



United States of America  
**Federal Trade Commission**

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**When Regulation Protects Privilege Instead of People:  
Government Restraints of Trade – A Competition Enforcer’s Perspective**

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**The Antitrust Enforcement Symposium 2015**  
**The Journal of Antitrust Enforcement**  
**Oxford, England**

**June 27, 2015**

**I. Introduction**

Good afternoon. Thank you for inviting me to speak at the Symposium. I am delighted to be here today to discuss an issue that has been debated for decades among academics, enforcers, and leading policymakers -- when should government intervention on the basis of non-competition factors influence market outcomes? If you are an advocate for free market capitalism, as I am, a glib answer might be “never.” Of course, the real answer is much more complex and nuanced. There are good reasons why these issues have preoccupied so many talented and thoughtful people around the world for so many years.

As a threshold matter, undesirable government restraints of trade can be broken into two broad categories: First, free-standing government restraints established in nominal deference to some perceived social good, like health, safety, or national security but which actually function

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<sup>1</sup> The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I would like to acknowledge my attorney advisors, Alexander Okuliar and James Frost, for their important contributions to this speech.

mainly to restrict socially beneficial competition. These interventions typically benefit entrenched, politically powerful special interests to the detriment of the broader public good.

Second, competition enforcement actions guided, either expressly or implicitly, by non-competition factors like industrial policy. Here, there is a clear diversity of opinion. In the United States today, federal antitrust enforcers would tell you that non-competition factors play no role in their analysis. In many other countries, the answer is distinctly different. In particular, competition regimes in several emerging economies, like South Africa, apply a statutory “public interest” standard that involves consideration of, for example, the potential impact of a transaction on fairness, access to goods and services, and domestic employment.<sup>2</sup> Other nations’ agencies say little about their internal analysis but end up taking actions that appear to favor domestic industry, suggesting industrial policy concerns may be at play.

I will focus my remarks today on how my agency, the Federal Trade Commission, is using its research, advocacy, and enforcement tools to advance free market principles and antitrust economics to address both of these government restraint of trade scenarios. On the enforcement side, for decades the FTC has challenged state and local public restraints in the United States that attempt to protect businesses under the cloak of “state action immunity.” On the advocacy side, the FTC conducts research, hosts workshops, and, when asked, submits comments to states and foreign governments about the benefits of a free market and the pitfalls of using government authority to favor one group of consumers or competitors over another.

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<sup>2</sup> See, e.g., John Oxenham and Patrick Smith, *What is Competition Good For – Weighing the Wider Benefits of Competition and the Costs of Pursuing Non-Competition Objectives*, White Paper (2014), available at <http://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf>.

## **II. Concerns About Government Intervention To Displace or Distort Competition**

### **A. Domestic or Regional Public Restraints**

No society is immune from the harmful effects of unnecessary market intervention by government. In the United States, we have recently been debating the role of state and municipal licensing as a barrier to new disruptive businesses like Uber and AirBnB. These new businesses have been met with resistance by cities and states that insist they are violating boarding or livery laws that are, in many cases, antiquated and in need of modernizing to keep up with the innovative new sharing economy.<sup>3</sup> This story has played out similarly in jurisdictions around the world, from New York to Paris to New Delhi.<sup>4</sup> In the same vein, EU Vice President Andrus Ansip has been making pointed remarks about tackling member states' laws and practices, such as unwarranted geo-blocking of online transactions, that might pose obstacles to the EU's ambitious push to create a Digital Single Market.<sup>5</sup>

### **B. Global Competition Enforcement and Industrial Policy**

Turning from domestic to international concerns, economists, policymakers, and journalists have spilled a lot of ink and grown many a grey hair over the past few years thinking, arguing, and writing about the possibility that some nations are using their competition laws to favor local players. And, unsurprisingly, some studies do suggest bias in merger reviews. For instance, a 2013 study of European competition enforcement looked at the largest 25 European-based merger targets during the period from 1997 to 2006. The study found that “instead of staying neutral, governments of [European] countries where the target firms are located tend to

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<sup>3</sup> Liz Alderman, *Uber's French Resistance*, N.Y. TIMES, June 3, 2015 (discussing Uber's regulatory fight around the world), available at [http://www.nytimes.com/2015/06/07/magazine/ubers-french-resistance.html?\\_r=0](http://www.nytimes.com/2015/06/07/magazine/ubers-french-resistance.html?_r=0).

