

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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Industrial Policy and the Promotion of Domestic Industry**

– Contribution from the United States –

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## *Session III: Industrial Policy and the Promotion of Domestic Industry*

### **- Contribution from the United States -**

#### **1. U.S. Commitment to a Free Market Economy**

1. Industrial policy can be described as government intervention in the economy to support the domestic industry in key economic sectors. Both industrial policy and competition policy aim to boost national productivity and economic growth. When policymakers target these objectives, carefully crafted interventions in the economy can encourage growth or adjust for market failures or other externalities that might otherwise produce suboptimum outcomes. When applied to serve special interests, or with the objective of creating or maintaining a national champion, however, industrial policy can harm both consumers and the overall economy. National champions, shielded from competition, are “more likely to become national basket cases than national breadwinners.”<sup>1</sup>

2. Any nation’s economic policy is necessarily the sum of a variety of policies intended to serve various ends. Free and competitive markets have long been and today remain the centerpiece of the economic policies of the United States. At the same time, this commitment has been, as with other countries, balanced against other policies. At various times, for example, limited government exceptions to reliance on market forces have been applied in the area of national security, air and maritime transport, and trade policy. These regulations generally are separate from the antitrust laws and are administered by agencies other than the U.S. competition agencies.

3. Antitrust law in the United States embodies a commitment to a free market economy.<sup>2</sup> Competition is protected because competitive market forces are viewed as one key to promoting innovation, growth, wealth, and other social objectives. The idea of picking well-connected firms and insulating them from the forces of competition and consumer choice is antithetical to this vision. The United States Supreme Court has stated on several occasions that antitrust law is intended for the “protection of competition, not [individual] competitors.”<sup>3</sup>

4. U.S. antitrust law is not designed to help any particular competitors, be they small firms, weak firms, or domestic firms. It is designed to help consumers by protecting the competitive process from restraint on competition. It “rests on the premise that the

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<sup>1</sup> Paul Geroski, March 8, 2005, “Competition Policy and National Champions” at 37, *available at* [https://www.regulation.org.uk/library/2006\\_geroski\\_essays.pdf](https://www.regulation.org.uk/library/2006_geroski_essays.pdf).

<sup>2</sup> For a more robust discussion of the objectives of U.S. competition law, see the U.S. submission to OECD “The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency,” (Jan. 31, 2003), *available at* <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/2003--The%20Objectives%20of%20Competition%20Law%20and%20Policy.pdf>.

<sup>3</sup> Brown Shoe Co. v. United States, 370 U.S., 294, 320 (1962).

unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”<sup>4</sup>

## 2. U.S. Experience with Protecting National Industry

5. U.S. antitrust law has traditionally rejected that idea that government can override the demands of the marketplace and successfully “pick winners” by supporting them with subsidies or protection from competition.<sup>5</sup> Favoring politically well-connected firms or sectors, and insulating them from competition, will not likely produce the kind of innovation that best serves consumers and succeeds in the global marketplace. Firms that are shielded from competition at home will rarely succeed abroad because they will not have honed the necessary skills to survive in a competitive global market.<sup>6</sup> By contrast, firms that have faced rigorous competition are likely to be well managed and innovative because only such firms survive. Through a process of natural selection, they will have developed the qualities needed to be successful in foreign markets.<sup>7</sup>

6. The most direct intrusion of industrial policy into competition policy occurred during the Great Depression with the passage of the National Industrial Recovery Act in 1933. In an effort to promote economic stability, the Act suspended the antitrust laws for two years and allowed industries to create “codes of fair competition,” which set industries’ prices and wages, established production quotas, and imposed restrictions on entry. Competition was relegated to the sidelines, and the welfare of firms took priority over the welfare of consumers. Output was restricted, prices increased, and consumer purchasing power was reduced.

7. The Act became unpopular even at the time and was declared unconstitutional by our Supreme Court. Subsequent analysis has widely concluded that not only did these measures not help the United States recover from the Depression, they likely prolonged it.<sup>8</sup>

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<sup>4</sup> Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958).

<sup>5</sup> Deborah Platt Majoras, “National Champions: I Don’t Think it Even Sounds Good,” Remarks Delivered at EU Competition Day (March 26, 2007), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/national-champions-i-dont-even-think-it-sounds-good/070326munich.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/national-champions-i-dont-even-think-it-sounds-good/070326munich.pdf).

<sup>6</sup> Michael E. Porter, *The Comparative Advantage of Nations* (1990), at 662.

<sup>7</sup> A. Douglas Melamed, “Antitrust at the Turn of the Century,” Remarks Prepared for the Fourth International Symposium on Competition Policy (Dec. 7, 1999), available at <https://www.justice.gov/atr/speech/antitrust-turn-century>.

<sup>8</sup> Christina Romer, “Why Did Prices Rise During the 1930s?” *Journal of Economic History*, 59(1), 167-199, p. 197, quoted in Carl Shapiro, then-Deputy Assistant Attorney General for Economics, U.S. Department of Justice, “Competition Policy in Distressed Industries,” Remarks Prepared for Delivery to American Bar Association Antitrust Symposium (May 13, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245857.htm>; Jason Taylor, “The Output Effects of Government Sponsored Cartels During the New Deal,” *Journal of Industrial Economics*, 50, 1-10 (2002).

