

UNDERSTANDING HOW AND WHY THE U.S. COMPETITION LAW SYSTEM IS DECENTRALIZED

Robert Roulusonis

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1. THE DECENTRALIZED U.S. ANTITRUST AUTHORITY

U.S. antitrust law is decentralized; it is enforced by private parties, state agencies, and two federal agencies. As is natural in a federalist system, states share powers with the federal government. The decentralization within the federal government itself is a consequence of judicial and legislative history, not strategy. Private party right of action (PRA) in federal court is afforded by the federal government and PRA in state court by most states.

Whether a case falls under the jurisdiction of state court versus federal court hinges on whether or not the activity is substantially related to interstate commerce. Jurisdiction between the two federal agencies relies largely on

cooperation, not clear jurisdictional lines, between the two federal agencies, while private parties require standing to be in either jurisdiction. The following will discuss this U.S. decentralized system in three parts.

Initially it will address the complex situation of the two-headed federal authority. From there, it will delve into the nature of state antitrust authorities. Lastly, it will address private party rights of action, which is the exception in international competition law, in both the state and federal setting.

First, make note that the word enforcement can be misleading when speaking about competition law. For example, the private party right of action is often said to be private party enforcement; better said, it is a private party right to sue, which is more a request for enforcement than actual enforcement. This paper will use the term enforcement, as is the case in often modern competition law climate, as both right to enforce and right to sue. Accordingly, the states, the two federal agencies, and private parties, all are said to have the right to enforce competition law.

The highest profile cases almost always involve one of the two federal agencies and thus are carried out in federal courts. Federal courts also account for the setting of the majority of antitrust claims, while private party actions account for bringing the majority of claims.

2. FEDERAL COMPETITION LAW ENFORCEMENT

Federal competition law is overseen by two authorities: the Department of Justice's Antitrust Division (hereafter DoJ), and the Federal Trade Commission (FTC). Their jurisdictions and statutory tools generally overlap, but each agency has one tool (one Act/law) off-limits to the other. The DoJ cannot bring cases under the FTC Act; the FTC cannot bring a case under the Sherman Act. These two agencies may bring antitrust suits to federal courts.

a) *Department of Justice overview*

The DoJ is an executive agency created by congress in 1870 to be headed by the Attorney General¹ as an extension of the Attorney General (AG) in the enforcement of federal law. The DoJ had existed for twenty years when Congress passed the first competition law, the Sherman Act (1890)². Its antitrust division is charged with enforcing all competition laws, *not the FTC Act however*. The DoJ can seek *both criminal and civil remedies*.

¹ The 1870 Act to Establish the Department of Justice.

² 15 U.S.C. §§ 1-7.

b) *Federal Trade Commission overview*

The FTC is a commission created by the FTC Act³ in 1914 to prevent anti-competitive business practices and enforce competition law. Congress gave the Commission its own administrative law judges. The FTC is tasked with enforcing all competition law, *except the Sherman Act*. The Commission may enforce under any other act by seek/administer *only civil remedies*.

2.1. *Why Federal Competition Authority is Decentralized*

Federal competition law was not always decentralized. As the lone competition Act, the Sherman Act had held «restraint on trade» to be illegal since 1890. However, in 1911, the Supreme Court's interpretation of the Sherman Act dissatisfied Congress into creating narrower antitrust law, the FTC Act, which overlapped, not replaced, the Sherman Act. Consequently, the U.S. has two authorities with two separate tools to control one field of law, competition. Since this split, Congress has passed additional competition laws as tools that either agency may use.

Justice Edward Douglas White catalyzed this forked system in 1911, while being torn between two theorems: the need to follow an established precedent versus the caution to avoid judicial-legislation. He acknowledged that he was fixed to follow an ill-laid precedent.⁴ While the Court had the historical obligation of avoiding legislation by adjudication, it concurrently, conversely, and repeatedly had read the word «unreasonable» into the Sherman Act. As White states:

...the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution; namely, by interpretation of a statute changed a public policy declared by the legislative department.⁵

White felt convicted to abide by a precedent, which he saw to be established in error:

If the court was wrong in the Taylor Case, the way is open for such an amendment of the statute, as Congress may, in its discretion, deem proper. This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts.⁶

³ 15 U.S.C. §45(a).

