COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE UNITED KINGDOM COMPETITION AND MARKETS AUTHORITY'S REVIEW OF THE COMPETITION CONCURRENCY ARRANGEMENTS

November 3, 2023

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and the International Law Section (the "Sections") of the American Bar Association ("ABA") are pleased to submit their views to the United Kingdom Competition and Market Authority ("CMA") in response to its *Review of Competition Concurrency Arrangements*.[1] These comments provide general observations regarding concurrency within the United States in the hope that, despite clear differences between the UK and the US in both sectoral regulation and in competition enforcement, the experience of the US might provide some helpful insights to the CMA.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-US jurisdictions. For over thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section ("ILS") focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.

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[1] Competition & Mkts. Auth., Review of the Competition Concurrency Arrangements Call for Inputs (Aug. 24, 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1180013/Concurrency_review_call_for_inputs__.pdf.

[2] Past comments of the Antitrust Law Section are available at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

[3] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about/.

I. US Experience with Concurrent Enforcement Authority

There are numerous instances of concurrent competition enforcement authority in the United States. The most straightforward example is at the federal level, where the two primary antitrust agencies share concurrent jurisdiction over federal antitrust law. The Department of Justice, Antitrust Division brings civil and criminal enforcement actions under the US federal antitrust laws, which are encompassed primarily in two statutes: the Sherman Act of 1890 and the Clayton Antitrust Act of 1914. However, the US Supreme Court has also stated that all violations of the Sherman Act also violate the Federal Trade Commission Act of 1914, which empowers the Federal Trade Commission ("FTC") to prevent unfair methods of competition.[4] Thus, although the FTC does not technically enforce the Sherman Act, it can bring civil cases under the Federal Trade Commission Act against the same kinds of activities that violate the Sherman Act. The FTC Act also covers other practices that harm competition but that may not fit neatly into categories of conduct prohibited by the Sherman Act, but only the FTC may bring cases under the statute.

While the Antitrust Division and FTC enjoy almost concurrent jurisdiction enforcing the US antitrust laws, in practice, the two agencies generally complement one another, with each agency having developed superior expertise in particular industries or markets. For example, the FTC enforces the antitrust laws in segments of the economy such as healthcare, pharmaceuticals, professional services, food, energy, and certain high-tech industries such as computer technology and internet services. The Antitrust Division has exclusive jurisdiction over criminal antitrust enforcement, and also generally enforces antitrust matters relating to banking, defense, agriculture, telecommunications, and transportation. Before opening an investigation, the agencies consult with one another to avoid duplicating efforts.

In addition to these federal antitrust enforcers, state attorneys general can bring civil actions under the main federal antitrust laws as *parens patriae* as well as enforce applicable state antitrust laws. State laws generally mirror their federal counterparts, although there can be differences depending on the state. In many instances, these laws are interpreted in conjunction with the federal antitrust laws, and their reach extends correspondingly. In other instances, state competition laws extend beyond what is provided for in the federal antitrust laws. For instance, Maryland state law explicitly prohibits minimum resale price maintenance agreements, in contrast with federal law.[5] Furthermore, private plaintiffs can bring civil suits under both federal and state competition law.

II. Sector-Specific Concurrent Enforcement

Antitrust enforcement and sector-specific regulations share a long and complex history that began in the late nineteenth century when Congress passed two laws—the Interstate Commerce Act of 1887 and the Sherman Act of 1890. The former created the Interstate Commerce Commission ("ICC") to regulate a variety of competitive conduct in the surface transportation sector while the latter protected competition across the general economy, which included industries the ICC regulated, such as the railroads.[6] This early overlap laid the foundation for adjudicating the interplay between sector-specific regulations and general competition laws. Sector-specific regulations can allow the development of nuanced and informed industry rules tailored to specific industries.[7] But sector-specific regulation risks "capture" by the industry itself.[8] Conversely, while independent generalist judges may lack sector-specific expertise, they are more insulated from interest-group pressures affecting the industry.[9] Court cases involving heavily regulated industries

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[4] FTC v. Motion Picture Advertising Service Company, Inc., 344 U.S. 392, 394-95 (1953).

[5] Md. Code, Com. Law § 11-204(b).

[6] Randal C. Picker & Dennis W. Carlton, Antitrust and Regulation, 30 (Univ. of Chicago Law & Econ., Olin Working Paper No. 312, Oct. 2006), available at http://ssrn.com/abstract=937020.

