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# Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System

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## PROCEDURAL AND INSTITUTIONAL NORMS IN ANTITRUST ENFORCEMENT: THE U.S. SYSTEM

Harry First, Eleanor M. Fox, and Daniel E. Hemli

### ABSTRACT

The purpose of this paper is to describe the institutions of antitrust enforcement in the United States and to test those institutions against a set of norms used to assess the operations of administrative agencies. The paper is part of a broader project studying global administrative law and will be a chapter in the forthcoming book *THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES* (Eleanor M. Fox & Michael J. Trebilcock, eds.) (Oxford University Press).

The paper begins with a short review of the statutory structure of the U.S. antitrust system (federal, state, and private) and a more in-depth description of the institutional structure of antitrust enforcement in the United States, including the interaction between U.S. and non-U.S. enforcement agencies. The second part of the paper examines the performance of the two federal enforcement agencies (the Justice Department Antitrust Division and the Federal Trade Commission) in two general areas, case-by-case decision-making and institutional performance. Within the case-by-case category, the paper reviews three aspects of the process—the decision to proceed, adjudication, and appeals—and two broad due process norms relevant to individual case decision-making—non-discrimination and proportionality of remedies. Within the institutional performance category, the paper reviews five broad norms—operational efficiency, expertise, transparency, accountability, and the rule of law. With regard to each of these ten areas, the paper describes and assesses the two antitrust agencies separately.

The paper concludes that the U.S. antitrust enforcement system measures up well in terms of the due process and institutional performance norms that are the focus of the study. Although major structural changes in the system appear to be both unnecessary and unlikely, the paper suggests some incremental changes to increase transparency and accountability throughout the decision-making process.

**KEYWORDS:** Antitrust, enforcement, institutions, accountability, administrative law, due process, transparency, separation of functions, Antitrust Division, Federal Trade Commission, state enforcement, private enforcement, rule of law

**JEL Codes:** K21 [antitrust law], K23 [regulated industries and administrative law], H11 [structure and scope of government], L49 [antitrust policy, other]

# PROCEDURAL AND INSTITUTIONAL NORMS IN ANTITRUST ENFORCEMENT: THE U.S. SYSTEM

Harry First, Eleanor M. Fox, and Daniel E. Hemli\*

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## I. The History of Antitrust Enforcement

### A. Federal Enforcement

Three major federal antitrust statutes—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—set out the basic substantive provisions of U.S. antitrust law and its enforcement structure. Although each statute has been amended over time, sometimes in important ways (penalties have been increased substantially, for example), judicial interpretation and enforcement practice have been more significant for the development of U.S. antitrust law than has legislative action.

One of the most important innovations of the original Sherman Act was to create a system of public enforcement. Prior to the Act’s passage in 1890, enforcement was a common law enterprise, invoked by private litigants seeking to avoid contractual obligations by arguing that enforcement of a particular contract would restrain trade and should therefore be void as against “public policy.” Important substantive antitrust doctrines were developed in litigation framed this way, particularly the basic ideas behind what types of restraints might be considered “unreasonable.” Sporadic private contract litigation, however, was not adequate to deal with the increasing power of large business enterprises (often formed through the legal vehicle of a “trust”). This led Congress to provide for government enforcement of the Sherman Act’s prohibitions, through suits in equity to enjoin violations and through criminal prosecutions.

Government enforcement of the Act developed slowly. It was not until 1903 that a special division in the Department of Justice (“DOJ” or “Justice Department”) was funded to deal with antitrust enforcement, and the modest number of cases the Department filed in the early years led many to view it as an ineffective enforcement agency. Judicial interpretation of the Act during this time was also thought to have compromised the Act’s effectiveness. Particularly important was the Supreme Court’s 1911 decision in *Standard Oil*,<sup>1</sup> adopting a general “rule of reason” approach to the Sherman Act which critics believed launched judges on a “sea of doubt,” leaving the legality of any particular restraint to be determined more by a judge’s predilections than by clear legal rules.<sup>2</sup>

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<sup>1</sup> 221 U.S. 1 (1911).

<sup>2</sup> See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (6th Cir. 1898) (referring to some common law judges deciding “how much restraint of competition is in the public interest, and how much is not”).

The Clayton Act and Federal Trade Commission Act were passed in 1914 to correct these perceived substantive and institutional weaknesses. The Clayton Act added certain specific prohibitions to federal antitrust law, dealing, for example, with mergers, tying, and exclusive dealing contracts. The Federal Trade Commission Act established a new administrative agency, the Federal Trade Commission (“FTC” or “Commission”), and gave it authority to prevent “unfair methods of competition” (not otherwise defined). Congress also gave both the FTC and the Justice Department authority to enforce the new Clayton Act’s prohibitions.

Passage of the FTC Act and the Clayton Act set up the possibility that the Justice Department and the FTC would have overlapping enforcement authority. At the time the statutes were enacted, however, Congress apparently saw the two agencies as focusing on competition problems in different ways and using different procedures. The Justice Department would continue to deal with monopoly “as established fact,” litigating in court the legality of a company’s practices. The new FTC would engage in preventive regulation, checking monopoly “in the embryo” by stopping unfair methods of competition by a corporation of “no conspicuous size.”<sup>3</sup> Nevertheless, the statutory language did not clearly set out these different roles and Congress paid no attention to the potential for conflict between the agencies, being more concerned with adding a new enforcement authority to strengthen government antitrust enforcement.

Whatever the possibilities for conflict, the two federal enforcement agencies developed along the lines that Congress apparently anticipated in 1914, generally dividing their responsibilities and sharing enforcement burdens.<sup>4</sup> Prior to 1950, for example, the Justice Department rarely filed suit under the Clayton Act provisions dealing with mergers or exclusive dealing while the FTC filed a substantial number of complaints. On the other hand, during this period the Justice Department handled all Sherman Act criminal prosecutions, given its exclusive authority over criminal enforcement, and both agencies handled non-criminal pricing conspiracies, with the FTC being slightly more active.<sup>5</sup>

It was not until 1938 that the FTC and the Justice Department entered into an informal agreement to determine which agency should handle a particular

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<sup>3</sup> See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *Antitrust L.J.* 1, 68, 74 (2003).

<sup>4</sup> We note that our discussion generally refers to the Justice Department Antitrust Division and the FTC as “agencies.” As a technical matter, only the FTC is an independent agency; the Justice Department is part of the executive branch of government. For further description, see *infra* notes 27-45 and accompanying text.

<sup>5</sup> See Gilbert H. Montague, *The Commission’s Jurisdiction Over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Antitrust Laws*, 8 *Geo. Wash. L. Rev.* 365 (1940) (FTC and Justice Department enforcement data).

investigation, an agreement not formalized until 1948.<sup>6</sup> After a change in the Clayton Act's antimerger provision in 1950, the Justice Department became active in merger enforcement, leading to some conflict over case selection and the development of a "clearance" process for merger enforcement that has reduced, but not eliminated, conflicts in particular cases.<sup>7</sup>

The two agencies' policy views have sometimes differed over time and each has been criticized for somewhat different reasons. The FTC, perhaps true to the vision that it should engage in preventive regulation of "unfair" conduct, has at times been criticized for being overly regulatory, for focusing on matters of small consequence, and for being unduly protective of small business.<sup>8</sup> During the late 1970s and 1980s it came under intense criticism from Congress for its enforcement policies, leading to a period when Congress refused to pass annual appropriations bills for the agency and to an eventual restriction of its "unfairness" jurisdiction.<sup>9</sup> The Justice Department, on the other hand, has often been criticized for lax enforcement policies, with periods of perceived reduced enforcement often followed by increased enforcement efforts when national elections bring a change of administration.<sup>10</sup>

Although the Justice Department and the FTC are the major federal antitrust enforcement agencies, Congress has often given concurrent or exclusive jurisdiction over competition matters to sectoral regulatory agencies. For example, the Interstate Commerce Commission was given exclusive jurisdiction over railroad and trucking mergers under a broad "public interest" standard when those industries were regulated; the Commission's replacement, the Surface Transportation Board, still has exclusive jurisdiction over railroad mergers.<sup>11</sup> Even though the airline industry has been virtually deregulated, the Department of Transportation continues to have jurisdiction over "unfair methods of

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<sup>6</sup> See Report of The Attorney General's National Committee to Study the Antitrust Laws 376 & n.53 (1955).

<sup>7</sup> For further discussion of the clearance process, see *infra* notes 167-172.

<sup>8</sup> For critical studies, see, e.g., Robert A. Katzmann, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY (1980); Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, ANTITRUST L. J. 53 (1989).

<sup>9</sup> See Federal Trade Commission Act Amendments of 1994, 108 Stat.1695, codified at 15 U.S.C. § 45 (n) (narrowing unfairness jurisdiction). The FTC went without a budgetary reauthorization from 1982 to 1994. See Hearing Before the Sen. Subcomm. on Consumer of the Comm. on Comm., Science, and Transp., 103d Cong. 2 (1993) (statement of Sen. Hollings).

<sup>10</sup> For critical studies, see, e.g., Suzanne Weaver, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION (1977); Mark J. Green, Beverly C. Moore & Bruce Wasserstein, THE CLOSED ENTERPRISE SYSTEM (1972).

<sup>11</sup> See 49 U.S.C. § 11324.

competition<sup>12</sup> and has the power to exempt international airline alliances, including code-sharing agreements.<sup>13</sup> Telecommunications and broadcasting mergers are reviewed by the Federal Communications Commission as well as by the Justice Department and the FTC.<sup>14</sup> Banking mergers are reviewed under a competition standard by bank regulatory agencies and by the Department of Justice under antitrust law.<sup>15</sup> As with the original Congressional decision to create two antitrust enforcement agencies, the decision to give sectoral regulators concurrent or exclusive jurisdiction over competition matters has been more a matter of the political and policy concerns of the time and less a matter of a conscious plan for creating an optimal structure for government antitrust enforcement.

## B. State Enforcement

States have enacted their own antitrust laws, some of which precede the passage of the Sherman Act.<sup>16</sup> The states were relatively vigorous enforcers of their antitrust laws in the period between 1890 and 1914, often bringing suit against the major trusts of the day and sometimes bringing such suits before the federal government did.<sup>17</sup> Although the importance of state antitrust law enforcement subsequently declined, states continue to enforce their laws, bringing both criminal and civil cases, the latter for injunctions or damages incurred by state agencies or consumers.

States can also enforce the Sherman and Clayton Acts in federal court. In 1945 the Supreme Court recognized the power of the states to bring suit as *parens patriae* on behalf of their citizens for injunctive relief for a violation of the federal antitrust laws.<sup>18</sup> In 1976 Congress passed the Hart-Scott-Rodino Antitrust Improvements Act giving state attorneys general the right to bring suit in federal court as *parens patriae* for treble the damages that “natural persons” residing in their respective states incurred by virtue of a Sherman Act violation.<sup>19</sup> As a

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<sup>12</sup> See 49 U.S.C. § 41712.

<sup>13</sup> See 49 U.S.C. §§ 41308, 41309.

<sup>14</sup> See 47 U.S.C. §§ 214(a), 310(d) (FCC jurisdiction).

<sup>15</sup> See 12 U.S.C. § 1828(c)

<sup>16</sup> Early state antitrust legislation and judicial interpretations are discussed in, e.g., James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. Pa. L. Rev. 495 (1987); David Millon, *The First Antitrust Statutes*, 29 Washburn L. J. 141 (1990).

<sup>17</sup> See *United States v. Int'l Harvester Co.*, 214 F. 987 (D. Minn. 1914) (federal suit filed after suits brought by Kentucky and Missouri), appeal dismissed, 248 U.S. 587 (1918).

<sup>18</sup> See *Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945).

<sup>19</sup> See 15 U.S.C. §§ 15c-15h.

result, state antitrust enforcers have brought federal suits challenging mergers, monopolization, and cartel agreements, often obtaining large monetary recoveries to be distributed to injured consumers.<sup>20</sup> Critics have argued that state enforcement is duplicative of federal efforts at best and potentially in conflict with federal policies at worst, but in 2007 the congressionally-mandated Antitrust Modernization Commission decided against recommending any substantial changes to the current system.<sup>21</sup>

### C. Private Enforcement

The Sherman Act as passed in 1890 provided that anyone injured in their “business or property” by a violation of the Act could bring suit in federal court to recover treble their damages plus attorneys fees. The reason for including a private action was to provide compensation to those victimized by antitrust violations; damages were trebled to give plaintiffs adequate incentive to bring suit for what might otherwise have been small damages.<sup>22</sup> As with federal government enforcement, however, the number of private cases brought in the period immediately following passage of the Sherman Act was modest (somewhat less than the number brought by the federal government). When Congress passed the Clayton Act in 1914 it added some important procedural provisions to make it easier to bring private suits (for example, making government settlements prima facie evidence of a violation). Congressional debate over the Clayton Act also stressed the important role that private suits might have in deterring antitrust violations, and private litigants have subsequently been referred to as “private attorneys general” to emphasize this role.<sup>23</sup>

Views of the effectiveness and wisdom of the private action have varied over time. Prior to 1950, commentators judged the private suit as ineffective, based on the relatively small numbers of cases brought. Increased federal government enforcement in the 1940s helped fuel a dramatic post-War increase in private litigation, with the result that the number of private cases brought since the

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<sup>20</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001) (monopolization case; separate suit filed by twenty-one states, consolidated for trial with Justice Department litigation); *New York v. Kraft Gen'l Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995) (state suit challenging merger); Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 *Geo. Wash. L. Rev.* 1701, 1718-20 (2001) (describing vitamins litigation; \$250 million state settlement).

<sup>21</sup> See Antitrust Modernization Comm'n, Report And Recommendations (2007) (hereinafter AMC Report), available at <http://govinfo.library.unt.edu/amc/>. For criticism of state antitrust enforcement, see, e.g., Richard A. Posner, Antitrust in the New Economy, 68 *Antitrust L.J.* 925 (2001).

<sup>22</sup> See Harry First, Lost in Conversation: The Compensatory Function of Antitrust Law, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579343).

<sup>23</sup> See *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 147 (1968) (Fortas, J., concurring).

1950s has substantially exceeded the number of cases that the federal agencies have filed.<sup>24</sup> The increased number of filings, coupled with the development of the class action device and liberal pretrial discovery rules, then brought criticism of the private action as leading to unwarranted recoveries against defendants. Recent Supreme Court cases have tended to accept this criticism and have restricted the use of the private action in significant ways.<sup>25</sup>

## II. Institutional Structure

### A. Federal Enforcement

#### 1. Department of Justice

The Department of Justice is part of the Executive Branch and has the responsibility for representing the United States in court proceedings. The Department is divided into divisions that are given specific responsibilities. The Antitrust Division is responsible for civil and criminal antitrust enforcement, even though federal criminal prosecutions are generally the responsibility of the Justice Department's Criminal Division and the 93 U.S. Attorneys Offices located throughout the United States. Supreme Court antitrust litigation is handled by the Office of the Solicitor General, which is part of the Justice Department, working closely with the Antitrust Division. The head of the Justice Department (the Attorney General) and the head of the Antitrust Division (Assistant Attorney General) are appointed by the President and are subject to Senate confirmation.<sup>26</sup>

Antitrust enforcement by the Antitrust Division follows the bifurcated judicial model. That is, with rare exception,<sup>27</sup> the Division investigates cases, using legally available processes, makes its own internal determination whether to charge a violation of the antitrust laws, and then files suit in federal court where it is required to prove its case. The determination of whether there has been a

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<sup>24</sup> For statistics on private and government enforcement, *see, e.g.*, L. White, *The Georgetown Study of Private Antitrust Litigation*, 54 *Antitrust L.J.* 59 (1985); B. Zorina Kahn, Symposium on Antitrust, 9 *Cornell J. Law & Pub. Pol.* 133, 137 (1999) (Figure 1); Richard A. Posner, A Statistical Study of Antitrust Enforcement, 13 *J.L. & Econ.* 365, 373 (Figure II) (1970). For a mid-century view of the private action, *see* Homer Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 *Mich. L. Rev.* 363 (1954).

<sup>25</sup> *See, e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (requiring plaintiff to plead "enough factual matter" to show "plausible grounds" to infer illegal agreement; dismissing complaint); *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko LL.P.*, 540 U.S. 398 (2004) (disallowing Sherman Act Section 2 private damages claim arising out of failure of monopoly local exchange carrier to provide adequate interconnection service to rival).

<sup>26</sup> *See* 28 U.S.C. §§ 503, 506.

<sup>27</sup> *See* 28 C.F.R. § 48.1 et seq. (allowing Attorney General to appoint an Administrative Law Judge to hold fact-finding hearings to determine whether a joint newspaper operating agreement qualifies for an exemption under the Newspaper Preservation Act).

violation of the antitrust laws is made by a federal district court judge of ordinary jurisdiction, not by a specialized court. In criminal matters, defendants have a constitutional right to trial by jury, but in civil suits for injunctive relief, decisions are made solely by a judge. District court antitrust decisions in government cases are subject to appellate review under the same processes as other federal litigation, with appeal as of right to a circuit court of appeals and discretionary review by the U.S. Supreme Court.<sup>28</sup>

Government civil enforcement often ends in settlement, generally agreed to prior to the filing of litigation. By custom, these settlements have been incorporated into “consent decrees,” judicial decrees entered by district court judges, whose violation can be enforced through civil or criminal contempt proceedings.<sup>29</sup> Consent decrees are an important part of antitrust enforcement and their use has a long and controversial history.<sup>30</sup>

## 2. Federal Trade Commission

The Federal Trade Commission is an independent regulatory Commission consisting of five Commissioners appointed for seven-year terms by the President, subject to Senate confirmation.<sup>31</sup> To help assure political independence, no more than three can be from the same political party and Commissioners can be removed by the President only for cause.<sup>32</sup> The President chooses the chairman of the FTC, with a new chairman being selected when presidential administrations change.

As originally envisioned, the FTC’s structure follows the integrated agency model where the agency investigates and adjudicates all violations internally.<sup>33</sup> FTC staff in the Bureau of Competition undertakes the investigation into potential violations and decides whether to recommend to the Commission

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<sup>28</sup> See 15 U.S.C. § 29.

<sup>29</sup> See, e.g., *United States v. Microsoft Corp.*, 980 F. Supp. 2d 537 (D.D.C. 1997) (refusing government petition for criminal contempt, but entering injunction restraining bundling practices that violated decree), *rev’d*, 147 F. 3d 935 (D.C. Cir. 1998) (injunction improperly issued).

<sup>30</sup> Settlements of important cases were often believed to reflect political deals and grant inadequate relief. For a history of consent decree practice, see, e.g., John J. Flynn, *Consent Decrees in Antitrust Enforcement*, 53 *Iowa L. Rev.* 983 (1968). The consent decree process is now governed by the Tunney Act, see *infra* notes 232-242 and accompanying text.

<sup>31</sup> See 15 U.S.C. § 41.

<sup>32</sup> See *id.*

<sup>33</sup> The FTC also has “notice and comment” rule-making authority, see 15 U.S.C. § 57a. The aggressive use of this rule-making authority provoked considerable controversy in the 1970s and the Commission has not recently used this authority in competition matters..

that formal charges be brought.<sup>34</sup> If the Commission determines that there is “reason to believe” a violation has occurred, it will issue a complaint, which will then be tried before an Administrative Law Judge (“ALJ”) under procedural rules similar to those used in federal court litigation.<sup>35</sup> An appeal of the ALJ’s decision can then be taken (either by staff “complaint counsel” or by the respondent) to the full Commission.<sup>36</sup> The Commission, after briefing and argument, will issue a written decision, entering a cease and desist order (and other appropriate relief) if it finds a violation. The respondent can then appeal to a federal circuit court of appeals, with subsequent discretionary review in the Supreme Court.<sup>37</sup> At any time in the process the Commission can also decide to settle a case with a “consent order” analogous to the Antitrust Division’s consent decree except that it is not entered in court.<sup>38</sup>

As Commission practice has developed, however, important parts of its enforcement mission are now undertaken in a way that more nearly resembles the bifurcated judicial model. In 1973 Congress added Section 13 (b) to the FTC Act, giving the Commission the power to seek temporary and permanent injunctions in federal district court for violations of the FTC Act.<sup>39</sup> The Commission has subsequently argued that this provision not only gives it the power to bring suit in federal court for any violation of the FTC Act, but also to obtain any equitable relief, including orders of restitution which require defendants to pay to consumers the damages their anticompetitive conduct has caused.<sup>40</sup>

More critically for the FTC’s enforcement mission, the Commission has made use of Section 13 (b) to seek preliminary injunctions to stop mergers that it believes violate Section 7 of the Clayton Act and/or Section 5 of the FTC Act, with the result that the FTC now litigates most of its merger challenges in federal

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<sup>34</sup> See 15 U.S.C. § 49 (FTC investigative powers); Federal Trade Comm’n, Nonadjudicative Proceedings, 16 C.F.R. § 2.1 et seq.

