Chapter Five

Building the Institutions of Enforcement

The effectiveness of the antitrust laws depends on the institutions that create the context and the means for their enforcement. In this chapter, we discuss the three public agencies of antitrust law enforcement in this country, the Department of Justice (DOJ), the Federal Trade Commission (FTC), and, collectively, the state attorneys general; we also advocate strengthening these institutions by improving public education and transparency. We have already discussed substantive policies regarding cartels, mergers, monopoly, etc. A later chapter will focus on private enforcement. Our interest in this chapter is less doctrinal than institutional. We begin with where antitrust should go over the longer term.

The antitrust community should engage in long-term planning on a systematic basis. Little of this has ever occurred. It was not part of the agenda of the recently concluded Antitrust Modernization Commission (AMC). The FTC, DOJ, and the National Association of Attorneys General (NAAG) have apparently never collaborated on shared long-term goals for the overall antitrust enforcement effort. We urge such a joint convocation as a starting point, to be followed by each organization producing its own long-term plan. At both stages, substantial transparency and public input should guide the process.

Some appropriate topics would include optimal staff levels and composition, allocation of responsibilities among the public agencies, budgetary needs, training efforts, enforcement foci for a changing economy, research topics, transparency, and public education programs – many of which we discuss in this chapter. A central objective, as FTC Chairman Kovacic has suggested, would be to identify the metrics by which institutional success should be measured. As Kovacic has observed, other nations and the EU appear far ahead of us in their long-term thinking about the direction of competition policy.

MAJOR RECOMMENDATIONS

Improving the Enforcement Agencies – In General

- The agencies should initiate a focus on long-term planning. As part of this effort, the FTC, DOJ, and NAAG should collaborate at the outset to discuss shared goals and possible coordination. Planning efforts should include identifying key metrics to measure institutional performance. Such metrics should be flexible enough to accommodate change.

- Congress should be encouraged to increase funding to the federal antitrust agencies, phasing in a substantial funding increase over several years.

- To aid recruitment and retention of talented staff, pay should be increased for lawyers and economists. In particular, the agencies should support legislation to allow legal staff to be paid on the same schedule as SEC lawyers.

- Even with increased pay levels, retention of staff requires additional attention to planning for career paths, cross-training, and management training.

- The federal government should be prepared to go to trial more frequently. Therefore, the agencies should focus on developing internal litigation expertise. Rather than hiring outside attorneys for individual trials, outside litigation specialists should be hired for two- or three-year periods, be involved in investigations from an early stage, and help train permanent staff in litigation skills.

- The agencies should continue to perform a policy advocacy role with Congress, state legislatures and other agencies, attempting to stop rules or laws with unintended or unacceptable anticompetitive effects from being enacted.

- The agencies should continue to support the International Competition Network (ICN) as well as other multinational efforts, and should work with other competition agencies abroad to create a secretariat with permanent staff to house the ICN.

- The agencies ought to undertake more post hoc evaluations a few years after closing investigations or the completion of enforcement actions to determine the accuracy of, and thereby improve, enforcement predictions with respect to price increases, output reductions, quality changes, and such key structural features as entry.

The FTC

- The administration should select Administrative Law Judges with prior experience in economics and antitrust law. Additionally, the agencies should provide training to build these judges' knowledge of antitrust and consumer protection and skills in overseeing complex litigation.

- The FTC's research agenda should include general studies on the competitive landscape in particular industries.

- The FTC should continue to sponsor public workshops on issues of particular importance to competition policy. These should include, for example, a workshop on the impact of behavioral economics insights on antitrust.

- The FTC should take the lead in developing structured rules of reason for particular recurring situations. To create these, the agencies should draw on relevant hearings, workshops, and sectoral studies.

- The FTC should continue and expand on its recent initiatives to develop Section 5 as a tool for addressing anticompetitive threats and conditions that may not be effectively reachable by the Sherman or Clayton Act.

- It should be affirmed that the 13(b) standard for FTC preliminary injunctions in merger cases is not based on a traditional "balance of hardships" evaluation; rather, it involves a more lenient "public interest" analysis. If a legislative effort is made to make the FTC and DOJ operate identically in premerger injunction cases, the appropriate model is the FTC rather than DOJ, such that preliminary

injunctions would be somewhat easier to obtain, while merger trials would benefit from more complete investigation and case presentation.

The States

- The role of state attorneys general as antitrust enforcers should be strengthened. To do so, funding should be increased, which could be accomplished in part by congressional "seed money" or by a revision of the Clayton Act to grant states a portion of recovery funds in *parens patriae* cases.

- To encourage multistate-coordinated antitrust actions and improve the ability of states to analyze competition issues and prosecute cases, NAAG should serve as an enhanced vehicle to provide resources to the states.

- State attorneys general should undertake policy advocacy efforts similar to those of the federal agencies to oppose anticompetitive state legislation.

Educating the Public

- To increase support for the antitrust mission, the agencies should endeavor to educate the public on competition policy and its underlying rationale. The next administration should coordinate with NAAG to add antitrust education to high school curricula.

- The next administration should implement an American version of the EU's Competition Day to provide an opportunity to coordinate statements of public officials and observers on the antitrust mission and garner media coverage.

- In general, the agencies should do all they can to stimulate media coverage for antitrust issues by providing journalists with relevant information, background briefings, and education related to antitrust.

- The Antitrust Section of the American Bar Association should consider forming a committee devoted to better educating the public about the meaning and value of the antitrust laws.

Increasing Transparency

- The federal agencies should adopt rules providing for disclosure of every reported transaction at the outset of premerger investigations. The purpose of such disclosure would be to provide public notice in a manner that allows any interested party to inform agency staff of its perspective on the proposed acquisition. The FTC and DOJ could consolidate notice announcements on a single Web site operated by one of the two agencies. To the extent that federal legislation is required to provide this notice, amending legislation should be promptly sought from the Congress.

- To address concerns about inside information and unfair stock trading, DOJ and the FTC should immediately announce every decision to make a second request for documents under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

- The agencies should issue statements at the close of every prolonged or high-visibility merger investigation that results in no agency challenge. One possible triggering mechanism would be whether the investigation involved a second request for documents by the federal agency. These statements should be more than perfunctory, describing not only issues involving definition of markets but also additional information, such as entry and efficiencies, whether favorable or unfavorable to the agency's decision, that was considered in determining whether or not to challenge the transaction.

- The agencies should issue more comprehensive statements in connection with merger cases settled by consent. In connection with this change, the administration should also consider advocating changes to the Tunney Act that would make compliance less costly. The goal should be to provide more meaningful information to interested members of the public at the least possible cost to DOJ.

I. Staff and Organization

A. Funding the Enforcement Agencies

A common problem for DOJ, the FTC, and the states is inadequate funding of the competition mission. At the federal level, Congress will ultimately determine funding for the antitrust agencies, but the White House will play a large role when it proposes DOJ and FTC budgets.

Of course a governmental budget should involve efficient use of resources directed to appropriate priorities, but the budget should also reflect an overall judgment on whether the service in question should be given a higher (or lower) priority than the status quo. Are there unmet needs which justify greater funding? Can these needs be met by operating more efficiently or with better priorities? It is our view that larger budgets for both federal antitrust agencies are needed in order to sustain more human and technological resources, which will in turn enable more and, hopefully, better investigations, leading to more and better cases as well as clearer guidance to the business community. Two issues are paramount: quality and quantity.