<sup>4</sup> *Id.*

<sup>5</sup> Daniel Tost, *EU 'Racing to Catch Up' with Digital Single Market Plan*, EURACTIV, May 7, 2015, available at <http://www.euractiv.com/sections/infosociety/eu-racing-catch-digital-single-market-plan-314390>.

oppose foreign merger attempts while supporting domestic ones that create so-called national champions, or companies that are deemed to be too big to be acquired.”<sup>6</sup>

Some Americans have also expressed concerns that repeated EU investigations of American technology companies reflect an interest in using competition law to further a protectionist agenda. Similar concerns have also been voiced about the on-line platform sector inquiry recently announced as part of the EU’s Digital Single Market initiative.

In Asia, American government enforcers have raised questions about the neutrality of China’s merger review and antitrust enforcement regime, spurred on in part by recent reports from the U.S. Chamber of Commerce and the U.S.-China Business Council suggesting that the Chinese government is taking non-competition factors into account when applying the law.<sup>7</sup> For example, the Chamber report notes that although roughly 80% of Chinese deals with a Chinese target are domestic-to-domestic, only 7.6% of reviewed deals were domestic-to-domestic.<sup>8</sup> In addition, the Chamber report asserted that every case in which the Chinese merger enforcer, MOFCOM, took action to reject or conditionally approve a proposed deal involved a foreign company.<sup>9</sup> By comparison, between 2008 and 2012, about a third of U.S. conditional approvals and rejections involved foreign companies.<sup>10</sup>

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<sup>6</sup> Serdar Dinc & Isil Erel, *Economic Nationalism in Mergers & Acquisitions*, 68 J. FIN. 2471, 2504 (2013); see also D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, GEORGE MASON L. REV. 8 (forthcoming 2015) (internal citations omitted), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2590266##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2590266##) (discussing same and other examples).

<sup>7</sup> See, e.g., U.S. China Business Council, *Competition Policy and Enforcement in China*, 5 (Sept. 2014), available at <http://uschina.org/reports/competition-policy-and-enforcement-china>; U.S. Chamber of Commerce, *Competing Interests in China’s Competition Law Enforcement: China’s Anti-Monopoly Law Application and the Role of Industrial Policy* (Sept. 9, 2014), available at [https://www.uschamber.com/sites/default/files/aml\\_final\\_090814\\_final\\_locked.pdf](https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf) [hereinafter Chamber Report].

<sup>8</sup> Chamber Report, *supra* note 7, at 28-29.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Concerns about the potential use of government regulation to indirectly support industrial policy objectives can also arise in areas beyond competition enforcement. For example, American business and political leaders have criticized European authorities for enforcing stringent privacy rules.<sup>11</sup> Probably the most controversial issue along these lines has involved an attempt by the French data privacy agency, Commission Nationale de l'Informatique et des Libertés or CNIL, to require Google, an American company, to comply with the EU's "right to be forgotten" order globally, prompting a strong reaction in the United States.<sup>12</sup> This debate is likely to continue with the introduction of the new EU data regulation.<sup>13</sup> Similarly, EU leadership has expressed frustration with member states' policies that slow transnational innovation and efficiency gains, such as country-level copyright protections and the high cost of cross-border package delivery.

In this era of dynamic global innovation, competition agencies like the FTC need a multifaceted response to these developments. At home, we need to take the lead in tackling domestic restraints that favor inefficient incumbents. Abroad, we need to be an unswerving voice for politically neutral, analytically sound competition enforcement that benefits consumers. With that in mind, let me offer a few thoughts on the historical influence of industrial policy on competition enforcement and then give you a few recent examples of how the FTC has been working to promote competition and consumer welfare, even in the face of government restraints on trade.

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<sup>11</sup> Henry Farrell, *President Obama Says That Europeans Are Using Privacy Rules to Protect Their Firms Against U.S. Competition. Is He Right?*, WASH. POST. BLOG, Feb. 17, 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/02/17/obama-says-that-europeans-are-using-privacy-rules-to-protect-their-firms-against-u-s-competition-is-he-right/>.

<sup>12</sup> Sam Schechner, *French Privacy Watchdog Prompts Google to Expand "Right to Be Forgotten,"* WALL ST. J. (June 12, 2015), <http://www.wsj.com/articles/french-privacy-watchdog-orders-google-to-expand-right-to-be-forgotten-1434098033>.

