diet so that it is "faster, leaner, and meaner." On the topic of faster, I will review what we at the Commission have done recently to reform our rules of administrative procedure to expedite enforcement cases, and ponder what else we might do to speed up our process. On the topic of leaner, I will address the challenge of "doing more with less" faced by the Commission—and indeed, every other U.S. federal agency—in this day and age of budgetary constraints, and talk about how we can more efficiently and productively partner with our state-level counterparts. On the topic of meaner, I will describe my views on consent decrees, particularly denials of liability by respondents, as well as my views on criminal penalties for cartel defendants.

I.

As you may know, the Commission was created by our Congress in 1914 to be an expert agency specializing in antitrust matters, including mergers.[2] To my way of thinking, an integral part—and a distinguishing feature—of our DNA as an expert agency is our ability to adjudicate antitrust matters sitting as an

[2] See, e.g., S. REP. NO. 63-597, at 8–9 (1914) (expressing the view that "the peculiar character and importance" of Sherman Act enforcement against combinations in restraint of trade and monopolies "make it indispensable that some of the administrative functions should be lodged in a body specially competent to deal with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected"); H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.) (expressing the view that "the most certain way to stop monopoly at the threshold is to prevent unfair competition," and that "[t]his can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business"); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 98 (1924) ("The Federal Trade Commission was conceived to be a body of men especially qualified to pass on questions of competition and monopoly."); W. STULL HOLT, THE FEDERAL TRADE COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 5 (1922) (recounting that the idea of a commission of experts "designed to afford more speedy and informal relief than that given by the law and to make the remedy fit the circumstances" had gained increasing traction among politicians as a new type of agency in American government).

unwelcome burdens and distractions on respondents and third-party witnesses.[5] Furthermore, from the standpoint of respondents in merger cases, protracted proceedings may result in their abandoning the transaction before the antitrust merits can be adjudicated. [6] Also, the maxim justice delayed is justice denied seems just as applicable to our enforcement proceedings, which are always brought with the public interest in mind, [7] as it is to criminal and civil trials at common law. [8] Not only does delay not necessarily produce higher quality decisions, [9] but it may also hurt consumers, who pending a final decision may have to live with unc ertainty in the marketplace, if not with deleterious effects fl owing from the challenged conduct or transaction. [10]

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[5] SeeRosch, Reflections, supra note 3, at 6 (observing that protracted administrative litigation may result in substantially increas ed litigation costs fo

Indeed, delay may actually produce lower quality decisions that are less likely to withstand appellate review—even under the highly deferential, substantial evidence standard for the Commission's factual findings.[11] The United States Court of Appeals for the Seventh Circuit encountered this very problem in Columbia Broadcasting System, Inc. v. FTC.[12] In that case, the Commission challenged Columbia Record's exclusive licensing arrangements with smaller record manufacturers for records from their catalogs to be sold only through the Columbia Record Club,[13] and not any other rival club, as having the alleged effect of barring new entrants into the record club market.[14] The Commission filed its complaint in June 1962, but the hearing examiner did not issue his initial decision until September 1964, which dismissed the complaint, and the Commission did not issue its opinion reversing the examiner until July 1967—five years after the filing of the complaint.[15]

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relief to consumers. See, e.g.,FTC v. QT, Inc., 472 F. Supp. 2d 990, 998 (N.D. Ill. 2007) (finding that defendants' requested stay would compromise the rights of consumers because the attendant delay may result in the Commission being unable to locate many eligible consumers and in the defendants dissipating assets available for redress); FTC v. Am. TelNet, Inc., 188 F.R.D. 688, 692 (S.D. Fla. 1999) (denying private plaintiff's request to intervene because the attendant delay would prejudice consumers that are waiting for compensation and protection through the Commission's action against American TelNet).