[7] *Id.*

[8] *Id.*

[9] *Id.*

highlight antitrust law's ability to protect competition where regulations fall short. In 1912, the Supreme Court in *United States v. Terminal R. Association* held that even though a private association's acquisition of essentially all railroad facilities in St. Louis complied with ICC regulations, the Association nonetheless violated the Sherman Act.[10]

By the mid-1970s, sector-specific regulations became subject to reassessment, and Congress enacted a series of deregulation initiatives. Both the ICC and the Civil Aeronautics Board (regulatory agency for commercial aviation) were abolished.[11] Yet sector-specific regulation and antitrust still interact in heavily regulated industries. For example, recently JetBlue and American Airlines entered a partnership, which adhered to industry regulations and was approved by the Department of Transportation, but the Department of Justice successfully obtained a trial-court ruling that the transaction violated the Sherman Act.[12]

Despite many federal deregulation initiatives, numerous sectoral regulators remain tasked with preserving competition alongside federal and state antitrust enforcers. Sector-specific enforcement mandates are carried out by both federal and state regulators. For instance, pursuant to the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") regulates competition among telecommunications common carriers, having established rules regulating interconnections between local exchange carriers, resale of services, and access to network elements.[13] As is often the case with sectoral regulators, the FCC often reviews proposed telecommunications mergers alongside the Department of Justice to determine whether the transaction is in the public interest – a broader standard that allows for consideration of factors that federal antitrust enforcers generally exclude.[14] For instance, the FCC reviewed the proposed T-Mobile and Sprint transaction concurrently with the Antitrust Division before approving it.[15] State-level public utility commissions also share a concurrent competition mandate and have the ability to impose conditions on the transaction to preserve competition and protect consumers.[16]

As another example, competition in the meat-packing industry is policed by the US Department of Agriculture. The Packers and Stockyards Act of 1921 prohibits meat packers or dealers from "engag[ing] in or us[ing] any unfair, unjustly discriminatory, or deceptive practice or device," as well as engaging in market allocation, price manipulation, or restraint of commerce.[17] Stockyard owners, market agencies, and dealers are similarly prohibited from "unfair, unjustly discriminatory or deceptive practice[s] or device[s]."[18] The U.S. Department of Agriculture's Grain Inspection, Packers and Stockyards Administration enforces both of these prohibitions through administrative proceedings or through the Department of Justice in federal court.[19]

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[10] *United States v. Terminal R. Ass'n*, 224 U.S. 383, 411 (1912).

[11] *See* 104 P.L. 88, 109 Stat. 803("The ICC Termination Act of 1995"); *see also* 98 P.L. 443, 98 Stat. 1703 (Civil Aeronautics Board Sunset Act of 1984).

[12] *United States v. Am. Airlines Grp. Inc.*, No. 21-11558-LTS, 2023 U.S. Dist. LEXIS 87867, at *6 (D. Mass. May 19, 2023), *appeal filed*, No. 23-1802 (1st Cir. Oct. 5, 2023).

[13] Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers, 11 FCC Rcd. 15,499 (1996); *see also* Implementation of Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd. 3696, 3728-30 (1999).

[14] 47 U.S.C. §§ 214(a), 309(a), (d), 310(d).

[15] *See, e.g.*, Press Release, Fed. Commc'ns Comm'n, FCC Approves T-Mobile/Sprint Transaction with Conditions (November 5, 2019), https://www.fcc.gov/document/fcc-approves-t-mobilesprint-transaction-conditions.

[16] *See, e.g.*, Press Release, California Public Utilities Comm'n, CPUC Approves Merger of Sprint and T-Mobile (April 16, 2020), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M333/K367/333367934.PDF.

[17] 7 U.S.C. § 192(a)-(g).

[18] *Id.* § 213(a).

[19] *Id.* § 224.

The US Congress has enacted numerous other statutes that charge executive agencies with protecting competition in specific industry sectors, including beverage alcohol, pharmaceuticals, and finance.[20] And more recently, President Biden, seeking to establish a "whole-of-government" approach to antitrust enforcement, issuing an executive order on "Promoting Competition in the American Economy," directing agencies with "overlapping jurisdiction over particular cases, conduct, transactions, or industries" to "coordinate their efforts" to enforce the antitrust laws, including "the investigation of conduct potentially harmful to competition," "the oversight of proposed mergers, acquisitions, and joint ventures," and "the design, execution, and oversight of remedies."[21]

III. Implied Immunities and Exemptions

Concurrent oversight by sector regulators—even oversight mandated by statute—historically has not created antitrust immunity. US courts have long held that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[22] Said differently, "[r]epeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary."[23]

