Policy Brief

[2016]

PIRCE COMPETENCIA

Why Competition Matters?

Text based on Diane Wood conference "Why Competition Matters: The U.S. Perspective" October 22th 2015, CIDE

The Circuit Judge for the U.S. Court of Appeals for the 7th Circuit, Diane P. Wood initiates her conference by stating that competition matters because "it yields benefits that we all want: lower consumer prices, greater product and service variety, more innovation, and business opportunity". But this is just a first approximation that will be subsequently answered by analyzing why and how competition matters for judges in the United States.

Introduction

Wood reviews representative cases that came before her own court from 2000 to date. She starts stating that over that period, the 7th Circuit has issued approximately 26 full opinions in antitrust cases. Obviously, this is not a large number however; the low numbers are not unique to the Seventh Circuit. "Nationwide, as of 2012, less than 120 antitrust cases were pending at the court of appeals level, and that number has been slipping: at the end of March 2013, the nationwide number was only 88.1 but the importance of these cases cannot be judged by numbers alone. The Supreme Court, which keeps tight control over its docket, has issued 15 antitrust decisions since 2000, and each one has ripple effects through the entire economy."

Cases

Correspondingly, Wood chooses some cases to illustrate different aspects of U.S. antitrust law. The first case addresses the claim of illegal price fixing, illustrated by the decision in *Text Messaging Antitrust Litigation*. In this case the complaint alleged that four mobile phone companies, which controlled 90% of the market for wireless service, colluded to inflate the price of text messages. Even when the plaintiffs had no "smoking gun" evidence that there was any explicit agreement between the companies under which they made these price changes, they argued that several reasons supported a strong inference of such an agreement.

In this case, the district court found that the complaint stated a plausible claim that the defendants agreed to fix prices above the market rate, and later on the 7th Circuit Court affirmed this determination, thereby allowing the case to go forward. As a consequence, the Circuit Court evaluated the need for enough information in pleadings to assure that the plaintiff's case is at least plausible. This implies that a complaint alleging a violation of the Sherman Act must include "enough factual matter (taken as true) to suggest that an agreement was made" or "plausible grounds to infer an agreement." In the *Text Messaging* case, the 7th Circuit concluded that the complaint satisfied these standards by "establish[ing] a nonnegligible probability that the claim is valid."

Horizontal and vertical restraints

Paraphrasing Wood, the conspiracy alleged in *Text Messaging* was an example of a horizontal restraint—an agreement among competitors. This in comparison with a vertical restraint, which is an agreement between parties at different levels in the distribution chain.

To exemplify the difference between horizontal and vertical restraints, Wood explains Toys "R" Us v. Federal Trade Commission case. Toys "R" Us as a specialized large toy retailer was threatened when the so- called "warehouse clubs" such as Costco and Pace entered the toy market. These companies, in comparison to Toys "R" Us, were able to sell the most popular toy products at a mere 9% above the manufacturer's price. This was possible because the clubs do not earn all of their revenue from sales in the stores; instead they sell only to members, and each member pays an annual fee.

As a response to recapture market share, Toys "R" Us negotiated agreements with at least ten of its suppliers providing that the suppliers would restrict distribution of their products to warehouse club stores. In this case the 7th Circuit Court decided that Toys "R" Us had effectively facilitated an illegal horizontal agreement between toy manufacturers to restrict output, rejecting the argument that Toys "R" Us had done no more than to enter into a series of separate vertical agreements with various toy suppliers.

Predatory Pricing

The last case illustrates a different theory of anti- competitive practice, predatory pricing. Predatory pricing occurs when a competitor lowers its price to a point below some measure of cost driving other producers who cannot afford to compete with those prices out of the market, and then recoups its losses by setting monopoly prices that injure consumers. In *Wallace v. IBM*, the plaintiff complained that a number of software and computer companies engaged in predatory pricing by distributing the Linux operating system under an arrangement that made it permanently free and available to any computer user. Wallace argued that making Linux freely available drove him out of the market because he could not afford to compete on those terms. In this case the Court rejected this claim on the basis that the ultimate concern behind the prohibition of predatory pricing is not that it will drive one particular competitor out of the market, but instead that the alleged predator will later be in a position to harm consumer welfare by increasing prices to monopoly levels. In addition, Wood explained that the central concern of antitrust law is consumer welfare, not the broader goal of fair business practices

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Conclusions

In summary, Wood examines a variety of cases to make her point clear: in the United States competition law still plays a fundamental part in the national economic policy, and its primary focus is on economic efficiency and consumer welfare. In her own words, "the more things have changed, the more they have stayed the same: competition law for the United States is here to stay."