⁴ *Standard Oil Co. of N.J. v U.S.* 31 S.Ct. 502.

⁵ *Id.* 533.

⁶ *Id.* 532.

Almost beckoning Congress to act, White echoed Justice Harlan's sentiment from the same year proclaiming that «[w]e only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor Case, this court will adhere to and apply that rule.»⁷

Heavy-hearted, White solidified the Court's precedent. His majority opinion blatantly exposed a disconnect between Congressional intent of the Sherman Act and that of its judicial interpretation. This disconnect is highlighted below:

The Sherman Act as written:

*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...*⁸

The de facto Sherman Act as realized by *Standard Oil*:

*Every contract, combination in the form of trust or otherwise, or conspiracy, in **unreasonable** restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*

«Unreasonable» is an extremely high bar. Though that criterion was met by Rockefeller in *Standard Oil*, Congress was disappointed with the interpretation and thought it harmful to the intent of the Sherman Act. To date, «unreasonable» remains the standard for the Sherman Act, which might make sense considering that some violations to the Sherman Act are per se illegal. However, neither the «unreasonable» standard nor the per se illegality apply to the FTC Act, which was to come three years after the *Standard Oil*.

2.2. Congress reacts with *The Federal Trade Commission Act*

Congress finally responded to the Court's interpretation. In 1914, they passed the Federal Trade Act, which narrowed the standard on restraint to trade, and provided a Commission to oversee the new standard. To bolster the Commission's impact, Congress also gave the Commission quasi-judicial authority, which removed heavy reliance on the federal courts' interpretations. To be clear, the FTC Act is written in the spirit of the Sherman Act; the FTC Act is thus more an introduction of new enforcement rather than new law.

The Act itself prohibits «unfair methods of competition.»⁹ Instead of the hardly surmountable «unreasonable»¹⁰ criterion, competition law thus had the second and concurrent standard, «unfair.» While the FTC cannot bring a

⁷ *Id.* 532, quoting *Chicago, B. & Q. R. Co. v. United States*, 31 S.Ct. 612, 616.

⁸ 15 U.S. Code § 1.

⁹ see footnote 5

¹⁰ *Standard Oil* interpretation of the Sherman Act

case under the Sherman Act, there is no need. The FTC Act is written such that a violation of the Sherman Act likewise violates the FTC Act.

The Act provides the Commission with an Office of Administrative Law Judges (ALJ), a quasi-judicial authority, which, according to the FTC's own website:

...is assigned to handle each complaint issued by the Commission holds pre-hearing conferences; resolves discovery disputes, evidentiary disputes and procedural disputes; and conducts the full adversarial evidentiary hearing on the record. The administrative law judge issues an initial decision which sets out relevant and material findings of fact with record citations, explains the correct legal standard, applies the law to the facts, and, where appropriate, issues an order on remedy.»¹¹

While both the DoJ and FTC can bring claims under all other competition laws, the salient differences regard penalties sought and the exclusiveness of the Sherman v. FTC Acts. Below illustrates these differences.

	Who can file Criminal suit?	Who can file Civil suit?	What the standard on competition restraint
Sherman ACT 15 U.S.C. §1	DoJ only	DoJ and private parties only	«Unreasonable»
FTC Act 15 U.S.C. §45(a)		FTC only	«Unfair»
All other antitrust laws	DoJ only	DoJ, FTC, Private Parties	

2.3. «The rub:» No standard to decide which federal agency adjudicates and when

«No one would design the system we have if we were starting a new antitrust regime today in the U.S.»

Sean Heather, U.S. Chamber of Commerce.¹²

There is no official standard for which agency brings competition law cases. What the agencies do have, however, are customs and norms that help

¹¹ *Office of Administrative Law Judges page.* ftc.com. Federal Trade Commission, n.d. 10 February 2015.

