INTRODUCTION TO COMPETITION LAW AND POLICY

Workshop on Competition Law and Policy

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*The views expressed herein are those of the speaker and not necessarily those of the Federal ... s individual Commissioner, or the United States government.

A LITTLE ABOUT ME

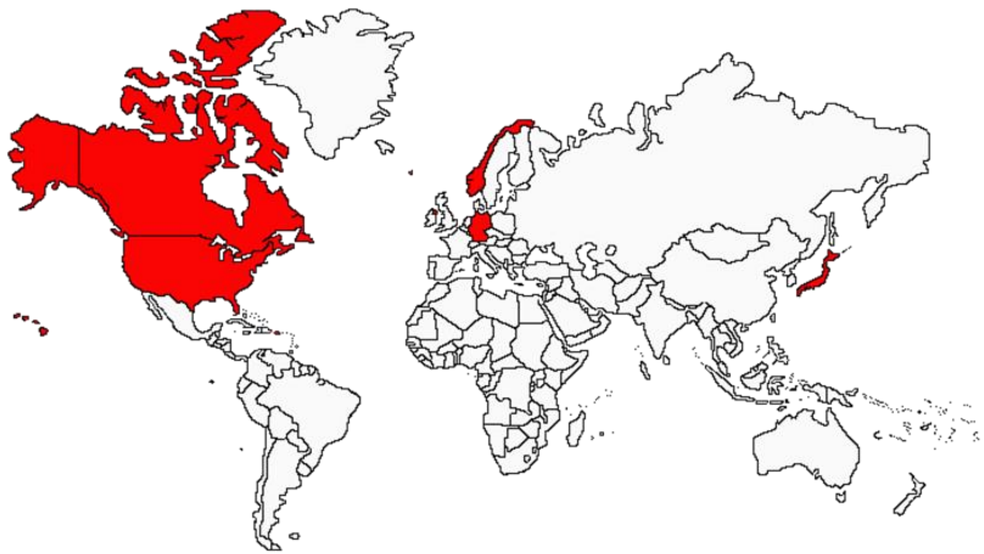
- Manager in FTC's Mergers I Division since 2012
  - Shop has more than 30 attorneys
  - Industries include pharmaceuticals, medical devices, consumer healthcare products scientific instruments, internet, advertising, and defense
- Prior FTC experience
  - Mergers III – Energy
  - Merger IV – Hospitals and Retail
  - Counsel to Director of the Bureau of Competition
- Litigation experience
  - Most recently led *Otto Bock* and *Advocate* trial teams
  - Other litigation cases include *Steris*, *Omnicare*, *Rockford*, *ProMedica*, *Inova*, and *Equitable*.

OVERVIEW

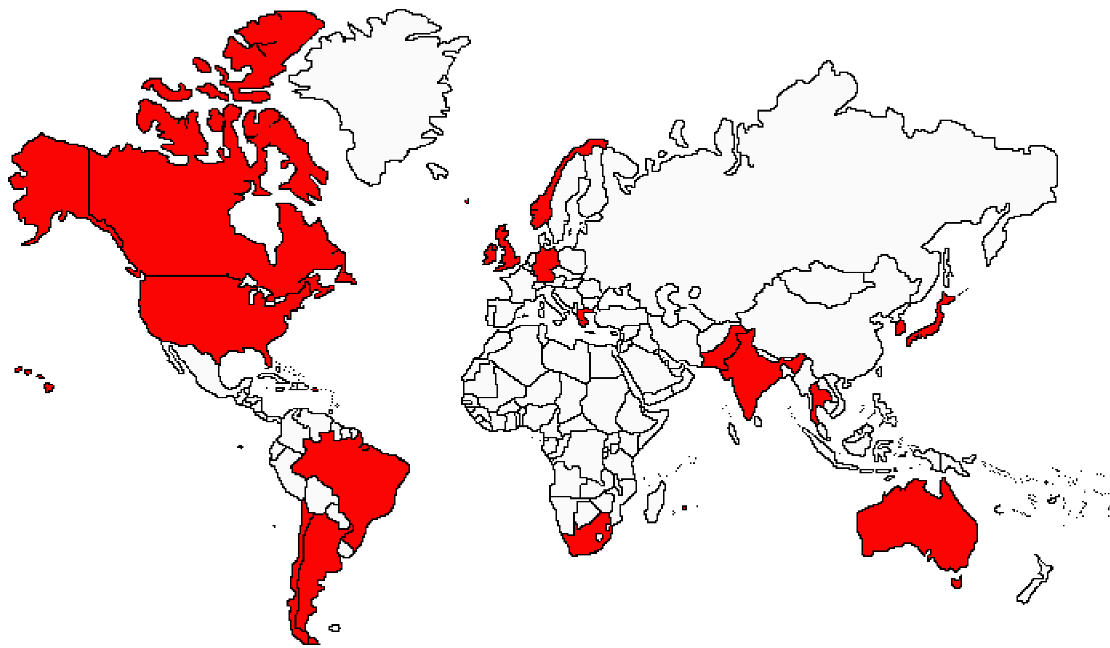
- History of Competition Law Regimes
- Goals and Policies of Competition Law
- Enforcement Standards and Priorities

