

When Form Improves Substance: Processes that Enhance Agency Effectiveness

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Introduction

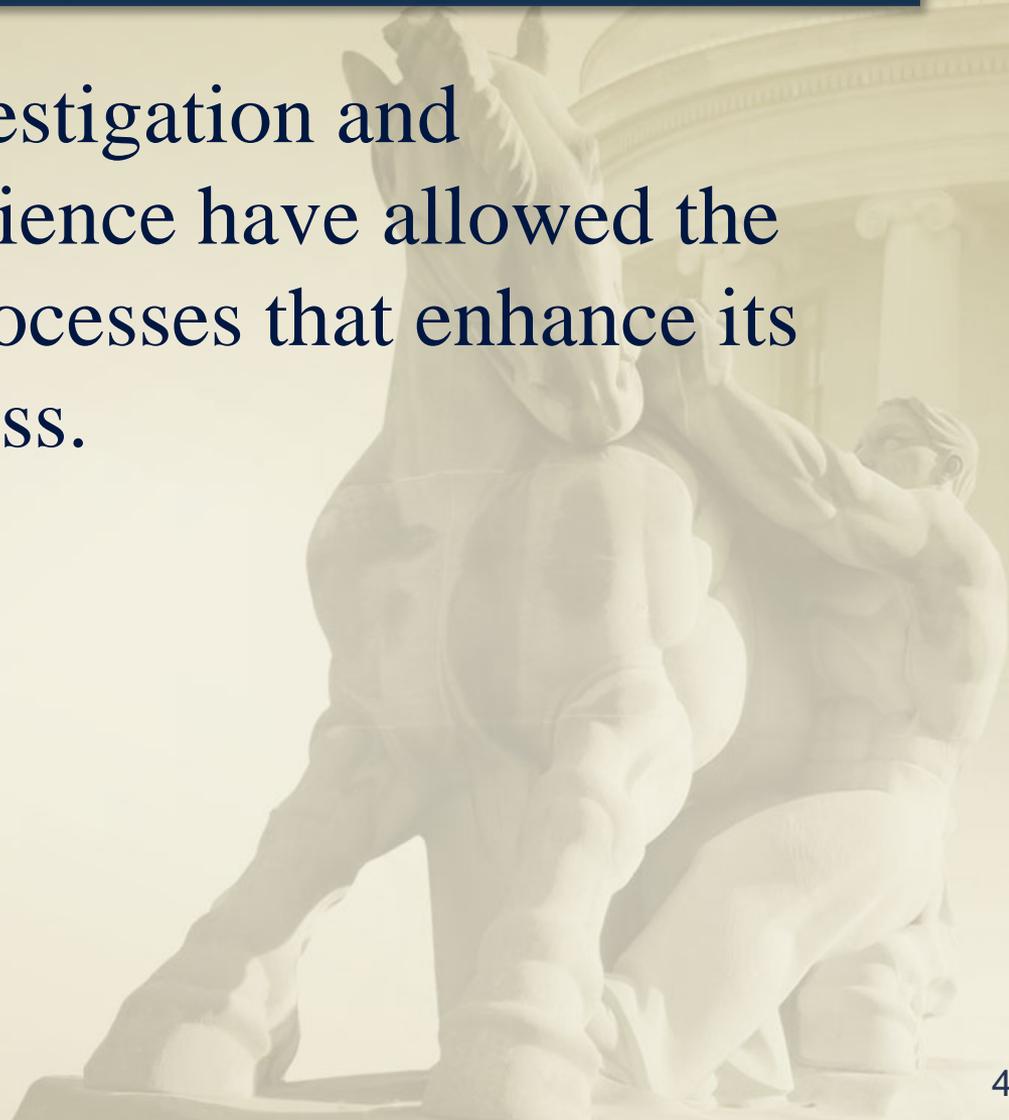
- The FTC's competition enforcement mission involves civil enforcement in merger and conduct investigations (unilateral conduct and concerted practices).
- The U.S. DOJ has sole jurisdiction over criminal antitrust enforcement.
- The agencies' investigatory processes are similar, but their enforcement procedures differ.

Introduction (cont'd)

- This presentation focuses on the way in which agency processes can enhance agency effectiveness.
- Most processes described benefit both the agency and the parties; the presentation focuses on their benefits to the agencies.
- Substance and process in government antitrust investigations go hand in hand.

Introduction (cont'd)

- Many years of investigation and enforcement experience have allowed the FTC to develop processes that enhance its agency effectiveness.