[11] See, e.g.,Realcomp II, Ltd. v. FTC, 635 F.3d 815, 823 (6th Cir.), cert. denied, 132 S. Ct. 400 (2011); Chicago Bridge & Iron Co., N.V. v. FTC, 534 F.3d 410, 422 (5th Cir. 2008).

[12] 414 F.2d 974 (7th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

[13] The Columbia Record Club was then (in 1955) a new business model of selling phonograph records directly to consumers on a mail-order subscription basis. Id. at 975, 978.

[14] Id. at 976, 978. The Commission also challenged Columbia Record's royalty agreements with artists whose records were sold through the Club as a form of unlawful price-fixing. Id.

[15] Id. at 975.

On appeal, although the Seventh Circuit agreed with the Commission's identification of a "record club" submarket, it concluded that the Commission's findings on the nature and extent of market foreclosure could not stand because that relevant market had "undergone a significant change since the hearing examiner completed his hearings and entered his findings." [16] Specifically, there had been at least four new entrants in the club market since the examiner completed his hearing and entered his findings. [17] Furthermore, consumer tastes had substantially changed, such that many "hit" recording stars were signing with smaller, lesser known labels instead of the "Big Three" labels, of which Columbia was one. [18] In short, "because of the long delay in deciding [the] case and the substantial allegations of changes in the structure of the entire industry, and especially the club market," the Seventh Circuit reversed and remanded the case to the Commission "for further evidence as to the present structure of the record club market in order to determine whether supplies of records have been foreclosed from other clubs and whether such foreclosure has significantly prevented new entrants into the market." [19]

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[16] Id. at 981.

[17] Id. The new entrants were Record Club of America, Longine, Dot, and Starday, with Record Club claiming to be the second largest record club in the industry. Id. at 977–78.

[18] Id. at 981. The "Big Three" major recording labels at the time were Columbia, R.C.A., and Capitol. Id. at 975.

[19] Id. at 982.

Although the decision is over 40 years old, Columbia Broadcasting is just as instructive today as it was in 1969. As members of the antitrust and competition bar, industry participants, and economists have pointed out to the Commission, many of the markets we examine today are characterized by dynamic competition. We therefore can ill afford any undue delay in our investigations and adjudications, lest the facts and circumstances of those markets that ground our antitrust analysis change right before our very eyes, like the shifting dunes of the Sahara.

B.

Accordingly, with considerations of speed and efficiency in mind, in 2009 the Commission revised its rules governing the adjudicative process, which we call "Part 3" because that is where the rules are found within Title 16 of the Code of Federal Regulations. [20] As we acknowledged in our notice of proposed rulemaking published in the Federal Register, the Commission's Part 3 process had long been criticized as too protracted. [21] We therefore implemented several amendments designed to streamline our Part 3 process, including:

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[20] 16 C.F.R. Parts 3 and 4, Rules of Practice , 73 Fed. Reg. 58,832 (Oct. 7, 2008) (proposed rules), available at http://www.gpo.gov/fdsys/pkg/ FR-2008-10-07/pdf/E8-23745.pdf ; 16 C.F.R. Parts 3 and 4, Rules of Practice, 74 Fed. Reg. 180 4 (Jan. 13, 2009) (interim final rules, to be codified at various sections of 16 C.F.R. Parts 3 and 4), available at http://www.gpo.gov/fdsys/ pkg/FR-2009-01-13/pdf/E9-296.pdf ; 16 C.F.R. Parts 3 and 4, Rules of Practice, 74 Fed. Reg. 20,205 (May 1, 2009) (final rules, codified at various sections of 16 C.F.R. Parts 3 and 4), available at http://www.gpo.gov/fdsys/pkg/FR-2009-05-01/pdf/E9-9972.pdf .

[21] Rules of Practice, 73 Fed. Reg. at 58,832 (citing cases and commentators); see alsoRosch, Reflections, supra note 3, at 3.

