



DEPARTMENT OF JUSTICE

Procedural Fairness

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Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome. Both are important. Indeed, we hear complaints about process as frequently as we hear complaints about substantive outcomes.

In the context of competition law enforcement, procedural fairness concerns not only dealings among parties, third parties, and enforcers, but also the internal dealings of the enforcement agency. The interactions among parties, third parties, and enforcers are obviously important, but so too is an understanding of how the enforcement agency makes decisions. Knowing who within an enforcement agency makes decisions and a grasp of the timetable of likely milestones in an investigation are important steps in assuaging process concerns. Moreover, the symbolism of events, like the ability to meet with final decision makers, should not be underestimated. The ability to present one's case and have a fair hearing before the decision to bring an action ensures that the government decision maker knows all the arguments against an action, while simultaneously providing the party with the confidence that all relevant arguments have been considered.

In the United States, the importance of procedural fairness is deeply ingrained in our legal system. The Fourteenth Amendment of our Constitution prevents the government from depriving “any person of life, liberty, or property, without due process of

law.”¹ Although the kind of process that is due in a particular circumstance depends on many considerations, our Supreme Court has laid out some general guideposts focusing on government transparency and the right of private parties to participate meaningfully in government proceedings affecting them. For instance, the Court has explained that “[a]n elementary and fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”² Similarly, the Court has stressed that “[t]he fundamental requisite of due process of law is the opportunity to be heard” at “a meaningful time and in a meaningful manner.”³

Today, I’m going to talk about processes used to protect procedural fairness at the United States Department of Justice’s Antitrust Division during our civil investigations, keeping in mind, of course, that we at the Antitrust Division do not have all the answers and our methods may not fit different legal systems. Our processes are set forth in detail in the Antitrust Division Manual⁴ and other publicly available material on our website, www.usdoj.gov/atr. The specific examples I will discuss today share a common theme: open and frequent dialogue between competition law enforcers and those under

¹ U.S. CONST., amend. XIV, § 1.

² *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

³ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁴ U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL (4th ed. 2009), *available at* <http://www.usdoj.gov/atr/public/divisionmanual/index.htm>.

investigation not only helps ensure fairness to the parties but also facilitates more effective enforcement.

The idea that transparency during an investigation helps enforcers as well as parties may be counterintuitive to those who worry that openness creates strategic disadvantages for enforcers. That has not been our experience at the Antitrust Division. Frank exchange during all phases of an investigation allows us to conduct investigations more efficiently by focusing all parties on the real issues in dispute. Simply put, transparency and cooperation enhance enforcement efforts and are fully consistent with litigation tactics.

Transparency helps us to make better enforcement decisions by exposing our thinking to informed criticism before we reach decisions or, ultimately, the courtroom. We explain our thinking to parties through regular, informal, oral discussions. When parties are aware of our concerns, they have the opportunity to present evidence and legal arguments directly targeted to our concerns. Joining issue in this fashion is something we at the Antitrust Division view as an important part of our decision-making process. Thus, process involves not only telling parties the subject of the investigation and our basis for it, but also sharing the factual basis for the allegations, the relevant economic theory of harm, and the applicable legal doctrines. Just as we seek to promote competition in markets for goods and services, we should not be afraid of explaining our reasoning and exposing it to the marketplace of ideas. As Justice Brandeis put it in another context, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁵

⁵ LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* 92 (1914).

Once we decide to bring an action, a different set of procedures is implicated. Our civil actions are tried, in public, before judges who serve as neutral arbiters over our claims and the defenses of the parties. Those neutral courts weigh the Antitrust Division's evidence against the parties' evidence in forming their own, independent conclusions. Our trial judges are accountable for their decisions, which must be explained publicly and are subject to further review through our appellate courts. The accumulated learning of those court decisions fills out the specifics of our antitrust laws: ours is a common-law system where the law evolves over time through decisions applying law to specific facts.

As I mentioned before, our processes in the United States are not the only ones that are fair. Different legal traditions may well entail different processes yet still provide due process for the parties. Our traditions do, however, have the benefit of having been developed and tested over time, and it is possible that they might be usefully adapted to other legal regimes. Moreover, my description of Antitrust Division processes might also illuminate the expectations of parties accustomed to our system. I offer our Division processes by way of illustration for other competition law enforcers around the world concerned with enhancing the fairness of their own processes and the effectiveness of their investigations—just as we seek to improve our own enforcement efforts by looking to practices successfully employed in other jurisdictions.