One of the lessons we learned from this experience is that there is no substitute for a competitive market, including and perhaps particularly in times of economic distress.

8. One example is the domestic ocean shipping industry. The Merchant Marine Act of 1920 (“Jones Act”) aimed to protect the U.S. shipbuilding industry because substantial capacity would be needed in wartime and for other national emergencies. The law was designed to achieve its objectives by requiring that goods shipped between two domestic U.S. ports be transported on U.S.-built, U.S.-owned, U.S.-flagged, and U.S.-staffed ships. A recent study by the Cato Institute found that as a result of the restrictions that completely insulate domestic shippers from foreign competition, the U.S. economy endures artificially inflated domestic shipping costs and heightened reliance on other modes of transportation, such as trucks and freight trains.<sup>9</sup> According to the study, the U.S.-built ships are significantly more expensive than foreign-built ships, the domestic shipping industry has less incentive to invest in new or more innovative ships, and the higher costs of domestic shipping are passed onto customers and consumers.<sup>10</sup>

9. In a democratic society, however, there is an inevitable give and take between competition policy and policies that promote the interest of particular industries, and given the nature of the political process, it is not a foregone conclusion that competition policy will always be given primacy. However, the U.S. experience has shown that when a government gives into special interests, the protected industry generally will have a diminished incentive to innovate. It is more apt to become sluggish and complacent. The U.S. is not alone in this experience. As Paul Geroski, a well-known industrial economist and former head of the U.K. Competition Commission wrote:

*[R]ecent industrial history is littered with examples of firms who have had the ability to act—the command over resources, top quality senior management, well-furnished labs, and so on—and yet have somehow failed to do so. The problem is almost always the same—the sheer lack of competitive pressure to act, to keep ahead and to set a standard against which the performance of senior managers can reliably be judged.<sup>11</sup>*

10. The benefits of special interest legislation are concentrated while the costs are diffuse; the favored groups enrich themselves at the expense of consumers.

### 3. Limited Circumstances Justifying Intervention

11. The circumstances in which U.S. law allows for the protection of domestic industry from foreign competition are ordinarily limited. One special case is the review of foreign investments in strategically sensitive sectors that implicate national security. The private market cannot be expected to properly value the benefits that some strategically important firms or sectors bring to national security, nor can market mechanisms prevent foreign firms from making uneconomic investments in U.S. firms to promote national security

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<sup>9</sup> Colin Grabow, Inu Manak, and Daniel Ikenson, The Jones Act: A Burden America Can No Longer Bear (June 28, 2018), available at <https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear>.

<sup>10</sup> Grabow, Manak and Ikenson at 16.

<sup>11</sup> Geroski at 40.

objectives of foreign governments. When a merger or acquisition poses a threat to national security, an inter-governmental body, the Committee on Foreign Investment in the United States (CFIUS), may seek to suspend or prohibit the transaction, or impose conditions on it. The scope of CFIUS review is limited to national security concerns and does not encompass broader economic development interests. While proposed acquisitions have been abandoned in light of adverse findings by CFIUS, or by political opposition in U.S. Congress, such instances are infrequent.<sup>12</sup>

12. Another special case would be through the imposition of trade remedies. For example, under section 203 of the Trade Act of 1974,<sup>13</sup> the President may take action to facilitate efforts by the domestic industry in question to make a positive adjustment to import competition and provide greater economic and social benefits than costs. Under Section 301 of that Act, the U.S. may take steps to respond to unreasonable and discriminatory actions by foreign governments.

13. On occasion, the United States may seek to directly intervene to protect a domestic firm that has been severely dislocated by unforeseen events. When a business is strategically important, its abrupt exit from the market or prolonged inability to function effectively could cause spillover effects and harm a range of complementary sectors. In late 2008, in the midst of the most severe economic crisis since the Great Depression, the U.S. government provided direct economic assistance to U.S. automobile manufacturers and large banking institutions that faced a liquidity crisis. The U.S. government intervened out of concerns that collapse of large companies in these strategic sectors would have domino effects, causing dislocation or collapse of other companies in related or complementary sectors. In this instance, the application of government support was narrowly tailored and of limited duration, and the United States exited from those investments as soon as possible. Moreover, there was no giveaway. The U.S. government made a profit on its investments for the American people, while many private investors suffered.<sup>14</sup>

14. More recently, the Trump Administration has been urging trading partners to dismantle protectionist tariff and non-tariff barriers or face increased tariffs on selected imports entering the United States. The U.S. competition agencies do not implement policies other than competition policies, but the U.S. Department of Justice will seek opportunities to advise the other U.S. agencies about the pro-competitive means to achieve policy goals. For example, the U.S. Department of Justice participates in the interagency committee that makes recommendations to the President as to what action, if any, the U.S. Trade Representative (USTR) should take to respond to unreasonable or discriminatory practices by foreign governments.<sup>15</sup>

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<sup>12</sup> Majoras at 9. See also, “Statement on CFIUS Action,” (March 4, 2018), *available at* <https://home.treasury.gov/news/press-releases/sm0303>.