<sup>13</sup> Press Release, European Commission, Commission Proposal on New Data Protection Rules to Boost EU Digital Single Market Supported by Justice Ministers (June 15, 2015), available at [http://europa.eu/rapid/press-release\\_IP-15-5176\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5176_en.htm).

### **III. The Historical Influence of Industrial Policy on Competition Enforcement**

#### **A. Generally**

It is every society's prerogative to balance its interest in market competition with other interests held valuable by the body politic. I am not questioning that today. I agree with Supreme Court Justice Brandeis when he said "[t]here must be power in the States and the Nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs."<sup>14</sup> My friends, former FTC Chairman Bill Kovacic and Dr. James Cooper, put it nicely when they noted that it would be an "affront to democratic values" for a federal court to overrule legislated tradeoffs between competition and other social values.<sup>15</sup> I can assure you that the FTC is not looking to offend anyone's democratic sensibility. Far from it. That said, the agency's work rests on two predicates: First, when a state government imposes a public restraint it must take full political accountability for it and demonstrate a clear public intent to supplant competition with regulation. Second, a free market economy with a robust competition enforcement regime generates greater consumer welfare than a system of government-directed industrial policy that principally favors entrenched or well-connected interests.

#### **B. The United States and Competition as an Ordering Principle**

The United States learned the weakness of mixing industrial policy with antitrust the hard way. After the 1890 Sherman Act, our courts and policy makers spent decades interpreting our famously open-ended competition laws to include numerous social and political objectives. The Supreme Court repeatedly read the laws to protect non-economic ideals, including famously

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<sup>14</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

<sup>15</sup> James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B. U. L. REV. 1555, 1589 (2010).

remarking that the Court “cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”<sup>16</sup>

This philosophy was not limited to the courts. In the 1930s, the U.S. Congress passed the National Industrial Recovery Act (NIRA) in reaction to the Great Depression. NIRA allowed industries to agree to certain “industrial codes” that, while subject to nominal governmental oversight, ultimately encouraged the formation of cartels to restrain prices and output and restrict entry. Many economists have studied NIRA and concluded that, despite its intentions, it actually made the Great Depression worse by lowering domestic output by more than 10%.<sup>17</sup>

As Professor Sokol noted in his recent article on the subject, “industrial policy that favored inefficient competitors was a fundamental part of both case law and government enforcement priorities [at the time]. Such economically misguided and aggressive enforcement hurt American competitiveness and contributed to America’s economic malaise.”<sup>18</sup> These missteps served as a lesson in the United States that there are no easy shortcuts to national prosperity.

This era of populism began to fade in the 1960s as the prominence of Chicago School economic thought grew. Our policies since have been increasingly animated by the recognition that competition, consumer welfare, and economic growth are all linked. The U.S. Supreme Court has explicitly rejected the notion that non-competition factors, such as economic

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<sup>16</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

<sup>17</sup> See, e.g., Jason Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, 50 JOURNAL OF INDUSTRIAL ECONOMICS 1, 8 (2002).

<sup>18</sup> Sokol, *supra* note 6, at 3-4.

development, effects on local or national control, and international competitiveness, may be considered in competition analysis.<sup>19</sup>

Several retrospective studies have shown that in roughly the last twenty-five years, the shift to a more empirically-grounded approach to antitrust in the United States has yielded a federal antitrust enforcement program that remains remarkably stable across different government administrations.<sup>20</sup> This stability can also be tied heavily to the 1992 FTC and DOJ horizontal merger guidelines which, along with subsequent revisions, formally shifted merger review away from advocacy of proxies, simple labels, and other factors to increasingly nuanced and sophisticated empirical tests designed by economists. These tests include measures of concentration in the 1992 guidelines and the endorsement of upward pricing pressure in the 2010 revision.<sup>21</sup> Simply put, the inclusion of economists in the analysis now leaves less room for antitrust lawyers or others to advocate using non-competition factors.

### **C. Lingering Public Restraints at the State and Local Level**

Although a philosophy of economically-grounded competition analysis and faith in the consumer welfare benefits of robust competition now generally prevail at the federal level, many U.S. states and municipalities continue to take steps through laws or licensure requirements to protect local businesses at the expense of free market competition. Finding the right boundary between federal antitrust enforcement and these state and local laws that are often motivated by industrial policy or protectionism is one of the most important competition law challenges being tackled by the FTC right now.