In that vein, I want to use this opportunity to call on competition agencies, international organizations, and the antitrust community to discuss procedural fairness more broadly, focusing on the opportunity to refine procedures that parties can understand and rely on as a means of removing unnecessary uncertainty from enforcement efforts. To

that end, I offer my remarks today, which use Division practices regarding electronic discovery, timing agreements, and internal deliberations as examples and then touch on court adjudication of our enforcement actions, as a springboard for further discussion.

As I mentioned earlier, my remarks focus on aspects of the Antitrust Division's civil investigations. It is worth noting, however, that fairness concerns are even more heightened in the criminal context where individual liberty may be at stake. In the United States, we have special processes specifically designed to ensure fairness in the criminal context, including the right to a jury trial, the right against self-incrimination, the right to a speedy trial, and other detailed processes set forth in the Federal Rules of Criminal Procedure, which govern our criminal cases. We have a rich tradition of criminal processes from which other jurisdictions beginning to criminalize cartel activity can draw.⁶

I. Electronic discovery

The Antitrust Division has a variety of investigative tools at its disposal during an investigation. A basic tool is the ability to require firms to allow us to review their relevant business records. Business records are often highly probative, providing, for example, the data needed to perform econometric analyses that are often valuable in analyzing the likely competitive effects of a proposed merger.

⁶ See, e.g., Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations (Mar. 29, 2006), *available at* <http://www.usdoj.gov/atr/public/speeches/215514.pdf>; Scott D. Hammond, Dir. of Criminal Enforcement, Cornerstones of an Effective Leniency Program (Nov. 22, 2004), *available at* <http://www.usdoj.gov/atr/public/speeches/206611.pdf>; Gary R. Spratling, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders (Oct. 15, 1999), *available at* <http://www.usdoj.gov/atr/public/speeches/3952.pdf>.

In this age of electronic records, however, document requests have the potential to impose significant costs on parties. Reviewing thousands or even millions of records for relevance and privilege can be enormously expensive and time-consuming for parties. Electronic discovery also taxes the resources of the Antitrust Division. Reviewing millions of documents potentially relevant to an investigation quickly consumes limited government resources. Thus, sound judgment is needed to determine the appropriate scope of a document request, balancing the enforcer's legitimate needs for information and the burdens imposed by a discovery request on both the parties and the enforcer.

To find that appropriate balance, the Antitrust Division typically engages in detailed negotiations with parties about what exactly should be produced and when, including very practical issues like the search terms to be used when culling through electronic files and the individuals whose files should be reviewed. The effectiveness of those conversations obviously depends on the willingness of parties to discuss with us their organizational structure, personnel, and information-management systems. With a clear understanding of those matters, we are routinely able to negotiate productions that are substantially less burdensome on parties than they would otherwise be.

Implicit in the concept of a meaningful dialogue about the scope of a document production is our own willingness to discuss with parties our preliminary concerns about a matter in the early stages of an investigation. With an understanding of our preliminary views and concerns, parties are better able to engage meaningfully with us about the appropriate scope of a production. Our experience with this sort of interaction has been overwhelmingly positive. Indeed, were we to omit these interactions, we would condemn

ourselves to less effective and less efficient investigations given the enormous amount of potentially relevant information that could overwhelm our enforcement resources.⁷ The Antitrust Section of the American Bar Association noted the importance of cooperative discovery efforts in its 2008 Transition Report,⁸ which I commend to you.

Finally, I note that an important part of fairness in the realm of document production is protecting the confidentiality of sensitive business information. In view of the potential for information leaks to damage legitimate business interests, the Antitrust Division takes very seriously its obligation not to disclose confidential information.⁹ Quite simply, leaks have no legitimate enforcement purpose and are fundamentally unfair to parties, which have the right to trust that their competitors will not be able to gain a competitive advantage as a result of an unauthorized government disclosure during an investigation.¹⁰ Moreover, they undermine our ability to depend on party cooperation with

⁷ For a thoughtful discussion of the Antitrust Division's e-discovery practices, see Tracy Greer, *E-Discovery Initiatives at the Antitrust Division* (Mar. 25, 2009), available at http://www.usdoj.gov/atr/public/electronic_discovery/243194.pdf. The Division also has developed internal processes by which parties dissatisfied with an initial determination about a significant document-production issue can appeal to others within the Division for a fresh consideration of the issues. See U.S. DEP'T OF JUSTICE, *supra* note 4, at III-40.

