



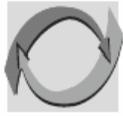
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9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

The Fairness Debate in the U.S.

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The Fairness Debate in the U.S.

by

*Bert Foer**

The U.S. Federal Trade Commission (“FTC”) celebrates its one hundredth anniversary in 2014. This prospect has generated substantial debate over the value of the commission-based administrative process as opposed to the competing court-based process for civil cases initiated by the Department of Justice Antitrust Division (“DOJ”). In particular, a recently appointed conservative member of the FTC, former law and economics professor Joshua Wright, has been pressing the case that the FTC processes are unfair.¹ Some less conservative observers have written articles supporting this view.²

I want to begin by discussing what a statistic reflecting nineteen consecutive victories for the FTC may or may not mean. I then want to turn to the question of whether it is unfair to have two different agencies that can approach competition cases with different attitudes and procedures. How would one judge whether there is unfairness? Finally, assuming for the moment that there is some degree of unfairness, what justifications might counterbalance the criticisms? I hope that the discussion will be of value to jurisdictions that are considering whether they want a single competition agency or multiple enforcement agencies, and whether administrative procedures are fair.

* President of the American Antitrust Institute. The American Antitrust Institute is a non-profit education, research, and advocacy organization headquartered in Washington, DC. See www.antitrustinstitute.org. The author thanks AAI Research Fellow Amaury Sibon for assistance in preparation of this paper.

¹ See Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission’s Section 5 Unfair Methods of Competition Authority*, (4) CONCURRENTS: COMPETITION L.J. 1 at 2 (2013).

² See David Balto, *Can the FTC be a Fair Umpire?*, THE HILL, Aug. 14, 2013, available at <http://thehill.com/blogs/congress-blog/economy-a-budget/316889-can-the-ftp-be-a-fair-umpire>.

I. Some Necessary Background

The FTC enforces Section 5 of the FTC Act, which outlaws “unfair methods of competition,” a phrase which is admittedly and intentionally vague. Sometimes it brings cases under both Section 5 and the Sherman Act or the Clayton Act, and sometimes only as standalone Section 5 cases. Section 1 of the Sherman Act in effect outlaws unreasonable agreements that restrain trade and Section 2 of the Sherman Act, which outlaws monopolization and attempted monopolization. The Clayton Act outlaws certain specified conduct, such as exclusive dealing. The fact that there are also “standalone” complaints implies that the Unfair Methods of Competition phrase has a larger scope than the Sherman Act and the Clayton Act. Virtually everyone agrees with this, but there is little agreement on how far Section 5 extends beyond the Sherman and Clayton Acts. No internal guidelines and very little authoritative common law clarifies the potential reach of Section 5.

Except for merger injunction cases, which are usually brought in federal district court, most of the FTC cases are adjudicated before an Administrative Law Judge, whose findings may be appealed to the five Commissioners. It is the Commissioners, in the first place, who authorize the investigation and the issuance of a complaint. The Commissioners are both the prosecutor and the judge in the same case, an undeniable fact that can be argued to be unfair to defendants.

Commissioner Wright, for one, has argued, “The combination of institutional and procedural advantages with the vague nature of the Commission’s Section 5 authority gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely may not be anticompetitive.”³ Wright claims that the situation provides not even a minimal level of certainty for businesses and that it may chill some legitimate business conduct that would otherwise have enhanced consumer welfare.⁴ His solution is a proposed guideline providing that “A standalone Unfair Methods of Competition violation requires evidence of harm to competition and no cognizable efficiencies....”⁵

³ Wright, *supra* note 1, at 3.

⁴ *Id.*

⁵ *Id.* at 3. Another way of saying this is that if a defendant can show one iota of cognizable efficiency (and Wright elsewhere indicates a desire to expand the bounds of what is cognizable), this would defeat the FTC’s ability to demonstrate even the most overwhelming amount of anticompetitive harm.

