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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

ROUNDTABLE ON COMPETITION AUTHORITIES'ENFORCEMENT PRIORITIES

-- Note by the United States --

This note is submitted by the Delegation of the United States to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 20, 21 and 22 October 1999, under item VI of its agenda.

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1. The U.S. antitrust system distributes prosecutorial power more widely than many other competition law regimes. U.S. statutes and court decisions confer standing to enforce antitrust statutes on the two federal antitrust agencies, the Federal Trade Commission and the Antitrust Division of the Department of Justice, as well as on state attorneys general and private parties, including injured consumers and businesses. This paper focuses on how the two federal antitrust agencies set and implement enforcement priorities.

I. The Federal Trade Commission

Legal Framework

2. The Federal Trade Commission has exclusive responsibility for enforcing the Federal Trade Commission Act ("FTC Act") and has concurrent authority with the Antitrust Division for Clayton Act enforcement. The Commission's antitrust authority derives from Section 5 (a) (1) of the FTC Act, which prohibits "[u]nfair methods of competition in or affecting commerce." Unfair methods of competition include all conduct that violates the Sherman or Clayton Acts, and also extend further to cover conduct that violates the spirit of these Acts and constitutes an "incipient" antitrust offence -- conduct which, if left unchallenged, might develop into a Sherman or Clayton Act violation. The Commission is the primary arbiter of what constitutes an "unfair method of competition" and has broad discretion to interpret this mandate, within the parameters set by the courts, on a case-by-case basis.[1]

3. Under Section 5 (b) of the FTC Act, the Commission can bring a case only if it has "reason to believe" that the law has been violated[2] and if it determines that an enforcement action "would be of interest to the public.[3] The statute lists no factors for making this "public interest" determination, leaving it to the agency's discretion.

4. In each case the Commission evaluates the short and long term effects on the public interest of a decision to prosecute, considering, among other things, its significance to the evolution of the law, precedential value, and the agency's resource constraints. Before bringing a case, the Commission must be convinced not only that there is a probable law violation but that there is likely injury to competition and consumers. Exercising its prosecutorial decision entails weighing the potential benefits of prohibiting the violation against the costs of bringing an enforcement proceeding and monitoring compliance with a Commission order. The Commission seeks to bring cases that yield the largest tangible benefits to consumers while using the fewest resources and without unduly interfering with the free operation of the marketplace.

5. The Commission was set up as an independent agency to ensure that its enforcement is non-political. Commissioners have staggered terms of seven years, thus overlapping presidential administrations, and cannot be removed for making politically unpopular decisions.[4] No more than three of the five Commissioners can be of the same political party. Section 6(c) of the FTC Act authorises the Commission "upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation," but the Commission independently determines whether to undertake such investigations and whether to prosecute based on the evidence.

Setting Enforcement Priorities

A. Resource Allocation

6. The FTC interprets and implements the FTC Act primarily through the prosecution and adjudication of individual cases. The Commission's Bureau of Competition, with assistance from the Bureau of Economics, carries out the Commission's antitrust mission by investigating alleged law violations and recommending, when appropriate, that the Commission take formal enforcement action. In addition, the Commission promotes the use by federal, state, and local government agencies of free market mechanisms rather than regulatory restraints by providing, upon request, reports or comments to those agencies that seek its views. The Commission's Office of Policy Planning is responsible for the co-ordination of consumer and competition advocacy. Commission staff also encourage voluntary compliance by issuing advisory opinions to members of the public who request clarification of its enforcement policies.

7. The Commission also addresses its enforcement priorities through the budget process. Each year, the Bureau of Competition prepares a budget request for its antitrust mission, which is subject to Commission and ultimately Congressional approval. The budget request sets out how appropriated funds will be allocated by enforcement program area, e.g., premerger notification, merger and joint venture enforcement, and nonmerger enforcement. The requested allocations are based on recent experience as well as judgements about expected trends in the economy.

8. The principal practical limitation that the Commission confronts in setting its antitrust enforcement priorities is the resource constraint imposed by its statutorily required merger review responsibilities. The premerger notification requirements and tight statutory deadlines for merger review imposed by the Hart-Scott-Rodino Improvements Act of 1976 require us to allocate sufficient resources to fulfill our responsibilities under the Act. The merger wave of the 1990s has tripled our merger workload in the past seven years and required diversion of resources from the nonmerger area. Currently over two-thirds of the Bureau of Competition's resources are allocated to merger enforcement.