⁸ SECTION OF ANTITRUST LAW, AM. BAR ASS'N, 2008 TRANSITION REPORT 6-8, available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>.

⁹ The Antitrust Civil Process Act (ACPA) sets forth the limitations on disclosure of CID material. See 15 U.S.C. § 1313(c)-(d) (2006), and related regulations, 28 C.F.R. 49.1-4. Additionally, section 7a of the Clayton Act contains a non-disclosure provision, 15 U.S.C. § 18a(h), relating to pre-merger filings.

¹⁰ See generally INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES 25 (n.d.), available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf> ("Business secrets and other confidential information received from merging parties and

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our investigations. Relatedly, leaks to the press of enforcement intentions can be just as damaging to perceptions of procedural fairness—parties rightly feel something is amiss when they learn more from the newspapers than enforcers about the status of an investigation.

II. Timing agreements

Closely linked to our e-discovery practices are our practices concerning timing agreements whereby the Division agrees with merging parties on a review schedule for the investigation.¹¹ Timing agreements can take many forms, depending on the specifics of the investigation and the parties' circumstances. Among other topics, they can address (1) commitments for modifying and complying with discovery requests; (2) commitments regarding format of electronic production; (3) scheduling of deposition dates; (4) dates for exchanging economic data; (5) dates for discussions among economists; and (6) procedures governing expert discovery. Importantly, they also typically include schedules of rolling production, where parties agree to provide information or documents on a set timetable. In appropriate instances, they can even involve the mutual use of some shared databases so Division and party economists are able to work from a common data

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third parties in connection with the merger review process should be subject to appropriate confidentiality protections.”).

¹¹ See, e.g., U.S. DEP’T OF JUSTICE, *supra* note 4, at III-46; U.S. Dep’t of Justice, *Merger Review Process Initiative* (Dec. 12, 2006), available at <http://www.usdoj.gov/atr/public/220237.pdf>.

set. More generally, we welcome creative suggestions from parties about how to make our investigations more efficient in specific instances.

The use of timing agreements gives the parties a fair understanding of the road ahead, and the Antitrust Division often uses them, as appropriate, notwithstanding the potential curtailment of our options. By being transparent about our intentions and the milestones of an investigation, we seek to eliminate elements of gamesmanship and focus instead on the underlying merits of the antitrust issues. Again, fair processes allow us to focus on what's important, making us better enforcers.

III. Internal deliberations

I'd next like to address briefly the Antitrust Division's deliberative process. Internally, our lawyers and economists work together on investigations. Both groups, however, have separate reporting chains with different lines of communication to the Division's leadership. These separate channels help ensure that different staff perspectives are fully represented in the materials presented to Division management. At the same time, however, an important part of process is the exercise of leadership over staff decisions and in particular the ability and willingness of leadership to make the final decision.

Regarding our interactions with the parties, as I mentioned earlier, we attempt during our investigations to have an ongoing conversation with parties, at both the Division staff and management levels, so parties have an accurate view of our concerns. Those communications help avoid situations where parties are surprised by the scope of our concerns and enable a meaningful dialogue as an investigation progresses.

Of course, implicit in the concept of a dialogue is that we keep an open mind during our investigation. In order to ensure that we appreciate party perspectives, we sometimes even engage in what we call red and blue team exercises, where part of the Division staff investigating a matter is tasked with presenting to Division management the views of the parties in a mock adversarial proceeding. Those exercises are similar to the European Commission's peer review panels announced in 2003.¹²

Similarly, we invite parties to submit what we call white papers addressing the crucial elements of a case from the parties' perspectives.¹³ White papers serve an important role in our investigations, allowing us to assess the strengths and weaknesses of our theories before making an ultimate decision whether to bring an action. Moreover, parties typically request, and are granted, meetings with Division leadership, including the Deputy Assistant Attorneys General and the Assistant Attorney General, before a final enforcement decision is made. Keeping an open mind until these processes play out is essential to sound exercise of our prosecutorial discretion, and these processes demonstrate

