

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by the United States****4 June 2019**

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## *United States*

### **1. General Overview of U.S. Competition Enforcement Process**

1. In the United States, the competition laws are enforced by two dedicated federal government agencies: the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission. But competition enforcement authority in the United States is not vested exclusively in the federal enforcement agencies. State governments can also enforce their own competition laws and some federal statutes, and sometimes they work together to bring cases. Most U.S. competition cases are brought by private citizens, seeking redress from the courts for the antitrust injuries they have suffered.

2. The U.S. federal courts play a central role in reviewing antitrust enforcement actions. Although the decision about whether or not to take enforcement action is committed to agency discretion, the DOJ is a law enforcement agency that has no adjudicative power on its own. Thus, in order to enforce the federal antitrust statutes under its purview (the Sherman Act and the Clayton Act), the DOJ, like a state or private enforcer, must file an action in a federal district (trial) court. The court is the arbiter of whether the law has been violated and, if so, orders appropriate remedies. The court is also responsible for resolving disputes over DOJ's investigatory powers (*e.g.*, enforcement of subpoenas and other requests for information; authorization of search warrants, etc.). In addition, courts review cases that the FTC decides through its internal adjudicative process, discussed in more detail below.

3. Regardless of whether a case is initiated by one of the federal enforcers, a state enforcer or a private citizen, the process is adversarial: the parties submit their evidence and arguments regarding the relevant facts to a judge (or potentially a jury in criminal cases). Based on the parties' submissions, the judge (or jury) determines the ultimate facts and the court decides the case in accordance with the controlling law and precedent.

4. The U.S. judicial system provides significant due process protections to the defendant before liability can be imposed. For example, both the plaintiff and defendant may seek subpoenas for documents and sworn testimony, seek expedited dismissal of unfounded claims, cross-examine each other's witnesses and argue the merits of their positions before a neutral decision-maker. The burden of proof for a violation of law lies with the enforcer or civil plaintiff. The defendant never needs to affirmatively prove their innocence in the United States.

5. In civil matters, the plaintiffs and defendants also enjoy the right to appeal an adverse ruling on the ultimate merits to an appellate judicial body, composed of neutral decision-makers. A corporate or individual defendant convicted in a criminal case also has the right to appeal.

6. U.S. courts evaluate mergers based on whether they tend substantially to lessen competition. In assessing whether conduct is anticompetitive, except for a small group of restraints that are *per se* unlawful because they "always or almost always tend to restrict competition," U.S. courts evaluate single-firm conduct and agreements between competitors under the "rule of reason." Naked price-fixing, bid rigging, and horizontal market allocation agreements are condemned without a factual inquiry into their actual competitive effects. When applying the rule of reason for other types of conduct, courts

rely on a burden-shifting framework. Under this framework, the plaintiff has the burden to prove that the challenged restraint has, or is likely to have, a substantial anticompetitive effect that harms consumers. If the plaintiff meets its initial burden, the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the plaintiff must show that the procompetitive justification could be reasonably achieved through less anticompetitive means or that the anticompetitive harm outweighs the procompetitive benefits.

## 2. General Court Litigation Process

7. The federal courts that hear competition cases are courts of general jurisdiction, and they are organized into three tiers: a trial court, an appellate court, and the U.S. Supreme Court.<sup>1</sup>

8. In the first tier, generalist district court judges decide on any motion to dismiss the complaint,<sup>2</sup> oversee the discovery<sup>3</sup> process, conduct the trial, render a verdict, and issue a detailed written opinion determining both the facts of the case and the applicable legal analysis underlying their decision.<sup>4</sup>

9. From the district court opinion, either side may appeal the case to the appellate court within the “circuit” of that district court.<sup>5</sup> Just as in the district court, these appellate courts are courts of general jurisdiction, staffed by generalist judges who do not necessarily have substantial antitrust experience.<sup>6</sup> In the appellate proceedings, which typically include

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1 Generally, state courts that hear competition matters in the United States are organized in much the same way as the federal court system, with general jurisdiction trial courts, general jurisdiction appellate courts and a single, generalist supreme court that is the final arbiter of all issues of state law.

2 Defendants in federal courts can move to dismiss an antitrust complaint on a number of grounds, including failure to allege sufficient facts to assert antitrust claims or make the antitrust claim plausible. The court must decide whether the complaint’s factual allegations are enough to raise a right to relief above the speculative level, assuming that all allegations in the complaint are true.

3 The term “discovery” in U.S. law means the compelled exchange of information between the parties and from third parties. Discovery normally includes compelled production of documents and data, depositions of potential witnesses along with expert discovery of each side’s expert witnesses, and supporting expert materials. Courts can limit the frequency or extent of discovery if the discovery sought is irrelevant, is unreasonably cumulative or duplicative, can be obtained from another more convenient source, or for certain other reasons.