COMPETITION LAW REGIMES circa 1900

1960: JAPAN AND THE UK



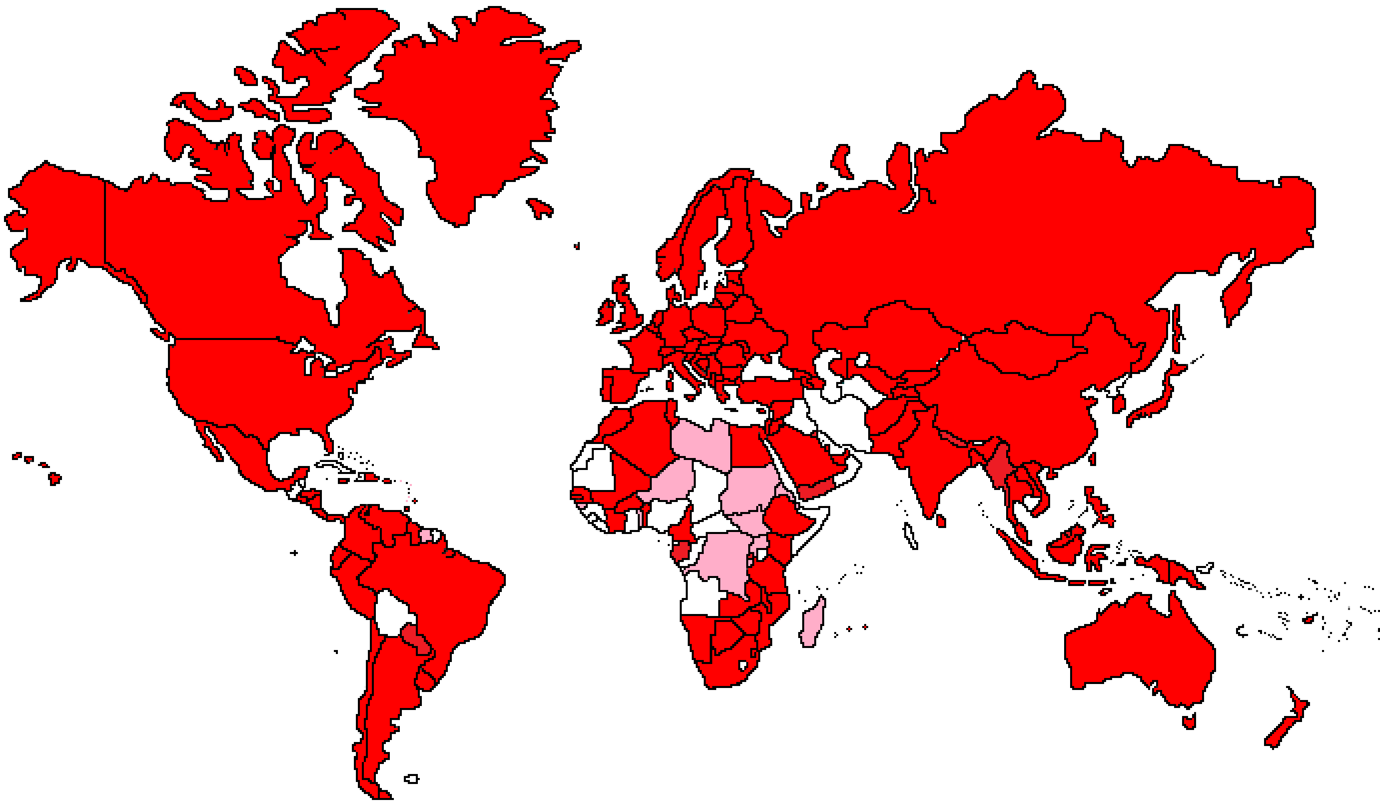
1960-1980: ASIA, EUROPE, SOUTH AMERICA



1980

2000: CENTRAL AND EASTERN EUROPE

COMPETITION LAW REGIMES circa 2017



THE MODERN ERA

- Today more than 130 countries have competition laws, most of them only since 1980
- In 1990, only three competition authorities had convicted and fined an international cartel; in 2016, the number has grown to 75
- In 2016, more than 31 deals totaling over 69 billion euros were blocked or abandoned as a result of antitrust concerns around the world

EVOLUTION OF COMPETITION LAW IN THE U.S.

- 1880s: 26 states in U.S. had antimonopoly laws before the Sherman Act
- 1890: Sherman Act
- 1914: Clayton Act
- 1914: FTC Act
- 1976: Hart-Scott-Rodino Act

FORERUNNER: INTERSTATE COMMERCE ACT OF 1887

- First attempt to control big business through federal regulation
  - Initiated over railroad trusts specifically
