Overview of Competition and Telecommunications Law and Regulation in the U.S.

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Overview of Agency Roles

Complex, sometimes overlapping roles between U.S. agencies with competition responsibilities in telecom industry

DOJ : Responsible for civil and criminal antitrust enforcement; handles most telecom-related antitrust enforcement

FTC : Responsible for civil antitrust enforcement and consumer protection; does not do much telecom-related antitrust enforcement

FCC : Telecom regulatory agency

U.S. Department of Justice (DOJ)– Antitrust Division

- DOJ is one of the two principal U.S. federal antitrust enforcement agencies
- Agency is in the executive branch; headed by a presidential appointee confirmed by the Senate, the Assistant Attorney General
- Responsible for both civil and criminal antitrust enforcement
- About 700 staff in 4 offices (DC, NYC, SF, CHI)
  - Economic Analysis Group includes in-house economic experts
- Civil attorneys organized into section by product area; DC has a specialized Telecommunications and Media Enforcement section
  - Handles telecom-related antitrust issues, including merger review & civil non-merger
- DOJ is an <u>enforcement</u> agency, not a decisionmaker
  - Must present challenges (to mergers or conduct) to a court and go to trial or settle with court approval. No independent authority to block mergers or enforce settlements.
- Statutory authority to police agreements in restraint of trade; monopolization; mergers that substantially lessen competition, and exclusive dealing
  - Will often coordinate with state antitrust agencies in review and enforcement

Federal Trade Commission (FTC)

- FTC is one of the two principal U.S. federal antitrust enforcement agencies
- Agency is independent; headed by a five-member Commission. Each Commissioner is nominated by the President and no more than three may be from the same political party
  - In practice, three commissioners from President's party, two from minority party
- Mission to promote competition and protect consumers
- Promotes competition and enforces antitrust law through merger review and investigations of civil non-merger conduct
  - Bureau of Economics employs expert economists to help with analysis
- Protects consumers by stopping unfair, deceptive, or fraudulent practices
  - Collects complaints directly from consumers
  - Investigates individual companies and industries, litigates when necessary, and also proceeds through rulemakings and industry and legislative education and outreach

Comparison of DOJ and FTC Roles

DOJ

- Criminal antitrust enforcer
- Responsible for antitrust enforcement in telecom industry, including mergers and civil non-merger conduct
- Long experience promoting competition in telecom industry dating back to U.S. v. AT&T case, Bell System divestiture

FTC

- No criminal enforcement role
- Responsible for merger reviews and civil non-merger cases
- But jurisdiction limited in telecom area, excludes common carriers (can do some other types of cases)
- Has additional consumer protection responsibilities

Overview of U.S. Antitrust Laws

Flexible, general-purpose statutes with detailed standards established through court decisions and agency guidelines

Sherman Act: § 1 outlaws contracts, combinations, & conspiracies in restraint of trade; § 2 outlaws unlawful monopolies

- Agreements among competitors to fix prices, rig bids, and allocate customers are punishable as criminal felonies

Clayton Act: Civil statute prohibiting mergers that will likely lessen competition

- Companies considering mergers above a certain size must notify the antitrust agencies

Merger Guidelines: Guidance issued jointly by the FTC and DOJ to explain agencies' analytical approach to merger analysis and enforcement

Introduction to the FCC

- Established by the Communications Act of 1934.
- Regulates television, radio, wireline, fixed and mobile wireless, satellite, and cable services in all 50 states plus U.S. territories.
  - Mission: "To ensure that all Americans, without discrimination, have available a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges."
- Converged regulator.
- Independent of the Executive Branch (directly responsible to Congress, not the President).
- Clearly separated from regulated entities.
  - The United States does not have any government-owned telecommunications companies.

FCC Leadership & Staff

- Directed by five Commissioners (including one Chairman).
  - Appointed by the President, confirmed by the Senate.
  - Serve staggered 5-year terms.
- Approximately 1,800 employees, primarily in Washington, DC.
- Organized by function → 7 Bureaus:
  - Consumer & Governmental Affairs (CGB)
  - Enforcement Bureau (EB)
  - International Bureau (IB)
  - Media Bureau (MB)
  - Public Safety & Homeland Security Bureau (PSHSB)
  - Wireless Telecommunications Bureau (WTB)
  - Wireline Competition Bureau (WCB)
  - *Plus*, Office of Engineering & Technology (OET) and 9 other offices to provide support services (*e.g.*, Office of General Counsel)

FCC Regulatory Activities

Key efforts include:

- Allocating spectrum for commercial use.
- Developing and implementing regulatory programs and policies (*e.g.*, universal service).
- Processing applications and licenses.
- Conducting investigations and analyzing complaints.
- Engaging in consumer education and outreach.
- Managing domestic administration of international treaties and agreements.