B. Putting People First

Most of the annual antitrust budgets appropriately go for personnel since antitrust work is labor-intensive and depends on well-motivated and highly educated staff.[1] The agencies must now look to the future. Many senior career people are approaching retirement. Where will their replacements come from? How will new personnel be trained and gain hands-on experience?

Federal antitrust lawyers and economists are almost always out-numbered and dramatically underpaid compared to their counterparts across the table. As the caseload grows, we need to increase their numbers and, to some extent, their qualifications if we expect them to represent the United States successfully. We have great respect for the career professionals at DOJ and the FTC. Many of them are attorneys or economists who are the full equal of their private counterparts and thus shoulder a great personal financial sacrifice to serve the public. However, since the starting salary for federal

[1] Technology, which is continually changing, represents another financial need. How will the agencies afford to keep up with the expense of new equipment to counter the upgrades and advances being made in the private sector? Again, long-term planning, to some extent done jointly by the agencies and with buy-in from those responsible in Congress, is necessary.

attorneys is now roughly a third of that for lawyers in firms that defend antitrust actions, with the gap growing with length of incumbency, it has become increasingly difficult for the agencies to recruit and retain the best attorneys.[2]

The Securities and Exchange Commission (SEC) has been able to increase the pay for its attorneys through special legislation recognizing the high level of expertise needed and the troubling comparison with the private sector. We urge similar legislation for the attorneys and economists of the two antitrust agencies, whose expertise and marketplace value are no less than that of their colleagues at the SEC.

The antitrust agencies should seek legislation that would put its legal staff on the same schedule as lawyers at the SEC and the federal bank regulators.[3] Lawyer pay in these agencies ranges from $75,000 to $96,000 for lawyers with one year of experience to $159,000 for senior and supervisory positions. An increase in these numbers will not overcome the public/private disparity, but would make it somewhat easier for a capable antitrust lawyer to stay in government at least a while longer. Much of what the SEC said in support of pay parity applies equally well to the FTC and DOJ. Like the SEC, the antitrust enforcer "oversees our nation's . . . markets with a modest staff and limited resources, operating in conjunction with the states and self-regulator organizations," leveraging its resources to fulfill its mission. The economy that the federal antitrust effort oversees has grown enormously since the FTC and DOJ were created, in terms of size, number of participants, and complexity.[4]

The agencies should also seek legislation that would create an education loan forgiveness program for their lawyers and economists. In addition, we urge the federal agencies to

---

[2] The Am Law 100, which includes many firms with sizeable antitrust practices, pay their starting lawyers approximately $160,000 per year. The FTC pays its starting lawyers $48,148 (GS-11 Step 1) and its most senior staff lawyers (those at GS-15 Step 10) $124,010 ($149,000 in Washington, DC). Senior Executive Service pay goes as high as $172, 200. We have not developed information regarding disparities between agency economists and their counterparts in the private sector, but if the disparities are comparable to what lawyers face, then their pay status should also be improved by special legislation.

[3] Employees paid on the GS schedule cannot receive more compensation than those at the lowest level of the Executive Schedule. 5 U.S.C. § 5307. The SEC was exempted from this limitation in an effort to solve its recruitment and retention problems. 5 U.S.C. § 4802(b).

[4] *See* Pay Parity Implementation Plan and Report, U.S. Securities and Exchange Commission at 3 – 4 (Mar. 6, 2002).

undertake a joint effort to enhance the career experience of their professional staff so as to make a public career more attractive. We will offer some suggestions in subsequent parts of this chapter.

There is no scientific way to justify a particular staff increase. Redeployment of current personnel might result in different targeting and different outcomes, but it is unlikely to result in a larger role for antitrust, which is what we advocate. In seeking expanded budgets, we support the long-term approach of the Dorgan-Inouye bill, the proposed FTC Reauthorization Bill of 2008. Its concept of incremental increases of 10% over a seven-year period is a reasonable and appropriate quantification that could be applied to DOJ and the FTC alike. These anticipated annual budget increases would give the agencies time to plan how to utilize each increase most effectively.

C. Improving the Career Path

DOJ and the FTC are organized in quite different ways, neither of which seems to us to maximize the career prospects of staff. DOJ makes a hard-line distinction between criminal and civil practice, but for noncriminal matters it divides attorneys according to industry sectors. The FTC makes a hard-line distinction between antitrust and consumer protection, but on the antitrust side divides attorneys according to types of violations (mergers, horizontal, etc.) except for the health care "shop." Economists in both agencies tend to be assigned to cases based on industry expertise.

Within FTC's Bureau of Competition (BC) six shops handle investigations and cases: four merger shops, one health care shop that handles both mergers and nonmergers, and one anticompetitive practices shop. Each of the merger shops has specialized industry expertise. The anticompetitive practices shop handles nonmerger investigations across all segments of the economy other than health care.

This organization differs from that of DOJ's Antitrust Division, where the equivalent groups (referred to as sections) are largely organized by industry, giving lawyers experience in both merger and nonmerger investigations and giving the agency the benefit of industry expertise regardless of the nature of the matter. While one FTC shop can take advantage of industry expertise located in another, it is unlikely to be as efficient as when the expertise lies within a single shop. The FTC should take a fresh look at whether the BC's organization is maximally effective.

It is our impression that DOJ attorneys would prefer to be assigned, over a period of years, to both civil and criminal matters and that the FTC's antitrust attorneys would prefer to be given responsibility for particular industries without regard to the type of practice to be pursued. Whether exposing attorneys to both consumer protection and antitrust work within individualized career plans would be desirable should also be explored. We suggest that the next administration pay attention to staff insights on these organizational and career issues.

At DOJ, we have heard a variety of complaints in recent years that staff morale is poor, that the front office has no confidence in staff, that staff are dissuaded from including dissents in internal memoranda, that top management is prematurely involved in case management (including directly interrogating potential witnesses), and that conformity to policy is being stressed in annual reviews. We do not know how much credibility to give these complaints or even whether they represent anything more than normal levels of tension between staff and management, but we suggest that the next administration make a point of recognizing the importance of bottom-up analysis and staff independence. Both agencies should consider providing enhanced management training.

D. A Note on the Revolving Door

Some have criticized the "revolving door" practice of attorneys trained in the government moving to the private sector or of private attorneys coming into government and then returning to the private sector. The European Commission's (EC) Competition Directorate is sometimes held up as an alternative model, where government attorneys spend their entire careers in public service and private attorneys rarely enter laterally.

The EC situation is not an appropriate model for the United States. First, its employees are better paid than ours; second, many of its employees do not enter the service as specialized antitrust attorneys or economists but rather as intelligent generalists who happen to be assigned to a particular Directorate; and third, many believe the EC has been disadvantaged by the difficulty in importing lateral transfers.

There are benefits to the U.S. revolving door. Young attorneys are attracted to FTC and DOJ jobs both for public service reasons and for the prospect of obtaining specialized

knowledge that they may eventually parlay into better paying jobs in the private sector. Similarly, laterally transferring experts can justify taking a large salary reduction to perform government service if they believe they will later be able to return to the private sector with enhanced standing. In both situations, individuals' career investment motives work to the government's advantage.

The downside of fluid movement between the public and private sector comes from perceptions that government attorneys may give favorable treatment to a potential private employer, hindering effective enforcement. We believe conflicts of interest of this sort are rare in practice. More generally, there is the risk that appointing private attorneys to senior government positions may result in a bias toward defendants' perspectives. Such bias, however, would be the result of a particular administration's hiring predilections rather than an inherent problem with the revolving door. We hope that the next administration will conduct a balanced hiring strategy that includes attorneys with experience in representing plaintiffs and whose attitudes are pro-enforcement.