¹² BROWNING, S. and BLISS, J., «Varney Says Congress ‘May Want’ to Study Antitrust Overlap.» Bloomberg, 16 Apr. 2011. <<http://www.bloomberg.com/news/articles/2011-04-14/varney-says-congress-may-want-to-review-justice-department-ftc-overlap>> (10 February 2015).

to suffice, but not always. Each agency has strengths, and they can usually allocate cases accordingly. American Bar Association gives an example of how they typically allocate mergers: «...the DOJ typically investigates mergers in the Financial Services, Telecommunications, and Agricultural Industries; the FTC typically investigates mergers in the Defense, Pharmaceutical, and Retail Industries.»¹³

Codifying norms is all but impossible, but we can look at the most recent actions of each agency in order to string together an idea of how these agencies share duties.

The DoJ handled the famous 1974 AT&T, monopoly case, the largely publicized Microsoft cases at the turn of the century and 2007 respectively, as well as the 2009 fraud and perjury case of Bernie Madoff. The FTC boasts the famous 1921 tying case of Players-Lasky, a 2011 \$22.5 million Reebok settlement for false advertising, and the \$22.5 million Google settlement suit for misrepresentation in 2012. A look into some of the most recent cases (as of February 2015) may further add insight.

DOJ	FTC
2015, Japanese company executive pled guilty to price fixing and bid rigging and has to serve one year and one day and pay a fine of \$20,000	2015, AMG services settled for \$21 million for overcharging clients for payday lending
2014, Verso Paper court, DOJ required that it divest two paper mills in order to proceed with other acquisition	2015, FTC modified a 2014 settlement with Bilo (supermarkets) which called for it to sell 12 stores to identified buyers, one of which withdrew purchase of four stores. BiLO tried hard for alternative and FTC modification no longer required the four sales to withdrawn buyer.
2014, NYK (Japanese corp.) was fined \$59 million for price fixing, customer allocating, and bid rigging	2015 FTC sent recovered funds of \$700,000 to 16,000 consumers (\$42+ each)

Recent DoJ and FTC cases.

¹³ HUTCHISON, T., «Understanding the Differences Between the DOJ and the FTC.» American Bar Association, n.d. doj. <http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/understanding_differences.html> (10 February 2015).

If you find it difficult to correlate where one jurisdiction ends and the other begins, then you have arrived at issue. One can sow threads of, for example, consumer protection through FTC cases as well as threads of antimonopoly through those of the DoJ. But these are overlapping tendencies that lack clear, bright-line jurisdictions; there are no concrete rules.

That ambiguity is the nature of the decentralized federal system with overlapping duties. The DoJ and FTC have a history of resolving disputes between themselves, but issues arise from time to time such as public health-care recently that find them at odds for jurisdiction. Some defend the system as having competition within itself the field of competition enforcement, others perennially call for consolidation; having just reached one century of decentralization however, the system is not trending toward change and seems likely remain decentralized for a long time.

3. STATE COMPETITION LAW ENFORCEMENT

Some State competition laws predated that of the federal government. The states' rights to create and enforce competition laws were not removed by federalism. To this day, most states have their own laws and agencies to enforce them.

3.1. *Federalism Accounts for Separation Between State and Federal Authority*

Before the «States» were «United,» each was its own entity, and many were disinterested in forfeiting complete control to the federal government.¹⁴ Thus not all states' powers were granted to the federal government.¹⁵ Note that power originated in the states, and the granting of power went from state to federal government. To this day, much power remains with the states. That divided power is at the heart of federalism, which also accounts for the separation between state and federal antitrust enforcement. As an initial overview, Congress can regulate antitrust laws between states and in cases that

¹⁴ The U.S. Constitution represented a union of the independent states; each state was independent, as if it were its own country.

¹⁵ The U.S. Constitution grants powers from the states to the federal government, not from the federal government to the states. This distinction is important in understanding the U.S. legal climate. In Spain for example, its relationship to the E.U. is more akin to the states' relationship to the U.S. than the relationship of Spain's provinces to Spain. If a European were to think in these terms, it may make more sense that states feel a bit more proprietary than provinces within a single European country.

involve the federal government, and a state can regulate antitrust laws within its own state.

