Level In U.S.?

Regulatory Impact Analysis Mandated ***Prospectively*** At National Level

- Executive Order 12866 of 1993 and Unfunded Mandates Reform Act require a regulatory impact analysis for proposed regulations.
- "Regulatory impact analysis (RIA)" is a report that evaluates
  - the size and nature of a problem,
  - possible solutions, and
  - pros and cons (benefits and costs) of different solutions." https://www.mercatus.org/system/files/Mercatus-Regulatory-Impact-Analysis-Toolkit.pdf

RIA Mandated *Retrospectively* At National Level

- Obama Executive Order 13563 (2011), directed agencies to submit to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) a preliminary plan to review their existing significant regulations (those that may have an annual effect on the economy of $100 million) periodically to determine if they should be modified, streamlined, expanded, or repealed.
- House of Representatives Resolution 72 directed 10 congressional committees to inventory and review existing regulations for impact on jobs & economy.

Recent Executive Order Effectively Mandating ***Retrospective*** Review

- Executive Order 13771 (2017)
  - Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

Examples Quantifying Benefits From National Efforts

- Deregulating and injecting competition into the airline sector in the U.S. saves consumers $12.4 billion annually
- Deregulating and injecting competition into the telecommunications sector in the U.S. lowered prices by 50% between 1984 and 1994

FTC Staff Supported Federal Energy Regulatory Commission (FERC) Rule

- FTC May 2018 staff comment supported rules governing how electricity generation facilities connect to the transmission grid. These reforms are designed to allow wholesale power producers to connect to the transmission grid more quickly and cost-effectively. The comment notes that FERC's proposals may give power generation entrants more opportunities to innovate and decrease interconnection costs.

What Makes *Competition* Regulatory Assessments Different?

Focus

- Supply Side of the Market
  - Entry – do the regulations unnecessarily impede entry
  - Expansion – do the regulation
- Demand Side of the Market
  - Information – do the regulations impede dissemination of price & quality information needed to make purchasing decisions?

Not focused on excessive bureaucracy or red tape in government

Remember Earlier Slide – The Need For Government Intervention In Order To:

- Address Market failures -- natural monopolies and externalities -- true costs and benefits are not reflected correctly in market prices;
- Reduce entry barriers – and combat short-sightedness—all to increase economic growth; and
- Consumer, worker and investor safety, transparency in information about products

But, Interventions Are Risky Two-Edged Swords

- They can help the market to work better or harm the market.
- They can regulate natural monopolies or stand in the way of new technologies that could change market dynamics and benefit consumers (e.g. landline vs. cellular telephony.)
- In the drafting process, special interests or incumbents can distort the original good motive of leveling the playing field.

Imagine Yourself . . .

- As a business person who wants to avoid the rigors of competition

- How would you go about limiting competition?

The Hard Ways To Do It

- Enforce exclusivity agreements with supplier or distributors
- Merge with competitors
  - Transaction costs high
  - Competition Authority may block the merger
- Conspire with competitors
  - Risk that co-conspirators will cheat or that new competitors will enter the market
  - Cost of enforcing cartel
  - Risk of discovery -- jail, fines

The Easy Ways

- Get the government to do it for you!
  - Costs of lobbying not substantial
  - Government polices cheating
  - Ability of competition agencies to intervene is limited
  - Industry–wide regulation applies to new entrants

- A low risk, low cost way to suppress competition

Interests Are Not ***Balanced***

- Business supporters of restrictions
  - Well organized
  - Have access to lawmakers
  - Have clear incentives to succeed
- Consumers who might oppose restrictions
  - May be poorly organized
  - May have limited incentives
  - May not understand implications

Tools to Address Government Restrictions on Competition

- Law Enforcement (sometimes)
  - Legal issues
  - Sovereignty issues
  - Political Issues

- Competition Advocacy
  - Informs government of true costs and benefits
  - The competition authority often is the only one in government with the expertise and interest

What Role Do Competition Authorities Like The U.S. FTC Play?

Competition Authorities Are Advocates

- Advocates speak in support of something; they take one side in an argument.
- Advocacy is needed to ***bring balance*** to the assessment and point out competition costs and benefits that might otherwise be undervalued or overlooked.
- Using the competition agency's expertise
  - In competition policy and economics
  - To promote pro-competitive regulatory outcomes

Lessons from Competition Improve Consumer Protection Concerns

- Setting prices is poor consumer protection
  - Exception: monopoly sectors
- If you are going to regulate, preserve market incentives to the extent possible.
- Regulating quality and services to “protect consumers” can harm consumers.
  - Exception: health and safety
- Examples:
  - Comparative advertising
  - Health claims for food
  - Professional advertising

U.S. Advocacy Experience In Many Sectors

- Lawyers
- Dentists
- Optometrists
- Internet Sales
- Wine
- Funerals
- Airlines
- Gasoline
- Food Sellers
- Electricity
- Telecommunications
- Doctors
- Pharmaceuticals
- Motor Vehicle Sales

Many Tools Used For Advocacy

- Letters to regulators
- Testimony before legislators
- “Amicus curiae” briefs before courts
- Economic studies
- Public workshops and hearings
- Informal contacts with regulators