II. Does the FTC's Winning Streak Prove Unfairness?

As evidence in support of the conclusion that the process is unfair, Wright notes:

The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years.⁶ In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff. In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FCT staff, the Commission affirmed; and in 100 percent of the cases in which the administrative law judge ruled against the FTC staff, the Commission reversed. By way of contrast, when the antitrust decisions of federal district court judges are appealed to the federal courts of appeal, plaintiffs do not come anywhere close to a 100 percent success rate—indeed, the win rate is much closer to 50 percent.⁷

Can we look to statistics in this way to determine whether the process is unfair?⁸ Let me suggest ten alternative explanations of why the FTC might be more likely to win a higher proportion of its cases than private plaintiffs.

1. The FTC could be unduly timid, much more timid than private plaintiffs, and only bring extremely well-prepared and formidable complaints. The implication could be, not that it is biased but that it should be more aggressive in its case selection, or, as will be suggested, that the case selection process and criteria are very different for the government and for private plaintiffs' attorneys.

2. The FTC benefits from extensive pre-complaint discovery, not available to private plaintiffs, hence the Commissioners and their staff are likely to have a stronger and more realistic grasp on the strength of their allegations.

⁶ See Nicole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950–2011 and Integration of Decision Functions*, 81 GEO. WASH. L. REV. 1684 (2013).

⁷ Wright, *supra* note 1, at 2. In January 2014, the FTC dismissed a majority of the claims against McWane, Inc., for alleged price-fixing on certain iron pipe fittings, though it kept in place a ruling by the ALJ that McWane restrained competition in a narrower market through a rebate program. This is seen as the end of the FTC's winning streak. See Alex Lawson, *FTC Dismisses Price-Fixing Allegations Against McWane* (LAW 360), Feb. 6, 2014, available at <http://www.law360.com/articles/507597>.

⁸ See Robert H. Lande, *Should Section 5 Guidelines Focus on Economic Efficiency or Consumer Choice?*, (1) CPI ANTITRUST CHRONICLE 1 at 6 (May 2014). Some of the alternative explanations discussed in the text were raised by Professor Lande.

3. The FTC consults economic experts who are already on the payroll and much less expensive than consulting economists available only for cash to lawyers working on contingency- - hence more economic pre-screening is likely at the FTC.

4. The FTC has a greater opportunity to choose its cases than a plaintiff's antitrust lawyer, who very often is part of a syndicate of firms that share the risk and hold a portfolio of cases, like venture capitalists, anticipating they will lose a lot of cases for every one that pays off.⁹

5. The FTC has public resources that provide for better research and data collection than plaintiffs' lawyers generally have, helping staff make fewer mistakes about a case's potential.

6. The FTC is highly specialized in the law and economics of antitrust, as compared to generalist Federal courts. The fact that the Commissioners need to come to a majority vote may give them a higher probability of making correct decisions than the Federal courts.

7. The 5-person Commission is bipartisan and usually tries to avoid 3-2 decisions, thus generating cases based on consensus, whereas there are countless plaintiffs' attorneys who on their own can decide to file a complaint.

8. Government lawyers tend to be more risk averse than plaintiffs' lawyers. The risky nature of contingent fee practice is premised on a small number of large victories, whereas the public expects that its law enforcement agencies will only bring cases with a high probability of winning.

9. The FTC staff has much better judgment and experience as to what the five Commissioners are likely to do, than a private lawyer who may face an unknown and/or randomly selected judge.

10. The FTC's Administrative Law Judges are independent of the Commissioners, have expertise from conducting repeated antitrust hearings, and contribute to the Commissioners' competence in reaching correct decisions, even where the Commissioners disagree, because of the quality of the record presented to them.

The point is not that the FTC never makes a mistake, but that it is perfectly natural to see carefully selected cases, developed in full hearings by expert Administrative Law Judges, ultimately upheld by the FTC, even without attributing any more bias than exists in generalist courts which too often have disdain for complex and long-lasting antitrust cases. The bottom line

⁹ See K. Craig Wildfang and Stacey P. Slaughter, *Funding Litigation*, in ALBERT A. FOER AND RANDY M. STUTZ (EDITORS), *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES* (2012), 257-279.

is that the implications of the Commission’s winning streak do not necessarily reflect unfairness and may, indeed, reflect a very high degree of fairness. Comparison to private cases is inapt and misleading.