(1) A five-month

(4) An initial decision from the ALJ within 70 days after the filing of the last-filed proposed findings of fact, conclusions of law, and order,[26] which thereby preserves an over all one-year timetable for the issuance of an initial decision; [27] and

(5) A final decision from the Commission within 45 days after oral argument, or after the deadline for filing reply briefs, if no oral argument is scheduled, in all cases in which the Commission has sought preliminary injunctive relief under Section 13(b) from a federal district court. [28]

The changes I have gone over are just a few highlights from a multi-year effort by the Commission to stud y its rules of practice with an eye towards improving the efficiency and timing of administrative litigation. [29]

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expertise to rule initially on dispositive motions and that doing so will improve the quality of the decisionmaking and . . . will expedite the proceeding")

[26] 16 C.F.R. § 3.51(a) (2012). If the parties waive the filing of proposed findings, then the ALJ's initial decision is due within 85 days after the closing of the hearing record. Id.

[27] Rules of Practice, 74 Fed. Reg. at 1817–18.

[28] 16 C.F.R. § 3.52(a) (2012). This works out to roughly 100 days from the filing of the initial decision. Rules of Practice, 74 Fed. Reg. at 1818. In all other cases, i.e., those in which the Commission did not seek preliminary relief, the timetable for the Commission's final decision is 100 days after oral argument or the reply brie f deadline. 16 C.F.R. § 3.52(b)(2) (2012).

[29] I have commented extensively on the reforms to Part 3 proceedings in prior speeches and interviews. SeeJ. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Thoughts on the FTC's Relationship (Constitutional and Otherwise) to the Legislative, Executive, and Judicial Branches, Remarks Before the Berlin Forum for EU–US Legal–Economic Affairs 23–27 (Sept. 19, 2009), http://www.ftc.gov/speeches/ros ch/090919roschberlinspeech.pdf [hereinafter Relationship]; Interview with J. Thomas Rosch, Co mmissioner, Federal Trade Commission , ANTITRUST , Spring 2009, at 32, 33–39, available at http://www.ftc.gov/speeches/rosch/

Significantly, all of those reforms compel us at the Commission “to put our money where our mouth is”—that is, to live by specific deadlines that make clear we mean what we say—when we say that our policy is to conduct Part 3 proceedings expeditiously. [30] These reforms also reflect our balancing of three, separately important interests, namely, the public interest in a high quality decisionmaking process, the interest of justice in an expeditious resolution of litigated matters, and the interest of th

companies with limited resources) had not provided the Commission with all the information staff had asked for should have not been a valid excuse for the Commission essentially to pause its investigation—at a point where, as my colleagues asserted, the Commission "is not in a position to make a formal assessment one way or the other." [43]

As our Merger Guidelines make clear, whenever the Commission undertakes a merger investigation, it always endeavors to reach an enforcement decision by "apply[ing] a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."[44] That is to say, we always work under imperfect conditions, in which we have a limited amount of time to make a decision based on a limited amount of information. We cannot reasonably expect to get all the information that we may like to have for our merger analysis, but if there is some information that we need and we think we can get from the parties, then it is incumbent on us to interview or depose their employees, send out a more tailored subpoena, and/or enforce the pending subpoena. [45] Otherwise, we need to make the best decision we can (either challenging or

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http://www.ftc.gov/os/closings/staff/090609galilendocarejointstmt.pdf [hereinafter Joint Statement].

[43] Id. at 2; Statement of Commissioner J. Thomas Rosch on the Abandonment of the Endocare, Inc./Galil Medical, Ltd. Merger, Endocare, Inc. and Galil Medical, Ltd., No. 0910026 (June 9, 2009), at 4, http://www.ftc.gov/os/closings/staff/090609galilendocarestmtrosch.pdf [hereinafter Rosch Statement].