The U.S. Constitution gives Congress the power to «regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.»¹⁶ This is the interstate commerce clause of the Constitution, which is the source of federal government power to regulate over states affairs.¹⁷ Generally, if the activity is an economic activity that substantially relates to interstate commerce, Congress may regulate the activity. Conversely, the Tenth Amendment to the Constitution makes clear that «[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people.»¹⁸

Like this, federal antitrust laws regulate economic activities that substantially relate to interstate commerce.¹⁹ If the economic activity relates only to intrastate commerce (*intrastate* commerce is commerce within a singular state), or at least not substantially beyond the one state, the power remains in that state to regulate the activity. This is the nature of U.S. federalism, and it applies to antitrust activities as well.

The majority of states have their own Department of Justice, or similar agency, that enforces state laws.²⁰ Each state's competition authority can file a suit in state court or in federal court on behalf of the state or its citizens who have been injured by a violation of the Sherman Act²¹. The state competition authority functions much like the DoJ and FTC; by and large, it works to protect consumers and prohibit restrictions to competition.

¹⁶ U.S.C.A. Const. Art. I §8, cl.3

¹⁷ See *Heart of Atlanta Motel, Inc. v U.S. Et al.* 515, 379 U.S. 241., where this rule was confirmed: Congress only has the power to regulate activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, the Court held that the activity must first be economic in nature.

¹⁸ U.S.C.A. Const. Amend. X

¹⁹ The parameters of «substantially relating to interstate commerce» are best demonstrated by the following cases: on one end, we have *Wickard*, where the Court held that growing wheat for personal consumption suffices as substantially relating to interstate commerce, as the national market would be affected if many people did so; on the other end is *Lopez*, 18 U.S.C. 922, where the Court denied congress the regulatory power to prohibit guns in a school zone, as it did not substantially relate to interstate commerce. Thus, «guns in school zones» does not substantially relate to interstate commerce, whereas growing wheat for personal consumption does.

²⁰ For example, California has a DoJ whose mission is almost identical to the U.S. DoJ, but clearly its jurisdiction is the state of California.

²¹ The Clayton Act, 5 U.S.C. §15c, allows for *Parens Patriae*, which permits the state to sue on behalf of its citizens.

4. PRIVATE PARTY COMPETITION LAW ENFORCEMENT

Private party right of antitrust action is not common globally, especially in the E.U. It has a long history in U.S. competition law, and the policy behind it is worth discussion.

4.1. *Private Party Right of Action*

In 1914, Congress passed the Clayton Act, which allows that «any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . , and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.»²²

To be clear, That Clayton Act, the Act which grants this private right of action (PRA), is a federal act, and is thus a private right of *federal* action. Accordingly, an individual has a federal PRA when she suffers (normally directly, as apposed to indirectly) from a violation of a federal antitrust act. Most states, but not all, allow for a PRA. The state right, or lack thereof, is not in series with federal law, but rather parallel; one may thus have a PRA for both state and federal, or just federal.

Consider now the example of a citizen in a state that does not allow PRA. He still maintains the federal PRA. This citizen, even if clearly injured by a violation of state competition law, has no private right to state action. However, if that injury can be linked to a federal violation, he can exercise the PRA in federal court. Again, these are parallel rights. If the injury violates both federal and state law, he can choose which judicial system, state or federal, would be more profitable.

4.2. *Policy for Private Right of Action*

While an international competition audience may understand the policy for antitrust law, the policy for private party enforcement may call for some explanation. International attorney Assimakis P. Komninos may have best captured the diverging perspectives on private antitrust enforcement with this causal distinction: «is it the public interest in safeguarding effective competition in the common market or the private interest in protecting one's economic freedom?»²³ The latter is assuredly the case in the U.S. where indi-

²² 15 U.S.C. §15

²³ Assimakis P. Komninos, «Public and Private antitrust enforcement in Europe: complement? Overlap?», «The Competition Law Review 3. no.1 pg.12 (2006), <<http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art1Komninos.pdf>> (25 February 2015).

vidual freedoms justify that which often puzzles the European community, for example, private health care.

Other policy aligns with individual freedom. Komninos shows that private action has three functions which all support market competition: injunction, compensatory and punitive damages. Injunctions are common global tools, but both compensatory and punitive damages provide great deterrence against antitrust law violations. The Clayton Act provides that an individual can be awarded treble damages, which is to say that the compensatory damages can be automatically tripled. These are serious incentives to abide by competition laws.