  - Transportation rates had to be reasonable and just
  - No price discrimination
  - Later expanded to regulate other transportation

- Senator John Sherman:

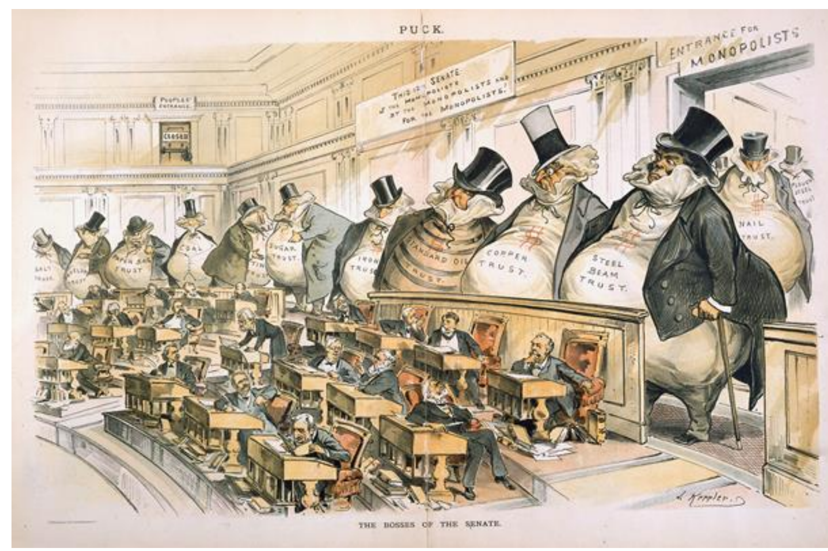
"*If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.*"

SHERMAN ACT (1890)

- Meant in part to supplement states' laws
- Section 1 – prohibits "every contract, combination … or conspiracy in restraint of trade"
- Section 2 – makes it unlawful for a company to "monopolize, or attempt to monopolize, or combine or conspire … to monopolize" trade
- Purposely framed in general terms

CONCERNS THAT LED TO THE SHERMAN ACT

- Huge economies of scale allowed large companies to undercut smaller companies
- Loss of local community-based businesses
- Concern about large businesses becoming too politically influential as well



The Bosses of the Senate, a cartoon by Joseph Keppler. First published in *Puck* in 1889.