What happens if we compare the FTC’s performance with the DOJ’s? The data used by Commissioner Wright can be found in an article written by David Balto, though no empirical study or dataset seems to be cited in any of the documents.¹⁰ Both Wright and Balto alleged that since 1995, the FTC has not once dismissed a complaint after trial. Every time the FTC issued a complaint, it found a violation. Out of these 19 cases, nine were appealed to the courts of appeal, and only two of the nine appeals were decided against the FTC. This gives the FTC a success rate of 80% from the complaint stage to the last appeal available. According to Nicole Durkin’s law review article, which contains similar data, the dataset analyzed consists of adjudicatory decisions made by the Commission in both merger and non-merger cases.¹¹ Over the past 20 years, the Antitrust Division won 108 of 113 civil non-merger cases. If we examine all civil cases (merger and non-merger), the Antitrust Division won 300 of 312 cases from 1994 to 2013. Additionally, the DOJ has won 100% of its civil cases from 2007-2013. Statistically, there is no significant difference between the FTC and the DOJ victories.¹²

¹⁰ See David Balto, *Can the FTC be a Fair Umpire?*, THE HILL, Aug. 14, 2013, available at <http://thehill.com/blogs/congress-blog/economy-a-budget/316889-can-the-ftc-be-a-fair-umpire>.

¹¹ Nicole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950–2011 and Integration of Decision Functions*, 81 GEO. WASH. L. REV. 1684 (2013):

Decade	No. of Cases Decided by the FTC	No. of Cases Dismissed by the FTC on the merits	%	No. of Appeals of FTC Decisions	No. of Appeals in which the FTC was reversed, set aside or vacated.	%
1990 – 1999	17	4	24%	5	1	20%
2000 – 2011	20	0	0%	9	2	20%

¹² See U.S. Department of Justice, Antitrust Division Workload Statistics FY 2004-2013, available at <http://www.justice.gov/atr/public/workload-statistics.html>.

III. The Challenge of Dual Enforcement

In the U.S., at the federal level there are two separate agencies that enforce the antitrust laws. This duality reflects history rather than logic, but as Oliver Wendell Holmes, Jr., wrote in his classic *The Common Law*, “The life of the law has not been logic: it has been experience.” The two agencies are not identical. The Department of Justice is part of the executive branch of government, reporting through the Attorney General to the President. The Antitrust Division in the DOJ is primarily a prosecutorial, litigating unit. It has sole jurisdiction over criminal cases, and a great deal of its work is the prosecution of criminal conduct that is per se illegal, such as price fixing, for which fines and imprisonment are common penalties.

The FTC, on the other hand, is an independent commission rather than an executive agency, generally closer to its Congressional overseers than to the White House. It shares merger controls and civil non-merger enforcement with the DOJ, but has no criminal authority. Both by statute and tradition, the FTC expends more effort on non-enforcement investigations and reports than the DOJ. Both agencies seek injunctions against mergers in the federal district courts, but the FTC can also move against mergers as well as all other violations of the Clayton Act or Section 5 of the FTC Act, through internal administrative procedures.

Dual enforcement raises several questions¹³, two of which I will address: (1) how do the agencies decide which one will pursue a particular case? And (2) does the outcome depend on which agency brings the case?

A. Which Agency Brings the Case?

Although the history behind this question of which agency should bring a particular case is politically interesting, involving a certain amount of fighting between the congressional committee that oversees the Justice Department and the one that oversees the FTC, the choice of agency is reasonably clear most of the time. Each agency has developed expertise in certain industries, based on its recent enforcement or investigative activities. Typically, the next matter that arises is allocated to the agency with the most recent expertise. Difficulties can arise from time to time when both agencies want to lay claim to an investigation, especially with respect to high profile mergers where there is a statutory time clock running.

¹³ See generally ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 129-83 (April 2007).

The Antitrust Modernization Commission (“AMC”) studied the merger clearance issue and in 2007 made several recommendations to assure that all proposed transactions be cleared to one agency or the other within a short period of time after the filing of a premerger notification. One recommendation was to formalize the industry-by-industry breakdown so that everyone could predict which agency would handle a particular merger. In the seven years since the report, no legislation has been generated, but the agencies have revised their clearance procedures and now apply a process that begins with the two agencies’ litigation staffs negotiating, and then kicking it upstairs in steps, until the two agency heads get called in, if necessary, and negotiate an outcome. My impression is that this is working reasonably well.

