Federal Trade Commission

Rewriting History: Antitrust Not As We Know It . . . Yet

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before the

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I'd like to thank the Antitrust Section for this opportunity. Of all of the speaking opportunities that I've had as a Commissioner, this is may very well be the most interesting topic that I've encountered yet. I can't tell you how anxious I am to start the debate. To that end, I will focus my remarks on three topics: (1) the ideal institutional architecture for a U.S. antitrust enforcement agency; (2) what lessons we can draw upon in developing the best antitrust regime from overseas; and (3) whether and to what extent there's room in the ideal antitrust regime for federal class actions.

I.

I'll not shy away from stating the obvious: the current system is broken. Any system that subjects different parties to different decision-makers, different procedural

The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Amanda Reeves, for her invaluable assistance preparing this paper.

hurdles, and (depending on who you talk to) different substantive standards based on a closed-door clearance process is not only sub-optimal, but is, dare I say it, dysfunctional. The Antitrust Modernization Commission took the politically correct path when it rejected calls to consolidate antitrust enforcement in one agency, even while recognizing that "a single agency generally would have a superior institutional structure."[1] In making that observation, the AMC was dead on. But were I operating on a blank slate, I'd consolidate all civil antitrust enforcement in the FTC.

If that strikes you as crazy, I'd encour

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marketplace while antitrust law protects consumers by ensuring that there is competition in the marketplace. In my time at the Commission, there have been several competition cases that have raised consumer protection issues either on the margins or front and center. Indeed, the agency's competition and consumer protection missions converge when a firm engages in deception or fraud which has the effect of eliminating competition. The Commission's experience with consumer protection means that it not only has the ability to spot such deception, but to make well-informed decisions about

expert or less equipped to make decisions on hard questions of antitrust law. That would be silly and baseless. The comparison, however, is between the Commission and generalist federal district courts (before which DOJ tries most of its cases).

The real problem is not that the lawyers, economists, and senior officials at the Antitrust Division are not first rate in their own right, but is that the FTC is an independent regulatory Commission and the Antitrust Division is not. The DOJ is solely a prosecutor that must prove its cases to a federal district court. To put a finer point on it, there is an entire body of administrative law – and, indeed, a substantial piece of the U.S. federal government – that is based on the fundamental principle that administrative agencies are entitled to deference when they act within the scope of their expertise. For all of its similarities, the Antitrust Division is not bipartisan, is not independent, and does not have the ability to issue administrative decisions on the merits; all of these distinctions, in turn, have real implications for why the agencies are subject to different procedural and substantive standards in the areas that provide the fodder for most of the public debate.

Nevertheless, with that caveat in mind, there are some changes worth considering that could make the system run more smoothly. First, I would improve the clearance process. That's, of course, easier said than done. The problem with clearance is that we can all agree in the abstract how to divide things up; for most of the cases, that agreement works fine. In the really high profile cases, however, there are inevitably going to be turf wars. Compounding that problem is that both agencies can now legitimately lay claim to special expertise in just about any investigation. We could employ a special arbiter, a possession arrow, or even a coin flip held half between the buildings in front of the

National Archives to make the ultimate decision in the hard cases, but that assumes that both sides could agree quickly on how to identify the hard cases. I'm not sure that's possible. Ultimately, I think a few more tweaks to the current system is the best that we can hope for.

Second, I would level the playing field when it comes to 13(b). Right now, the Commission has the benefit of the public interest 13(b) standard, which authorizes a district court to grant a preliminary injunction upon finding that "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[10] In *Whole Foods* and *Heniz*, the D.C. Circuit recognized that, in adopting this standard, "Congress recognized that the traditional four-part equity standard for obtaining an injunction was 'not appropriate for the implementation of a Federal statute by an independent regulatory agency.'"[11] Thus, the court held, to obtain a preliminary injunction under 13(b), "the FTC need not show any irreparable harm and the 'private equities' alone cannot override the FTC's showing of likelihood of success."[12] Instead, because the determination of the merits ultimately lies with the Commission, so long as the FTC raises "questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation," the court held that the FTC is entitled to a presumption in favor of a preliminary injunction.[13] The parties can

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[10] 15 U.S.C. § 53(b).

[11] *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869, 875 (D.C. Cir. 2008) (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)).