9. The remaining third of the Bureau's resources is devoted to nonmerger enforcement, an area of growing concern particularly in dynamic areas of the economy that have a serious impact on consumers, such as conspiracies in the provision of health care services and exclusionary behaviour by dominant firms in high technology industries. Resources for nonmerger matters are also devoted to non-litigation activities, such as analytical work in support of the Commission's advocacy program, advisory opinions, and handling of public correspondence and inquiries.

10. Advocacy also has an important role in the agency's work as one of the Commission's goals is to support sound deregulation. Commission staff regularly file comments in federal and state proceedings aimed at establishing sensible rules for deregulating sectors such as electricity. In addition, the Commission has brought enforcement actions in formerly regulated markets to ensure that the benefits of competition are not thwarted by private restraints. Thus, the Commission has challenged anticompetitive conduct in deregulated or deregulating industries, such as natural gas industry, electricity, cable television, and professional services.[5]

11. While the Commission does not "target" specific sectors, it focuses its limited resources on segments of the economy where consumer spending is high, such as health care, pharmaceuticals, other professional services, food, energy and certain high-technology industries like computers and video programming. In the past few years, the Bureau of Competition has devoted an increasing amount of its resources to enforcement in high-tech industries. The FTC also has played a major role in preserving competition in defense industries, where the "consumer" is essentially the U.S. government.

B. Case Selection - Procedures and Evaluative Factors

12. The Commission derives ideas for cases from many sources. These include complaints from customers, suppliers, or competitors about practices alleged to be anticompetitive. Bureau staff review the complaints and, where a complaint falls within our jurisdiction, may initiate an inquiry. Investigations are often triggered by the staff's monitoring of the general and trade press concerning mergers, distributional arrangements and other relevant conduct or agreements and can also arise out of other Bureau cases, investigations and projects. The premerger notification program, of course, is the main source of merger investigations. Investigations do not generally grow out of a Bureau or Commission initiative in any formal sense. Instead, the policy views of Commissioners and staff are developed and expressed both in individual investigations and by keeping up with business and economic developments in the literature, holding workshops, and participating in conferences. In turn, these policy views and insights help shape the way in which staff perceives, evaluates, and follows up on leads received through traditional sources. A great deal of informal interaction helps disseminate such new learning throughout the agency.

13. The Commission has established procedures designed to ensure that its cases are legally and economically sound, and are the most productive use of the Commission's limited resources. Nonmerger and merger investigations have similar but separate procedures for case initiation and review. In nonmerger investigations, the head of the relevant division approves the opening of an initial investigation, generally on the basis of a staff attorney's request and a memorandum that briefly explains the proposed investigation. An economist is assigned to assist in the investigation. If a preliminary investigation produces evidence of a plausible law violation and injury to competition, staff forwards a summary of their findings, the legal theory and a request to the Bureau's Evaluation Committee for conversion to a full investigation, which is a more searching and detailed inquiry. Staff at this point may also seek authorisation of compulsory process, which requires the Commission's approval.

14. The Evaluation Committee consists of the Directors of the Bureaus of Competition and Economics and their principal deputies and is usually chaired by the Director of the Bureau of Competition. The Committee considers the separate analyses and, if there are different views, separate recommendations of the Bureau of Competition's investigative staff, the Bureau of Competition's Office of Policy and Evaluation and the Bureau of Economics. The Bureau of Economics provides economic analysis and advice on the economic merits and impact of alternative courses of action. The decision whether to commit additional resources to the investigation is made by the Director of the Bureau of Competition.

15. A full nonmerger investigation has three potential outcomes: a recommendation to the Commission to issue a complaint, a staff request to enter into consent negotiations,[6] or the closing of the investigation. The investigative staff makes its recommendation to the Evaluation Committee, which reviews the separate analyses and possibly separate recommendations of the investigative staff, the Bureau of Competition's Office of Policy and Evaluation and the Bureau of Economics. The Director of the Bureau of Competition decides whether to recommend an enforcement action to the Commission after considering all recommendations and after the parties under investigation have the opportunity to present their arguments. Ultimately the Commission decides whether to issue a complaint or accept a settlement negotiated by staff. Closing an investigation requires Commission approval (usually on a negative-option basis), if the Commission has formally acted in the matter, e.g. by authorising the use of compulsory process.