I think that a problem for the AMC’s proposal is that the kinds of cases most in controversy usually involve markets in transition where neither agency has a clear edge in expertise and there is no crystal-clear market definition. An example could be areas where hardware and software markets are converging. Should all cases involving a converged market necessarily go to one or the other agency? One possible solution that has not been followed is for agencies to share their expertise in a formal, functional way.

Lurking somewhat unnoticed in questions about dual enforcement is the further question: should a single agency organize itself internally by industry or by type of violation alleged? The Chinese recently created three different agencies, each focused on a different type of violation. Each of the US antitrust agencies reflects a mix of organizational schemes, e.g., the FTC has multiple merger shops, each focusing on several specified sectors of the economy, and a number of other litigation shops that focus on certain violations without particular regard to industry. Thus, the administrative problem of determining which unit will have prior claim on an incoming investigation may be common to all antitrust authorities, whether or not there is some form of dual enforcement.

B. Does the Outcome Depend on Which Agency Brings the Case?

History helps explain why there are two federal antitrust agencies. The Sherman Act was passed in 1890. The position of Assistant Attorney General for Antitrust was created in 1903 and the Antitrust Division was created 30 years later.¹⁴ In its early years the Sherman Act was controversial both for what it could and apparently could not do. In 1912, three presidential

¹⁴ *Id.* at 129.

candidates made antitrust a salient campaign issue.¹⁵ All three agreed that something needed to be done, but they disagreed vehemently on what. William Howard Taft, a judge for much of his life, supported the common law approach in which judges set antitrust policy through their interpretations of a vaguely worded Sherman Act. Woodrow Wilson, the Progressive political science professor, wanted an administrative agency composed of experts with broad powers of investigation but with the power only to enjoin anticompetitive activity. Theodore Roosevelt, who had previously tangled as President with Standard Oil and the other trusts, had come to believe that the new industrial behemoths were too economically inevitable and powerful to be regulated by the market. Instead, he wanted federal regulation through charters and direct oversight. In 1914, after Wilson was elected, both the Clayton Antitrust Act, with its list of specific anticompetitive offenses intended to strengthen the Sherman Act, and the FTC Act, with its expert commissioners and broad mandate reflecting the belief that any specific list could be circumnavigated, were created. The new Federal Trade Commission would administer the FTC Act and both DOJ and the FTC would administer the Clayton Act. It does not appear that a great deal of attention was given to problems of dual enforcement.

The bipartisan AMC studied the system of dual enforcement and it is worth quoting from its summary:

Critics contend that having two agencies enforce the federal antitrust laws entails unnecessary duplication and can result in inconsistent antitrust policies, additional burdens on businesses, or other obstacles to efficient and fair federal antitrust enforcement. Some have suggested eliminating the FTC's antitrust authority; others propose reallocating nearly all antitrust authority to the FTC, with the DOJ prosecuting only criminal violations of the Sherman Act The Commission recommends no comprehensive change to the existing system¹⁶

The AMC found that there “appears to have been little, if any, duplication of effort between the two agencies, and they typically have worked together to develop similar, if not

¹⁵ See James Chace, *1912: Wilson, Roosevelt, Taft & Debs—The Election That Changed the Country* (2004); Susan Wagner, *The Federal Trade Commission* 3-18 (1971); William Letwin, *Law and Economic Policy in America* 238-78 (1965).

¹⁶ *Supra* note 13, at 129.

identical, approaches to substantive antitrust policy.”¹⁷ The Report noted that the costs of moving to a single agency at this point in time would likely exceed the benefits and in any event there was no consensus as to which agency should retain antitrust authority.¹⁸

Nonetheless, the AMC made two recommendations dealing with situations where the DOJ and the FTC take different approaches. Legislation responding to these recommendations was drafted for introduction in 2014 and, in an act of supreme legislative chutzpah, it was named THE SMARTER ACT.¹⁹

The proposed bill seeks to eliminate any difference between the FTC and the DOJ in the processes for stopping a merger, its proponents asserting that the standard for a preliminary injunction is lower for the FTC than for the DOJ. Further, the bill would deprive the FTC of its authority to subject the merging parties to an administrative trial, on the assumption that this is more burdensome on the parties than a DOJ court proceeding. The bill would, first, make the preliminary injunction standard in Section 13(b) of the FTC Act inapplicable to mergers and, second, deprive the FTC of the ability to challenge mergers under Section 5 of the FTC Act.