Outline

- Evidence-gathering authority
- Modifying scope of information requests
- Communication with investigated parties
- Legal and expert representation
- Timelines and deadlines
- Settlements
- Judicial review
- Transparency

Outline (cont'd)

- Multilateral projects in this area
- International case cooperation



Evidence gathering authority

- The Commission can subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation (§9 FTC Act; 15 U.S.C. Sec. 49).
- Civil Investigative Demands (CIDs) are also used for investigating potential antitrust violations. Like subpoenas, CIDs may be used to obtain existing documents or oral testimony (§20 FTC Act; 15 U.S.C. Sec 57b-1).

Evidence gathering authority (cont'd)

- Unlike subpoenas, CIDs may also require the recipient to file written reports or answers to questions (15 U.S.C. Sec. 57b-1(c)(1)). In addition, Section 20 expressly authorizes the issuance of CIDs requiring the production of tangible things and provides for service of CIDs upon entities not found within the territorial jurisdiction of any court of the United States (15 U.S.C. Sec. 57b-1(c)(7)(B)).

Evidence gathering authority (cont'd)

- These are powerful instruments for gathering evidence in antitrust investigations.
- They need to be approved on the Commission level (not just staff level).
- If a party fails to comply with a subpoena, the Commission may seek enforcement in U.S. district court. Refusal to comply with a court enforcement order is subject to penalties for contempt of court.

Evidence gathering authority - Mergers

- The standard pre-merger (“HSR”) notification form (*available at http://www.ftc.gov/bc/hsr/hsr_form_ver_101.pdf*) requires limited information.
- Since over 95% of reportable deals raise no competitive issues, this saves staff time in reviewing filings, while allowing them to identify matters that may require a deeper review.

Evidence gathering authority - Mergers

- When the Commission determines that a transaction requires more thorough review, it may issue a ‘second request’ seeking additional information on it (15 U.S.C. 18a(e)(2)).
- An HSR ‘second request’ is a hybrid administrative subpoena that can seek both interrogatory style information as well as documents from the parties.

Evidence gathering: expediting timelines

- The FTC General Counsel has authority to initiate enforcement proceedings when a party fails to comply with the HSR ‘second request’ process.

Discussing scope of information requests

FTC staff recognizes that information production can be costly and time-consuming, especially in HSR 2nd requests. Therefore:

- Staff aims to obtain the information necessary for the investigation without undue burden on the respondents.
- Staff is available to discuss respondents' concerns about the scope of requests for information.

Discussing scope of information requests

- Commission rules allows a party to raise objections to a subpoena by filing a petition to limit or quash. The Commission will issue an order ruling on a petition to limit or quash within 30 days after it is filed (16 C.F.R. § 2.10).

Benefits of negotiating info requests

- Parties more likely to successfully comply with manageable requests.
- Assuming staff is convinced the effectiveness of the request will not be compromised by its narrowing – narrower submissions require fewer agency resources to review them.
- Established mechanism for deciding any disagreements streamlines the process.

Regular communication with the parties

- FTC staff communicate with the parties as to how the investigation is proceeding and when major milestones are approaching.
- Communication starts relatively early (before compulsory process is issued).
- During the investigation, respondents are free to request, and regularly granted, meetings with management, lawyers, economists, and Commissioners, to express concerns and present their positions.

Regular communication with the parties

- Staff, management and Commissioners are receptive to the parties' "white papers" containing argument, facts, and theories the parties believe relevant during the investigation.
- A two-way dialogue – staff often shares its harm and economic theories.
- There is no formal procedure for these communications but they are an integral part of the agency's practice.

Benefits from regular communication

- Parties hold the most information about the industry and their business and conduct; they can help staff to more quickly understand the dynamics of the market and narrow issues, thus saving agency investigation resources.
- The two-way dialogue allows staff to test their working assumptions by hearing the parties' reactions to their analysis.

Benefits from regular communication

- The parties present their defense early in the process. This is helpful for testing the theory of the case and can expedite closure of investigations or settlement with the parties, as well as provide helpful input when deciding to litigate.
- FTC staff, management and Commissioners all offer different perspectives; parallel meetings are helpful and inform all.

Legal & expert representation

- Even before litigation ensues, parties meeting with FTC staff or Commissioners are typically represented by legal, and sometime other, expert counsel.
- When an FTC case proceeds to court, the parties have a right to legal representation, to present legal arguments, to cross-examine the government's witnesses and experts, to present legal arguments as to

Legal and expert representation (cont'd)

why the case should not proceed, to challenge documentary evidence, and to appeal any adverse rulings.

