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LATIN AMERICAN COMPETITION FORUM

-- Session III: Strategies for Competition Advocacy --

Contribution from the US Federal Trade Commission

8-9 September 2010, San José (Costa Rica)

The attached document from the US Federal Trade Commission is circulated to the Latin American Competition Forum FOR DISCUSSION under session III of its forthcoming meeting to be held in Costa Rica on 8-9 September 2010.

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LATIN AMERICAN COMPETITION FORUM

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Session III: Strategies for Competition Advocacy

-- CONTRIBUTION FROM THE US FEDERAL TRADE COMMISSION--

1. While the statutory mission of the United States' antitrust agencies is to enforce the laws against anticompetitive business practices and mergers, the Federal Trade Commission and Department of Justice have recognized for many years that anticompetitive governmental practices have at least the same, if not greater, potential to deprive consumers of the benefits of competition than do private anticompetitive practices. Competition advocacy is the principal tool that the United States' agencies use to combat such governmental anticompetitive business practices. This paper will discuss the design of and strategies used to pursue competition advocacy at the Federal Trade Commission.

1. Background

2. It may be easier and more effective for a firm seeking to avoid competing on the merits to obtain governmental regulations that shield it from competition than to engage in anticompetitive conduct such as collusion with competitors or other anticompetitive exclusionary schemes. The ultimate impact, for example, of a price-fixing cartel could be less enduring than the establishment of a regulatory body with the authority to set minimum prices that competitors may charge. The impact of conduct by a dominant firm that enables it to exclude new entrants from the market can be eclipsed when a dominant firm persuades the government to enact an unjustified permitting scheme that excludes new entrants from the market.¹

¹ Deborah Platt Majoras, Chairman, The Federal Trade Commission, Promoting a Culture of Competition," Remarks Before the Chinese Academy of Social Sciences, April 2006, *available at* <http://www.ftc.gov/speeches/majoras/060410chinacompetitionadvocacy.pdf>.

3. Throughout the United States consumers have had ample experience with business strategies of this sort. In the 1930s, the airline industry, feeling burdened by competition, persuaded the Congress to enact a comprehensive system of regulation that restricted entry and exit from markets, and required regulatory approval of fares. This regulation largely shielded the industry from competition, removed incentives for airlines to respond to market forces, and resulted in higher fares for consumers. It was not until the 1970s that advocates of competition, initiated by the antitrust agencies, persuaded Congress to end the airlines' legalized price-fixing arrangement.² While airline deregulation involved competition advocacy directed at federal regulation, by far the most common subjects of competition advocacy are anticompetitive regulations at the state and local level.³

4. The effects of anticompetitive government regulation may be worse than that of anticompetitive business conduct. First, those protected through government restraints on competition do not need to spend resources enforcing them, as a government regulator takes on this role. Also, members of the protected cartel do not run the risk of the restrictions failing to achieve their purpose, because they have the force of law. These types of competitive restraints are enduring, because they are established through governmental action. They become entrenched by institutional reluctance to vote for their removal, supported by pressure from incumbent beneficiaries of the restrictions.

5. Competition authorities often are the only institutions within government that have the expertise and interest in serving as an advocate against anticompetitive regulations and for pro-competitive regulatory approaches. In the United States, like many countries, this is done through the process of competition advocacy, in which the competition agency studies the proposed restriction, its costs and benefits, and seeks to educate lawmakers, regulators, and the public about those costs and benefits. A key objective is to make those costs and benefits transparent so that decision-makers will be able to appreciate whether imposing the costs of regulation on consumers can be justified.

6. Much valuable work has been done in the International Competition Network and elsewhere to describe the process of competition advocacy,⁴ and this document will not seek to replicate that work. Instead, this submission will focus on the strategy for designing a program of competition advocacy.

2. Strategy for Competition Advocacy

7. A well-defined strategy for competition advocacy is necessary for several reasons. First, the impact of governmental regulation differs from one jurisdiction to another. Second, agency resources are finite, and it may not be feasible to address all of the issues that might be presented. Third, developing a strategy for competition advocacy must take into account what is politically achievable.

² Timothy J. Muris, Chairman, Federal Trade Commission, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Prepared Remarks Before International Competition Network Panel on Competition Advocacy and Antitrust Authorities, Naples, Italy, September 28, 2002, at 1, *available at* <http://www.ftc.gov/speeches/muris/020928naples.shtm>.