[12] *Id.*

[13] *Id.* at 875 (quoting *Heinz*, 246 F.3d at 714-15).

then rebut that presumption by showing that the equities weigh in favor of the merger.[14] In contrast, of course, it is argued that the Antitrust Division must meet the traditional common law preliminary injunction standard.[15]

It will not surprise you that I don't believe the way to level the playing field here is to require that both agencies be subject to the traditional common law preliminary injunction standard. That would be two steps backwards in my view. Congress was right to give the FTC the 13(b) standard because, whereas in a typical common law case, a generalist district court decides the merits and therefore can logically make a threshold decision about the plaintiff's likelihood of success, in administrative litigation, Congress delegated decision-making on the merits to the Commission in the first instance and to the administrative (Part 3) process. I undermines the theoretical foundation of that process to say that merits decisions should be left to an expert agency, but that a generalist court can short circuit that review based on a preliminary assessment of the case. So, given that most would agree that the Antitrust Division is similarly expert in some ways, it seems the right way to look at the 13(b) issue is not to assume that the FTC should operate without 13(b), but instead to ask whether there is a justification for giving the Antitrust Division the benefit of 13(b). I can envision two justifications.

The easiest possibility would be to authorize the Antitrust Division to bring its cases in Part 3 administrative litigation over the Commission. Under that scenario, authorizing the Antitrust Division to obtain preliminary injunctions under the 13(b)

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[14] *Id.*

[15] The traditional common law standard requires a "likelihood of success on the merits," a showing of irreparable harm if the injunction does not issue, that granting the injunction will not cause undo harm to the private parties, and that the public interest favors such relief.

standard would logically follow because an expert agency would be making the merits determination in the first instance. Of course, this would mean that the FTC would be sitting in review of the Antitrust Division's prosecutorial discretion and trial strategy, which not everyone may like. The flipside is that, however, for those of you that have long criticized the fact that the Commission gets to serve as the prosecutor and judge in administrative litigation, this would eliminate that dual function in cases brought by the DOJ.

The other possibility on the 13(b) front would be to encourage the Antitrust Division to go into federal court and seek a preliminary injunction under the 13(b) standard, pending a trial on the merits – a permanent injunction. The problem here is that the argument for applying the deferential 13(b) standard is theoretically tougher when the merits are being decided by a generalist district court. To be sure, there's still a basis for 13(b) insofar as one believes that the Antitrust Division's threshold decision to sue is entitled to some deference, which it is. There is also the more practical problem that judges may not want to conduct two separate hearings – of course, judges issue preliminary injunctions in cases all the time before they resolve the merits, so the idea of requiring that they do the same in the antitrust context might not be so far fetched after all.

Third and finally, although I've not formed a view on this point, I'd at least consider whether it makes sense to augment the DOJ's enforcement authority by giving it power to prosecute free-standing Section 5 actions. Again, the problem here as I see it

(and as I've explained elsewhere[16]) is that the purpose of Section 5 is to allow the FTC as an expert agency to identify in the first instance the out-of-the-ordinary conduct that is anticompetitive, but not clearly prohibited by the other federal antitrust laws. Although I trust that the DOJ as a matter of prosecutorial discretion could identify the proper uses for Section 5, the whole point of Section 5 is lost if a generalist district court is opining on Section 5 claims in the first instance.

Perhaps the compromise here, as I suggested with 13(b) reform, is again to authorize the Antitrust Division to sue for Section 5 violations, but only in Part 3 administrative litigation.[17] Such a reform would mean that an expert agency (in the form of the Antitrust Division) would be identifying Section 5 causes of action as a matter of prosecutorial discretion while the other expert agency (the FTC) would be ruling on the validity of those causes of action, which would all arguably be consistent with Section 5 as Congress originally intended.

II.

Next I'd like to take a more global focus and discuss whether, if I were starting from scratch, I'd create identical antitrust enforcement systems in the U.S. and the EU and, relatedly, whether there are aspects of the EU system that I'd replicate in the U.S.

Before I get to the specifics, however, there's an important threshold question: how important is it that there be convergence between the U.S. and the European Commission? I believe that convergence is important – if for no other reason than in a

[16] *See, e.g.*, J. Thomas Rosch, "Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be? (March 23, 2010), *available at* http://www.ftc.gov/speeches/rosch/100323uscremarks.pdf

[17] I would likewise modify the FTC Act to place this same limitation on the Commission.

global economy firms cannot be expected to comply with divergent international standards – but I don't believe a one-size-fits all approach is essential, if even possible. Moreover, I believe that now, more than any time before, are we in the U.S. are closer to agreement with the EC. Much of that has to do with the fact that, as the EC has gotten more sophisticated and experienced in its competition law – as, for example, Europe's openness to less measurable non-price competition, consideration of quality and innovation, and its conclusion that consumer choice is a value in considering the impact of a practice on consumer welfare – the U.S. has opened itself up to newer forms of economic thinking, we have met in the center. Nonetheless, differences remain. I'd like to comment on three of those differences.

