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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from United States

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- United States --

1. In the United States, two agencies have responsibility for enforcing the federal antitrust laws: the Department of Justice's Antitrust Division ("Division") and the Federal Trade Commission ("FTC") (collectively "the agencies"). The particular statutes they enforce differ somewhat,¹ as does their institutional design.

2. It is generally understood in the international antitrust community that antitrust agencies (like other law enforcement agencies) should be "independent," in the sense that their actions should be based on the facts and the law, and not on political considerations.² But there is less commonality of views as to how that should be accomplished as an institutional matter. So, while many antitrust agencies are functionally independent in some way, many are also clearly part of or directly responsible to the executive branch of government. Indeed, the multiplicity of organizational formats for antitrust agencies within the United States and in some other countries suggests that there are no established conventions on how they should be connected formally to the rest of the government.³

3. The rest of this paper discusses in turn institutional design and practice features of the Division and FTC.

1. The U.S. Department of Justice's Antitrust Division

4. The Division is a component of the Department of Justice, an executive branch agency, with responsibility for enforcement of the federal antitrust laws. The Division is led by an Assistant Attorney General ("AAG") who is nominated by the President and confirmed by the Senate, and serves at the will of the President. There is no set term for AAGs, but most serve for 2-4 years, and a change of administration (whether a change in party or not) almost always leads to new leadership in the Division.

5. The Division's budget is part of the federal government's operating budget; it is proposed by the President and authorized and appropriated – usually with modifications – by Congress. The Division has a

¹ For example, the Division has sole responsibility for cartel enforcement, which is prosecuted criminally, and the FTC, unlike the Division, has authority under the FTC Act to take enforcement action against "unfair methods of competition" and to conduct studies that do not have a specific law enforcement purpose.

² See Global Forum on Competition, OECD, *Independence of Competition Authorities – From Designs to Practices: Call for Country Contributions*, at 2, DAF/COMP/GF(2016)3 (July 5, 2016), available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf\(2016\)3&doclangua ge=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf(2016)3&doclangua ge=en) ("The ability of national competition authorities (NCAs) to take decisions based on legal and economic arguments rather than under political influence is a fundamental means to ensure that competition rules are applied in a sound, stable, coherent and foreseeable manner.").

³ See William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOKLYN J. INT'L L. 403, 424 (1997).

separate line item in the overall Department of Justice budget. The Division's budget is partially offset by pre-merger notification filing fees.

6. As part of the executive branch of the federal government, the Division is subject to direction from the President, who is head of the executive branch. That said, the Division has long benefitted from substantial independence in its law enforcement mission.⁴ Intervention from outside the Division is virtually nonexistent.⁵

7. More generally, the Division interacts with other executive branch components in an advisory capacity with respect to competition issues, and participates regularly in White House and interagency task forces on a number of regulatory issues. In some cases, executive branch agencies must obtain the Attorney General's antitrust advice, for example before sale of certain government property to a private interest.⁶

8. One of the Division's major competition advocacy efforts involves informally advising and more formally submitting comments and otherwise participating in the proceedings of Federal regulatory agencies, in order to focus attention on important competitive issues and to suggest adoption of the least anticompetitive and best designed forms of regulation where continued regulation is deemed necessary. When filing public comments with independent regulatory agencies, the Division coordinates, in advance, the content and timing of the comments with the relevant White House policy council. This policy is designed to ensure that Executive Branch departments do not take contradictory positions in their filings. This policy does not apply to situations where only the Department of Justice is mandated to make filings, such as competitive factor reports with bank regulatory agencies in merger matters.

9. The Division is often asked to testify before Congress or to prepare a written report stating the Administration's views on pending or proposed legislation. The AAG regularly appears in oversight hearings before the Senate and House committees responsible for antitrust. Testimony and written comments are subject to interagency review and final clearance by the Office of Management and Budget ("OMB"). Before transmittal to Congress, legislative proposals or comments from Executive Branch

⁴ "As a matter of custom developed over a period of decades, the Antitrust Division has developed a substantial degree of insulation from the president. Reported episodes of direct political interference to shape the disposition of cases are rare, and there are important instances in which the Antitrust Division has proceeded with major cases despite the vehement opposition of other executive branch ministries." William E. Kovacic, *Competition Agencies, Independence, and the Political Process*, in *COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS* 291, 299 (JOSEF DREXL, WOLFGANG KERBER, RUPPRECHT PODSZUN EDS., 2011) (footnote omitted).

⁵ The only case in recent memory involved the closing of the Division's investigation of a complaint from Laker Airlines concerning air travel between the United States and the United Kingdom. The intervention was so unusual that the Division issued a press release to explain it on November 19, 1984:

The Department of Justice today announced that it is closing an antitrust grand jury investigation into passenger air travel between the United States and the United Kingdom. The Department announced that it was the President's decision based on foreign policy reasons that this should be done.