EARLY ENFORCEMENT OF THE SHERMAN ACT

- President Roosevelt sued 45 companies
- President Taft sued 75 companies
- *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)
  - John D. Rockefeller’s attempts to monopolize the oil business
  - Tying up railroad services
  - Broken up into separate companies

GOALS AND POLICIES OF THE SHERMAN ACT

- In *United States v. Topco Associates, Inc.*, the U.S. Supreme Court memorably stated:

> Antitrust laws in general, and the Sherman Act in particular, are the *Magna Carta of free enterprise*. They are as important to the preservation of economic freedom and our free-enterprise system as the *Bill of Rights* is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—*to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster*.

405 U.S. 596, 610 (1972)

GOALS AND POLICIES OF THE SHERMAN ACT cont'd

- More recently, the U.S. Supreme Court in *Spectrum Sports, Inc. v. McQuillan* stated:

  The purpose of the [Sherman Act] *is not to protect businesses from the working of the market; it is to protect the public from the failure of the market*. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

  506 U.S. 447, 458 (1993) (emphasis added)

- Protection of *competition*, <u>not</u> competitors

ADDITIONAL COMPETITION LAWS—CLAYTON ACT

1914: Clayton Antitrust Act

- Prohibits mergers that *may* substantially lessen competition or tend to create a monopoly
- Prohibits price discrimination, exclusive dealing, and tying
- Authorizes lawsuits for injunctions and treble damages by private actors, federal gov’t, and states
- Authorizes recovery of costs and fees for states and private actors

ADDITIONAL COMPETITION LAWS—FTC ACT

1914: U.S. Federal Trade Commission Act

- Prohibits “unfair methods of competition”
- Interpreted to include Sherman Act conduct
- Creates FTC as specialized enforcement body
- Provides for injunctions and redress for consumer harm rather than fines and jail—civil enforcement only
- Consumer protection as well as competition (1938)

GOALS AND POLICIES OF COMPETITION LAW—FTC ACT

August 13, 2015 Statement of Enforcement Principles:

- Encompasses Sherman and Clayton Acts as well as violations of their “spirit”’ and incipient violations
- Congress left it to the FTC to apply the statute on a case-by-case basis
- FTC will be guided by the goals of antitrust laws, namely the promotion of consumer welfare
- Analytical framework is similar to rule of reason
- Less likely to use FTC Act alone if Sherman or Clayton Act is sufficient to address harm

WHY DOES COMPETITION LAW MATTER TO BUSINESSES?

- Enhances economic efficiency
- Encourages innovation
- Fosters greater productivity and growth
- Improves international competitiveness and helps address privately-imposed barriers to trade

GREATER PRODUCTIVITY AND PROSPERITY

- In 1991, McKinsey Global Institute studied 13 countries for 12 years: What makes some countries rich and others poor?
  - *The answer:* **Productivity**
- What drives productivity? Study examined labor, capital formation, corporate governance, education, competition, etc.
  - *The most important factor:* **Competition**

GREATER PRODUCTIVITY AND PROSPERITY

- World Bank, World Development Report 2005:

  Barriers to competition benefit some firms but deny opportunities and increase costs to other firms and to consumers. They also weaken incentives for protected firms to innovate and improve their productivity. *Increasing competitive pressure can increase the probability of firm innovation by more than 50%.*

  (emphasis added)

WHY DOES COMPETITION LAW MATTER TO CONSUMERS?

- Enhances consumer welfare
  - Lower prices
  - Higher quality goods and services
  - Greater innovation

- Creates greater productivity and prosperity

ENHANCING CONSUMER WELFARE

- Competition laws maximize consumer welfare by preventing and remedying the illicit acquisition, preservation, and use of **market power**
- **Market power** is the ability profitably to maintain prices above competitive levels for a significant period of time
- **Market power** can result in:
  - Higher prices for consumers
  - Lower quality of products and services
  - Reduced output
  - Fewer product choices
  - Reduced incentive to innovate

BUT MARKET POWER IS NOT BAD IN OF ITSELF

- Market power obtained by offering a better product at a lower price is legal
- Success in the market through free and aggressive competition is encouraged:
  - Profits thus earned encourage others to enter
  - Threat of entry by others will exert competitive discipline
  - Profits create incentive to innovate and provide customer service to maintain market position
  - Competitive equilibrium will be restored
- Market power is bad *only* when it is obtained or maintained unfairly

MARKET POWER IS AT CORE OF COMPETITION LAW AND POLICY

MONOPOLIZATION/DOMINANCE

MERGERS

AGREEMENTS

U.S. ANTITRUST ENFORCERS

Who enforces antitrust laws in the U.S.?