[44] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1, at 1 (2010) (emphases added), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[45] Rosch Statement, supra note 43, at 1–2.

clearing the transaction) based on th e information we have. But we should not block a transaction de facto by keep ing the investigation open and letting the clock run out on the parties' merger agreement. [46]

Hopefully, the Endocare scenario is water under the bridge, as they say. Earlier this year, the Commission announced proposed revisions to its Part 2 rules. [47] As the Federal Register Notice indicates, the proposed revisions are intended to expedite Part 2 investigations by (1) conditioning extensions of time to comply with Commission process (that is, civil investigative demands and subpoenas) on a party's continued progress in achieving compliance; (2) conditioning the filing of any petition to quash or limit Commission process on a party's engagement in meaningful meet-and-confer sessions with staff; and (3) eliminating the current two-step process for resolving petitions to quash and impo sing tighter deadlines for Commission rulings on such petitions. [48]

Although I agreed in general with these reforms, I expressed my view that the reforms do not go far enough. [49] Specifically, I felt that the Part 2 rule revisions should have included a prov ision for mandatory compulsory process

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[46] Id. at 1 & 4.

[47] 16 C.F.R. Parts 2 and 4: Rules of Practice, 77 Fed. Reg. 3191 (Jan. 23, 2012) (proposed rules), available at http://www.gpo.gov/fdsys/pkg/FR

at the outset of all full-phase, competiti on investigations to assure that the Commission will have as thorough and complete a record as possible when making enforcement decisions. [50] Simply put, when we issue compulsory process against enforcement targets, they have no choice but to turn over responsive, incriminatory information. When we issue compulsory process against third parties, they have the "c over" they need to turn over candid, confidential information that a target might otherwise want them to keep to themselves. We are then not left in the awkward situation of not having enough information to make an enforcement decision, and yet not having any judicial recourse either.

I also felt that the Part 2 rule revisions should have included a provision for regular reports by staff on the status of investigations to all Commissioners, not just the Chairman. [51] In particular, this reform measure would allow the Commission as a whole to keep an eye on investigations that have been languishing for a relatively lengthy period of time and to address any undue delays. Such a process can on ly inspire public confidence in our work.

II.

Let me now turn to the next topic of "leaner" antitrust enforcement. In March of this year, I along with our Ch airman testified before the House

[50] Id.

[51] Id.

Appropriations Subcommittee that reviews our annual budget.[52] Much of the hearing revolved around the general theme of "doing more with less" and fiscal belt tightening. Needless to say, the Subcommittee members were looking for places to cut our budget, including reductions in the size of our staff.

At their prodding, I mused that if we are to take deeper cuts to our budget, then we should be looking for projects that we can hand off to the State Attorneys General. For example, on the consumer protection front, the problem of identity theft may be better handled by the states and local authorities, which have criminal enforcement jurisdiction that the Commission does not have. To be sure, we can still assist them in a substantial way with our consumer education efforts. Also, we are better situated to address related problems like security breaches at companies, which may affect millions of consumers across several states, and if left unchecked, could spawn numerous incidents of identity theft.

As a matter of enforcement approach, we at the Commission should recognize that our jurisdiction is nationwide, and that we have to do our best to cover that broad waterfront with the limited staff size (about 1,100 full-time equivalents) and finite resources at our disposal. That means, in my judgment, going after cases and respondents that are going to make the

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[52] Budget Hearing on the Federal Trade Commission Before the Subcomm. on Fin. Servs. and Gen. Gov't of the H. Appropriations Comm., 112th Cong. (Mar. 5, 2012) (video testimony publicly available; transcripts available by subscription), http://appropriations.house.gov/calendararchive/eventsingle.aspx?EventID=279164.

largest impact for consumers in terms of the relief we are able to secure. For example, I have questioned the wisdom in consumer protection cases of accepting a consent judgment that provides conduct relief but very little monetary relief relative to the amount of consumer injury asserted.[53] In such instances, we should be asking ourselves whether the conduct relief, standing alone, is a sufficiently robust remedy (for example, to send a strong message that the proscribed acts and practices will not be tolerated), and whether there is a compelling reason for settling the case for a tiny fraction of the estimated consumer injury.[54]