<sup>35</sup> See 15 U.S.C. § 45 (b); Federal Trade Comm’n, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.1 et seq. (“Part 3 proceedings”).

<sup>36</sup> See FTC Rules, §§ 3.52, 3.54.

<sup>37</sup> See 15 U.S.C. § 45 (c). Since 1975 the Commission has had the power to represent itself before the Supreme Court, rather than be represented by the Justice Department’s Solicitor General’s office, see 15 U.S.C. § 56 (a) (3), but the FTC has only invoked this provision three times. See Office of Gen’l Counsel, A Brief Overview of the Federal Trade Commission’s Investigative And Law Enforcement Authority n.7 (rev. 2008), [http://ftc.gov/ogc/brfovrwv.shtm#N\\_7\\_](http://ftc.gov/ogc/brfovrwv.shtm#N_7_).

<sup>38</sup> See FTC Rules, §§ 2.31-2.34, 3.25.

<sup>39</sup> See P.L. 93-153, 87 Stat. 592, codified at 15 U.S.C. § 53 (b).

<sup>40</sup> See *FTC v. Mylan Labs, Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999) (upholding FTC legal claim).

court. In 1995 the Commission adopted a general practice of not continuing with administrative litigation if it lost its court motion for a preliminary injunction.<sup>41</sup> The practice of litigating merger cases exclusively in court, however, is not required by the FTC Act and the Commission has more recently indicated that it may decide to litigate at least some merger cases under its “Part 3” procedures<sup>42</sup> even if it loses its preliminary injunction motion in federal court.<sup>43</sup> Because the standard for granting preliminary relief under Section 13 (b) is arguably more favorable to the FTC than the general common law standard for preliminary injunctions applied in Justice Department cases,<sup>44</sup> some critics argue that Section 13 (b) produces inconsistent merger results that depend on which federal agency brings suit.<sup>45</sup>

## B. State and Private Enforcement

### 1. State Enforcement

Each U.S. state, plus each of the five additional federal jurisdictions—the District of Columbia, the Commonwealth of Puerto Rico and the three U.S. territories of Guam, Northern Mariana Islands, and the Virgin Islands—has some form of antitrust legislation.<sup>46</sup> Enforcement in these jurisdictions, whether

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<sup>41</sup> See Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741, 39,743 (1995). Technically, the Commission said it would make the decision on a case-by-case basis, using five specific factors: (i) the factual findings and legal conclusions of the district court or any appellate court; (ii) any new evidence developed during the course of the preliminary injunction proceeding; (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation; (iv) an overall assessment of the costs and benefits of further proceedings; and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge. *Id.* at 39,743.

<sup>42</sup> “Part 3” procedures are so named because the FTC’s rules for adjudicative procedures are Part 3 of the FTC’s general rules of procedure.

<sup>43</sup> In 2009 the Commission changed its rules to make it clear that it will not automatically withdraw from administratively adjudicating cases that it loses on preliminary injunction. See 74 Fed. Reg. 1811-12 (Jan. 13, 2009). For further discussion of the 2009 amendments to the FTC’s procedures, see *infra* note 183-186.

<sup>44</sup> Section 13(b) states that a court may grant preliminary relief “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). By contrast, the DOJ, like any other plaintiff, must establish (i) a likelihood of success on the merits; (ii) that it faces a substantial threat of irreparable harm if the injunction is not granted; (iii) that the balance of harms weighs in the DOJ’s favor; and (iv) that the grant of an injunction would serve the public interest.

<sup>45</sup> See, e.g., AMC Report, *supra* note 21, at 130-32 (recommending change in § 13(b) to conform it to the same standard as applies to Justice Department cases).

<sup>46</sup> We refer to these jurisdictions collectively as “states.”

accomplished through suit under federal antitrust law or under state antitrust law, is handled by the state Attorney General. State Attorney General offices usually have a specialized division or bureau responsible for antitrust enforcement. Enforcement conforms to the bifurcated judicial model, taking place exclusively through court litigation.

A critical aspect of the institution of state enforcement is the mechanisms employed to coordinate the activities of state enforcement agencies. Although state antitrust enforcers bring many of their cases on an individual state basis, they also investigate and file cases jointly. As a general matter, the most significant state antitrust cases since the 1980s have been brought as multistate cases involving a varying number of state enforcement agencies, depending on the interest of each individual state in the particular matter as well as the resources that individual states have available at the time. Joint state effort can also occur in coordination with the federal enforcement agency investigating the same matter.<sup>47</sup> If the federal agency files suit in federal court, participating states will most often join the litigation rather than filing a separate suit.<sup>48</sup>

The key organizational vehicle for cooperation among the fifty-five state jurisdictions is the National Association of Attorneys General (“NAAG”). Through its central office in Washington, D.C., NAAG has helped coordinate the states’ efforts in investigation, litigation, lobbying, and training.<sup>49</sup> In addition, the states, through NAAG, have put together a number of agreements formalizing some of the relationships that have evolved to handle multistate merger enforcement, joint state and federal merger enforcement, and joint state and federal criminal investigations.<sup>50</sup>

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<sup>47</sup> Nearly all *parens patriae* cases have been brought by the states without federal participation; cases seeking some form of injunctive relief have most often been brought in conjunction with one of the federal Agencies.

<sup>48</sup> See, e.g., *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (Justice Department and ten states). The Microsoft monopolization litigation, in which the states filed a separate complaint, is a rare exception to this pattern.

<sup>49</sup> See [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (describing organization of NAAG).

<sup>50</sup> See, e.g., Nat’l Ass’n of Attorneys Gen., *Voluntary Pre-Merger Disclosure Compact*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,410 (Mar. 21, 1994); Antitrust Div., U.S. Dep’t of Justice, *Protocol For Coordination In Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*, reprinted in John J. Flynn et al., *Antitrust: Statutes, Treaties, Regulations, Guidelines, Policies* 535-43 (2011) (governing confidentiality of information, sharing of information, and guidelines for joint investigations and settlements); U.S. Dep’t of Justice, *Protocol for Increased State Prosecution of Criminal Antitrust Offenses*, reprinted in 70 Antitrust & Trade Reg. Rep. (BNA) 362 (Mar. 28, 1996).

Nearly all state attorneys general are elected officials.<sup>51</sup> This direct political accountability to the electorate is perhaps unique in the world for antitrust enforcers; certainly it is different from the more indirect political accountability mechanisms that constrain federal antitrust enforcement officials.<sup>52</sup> It is unclear how this institutional position affects enforcement decisions. It may be that, as elected officials, state attorneys general are more interested in obtaining monetary recoveries on behalf of their citizens (voters) than are federal antitrust enforcers, which would align antitrust enforcement with consumer welfare. On the other hand, some have criticized state enforcement as being influenced by improper political considerations, for example, favoring in-state business interests over out-of-state interests.<sup>53</sup> Although political concerns could theoretically lead state attorneys general to favor their constituents in this way, there is no empirical support for this proposition.<sup>54</sup> This is not to say that interest groups do not attempt to influence state attorneys general when making antitrust enforcement decisions. As with the federal government, business interests may try to pressure state enforcers not to bring suit and labor groups may try to pressure the attorney general to consider the effect on jobs of bringing an antitrust case.<sup>55</sup> Whether state attorneys general are more amenable to this political pressure than federal enforcers is difficult to say.

## 2. Private Enforcement

Private antitrust enforcement is pursued through litigation in federal and state court. Such litigation is conducted in courts of general jurisdiction, under procedural rules that do not distinguish antitrust cases from other types of cases. To the extent that these cases involve multidistrict or complex litigation, the special federal provisions applicable to such litigation also apply.

Private party litigation is often filed after the government has investigated the matter and brought suit (such private cases being called “follow-on” or “complementary” litigation), but not all private litigation is complementary to government litigation.<sup>56</sup> Business firms often bring antitrust suits in the normal

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<sup>51</sup> See [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (attorneys general are popularly elected in 43 states; remaining states have a variety of selection mechanisms).

<sup>52</sup> For further discussion of these accountability mechanisms, see *infra* notes 244-259.

<sup>53</sup> See, e.g., Posner, Antitrust in the New Economy, *supra* note 21, at 940-41.

<sup>54</sup> See First, Delivering Remedies, *supra* note 20, at 1726-27.

<sup>55</sup> For example, Texas did not file suit against Microsoft, reportedly after Dell met with the state Attorney General, and the State of Washington, Microsoft’s home state, was conspicuously absent from the state Microsoft litigation.

<sup>56</sup> See Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, 24 ANTITRUST 58 (Summer 2010) (reporting that nearly sixty percent of antitrust class actions arose out of prior government enforcement, including government cases outside the United States; but

course of business dealings without regard to prior government actions (for example, in contract or patent disputes, or for exclusionary business conduct) and all the most important recent Supreme Court antitrust cases have been decided in the context of private suits rather than government litigation.

Private parties also attempt to convince government enforcers to bring cases. Critics have been concerned that such approaches can lead to a form of capture, where the agency ends up protecting a complaining business firm rather than advancing competition policy. On the other hand, it has been argued that business firms often possess information about anticompetitive practices that is unavailable to government enforcers and that consumers are generally not in a position to complain about antitrust violations because they are usually unaware that they are victims of anticompetitive practices. This need for private-party information is true both in exclusionary practices cases and in cartel cases (where the government offers amnesty to incentivize private parties to provide information) and government enforcers indicate that they are aware of the possibility of self-serving complaints.

### C. International Enforcement

Informal (“networked”) coordination occurs between and among authorities and it sometimes influences enforcement decisions. As discussed above, coordination occurs between the two federal agencies (Justice Department and the Federal Trade Commission), between the Justice Department or the FTC and the states, and among the states. Internationally, networking occurs between the federal agencies and the European Union Competition Directorate and between U.S. authorities and many national authorities. Canada probably leads the list of frequent contacts with national authorities. Many of these contacts are made pursuant to bilateral cooperation agreements.<sup>57</sup> In addition, the U.S. authorities take a major role in the International Competition Network, the virtual network of more than 100 competition authorities from more than 90 jurisdictions around the world.<sup>58</sup>

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this does not include cases filed by individual litigants). For an earlier study, see Marvel, Netter, & Robinson, *Price Fixing and Civil Damages: An Economic Analysis*, 40 STAN.L.REV. 561, 572 (1988) (of 117 government criminal cases filed between 1972 and 1979, only about one-half resulted in follow-on civil suits, despite the fact that all but three of the cases resulted in convictions).

<sup>57</sup> See, e.g., Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, International Cooperation: Preparing for the Future, Remarks prepared for the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium 3 (Washington, D.C., September 21, 2010), available at <http://www.justice.gov/atr/public/speeches/262606.htm>.

<sup>58</sup> See ICN Factsheet and Key Messages, <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>. For further discussion of the international aspects of competition coordination, see International Institutions, *infra* ch. \_\_.

The U.S. Agencies' most intense coordination is with the Competition Directorate of the European Union, especially on merger enforcement. Under the aegis of the US-EU Merger Working Group, the parties have agreed to best practices on cooperation in merger investigations.<sup>59</sup> They exchange, on a day-to-day basis, ideas and analyses of particular mergers that have been filed in both jurisdictions. Often they investigate in close cooperation with one another. Despite two well-known cases to the contrary,<sup>60</sup> the jurisdictions usually reach the same conclusions as to anticompetitive effects. On occasion, the jurisdictions coordinate their remedies so as to take substantially the same action at the same time on both sides of the ocean.<sup>61</sup> A good example of the extent of this cooperation is the 2010 merger of Cisco Systems and Tandberg ASA where the Justice Department was satisfied that the relief offered and accepted in the EU also cured the competition problems in the United States.<sup>62</sup> The Department accordingly closed its investigation with no challenge, concluding that "the proposed deal is not likely to be anticompetitive due to the evolving nature of the videoconferencing market and the commitments that Cisco has made to the European Commission (EC) to facilitate interoperability."<sup>63</sup>

### III. Competition Mandate

#### A. Federal Agencies

##### 1. Department of Justice Antitrust Division

The Justice Department's Antitrust Division, in enforcing the provisions of the Sherman and Clayton Acts, has a mandate to consider the entire range of competition issues: agreements in restraint of trade, single-firm monopolizing conduct, and mergers whose effect may be to lessen competition. Although as a constitutional and statutory matter this mandate is limited to acts that affect interstate commerce, the Supreme Court has taken a sufficiently expansive

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<sup>59</sup> See [http://ec.europa.eu/competition/mergers/legislation/eu\\_us.pdf](http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf).

<sup>60</sup> See Boeing/McDonnell Douglas, Statement of FTC Commissioners on Decision of July 1, 1997 to Close Investigation, CCH Trade Reg. Rep. [1997-2001 Transfer Binder] ¶ 24,295; European Commission Case IV/M877, O.J. L 336/16 (1997); GE/Honeywell, General Electric Co. v. Commission, Case T-210/01, [2005] ECR II-5575.

<sup>61</sup> See, e.g., Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Time for a Global Competition Initiative?, Remarks prepared for the EC Merger Control 10<sup>th</sup> Anniversary Conference 3-4 (Brussels, Belgium, September 14, 2000), available at <http://www.justice.gov/atr/public/speeches/6486.pdf>, citing the Halliburton-Dresser merger.

<sup>62</sup> See, e.g., the matter of Tandberg/Cisco, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/377&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>63</sup> [http://www.justice.gov/atr/public/press\\_releases/2010/257173.htm](http://www.justice.gov/atr/public/press_releases/2010/257173.htm).

approach to the interstate commerce requirement that the Justice Department is able to reach fairly localized behavior if it so chooses.<sup>64</sup> Because of the way the Justice Department is organized, the Antitrust Division has responsibility both for civil and criminal antitrust enforcement; prosecutors outside the Antitrust Division are not used for criminal antitrust investigations or prosecutions.

In addition to its antitrust enforcement mandate, the Division pursues an active competition advocacy role within the federal government. This role most often involves providing its views on the competitive effects of decisions that sectoral regulators are considering, including rule making proceedings and merger approvals, but it can also involve providing advice on antitrust analysis of specific cases that sectoral regulators are considering.<sup>65</sup> The Division has used its advocacy role to prod regulatory agencies to take greater account of competition when making their decisions, advice that regulators have not always heeded.

One important gap in the Division's mandate is in the area of trade policy. Although there are occasions when trade policy and antitrust policy are aligned (for example, the effort to end non-tariff barriers that block market access for U.S. exports<sup>66</sup>), more often trade policy runs counter to basic antitrust concepts. Thus, the Division appears to have had little influence over most aspects of U.S.-negotiated trade agreements.<sup>67</sup> Similarly, the Division has no involvement with

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<sup>64</sup> See, e.g. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) (conspiracy to exclude a single ophthalmological surgeon from "the Los Angeles market" met the Sherman Act's jurisdictional requirement).

<sup>65</sup> For the comments that the Division has filed with various federal agencies, see <http://www.justice.gov/atr/public/comments/comments.htm> (posting comments involving ten federal agencies). For an example of providing antitrust advice to other federal agencies on a less formal basis, see Sarah N. Lynch, Brent Kendall, & Jacob Bunge, *CME Inquiry Gets an Assist*, WALL ST. J., Aug. 28-29, 2010, at B3 (reporting "informal talks" between Commodities Futures Trading Commission and Justice Department lawyers concerning a futures exchange's refusal to open its market to competition) ("It isn't unusual for the Justice Department's antitrust experts to help other agencies that are looking into competition issues.").

<sup>66</sup> See Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INTL. L. 436 (1991) (discussing U.S. efforts to get Japan to increase its antitrust enforcement as a way of opening Japan's markets to imports).

<sup>67</sup> The Division indicates that "from time to time" it "participates in U.S. Government delegations negotiating agreements with other governments"; that it "occasionally" advises the United States Trade Representative of the antitrust implications of trade policy options; and that it "usually" represents the Justice Department in the interagency Trade Policy Group. See U.S. Dep't of Justice, Antitrust Division Manual, at VII-38 (4<sup>th</sup> ed. 2008), available at <http://www.justice.gov/atr/public/divisionmanual/index.htm> (hereinafter Antitrust Division Manual).

the statutory process for reviewing foreign acquisitions of domestic companies that the President has authority to block on national security grounds.<sup>68</sup>

## 2. Federal Trade Commission

The FTC's mandate is similar to the Antitrust Division's, in that the Commission can consider the same range of competition issues that the Division can. Likewise, the FTC plays an important role in competition policy advocacy, not only at the federal level but also at the state level.<sup>69</sup> Nevertheless, there are two major differences between the FTC's mandate and the Antitrust Division's.

The first is that the FTC has no power to bring criminal proceedings. As an independent administrative agency it cannot represent the United States in a criminal proceeding. Also, the statutes that the FTC enforces—the Federal Trade Commission Act and the Clayton Act—contain no criminal penalties.

The second major difference is that the FTC has a consumer protection mandate under the FTC Act to prevent “unfair or deceptive acts or practices,” as well as its competition mandate to prevent “unfair methods of competition.” This consumer protection mandate involves practices that do not necessarily have a connection with competition issues. For example, in the exercise of its consumer protection authority the Commission has promulgated its extremely popular “Do Not Call” regulation of telemarketers, a regulation that is not based on remedying an adverse effect on competition. Nevertheless, there are ways in which the consumer protection mandate can overlap with, and inform, the competition mandate. Consumer protection often deals with information asymmetries, opportunism, and information failures, all of which might not only harm consumers directly but also lead to less transparent and less efficient markets.<sup>70</sup>

Even though the Antitrust Division's and the FTC's mandates are otherwise similar, the two agencies have often been interested in somewhat different matters. A recent example of this different focus is the Commission's

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<sup>68</sup> Under the Exon-Florio Amendment to the Defense Production Act, the Committee on Foreign Investment in the United States (“CFIUS”) makes recommendations to the President regarding foreign-firm acquisitions that affect national security. *See* 50 U.S.C. App. § 2170 (k). The Attorney General is a member of the CFIUS, but the National Security Division of the Justice Department, not the Antitrust Division, serves as the Attorney General's representative. *See* U.S. Dep't of Justice, Nat'l Security Div., FY 2009 Performance Budget, Congressional Submission, at 6, *available at* <http://www.justice.gov/jmd/2009justification/pdf/fy09-nsd.pdf>.

<sup>69</sup> The FTC's state and federal level “Advocacy Filings” since 1983 are posted at [http://ftc.gov/opp/advocacy\\_date.shtm](http://ftc.gov/opp/advocacy_date.shtm).

<sup>70</sup> *See* Timothy J. Muris, Chairman, Fed'l Trade Comm'n, “The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy,” Prepared Remarks, Aug. 19, 2003 (“the core of modern consumer protection policy is to protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices, such as fraud, unilateral breach of contract, and unauthorized billing”).

concern for the granting and exercise of intellectual property rights, leading the Commission, for example, to issue a study highly critical of the patent granting policies of the U.S. Patent and Trademark Office.<sup>71</sup> By contrast, during this same period the Antitrust Division was not very concerned about the anticompetitive potential of broad intellectual property protection.<sup>72</sup> Another example is the FTC's historic interest in enforcing the anti-price discrimination provisions of the Clayton Act; the Justice Department, on the other hand, believed that enforcement of these provisions had the potential for dampening price competition. In recent years, however, the Commission's views changed, becoming more like the Antitrust Division's, and its enforcement of the anti-price discrimination law has almost completely ended.<sup>73</sup>

## B. States and Private Enforcement

Although state enforcers have statutory mandates that are at least as broad as federal enforcers, they have traditionally exercised their mandates in somewhat different ways. For example, state enforcers have long emphasized their role in obtaining damages on behalf of their citizens injured as a result of antitrust violations.<sup>74</sup> Federal enforcers could, in theory, also undertake such actions, but neither the FTC nor the Justice Department has shown much interest in allocating their enforcement resources in this way.<sup>75</sup> Similarly, the states' concern for consumer injuries has led the states to be more active than federal enforcers in the area of minimum resale price maintenance agreements, again obtaining monetary relief on behalf of retail consumers when prices are increased as a result of such agreements.<sup>76</sup>

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<sup>71</sup> See FED'L TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (critiquing the patent system).