Perceptions can also be managed by strict rules of recusal. The next administration should review these rules and assure that they are well-understood within the agencies.

E. Clearing Up the Merger Clearance Problem

The difficulties that sometimes arise in coordinating which agency will handle a particular investigation need to be fixed. The problem, which is discussed sufficiently in the Report of the AMC, is particularly acute under the statutory timeframe for responding to merger proposals. An effort was made to deal with this early in the Bush II administration, based on a specific allocation of industries to the agencies. This was killed by an influential member of Congress whose committee would have lost its oversight of a key industry. In our view, a division by industry is not needed. Usually industry expertise prevails in the clearance process; the problems arise when industry boundaries are changing or antitrust issues arise in industries that have not recently been under anyone's particular focus. We urge the adoption of a procedure under which, when the agencies cannot agree within a defined but brief time, assignment is determined on a random basis. To the extent that relevant expertise is available within the agency not randomly assigned to a particular investigation, the agencies should experiment with temporary personnel swaps. Indeed, providing staff of each agency with exposure to the internal workings of the other agency should be an attractive career-building practice.

II. Litigation

A. Trials

Although there is nothing inherently wrong with the government settling a high proportion of cases, this results in both agencies having very few experienced trial attorneys. Many of the agencies' attorneys desire trial experience as part of their career path and are disappointed when they realize they are not likely to obtain this experience in the federal government. They are particularly disappointed when a trial does come up and the government contracts with superstar attorneys from the private sector to run the litigation.

Antitrust trial experience is rare in both the public and private sectors (most private cases are dismissed or settled by the summary judgment stage). While law firms can easily move general litigators onto antitrust cases, the antitrust agencies have no such "ready reserve" of experienced general litigators.

While we believe the government should be prepared and willing to go to trial more frequently (because defendants need to recognize that the government is not reluctant to litigate), we do not arbitrarily call for a larger number of trials or for training all attorneys for litigation that they may never experience. We also don't think the solution is to import superstars from the outside for a particular trial.

Both the FTC and DOJ need to boost the number of first-chair trial litigators and the overall trial skills level of their lawyers. With respect to increasing the number of first-chair trial litigators, the agencies should recruit experienced litigators with the understanding that they would stay with the agency for two to three years. During that time, they would lead trial teams in litigation. They would also be required to teach litigation skills to staff lawyers. They should be involved with investigations from the outset, helping to develop them with an eye to trial.

The agencies should resist the temptation to hire private sector trial attorneys on a "special government employee" basis to try specific cases. It is at best a quick fix with high institutional costs. The practice almost inevitably leaves staff feeling displaced and undervalued; the outside litigator does not invest the effort to teach the staff that he would invest in training his or her firm's own people, since he or she will almost certainly

not work with them again. Many professionals join the agencies to gain responsibility and experience; the litigator-for-hire model defeats this ambition and can make recruiting and retention even harder.

B. Administrative Law Judges

Finally, in discussing the role of trials at the FTC, mention must be made of the Administrative Law Judges (ALJs). ALJs are the gateway to the FTC's administrative adjudication process. Once the FTC has decided to bring a case, an ALJ takes evidence and renders an Initial Decision; the Commissioners may thereafter adopt, revise, or reject it in the course of rendering a Final Commission Decision (which is then subject to appeal in a U.S. Circuit Court). An ALJ does not have the same stature as a federal district court judge and may not bring a background in complex commercial litigation or in antitrust law and economics (or consumer protection) to the task. Consequently, some of the respect for the business acumen of the FTC that was a part of the original idea for the FTC may be lost at the gateway and all the more so when a federal court defers to the ALJ rather than to the FTC itself.

The FTC should be able to select ALJs based on their experience with antitrust and other complex litigation and antitrust economics, as proposed in the Dorgan-Inouye bill. ALJs should receive training not only in substantive antitrust law and consumer protection but also in FTC procedure and techniques for managing complex litigation. One obvious benefit of such training is increased efficiency in handling administrative litigation. Another benefit may be less obvious – better formulated ALJ decisions could enhance the FTC's claim to deference when matters reach the courts of appeal. When the FTC declines to adopt all or part of an Initial Decision, even for clear error, recent experience shows that the reviewing court accords less deference to the FTC's conclusions. While the ALJ must act in accordance with his or her own independent assessment of the facts presented, ALJs today may come to the FTC with no relevant expertise or experience.

III. Policy Advocacy

A. Maintaining the Policy Advocacy Function

A very important area of activity for both of the federal antitrust agencies is competition policy advocacy. As advisors to the executive branch on competition policy, the antitrust agencies can help assure that other agencies do not adopt policies that are unnecessarily or unknowingly at odds with antitrust. Competition advocacy aims at preventing or

eliminating government rules that have anticompetitive market effects. By intervening early, the antitrust agencies may derail regulations that would otherwise create immunities because of the state action doctrine or because the activity of the acting federal agency is exempt from the antitrust laws. The antitrust agencies' expertise in particular industries or in particular types of business behavior may be informative to another agency, and their credibility with the public may be influential. While this role is not always appreciated by other agencies, the next administration should continue to support it.

Similarly, the federal antitrust agencies can play an influential role in bolstering states' competition policy. For example, the FTC has become an important and appreciated source of wisdom to states making decisions about their regulation of the electricity industry, even though the FTC has no relevant jurisdiction. Again, self-insertion into matters before another jurisdiction may sometimes raise hackles, but it is a valuable activity.

Both DOJ and the FTC have established offices that focus on international antitrust matters, many of which fall into the category of advocacy. The international function has clearly become more important with each passing year. Both agencies have devoted substantial time to participation in the ICN, which has become one of the central institutions for expanding and raising the quality of antitrust enforcement on a global basis. For example, this network enhances the ability of governments around the world to fight cartels, thereby serving our own national interest. The ICN represents a pragmatic response to the coordination problems created by the world's approximately 100 antitrust authorities. On the one hand, it provides best-practices recommendations, arising out of conferences in which most of the world's antitrust officials participate. On the other hand, it avoids the political and policy problems inherent in any effort to promote a more formal harmonization program. The next administration should continue the commitment to building the ICN and should give attention to the question of how to build a secretariat with permanent staffing that will put the ICN on a firmer institutional foundation. At the same time, recognizing that the private for-profit sector is well-represented in ICN meetings and workshops, it should give consideration to how consumer representatives can play a more significant role.

B. A Debriefing on Amicus Briefs

The federal agencies are rarely before the Supreme Court as parties but they play an important role in the development of antitrust law through their participation in amicus briefs in private cases. The agencies have been quite successful at influencing decisions. The American Antitrust Institute (AAI) has been dismayed by the agencies' consistently pro-defense perspective, although we credit the FTC for not participating in DOJ's *Twombly* brief or its support of granting certiorari in *linkLine*, which will be heard in the fall of 2008. If the next administration adopts our philosophy, the substance and tone of government amicus briefs should be a priority for change.

IV. Research and Evaluation

In recent years, DOJ and the FTC have worked together on some policy-oriented projects in the hope of arriving at consistent policies. The current Horizontal Merger Guidelines are a positive result of such joint venturing. A more recent effort to arrive at consensus on certain issues relating to single-firm conduct succeeded in creating a public record of what a variety of experts think about the issues, but thus far the agencies have not been able to agree on the substance of a joint report. We applaud the use of public workshops and similar formats, including joint activities by DOJ and the FTC, when the objective is to create policies on which it would be particularly desirable for the two agencies to take the same line. Because such joint activities have sometimes proven difficult, they should not be considered the normal method for undertaking policy initiatives. In general, the FTC is better situated by structure, legislative history, statutory authority, track record, and mission to do most of the economy-monitoring and policy development work for antitrust, although DOJ should also be extending the frontiers of antitrust through innovative litigation strategies.