¹² See Mario Monti, European Comm'r, DG Competition, European Comm'n, EU Competition Policy after May 2004, at 8 (Oct. 24, 2003), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/489&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹³ See generally INT'L COMPETITION NETWORK, *supra* note 10, at 19 ("Prior to a final adverse enforcement decision on the merits, merging parties should be provided with sufficient and timely information on the facts and the competitive concerns that form the basis for the proposed adverse decision and should have a meaningful opportunity to respond to such concerns."). As I noted earlier, the Division engages in informal but regular conversations with the parties during an investigation about its enforcement intentions.

that we are willing and indeed eager to learn from parties their perspectives on the key issues in a matter.

Another important process that enhances our transparency efforts concerns the steps we must take upon settling an action. After reaching a settlement, we file with a court a public competitive impact statement explaining our claims and how the settlement resolves them.¹⁴ These competitive impact statements provide an important window into the prosecutorial discretion exercised by the Division, enabling parties to predict how new situations will be treated in light of past practice.

Another effective way for antitrust enforcers to expose internal deliberations to not just the parties but more broadly is through the use of closing statements, a practice we have learned from the European Commission and are seeking to get better at. Closing statements permit what would otherwise be unavailable to the general public: an explanation of why antitrust enforcers did not bring an action in a particular case. Those explanations play an important part in enhancing transparency, thereby enabling parties to better understand enforcement decisions and feel that they are being treated fairly and impartially.

Merger-remedy retrospectives are a topic somewhat related to closing statements. Those retrospectives can provide an opportunity to test predictions about the efficacy of proposed relief at the time it was entered into against actual results. Again, this is an area

¹⁴ 15 U.S.C. § 16(b). *See generally* U.S. DEP'T OF JUSTICE, *supra* note 4, at IV-56 to 59.

where we have helpful precedent from the European Commission, which recently revised its merger remedies guidelines in light of a lengthy merger-remedies retrospective.¹⁵

IV. Judicial oversight

Finally, I will briefly sketch the judicial process that is triggered once the Division brings an enforcement action. As I alluded to before, the Division cannot unilaterally order parties to take or not take certain actions. Instead, we must bring an action in court to obtain relief. In our court system, neutral judges who have no connection to the Antitrust Division are tasked with deciding disputed issues of fact and assessing the soundness of our legal theories. Among other important functions, judges rule on evidentiary disputes, assess witness credibility, and decide contested issues of fact.

In a public proceeding, parties are given full opportunity to contest our evidence, submit their own evidence, and advance their own interpretation of the law. Court proceedings are governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which are available to everyone and provide quite detailed instructions about the course of a litigation and the kinds of evidence that can be considered. A trial court's decision is made publicly, and it is subject to further review through our courts of appeals and, potentially, our Supreme Court. These court procedures are all designed to ensure

¹⁵ See DIRECTORATE-GEN. FOR COMPETITION, EUROPEAN COMM'N, MERGER REMEDIES STUDY (2005), *available at* http://ec.europa.eu/competition/mergers/studies_reports/remedies_study.pdf.

fairness to the parties, and they are all consistent with the ICN's widely used recommendations concerning merger notification and procedure.¹⁶

The judicial process governing Antitrust Division investigations is one of the areas differing most significantly from the experiences of more administrative based systems. As with the Federal Trade Commission in the United States, many competition regimes are based on administrative models where the agency prosecutes and adjudicates, with more circumscribed independent judicial review. Those regimes are perfectly consistent with procedural fairness, although they do place additional responsibility on enforcers to ensure a fair and transparent process.

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To conclude, the Antitrust Division has found that keeping our views from the parties as they develop during our civil investigations actually hinders our enforcement efforts. Exposing our enforcement actions and the reasons behind them to scrutiny allows us to better understand and appreciate all sides of the facts, the underlying economics, and the law. In short, we at the Antitrust Division believe that transparency—keeping those under investigation informed of our intentions—is not only fair to parties but also leads to better and sounder enforcement.

Thank you.

¹⁶ INT'L COMPETITION NETWORK, *supra* note 10, at 19 (“Merger review systems should provide an opportunity for timely review by a separate adjudicative body of a competition agency’s final adverse decision on the merits of a merger.”).