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<sup>19</sup> See, *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 371-72 (1963); Sokol, *supra* note 6, at 5.

<sup>20</sup> See, e.g., Ronan Harty, Howard Shelanski & Jesse Solomon, *Merger Enforcement Across Political Administrations In the United States*, 2 CONCURRENTS COMPETITION L.J. 1 (2012) (noting that there is simply no correlation between political party and enforcement activity).

<sup>21</sup> See, e.g., U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.1 (Aug. 19, 2010); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §1.5 (Apr. 2, 1992).



In the United States, the individual states have sovereign status that entitles them to certain deference from federal laws. As a result, the Supreme Court has held that where states intentionally seek to displace competition in favor of another social good, they are immune from the federal antitrust laws. This “state action” doctrine also provides that where a state clearly articulates a policy to displace competition and then actively supervises those local governments or private parties implementing the state policy, the actions of those non-state entities also can be immune from federal antitrust laws.<sup>22</sup> For obvious reasons, the states, local governments, and protected private actors all argue for broad interpretations of the doctrine. Unfortunately, in too many situations, the state and local laws are being used not to protect genuine public goods like health and safety, but to protect politically-favored local businesses.

#### **IV. Tackling Domestic Public Restraints at the FTC**

The FTC has been aggressively litigating against abuse of state action immunity and attempting to better define the contours of the doctrine. Ultimately, it should only displace competition in situations where the state is willing to stand accountable for its policy – that is, where the state is doing more than just attempting to broadly disregard the federal antitrust laws. The agency has also been advocating against restrictive state laws and licensing requirements that unjustifiably protect inefficient local incumbents. I will give you two prominent recent examples of the FTC’s enforcement work, *Phoebe Putney* and *North Carolina Dental*, and describe a few examples of our advocacy work as well.

##### **1. *Phoebe Putney* and Certificate-of-Need Laws**

The FTC’s recent litigation against the hospital system *Phoebe Putney* in the U.S. state of Georgia offers an example of the agency’s attempt to sharpen the contours of a public restraint that states – or in this case sub-state bodies like local hospital authorities – sometimes use to

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<sup>22</sup> *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

favor incumbents.<sup>23</sup> At issue in this case was an attempt by a hospital system to immunize a merger to monopoly by cloaking the acquisition under the authority of the state. The hospital system arranged to have the local hospital authority buy the target hospital and then transfer management control to the acquirer, Phoebe Putney Health System, under a long-term lease. The agency challenged this action. Normally, sub-state entities like the hospital authority – since they are not sovereigns – depend upon a grant of authority directly from the state. The authority argued that even though the state did not expressly state that the hospital authority could make acquisitions that harmed competition, a merger to monopoly was a reasonably foreseeable outcome of its authority to purchase, sell, and lease hospitals in the area to provide better access to health care for the indigent.<sup>24</sup>

The Supreme Court disagreed. It sided with the FTC to narrow the inferences that could be drawn about reasonably foreseeable consequences of a state law and the immunity available to sub-state entities. The court reaffirmed the principle that the scope of immunity for local bodies may encompass only situations in which the state has “clearly articulated and affirmatively expressed” a desire to supplant competition and then actively supervised the local entity.<sup>25</sup> The court then went on to hold that general corporate powers do not satisfy the clear articulation prong of state action immunity. Because the law here did not expressly authorize the hospital authority to make acquisitions of existing hospitals that would substantially lessen competition, the Court held in favor of the FTC.<sup>26</sup>

Unfortunately, this is not the end of the story. In addition to the state action immunity sought by the hospital authority, the state has another potentially relevant regulatory process.

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<sup>23</sup> *FTC v. Phoebe Putney*, 133 S. Ct. 1003 (2013).

<sup>24</sup> *Id.* at 1014-15.

<sup>25</sup> *Id.* at 1010.

<sup>26</sup> *Id.* at 1017.