<sup>72</sup> See Thomas O. Barnett, Ass't Att'y Gen., Dep't of Justice, Antitrust Div., Presentation to the George Mason University School of Law Symposium: Interoperability Between Antitrust and Intellectual Property 3-4 (Sept. 13, 2006), available at <http://www.usdoj.gov/atr/public/speeches/218316.pdf> (arguing for a "Schumpeterian view" of antitrust law and for "strong intellectual property protection," because "properly applied, strong intellectual property protection creates the competitive environment necessary to permit firms to profit from their inventions, which encourages innovation effort and improves dynamic efficiency").

<sup>73</sup> See William E. Kovacic, *The Modern Evolution Of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377 (2003) (discussing change in FTC enforcement norms between 1961 and 2000).

<sup>74</sup> The statutory basis for such suits is discussed *supra* notes 18-19 and accompanying text.

<sup>75</sup> For a rare example of the FTC seeking restitution on behalf of consumers, see *Mylan*, *supra* note 40 and accompanying text.

<sup>76</sup> See, e.g., *In Re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197 (D. Me. 2003) (approving \$143 million settlement for retail pricing overcharges of 3.5

There is also one important area in which the states' enforcement mandate is broader than the mandates of federal enforcers. Following the Supreme Court's decision in *Illinois Brick*<sup>77</sup> that indirect purchasers lack standing to sue for their damages, many states enacted indirect purchaser laws to allow their citizens to sue for such damages under state antitrust law.<sup>78</sup> After the Supreme Court upheld the states' power to pass such laws,<sup>79</sup> state enforcers aggressively used these indirect purchaser laws in broad multistate efforts to obtain large recoveries on behalf of end-user consumers who lack standing to sue under federal antitrust law.<sup>80</sup>

Private litigants take their competition "mandate" from the private right of action under federal and state law. Various procedural doctrines, such as standing requirements and strict pleading rules, limit this mandate in ways that do not affect government enforcers. For example, whereas government enforcers can bring suit for any violation of the antitrust laws without needing to prove harm, private litigants must show that their injury is of the type that the antitrust laws were designed to remedy, that their injuries were "direct" rather than "remote," that their damages would not be duplicative of others and not complex to determine, and that there are not more direct victims available to bring suit.<sup>81</sup> Similarly, class actions under Rule 23 of the Federal Rules of Civil Procedure are constrained by the need to show numerosity, common issues of fact or law, typicality, and adequacy of representation, whereas state *parens patriae* suits under Section 4A of the Clayton Act have no such constraints. The result is that private enforcers effectively have a narrower mandate to enforce federal antitrust law than might otherwise appear from the Clayton Act provision creating a private right of action.

#### IV. Procedural Characteristics of the U.S. Enforcement System

##### A. Introduction

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million consumers who purchased CDs at retail over a five year period). For data on state litigation against resale price maintenance between 1995 and 2004, see Statement of Harry First Before the Antitrust Modernization Commission, at 22 (Table 5) (Oct. 26, 2005), [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Statement-First.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf).

<sup>77</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>78</sup> See Kevin J. O'Connor, *Is The Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (Summer 2001) (discussing indirect purchaser statutes in various states).

<sup>79</sup> See *California v. Arc America*, 490 U.S. 93 (1989).

<sup>80</sup> See O'Connor, *supra* note 76 (detailing settlements). For more recent information, see Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 ANTITRUST BULL. 281, 300-01 (2009).

<sup>81</sup> See *Associated Gen'l Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

The purpose of this Section is to describe the procedural characteristics of the U.S. enforcement system. As indicated above, the U.S. “system” is highly fragmented, consisting of numerous competition enforcement agencies with the legal authority to act completely independently of each other. Rather than analyze the procedural characteristics of each agency in this loosely-networked environment, we have chosen to concentrate on the two main federal government enforcement agencies, the Justice Department’s Antitrust Division and the Federal Trade Commission. These agencies do the bulk of public antitrust enforcement in the United States. A description of their very different procedures should provide a sufficient (albeit not complete) understanding of the extent to which the identified norms are followed in U.S. antitrust enforcement.

This Section is organized as follows. We divide the procedural characteristics into two broad categories, case-by-case decision-making and overall institutional performance. Within the case-by-case category, we describe three aspects of the process—the decision to proceed, adjudication, and appeals—and two broad due process norms relevant to individual case decision-making—non-discrimination and proportionality of remedies. Within the institutional performance category, we describe five broad norms—operational efficiency, expertise, transparency, accountability, and the rule of law. With regard to each of these ten areas, we describe the two agencies separately. The Section concludes with a brief overall assessment of the two agencies viewed together.

## B. Case-by-Case Decision Making: Due Process Norms

### 1. The Decision to Proceed

#### a. Department of Justice

Antitrust Division enforcement decisions are made after investigation by staff attorneys and economists. Recommendations to proceed are made to the Division’s “Front Office” and all litigation, whether civil or criminal, is approved by the Assistant Attorney General in charge of the Antitrust Division. Although the Division needs no further approval to commence an enforcement action, there are times when the Attorney General or the White House might be notified before suit is filed.<sup>82</sup>

One consequence of the Antitrust Division’s dual civil and criminal enforcement powers is that while some matters (*e.g.*, merger investigations) are by their very nature civil investigations, in other matters a choice must be made to proceed by either criminal or civil investigation and, if necessary, prosecution. In

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<sup>82</sup> For example, in 1998 in the Clinton Administration, the White House Counsel’s Office and Council of Economic Advisors were informed prior to the Justice Department’s filing of its suit against Microsoft. See Harry First & Andrew I. Gavil, *Reframing Windows: The Durable Meaning of the Microsoft Antitrust Litigation*, 2006 UTAH L. REV. 641, 688 n.207.

general, the nature of the investigation is determined by the type of suspected underlying conduct. The Division currently reserves criminal investigation and prosecution for cases involving *per se* unlawful agreements among competitors in violation of Section 1 of the Sherman Act, such as price fixing, bid rigging, and customer and territorial allocations,<sup>83</sup> although even here it reserves the possibility of initiating civil rather than criminal proceedings notwithstanding the apparent *per se* nature of the suspected conduct.<sup>84</sup> All other antitrust violations are handled through civil process, although in recent years the Division has filed very few non-criminal Section 1 cases, either of a *per se* or rule of reason nature.<sup>85</sup>

In both civil and criminal matters, the parties are afforded an opportunity to present their views to the investigating staff before the staff makes its formal recommendation. This generally occurs through one or more face-to-face meetings and often includes the presentation of a “white paper” setting out the parties’ views of the case. In civil matters, the staff informs the parties in advance of its competitive concerns and the basis for those concerns, although the degree of specificity of the explanation provided by the staff is within its discretion and can vary from case to case. Where the staff recommends bringing a case, the parties usually will request and be granted the opportunity to meet with the reviewing officials at each successive level within the DOJ, including the appropriate chief of section, the Director of Operations, the relevant Deputy Assistant Attorney General and, in some cases, the Assistant Attorney General.<sup>86</sup> The Division treats criminal cases more circumspectly. Although the Director of Criminal Enforcement and the Deputy Assistant Attorney General for criminal enforcement will “ordinarily” provide an opportunity for counsel to present

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<sup>83</sup> See Antitrust Division Manual, *supra* note 67, at III-20.

<sup>84</sup> These situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action. *Id.*

<sup>85</sup> For a recent civil case, see *United States v. KeySpan Corporation*, No. 10-cv-1415 (S.D.N.Y. Feb. 22, 2010) (civil complaint challenging financial swap agreement for its effect on electricity prices), available at <http://www.justice.gov/atr/cases/f255500/255507.htm>. The case was simultaneously settled with an agreement under which KeySpan disgorged \$12 million in profits to the United States Treasury. See Competitive Impact Statement, <http://www.justice.gov/atr/cases/f255500/255578.htm>. The Justice Department subsequently entered into a similar agreement with Morgan Stanley for facilitating the anticompetitive agreement. See *United States v. Morgan Stanley*, No. 11-cv-6875 (S.D.N.Y. Sept. 30, 2011), Competitive Impact Statement, <http://www.justice.gov/atr/cases/f275800/275857.pdf> (disgorgement of \$4.8 million in profits).

<sup>86</sup> See Christine A. Varney, Ass’t Attorney Gen., Antitrust Div., Procedural Fairness, Speech to 13<sup>th</sup> Annual Competition Conference of the International Bar Association (Sept. 12, 2009) (describing opportunities for counsel to be heard during the investigation of civil cases and emphasizing the importance of procedural fairness in the Division’s internal processes), available at <http://www.justice.gov/atr/public/speeches/249974.htm>.

arguments against indictment, a meeting with the Assistant Attorney General will occur only in “very unusual circumstances.”<sup>87</sup>

The decision to proceed in criminal cases is also affected by two formalized procedural steps not applicable to civil investigations: the grand jury process and the amnesty (or “leniency”) program. The grand jury process imposes special rules of secrecy that are not applicable in civil matters and which prevent Justice Department attorneys from sharing certain information with potential defendants.<sup>88</sup> Rules relating to grand jury procedures may also prevent the Division from using information gained through the grand jury process in a subsequent civil suit.<sup>89</sup> The Division’s leniency program provides a well-publicized process that corporations and corporate employees can use to convince the Division not to bring charges against them in return for their cooperation in the investigation and prosecution of others.<sup>90</sup> Leniency grants are made on the recommendation of staff lawyers to the Deputy Assistant Attorney General for criminal enforcement and then to the Assistant Attorney General for the Antitrust Division.<sup>91</sup> Counsel are “generally afforded” an opportunity to meet with the Deputy Assistant Attorney General when an initial decision to grant leniency is being considered.<sup>92</sup>

#### b. Federal Trade Commission

FTC competition matters are investigated by staff in the Bureau of Competition and the Bureau of Economics.<sup>93</sup> Compulsory process to obtain information in such investigations must be approved by the Commission (most often acting through a single “moving Commissioner”).<sup>94</sup> Current FTC

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<sup>87</sup> See Antitrust Division Manual, *supra* note 67, at III-124. The Division provides no information on how often such meetings are actually held.

<sup>88</sup> See Fed. R. Crim. P. 6(e).

<sup>89</sup> See, e.g., *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) (government attorneys involved in grand jury investigation cannot disclose evidence brought before the grand jury to attorneys not involved in the investigation without a court order based on a “particularized need” for the evidence).

<sup>90</sup> The leniency process is described *infra* notes 188-197 and accompanying text.

<sup>91</sup> See Antitrust Division Manual, *supra* note 67, at III-107.

<sup>92</sup> See *id.* (conditional grant of leniency).

<sup>93</sup> “Large-scale” or industry-wide investigations requiring substantial expenditures require prior approval by the full Commission. See Federal Trade Comm’n, Operating Manual, ch.3, § .1.2.4.1 (hereinafter FTC Operating Manual), available at <http://www.ftc.gov/foia/adminstaffmanuals.shtm>.

<sup>94</sup> See *id.* at § .3.6.7.3.

procedures assume that staff will be in contact with the parties during the investigation and that the parties will make efforts to convince the staff not to recommend action, but current rules do not formally provide for such meetings.

When the investigation is complete, the Bureau of Competition and the Bureau of Economics file separate memoranda with the Commission giving their recommendations as to whether the Commission should vote out a complaint. It is not uncommon for the opinions of the two Bureaus to diverge.<sup>95</sup> The parties will be informed that recommendations have been forwarded to the Commission and will be told to contact the Commission. Because the federal “Sunshine Act” forbids agencies from holding closed-door meetings on official agency matters at which a quorum of commissioners is present, the parties will meet individually with each of the five Commissioners. Although the Commission’s formal procedures leave it within the discretion of each Commissioner as to whether to meet with the parties,<sup>96</sup> current practice is to provide this opportunity. Parties will take this opportunity to submit White Papers to the Commissioners, as well as to tailor their arguments to the particular interests of individual Commissioners.<sup>97</sup> A majority vote of the eligible Commissioners is necessary to issue a complaint.<sup>98</sup>

## 2. Adjudicating the Charge

### a. Department of Justice

The Antitrust Division can act only through the federal judicial system, *i.e.*, through trial-type proceedings decided in non-specialized law courts. This is true for both civil and criminal cases.

The Division exercises its enforcement authority in civil matters by seeking injunctions to prevent antitrust violations, pursuant to Section 15 of the Clayton Act<sup>99</sup> for mergers and Section 4 of the Sherman Act<sup>100</sup> for non-merger conduct. When seeking injunctive relief, the Division will request both a preliminary and final injunction, sometimes litigating both requests in the same proceeding. Merger cases tend to proceed more quickly than non-merger civil

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<sup>95</sup> See Darren S. Tucker & Amanda P. Reeves, *Effective Advocacy Before the Commission*, 24 ANTITRUST 52, 54 (Summer 2010).

<sup>96</sup> See FTC Operating Manual, *supra* note 93, at § .3.6.1.

<sup>97</sup> See Tucker & Reeves, *supra* note 93, at 54-56 (describing advocacy process). The authors, who are attorney-advisors to FTC Commissioner Rosch, conclude that “[t]o outsiders, the decision-making process at the Commission may seem like a black box.” *Id.* at 56.

<sup>98</sup> See 16 C.F.R. § 3.11(a).

<sup>99</sup> 15 U.S.C. § 25.

<sup>100</sup> 15 U.S.C. § 4.

cases. This is usually at the behest of the merging parties, as prolonged delay in reaching a final outcome can erode the economic benefits of the merger. Complex monopolization cases, on the other hand, carry the potential for highly protracted litigation. The monopolization case brought against IBM in 1969, for example, continued in trial until 1982, when the Justice Department decided to obtain dismissal of its complaint.<sup>101</sup> More recent cases have been tried more expeditiously, as judges and the government have become concerned about the costs of delay. The trial in the Microsoft case, the most recent major Justice Department monopolization suit, was tried in sixteen months, from the filing of the complaint to the close of the evidence.

A significant percentage of litigated Antitrust Division cases are brought as criminal cases, mostly for alleged cartel activity in violation of Section 1 of the Sherman Act. Judicial process in federal criminal cases is governed by the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the local rules of court. These rules cover the entire process, from summoning a grand jury and returning an indictment, to arraignment, pretrial discovery and motions, and trial and sentencing.

U.S. criminal procedure provides heightened protections for defendants. These include Fourth Amendment protections against unreasonable searches and seizures, the Fifth Amendment privilege against self-incrimination,<sup>102</sup> the Sixth Amendment right to a speedy trial by jury,<sup>103</sup> and the due process right to have guilt proved beyond a reasonable doubt (as compared with a “preponderance of the evidence” standard for liability in civil antitrust cases).<sup>104</sup> On the other hand, the defendant’s right to discover evidence in criminal cases is more limited than in civil cases,<sup>105</sup> while the government’s ability to use the powers of the grand jury gives the government a powerful weapon for investigating criminal antitrust offenses.<sup>106</sup>

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<sup>101</sup> See Barnaby J. Feder, *End Of Action On I.B.M. Follows Erosion Of Its Dominant Position*, N.Y. TIMES, Jan. 9, 1982, at 1.

<sup>102</sup> “No person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V.

<sup>103</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

<sup>104</sup> See *In re Winship*, 397 U.S. 358 (1970).

<sup>105</sup> See F.R.Crim. P. 16.

<sup>106</sup> These powers were established in an early Sherman Act criminal prosecution, *Hale v. Henkel*, 201 U.S. 43 (1906).

## b. Federal Trade Commission

As discussed above, the FTC has statutory authority to seek preliminary and permanent injunctions in federal court to stop parties from violating the FTC Act.<sup>107</sup> When the Commission proceeds under this authority, it is subject to the same adjudicatory process as is the Antitrust Division when it seeks injunctive relief in federal court.

In addition, section 5(b) of the FTC Act<sup>108</sup> empowers the FTC to commence an administrative adjudicatory proceeding challenging alleged “unfair methods of competition,” which includes any conduct that would violate the Sherman Act or the “spirit” of the Act. Section 11 of the Clayton Act parallels Section 5(b) of the FTC Act in authorizing FTC administrative enforcement of alleged Clayton Act violations, including potentially anticompetitive mergers.<sup>109</sup>

Several aspects of FTC administrative enforcement have caused significant controversy. These include the identity and choice of Administrative Law Judges, the FTC’s dual roles as both prosecutor and appellate tribunal, and the speed (or lack thereof) of administrative proceedings. Some of these issues implicate due process norms.

The Administrative Procedure Act (“APA”), which governs the rulemaking process of federal administrative agencies, allows the Commission itself to preside over a hearing or to designate one of its members to preside over the hearing.<sup>110</sup> The FTC Act and its Rules of Practice also authorize such a practice.<sup>111</sup> The FTC has exercised this right from time to time, appointing a Commissioner as the ALJ to handle discovery and fact-finding in the administrative trial. The FTC typically justifies such action as a means of expediting the administrative process, pointing to the antitrust expertise and litigation experience of the chosen Commissioner.<sup>112</sup>

The practice of appointing a Commissioner to serve in the capacity of an ALJ, although permitted as a matter of the FTC’s discretion, calls into question the impartiality of the decision-maker. This concern is especially acute if the

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<sup>107</sup> See *supra* notes 39-45 and accompanying text.

<sup>108</sup> 15 U.S.C. § 45(b).

<sup>109</sup> 15 U.S.C. § 21.

<sup>110</sup> 5 U.S.C. § 556(b).

<sup>111</sup> See 15 U.S.C. § 49; 16 C.F.R. § 3.42(a).

<sup>112</sup> See, e.g., Press Release, FTC, *FTC Designates Commissioner J. Thomas Rosch as ALJ in Case Challenging Inova Health System Foundation’s Acquisition of Prince William Health System, Inc.* (May 9, 2008), available at <http://www.ftc.gov/opa/2008/05/inovafyi.shtm>.

Commissioner serving as ALJ in a particular case participated in the FTC's decision to vote out the complaint, but it may also be problematic if the Commissioner had learned about the case in connection with a Commission decision to issue compulsory process or if the Commissioner had received periodic updates on the case from the Bureau of Competition.<sup>113</sup> For a Commissioner to then preside over an administrative hearing can therefore create an appearance of impropriety beyond the usual concern that arises when the Commission both approves complaints (the prosecutorial function) and reviews ALJ findings and decisions (the adjudicative function).<sup>114</sup> This, of course, is a problem inherent in the integrated agency model. Respondents have, in some cases, sought recusal or disqualification of individual Commissioners from acting as the ALJ. Such motions, which are heard by the FTC itself, have generally been unsuccessful.<sup>115</sup>

Several changes in FTC practice may make the issues surrounding its administrative hearings more significant. As noted above, in 2009 the FTC changed its rules of practice to make it more likely that it will pursue cases using its administrative hearing procedures even where it first loses a motion for a preliminary injunction in federal district court.<sup>116</sup> The Commission has also taken the position that the commencement of Part 3 administrative litigation obviates the need for separate discovery or an evidentiary hearing in federal court.<sup>117</sup> The FTC's recent approach signals its intent to utilize fully its administrative enforcement powers, perhaps largely supplanting the role of federal district courts as the first-level arbiter in disputed cases and returning to its earlier practice of continuing with an administrative hearing even after losing a preliminary injunction.

### 3. Appeals

#### a. Decision Not to Proceed

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<sup>113</sup> See Tucker & Reeves, *supra* note 93, at 53 (describing such contacts).

<sup>114</sup> See J. Thomas Rosch, So I Serve as Both a Prosecutor and a Judge – What's the Big Deal?, Remarks before the American Bar Ass'n, Aug. 5, 2010, at 12-16 (discussion of due process issue by FTC Commissioner who has served as an ALJ), available at <http://ftc.gov/speeches/rosch/100805abaspeech.pdf>.

