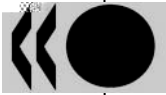


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Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

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1. Substance and process in government antitrust investigations go hand in hand. Regardless of the outcome of an investigation, concerns about process create the impression that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the enforcement outcome.

2. This submission provides an overview of the practices of the Antitrust Division of the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (together, “the Agencies”) with regard to transparency and procedural fairness. Part I discusses transp.6eL2 778.7 (on o 58]2-124)]p-1.

decisions that apply the general statutory provisions to specific facts as presented through adversarial litigation. As the United States Supreme Court has explained:

*Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.*⁶

5. The extensive body of court decisions under the common-law system is an important way that substantive legal standards become known and transparent to the business community, lawyers, economists, and consumers.⁷ In addition, the FTC, through its administrative enforcement process, contributes to the body of decisional law interpreting the Clayton and FTC Acts.

6. The Agencies also publicize substantive guidance, including information about how they decide whether to open an investigation or challenge conduct on antitrust grounds. Both agencies have published

Parties are especially urged to open a continuing dialogue with agency economists early in any investigation, r to address issues related to the collection and analysis of relevant data and the applicability of different potential economic theories.²⁸ Parties are also free to submit “white papers” containing argument, facts, and theories they believe relevant during the investigation. Notably, Part II of the Commission’s rules, which govern investigations, state: “Any person under investigation compelled or required to furnish information shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation.”²⁹

13. Similarly, in a typical DOJ investigation, these ongoing discussions with parties will engage more and more senior staff and policy officials, including the Deputy Assistant Attorneys General, as the investigation proceeds, allowing DOJ and the parties to refine and narrow the open issues.³⁰ 1a 07.3 1931 4 tim.8 083 4

their role as antitrust enforcers -- an appropriate settlement is often sufficient to achieve the goals of the antitrust enforcement while both conserving resources and enabling the parties to achieve their legitimate business objectives. Accordingly, the Agencies view the opportunity for parties to present settlement options and to discuss consensual resolution as a key aspect of a fair and transparent investigation process.³⁸

5. Opportunities to be heard before adverse decisions are taken

22. As indicated, DOJ cannot unilaterally order parties to take or not take certain actions (*e.g.*, block a merger). Instead, DOJ must file a lawsuit in court to obtain relief, and defendants to such lawsuits are entitled to a formal hearing or trial before a court takes final action against them. As noted above, once a case proceeds to trial, constitutional law and rules of federal procedure provide many opportunities for defendants to present evidence and make arguments in their favor.

23. The FTC, by contrast, has the power to order respondents to “cease and desist” from anticompetitive practices if the Commission finds, after a full administrative proceeding, that a law violation has occurred. Parties may seek reconsideration of that decision as well as a stay by a federal appellate court. As explained above, parties have the opportunity to be heard through these processes before a decision is made against them. If the FTC wishes to block a merger pending an administrative proceeding to determine the lawfulness of the transaction, however, it must, like DOJ, seek relief in U.S. district court.

24. There is no opportunity for a formal hearing before either of the Agencies before the Agencies decide to file a complaint. However, as discussed more fully above, both agencies afford parties in civil investigations significant ongoing informal opportunities to be heard on the merits before deciding whether to bring a lawsuit. As mentioned, parties in civil matters are able to submit written materials detailing their positions, and they typically are able to meet directly with the Assistant Attorney General in the case of DOJ, Commissioners in the case of the FTC, and other senior officials at either agency, to explain their case. It is not unusual for the agencies to alter or refine their thinking in response to those meetings and submissions. While this procedure does not involve formal witness testimony, business executives and industry or economics experts, as well as the parties’ lawyers, often attend to explain their views.

6. Length of agency investigations

25. For both Agencies, the time limits of merger review are structured by the Hart-Scott-Rodino (“HSR”) Act.³⁹

29. If the agency initiates an enforcement proceeding by issuing an administrative complaint, an administrative law judge will issue an initial decision after a trial. The complaint, hearing record, and initial decision are public documents, except to the extent they contain confidential information submitted by private parties.⁴⁶ Similar to a complaint filed in federal district court, the administrative complaint must contain a “clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law,” as well as a “[r]ecital of the legal authority and jurisdiction for institution of the proceeding.”⁴⁷ The initial decision is subject to review by the full Commission, and the Commission’s decision, in turn, is subject to review by a U.S. court of appeals. Both of these decisions are also public documents.⁴⁸

30. The Commission’s acceptance of a proposed consent agreement also initiates a public process, whether before or after an enforcement action has been initiated. Every consent agreement proposed must contain certain provisions, largely designed to ensure that the decree is enforceable and legally sustainable in case compliance problems arise later.⁴⁹
