

**Summary of Antitrust Modernization Commission Hearings on  
Federal Enforcement Institutions  
November 3, 2005**

The Antitrust Modernization Commission (“AMC” or the “Commission”) held hearings on November 3, 2005 to obtain testimony regarding dual federal enforcement of the antitrust laws. The AMC heard from two panels of experts on this topic.

The first panel focused on the differences between FTC and DOJ preliminary injunction procedures and suggestions for harmonizing those procedures. Initially, the discussion focused on whether there was a difference between the preliminary injunction standards applied in pre-consummation horizontal merger cases depending on whether it was the DOJ or the FTC that was seeking a preliminary injunction. After the panelists reached a general consensus that any differences in the standards were minimal, the discussion shifted to the procedural factors that influence how the DOJ and FTC choose to litigate merger cases. The most significant difference mentioned by the panelists is that the DOJ, unlike the FTC, is often willing to consolidate the preliminary injunction proceeding with the trial on the merits, which often occurs within six months of the expiration of the HSR waiting period. The Commission appeared interested in this observation and many of their questions focused on whether there were any reasons the FTC should not follow a similar procedure.

The second panel offered testimony on the FTC-DOJ clearance process and ways that process could be improved. Initially, the panel focused on educating the Commission regarding the short-lived, but effective clearance procedures agreed to by the DOJ and the FTC in 2002. That agreement (the “2002 Clearance Agreement”), the focal point of which was an agreed industry allocation, collapsed under political pressure only a few months after it was implemented. All of the panelists agreed that improvements to the clearance process are as important now as they were in 2002 and that the best way to improve the process would be to implement the procedures that were jointly agreed to by the DOJ and FTC in 2002. However, the panelists were pessimistic about the chances of those changes being implemented given the spectacular failure of the 2002 effort.

**Panel I: Harmonizing FTC and DOJ Injunction Procedures**

**I. Summary of Written Testimony:**

A. William Blumenthal. General Counsel for the Federal Trade Commission.

William Blumenthal argues that despite minor differences in wording, there is no meaningful difference in the standards the FTC and DOJ are required to meet in order to obtain a preliminary injunction in pre-consummation horizontal merger cases. In support of this argument, he quotes from several cases in which the courts described the DOJ and FTC preliminary injunction burdens using almost identical language.<sup>1</sup> Blumenthal’s testimony also addresses the concern that the FTC might rely on its right to engage in

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<sup>1</sup> Compare *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) with *United States v. Country Lake Foods*, 754 F. Supp. 669, 675 (D. Minn. 1990).

administrative litigation after a preliminary injunction has been denied to needlessly prolong litigation. He argues that this concern is unwarranted because (1) the agency rarely litigates cases after a preliminary injunction has been denied, and (2) it is beneficial to have an occasional merger case litigated to full conclusion.

Blumenthal argues that the true problem that the Commission should focus on is not that the FTC and DOJ are held to different standards in seeking preliminary injunctive relief, but that neither agency gets the benefit of a true preliminary injunction hearing in merger cases because they are rushed by the courts into full trials on the merits. In the case of the FTC, this is particularly problematic because, as a practical matter, it deprives the FTC of the opportunity to utilize the administrative adjudication process.

B. Craig Conrath. Attorney with the Antitrust Division of the United States Department of Justice.

Craig Conrath's written testimony did not directly address the differences, if any, between the FTC and DOJ preliminary injunction standards. Instead, he simply (1) described the legal standard to which the Antitrust Division is held when seeking a preliminary injunction in a merger case and (2) explained how the Division determines whether or not to seek an preliminary injunction in a particular case.

Conrath explained that the courts apply a variation on the traditional equity standard that applies in all preliminary injunction proceedings in determining whether the DOJ is entitled to a preliminary injunction in a merger case. The factors generally considered by the courts in determining whether to grant a preliminary injunction are (a) the probability of success on the merits, (b) the threat of irreparable harm to plaintiff, (c) any harm that the injunction may cause the defendant, and (d) the public interest. In cases in which the government is the plaintiff (including cases in which the DOJ seeks to preliminarily enjoin a merger), the courts apply a variation on this test that relieves the government of showing irreparable injury.

Conrath also explained that the Antitrust Division (the "Division") does not seek a preliminary injunction in every merger case. To the contrary, some cases proceed directly to trial on the merits, and in other cases the Division consolidates the preliminary injunction hearing with the trial on the merits. The determining factor in whether the Division seeks a preliminary injunction is whether the parties will be able to close the merger as soon as the HSR waiting period is over, or whether there are other pre-closing regulatory or corporate law requirements that will delay the closing long enough for the Division to complete its investigation and prepare for trial. If the parties can close the merger as soon as the HSR waiting period is over, the Division believes it is important to obtain a preliminary injunction because (1) once a merger has been consummated it is difficult to unwind, and (2) any anticompetitive harm from the merger may begin immediately.

- C. Joe Sims. Senior antitrust partner at Jones Day. Mr. Sims was formerly a Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice.

Joe Sims argues that there are meaningful differences between the DOJ and FTC preliminary injunction standards. At least when read literally, section 13(b) of the FTC Act provides a lower standard for obtaining injunctive relief than the standards developed by the courts in cases in which the DOJ seeks injunctive relief. Moreover, the fact that there is a perception that the FTC faces a lighter burden in obtaining preliminary injunctive relief, even if that perception is false, makes the FTC slightly more aggressive than the DOJ in seeking that relief.

Sims believes that the DOJ standard, not the FTC standard, is the standard that should apply in merger cases. Given the virtually unlimited discovery the agencies are able to obtain in the HSR process, there is no reason they should not be required to meet the standard that any other litigant must meet in order to obtain a preliminary injunction. Although the lesser FTC standard might be justified in other contexts, the rationale that has been used to support its application in the merger context does not bear up under scrutiny. Sims dismisses the argument that the FTC should face a lower burden because it is an “expert” agency that has the ability to employ an administrative process as irrelevant in the merger context. Because the entry of a preliminary injunction will almost always kill the transaction, the administrative procedure will rarely if ever be used.

- D. Michael N. Sohn. Partner in Antitrust Practice Group of Arnold & Porter LLP. Mr. Sohn was formerly General Counsel for the Federal Trade Commission.

Michael Sohn testified that there is some difference in the preliminary injunction standards to which the FTC and DOJ are held. The preliminary injunction standard for the FTC is set out in § 13(b) of the Federal Trade Commission Act, which requires a court to grant a preliminary injunction “upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”<sup>2</sup> In contrast, there is no statute setting out the preliminary injunction burden that the DOJ must meet. Instead, courts use the four-part equity test applicable to all requests for preliminary injunctive relief, which requires the court to consider (a) the probability of success on the merits (b) the threat of irreparable harm to plaintiff (c) any harm that the injunction may cause the defendant, and (d) the public interest. Theoretically, these two tests differ in that the traditional equity test, unlike the 13(b) test, requires a demonstration of irreparable injury. However, in practice, courts generally do not require the DOJ to establish irreparable harm. Nevertheless, there is a perception, which is reinforced by the deferential language used by some courts to describe the FTC’s burden in a preliminary injunction hearing,<sup>3</sup> that the courts give the FTC more deference in preliminary injunction cases than they give the DOJ.

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<sup>2</sup> 15 U.S.C. § 53(b).

<sup>3</sup> See, e.g., *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 50 (D.D.C. 2002).

Sohn argues that the real difference between litigating a preliminary injunction proceeding against the FTC and litigating one against the DOJ does not stem from the courts applying different standards to the agencies, but rather from the fact that the FTC, unlike the DOJ, has the ability to litigate the merits of the dispute in an administrative process. Because the DOJ will litigate the preliminary injunction in the same court that will hear the trial on the merits, it often agrees to consolidate the two proceedings. This, of course, means that the DOJ must meet the higher standard of proof that is required to obtain a permanent injunction. The FTC, on the other hand, has no incentive to consolidate the two proceedings.

Sohn believes that the best solution to this problem would be for Congress to require the FTC to try the merits of merger cases in district court, but he acknowledges that this is unlikely to happen. In the alternative, he suggests that Congress could adopt legislation requiring courts to consider (1) the likelihood that a preliminary injunction will result in the abandonment of the merger and (2) the harm to consumers (such as lost cost savings and other synergies) if the merger is abandoned. Finally, Sohn suggests that the Commission encourage the FTC to seek a permanent injunction at the same time it seeks a preliminary injunction unless there is good reason to believe that there is a benefit to post-injunctive administrative litigation.

## II. Highlights from Questions and Answers (Paraphrased):

A. *What I am hearing is that, as a practical matter, the FTC and DOJ preliminary injunction standards are not that different. Does everyone agree that the agencies should operate under the same preliminary injunction standard, and if so, why not have one statute?*

Sims: I think you may have dismissed the practicalities too quickly. People at the FTC think they have a lighter burden and so they act accordingly.

Blumenthal: It is fine to have one standard so long as the 13(b) standard is the one that is chosen.

B. *If the whole game is do we get an injunction or not, what is the most fair standard to use? What about moving directly to a permanent injunction hearing?*

Sohn: Given the extensive discovery afforded the government during the HSR process, it is hard to see how the FTC can argue that they are being rushed to a trial on the merits. The DOJ follows a sound consolidation practice.

Sims: The current procedure is not a true preliminary injunction procedure because the government has already had so much

discovery, but it is not a trial on the merits either. It seems like it should be one way or the other.

Conrath: It is our experience that regardless of the way we get to a fact hearing before the court, the court is focused on the substance and the standard is far less significant.

Blumenthal: There are other things, such as developing expert reports, that the government has to do before trial. It is not a matter of simply reviewing the Hart-Scott documents.

*C. Is the willingness of the respective enforcers to go directly to a trial on the merits influenced at all by differences in the preliminary injunction standards?*

Blumenthal: The standard is irrelevant, but the FTC's willingness to go directly to a trial on the merits is influenced by fact that the FTC has an administrative hearing process.

Conrath: It is a case by case decision.

Sohn: I suspect the difference has more to do with the FTC's theory that there is something to be gained by having an administrative trial.

*D. I think we all agree that whether a merger is cleared to the FTC or to the DOJ should not make a substantive difference in the outcome. So why wouldn't we want the same process either way?*

Blumenthal: That is a fair presumption and has intuitive merit, but I would have to think through the ripple effects.

Conrath: We do just fine without Part III.

Sims: Part III power is irrelevant because everything is won or lost at the preliminary injunction stage. The FTC should have to try cases in federal court.

*E. If the Commission were to recommend that in all pre-consummation horizontal merger cases, the preliminary injunction hearing should be consolidated with the trial on the merits, and all such cases should be set for trial within six months of the end of the HSR waiting period, would that be a problem for the agencies?*

Conrath:<sup>4</sup> The DOJ would be fine with that in most cases. It is not that different from our current practice.

## **Panel II: THE FTC-DOJ Clearance Process**

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<sup>4</sup> Blumenthal did not respond to this question.

## **I. Summary of Written Testimony:**

- A. Timothy J. Muris. Co-chair of the Antitrust & Competition Practice at O'Melveny & Meyers LLP. Muris, who was Chairman of the FTC at the time of the 2002 Clearance Agreement, is also a Professor of Law at George Mason University.

Timothy Muris recounted the historical circumstances that led to his decision to work with Charles James, the Assistant Attorney General for the Antitrust Division of the Department of Justice, to develop the 2002 Clearance Agreement. Muris explained that the clearance process prior to the 2002 Agreement was problematic for four different reasons: (1) it created unnecessary delays in clearing matters; (2) it gave the agencies a perverse incentive to investigate matters simply to use the experience gained to assert claims in future cases; (3) it generated friction between the agencies; and (4) it was so confusing that parties could not accurately predict which agency would obtain clearance for any given matter.

The 2002 Clearance Agreement offered at least three benefits over the old process: (1) the industry allocation permitted enhanced specialization; (2) the reduction in clearance disputes improved interactions between the agencies; and (3) it made it easier for parties to predict which agency would handle a given matter. Despite these benefits, Muris believes that it is unlikely that the agencies will be able to summon the political willpower to push for significant reforms in the clearance process.

- B. John M. Nannes. Attorney with Skadden, Arps, Slate, Meagher & Flom LLP. Mr. Nannes is a former Deputy Assistant Attorney General and former Acting Assistant Attorney General of the Antitrust Division of the United States Department of Justice.

John Nannes argues that the current clearance process, under which the agencies agree to allocate investigations based on historical agency expertise with the industry in question, needs to be improved not only so that clearance disputes can be resolved more quickly, but also because the process rewards agency inefficiency. Because clearance disputes are resolved based on historical agency expertise, the agencies have an incentive to engage in unnecessary or excessive investigations simply to bolster their industry portfolios.

Nannes offers three suggestions to help improve the process. First, he suggests that adopting industry allocations, like those contained in the 2002 Clearance Agreement, would go a long way towards reducing clearance disputes. Second, Nannes believes that clearance disputes could be reduced if the heads of the respective agencies would simply tell their staffs that "gaming" the clearance process will not be tolerated. Finally, Nannes argues that seeking opportunities for inter-agency coordination in other areas would foster a spirit of cooperation that might eliminate some of the competitiveness that contributes to the number of clearance disputes.

- C. Joe Sims. Senior antitrust partner at Jones Day. Mr. Sims, a former Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice, was one of the four DOJ/FTC alumni who worked to develop the 2002 Clearance Agreement.

Joe Sims believes that the current clearance procedure works smoothly most of the time. However, when the process does fail, the failure is incredibly expensive for both the agencies and the affected parties. Accordingly, Sims argues that any unnecessary delay in clearing a matter is unacceptable. The important issue is not which agency investigates any given industry, but that the decision is made as quickly as possible.

Sims contends that the 2002 Clearance Agreement, had it been allowed to remain in place, would have continued to significantly reduce delays in the clearance process. However, he is extremely pessimistic that the agencies will ever be able to reach such an agreement again because the first effort failed so spectacularly.

- D. Michael N. Sohn. Chairman & Partner in Antitrust Practice Group of Arnold & Porter LLP. Mr. Sohn was formerly General Counsel for the Federal Trade Commission.

Michael Sohn testified that clearance disputes are likely to become increasingly common as industries converge because it is increasingly difficult to determine which agency has the most relevant historical expertise. This is a severe problem for parties because, when a clearance dispute takes up all or most of the HSR waiting period, the agencies have no choice but to issue a broad Second Request that might not have been necessary. The only way for the parties to avoid this problem is to withdraw their filing and refile, turning what should have been a 30-day waiting period into a 60-day waiting period.

Mr. Sohn agrees with the other panelists that the best solution to the clearance problem would be for the agencies to reach an agreement similar to the 2002 Clearance Agreement. This time, however, the agencies should consult with the relevant congressional committees in an attempt to avoid the problems that derailed the 2002 Clearance Agreement.

## II. Highlights from Questions and Answers (Paraphrased):

- A. *How important was the industry allocation to the 2002 agreement?*

Muris: That was the key.

Sims: Industry allocation was a device to try to get fast decisions on clearance. Agency competition is inevitable, but industry allocation reduces competition by taking some potential disputes off the table.

Sohn: Industry allocation is key.

*B. Is there anything other than industry allocation that would solve the agency clearance problem?*

Sohn: Nothing else comes close. Anything other than industry allocation based on agency expertise would be arbitrary.

Sims: I don't like any of the other options, but the best alternative I can think of would be to give the agencies a short time limit (perhaps seven days) to resolve clearance problems.

Nannes: I hope the agencies will figure it out. They are the ones who can really figure out who has the expertise.

Muris: I like agency expertise best, but anything would help – perhaps a time limit followed by arbitration or mediation.

*C. This one for me is just such a no-brainer. Where did we go wrong in 2002? What should be done to make sure that doesn't happen this time around?*

Muris: Get the business community involved. Get them to tell the appropriations committee to force the agencies to solve the problem.

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