<sup>115</sup> See, e.g., In the Matter of Whole Foods Market, Inc., and Wild Oats Markets, Inc., File No. 0710114, Docket No. 9324, *Order Denying Respondent's Motion To Disqualify The Commission* (Sept. 5, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/080905order.pdf>; In the Matter of Inova Health System Foundation, and Prince William Health System, Inc., File No. 0610166, Docket No. 9326, *Statement of Commissioner J. Thomas Rosch Accompanying Order Certifying Respondents' Motion to Recuse* (May 29, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080529ordercert.pdf>.

<sup>116</sup> See *supra* notes 41-43 and accompanying text.

<sup>117</sup> See, e.g., *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. 2008).

No appeal lies from an allegedly inappropriate decision not to proceed, either by the FTC or by the Justice Department. In this respect, U.S. law differs from European law. In the European Union, an interested party may appeal from a European Commission decision not to bring proceedings.<sup>118</sup> A fortiori, no appeal lies from insufficient explanation of a decision not to proceed. Indeed in the U.S., unlike the EU, the authorities are not required to give reasons for not challenging a merger, although both U.S. agencies have done so from time to time.<sup>119</sup> In this respect the U.S. has opted for flexibility and efficiency in enforcement decisions, and to some extent protection of confidentiality, in preference to greater transparency.

#### b. Department of Justice

From 1903 to 1974 appeals of Justice Department civil cases went directly from the district court to the Supreme Court. Congress changed this practice in 1974 and civil appeals are now taken to the relevant federal circuit court of appeals, with the losing party able to petition the Supreme Court for discretionary review.<sup>120</sup>

Appeals in criminal cases have always been taken to the court of appeals and then, through discretionary review, to the Supreme Court. Convicted defendants have numerous grounds on which they can base an appeal, including the imposition of an improper sentence and the refusal of a court to allow the defendant to enter a plea of *nolo contendere* (no contest). The government's rights to appeal are much more limited. Most importantly, because of the constitutional protection against double jeopardy, the government may not appeal a judgment of acquittal. The government may, however, appeal a trial judge's sentence if it feels that the sentence was improperly low.<sup>121</sup>

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<sup>118</sup> See *Impala v. Commission* (Sony/BMG), Case T-464/04, [2006] ECR II-2289.

<sup>119</sup> See, e.g., *Boeing/McDonnell Douglas*, Statement of FTC Commissioners on Decision of July 1, 1997 to Close Investigation, CCH Trade Reg. Rep. [1997-2001 Transfer Binder] ¶ 24,295; *Whirlpool Corporation and Maytag Corporation*, Statement of Department of Justice on Decision of March 29, 2006 to Close Investigation, 7 CCH Trade Reg. Rep. ¶ 50, 209; *XM Satellite Radio Holdings and Sirius Satellite Radio*, Statement of Department of Justice on Decision of March 25, 2008 to Close Investigation, 7 CCH Trade Reg. Rep. ¶ 50, 277.

<sup>120</sup> Antitrust Procedures and Penalties Act, 88 Stat. 1709, Pub. L. 93-528, sec. 4, 15 U.S.C. § 29 (Dec. 21, 1974). Direct Supreme Court review is still possible, but only for cases "of general public importance in the administration of justice." Since the passage of the 1974 Act, the Supreme Court has only reviewed two such cases, both of which involved the Justice Department's 1982 settlement decree with AT&T. See *California v. United States*, 464 U.S. 1013 (1983); *Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>121</sup> 18 U.S.C. § 3742(b).

Appellate procedures are governed by detailed federal court rules that apply both to civil and criminal appeals. Appellate courts are required to provide a fair and timely opportunity to be heard, with adequate notice of the evidence to be relied on and adequate time to prepare a defense. The courts themselves are composed of independent decision-makers. Federal court judges are nominated by the President and confirmed by the Senate after a usually thorough screening process. Judges are required to avoid conflicts of interest. For example, they may not sit on cases involving a party in which they have stock holdings. These rules are self-policed in the courts,<sup>122</sup> but the Supreme Court and courts of appeals are often called on to disqualify judges not only for actual conflicts of interest that show bias but also for conduct that may appear to show bias.<sup>123</sup>

Standing rules for filing appeals are rigorous. For example, non-parties directly interested in the outcome do not automatically have standing to appeal from a judgment,<sup>124</sup> as they do in Europe. Notwithstanding these limitations on

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<sup>122</sup> See, e.g., the statement of Chief Justice Rehnquist in *Microsoft v. United States*, 530 U.S. 1301 (2000), denying petition for direct appeal from the district court. Chief Justice Rehnquist disclosed that Microsoft had retained his son's law firm as local counsel in Boston in private antitrust litigation and explained why in his opinion his participation in the *Microsoft* appeal would create neither a conflict nor the appearance of one.

Perhaps the most famous case of recusal is *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). On appeal from a district court decision dismissing the complaint, four justices recused themselves because of their involvement with the defendant and thus a quorum of six could not be mustered. Accordingly, the Supreme Court, pursuant to a specially enacted statute, referred the case to an ad hoc panel of the Court of Appeals to decide the case in its stead. See *Alcoa* at 421.

<sup>123</sup> See, e.g., *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463-65 (D.C. Cir. 1995), where the Justice Department and Microsoft appealed the district court's refusal to enter a proposed consent decree. The court of appeals, observing that the district court judge, Judge Sporkin, had apparently been influenced by reading a book outside of the record and had made comments evidencing his distrust of Microsoft's lawyers and his poor view of Microsoft's practices, concluded that a reasonable observer would question the judge's impartiality. It accordingly remanded the case for assignment to another district court judge, with instructions to enter the decree.

An issue of disqualification also arose in the later monopolization case against Microsoft, involving different conduct. In the final stages of the trial, the district court judge, Judge Thomas Penfield Jackson, gave secret interviews to selected reporters, obtaining promises that the interviews would be embargoed until after final judgment was entered, disclosing his view on the facts, the law, and the appropriate remedy and offering "contemporaneous impressions of testimony" — including his disbelief in the credibility of key Microsoft witnesses. The appellate court found that the judge had breached his duty of appearance of impartiality. While affirming most of the case on the liability issues, and dismissing and remanding other claims, the appellate court disqualified the judge retroactive to the date that he had ordered a breakup of Microsoft. See *United States v. Microsoft Corp.*, 253 F. 3d at 107-18.

<sup>124</sup> In some cases, however, particularly where the appellant withdraws from a case of public importance, courts have allowed an intervenor or an amicus to step into the appellant's place. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (intervenor); *Utah Pub. Service Comm'n v. El Paso Nat'l Gas Co.*, 395 U.S. 464 (1969)

access to courts, there appears to be nothing in the appeals process that might suggest a systemic lack of due process. Any arguable denial of due process would arise in a particular litigation, and is subject to challenge in court.

### c. FTC

Appeals from the Commission's final order, entered after an administrative trial, may be taken to a federal circuit court of appeals.<sup>125</sup> A party can file an appeal in any district in which the party resides or does business or where any act that was a subject of the proceeding took place.<sup>126</sup> The Federal Rules of Appellate Procedure, and where relevant, local federal circuit rules, apply.

Cases in which the FTC has sought injunctive relief in district court may be appealed to the relevant federal circuit courts of appeal. To challenge a federal circuit court opinion, the party must petition the U.S. Supreme Court for a writ of certiorari. Writs of certiorari are seldom granted, absent significant questions of law or policy, or a conflict among the federal circuits.

The FTC is an expert body charged with both finding the facts and interpreting and applying the law. Normally in the United States, both the findings of fact and the policy/law judgments of the expert commission are entitled to deference by the appellate courts.<sup>127</sup> At least, findings of fact should not be overturned when they are supported by substantial evidence.<sup>128</sup> Accordingly, the opinions of expert commissions are not frequently overturned. Notwithstanding the deference that courts often accord administrative findings, several important FTC decisions have been reversed on interpretations of law and mixed questions of law and fact<sup>129</sup> and critics have expressed concern that FTC decisions are not accorded adequate deference in the courts.<sup>130</sup>

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(amicus). *See also* Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004), allowing two amici industry associations to intervene in Massachusetts' appeal from entry of a proposed consent decree where the amici had raised additional considerations, were abreast of the issues, and would not need more time to prepare.

<sup>125</sup> *See* 15 U.S.C. §§ 21(c), 45(c).

<sup>126</sup> For an indication that before filing a complaint the Commissioners may consider the circuit court to which the case might be appealed, *see* Tucker & Reeves, *supra* note 93, at 53.

<sup>127</sup> *See* Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984); Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986).

<sup>128</sup> *See, e.g.*, Fall River Dyeing & Finishing Corp. v. NLRB, 482 US 27, 42 (1987).

<sup>129</sup> *See, e.g.*, California Dental Association v. FTC, 526 U.S. 756 (1999). In *Indiana Fed'n of Dentists*, the Supreme Court held that the FTC's deferential standard is coextensive with the APA's requirement that a court defer to an agency's factual findings so long as they are supported by "substantial evidence." 5 U.S.C. § 706(2)(E); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454

#### 4. Equality and Non-Discrimination

When can discrimination on the basis of nationality undermine markets and offend the spirit of antitrust? There are two major points of concern. One is in connection with the treatment of foreign goods and persons who are selling into the U.S.; the other is in connection with a possible nationalistic motivation to bless “national champions” at the expense of out-of-country rivals and consumers. There is no indication, however, that in either regard U.S. antitrust enforcement fails to treat similarly placed persons equally or discriminates on the basis of nationality. Indeed, U.S. antitrust officials normally pride themselves on supporting competition, whatever its source. Competition is nation blind.

A particularly good example is the Japanese electronics antitrust case, *Matsushita Electronics Indus. v. Zenith Radio Corp.*<sup>131</sup> The Japanese electronics industry had been damaging the U.S. electronics industry by charging significantly lower prices in the U.S. market than the American firms. The U.S. producers sued the Japanese firms, alleging that they had entered into a predatory-pricing cartel. This was a time of American paranoia that Japanese competition was making dangerous inroads into American markets.<sup>132</sup> After extensive discovery, the defendants moved to dismiss the complaint on grounds that the Americans had no plausible evidence of a low price conspiracy, and that a below-cost conspiracy would not have made sense because it would have cost more than it could have returned in profits. When the Japanese firms lost in the court of appeals, the Justice Department supported their petition for review in the Supreme Court and, after the Court decided to take the case, filed an amicus brief in support of their position. The Supreme Court held for the Japanese firms. It took the occasion to articulate the importance of freedom of low pricing, the implausibility of a low price conspiracy, and the double implausibility that a cartel engaged in price predation could ultimately obtain high prices. The Court’s opinion has been much criticized for the presumptions underlying its economic analysis and its inattention to cultural detail (it has also been praised), but it could never be criticized on grounds of protecting the Americans against the Japanese.

We know of no U.S. antitrust case that leans in the opposite direction – that is, one that condemns conduct of foreign competitors under standards looser

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(1986) (holding that the standard of review under § 5(c) is “essentially identical” to the substantial evidence test). *See also* *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005). For a description of FTC process and appellate review, see William C. MacLeod, *The Federal Trade Commission and the Federal Trade Commission Act* §§ 9:40-9:57, in *Antitrust Advisor* (Irving Scher, ed., 4th ed. 2009).

<sup>130</sup> *See, e.g.*, Stephen Calkins, *California Dental Association: Not a Quick Look But Not The Full Monty*, 67 *Antitrust L.J.* 495, 555 (2000).

<sup>131</sup> 475 U.S. 574 (1986).

<sup>132</sup> *See, e.g.*, Michael Crichton, *Rising Sun* (1992).

than courts would apply to the same conduct by American firms. A matter criticized as nationalistic, whether fairly or unfairly, is the U.S. closure of investigation of the Boeing/McDonnell Douglas merger. Boeing was the largest manufacturer of commercial jet aircraft, accounting for about 64% of the world market. The European consortium Airbus Industrie was second with about 30%. Boeing wished to acquire the only other competitor, McDonnell Douglas, with about 6%. The U.S. Department of Defense strongly supported the merger because it would consolidate assets for building military jets (military jets were not part of the contested relevant market). The FTC opened an investigation and later closed it, announcing that there was no antitrust problem; McDonnell Douglas had failed to invest in current technology and could no longer compete for new orders of commercial jet aircraft. The FTC (unusually) issued a closing statement noting—and vehemently denying—speculation that the merger was actually anticompetitive and that the FTC was merely supporting a national champion.<sup>133</sup> In a parallel investigation, the European Competition Directorate investigated the merger and concluded that it was anticompetitive. It ultimately allowed the transaction but only with stringent and elaborate conditions.<sup>134</sup>

One area in which it might appear that antitrust enforcement is stronger against foreign firms than domestic enterprises is criminal prosecutions. Many of the recent major cartel prosecutions have involved international cartels composed almost entirely of non-U.S. participants.<sup>135</sup> The Justice Department has prosecuted these cartels vigorously and non-U.S. executives of these firms have served sentences of imprisonment in U.S. jails.<sup>136</sup> Nevertheless, it is difficult to make out a claim that these cartels were discriminatorily prosecuted, particularly given their simultaneous prosecution by enforcement agencies around the world. There is also no evidence that U.S. enforcement authorities fail to investigate or prosecute U.S. firms or their executives for price-fixing activities.

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<sup>133</sup> See Statement of FTC Commissioners on Decision of July 1, 1997 to Close Investigation, CCH Trade Reg. Rep. [1997-2001 Transfer Binder] ¶ 24,295.

<sup>134</sup> Case IV/M877, O.J. L 336/16 (European Commission 1997).

<sup>135</sup> As of March 5, 2012, 80 of the 93 firms that had been fined \$10 million or more were non-U.S. firms (86 percent); 18 of the 20 firms that had been fined \$100 million or more were non-U.S. firms (90 percent). See Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, <http://www.justice.gov/atr/public/criminal/sherman10.html> (last viewed May 14, 2012).

<sup>136</sup> See Scott D. Hammond, Dept’y Ass’t Att’ny Genl., “The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades,” Speech to The 24th Annual National Institute On White Collar Crime at 7-8 (Feb. 25, 2010) (“Since May 1999, more than 40 foreign defendants have served, or are serving, prison sentences in the United States for participating in an international cartel or for obstructing an investigation of an international cartel. Foreign nationals from France, Germany, Japan, Korea, Norway, the Netherlands, Sweden, Switzerland, Taiwan and the United Kingdom are among those defendants.”), *available at* <http://www.justice.gov/atr/public/speeches/255515.pdf>.

The cosmopolitan approach that U.S. antitrust enforcement authorities normally take, welcoming open markets and competition on the merits without regard to nationality, sometimes contrasts with Congressional attitudes and pressures. For example, U.S. Congressional opposition defeated the 2005 bid by China's CNOOC for Unocal and the 2006 bid by Dubai Ports World of United Arab Emirates for contracts to operate six U.S. ports.<sup>137</sup> U.S. statutes outside of the antitrust area, such as the antidumping and tariff laws and the Defense Production Act, which sets rules for clearance of foreign investment, may also facilitate nationalism and protectionism.<sup>138</sup>

## 5. Proportionality of Remedies

The U.S. antitrust agencies and the courts are generally attentive to remedies. They seek a remedy tailored to the violation and likely to cure the competition problem. In the merger context, the Antitrust Division of the Department of Justice has been particularly clear on this point. The Department of Justice Antitrust Division's Guide on Merger Remedies states:<sup>139</sup>

There must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions. Focusing carefully on the specific facts of the case at hand will not only result in the selection of the appropriate remedies but will also permit the adoption of remedies specifically tailored to the competitive harm. \* \* \* The Division will insist upon relief sufficient to restore competitive conditions the merger would remove.<sup>140</sup>

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<sup>137</sup> See Up to 8 companies vie for Dubai's US port assets, Reuters, Sept. 1, 2006; C. Fred Bergsten, op-ed., Avoiding Another Dubai, Washington Post, Feb. 28, 2006 at A15; US Lawmakers Meddle in CNOOC's Unocal Bid, China Daily, July 6, 2005; Edward M. Graham, op-ed., No Reason to Block the Deal, Far Eastern Economic Rev., July/Aug 2005 at 24.

<sup>138</sup> See *supra* note 68 and accompanying text. CNOOC and Dubai Ports, see *supra* note 137, were aired as CFIUS matters.

<sup>139</sup> See <http://www.justice.gov/atr/public/guidelines/205108.pdf>.

<sup>140</sup> Footnote 2 of the guide collects the authorities thus: Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (In a Section 7 action, relief "necessarily must 'fit the exigencies of the particular case.'"); ... Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1228 (D.C. Cir. 2004) ("[T]he court carefully considered the 'causal connection' between Microsoft's anticompetitive conduct and its dominance of the market . . . ."); United States v. Microsoft Corp., 253 F.3d 34, 105-07 (D.C. Cir. 2001) (Relief "should be tailored to fit the wrong creating the occasion for the remedy."); Yamaha Motor Co. v. FTC, 657 F.2d 971, 984 (8th Cir. 1981) (Relief barring certain vertical restrictions "goes beyond any reasonable relationship to the violations found."); United States v. Microsoft Corp., 231 F. Supp. 2d 144, 154, 202 (D.D.C. 2002), *aff'd sub nom*, 373 F.3d 1199 (D.C. Cir. 2004).

When relief has no reasonable relationship to the violations found, it must be set aside. Indeed, courts have set aside remedies that are not related to competition concerns even if the remedy might be regarded as good social policy.<sup>141</sup>

Although the U.S. Supreme Court has not specified proportionality as a goal of antitrust remedies,<sup>142</sup> commentators have argued that proportionality is important in crafting them.<sup>143</sup> But proportionality is not a self-executing goal. Moreover, what qualifies as appropriate relief is often a matter of contention and may vary with time. For example, in the 1974 *Ford/Autolite* merger case, relied on by the Department of Justice Guide on Merger Remedies discussed above, the Supreme Court held that a 10-year injunction against Ford's entry into the auto spark plug market, in addition to divestiture, was appropriate to remedy Ford's vertical acquisition of the number three spark plug company. One may confidently speculate that these obligations would be regarded as gargantuan when judged by 21st century measures.

In the *Microsoft* monopolization case, the court of appeals explicitly required the district court to enter a decree "tailored to the harm" that the plaintiffs had proved. Although the final settlement that the district court approved closely tracked the exact conduct shown to be illegal, that settlement has been criticized by many as having fallen far short of the relief necessary to cure the effects of Microsoft's anticompetitive behavior.<sup>144</sup> Indeed, some have

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<sup>141</sup> See *Wal-Mart Stores Inc. v. Rodriguez*, 238 F. Supp. 2d 423 (D.P.R.) (preliminarily enjoining Puerto Rican government minister from imposing buy-national and employee-retention obligations on Wal-Mart as a condition of acquiring Supermercados grocery chain; conditions violated the Commerce and Equal Protection clauses of the Constitution), *vacatur granted*, 322 F.3d 747 (1st Cir. 2003).

<sup>142</sup> See *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972) (purpose of remedial decree is to "unfetter a market from anticompetitive conduct"); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968) (decree should "terminate the illegal monopoly" and "ensure that there remain no practices likely to result in monopolization in the future"). See also E. Thomas Sullivan, *Antitrust Remedies in the U.S. and EU: Advancing a Standard Of Proportionality*, 48 *Antitrust Bull.* 377, 378, 423 (2003) (observing that "proportionality" is a term not normally employed in the United States).

<sup>143</sup> See, e.g., William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 *Conn. L. Rev.* 1285, 1312-1313 (1999) ("Remedies should be proportional in the sense that they reflect the dangers of the conduct by which a firm has achieved or sustained a position of dominance"); John E. Lopatka & William H. Page, A (Cautionary) Note on Remedies in the *Microsoft* Case, 13 *Antitrust* 25, 26 (1999) ("Indeed, one of our principal points is that a remedy should be proportionate to the violation."). See also Philip E. Areeda & Herbert Hovenkamp, II *ANTITRUST LAW* ¶ 303 at 37 (3rd ed. 2007).