<sup>13</sup> 19 U.S.C. § 2253.

<sup>14</sup> For a more detailed discussion of government assistance in periods of retrenchment, see the U.S. submission to OECD “Competition and Financial Markets” (Feb. 11, 2009), *available at* <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/09financialcrisis.pdf>.

<sup>15</sup> U.S. DOJ and FTC, Antitrust Guidelines for International Enforcement and Cooperation §2.11 (January 2017) *available at* <https://www.justice.gov/atr/internationalguidelines/download>.

#### 4. Importance of Non-Discrimination in U.S. Competition Enforcement

15. For many years the United States has been a strong proponent of work in the OECD and ICN to commit competition agencies to conduct enforcement activities in a consistent and impartial manner, free of political interference, and in a manner that does not discriminate on the basis of nationality.<sup>16</sup> This commitment to non-discrimination featured prominently in a new initiative announced by the U.S. Department of Justice in spring 2018—the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP).<sup>17</sup> In July, 2018 the Department of Justice sought to promote procedural norms and due process in competition enforcement by inviting the broader competition enforcement community to join the MFP framework.

16. The U.S. agencies keep industrial policy out of their enforcement activities. U.S. antitrust law seeks to protect competition, and it does not permit the U.S. antitrust agencies to promote national champions or undertake other industrial policy objectives. In recent years, the U.S. agencies have undertaken investigations involving flagship U.S. firms, including Amazon, Apple, and Google. National origin played no role in any of these investigations. In the late 1990s, the Department of Justice successfully sued Microsoft, a U.S. firm and, at the time, the most successful software company in the world, for its abuse of monopoly power in how it tied its operating system with its Internet Explorer web browser software.<sup>18</sup>

17. In merger enforcement, the U.S. competition agencies only challenge transactions that are believed likely, in the foreseeable future, to raise prices, lower output, or retard quality or innovation.<sup>19</sup> Some significant transactions reviewed by the U.S. competition agencies involved acquisitions of U.S. firms or assets by foreign firms, and in none of these cases did the agencies consider protecting domestic firms from foreign ownership.<sup>20</sup>

18. Nationality or industrial policy objectives also play no role in U.S. anti-cartel enforcement. In recent years the Department of Justice has faced the critique that its cartel

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<sup>16</sup> International Competition Network, Guidance on Investigative Process §9.1, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc1146.pdf>; see also OECD, Procedural Fairness and Transparency (2012), *available at* <https://www.oecd.org/daf/competition/abuse/50235955.pdf>

<sup>17</sup> Makan Delrahim, “Remarks on Global Antitrust Enforcement at the Council on Foreign Relations” (June 1, 2018), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement>.

<sup>18</sup> For more information about this case, see U.S. v. Microsoft Corp. Information on the Settlement, *available at* <https://www.justice.gov/atr/usdoj-antitrust-division-us-v-microsoft-corporation-information-settlement>.

<sup>19</sup> FTC and DOJ, Horizontal Merger Guidelines (August 2010) at 2, *available at* <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

<sup>20</sup> See U.S. DOJ Press Release Issued for Bayer-Monsanto (May 29, 2018), *available at* <https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened>; FTC Press Release (June 14, 2018), FTC Requires Construction Company CRH plc to Divest Facilities in Montana, Nebraska and Kansas as a Condition of Acquiring Competitor Ash Grove Cement Company, *available at* <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-requires-construction-company-crh-plc-divest-facilities>.

enforcement focuses disproportionately on international companies. This critique is unwarranted. The Department of Justice prosecutes cartels that harm American consumers, just as other nations enforce their laws against cartels that harm their citizens.<sup>21</sup> U.S. enforcement has been free of national bias or favoritism. Violations are most often brought to our attention by individuals and companies that self-report through the Antitrust Division's Corporate and Individual Leniency Programs. The Antitrust Division will not prosecute cartels that have nothing to do with the United States, but it will prosecute cartels that harm or threaten to harm U.S. commerce or consumers, regardless of where the cartels occur and regardless of the participants' nationality.<sup>22</sup>

## 5. Conclusion

19. In the United States the competition laws embody a commitment to a free market economy. They do not permit the U.S. competition agencies to place a thumb on the scale to favor a particular firm or national champion, or to otherwise discriminate against a firm based on its nationality. The U.S. experience with subsidizing or shielding domestic firms from external competition has shown that a protected industry shielded from the rigors of competition is less likely to innovate and succeed, and the protected firms or industry are more likely to benefit at the expense of consumers. For these reasons, industrial policy concerns play a very limited role in U.S. competition policy.

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<sup>21</sup> In recent years, DOJ has vigorously prosecuted bid-rigging and price-fixing activities within the United States. See "Three Real Estate Investors Indicted for Bid Rigging in Florida Online Foreclosure Auctions," (Nov 3, 2017), available at <https://www.justice.gov/opa/pr/three-real-estate-investors-indicted-bid-rigging-florida-online-foreclosure-auctions>.

<sup>22</sup> See Antitrust Guidelines for International Enforcement and Cooperation §3.2, *supra* note 15.