On the competition front, the states can and do take an active role in challenging mergers that they conclude are anticompetitive, either jointly with the Commission or the Department of Justice,[55] or separately, including merger cases that the federal enforcement agencies have decided not to challenge.[56] Importantly, the State Attorneys General have jurisdiction to enforce the Clayton Act[57] as well as their own state antitrust laws, as applicable. Many of our merger enforcement cases have thus had the support

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[53] Statement of Commissioner J. Thomas Rosch Concurring in Part, Dissenting in Part, Freedom Foreclosure Prevention Servs., Inc., No. X090055 (Nov. 24, 2009), http://www.ftc.gov/os/2009/11/091124roschstmt.pdf ("However, in other cases, where it is apparent from the outset that substantial and effective consumer redress may not be provided, I believe the Commission should carefully focus on whether it is worthwhile to spend its scarce resources in order to achieve the 'Conduct Relief' alone.").

[54] Id.

[55] See generally I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 435 n.645 (7th ed. 2012).

[56] See generally id. at 435 n.647.

[57] 15 U.S.C. §§ 15c(a) & 26 (2011).

and involvement of our counterparts in the state attorney general's office.[58] Sharing and dividing up enforcement responsibilities with the states in merger cases may be another way to achieve "leaner" antitrust enforcement.

III.

Let me now move to the last topic of "meaner" antitrust enforcement. I have in mind two subtopics: first, the problem of consent decrees in which respondents deny any wrongdoing, and second, the role of criminal penalties, especially incarceration, for cartel defendants. A common thread running between both subtopics is the goal of deterring anticompetitive conduct.

A.

or “without any admission or finding of liability” was tantamount to a denial of liability by the defendants. [61]

In my judgment, the inclusion of such language denying liability impacts a federal district court’s required assessment under Section 13(b) as to whether the Commission has made a “proper showing” of its likelihood of success on the merits, and whether the settlement would be in the public interest. [62] Furthermore, as a Commissioner, such language may also impact my own determination whether there is reason to believe a violation of law has indeed occurred, when I am in the process of voting out a complaint and consent order providing for the award of permanent injunctive relief in federal court. [63]

The federal district court presiding over the Circa Direct LLC case recently issued an opinion concluding that my expressed concern merited further briefing and consideration. [64] Notably, even if settlements are inherently compromises between the parties, a question remains whether, in a case involving allegations of “extensive deceptive conduct and significant consumer loss,” the acceptance and approval of a consent decree that includes a denial of liability deprives the public of “knowing the truth in a matter of

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[61] Id. at 1.

[62] 15 U.S.C. § 53(b) (2011); id.

[63] 15 U.S.C. §§ 45(b) & 53(b) (2011). I had voted in favor of the consent order in Circa Direct, however.

[64] Opinion & Order at 9, FTC v. Circa Direct, LLC, No. 1:11-cv-02172-RMB-AMD (D.N.J. filed June 13, 2012), ECF No. 50.

obvious public importance." [65] As the district court explained, it was "merely recogniz[ing] that settlement without an admission of liability forecloses a determination of the truth of the FTC's allegations and leaves the public with no better appreciation of the truth of the matter than when the litigation began."[66]

I agree with the Circa Direct Court. If we are to achieve true

Recognizing the informational aspect of our mission, the D.C. Circuit most recently held in Trudeau v. FTC that the Commission had not exceeded its statutory authority in issuing a press release describing the consent decree against Kevin Trudeau as a "ban . . . meant to shut down an infomercial empire that has misled American consumers for years,"[68] even though Mr. Trudeau, in agreeing to the decree, expressly denied any wrongdoing or liability in connection with the matter.[69]

Although the Trudeau decision confirms that the Commission may describe the nature and extent of the alleged wrongdoing in a press release as a means of educating consumers about "the truth of a matter of obvious public importance," it also illustrates the mischief that can arise when we allow respondents to deny any wrongdoing or liability. As I alluded in my letter to the Circa Direct Court, we might do better by following the Securities and Exchange Commission's policy "that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed,

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[68] Trudeau , 456 F.3d at 196–97. See Press Release, Fed. Trade Comm'n, Kevin Trudeau Banned from Infomercials (Sept. 7, 2004), http://www.ftc.gov/opa/2004/09/trudeaucoral.shtm (quoting Lydia Parnes, Director of the FTC's Bureau of Consumer Protection).