Private action is also an additional watchdog to market competition, and the effected party provides the best vigilance. After all, who is more motivated to sue than the injured party itself? There is also justice in compensating victims. Lastly, public enforcement does not always cover each individual who is violated.

4.3. *Who is a Private Party that can enforce competition law?*

State governments, corporations, and individuals can all be considered private parties, but not all private parties can bring a competition law claim. One must have «standing.» Standing requires that the party bringing the case must have actual injury to business or property, and that the antitrust violation was the cause of the injury. In most cases, the injury must be direct as opposed to attenuated from the cause of injury

In short, a state government, corporations, or individuals can bring a claim if an antitrust violation has directly (normally) that person in a way the laws were created to prevent.

5. CONCLUSION

Partially by design and partially by judicial and legislative interaction, the U.S. competition law system is decentralized. Federalism accounts for both state and federal enforcement, while the U.S. focus on rights of the individual, as opposed to community, is likely the catalyst for allowing private right of action. The four enforcement agencies and their salient differences are distilled on the following chart.

Each entity has its own source of authority and history. Private parties, state, and two federal authorities may file competition suits. Federal authorities cannot file a case in state courts, while private parties and state agencies may file in both federal courts and their own state courts.

Who may enforce competition law?	State Gov.	(Federal) DoJ	(Federal) FTC	Private Party
<i>From where does each get its authority?</i>	U.S.C.A. Const. Amend. X. maintains power to legislate and enforce within the state.	Act to Establish the Justice Department 1870	FTC ACT: 15 U.S.C. §45(a)	Clayton Act: 15 U.S.C. §15 gives private parties right to bring case to <i>federal</i> court. Private parties may have state PRA only if the state allows
<i>What is the authority reserved or granted?</i>	Powers not delegated to U.S. in the Constitution, nor prohibited to states, are reserved to states respectively	Power to enforce federal laws, which includes antitrust laws	Power to enforce violations of the FTC ACT	Power for individuals to seek damages for injuries rising from antitrust violation

While statistics seem impossible to find, most academic sources agree that the federal courts preside over the majority of competition cases in the U.S. while private parties account for bringing the majority of cases. Private party suits often come after a case brought by the state or federal government, as the private party may use proven violation as established for its own case.

Some laud the decentralization, seeing it often as competition within the system. Others focus on its ambiguities and condemn it for that. At its best, every private party has recourse if he or she has been directly injured by an antitrust violation; at its worst, some companies may find themselves confused as to which federal agencies case history rules the day.

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TÍTULO: Cómo y por qué el sistema de Derecho de la competencia estadounidense está descentralizado.

RESUMEN: La autoridad de competencia (antitrust) estadounidense está descentralizada, a diferencia de la mayoría de los países. Las particulares, las agencias estatales, y dos agencias federales hacen cumplir la ley de competencia tanto en el nivel estatal como federal. La ejecución privada y federal era una decisión deliberada por el Congreso, mientras el poder compartido entre el gobierno estatal y federal es natural en un sistema federalista. Sin embargo, la descentralización del gobierno federal es más una consecuencia de la historia judicial y legislativa que una intención.

El objetivo de este trabajo es explicar a las agencias legales internacionales cómo y por qué el sistema estadounidense de derecho de la competencia está descentralizado. Ello cubrirá la naturaleza de los agentes estatales, federales y privados en la ejecución del derecho de la competencia.

PALABRAS CLAVE: descentralizado, derecho de la competencia estadounidense, gobierno federal.

ABSTRACT: U.S. competition (antitrust) authority is decentralized, unlike that of most countries. Private parties, state agencies, and two federal agencies enforce competition law at both the state and federal level. Private and federal enforcement was a deliberate congressional decision, while power shared between state and federal government is natural in a federalist system. The federal government decentralization however, is more a consequence of judicial and legislative history than intent.

The purpose of this essay is to explain to international law agencies how and why the U.S. competition law system is decentralized. It will cover the nature of state, federal, and private party enforcement of competition law.

KEY WORDS: decentralized, U.S. competition law, federal government.

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