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, the Supreme Court considered an antitrust challenge brought by a consumer of AT&T's competitive local exchange service under the Telecommunications Act of 1996. The plaintiff argued that Verizon's provision of supporting services necessary for AT&T to compete, as purportedly required by the Act, was inadequate.[24] The Court noted that, although Congress had created duties under the Act, that did "not automatically lead to the conclusion that they can be enforced by means of an antitrust claim."[25] While the Court refers in passing to the presence of a "detailed regulatory scheme" "rais[ing] the question whether the regulated entities [were] not shielded from antitrust scrutiny altogether by the doctrine of implied immunity," the Court held that question had been answered by an antitrust-specific savings clause in the Act, which "bars a finding of implied immunity."[26] The Court observed, however, that "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" resulted in "light benefits of antitrust intervention here."[27]

In *Credit Suisse Securities (USA) LLC v. Billing*, the Supreme Court held that the complex regulatory regime of the securities industry implicitly precluded the application of the antitrust laws.[28] In so holding, the Court weighed four factors: (1) whether the regulator had "legal regulatory authority;" (2) whether it exercised that authority; (3) whether a conflict existed between antitrust law and securities law that rises to the level of incompatibility; and (4) whether the challenged activity fell within the "heartland"

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[20] *See, e.g.,* the Federal Alcohol Administration Act (Public Law 74-401, 49 Stat. 977, 27 U.S.C. 201 et seq.), the Bank Merger Act, the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98-237, 98 Stat. 67, 46 U.S.C. 40101 et seq.) (Shipping Act), the ICC Termination Act of 1995 (Public Law 104-88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108-164, 117 Stat. 2024, 15 U.S.C. 7601 et seq.), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203, 124 Stat. 1376) (Dodd-Frank Act).

[21] Exec. Order No. 14036, 86 FR 36987 (July 9, 2021) (Executive Order on Promoting Competition in the American Economy), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[22] United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51 (1963). This stands in contrast with express antitrust exemptions, which do confer antitrust immunity. *See*, *e.g.*, 49 U.S.C. § 10706 (2000) (providing antitrust immunity for rail transportation). But even express exemptions are narrowly construed. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982).

[23] Silver v. New York Stock Exch., 373 U.S. 341(1963).

[24] 540 U.S. 398 (2004).

[25] *Id.* at 406.

[26] *Id.*

[27] *Id.* at 411-412, 414.

[28] 551 U.S. 264 (2007).

of securities law.[29] Finding that the first, second, and fourth factors unquestionably weighed in favor of implied immunity, the Court turned to "the third condition: Is there a conflict that rises to the level of incompatibility?"[30] Considering the active regulatory oversight, the Court found

> it fair to conclude that where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.[31]

The Court thus concluded that securities laws were "clearly incompatible" with the application of the antitrust laws and impliedly precluded antitrust liability.[32]

Applying the *Billing* factors, lower courts have since held that securities laws require an implied preclusion of the antitrust laws. For instance, in *Elec. Trading Group, LLC v. Banc of Am. Sec. LLC*, the Second Circuit affirmed the dismissal of a putative class action brought against financial institutions serving as prime brokers, where a short seller of securities alleged that the brokers charged artificially inflated borrowing fees by arbitrarily designating certain securities as hard-to-borrow and then fixing the price for borrowing them.[33] Assessing all four factors, the court concluded that each weighed in favor of implied immunity and thus dismissal was appropriate.[34]

Finally, if a party brings a lawsuit before an Article III court in a regulated industry where the case "turns on issues entrusted by Congress to administrative agencies[,]" then the court may invoke the doctrine of primary jurisdiction.[35] Primary jurisdiction is not a defense to antitrust liability, but rather a mechanism allowing courts to "hold the claim in abeyance or dismiss it without prejudice and 'refer' the issue to the agency for its consideration in the first instance."[36] In antitrust cases, this manifests when conduct is simultaneously encroaching on antitrust laws and is arguably "protected or prohibited by another regulatory statute."[37] This most frequently occurs when the case hinges on the agency's interpretation of statutory language, rules, orders, or other actions within the agency's power.[38] If the conduct at issue goes beyond the agency's congressionally permitted bounds, then the doctrine of primary jurisdiction will not apply.[39]

Further Resources

In addition to these comments and the sources cited therein, the Sections respectfully suggest that the CMA may wish to refer to the Antitrust Law Section's treatise *Antitrust Law Developments* (9th Ed.) chapters 13.D and 14 for extensive additional information on concurrency in the United States. The Sections would be happy to provide such further information on the subject of this Review as the CMA may consider appropriate and helpful.

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29 *Id.* at 277.
30 *Id.*
31 *Id.* at 278.
32 *Id.* at 285.
33 588 F.3d 128 (2d Cir. 2009).
34 *Id*. at 138.
35 Christopher L. Sagers, HANDBOOK ON THE SCOPE OF ANTITRUST 173 (2015).
36 *Id.*
37 *Id.*
38 *Id.* at 176.
39 *Id.*