Thirty-six states in the U.S. have what are referred to as “certificate-of-need” or “CON” laws.<sup>27</sup> Under these laws, would-be suppliers of health care services must seek approval from a state entity to enter the market. The real issue in a typical certificate-of-need determination is not, however, one of ensuring patient safety—there are other laws and regulations that address those issues more directly—but rather the “need” for new entry into the market at issue, as determined by said state entity.<sup>28</sup>

Although the FTC won the battle on state action, it lost on the CON laws here. The agency ended up settling with the hospital systems without requiring a divestiture because the Georgia Department of Community Health (DCH) indicated that the relevant area of Georgia was considered “overbedded,” meaning it had an excess supply of hospital beds. Thus, even if the FTC had ultimately proven that the proposed acquisition was a merger to monopoly, because of the Georgia CON laws, it was unlikely that any divestiture buyer could obtain the necessary state approval to operate an independent hospital.<sup>29</sup> Among other things, this case is a stark reminder of the anticompetitive nature of CON laws.

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<sup>27</sup> See *National Conference of State Legislatures, Certificate of Need: State Health Laws and Programs*, <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx> (indicating that 36 states retain some type of CON program as of 2014).

<sup>28</sup> See Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 *GEORGE MASON UNIV. CIVIL RIGHTS L.J.* 159, 160 (2014) (“Unlike occupational licensing laws, CON requirements do not purport to determine whether a person is educated, trained, or skilled before going into business. Instead, they are expressly aimed at preventing competition against established companies, regardless of quality or skill.”); Roy Cordato, *Certificate of Need Laws: It’s Time for Repeal*, 1 *NATHANIEL MACON RESEARCH SERIES* 1, 27 (2005) (“Economist Friedrich Hayek in his Nobel Laureate lecture, ‘The Pretense of Knowledge,’ argued that central planners, like those charged with determining who should and should not get to provide medical services, can only ‘pretend’ to have the information necessary to make the kinds of decisions they claim to be making. At best, any determination of ‘need’ by such planners will be arbitrary and will not reflect actual market conditions. At worst, these planners can become witting or unwitting tools of entrenched interests who wish to keep competition out of the market.”).

<sup>29</sup> See *In re Phoebe Putney Health System, Inc.*, Docket No. 9384, Statement of the Federal Trade Commission, at 3 (F.T.C. Mar. 31, 2015).

## 2. *North Carolina Dental* and State Licensing Boards

Another area where state regulation can serve as an unwarranted government restraint of trade relates to state licensing of professionals. Here, the concern is the artificial and unjustified barriers to entry erected by some state licensing boards, including, in particular, those composed of active participants in the very markets they regulate. This issue came to a head in the Commission’s successful case against the North Carolina Board of Dental Examiners (the Board).

In that case, the FTC sued the Board alleging that its dentist-members—through the Board—were “colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services” in North Carolina.<sup>30</sup> After deciding that whitening teeth constitutes the practice of dentistry, the Board issued at least forty-two letters to non-dentist teeth whitening providers, informing them that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing those services.<sup>31</sup>

Our case ended up at the Supreme Court, which ruled in the Commission’s favor last February. The Court held that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.”<sup>32</sup>

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<sup>30</sup> *In re* N.C. Bd. of Dental Exam’rs, Docket No. 9343, Complaint, at 1 (June 17, 2010) [hereinafter *N.C. Dental Compl.*], available at <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf>. The Board consists of six licensed dentists, one licensed hygienist, and one “consumer member,” who is neither a dentist nor a hygienist. *Id.* ¶ 2.

<sup>31</sup> *Id.* ¶ 20.

<sup>32</sup> *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015). Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Alito, with Justices Scalia and Thomas joining, dissented. Among other things, the dissent argued that *Parker* immunizes state agencies, the Board is a state agency, “and that is the end of the matter.” *Id.* at 1117-18 (Alito, J., dissenting). The dissent further noted that the regulation of the practice of medicine and dentistry has fallen “squarely within the States’ sovereign police power” since before the Sherman Act was passed in 1890. *Id.* at 1119. Thus, the state statutes that created, and conferred regulatory authority on, the Board “represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.” *Id.*

A few key aspects of the Court’s opinion stand out. First, the Court reiterated the crucial role that antitrust plays in our economy, noting that “[f]ederal antitrust law is a central safeguard for the Nation’s free market structures.”<sup>33</sup> Second, the Court focused on the important issue of political accountability, explaining that immunity for state agencies “requires more than a mere facade of state involvement, for it is necessary [that] the States accept political accountability for anticompetitive conduct they permit and control.”<sup>34</sup> Third, in addressing the states’ concern about their licensing boards incurring antitrust liability and damages, the Court observed that states can ensure [state action] immunity is available to agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active supervision.<sup>35</sup>

### 3. State and Local Advocacy

In addition to our enforcement work, the Commission has challenged state and local public restraints through education and advocacy.<sup>36</sup> Our educational efforts most recently included a full-day workshop on the economics and regulatory issues associated with the so-called “sharing” economy.<sup>37</sup> Our recent domestic advocacy involves persuading states and local

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<sup>33</sup> *Id.* at 1109.