16. Because the Bureau's merger workload has soared, it is selective in deciding how to use its nonmerger resources. Bureau management monitors closely the progress of investigations and tries to decide early in the process whether the investigation is worth continuing and whether its focus needs to be narrowed or shifted. The determination of where to devote resources is an important and refined part of the process of setting enforcement priorities. The size of the resource commitment differs from case to case as well as from one stage of the enforcement process to another in the same case. Some of the key

factors that the Bureau considers before pursuing an investigation are: the likelihood of finding a legal violation; the impact on consumers; the deterrent and precedential value of the case; and how consumers will benefit. In recommending a complaint, the Bureau also weighs litigation risks, including the size of the resource commitment and the likelihood of success on the merits. The magnitude of consumer benefit need not always be as great as in Toys ?R' Us, a case we discussed last year in this Committee, where millions of consumers purchase the relevant products. The Commission brings cases, for example involving health care services, in relatively small markets where the impact of the violation may be smaller in relative scale but still substantial for the affected consumers or in deterrent value.

17. The Commission sometimes brings cases not only because of the immediate market impact, but also because the case may help clarify the law.[7] For example, the Commission has applied straightforward concepts of joint venture law to new arrangements among health professionals and has provided guidance in areas such as invitations to collude or standard setting, where there is relatively little case law.[8] In both types of cases, the value of enforcement action goes beyond the specific case by clarifying the law and in turn guiding the broader business community.

18. Where the source of the investigation is a complaint by a private party, the Bureau also will consider whether the public interest in the matter is sufficient to warrant using government resources, rather than leaving the private party to pursue the case, and whether the relief that the private party could obtain would be sufficient to vindicate the Commission's interest in the case.

19. The case selection and review procedures for mergers are similar in most respects to those of nonmerger investigations but are streamlined because of the time constraints imposed by the HSR Act. Legal staff in our Premerger Notification Office review HSR filings and prepare analytical summaries that include recommendations to grant early termination for transactions that raise no competition concerns or recommendations for further investigation by staff in the litigation divisions. The procedure for opening an initial phase investigation is the same as that for nonmergers. However, the decision to convert an initial phase investigation to a full phase, including authorisation to issue second requests to the parties and to use compulsory process,[9] is made after consideration by the Bureau's Merger Screening Committee, which has the same composition as the Evaluation Committee. At conclusion of the full phase investigation, the Bureau Director again consults with Bureau staff and the Bureau of Economics on any staff recommendation for an enforcement action. The Director also gives the parties to the transaction an opportunity to present arguments in support of the merger. The Commission makes the ultimate enforcement decision on behalf of the agency.

20. The factors that the Bureau considers in deciding whether to initiate a full phase investigation or recommend an enforcement action are the same as for nonmergers. The standards for a legal violation are set out in the 1992 Horizontal Merger Guidelines jointly issued by the FTC and the Department of Justice. There are no "trigger thresholds" in the Guidelines but if the investigation shows that market concentration and/or barriers to entry are low or the requirements of a "failing firm" are met, the acquisition likely will not pose a competitive problem and enforcement action is not warranted.

21. Where an investigation reveals that a merger raises competitive concerns under the Horizontal Merger Guidelines, additional factors may influence the decision whether to recommend an enforcement action. For example, in one close case, a combination of three factors caused the Bureau not to seek a preliminary injunction: the deteriorating financial position of the acquired party that made uncertain the likelihood of finding a viable, alternative purchaser if the Commission blocked the transaction; the difficulty of establishing new law to support our geographic market definition; and mixed evidence on the likely competitive effects of the merger.

22. In both the merger and nonmerger area, a competitive problem may be resolved through consent negotiations, as noted above. In each, the Bureau's decision whether to recommend a settlement or litigation is based on an assessment of what type of relief is necessary to prevent the actual or potential

injury to competition. An example from the merger area is *Staples Inc./Office Depot Inc*. in which the parties proposed a divestiture that only addressed the geographic areas where the merger would leave only one office superstore but not those where the number of such competitors was reduced from three to two. The Bureau urged the Commission to reject the settlement as inadequate to fully restore the level of competition that existed before the merger. The Commission agreed and authorised staff to seek injunctive relief, which the federal district court granted.