<sup>144</sup> Carl Shapiro, *Microsoft: A Remedial Failure*, 75 *Antitrust L.J.* 739 (2009); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 300 (2005). Not all commentators are critical, of course. See, e.g., William H. Page, *Mandatory Contracting Remedies in the American and European Microsoft Cases*, 75 *Antitrust L.J.* 787 (2009); John E. Lopatka, *Assessing Microsoft from a Distance*, 75 *Antitrust L.J.* 811 (2009).

argued that excessive focus on “tailoring” can produce inadequacies where the defendant’s conduct is systemic.<sup>145</sup> Further, in a globalized economy, there may be a misfit between national remedies and global harms, leading to remedies that are insufficiently robust to counter transnational violations.<sup>146</sup>

In the criminal area, maximum penalties are set by statute, but the penalties in specific cases are governed by the federal Sentencing Guidelines, which apply to all criminal cases in federal court. Because current Justice Department policy is to criminally prosecute only price fixing, bid rigging or market allocations, criminal penalties in antitrust cases are imposed only in a limited range of offenses, and, most importantly, not in monopolization cases.<sup>147</sup>

Under the Sentencing Guidelines, fines are explicitly keyed to monetary harm. The base corporate fine for price-fixing cases is set at twenty percent of the volume of commerce affected, an amount that the U.S. Sentencing Commission believes represents an average overcharge of ten percent of the selling price plus a welfare loss of ten percent.<sup>148</sup> The total amount of the fine is also capped, either at the Sherman Act’s \$100 million maximum fine or at a fine of twice the gain or loss, whichever is larger.<sup>149</sup>

There have been a number of very substantial fines imposed in international cartel cases and some have argued that the combination of high fines in the United States and in other jurisdictions, plus private treble-damages recoveries in the United States, could result in excessively high penalties.<sup>150</sup> Other commentators criticize the fine structure as producing fines that are too low, leading to under-deterrence because “average” cartel overcharges are, it is estimated, more than twenty percent and because the fines fail to account

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<sup>145</sup> See, e.g., Harry First, *Netscape is Dead: Remedy Lessons from the Microsoft Litigation* (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1260803](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260803).

<sup>146</sup> See Eleanor Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 *Tulane L. Rev.* 571 (2005).

<sup>147</sup> Under the Sherman Act fines can be imposed only in the context of a criminal prosecution. There is no provision for “civil fines,” although it has been argued that the law should be changed to allow for the imposition of civil fines at least in monopolization cases. See Harry First, *The Case for Antitrust Civil Penalties*, 76 *ANTITRUST L. J.* 127 (2009).

<sup>148</sup> See U.S. Sentencing Guidelines Manual § 2R.1.1(d) and Application Note 3 (2010), available at [http://www.ussc.gov/Guidelines/2010\\_guidelines/Manual\\_HTML/2r1\\_1.htm](http://www.ussc.gov/Guidelines/2010_guidelines/Manual_HTML/2r1_1.htm).

<sup>149</sup> See 18 U.S.C. § 3571 (c), (d).

<sup>150</sup> See, e.g., Michael L. Denger & D. Jarrett Arp, *Criminal And Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 *ANTITRUST* 41 (Summer 2001).

adequately for the fact that not all cartels are discovered or prosecuted.<sup>151</sup> Because fines in cartel cases have been accepted under negotiated plea agreements rather than litigated in court, it is difficult to tell how close the fines come to an accurate measure of harm, or whether the parties have agreed to consider the impact of non-U.S. effects, or whether there has been some multiplier applied to take account of the likelihood of detection.<sup>152</sup>

Sentences of imprisonment under the Sherman Act are also subject to the Sentencing Guidelines.<sup>153</sup> As with fines, the term of imprisonment for price-fixing is keyed to monetary harm, with the length increasing with the volume of commerce involved. Unlike fines, however, there is no metric for correlating economic harm to the severity of the sentence. It is difficult to say how much a year in prison is “worth” to an offender or to society, making it hard to assess whether offenders are being punished too severely or not severely enough. When the Sentencing Guidelines were initially promulgated in 1987, the Sentencing Commission made an explicit effort to increase prison sentences for all white collar offenders, responding to a general feeling that such sentences were too low.<sup>154</sup> In recent years Congress has also increased statutory maxima in a number of white collar crimes, including an increase in antitrust penalties in 2004 from a three-year maximum to a ten-year maximum.<sup>155</sup> Indeed, enforcers often stress the

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<sup>151</sup> See, e.g., John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU fining policies*, 51 *Antitrust* 983 (2006) (surveying prior studies showing a range of average overcharges between 18 and 37 percent; concludes that fines are “far too low”).

<sup>152</sup> The Division currently takes the view that non-U.S. commerce can be relevant to a defendant’s culpability (both individual and corporate) but that it will not include non-U.S. commerce in calculating the “volume of commerce” under the Sentencing Guidelines. See Scott D. Hammond, Dept’y Ass’t Attny. Gen’l, U.S. Dept. of Justice, “Charting New Waters In International Cartel Prosecutions,” at 14 n.28 (March 2, 2006) (noting two corporate plea agreements in which sales outside the United States were considered), <http://www.justice.gov/atr/public/speeches/214861.pdf>. The Sentencing Guidelines are silent on the issue.

<sup>153</sup> Since 2005 the Guidelines have been discretionary, rather than mandatory, see *United States v. Booker*, 543 U.S. 220 (2005), but courts still impose “within Guidelines” sentences in a majority of all cases. See U. S. Sentencing Comm’n Sourcebook of Federal Sentencing Statistics Tbl. N (2009) (for FY 2009, 56.8 % of sentences within Guidelines range; 15.9 % below Guidelines range; 25.3% Government-sponsored below Guidelines range; 2% above Guidelines range), available at <http://www.ussc.gov/ANNRPT/2009/TableN.pdf>.

<sup>154</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 1 § 4(d), 52 Fed. Reg. 18,046 (May 13, 1987) (“Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’ If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.”).

<sup>155</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 661 (2004) (codified as amended in scattered sections of 15 U.S.C.) (increasing imprisonment from three-year maximum to ten-year maximum).

importance of imprisonment for attaining adequate deterrence.<sup>156</sup> Nevertheless, most prison sentences in cartel cases have been agreed to in plea negotiations and do not come anywhere close to the statutory maximum.<sup>157</sup> Whether they are disproportionate to the harm caused cannot be determined, but at least the sentences are transparent so that an offender can argue over whether a particular sentence is out of line with sentences in similar cases.<sup>158</sup>

The principle of proportionality of remedies requires that the remedy must be proportionate to the aims of the statute in condemning the conduct; that is, reasonably related and not excessive in view of the aims. In antitrust the aims are several: to restore competition, to deter, to compensate, and for criminal violations, also to punish. It does not appear that U.S. remedies are disproportionate, or that they otherwise raise concerns of due process.

### C. Institutional Performance Norms

#### 1. Operational Efficiency

##### a. Setting Enforcement Priorities

It is not clear how the Agencies set enforcement priorities.<sup>159</sup> To some extent enforcement agendas at both Agencies are determined by external events that are not within their control. The announcement of a merger can trigger immediate review; private parties can bring complaints of antitrust violations to the Agencies that may lead to an extended investigation and, possibly, litigation;

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<sup>156</sup> See Hammond, *supra* note 136, at 11 (“The Antitrust Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.”)

<sup>157</sup> In 2007, the average prison sentence for cases prosecuted by the Antitrust Division was 31 months; this was an historic high, but it includes non-antitrust offenses as well as antitrust violations. See *id.* at 9. As of 2010, the longest prison sentence that a foreign national has agreed to serve in an antitrust case is 30 months. See *United States v. Whittle*, Crim. No. H-07-487-03, S.D. Tex. (12/3/07) (Plea Agreement) (to be reduced by amount of time served in the United Kingdom for same cartel activities), available at <http://www.justice.gov/atr/cases/f228500/228582.htm>.

<sup>158</sup> All plea agreements are public records and the Justice Department posts all agreements on its website. Note that inequality between co-defendants or among similar defendants is not formally accounted for in the Sentencing Guidelines, although judges do sometimes make an effort to compare sentences in similar cases. See *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008) (comparing sentences in fraud cases).

<sup>159</sup> The FTC formally reports some of its enforcement agenda on a semi-annual basis. See, e.g., FTC, Statement of Regulatory Priorities, 75 Fed. Reg. 79695 (Dec. 20, 2010); Federal Trade Comm’n Act, § 22 (d), 15 U.S.C. § 57b-3(d) (requiring semiannual publication of regulatory agenda listing rules FTC intends to propose or promulgate in the following 12 months).

decrees from past cases need to be policed and enforced.<sup>160</sup> To a large extent, however, both Agencies have a great deal of discretion in setting their enforcement agendas. For the Antitrust Division, discretionary enforcement policies have been a blend of the overall political goals of the national administration and the specific policies that the Assistant Attorney General in charge of the Antitrust Division wants to pursue. For the FTC, discretionary enforcement generally reflects the priorities of the Chairman. Given that the Chairman is politically appointed by the President, these priorities have been a blend of the national administration's goals and the Chairman's policy preferences. In addition, individual Commissioners may identify specific policy areas in which they are interested. Their interest may, in turn, provide support to staff to pursue enforcement in these areas.

#### b. Agency Merger Review

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act")<sup>161</sup> requires parties to mergers exceeding certain size-of-company and size-of-transaction thresholds and having a sufficient nexus to U.S. commerce to file a notification form with the FTC and the Antitrust Division and observe a waiting period prior to consummating the merger. For most HSR-reportable transactions, the initial waiting period is thirty calendar days.<sup>162</sup> This period provides the government time to determine whether to allow the transaction to proceed or to conduct a more extensive investigation. The initial waiting period may be terminated early if the parties so request and the government determines there are no material competitive issues, or it may simply be allowed to expire.<sup>163</sup> In either case, the parties may then close their transaction. Alternatively, the government can extend the waiting period by issuing a request for additional information and documentary material, known as a "second request."<sup>164</sup> If a second request is issued, the waiting period during which the parties cannot close their transaction is extended, in most instances until thirty days after both parties have

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<sup>160</sup> See, e.g., Federal Trade Comm'n, Press Release, "Toys 'R' Us to Pay \$1.3 Million Penalty for Violating FTC Order (March 29, 2011) (civil penalty for violating FTC order entered in 1998 at conclusion of litigation for conduct that occurred between 1999 and 2010), available at <http://ftc.gov/opa/2011/03/toysrus.shtm>.

<sup>161</sup> 15 U.S.C. § 18a.

<sup>162</sup> 15 U.S.C. § 18a(b); 16 C.F.R. § 803.10(b). For cash tender offers and acquisitions involving a party in bankruptcy, the initial waiting period is fifteen calendar days. Any waiting period scheduled to expire on a weekend or federal holiday is automatically extended to the next business day. *Id.*

<sup>163</sup> 15 U.S.C. § 18a(b)(2).

<sup>164</sup> 15 U.S.C. § 18a(e); 16 C.F.R. § 803.20.

“substantially complied” with the second request.<sup>165</sup> A second request is usually very burdensome, often taking weeks or months and costing the merger parties millions of dollars. Only a small percentage of reported transactions receive second requests.<sup>166</sup> Before the end of the second waiting period, the FTC or DOJ must decide whether to allow the transaction to close without conditions, seek to block the transaction, or negotiate a consent decree with the merger parties allowing the transaction to proceed subject to conditions resolving competitive concerns.

There are several aspects of the HSR merger review process that are not a formal part of the statutory regime (*i.e.*, are not included in the HSR Act or regulations) and yet can have a significant impact on the efficiency of the process and the timeliness of decisions.

Following an HSR filing, if staff at either the FTC or the DOJ determine that an investigation is warranted, the transaction is assigned to one of the agencies through a process known as “clearance.”<sup>167</sup> In most cases, generally involving industries in which one agency has an established record of expertise and experience, only that agency requests clearance, which the other agency grants quickly.<sup>168</sup> In instances where both agencies seek clearance or one agency objects to the other’s request for clearance, the agencies must determine jointly which will conduct the investigation. Neither agency can (formally) investigate a transaction until clearance has been agreed. While some clearance disputes are resolved fairly rapidly, others can escalate all the way up to the Chairman of the FTC and the Assistant Attorney General at the DOJ.

Although clearance disputes are relatively infrequent, when they occur they can consume a significant portion of the initial HSR waiting period and can even result in a situation where the staff lacks sufficient time to complete its initial competitive assessment within the initial waiting period. This may force the parties to withdraw and refile their HSR notifications, thereby restarting the

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<sup>165</sup> 15 U.S.C. § 18a(e)(2); 16 C.F.R. §§ 803.10(b)(2), 803.20(c). For cash tender offers and acquisitions involving a party in bankruptcy, a second request extends the waiting period for ten calendar days, and the waiting period restarts upon compliance by the acquiring party. *Id.*

<sup>166</sup> From fiscal year 2000 to fiscal year 2009, the number of second requests issued as a percentage of the total number of transactions reported under the HSR Act ranged from 2.1% to 4.5%. See Federal Trade Comm’n & U.S. Dep’t of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2009*, at 4, available at <http://www.ftc.gov/os/2010/10/101001hsrreport.pdf>. In fiscal year 2010 the number of reported transactions increased, from 716 to 1166, but the percentage of second requests declined, from 4.5% to 4.1%. See Federal Trade Comm’n & U.S. Dep’t of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2010*, at 1, 5, available at <http://ftc.gov/os/2011/02/1101hsrreport.pdf>.

<sup>167</sup> This is not to be confused with clearance of a transaction following an investigation.

<sup>168</sup> See Federal Trade Comm’n & U.S. Dep’t of Justice, *FTC/DOJ Clearance Procedures for Investigations* (Dec. 1993), reprinted in 65 Antitrust & Trade Reg. Rep. (BNA) 746 (1993).

waiting period, or to accept a second request that otherwise might have been avoided.<sup>169</sup> In either case, clearance disputes often cause material delay in the review of proposed transactions and impose additional costs and burdens on the transaction parties, with potentially significant consequences for time-sensitive transactions, as well as postponing the procompetitive benefits of transactions.

The FTC and DOJ attempted to address the clearance problem in 2002 by formalizing an agreement allocating primary areas of responsibility on an industry-specific basis.<sup>170</sup> They abandoned the agreement, however, after strong opposition from some members of Congress.<sup>171</sup> Although there have since been repeated calls for the FTC and DOJ to implement a new clearance agreement, the Agencies continue to operate under the pre-2002 procedures.<sup>172</sup>

The second request procedure has also been the subject of concern. In 2006 the FTC and the DOJ adopted separate, non-identical procedures aimed at streamlining and reducing the costs and burden of second request compliance.<sup>173</sup> These reforms focused primarily on reducing the volume of documents parties must produce in response to a second request, as this is usually the most costly and inconvenient component of second request compliance. To obtain the benefits of these reforms, however, the parties must, *inter alia*, agree to certain provisions extending the length of the investigation and providing for a minimum

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<sup>169</sup> An acquiring party may withdraw its HSR notification and refile within two business days without paying an additional filing fee, thereby restarting the initial waiting period and allowing for further discussion with agency staff. This procedure, which may be used only once without another filing fee, introduces valuable flexibility into the process and is sometimes utilized by merger parties to provide additional time to attempt to resolve competitive concerns and avoid the issuance of a second request.

<sup>170</sup> See Memorandum of Agreement Between The Federal Trade Commission and The Antitrust Division of The United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002), available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

<sup>171</sup> See Press Release, DOJ, *Statement by Charles A. James Regarding DOJ/FTC Clearance Agreement* (May 20, 2002), available at [http://www.justice.gov/atr/public/press\\_releases/2002/11178.htm](http://www.justice.gov/atr/public/press_releases/2002/11178.htm). For further discussion of this incident, see *infra* notes 257-263 and accompanying text.

<sup>172</sup> See, for example, AMC Report, *supra* note 21, at 134-37.

<sup>173</sup> See Fed. Trade Comm'n, Reforms to the Merger Review Process (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf> (hereinafter FTC Merger Process Reforms); U.S. Dep't of Justice, Background Information on the 2006 Amendments to the Merger Review Process Initiative (Dec. 14, 2006), available at <http://www.justice.gov/atr/public/220241.htm> (hereinafter DOJ Background on Merger Process Amendments) and U.S. Dept's of Justice, Merger Review Process Initiative (Dec. 14, 2006), available at <http://www.justice.gov/atr/public/220237.htm> (hereinafter DOJ Merger Process Initiative).

stipulated discovery period in the event of litigation.<sup>174</sup> It has been suggested that these conditions effectively amount to an administrative amendment of the statutory waiting periods and circumvent the court's authority and discretion to set an appropriate period for litigation discovery.<sup>175</sup>

In HSR-reportable transactions that receive a second request, it is common practice for the transaction parties "voluntarily" to delay the closing to permit additional time for discussions with the investigating agency. Such discussions may focus on negotiating the details of a consent decree with staff who, in the absence of additional time, may need to switch to "litigation preparation" mode, leaving little or no time for further settlement negotiations. Alternatively, the extra time may be used to make presentations to senior management, including ultimately the Assistant Attorney General at the DOJ or the Commissioners at the FTC, in an effort to dissuade them from bringing an action to block the merger. A refusal by the transaction parties to delay the closing can cause staff to terminate settlement negotiations (or at least threaten to do so) or may limit meetings with the decision-makers. Such timing agreements can take several forms and range in duration from an extra few days to several weeks.<sup>176</sup>

Mergers are also reviewed outside the HSR notification procedures. Each year the FTC and DOJ investigate and challenge a small number of consummated mergers that were not reportable under the HSR Act but are later discovered by the agencies, typically due to industry complaints of anticompetitive conduct, such as a post-consummation price increase.<sup>177</sup> Investigations of mergers not subject to the HSR statutory deadlines can last for considerable periods of time. This creates uncertainty for the merged company, which may face the prospect of eventually being required to divest all or a substantial portion of the acquired business, assuming such a remedy is feasible.<sup>178</sup> The company may also have an incentive to use stalling tactics in the hope that the investigation will eventually

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<sup>174</sup> The FTC requires the parties to delay certifying substantial compliance until thirty days after producing responsive documents and data or to agree to a "rolling" production, and to agree to a joint scheduling order containing at least a sixty-day pre-trial discovery period. FTC Merger Process Reforms, at 10, 15-19. The DOJ envisages a negotiated schedule for the investigation and requires that the parties agree to provide sufficient time for post-complaint discovery, noting that "four to six months is generally necessary." DOJ Background on Merger Process Amendments, at 11; DOJ Merger Process Initiative, at 5-7.

<sup>175</sup> See AMC Report, *supra* note 21, at 170.

<sup>176</sup> For a more detailed discussion of the strategic implications of timing agreements in merger reviews, see ABA Section of Antitrust Law, *The Merger Review Process: A Step-by-Step Guide to Federal Merger Review*, 3d Edition, at 247 (2006).

<sup>177</sup> Technically, the Antitrust Division and the FTC are legally free to re-investigate and challenge consummated mergers that already cleared HSR review. For a rare example of such a challenge, see *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 421 n.2 (5th Cir. 2008).

<sup>178</sup> Once the acquired business has been fully integrated into the combined company, it can be extremely difficult to "unscramble the eggs" and return to the pre-merger position.

“run out of steam” and close.<sup>179</sup> It has been recommended that the FTC and DOJ create flexible timelines or roadmaps for non-HSR investigations.<sup>180</sup>

### c. FTC Procedures

A common criticism of FTC administrative adjudication is that it is too slow, thereby undermining its effectiveness.<sup>181</sup> In merger cases, for example, the prospect of lengthy proceedings has caused parties to abandon transactions before the antitrust merits could be adjudicated.<sup>182</sup> The FTC’s increasing tendency to use the administrative process has brought this concern to the fore.

The FTC’s 2009 amendments to Parts 3 and 4 of its Rules of Practice are intended, in part, to expedite its proceedings. The new rules provide that, unless a different date is determined by the FTC, an evidentiary hearing must be commenced within five months from the date of the complaint where the FTC is seeking a preliminary injunction (primarily, unconsummated merger cases) and within eight months in all other cases.<sup>183</sup> The revised rules also set deadlines for the ALJ’s decision<sup>184</sup> and for the FTC’s decision if there is an appeal.<sup>185</sup> The

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<sup>179</sup> American Bar Association Section of Antitrust Law, Transition Report on the Current State of Federal Antitrust and Consumer Protection Enforcement, at 9-10 (Nov. 2008), *available at* <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf> (hereinafter ABA Transition Report).

<sup>180</sup> *Id.* at 9-10. This suggestion applies not only to non-HSR reportable mergers but also to investigations of anticompetitive conduct.