4 Civil competition cases brought by the federal agencies in federal court are tried directly before a federal judge, with no jury. Criminal antitrust cases may be tried before a jury or a judge, but the defendant in a criminal case has the right to a jury trial. In state and private actions, procedures may vary, but jury trials are considerably more common.

5 There are 13 judicial circuits in the federal judiciary. There is a single circuit covering the nation’s capital in Washington DC, and a special circuit largely focused on certain patent cases, but the other eleven circuits each cover a specific geographic region of the country.

6 Some current and former appellate judges are highly versed in antitrust, and the appellate bench has included a number of distinguished antitrust scholars. But there is no formal requirement that appellate judges hearing competition matters must have specialized training in competition issues or economics. The Federal Judicial Center and the American Bar Association, among others, provide training to judges on competition issues.

written briefings and oral argument, questions of law are reviewed *de novo* with no deference provided to the court below. On the other hand, findings of fact are reviewed under a clear error standard. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

10. After the appellate court renders a final decision on the merits, it is still possible to appeal the matter further to the U.S. Supreme Court. However, the Supreme Court controls its own docket, and so litigants must petition the court to have their matter heard. The Supreme Court typically hears cases only when there are conflicting decisions across the country on a particular issue or when a case raises issues of particular importance. Thus, the Supreme Court receives a large number requests for further appellate review each year, but takes relatively few cases. In recent years, the Supreme Court has typically accepted only one or two competition cases, if any, per year.

### 3. Procedures Applicable to DOJ Criminal Enforcement Actions

11. Criminal prosecutions of competition issues proceed slightly differently. At the federal level, the United States prosecutes the most egregious (or hardcore) *per se* competition offenses criminally, and this prosecution authority vests exclusively in the U.S. Department of Justice. While much of the process is identical to a civil case, there are some important variances that provide criminal defendants with additional due process protections beyond those afforded to civil defendants. For example, criminal matters typically involve initial proceedings before a grand jury, which is tasked with deciding whether sufficient grounds for issuing an indictment exist, that is, whether there is “probable cause” that a crime was committed. Where an indictment is issued, the defendant has the right to a trial before a jury, where the DOJ bears the burden to prove the allegations “beyond a reasonable doubt” rather than the “preponderance of the evidence” standard that normally governs in civil matters.

12. Another important difference between civil and criminal prosecutions in the U.S. system is the scope of appellate rights. While a criminal defendant can appeal an unfavorable criminal ruling in much the same way as a civil defendant, the DOJ, as prosecutor, can appeal adverse trial court decisions in a criminal case only in very limited circumstances.

### 4. Procedures Applicable to FTC Administrative Process

13. The FTC can and frequently does enter the federal court system as a civil litigant, in much the same way as the DOJ. Congress also has entrusted the FTC, an independent administrative agency, with an additional, internal adjudicative process. In brief, this procedure brings the initial investigation, adjudication and enforcement functions under the control of the agency, subject to a number of due process safeguards and the right to appeal to the federal circuit courts.

14. When the FTC determines that it has “reason to believe” (a legal standard lower than that for ultimate liability) an antitrust violation has occurred, it can vote to issue an administrative complaint. That complaint is normally referred to an administrative law

judge (“ALJ”).<sup>7</sup> The ALJ cannot be removed absent malfeasance, and enjoys other statutory protections designed to ensure impartiality. The vote to issue an administrative complaint also triggers an internal firewall between the Commission and the attorneys charged with prosecuting the dispute. The matter is prosecuted from this point forward by agency staff, with no further involvement of the Commissioners.<sup>8</sup>

15. The administrative litigation that follows closely resembles a trial in federal district court, with the ALJ performing many of the same functions as a federal court judge. In brief, the ALJ oversees discovery, makes evidentiary rulings, conducts a trial, renders an initial decision, and drafts a written opinion containing the factual and legal basis for the decision.

16. From that initial decision, either side may appeal to the Federal Trade Commission itself, which acts in an adjudicative capacity. Proceedings at this stage are very much like the appellate process in the federal circuit courts, with written briefings and oral argument in front of the Commissioners, and a liability standard of preponderance of the evidence (more than 50% probability of illegality). However, there is one key, substantive difference between proceedings before the FTC and those before a federal circuit court. The Commission is not required to give deference to the ALJ’s factual determinations; it reviews both the legal and factual issues *de novo*. The Commission then issues a final decision with a written reasoned opinion either finding liability and, typically, issuing an order to cease and desist, or dismissing the complaint.

17. That opinion is directly appealable by the defendant (but not by FTC staff if the Commission dismisses the complaint) to any federal circuit court in whose jurisdictional region the defendant does business. The case then proceeds from that point along the same path as cases originally filed in the district courts. Just as a case coming up for appellate review from a federal district court receives some deference from the appellate court, so too does a final Commission decision. Specifically, the appellate court reviews questions of law *de novo* but will not disturb factual determinations of the Commission that are supported by substantial evidence.