A. Producing Sectoral and Other Studies

The FTC should make more frequent use of its authority to study particular industries and/or sectors of the economy, intellectual developments, and potential problem areas for competition. By way of example, we suggest a study of the relevance of behavioral economics for antitrust policy; analysis of the increasing role of business "ecosystems" in the global economy; the impact of partial ownership and equity funding on competition; and exploration of the differences between what the business schools teach and what industrial organization economists teach about competition.

The FTC should more frequently undertake sectoral studies to determine whether law enforcement, rulemaking, or some other governmental activity is appropriate with respect to particular sectors of the economy. Traditionally, the FTC's nonmerger case generation has depended to a significant extent on complaints by private parties; some cases have been started as a result of information in the general or trade press; only a few have been driven by an institutional determination to identify a fact pattern that would support an expansion or clarification of antitrust doctrine. The agencies are thus usually in the position of reacting to market developments rather than influencing their direction ex ante.

Sectoral studies allow a competition agency to understand how an industry operates, what trends are taking place, and the dimensions of competition in the industry. A sectoral study may reveal competitive problems or conclude that none exist. Neelie Kroes, the European Union (EU) Commissioner for Competition Policy, described a sectoral inquiry this way:

> A sector inquiry is different from a competition case. It does not investigate particular companies or cases. It is not based on specific evidence of wrongdoing. Rather it looks at the sector as a whole, finds out what all the companies in a particular sector are doing, finds out how the sector works. Or doesn't work. Only then does it draw conclusions as to whether action under the competition rules is necessary. [5]

The EU provides some examples of the use of sectoral studies. The EU's current inquiry into pharmaceuticals began with two questions: first, whether settlements of patent disputes violated the EC Treaty and second, whether the companies had created artificial barriers to entry of new products.[6] A third area of inquiry has been added recently: whether the pharmaceutical firms diverted their attention from developing new drugs to using their patent portfolios to deter competition.[7] The EU is now contemplating an

---

[5] Neelie Kroes, European Commissioner for Competition Policy, Commission Launches Sector Inquiry into Pharmaceuticals, Introductory remarks at Press Conference, (Jan. 16, 2008).

[6] *Id.*

inquiry into the retail sector to determine whether anticompetitive conduct is causing a rise in inflation and prices.[8] The UK Competition Commission conducted an investigation into grocery retailing. The investigation did not lead to specific enforcement actions, but the report set forth specific measures to increase competition in certain areas, including limitations on restrictive covenants and exclusivity arrangements.[9]

Sectoral inquiries can identify situations in which law enforcement activity is warranted and also situations in which a different approach, such as legislation, rulemaking or guidelines, might be preferable. The FTC has sufficient authority to conduct sectoral studies, which it has utilized from time to time over the years with important effects. We urge that greater use be made of this valuable tool.

B. Rulemaking

Rulemaking by the FTC has usually been initiated as a consumer protection strategy, although it has often had an effect on competition within a particular industry. We urge that more attention be given to rulemaking as a possible remedy for industry-wide competitive problems. It could be particularly appropriate in situations where conduct recurs with some frequency. Intellectual property issues such as patent pools, licensing, and litigation settlements are possibilities, as are health care issues such as physicians' collective negotiation with payors. Rulemaking can be prolonged and can eat up resources (both an agency's and an industry's), so it must be employed with great care and only when it is determined that the industry's competitive problems will not be dealt with more economically through company-targeted litigation. Rulemaking, or its weaker sister, publication of a guide, may also be appropriate for structuring certain rule of reason inquiries, as discussed elsewhere in this Report.

---

[7] James Kanter, *Europe Expanding Inquiry on Availability of Drugs*, N.Y. TIMES, May 15, 2008, *available at* http://www.nytimes.com/2008/05/15/business/worldbusiness/15pharma.html.

[8] Bailey Somers, *Inflation May Spark EU Probe of Retail Sector*, COMPETITION LAW 360 (May 14, 2008) (on file with AAI).

[9] News Release, UK Competition Commission, Groceries Market Investigation – Final Report (Apr. 30, 2008), *available at* http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm.

C. Workshops

Workshops (sometimes called roundtables or simply public hearings) are an important way by which the FTC can transparently invoke the resources of external experts to educate itself and the public on factual matters, trends, academic developments, and other information and opinions that can assist the policy-making process. A workshop may be one part of the methodology for an agency study or it may stand on its own. For example, we suggest that it would be appropriate to conduct a workshop on the relevance of behavioral economics to antitrust, to be followed by a report that draws conclusions and recommends actions.

The FTC is well-suited to explore the impact that behavioral economics may have on competition policy; indeed, it has already held hearings on the impact of behavioral economics on consumer protection policy. Even a quick look at the behavioral economics literature identifies a number of potential departures from rational choice theories that bear on how individuals make decisions. Some of the departures from rational choice theory with obvious bearing on competition issues are loss aversion, status quo bias, faulty heuristics (e.g., availability as a proxy for likelihood), representativeness, anchoring, and acting inconsistently with wealth maximization. To the extent that individuals systematically behave in ways that are not rational, the underlying assumptions of the Chicago school about "economic man" are challenged and may need modification. If firms, which of course are made up of individuals, also behave in ways that are not rational, competition policy may need to move away from the Chicago model. To what extent is the behavioral approach valid, both for individuals and for firms? What changes in policy are therefore appropriate? A workshop could be a good platform for beginning to face these questions.

The workshop format could also be applied to a series of programs that bridge the gap between the FTC and those industries subject to its jurisdiction. The FTC's recent workshop on Innovations in Health Care Delivery is a good example. Other workshops, perhaps as parts of larger studies, could focus on more theoretical issues such as the divergence between what business schools and business consultants teach about competition and agency perspectives on such matters as business ecosystems in the global economy and financing developments such as partial ownership and equity funding with which the agencies now have some limited experience. Like sectoral

studies, these workshops would allow the FTC to be proactive in its approach to competition issues.

As discussed in our chapter on Restoring the Legitimacy of Private Enforcement, we also propose a joint FTC-DOJ workshop on the effects of the *Daubert* case and its progeny on private and public enforcement. Similarly, two other topics that are discussed in that chapter, the impact of *Twombly* and the impact of the Class Action Fairness Act of 2005, might merit workshops. Obviously, there are many candidates for studies and workshops and the agencies need to make allocations of resources and set priorities. Our suggestion is that this be part of a multiyear plan and that the plan include a wish list of topics that can either be outsourced, with federal funding, or undertaken by volunteers in response to the agency's statement of interest. The large-scale responsiveness of the public to the AMC's request for public comments on specific topics is an indication that substantial nongovernmental expertise is available even on a voluntary basis.

D. Undertaking Post Hoc Evaluations

As mentioned elsewhere in this Report, the agencies need to do a better job of evaluating – or helping others to evaluate – their decisions through post hoc studies. Complex questions arise about how many and what kinds of studies should be conducted, and who should conduct them (e.g., staff or outside consultants), subject to what controls. While we agree with Assistant Attorney General Barnett that retrospective evaluations can be difficult to do well and meaningfully,[10] we think he is unduly skeptical. The fact is that retrospective studies have been done many times and that objective critiques of the agencies' actions and non-actions are of great importance both to the evaluation of the work of our government and to the evolution of antitrust law, economics, and practice. Given DOJ's apparent skepticism about this, perhaps it would be useful for an independent and research-oriented outside organization, such as the National Academy of Sciences, to develop a proposal for the agencies to consider.