<sup>181</sup> Federal Trade Commission, The Federal Trade Commission at 100: Into Our 2<sup>nd</sup> Century—The Continuing Pursuit of Better Practice, 43 (Jan. 2009), *available at* <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf> (hereinafter FTC at 100 Report).

<sup>182</sup> In fiscal year 2009, for example, the FTC commenced simultaneous administrative proceedings and federal district court preliminary injunction challenges to block CCS Corporation’s acquisition of Newpark Environmental Services; the merger of CCC Information Services and Mitchell International Inc.; and Oldcastle Architectural Inc.’s acquisition of Pavestone Companies. In two of these challenges—*CCS/Newpark* and *Oldcastle/Pavestone*—the parties abandoned their transaction after the FTC filed its complaints initiating litigation. See <http://www.ftc.gov/os/adjpro/d9333/081210redskycmpt.pdf> (CCS/Newpark, Commission order dismissing complaint); <http://www.ftc.gov/opa/2009/01/pavestone.shtm> (Oldcastle/Pavestone, FTC statement).

<sup>183</sup> 16 C.F.R. § 3.11(b).

<sup>184</sup> The ALJ must file an initial decision within 70 days after the last-filed proposed findings of fact and conclusions of law, or 85 days after the closing of the hearing record if the parties waive filing proposed findings. The ALJ can extend these deadlines by 30 days “for good cause.” The previous rule required that the initial decision be filed within 90 days of the close of the hearing record and permitted the ALJ to grant consecutive 60 day extensions. See 16 C.F.R. § 3.51(a).

<sup>185</sup> For cases in which the FTC has sought preliminary relief under Section 13(b) of the FTC Act, it will issue a final decision within 45 days of oral argument, *i.e.*, within 100 days of the

amended Part 3 also shortens various other deadlines, some of which apply to the respondents as well as to FTC complaint counsel.<sup>186</sup> Despite these changes, commentators have called for an even faster timetable in unconsummated merger cases, to bring the FTC's administrative proceedings in line with the typical timeline in federal district court proceedings initiated by the DOJ and to reduce the period of uncertainty for pending transactions (as well as the instances of merging parties abandoning transactions rather than facing the prospect of lengthy administrative litigation with an uncertain outcome).<sup>187</sup>

The revised rules further attempt to expedite administrative litigation by providing for earlier Commission involvement in administrative proceedings, such as in resolving dispositive motions, *e.g.*, motions for summary decision and prehearing motions to dismiss.<sup>188</sup> These changes were premised on the desirability of the Commission applying its antitrust expertise at an earlier stage and avoiding the potential cost and delay to the litigants that an erroneous ALJ decision might cause. On the other hand, commentators have criticized the rule change as likely to impact negatively the perception of the fairness and impartiality of administrative proceedings by permitting the Commission to adjudicate dispositive issues shortly after it has voted out the decision to bring a challenge in the first place.<sup>189</sup> This highlights the inherent tension that can exist between enabling a more efficient enforcement procedure and upholding due process norms.

#### d. Department of Justice Procedures

As a general matter, the Antitrust Division has no internal rules imposing time constraints on its investigations. Nevertheless, some time constraints on its activities are imposed either by federal statute or by other agencies' processes. For example, the Antitrust Division operates under the same HSR time constraints in considering notified mergers as does the FTC. When the Division engages in competition advocacy before federal regulatory agencies it must take care to

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filing of the initial decision by the ALJ. For all other cases, the FTC will issue a final decision within 100 days after oral argument, *i.e.*, within six months after the initial decision. *See* 16 C.F.R. § 3.52.

<sup>186</sup> For example, the respondents' deadline for filing an answer was shortened from 20 days to 14 days. 16 C.F.R. § 3.12(a).

<sup>187</sup> ABA Transition Report, *supra* note 179, at 31; Comments of the ABA Section of Antitrust Law In Response to the Federal Trade Commission's Request For Public Comment Regarding Parts 3 and 4 Rules of Practice Rulemaking – P072104, at 16 (Nov. 6, 2008), *available at* <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-3and4.pdf> (hereinafter ABA Comments).

<sup>188</sup> 16 C.F.R. § 3.22(a).

<sup>189</sup> ABA Comments, *supra* note 183, at 3-4, 11.

comply with regulatory deadlines and so endeavors to prepare pleadings “promptly.”<sup>190</sup>

Antitrust Division civil litigation in federal court is subject to the same time constraints as any other civil litigation. As discussed above, earlier criticism of the slowness of the Division’s civil litigation efforts has generally abated.<sup>191</sup> In part, however, this lack of criticism reflects the fact that the Division did not file any monopolization cases from 2001 through 2009 (monopolization cases tend to be the most complex to litigate) and that nearly all of the rest of its civil litigation during this period involved merger cases which have generally been litigated quickly under a single preliminary and permanent injunction hearing. The Department publishes no statistics on the length of time it takes to investigate or litigate cases.

The Division is more constrained in investigating and litigating criminal cases. Some of the constraints are self-imposed; others are the result of federal statutes and the U.S. Constitution.

Today, nearly all criminal cases begin with amnesty (or leniency) applications in which corporations come forward with evidence of their own participation in illegal cartel activity. The leniency process is one the Antitrust Division adopted internally in the exercise of its prosecutorial discretion and is available both to organizations and individuals. The Division’s extensive efforts to publicize the program and the benefits available to applicants have made it into an extremely useful prosecutorial tool, one that has been adopted by other enforcement agencies around the world.<sup>192</sup> The Division posts its formal policy on its website, along with other relevant information.<sup>193</sup> In addition, the Division’s Manual explains the procedures it follows when considering amnesty applications,<sup>194</sup> in particular its procedure for granting an applicant a “marker” preserving its place in line for leniency pending further investigation of the quality of its disclosures.<sup>195</sup>

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<sup>190</sup> See Antitrust Division Manual, *supra* note 67, at V-7.

<sup>191</sup> See *supra* text accompanying note 101.

<sup>192</sup> See, e.g., Hammond, *supra* note 136, at 15 (noting “proliferation of effective leniency programs” in “multiple jurisdictions”).

<sup>193</sup> See <http://www.justice.gov/atr/public/criminal/leniency.htm>.

<sup>194</sup> See Antitrust Division Manual, *supra* note 67, at III-102 – 108.

<sup>195</sup> See *id.* at III-106.

There has been little criticism of the leniency process in practice.<sup>196</sup> As of 2010 there had been only one case in which the courts reviewed the Division's conduct under the program. The case involved a decision by the Division to revoke a grant of conditional leniency which had required the company to cease its illegal conduct. The Division believed it had evidence demonstrating that the company had not stopped its illegal price fixing conduct after its general counsel brought the conduct to the attention of upper management, even though the company had told prosecutors otherwise. The company, however, vigorously resisted the Division's efforts to revoke its amnesty. A district court eventually dismissed the indictment brought against the company and its executives, holding that the Division had no reasonable basis to revoke the leniency agreement because it had not demonstrated any breach of the agreement.<sup>197</sup>

Outside of the leniency process, the Division's main tool for criminal investigation is the grand jury, which is subject to the process and time constraints of Rule 6 of the Federal Rules of Criminal Procedure. Although prosecutors have great control over the grand jury, judges still retain a degree of supervision over the grand jury's processes, sometimes reviewing their subpoenas before the trial and sometimes reviewing the conduct of prosecutors before the grand jury after an indictment has been handed down. Trials are subject to the time constraints of the Speedy Trial Clause of the Sixth Amendment as well as the Speedy Trial Act.

## 2. Expertise

### a. Staff

As the two oldest and best-established antitrust agencies in the world, the FTC and the DOJ each have substantial staffs consisting of attorneys, economists, paralegals and administrative personnel. A particularly noteworthy feature of both agencies' functional organization and internal expertise is the considerable number of Ph.D.-level economists employed by the Agencies and the significant degree of integration of those economists into the Agencies' workings.<sup>198</sup>

The FTC's Ph.D. economists are mostly organized together in the Bureau of Economics, which has a Director who reports directly to the FTC Chairman. Similarly, most of the DOJ's economists are part of the Economic Analysis Group which consists of three sections, the Economic Litigation Section, the Economic

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<sup>196</sup> The AMC's Report, for example, does not criticize the program or offer any suggestions for improvement.

<sup>197</sup> See *United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 586, 609 (E.D. Pa., 2007). The Division chose not to appeal. See Press Release, Dec. 21, 2007, [http://www.justice.gov/atr/public/press\\_releases/2007/228788.htm](http://www.justice.gov/atr/public/press_releases/2007/228788.htm).

<sup>198</sup> See Fed'l Trade Comm'n, *The FTC in 2010* at 9 ("more than 70 Ph.D. economists" in the Bureau of Economics), <http://www.ftc.gov/os/2010/04/2010ChairmansReport.pdf>.

Regulatory Section, and the Competition Policy Section. These three economic sections report to the Deputy Assistant Attorney General for Economic Analysis, who in turn reports to the Assistant Attorney General. As a matter of practice, both the Director of the Bureau of Economics and the Deputy Assistant Attorney General for Economic Analysis have been outside academic economists of distinguished reputation.

The housing of Agency economists in organizationally distinct groups within the FTC and DOJ reflects the important role of economic analysis across all facets of the Agencies' activities. The Agencies' economists perform a wide range of functions, including analyzing the competitive effects of mergers and alleged anticompetitive practices (sometimes involving sophisticated econometric analysis), assessing proposed regulatory changes, participating in the Agencies' competition advocacy efforts, engaging in policy-related research, and international outreach.<sup>199</sup> Economists participate fully in civil enforcement matters from the initial investigative stage to their final resolution, including the assessment of proposed enforcement measures and remedies.<sup>200</sup>

Staff economists at the FTC and DOJ not only play an important attorney support function in merger and civil non-merger investigations, they also participate in internal case strategy meetings and meetings with the parties and usually are afforded an opportunity to influence directly the key decision-makers at the Agencies. While staff attorneys and economists assigned to an investigation work closely together, input by economists is not merely subsumed into recommendations controlled by attorneys. Rather, staff economists typically prepare a separate recommendation memorandum that follows a parallel review track to the staff attorneys' recommendation, ultimately reaching the Assistant Attorney General at the DOJ or the Commissioners at the FTC. It is not unheard of for staff attorneys and economists to offer conflicting recommendations to senior management.

One role that Agency economists are unlikely to play is that of testifying in court (or in an administrative trial before the FTC). Testifying economists need to be shielded from the general investigation of a case so that they will not be forced to testify about matters that the Agency views as irrelevant (or potentially harmful) to its case.<sup>201</sup> Thus, although the Agencies hold open the possibility that

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<sup>199</sup> Economists at the FTC also support its consumer protection activities.

<sup>200</sup> For a more detailed description, see Michael Salinger and Paul A. Pautler, *The Bureau of Economics at the US Federal Trade Commission (2006)*, available at <http://www.ftc.gov/be/recruit/06beover.pdf>; Antitrust Division Manual, *supra* note 67, at VI-6-8.

<sup>201</sup> See Antitrust Division Manual, *supra* note 67, at VI-8 (“The materials provided to the ‘outside’ economist will depend upon the needs of the case and must be monitored so that an appropriate record is maintained for use later in discovery. The testifying expert’s participation in strategy and enforcement decision meetings is severely curtailed.”)

an inside economist could perform the role of testifying economist, the general practice has been to hire an outside economist to perform this role.

In recent years the Antitrust Division has occasionally found the need to hire outside lawyers to take the role of lead counsel in high-profile civil litigation. The best-known example is the Microsoft monopolization litigation, where the Division hired David Boies, a highly experienced litigator, to try the case.<sup>202</sup> Hiring outside counsel may reflect the fact that government civil antitrust litigation has become rare over the course of successive administrations, which have emphasized criminal enforcement and merger reviews but have filed few civil cases. Hiring an experienced litigator can thus make up for a lack of staff civil trial experience, but the practice does have the potential of damaging staff morale.<sup>203</sup>

#### b. Agency Leadership

The statutory provisions regarding the appointment of the five FTC Commissioners and the Assistant Attorney General for the Antitrust Division do not specify minimum or preferred qualifications. The fact that they are political appointees, however, means that considerations other than expertise in the fields relevant to the Agencies' jurisdiction play a role in their appointments. Such considerations may include, for example, a desire to select individuals who will promote the White House's policy preferences or to reward loyal political operatives. The fact that these appointments are subject to Senate confirmation means that Congressional political concerns must also be taken into account.

The quality of FTC Commissioner appointments in particular has attracted scrutiny and criticism.<sup>204</sup> This scrutiny is particularly appropriate, given the fact that Congress, in establishing the FTC and granting it broad discretion, expected federal judges to defer to FTC decisions because of the FTC's anticipated expertise in understanding business matters. The Commissioners were to be an important component of the FTC's capability and Congress intended the FTC to be comprised not only of eminent lawyers but also of distinguished economists

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<sup>202</sup> See also *DOJ Hires Axinn as a Consultant for Its Review of MCI WorldCom/Sprint Deal*, 77 *Antitrust & Trade Reg. Rep.* (BNA) 658 (Dec.16, 1999) ("The last time the division retained an outside lawyer of Axinn's standing was when it hired David Boies to work on the government's case against Microsoft Corp., DOJ noted.").

<sup>203</sup> See ABA Transition Report, *supra* note 179, at 15 (recommending employing outside trial counsel "[i]n exceptional circumstances and on a case-by-case basis").

<sup>204</sup> See, e.g., William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 *Admin. L. Rev.* 915 (1997). Kovacic argues that one of the reasons a lack of suitable qualifications has been more of an issue at the FTC than at the DOJ is the FTC's multi-member structure, which "may reduce the inclination of the executive branch and Congress to insist that each appointee possess outstanding qualifications." *Id.* at 948.

and business executives.<sup>205</sup> Over time, however, economists and business executives have been sparsely represented among the Commissioners. Since the FTC's founding, only three professional economists have been appointed as Commissioners, despite the substantial economic dimension of the FTC's mission, although the professional diversity of FTC Commissioners has increased somewhat since the 1980s.<sup>206</sup>

### c. Expertise of ALJs

Another controversial expertise-related issue involves the selection process for ALJs in FTC administrative proceedings. The ALJ selection process is dictated by government-wide requirements, not by FTC rules or policy,<sup>207</sup> and the FTC's rule of practice on presiding officials is silent regarding the necessary or desirable qualifications of ALJs.<sup>208</sup> Commentators have expressed concern that familiarity with antitrust or consumer protection law is not a factor in the choice of the ALJ, which results in situations where the initial decision-maker in administrative litigation has little or no expertise in the areas of FTC enforcement.<sup>209</sup> Thus the ALJ tends to resemble more a district court judge of general jurisdiction than an expert decision-maker, except where a Commissioner acts as ALJ, raising the impartiality concerns previously described.<sup>210</sup>

## 3. Transparency

Transparency has both *ex ante* and *ex post* elements. The former refers to the process by which the Agencies develop and explain policy. The latter refers to transparency of actual enforcement decisions made by the Agencies in specific cases, including decisions to challenge, not to challenge, or to settle. Both aspects of transparency assist lawyers, businesses, judges, and the general public in understanding how the competition laws are administered. This in turn enhances public confidence in, and the credibility of, the competition agencies, and can enable more informed and efficient decision-making by those inside and outside the Agencies.

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<sup>205</sup> See *id.* at 917-20. For oral histories of the careers of eight of the FTC's Commissioners, see <http://www.ftc.gov/ftc/history/oralhistory.shtm>.

<sup>206</sup> Kovacic, *supra* note 201, at 935-36; FTC at 100 Report, *supra* note 181, at 28. The Assistant Attorney General in charge of the Antitrust Division must be a lawyer.

<sup>207</sup> See 5 U.S.C. §§ 556, 3105; 5 CFR § 930.204 (regulation of Office of Personnel Management); FTC at 100 Report, *supra* note 181, at 45 ("It bears noting, however, that the ALJ selection process is dictated by government-wide requirements and not by FTC rules or policy.").

<sup>208</sup> 16 C.F.R. § 3.42.

<sup>209</sup> FTC at 100 Report, *supra* note 177, at 44.

<sup>210</sup> See *supra* notes 110-115 and accompanying text.

Transparency is not without costs, of course. For one, statements of policy may cabin discretion. Despite disclaimers that the Agencies place on any *ex ante* statements of policy, courts may take the Agency at its word and hold it to its written statements even though the Agency would prefer to do something different. For another, explanation of policy, whether *ex ante* or *ex post*, takes time and resources. Agencies must consider carefully whether their resources could be better devoted to actual enforcement rather than to the explanation of their policies, particularly *ex post* explanations of their reasons for failing to bring a particular case.

a. *Ex Ante* Transparency

The Justice Department and the FTC practice *ex ante* transparency through several means. Perhaps the most influential method is the issuance of guidelines, policy statements, and reports (collectively referred to here as guidelines) describing the Agencies' approach in applying the antitrust laws. In recent years guidelines have typically been issued jointly by the FTC and DOJ, although there have also been several notable examples where the Agencies were unwilling to act together.<sup>211</sup> Current guidelines explain competition policy in horizontal merger review,<sup>212</sup> collaborations among competitors including joint ventures,<sup>213</sup> intellectual property licensing,<sup>214</sup> and health care.<sup>215</sup>

Enforcement guidelines outline the Agencies' decision-making criteria and can also serve as an ongoing commentary on the law from the antitrust regulators' perspective. As such, guidelines are relied upon not only by

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<sup>211</sup> One such example was the disagreement between the Justice Department and the FTC during the George W. Bush Administration over a report analyzing single-firm conduct under Section 2 of the Sherman Act. See *infra* notes 272-274 and accompanying text.

<sup>212</sup> See U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (August 19, 2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>. Prior to the 2010 revision, the FTC and DOJ had issued a commentary on how the Agencies apply the Horizontal Merger Guidelines in particular investigations. See Fed. Trade Comm'n & U.S. Dep't of Justice, Commentary on the Horizontal Merger Guidelines (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

<sup>213</sup> See Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>214</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), available at <http://www.ftc.gov/bc/0558.pdf>; U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), available at <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>.

<sup>215</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Enforcement Policy in Health Care (1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>.

businesses and their counsel but also by the courts.<sup>216</sup> The degree of deference given to the guidelines in the courts varies, however. The guidelines are not formally adopted as “notice and comment” agency regulations and thus do not receive the level of deference that such agency rules would receive.<sup>217</sup> Although courts often acknowledge that the Agencies have embodied their expertise in the guidelines, judges have also pointed out that the guidelines do not have the force of law and do not bind the courts.<sup>218</sup>

Although the U.S. antitrust Agencies have been increasingly willing to issue guidelines, there are some problems in their use. These problems include ensuring that guidelines accurately reflect current Agency thinking given the practical difficulty in updating guidelines on a frequent basis;<sup>219</sup> the perception that because guidelines represent the collective views of members and staff at one or more of the Agencies, the inevitable compromises to reach consensus lead to a watered-down document that may not be truly informative; and a concern, at least from the Agencies’ perspective, that although guidelines do not have the force of law, they may nevertheless be used against the agencies, especially during litigation.<sup>220</sup>

Apart from issuing guidelines, the FTC and DOJ host a variety of events that are open to the public, including conferences and workshops designed to bring together government and members of the business and legal communities to discuss timely topics in competition (and also, in the FTC’s case, consumer protection) policy. For example, the DOJ recently held a series of joint workshops with the U.S. Department of Agriculture to explore competition issues in the agriculture industry<sup>221</sup> and held joint workshops with the FTC to review and

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<sup>216</sup> FTC at 100 Report, *supra* note 181, at 128.

<sup>217</sup> Before issuing the 2010 revision of the Horizontal Merger Guidelines, the Agencies first held joint “workshops” seeking comments on the then-current guidelines. The FTC subsequently posted on its website a draft of a new version of the guidelines, seeking public comment. Four months later the FTC and the Antitrust Division issued a revised version of the draft, but sought no further comments. No hearings were held on either the draft or final guidelines.

<sup>218</sup> *See, e.g., State of New York v. Kraft Gen. Foods, Inc.*, 926 F.Supp. 321, 359 (S.D.N.Y. 1995); *FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1503 (D.C.Cir. 1986).