Comparing Antitrust Law and Telecom Regulation

Antitrust Law

- General purpose laws that apply to all industries, not just telecom
- Focused objectives – protection of consumers and the competitive process
- Not protection of particular competitors – may be inefficient
- Authority over all industry participants, but only on particular matters, like mergers or non-merger investigations

Telecom Regulation

- Industry specific, laws intended to reflect particular characteristics of industry
- Broad variety of policy aims: Ensuring reasonable rates for consumers, promoting universal service, efficient use of public resources such as spectrum, promoting development of new technologies, *and* protecting and advancing competition
- Authority over industry issues in general, but limited to certain types of firms, such as spectrum or facilities licensees

Comparing Antitrust Law and Telecom Regulation

Antitrust Law

- Civil and criminal jurisdiction
- Key distinction between “per se” (absolute) anticompetitive practices, can be criminal or civil, and “rule of reason” (relative) practices, civil only

- Strong reliance on economic analysis of competitive effects in rule of reason cases
- Agency has expert economists on staff

Telecom Regulation

- Generally civil enforcement only, regulators lack criminal jurisdiction

- Agency staff likely to have technical engineering expertise in addition to legal and economic expertise

The FCC and the Antitrust Authorities

- The FCC and the antitrust agencies – the Department of Justice (DOJ) and the Federal Trade Commission (FTC) – are independent decision makers.
  - The FCC and FTC are independent agencies that act through Commission votes.
  - DOJ is an executive agency whose course of action is decided by its congressionally approved management
- The antitrust agencies and the FCC apply different standards:
  - The antitrust agencies apply antitrust laws.
  - The FCC applies a public interest standard (needs to find that the action requested will serve the public interest, convenience, and necessity).
    - The public interest standard encompasses the broad aims of the Telecommunications Act, which include a deeply rooted preference for preserving and enhancing competition, accelerating private sector deployment of advanced services, and promoting diversity of information sources and services to the public.

The FCC and the Antitrust Authorities

Mergers:

- Often the FCC and the antitrust agencies both have the responsibility to review mergers.
  - FCC → under its authority to approve license transfers in the public interest.
  - DOJ → under its Section 7 antitrust authority.
- The FCC and the antitrust agencies collaborate and cooperate:
  - Informally discuss issues and analysis at staff and management levels.
  - The antitrust agencies share confidential information with the FCC if the parties allow it.
  - The antitrust agencies assist the FCC by sharing their antitrust analyses.
  - The FCC assists the antitrust agencies by providing background on the technical aspects of telecommunications services.

The FCC and the Antitrust Authorities

Mergers (continued):

- The FCC and the antitrust agencies reach independent determinations on mergers:
  - Decisions are not identical because different standards apply.
  - Different burdens of proof and merger challenge processes.
- Often mergers are resolved by imposing conditions:
  - Each agency has the power to impose conditions that it believes remedy the harms from the merger.
    - In practice, the conditions are often the same, or one agency takes the lead in one area, and the other agency takes the lead in another area.
    - For administrative convenience, compliance monitoring is often coordinated.

Comparing DOJ and FCC Merger Roles

DOJ

- Decisions public if DOJ blocks merger
- Broad powers to get confidential documents and testimony from merging parties and others while reviewing mergers and other matters
- Merger challenges must succeed in court; settlements require court approval

FCC

- Decisions and reasoning are public
- Can obtain confidential information during reviews, but must disclose information to support its decisions
- Decisions are subject to judicial review

Collaboration Between FCC and DOJ

- DOJ and FCC are independent decision makers
  - When responsibilities overlap—as on telecom mergers—the agencies apply different standards and reach separate decisions
  - FCC usually waits to see what DOJ will do on competition issues, but not required to do so
  - FCC may impose additional requirements to allow a merger under its "public interest" authority
- But coordinate in practice to minimize conflicting results, though this is not required by any law
  - DOJ and FCC can share confidential information if waivers granted by firms
  - DOJ and FCC can share analysis, concerns, views on remedies through regular staff-level discussions on mergers
  - Competition aspects of FCC's analysis increasingly similar to DOJ's

Collaboration Between FCC and DOJ

Other areas of cooperation:

- Competition advocacy:
  - The antitrust agencies share their expertise and experience in filed comments in FCC proceedings.
- Referral of potential violations of laws and rules:
  - The FCC informally and confidentially refers potential violations of the antitrust laws to the antitrust agencies.
  - The antitrust agencies informally and confidentially refer FCC statutory and rule violations to the FCC.
- The antitrust agencies seek assistance from the FCC to understand the technologies underlying telecommunications services.

QUESTIONS?

Thank you!

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