The agencies should examine the feasibility of building a requirement into certain antitrust remedies for the defendants to provide impact reports two or three years after the remedy goes into effect, as well as an agreement to provide data on request. This

[10] Thomas O. Barnett, Ass't Att'y Gen., DOJ, Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives, Lewis Bernstein Memorial Lecture (June 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/234537.htm.

would facilitate agencies' internal evaluations of the efficacy of remedies and manifest an emphasis on assuring they accomplish their purpose.

V. More Fully Implementing the Federal Trade Commission Act

A. Section 5 of the FTC Act

The Supreme Court confirmed 36 years ago that the FTC's "unfair methods of competition" authority under Section 5 of the FTC Act empowers the agency to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws . . . ." [11] Expansive invocations of this power, however, ceased in the aftermath of setbacks in the courts in the early 1980s; for most of the past 30 years, the FTC has utilized its Section 5 authority as if it could reach only conduct that also violates the Sherman or Clayton Act. This is unfortunate and inconsistent with the fundamental congressional intent underlying the enactment of the FTC Act.

AAI applauds recent developments evincing new agency interest in exercising its Section 5 authority to address anticompetitive threats or conditions that may not be reachable under other antitrust laws. This new thinking can be seen in the FTC's "invitation to collude" cases, Commissioner Leibowitz's concurring opinion in the *Rambus* proceeding, the *N-Data* enforcement action, Commissioner Rosch's provocative suggestion for using Section 5 to address concerns surrounding broadband access policy and the net neutrality debate, and plans for a workshop to explore the dimensions of Section 5 authority later this year.

The invitation-to-collude cases exemplify both the gap-filling and incipient violation functions that Section 5 can serve in a potentially broad array of circumstances. The *N-Data* action exemplifies how Section 5 can reach anticompetitive uses of market power that may not be actionable as Section 2 offenses because they do not entail either acquisition or maintenance of market power itself – they are more like abuse of dominance offenses under EC competition law. We encourage the further development of Section 5 law in these directions. At the same time, we support the FTC's focus on appropriate limiting principles such as the reliance on "coercion and oppressiveness" in

[11] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972).

N-Data, although those particular elements may not be necessary or appropriate in all cases.

Finally, we encourage experimentation with the use of the FTC's unfair acts or practices authority – a key part of the agency's consumer protection agenda – as a complement to its unfair methods of competition authority to reach situations that are difficult to address with either authority alone. Again, the FTC did so creatively in *N-Data* as applied to an instance of installed-base opportunism in the standard-setting context. A similar complementary use of both prongs of Section 5 could be employed to address various kinds of installed-base opportunism in aftermarket contexts where *Kodak* and its progeny invite close scrutiny but have not been effective to date.

B. Rule of Reason

With the demise of many of antitrust's longstanding per se rules, the rule of reason has become the norm in antitrust analysis outside of hard-core horizontal collusion. Yet there is a surprising dearth of either judicial or agency guidance on how a rule of reason analysis should be conducted, particularly with respect to the actual balancing of procompetitive benefits against anticompetitive effects or risks. The need for that guidance has taken on new urgency in light of the *Leegin* decision. Our chapter on Monopoly, Exclusion and Intrabrand Competition provides ideas on how a rule of reason test might be shaped for evaluating various types of conduct. Here, we urge that the FTC take the lead in moving from the generalized rule of reason concept (under which, for a variety of reasons, a defendant will usually win) to a workable set of legal presumptions and evidentiary burdens that are not heavily loaded in favor of one side or the other, but are designed to elicit the truth of each situation in an efficient manner.

The FTC should employ a variety of approaches in fostering the evolution of rule of reason standards, starting with the test for minimum resale price maintenance in the post-*Leegin* world. Hearings and workshops could create opportunities to learn from a wide array of voices. The FTC should seek out diversity by inviting input from lawyers, economists, large and small manufacturers and retailers, and consumers (or their representatives). The FTC should also study effects of so-called unilateral *Colgate* policies, used to suppress price competition in some major industries.

In designing rules of reason, the FTC should emphasize the state of empirical knowledge.

Theory has a place, if facts are to be interpreted meaningfully, but fact-based realistic approaches will be critical as a basis for decisions about presumptions, burdens of proof, and other elements of the standards that evolve from these efforts.

As the FTC works on rule of reason tests for various areas, including but not limited to minimum resale price maintenance, it should focus upon two issues: dimensions of competition and the balancing process. With respect to the former, transaction price has often been the exclusive focus because that is what is most readily measured and for which data are most readily available. It is now widely recognized, however, that the current emphasis on price does not give appropriate weight to nonprice dimensions of competition such as variety, quality, and innovation. With respect to the balancing issues, there is need for more clarity in defining what fits in the procompetition and anticompetition columns. For example, if a practice is justified as eliminating free riding, there must be an understanding of what constitutes cognizable, competitively harmful free riding. Whether balancing must be based on a comparison of costs (and how to measure them) or on some other basis will also need to be determined, as will related burden of proof issues.

The evidence and arguments brought forward in these efforts could lead to guidelines that, if they are well-crafted, carry weight with courts as the thoughtful output of an expert agency which has gone through an intensive deliberative process.

C. Continued Development of the 13(b) Standard

Under the Hart-Scott-Rodino Premerger Notification Act (HSR), mergers that meet threshold standards must be brought to the attention of both the FTC and the DOJ before they may be consummated, and one or the other agency will take on the responsibility of an enforcement determination. Merger challenges typically end up in federal district court, and the court's determination of whether to grant a preliminary injunction is often the last act in the merger game: if the merger is enjoined, the parties give up; if it is not enjoined, they go ahead and consummate their transaction.

An on-going debate, which will become louder as the recent appellate decision in *Whole Foods* is dissected, relates to whether there should be any differences in process or substance depending on which agency pursues the merger. We agree with the AMC that

there should be approximately equal treatment, in theory. We disagree, however, with the AMC's proposal that the FTC give up its special attributes as an administrative agency, especially its ability to pursue administrative litigation in HSR merger cases even when a preliminary injunction is denied, in order to be more like the DOJ. Instead, we believe that the FTC Act is presently better structured to deal with mergers generally and that it is the DOJ's situation that should be modified to give its merger regime greater similarity to the FTC's regime.

Section 13(b) of the FTC Act provides that the FTC is entitled to a preliminary injunction "upon a showing that, weighing the equities and considering the [FTC]'s likelihood of success, such action would be in the public interest." Congress established the "public interest" standard in lieu of the traditional "equity" standard of irreparable damage, probability of success on the merits and balance of hardships favoring the petitioner, because the latter "is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standard of the public interest measures the propriety and need for injunctive relief."[12]

As AAI argued in its amicus brief in support of the FTC in *Whole Foods*, Congress intended that injunctive relief be "broadly available" to the FTC and that the FTC, not the court, was to be the principal arbiter of a challenged merger. These considerations, along with the incipiency standard of Section 7, suggest a deferential standard for preliminary injunctions that preserves the status quo in closely contested cases; indeed, one might expect that the close cases are precisely those in which settlements are not reached and preliminary injunctive relief is most appropriate. In ruling in favor of the FTC on the *Whole Foods* appeal, the D.C. Circuit correctly reaffirmed (most clearly in the concurrence) that the standard for preliminary injunctive relief under Section 13(b) is considerably more deferential to the FTC than is the ordinary standard for injunctive relief.