## 5. Procedures Applicable to DOJ Civil Settlements

18. Generally, in the United States, most cases settle or resolve well before the defendant has exhausted all of the appellate rights available to them. Competition cases follow this same pattern. Indeed, the parties settle a substantial majority of the cases brought by the federal enforcement agencies before a trial occurs.

19. The settlement of DOJ civil cases has specific statutory requirements. Under U.S. law, judicial review is required when DOJ concludes a civil antitrust investigation or

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<sup>7</sup> By statute, the Commission may appoint one of its Commissioners to conduct the hearing, or even sit itself to hear testimony. However, the standard, current practice is to refer the matter to the ALJ to both conduct the hearing and issue an initial decision.

<sup>8</sup> A full summary of the protections afforded to defendants in FTC administrative litigation is beyond the scope of this paper. But the composition of the Commission itself, the procedures for the appointment and removal of sitting Commissioners and the recusal process for Commissioners all exist to ensure that defendants are treated fairly by the agency. These fairness considerations are very important whenever a single agency holds both prosecutorial and adjudicative powers.

litigation by settlement or consent decree.<sup>9</sup> Under procedures established by the Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act, DOJ must file a complaint in federal district court that alleges the theory of harm and the relevant markets, along with a Competitive Impact Statement and a proposed final judgment that DOJ will ask the court to enter after a public comment period.

20. The standard of review under the Tunney Act is limited to ensuring that the settlement is in the public interest and that it addresses the harm alleged in its complaint. The district court's inquiry is necessarily a limited one, as DOJ is entitled to broad discretion to settle its cases. The district court is tasked with determining whether DOJ has fulfilled its duty to the public in consenting to the decree, even if it falls short of what the district court would impose on its own. The district court does not have discretion to reject a settlement based on aspects of the merger or conduct that DOJ did not find problematic.

21. Because DOJ's decrees are court orders, the DOJ cannot unilaterally modify or terminate them. Parties must petition the district court to modify or terminate them, and only the court may order a modification or termination.

## 6. Competition Expertise in U.S. Adjudicative Process

22. With the notable exception of the FTC's administrative adjudication process, most competition matters in the United States are adjudicated and resolved by generalist judges with no particular prior, required experience in competition issues or economics.<sup>10</sup>

23. The wide use of generalist judges has been a mainstay of the U.S. system and has contributed to the legitimacy and general acceptance of important competition decisions affecting major sectors of the economy. Using generalist judges in what has become a fairly complex and technical area of law, however, presents some challenges for both plaintiffs and defendants in the U.S. system. In most litigated, civil competition cases, both sides hire expert economists to undertake empirical analysis, prepare a written report, and provide expert economic testimony. Both sides are also given the opportunity to depose and cross-examine the expert proffered by the other side, and can seek to have that expert's testimony excluded by the judge if it does not meet minimum standards of reliability.<sup>11</sup> If the expert's testimony is admitted, the judge evaluates the economic evidence under the same standard applicable to other expert evidence.

24. In most cases, the judge does not appoint a neutral economic expert and leaves it to the parties to litigate the economic analysis underlying the theory of the case. It therefore is vital for litigants to educate the judge on not just the facts of the case and the law, but also on the economic theory that underlies the theory of the violation.

25. One of the advantages of the U.S. common law system is that judges with limited experience in any field of law can draw on a large body of judicial precedent. These prior

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9 Consent decrees are not used to resolve allegations of hard-core horizontal conduct that DOJ prosecutes criminally, such as price fixing, bid rigging, or market or customer allocation.

10 The FTC's administratively adjudicated matters are ultimately appealable to a panel of generalist judges.

11 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

cases can often provide critically important guidance to judges who are unfamiliar with the nuances of modern competition analysis.

26. These prior written opinions are not simply advisory; in many cases this precedent is binding authority that the judge must follow. For example, at the federal district court level, both the decisions of the appellate courts within the court's judicial circuit and U.S. Supreme Court opinions constitute binding precedent. In practice, federal district courts also regularly look to the opinions written by circuit courts in the other circuits of the federal system, as well as prior district court opinions that may be instructive. This large body of precedent, some of it written by well-regarded antitrust scholars, helps to disseminate the specialized knowledge of competition issues more broadly through the federal judiciary.

27. Because of the importance of these judicial precedents to the advancement of antitrust law, the DOJ and FTC monitor competition cases closely, including those brought by private plaintiffs. At the appellate level, the DOJ Antitrust Division can intervene as *amicus curiae* (a friend of the court). In cases before the district court, the Antitrust Division has the authority to submit a statement of interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. Because many antitrust cases are settled before they reach the appellate courts, submitting statements of interest in district court is one way for the DOJ Antitrust Division to address important competition law issues before the courts. Like the DOJ, the FTC may file an amicus brief to provide information that can help the court make its decision in a way that protects consumers or promotes competition.