<sup>219</sup> For example, with the exception of a new section on efficiencies added in 1997, the FTC/DOJ Horizontal Merger Guidelines remained unchanged from 1992 until a major revision in 2010, and some believed that their usefulness in describing how the Agencies analyze horizontal mergers diminished during that period. *See, e.g., William Blumenthal, Scope and Specificity in the 2010 Guidelines: A Pretty Good Balance*, 25 *Antitrust* 10, 12 (Fall 2010) (“We have known for many years that the 1992 Guidelines . . . were only a blurry depiction of actual Agency practices . . .”).

<sup>220</sup> *See* FTC at 100 Report, *supra* note 181, at 129.

<sup>221</sup> *See* DOJ & USDA, Agriculture and Antitrust Enforcement Issues in Our 21<sup>st</sup> Century Economy, at <http://www.justice.gov/atr/public/workshops/ag2010/index.htm>.

explore the possibility of updating the Horizontal Merger Guidelines.<sup>222</sup> In addition to affording members of the public an opportunity to participate in the proceedings themselves, the Agencies provided public website access to transcripts of the workshops and hearings, any public comments submitted, and any resulting Agency reports.

Senior officials at the FTC and the DOJ speak regularly at conferences and seminars, both in the U.S. and abroad. Transcripts of speeches are published on the Agencies' websites and, despite the oft-used disclaimer that the speaker's comments do not necessarily represent the views of the speaker's agency, these speeches can provide insight into topics of particular interest to the agencies at any given time. As useful as these speeches are, some are skeptical about statements of "luncheon law," which might more reflect what the agency would like the law to be rather than what it is.

Another *ex ante* transparency tool is the issuance of advisory opinions by the FTC<sup>223</sup> and business review letters by the DOJ.<sup>224</sup> The advisory opinion/business review procedure allows persons concerned about the legality of proposed business conduct to seek a statement from the FTC or the DOJ of its current enforcement intentions with respect to that conduct.<sup>225</sup> There are no limitations on the industries or subject areas that may be considered for an advisory opinion or business review letter.<sup>226</sup> Advisory opinions and business review letters are not legally binding — the FTC and DOJ both make clear that they remain free to bring whatever action they subsequently determine to be required. Moreover, not all forms of proposed conduct are suitable for advisory opinions and business review letters.<sup>227</sup> Although in practice these letters are infrequently sought, in appropriate circumstances they can offer substantial comfort to the requesting person(s), provided there is a full and true disclosure of the pertinent facts regarding the proposed conduct. Advisory opinions and

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<sup>222</sup> See FTC & DOJ, Horizontal Merger Guidelines Review Project, at <http://www.ftc.gov/bc/workshops/hmg/index.shtml>; *supra* note 217.

<sup>223</sup> See 16 C.F.R. §§ 1.1-1.4.

<sup>224</sup> See 28 C.F.R. § 50.6.

<sup>225</sup> There are two types of FTC advisory opinions: (1) Commission advisory opinions, and (2) advisory opinions provided by FTC staff. Most advisory opinions are issued by FTC staff. Commission advisory opinions are intended to address substantial or novel questions of fact or law or subjects of significant public interest. See 16 C.F.R. § 1.1(a).

<sup>226</sup> In practice, most FTC advisory opinions have involved the health care sector, while the subject matter of DOJ business review letters has been more varied.

<sup>227</sup> For example, advisory opinions and business review letters may be inappropriate where the same or substantially the same course of action is presently under investigation, or where an informed opinion cannot be made without extensive investigation going beyond the facts presented by the person(s) requesting the opinion/letter. See 16 C.F.R. § 1.1(b).

business review letters are posted on the agencies' websites (after confidential business information is redacted), enabling the broader business community to benefit from their guidance regarding the application of the antitrust laws to specific proposed conduct.<sup>228</sup> The FTC and DOJ maintain a clearance procedure for assigning requests for advisory opinions and business review letters to either agency.<sup>229</sup>

From a procedural perspective, the Antitrust Division Manual and the FTC's Operating Manual provide detailed guidance to agency staff regarding internal practices and procedures for investigating and litigating matters.<sup>230</sup> Although not binding and intended for internal advisory purposes, these documents offer a window into the day-to-day workings of the agencies and can be useful to businesses and their counsel in determining how best to navigate the investigatory waters.

#### b. *Ex Post* Transparency

The FTC and DOJ also utilize *ex post* mechanisms to shed light on specific matters after an investigation has concluded. The majority of filed civil cases are settled by consent decree. At both agencies, the consent decree process involves publishing the proposed complaint, the consent agreement and any related documents, and information about the merits of the proposed consent decree, and then inviting public comments before the consent decree is made final. This process is observed for every matter settled by consent decree, although the specific procedures differ between the agencies.<sup>231</sup>

The DOJ's consent decree procedure is governed by the 1974 Antitrust Procedures and Penalties Act, also known as the Tunney Act.<sup>232</sup> The Tunney Act requires that all DOJ settlements of civil antitrust actions be approved by a federal district court judge as being in the public interest, following a minimum 60-day

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<sup>228</sup> See <http://www.ftc.gov/ftc/opinions.shtml>; <http://www.justice.gov/atr/public/busreview/index.htm>. Parties can seek to have certain information treated as confidential and redacted from the public version. See 16 C.F.R. § 1.4, 28 C.F.R. § 50.6.

<sup>229</sup> For additional information, see FTC, Guidance From Staff of the Bureau of Competition's Health Care Division on Requesting and Obtaining an Advisory Opinion, at 2 (May 2010), available at <http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf>; DOJ, Business Reviews, available at <http://www.justice.gov/atr/public/busreview/201659a.htm>.

<sup>230</sup> See Antitrust Division Manual, *supra* note 67; FTC Operating Manual, *supra* note 91.

<sup>231</sup> In merger cases, the merging parties are generally allowed to consummate the transaction once the consent decree has been filed or published and before the public comment period, subject to appropriate hold separate orders for assets to be divested. See ABA Merger Review Process, *supra* note 177, at 318, 325.

<sup>232</sup> 15 U.S.C. § 16.

public comment period that commences when the proposed consent judgment is filed with the court and published in the Federal Register.<sup>233</sup> The DOJ must file, together with the proposed consent decree, a Competitive Impact Statement that explains the nature of the proceeding and why the proposed judgment is appropriate under the circumstances.<sup>234</sup> In making the public interest finding, courts have recognized that their inquiry is limited and have accorded substantial deference to the DOJ, in order to preserve the practical benefits of settlement through the consent decree process as an alternative to the cost and burden of litigation.<sup>235</sup> If the court does conclude that a consent decree is not in the public interest, the court only has the power to reject the decree. The Tunney Act does not give the court the power to modify the decree according to its view of what constitutes appropriate relief, although, in practice, courts have suggested modifications that the parties have then accepted.<sup>236</sup>

Some critics, particularly those who disagreed with the DOJ's settlement of the much-publicized Microsoft litigation in 2001, view the courts as excessively deferential to the Justice Department and have called for a more thorough review process.<sup>237</sup> Although the Tunney Act was amended in 2004, the changes were relatively modest.<sup>238</sup> The amended Tunney Act sets out certain factors that the court must consider in making the public interest determination, but it also expressly states that the court is not required to conduct an evidentiary hearing or to permit third parties to intervene.<sup>239</sup> In a very lengthy proceeding under the amended Tunney Act involving two mergers of four of the country's largest telecommunications companies, SBC/AT&T and Verizon/MCI, a federal district court concluded that its "scope of review remains sharply proscribed by

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<sup>233</sup> 15 U.S.C. §§ 16(b), (d), (e). The Tunney Act does not apply to the dismissal of an enforcement action. In the merger context, the Tunney Act does not apply to the decision not to challenge a merger, nor does it apply to negotiated "fix-it-first" divestitures that do not involve the filing of a judicial complaint and consent decree.

<sup>234</sup> The Tunney Act sets out six specific topics that the competitive impact statement must cover. *See* 15 U.S.C. § 16(b).

<sup>235</sup> *See*, for example, *United States v. Microsoft Corp.*, 56 F. 3d 1448, 1461-62 (D.C. Cir. 1995).

<sup>236</sup> *See* *United States v. Microsoft Corp.*, 56 F. 3d 1448, 1458-59 (D.C. Cir. 1995) (review power). For an example of party acceptance of suggested judicial modifications, see *United States v. Thomson Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,735 (D.D.C. 1997) (entering decree after parties conformed it to meet judge's concerns).

<sup>237</sup> For criticism of the application of the Tunney Act to post-trial settlements, see John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 34 *Loy. U. Chi. L.J.* 749 (2003).

<sup>238</sup> *See* ABA Merger Review Process, *supra* note 176, at 326.

<sup>239</sup> 15 U.S.C. § 16(e).

precedent and the nature of Tunney Act proceedings,”<sup>240</sup> that it “must accord deference to the government’s predictions about the efficacy of its remedies,”<sup>241</sup> and that the government “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.”<sup>242</sup>

The FTC’s consent order procedure is governed by Part 2 Subpart C of the FTC’s Rules of Practice.<sup>243</sup> There is no court involvement in FTC consent decrees. The FTC publishes the proposed complaint, the consent agreement, and an Analysis to Aid Public Comment (similar to the DOJ’s Competitive Impact Statement) on the FTC website and in the Federal Register. There is a 30-day public comment period, following which the FTC decides whether to withdraw from the proposed consent agreement, modify it, or make the order final.<sup>244</sup> In practice, it is rare for the FTC to withdraw or modify its proposed order based on public comments received.

The FTC and Antitrust Division also occasionally issue public statements in connection with the decision to close an antitrust investigation. Such closing statements describe the reasons for not bringing an action in particular cases. This practice, which was adopted from the European Commission, is entirely within the agencies’ discretion and remains sporadic.

The Antitrust Division has a formal policy on the issuance of closing statements.<sup>245</sup> This policy provides that the Division will consider issuing a closing statement only if the investigation has previously been publicly confirmed, and that in deciding whether to issue a statement in a particular case it will evaluate whether the matter has received substantial publicity and consider the value to the public in receiving information regarding the reasons for non-enforcement (including public trust in the Division’s enforcement and the value of the analysis to other enforcers, businesses and consumers). Issued statements have been relatively brief, sketching out the markets the Division reviewed and the basic theories it applied.<sup>246</sup>

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<sup>240</sup> *United States v. SBC Commc’ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007). The court issued its opinion and order entering the consent decrees almost seventeen months after the proposed decrees were first filed by the DOJ.

<sup>241</sup> *Id.* at 17.

<sup>242</sup> *Ibid.*

<sup>243</sup> 16 C.F.R. §§ 2.31-2.34.

<sup>244</sup> 16 C.F.R. § 2.34.

<sup>245</sup> Antitrust Div., Dep’t of Justice, Issuance of Public Statements Upon Closing of Investigations (n.d.), <http://www.justice.gov/atr/public/guidelines/201888.htm>.

<sup>246</sup> *See, e.g.*, Dep’t of Justice, Press Release, Statement By Assistant Attorney General Thomas O. Barnett Regarding The Closing Of The Investigation Of At&T’s Acquisition Of

By contrast, the FTC has no formal policy on closing statements. Sometimes the Commission issues a statement; sometimes individual Commissioners issue statements; and generally the dissenting Commissioners will issue statements.<sup>247</sup> On the other hand, the FTC's statements typically provide greater detail than the Justice Department's. Having multiple independent Commissioners provides an opportunity to air policy differences publicly, whereas the Antitrust Division's single decision-maker structure means that all policy differences are ironed out internally and not disclosed. This diminishes the incentive for the Division to be open about the problems in a particular case and to disclose the counter-arguments to those that eventually convinced the Assistant Attorney General not to take action.

Consent decrees, Competitive Impact Statements, Analyses to Aid Public Comment, and closing statements are scrutinized carefully by industry and the private bar for guidance as to the agencies' enforcement stance in a given area. They provide the most tangible and up-to-date insight into the manner in which the FTC and DOJ exercise prosecutorial discretion. There is nevertheless some debate regarding the effectiveness of these processes in achieving full disclosure and whether the agencies could provide more information and explanation than they currently do, while still maintaining appropriate confidentiality protections.<sup>248</sup>

Many of the efforts undertaken by the FTC and DOJ to promote transparency also serve to enhance the degree of predictability in their application of the antitrust laws. Understanding the agencies' enforcement policies and priorities, and their reasons for decisions in specific matters, can enable better predictions of how new situations are likely to be treated. That said, the norms of transparency and predictability are not always positively correlated. For example, the new Horizontal Merger Guidelines released by the FTC and DOJ in draft form in April 2010 and finalized in August 2010 set out a more detailed but also more

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Bellsouth (Oct. 11, 2006) (includes two-page "background" regarding the closing of the investigation), [http://www.justice.gov/atr/public/press\\_releases/2006/218904.pdf](http://www.justice.gov/atr/public/press_releases/2006/218904.pdf); Dep't of Justice, Press Release, Background To Closing Of Investigation Of Unitedhealth Group's Acquisition Of Oxford Health Plans (July 20, 2004), [http://www.justice.gov/atr/public/press\\_releases/2004/204676.htm](http://www.justice.gov/atr/public/press_releases/2004/204676.htm).

<sup>247</sup> For examples, see Press Release, FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), <http://www.ftc.gov/opa/2004/01/genzyme.shtm> (with links to statements by Chairman Muris and Commissioner Harbour, and dissenting statement of Commissioner Thompson); In the Matter of Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc (Oct. 4, 2002), <http://www.ftc.gov/os/caselist/0210041.shtm> (with links to FTC Statement and dissenting statement of Commissioners Anthony and Thompson).

<sup>248</sup> FTC at 100 Report, *supra* note 181, at 119.

open-ended approach to merger analysis than the previous guidelines, which may reduce rather than facilitate predictability in merger review.<sup>249</sup>

#### 4. Accountability

The FTC and DOJ observe internal processes that facilitate accountability. Both agencies publish extensive information and data regarding their enforcement decisions. The FTC has an online Competition Enforcement Database that catalogs its competition enforcement actions, both merger and non-merger, including a short description of each action and links to related documents.<sup>250</sup> The DOJ publishes workload statistics for its civil and criminal enforcement activities as well as an annual update newsletter.<sup>251</sup> The agencies also file joint annual reports to Congress regarding the HSR premerger notification regime; these reports provide a statistical summary of the operation of the HSR Act and summarize the agencies' merger enforcement activities, with descriptions of specific matters.<sup>252</sup>

These data and statistics, while interesting, are at best a crude measure of the quality of agency performance. A more direct method of reviewing agency effectiveness and increasing public confidence in government competition enforcement involves empirical studies of past decisions to assess whether the agencies achieved the intended outcome and enhanced consumer welfare in specific instances. Most of the discussion regarding such retrospective studies has centered around mergers, although very little empirical work has been performed to date.<sup>253</sup> It has been suggested that the agencies also develop metrics to evaluate the degree of success of civil non-merger challenges in advancing their

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<sup>249</sup> See David S. Neill, Nelson O. Fitts and Daniel E. Hemli, *U.S. Antitrust Agencies Unveil Proposed New Horizontal Merger Guidelines*, 44(5) *Bank and Corporate Governance Law Reporter*, July 2010.

<sup>250</sup> See <http://www.ftc.gov/bc/caselist/index.shtml>. The Competition Enforcement Database, which replaced the FTC's annual Antitrust Enforcement Activities reports, covers the period from fiscal year 1996 to the present. Each fiscal year commences October 1 and ends September 30.

<sup>251</sup> See [http://www.justice.gov/atr/public/division\\_operations.htm](http://www.justice.gov/atr/public/division_operations.htm).

<sup>252</sup> See <http://www.ftc.gov/bc/anncompreports.shtm>.

<sup>253</sup> One noteworthy example involved an analysis carried out by the DOJ's Economic Analysis Group, at the direction of then-Assistant Attorney General Tom Barnett, of the effect of the 2005 merger of Whirlpool Corporation and Maytag Corporation on the prices of residential laundry machines sold in the United States (Barnett's decision not to challenge the merger was one of the most controversial of his tenure as Assistant Attorney General). Comparing the pre-merger and post-merger periods, the study showed that there was no apparent increase in price for washers of comparable quality. See Thomas O. Barnett, *Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives* (Jun. 26, 2008), available at <http://www.justice.gov/atr/public/speeches/234537.pdf>.

mandates.<sup>254</sup> There are, however, difficulties in conducting retrospectives and interpreting their results.<sup>255</sup>

At the macro level, the FTC recently conducted a comprehensive self-assessment, spearheaded by then-FTC Chairman William E. Kovacic. The initiative, titled “FTC at 100: Into Our Second Century,” involved internal deliberations and external consultations, including a series of public roundtables held in various cities around the world.<sup>256</sup> The project’s stated goals were to encourage acceptance of a norm of periodic self-assessment, to create a template for the agency to engage regularly in an analysis of its performance, and to identify approaches for improvement over both the short and long term.

The Executive Branch has some power to hold the agencies accountable for their enforcement policies. To the extent that accountability is an *ex post* exercise, the Executive can remove politically appointed agency leaders, but the removal power is not significant (it is legally circumscribed with regard to the FTC<sup>257</sup>) and has not been overtly exercised. The Executive maintains budgetary controls over the Justice Department through which it can constrain (or reward) the agencies’ activities.

The FTC and the Antitrust Division are also accountable to the United States Congress in three important ways. First, Congress can pass a law to narrow an agency’s jurisdiction or regulatory authority, an approach it has taken in the past with regard to the FTC.<sup>258</sup> Second, Congress can try to influence the agency through the budget process. For example, for several years Congress specifically refused to allow the Justice Department to expend funds to argue in the Supreme Court against the *per se* rule in resale price maintenance cases.<sup>259</sup> In another well-known case, Microsoft unsuccessfully lobbied Congress to cut the Justice Department’s budget after the Department filed its monopolization suit against

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<sup>254</sup> ABA Transition Report, *supra* note 175, at 28.

<sup>255</sup> For a useful discussion in the merger context, see Barnett, Current Issues in Merger Enforcement, *supra* note 253, at 19-21; Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It* (U.S. Dep’t of Justice, Paper No. EAG 07-15, Dec. 2007), available at <http://www.justice.gov/atr/public/eag/228687.pdf>.

<sup>256</sup> See *supra* note 181.

<sup>257</sup> 15 U.S.C. § 41 (“Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office”).

<sup>258</sup> See *supra* note 9 and accompanying text.

<sup>259</sup> See Pub. L. No. 98-166, § 510 (“None of the funds appropriated in title I and title II of this Act may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws . . .”). The bill was enacted less than a month before oral argument in *Monsanto v. Spray-Rite Service Corp.* 465 U.S. 752 (1984) in which the per se rule was potentially an issue.

Microsoft.<sup>260</sup> A third recent example occurred in 2002 when Senator Ernest F. Hollings, then Chairman of the Senate Appropriations Subcommittee on Commerce, Justice, and State,<sup>261</sup> publicly objected to the proposed FTC/DOJ merger clearance agreement and threatened to cut the agencies' funding.<sup>262</sup> After a few months of behind-the-scenes maneuvering, the agencies abandoned the agreement in response to Senator Hollings' opposition.<sup>263</sup> Third, Congress exercises oversight power with regard to the executive branch and independent regulatory agencies. Congressional oversight comprises a variety of activities, such as holding investigative hearings and imposing reporting obligations on federal agencies.<sup>264</sup> The FTC's Office of Congressional Relations and the DOJ's Legal Policy Section are responsible for coordinating the agencies' respective relations with Congress and for responding to Congressional requests and inquiries.

The third formal accountability constraint on the Agencies is the judiciary, particularly when they decide to file suit (declinations of prosecution, whether civil, criminal, or administrative, are not reviewable under U.S. law). In a sense, the Agencies are always acting in the shadow of the law, *i.e.*, apart from the courts' ability to overturn Agency decisions, the mere prospect of ending up in court, and the uncertainty of a litigated outcome, can constrain the Agencies'

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<sup>260</sup> See Dan Morgan & Juliet Eilperin, *Microsoft Targets Funding for Antitrust Office*, Wash. Post, Oct. 15, 1999, at A1 (describing efforts of Microsoft and its allies to cut Antitrust Division funding by \$9 million).

<sup>261</sup> This subcommittee is now known as the U.S. Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies.