It is important to note that Congress originally established the FTC as an independent expert body and expected its expertise to receive a high degree of deference from the courts. In its later wisdom, in connection with establishing the HSR regime, Congress also permitted the FTC a choice of seeking a preliminary injunction against a pre-noticed

[12] FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting H.R. REP. No. 93-624 at 31 (1971)).

merger in federal court and following through with an administrative adjudication or of seeking both preliminary and permanent injunctions, on a consolidated basis in federal court. The DOJ, having no administrative alternative, makes it a practice concurrently to seek both preliminary and permanent injunctions. If the FTC is unable to obtain a preliminary injunction, it often does not proceed with an administrative adjudication, both because the court's determination that the FTC is not likely to win on the merits carries considerable weight and because finding a suitable remedy is much more difficult after the merger has been consummated. Nevertheless, there may be occasions when an administrative proceeding is justified even after preliminary relief has been denied and there is no good reason for this option to be eliminated.

More important is the question of judicial deference to expertise. We believe that courts should give the DOJ the same level of deference in a merger injunction proceeding that the law requires them to give to the FTC, and that legislation to require this type of equality would be appropriate. The DOJ's expertise and its analytical process with respect to mergers is qualitatively the same as the FTC's expertise and process in this area.

As illuminated in our chapter on mergers, only a small portion of large mergers (less than 3% generally) is subjected to second-request investigations and only a portion of those mergers are challenged. Individual federal judges are rarely confronted with merger cases; they are generally far less prepared to analyze a merger than either the FTC or the DOJ. There should be a presumption that the agency – either agency – has done its work reasonably, such that a preliminary injunction will be granted upon a showing that the agency has "raised questions going to the merits so serious, substantial, difficult and doubtful"[13] that additional investigation and argument, with additional time for deliberation, is appropriate. If such questions are found at the preliminary injunction hearing, then the usual standards would apply for a permanent injunction in the case of the DOJ, while the FTC could either go on to seek a permanent injunction under the usual standards or conduct its own administrative adjudication. The DOJ would not be precluded from concurrently seeking preliminary and permanent injunctions, but would now have the option of conducting a more complete investigation and trial after obtaining the preliminary injunction. The result of this kind of reform would be to keep

[13] Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953)

as much parallelism as possible between the agencies, while recognizing the special nature of the FTC and raising the bar overall for anticompetitive large mergers.

VI. Enhancing the Role of the States

When the AMC was formed, its sponsor, then-House Judiciary Committee Chairman James Sensenbrenner, identified the role of state attorneys general in enforcing the antitrust laws as one of the three topics he thought most important to study. Sensenbrenner was well aware that, in response to criticism of the role of state actors in the *Microsoft* case, various proposals had been put forward to restrict states' authority, e.g., to withdraw their ability to sue under federal antitrust laws, to limit the states to local matters, and to create a right of first refusal in the federal enforcement agencies. In the end, the AMC rejected these proposals, finding no real problem to fix.[14]

Our view is that the states properly occupy an important place in the antitrust enforcement community, and their role should be strengthened. Almost all the states have laws that can be used for antitrust purposes, including ubiquitous "Little FTC Acts." This adds an element of policy diversification to the overall system, which should be embraced. Different agencies can reflect states' varied constituencies and interests, and they can develop different competencies and specializations. The states, with different sources of funding or somewhat different antitrust missions, can augment enforcement in a way that a single agency could not. In fact, the states have frequently performed well in the litigation they have brought, often winning substantial settlements on behalf of consumers and producing benefits that stretch beyond specific state boundaries.

The principal weakness of the states as antitrust enforcers lies in their inadequate funding. Even the largest states have only small staffs devoted to antitrust. Inadequate budgets limit travel, training, planning, evaluation, and in some cases the ability to carry out satisfactory discovery. All of these deficiencies can be addressed by more funding and the increased commitment of state attorneys general to the antitrust mission.

---

[14] The AMC said it "was not persuaded that the costs of state enforcement – such as companies' being required to deal with multiple enforcers – outweigh the benefits of state enforcement or could not be substantially mitigated by means short of eliminating the authority of the states to enforce the federal antitrust laws. Rather, to address the concerns that have been raised, state antitrust enforcers should continue to focus on their areas of comparative advantage, such as local markets, and should coordinate with the federal antitrust agencies and each other to find additional ways to reduce the costs to businesses of state merger review." ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, 186 – 87 (2007).

Congress could offer seed money, as it did in 1976, to encourage further development of the states' capacity. Alternatively, it could amend Section 4E of the Clayton Act to require courts to distribute part of the monetary recovery obtained in *parens patriae* cases to the states for use in their enforcement efforts.

The use of multistate actions, in which one or several states take the lead in litigation, has allowed even states with relatively minimal resources to contribute something to the litigation while sharing in the benefit of the broader effort. The Washington, DC, office of the National Association of Attorneys General (NAAG) has helped turn the states into an important part of the antitrust enforcement machinery by coordinating the states in joint activities and researching issues. Coordination has been hampered by a limited budget, which is dependent upon moneys from the states, not all of which share an equal commitment to antitrust. Centralization of more resources for litigation and planning, probably through NAAG, would be beneficial. A stronger central coordinating role for NAAG could also include more assistance in the form of policy analysis and resource coordination (e.g., legal and economic expertise that can be supportive of state cases).

The state attorneys general should play a larger role in advocating for competition policy within state government. Many state legislative bills get passed without a public airing or weighing of their anticompetitive features. There are many state-specific problems, not limited to resource constraints, which prevent state antitrust offices from finding out about such bills in time to intervene successfully. Once a law is passed, attempts to address its anticompetitive effects through subsequent antitrust actions may not be feasible. NAAG could focus on ways to mitigate these problems.

Another problem is that the state attorney general may sometimes be in the conflicted position of representing the very state agency that is acting or proposing to act anticompetitively. Some consideration should be given to a structural arrangement (necessarily specific to each state and not necessarily possible in all states) that would permit the highest-ranking antitrust specialist within the attorney general's office to represent the state's interest in competition when there are intrastate conflicts.

We recognize that the next administration can play only a limited role in upgrading state antitrust enforcement. It can nonetheless assist by promoting a tone of mutuality that

encourages the states themselves to give greater priority to enforcing their own antitrust laws.

VII. Educating the Public

A. Educational Initiatives

Antitrust, like any public policy, requires public support to sustain its statutory basis, its funding, and its place in the nation's law enforcement agenda. Certainly antitrust has opponents who are powerful and have an important economic stake in assuring that antitrust authority is narrowly circumscribed.

Today there are few interest groups that lobby for the antitrust enterprise in Congress or otherwise. An "antitrust community" exists, consisting of members of the American Bar Association's Antitrust Section, legal practitioners, economic consultants, scholars (in law schools, economics departments, and business schools), and antitrust agency staff, all of whom are invested in antitrust expertise and therefore have a personal stake in it. In addition, consumer groups often are supportive, but tend to lack resources and expertise necessary for effective support. A few corporations and trade associations have found that support for antitrust is in their strategic interest, but most large businesses and trade associations take the opposing position. Independent farmers and ranchers and small and medium-size businesses sometimes seek the help of antitrust in opposing power buyers who suppress the price of their goods and services, but truly powerful buyers are typically among the largest financiers of political campaigns, giving them an edge in the push and pull of antitrust's political life. Labor unions occasionally support antimerger efforts when union jobs are at stake, but organized labor today generally pays little attention to antitrust. Small business, which ought to care more, largely ceased its active support when the FTC stopped enforcing the Robinson-Patman Act. The general public has little knowledge of what antitrust is, how it works, or how it helps consumers.