<sup>34</sup> *Id.* at 1111. *See also id.* (“*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.”).

<sup>35</sup> Those two requirements and their underlying rationale, the Court found, should apply to the Board, just as they were held to apply to the medical peer review board in *Patrick v. Burget*, 486 U.S. 94 (1988), where the Court directed to the legislative branch any challenges to the wisdom of applying the antitrust laws to the sphere of medical care. *See N.C. State Bd.*, 135 S. Ct. at 1115-16.

<sup>36</sup> Since the 1970s, for example, the Commission has issued hundreds of comments and amicus briefs to state and self-regulatory entities addressing professional licensure and other restrictions across a wide range of industries. *See Prepared Statement of the Fed. Trade Comm’n, Competition and the Potential Costs and Benefits of Professional Licensure*, before the U.S. House of Representatives Committee on Small Business, at 9-13 (July 16, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/568171/140716professionallicensurehouse.pdf](https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf).

<sup>37</sup> Fed. Trade Comm’n, *The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators* (June 9, 2015), available at <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>.

enforcers to abandon or modernize antiquated regulatory structures, like the certificate-of-need process, to allow more new innovative forms of business.

For example, many U.S. states have automobile distribution laws that prohibit cars to be sold directly by manufacturers to consumers. These laws were originally intended to protect both the distributors of cars from abuse by manufacturers and to guarantee that consumers would have a local representative of the manufacturer to whom to they could turn for servicing and warranty issues. However, new car companies like Tesla and Elio Motors are attempting to create new models of national distribution and auto servicing of their cars that do not require locally franchised dealers.<sup>38</sup> In many states, these companies have faced legislative actions and litigation to prevent them from pursuing direct sales.<sup>39</sup>

The FTC staff has pointed out repeatedly in letters and commentary to state legislatures and government officials that these laws are anomalous within the larger economy and potentially counterproductive. Most manufacturers can, and should be allowed to determine the best method of distribution for their products based on consumer preferences and other business considerations. These new distribution models also offer potential efficiencies that could be passed on to consumers in the form of better pricing or quality of service. Government intervention in the market should only be used to accomplish specific policy objectives – none of which are apparent in the auto distribution restrictions at issue here.

Thankfully, it seems that the FTC's advocacy efforts are paying some dividends, albeit small ones. The state of New Jersey recently passed legislation – what I would call a test bill – that specifically allows Tesla to operate a handful of direct sales outlets in the state.

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<sup>38</sup> See, e.g., Marina Lao, et al., *Direct-to-consumer Auto Sales: It's Not Just About Tesla*, FTC Blog, May 11, 2015 11:00 AM, <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> (describing the agency's advocacy efforts across several states).

<sup>39</sup> *Id.*

## V. The Role of the FTC in Shaping Global Competition Norms

### A. Generally

As I mentioned at the outset today, a second and even more controversial area of concern for market participants and policymakers is the potential for national governments to use the competition laws to promote industrial policy objectives. The response to these concerns by an agency like the FTC is more challenging and indirect than with respect to domestic restraints, where we have the authority to take our concerns before a court, if necessary. In this regard, our work is focused more on education, engagement, and soft advocacy, particularly because many of the issues prompting concern will require legislative or executive action that is beyond the control of the overseas competition agency.

### B. An Issue of Statutory Design

Unlike the antitrust statutes in the United States, which are open-ended and subject to interpretation, the statutory foundation in many other prominent jurisdictions, including the European Union and China, are more specific. These competition laws often expressly contemplate or even command the consideration of “public interest” factors in the antitrust analysis. Thus, for instance, the European Court of Justice in a recent decision noted that Section 101 of the TFEU, “like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”<sup>40</sup>

China’s antitrust laws contemplate non-competition factors expressly. For example, Article 1 of the Chinese Anti-Monopoly Law (AML) says it was created for, among other things,

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<sup>40</sup> Case C-8/08, 2009 E.C.R. I-4529 ¶ 38; *see also* Sokol, *supra* note 6, at 6 (discussing same and offering additional examples).