[69] See Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief As to Defendants Kevin Trudeau, et al. ¶ 8,

when the conduct alleged did not, in fact, occur." [70] Pursuant to that policy, the SEC does not allow a defendant or respondent to consent to a judgment or order that imposes a sanction and at th e same time, to deny the allegations in the complaint or order. [71] At a minimum, the defend ant or respondent must state that he neither admits nor denies the allegations. [72]

B.

Although the Commission does not have criminal enforcement authority, I want to spend a few minutes talking abo ut the role of criminal penalties, particularly incarceration, in providing for "meaner" antitrust enforcement. As I understand it, the rule for cartel activity in the EU and most Member States is that there is no incarceration. [73] Rather, the EU and most Member States (except most notably, the UK and Ireland) [74] impose stiff fines

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[70] 17 C.F.R. § 202.5(e) (2011).

[71] Id. By contrast, the current Commission policy is to permit consent agreements to state that their signing is "for settlement purposes only and does not constitute an admission by any party that the law has been violated as a lleged in the complaint." 16 C.F.R. § 2.32 (2012).

[72] 17 C.F.R. § 202.5(e) (2011).

[73] See Gregory C. Shaffer & Nathaniel H. Nesbitt, Criminalizing Cartels: A Global Trend? , 12 SEDONA CONFnaNA ONF

(especially on the corporate defendant) and debarment of board members who "look the other way." [75] In the U.S., federal law and most states provide heavy corporate fines for cartel activity. But we also provide for incarceration of wrongdoers. Why the difference?

First, it has been argued that incarceration is appropriate because at the end of the day, horizontal cartel activities are committed by individuals, not corporations. Unless and until those individuals are incarcerated, so the argument goes, we will not see any real reduction in cartel activity. Indeed, Scott Hammond, who heads up the Justice Department's criminal antitrust enforcement program, has reported that the cartel activity stops "at the water's edge" as more and more individuals face jail time for engaging in such activity in the U.S. [76] Even if that were not so, the Antitrust Division

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Law/Criminal-Court-Cases/Irish-Ford-Dealers-Association.aspx (last visited Aug. 4, 2011); Citroen Dealers Association, THE COMPETITION AUTHORITY, REPUBLIC OF IRELAND, http://www.tca.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Citroen-Dealers-Association.aspx (last visited Aug. 4, 2011). Estonia has criminal laws against cartel behavior but I am not aware of any cases that have resulted in jail time. Germany has sentenced defendants to jail time, but only under its laws that criminalize bid-rigging. See Shaffer & Nesbitt, supra note 73 (manuscript at 16).

[75] See, e.g.,Company Directors Disqualification Act, 1986, c. 46, § 9A (Eng.) (as amended by the Enterprise Act, 2002, c. 40, § 204(1) & (2) (Eng.)) (requiring a court to enter a competition disqualification order against an individual who serves as a director of a company if his or her company has committed a breach of competition law, and the court considers the individual's conduct as a director renders him or her unfit to be concerned in the management of the company); Andreas Stephan, Disqualification &g1ers tor e6(oDi9.1(be c)(nt o)oJ 10.36s076 11

may have already “picked the low hanging fruit” already (that is, the classic, smoke-filled room, price-fixing cases). [77] And because the Division is now challenging more price information exch ange cases, it seems to be losing more criminal cases than in the past. [78]