As AAI Senior Fellow Professor John Kirkwood said in personal testimony before the House Judiciary Committee,²⁰ requiring the FTC and DOJ to satisfy the same preliminary injunction standard has considerable appeal. But it is not at all clear that the agencies face different preliminary injunction standards. Both agencies have to supply essentially the same evidence and rigorous analysis. Judges normally demand of both agencies proof that a merger is “likely” to harm competition. “If that is generally true,” Professor Kirkwood testified, “there is little reason to alter Section 13(b).”²¹

So why not alter the legislative language to assure that the FTC be held to precisely identical standards as the DOJ? First, there could be unintended consequences, in that Section 13(b) is used not only for mergers but other kinds of FTC cases. More importantly, said Professor

¹⁷ *Id.*

¹⁸ *Id.* at 129-30.

¹⁹ *Standard Merger and Acquisition Reviews Through Equal Rules Act*, H.R.____, 113th Cong. (2014). A hearing on this draft was held before the House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law on April 3, 2014.

²⁰ *Standard Merger and Acquisition Reviews Through Equal Rules Act*, 113th Cong. 3 (2014) (statement of John B. Kirkwood, Professor of Law and Associate Dean for Strategic Planning and Mission, Seattle University School of Law).

²¹ *Id.*

Kirkwood, once the FTC obtains a preliminary injunction in district court, it adjudicates the legality of the proposed merger through administrative proceedings. This is exactly where Congress had wanted the FTC to bring to bear its antitrust expertise. If there really is a meaningful difference in standards, the AAI has suggested that a better solution would be to extend the allegedly more lenient FTC standard for preliminary injunctions to the DOJ.²²

The second SMARTER Act proposal is to deprive the FTC of the power to use administrative adjudication in a merger case. In other words, once an injunction is secured, the FTC would no longer have the option of holding an administrative adjudication, but would have to go to trial in a federal district court, the same as the DOJ. Once this option is removed for mergers, what proposal would come next? Are we at the top of a slippery slope, leading to elimination of the core characteristic that led President Wilson to seek an administrative agency? After one hundred years, should we be ready to eliminate the uniqueness of the FTC, thereby eliminating the justification for continuing a dual enforcement regime?

I will make two points. First, there are differences between an agency in which one person is empowered to make prosecution decisions and one in which a majority of a college of five equals makes decisions. This can be particularly important when dealing with changing, complex industries where the key requirement is judgment about the probability of future events, as is required in predicting the competitive effects of a merger or a merger remedy. I think that on balance the commission structure has an advantage.

Second, there are differences between a generalist court and a commission of experts. A generalist judge can usually bring to the court common sense and a keen ability to sort out what actually happened in the past from the testimony of witnesses. But most federal judges rarely try an antitrust case and are more likely to have prior experience in a prosecutor's office than in an economics classroom mastering the economics that is required in antitrust work. Most juries have far less relevant experience and there is reason to believe they do not even understand model jury instructions for civil antitrust cases. In short, the administrative process seems better suited to non-criminal antitrust matters than the standard federal district court route that must be taken by the DOJ. I see little reason to trade downward for the purpose of achieving an ideal

²² Letter to House of Representatives Judiciary Committee, April 9, 2014, <http://www.antitrustinstitute.org/sites/default/files/AAI%20SMARTER%20Act%20Letter%204-9-2014%5B1%5D.pdf>

hypothetical equality between the DOJ and the FTC. If anything, it makes more sense to move all non-criminal matters to the administrative system, along with adequate resources, of course.

Since this is politically unrealistic in today's United States, the prudent policy is to stick with dual enforcement, recognizing that it is not perfect, but not finding persuasive evidence that its flaws are worth the trouble of fixing.