In this section, we suggest several ways in which the next administration should seek to build public support for the antitrust enterprise. The general public is woefully ignorant of basic economics, much less antitrust principles. Yet, it would seem that the way to start in building support is to increase the proportion of the public that is aware of antitrust and its mission.

A major initiative in educating the public about antitrust in recent years was the AAI's

video, *Fair Fight in the Marketplace*, which aired over 75 times on public television stations. The video is complemented by an enrichment website, www.fairfightfilm.org. The video and website were made possible through a cy pres grant from the California *Vitamins Cartel* case. The enrichment materials include teaching guides for introducing antitrust into the high school curriculum. Unfortunately, funding has not been available for presenting the materials to educators outside California. Experience teaches that the K – 12 public education system is so decentralized and teachers so overburdened that meaningful addition to the curriculum of this nature will not occur without aggressive outreach on a state-by-state basis. The next administration should work with NAAG to bring antitrust into high school curricula.

One way in which antitrust might be introduced to the education system with the help of the next administration would be to implement an American version of Competition Day, following the EU's lead. To educate the European public about the EC's competition mission, a special day is established each year in a different EU country. Major speeches and important announcements are made and the media provide large-scale coverage, increasing public awareness of the competition mission. A U.S. Competition Day could be an opportunity for the President, the Attorney General, the agency heads, and state attorneys general to explain to the public why we have antitrust and why it should be supported.

A third method of reaching the public is through the media. Very few journalists cover antitrust as a regular beat. The agencies should make an effort to identify and reach out to these journalists. The agencies should work hard to provide these journalists with information, including more frequently making key staff available for interviews or to provide background as significant investigations are opened, pursued, and eventually closed. Other journalists who occasionally cover antitrust matters usually are assigned to a general business beat or a general legal beat. They are especially in need of background briefings so that they will be better able to report on matters when they arise.

Public awareness of antitrust is strongly influenced by congressional action, especially with regard to hearings. Too often such hearings focus on what is likely to get press coverage rather than what is of importance to the antitrust enterprise. The question is how to present educational hearings as newsworthy. One answer is to educate journalists

so they will be more likely to cover and report on hearings in a meaningful manner. The agencies and congressional oversight committees should cooperate to furnish this education.

The Antitrust Section of the American Bar Association is particularly well-situated to play a larger role in educating the public about the value of its bread-and-butter field. Although not a matter for the next administration, we suggest this would be an appropriate time to launch a new committee that would explore and implement a public education strategy.

B. Transparency and Public Education

The following section addresses the antitrust agencies' disclosure policies governing investigations and law enforcement proceedings. Although both agencies have taken steps to provide more disclosures of that kind, more is needed to provide adequate accountability and education of the public. The FTC is particularly to be praised for its Web site, which now includes (among many very useful components) an updated primer on antitrust. Our belief is that, if the public knows more about antitrust enforcement activity, public support will increase. A high-quality body of journalists familiar with antitrust will be essential to convey this information to the public.

VIII. Transparency

Although there are substantial and readily evident benefits to transparency, disclosure also imposes significant costs. An appropriate disclosure policy should seek a principled middle ground between fish-bowl transparency and total secrecy. This section begins with an overview of the benefits of greater transparency and then moves to a consideration of the attendant costs.

Among the benefits of greater transparency are deterrence to inadequate, politically tainted, or corrupt decisions; incentives for correcting misguided policy; and better knowledge of, and compliance with, the law. Costs of greater transparency, which must also be considered, include less candid discussion and accommodation among agency officials; diversion of resources from other areas of need; possible undermining of an agency's efforts to obtain information; and the possible undermining of an agency's

credibility if agency mistakes are made known to the public. [15]

While the costs of disclosure can never be eliminated, they can be minimized through a well-designed disclosure program. The primary function of disclosure at an early stage of an agency investigation is to provide notice. Burdensome disclosure requirements in the early phases of an investigation are likely to be most harmful. On the other hand, after the agency has reached its decision, the benefits of transparency are at their greatest. The agency should be accountable to the public for its decision.

A. Overview of Merger Transparency

A critical area for transparency is the category of decisions not to challenge certain mergers and acquisitions. No disclosure is made leading up to these decisions, and none is offered even after the fact in the vast majority of clearance decisions. Accordingly, this subsection will focus on mergers, although many of our comments would apply to other areas of antitrust as well.

During the period from 1950 through the mid-1970s, merger enforcement was a matter of filing a civil complaint against firms that had already completed their combination. There was little or no disclosure of the agency's thinking before an action was filed. But once in court or (in the case of the FTC, before an ALJ), the long tradition of openness and transparency in court proceedings controlled. The government's position was spelled out in public briefs and probed in any judicial decision that was issued.

In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act (HSR) instituting premerger reporting and administrative review for large corporate acquisitions and mergers. By most accounts, HSR greatly improved merger enforcement by giving the two federal agencies the chance to review a proposed transaction before it occurred, not after the deal was done and momentum was on the side of the merging parties. HSR was the solution to the proverbial remedial problem of "having to unscramble the eggs" after a merger was consummated. A probably unanticipated consequence of HSR was to move most merger enforcement from the relative sunlight of judicial proceedings to the

---

[15] The benefits and costs of transparency for the federal antitrust agencies are addressed more comprehensively in Warren S. Grimes, *Transparency in Federal Antitrust Enforcement,* 4 BUFF. L. REV. 937 (2003).

deep shadows of agency administrative decision.

Before 1976, interested experts had access to many reported judicial decisions (many decided by the Supreme Court), enabling informed critique of merger enforcement policy. During the period of aggressive merger enforcement in the 1960s and early 1970s, critics' access to extensive judicial records allowed them ample information on which to base their analyses. That opportunity contributed to desirable moderation of merger policy by the late 1970s.

The current system still allows for some scrutiny of an agency decision to challenge a merger, particularly in the scattered cases that result in lower court decisions. Overly aggressive enforcement, should it occur, is thus exposed to daylight and informed criticism by specialist lawyers and academics. Underenforcement is a different matter. If the agencies are not bringing cases that should be brought, the public typically learns only that the DOJ or the FTC has decided not to challenge the merger. The analysis that led to the decision is ordinarily not disclosed, nor will the public know the most basic facts relevant to it.

For the FTC, these nonenforcement decisions may produce a dissent among the five Commissioners, a circumstance that may result in published Commissioner statements shedding some light on the agency's analysis.[16] For the DOJ, however, there is no public dissent from the final decision of the Assistant Attorney General and only rarely a disclosure of the agency's thinking in deciding not to challenge a pending acquisition.

In his study for the AAI published in 2003, Professor Grimes concluded that both the FTC and the DOJ needed to provide more disclosure, particularly for premerger investigations that result in an agency decision to take no action.[17] Both agencies have publicly acknowledged the need for more disclosure. For example, in a speech given in 2003, former Assistant Attorney General R. Hewitt Pate announced that the agencies

---

[16] *See, e.g.,* Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd/P&O Princess Cruises plc & Carnival Corporation/P&O Princess Cruises plc.. FTC File No. 021 0041 (Oct. 4, 2002).