Conclusion

23. Competition law enforcement agencies have finite resources that impose a practical limit on the number of investigations and proceedings that can be initiated and pursued. In choosing where to allocate scarce resources, the Federal Trade Commission is guided primarily by a case- by-case weighing of the benefits to consumers of enforcement against the direct and opportunity costs of pursuing the case.

II. The Department of Justice

Legal Framework

24. The Department of Justice (DOJ) is a law enforcement agency. As an Executive Branch Department, it enforces the antitrust laws through criminal prosecutions and civil lawsuits in the federal courts. The DOJ has sole authority to prosecute federal criminal violations. The Attorney General is an officer of the Executive Branch, and under the United States Constitution, she is ultimately responsible to the President, by whom she is appointed (with the advice and consent of the Senate). Within the DOJ, which the Attorney General heads, responsibility for antitrust enforcement lies in the Antitrust Division, headed by an Assistant Attorney General (AAG) who is also appointed by the President (with the advice and consent of the U.S. Senate).

Setting Enforcement Priorities

25. As a law enforcement agency, the DOJ possesses full discretion over the setting of enforcement priorities and in determining which investigations to open, investigate, and prosecute. A DOJ decision not to investigate or prosecute a complaint cannot be challenged. Certain enforcement activity is mandated by statute, such as the review of pre-merger notifications under the Hart-Scott-Rodino Act. In the 1998 Fiscal Year, 40 percent of the Division's total resources were devoted to merger enforcement, 22 percent to civil non-merger enforcement, and 38 percent to criminal enforcement.

26. The DOJ has no formal priority-setting practice. It is subject to the oversight of Congress, which appropriates the funds to support its activities and can request that the Division look into certain sectors or activities. Recently the DOJ has set as broad priorities the clarification of antitrust doctrine in an era of high-tech network industries, ensuring effective competition as long-regulated industries move to a competitive model, and tackling the challenges of antitrust enforcement in a globalised economy. The DOJ has a responsibility to contribute to the continual evolution of antitrust doctrine and to ensure that it proceeds coherently and in a manner that is applicable to economic trends and industry practice. Because antitrust doctrine continues to be primarily a matter for common law, doctrinal development is a DOJ priority in considering whether to bring a case. The same is true with respect to decisions on whether to file amicus curie briefs in other cases.

27. In addition to these precedential and doctrinal considerations, the DOJ considers the amount of commerce affected and the number of consumers and businesses affected when deciding whether to prosecute cases. In the U.S., each of the fifty state governments may sue to enforce federal antitrust laws when an antitrust violation causes injury to the state itself or to its citizens, and nearly all the states have their own antitrust laws which may be enforced through suits brought by states in the state courts. In addition, private rights of action are available for parties to enforce their rights under the antitrust laws, so a decision by federal or state agencies not to prosecute does not leave parties without a remedy.

28. Another important factor considered is the deterrent value of a particular prosecution within an industry or region. There is no formal cost-benefit analysis applied to the decision whether to investigate and prosecute a case, but internal procedures ensure that at various logical decision points (*e.g.,* (1) the decision to open a preliminary investigation, (2) the decision to issue a civil investigative demand, second request in an HSR investigation, or subpoena, (3) the decision to file a case, terminate an investigation, or enter a settlement), a written recommendation memorandum prepared by staff, including careful review of whatever economic analysis will be needed from the economic sections, is evaluated by senior officials in the Division. Detailed explanations of proposed staffing, information system support, workspace requirements, and other logistical considerations are included in these memoranda, along with a detailed discovery plan identifying specific requests, individuals involved, relevant dates, and expected outcomes.

29. The DOJ enforces the antitrust laws through the federal courts. A critical factor in the decision whether to bring a case is the need to persuade a federal judge of general jurisdiction (and ordinarily a jury in criminal cases). The quality of the evidence (including the credibility of witnesses) and complexity of the case are important in this context.

30. The DOJ does not target particular sectors, although it may focus its resources in response to economic developments -- consolidation and other potentially anticompetitive activity in recently deregulated sectors, for example. Competition advocacy efforts before other government departments and agencies typically are undertaken after an informal cost/benefit analysis in which the likelihood and importance of a successful outcome are estimated and compared to the cost of the necessary undertaking.