“*promoting the healthy development of the socialist market economy.*”<sup>41</sup> This could mean anything, including the protection of jobs, Chinese state-owned entities, or other aspects of a socialist economy.

### **C. The FTC’s Advocacy for Competition-based Enforcement**

Given these differing legal authorities, the FTC must take a less direct approach in much of its international work. The agency participates in several multilateral fora on competition law and policy issues. Prominent among these are the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD).<sup>42</sup>

Despite its diverse membership, the ICN has succeeded in achieving consensus on recommended practices in several areas, including merger review procedures, substantive merger analysis, and the criteria for assessing abuse of dominance. Work product by the ICN has included recommended practice manuals, case-handling and enforcement manuals, reports, legislation and rule templates, and workshops.<sup>43</sup> Nations in emerging economies around the world have adopted these practices. For example, in addition to bringing its three competition agencies under one roof, Brazil in 2011 and 2012 changed its merger review system to better reflect the ICN practices, such as moving from a post-merger to pre-merger review. These changes greatly increased the efficiency of Brazil’s merger review process and allowed it to become a more active player in international cooperation on antitrust issues.<sup>44</sup> Market participants working with the Brazilian government have viewed these reforms as tremendous improvements.

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<sup>41</sup> Art. 1, China Anti-Monopoly Law (2008).

<sup>42</sup> The ICN was founded in 2001 by the FTC, the Antitrust Division, and 14 other competition agencies. Its membership has risen to 127 competition authorities. See <http://www.internationalcompetitionnetwork.org/>.

<sup>43</sup> The ICN’s work product is available on the ICN website at <http://www.internationalcompetitionnetwork.org/>.

<sup>44</sup> IBRAC, OVERVIEW OF COMPETITION LAW IN BRAZIL 54 (Editora Singular ed. 2015). (The agency also replaced a single subjective threshold with a two-party Brazilian revenue threshold).



The FTC also works regularly on a bilateral basis with other antitrust agencies, offering commentary on laws and rules under development and engaging other competition authorities with technical assistance or even participating in high-level dialogues with other governments about issues of mutual interest. The FTC's bilateral work is incremental, but over time can achieve meaningful results. For example, the agency supported the U.S. government last year in connection with the U.S.-China Joint Commission on Commerce and Trade (JCCT), which resulted in several major Chinese commitments, including the application of competition-based remedies despite the language of the AML calling for a broader public interest inquiry.<sup>45</sup>

## **VI. Conclusion**

The antitrust agencies in the United States were originally tasked with policing the anticompetitive behavior of private individuals. That concern remains the central focus of our mission.

However, if you generally believe in the value of free market capitalism to improve society, it is almost impossible to ignore the inevitable situations where the harm to competition is inflicted by the actions of government rather than by private actors. The appropriate response to these situations must be nuanced.

But those of us who do competition work for a living are uniquely attuned to situations where socially beneficial market forces can and should be brought to bear. We should share those insights not just among ourselves, but with a wider audience of decision-makers. Competition concerns do not need to drive every decision of government, but they need a place at the table far more often. As competition specialists, it is often up to us to ensure that invitation is extended.

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<sup>45</sup> Maureen K. Ohlhausen, Testimony before the U.S.-China Economic and Security Review Commission 4 (Jan. 28, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/621411/150128\\_chinatestimony.pdf](https://www.ftc.gov/system/files/documents/public_statements/621411/150128_chinatestimony.pdf).

Let me give you an excellent, concrete example. As part of the reorganization that created the Competition and Markets Authority (“CMA”), greater collaboration between the CMA and sector regulators is envisioned. David Currie has spoken about the value of integrating the deep industry expertise of a sector regulator with the competition expertise of the CMA. That sort of collaboration, where competition expertise is closely integrated into the decisions of government, seems to me like an excellent idea, and it is a development worth watching carefully in light of some of the concerns I have outlined today.

Thank you very much for your attention. I would be happy to answer any questions and look forward to the discussion.