<sup>262</sup> Brent Shearer, *Merger Clearance Accord Turns Nasty*, *Mergers & Acquisitions J.* (Jun. 1, 2002). Senator Hollings was concerned about the potential ramifications of formally allocating review of all mergers in certain industries to the Justice Department, an executive branch agency answerable directly to the President.

<sup>263</sup> See Press Release, DOJ, *Statement by Charles A. James Regarding DOJ/FTC Clearance Agreement* (May 20, 2002), available at [http://www.justice.gov/atr/public/press\\_releases/2002/11178.htm](http://www.justice.gov/atr/public/press_releases/2002/11178.htm) (“...in view of the opposition expressed by Senator Hollings...to the agreement and the prospect of budgetary consequences for the entire Justice Department if we stood by the agreement, the Department will no longer be adhering to the agreement.”). This event also highlights the potential for conflict between different Congressional committees — Senators Herb Kohl and Mike DeWine, then Chairman and Ranking Member, respectively, of the Senate subcommittee with responsibility for overseeing competition matters, supported the proposed clearance agreement. See Letter from Senator Herb Kohl, Chairman, Subcommittee on Antitrust, Bus. Rights, & Competition, & Senator Mike DeWine, Ranking Member, Subcommittee on Antitrust, Bus. Rights, & Competition, to John Ashcroft, Attorney General, Charles James, Assistant Attorney General for Antitrust, & Timothy Muris, Chairman, Fed. Trade Comm’n (Mar. 1, 2002), available at <http://www.ftc.gov/opa/2002/03/clearance/kohldewine.pdf>.

<sup>264</sup> For example, the FTC submits to Congress annual Performance and Accountability Reports providing the results of the FTC's program and financial performance. See <http://www.ftc.gov/par>.

behavior. For FTC matters, the path to court can be more circuitous, because the FTC has the option of pursuing administrative proceedings rather than suing in district court, thereby precluding respondents from having their day in court until the appeals stage. The practical influence of judicial constraints on the functioning of the FTC is thus somewhat diminished compared to the DOJ, although in issuing a complaint the Commission may consider the circuit court in which the potential respondent might seek review.<sup>265</sup>

Finally, to some extent the Agencies are constrained by professional norms—“consensus views of what public competition authorities ought to do.”<sup>266</sup> There is a long tradition in the United States of developing these consensus views through professional debate involving academic commentators and the private bar. Particularly important in this debate has been the role played by the Antitrust Section of the American Bar Association. Its more than 8000 members include attorneys from private law firms that represent defendants and plaintiffs, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, judges, professors, and law students. The Section publishes three important journals devoted to antitrust law and policy and provides continuing institutional support for a system of antitrust law.

## 5. Commitment to the Rule of Law

The rule of law connotes a bundle of values, perhaps none so important as rule by application of previously-stated rules and principles and not by whim or personal interest. If the decision-maker must have discretion, the rule of law connotes bounded discretion, for unbounded discretion invites unpredictability, unequal treatment, and the intrusion of personal and vested interests and other biases into the process. Attributes of the rule of law include reasonable certainty of the governed as to what the law is, rights of review by an independent judiciary, and effective enforcement of the law.<sup>267</sup>

We have already considered equal treatment and right to appeals, above. We will limit our inquiry here to the following set of questions: Is U.S. antitrust law rule by law, not by personal interest or whim; is the decision-makers’ discretion appropriately cabined; does the law give sufficient notice of what the law is and how it will be applied; thus, is it sufficiently clear and predictable?

First, as background, the U.S. Constitution requires a degree of clarity of law. This is particularly so as to criminal law: “To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that

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<sup>265</sup> See Tucker & Reeves, *supra* note 93, at 53.

<sup>266</sup> Kovacic, *Enforcement Norms*, *supra* note 73, at 380.

<sup>267</sup> See, e.g., Lon L. Fuller, *The Morality of Law* (rev. ed. 1969); Joseph Raz, *The Rule of Law and its Virtue*, in *The Authority of Law: Essays of Law and Morality* 210 (1979).

ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>268</sup> Applying this standard, the Supreme Court recently held that the “honest services” mail fraud statute could constitutionally reach only offenses that were clear (such as bribery and kickbacks).<sup>269</sup> Nevertheless, we do not believe that this holding calls into question the constitutionality of criminal prosecutions under the Sherman Act — vague though the statutory language is. In recent years the Justice Department has limited its criminal prosecutions to price fixing, which is at least as clear an offense as bribery or kickbacks. Indeed, over the course of a century, the Supreme Court has explicitly and implicitly upheld the constitutionality of the criminal provisions of the Sherman Act.<sup>270</sup>

In its civil applications, antitrust law has a greater margin of flexibility. Antitrust law is economic law and its application requires a mixed law-and-economic analysis applied to particular facts of an industry. We address here whether U.S. antitrust law, civilly applied, is sufficiently clear and predictable, and whether the litigant can expect its conduct or transaction to be analyzed on the basis of the relevant competition facts and conditions rather than on the basis of extraneous considerations.<sup>271</sup>

Robert Bork, in his 1978 book *The Antitrust Paradox*, argued that antitrust law was “mush” – filled with non-economic considerations, and unpredictable. Beginning in the 1980s, U.S. antitrust law became rationalized along lines of an economic model. The Supreme Court overturned many earlier decisions and honed the law. Still, there is a margin of flexibility, with some antitrust enforcers and jurists more willing than others to find persistent market power, for example, and some more concerned than others about the costs of antitrust interventions.

The margin of flexibility is illustrated by the story of the Sherman Act Section 2 Report. In the George W. Bush Administration, the Antitrust Division and the Federal Trade Commission undertook a study of the appropriate standards for analysis of conduct that might violate Section 2 of the Sherman Act, which prohibits monopolization. The study was concluded, but the FTC refused to join or endorse the report – in fact, a majority of the Commissioners openly criticized

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<sup>268</sup> *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010) (internal quotation marks omitted).

<sup>269</sup> *See id.* at 2906.

<sup>270</sup> *See, e.g., Nash v. United States*, 229 U.S. 373 (1913) (upholding Sherman Act against vagueness claim) (Holmes, J.); *cf. United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978) (imposing intent requirement in criminal prosecution and rejecting mistake of law defense).

<sup>271</sup> The antitrust case law rules out consideration of non-competition values; there is no “public interest” defense. The failing company defense to an otherwise anticompetitive merger is a rare exception and hardly visible in practice, because the conditions to its use are so stringent that it is virtually not available.

its conclusions.<sup>272</sup> As a result, in September 2008 the Justice Department released the Report on its own, expressing its concern that antitrust lawsuits challenging dominant firms' strategies tend to chill competition and innovation from those firms, and taking the view that conduct should not violate Section 2 unless the anticompetitive effects disproportionately outweigh the procompetitive benefits.<sup>273</sup>

Eight months later, Christine Varney, President Obama's newly-appointed Assistant Attorney General, withdrew the Report. She characterized it as having "an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement."<sup>274</sup>

The recommendations of the Report in general stand on the conservative side of the antitrust spectrum – a position compatible in spirit with several recent Supreme Court decisions. Varney's perspective is more sympathetic to antitrust enforcement; a perspective that also finds grounding in the sometimes disparate caselaw. The two perspectives frame an on-going debate about the appropriate scope and limits of anti-monopoly enforcement.

Subject to the margin of difference in perspective and to the tension between predictability and complex analysis, practitioners and thus their clients have a substantial basis on which to predict legality or illegality of particular conduct.<sup>275</sup>

The 2010 Horizontal Merger Guidelines provide an illustration of a different sort – the balance between transparency, predictability, and analytical clarity. The new merger guidelines have fewer bright line standards than the predecessor guidelines, yet they reveal more accurately the analytical criteria that

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<sup>272</sup> See Press Release, FTC, *FTC Commissioners React to Department of Justice Report, "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act"* (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

<sup>273</sup> See U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008), reprinted at 7 CCH Trade Reg. Rep. ¶ 50, 231.

<sup>274</sup> Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in this Challenging Era*, Remarks prepared for the Center of American Progress 8 (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711.pdf>.

<sup>275</sup> Treatises, frequently updated, set forth the law and report when, for example, there are conflicting interpretations of law among the circuits. See, e.g., ABA Section of Antitrust Law, *Antitrust Law Developments* (5th ed. 2002), and annual review of developments for each subsequent year; Phillip Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (3rd ed., loose leaf, as supplemented 2010). But see Edwin S. Rockefeller, *The Antitrust Religion* (2007) (arguing that antitrust law is incoherent). Compare Maruice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375 (2009) (arguing that the rule of reason in U.S. antitrust law has deficiencies from a rule-of-law perspective, but they can be cured).

the Agencies in fact use in assessing mergers. The Guidelines' revision thus reflects the "predictability/flexibility" problem of antitrust, especially in a common law jurisdiction. There is a tension between bright lines (and thus predictability), on the one hand, and the best analysis to evaluate complex anticompetitive effects, on the other. At present in the United States, the tension tends to be resolved against bright line rules.

Thus far we have considered the uncertainties of antitrust law even when the decision-maker takes account only of competition factors. For the most part, the litigant can be assured that the authorities and courts will not smuggle into the analysis factors unrelated to competition concerns,<sup>276</sup> but the intrusion of other factors cannot be ruled out.

Within these parameters, we think it fair to say that the U.S. Agencies and courts are strongly committed to the rule of law.

#### D. Assessing the System

The U.S. antitrust enforcement system is complex. It features two federal enforcement agencies, following different organizational forms but with similar enforcement mandates. Added into the mix are state enforcers and private actions. The system is further split between civil enforcement and criminal enforcement, each of which has its own process demands. The federal Agencies themselves do not have complete control over the process of antitrust enforcement, much of which is pursued through litigation in courts of general jurisdiction under rules applicable to all federal litigation.

Looking at the ten identified process areas in broad terms, however, this complex system performs well. In the area of individual case decisions, investigated parties are given opportunities to present arguments to the Agencies prior to official action; initial adjudications and appeals test the legal and factual validity of enforcement agency charges; there are no claims of discriminatory treatment; and remedies are closely-tied to the claimed illegal behavior. In the area of institutional performance, the Agencies have made efforts to reach decisions more quickly (although these efforts are not always successful); their staffs and managers are professional; there is a high degree of transparency; there are mechanisms at work that provide political accountability (although law enforcement also requires a level of independence from political actors to assure impartiality); and all the identified factors foster the commitment to the rule of law.

Nevertheless, there are tensions inherent in the enforcement structure that affect due process norms as conventionally conceived. Probably the most significant are the tensions within the FTC between its prosecutorial and adjudicatory roles, tensions most apparent when FTC Commissioners vote on

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<sup>276</sup> See, e.g., *Wal-Mart Stores, Inc. v. Rodriguez*, *supra* note 141.

complaints and then sit as administrative law judges. In addition, the dictates of confidentiality in the criminal process necessarily reduce procedural transparency and the tradition of prosecutorial discretion in the U.S. makes review of agency decisions to decline prosecution less subject to outside control than in other systems. Finally, the Agencies must often decide between the identified process norms and the overall goal of effective and appropriate enforcement. Recent behavior, particularly the adoption of the revised Horizontal Merger Guidelines, indicates that the Agencies today may be inclined to give greater weight to the latter than the former. Whether this weighting is appropriate, and whether the Agencies could improve on process norms without sacrificing effectiveness, are subjects to which we turn in the next Section.

## V. Evaluation

The U.S. antitrust enforcement system described in Section IV shows a high degree of adherence to the identified process norms. Of course, adherence does not imply that improvements cannot be made. Indeed, there is a rich history in the United States of organized efforts to study and suggest improvements to the institutions of antitrust enforcement, dating from Gerard Henderson's 1924 study of the Federal Trade Commission<sup>277</sup> to the Antitrust Modernization Commission's broad study of antitrust enforcement agencies and doctrine completed in 2007. Some of the issues that our study has highlighted have long been discussed as potentially problematic—particularly the lack of separation of adjudicatory and prosecutorial functions in the FTC—while others, such as transparency and review of decisions not to bring cases, are newer.

We focus our evaluation on two major categories: institutional design and transparency.

### A. Institutional Design

The two U.S. federal enforcement Agencies combine certain functions in ways that enforcement agencies elsewhere do not: The FTC combines prosecutorial and adjudicative functions; the Antitrust Division combines civil and criminal enforcement. Certainly, other arrangements could be chosen. The FTC could present its cases to a separate competition tribunal, for example; the Justice Department could reassign the Antitrust Division's criminal responsibilities to the Department's Criminal Division and to the U.S. Attorneys' offices.

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<sup>277</sup> Gerard C. Henderson, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* (1924). For discussion of the book's "vivisection of a faltering federal agency" and its impact on the debate regarding proper administrative procedures, see Daniel R. Ernst, *Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932* at 23-25 (2009), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1017&context=facpub>.

Based on our study, however, it is hard to make an argument that either alteration would enhance process norms. With regard to the FTC, the concern for unfairness arising out of the lack of separation of functions does not seem to have been realized. One reason may be that, as a practical matter, the FTC's merger enforcement today generally takes place in federal court litigation rather than in administrative trials (although this may be changing). Another reason may be that federal appellate court review of FTC decisions casts a critical shadow over FTC decision-making. The FTC has come a long way from the days when "the FTC's trial examiners [predecessors to ALJs] simply presided over hearings and sent the transcript to the commission, whose members reached their decision in secret and left it to the lawyers to justify the result after the fact."<sup>278</sup> Today, Commissioners anxious about appellate review have every incentive to conform their processes more closely to judicial norms of fair procedures and reasoned decision-making. Hostile courts are unlikely to look kindly on FTC decisions.

With regard to the Justice Department's structure, having both civil and criminal enforcement authority in one "shop" does not appear to have adversely affected any of the process norms, perhaps because of the many legal restrictions that U.S. law places on the investigation and prosecution of criminal offenses.<sup>279</sup> If anything, the integration of enforcement responsibilities likely permits the Antitrust Division to carry out its mandate more efficiently. It can see antitrust policy (and optimal deterrence) as an integrated whole and the Division has no institutional incentives to advantage one set of enforcement tools (civil enforcement) over another (criminal). Arguably, the integration of functions has helped the Antitrust Division to be a formidable advocate for the use of criminal penalties to deter cartel behavior.

Another critical issue for institutional design is the question whether there should be two general federal antitrust enforcement agencies with overlapping jurisdiction. This has been a long-standing topic of debate in the antitrust community. Some have argued that a unified federal agency would produce consistent policy decisions and perform more efficiently; others have argued that having two federal agencies has an important back-stopping function in terms of vigorous antitrust enforcement and that unification would be unlikely to produce significant efficiency gains.<sup>280</sup> The Antitrust Modernization Commission

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<sup>278</sup> Daniel Ernst, *Morgan and the New Dealers*, 20 J. POL'Y HIST. 447, 471 (2008) (discussing views of the FTC in the 1930s).

<sup>279</sup> Note that any potential for unfairness in using criminal enforcement tools in civil litigation is mitigated by legal doctrine and Justice Department practice. See *supra* notes 86-87 and accompanying text.

<sup>280</sup> Compare Ernest Gelhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 Antitrust Bull. 695 (1990) (favoring single enforcement) with Report Of The American Bar Association Section Of Antitrust Law Special Committee To Study The Role Of The Federal Trade Commission, 58 Antitrust L.J. 53 (1989) (after reviewing virtues and disadvantages of multiple agencies, majority concludes, on balance, not to recommend consolidating antitrust enforcement in a single agency).

considered this issue in its 2007 Report, concluding that "[a]lthough concentrating enforcement authority in a single agency generally would be a superior institutional structure, the significant costs and disruption of moving to a single-agency system at this point in time would likely exceed the benefits."<sup>281</sup> The Modernization Commission also pointed out that there was no consensus on which agency would retain antitrust enforcement authority.<sup>282</sup> More recently, the question of dual enforcement was visibly raised by reports of jurisdictional disagreements between the Agencies over merger clearances, health-care antitrust enforcement, and potential major monopolization investigations.<sup>283</sup>

Eliminating dual federal enforcement might have some impact on due process and institutional norms, but it is hard to say whether the impact would be a net positive or negative because that would depend, in part, on how the new enforcement agency were designed. This makes it difficult to recommend unification based on the enhancement of process or institutional norms alone. Rather, the question of unification will likely depend more on a prediction of its effect on antitrust policy outcomes, an area that lies beyond the scope of this study.

## B. Transparency

Increasing the transparency of government decision-making has been an important goal of administrative law. Transparency has many virtues. It can increase political accountability; it can increase law observance and improve deterrence; it can reduce the chances of arbitrary government action. Transparency has costs as well. By cabining discretion, transparency may hamper the ability of policy-makers to change directions or to experiment. Forcing decisions into public view may also make debate less robust by making policy-makers cautious about how they articulate their decisions. And mechanisms to increase transparency can take resources away from an agency's positive enforcement agenda.

The main transparency issue our study has identified centers around decisions not to bring cases. Explanation of such decisions would be consistent with the goals of transparency, particularly in cases where the decision not to go

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<sup>281</sup> See AMC Report, *supra* note 21, at 129-30.

<sup>282</sup> See *id.* at 130. The Commission instead made recommendations aimed at specific areas in which it believed dual enforcement has had negative consequences, including the merger clearance process and the different avenues available to the FTC and DOJ in HSR Act merger challenges. See *id.* at 130-31.

<sup>283</sup> See Thomas Catan, This Takeover Battle Pits Bureaucrat vs. Bureaucrat, *Wall St. J.*, April 12, 2011, p.A1 (describing current disagreements between the Agencies and reporting that FTC Commissioner Kovacic "said his agency had a better working relationship with the European Union than it did with the Justice Department, just two blocks away").

forward is controversial, but there is no formal mechanism in the U.S. system for requiring either the Antitrust Division or the FTC to justify failures to act.

The major proposal advanced for dealing with declinations is the closing statement. Both Agencies have moved toward greater use of these statements, but only in major merger investigations and on a discretionary basis. Recent reviews of both Agencies have urged greater use of such statements, although these recommendations have focused on the merger area and not discussed a broader use of these statements.<sup>284</sup> Nor have these recommendations urged the adoption of a statutory requirement for such statements, one that might be similar to the requirements for the entry of consent decrees in Justice Department cases.<sup>285</sup>

It is hard to fault a recommendation for greater use of closing statements, although it is much more difficult to assess whether a statutory obligation would be wise. Indeed, it is not necessarily the case that requiring closing statements will provide substantially greater transparency. Much depends on the willingness of the agency to discuss its reasons honestly and fully. In this regard, the FTC may have an institutional comparative advantage over the Justice Department. Dissenting Commissioners have incentives to make their conflicting policy views known, which, in turn, can force majority Commissioners to provide fuller explanations of their own views. The Assistant Attorney General in charge of the Antitrust Division has no similar incentives. It is difficult to know how a statutory obligation could much alter these incentives.

Mechanisms other than closing statements may exist that could provide some of the benefits of transparency, particularly political accountability. The United States has a broad system of public and private enforcement that, in part, back-stops and checks federal agency decisions not to bring cases. Providing more information about federal investigations (not just the Agencies' conclusions) might enable other enforcers to make more informed judgments about the Agencies' decisions not to prosecute and, perhaps, to decide to bring suit on their own. Such transparency, of course, involves costs to the parties and risks to confidentiality of business information, and would require significant changes in federal law governing merger and criminal investigations.<sup>286</sup>

## VI. Conclusion

This chapter's review of the U.S. antitrust enforcement system describes a system that measures up well in terms of the due process and institutional

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<sup>284</sup> See FTC at 100 Report, *supra* note 181, at 119-120 (testimony generally approving such statements); AMC Report, *supra* note 21, at 64-65 (Recommendation 11a).

<sup>285</sup> See *supra* notes 228-238 and accompanying text.

<sup>286</sup> For restrictions on disclosure of documents, see, e.g., 15 U.S.C. § 18a(h) (premerger notification documents); FED. R. CRIM. P. 6(e) (documents produced to grand jury).

performance norms that are the focus of this study. Although major structural changes in the system appear to be both unnecessary and unlikely, there is still room for incremental changes that increase transparency and accountability throughout the decision-making process. Whether such changes are warranted will depend on how the enforcement agencies weigh the values embodied in the norm against the effects that such changes might have on the Agencies' ability to carry out their mandate to effectively enforce U.S. antitrust law.