- Federal Trade Commission
- United States Department of Justice
- States through State Attorneys General
- Private enforcement

ENFORCEMENT TOOLS—FTC

Federal Trade Commission

- Civil injunctions through the courts
- Administrative orders
- Policy
- Education and outreach
- Research and advocacy

How the FTC Uses Its Tools

Stats & Data 2017

JANUARY - DECEMBER 2017
FEDERAL TRADE COMMISSION

COMPETITION

ANTITRUST ENFORCEMENT

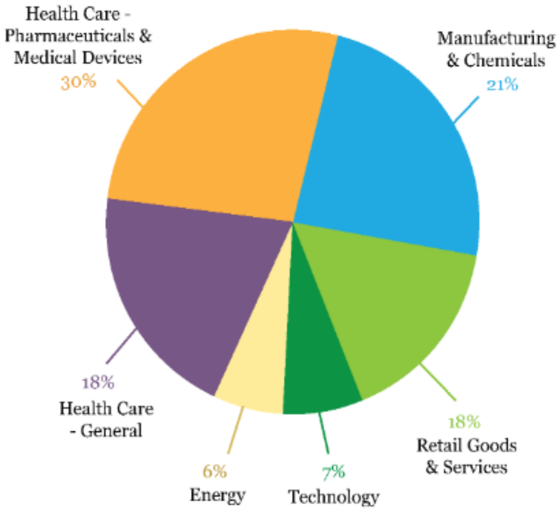
Merger Consent Orders	16
Filed Merger Cases	4
Abandoned Transactions	5
Non-Merger Actions	9
Civil Penalty Actions	2

POLICY INITIATIVES

Workshops	5
Reports	10
Advocacy & Amicus Briefs	12

ENFORCEMENT ACTIONS BY SECTOR

FISCAL YEARS 2013-2017



FTC/DOJ MERGER ENFORCEMENT

FTC:

- 21 FTC enforcement actions in FY2017
  - 14 consent orders
  - 6 transactions abandoned due to antitrust concerns raised in the investigation
  - 1 preliminary injunction/administrative trial authorized
- In FY2018, several additional court challenges, including *Otto Bock*, *Tronox*, and *Wilhelmsen*

DOJ: challenged 18 additional FY2017 mergers

ENFORCEMENT RESULTS AND PRIORITIES—DOJ CRIMINAL

Criminal cartels FY2016

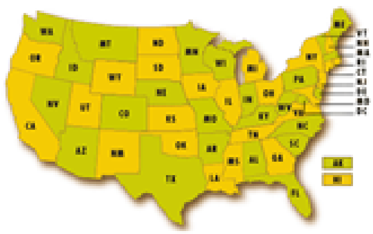
- 19 companies, 52 executives charged
- 51 criminal cases filed
- Record fines: $3.6B (FY2015)
- Average prison sentences increased from 20 months (FY2000-09) to 22 months (FY2010-16)
- Priorities include real estate foreclosure auctions (northern California and southeastern U.S.), automotive parts (conspiracies uncovered in more than 50 parts), financial industry (foreign currency exchange spot market, LIBOR manipulation)

ENFORCEMENT BY THE STATES

“Baby Sherman” and “Baby FTC” acts

Hard-core price fixing

- States as purchasers (bid-rigging)
- Large numbers of consumers



Anticompetitive mergers

- Local products
- Healthcare markets
- Supermarkets

States focus on restitution, injunctions, attorney’s fees

ENFORCEMENT BY PRIVATE PARTIES

Federal antitrust laws

- Treble damages
- Attorney’s fees
- Class actions
- “Follow on” to federal criminal actions

State antitrust laws vary and present a number of unique issues

THESE TWO DAYS

Market power concepts

Identify illegal behavior

- Mergers
- Monopolization/Dominance
- Agreements
  - Horizontal
  - Vertical

Discuss real-life examples

Discuss hypotheticals