Finding and Evaluating Antitrust Complaints

31. The Antitrust Division's investigations arise from a variety of sources including:

1. complaints received from citizens and businesses when they believe that companies or individuals are engaged in unlawful conduct;

2. analysis and evaluation of filings under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976;

3. press reports of various practices that come to the Division's attention through the monitoring of newspapers, journals, and the trade press;

4. "inside" information obtained from informants, or individuals or corporations applying for amnesty;

5. complaints and information received from other government departments or agencies, or from foreign authorities;

6. complaints and referrals received from United States Attorneys and state attorneys general;

7. analysis of particular industry conditions by Division attorneys and economists; and

8. monitoring of private antitrust litigation to determine whether the Division should investigate the matter.

32. The broad standards used by the DOJ in deciding whether to conduct criminal proceedings, including investigative measures, are set out in the U.S. Attorneys' Manual. This public document explains that the DOJ enjoys wide discretion regarding whether, when and how it will bring criminal charges. For example, §9-27.220 states that, where there is sufficient admissible evidence of a Federal offence, the government may nonetheless decline to prosecute because: (1) no substantial Federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non- criminal alternative to prosecution. In §9-27.230, "Substantial Federal Interest" is defined to include, *inter alia*, "federal law enforcement priorities" and "the nature and seriousness of the offence."

33. In a matter where the suspected conduct appears to meet the Division's standard for a criminal proceeding, the decision whether to open an investigation will depend on three questions. The first of these is whether the allegations or suspicions of a criminal violation are sufficiently credible or plausible to call for a criminal investigation. This is a matter of prosecutorial discretion and is based on the experience of the approving officials; there is no legal standard. The second question is whether the matter is "significant." Determining which matters are "significant" is a flexible, matter-by-matter analysis that involves consideration of a number of factors, including: volume of commerce affected; geographic area impacted; the potential for expansion of the investigation or prosecution from a particular geographic area and industry to an investigation or prosecution in other areas or industries; the deterrent impact and visibility of the investigation and/or prosecution; the degree of culpability of conspirators (*e.g.*, the duration of the conspiracy, the amount of overcharge, any acts of coercion or discipline of cheaters, etc.); and whether the scheme involved a fraud on the federal government. The third question -- what resources will be required to investigate and prosecute the matter -- is asked for all matters, but affects decisions to prosecute only for matters that are assessed as having lesser significance; the Division is committed to prosecuting all matters of major significance.

NOTES

1. See FTC v. Sperry & Hutchinson Co., 495 U.S. 233 (1972); FTC v. R.F. Keppel & Bros., Inc, 291 U.S. 304 (1934).

2. The Supreme Court has held that the Commission's finding of a "reason to believe" that the law has been violated is a discretionary act not subject to judicial review except in connection with review of a final FTC cease and desist order. See FTC v. Standard Oil Co., 449 U.S. 232, 239-43, 246 (1980).

3. The FTC Rules of Practice and Procedure provide that "[t]he Commission acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of laws is merely of private controversy and does not tend to affect the public." 16 C.F.R. § 2.3.

4. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

5. See U.S. submissions for Working Party No. 2 round tables on broadcasting and professional services, DAFFE/CLP/WP2/WD(99)25 and DAFFE/CLP/WP2/WD(98)51.

6. Draft and final proposed consent agreements are reviewed by the Bureau and the Bureau of Economics before being sent to the Commission for provisional approval pending public comment..

7. Even when a case is settled, the Commission publicly explains the facts and legal theory in its analysis to aid public comment on a proposed consent order.

8. Urological Stone Surgeons and Parkside Kidney Stone Centers, Dkt. No. C-3791, 5 Trade Reg. Rep. (CCH) ¶ 24, 367; Mesa County Physicians Independent Practice Ass'n, Inc., Dkt. No. 9284, 5 Trade Reg. Rep. (CCH) ¶ 24, 266; Stone Container, Dkt. No. C- 3815, 5 Trade Reg. Rep. (CCH) ¶ 24,390; Dell Computer Corp., Dkt. No. C-3658, 5 Trade Reg. Rep. (CCH) ¶ 24, 054. See summaries of these cases in DAFFE/CLP(99)14/07, DAFFE/CLP (98)10/07 and DAFFE/CLP(97)1/07.

9. As with nonmergers, the Commission must approve the use of compulsory process.