[17] Grimes, *supra* note 15, at 990 – 93 (making recommendations for changes in agency disclosure policy).

were cooperating to provide a release of horizontal merger data keyed to HHI numbers.[18] The FTC followed up on this commitment to release the aggregate data (which did not identify individual mergers).[19] The data has proved useful, sparking scholarly commentary evaluating the FTC's performance.[20]

However, the FTC's aggregate data approach suffers from some critical deficiencies. It does not cover mergers reviewed by the DOJ and also omits a large number of FTC-reviewed mergers with complex market definitions (e.g., geographic market overlap). Even for those mergers included in the data, no information is available regarding the particulars of agency analysis. For example, there is no way of determining which theories of anticompetitive effect were considered, rejected, or found credible but outweighed by other unknown countervailing considerations. In sum, aggregate disclosure falls far short of the transparency necessary for public understanding of the grounds for nonenforcement decisions. Meaningful review of agency performance requires far more public information about the thinking behind nonenforcement decisions.

B. DOJ Closing Statements

In December 2003, the DOJ released Guidelines on the Issuance of Public Statements Upon Closing of Investigations.[21] Potentially, the release of such closing statements would rectify the major information vacuum in assessing the DOJ's performance with respect to mergers that have been investigated but not challenged. The Guidelines themselves, however, make clear that statements would be issued at the DOJ's discretion

---

[18] R. Hewitt Pate, Assistant Attorney General, Reviewing Merger Enforcement at the Federal Antitrust Agencies, Address Before the 2003 Annual Fall Forum, ABA Section of Antitrust Law (Nov. 18, 2003), available at www.usdoj.gov/atr/public/speeches/201471.htm.

[19] Initially released in February 2004, that data has been updated to include data from the years 1996 through 2005. FEDERAL TRADE COMMISSION, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996 – 2005, *available at* http://www.ftc.gov/opa/2007/01/horizmerger.htm.

[20] *See* Malcolm B. Coate, *An Overview of Transparency at the Federal Trade Commission: Generalities and Innovations in Merger Analysis* (May 2008), *available at* http://ssrn.com/abstract=1111687. For a critique of the FTC's data, see Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* WHERE THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., forthcoming 2008).

[21] The Guidelines are available at www.usdoj.gov/atr/public/guidelines/201888.htm.

and would likely be limited to cases in which the investigation is already a matter of public knowledge and where public interest in the acquisition is high. In fact, very few of these statements have been issued.

An example of a useful closing statement is provided by the XM-Sirius merger.[22] The four-page satellite radio statement is sufficiently detailed to allow informed criticism of the decision. The statement addresses market definition questions and offers the DOJ's analysis of why, despite the unique features of satellite radio, the acquisition is deemed unlikely to raise prices for users of this radio service. Whether one agrees or disagrees with the decision,[23] there is sufficient content to the statement to allow outside experts to offer thoughtful reactions. The major infirmity here is not the satellite radio statement itself but the circumstance that these statements are not issued as a matter of course at the end of any second request investigation.

On the other hand, on June 5, 2008, the DOJ issued a Statement on Its Decision to Close Its Investigation of the Joint Venture Between SABMiller PLC and Molson Coors Brewing Company. This was a highly publicized combination of two major beer operations in the United States. Here is the full disclosure statement:

> WASHINGTON — The Department of Justice's Antitrust Division issued the following statement today after the Division announced the closing of its investigation of the proposed joint venture between SABMiller plc (Miller) and Molson Coors Brewing Company (Coors), under which the companies will combine their beer operations in the United States and Puerto Rico:
>
> After a thorough, eight-month investigation, during which the Division obtained extensive information from a wide range of market participants – including the companies, rival brewers, beer distributors, and national

[22] Statement of the Department of Justice Antitrust Division on its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger With Sirius Satellite Radio Inc., Mar. 24, 2008, *available at* www.usdoj.gov/atr/public/press_releases/2008/231467.htm.

[23] AAI issued a critical statement on April 22, 2008. *See* Letter from Richard M. Brunell, Director of Legal Advocacy, American Antitrust Institute, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission (Apr. 21, 2008), *available at* http://www.antitrustinstitute.org/Archives/XMSiriusFCCletter.ashx.

> retailers – the Division has determined that the proposed joint venture between Miller and Coors is not likely to lessen competition substantially. In one of the key parts of the investigation, the Division verified that the joint venture is likely to produce substantial and credible savings that will significantly reduce the companies' costs of producing and distributing beer. These savings meet the Division's criteria of being verifiable and specifically related to the transaction and include large reductions in variable costs of the type that are likely to have a beneficial effect on prices.
>
> The large amount of these savings and other evidence obtained by the Division supported the parties' contention that the venture should make a lower-cost, and therefore more effective, beer competitor.

This does not disclose market concentration information and does not specify whether the joint venture creates anticompetitive conditions that are outweighed by efficiency gains. All it says, in effect, is "Trust us." We submit that this does not contribute to transparency in any meaningful way.

In the first four months of 2008, the DOJ released seven press releases announcing divestiture relief in merger cases settled by consent.[24] All of them are one or two pages in length and address only the competition issues that are implicated in the divestitures. Issuance of these releases is routine, at least in part because consent settlements relating to the divestiture relief trigger application of the Tunney Act.[25] Without addressing the more controversial aspects of that Act and the DOJ's minimalist style of complying with it, it is clear that routine disclosure in all divestiture cases at least provides for minimum public disclosure in each of these cases. Unfortunately, the disclosure is superficial. The competitive impact statements that the Tunney Act requires do little more than summarize the complaints accompanying the proposed consent decrees. There is, for example, no discussion of issues that might have been seriously considered but were

---

[24] See the Antitrust Division's index of press releases, *available at* http://www.usdoj.gov/atr/public/press_releases/2008/index08.htm.

[25] The Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. § 16.

ultimately deemed not worthy of requiring divestiture relief. In this respect, the press releases issued in these seven cases are notably less informative than the March 2008 statement issued in the satellite radio case. The DOJ has always minimized the importance of the Tunney Act, complying in the most perfunctory fashion. The next administration could increase antitrust transparency if it simply approached its statutory obligations under the Tunney Act in a more positive manner.

C. Towards Greater Transparency

Although an across the board reevaluation of disclosure policies in all antitrust investigations is warranted, the most pressing area remains disclosures involving merger enforcement.

- The agencies should adopt rules providing for disclosure of every reported transaction at the outset of premerger investigations. The purpose would be to enable any interested party to inform agency staff of its perspective on the proposed acquisition. This sort of disclosure is already in place in other federal agencies that review mergers and in competition agencies around the world.[26] The FTC and the DOJ could consolidate notice announcements on a single Web site operated by one of the two agencies. To the extent that federal legislation is required to provide this notice, amending legislation should be promptly sought from Congress.[27]

- To address concerns about inside information and unfair stock trading, the agencies should immediately announce every decision to issue an HSR second request.

- The agencies should issue statements at the close of every second request investigation that results in no agency challenge, unless there is a strong reason to keep the matter private. These statements should be more than perfunctory, describing not only issues involving definition of markets but also additional information, whether favorable or unfavorable to the agency's decision, that was considered in determining whether or not to challenge the transaction.

---

[26] *See* Grimes, *supra* note 15, at 990 – 91.

[27] There is a question whether a provision in HSR might prohibit disclosure of information received in a premerger filing. 15 U.S.C. § 18(a)(h). *See* Grimes, *supra* note 15, at 949 & n.21.

- The agencies should issue more comprehensive Tunney Act statements in connection with merger cases settled by consent. In particular, these statements should offer the same information about claims not pursued that is offered in cases that are not pursued. In connection with this change, DOJ should also consider advocating changes to the Tunney Act that would make compliance less costly. The goal should be to provide meaningful information to interested members of the public at the least possible cost to DOJ.