The first difference is that the EC system is purely administrative and not adversarial. To get a sense of how the EC functions, imagine a world in which the DOJ serves as the sole decision-maker. There is no hearing and there is no judge. We don't need to move to block your merger and get a judicial decision because we can just block it. Likewise, we don't have to have a judge decide whether a firm violated the Sherman Act because we can unilaterally decide that it did. That is how the EC works: the Directorate General for Competition ("DG Comp") plays the role of prosecutor, jury, and judge; it makes a finding of guilt and decides on punishment. There is an appeal process to the General Court (formerly known as the Court of First Instance), but those appeals drag on and the General Court can only review the Competition Commissioner's decisions for "manifest errors of law." Having spent 40 years as a litigator (and on the defense side, I should add), I find that to be crazy. This may be my American bias, but I just can't imagine a system where there is so much as a right to cross examine the

opposing sides witnesses, let alone an independent decision-maker. My ideal antitrust system would unquestionably be adversarial.

The second difference is that the EC (like Canada) has a unitary appellate system. All appeals originate in the General Court (which is essentially one large federal appellate intermediate court) and can then be appealed to the European Court of Justice.[18] The General Court is comprised of 27 judges (one from each member state), who generally sit in panels of 3 or 5 judges at a time. In contrast, of course, in the U.S., antitrust decisions in public and private cases are reviewed by a panel from one of 12 federal appellate courts and may, on a discretionary basis, also be reviewed by the United States Supreme Court.

In comparing and contrasting these models, I am left to wonder whether the U.S. would be better off with one large intermediate appellate court with rotating panels of judges or whether we are better off with our current system. The answer to this question essentially boils down to whether or not there is value in having the law develop in the various silos that are the 11 regional circuits, the D.C. Circuit, and the Federal Circuit, or whether we'd be better off eliminating the circuit-by-circuit precedent and getting a final answer more quickly (still subject to review by the Supreme Court). I struggle with this one. The defense lawyer in me says that the business community would prefer the latter EU-type system – particular in the Section 2 context where it seems like the Supreme Court resolves the hard questions once or twice in a decade – I think we are better off as a legal matter with the current system precisely because it is a common law system. Judges are not perfect. Nor are litigants or attorneys for that matter. In a

[18] Similarly, in Canada the Competition Tribunal's decisions are appealable only to the Federal Court of Appeal and thereafter to the Supreme Court of Canada.

one-shot appellate system, everything better working perfectly every time or there is a risk that bad precedent will be made because of bad facts, bad lawyering, bad judging, or all of the above. Some of that could be avoided by trusting judges to issue non-precedential decisions, but that practice itself has largely fallen out of favor.

Moreover, given that our antitrust is made through common law, the intermediate federal appellate courts serve a critical role in that they let district courts and parties test drive rules and see if they work. When statutes are enacted, there are hearings, lobbying, debates in the media, and town hall meetings. When a federal appellate court announces a rule on monopolization (or, far more rarely, merger law), its decision has the same force and effect, but the process is, in many ways, much more limited. The common law system generally works well, but part of the reason is because the federal appellate courts enable issues to percolate. Stripping that out of our system would be risky.

Third, switching to substance, I would like to discuss what the goal of antitrust law should be. Everyone generally agrees that the goal of antitrust law should be to promote consumer welfare. To call that an "agreement," however, is a red herring: there are many different ideas as to how to achieve that end.[19] In my view, the proper

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[19] *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7-48 (1966) (arguing for a total surplus standard); Robert H. Lande, *Wealth Transfers as the Original and Primary C*

In my view, if there is one thing we could do to better emulate the EC, moving towards a consumer choice framework would be it.

Fourth, while I am talking about substance, my final view vis-à-vis other systems is that, while other foreign states (Canada in particular) have included more specificity in their antitrust laws, I think our system which marries a common law Section 1, Section 2, and Section 7, with a catch-all Section 5 is just right.[22] A common law system, as I have already suggested, makes particular sense in the antitrust context. There is very little that is static about modern firm behavior and it would be a mistake to try and enumerate specific types of anticompetitive conduct or to codify the economic principles that should govern that behavior. All of it is evolving and the law needs to be able to as well. Nevertheless, I think it would also be a mistake to give the private plaintiffs' bar and generalist district judges and juries a blank check to go after any conduct that could conceivably anticompetitive. Congress gave the Commission Section 5 for that reason: to identify the types of conduct that are not easily categorized as violations of any existing statute, but which nonetheless have anticompetitive effects. This combination of the Sherman Act, the Clayton Act, and the FTC Act, in my view, strikes the right doctrinal balance.

