



Judicial Review in Competition Cases: the US Experience

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Judicial Review in the US

- When Congress enacted the Sherman Act, the language was impossibly broad – “every contract . . . in restraint of trade” – and that necessarily left it to the courts to determine what antitrust policy should actually be.
 - Later statutes, such as the Clayton Act, were not quite so broad, but still required extensive judicial interpretation.
 - Competition statutes in the 50 states are similarly broad.
 - Policy would develop through the common law process.
- The Supreme Court has interpreted its common law powers broadly, essentially saying that stare decisis has little to no role in antitrust.



1974: 45 Years Ago

- Mergers resulting in combined 5% share successfully challenged as unlawful.
- Vertical exclusive territories illegal per se; minimum and maximum resale price maintenance illegal per se.
- Easy to show abuse of dominance; defendant guilty unless monopoly power is “thrust upon” the defendant.
 - *Alcoa* (1945) held that building a new plant was an abuse.
- Proposals to make “no fault” monopolization actionable.
- Wholly-owned subsidiaries could conspire with their parents.
- Market power presumed from patents, copyrights, and even trademarks.
- No “antitrust injury” requirement.
- **On all these and several other issues, the law today is exactly the opposite, without a word from Congress.**



Review of Agency Rulings

- DOJ can proceed only by filing a case in district court.
- FTC can either sue in district court or commence administrative proceedings.
 - When a case is brought in administrative proceedings, appeal is from an agency judge to the five commissioners; appeals from the FTC go to the court of appeals of respondent's choosing.
- DOJ is given no formal deference in court.
- FTC is treated the same as DOJ when suing in district court, but on appeal to a court of appeals from the FTC, the appeals court is supposed to be deferential on the facts.



Review of Agency Rulings

- US courts are in no way bound by agency actions or rulings, and do not defer to them, but generally rule in the agency's favor. The issue of agency deference generally is controversial in the US, but is not much of an issue on antitrust.
- In practice, DOJ is given great respect in district court. Aside from cases like the recent *AT&T* case, trial courts almost always give DOJ the benefit of the doubt.
- In district courts and to courts of appeals, the FTC gets roughly the same respect as DOJ.
- In the Supreme Court, DOJ (represented by the Solicitor General) is given great respect, as is the FTC when represented by the SG (although less so when representing itself). In *Vitamin C*, for example, the Supreme Court essentially copied the SG's brief. In *Amex* and the recent *Apple* case, in contrast, the SG lost.



Review of Agency Rulings

- Procedural rulings are different.
- Efforts to quash or dismiss agency proceedings almost invariably fail.
- Challenges to subpoenas, CIDs, or second requests are basically hopeless.
- If there is a scheduling dispute, the agency will typically win.
- On matters of procedure generally, the agencies are given free reign.



Review in Private Cases

- Most competition litigation in the US is brought by private parties. But private parties fare much less favorably than the federal agencies.
 - State AGs are treated as private parties in most respects.
- Until the 1980s, private antitrust cases were largely a trial practice. Dismissals and summary judgments were rare and “disfavored” by the courts.
- But as the substantive law changed, so did the practice in private cases. *Matsushita* in 1986 made clear that summary judgment was not disfavored, and *Twombly* in 2007 encouraged courts to dismiss cases prior to discovery.
- Today, prevailing in a private case is hard. The vast majority of cases are resolved on motions to dismiss or for summary judgment.
- Federal agency cases tend to fare far better.



Role of Judicial Review

- Unlike a number of other jurisdictions, judicial review is central to US antitrust policy. The US Congress rarely weighs in. DOJ and FTC substantive decisions are always subject to review.
 - Apart from merger law, where the Supreme Court has not weighed in for 45 years and where the agencies' Guidelines are the fundamental source of law, competition law in the US is made by the courts.
- Even though antitrust in the US can be and often is political, and even though political perspectives can be decisive in close cases, this has not diminished respect for the judiciary as the ultimate arbiter of competition policy.
- This is not to say that everyone agrees with all court decisions. Far from it. But there is a strong consensus in the US that the system overall is fair, and provides checks and balances that contribute to the sense that the process overall is fair.