³ The FTC has undertaken competition advocacy initiatives in numerous sectors, including the accounting, legal, advertising, agricultural, alcoholic beverage, health care, pharmaceutical, automobile, brokerage, franchising, car rental, commodity futures, landscape architecture, interior design, electrician, architectural, optometric, dental, consumer lending, banking, funeral service, gasoline marketing, pharmacy benefit management, hospital, physical therapy, chiropractic, real estate, internet commerce, postal, telecommunications, airline, taxi, marine pilotage, trucking, electric power, natural gas, and veterinary medicine industries, most aimed at the state and local level. *See* http://www.ftc.gov/opp/advocacy_subject.shtm.

⁴ See generally, International Competition Network, Advocacy Working Group, <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx>.

8. Generally, the starting point in defining a competition advocacy campaign is to develop a clear and shared understanding of the competition mission the agency seeks to uphold. The agency should be able to articulate its views, and the views of the society it serves, on the relative benefits of competition and regulation in the marketplace. To be sure, those views may change from market to market, and indeed may change over time, as the market changes and as economic understanding of market behavior evolves. For example, if society at large believes that there are certain “natural monopolies” in which it makes more sense to have one provider of a set of goods (*e.g.*, water, electricity, health care), then the agency must recognize that while it may advocate for competition, there are limits on what the political economy in its jurisdiction is prepared to accept.

9. The agency must also understand and employ its role in the greater economy. There may be other agencies, branches of government, or sub-jurisdictions such as states, provinces, or municipalities that may have their own viewpoints with respect to competition and regulation. Their incentives and positions on competition and regulation must be considered; some may prove to be proponents or opponents of competition depending on the issue involved. Some may be identified as potential fellow advocates for competition or may be potential converts to that position. The position of various stakeholders in the private sector also must be considered. They likely will advocate for policies perceived to support their interests, and some may themselves be indirect targets of competition advocacy initiatives.

10. The next step is to determine the objectives for the advocacy. Identifying the goals of the advocacy program should follow logically from the agency’s core beliefs and its role in the system. Typically, this will mean promoting, opposing, or seeking to modify particular legislative or regulatory initiatives to promote competition in particular sectors. Designing a particular piece of advocacy should be done with a clear understanding of the political landscape. In most cases, it may be hoped that advocacy will educate legislators and regulators as to the costs and benefits of regulation with the expectation that the advocacy will inform and influence the outcome. In some cases, it may be that a successful result in a particular sector is unlikely, but instead a valid objective may be to speak with a clear voice to the wider public to promote competition principles. Because advocacy may require staking out a position that is contrary to other stakeholders’ interests, the agency must balance the expected benefits and the political risks to the agency. In the end, the objectives of the advocacy program should advance the principles of the agency, and should position to agency to be able to more effectively advance its goals in the greater political economy.

11. With the objectives determined, the agency should map how best to achieve that plan. In the United States, the competition agencies advocate their principles through letters to legislative bodies and regulators, making submissions in formal rulemaking proceedings that explain the costs and benefits of regulation, conducting and publicizing market studies in order to better inform the regulatory debate with facts and analysis, and filing *amicus curiae* briefs to courts that must rule on the legality of regulatory interventions. In addition, antitrust agency officials routinely make speeches and give media interviews to promote the agency’s advocacy agenda.

12. Once the agency has mapped out a strategy, the next step is to identify resources to implement the various objectives. This can be more challenging than it would appear. It is usually insufficient to merely invoke the authority and expertise of the competition agency. Instead, successful advocacy requires both information and analysis. For example, the costs and benefits may need to be identified, perhaps quantified, and analyzed in order to lay an unimpeachable factual basis for the agency’s position. In some cases, the U.S. agencies have conducted studies and public workshops themselves to this end. Other agencies have, from time to time, engaged in partnerships with academic institutions or think tanks to the same effect. Once the costs and benefits of regulation have been determined, appropriate agency personnel develop the final advocacy document. At the U.S. agencies, this usually involves a partnership of lawyers who understand the legal environment and who are trained in the art of advocacy, economists

who can quantify and explain the economic effects of the regulation, and agency leadership that understands the political costs and benefits of advocacy.