Example: Optometry

- Traditional solo practices
- Chain optical firms entered
- State regulatory bodies often dominated by traditional practitioners

Optometry (2)

- Optometry Boards passed restrictions that limited use of:
  - Advertising
  - Trade names
  - Commercial locations
  - Branch offices
  - Employment of optometrists by optical firms
- FTC studies showed:
  - Prices higher in states with restrictions
  - Quality is unaffected by chains

Optometry (3)

- FTC conducted advocacy campaign before state legislatures
  - Used studies to highlight costs of restrictions and lack of benefits
  - Testimony to state legislatures
  - Letters to legislators

Opportunities For Advocacy

- By invitation
- By legal mandate
- Invitations follow investment in
  - Reputation for reliability and impartiality
  - Public awareness of agency through enforcement actions
  - Informal contacts

Advocacy Is More Effective When Opinion Is Invited

- Ensures that advocacy is directed to officials with decision-making authority
- Ensures at least some interest in your views
- Prevents the appearance of over-reaching

Most Effective on Issues on Which It Has Expertise

- Issues on which the agency has held hearings or workshops
- Issues raised in agency cases
- Issues addressed in staff reports
- Issues on which the agency has done empirical research

Transparency and Publicity

- An effective strategy is to publicize:
  - The cost of the restriction to consumers
  - The lack of relationship between the restriction and the purported consumer benefit
- When the costs and benefits are known, lawmakers are more likely to do the right thing for consumers

Analytic Approach

- What specific harm to consumers is the barrier designed to address?
- Is the proposed restriction appropriately tailored to address that harm?
- Does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition?

Example: Internet Shipments of Wine

- Changes in the economic operating environment, such as new technology or new ways to do business often result in increased attempts to seek governmental protection
- US regulatory structure for selling alcoholic beverages bans direct shipment of wine in many states
- Stated concern: prevention of wine sales to minors
- E-commerce and direct shipment

Wine example (Continued)

- FTC staff report on state restrictions on direct shipment of wine
  - Concluded that states could significantly enhance consumer welfare by allowing direct shipment
  - Consumers buy wines online that are not available in local stores
  - Consumers can save money by purchasing more expensive wines online
  - No systematic evidence of direct shipment problems to minors
  - Other ways less harmful to competition to resolve any underage access problems

Wine Example (continued)

- U.S. Supreme Court relied on FTC report in striking down two state bans on the interstate direct shipping of wine
- Ohio and Florida legislators asked the FTC for advice on bills considering the direct shipment of wine

Example: Gasoline Retailing Restrictions

- Some states have or have proposed laws that would require integrated refiners to sell their downstream retailing operations
- Tend to protect small, potentially inefficient gas stations
- FTC economist conducted an economic study comparing gas prices in states requiring divorcement with those in states allowing integration, controlling for other factors
    - Prices were about 2.6 cents per gallon higher in states requiring divorcement

Retail Gasoline Restrictions (continued)

- FTC has filed numerous comments with various states arguing that such laws reduce competition and harm consumers
  - New York state considered a divorcement law
    - Annual sales volume in NY in 2002 was roughly 5.7 billion gallons
    - If consumers could save 2.6 cents/gallon the NY consumers would save $148 million per year from avoiding divorcement restrictions

Consumer Information

- Consumers are well-served by maximizing the amount of truthful information that markets can provide
- Private markets will sometimes under-produce some information
  - A firm that privately provides information would bear the entire cost of information provision but be unable to reap the rewards for disseminating it
  - Role for government in providing information
  - FTC examples
    - R-value rule for insulation efficiency
    - Various uniform lending disclosures

Food Health Claims Information

- FTC advocates allowing manufacturers to provide more accessible and useable information to consumers regarding health benefits.
- FTC opposes unnecessary mandates
  - Do not want to block producers’ incentive or ability to provide useful information
  - Want producers to compete on important nutritional attribute of their products
- FTC works closely with the U.S. Food and Drug Administration on food regulation issues involving health claims and nutritional issues

Promoting Sound Self-Regulation Quasi-Governmental Regulation

- Self regulatory initiatives by dentists, real estate agents, others have unreasonably excluded competition for incumbent firms represented by self-regulatory organization
- At the same time, other self regulatory programs have benefited consumers through voluntary codes of good practice, e.g., Better Business Bureau advertising standards
- FTC works to support self-regulatory programs that are beneficial, while opposing schemes that harm competition & consumers

Example: Advanced Practice Registered Nurses

- APRN is nursing by a certified registered nurse anesthetist, certified nurse midwife, clinical nurse specialist, or nurse practitioner which is based on knowledge and skills acquired in a basic nursing education program, licensure as a registered nurse, and a minimum of a master's degree with a concentration in the respective advanced practice nursing specialty
- In competition with medical doctors who lobby to require that they have a “cooperation agreement” with them and to deny them hospital privileges.

Conclusion

Consumers Are the Key To Success

- If consumers are the focal point for competition assessments, then advocacy efforts will more likely be good for the economy;
- Empirical studies show that competition policy supports growth and development, but are ambiguous about the isolated impact of competition law enforcement. It is wise to place great effort into advocating review of regulatory policies that affect competition.