- Respondents in FTC adjudications enjoy similar rights of due notice, cross examination, presentation of evidence, objection, motion, and argument (16 C.F.R. § 3.41(c)).

Legal and expert representation

- In pre-litigation meetings, legal counsel is helpful in explaining the procedures to its clients, and describing their positions in legal antitrust terms. This renders the meetings more efficient, saving staff time.
- Legal counsel are often repeat players in front of the agency.
- Disciplinary action in case of legal counsel misconduct is available.

Timelines

- In civil non-merger cases, there are no formal time limits on the length of investigations. However, both agencies endeavor to move investigations forward as quickly as possible, and to close investigations if they fail to progress.

Timelines (cont'd)

- The FTC rules call for an evidentiary hearing within five months of an administrative complaint in cases in which the agency is also seeking preliminary injunctive relief in federal court, and within eight months in all other cases (16 C.F.R. § 3.11(b)(4)).

Timelines (cont'd)

Benefits

- Anticompetitive behavior needs to be timely challenged due to the dynamic nature of the competitive process. Cases that move faster are more likely to resolve before market circumstances change.
- Fast moving cases also mean a more efficient use of staff's scarce time and resources.

Timeliness (cont'd)

- Nonetheless investigation needs to be long enough to work through complex factual and analytical issues as well as voluminous, complex, and sometimes untimely parties' submissions.

Timelines: mergers

- There are strict statutory time limits on the timing of HSR investigations: usually 30 days for the first phase (the parties can request ‘early termination’); plus 30 days after all parties comply with a ‘second request,’ if issued.
- Parties cannot close their transaction before the investigation is concluded, and therefore are under pressure to respond to agency information requests.

Timelines: mergers (cont'd)

- Timing Agreements. In complex merger review, the parties frequently agree to a limitation on the scope of information requested by the agency in exchange for obligations regarding the prompt production of information and agreeing to delay consummation of the merger.

Such extra time can address the staff's concerns or narrow the issues for litigation or settlement.

Settlements

- Once FTC staff believes antitrust law is violated – it is open to settlement negotiations with the parties at virtually every stage of a trial investigation.
- Proposed consent agreements must contain provisions designed to ensure they are enforceable and legally sustainable in case compliance problems arise later (16 C.F.R. § 2.32).

Settlements' benefits

Our investigations aim to safeguard the competitive process, to the benefit of consumers. A settlement:

- Resolves the competitive problem faster, without the need to wait for the litigation to end.
- Faster resolution allows FTC staff to focus on other or new investigations that pose competitive problems.

Settlements' benefits (cont'd)

- Settlements reduce litigation costs, for both sides.
- A 30-day public comment period allows stakeholders to weigh in. The Commission evaluates the record and determines whether to accept, modify, or reject the settlement.

Judicial Review

- The parties can appeal the final decision of the full Commission to a U.S. Court of Appeals and, thereafter, petition for review by the U.S. Supreme Court.

Benefits

- Judicial review serves as a quality filter for decisions.
- Such review ensures coherence of FTC decisions with broader U.S. jurisprudence.

Transparency

- FTC, usually together with DOJ, publishes substantive guidance about the circumstances and analysis under which it may consider certain mergers or conduct to violate antitrust law.
- An ‘analysis to aid public comment’ accompanies consent decree proposals.
- FTC sometimes issues a public statement explaining the reasons for closing second-stage merger investigations.

Transparency benefits

- Development and issuance of policy statements requires the agencies to develop a coherent enforcement policy, which in turn promotes consistency in enforcement.
- Such consistency improves the overall soundness and coherency of agency decisions.
- In addition, bright line guidelines and rules improve compliance (an active private bar also plays a key role in that).

Multilateral work in this area

- The ICN's ongoing Investigative Process Project establishes a forum to discuss these issues with a view to issuing consensus guidance on agencies' procedures.
- The OECD Competition Committee held three roundtable discussions in this area:

<http://www.oecd.org/daf/competition/48825133.pdf>
(2010).

<http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf> (2011).

International case cooperation

FTC case cooperation with other agencies has been growing exponentially. Benefits include:

- Coordinating merger remedies.
- Aiding analysis, especially by newer agencies.
- In some (especially non-merger) cases - saving agency sources.
- Limited by confidentiality rules, but the parties often provide waivers.

Questions? Comments?

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