Second, and on the other hand, I recall attending a seminar on incarceration at Yale College in 1979. Th e central thesis of that seminar was that incarceration costs society much more money than other forms of punishment do. In fact, it was said th at incarceration was the most costly

shareholders," so the argument goes. [79] And shareholders, of course, are not the ones who have engaged in the cartel activity, and in any event, they are powerless to stop it from occurring. That said, shareholders can insist that their directors adopt stringent rules of corporate compliance. Besides, arguably the individuals who engage in these activities and, indeed, directors who "look the other way" are punished too. An individual defendant almost always loses his or her job in Europe, not to speak of the public opprobrium that attaches whenever one is caught. [80] And as mentioned previously, under the laws of most Member States, the director always forfeits his or her position.

Fourth, the reluctance to incarcerate cartel wrongdoers in Europe has been attributed to the fact that there is a different history and culture in most Member States than what we have here in the U.S. More specifically, it has been argued that in Europe, there has been greater tolerance of cartels, which are seen as fostering positive, cooperative, organized behavior, than in the U.S., and that correspondingly, there has been less tolerance of dominant firms, which are seen as engaging in negative, individualistic, conflict-inducing behavior. [81]

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[79] Douglas H. Ginsburg & Joshua D. Wright, Antitrust Sanctions, 6 COMPETITION POL'Y INT'L 18 (Autumn 2010).

[80] See Andreas Stephan, Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain, 5 COMPETITION L. REV. 123, 144 (Dec. 2008) ("The sanction most favoured by respondents is the naming and shaming of both price-fixing firms and individuals.").

[81] James S. Venit, Cooperation, Initiative and Regulation – A Cross Cultural Inquiry, in CLAUS-DIETER EHLERMANN & MEL MARQUIS, EDS., EUROPEAN COMPETITION LAW ANNUAL

That may be true but I would suggest that the difference goes deeper. Importantly, there is a difference between the laws as well. Section 1 of the Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." [82] Interpreting this language, our Supreme Court has cautioned that the Sherman Act, unlike traditional criminal statutes, does not clearly and precisely identify the unlawful conduct that it proscribes.[83] Instead, the Act is worded in broad and general terms, such that the behavior it proscribes—with the exception of certain species of per se illegal conduct that have "unquestionably anticompetitive effects"—"is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." [84] Consistent with those concerns raised by our Supreme Court, the Antitrust Division has hewed to the general policy that it criminally prosecutes only "hard core" violations of Section 1 of the Sherman Act—that is, price fixing, bid rigging and market allocation. [85] (The only exception I can think of to this rule is the Cuisinarts prosecution and that was resolved on a plea prior to trial.) [86]

2007: A REFORMED APPROACH TO ARTICLE 82 EC – (2008), available at http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Venit.pdf (manuscript at 2–4).

[82] 15 U.S.C. § 1 (2011).

[83] United States v. U.S. Gypsum Co., 438 U.S. 422, 438–39 (1978).

[84] Id. at 440–41.

[85] See Thomas O. Barnett, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Criminal Enforcement of Antitrust Laws: The U.S. Model, Remarks before the Fordham Competition Law Institute's Annual Conference on International Antitrust Law and Policy (Sept. 14,

But if Section 1 of the Sherman Act is seen as broadly worded, then its EU counterpart, Article 101 of the Treaty on the Functioning of the European Union (TFEU), is even more bloppy. It generally outlaws “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of

economic progress, while allowing consumers a fair share of the resulting benefit[.]" [88] In contrast to Section 1, Article 101 TFEU thus explicitly recognizes that some restraints of trade may be permissible if they benefit consumers by improving output or promoting innovation. Moreover, it seems harder to criminalize conduct under Article 101 that merely "distorts" competition, as opposed to preventing or restricting it.

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As we gather in London during this Olympic year, we would do well to remember the words of Baron Pierre de Coubertin, who said that "[i]n these Olympiads, the important thing is not winning but taking part. . . . the essential thing is not to conquer but to fight well." [89] He could just as easily