3. Competition Advocacy in Practice

13. A good example of this process can be taken from the FTC's recent advocacy efforts addressing state-imposed barriers to the interstate shipment of wine. For many years, wine has been distributed in the United States through a three-tiered system of producers, licensed wholesalers, and retailers. With the rise of on-line marketing, however, direct marketing and shipment of wine to consumers became a growing and potentially important alternative to the traditional distribution system. Internet advertising and direct distribution was potentially effective way for small vintners to introduce their products. Many states, however, banned or severely restricted the direct shipment of wine to consumers, thereby creating an entry barrier for numerous, particularly small, wineries seeking to sell their products online. In some cases, however, states banned shipments from out-of-state wineries while permitting them from in-state wineries. The FTC began to study the effects of these restrictions. The FTC conducted an in-depth workshop on the effects and rationale of the restrictions, hearing from both supporters and opponents of the restrictions, and examining both the purported rationale for the restrictions – primarily the prevention of underage drinking and prevention of tax evasion – and less restrictive ways that states could achieve these objectives. In July 2003, the FTC staff issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.⁵

14. The staff report, reflecting the unique interest and sensitivity of the Commission both to competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. The report supported this conclusion with a study conducted by FTC economists, which showed that many wines available to consumers online are not available in local retail outlets and that consumers could save money if they purchased their more expensive wines online. The report also examined concerns about the direct shipment of wine to consumers, given that underage drinking is a serious health and safety issue. The report concluded, however, that there is no systematic evidence of problems of Internet-related shipments to minors. Moreover, the report noted that safeguards, such as checking identification at delivery, may address these concerns, and that, in fact, some states have successfully followed this less restrictive approach.

15. Armed with the Staff Report, the FTC was invited to provide advocacy to state legislatures that were considering adopting such restrictions.⁶ Ultimately, the issue of whether states could prohibit out-of-state sellers from shipping wine to consumers while allowing in-state wine producers to do so ultimately was addressed by the Supreme Court. The United States Supreme Court struck down two state bans on the interstate direct shipping of wine and, in doing so, relied heavily on the FTC's wine report, particularly in its analysis to determine whether such restrictions were necessary.⁷ Several states are now considering whether to change their laws in light of the Court's decision.

16. Another FTC advocacy effort dealt with the availability of optometric services. Optometry had for many years been practiced by individual and small group practitioners. In the United States, the practice of optometry is regulated at the state level, and, in many states, the regulatory bodies were

⁵ Possible Anticompetitive Barriers to E-Commerce: Wine. A Report from the Staff of the Federal Trade Commission (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

⁶ E.g., FTC Staff Comment to the Honorable William Magee et al. Concerning New York A.B. 9560-A; S.B. 606-A; and S.B. 1192 to Allow Out-of State Vendors to Ship Wine Directly to New York Consumers (Mar. 2004), available at <http://www.ftc.gov/be/v040012.pdf>. See also other advocacy comments cited at footnote 3, *supra*.

⁷ *Granholm v. Heald*, 544 U.S. 460 (2005).

dominated by such optometrists. In the 1970s, chain optical firms began to enter the market, and many of them sought to offer optometric services in competition with traditional practitioners. In a number of cases, the regulatory bodies responded with rules that limited the ability of chain firms to offer optometric services, including by restricting advertising, the use of branch offices, practice in mercantile locations, and the employment of optometrists by non-optometrists. The FTC conducted several studies that compared the cost and quality of optometric services offered in states that had such regulations and those that did not.⁸ The studies showed that prices were, on average, 25% lower in states without such regulations, but that the quality was the same. Using this information, the FTC developed a multifaceted campaign of competition advocacy,⁹ rulemaking,¹⁰ and litigation¹¹ to challenge the regulations.

17. In sum, the internet shipment of wine and optometry issues illustrates how market studies and subsequent advocacy can lead to substantial changes to enhance competition throughout federal and state jurisdictions.

⁸ The Effects Of Restrictions On Advertising And Commercial Practice In The Profession: The Case Of Optometry, FTC Bureau Of Economics Staff Report (1980).

⁹ *E.g.*, Comments of the Staff of the Federal Trade Commission, Intervener, Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses, State of Connecticut Dep't of Pub. Health, Connecticut Bd. of Examiners for Opticians (Mar. 27, 2002), *available at* <http://www.ftc.gov/opp/advocacy/v020007.htm>.

¹⁰ Advertising of Ophthalmic Goods and Services, Statement of Basis and Purpose, 43 Fed. Reg. 23292 (1978) ("Eyeglasses I"); 54 Fed. Reg. 10285 (1989). The rule, which sought to declare such regulations unfair, was significantly limited on appeal, however. *American Optometric Ass'n v. FTC*, 626 F.2d 896 (D.C. Cir. 1980). *Eyeglasses II* was entirely vacated on state action grounds. *California State Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990).

¹¹ *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).