A concern over possible political influence in the settling of the *ITT/Hartford* merger case in 1971 led to passage of the Tunney Act. Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16. The Tunney Act established a process for public scrutiny and comment for settlements entered into by the Division, further ensuring against political influence, prior to approval by the court of the settlement if it is within the public interest. A detailed discussion of Tunney Act procedures is available in paras 6-12 of the U.S. submission to the June 2016 roundtable on *Commitment Decisions in Antitrust Cases*, DAF/COMP/WD(2016)23.

⁶ See 40 U.S.C. § 559.

agencies, including testimony and written reports, are reviewed and cleared by OMB. The Division participates in OMB's interagency clearance process in both an originating and reviewing capacity.

10. The AAG has authority to hire Deputy Assistant Attorney Generals ("DAAGs") and counsel to assist the AAG. Historically, the DAAG in charge of criminal matters, most counsel, and the vast majority of Division staff are federal civil servants with full protection of the federal civil service system. Hiring, compensation, promotion, and other personnel matters are all subject to standard federal government personnel rules.

2. The Federal Trade Commission

11. The FTC is an independent agency with a dual mission to protect consumers and promote competition. It is led by five Commissioners, who are nominated by the President and confirmed by the Senate. No more than three Commissioners can be members of the same political party. Commissioners are appointed to staggered seven-year terms and may be reappointed. Because the President is elected for a four-year term, Commissioners' terms extend across presidential terms. Commissioners can be removed only for inefficiency, neglect of duty, or malfeasance in office, which has never happened.⁷

12. The President chooses a Chair from among the Commissioners. The election of a new President (regardless of the new President's party affiliation) almost always leads to the appointment of a new Chair. If the President changes the Chair, the previous Chair can continue to serve out his or her term as a Commissioner. The Chair directs the work of the staff and appoints the heads of the major operating units, and therefore has significant influence in setting agency priorities and in the case selection process. The full Commission, however, must vote to approve the use of compulsory process, to initiate a law enforcement proceeding, to approve negotiated settlements, and to issue a final decision in any administrative appeal of an initial decision by an FTC Administrative Law Judge ("ALJ"), who is an independent decisionmaker. Throughout the government, ALJs are subject to specific statutory and regulatory requirements intended to preserve the independence of the ALJ when performing certain functions.

13. The FTC's budget is determined through a multistep process: the agency makes a request to the President, the President proposes a budget to Congress, Congress passes a law appropriating funds, and the President signs it (or vetoes it, and Congress may override the veto if there are enough votes, or enact a revised bill). The FTC's funding is partially offset by fees from pre-merger notification filings and Do-Not-Call registry access.

14. Final agency decisions are subject to review by the independent federal judiciary.⁸ Neither the President nor Congress has the authority to make or change any specific agency decision, except that Congress and President (or Congress alone if there are enough votes to override a presidential veto) can enact a statute that overturns or supersedes certain agency actions prospectively, or denies appropriations for a particular matter.⁹ Instances of direct political intervention to shape the disposition of FTC

⁷ President Franklin Roosevelt sought to remove a Commissioner in the 1930s but was rebuffed by the U.S. Supreme Court. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). No President has tried it since.

⁸ When the Commission decides cases administratively, the decisions are subject to appellate review in federal court. In some instances (typically mergers), the FTC staff litigating the case will seek preliminary injunctive relief in federal court in addition to litigating within the FTC's administrative system. In these situations, both the court's decision on preliminary injunctive relief and the Commission's administrative decision are subject to review by the appellate courts.

⁹ For example, Congress has on rare occasions passed legislation (1) overturning FTC decisions finding specific practices to be anticompetitive or (2) prohibiting the FTC from using appropriated funds to bring specific types of antitrust cases. This has not occurred since 1985.

competition enforcement actions are extremely rare, as there is a long and robust tradition of non-interference with FTC decisionmaking.¹⁰

15. As part of the FTC's competition advocacy efforts, FTC staff sometimes submits comments to other federal agencies or to state or local decisionmakers in order to focus their attention on important competition issues or factors, provide information about relevant FTC studies, or recommend competition-enhancing alternatives for proposed legislation or regulations.

16. The FTC is often asked to testify before Congress and to provide technical assistance on pending or proposed legislation. The FTC regularly appears in oversight hearings before the Senate and House committees responsible for antitrust policy.¹¹ Because the FTC is an independent agency, its testimony and written comments are not subject to the OMB interagency review and final clearance described above. The FTC participates in OMB's interagency clearance process in a reviewing capacity.

17. Hiring, promotions, and discharge for the vast majority of FTC staff are subject to standard federal government rules. These employees are civil servants with full civil service protection.

¹⁰ FTC staff is aware of only one such instance in the 100-year history of the agency: in 1980, the enactment of an appropriations restriction required dismissal of a pending case in which the FTC was seeking cancellation of a trademark.

¹¹ The FTC provides confidential information to Congressional committees in response to duly authorized requests, pursuant to Congress's constitutional powers of investigation. The laws governing the FTC do not provide a basis for rejecting such a request.