III.

The final topic that I'd like to discuss is the separation between public and private litigation and, more specifically, whether there is an effective role for private class

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useful citations, are *available at* http://ec.europa.eu/comm/competition/antitrust/art82/index.html

[22] For a brief discussion of the differences between the U.S. and Canadian antitrust regimes, *see* J. Thomas Rosch, The Path You Need Not Travel: Observations on Why Canada Can Do Without Section 5, *available at* http://www.ftc.gov/speeches/rosch/100204roschcanadaspeech.pdf (Feb. 4, 2010)

actions to play in federal antitrust law or whether we would simply be better without them.

In recent years, more so than ever, the courts have explicitly attacked this issue head on. In *Twombly*, of course, the Court imposed its plausibility gloss on the Rule 8 pleading standard in part because of the high costs of antitrust discovery.[23] To be sure, there's nothing cheap about complying with a Second Request or litigating against the government, but there can be little doubt that the Court's decision was predominantly animated by concerns that the private treble action bar needed to be reigned in.[24] To that end, the Court observed that Rule 8 prohibits plaintiffs from using "a largely groundless" claim to go on fishing expeditions or up the ante on settlement negotiations.[25] Likewise, in *Billing v. Credit Suisse*, the Supreme Court held that the securities laws should preempt the antitrust laws, stating in part that preemption was needed to remedy the fact that "antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries" who were apt to err in the hard line drawing needed to separate the legal from the illegal and reach

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[23] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007).

[24] *See, e.g.*, Lee Goldman, *Trouble For Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 B.Y.U.L. REV. 1057, 1100-01 (2008) ("Eliminating private suits alleging price fixing in oligopoly markets may have been the *Twombly* Court's intent. The Court has been restricting enforcement of the antitrust laws generally and may have reasoned that government suits remedy the majority of price fixing cases.").

[25] *Id.* at 557-58. ("We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.' *Id.*").

inconsistent results.[26] Arguably the appellate courts'

of trial) are simply too much in comparison to a settlement offer. To make matters worse, substantial portions of settlement payments never even trickle down to the alleged injured consumer, but instead end in the pockets of the plaintiffs' attorneys. To the extent private class actions have come to serve more as the plaintiff bar's full employment act than as a way to remedy real harm, one has to wonder if that tradeoff is worth it.

On the other hand, however, it's not apparent that abolishing private class actions is the right answer. A treble damages system must incentivize plaintiffs' lawyers to invest and that means opt out

catastrophic damages."[33] That may overstate matters, but it may be accurate in some cases too. Indeed, there have been a number of proposals over the years to eliminate or reduce the availability of treble damages.[34] Compensatory damages, if coupled with pre-judgment interest, can, arguably, achieve these goals. Moreover, perhaps we would all be better off to address the treble damages issue head on (rather than backdoor reforms through case law) which, in turn, might decrease the volume of settlements that have nothing to with the merits of the case.

Second, following the Antitrust Modernization Commission's recommendation, I'd eliminate joint and several liability[35] and, relatedly, would allow contribution among defendants. As the AMC correctly recognized, the current system, whereby all defendants are fully liable for damages caused by unlawful joint conduct such that any plaintiff can recover the full amount of their damages from any defendant is inequitable

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[33] *See, e.g.*, Robert Bork, Comments on the Status of the Antitrust Laws, *available at* http://govinfo.library.unt.edu/amc/comments/bork.pdf.

[34] Antitrust Remedies Improvement Act of 1986, S.2162, H.R. 4250, 99th Cong. (1986); *see also* Research Joint Ventures: Hearings before the Subcomm. on Investigations and Oversight of the Subcomm. on Science, Research and Technology of the House Comm. On Science and Technology, 98th Cong., 1st Sess. 154, 159 (1983) (testimony of William F. Baxter); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time has Come?*, 61 TUL. L. REV. 777, 830 (1987); Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, pp. 3-4 (Nov. 4, 2005), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/051104_BRT.pdf.

[35] *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (noting the "judicial determination that defendants should be jointly and severally liable" in antitrust cases, while holding that there is no right of contribution); *see also Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both "firmly rooted" and a "well settled principle"); Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 214 (providing that nothing in the Act "shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . . .").