



# Federal Trade Commission

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## **Faster, Leaner, Meaner: A Prescription Diet for U.S. Antitrust Enforcement?**

**Remarks of J. Thomas Rosch\*  
Commissioner, Federal Trade Commission**

**before the**

**Chatham House Conference on  
Competition Policy in Global Markets**

**London, England**

**June 22, 2012**

Good morning. As you have no doubt figured out from the slate of speakers for this session,<sup>1</sup> I am here to provide you with the United States perspective on what we might be able to do to put antitrust enforcement on a prescription

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\* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing this paper.

<sup>1</sup> For the benefit of readers who did not attend the conference, my fellow speakers were Joaquín Almunia, Commissioner for Competition, European Commission, and Jiang Lui, Director of the Premerger Notification Consultation Division of the Antimonopoly Bureau, Ministry of Commerce, China. *See Competition Policy in Global Markets, 22 June 2012 – Agenda*, CHATHAM HOUSE, <http://www.chathamhouse.org/competition2012/agenda> (last visited June 12, 2012).

diet so that it is “faster, leaner, and meaner.” On the topic of *faster*, I will review what we at the Commission have done recently to reform our rules of administrative procedure to expedite enforcement cases, and ponder what else we might do to speed up our process. On the topic of *leaner*, I will address the challenge of “doing more with less” faced by the Commission—and indeed, every other U.S. federal agency—in this day and age of budgetary constraints, and talk about how we can more efficiently and productively partner with our state-level counterparts. On the topic of *meaner*, I will describe my views on consent decrees, particularly denials of liability by respondents, as well as my views on criminal penalties for cartel defendants.

## I.

As you may know, the Commission was created by our Congress in 1914 to be an expert agency specializing in antitrust matters, including mergers.<sup>2</sup> To my way of thinking, an integral part—and a distinguishing feature—of our DNA as an expert agency is our ability to adjudicate antitrust matters sitting as an

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<sup>2</sup> See, e.g., S. REP. NO. 63-597, at 8–9 (1914) (expressing the view that “the peculiar character and importance” of Sherman Act enforcement against combinations in restraint of trade and monopolies “make it indispensable that some of the administrative functions should be lodged in a body specially competent to deal with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected”); H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.) (expressing the view that “the most certain way to stop monopoly at the threshold is to prevent unfair competition,” and that “[t]his can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business”); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 98 (1924) (“The Federal Trade Commission was conceived to be a body of men especially qualified to pass on questions of competition and monopoly.”); W. STULL HOLT, THE FEDERAL TRADE COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 5 (1922) (recounting that the idea of a commission of experts “designed to afford more speedy and informal relief than that given by the law and to make the remedy fit the circumstances” had gained increasing traction among politicians as a new type of agency in American government).

administrative tribunal, instead of having always to rely on the federal district courts, which are inherently generalists.<sup>3</sup> But if we are to justify and retain our imprimatur as an administrative tribunal that gets to pass on antitrust matters in the first instance,<sup>4</sup> then we must ensure that our investigative and adjudicative processes move as expeditiously as possible.

### A.

Administrative litigation, no differently than district court litigation, invariably consumes resources and time of both sides, and imposes

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<sup>3</sup> See J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Reflections on Procedure at the Federal Trade Commission, Remarks at the ABA Section of Antitrust Law Antitrust Masters Course IV 4 (Sept. 25, 2008), <http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf> [hereinafter Reflections] (disagreeing with the suggestion that all merger challenges should be tried in the federal district courts). This is not to say that there is anything wrong with our institutional design of the federal judiciary to be, by and large, generalists. Rather, it is to say that Congress intended that antitrust matters could be referred first to specialists, and hence it created the Commission to fulfill this role. For example, I have observed that the “inherently suspect” standard adopted by the courts for use in a truncated, rule-of-reason analysis was an innovation of the Commission sitting as an administrative tribunal, and that it is unlikely a federal district court, which is bound to apply the precedent in its regional circuit, would have been open (let alone equipped) to applying a more novel form of analysis in the first instance. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Rewriting History: Antitrust Not As We Know It . . . Yet, Remarks Before the ABA Section of Antitrust Law 58th Spring Meeting 5 (Apr. 23, 2010), <http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf> [hereinafter Rewriting History] (referring to *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 360–63 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009), and *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36–37 (D.C. Cir. 2005)); J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, So I Serve as Both a Prosecutor and a Judge—What’s the Big Deal?, Remarks Before the ABA Annual Meeting 6 (Aug. 5, 2010), <http://www.ftc.gov/speeches/rosch/100805abaspeech.pdf> [hereinafter Big Deal] (same).

<sup>4</sup> *FTC v. Texaco Inc.*, 393 U.S. 223, 226 (1968) (“While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight.”) (citing prior cases); *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) (“In a broad delegation of power [the Federal Trade Commission Act] empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair.”); *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 314 (1934) (“While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, . . . in passing on that question the determination of the Commission is of weight.”) (citation omitted).

unwelcome burdens and distractions on respondents and third-party witnesses.<sup>5</sup> Furthermore, from the standpoint of respondents in merger cases, protracted proceedings may result in their abandoning the transaction before the antitrust merits can be adjudicated.<sup>6</sup> Also, the maxim *justice delayed is justice denied* seems just as applicable to our enforcement proceedings, which are always brought with the public interest in mind,<sup>7</sup> as it is to criminal and civil trials at common law.<sup>8</sup> Not only does delay *not* necessarily produce higher quality decisions,<sup>9</sup> but it may also hurt consumers, who pending a final decision may have to live with uncertainty in the marketplace, if not with deleterious effects flowing from the challenged conduct or transaction.<sup>10</sup>

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<sup>5</sup> See Rosch, Reflections, *supra* note 3, at 6 (observing that protracted administrative litigation may result in substantially increased litigation costs for the Commission and respondents alike, and may spawn nonessential and costly discovery and motion practice).

<sup>6</sup> See *id.* at 5–6 (observing that the very real possibility of either respondent walking away from a challenged transaction is often cited as an argument against the grant of preliminary relief by a district court enjoining the consummation of the transaction pending an administrative trial on the merits). See, e.g., FTC v. Lab. Corp. of Am., No. SACV 10-1873 AG (MLGx), 2011 U.S. Dist. LEXIS 20354, at \*58, ¶ 179 (C.D. Cal. Feb. 22, 2011) (“Courts must also carefully consider whether preliminary injunctive relief is appropriate in light of the long time period between preliminary proceedings and a final decision on the merits.”).

<sup>7</sup> 15 U.S.C. § 45(b) (2011) (“[A]nd if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect[.]”).

<sup>8</sup> As an aside, it has been speculated that the maxim *justice delayed is justice denied* may have originated from chapter 40 of the Magna Carta—*nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam* (“To no one will we sell, to no one will we refuse or delay, right or justice.”). WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (1914) (clarifying that payments made to the royal courts were not bribes for a particular ruling or result, but rather, “expedients for hastening the law’s delays”).

<sup>9</sup> See Rosch, Reflections, *supra* note 3, at 6 (expressing doubt that protracted proceedings improve the quality of decisions).

<sup>10</sup> For example, in the context of consumer protection cases brought by the Commission, courts have expressed concern with third-party requests to intervene or defense requests for stay that may delay the entry of final judgment and prejudice the award of agreed-upon

Indeed, delay may actually produce lower quality decisions that are less likely to withstand appellate review—even under the highly deferential, substantial evidence standard for the Commission’s factual findings.<sup>11</sup> The United States Court of Appeals for the Seventh Circuit encountered this very problem in *Columbia Broadcasting System, Inc. v. FTC*.<sup>12</sup> In that case, the Commission challenged Columbia Record’s exclusive licensing arrangements with smaller record manufacturers for records from their catalogs to be sold only through the Columbia Record Club,<sup>13</sup> and not any other rival club, as having the alleged effect of barring new entrants into the record club market.<sup>14</sup> The Commission filed its complaint in June 1962, but the hearing examiner did not issue his initial decision until September 1964, which dismissed the complaint, and the Commission did not issue its opinion reversing the examiner until July 1967—five years after the filing of the complaint.<sup>15</sup>

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relief to consumers. *See, e.g.,* *FTC v. QT, Inc.*, 472 F. Supp. 2d 990, 998 (N.D. Ill. 2007) (finding that defendants’ requested stay would compromise the rights of consumers because the attendant delay may result in the Commission being unable to locate many eligible consumers and in the defendants dissipating assets available for redress); *FTC v. Am. TelNet, Inc.*, 188 F.R.D. 688, 692 (S.D. Fla. 1999) (denying private plaintiff’s request to intervene because the attendant delay would prejudice consumers that are waiting for compensation and protection through the Commission’s action against American TelNet).

<sup>11</sup> *See, e.g.,* *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 823 (6th Cir.), *cert. denied*, 132 S. Ct. 400 (2011); *Chicago Bridge & Iron Co., N.V. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008).

<sup>12</sup> 414 F.2d 974 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

<sup>13</sup> The Columbia Record Club was then (in 1955) a new business model of selling phonograph records directly to consumers on a mail-order subscription basis. *Id.* at 975, 978.

<sup>14</sup> *Id.* at 976, 978. The Commission also challenged Columbia Record’s royalty agreements with artists whose records were sold through the Club as a form of unlawful price-fixing. *Id.*

<sup>15</sup> *Id.* at 975.

On appeal, although the Seventh Circuit agreed with the Commission’s identification of a “record club” submarket, it concluded that the Commission’s findings on the nature and extent of market foreclosure could not stand because that relevant market had “undergone a significant change since the hearing examiner completed his hearings and entered his findings.”<sup>16</sup> Specifically, there had been at least four new entrants in the club market since the examiner completed his hearing and entered his findings.<sup>17</sup> Furthermore, consumer tastes had substantially changed, such that many “hit” recording stars were signing with smaller, lesser known labels instead of the “Big Three” labels, of which Columbia was one.<sup>18</sup> In short, “because of the long delay in deciding [the] case and the substantial allegations of changes in the structure of the entire industry, and especially the club market,” the Seventh Circuit reversed and remanded the case to the Commission “for further evidence as to the present structure of the record club market in order to determine whether supplies of records have been foreclosed from other clubs and whether such foreclosure has significantly prevented new entrants into the market.”<sup>19</sup>

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<sup>16</sup> *Id.* at 981.

<sup>17</sup> *Id.* The new entrants were Record Club of America, Longine, Dot, and Starday, with Record Club claiming to be the second largest record club in the industry. *Id.* at 977–78.

<sup>18</sup> *Id.* at 981. The “Big Three” major recording labels at the time were Columbia, R.C.A., and Capitol. *Id.* at 975.

<sup>19</sup> *Id.* at 982.

Although the decision is over 40 years old, *Columbia Broadcasting* is just as instructive today as it was in 1969. As members of the antitrust and competition bar, industry participants, and economists have pointed out to the Commission, many of the markets we examine today are characterized by dynamic competition. We therefore can ill afford any undue delay in our investigations and adjudications, lest the facts and circumstances of those markets that ground our antitrust analysis change right before our very eyes, like the shifting dunes of the Sahara.

## B.

Accordingly, with considerations of speed and efficiency in mind, in 2009 the Commission revised its rules governing the adjudicative process, which we call “Part 3” because that is where the rules are found within Title 16 of the Code of Federal Regulations.<sup>20</sup> As we acknowledged in our notice of proposed rulemaking published in the Federal Register, the Commission’s Part 3 process had long been criticized as too protracted.<sup>21</sup> We therefore implemented several amendments designed to streamline our Part 3 process, including:

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<sup>20</sup> 16 C.F.R. Parts 3 and 4, Rules of Practice, 73 Fed. Reg. 58,832 (Oct. 7, 2008) (proposed rules), available at <http://www.gpo.gov/fdsys/pkg/FR-2008-10-07/pdf/E8-23745.pdf>; 16 C.F.R. Parts 3 and 4, Rules of Practice, 74 Fed. Reg. 1804 (Jan. 13, 2009) (interim final rules, to be codified at various sections of 16 C.F.R. Parts 3 and 4), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-13/pdf/E9-296.pdf>; 16 C.F.R. Parts 3 and 4, Rules of Practice, 74 Fed. Reg. 20,205 (May 1, 2009) (final rules, codified at various sections of 16 C.F.R. Parts 3 and 4), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-05-01/pdf/E9-9972.pdf>.

<sup>21</sup> Rules of Practice, 73 Fed. Reg. at 58,832 (citing cases and commentators); see also Rosch, Reflections, *supra* note 3, at 3.

(1) A *five-month* timetable between the filing of the administrative complaint and the evidentiary hearing before the Administrative Law Judge (ALJ), if the Commission is also seeking preliminary injunctive relief under Section 13(b) of the FTC Act from a federal district court,<sup>22</sup> and an *eight-month* timetable in all other proceedings;<sup>23</sup>

(2) A *30-day* timetable for the Commission to decide a motion by the respondents—in the event a federal district court has *denied* preliminary injunctive relief under Section 13(b)—asking that the Commission either withdraw the matter from Part 3 adjudication or dismiss the administrative complaint, based on the argument that the public interest does not warrant further litigation;<sup>24</sup>

(3) Resolution by the Commission in the first instance, as opposed to the ALJ, of dispositive motions (that is, motions to dismiss and motions for summary decision), which are to be decided within *45 days* of the filing of the reply to the motion;<sup>25</sup>

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<sup>22</sup> 15 U.S.C. § 53(b) (2011).

<sup>23</sup> 16 C.F.R. § 3.11(b)(4) (2012). The Commission may always shorten the eight-month timetable for proceedings in other cases, e.g., a consummated merger case, if an expedited schedule would be in the public interest. 74 Fed. Reg. at 1807.

<sup>24</sup> 16 C.F.R. § 3.26(g) (2012). In considering such motions, the Commission continues to take a case-by-case, multi-factor approach, as originally described in its 1995 policy statement on whether administrative litigation should continue following the denial of a preliminary injunction. *See* Rules of Practice, 74 Fed. Reg. at 1811–12; Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Fed. Trade Comm’n Aug. 3, 1995), *available at* <http://www.ftc.gov/os/fedreg/1995/august/950803administrativelitigation.pdf>.

<sup>25</sup> 16 C.F.R. §§ 3.22(a) & 3.24 (2012). *See* Rules of Practice, 74 Fed. Reg. at 1809 (identifying as the central premise of the rule change “that the Commission has the authority and



(4) An initial decision from the ALJ within *70 days* after the filing of the last-filed proposed findings of fact, conclusions of law, and order,<sup>26</sup> which thereby preserves an overall one-year timetable for the issuance of an initial decision;<sup>27</sup> and

(5) A final decision from the Commission within *45 days* after oral argument, or after the deadline for filing reply briefs, if no oral argument is scheduled, in all cases in which the Commission has sought preliminary injunctive relief under Section 13(b) from a federal district court.<sup>28</sup>

The changes I have gone over are just a few highlights from a multi-year effort by the Commission to study its rules of practice with an eye towards improving the efficiency and timing of administrative litigation.<sup>29</sup>

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expertise to rule initially on dispositive motions and that doing so will improve the quality of the decisionmaking and . . . will expedite the proceeding”)

<sup>26</sup> 16 C.F.R. § 3.51(a) (2012). If the parties waive the filing of proposed findings, then the ALJ’s initial decision is due within *85 days* after the closing of the hearing record. *Id.*

<sup>27</sup> Rules of Practice, 74 Fed. Reg. at 1817–18.

<sup>28</sup> 16 C.F.R. § 3.52(a) (2012). This works out to roughly *100 days* from the filing of the initial decision. Rules of Practice, 74 Fed. Reg. at 1818. In all other cases, i.e., those in which the Commission did *not* seek preliminary relief, the timetable for the Commission’s final decision is *100 days* after oral argument or the reply brief deadline. 16 C.F.R. § 3.52(b)(2) (2012).

<sup>29</sup> I have commented extensively on the reforms to Part 3 proceedings in prior speeches and interviews. See J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Thoughts on the FTC’s Relationship (Constitutional and Otherwise) to the Legislative, Executive, and Judicial Branches, Remarks Before the Berlin Forum for EU–US Legal–Economic Affairs 23–27 (Sept. 19, 2009), <http://www.ftc.gov/speeches/rosch/090919roschberlinspeech.pdf> [hereinafter Relationship]; *Interview with J. Thomas Rosch, Commissioner, Federal Trade Commission*, ANTITRUST, Spring 2009, at 32, 33–39, available at <http://www.ftc.gov/speeches/rosch/090126abainterview.PDF> [hereinafter *Interview*]; J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, One Retrospective View of the Commission’s Activities, Remarks Before the Washington State Bar Association Antitrust & Consumer Protection Annual CLE Meeting 6–10 (Nov. 6, 2008), <http://www.ftc.gov/speeches/rosch/081106rosch->

Significantly, all of those reforms compel us at the Commission “to put our money where our mouth is”—that is, to live by specific deadlines that make clear we mean what we say—when we say that our policy is to conduct Part 3 proceedings expeditiously.<sup>30</sup> These reforms also reflect our balancing of three, separately important interests, namely, the public interest in a high quality decisionmaking process, the interest of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense.<sup>31</sup>

Thus far, the Commission has issued two final decisions under the revised Part 3 rules: *North Carolina Board of Dental Examiners*,<sup>32</sup> a conduct case, and *ProMedica Health System, Inc.*,<sup>33</sup> a consummated merger case. In *North Carolina Dental*, the ALJ issued his initial decision 13 months after the filing of the complaint, and we issued our final decision less than five months later, and only 35 days after oral argument.<sup>34</sup> In *ProMedica Health*,

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[washingtonstatebarassoc.pdf](#) [hereinafter Retrospective]; Rosch, Reflections, *supra* note 3, at 3–6.

<sup>30</sup> 16 C.F.R. § 3.1 (2012) (“To the extent practicable and consistent with requirements of law, the Commission’s policy is to conduct such proceedings expeditiously.”).

<sup>31</sup> Rules of Practice, 74 Fed. Reg. at 1805.

<sup>32</sup> No. 9343, 2011 FTC LEXIS 290 (F.T.C. Dec. 2, 2011) (Rosch, Comm’r), *available at* <http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf>, *petition for review filed*, No. 12-1172 (4th Cir. Feb. 10, 2012).

<sup>33</sup> No. 9346, 2012 FTC LEXIS 58 (F.T.C. Mar. 22, 2012) (Brill, Comm’r), *available at* <http://www.ftc.gov/os/adjpro/d9346/120328promedicabrillopinion.pdf>. For my concurring opinion, *see id.*, 2012 FTC LEXIS 60 (F.T.C. Mar. 22, 2012) (Rosch, Comm’r, concurring), *available at* <http://www.ftc.gov/os/adjpro/d9346/120328promedicaroschopinion.pdf>.

<sup>34</sup> The administrative complaint was filed on June 17, 2010; the initial decision on July 14, 2011; and the final decision on December 2, 2011.

the ALJ issued his initial decision only 11 months after the filing of the complaint, and we issued our final decision less than four months later, and 45 days after oral argument.<sup>35</sup> I think it is fair to say that the prospect of the Commission reaching a decision on the merits in *ProMedica* under a one-year timetable helped to convince the federal judge who heard the Commission's request for preliminary relief that the merging hospitals would only have to endure "a relatively short stay of the completion of [their] relationship" under the hold-separate agreement with the Commission.<sup>36</sup>

### C.

We should not rest on our laurels, however. As I have said before,<sup>37</sup> the Commission should reform its rules governing the investigative process as well, which we call "Part 2" because that is where the rules are found within Title 16 of the Code of Federal Regulations.<sup>38</sup> Like protracted adjudicative proceedings, protracted investigations in merger cases can also result in the parties abandoning their transaction, even before the antitrust merits can be considered by the Commission under its reason-to-believe standard.<sup>39</sup> In my

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<sup>35</sup> The administrative complaint was filed on January 6, 2011; the initial decision on December 5, 2011; and the final decision on March 22, 2012.

<sup>36</sup> *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-47, 2011 U.S. Dist. LEXIS 33434, at \*164 (N.D. Ohio Mar. 29, 2011) ("Toward that end, if the FTC has not completed actions before it by November 30, 2011, this Court will entertain taking additional steps to insure that all parties are treated fairly and expeditiously.").

<sup>37</sup> See Rosch, Relationship, *supra* note 29, at 23–26; Rosch, *Interview*, *supra* note 29, at 34.

<sup>38</sup> 16 C.F.R. pt. 2 (2012).

<sup>39</sup> See 15 U.S.C. §§ 21(b) & 45(b) (2011).

view, such was the outcome of the Commission’s investigation of a proposed merger between Endocare, Inc. and Galil Medical Ltd., two small companies that were involved in developing innovative therapies for prostate and renal cancer.<sup>40</sup> That merger was too small to be reportable under our Hart-Scott-Rodino Antitrust Improvements Act but the parties had agreed not to close the transaction so long as the Commission was investigating it, a process that began in November 2008.

Some seven months later, on June 8, 2009, Endocare filed an 8-K report with our Securities and Exchange Commission announcing that it had terminated its merger agreement with Galil “as a result of the failure by the United States Federal Trade Commission to close its investigation into whether the Galil Merger violated certain U.S. antitrust laws, which caused certain conditions to closing of the Galil Merger to become incapable of fulfillment.”<sup>41</sup> The following day, the Commission responded to Endocare’s statement. I disagreed with my colleagues that the merging parties were to blame for choosing to provide the Commission with “very limited information” to allay the staff’s “substantial concerns” about the proposed transaction.<sup>42</sup> In my view, the fact that the parties (both of which were small

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<sup>40</sup> See Press Release, Fed. Trade Comm’n, Chairman, Commissioners Issue Statement on Endocare, Inc.’s Announcement That It has Terminated Its Merger Agreement with Galil Medical Ltd. (June 9, 2009), <http://www.ftc.gov/opa/2009/06/endocare.shtm>.

<sup>41</sup> Endocare Inc., Current Report of Material Corporate Event, Item 1.02 (Form 8-K) (June 8, 2009), available at <http://www.secinfo.com/dsvr4.sBxz.htm>.

<sup>42</sup> Joint Statement of Chairman Leibowitz, Commissioner Harbour, and Commissioner Kovacic, Endocare, Inc. and Galil Medical, Ltd., No. 0910026 (June 9, 2009), at 1–2

companies with limited resources) had not provided the Commission with all the information staff had asked for should have not been a valid excuse for the Commission essentially to pause its investigation—at a point where, as my colleagues asserted, the Commission “is not in a position to make a formal assessment one way or the other.”<sup>43</sup>

As our Merger Guidelines make clear, whenever the Commission undertakes a merger investigation, it always endeavors to reach an enforcement decision by “apply[ing] a range of analytical tools to the *reasonably available and reliable evidence* to evaluate competitive concerns in a *limited period of time*.”<sup>44</sup> That is to say, we always work under imperfect conditions, in which we have a limited amount of time to make a decision based on a limited amount of information. We cannot reasonably expect to get all the information that we may like to have for our merger analysis, but if there is some information that we need and we think we can get from the parties, then it is incumbent on us to interview or depose their employees, send out a more tailored subpoena, and/or enforce the pending subpoena.<sup>45</sup> Otherwise, we need to make the best decision we can (either challenging or

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<http://www.ftc.gov/os/closings/staff/090609galilendocarejointstmt.pdf> [hereinafter Joint Statement].

<sup>43</sup> *Id.* at 2; Statement of Commissioner J. Thomas Rosch on the Abandonment of the Endocare, Inc./Galil Medical, Ltd. Merger, Endocare, Inc. and Galil Medical, Ltd., No. 0910026 (June 9, 2009), at 4, <http://www.ftc.gov/os/closings/staff/090609galilendocarestmtrosch.pdf> [hereinafter Rosch Statement].

<sup>44</sup> U.S. DEPT OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1, at 1 (2010) (emphases added), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

<sup>45</sup> Rosch Statement, *supra* note 43, at 1–2.

clearing the transaction) based on the information we have. But we should not block a transaction de facto by keeping the investigation open and letting the clock run out on the parties' merger agreement.<sup>46</sup>

Hopefully, the *Endocare* scenario is water under the bridge, as they say. Earlier this year, the Commission announced proposed revisions to its Part 2 rules.<sup>47</sup> As the Federal Register Notice indicates, the proposed revisions are intended to expedite Part 2 investigations by (1) conditioning extensions of time to comply with Commission process (that is, civil investigative demands and subpoenas) on a party's continued progress in achieving compliance; (2) conditioning the filing of any petition to quash or limit Commission process on a party's engagement in meaningful meet-and-confer sessions with staff; and (3) eliminating the current two-step process for resolving petitions to quash and imposing tighter deadlines for Commission rulings on such petitions.<sup>48</sup>

Although I agreed in general with these reforms, I expressed my view that the reforms do not go far enough.<sup>49</sup> Specifically, I felt that the Part 2 rule revisions should have included a provision for mandatory compulsory process

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<sup>46</sup> *Id.* at 1 & 4.

<sup>47</sup> 16 C.F.R. Parts 2 and 4: Rules of Practice, 77 Fed. Reg. 3191 (Jan. 23, 2012) (proposed rules), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-01-23/pdf/2012-985.pdf>.

<sup>48</sup> *Id.* at 3191. Currently, a petition to quash is decided through a two-step process whereby it is first assigned to a single Commissioner for a ruling, and then a petitioner who is dissatisfied with the ruling may appeal the matter to the full Commission. 16 C.F.R. § 2.7(d)(4) & (f) (2012).

<sup>49</sup> J. Thomas Rosch, Comm'r, Concurring & Dissenting Statement Regarding Proposed Revisions to the Part 2 Rules and Rule 4.1(e) (Jan. 13, 2012), <http://www.ftc.gov/os/2012/01/120113part2and4statement.pdf>.

at the outset of all full-phase, competition investigations to assure that the Commission will have as thorough and complete a record as possible when making enforcement decisions.<sup>50</sup> Simply put, when we issue compulsory process against enforcement targets, they have no choice but to turn over responsive, incriminatory information. When we issue compulsory process against third parties, they have the “cover” they need to turn over candid, confidential information that a target might otherwise want them to keep to themselves. We are then not left in the awkward situation of not having enough information to make an enforcement decision, and yet not having any judicial recourse either.

I also felt that the Part 2 rule revisions should have included a provision for regular reports by staff on the status of investigations to all Commissioners, not just the Chairman.<sup>51</sup> In particular, this reform measure would allow the Commission as a whole to keep an eye on investigations that have been languishing for a relatively lengthy period of time and to address any undue delays. Such a process can only inspire public confidence in our work.

## II.

Let me now turn to the next topic of “leaner” antitrust enforcement. In March of this year, I along with our Chairman testified before the House

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

Appropriations Subcommittee that reviews our annual budget.<sup>52</sup> Much of the hearing revolved around the general theme of “doing more with less” and fiscal belt tightening. Needless to say, the Subcommittee members were looking for places to cut our budget, including reductions in the size of our staff.

At their prodding, I mused that if we are to take deeper cuts to our budget, then we should be looking for projects that we can hand off to the State Attorneys General. For example, on the consumer protection front, the problem of identity theft may be better handled by the states and local authorities, which have criminal enforcement jurisdiction that the Commission does not have. To be sure, we can still assist them in a substantial way with our consumer education efforts. Also, we are better situated to address related problems like security breaches at companies, which may affect millions of consumers across several states, and if left unchecked, could spawn numerous incidents of identity theft.

As a matter of enforcement approach, we at the Commission should recognize that our jurisdiction is nationwide, and that we have to do our best to cover that broad waterfront with the limited staff size (about 1,100 full-time equivalents) and finite resources at our disposal. That means, in my judgment, going after cases and respondents that are going to make the

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<sup>52</sup> *Budget Hearing on the Federal Trade Commission Before the Subcomm. on Fin. Servs. and Gen. Gov't of the H. Appropriations Comm.*, 112th Cong. (Mar. 5, 2012) (video testimony publicly available; transcripts available by subscription), <http://appropriations.house.gov/calendararchive/eventsingle.aspx?EventID=279164>.



largest impact for consumers in terms of the relief we are able to secure. For example, I have questioned the wisdom in consumer protection cases of accepting a consent judgment that provides conduct relief but very little monetary relief relative to the amount of consumer injury asserted.<sup>53</sup> In such instances, we should be asking ourselves whether the conduct relief, standing alone, is a sufficiently robust remedy (for example, to send a strong message that the proscribed acts and practices will not be tolerated), and whether there is a compelling reason for settling the case for a tiny fraction of the estimated consumer injury.<sup>54</sup>

On the competition front, the states can and do take an active role in challenging mergers that they conclude are anticompetitive, either jointly with the Commission or the Department of Justice,<sup>55</sup> or separately, including merger cases that the federal enforcement agencies have decided not to challenge.<sup>56</sup> Importantly, the State Attorneys General have jurisdiction to enforce the Clayton Act<sup>57</sup> as well as their own state antitrust laws, as applicable. Many of our merger enforcement cases have thus had the support

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<sup>53</sup> Statement of Commissioner J. Thomas Rosch Concurring in Part, Dissenting in Part, Freedom Foreclosure Prevention Servs., Inc., No. X090055 (Nov. 24, 2009), <http://www.ftc.gov/os/2009/11/091124roschstmt.pdf> (“However, in other cases, where it is apparent from the outset that substantial and effective consumer redress may not be provided, I believe the Commission should carefully focus on whether it is worthwhile to spend its scarce resources in order to achieve the ‘Conduct Relief’ alone.”).

<sup>54</sup> *Id.*

<sup>55</sup> *See generally* I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 435 n.645 (7th ed. 2012).

<sup>56</sup> *See generally id.* at 435 n.647.

<sup>57</sup> 15 U.S.C. §§ 15c(a) & 26 (2011).

and involvement of our counterparts in the state attorney general's office.<sup>58</sup> Sharing and dividing up enforcement responsibilities with the states in merger cases may be another way to achieve "leaner" antitrust enforcement.

### III.

Let me now move to the last topic of "meaner" antitrust enforcement. I have in mind two subtopics: first, the problem of consent decrees in which respondents deny any wrongdoing, and second, the role of criminal penalties, especially incarceration, for cartel defendants. A common thread running between both subtopics is the goal of deterring anticompetitive conduct.

#### A.

Recently, in the Commission's *Circa Direct LLC* case,<sup>59</sup> I openly questioned whether it was appropriate for the federal district court to approve a settlement that included a consent decree in which the defendants, Circa Direct LLC and Andrew Davidson, did not admit to any wrongdoing.<sup>60</sup>

Specifically, I expressed my view that consent decree language to the effect "without admitting the allegations set forth in the Commission's Complaint"

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<sup>58</sup> See, e.g., Press Release, Fed. Trade Comm'n, FTC and Georgia Attorney General Challenge Phoebe Putney Health System's Proposed Acquisition of Palmyra Park Hospital as Anticompetitive (Apr. 20, 2011), <http://www.ftc.gov/opa/2011/04/phoebeputney.shtm>; Press Release, Fed. Trade Comm'n, FTC and Ohio Attorney General Challenge ProMedica's Acquisition of St. Luke's Hospital (Jan. 6, 2011), <http://www.ftc.gov/opa/2011/01/promedica.shtm>.

<sup>59</sup> *FTC v. Circa Direct, LLC*, No. 1:11-cv-02172-RMB-AMD (D.N.J. complaint filed Apr. 19, 2011), <http://www.ftc.gov/os/caselist/1123059/index.shtm>.

<sup>60</sup> Letter from Comm'r J. Thomas Rosch to Hon. Renee Marie Bumb, *FTC v. Circa Direct, LLC*, No. 1:11-cv-02172-RMB-AMD (D.N.J. filed Mar. 21, 2012), available at <http://www.ftc.gov/speeches/rosch/120321bumbcircadirect.pdf>.

or “without any admission or finding of liability” was tantamount to a denial of liability by the defendants.<sup>61</sup>

In my judgment, the inclusion of such language denying liability impacts a federal district court’s required assessment under Section 13(b) as to whether the Commission has made a “proper showing” of its likelihood of success on the merits, and whether the settlement would be in the public interest.<sup>62</sup> Furthermore, as a Commissioner, such language may also impact my own determination whether there is reason to believe a violation of law has indeed occurred, when I am in the process of voting out a complaint and consent order providing for the award of permanent injunctive relief in federal court.<sup>63</sup>

The federal district court presiding over the *Circa Direct LLC* case recently issued an opinion concluding that my expressed concern merited further briefing and consideration.<sup>64</sup> Notably, even if settlements are inherently compromises between the parties, a question remains whether, in a case involving allegations of “extensive deceptive conduct and significant consumer loss,” the acceptance and approval of a consent decree that includes a denial of liability deprives the public of “knowing the truth in a matter of

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<sup>61</sup> *Id.* at 1.

<sup>62</sup> 15 U.S.C. § 53(b) (2011); *id.*

<sup>63</sup> 15 U.S.C. §§ 45(b) & 53(b) (2011). I had voted in favor of the consent order in *Circa Direct*, however.

<sup>64</sup> Opinion & Order at 9, *FTC v. Circa Direct, LLC*, No. 1:11-cv-02172-RMB-AMD (D.N.J. filed June 13, 2012), ECF No. 50.

obvious public importance.”<sup>65</sup> As the district court explained, it was “merely recogniz[ing] that settlement without an admission of liability forecloses a determination of the truth of the FTC’s allegations and leaves the public with no better appreciation of the truth of the matter than when the litigation began.”<sup>66</sup>

I agree with the *Circa Direct* Court. If we are to achieve true deterrence, we must not only enjoin respondents from engaging in the alleged acts and practices prohibited by Section 5, but also educate members of the public about the alleged acts and practices so that they are less likely to fall prey to them in the future, as well as forewarn would-be wrongdoers. Indeed, the United States Court of Appeals for the D.C. Circuit has twice recognized this important aspect of our consumer protection mission in the context of press releases describing the nature and extent of the wrongful conduct that is the subject of a Commission action:

If the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him utilizing such prohibited conduct.<sup>67</sup>

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<sup>65</sup> *Id.* at 18 (quoting *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *stay granted*, 673 F.3d 158 (2d Cir. 2012)).

<sup>66</sup> *Id.* at 19.

<sup>67</sup> *FTC v. Cinderella Career & Finishing Schs., Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968) (affirming the Commission’s authority under 15 U.S.C. § 46(f) to issue factual press releases concerning pending adjudicative proceedings); *accord* *Trudeau v. FTC*, 456 F.3d 178, 192 (D.C. Cir. 2006) (affirming the Commission’s authority under 15 U.S.C. § 46(f) to issue factual press releases concerning consent decrees).

Recognizing the informational aspect of our mission, the D.C. Circuit most recently held in *Trudeau v. FTC* that the Commission had not exceeded its statutory authority in issuing a press release describing the consent decree against Kevin Trudeau as a “ban . . . meant to shut down an infomercial empire that has misled American consumers for years,”<sup>68</sup> even though Mr. Trudeau, in agreeing to the decree, expressly denied any wrongdoing or liability in connection with the matter.<sup>69</sup>

Although the *Trudeau* decision confirms that the Commission may describe the nature and extent of the alleged wrongdoing in a press release as a means of educating consumers about “the truth of a matter of obvious public importance,” it also illustrates the mischief that can arise when we allow respondents to deny any wrongdoing or liability. As I alluded in my letter to the *Circa Direct* Court, we might do better by following the Securities and Exchange Commission’s policy “that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed,

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<sup>68</sup> *Trudeau*, 456 F.3d at 196–97. See Press Release, Fed. Trade Comm’n, Kevin Trudeau Banned from Infomercials (Sept. 7, 2004), <http://www.ftc.gov/opa/2004/09/trudeaucoral.shtml> (quoting Lydia Parnes, Director of the FTC’s Bureau of Consumer Protection).

<sup>69</sup> See Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief As to Defendants Kevin Trudeau, et al. ¶ 8, *FTC v. Trudeau*, No. 03-C-3904 (N.D. Ill. Sept. 7, 2004), available at <http://www.ftc.gov/os/caselist/0323064/040907stip0323064.pdf>.

when the conduct alleged did not, in fact, occur.”<sup>70</sup> Pursuant to that policy, the SEC does not allow a defendant or respondent to consent to a judgment or order that imposes a sanction and at the same time, to deny the allegations in the complaint or order.<sup>71</sup> At a minimum, the defendant or respondent must state that he neither admits nor denies the allegations.<sup>72</sup>

## B.

Although the Commission does not have criminal enforcement authority, I want to spend a few minutes talking about the role of criminal penalties, particularly incarceration, in providing for “meaner” antitrust enforcement. As I understand it, the rule for cartel activity in the EU and most Member States is that there is no incarceration.<sup>73</sup> Rather, the EU and most Member States (except most notably, the UK and Ireland)<sup>74</sup> impose stiff fines

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<sup>70</sup> 17 C.F.R. § 202.5(e) (2011).

<sup>71</sup> *Id.* By contrast, the current Commission policy is to permit consent agreements to state that their signing is “for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.” 16 C.F.R. § 2.32 (2012).

<sup>72</sup> 17 C.F.R. § 202.5(e) (2011).

<sup>73</sup> See Gregory C. Shaffer & Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, 12 SEDONA CONF. J. 313 (Fall 2011) (manuscript at 15–17), *manuscript available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1865971](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865971) (reviewing developments in the EU and its Member States); Lewis Crofts, *White-Collared*, MLEX MAGAZINE, Apr.–June 2011, at 8, 9 (“Currently, the European Commission doesn’t target executives, either with criminal or administrative fines. Therefore, it is [up] to EU states to come up with solutions. For some this can be personal fines, for others it can be disqualification from holding directorships. For a few it can mean imprisonment. But, despite the apparent choice, most of the tools are largely untested.”).

<sup>74</sup> See *Concluded Prosecutions – Marine Hose*, OFFICE OF FAIR TRADING, UNITED KINGDOM, [http://www.offt.gov.uk/about-the-offt/legal-powers/enforcement\\_regulation/prosecutions/marine-hose](http://www.offt.gov.uk/about-the-offt/legal-powers/enforcement_regulation/prosecutions/marine-hose) (last visited Aug. 4, 2011). The Irish Competition Authority has also obtained jail sentences against convicted offenders but those sentences have been suspended. See *DPP v. Denis Manning*, THE COMPETITION AUTHORITY, REPUBLIC OF IRELAND, <http://www.tca.ie/EN/Enforcing-Competition->

(especially on the corporate defendant) and debarment of board members who “look the other way.”<sup>75</sup> In the U.S., federal law and most states provide heavy corporate fines for cartel activity. But we also provide for incarceration of wrongdoers. Why the difference?

First, it has been argued that incarceration is appropriate because at the end of the day, horizontal cartel activities are committed by individuals, not corporations. Unless and until those individuals are incarcerated, so the argument goes, we will not see any real reduction in cartel activity. Indeed, Scott Hammond, who heads up the Justice Department’s criminal antitrust enforcement program, has reported that the cartel activity stops “at the water’s edge” as more and more individuals face jail time for engaging in such activity in the U.S.<sup>76</sup> Even if that were not so, the Antitrust Division

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[Law/Criminal-Court-Cases/Irish-Ford-Dealers-Association.aspx](#) (last visited Aug. 4, 2011); *Citroen Dealers Association*, THE COMPETITION AUTHORITY, REPUBLIC OF IRELAND, <http://www.tea.ie/EN/Enforcing-Competition-Law/Criminal-Court-Cases/Citroen-Dealers-Association.aspx> (last visited Aug. 4, 2011). Estonia has criminal laws against cartel behavior but I am not aware of any cases that have resulted in jail time. Germany has sentenced defendants to jail time, but only under its laws that criminalize bid-rigging. See Shaffer & Nesbitt, *supra* note 73 (manuscript at 16).

<sup>75</sup> See, e.g., Company Directors Disqualification Act, 1986, c. 46, § 9A (Eng.) (as amended by the Enterprise Act, 2002, c. 40, § 204(1) & (2) (Eng.)) (requiring a court to enter a competition disqualification order against an individual who serves as a director of a company if his or her company has committed a breach of competition law, and the court considers the individual’s conduct as a director renders him or her unfit to be concerned in the management of the company); Andreas Stephan, *Disqualification Orders for Directors Involved in Cartels*, 2 J. EUR. COMPETITION L. & PRAC. 529, 530, 534 (2011) (highlighting the significant role of competition disqualification orders to effective deterrence, given “the realisation that corporate fines do not directly punish individual decision makers; and the failure of national criminal offences to complement enforcement at the EU level,” as well as a significant obstacle to their use given OFT’s stated position not to apply for such orders against directors participating in leniency programs).

<sup>76</sup> See Gregory J. Werden, Senior Econ. Counsel, U.S. Dep’t of Justice, et al., *Recidivism Eliminated: Cartel Enforcement in the United States Since 1999*, Remarks Before the Georgetown Global Antitrust Enforcement Symposium 7 (Sept. 22, 2011),

may have already “picked the low hanging fruit” already (that is, the classic, smoke-filled room, price-fixing cases).<sup>77</sup> And because the Division is now challenging more price information exchange cases, it seems to be losing more criminal cases than in the past.<sup>78</sup>

Second, and on the other hand, I recall attending a seminar on incarceration at Yale College in 1979. The central thesis of that seminar was that incarceration costs society much more money than other forms of punishment do. In fact, it was said that incarceration was the most costly form of punishment imaginable. I don’t know about that. But I can see why incarceration might be eschewed for costs reasons. Additionally, it may be that there is less likelihood of recidivism, and correspondingly less need for deterrence, when the criminal conduct is horizontal cartel activity, as opposed to some other type of offense. (The flip side, however, is that there may be more need for deterrence, given the lower chance of detection and the high chance of consumer loss, when such criminal activity is at work.)

Third, it has been argued that it makes no sense to simply fine corporations. A corporate fine, however stiff, is simply a “tax on the

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<http://www.justice.gov/atr/public/speeches/275388.pdf> (“Meaningful prison terms for both U.S. and non-U.S. citizens eliminated cartel recidivism within the United States.”).

<sup>77</sup> See J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Antitrust Issues Related to Benchmarking and Other Information Exchanges, Remarks Before the ABA Section of Antitrust Law and ABA Center for Continuing Legal Education’s Teleseminar on Benchmarking and Other Information Exchanges Among Competitors 7 (May 3, 2011), <http://www.ftc.gov/speeches/rosch/110503roschbenchmarking.pdf>.

<sup>78</sup> *Id.* at 8–9.



shareholders,” so the argument goes.<sup>79</sup> And shareholders, of course, are not the ones who have engaged in the cartel activity, and in any event, they are powerless to stop it from occurring. That said, shareholders can insist that their directors adopt stringent rules of corporate compliance. Besides, arguably the individuals who engage in these activities and, indeed, directors who “look the other way” are punished too. An individual defendant almost always loses his or her job in Europe, not to speak of the public opprobrium that attaches whenever one is caught.<sup>80</sup> And as mentioned previously, under the laws of most Member States, the director always forfeits his or her position.

Fourth, the reluctance to incarcerate cartel wrongdoers in Europe has been attributed to the fact that there is a different history and culture in most Member States than what we have here in the U.S. More specifically, it has been argued that in Europe, there has been greater tolerance of cartels, which are seen as fostering positive, cooperative, organized behavior, than in the U.S., and that correspondingly, there has been less tolerance of dominant firms, which are seen as engaging in negative, individualistic, conflict-inducing behavior.<sup>81</sup>

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<sup>79</sup> Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL’Y INT’L 18 (Autumn 2010).

<sup>80</sup> See Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, 5 COMPETITION L. REV. 123, 144 (Dec. 2008) (“The sanction most favoured by respondents is the naming and shaming of both price-fixing firms and individuals.”).

<sup>81</sup> James S. Venit, *Cooperation, Initiative and Regulation – A Cross Cultural Inquiry*, in CLAUDIUS-DIETER EHLERMANN & MEL MARQUIS, EDS., EUROPEAN COMPETITION LAW ANNUAL

That may be true but I would suggest that the difference goes deeper. Importantly, there is a difference between the laws as well. Section 1 of the Sherman Act outlaws “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”<sup>82</sup> Interpreting this language, our Supreme Court has cautioned that the Sherman Act, unlike traditional criminal statutes, does not clearly and precisely identify the unlawful conduct that it proscribes.<sup>83</sup> Instead, the Act is worded in broad and general terms, such that the behavior it proscribes—with the exception of certain species of per se illegal conduct that have “unquestionably anticompetitive effects”—“is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.”<sup>84</sup> Consistent with those concerns raised by our Supreme Court, the Antitrust Division has hewed to the general policy that it criminally prosecutes only “hard core” violations of Section 1 of the Sherman Act—that is, price fixing, bid rigging and market allocation.<sup>85</sup> (The only exception I can think of to this rule is the *Cuisinarts* prosecution and that was resolved on a plea prior to trial.)<sup>86</sup>

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2007: A REFORMED APPROACH TO ARTICLE 82 EC – (2008), *available at* [http://www.eui.eu/RSCAS/Research/Competition/2007\(pdf\)/200709-COMPed-Venit.pdf](http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Venit.pdf) (manuscript at 2–4).

<sup>82</sup> 15 U.S.C. § 1 (2011).

<sup>83</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438–39 (1978).

<sup>84</sup> *Id.* at 440–41.

<sup>85</sup> See Thomas O. Barnett, Asst. Att’y Gen., U.S. Dep’t of Justice, Antitrust Div., Criminal Enforcement of Antitrust Laws: The U.S. Model, Remarks before the Fordham Competition Law Institute’s Annual Conference on International Antitrust Law and Policy (Sept. 14,

But if Section 1 of the Sherman Act is seen as broadly worded, then its EU counterpart, Article 101 of the Treaty on the Functioning of the European Union (TFEU), is even more bloppy. It generally outlaws “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”<sup>87</sup> At the same time, Article 101 may be declared inapplicable to agreements, decisions and concerted practices that meet certain specified criteria, which include “contribut[ing] to improving the production or distribution of goods or to promoting technical or

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2006), at 2 (“At the same time, the Division focuses its criminal enforcement only on hard core violations. By focusing narrowly on price fixing, bid-rigging, and market allocations, as opposed to the “rule of reason” or monopolization analyses used in civil antitrust law, we have established clear, predictable boundaries for businesses.”), *available at* <http://www.justice.gov/atr/public/speeches/218336.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 2 (Apr. 2005 rev.) (“Price fixing, bid rigging, and market allocation are violations of Section 1 and generally are prosecuted criminally.”), *available at* <http://www.justice.gov/atr/public/guidelines/209114.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (Sept. 28, 2005 rev.) (“Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes.”), *available at* <http://www.justice.gov/atr/public/guidelines/211578.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIV. MANUAL ch. III.C.5 at III-20 (4th ed. July 2009 rev.) (providing an internal agency statement that the “current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations”), *available at* <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>. *Cf. Gypsum*, 438 U.S. at 439–40 (reviewing the then prevailing statements of policy from the Attorney General of the United States and the Antitrust Division).

<sup>86</sup> See *In re Grand Jury Investigation of Cuisinarts, Inc.*, 516 F. Supp. 1008, 1010–11 (D. Conn.) (recounting the proceedings in the criminal case, which resulted in a *nolo contendere* plea and a \$250,000 fine), *aff’d*, 665 F.2d 24 (2d Cir. 1981). The DOJ also brought a companion civil case that was resolved by consent decree. See *United States v. Cuisinarts, Inc.*, Civ. No. H80-559, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. Mar. 27, 1981).

<sup>87</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 101, ¶ 1, Sept. 5, 2008, 2008 O.J. (C 115) 88–89 [hereinafter TFEU], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>.

economic progress, while allowing consumers a fair share of the resulting benefit[.]”<sup>88</sup> In contrast to Section 1, Article 101 TFEU thus explicitly recognizes that some restraints of trade may be permissible if they benefit consumers by improving output or promoting innovation. Moreover, it seems harder to criminalize conduct under Article 101 that merely “distorts” competition, as opposed to preventing or restricting it.

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As we gather in London during this Olympic year, we would do well to remember the words of Baron Pierre de Coubertin, who said that “[i]n these Olympiads, the important thing is not winning but taking part. . . . the essential thing is not to conquer but to fight well.”<sup>89</sup> He could just as easily have been describing what we as antitrust and competition enforcers want to see in consumer markets. I think we can agree that when all is said and done, it is the very process of competition that benefits consumers—that is, rival firms vying with one another for customers and consumers—and not whether any particular firm happens to succeed in seizing a market-leading position.

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<sup>88</sup> *Id.* ¶ 3.

<sup>89</sup> THE OLYMPIC MUSEUM, THE MODERN OLYMPIC GAMES 10 (2d ed. 2007) (quoting Pierre de Coubertin, Speech Given at the 1908 Olympic Games in London), *available at* [http://www.olympic.org/Documents/Reports/EN/en\\_report\\_668.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_668.pdf).